LABOR & EMPLOYMENT TELEBRIEF
By
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_____: Alright. Good morning everybody and thanks for joining us this morning. Howard actually pre-recorded this week's telebrief, so in about a minute I will play that for everybody and then if you do have any questions feel free to reach out to Howard directly afterwards.

Howard Kurman: Good morning, today is Wednesday, March 27, 2019 and as it has been stated because I have a partner's board meeting this morning, I am unable to do this live, but I have pre-recorded this telebrief because there are plenty of significant issues to review. Let me start off with some news from the Equal Employment Opportunity Commission, so in my last telebrief I indicated that the Equal Employment Opportunity Commission as you all know has EEO1 requirement for those employers who have over a 100 employees to submit data with regard to demographics in the work place and a Federal judge issued a decision recently which indicated that in addition to the traditional or historic demographic data that employers would also have to submit pay data along with that. We now have information that that same judge has given the Equal Employment Opportunity Commission until April 3rd to submit its plan as to whether or not and when it will require employers to also submit this additional data. So we then have to wait probably another week or so to ascertain whether the Equal Employment Opportunity Commission will continue with its position requiring those employers with over a 100 employees to submit in addition to demographic pay data, which could be quite burdensome for those of you out there who have to submit these reports. Nevertheless we won't know until April 3rd what the Equal Employment Opportunity Commission's timeline is for this.

In other news involving the EEOC has proposed to amend regulations regarding the so-called dismissal and notice of rights form. Those of you out there, whoever had an EEO charge filed at the Equal Employment Opportunity Commission by an employee or ex-employee or applicant know that the Equal Employment Opportunity Commission does its investigation and at the end of the day may issue, what is called a Dismissal and Notice of Rights Form to you. This Dismissal and Notice of Rights Form generally gives the employee or applicant as it may be 90 days from the receipt of that notice within which to file a lawsuit against your company. The Equal Employment Opportunity Commission is seeking to amend those rules to clarify that a no cause determination is not necessarily a finding or determination on the merits of the particular charge. So that according to the Equal Employment Opportunity Commission statements they would put out a statement that says that it

meaning the particular form that it uses does not certify that the respondent, i.e. "the employer is in compliance with the statutes" and that the "EEOC makes no finding as to the merits of any issues that might be construed as having been raised by this charge." I have had many clients over the years when they get these particular forms or when I have got them and forwarded them to the client, the client believes that, well the Equal Employment Opportunity Commission had a finding on the merits and concluded that there wasn't any merit to the particular charge. That's not necessarily the case with the great influx of charges to the Equal Employment Opportunity Commission. Frequently they just punt on these cases and issue a dismissal and notice of rights form to the charging party that does not necessarily mean that they have really done a merit based investigation or finding and this proposed rule would go further and indicate expressly that the notice for the designation of a dismissal and notice of rights form is not merit based and that employees then have 90 days within which to file a lawsuit against the employer. So we will stay tuned on this and see whether this rule is actually implemented or not in the future.

Turning our attention to another agency, the Department of Labor, last Friday, March 22nd, the United States Department of Labor put out a public announcement as follows: The U.S. Department of Labor announced today that the Office of the Federal Register has published the Department's Notice of Proposed Rulemaking that would make more than a million more American workers eligible for overtime under the Fair Labor Standards Act. It goes on to say the official publication in the Federal Register marks the start of the proposal's public comment period, which will remain open for 60 days and close on May 21, 2019. Finally, it states, more information about the proposed rule is available on its website. The Department encourages any interested members of the public to submit comments about the proposed rule electronically at www.regulations.gov, in the rulemaking docket RIN 1235-AA20. Comments must be received by May 21, 2019 to be considered. Again, we have spoken numerous times in past telebriefs about the fact that the Department of Labor is now seeking to increase the overtime exemption salary level to about $35,000 per year and as per federal statutory rules and regulations, **Audio Cut**.

In another development from the Department of Labor and I think a significant one with practical import. On March 14, just a week and a half ago, two weeks ago, there was a wage and hour opinion letter, and as I have indicated in past telebriefs, sometimes the Department of Labor issues these opinion letters in order to provide the employers and employees with guidance regarding the Department of Labor's interpretation of various provisions under the Wage and Hour Act, or in this case, under the Family and Medical Leave Act. So, the letter starts out, the opinion letter starts out by saying – This letter responds to your

request—in other words, an employer had made this request—for an opinion on whether an employer may delay designating paid leave as family and medical leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. It goes on to say that you represent to some employers "voluntarily permit employees to exhaust some or all available paid sick or other leave prior to designating leave as FMLA qualifying even when the leave is clearly FMLA qualified. You state that employers justify this practice by relying on the particular section in the code of federal regulations, which provides in relevant part that "an employer must observe any employment benefit our program that provides greater family and medical leave rights to employees than the rights provided by the FMLA. The opinion letter goes on to state that the employer is responsible in all circumstances for designating leave as FMLA qualifying and giving notice of the designation to the employee. Furthermore, the opinion goes on to state that the wage hour division's regulations require employers to provide a written designation notice to an employee within five business days absent extenuating circumstances. After the employer "has enough information to determine whether the leave is being taken for FMLA qualifying reason and after some other substance in the opinion letter, you get to the meaning of what the Department of Labor is saying, which is "an employer may not delay the designation of FMLA qualifying leave or designate more than 12 weeks of leave or 26 weeks of military caregiver leave as FMLA leave. It goes on to say first an employer is prohibited from delaying the designation of FMLA qualifying leave as FMLA leave. Once an eligible employee communicates the need to take leave for an FMLA qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. So, the department goes on to say, accordingly, when an employer determines that leave is for an FMLA qualifying reason, the qualifying leave is FMLA protected and counts towards the employee's FMLA leave entitlement. Once the employer has enough information to make this determination, the employer must absent extenuating circumstances provide notice of the designation within five business days. Accordingly, the employer may not delay designating leave as FMLA qualifying even if the employee would prefer that the employer delay the designation. I will read that again, once the employer has enough information to make this determination, the employer must absent extenuating circumstances provide notice of the designation within five business days. Accordingly, the employer may not delay designating leave as FMLA qualifying even if the employee would prefer that the employer delay the designation. It goes on to say, an employer is also prohibited for designating within 12 weeks of FMLA leave. Finally, in its conclusion, the Department of Labor says but providing such additional leave outside of the FMLA, so for instance, if you have a more generous plan cannot expand the employee's 12-week entitlement under the FMLA. Therefore, if an employee substitutes paid leave for unpaid FMLA leave,

the employees paid leave counts towards his or her 12-week FMLA entitlement and does not expand that entitlement. So, from a practical standpoint, those of you who administer or are responsible for managing FMLA leave for your employee base, you must know that the Department of Labor through this opinion letter has stated that once an eligible employee has given you information which would lead you to believe that the reason for the absence is FMLA qualifying, neither that employee nor you as the employer may decline to designate or delay such leave as FMLA particular leave and that as soon as you have that information, even if the employee is using other kinds of leaves, so for instance, vacation, sick leave, etc, it is still FMLA qualifying leave.

In another sort of agency interpretation of a policy issued, I had recently had a client who asked about whether it would be permissible to ban totally the use of personal cell phones in the workplace. I want to bring to your attention something that came up in an advice memorandum which is dated July 31, 2018, less than a year ago, for the National Labor Relations Board, and in this advice memo, they dealt with the issue of whether or not an employer rule which totally bans the use of personal cell phones by employees was violative of the National Labor Relations Act. Remember in the past I have talked about Section 7 of the National Labor Relations Act which provides that employees have the right to engage in collective or concerted protected activity in order to discuss wages, hours and terms and conditions of employment. The NLRB, the National Labor Relations Board was dealing with a proposed rule that stated that because cell phones can represent "a distraction in the workplace" resulting in "loss time and productivity" personal cell phones may be used for "work-related or critical quality of life activities only". The National Labor Relations Board went on to say that this rule is unlawful because employees have a Section 7 right to communicate with each other through non-employer monitored channels during the lunch or break periods because the rule in question there prohibits use of personal cell phones at all times except for work related or critical quality of life activities, it prohibits their use on those nonworking times. The phrase regarding text messaging and digital photography is more limited but still refers to "working hours" which the board and other contacts has held includes nonworking time during breaks. Although the employer has a legitimate interest in preventing distractions, lost time and lost productivity that interest is only relevant when employees are on work time. It therefore the Board says does not outweigh the employees' Section 7 interest in communicating privately via their cell phones during non-work time about the terms and conditions of employment. Thus from a practical standpoint those of you who have policies on the use of personal cell phones need to make sure that your policies will provide that employees may use such cell phones during non-work time, that is either before or after a work shift or during a break or during a meal period. Otherwise you can certainly prohibit the use of

personal cell phones during actual work time, but not during non-work time, so if you want to go back and look at your policies you should do that, certainly in view of this advice memorandum by the National Labor Relations Board from July of last year.

The last thing that I wanted to cover this morning was again in response to a client inquiry with regard to the meaning of a constructive discharge, so that employment lawyers have a different view of where constructive discharge is as opposed to perhaps the lay definition. But let me clarify for you, a constructive discharge is only present when the terms and conditions of employment by an employer are made so egregious that a reasonable employee would have really no choice but to resign under the circumstances. So it is not every little thing that happens at work that may constitute a constructive discharge; rather the law would state that there needs to be actions taken by an employer which a reasonable person would find to be so seriously demanding and so drastic in terms of the change and the terms and conditions of employment that a reasonable employee would really have no choice but to resign employment. So very often you may have a claim by an employee of a constructive discharge, but the law creates a pretty high burden on whether or not employer actions constitute a constructive discharge.

And the last thing I will say which is related, is that many of you may have policies which state that if an employee is absent without notice for more than three days or something akin to that, you will deem that employee to have resigned his or her employment and I caution you about that. It comes up sometimes at employment hearings and the term resignation generally applies or imputes an intent on the part of the employee to resign or terminate his or her employment. There are occasions when even if an employee were absent, lets say without notice for three or more days where the employee may say I never intended to resign, so the better policy on the part of the employer is rather than imputing an intent to the employee which the employer may not have that simply to say that an employee for instance who has been absent without cause or without notice for three or more days or something akin to that will be terminated for good cause. So you do not have to worry about what the intent is on the employee. You merely state that an employee who has done certain things will be terminated. It is a much easier burden to show than trying to show that the employee had a certain motive or a certain intent in his or her mind to resign employment.

So I apologize for the prerecording of this. Obviously, I cannot answer questions in this forum right now, but if you have any followup questions certainly you are free to email me at hkurman@offitkurman.com or even call me at some point 410-209-6417, and the next telebrief will be

Wednesday, April 10th, so thanks for your attention, and we will see you in a couple of weeks. Thank you.