LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Welcome to our telebrief, Wednesday, May 11th. The next telebrief which would be May 25th, may be a pre-recorded one because I am going to be out of town on business, so we will send around an email and let you all know. All right, we are going to get started.

The tea leaves indicate to me that from the DOL we will probably be getting their new salary test for exempt employees very, very soon. The information that I have is that the salary test would probably be at around $47,000 a year as opposed to around the $50,000 figure that was bandied about for probably the past six, seven, eight months. This is not a certainty, but the information I have is that, that will be the salary level that's probably the applicable one. We will not know also how the salary level will be indexed from one year to another and we will not know whether there is going to be any change in the duties test or the exempt salary test that is coming up but stay tuned. All indications are that this may be publicized probably within the next three to six weeks, so by the time we reconvene in the next telebrief or the one after that, we probably should have a final answer on what the DOL is doing with regard to the new exempt salary test.

All right, I wanted to spend some time on a report that was put out by the White House on May 5th. Generally, I attribute relatively little credibility to these reports that have been put out by the administration with regard to employment matters, but I have to basically say that this is a pretty interesting report, the title of which is, and by the way, we are having some issues with regard to muting so, if you guys can mute your phones that would be great. Usually it's done on our end but apparently we are having an issue with that. The title of the publication on May 5th was Non-Compete Agreement: Analysis of the Usage, Potential Issues, and State Responses, and again this is put out by the Obama White House. The purpose behind the publication was really to investigate the current status of noncompete agreement in the workplace all with an eye towards increasing mobility in the workplace, because as you know if you have effective noncompete, it does in many respects affect the mobility of workers that may leave your company and the White House report basically says in the report, I will quote from it, "building on these efforts, this document provides a starting place for further investigation of the problematic usage of one institutional factor that has the potential to hold back wages – non-compete agreement. These agreements currently impact nearly a fifth of US workers including a large number of low wage workers' which was a surprise to me." I really did not realize that the statistics are that about a fifth of United States workers are subjected to non-compete. The report goes on to say, it draws on a recently released report from the United States Treasury Office of economic policy entitled "Non-Compete Contracts, Economic Effects and Policy Implications." The report is pretty comprehensive and I will quote from several areas because I think it has a very dramatic practical impact not only on your present practice with regard to noncompete but what may be happening as a trend in the future. So let me quote a few things from this report. 1. Research suggests that 18% or 30 million American workers are currently covered by non-compete agreements. That's a lot, 30 million American workers. It goes on to say that non-compete clauses are found not only in the contracts of senior executives or rather highly compensated employees, but also for comparatively low skill occupations. Approximately 15% of workers without a college degree are currently subject to non-

compete agreements and 14% of individuals earning less than $40,000 are subject to that. Those are pretty telling statistics and I think at the end, I have some editorial comments about those. The report goes on to say in the coming months as part of the administration's efforts to support competition in consumer products and labor market, the White House Treasury and Department of Labor will convene a group of experts in labor law, economics, government and business to facilitate discussion on non-compete agreements and their consequences. The goal will be to identify key areas where implementation and enforcement of noncompete may present issues to examine promising practices in states and put forward a set of best practices and call to action for state reform. By facilitating a dialogue between academic experts and those with practical expertise, we aim to identify policies that could be used to promote a fair and dynamic labor market while remaining cognizant of real world challenges to reform. So the White House will be looking at several areas in which to probably improve upon or recommend improvement in this whole area.

They go on to cite some interesting occurrences. 1) They quote, many workers do not realize when they accept a job that they have signed a noncompete where they do not understand its implications. I find that to be a common practice frankly among many of the clients that I represent. 2) Many workers are asked to sign a noncompete only after accepting the job offer. The estimate is that 30% of workers are in this position. 3) Many firms ask workers to sign noncompete that are entirely or partly unenforceable in certain jurisdictions suggesting that firms may be relying on a lack of worker knowledge and that also is true, that many times workers are asked to sign noncompetes, which are overly broad, in terms of both the time within which they are restricted and the geographical areas as well. The report proceeds to say because of the potential issues presented by some noncompetes, there is a growing movement in states to take action to limit the misuse of non-compete agreements. Several states are banning non-compete agreements outright for certain sectors and occupations. This year, Hawaii banned non-compete agreements for technology jobs. As many of you know out there, the technology field is well known for mobility from one tech company to another. Many tech employees, as you may know, will move if they get 10 cents an hour more at some other employer. So, Hawaii has banned non-compete agreements for technology jobs and New Mexico banned them for healthcare jobs. The reason for that is public policy that New Mexico does not want to restrict as a matter of public policy, people in the healthcare fields from moving from one enterprise to another. They go on to say others have taken steps to limit the scope of noncompetes. Oregon recently banned non-compete agreement longer than 18 months, while Utah limited the agreement to one year.

At the federal level, legislation has been proposed to limit the use of non-compete agreements below a certain income threshold where they are less likely to have valid uses. And many states, including Maryland, had bills proposed that would render non-compete agreements unenforceable for any workers eligible to receive unemployment compensation. The report goes on to talk about various aspects of the state either existing law or proposed law, so that Oregon has passed a law that says that when particular compensation is paid to the employee during the period in which the employee is restricted from working that would be a condition of any kind of noncompete. This kind of payment is often referred to by labor lawyers as a shelf payment. So that if you are restricting an employee from noncompete for a noncompetitive period of six months to a year, under Oregon law you have to pay that employee for a portion of that period on which that employee is so-called on the shelf or off the shelf, however, you want to phrase it. Idaho has passed the law that restricts noncompetes to so-called key

employees, and New Hampshire has passed the law that requires non-compete agreements that are executed as a condition of employment need to be provided to potential employees prior to the acceptance of an offer of employment.

It goes without saying, and I have spoken about this before with regard to noncompetes, that they are often misused and misunderstood. And I think that it's incumbent upon those of you out there who either use or contemplating using noncompetes, that you understand that the trend is and will be to regulate the use of those noncompetes. In many cases I really do not see a reason for using a noncompete with employees that really don't matter to your company, clerical employees, low wages employees, you may want to subject those employees to confidentiality and nondisclosure agreements. That's something different, and they are valid and you can use them really with any employee. But with regard to a non-compete agreement, an agreement whereby an employee would be restricted from working for another company in the same industry, you need to be very careful how it is phrased; and the trend is for more regulation and a limitation of the validity of those agreements going forward, either on a federal level or on the state level. So it bears keeping in mind that you need to be very careful about who you are subjecting to the noncompetes. You want to make sure that employees who are coming on board know ahead of time that they may be subjected to a noncompete, and that the noncompete is clear and well drafted. And if you have any doubts about that, you really should consult with your employment attorney, because the enforceability of these agreements now and in the future will be subjected, I think, to increasing judicial scrutiny, if not, limited by legislation either in the federal level or in the state level.

Okay, let me switch gears for a minute if I can about activity at the EEOC which has received a lot of publicity with regard to the North Carolina legislation on the antidiscrimination laws and LGBT laws and regulations. As you know North Carolina has faced withering scrutiny with regard to the passage of its legislation very recently which would prohibit any kind of localities from enacting certain types of antidiscrimination laws. And now, as recently as the last couple of days, there have been cross-suits filed in Federal Court between the State of North Carolina and the federal government and the federal government and North Carolina over this very issue. Last week the EEOC stated, in unambiguous terms, that employers are required to provide transgendered workers with access to bathrooms that correspond with their gender identity. And contrary to any state law, the EEOC has admonished both states and companies that they risk violating Title VII if they attempt to restrict in anyway an employee from using a facility based upon that employee's birth as opposed to how that employee identifies himself or herself in a gender manner.

So, as you know in 2015, the EEOC issued an opinion which basically articulated that an employer cannot deny an employee equal access to a facility, which would reflect or correspond to that employee's gender identity; and if that employer does, it would be considered to be sex discrimination; and also that an employer cannot condition the right of an employee to use such a facility on proof of having undergone surgery or other medical procedure. So the federal government, in the guise of the EEOC, is squarely in opposition to the position taken by North Carolina and perhaps other jurisdictions as well. And I'm sure that the litigation between the EEOC and the State of North Carolina will be active and will be well publicized. So from my standpoint, it would behoove everyone to make sure that they are not in violation of the EEOC's restrictions that apply with regard to transgendered employees. Obviously, if you have a single-use bathroom, as long as you are not conditioning the use of that bathroom to transgendered employees,

but that transgendered employees are free to use that bathroom that's perfectly fine under the law.

I wanted to again switch gears to a wage and hour issue, in a wage and hour case, which I think is pretty interesting. This was reported in the Bureau of National Affairs just last week, and I will read some relevant parts of it. This is a Ninth Circuit opinion called Corbin versus Time Warner. And in this, according to BNA, a former Time Warner Call Center employee in California cannot proceed with his claim that the company violated federal and state wage hour laws by rounding work hours to the nearest quarter hour. The US Appeals for the Ninth Circuit ruled, as BNA reported, this is the first published opinion from a Federal Appeals Court addressing the Labor Department's regulation on permissible rounding under the Fair Labor Standards Act, even though district courts have frequently upheld these mutual rounding policies. So the BNA goes on to say Time Warner Entertainment had a mutual timekeeping system that rounded up or down to the nearest quarter-hour without considering whether it benefitted the employer or the employee. In this case, the Ninth Circuit affirmed summary judgment for the company ruling in courts, mandating that every employee must gain or break even over every pay period misreads the text that the federal rounding regulation and violates the purpose and effectiveness of using rounding as a timekeeping method. What they said in the report was in May 2010, the company moved from using a physical time clock to an online system for tracking employee work hours. The new system rounded the recording time to the nearest quarter-hour. So an employee who clocked in at 8:07 a.m. would gain seven minutes because the system would round the time to 8 o'clock. The court said as an example an employee who clocked out at 5:07 p.m. would lose seven minutes because the time would be rounded to 5 o'clock. The court goes on to say the DOL regulation approves of rounding up to the quarter hour under the FLSA, so long as the employer's policy neutrally rounds up and down. A neutral policy such as this favors neither the employer nor the employees because sometimes the employees are paid a little more and sometimes they are paid a little less than they would receive for the exact time worked. The regulation is meant to give employers a practical and efficient way to calculate wages that averages out over time. So those of you out there who have such systems, be aware of the fact that it is permissible under the DOL regulation to round up or to round down to the quarter hour, as long as the policy is neutral, which means that sometimes the employees will gain, as in the example that I gave you, an employee who clocks in at 8:07 would actually gain seven minutes, the employee who clocks out at 5:07 would lose seven minutes because its round down to 5 p.m.

The last thing that I wanted to mention to you is that the Department of Labor, years ago published an employee's guide to the Family and Medical Leave Act. I may have mentioned this but more specifically recently the Department of Labor on its website has issued, what they call an employer's guide to the Family and Medical Leave Act, which is available again on their web site, it's a 76-page PDF, which you can download, and I will review the topics, which are covered on the DOL's website and they are as follows: 1) Covered employers under the FMLA and their general notice requirements. 2) When an employee needs FMLA leave. 3) Qualifying reasons for leave. 4) The certification process. 5) Military family leave. 6) During an employee's FMLA leave. 7) FMLA prohibitions. These are very detailed explanations and those of you who administer or who oversee the administration of the FMLA know that it's a very complicated set of regulations, so the DOL has tried to provide a great deal of explanatory help for employers. Just bear in mind of course that this explanation is the DOL's position on these particular regulations. It does not necessarily mean that the DOL's position with

regard to these regulations would in all cases be affirmed or accepted by the courts that also enforce these, but it is important to note that these are the relevant explanations that the DOL asserts for purposes of enforcing and administering the Family and Medical Leave Act, which is I have said on many occasions, for something that really should be fairly simple, has been made extremely complex by the extent of the FMLA regulations and the complexity with which the DOL administers it and interprets it.

Okay, those are the developments for the day. As always, I invite any questions or comments, and if you want to catch me in private, my number is 410-209-6417. My email is hkurman@offitkurman.com.

Any questions or comments out there? Okay, well if not, as I indicated the next scheduled telebrief is on May 25th, and we will send around an email as to how this will be handled again, because I'm going to be out of town. I may be able to do it live, I may do a prerecorded, I'm just not sure. So we'll send around an email and we'll catch a hold of all of you; and hopefully when we talk next time, the sun will be shining for a change. Take care everybody.