LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay it is 9:02 by my official clock. Casey can you mute these lines. Thank you. Good morning everybody. Before we get started on substance, just a little bit about scheduling I wanted to mention. So this is the last telebrief in September. Normally we would have a telebrief on October the 9th, which is the second Wednesday in October but it is a holiday, a religious holiday, and I will not be around on October the 9th, and normally we would have a live presentation on October the 23rd which is the fourth Wednesday in October. I am going to be out of the country in a conference but I will prerecord the telebrief so there will be a telebrief on October the 23rd, and you will get emails reminding you of this by Casey, who is my very, very capable assistant in helping me out on these telebriefs. So again, before we get involved in the substance, no telebrief on October the 9th, you will get an email; and on October the 23rd there will be a telebrief, but it will be prerecorded probably a day or two before.

So in any event, on to the substance of which there is always a lot. And as I always say, up until the time we do these telebriefs, there is always news to report. So yesterday, the Department of Labor as I have been predicting for a long, long time as you know, put out its announcement regarding the revised overtime rule, and its public announcement stated as follows. Again this was just yesterday. Today the US Department of Labor, meaning yesterday, announced the final rule to make 1.3 million American workers eligible for overtime pay under the Fair Labor Standards Act. For the first time in over 15 years, American workers will have an update to overtime regulations. They will put overtime pay into the pockets of more than a million working Americans. Acting US Secretary of Labor Patrick Pizzella said, this rule brings a commonsense approach that offers consistency and certainty for employers as well as clarity and prosperity for American workers. It goes on to say the final rule updates the earnings thresholds necessary to exempt executive, administrative, or professional employees from the FLSA's minimum wage and overtime pay requirements, and allows employers to count a portion of certain bonuses or commissions towards meeting the salary level and these are the stated parameters. So, on the announcement you can see that the DOL states that it is raising the standard salary level from the currently enforced level of $455 per week to $684 per week, which is the equivalent $35,568 per year for a full year worker. Just my editorial comment I predicted a year ago that it would be in the neighborhood of $35,000, so I was off by $568. Secondly, the rule will raise the total annual compensation level for highly compensated employees from the currently enforced level of $100,000 to

$107,432 per year. Thirdly, it is allowing employers to use nondiscretionary bonuses, nondiscretionary bonuses and incentive payments including commissions that are paid at least annually to satisfy up to 10 percent of the standard salary level in recognition of evolving pay practices. The final rule so you know will go into effect January 1, 2020, so barring any litigation challenge to this DOL rule which is certainly possible, particularly by employee groups, because employee groups have been disappointed, as you know the salary level that was proposed under the Obama Administration was over $47,000 a year, A $12,000 shortage in their mind in the present rule. So it is very likely what seems to me that there may be some litigation challenge, but I do not think the litigation challenge will be successful. In my mind, both the procedure under which this rule was promulgated and the standard itself or the parameters themselves, I do think are reasonable. And the test under the administrative procedure act as to whether these will bear a successful challenge or not is whether the substance of the rule is deemed to be arbitrary or capricious, and I do not think that that is the case. They went through a state of methodology in coming up with this $35,500 and some dollar change. And I do not think that a court is going to overturn it at this point. I could be wrong, but I do not think litigation is going to be successful. So that being said, you only have really October, November and December to make sure that your pay practices are in compliance with the rule that will go into effect as of 1/1/20. That means that to need to identify which of your currently classified exempt employees are being paid less than the 35-5 salary level test. And if they are not, whether you want to give them raises to bring them up to that particular level or reclassify them as nonexempt employees and that is a big deal. Obviously reclassifying employees make them eligible for overtime but there is certainly a morale element to that. When you take an exempt employee or somebody who is currently classified as exempt and you remove that status from that exempt employee, that exempt employee is going to view it in my mind really as a demotion. So you have to be careful about that. The other thing about the new rule, and as I have stated in the past about this, they did not change the duties test. So keep in mind that in order for an employee to be properly classified as exempt, not only does the employee have to meet the salary, the new salary test, but also the duties test whether you classify that person as an executive administrative or professional employee, so a very significant development in yesterday's news coming out of the Department of Labor.

Another development coming out of or concerns with the Department of Labor also happened yesterday. So the Senate Health, Education Labor & Pensions Committee yesterday voted along party lines 12 to 11, republicans versus democrats, to recommend that Eugene Scalia be confirmed as the next Secretary of Labor in the Department of Labor. As you know, Eugene Scalia was nominated to take the place of Alex Acosta,

the prior Secretary of Labor, who was compelled to resign in the wake of the whole Geoffrey Epstein scandal. And as I reported I think in the last telebrief or may be the telebrief before that Eugene Scalia is at the present time a partner at Gibson Dunn & Crutcher, a very, very white shoe law firm in the District of Columbia and has devoted substantial part of his career to management side labor and employment law. The Democrats on the committee as well as labor groups have been very staunchly opposed to his nomination and confirmation on the viewpoint that he is much too aligned with employers and management side philosophy to be fair as the next Secretary of Labor. Nevertheless his nomination is going to go to the full Senate and, as you know, with the composition of the Senate being the way it is, I anticipate that his nomination will go through and that Eugene Scalia will be the next Secretary of Labor. What that portends for all of you and all employers remains to be seen. Sometimes when people are nominated into certain positions, what they actually do does not necessarily conform with their prior history or philosophy. So there have been many people that have been nominated to the Supreme Court only to disappoint the presidents who nominated them in terms of judicial philosophy. So we would not know until Scalia actually gets involved in the job, but if I had to predict I do not think that you will see anything radical in terms of his labor philosophy or some of the policies and rules and regulations that will come out of the Department of Labor.

Turning my attention to another federal agency, the Equal Employment Opportunity Commission, this is interesting. So, as you all know, in just five days you all have to have submitted your EEO-1 data for the past year as well as the Component 2 data for the past two years, which is the pay and hours data. Interestingly enough, the EEOC has stated now that it does not plan on renewing the collection of this pay data on a going forward basis. I am not sure exactly what the political infighting was at the Equal Employment Opportunity Commission, but it is basically stating that it wants to evaluate what it calls the utility or lack thereof in the data and also they really underestimated the financial cost that would be placed upon employers in order to comply with this requirement. So that they have stated that the agency said the costs for employers to submit both Component 1 and Component 2 data for 2017 and 2018 would be about $620 million for each year as compared with the approximately $54 million estimate that they originally came out with in imposing this Component 2 data. So, I bring this to your attention because I doubt that next year as of September 30th, you will have to report that component 2 data, but you do have to do it, if you have not done it in the next five days because September 30th is the deadline, so you need to get on the stick if you have not done it already. Whether the Equal Employment Opportunity Commission would pay any degree of attention to this data remains to be seen, and as I have stated with regard to the Department of Labor employee groups are up in arms about this. They see this as a

retrenchment on the part of the EEOC and sort of a turnaround from the original reasons for which this was proposed namely to ascertain and evaluate whether there are pay inequities throughout the country based either on gender or national origin etc, but it is a significant development within the Equal Employment Opportunity Commission. Secondly, within the EEOC, back in 2017, the Equal Employment Opportunity Commission sent to the Office of Management and Budget for final approval. A long sexual harassment guideline. It was 75 pages in length which would include the EEOC's legal interpretations of issues related to harassment, some practical examples outlining what the EEOC perceived to be unlawful workplace harassment, and a general advice for employers in order to comply with the latest developments in workplace harassment law. Again, that was two years ago, actually going on three now because it was submitted in January of 2017. The Office of Management and Budget is still sitting on it, and this is one time when I when I do think that it is not helpful for employers to sort of have this bollixed up in the administrative procedures and probably it is another indication or reflection of the Trump administration's negative attitude towards agency regulations of any kind. But I do think in this era of Metoo, etc., it would have been helpful to get some of this advice in black and white from Equal Employment Opportunity Commission, not necessarily because you would need to adhere to every example or to every philosophical viewpoint of the EEOC but some of it I am sure would be helpful to those of you out there who have these responsibilities on a daily basis and who struggle sometimes with what the EEOC would view as actionable harassment or not. So I do not know I cannot predict how long it will be stuck at the Office of Management Budget or if it will ever come out of the Office of Management Budget as a means of providing advice to employers. So, I will keep on top of it, but I wanted to let you know that it is still bollixed up, and I am not sure when or if it will ever come out.

I wanted to bring to your attention a decision in the Sixth Circuit, which has probably some value for those of you who have responsibilities in administering FMLA and particularly intermittent FMLA issues. So, this is a case that was decided a couple weeks ago in the Sixth Circuit of Appeals. It is called LaBelle v. Cleveland Cliffs, Inc. had to do was an employee who had shoulder issues and who requested the opportunity to take intermittent leave in order to deal with flare-ups of his shoulder condition and be able to use some intermittent leave for doctor's visits as well. What the company found after sort of viewing his attendance records and his patterns of absence was that this employee was using the so called intermittent leave to stack up with preplanned vacations and weekends off rather than really using it for it's intended purpose which was to use it for flare ups and what really turned the tide on this particular case and as the Sixth Circuit noted when the company believed that this person's intermittent leave was being abused they contracted with a

private investigator to take a look at what this guy was doing when he was off and lo and behold what they found was that on several occasions when he was supposed to be getting treatment or taking a respite because of exacerbations of his shoulder injury, he was indeed playing golf. So they wound up firing the guy. He files a lawsuit saying that company retaliated against him for having taken authorized FMLA leave. The Federal District Court judge granted the employer summary judgment. The employee appealed. It went up on appeal and the Sixth Circuit affirmed the dismissal of the complaint filed by this particular employee. Well, why do I bring this to your attention? I bring it to your attention because when you have employees that you suspect are abusing leave, you don't have to tolerate that and you can take affirmative actions whether that is contracting with a private investigator, looking at employee's social media posts. I can tell you that I have had clients who consulted with me over the years where we have just looked on somebody's Facebook page and somebody who was allegedly out on an authorized FMLA absence is indeed showing himself or herself on a Facebook page engaged in activities which would be antithetical to an authorized FMLA leave and courts get very annoyed with employees who misrepresent their need to take FMLA leave when in fact they are doing things which are certainly contrary to and not consistent with the need to take such leave and this Sixth Circuit decision is certainly in keeping with decisions around the country where courts routinely will countenance and will condone the use of private investigators in order to demonstrate that authorized leave taken by an employee is being taken inconsistent with the purpose of the particular leave in the first place.

The last thing I wanted to mention, because we have talked about arbitration that is used many times by employers as an alternative to judicial litigation, the Second Circuit just ruled about a week and a half ago in a case involving Citi Group that a financial adviser who had sued them under theories of discrimination as well as other causes of action was compelled to arbitrate her dispute as opposed to submitting it to judicial litigation. This is in keeping with actually the Supreme Court's decision earlier this year in a case called Epic Systems in which the Supreme Court condoned and encouraged the use of arbitration under the Federal Arbitration Act to resolve disputes through arbitration as opposed to judicial litigation. And those of you out there who are contemplating the use of arbitration as a dispute mechanism I encourage you to think very seriously about whether you want to do that and if you are gonna do that it really should be reviewed by an employment attorney to make sure that all the procedural safeguards are in place. So that if you are seeking to compel arbitration of a workplace dispute that a court will view it as a fair and a consistent dispute mechanism as opposed to something that was foisted upon an employee or candidate for employment where there is nothing fair or there is a great deal of unfairness about the process or

procedure. So, if you have a procedure or you are contemplating the use of a procedure make sure that a good employment attorney takes a look at procedure to make sure that it would pass muster under judicial scrutiny.

Okay those are the developments for the day Casey can you take this off mute.

Any questions from people out there on any of the stuff I have covered.

Nancy: Thank you. Yes Howard it's Nancy.

Howard Kurman: Hey. How are you?

Nancy: Okay, just wanted to ask about the submission of the EEOC report where you were referencing the pay so really what you were saying it's likely that if they are saying now that they are not going to be using that report moving forward that we should probably just plan to do the normal report back in May and that filing when we really need to be concerned about.

Howard Kurman: Yeah Nancy, I think I think that you are spot on. You know, there are two things I will comment on, one is, I am really speculative at this point as to what if anything they are going to do right now with the component 2 data. My gut tells me that there is not going to be a lot that comes out of that at the Equal Employment Opportunity Commission and secondly I think you are correct that you can probably assume that the only thing that you will have to do next year is the same thing that you have been doing for years which is the component one data and not component two.

Nancy: Okay great thank you.

Howard Kurman: Sure any other questions. Okay well if not, you know, I apologize in advance for my absence on October 9 and the fact that I will not be live, some people have accused me of not being alive anyway but not being live on the 23rd but I can guarantee you there will be plenty to report on the 23rd if you want to tune in, but I will be live in November. I will return from the dead in November, so everybody take care have a good rest of the week and we will talk soon.

[_____]: Enjoy then.

[_____]: Thank you.

[_____]: Happy New Year.

Howard Kurman: Thank you bye-bye.