LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay it is bewitching time 9:02. Casey can you mute these phone please. All right good morning everyone, this is the second and last telebrief in July and we are headed into August summer is running by. I know that the attendance may be a little low today because I am competing with no less important an event than the Mueller testimony but I will do my best. So first, I wanted to mention that back on July 18 it was just about a week ago the house passed the so-called Raise the Wage Act. I have talked about this in prior telebriefs and the act would raise the current federal minimum wage to $15 per hour over a five-year period and then have an automatic index to increases on an annual basis. I do not believe this is going to get any traction, the Senator the majority leader McConnell has stated that he will not even take up the bill in the Senate, but I just raised this in view of the fact that as you know Maryland has a new minimum wage statute and it seems to be certainly the trend among many state jurisdictions today and here we have at least the house of representatives which is and has considered this particular statue. I think a lot of the things that I have talked about where I have indicated that the Republican Senate will not even take up a particular bill passed by the house or consider it may in fact change we do not know what the political calculus will be after November 2020, but in any event that bill will not be going anywhere. Similarly on July 11, week an a half ago two weeks ago, the house financial services committee heard testimony and approved for the entire house to consider certain statutes or amendments to statutes which would amend the consumer reporting statutes or the fair credit reporting act and probably a much more employee favorable way. So one of the acts which the committee approved was entitled the restricting use of credit checks for Employment Decisions Act, long name, which would essentially ban the use of consumer reporting information for most employment related decisions. Pretty drastic I would view this as having zero chance of passing. Secondly, they considered and passed in committee a statute entitled the Restoring Unfairly Impaired Credit and Protecting Consumers Act, it is amazing to me how whether it's Republican or a Democratic led initiative they come up with some of these names, but anyway under this statute it would require consumer reporting agencies to remove adverse information from consumer reports after four rather than seven years, so as most of you know or probably have found out when you have done consumer reporting reports on applicants primarily that they will go back seven years. This would say that, if it were ever passed which I doubt, that that kind of information criminal background etc., would be removed after a four year passage of time. So again I do not see any of these going anywhere but I wanted to kind of

make you aware of things that were happening in the employment related realm of Congress.

More to the point in Maryland I wanted to point out a view things, we have talked tangentially about some of these statutes which will go into effect October 1, so we are not that far away from October 1. So one is and I mentioned this before but changes to the workplace harassment statutes under the Civil Right Statute of Maryland and on April 3 the general assembly passed and Governor Hogan eventually signed into law on April 30 changes to the workplace harassment laws essentially which would establish strict liability on employers for harassment committed by an employee's supervisor. One of the interesting things about this statute is it defines the term supervisor very broadly to include anyone who "directs supervises or evaluates" the employees work. As most of you know under the federal statute when dealing with workplace harassment generally there is an affirmative defense for employers where they can show that they moved quickly to address the issue or where the employee unreasonably failed to take advantage of an internal process or procedure. The Maryland statute essentially in a workplace harassment scenario does away with that affirmative defense. Which again calls into I think importance the question of internally training any kind of supervisory authority in the state of Maryland because you don't want to get stuck with strict liability under Maryland law even if it would pass muster under federal law. Secondly, again to take effect October 1 on April 6 again the general assembly passed what they called the Gender Diversity in the Boardroom Act, this was signed into law by Governor Hogan on May 13 and what this act does is for the purpose is to promote gender diversity in corporate management boardrooms, now this may not be applicable to all of you because you may not have private boards of directors but for those of you who do essentially the general assembly noted that gender diversity on boards of directors is certainly lacking among most boards, private boards, and as well as nonprofit boards, so what they said was for any private entity or nonprofit entity that has revenues of more than $5 million a year they have to file a yearly report on the Maryland controllers website when they file your personal property tax return and that report needs to note the percentage of female representation on your board of directors. Aspirationally it urges Maryland employers to have at least 30% of your seats on the board of directors occupied by women by the end of 2022 again Governor Hogan signed that into law May 13 of this year. Finally to go into effect October 1, the general assembly on April 8 passed they call the Equal Pay Remedies and Enforcement Act essentially the analog to the Federal Equal Pay Act and it establishes some pretty severe penalties for those employers who do not pay similarly situated employees the same wage without regard to sex or gender identity. Jurisdiction to enforce this particular statute falls under the Department of Labor and there are pretty severe monetary penalties for those employers who violate this statute

which again calls into question the obligation of all of you to make sure that your job descriptions certainly are gender neutral and that your pay levels are comparable for both men and women performing the same or substantially similar jobs. So take a look at that because not only do you face exposure now under the federal scheme but certainly under the state statutory scheme as well.

Speaking about Department of Labor this is on the federal side, in the last telebrief I mentioned that off course secretary Acosta resigned in the light of the Jeffrey Epstein debacle and the question was well who will be nominated to take his place in fact the administration has made that nomination to a person whose last name you will certainly remember and note. So they have, the administration has nominated Eugene Scalia as the next secretary of labor and yes Eugene Scalia is the son of the conservative justice who passed away a few years ago. Eugene Scalia is a senior partner at a very white shoe law firm, Gibson Dunn and Crutcher, many of you have probably heard of that, and at Gibson Dunn he was the head of their administrative law and regulatory practice. Through his writings, through his litigation he has been staunchly anti-regulatory in his philosophy and it really will be interesting it seems to me assuming that he is confirmed and given the senate confirmation, I do think that he will be confirmed, it will be interesting to see the practicalities of him being the new secretary of labor. After all there are issues that we have talked about in prior telebriefs which are still sort of out there in the atmosphere to be definitively ruled on or decided by the Department of Labor one of which as you know is the overtime exemption rules the salary adjustment rules that probably will go into effect in January 2020 dual employer issues and different department of labor wage hour opinion letters which he may have a hand in deciding. So I do not know exactly what hearings are scheduled but I am sure they will be scheduled soon and as I indicated I would be surprised given his pedigree if he were not confirmed as the next secretary labor.

One of the recent opinion letters by the Department of Labor I will just mention very quickly, it is opinion letter FLSA 2019-9 has put in writing the confirmation that the rounding practice that is the method by which employers round off time by employees under the FLSA is applicable also now to the Service Contract Act. So those of you out there who may have government contracts or may do work under the Service Contract Act will know that under this opinion letter you may affirmatively round off time the same way that you round off time under the Fair Labor Standards Act and of course the main thesis under that rounding off theory is that as long as you treat the time on both sides of the clock that is when the employee clocks in and when the employee clocks out the same under your rounding policies and if it is not excessive then such rounding policies are indeed permissible.

I wanted to turn my attention to sort of a policy issue or a question that I often get about severance agreements and I wanted to review several issues in conjunction with those severance agreements that come up because many of you out there have employed severance agreements without the aid of an attorney or you may use one that you got from an attorney in sort of a template kind of a manner and I would suggest to you that each time that you have a severance agreement you need to pay particular attention to the particularities of that severance agreement as it applies to the facts and circumstances of an employee. So I want to really review in due course a few of the issues that I always face with clients regarding severance agreements. First if you have a severed employee who is age 40 or over you probably know but I am not sure that your severance agreements must comply with the Older Workers Protection Act and in that you need to have certain peculiarities of the Older Workers Protection Act including advice that the employee should retain at his choosing, counsel to review the agreement and that the employee would have at least seven days to rescind acceptance of the agreement and 21 days to consider the agreement and though that time limitation would be expanded in the case of multiple terminations or multiple layoffs so that the employees under the Older Worker Protection Act would have 45 days within which to consider an agreement if there are multiple employees for instance being laid off of positions or being eliminated. Even if the employee is under the age of 40 I always advise clients to make sure that the employee who is considering the agreement has adequate time within which to consider the agreement. So for instance I would not give a proposed severance agreement to an employee on a Thursday and say we need an answer to whether you are going to accept this agreement by tomorrow Friday. I think a reasonable period of time in a situation like this is probably five business days or a week calendar. So you know consider that when you are trying to implement or trying to convince an employee to accept a severance agreement. Bear in mind if there are material changes to the severance agreement through negotiation or otherwise you start that 21 day clock again or the 45 day clock as the case may be. Also importantly many of you may have independent confidentiality agreements or non-compete or non-solicitation agreements with your employees many severance agreements will have what is called an integration clause in it which will simply state something like the agreement constitutes the entire agreement between the parties and supersedes all other prior agreements if you have that kind of integration agreement you are going to want to make sure that you integrate into the terms and conditions of your severance agreement any prior confidentiality or nondisclosure agreement otherwise you have effectively waived enforcement of that confidentiality or nondisclosure agreement. So there are two ways of dealing with the confidentiality or nondisclosure, non-solicitation agreement one is of course to have independent

agreements with your employees even before severance agreement and then incorporate by naming them in the severance agreement or if you do not have those kinds of covenants or agreements with your employee at the time of the severance agreement as part of the consideration which would support the severance agreement you can have independent clauses in your severance agreement which would bind the severed employee to a confidentiality covenant or nondisclosure or even a non-compete covenant. So those issues come up frequently and you have to be very, very careful how you want to deal with those. Oftentimes I am asked well how do we sort of phrase the termination of employment for a particular employee. So you may have in one sort of paper an employee who designates a termination of his employment as a resignation and yet in your severance agreement you may call it a termination. I think the easiest way to deal with this particular issue is simply to cite in your severance agreement that employment has ended that way you do not necessarily have to characterize it as either a resignation or termination.

Finally dealing with health insurance many of you know that under Obamacare restrictions in order to be eligible for health insurance the employee has to generally work 30 hours a week, well some severance agreements will indicate that the employee who is being severed will continue on with health insurance during the severance period. That is risky in that if the employee were to incur medical expenses and submit them to the carrier and if the carrier ascertains that that employee was not really eligible for health insurance the employer could get stuck with those particular health insurance costs. So one way of dealing with that is to indicate that the employer will make COBRA available to the employee and may pay either the employee's portion of COBRA or the entire COBRA cost. So just be wary of that if you are contemplating the coverage of an employee on your health insurance plan after an employee severs the employment and enters into a severance agreement.

The last thing I want to talk about is the Second Circuit decision, a recent Second Circuit decision, it is a case called Fox versus Costco Wholesale Corporation, we all know Costco, and in this case significantly the Second Circuit has agreed with cases involving disability, work harassment or work harassment on the basis of disability the Second Circuit has agreed with the Fourth Circuit that is our circuit, the Fifth, Eighth and Tenth Circuit under which employees can make cognizable claims of workplace harassment on the basis of disability not simply sexual harassment. I know that in the era of Me Too we tend to focus workplace harassment only on sexual harassment but clearly in many of the federal appellate circuits there have been recognition that an employee can bring a viable claim of workplace harassment not only on the basis of sexual harassment but on disability or race, gender etc. and in this case the employee incurred a lot of teasing and bullying by coworkers on the basis of his Tourette

syndrome and the allegation was that managers knew about this and did nothing about it, and the Second Circuit essentially said that the Plaintiff in this case had offered enough evidence to at least get to a jury regarding whether or not there was a cognizable claim that he was the victim of workplace harassment on the basis of his perceived disability. The practicality of this is I know probably everyone out there has handbook policies on workplace harassment but I think that it would behoove you all to make sure that in your policies you have statements that indicate that employees will not be the subject of workplace harassment either on the basis of sexual harassment or the basis of any other protected classification such as disability, religion, race etc. Okay those are the developments for the day. Casey can take this off of mute.

Howard Kurman: Okay, we are un-muted as always if anybody has any questions feel free to ask me and if you rather do it in a private forum as I always say you can get me at my email at hkurman@offitkurman.com or my number 410-209-6417 any questions?

Anne: Yeah Howard your termination agreement waiver and release agreement points are really important because that can easily be goofed up and you can have an unenforceable agreement that is really important to the company.

Howard Kurman:: Yeah, you know and these things tend to be sort of templated by companies you know they have one from three years ago Anne, and they assume that the same agreement can be used for all purposes and I am not saying that basic provisions change but certainly as I indicated facts and circumstances do change and you have to be cognizable of what those facts and circumstances are, so…

Anne: Yeah really good point.

Howard Kurman: Thank you any other questions, comments? Okay well I am sure that at the end of the day everybody will be listening to commentary about what Mr. Mueller had to say and we will collectively regroup the second Wednesday in August.