LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, 9:02 a.m. We are going to get started. Michelle, can you mute this? All right, good morning everybody. It's hard to believe it's the last telebrief in July. The next telebrief, as you know, will be the second Wednesday in August or August the 9th, so we're headed towards the dog days of summer, that's for sure.

I thought I would start off on a sort of all things O.J. note, not that it has anything to do with labor employment, but I saw an article the other day, which indicated that F. Lee Bailey, who as you know was on the defense team of O.J. back in 1994 and 1995, is now 83, he is broke and disbarred. Those of you who don't remember him, he was prominently the one who cross-examined officer Fuhrman in the O.J trial. He was disbarred in Florida in 2001 and then Massachusetts followed suit in 2003 and it's sort of a sad tale in my opinion of somebody whose fame and fortune really caught up with him. Enough said, but I just wanted to let you know he is living above a beauty salon in Maine with, I think, his fourth wife so, so much for that.

On to more important things. The Wage and Hour Division of the Department of Labor yesterday put out a press release and the press release reads as follows: The United States Department of Labor has today announced that it will publish a request for information. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. The RFI offers the public the opportunity to provide information that will aid the department in formulating a proposal to revise these regulations. As you know, this goes back to the lawsuit that was filed in Texas where the Obama Administration's Department of Labor revisions to the white collar exemptions were blocked by injunction, and the Department of Labor is now revisiting that whole area. I went on the Federal Register and I am going to just review for you quickly some of the questions that the Department of Labor is posing and which they are seeking comment from the public on, which may sort of presage what they're looking at and what they may be contemplating. Let me review a couple of these and then we'll move on to other things. You can find these, by the way, in the Federal Register. The first one is in 2004 the department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20% of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? They go on and ask further questions about that.

Secondly, this is an interesting one. Should the regulations contain multiple standard salary levels, if so, how should these levels be set; by size of employer, census region, census division, state, metropolitan statistical area or some other method? For example, should the regulation set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living areas across different parts of the United States? Interesting concept where the Department of Labor perhaps would consider whether or not, for instance in the metropolitan area like Baltimore, Philadelphia, and New York, the salary test would be higher than let's say an urban area in Mississippi.

Third, should the department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004, and if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rule making? As you know, once 2004 came, the salary level was the same for all these exemptions, $455. By this question, the department is sort of professing or presaging whether or not you have different salary levels for different particular white collar exemptions. A very, I think, interesting question is the next question. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or instead does it in effect eclipse the role of the duties test in determining exemption status; and that goes along with the next question is, would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties only test and would examination of the amount of non-exempt work performed be required. There are other questions, but you get the point? The point is that by the questions that the Department of Labor is asking, and again these were just published, there is certainly I think penetrating questions and go the heart of what would be the nature of this white collar exemption at the end of the game. Would it be a salary plus duties test, would it just be a duties test? Certainly if it's a salary test, my guess is going to be somewhere in the low 30s, not the level that we had as of December 1, 2016, which was $47,000. I am sure as the year goes on, as 2017 goes on, we'll get a better feel for what the Department of Labor is going to do with this. But again, given the fact that it is a Republican Department of Labor, I do think that it will be much more employer friendly than the one that existed as of December 1, 2016. We'll have to follow this and I will continue to update you in future telebriefs.

I wanted to bring to your attention a fairly significant state decision that was issued on July 17th by the Massachusetts Supreme Judicial Court. Some of you may have read about this, it's a case called Barbuto v. Advantage Sales and Marketing. In this case the Massachusetts Supreme Judicial Court stated that under the Medical Marijuana Act there was a duty to accommodate a medical marijuana user who had been hired and then fired precipitously after a medical test came back indicating the presence of cannabis in this employee's pre-employment drug test. In Massachusetts, the Massachusetts Medical Marijuana Act went into effect on January 1, 2013. What happened in this Barbuto case was that this woman, Cristina Barbuto, had suffered from Crohn's disease and the only thing apparently that gave her relief was the use of medical marijuana. In the summer of 2014, she was hired by a company called Advantage Sales and Marketing, which like many of your situations was contingent upon the satisfactory completion of a pre-employment drug test. Interestingly, before she took the drug test she informed the managers who had interviewed her at the company that she had Crohn's disease and she informed them that she used under prescription medical marijuana to treat her condition. She submitted to the drug test, was hired, the drug test came back positive for cannabis, and then the next day she was terminated. She filed a lawsuit against the company and the company succeeded at the trial level on getting it dismissed, but that was appealed to the Massachusetts Supreme Court, which again on July 17th ruled that under the Massachusetts Civil Rights Law, comparable to Maryland and many other states which has obviously prohibited discrimination on the basis of disability, the Supreme Court in Massachusetts ruled that the company should have engaged in an interactive process to determine whether or not she could be accommodated because she indicated that she was not using marijuana on the job or would not use it on the job. The fact of the matter is that many of you know that

cannabis stays in your system for a fairly long period of time unlike some of the other prohibited drugs under the federal system that have a very short, sort of, shelf life in your body. What the Massachusetts Supreme Court said was that even though under federal law cannabis or marijuana is a prohibited substance that under state law is legal, and that, therefore, the employer in this case should have engaged in an interactive process to ascertain whether or not as a reasonable accommodation she should have been allowed to work given the fact that this apparently was the only prescribed drug that gave her relief from her Crohn's disease. Obviously, this decision would not affect those employers who have federal contracts where the Drug-Free Workplace Act would be operative or applicable or any other, let's say, DOT regulation. But it's a significant case that may have traction in other states. As you know, Maryland passed their medical marijuana law. The first dispensary will be operational sometime I think in the fall of this year and also we have a Maryland Act, the Civil Rights Act, which includes disability as a basis of discrimination. We need to see how this will shake out, not only in Maryland, but in other states adjacent to Maryland, which will have similar statutes and we will need to see whether the Massachusetts Supreme Court rationale gains traction. There are other cases in other states, for instance Colorado, which go the other way and which state that because cannabis is a prohibited substance under federal act, even though there may be legal uses in a particular state, we will not abrogate the ability of an employer to terminate an employee were that employee test positive for cannabis. But this decision has gotten a lot of publicity; again some of you may have seen it. I bring it to your attention because the whole medical marijuana use and abuse issue would be forefront in the next several years, because as we move from the use of medical marijuana to recreational marijuana we will see a plethora of workplace issues come to the forefront. Again, sort of a word to the wise if you have policies on drug use, and I'm sure almost all of you do, we're going to need to take a look at those and we may even have to modify them in the sense that we need to allow for or discuss or permit in our policies the interchange between applicant or employee and company when it comes to the use of prescribed medical marijuana.

In an interesting development, you know, we have talked a lot in the prior telebriefs about Ban-the-Box legislation and one of the problems, practical problems that comes up in many situations is where you have differences in Ban-the-Box legislation from one local jurisdiction to another, so for instance you may have Ban-the-Box legislation in Baltimore City, which differs from Ban-the-Box legislation in Montgomery County. Well, on July 1, 2017, Indiana passed a statute, which basically states that political subdivisions are prohibited from enacting ordinances that interfere with an employer's ability to obtain or use criminal history information during the hiring process so, that any kind of local legislation in Indiana and there has been legislation that was introduced in Texas as well. Any local legislation that would interfere with an employer's ability to request criminal information would be preempted by the Indiana statute. Whether this is a sort of a for want of a better word, pending trend in other states will remain to be seen but I bring it to your attention, it was just passed, you know, two weeks ago, in Indiana, so more on that as we go forth and see how any Ban-the-Box legislation may be impacted by state legislation that would preclude it in any kind of local jurisdiction.

I know that our firm has sent around a little blog, but I wanted to make sure you all know that on July 17th the United States Citizenship and Immigration Service issued and released a revised I-9 Form to be used. This I-9 Form has to be used no later than September 18, 2017. Those of you out there obviously who are using the old form need

to use the new form and you can of course download it from the USCIS website, but I wanted to make sure that you understood that.

In the past telebriefs, I have indicated that the issue of class action waivers is going to be heard by the Supreme Court. This had a significant impact on those of you who have arbitration agreements with applicants or employees in which employees are required to waive any kind of a class action, wage and hour suit or any other kind of class action suit in lieu of arbitrating individual cases. As you know the National Labor Relations Board has put the kabosh on those indicating that they are violative of Section 7 of the National Labor Relations Act. This case will now be set for oral argument before the Supreme Court on October 2nd and this will be a very, very closely scrutinized oral argument. It will have huge impact and I have spoken about this in prior telebriefs. Given the fact that oral argument will be on October 2nd early on in the Supreme Court's new term, it is conceivable that we will get a decision earlier than late spring of 2018, but certainly at the latest by spring of 2018. My own prediction will be, that I do think the Supreme Court will uphold those waivers, particularly as I have stated since Justice Gorsuch, I think will be perhaps a deciding vote in a 5:4 decision, which upholds arbitration of these cases and will nix the National Labor Relation Board's prior decisions, in addition to which the composition of the board will be changing anyway along with the two new appointees whose nomination was approved by the Senate subcommittee and now will go on to the Senate floor for a full vote, which I am confident will pass, so we will have a Republican majority on the National Labor Relations Board in short order.

Talking about the Senate and House, I wanted to tell you that last week the House appropriations committee on last Wednesday approved budget cuts to both the budget of the Department of Labor and the National Labor Relations Board, so they passed a 11% cut in the Department of Labor's budget and a 9% cut to the NLRB's budget. Whether that will be finalized I'm not sure, but those are significant cuts and may in fact impact the ability of the Department of Labor and NLRB to enforce their particular statutes.

The last thing I wanted to mention was a Third Circuit decision that came out about two weeks ago, it's a Third Circuit Decision that basically stated that in a workplace harassment situation, the appropriate standard is whether or not the employer's actions were pervasive or severe. Some of you know that in different jurisdictions the test for whether or not there is actionable work place harassment is, whether it is severe and pervasive. What happened in the Third Circuit case is that two employees were told by their supervisor after assigning them to a fence clearing operation, the supervisor threatened that they would be fired if they "nigger-rigged the job." Two weeks after they complained about this language to their superior they were fired. Now, they were eventually re-hired but then terminated again for the lack of work and a question before the Third Circuit was whether or not a singular case of this kind of racial epithet would be sufficient at least to defeat a summary judgment motion under the severe or pervasive test. What the Third Circuit said was yes that in this case given the context and the threat of termination and actual termination that the singular use of that racial epithet would be sufficient under the severe or pervasive test to satisfy at least as the jury questioned whether or not there was actionable work place harassment.

Now what this portends to me, as an employment lawyer, is the essential task of workplace harassment training for managers of a higher level, mid level managers and

even frontline supervisors. They need to understand that what may appear to be innocuous even on a singular occasion could be actionable and imputable to a company as a means of liability. I have stressed this over and over again that it is imperative in my opinion to have regular training on workplace harassment and it seems to me that the most effective way of doing that is to have a session at least once a year probably with regard to your employment attorney who comes in, does the training in my experience is given credence by the Equal Employment Opportunity Commission and judges and juries as opposed to simply internal training and at the risk of sounding self serving, its been my experience that that kind of training gets much more credence than simply whether it is done by the Human Resources or some other in-house kind of vehicle. I thought the Third Circuit's decision was not atypical of the kind of decisions that you would get coming out of other circuits. Again, significant decision and it may or may not get traction in other circuits, but it is certainly I think significant and meaningful for those of you out there who have EEO responsibilities and training responsibilities for your management and frontline staff.

Okay, those are the developments for the day. Michelle, can you take this off of mute?

Alright as always I welcome any questions or comments by those of you out there and if you rather do it in a private forum as I always say you can get in touch with me at hkurman@offitkurman.com my email address or my phone number (410) 209-6417. Okay any questions or comments on anything that I have covered.

Ann Barnes: Howard, its Ann. Back to your very first item, the wage and hour division requesting comments.

Howard Kurman: Yes.

Ann Barnes: On the changes to the exemptions under the FLSA, is there any timeframe?

Howard Kurman: Sixty days.

Ann Barnes: For **[Audo cut]**.

Howard Kurman: Sixty days within which to comment. Yeah 60 days within which to comment or ask questions but that does not mean there is no time limit after that within, which the Department of Labor would then issue its so called promulgated rule, Ann, I think that it will do so with some dispatch, but I think it will also depend on the level, complexity and volume of the comments that are received by the public.

Ann Barnes: Because it potentially looks way more complicated by just looking at their questions.

Howard Kurman: It is complicated and I also think that as I stated that it gives you a some indication that the Department of Labor has heard the complaints and the comments that were raised by employers before the Department of Labor promulgated its last adjustment to these exemptions, so I think it gives you some indication of the political wins that employers may be subjected to.

Ann Barnes: Yeah, no, no question.

Howard Kurman: Any other questions.

Ann Barnes: I think on your..

Howard Kurman: Yeah go ahead.

Ann Barnes: On the medical marijuana case, especially with Maryland moving in that direction I think its going to be really difficult for those of us who operate plants, like plant facilities where people are operating equipment and, you know, potentially dangerous or hazardous situations. This is going to be a real concern for us. How do we determine if someone is actually under the influence, right?

Howard Kurman: Well, that's a real problem and as I have always stated the real test on any of these is whether the employee is fit for duty.

Ann Barnes: Yeah.

Howard Kurman: And that is not an easy determination sometimes. Now, even in the Massachusetts' decision they indicated that if it would be an undue burden on the employer perhaps because it is a safety hazard that there wouldn't be a reasonable accommodation even for medical use, but it does throw a lot of responsibility on the part of the employer and subjects that employer to a lot of second guessing down the road. Any other…

Howard Kurman: Any other questions out there? Okay. Well, if not, we will reconvene on August 9th. Have a good next two weeks and as always I am sure there will be plenty to talk about when we reconvene. Everybody take care, have a good day.