LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Alright, it is 9:02 by my official clock. Casey can you mute these phones please.

Casey: Yes.

Howard Kurman: Alright, well good morning everyone and Happy New Year 2020, a new decade and a New Year of telebriefs. Just a little sort of logistical announcement first. The second tele-brief in January would typically be or ordinarily be January 22nd. On January 22nd I may be out of town attending a conference and therefore there will not be, I repeat, there will not be a tele-brief on January 22nd. The next tele-brief will be the second Wednesday in February which will be February 12th and I'm sure Casey will send out an email confirming so that you all get that that there will not be a tele-brief on January 22nd. Okay so let's get started on some things that have happened many of which happened around the holidays which typically is not a real busy time from a labor and employment standpoint but there are things to report so as we go into 2020 as we enter into this new decade 2020 keep in mind that there will be an important Supreme Court case which will be decided sometime I think in the May-June timeframe which of course is the case having to do with whether or not Title VII of the Civil Rights Act and the prohibition contained against any kind of discrimination on the basis of sex, covers sexual orientation and gender identity. That particular case has been briefed. There has been oral argument in October 2019 and I'm sure this is going to pose a real conundrum for the Supreme Court particularly in view of the fact that the composition of the court is now 5:4 conservative majority. So we have no idea how it will come down, but of course there have been employer groups who have lobbied and who have filed amicus briefs in support of the fact that Title VII of the Civil Rights Act does in fact cover gender identity and sexual orientation. So I will keep an eye out and will report further on what happens at the Supreme Court.

As I indicated shortly before the New Year we are now at January 8th and as of January 1st the new Department of Labor salary exempt test took effect and as most of you know the new Department of Labor Rule increases the salary required to meet the exemption test to $684 per week or the equivalent of $35,568 per year. Those of you who have classified your exempt employees either as executives or professionals or administratively exempt employees must make sure that under the new Department of Labor Rule that those individuals make at least $35,568 or call it 36,000 and around $684 per week. If they don't you either have to

convert them into nonexempt employees or raise their salaries. So keep that in mind. Also those of you obviously who are doing business in Maryland, which is probably all of you on this call know that as of January 1st Maryland's minimum wage increased from $10.10 per hour to $11 per hour. Those of you who may do business in New Jersey as well know that also they raised their minimum wage from $10 an hour to $11 per hour as of January 1st. Now on December 12th sort of at the end of the year the wage and hour division of the Department of Labor put out a final rule that would exclude certain benefits from being included in the calculation of any overtime rate so as Department of Labor said the rule announced today meaning December 12th marks the first significant update to the regulations governing regular rate requirements under the Fair Labor Standards Act in over 50 years. Those requirements define what forms of payment employers include and exclude in the FLSA's time and a half calculation when determining overtime rates. So they go on to say, and you can check this out on the Department of Labor's website if you like, but they go on to say specifically the final rule clarifies that employers may offer the following perks and benefits to employees without risk of additional overtime liability. So they list these, the cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits or student loan program and adoption assistance. 2. Payments for unused paid leave including paid sick leave or paid time off. 3. Payments of certain penalties required under state and local scheduling laws. 4. Reimbursed expenses including cell phone plans, credentialing exam fees, organization membership dues, and travel expenses, even if such expenses are not incurred solely for the employer's benefit and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts or travel expenses are per se reasonable payments. Next certain sign-on bonuses and certain longevity bonuses. Next the cost of office coffee and snacks to employees as guests. Next discretionary bonuses by clarifying that the label given a bonus does not determine whether it is discretionary in providing additional examples. So there are some other ones that are articulated I invite you if you have questions you can easily go on to the wage and hour division's website but it is important to note that obviously from your employer standpoint and the employee standpoint there are certain perks now and benefits which would not be included as regular rate payments for purposes of determining overtime payments for nonexempt employees, obviously for exempt employees it would not be an issue because they are not entitled to overtime anyway.

Next on sort of the agenda is another regulatory development. So on December 27th the US Department of Transportation's Federal Motor Carrier Safety Administration announced that beginning January 1st the

minimum annual percentage rate for random drug testing is 50% of your average number of driver positions. Those of you out there on the call who have drivers that are subject to the Department of Transportation's Federal Motor Carrier Safety Act are going to want to pay attention to what changes are and I would remind you that there is an FMCSA Clearinghouse requirement which also begins on January 6, 2020. The Clearinghouse as you may know is a secure online database that will give employers access to certain information and require you to deposit certain information regarding your drivers into that Clearinghouse so that under new developments and new enactments as of January 6th those of you out there who have drivers are required to make inquiry of the Clearinghouse before allowing a newly hired commercial motor vehicle driver to begin operating that vehicle and you have to have your driver sign a consent form allowing you to do so. You will also be required to make query of the Clearinghouse at least once a year for each driver that you currently employ. You will need to report driver's drug and alcohol program violations to the Clearinghouse within three business days after you learn of that information and you will have to revise your drug and alcohol testing policies to notify drivers and driver applicants that information of a particular kind which you can find again on their website must be reported to the Clearinghouse. So I know that this may not apply to every person out there on the phone call but those of you who have the drivers subject to the Clearinghouse and to the drug and alcohol testing requirements are going to need to do that.

Next on the agenda, significant developments at the National Labor Relations Board at the very end of the year which in effect reversed law that was developed under the Obama administration pertaining to both unionized and non-unionized employees under the Obama National Labor Relations Board. As I have indicated in the past the National Labor Relations Board is a five member body that determines law under the National Labor Relations Act which applies both to unionized and non-unionized employees alike. We now have a 3-to-2 majority in the Republican's favor and because of that it's not surprising to me and to other labor and employment attorneys that many of the decisions which were announced and promulgated under the Obama democratically controlled National Labor Relations Board have now been modified or reversed and at the end of the year, specifically in the last week or two of December 2019, we have very significant developments that occurred at the National Labor Relations Board, three of which I want to report on this morning. I am not going to go into great detail about these because obviously you can read the decisions for yourself if you are interested, but I wanted to give you the 30,000 foot level of these three decisions.

First, the first one having to do with confidentiality of investigations is a decision called the Apogee Retail, which was decided by the board on

December 17, 2019, and under this decision, the Republican board ruled that in internal investigations, an employer rule which requires employees to maintain confidentiality for the duration of that investigation is presumptively lawful and that even a workplace rule which is not limited to the duration of the investigation can survive scrutiny if the employer can show that there is a legitimate justification for doing so. To be clear, under the Obama administration's modification of a long-standing board rule, the Obama administration board said that an employer cannot insist on confidentiality of investigations because that insistence would violate Section 7 of the National Labor Relations Act, which as you know protects concerted protected activity of employees. That rule really was directly contrary to rules for instance promulgated by the Equal Employment Opportunity Commission, which said that during investigations conducted by an employer, for instance during workplace harassment complaints, that it made sense to maintain confidentiality of witness statements and other investigatory proceedings so that the integrity of the investigation could be maintained. So, you had a rule promulgated by the EEOC which was directly contrary to the rule promulgated by the Obama administration board. Now we see under this case, Apogee Retail, the board returning the long-established board law, which states that an employer can insist on confidentiality of investigatory proceedings, particularly during the duration of the investigation, and that's important for those of you who have policies in your handbook for instance on the confidentiality of investigations and you can therefore at least during this period of time that we have a Republican majority insist on the confidentiality of proceedings during the duration of such investigation. Those of you who need help in fashioning that particular policy language can certainly reach out to me.

The second decision that I think is very significant is in a case called Caesars Entertainment. This was also decided on December 17, 2019. This decision in effect reverses an Obama decision which held that an employer could not prohibit its employees, whether unionized or non-unionized, from using its means of communication, whether it is employer issued phones or particularly emails that would be used by employees on non-work time to communicate with others regarding non-businesslike emails or text or any kind of material which could be used in a union organization campaign. So, this case had been decided under the Obama administration in a case called Purple Communications, in which the Obama administration board said that an employer could not prohibit the use of its primarily email system to its employees who wanted to use that system to communicate with one another non-work time. In Caesars Entertainment, what the board held was that an employer can in fact restrict its use of its email systems etc. for non-work purposes unless employees otherwise would have no way of communicating with one another regarding non-work topics. So, it is a very significant decision. It

is not a surprise to me that the board came down in this mode because it really reverts the long-established board law which was not in existence prior to the case of Purple Communications decided by the board under the Obama administration.

The last case that was decided on December 16, 2019 is a case called Valley Hospital Medical Center, and that case would only apply to those of you out there who have a collective bargaining agreement with a union, but what this case decided was that at the expiration of the collective bargaining agreement, an employer has the unfettered right to cease any kind of collection of union dues from its employees. Again, a significant decision for those of you out there who have a relationship with a union.

Another significant development administratively happened at the Equal Employment Opportunity ironically enough on December 17th, the same day that the National Labor Relations Board announced some important developments, which I just reviewed with you. So, on December 17th, the Equal Employment Opportunity Commission critically rescinded its 22-year-old policy, which disapproved of mandatory employment arbitration agreements for workplace bias claims. Many of you out there have mandatory arbitration agreements with your employees requiring that any dispute between an employee and employer including any kind of claim of discrimination or workplace harassment be submitted to mandatory arbitration rather than the use of any kind of judge or jury to decide that particular claim. The Equal Employment Opportunity Commission over a 22-year-period had a policy which said that those policies would not be honored by the Equal Employment Opportunity Commission. In view of the fact that the Supreme Court in a major case called Epic Systems, which was decided back in 2019, which basically gave credence to and deferral to employer-created arbitration systems, what the Equal Employment Opportunity Commission now said as of a couple weeks ago December 17th was that they would amend their policies to honor such agreements between employers and employees. However, significantly, I want to make sure you all understand that even if you have these agreements with your employees, it does not preclude such employee from filing a charge of discrimination with the EEOC and that the EEOC could still if it chooses investigate such charge on behalf of such employee. However, the monetary relief which may be applicable or available to an employee under such agreement that he or she would have with you as an employer would not be duplicated under the proceedings of the Equal Employment Opportunity Commission, so that the employee could not get monetary relief under both an arbitration agreement with you as the employer and as a result of a charge of discrimination filed with the Equal Employment Opportunity Commission. So those of you who have such agreements with your employees, this is good news for you. Those of you out there who may be contemplating creation of an arbitration agreement

with your employees, also good news. If you need assistance on creating those agreements, you can always reach out to me as well.

Okay, those are the developments for the day. Casey, can you take this off of mute. All right, well, as I always do, if anybody has any questions, comments, feel free to raise them here or in more private forum by my email hkurman@offitkurman.com or my phone 410-209-6417, and before I feel them, again I just want to announce no tele-brief remaining in January. The next tele-brief second Wednesday in February. We will send out an email to that effect. Okay, any questions or comments? Okay, well, if not, I appreciate your participation. Hopefully, we will have many interesting developments, I know we will for the duration of 2020, and again thanks for your participation. Have a great rest of the week.