LABOR & EMPLOYMENT TELEBRIEF
By
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Sheila: Alright good morning everyone. This is Sheila, Howard's marketing manager. As more of you join the call, I just wanted to mention again that Howard had to pre-record his telebrief call today, because he has a board meeting and he regrets not being able to be on the call with you. If you do have any questions, please feel free to email or call him after the telebrief today. I will be starting the recording at 9:02.

Howard Kurman: Good morning, as you all know or probably have got a notice of, this is a pre-recorded telebrief only because I'm at a board meeting that I had to attend this morning. It is the first telebrief of September, September 12, 2018. I welcome all participants and apologize for not being live this morning. Nevertheless, there is stuff to report on and to review and so as I always indicate if you have any questions about any of the material that I cover, please feel free to either email me at hkurman@offitkurman.com or you can either call my direct office line which is 410-209-6417.

Let me start now with an interesting press release put out by the Department of Labor. This was on Monday, August 27, 2018, so just a week and half or two weeks ago. So as you all know, I have spoken about, particularly in the last year the actions of the Department of Labor vis-a-vis the white collar exemptions for overtime and as you know when Obama was out of office and Trump came in the office with a new Department of Labor, there clearly was an indication that the reconstituted Department of Labor was going to look into the white collar exemptions and that they would probably modify the salary test which as you know under the Obama administration was almost going to double from around $24,000 a year to about $48,000 a year. It was litigated and then the Department of Labor rolled it back. Anyway on Monday, August 27, 2018, the Department of Labor issued the following press release which you can obviously find on their website, but it stated, The U.S. Department of Labor's Wage and Hour Division has announced that in the upcoming weeks we will hold a public listening session to gather views on the Part 541 white-collar exemption regulations, often referred to as the "Overtime Rule." The press release goes on and states issued under the Fair Labor Standard's Act, these regulations implement exemptions from the overtime pay requirements for executive, administrative, professional and certain other employees. The Department plans to update the Overtime Rule and is interested in hearing the views and ideas of participants on possible revisions to the regulations. The press release goes on to specify that listening sessions will be held in the following

cities, a couple of these have already been heard but the remaining ones are September 13th, September 14th, September 24th. The press release indicates that there is no fee to attend the listening sessions, but registration is required, so if you are at all interested in some of the things that commentators or people are saying about the state of the due purported regulations or proposed regulations feel free to go on the Department of Labor's website and register for any of these listening sessions.

Continuing with developments at the Department of Labor on August 28, 2018 which was the day after the press release that I just reviewed with you, there is a release that you can find and its entitled US Department of Labor announces new Office of Compliance Initiatives to expand compliance outreach, and I will just review this for you, obviously again, you can go on the Department of Labor's website, but its an interesting press release nevertheless and it states, U.S. Secretary of Labor Alexander Acosta announced the U.S. Department of Labor's new Office of Compliance Initiatives and they abbreviated as OCI during a speech today that was August 28, 2018 at the Voluntary Protection Programs Participants' Association's 2018 Safety & National Symposium. Coordinated by the Office of the Assistant Secretary for Policy, this cross-agency effort complements the Department's enforcement activities by strengthening and innovating compliance assistance outreach. Part of the initiative is the launch of worker.gov and employer.gov, two websites with resources to assess compliance with the law. It goes on to say, OCI will promote greater understanding of federal labor laws and regulations, allowing job creators to prevent violations and protect American wages, workplace safety and health, retirement security, and other rights and benefits. As part of its work, OCI will work with the enforcement agencies to refine their metrics to ensure the efficacy of the Department's compliance assistance activities. And then "it states, President Trump's Administration is committed to protecting the American worker. Vigorous enforcement and compliance assistance go hand in hand, said Secretary Acosta. The Office of Compliance Initiatives expands our efforts to promote full compliance with federal labor law. Established within the Office of the Assistant Secretary for Policy, OCI will provide leadership and support to the Department's enforcement agencies, advancing the expansion and development of innovative approaches to compliance assistance and enforcement. OCI's work will include and here they have four bullet items. 1. Facilitating and encouraging a culture that promotes compliance assistance within the Department. 2. Providing employers and workers with access to high-quality, up-to-date information about their obligations and rights under federal labor laws and regulations. 3. Assisting enforcement agencies in developing new strategies to use data for more impactful compliance and enforcement strategies, and 4. Enhancing outreach to stakeholders for the Department's enforcement

agencies. It goes on to say, OCI will also focus on helping enforcement agencies more effectively use online resources to deliver information and compliance assistance to the American people. The two new websites announced today are designed to assist workers and job creators who have compliance questions. Finally it goes on to say worker.gov provides a centralized base of information focused on federal worker protections. Employer.gov provides job creators easy-to-understand information about their responsibilities under federal laws and regulations. The Department expects more effective compliance assistance will help the Department target enforcement resources on repeat and willful violators to level the playing field for America's job creators who abide by the law." Obviously my editorial comment is that if there is practical guides on these website it certainly will help you, it will help your workers understand myriad of labor and employment laws that sometimes are very difficult to understand anyway. Just as two examples, I am sure that these websites that is worker.gov and employer.gov will address among other things the family and medical leave act which is certainly Byzantine in its structure, its interpretation and enforcement and the wage and hour laws, many of which are very taxing to understand from a layman standpoint. So I do give the administration credit or the Department of Labor credit for creating these websites it remains to be seen how comprehensive they will be, how interactive they will be, but in the end, if they can resolve questions that you all may have in a fairly efficient way then I think that is certainly a good thing.

The last thing that I will mention about the Department of Labor is that well, first of all as I stated in a couple of telebriefs ago the United States Department of Labor has continued now its prior policy or practice of issuing opinion letters which are really point of guidance to employers with regard to the interpretation of the statutes that they administer and enforce, so on August 28th, actually the same day that I just mentioned with regard to the creation of this new office, the Department of Labor issued some opinion letters, three of which I will mention to you and which may have practical significance to you.

So the first thing or the first opinion letter that they issued has to do with voluntary participation in wellness activities. Some of you may have certain programs that are voluntary in nature where employees can participate in benefit fairs or wellness activities or health screenings, for instance for blood pressure, cholesterol, etc.; and the question that was posed in the Department of Labor is whether or not the time that is voluntarily spent by employees on these activities is deemed to be compensable work. The Department of Labor's opinion letter stated that this is not deemed by the Department of Labor to be compensable work because it is deemed to be off duty for the employees and more for the

benefit of the employee than for the employer, so keep that in mind if any of you have those questions.

A second issue that the Department of Labor issued an opinion letter on was whether or not organ donation surgery would qualify as a serious health condition under the FMLA and what the Department of Labor stated was even if the employee that you have is healthy but is in the process or is donating an organ, then such donation activity would place that employee within the protections of the Family and Medical Leave Act because as the Department of Labor stated obviously organ donation surgery commonly would require that the donor spend at least an overnight hospitalization, and that therefore even if you are dealing with a healthy employee who is donating an organ, then that employee would gain protection under the Family and Medical Leave Act.

And then the third opinion letter that it issued, again you can get all of these opinion letters on their website, it had to do with whether or not under let's say, an employer's attendance policy whereby the employee accumulates certain points for absences and latenesses and then goes out on a leave protected by the Family and Medical Leave Act, whether that service would count towards, let's say erasing the 12-month period within which the points are accumulated and what the Department of Labor stated was if all other leaves are treated the same, that is if in essence, if an employee goes out on a personal leave, not Family and Medical Leave Act, and the period of time that the person is on a leave does not count towards the accumulation of the, let's say 12 months, for the period of time in the absence or lateness control policy, then the absence under the Family and Medical Leave Act can be treated in exactly the same way. So then in essence it freezes that period of time during which the employee goes out on a Family and Medical Leave Act, as long as the employer treats other leaves in exactly the same way. So these are all practical opinion letters that may have some impact on your practice or in your workplace.

Turning a different page, let me mention an interesting thing that I came across. Those of you, obviously most of you out there are nonunion companies. However, in the period of June the 1st to June the 30th of this year, according to the National Labor Relations Board's statistics there were 124 representation petitions filed with the National Labor Relations Board. A representation petition for those of you who don't know, is where a union files an official petition with the National Labor Relations Board to represent employees of an employer. Interestingly, the most active region out of the entire country was the Baltimore region which administers the National Labor Relations Act not only in Baltimore, but in some accompanying or adjacent states as well. Nevertheless, it is interesting that the most active region was the Baltimore region in which

14 representation petitions were filed in the first half of this year. I mention this because we've often talked about audits of handbook and other policies that have practical impact on your workplace. We haven't mentioned as much the advantage of or the necessity for doing union avoidance types of audits. I frequently am approached by clients to do these kinds of audits to make sure that there is no union activity that is going on either overtly or covertly, and that supervisors and others understand what those telltale symptoms of a potentially union organizing campaign are. So I'll just remind you that while unions and the percentage of the private workforce that is unionized is certainly at a low point, somewhere around 6% or so, it doesn't mean that you can be complacent about the fact that your nonunion now will forever remain nonunion. It is a continuous process of making sure that you understand what if any grievances you may have in the workplace, that you work to resolve those; and obviously if there are any signs of unionization out there, that you be familiar with them. So again, this is really sometimes referred to as a union avoidance audit; and I encourage you to, you know, pay some attention to this as the Baltimore region seems to be a pretty active region when it comes to this kind of activity.

Along those lines, I would make sure that you are mindful of your no solicitation and no distribution policies that are either standalone policies or are contained in your handbook. So as many of you may know, under the National Labor Relations Act you can certainly prohibit employees from soliciting one another during work time and in work areas, or in distributing literature in work time or work areas; but under the National Labor Relations Act, they are free to distribute literature in nonwork time and in nonwork areas, and to solicit one another during nonwork time as well. The big question that remains, and I have mentioned this in prior telebriefs, is what will happen with the issue of whether or not employers can be compelled to permit it employees to use their email systems for solicitation of other employees for purposes of unionization or discussion of wages, hours, and terms and conditions of employment on nonwork time. This is the so-called purple communications case that we have talked about in prior telebriefs, and which will probably be, or come to the forefront from the NLRB in the next 6 to 12 months, and I will certainly keep you up-to-date on that when a decision is forthcoming.

On another tack, this has to do with those of you who have separation agreements prepared when you are terminating an employee and where you may be paying severance; and I will mention this case, this was a case decided by the Sixth Circuit recently, its entitled McClellan v. Midwest Machining, Inc., and essentially what happened here was an employee signed a release but essentially signed the release under duress, for want of a better word. She alleged in the lawsuit and it was later litigated that the company's president gave her the agreement and said she "needed to sign

if she wanted any severance" and was not really given a lot of time within which to consider the agreement. As most of you know under the Older Workers Protection Act, if you have an employee who is 40 or older, the statute would require that you give that employee at least 21 days within which to consider the agreement and 7 days within which to rescind an acceptance of the agreement. That's for an employee who is over the age of 40, but many times you may be severing or terminating an employee who is under the age of 40, and the question comes up well how long was the process under which you should give that employee an opportunity to consider the agreement. My approach has always been that you certainly don't want an employee to sign the agreement the day that the person receives the agreement from your HR person or from an executive of any kind. You always want to make sure that the employee has been given a fair opportunity to consider the agreement whether or not the employee would be covered under the protections of the Older Workers Protection Act, nor would you want to put pressure on the employee to basically say unless you sign the agreement now, we're going to pull the offer off the table. So essentially, even if the employee is under the age of 40, you would want a particular clause or a paragraph in your separation agreement which indicates that the employee had sufficient time within which to consider the agreement and to seek the advice of counsel if that employee so desired. This is the best way to do it and a way which will most assure that your separation agreement will be upheld with regard to the particular employee in question. So those of you who have a template for separation agreements that you have either formulated yourself or through counsel make sure that even if the employee is under the age of 40 that it recites that the employee has had adequate time within which to consider the agreement, I believe adequate time is somewhere between five and seven days at a minimum; and that if the employee wanted to, the employee could go ahead and seek the advice of counsel.

The last issue that I'll mention, or case that I'll mention, derives out of a press release from the Equal Employment Opportunity Commission and it is dated Wednesday, August 29th, very recently, the headline is EEOC sues Cracker Barrel Old Country Store For Disability Discrimination emanating out of the Baltimore field office; and essentially as the press release states, Cracker Barrel violated federal law when it refused to hire a qualified deaf applicant for a dishwasher position because of his deafness. There are other aspects to this press release that I won't go into, but essentially what happened was the EEOC's allegation was that the Cracker Barrel manager refused to interview the applicant even though Cracker Barrel's policy is that job interviews are to be conducted by any manager available and as quoted by the Regional Attorney Debra Lawrence, she stated, "We filed this lawsuit because Cracker Barrel refused to interview or hire a qualified applicant simply because he is deaf." It has long been one of the, I think, sensitive issues for the Equal Employment Opportunity

Commission not only in the Baltimore region but elsewhere having to deal with the accommodation for deafness, both with regard to the interview of applicants and to the handling of actual employees. So I caution you when you are interviewing candidates and there is an issue of deafness, try to accommodate that interviewee or applicant in the most practical way you can; and generally I would say that for the most part, there are many ways that you can accommodate such applicant or employee through various means of technology. So this is the latest example of the EEOC coming down on a well known employer, I should say, for its handling of a particular situation of an interview of a deaf applicant.

All right, well those are the developments for the day. Again, I apologize for not being present in person, but hopefully we handled a bunch of stuff that will be of practical value to you, and the next telebrief will be live. So everybody have a good rest of the week and we will see you figuratively if not literally in the fourth Wednesday of September. Thanks very much.