LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Well by my clock anyway I do not know about anybody else's but my clock says 9:02 and with that I think it is time to start. Good morning to everybody. We are at Thanksgiving Eve 2015. Hard to believe fourth Wednesday of November and as you know we do these on the second and fourth Wednesdays of every month. So let me start off.

I have spoken about a little in the past in telebriefs and in other forums about the Department of Labor's revisions or intended revision to the white-collar exemption. As you know they proposed the rule back in June of this year under which the salary test for the exempt employee would go from $455 a week which is about $24,000 a year up to at least a proposed level of $970 a week or about $50,000 by 2016. When I last talked about this I was probably a little unsure of when this would go into effect. Since our last telebrief the solicitor of labor, it is a woman named Patricia Smith, gave a speech to the labor and employment bar the American Bar Association in Philadelphia on November 5th and during this speech basically she made several statements which I think bear repeating here in that they have practical import for all of you out there who may be contemplating these rule changes in 2016. So she said first that they had received, that is the Department of Labor has received more than 270,000 public comments on this particular rule. Now, you may say how does that compare to other times when they put out a proposed rule. The fact of the matter is that the last time the salary test was revised under the white collar exemption in 2004 they got about a third of the number of public comment that they did here. And you know I think that it is important to realize that the reason that so many public comments have been submitted, many of them of course by employers and employer groups, is that this would substantially change the landscape of how we define exempt and nonexempt employees in a real practical way because if you are going from a situation where you have an employee who may be making $30,000 and is considered to be exempt either as an executive exemption or an administrative exemption or professional exemption to someone who may be making $50,000 a year that $20,000 Delta is a substantial change in a practical way to all of you out there who have both exempt and non-exempt employees. And I think what it portends is that she had indicated in the speech on November 5th to the ABA that is because of the number of comments and the depth of these comments she did not believe that this rule would probably be finalized until sometime late in 2016. Now, that of course gives everybody an opportunity as I have spoken before to do some homework between now and late 2016 in closely analyzing the exemptions that you do have the white collar exemptions and to decide what it is you are going to do in re-classifying certain employees from

exempt and non-exempt. Now, that has both employee morale issues attached to it as well as potential legal liability issues attached to it. I say it has morale issues attached to it because if you have a group of people who have traditionally or historically been classified as exempt and now you go and tell them that essentially they are going to be moving into a non-exempt hourly position they view themselves as probably being less professional at that point and the kind of hourly flexibility or work flexibility that they once had which would be to take half a day off to attend to a medical exam for themselves or their family or whatever without being docked is now being changed dramatically so that they would be punching in and punching out and it does change the mentality and the philosophy of how a company works and how the employees view themselves. From a legal exposure standpoint if you convert many heretofore exempt employees into non-exempt employees, you are, of course, faced with the potential that some of these converted non-exempt employees may say, 'Well, wait a minute I have been working more than 40 hours for the last two years. I should be paid overtime' and so it is a situation that going to have to be managed very, very carefully both in terms of when you roll it out and how you roll it out. And that is why I indicated I think probably in the last telebrief or maybe the telebrief before that you are going to have to decide practically what you want to do, do you want to be in a situation where you hire more part-time employees, which would, therefore, obviate the need to have your newly non-exempt employees work overtime, do you want to make it clear that overtime will not be permitted even though it may have been permitted on some level before. So all of these issues are out there and given now that the solicitor of labor has indicated the number and depth of public comments that have been received by the DOL and the fact that this probably will mean that it will not go into effect that is the new rule in some form or fashion until late 2016. You do have a lot of time to be proactive and to examine your job description, to examine the whole sort of status of your exempt and non-exempt employees and to make some value assessments and strategy decisions about how you will proceed once this rule or some semblance of this rule, I say some semblance of this rule, is implemented because there will be a lot of critical litigation not only in challenging the rule which Ms. Smith, the solicitor of labor recognized, but also probably by newly converted non-exempt employees who will be making claims for unpaid overtime going back at least two years. So we are headed into troubled waters. As I have said before, I do not know that the ultimate rule will stay at $50,000. It may be a compromise somewhere around 40, something like that but it will be substantially more than the current $24,000 to $25,000 and you need to prepare for it.

Okay, while we are talking about sort of wage and hour issues, I think that it is probably appropriate dimension that the recent statistics show that the fiscal year 2005 wage and hour cases hit a new high essentially increasing 7.6% over 2014 to a total of 8781 cases filed. Now, these are just the

cases that are filed in Federal Court not in State Court where you have separate wage and hour cases that are predicated upon individual, local or state statute which may be analogous to the FLSA. This is just FLSA cases and, of course, you know, when you see the amount of these cases being filed you know that you need to be proactive in examining not only your exempt versus non-exempt issues but also issues of timekeeping off the clock work whether non-exempt employees are using time spent at home to answer emails, all these kinds of things are things that are part of a wage hour audit that you all would be thinking about doing while you have the time in 2016 and I know I mentioned in the last telebrief in order to do these wage and hour audits correctly you ought to do it in conjunction with your employment lawyer so that you shield information under both the attorney work product privilege and the attorney client privilege.

Okay, I do not know whether any of you saw there was an interesting article in the Washington Post very recently on November 13th. It was entitled the governments antidiscrimination watchdog is getting more aggressive and employers are fighting back. This has to do with part of the strategic plan on the part of the Equal Employment Opportunity Commission to forego really handling individual cases of discrimination in favor of systemic cases of discrimination and the author of this article reported by the name of Lydia DePillis described in great detail. All of you can go back and if you like read this article but described in detail the battle is being pitched between Texas Roadhouse which, of course, is a restaurant chain and the Equal Employment Opportunity Commission in which the EEOC is seeking the whole Texas Roadhouse liable for systemic age discrimination among its employees and Texas Roadhouse is doing anything but lying down in this case they are fighting aggressively against the Equal Employment Opportunity Commission. But frankly from the standpoint of the EEOC as is stated in this article there is a quote from the EEOC chairwoman, Jenny Yang, she says we are trying to use our resources strategically to identify the problem and fix it, otherwise we can get relief for one person, but we are going to have more coming down the pipeline. The commission doubled down on its commitment to systematic investigations with its five-year strategic plan in 2012 and the probes now compose 25% of all charges the agency pursues. To me that is a very telling statistic because I know just in our firm with the number of individual cases that are you know sort of on backlog we see what is happening, which is that the commission is really aggressively pursuing systemic cases against employers in lieu of necessarily pursuing individual cases. What that means for you all, from again a proactive and a prophylactic standpoint, is that you need to be investigating your overall statistics in terms of hiring, promotions due to general diversity in the workplace as well as accommodation to the disabled employees, your harassment policies, etc., because the last thing that you want to happen is that not necessarily that you get an individual complaint of discrimination.

Many of them found to be pretty frivolous or wanting or lacking in merit but those are not the real heavy cost items to you. The real heavy cost items to you are the systemic cases that can grow out of an individual charge so that if an employee goes to the EEOC and files an individual charge, it can just like the Department of Labor can take an individual charge and run with it, it can lead to a systemic charge. So again, if you are going into the new year, you certainly do not need to do it now with the holidays approaching, but as you are going into the new year. Again, it behooves you if you are going to do wage and hour audit probably audit probably ought to do an EEO audit to see where you may be vulnerable with regard to your hiring statistics, your promotion statistics, disability accommodations, those sort of things, the kinds of cases that may very well lead the EEOC to claim that there is a proof of systemic violation as opposed to simply an individual case.

I wanted when we are talking about EEOC cases to bring up a very recent case decided by the Third Circuit Court of Appeals, this is out of Philadelphia and New Jersey. And this was a very recent case, case called Faush versus Tuesday Morning, and in this case what the Third Circuit did was to decide that Tuesday Morning, which had gotten and used temporary employees from the staffing company was considered to be an employer under Title VII when it terminated a temporary worker and that it essentially said it reversed the lower court's decision and said it would send this case back for trial under the theory that we now see coming up in a variety of contexts in which employers may be held to be the dual employer along either with a staffing agency or a contractor or if it is a subcontractor or even a franchisor and franchisee. I know that a few telebriefs ago I mentioned a case cited at the labor board entitled Browning Ferris in which Browning Ferris is a large employer was found to be a dual employer with one of its subcontractors on the basis that even though it did not have direct control over the individual that had been sent by the subcontractor nevertheless it exercised what the board deemed to be indirect control, and here in this Faush case, the Third Circuit said that even though the employer that is Faush was not paying the employee directly, in other words it was paying the temporary company, nevertheless if there was indirect compensation being paid to the employee and that the employer had the right unilaterally to demand replacement of the temporary employees for any reason and that it controlled the day-to-day duties of temporary workers. Now, this seems to be a general trend that is becoming more and more prevalent either in the EEOC context or in the NLRA context and probably will also be in the DOL context where two entities, whether it is a staffing company supplying individuals to another company or where you have a contractor getting employees from a subcontractor or using a subcontractor are deemed to be dual employers for purposes of employment liability and whether that is wage and hour liability or EEO liability or NLRA liability, I know that these are the things that are not contemplated by a particular

employer when it utilizes individuals from any of these other entities. But what was the practical import of this in terms of how you need to manage this as an employer? I think the practical import is that to take a simple example, if you are an employer and you are utilizing employees from a staffing company it would behoove you to have an agreement in place with the staffing company in which the staffing company agrees to indemnify you as the employer for any potential claim in which you are about to be the dual employer of an individual which is furnished either by the staffing company or subcontractor, etc. So you are not going to be able to contract a way your liability with the EEOC or the NLRA or the DOL simply by saying you are not going to be liable because that would not work, but what you should do is take a look at any agreements that you might have using a staffing agency or using a contractor and it would probably be worth it to do some credit check or some sort of financial analysis of the company that you are dealing with to make sure that they are a viable entity because after all you can get an indemnification agreement from company B indemnifying company A, but frankly, if company B is not financially viable and does not have necessary resources in order to implement its indemnification agreement, then it is useless to you. So a word to the wise that when you are contemplating these kinds of arrangement or you are using staffing companies on a regular basis I think better it would behoove you to have some indemnification agreement in place which spells out what their obligation is, perhaps to defend you in the event that you are deemed to be a dual employer to pay for attorney fees and to pay for any judgment or settlement that may be reached at the end of the day. I just see this is a trend, which is happening more and more among different administrative agencies and I think that you have to be cognizant about it and make sure that from your standpoint you protect your company in that regard.

I think that one other case that I wanted to mention which is again a case that was decided by the Fifth Circuit and this was November 17th, just a week ago, a case called Porter versus Houma Terrebonne Housing Authority Board of Commissioners. Very simply what happened here is that an individual had raised an issue of harassment with the employer. The individual then resigned employment ostensibly because of the harassment and then sought to rescind her resignation. The individual who ostensibly was the harasser in this case would not permit this employee to rescind the resignation and what the Fifth Circuit decided in this case was that the failure or refusal to allow a rescinding of her resignation under these facts and circumstances was tantamount to an adverse action under Title VII and thus cognizable under Title VII's retaliation provision. I know that many of you out there may have faced situations where an employee has resigned and then has attempted to rescind that resignation. Normally, of course, you are not under an obligation to allow that rescission of her resignation; however, what this case stands for, it is just a week ago as I said, what this case stands for is if

you have an employee who prior to submitting a resignation has filed or claimed some sort of Title VII action or state analog to that or harassment case where that particular case is pending and then the employee seeks to rescind the resignation, it would behoove you to look at that very carefully because as you know there are many kinds of adverse actions that an employer can impose upon employee which may invoke the protections of Title VII of the Equal Employment Opportunity Act, therefore, what this case stands for is you cannot automatically sort of get out of jail-free by saying I do not have to worry about it because the employee has resigned. According to what this case said, the fact that the employee has resigned will not necessarily absolve you of liability if the employee seeks to rescind his or her resignation and it is refused on the basis that the employee has resigned and you have a policy, which will generally preclude that employee from rescinding the resignation.

So, those are the cases and the developments for the day. I know that sometimes you still have questions, I am happy to answer them here or if you would rather do it in private, my office number 410-209-6417 or my email at hkurman@offitkurman.com. Any questions or comments from anybody on any of the stuff that we…

Howard Kurman: Go ahead. Any questions?

Gina: Howard, Gina here, I do have a question going all the way back to the very beginning when you were talking about the department of labor and the potential for employees looking for overtime for possibly two years prior to the changes.

Howard Kurman: Right.

Gina: If the law was differing how can they, how can that even be a legitimate claim if employers were correctly operating under the law at the time?

Howard Kurman: Well, I mean that is a very good question and we are going to have to wait and see what the final regulations really state from the Department of Labor, but if the Department of Labor does not address that issue, see what happens in any rule that the Department of Labor promulgates, it sets out in great detail usually questions that are promulgated or asked by employers that are labor groups that certainly will be one of the questions. We would hope that what the labor board would state is that those employees who satisfied the old test, okay, so let us take those employees who you know made 25,000 or more but not necessarily up to 40 or 50 as the new test, we would hope that the labor board would say that those employees are not owed anything because at the time they were appropriately classified as exempt employees, but I can tell you what happens sometimes and I have dealt with clients, what happens sometimes is that an employee who may have been inappropriately classified as

exempt and now it is converted back to non-exempt, okay, in that situation without the change in the law that we are talking about, the employee would have a right to go back and say well I put in more than 40 hours so I am hopeful that the DOL will recognize this and it will be addressed in a specific guideline that they will put out along with the actual proposed rule, but it may not and then you know we are sort again be shooting in the dark but again yeah I think our position would be as employers that they satisfy the test that was in existence at the time and, therefore, no back pay would be due to them but, stay tuned because it is not a thing that is a certainty that is for sure.

Gina: Thank you.

Howard Kurman: Any other questions, comments?

Anne: Howard thank you for keeping us focused on this continuing dual employer problem. I think this is going to bite a lot of us potentially so your ideas about the indemnification provisions are really you know very timely and very good advice.

Howard Kurman: Well, I think that this is a trend that is increasing in frequency and when you see it being decided by more than one particular agency you know that it is something that time has come and I think that again it is a source keep in mind when an agency sues more than one entity it is often doing so because it is looking for the deeper pocket.

Anne: Exactly.

Howard Kurman: So if you have a staffing agency that may not be viewed as a deep pocket but you have somebody like Browning Ferris who is a deep pocket, they are going after the deep pocket as well, and that is why I say you know when you are looking at using the staffing agencies, etc., make sure that they are financially viable.

Okay, well, it goes without saying that I wish everybody a very happy, safe and healthy Thanksgiving tomorrow and that we will reconvene in the merry month of December on December 9th. So have a great day everybody, try to get out a little early, beat the traffic and we will see each other in December.