LABOR & EMPLOYMENT TELEBRIEF

By
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Howard Kurman: Good morning. As you all know, it is March 22, 2017 but because I am out of town today I am recording this as of Monday, March 20, 2017 so if there are any developments of course that occur between Monday the 20th and Wednesday the 22nd when you are all listening to this I apologize and will catch up with those on the next telebrief which will be the second Wednesday in April or April 12, 2017.

At the last brief there was a question regarding the Maryland Healthy Working Families Act and the status of that act. Of course, there has been a lot of publicity in the last two weeks particularly from Governor Hogan in Maryland who has indicated that irrespective of what the legislature does with regard to this particular piece of legislation he is going to veto it. There has been a lot of consensus among the Democrats on both the House and the Senate side of passing such an act and the parameters of that act had been well publicized but it is clear that whatever form it takes Governor Hogan is going to veto it on the basis that it imposes undue expenses and burdens on employers in Maryland and the question then will become whether or not the legislature has enough votes to overcome Governor Hogan's veto. We will just have to pay attention to that in the next few weeks until the session ends in mid-April.

I wanted to turn my attention to some development at the Department of Labor. There was an interesting development in terms of President Trump's budget having to do with the Department of Labor. President Trump has indicated or proposed that the Department of Labor's funding would be reduced under the new budget by 21% to $9.6 billion. This is accompanied by a meeting that was held or I guess a session that was held by the new acting Solicitor of Labor last Friday at Georgetown Law School. The new acting Solicitor of Labor, his name is Nicholas Geale, has indicated that under the new administration there will be a more compliance focused agenda for the Department of Labor. In his quotes, he indicated that I think you will see in the new administration that we will do a lot more outreach and attempt to assist particularly small employers who may not have the ability to have the excellent counsel like the people in this room. He went on to say and I quote, "we are very concerned about compliance with small business. They do not often have the best advice and capacity to contact attorneys for compliance so that is certainly going to be something that I am going to do my best to encourage the department, its agencies and the solicitor's office to promote compliance opportunities." This is accompanied by the fact that the proposed new Secretary of Labor, Alexander Acosta, is supposed to have a hearing on March 22nd, so as you are listening on March 22nd you will probably get some information out of Congress on how the hearing for secretary or proposed Secretary of Labor, Alexander Acosta, proceeds.

Speaking about hearings, we know that the hearing for the proposed Supreme Court nominee, Neil Gorsuch, is supposed to begin on Monday, March 20th and there will be an interesting hearing because, of course, the Democrats are still smarting over the fact that their nominee under President Obama, Merrick Garland, never got a hearing before Congress. There will be many, many questions. It is scheduled for a three or four day hearing by the time that you listen to this telebrief on Wednesday the 22nd, the hearing will be well underway and we will just have to wait and see what happens. Certainly, because Gorsuch is anticipated to be the replacement for the deceased Justice Scalia, it probably will not be as controversial as perhaps the next nominee would be under President Trump or another president because you are really substituting one set of judicial philosophies for another, which will probably be pretty similar so my prediction is despite all the sturm und drang I would think that Judge Gorsuch would probably be confirmed.

There was an interesting article in the Washington Post on March 11th and its entitled, I do not know if anybody saw it, it was in the health section, it is entitled "Employees who decline genetic testing could face penalties under proposed bill." This was an article written by a reporter named Lena Sun and she indicates that employers could impose hefty penalties on employees who decline to participate in genetic testing as part of workplace wellness programs if the bill approved by United States House committee this week becomes law. She goes on, in general, employers do not have that power under existing federal laws, which protect genetic privacy and nondiscrimination, but a bill passed Wednesday and that would have been two weeks ago, by the House Committee on education and the workforce would allow employers to get around those obstacles if the information is collected as part of a workforce wellness program. She says such programs, which offer workers a variety of keratin sticks to monitor or improve their health such as lowering cholesterol have become increasingly popular with companies. Some offer discounts on health insurance to employees who complete health risk assessments, others might charge people more for smoking. Under the Affordable Care Act employers are allowed to discount health insurance premiums by up to 30% and in some cases 50% for employees who voluntarily participate in a wellness program where they are required to meet certain health targets. She goes on to say the bill is under review by other House Committees and still must be considered by the Senate but it is already faced strong criticism from a broad array of groups as well as House Democrats and she cites the many, many organizations, which have opposed it such as the American Academy of Pediatrics, AARP, March of Dimes and the National Women's Law Center and all of these groups as she says indicate that the legislation if enacted in quotes would undermine basic privacy provisions of the Americans with Disabilities Act and the 2008 Genetic Information Nondiscrimination Act. I think we will pay attention to this. I do not think that it would pass in the Senate, it is a pretty onerous bill but nevertheless it has some scary elements to it particularly for those individuals who have any kind of damaging information as part of their

genetic makeup and where they would not want such information to be known to their employers.

A couple of cases of note that I think are worthy of discussion this morning. One was a decision on February 5, 2017 by the Massachusetts commission against discrimination. In this case, the Massachusetts commission held that an employer violated the act in refusing to accommodate or having a discussion to accommodate a pregnant employee who developed depression postpartum, used up her 12 weeks of FMLA leave, at first had a medical diagnosis which indicated that it was indeterminate when she might be able to return to work and the employer subsequently terminated the employee without having any further discussion with her with regard to any kind of possible accommodation i.e. a little extension of the leave or any other type of accommodation. This is not an uncommon development and I wanted to bring it up to you because there are many of you out there who face situations where an employee goes out on a medical leave of absence under FMLA has an expected return date at the end of that 12 week period and then during the leave or near the end of the leave indicates that he or she may not be able to return to work and you have a doctor's slip or note that says it is indeterminate when that employee may be able to return to work. Under the ADA and other state acts which are similar the mere fact that somebody has used up that person's FMLA leave is not an excuse to avoid further interactive dialogue with that employee with regard to whether or not a short extension of the leave may benefit the employee and allow that employee to return to work. That is simply because the employee has extinguished or was about to extinguish his or her FMLA leave does not end the inquiry and I would suggest to you that even if you have a doctor's note or slip which is ambiguous or which indicates that it is indeterminate as to when the employee may be able to return to work that you at least reach out to the employee, perhaps even to the employees doctor get some more information and if it looks like a two or three week extension may do the trick then certainly seriously consider that as opposed to simply terminating the employee without any further discussion or consideration because the EEOC and other state agencies have made it clear that just because an employee's FMLA leave is extinguished does not mean that your obligations to reach out to that employee or have discussions with that employee necessarily are over.

Another case of note is a case that was decided by the 11th Circuit Court of Appeals called Evans vs. Georgia Regional Hospital. This was a case that was decided in the last two weeks and it has to do with whether or not sexual orientation is a protected classification under title VII. The 11th Circuit held that sexual orientation is not protected under Title VII of the Civil Rights Act, thus setting up a circuit split on this potential issue and again probably headed for the Supreme Court at sometime either this term or next term as to whether or not such a classification would be protected under Title VII. Of course, it does not mean that under various state laws and one of those of course is at Maryland, which protects sexual orientation as a protected classification does not mean that you are not obligated as an employer to consider that in determining whether or not a particular employee's sexual orientation is

obvious or notorious or well-known would not be protected under your state statute. Again, there is an obvious split in the circuit and this one certainly at some point I think will be headed to the Supreme Court.

I know that in the past month or so we talked about the District of Columbia Universal Paid Leave Amendment Act and I know that I indicated probably a month ago that it would be submitted to Congress for a 30 day legislative day period of review. It has, in fact, been submitted to Congress and it is slated to become law as of April 7, 2017 and as we have discussed it is a very, very generous law providing that employees would get up to eight weeks of paid leave and it is financed by a employer payroll tax and that is the sort of a sticking point with many people probably particularly with Congress as well. Now even if it is passed by Congress as I have indicated before employers would not be subject to the new tax until July 1, 2019 and employees would not be able to begin getting these benefits until July 1, 2020, three years from now. Of course, Congress would have the right not only to veto it or to approve it but also to modify it in some fashion by reducing the cost on employers or some other material change. I will certainly keep an eye out on it for everyone and we will bring it up in future telebriefs once we find out what the standard will be.

Another interesting development regarding the National Labor Relations Board was a dissent that was written by the incoming or the new punitive Chairman of the National Labor Relations Board, Philip Miscimarra. Mr. Miscimarra in a dissent in a case called "Cellco Partnership doing business as Verizon Wireless," this was a case decided February 24, 2017, was out voted with regard to some handbook rules and regulations. But basically stated in a dissent that he disagreed with the board's overreaching of handbook policies and procedures, which are predicated upon the employees' rights under Section 7 of the National Labor Relations Act and signaled that when there is a Republican majority at the National Labor Relations Board and we have talked about this, which probably will take place later this year that he would intend to overrule cases; for instance, the case of Purple Communications. I have talked about Purple Communications in past telebriefs. Purple Communications was the case recently decided in the last year or so by the labor board, which indicates that if an employer allows its employees to use its email system for work-related purposes then those same employees are given a rebuttable presumption of being able to use that same email system to engage in other activities including solicitation for unions or union-related activities. That case, that is Purple Communications, overruled the decision in a case called Register Guard, which was a 2007 decision in which the labor board recognized that employers have property rights with regard to their own email systems and that, therefore, they can control the use of those email systems unless in doing so they would obviously discriminate between union and nonunion rights so that if they had a rule that said you could use the email system privately for one purpose but not for any kind union solicitation that would be violative of the National Labor Relations Act. He has strongly signaled that if and when the Republicans gain a majority which again should happen later on in a year that that kind of pro-

union handbook policy philosophy etc., would be a thing of the past and certainly that would be helpful to all of you out there whose handbook policies have been the subject of scrutiny and probably revision over the past two or three years.

The last thing that I will bring up is that as I have told you in the past there was a case that was decided by the National Labor Relations Board called Browning-Ferris having to do with the issue of dual employment. That case was argued at the DC Circuit Court on March 9, 2017, so just to take you back the National Labor Relations Board had ruled that under a dual employer theory that an employer could be held liable for the acts of let us say the employee that it had leased or subcontracted or used as temporary employees if it had some indirect control over the terms and conditions of employment of those employees as opposed to what the past standard was at the National Labor Relations Board, which was direct control. That case wound its way through the National Labor Relations Board up to the DC Circuit and again oral arguments were heard on March 9, 2017. The arguments were scheduled for 30 minutes but lasted over an hour and, of course, the main question will be whether or not the DC Circuit approves what has been criticized as a very ambiguous and indirect test of dual employment or whether it is sides with the National Labor Relations Board. There was a three judge panel on this particular case and we are just going to have to wait and see what happened. The panel was composed of two judges who were appointed by President Obama and one judge appointed by President Bush the elder and we are just going to have to wait and see what happens. But suffice it to say, and I have talked about this in prior telebriefs, it has been the subject of a lot of criticism and the standard, itself that of indirect control is a very difficult one in which to apply between two putative employers. I am sure we will get a decision on this in 2017 and when it comes down I will certainly bring that to your attention.

Those are the developments for the day. Hopefully I am sure that in the next two weeks there will be much to report on and I will be back in touch with you in the first telebrief in April. Again, as I always say if you have any questions or comments although this is not a live telebrief if you have any please submit them to me and you can do it in email hkurman@offitkurman.com. Thanks very much and have a good next two weeks.