LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: I appreciate everybody participating as you know these occur on the second and fourth Wednesdays of every month so this being the second Wednesday in February we are moving ahead and the next telebrief will be on the last Wednesday of February, which is February 24th. First a technical glitch some of you may have gotten the reminder that the next telebrief will be on December 23, 2015 obviously that was a mistake and while some people may think that I have some powers I certainly do not have the power to travel back in the past so, forgive the technical glitch and we will move forward and make sure that does not happen again. All right let me move on to some sustenance because there is enough to talk about.

First of all on January 29th, just about a week ago the Equal Employment Opportunity Commission put out a press release and in that press release it announced changes to the requirements that will take place with those of you who file EEO1 reports, these changes will occur September 2017. In reading from the press release in the salient parts it states the US Equal Employment Opportunity Commission today made public a proposed revision to the employer information report that is the EEO1 report that those of you who have more than 100 employees file, to include collecting pay data from employers including federal contractors with more than 100 employees. This new data says the EOC will assist the agency in identify possible pay discrimination and assist employers in promoting equal pay in their workplaces. The EEO1 will be announced today in conjunction with the White House commemoration of the seventh anniversary of the Lilly Ledbetter Fair Pay Act. The proposal would add aggregate data on pay ranges and hours worked to the information collected beginning with the September 2017 report. It goes on to say the proposed changes are available for inspection on the federal register website and then the public will have 60 days from that or until April 1, 2016 to submit comments. The press release goes on to say that the new pay data would provide EEOC and the Office Of Federal Contract Compliance Program that is the OFCCP for those of you who do government contracting work with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination. This pay data would allow EEOC to compile and publish aggregated data that will help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance. The agencies would use this pay data to assess complaints of discrimination, focus agency investigations and identify existing pay disparities that may warrant further examination and there is a statement in the press release by the EEOC's chair, Jenny Yang, she says more than 50 years after pay discrimination became illegal it remains a persistent problem for too many Americans. Collecting pay data is a significant step toward addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal antidiscrimination laws. Then there is a statement by Tom Perez who, as you know is the Secretary of Labor, he says we cannot know what we do not know we cannot deliver on the promise of equal pay unless we have the best most comprehensive information about what people earn. We

expect that reporting this data will help employers to evaluate their own pay practices to prevent pay discrimination in the workplace. So this will become law I have no doubt requiring that you change or amend your EEO1 report come September 2017 and while both EEOC's chair, Jenny Yang, and Secretary of Labor, Tom Perez, couched this in terms of an assistance to employers as well as the administrative agencies, do not kid yourself, this is really more to assist the agencies to ascertain whether there are employers out there that they can go after not only for discriminatory practices or discriminatory effect of hiring but also for equal pay types of claims. Because here for as you know when you fill out the EEO1 report you do not fill out salaries or pay ranges or wages you are merely putting into categories protected classifications and non-protected classifications your employees or applicants on a gross basis. That is how many African-American employees you have or African-American applicants, how many applicants or employees over the age of 40, Hispanics, veterans, etc. If this regulation goes into effect, which I am confident that it will come September 2017 not only will you have to include data with regard to those protected classifications but you will also have to include pay data and that aggregate pay data although not individually based; in other words you would not list how much Mary or Sally or John make individually, you have pay ranges and those would be either gender-based or based on the categories of protected classifications from that the EEOC and/or the Department of Labor would be able to ascertain in its own mind whether there are discriminatory hiring or other practices that are going on in your workplace. So this is a significant development and one that you will have to prepare for even though the next EEO1 report that you file in September of this year, 2016, will not require it, it will require it in September 2017 and as the year goes on and these regulation become finalized I will certainly keep that in mind and will revisit this issue in future telebriefs but more to come on this.

Okay, I want to turn my attention to I think a significant case that came out of the National Labor Relations Board on February 3, 2016. This actually was an appellate case in the 11th circuit that reversed a prior National Labor Relations Board decision in the case of Crew One Products Inc. v. NLRB. In this case the 11th circuit faced the issue of whether or not certain stage hands that were referred by Crew One Products to other entities were the employees of Crew One Products or whether they were, in fact, independent contractors. The reason this came up is that a union attempted to organize the so-called employees of Crew One Products, which was really a referral source to other companies that needed the service of the stagehands in California. The company, Crew One Products, said that well union you cannot organize these individuals because they are independent contractors rather than employees. The National Labor Relations Board ruled that in fact they were employees not independent contractors, the union won the election and then what happened was the employer, Crew One Products, refused to bargain with the union and then the case went all the way up to the 11th Court of Appeals, the 11th Circuit Court of Appeals, so the issue before the 11th Circuit Court of Appeals was whether these individuals were really employees or whether, in fact, they were independent contractors; because if they were independent contractors under the National Labor Relations Board independent contractors cannot be organized the way employees can be organized. So in analyzing the case and according to the report in the Bureau of National Affairs the following is relevant, so BNA reports according to the court, that is the 11th Circuit, Crew One maintains a database it uses for stagehand referrals, applicants complete a questionnaire about

their skills and availability and receive a basic orientation and safety information and driving directions from the referral service. Crew One maintains workers compensation insurance on the stagehands but it requires them to sign agreements reciting that they are independent contractors rather than employees. Each stagehand is also required to give Crew One a W9 federal tax form that identifies the individual by name and taxpayer number. The referral service did not treat the stagehands as employees for tax withholding or reporting purposes the court observed. The court said Crew One informed stagehands of work opportunities by email, the stagehand is free to accept or decline the offer without repercussions. So what the court went on to analyze and to conclude is that only the event producers and touring cruise control of the work performed by the stagehand and Crew One lacked the expertise to direct their stagehands in their work for any particular client. The court went on to say Crew One's tax treatment of the stagehands was strong evidence they are independent contractors as is the use of written agreements that sort of identify them as such. Writing that Crew One's lack of control strongly indicates independent contractor status, the tax treatment of the stagehands, the independent contractor agreements, the nature of Crew One's business in the absence of employee benefits outweighed any evidence suggesting employee status.

Now, I know that we have talked on prior telebriefs about the difference between independent contractors and employees. I think this case points up a few things, one, if there is ever an ambiguity between independent contractor and employee the National Labor Relations Board will always come down or most times come down in favor of the status of employee versus independent contractor again given the composition of the National Labor Relations Board we know how employee and union friendly they are so it is no surprise that in this case they came down on the side of these individuals being employees as opposed to independent contractors. On the other hand, once the case got to the 11th Circuit Court of Appeals, the Court of Appeals paid attention to those things, which are usually deemed to be important in ascertaining whether or not somebody is an independent contractor or an employee. That is one, do they have a written agreement, which reflects the fact that the individual considers himself or herself and that the employing or engaging entity considers that person to be an independent contractor. A very important point in determining independent contractor status, not dispositive but certainly important and if you have independent contractors make sure that you have that written agreement. Secondly, from a tax treatment standpoint, how are you treating these individuals? Hopefully, you are giving these individuals 1099 and not W-2s like you would regular employees, very important. Thirdly, are you dictating the means and manner by which they do their job, the hours that they particularly work or how they do their job. If you are, it looks much more like an employee than an independent contractor. In this case, the 11th Circuit Court of Appeals made sure to hone in on the fact that it was not the referring agency that was dictating how the particular task was done but the ultimate employing entity that was determining that status.

Lastly, it is important to know that in an independent contractor status the putative independent contractor has the right to refuse the assignment without in effect negating or impeding his status or her status as an independent contractor. So If I am truly an independent contractor and you ask me can I do the following task next

Tuesday and I say I am sorry I am busy I cannot do it or I will not do it, that theoretically should not impede my ability or opportunity to work as an independent contractor again for you down the road as opposed to an employment relationship where if I say I need you to do X next Tuesday and you refuse I am probably going to be terminated as an employee. So all these taken into account just a decision from last week from the 11th Circuit points out these important differences between employee and independent contractor particularly as the courts analyzed these things as opposed to the National Labor Relations Board.

I wanted to bring your attention to a very recent case; the case was decided in December 2015 in the United States District Court for the Eastern District of Pennsylvania involving a telemarketing firm, which was sued by the Department of Labor and where the issue was break time. Now, I don't know how many out there know what the issues are under the federal rules under the Department of Labor for breaks but this case demonstrates several important points under the Fair Labor Standards Act related to breaks. The first thing I want to make sure you understand is that under federal law there is no requirement for an employer to grant employees breaks. Often times, you will hear that from employees but there is no requirement to do that. Now of course as a matter of good employee relations it is always a good idea to provide employees with breaks. But frankly there is no requirement under either federal law or Maryland law to give breaks, there may be requirements in other states that you do business in, for instance in California obviously there are many laws on breaks, but under federal law or Maryland law there is no requirement. But in this case which emanates from Pennsylvania what happened was it involved many, many employees who are engaged in sort of telemarketing business publications, and the president of the company came up with a policy, which indicated that the employees could take breaks at any time they wanted to and as many times as they wanted to during the day. But lo and behold when they were taking breaks which often were less than 20 minutes they were not paid and the Department of Labor wound up suing them and determined that both the company and the owner were liable for at least $1.75 million in back wages and liquidated damages to more than 6000 employees who were taken advantage of these break times and who were not paid at least minimum wage during that period of time. Now, during the course of the case the Department of Labor relied upon the following provision in the Code of Federal Regulations, which is 29 CFR 785.118, which provides in part rest periods of short duration running from five minutes to about 20 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. The countervailing provision in the code of Federal Regulations is 29 CFR 785.16 which provides periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

In this case what the court found was that the employees who were involved and who could take these breaks have consistently taken breaks less than 20 minutes and because they took breaks of less than 20 minutes they were deemed to have been engaged in work time thus requiring them to be paid. Even though the employer argued

that they could take as many as they wanted and that they were supposedly free of all work responsibilities. And what this case portends is that obviously if you do give employees breaks and if they are less than 20 minutes, and even if they are more than 20 minutes, you need to keep track of them, have some system either signing in signing out or a time clock and if it is less than 20 minutes you are going to need to compensate that employee for the breaks. The court also went on to talk about the concept of liquidated damages and as you know liquidated damages are an amount equal under the FLSA to the amount that is owed and liquidated damages will effectively double the amount a back wage that is due unless the employer can show to the court's satisfaction that it acted in good faith and had a reasonable ground for believing that it was not violating the FLSA. In this case the employer said well the good ground for believing that it was not violating the law is that it had done its own research on a website and believed that it did not owe, legitimately owe, this amount and that it had relied on an attorney's advice as to why it did not need to pay the employees. The problem was the employer during the course of the litigation would not reveal what that lawyer had advised. Which was really antithetical to its claim that it relied on an attorney's advice, so obviously if the attorney had advised this particular employer it was not obligated to pay for this overtime or for this break time and the employer had revealed it to the Department of Labor the Department of Labor probably would have considered that and the court would have considered that in not assessing liquidated damages, but in this case the employer refused to reveal what the attorney had advised and obviously if the attorney advised that the employer needed to go ahead and pay this amount of money then obviously the employer could not have depended upon that attorney's advice. The other question you might ask is why was the individual president of the company held liable under the FLSA along with the company, that is would not there be a corporate shield of liability and the answer to that is under the Fair Labor Standards Act the DOL can pierce that corporate shield if, in fact, there is an individual who was intimately involved in policymaking and who dictated that a policy be implemented, which was violative of the FLSA. In this case, in fact, it was the president of the company who determined that they would implement this policy of unlimited breaks even though the unlimited breaks impeded or intruded upon the work time of the employee and that is why both the company and the president were bound by this ruling and now the only issue before the court is the amount of money that would be imposed or the amount of penalty that would be imposed on the employer. So it is very important for those out there if you have break times that you give to employees and if it is less than 20 minutes make sure that that is counted as work time and if you want to really excuse the company from the obligation of paying for these breaks then you are going to have to extend that break time out and give your employees at least a 20 minute break.

Okay those are the developments for the day. Michele you can unmute this please.

Operator: Presentation mode is now disabled.

Howard Kurman: All right as always I invite questions from any of you who may be out there. If you have questions, feel free to ask them now or if you would rather do it in private you can call my direct number 410-209-6417 or email me at hkurman@offitkurman.com. Okay any questions or comments out there?

Lady Speaker 1: I did have one question do you have the name of the case for the DOL telemarketing firm issue that you have been discussing.

Howard Kurman: Yeah, sure do, hold on a second, the name of the case is, Thomas C. Perez, Secretary of Labor, versus American Future Systems, Inc., District Court of Pennsylvania civil action number 12-6171.

Lady Speaker 1: Okay.

Howard Kurman: Any other questions? Okay, well as always I appreciate your participation and look forward to seeing you at least in a figurative sense in our next telebrief on February 24th until that time stay out of trouble.