LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Okay. It is 9:02 by my official clock. Casey can you mute these phones. All right, well good morning everybody. So plenty to report on as always. Much of this kind of coming out or emanating from our own State of Maryland. So first let me mention that on May 25th Senate Bill 328 officially became the law in Maryland which bans employers from entering into any kind of a non-competition agreement with employees who earn equal to or less than $15 an hour or $31,200 annually. I reported on this probably a few telebriefs ago after the legislative session ended in Maryland but now it is law. The governor did not detail this particular law, so it basically says that if you have employees that you typically enter into sort of standard non-competition agreements, they will only be applicable to those employees who are earning more than $15 an hour or more than $31,200 annually. The law does not bar employers from otherwise demanding for instance non-solicitation agreements, so if you have your employees of any kind of salary level sign a typical non-solicitation of clients' provision or non-solicitation of employees' provision and certainly a confidentiality or non-disclosure agreement, those agreements would be okay but what you can't do is have these sort of lower tier earning employees be bound by non-competition agreements and as you know in prior telebriefs, I have talked about the utility or lack thereof of having, you know, clerical or administrative employees sign a non-competition agreement anyway, but know that as of, you know, a few weeks ago, Maryland law has been changed and if you have agreements, sort of stock agreements, that you have these lower tier earning employees sign, you are going to have to modify them or not have these employees sign if they contain traditional non-competition types of covenants in them.

Okay, secondly out of Maryland, as you know the Minimum Wage Adjustment Act was passed by the Maryland legislature. There is a new poster which all employers are obligated to post along with their other similar kinds of posters that you put up, whether it is EEO posters, Department of Labor poster, etc. I have sent some of these to client but anybody who is not a client you can simply go on to DLLR website. By the way, as you know as of July 1st , the DLLR will be known now as the Department of Labor, we covered that in a prior telebrief, but you can go on the website and you can get the new poster that you need to post or if you want to just send me an email and I will send you a copy of it anyway, but you need to post that. Many of you get these posters where they are like eight-in-one posters or whatever, I am sure the latest iteration from

the DLLR will be on a new poster, if you purchase but you do not have to purchase this individual one, you can get it right off of the DLLR website.

All right, thirdly, out of Maryland, on May the 24th., two weeks ago, Governor Hogan announced that he was vetoing House Bill 994, that is a statewide Ban the Box bill, and as you know a Ban the Box bill is a prohibition on an employer asking a candidate for employment about prior criminal records under certain circumstances. This bill essentially says that an employee who applies for employment in the State of Maryland cannot be asked about his or her criminal record until the first in-person interview; and then at that interview, you can ask questions about it. Now so that would mean if this law goes into effect, and I will talk a little bit about that in a minute, if it does survive the veto of Governor Hogan, you would have to change your application forms to take off any question regarding prior criminal history and you would not be able to inquire into that history until the first in-person interview. It is interesting the Governor was quoted as saying, in his opposition, he states employers have the right and often the need to know the criminal history of applicants they may hire, and he says the bill "would result in costly and time-consuming human resources work that ultimately goes nowhere." He says by the time an employer discovers an applicant may have a disqualifying background, alternative candidates might not be available and the employer would have to restart the entire process. This would "have a particularly negative impact on high turnover industries or those that require positions to be filled quickly." Another point that the Governor raised was local jurisdictions have enacted their own moral restrictive laws, so as you may or may not know, Prince George's County has such a law, Montgomery County and Baltimore City. The Governor went on to say when and how an employer asked about criminal history is a decision that should be left to employers, not dictated by the legislature and micro-managed in the annotated code. So what may happen next? Well, the law has been vetoed and similar to the Safe and Sick Leave Law, from a procedural standpoint, what will happen is the legislature will go back into session as you know in January. It actually begins on January 8, 2020. The proposed effective date of the statute is January 1, 2020 but I do believe that based on the vote in the Senate and the House of Delegates, there really is a veto-proof majority and so what I expect will happen is that after January the 8th, somewhere around there, the legislature will override Governor Hogan's veto and then the law would take effect 30 days after that particular veto override. So you do not need to change your applications unless you are in the three jurisdictions that I mentioned before but I do believe the legislature will override the Governor's veto and it will become law somewhere in February 2020.

Finally, in the State of Maryland, just so you know, the Equal Employment Opportunity Commission last Monday, not this past Monday,

but the Monday before, filed two gender-based pay discrimination suits in Maryland Federal Court against an Asset dealer and against a guard company contending that both of those companies paid female employees less than their comparable male counterparts. So I hope we do not have anybody on the phone from Asset Strategies International, Inc. or Davis & Davis Enterprise, but they were the two employers that were sued; and the statement by the EEOC's Philadelphia District Director, and so many cases come out of the Philadelphia region which is where Baltimore is a part of, The Philadelphia District Director of the Equal Employment Opportunity Commission, Jamie Williamson, quoted saying addressing gender-based pay discrimination is a priority for the commission; and in both of these lawsuits, both of these complaints, there were allegations which indicated that the females involved were performing comparable duties and responsibilities with their male counterparts and yet were being paid less; and according to the regional attorney, the EEOCs regional attorney, she says it is blatantly unfair and unjust to pay a female manager lower wages than male employees she trained and supervised, especially when she had greater job responsibilities and that they had less Asset sales experience, so this was in the case of the Asset Company. The case involving Davis & Davis, this guard company, claims that they paid at least 11 female security guards less than their male counterparts as far back as October 2016 and the last quote I will leave in this, is she states it is fundamentally unfair and illegal to pay women less than men for doing the same work. The EEOC will step in to fight for people's rights against sex-based wage discrimination. So I only bring this to your attention because many of you out there have responsibility for auditing or supervising your pay systems at your respective companies, so I would advise you, at least periodically, to take a look at your pay grades, to take a look at how your gender kinds of differentiation, if any, breaks out and to make sure that from the standpoint of those pay grades and what you are paying your female employees in the same pay grades or classification as your males, that there is not really a discernable difference based upon duties, responsibilities and perhaps seniority. I do believe this is high on the Equal Employment Opportunity Commission's radar and oftentimes what the EEOC focuses on, is taken up as a priority by the Maryland Commission on Civil Rights, so just a word to the wise, take a look at your pay grades and your pay scales.

Okay, moving out of Maryland into the Federal Supreme Court, on June 3, 2019, last week and a half or so, the Supreme Court issued a unanimous decision in a case which is a little technical from a procedural standpoint and involved Davis County Texas, and essentially, and this was a decision rendered by Justice Ginsburg and again it was a unanimous decision, so it really was not all that difficult for the Supreme Court but what the court held was, you know that under Title 7 an employee is obligated before going to court to file an administrative charge of discrimination or

retaliation and in this case what happened was the employee filed those charges of sexual harassment and retaliation, eventually filed a lawsuit against the company, or the county in this case, in Texas, but did not file a formal religious case of discrimination as an administrative charge. The County, many years frankly after the original charge was filed, raised for the first time, after the lawsuit well had been processed and filed, the failure of the employee to file administrative charge and that was the issue before the Supreme Court and Justice Ginsburg in ruling for the Supreme Court indicated that the failure to file an administrative charge was waivable by an employer if not raised at the outset of a lawsuit and without getting too technical from a lawyerly standpoint, I just say to you, when you get an administrative charge discrimination, you know, hopefully you do not get one but when you do, pay close attention to the bases of discrimination and/or retaliation that are raised by the particular charging party because if the charge winds up in litigation, you will need or your attorneys will need to raise that at the outset of the lawsuit as opposed to some later point in the lawsuit. I do not think that it really poses any kind of practical problem for you all, but I raise it because any case coming out of the Supreme Court having to do with employment law bears noting, at least in some form or fashion on these phone calls, so I bring it up to you, I do not think it is going to change your world at all, particularly if you are represented by competent employment counsel, but I do raise it for you.

Okay, on the congressional side, democratic congressman yesterday proposed legislation that would amend the overtime salary level to $51,000 per year, which is just insane. So as you know, right now, under the current administration they have proposed that the new white collar salary level for professional executive and administrative employees be raised from the current level of about $24,000 a year to $36,000 a year and change. Well yesterday, democratic congressman proposed legislation that would up this from $36,000 to $51,000. Do I think this has a snowball's chance of passing, no, I don't but it is troublesome from the standpoint of even being higher than the Obama level or proposed level of $47,000 and change which was rebuked by a federal district court in Texas and was also rebuked frankly by the current Department of Labor in proposing the increase from $24,000 to $36,000. I still think and I have said this numerous times on prior telebriefs, that the level will go up, I do think the Department of Labor's proposed salary level of $36,000 ultimately will be the appropriate one, and I think it will go into effect probably somewhere on or about January 1, 2020 but stay tuned. So I do not think this has any chance of passing in the Senate, which as you know is presently controlled by the Republicans. There will be another hearing on this, actually tomorrow. It is in the House Committee on Education and Labor and it is entitled "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections", so no hint of

bias there, but that is what the hearing will be, you know, coming up actually today in the Congress. Something that has gotten, I think bipartisan support, is that on May 21st , the House Committee on Education and Labor held a hearing on a bill called Protecting Older Workers Against Discrimination Act, and really briefly, this particular piece of legislation would vitiate or reverse the Supreme Court's decision a while ago in a case called Gross whereby in age discrimination cases, the Supreme Court said that a plaintiff bringing an age discrimination case would have to show that but for the age discrimination mode of the employer, the plaintiff could not prevail in an age discrimination case. The essence of this, Protecting Older Workers Against Discrimination Act would be that similar to cases under Title 7, that if the plaintiff could show not necessarily that there is a but for causation or nexus, but if there is a factor which shows that age discrimination was a factor in the employer's particular adverse action against an employee, that the employee can prevail, and again, as I said, this bill has bipartisan support, surprisingly because not much in this Congress does, it is also supported by the strong lobbying group of AARP, so it may get some traction and again if it is enacted, it would mean that in an age discrimination case that winds its way up through the EEOC and winds its way into Federal Court, that the plaintiff would only need to show that age discrimination was a factor in the particular adverse action as opposed to the single factor in an age discrimination case. Moving along, another thing that I wanted to mention from a policy standpoint, is many of you do business in a multi-state environment, so you may do business in Maryland as well as Pennsylvania, Virginia, etc., and many of you from time to time amend your handbooks and the question I often get is, you know, can I have a single handbook for all the employees that we have including those in Maryland, Virginia, and Pennsylvania, etc. The answer is, yes, you can have a single handbook, the problem is that you may have policies that differ from one state to another. For instance, leave policies or policies on paying out accrued vacation or PTO at the end of an employee's termination, and in those situations what I often recommend to clients is that rather than having all of your employees see what the differences are from one jurisdiction to another, if you could have an addendum to your handbooks which you know are only given to the employees in those particular jurisdictions as opposed to having a separate handbook which is really a pain in the neck for employees who work in different jurisdictions. So if you have employees in a variety of jurisdictions and where there are policies that differ from one jurisdiction to another, it is just easier in my mind to have an addendum to the handbooks for the employees that do business in those particular jurisdictions as opposed to, you know, writing a separate handbook for each possible jurisdiction.

And finally the Department of Labor has announced some minor technical updates to the poster that all government contractors and subcontractors

are obligated to post. You can find this again on the Department of Labor website under Office of Labor Management Standards. There is not many substantive changes on this particular poster, so they have updated the phone number for the National Labor Relations Board and they have updated contact information for people who have hearing impairments, but if you can get that poster which you should post, it is under executive order 13496. You can get that right on the Department of Labor's website.

Okay, those are the developments for the day. Casey, can you take this off of mute please? Okay, I think we are off mute. If anybody has a question, glad to entertain it now. Okay, well, if there are no questions, I appreciate everybody's participation, and as you know we do these on the second and fourth Wednesdays of the month. So the second telebrief in June is slated for June 26th , at the end of June. So anyway, I appreciate everybody's participation and we will see you on June 26th. Thank you.