LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay its 9:02 by my official clock and we are going to get started. It is April 12th so it is the second Wednesday in April and the next telebrief will be on April 26th, the last or the fourth Wednesday in the month. I sort of apologize for the prerecorded telebrief the last time around, I was out of town and that happens a few times a year so I apologize. Michelle, who is on the phone with me tells me that we are not able to systematically mute the phone so if you all could just mute your own phone manually that would be great as I start the telebrief and then of course we will open it up for questions as we always do at the end.

Good morning to everybody. There is always plenty of stuff to report on. In our own backyard many of you probably know that the Maryland General Assembly passed a paid sick leave and bill, which officially went through the House of Delegates on April 5, 2017. It approved the bill that had been previously passed by the Maryland Senate and that essentially would require employers with at least 15 employees to provide up to five paid sick and safe leave days per year to their employees and for employers with less than 15 employees to provide up to five unpaid sick and safe leave days per year. This has been a controversial bill from its inception, as you know this made its way through the hearing process in the 2016 session did not pass but most of the experts concluded that 2017 would be the year that it would pass and indeed it has passed. Now, Governor Hogan has stated in the past that he was going to veto this. We really do not know for sure whether he will or while won't. I was talking to somebody from his administration at an event that I was at last week and the person said that he was not sure that despite what Hogan has said in the past that he really will veto it. However, if he does veto it there will not be time for the General assembly to override his veto at least this year. Now, remember that this act as promulgated would not take effect anyway until January 1, 2018 but of course if there is no override of the veto or if he does veto it the General assembly would have to take it up in order to officially override his veto when the General assembly begins on January 10, 2018.

Now, chances are even if it vetoed there will be an override in 2018 so those of you obviously out there who do business in Maryland will certainly want to look at your sick leave policies and probably bring them up to date and in accordance with what this statute would require anyway for purposes of preparing for the enactment, which certainly will occur I am sure in 2018. The act, itself is a little technical and I am not going to take the time to go into all the details here. Obviously, it would not apply pursuant to its terms to employees who regularly are scheduled and work less than 12 hours a week. It does not apply to employees who are employed in the construction industry and certain on-call or as needed employees in the health or human services industry. The actual statute, itself will be well-publicized I am sure in the next couple weeks following the official end of the session but suffice it to say that the time is come

for the enactment of this particular piece of legislation and I am sure that it will be enacted in some form in 2018. Remember, the legislature could even amend this in January 2018 depending on what Governor Hogan says about it with regard to the reasoning for his veto, which probably will come when the bills are presented to him at the end of the session. We can talk more about that as things develop during the year but I wanted to bring that to your attention.

Another significant development as you all know as a result of the so called nuclear option in Congress justice or Judge Neil Gorsuch was approved and confirmed to take his seat on the Supreme Court. He was sworn in on Monday and is now an official member of the Supreme Court. What that portends for employment cases of course remains to be seen but the tea leaves are there for him to essentially replace Justice Scalia who as you all know was a conservative justice and when it comes to employment cases and certainly I believe that for the most part despite some of the statements that now Justice Gorsuch said in his confirmation hearing, I believe that he will be on the employer side in most cases and the result of that probably will be some 5:4 decisions in favor of management or employers as these cases come up to the Supreme Court.

On January 13th, the Supreme Court granted cert in a case called Epic Systems v. Lewis and the issue in this case is whether or not the National Labor Relations Board's decisions on whether federal labor law bars arbitration agreements that contain class action waivers would be sustained at the Supreme Court level. As some of you know, there was a 2012 decision called DR Horton and that was a decision by the labor board that essentially said that those employers, union or nonunion, who have class action waivers in arbitration agreements so that essentially what these agreements say is that employees have no right to bring class action cases in court and that in order to litigate any of these class action cases they have to be subject to arbitration as opposed to judicial litigation. In DR Horton, the labor board said that those agreements would violate Section 7 of the National Labor Relations Act, which I have talked about on numerous occasions in prior telebriefs. Section 7, of course, grants employees the right to engage in concerted protected activity in other words to band together to discuss wages, hours, terms and conditions of employment or to take actions in concert with one another in order to improve or better those terms and conditions of employment. The Supreme Court has agreed to put this issue front and center in this case called Epic Systems v. Lewis. It will be on the fall calendar of the Supreme Court and of course Justice Gorsuch will be a member of the Supreme Court when it is subject to oral argument and briefing in the fall term of 2017. This case could have significant impact not only with regard to decisions of the National Labor Relations Board but in terms of the court's deference to arbitration agreements between employers and employees. Some of you may have such arbitration agreements currently between your employer and employees under which employees agree that any disputes between the employer and the employee rather than being subject to court action would be subject to final and binding arbitration before an outside arbitrator. As I have spoken before, arbitration generally would be preferable to an employer, it's less costly, there is no publicity associated with it, there is not the protracted

discovery process that you would have in judicial litigation and generally arbitrators are not going to be subject to the kinds of emotional appeals that an employee's attorney would be able to interject before a jury. So this case could have significant impact and I think that in his prior decisions when Judge Gorsuch was on the Appellate Court he showed deference to arbitration clauses in employment agreements. I would expect that in this case of Epic Systems v. Lewis, Justice Gorsuch would be on the side, probably I would think, of a majority maybe a 5:4 majority, which would essentially invalidate the decision of DR Horton and basically give deference and respect to employers who have arbitration agreements with employees. There is a longstanding line of cases in the Supreme Court and in the courts of appeals which essentially give respect to and deference to arbitration as a means of alternative dispute resolution saving the court and their dockets from many cases that would otherwise be decided by arbitrators. Pay attention to this as it winds its way through the Supreme Court. There will not be much to say about it until the fall term of 2017 but it is significant that Justice Gorsuch will be on the court at the time that this case is orally argued at the Supreme Court.

Another significant case that was decided very recently in fact on April 4th is a case decided at the Seventh Circuit, a case called Hively v. Ivy Tech Community College of Indiana. This is the first federal appellate decision, which ruled that title VII of the Civil Rights Act encompasses sexual orientation discrimination within the meaning of sex discrimination. There have been decisions at the lower courts and indeed by other federal appellate courts, in the Eleventh circuit and the Seventh Circuit where the Circuit Court of Appeals have indicated that despite the fact that they may be sympathetic with those Plaintiffs who allege that sexual orientation is simply another means or another brand or encompassed within the meaning of sex discrimination. The Seventh Circuit in this case is the first federal circuit who has recognized that the meaning of sex discrimination within the 1964 Civil Rights Act also encompasses sexual orientation. Now, of course, there are many state statutes including Maryland and other states as well where sexual orientation for a while has been recognized as a protected classification but it has been controversial as the whether sexual orientation is included within the ambit of sex discrimination under the 1964 Civil Rights Act. It probably is something that will ultimately be decided at some point by the Supreme Court as it winds its way through the various circuit courts of appeal on the federal level and of course we do not know how the Supreme Court would rule. Again, we have Justice Gorsuch certainly on the conservative side and on the Scalia side of kind of originalist when it comes to the interpretation of statutes and essentially the position would be that if Congress wants to include sexual orientation within the meaning of sex discrimination that it should say so expressly in an amendment of the 1964 Civil Rights Act. On the other hand, it certainly maybe possible that if it winds its way up through the Supreme Court the Supreme Court could say that it is a natural evolution of the term sex discrimination to include sexual orientation as it has been encompassed within various iterations in state statutes as well. It is a very significant decision and it has gotten a lot of publicity even in non-legal circles since it was announced on April 4th and we will

just have to see how it winds its way through the various federal courts of appeal but I am relatively certain that at some point whether it is in the 2017 term or the 2018 term we will have a case that winds its way up to the Supreme Court for the rule on and interpret the 1964 Civil Rights Act.

There was another case that was decided by the DC circuit a week or two ago and this is a case that I have talked about in prior telebriefs. It is called Banner Health Systems v. NLRB. There were really two issues that were dealt with by the DC circuit in Banner Health. One was whether or not employers could prohibit employees from discussing information, which was related to employee salaries and discipline. Many of you I know I have spoken to about this in prior telebriefs may have in your handbooks policies that historically have prohibited employees from discussing with one another each other's salaries or wages or other terms and conditions of employment. The DC circuit, which is an influential circuit opined in Banner Health in keeping and in agreeing with the National Labor Relations Board that employers cannot force employees either through their handbooks or confidentiality agreements to agree to keep such information confidential and not to discuss it with other employees because in doing so there would be a violation of Section VII of the National Labor Relations Act.

The second issue that the DC circuit faced and which is in keeping with sort of the discussion I have had in prior telebriefs is whether in an investigation an employer violates the National Labor Relations Act by a general prohibition on employees being able to discuss anything related to the investigation with other employees. There is no blanket rule that the DC circuit came up with, essentially what the DC circuit said was that employers should be careful in imposing blanket rules of confidentiality with regard to employees discussion of anything taking place in an investigation of workplace misconduct, that there are certain times when it would be appropriate for an employer to impose such restrictions. For instance, if it thought that there could be a threat of witness intimidation by other employees or if it thought that evidence could certainly be compromised or if it thought that there was a legitimate reason for imposing confidentiality for instance in the midst of sexual harassment investigation. What the DC circuit said in Banner Health was that these really should be decided on a case-by-case basis and that if you have policies in your handbook and I have spoken about this before, essentially what you should say is that confidentiality maybe maintained in a workplace investigation depending on the facts and circumstances of the case as opposed to a blanket policy that says in all cases of workplace investigations confidentiality will be maintained. You have to be careful about that and what the DC circuit indicated was that this really needs to be decided based on the facts and circumstances of a particular case and that an employer would proceed at its own risk in attempting to impose a blanket confidentiality rule in all cases of workplace investigations. It is a significant case because the DC circuit is an influential circuit when it comes to national adherence to certain workplace rules and policies.

An interesting statistic I came across for you. I know that while the percentage of the private workplace is down to about 6.4%, interestingly in 2016 statistic is that unions won 72% of any union election that was held by the National Labor Relations Board. A 74% win rate is very, very high higher than it has been in the past and so the paradox is that while the percentage of the private unionized workforce is down to a very low rate the percentage of union wins in those elections that are held is very high. I only bring this to your attention because periodically it is useful for employers to conduct what I call union avoidance audits or union vulnerability audits, it's where an outside expert would come in and would work with the company or the employer to really assess whether there are any issues that would make it more vulnerable to union organization or not by addressing any outstanding grievances, complaints, issues that are unresolved, wages, benefits, any terms and conditions of employment that a labor lawyer would believe may pose some risk of the employer being unionized. Just a word to the wise, it may be useful during 2017 because of that percentage to think about doing a union vulnerability audit.

The last thing that I would say is as you know the Department of Labor does not have a confirmed secretary yet, Alexander Acosta has had hearings, he is the nominee for the Secretary of Labor. Interesting statements that he made during his March 22nd hearing particularly with regard to the salary test that traditionally has been used along with the duties test to ascertain whether anybody meets the white collar exemptions under the Fair Labor Standards Act. In his hearing, he was skeptical of any particular salary test, in fact, a salary test at all, which is pretty interesting for somebody who would be incoming as a Secretary of Labor. He probably will be confirmed as the next Secretary of Labor and we will have to see how that shakes out in terms of what the DOL does with regard to the salary test. As you know, the salary test that was going to be used as of December 1, 2016, which would have increased the exemption test from $24,000 and change to $47,000 and change was enjoined by a federal court in Texas and there is every indication of course that if Acosta is confirmed that we will be nowhere near that $47,000 level if, in fact, we have a salary test at all. I will keep you tuned in on what goes on once he is confirmed but it was an interesting confirmation hearing on March 22nd.

Those are the developments for the day. As always I welcome any comments or questions if you would like if not you certainly can direct them to me at my telephone number (410) 209-6417 or my email at hkumran@offitkurman.com. Any questions or comments from anybody out there?

Fran: I do have a question about the paid sick leave bill and there are probably some more questions out there but it says for employees that are working 12 hours a week we are going to have to do sick time for them, but we do not normally offer part time benefits for employees?

Howard Kurman: No, the bill would not cover any employee who regularly works less than 12 hours a week. Okay so.

Fran: At least 12 hours?

Howard Kurman: That is right.

Fran: So that is considered a part-time employee for us so we are going to have to start offering benefit those benefits to those folks who do work those hours. Correct?

Howard Kurman: If they are working more than 12 hours a week.

Fran: Right, okay.

Howard Kurman: Okay, not if they work less than that. Now, again remember this bill may be changed or amended in some way come 2018. It is not going to be in effect at all during 2017. We will have time to make any adjustments that you need to make during 2017.

Fran: Okay, we are just trying to understand it.

Howard Kurman: Yeah, any other questions?

Sam Rush: Howard, this is Sam Rush, I have a question regarding paid sick leave as well. Our company we had a general PTO policy, which is well over you know five days would that suffice for the required sick leave?

Howard Kurman: Well, that is a very good question because many companies do that. I do not have the direct answer for you at this point because I am not sure that the statute actually addresses that for those of you who lumped together for instance vacation and sick leave and personal leave together and just called it PTO so, that is one of the open issues that I have for some clients that I want to take a look at and probably will address in the next telebrief or the telebrief after that but it's a good question. I would think that you are going to have to at least in some way make sure that to the extent that employees are entitled for instance to the amount of sick leave designated in the bill that that be designated somehow within your policy of PTO, but it becomes confused for those of you who lump them all together. I am hopeful that I will be able to get back to you on that in maybe the next telebrief or the one after that.

Sam Rush: Okay, thank you.

Howard Kurman: Sure. Okay, well those are the developments for the day and we will reconvene in two weeks and hope everybody is well and enjoy the decent weather.