LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, well. Good morning everybody. This is the second telebrief in July, the last telebrief in July and as you know we do them on the second and fourth Wednesday, so at least by my calender, the first telebrief in August will be Wednesday, August 8th. I want to apologize, I know, at the end of the last telebrief had somewhat of a technology issue and I think a lot of you heard music playing, so, I'm not sure what was going on, hopefully it won't be repeated. Okay, as always there is a bunch of stuff to report on. I think in either the last telebrief or the one before that I indicated that the Department of Labor was in the process of rescinding what was highly criticized under the Obama administration as the Persuader Rule. Again just a short summary of the Persuader Rule is that under the Federal Landrum–Griffin Act, it is also know as the Labor Management Reporting and Disclosure Act of 1959. For 15 plus years employers, companies could utilize the services of labor relations consultants and attorneys in the face of union organization campaigns without having to report that to the Department of Labor or anyone else as long as those consultants or attorneys did not meet face to face with employees. So the people like you HR executives, whatever, could consult with employment attorneys or labor consultants in the midst of any kind of a labor organization campaign without having to report that to the Department of Labor. In May of 2016, under the Obama administration, they did a 180 on that particular rule and they said that henceforth if employers or companies, HR executives engage the services of a labor attorney or an outside consultant in order to fashion a campaign or consult on an anti-union campaign, the employer was under an obligation as was the consultant and attorney to make detailed reports to the Department of Labor concerning the financial arrangements that were undertaken as well as the nature of the engagement. That was immediately attacked. Even the American Bar Association attacked that rule on the basis that it invaded attorney-client privilege and that it also intruded upon the First Amendment Rights of companies and so it was severely attacked. It was attacked in court and a Federal Court in Texas actually issued an injunction prohibiting the enforcement of that rule. Lo and behold Trump is elected president, we have a new Department of Labor at least at the top and so a week ago, on July 17th, the Department of Labor issued a very formal press release formally rescinding the Obama 2016 final rule and I will just read to you from their publication, so the Department of Labor Rule, the Persuader Rule impinged on attorney-client privilege by requiring confidential information to be part of disclosures and was strongly condemned by many stake holders including the American Bar

Association. The Federal Court, that's the one I talked about, in Texas, has ruled that the Persuader Rule was incompatible with the law and client confidentiality. For decades the department enforced an easy to understand regulation. Personal interactions with employees done by employer's consultants triggered reporting obligations, but advice between a client and attorney did not. By rescinding this rule the department stands up for the rights of Americans to ask a question of their attorney without mandated disclosure to the government. So those of you who unfortunately in the future may face union organization campaigns at least can do so knowing that you can engage the services of labor attorney or outside labor consultant without making reports to the Department of Labor as long as those consultants or labor attorney do not meet face to face with your employees.

Okay, another indication of sort of the outgrowth of the Me Too Movement was that just a week ago on July 17th, there was a bipartisan group of house congressman both republicans and democrats who introduced a bill which is entitled the Ending the Monopoly of Power over Workplace harassment through Education and Reporting act, the so-called EMPOWER Act. An editorial comment how congressman and women come up with these names is beyond me, but it really is an outgrowth of the Me Too Movement and includes several substantive provisions, which enacted again would place restrictions and obligations on employers as an outgrowth of the whole anti-harassment movement and by the way there was a similar act that was introduced into the senate as well. In this particular legislation has a lot of substantive components to it, first it would make it unlawful for an employer to include any kind of a non-disparagement or nondisclosure clause that would cover instances of harassment including sexual harassment in the work place. Pretty complicated provision, but I'm just sort of summarizing these to you. The protections in addition to covering employees would cover job applicants and independent contractors, temporary workers and interestingly volunteers as well. The legislation would include a confidential tip line that covered employees could use to report violations of the Act to the Equal Employment Opportunity Commission. Thirdly, this legislation would mandate the public companies, make certain disclosures regarding harassment settlements or judgments in their annual SEC filings. Now you know on prior telebriefs I have talked to you about a Maryland statute which is scheduled to go into effect as of this October 1st mandating that by 2020 employers engage in reporting to the Maryland Commission on Civil Rights, any settlement in the harassment field. So this is an analog to this state statute on the Federal side. It also would, this federal statute if enacted, would also require the EEOC to develop anti-harassment training materials as well as a public service advertisement campaign to disseminate these training materials to employers. Whether or not this particular statute will gain traction, sort of anybody's guess, but if for

instance the House of Representatives in the mid-term elections goes democratic, it would even seem to me to have a better chance of passing than it does right now and again this was a bipartisan introduction of legislation, so it is probably safe to say that some offshoot of this will go into effect at sometime in the next year or so.

Okay, couple of interesting developments from a case standpoint. Just a week ago, on July 17th, the Sixth Circuit, the Federal Sixth Circuit dealt with a case involving the termination of an employee who was out on leave or working part-time as opposed to full-time. This is a case called Hosttetler v. College of Wooster, and briefly in this case what happened was the employee Hosttetler worked interestingly enough as an HR generalist and she went out on maternity leave. She gave birth to a child and after giving birth to her child she experienced postpartum depression and separation anxiety. Her physician recommended that she work a reduced schedule and therefore recommended that the employee, the HR generalist return to work on a part-time basis as he called for the foreseeable future. The employer allowed that for two months and then stated that it was unable to return her in a full-time position and terminated her. She wound up suing under the Americans with Disabilities Act, and the District Court, the trial court granted the employer summary judgment holding that she was not a qualified individual with a disability because she could not work full-time and full-time was an essential function of her position. Case went up to appeal. The plaintiff appealed it and it went up to the Sixth Circuit and just last week in a published decision, the Sixth Circuit reversed the lower court decision. First they decided that the employee separation anxiety and depression constituted a disability under the ADA. More significantly, the court went on and it said that while the job description of the employer stated that the employee needed to work full-time as an essential function that the evidence was in conflict regarding whether or not this employee was able to accomplish her task working at least temporarily on a part-time basis, and therefore, it reversed the decision of summary judgment and sent the case back to the trial court for determination of whether or not really the employee could be accommodated by working part-time at least for the foreseeable future. I think the takeaway for you all in dealing with leave issues and accommodation issues is that the mere fact that your job descriptions may state that an employee must work as an essential function full-time or be on-site full-time, is probably a necessary but not necessarily a sufficient predicate in terms of your actual requirements for a particular employee who is out on leave. And it points all the more importantly I think to the fact that these things have to be decided on a case-by-case basis, and so I have always indicated that job descriptions are important and you really should in appropriate cases make clear that an employee needs to be on-site and needs to work full-time as an essential function. When you have an employee who is out on leave and either the FMLA leave has expired

or you are dealing with someone who is out on an ADA leave and you are looking at additional time off, it behooves you to look at these on an individual basis and determine, do you in fact need to make the case that the employee needs to be on-site or that as an essential function of the job needs to work full-time, and I think while the Sixth Circuit does not necessarily bind you all, remember we are in the Fourth Circuit. It is an indication that under leave law that you need to make clear that there be an individual interactive analysis between the employee and the employer regarding what are the essential functions of the job, what is the burden that is placed on the employer by virtue of their request to work either part-time or off-site, and while we are talking about leave, I want to make sure that hopefully your leave policies indicate that an employee will be mandated to use paid time off, whether it is PTO, vacation, sick days, when they are out on leave. So, you want to make co-terminus, the amount of the leave that the employee has in the paid bank along with FMLA leave or ADA leave as well. I mean the last thing you want is an employee coming back from leave and saying, "Well, now I need to take a vacation because it has been so stressful being on leave." And again, another issue with regard to leave is the interactive process, now I have talked about this frequently, which is the need to document the interactive process, so it is not sufficient really in today's day and age simply to have verbal interactions and verbal exchanges with an employee who may be out regarding the need for some sort of accommodation or even an applicant for a job. You really need to document that because frankly there are more cases today having to deal with violations of the so-called interactive obligation than there are on determinations of whether something is or is not a disability under the ADA. The standards under the federal statute are very liberal with regard to what is or is not a disability with most cases deciding that things are in fact a disability and we saw in this Sixth Circuit case basically the decision by the Sixth Circuit in stating that separation anxiety and depression are in fact considered to be disabilities under the ADA. So, a lot of stuff happening with regard to leaves and disability and I encourage you to look at these on an individual basis if you get involved in these decisions.

I have gotten a few questions from clients in the last few weeks about non-competes in terms of how long should you go in terms of imposing a non-compete on employee to make it enforceable. While there is no black or white issue, I would say that there are certain rules of thumb that I generally use and if you are imposing a non-compete either on an applicant or an existing employee, I think it is very seldom when you would go past the two-year mark, and frankly, I think that that is on the outer bounds of enforceability. You can enforce them up to two years, but generally, my rule of thumb is if you can stick to a year, I think it is much more palatable to a court than two years, and frankly, my point of view is that if you could keep an employee off the shelf for a year, I think that you

have gained everything that you need to gain and anything beyond the year is probably surplus. So if you had to ask me for my preference, I would say probably stick to a 12-month non-compete although you can probably go two years on the sort of liberal side but that is stretching it. In terms of the geographical boundaries along with the time restrictions, you really should not restrict the ex-employee to an area that is anymore extensive than where the company actually does business geographically or where the employee had duties and obligations as an employee when he was employed. So for instance, if you had an employee whose territory as a salesperson was Maryland and you are seeking to enforce a non-compete which is the whole east coast or the whole country, I think that you have probably overextended yourself in terms of the enforceability of that. Generally, courts are going to say that they do not want to enforce the non-compete geographically to any area which is any wider than where the employee and the company were doing business during the time that the employee was part of your employment. So again, these things are termed on an individual basis, but if you are seeking to enforce or write non-competes, keep that in mind.

I had a question from a client about two weeks ago about the so-called zero tolerance that you would have in a harassment policy and how that interacts really with what I have talked about before, which is the nuances that are indicative of a good enforcement of a workplace harassment policy. And so what I mean by that is the mere fact that your harassment policy states that it is zero tolerance does not mean that in every case zero tolerance means that if an employee has acted inappropriately that you must by force of nature terminate that employee, that is not what zero tolerance means. Zero tolerance really means that you have zero tolerance for inappropriate conduct in the workplace, but if you have inappropriate conduct, there is a gradation within which you are going to discipline the offender assuming that you find that there has been inappropriate conduct that has taken place, that begs the question of whether or not you have done an adequate workplace investigation, and just last week, one of the EEOCs commissioners, Chai Feldblum is her name, stated "A lot of people like to use the term zero-tolerance policy. What we like about that term is that it communicates that there will be zero tolerance for any form of unwelcome behavior in the workplace. The whole point is that you're nipping bad behavior in the bud. An employee should understand that it does not mean that every type of conduct results in the same consequence, for example, termination." And that simply is a supporting statement from one of the EEOC commissioners along the lines that I have stated for a long time which is that you need to look at these things individually and I think that it is important to understand that there are due process rights that need to be imported to the alleged defender and the investigation needs to be objective and then if you conclude that inappropriate conduct has taken place, zero tolerance does not mean capital punishment in all

cases, it means that the so-called punishment must meet the crime. The last thing I want to talk about in connection with that is your employment practices liability polices, got a couple of questions from clients on that and I will just point out a couple of things to you as you look at your or have your risk management team look at your policy for employment practices liability. Just a few things, before we end this morning. First, make sure your policy limits are adequate. I think it is more important today that your policy limits be adequate and I would trade a larger deductible for larger policy limits, because I believe that your policy limits are indicative of the need to sort of have your catastrophic coverage. So in today's day and age make sure that your policy limits are high, even if it means that you have a higher deductible under your EPLI policy. Secondly, look at your consent to settle provisions in your EPLI policy. So all policies have provisions on what you need to do when you are considering the settlement of a case. They all probably require you to notify your EPLI carrier. These clauses vary in their content, you need to take a good look at that because if you settle without the appropriate consent of your carrier, you can jeopardise not only your coverage, but your finances as well. Make sure also that even though most EPLI policies do not cover claims under wage and hour acts, many of them today will cover defense costs under wage and hour claims or charges, so take a look at that and preferably your policy will include that and lastly make sure that the definition of your employees will include not only your regular employees, but your volunteers, your temporary and seasonal employees, as well as independent contractors. So these are all the things that you want to pay attention to or at least have your risk management people pay attention to in analyzing your EPLI policies.

Okay, so, those are the developments of the day. Michelle, can you take this off of mute? Alright. As always I invite any questions or comments and I'm happy to do that, either in this forum or if anybody has a personal question, you can get in touch with by my email at hkurman@offitkurman.com. Okay, any questions, comments?

Carole Duvall: Howard, this is Carole Duvall. In the last comment about the EPI insurance, would you also include the interns?

Howard Kurman: I would, absolutely.

Carole Duvall: Thank you.

Howard Kurman: I mean, you want to make coverage as broad as you possibly can and your broker should take care of that for you.

Carole Duvall: Okay, thanks.

Howard Kurman: Sure, any other questions. Okay, well if not I hope everybody has a good next two weeks and as I stated the first telebrief in August will be Wednesday, August 8th. So, thanks every body.