LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Okay, it is 9:02 on my official clock Casey can you mute the lines please. All right good morning everybody, its hard to believe that we are at the pre-Memorial day telebrief but so be it we are. All right, let me start with some news sort of congressional news, not impeachment news, not Trump news but labor and employment news. So on May 8, just a couple of weeks ago the Senate voted 50 to 43 to confirm a new chair of the Equal Employment Opportunity Commission her name is Janet Dhillon and with her approval and confirmation the Equal Employment Opportunity Commission now has a quorum which they did not have before so they have three members out of the five which would constitute a quorum. Interestingly, her nomination was first put before Congress back in June 2017 so it has taken that long to approve her. The reason I think that it is noteworthy is I wanted to kind of mention what her background is for those of us on the management side, so she at the time of the nomination for her chair had served two years as executive vice president general counsel and corporate secretary for the big national retailer Burlington Stores, before Burlington she actually was the head of the legal department First US Airways and then JC Penney and prior to that she had practiced as an attorney at Skadden Arps which is a very sort of white shoe law firm based out of New York and so you can see pretty much that at least from a management perspective, from an employer's perspective, it will be helpful I believe to have somebody with a business perspective at the chair at the Equal Employment Opportunity Commission and that is not a guarantee of course that everything that comes out of the Equal Employment Opportunity Commission will be business friendly but what it does portend I believe is that there will be a business perspective which is in many cases been lacking in Equal Employment Opportunity Commission initiatives and decisions and interestingly during her testimony for confirmation she stated that she viewed litigation from a EEOC's perspective as a last resort believing that most employers in her mind where in "law-abiding" and that the EEOC should continue providing to employer's tools to assist with compliance. So you can see really from the standpoint of the Equal Employment Opportunity Commission it will be helpful I think that all of you out there who want somebody that is business friendly to be at the helm of the EEOC, her term will not expire until July 1, 2022. And she also made it a point in her senate testimony of focusing on clearing up the backlog at the EEOC. Those of you out there who have had charges filed against your company know that many cases they just languish sometimes for months even sometimes for years I have some cases now on behalf of clients which have been at the EEOC for 15, 18 months without any action. So she has

made it a priority of cleaning up that backlog and I think that that's a good thing sort of falls into the adage of justice delayed sometimes is justice denied and too frequently both at the EEOC and frankly at the Maryland Commission cases just sit there without any action and for an employer particularly in a termination case that can be problematic because as you know potential back pay keeps building up. So its good news I think and we'll see what Ms. Dhillon does at the helm of the EEOC but I do not think that you are going to see crazy initiatives that will move the needle so far to the left at the untenable which I think was often the case at the National Labor Relations Board, Department of Labor and EEOC during the Obama administration.

Okay, another sort of development legislatively or at least administratively at the Department of Labor. As you know I have spoken about numerous occasions in the past the Department of Labor proposed initiative to change the overtime rules and change the threshold for exemptions for administrative executive or professional employees, you know that under the Obama administration the proposed salary cutoff level was almost $48,000. The proposed rule now by the Department of Labor or at least as it sought comments from both the labor and the employer community is $35,308. While the deadline for public comments on this rule, the proposed rule, ended yesterday and not surprisingly there are many comments that are in favor of the proposed rule and many comments that are in opposition to the proposed rule. For instance, the National Employment Lawyers Association which is comprised of Plaintiffs employment attorneys, bitterly attacked the rule and they believe that the Department of Labor should set the overtime threshold in "no lower than the medium salary level for American workers which is $51,152.10" which I believe is an absurd proposal, has actually no chance of becoming law but that is on one side of the spectrum and then on the other side of the spectrum you get comments for instance from the National Restaurant Association which deems $35,308 to be too high and takes the position that at that level employees may have to be laid off or converted into non-exempt employees because they simply cannot pay, at least their constitute members cannot pay the $35,308. I have long said those of you who have participated in these telebriefs for a while, I have long said that I believe the Department of Labor's proposed salary cutoff level under Obama was way too high and I have often stated that I believe that the current level of about $24,000 is way too low and I predicted, I think accurately, that the Department of Labor would come out with a median kind of a level of $35,000 which is exactly what it has done. So right now what will happen is the Department of Labor will analyze the comment that it have been made on behalf of both the labor community and the employer community and I believe it will stay true to its original proposal here of the $35,000 and I also believe it will become law and become effective as of January 1, 2020. So those of you out there and I have stated this and

recommended this before, do your internal audits now on the assumption that the cutoff level for these white-collar exempt positions will be at the $35,000 and change level and do your own due diligence and make sure that if you are paying currently under that level for exempt positions that you make the appropriate adjustments as necessary.

Again staying on some congressional developments I wanted to review some action in the house on various labor and employment bills which I doubt will become law in most cases because of the fact that we have a Republican controlled senate. Let me quickly review these. The House education and labor committee – subcommittee – recently held a hearing on what is known as HR2474 known as protecting the right to organize act or the Pro Act. This would engage or consist of a drastic overhaul probably of the National Labor Relations Act that would strengthen unions and impose penalties on employers that interfere with attempted union organizing. This is the kind of bill that has been introduced for many, many years I don't see anyway that it becomes law. The second proposed act is called the Equality Act this is HR5 this would re-write title VII of the Civil Rights Act to include sexual orientation and gender identity as protected classifications under the 1964 Civil Rights Act. Now as you know, the Supreme Court is scheduled to hear arguments in the fall on three cases that will pose this very issue, that is whether sexual orientation and gender identity are included within the meaning of the prohibition or discrimination on the basis of sex. So this proposed legislation would in essence preempt the Supreme Court's decision and would include gender identity and sexual orientation within the meaning of title VII. I think this probably does not have at least at this point the backing that would be necessary to pass in the Senate although interestingly the US Chamber of Commerce has supported the bill and a statement from its head Glenn Spencer is it's a pretty simple calculus we do not support discrimination in the workplace. Nevertheless, I think that we will probably have a decision by the Supreme Court before we have an enactment of the amendment to title VII of the Civil Rights Act. Thirdly, we have a proposal called the Wage Act this is HR 582 which would increase the current $7.25 minimum hourly wage by a $1.30 every year until it reaches $15 on the fifth anniversary of its effective date. I do not think that it will gain traction in the Senate but as you know for instance in the state of Maryland we already have our amendment to minimum wage and the $15 is part of that amendment in the state of Maryland and in other states as well. Fourthly, there is an act called the… or at least proposed Act called the Paycheck Fairness Act which would amend the Equal Pay Act to make employers with pay gaps between men and women liable for damages unless they can show non-gender business based reasons for the differentials in wages. Those of you out there with a number of employees would be wise even in the absence of this particular proposed statute to make sure that you have pay equity between men and women employees performing similar kinds of jobs.

The next proposed piece of legislation would be what is called the Ending Forced Arbitration of Sexual Harassment & Fair Act. So this is HR1443 which would if enacted block employers for making workers arbitrary claims that they were sexually harassed on the job also it would do away with in essence Supreme Court precedent favoring arbitration as I said in the last telebrief with the Lamps Plus case and with the Ethics case, Ethics systems case in the last term of the Supreme Court, the Supreme Court has always been favorable to arbitration of claims whether they are employment claims or not and this would be a proposal which would in essence give employees the right to bypass arbitration and go into court and litigate employment claims as opposed to being mandated to arbitrate those claims. Again I do not see it passing the Senate, and lastly the so-called Family Act which is HR1185 which would mandate federal paid family leave and interestingly this is gotten some Republican supporters as I have reported before but most states including Maryland already have now you know for instance in Maryland the Safe & Sick Leave Act which provides for paid leave for those employers with 15 or more employees in the state of Maryland. So you can see the house has been active in discussing and proposing these kinds of statute but with the Senate being Republican-controlled there are very few of them that I really think will have traction. Nevertheless there is a lot of activity in discussing the employment provisions and most of them being employee favorable.

Let me turn my attention to an issue that you know came to in my attention from a client, it has to do with those of you who hire employees from perhaps a competitor and where that employee even if the employee is not subject to a confidentiality or nondisclosure agreement brings over so-called proprietary or confidential information to your company. There is a Federal Trade Secrets Act and in many states comparable state legislation which prohibits an employer from making use of proprietary or confidential information and it goes to the issue of whether as a matter of due diligence you as a prospective employer or a new employer of an employee should do some due diligence and ensure that that new employee is not bringing over or utilizing any confidential or proprietary information to be used and which would favor your company. So in your due diligence or in your questions it is a good idea to ask that prospective employee whether the employee either is subjective of confidentiality or nondisclosure agreement or whether the employee or prospective employee possesses any kind of proprietary or confidential information, because not only would the employee or the new employee would be liable for utilizing some confidential or proprietary information. So you as the new employer would similarly be liable as well so as a matter of due diligence you want to make sure that you enquire of and prohibit the use of any kind of proprietary or confidential information that that employee may possess either in writing or otherwise that would be down to your benefit as a company and the detriment of a prior employer.

Another thing that came to my attention by a client of mine was the use of remote connections and remote commuting by employees which is becoming very commonplace today. And I think you need to be aware of a couple of things if you utilize these remote capabilities, one of course is yet for a nonexempt employees you need to keep track of hours worked whether they are in your workplace or whether they are remotely commuting and there are apps out there and software programs that help you keep track of those hours but for instance if you have nonexempt employees who are scheduled to take meal breaks you need to be able to keep track of that and insist that your remotely commuting employees take the necessary breaks or meal break that you would otherwise have them take in your workplace and you need to be able to keep track of those because if you have employees as you know who are working through meal breaks whether they are at your place of work or remotely commuting that is compensable time, so you need to be able to keep track of that. Another issue that can come up and not normally but can come up is that you need to make sure that employees have a safe workplace if they are remotely commuting because just as though Workers' Compensation statutes will compensate an employee accident that arises out of and in the course of their employment while at work if their workplace is at home the same law would obtain, so an employee who incurs a workplace injury while commuting at home would be just as compensable as if the employee were at work. So you certainly want to ensure if you are allowing workplace commuting or remote commuting that the employee has a safe place within which to work. And lastly on this if you have a handbook or standalone policy you want to talk about and deal with workplace remote commuting and you want to make sure that employees understand that they need to certify that their time records are correct and that they are being provided with meal periods same as if they were working at your place of work and that they understand that if they are going to have any overtime that it needs to be approved by their managers and their supervisors.

The last thing that I will mention is that there do seem to be an increase in age discrimination charges and complaints obviously as the work group or the demographics change and we have more and more employees in the protected age group which as you know is forty or more it stands to reason that we would have more employees filing age discrimination complaints either on the basis of failure to hire or perhaps terminating employees in that protected age group. So you want to make sure that your policies are age neutral that you are not advertising of course for employees in any particular age group, that you do not have mandatory retirement policies that are in place and that you make sure that you concentrate on employee performance much more significantly than the age of the particular employee. That does not mean that you cannot deal with performance-

based issues of older employees. Sometimes it is more difficult in dealing with those because you have to be sensitive to the employees age but you can and you should concentrate objectively on performance even if those performance issues involve employees in the protected age category. It just may mean that you have to be more sensitive in your discussions with the employee and you should obviously document performance inadequacies, so at the point at which you may be in a position of terminating a protected age employee that you have the proper documentation to implement or impose a termination decision and as an alternative discuss separation agreements with that particular employee by paying some degree of severance, as long as the separation agreement contains the adequate provisions under the Older Worker Protections Act for instance giving that employee 21 days within which to consider the agreement, seven days within which to rescind acceptance and advising and counseling that particular employee to seek counsel prior to accepting the agreement. Okay those are the developments for the day. Casey can you take this off of mute please.

Casey: All right.

Howard Kurman: Okay, so as always I invite any questions that any of you may have either in this forum or through my email hkurman@offitkurman.com or my phone which is 410-209-6417. Any questions out there?

Anne: Not from me today Howard as always really interesting to see what is happening.

Howard Kurman: Okay, well as always I appreciate your participation and wish you a very happy and healthy you know Memorial Day and we will reconvene on the second Wednesday in June. Take care everybody.