LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Good morning everybody. Again it is hard to believe spring is here with all the weather we have had but we will get started and as always plenty to report on. Those of you out there who have 100 or more employees know that as of March 31st, it's just a few days away, you need to file your EEO-1 report. You know that under Obama in 2016, the Equal Employment Opportunity Commission announced that there would be additional information that would be required in addition to the information on race and ethnicity and the sex of workers by category. Those additional regulations were put on hold, so you don't need to include that information in your EEO-1 report, but the change of the reporting period went from July 1st to September the 30th to October 1st to December 31st of 2017. So those of you who have a 100 or more employees will need to include your data from October, November and December of 2017. Again this only applies to those of you out there who have a 100 or more employees, but just a reminder you have got to get it in in the next few days.

Talking about some EEO kinds of developments, just Monday Uber agreed to pay a settlement of $10,000,000 for claims that were made in a law suit originally filed in California State Court then removed to Federal Court and the gist of the claims was that under Uber's performance evaluation system their females were ranked lower and therefore got lower pay increases and according to the lawsuit and I will quote, it said, "In this system, female employees and employees of color are systematically undervalued compared to their male and white or Asian American peers, because female employees and employees of color receive on average lower rankings despite equal or better performance." That was in the lawsuit. So I just bring it up. Obviously $10,000,000 is a heck of a lot of money and I am not saying that you all would face that kind of liability, but I do think it is a instructive kind of theme because it tells you that if you are using performance evaluations make sure that they are objective and make sure that there aren't inbred biases and if you need a compensation expert or somebody who deals in performance evaluations and can advise you on that, that would be useful if you haven't taken a look at your performance evaluation system in a long time, the last thing you want is to be accused of having a performance evaluation system that has either expressed or implied biases in favor of males or Caucasians.

Talking about the Equal Employment Opportunity Commission, last Monday President Trump announced that he was going to nominate a new

general council to the Equal Employment Opportunity Commission. The new general council is a woman named Sharon Gustafson. She actually argued a Supreme Court case involving UPS last year in the last term of the Supreme Court having to do with pregnancy discrimination. She has got an interesting background. She started her career at Jones Day which is a very large law firm and she was a management attorney at that point until she went into private practice in 1996 and she basically handled cases in the geographical region extending from Virginia and Maryland and Washington and handled both employer and employee cases, kind of unusual mix, of course most employment attorneys aren't really on both sides of the fence but she was and out of general council that you would see for the Equal Employment Opportunity Commission it is probably kind of rare when somebody has any kind of conservative bent to him or her. And the reason that I think its significant is general council for the Equal Employment Opportunity Commission like the general council at the National Labor Relations Board has a lot of discretion in what cases to prosecute, what causes to prosecute, so I think that probably for you all, for employers it's a rather good pick, the general council that existed under the Obama administration was a much more employee oriented person, his name was David Lopez and he was much more prone to employee kind of biases then I think this new general council will be. I think it's a good thing for employers and I think that given the fact that the Equal Employment Opportunity Commission will have a republican majority of commissioners along with somewhat of a more conservative general council that bodes well for employers. Of course that does not mean that there won't be problems for employers in the future or that the Equal Employment Opportunity Commission will stand down from its strategic plan of bringing class wide litigation where they see any kind of biases on a more class wide as opposed to individual basis, but I think it's a little more favorable for employers.

By the same token on April 9th, coming up in a week and half or so, the senate will vote on the new nominee to the National Labor Relations Board fill in by the name of John Ring. I mentioned this in a prior telebrief, Mr. Ring is a, or has a background as a management labor and employment attorney. He will be confirmed, I am sure in the republican controlled senate and if he does the republicans once again will have a 3:2 majority on the National Labor Relations Board and of course as a republican majority many of the decisions of the Obama administration, some of the more probably liberal and extreme cases in my opinion will either be modified or perhaps even overturned along the lines that the case of Boeing Company, I may have reported on this back in December. The Boeing Company case was a National Labor Relations Board case in December where they overturned a prior decision in a case called Lutheran Village. The reason I bring this up is many of you maybe in the process of amending or modifying your handbooks either now or

sometime during the year in 2018. Back under the Obama administration, the general rules under Lutheran Village for interpreting employer policies was that if anything, any policy could be deemed to be in the least bit intrusive of either actual or theoretical rights of employees to engage in what was called Section 7 protected activity. That policy was deemed to be violative of the National Labor Relations Act. Again, and I know I have spoken about this numerous times in the past, but under the National Labor Relations Act Section 7 says that employees have the right to band together in collective action for purposes of discussing or promoting commonality in working conditions or terms and conditions of employment, that is right in the National Labor Relations Act, and under Obama, we saw that there were many policies that came to the scrutiny of the National Labor Relations Board in which they basically said, if there was any way or any chance that they could impede or in anyway be a detriment to the rights of employees to engage in these activities, they found the employer guilty of an unfair labor practice. Under the Boeing case, which was decided at the end of December, essentially the labor board overturned Lutheran Village and went to attest which now basically says that the board will balance the interest or the intrusiveness of any particular policy on the employees with the legitimate business interest which has been promulgated or articulated in the policy that is communicated to the employees by an employer. It is a much more employer friendly test and would basically say that, look, if you have a handbook policy or standalone policy and if there is a charge that that particular policy violates provisions of Section 7 of the National Labor Relations Act, the board will take a look at the policy and it will go down to sort of separate prongs. Prong one is, does it really intrude on the Section 7 rights of the employee, and two, which is the business justification, which is advanced by the employer, in communicating this policy to employees. So those of you who heretofore may have amended your handbook or your policies to take into account sort of the Obama administration's proclivity to find any kind policy violative of Section 7 may be in a better situation right now and I would be glad to help you out on that, but it is a much more favorable test and I bring it to your attention because I know companies frequently take a look at their handbooks during the year and I do not want you to be overly skittish now about your policies, particularly in view of the fact that the labor board has certainly liberalized those tests that will be utilized in assessing the propriety of any particular policy. While we are talking about the National Labor Relations Board, I just wanted to let you know that, as you know, the Congress passed last week the 1.3 trillion dollar spending bill, and it was thought prior to this that the budgets of the National Labor Relations Board and the Department of Labor would be significantly cut under prior Trump proposals. Fact of the matter is that neither the Department of Labor nor the NLRB had their budgets cut. In the NLRB's case, they received the same amount of funding for this upcoming budget year than it did in 2017

and actually the Department of Labor received more money than it had in 2017. So that frankly, you know, any hopes that well maybe enforcement actions would be somewhat slower at both the National Labor Relations Board level and the Department of Labor level because they may not have the adequate fund to it to engage in enforcement actions probably misplaced. Does it mean that you as employers will face significant enforcement activities, but it does mean that from a budgetary standpoint under the new spending bill they will not undergo budget cuts as may have been proposed months ago when Trump first took office.

I wanted to mention a very recent case, February 22nd this came out. This is in the federal court in southern district of California, case called Ruis v. Paradigm Works Group. The reason I bring this up is because it really deals with an issue that I know I have spoken about before in telebriefs, that is whether an employer is required to continually extend a medical leave of absence where that employee is really totally disabled and is unable to provide evidence or documentation as to when that employee may be able to return to work. In this particular case, the plaintiff had an accident at home. She was granted three consecutive leaves of absence that totaled 14 weeks, which of course is longer than the 12 weeks under the Family Medical Leave Act. She then requested that her employer give her an additional six weeks of leave, but she could not supply or furnish any return to work date. And what happened was the company denied that request, terminated her, and of course, she subsequently filed suit, which made its way first into state court and then was removed to federal court in California. As the court stated in its decision, there was "no dispute" that in this particular case, the plaintiff was totally disabled and "no accommodation would have allowed her to perform her job." So, they dismissed the case and I know I have mentioned this in the past, but it certainly bears mentioning again, those of you who grant medical leaves of absence either under an independent leave policy or the Family Medical Leave Act, certainly, if an employee is coming up on his or her 12 weeks of protected leave and then requests an extension, you may or may not be obligated to do that depending on whether the extension is reasonable. For instance, may be it is a week or two, and there is medical information that says at the end of that very short extension, the employee will able to perform the essential functions of the job. On the other hand, you may have a request for an indefinite extension where you may have medical information, which indicates that the employee may or may not be able to return to work at the end of that particular request, and in those situations you would be within your rights, either under state law or under federal law, to terminate the employee on the basis that either the accommodation that is being requested is unreasonable or that the employee would be unable to perform the essential functions of the job even at the end of such requested extension. So, I bring that up to you because I know that frequently you get requests for extensions of time for those people who are

out on medical leave and I think obviously you look at these on an individual basis, but the factors to consider certainly are one with the medical information that's being submitted. You also have the right, as you probably know, to seek more specific medical information, if the information that you get is indefinite or it's vague or unclear, as frequently medical documents on behalf of an employee are; and under either the FMLA or the Americans with Disabilities Act, you do have the right to ask for more definite information.

I also wanted to mention a case that got some notoriety recently in New York Times and elsewhere. This was a lawsuit that was filed in New York by this fellow James Levine, he actually was the conductor in the New York Metropolitan Opera and he was fired over claims that indicated that he had molested young musicians during his tenure. He turned around oddly and he sued the New York Metropolitan Opera last week on the basis that when they did the investigation it was really just a pretext to fire him and that the investigation was incomplete because, A, they did not give him, in his opinion anyway according to lawsuit, an opportunity to rebut the allegations against him and that from his allegation in the complaint it looks like the New York Metropolitan Opera promised his accusers anonymity. The reason I bring this up is because it is sort of the flipside of the coin that I've spoken about so often in the past regarding cases of workplace and sexual harassment and investigations. Obviously you need to thoroughly investigate the allegations that may come to your attention. On the other hand, concepts of due process are important as well and certainly you want to be in a position making sure that you thoroughly promptly and objectively investigate any kind of claim, but you also want to be in a position of defending your investigation on the basis that you gave the alleged perpetrator due process rights, in the sense that you've defined with specificity the allegations that have been made against him or her, and you certainly should not be in a position in all cases of promising anonymity of the allegations and where they emanated from. You may or may not be able to protect anonymity, but you really can't guarantee anonymity in all cases because investigations take different turns, and I think that they are individualistic is nature. And just as though you need to thoroughly investigate allegations that are made by a complaining witness and any other corroborating witnesses, you need to make sure that when you're speaking to the alleged perpetrator that you give him or her, you know, a full explanation of the specific allegations that have been made against him or her as a perpetrator. So, we will follow this lawsuit. It's an interesting twist and it's gotten great notoriety in the New York media, so we will see where that goes.

And the last thing I wanted to mention, it's almost comical, but it emanates from New York, and there was a New York City Councilman named Rafael Espinal who introduced legislation last week. It's called

Introduction 726, it's a bill, and it would apply to employers in New York with at least 10 workers and would require employers to notify new employees at hiring and incumbent employees within 30 days from the time that the law would go into effect, that employers cannot compel employees to answer telephone calls or texts or emails after their normal work day or when they are on paid leave, except in the cases of an emergency and there are proposed fines of $250 per violation. I know that we've spoken about from time to time from under a Fair Labor Standards Act, the issue for nonexempt employees whether you would need to pay employees for answering texts and emails. This takes it to another level and actually would fine employers for requiring employees to do that. I doubt that it will be enacted, but I wanted to mention it to you while we're talking about New York.

Okay, those are the developments of the day. Michelle, can you take this off of mute? Okay, as always any questions or comments, I would be happy to address either in this forum or in a private forum, either my email hkurman@offitkurman.com or my phone number 410-209-6417. Any questions?

Connie: Hi Howard. This is Connie.

Howard Kurman: Hi Connie.

Connie: How are you?

Howard Kurman: Good.

Connie: Going back to Uber settlement…

Howard Kurman: Yeah.

Connie: Were there specifics in the performance evaluation that pointed to how the females and employees of color were ranked lower than others.

Howard Kurman: Yeah, I don't… yeah I don't know the specifics Connie about the particular performance evaluation, the clear inference from the settlement, and of course there are probably a lot of confidential elements to that settlement, is that when supervisors and managers rank the employees there was a statistical bias in favor of male employees and Caucasian employees as to their performance rating as opposed to female employees. How that bias actually was manifested I'm not sure, I could probably check into it, but it may be confidential as well, but the clear implication is that the performance system itself was weighted heavily in favor of males and Caucasians. I could probably find out some more information for you about it.

Connie: Thank you.

Howard Kurman: Sure.

Connie: Thank you.

Howard Kurman: Sure, sure. Okay, well if no other questions or comments, appreciate your time and attention. Hope everybody has a good Passover and/or Easter, and we will talk again in April. Thanks very much.