LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, it is 9:02 by my official clock, so we are going to get started. Sheila, would you put the phones on mute please. All right, good morning everybody, just a logistical announcement, the next telebrief will not be held. It would have normally been, I think, October 24th. I am going to be out of the country for two weeks, sort of a combination of business trip and vacation and it will not be pre-recorded, so October 24th no telebrief. So the first telebrief or the next one would be the second Wednesday in November. I apologize, but you guys will just have to do without me in two weeks.

Alright, so, lets get on to the substantive stuff. One, beside all of the political brouhaha that happened with the Kavanaugh conformation hearing which in and of itself from an employment law standpoint I view it as a real travesty without any political comment one way or another, it was not done in a very judicious and judicial way, but Kavanaugh is now in the Supreme Court and we will have employment cases coming up before the Supreme Court and it is no secret that there will be probably five conservative justices now in the court four liberal justices and as you know in many employment cases it really does come down to a conservative/liberal split. So, I think that you can at least predict with some degree of accuracy that the employment cases, that come up whether they are traditional labor cases, may be coming from appeals from the National Labor Relations Board or administrative or judicial cases coming from the world of Equal Employment Opportunity Commission etc., very likely in my opinion would be decided 5:4 in favor of companies and employers as opposed to employees. I don't know if that would be universally true, but as a betting person, I think you can safely assume that in close cases and in the employment realm you will have a 5:4 majority for many years to come on the Supreme Court. Speaking of the Equal Employment Opportunity Commission, the fallout from the Me Too Movement just keeps coming and coming and coming and I would point out to you that there was an article posted on Law360 which I do get everyday, probably most of you would not get and its an article that was dated October 5th and I would like to go over certain porions of it because I think it is relevant to where you are from a policy standpoint and a training standpoint, so it says a year after the Harvey Weinstein scandal, galvanized the Me Too Movement and pushed sexual harassment into the national spotlight, acting EEOC chair Victoria Lipnic told Law360 that the ensuing increase in workers stepping forward to report claims isn't likely to slow down anytime soon. It goes on to say when the New York Times published its initial report on October 5, 2017 alleging Weinstein engaged

in a decade's long pattern of sexual misconduct, few knew that it would be the catalyst for people nationwide who are victims of sexual harassment and abuse to publicly share their experiences which they did en masse under the Me Too Hashtag. Then it goes on to say speaking to Law360 on October 3rd Lipnic again, she is in a very high position, she is the chair of the EEOC said that sexual harassment has long been a problem and that the allegations against the one time Hollywood mogul uncovered what has been there all along. She said I would like to say I date my life now, pre-Harvey Weinstein and post-Harvey Weinstein. Adding that a year after the New York Times report, the topic of sexual harassment and the public reckoning with it has not abated and I don't think it will for a while. The article goes on to say those comments by the EEOC's acting chair came on the eve of the EEOC releasing preliminary data and statistics about work place harassment for the 2018 fiscal year which ended September 30 and roughly tracked the Weinstein saga in the burgeoning Me Too Movement. Those numbers showed a 12% increase in a number of sexual harassment complaints, the agency has fielded in the years since the Weinstein scandal broke the first time this decade that the EEOC has seen any increase at all in such changes. Other interesting aspects in this article are the following "from her while there may always be some natural variant, we believe the EEOC will continue to see charge filing alleging sexual harassment at this level for the coming year. Some state and local agencies she said who also receive harassment charges has seen significant increases, even if only a fraction of these people file formal charges with the EEOC the flow will continue". It goes on to say that on the harassment prevention side of the ledger, one of the EEOC's initiatives over the past year was to implement two newly developed respectful workplace training seminars for supervisors and employees which are conducted by EEOC training staff and were based on the recommendations contained in the 2016 anti-harassment report. She said demand has been high for these training and it said according to data released by the EEOC this was last Thursday about 9000 individuals have taken part in those trainings over the past year as have the agencies own senior staff and another 13000 workers also took part in the EEOC's anti-harassment compliance training. The problem with this by the way from an editorial standpoint, is there is a huge backlog on getting this harassment training even though it does not cost anything. Its really over probably a year and half, so if you are counting on using the EEOC to do your workplace training its probably not going to be timely and as I always say and as the EEOC recommended in its compliance report 2016 you really need personal training as opposed to employees just watching videos or getting handouts on work place harassment. Other statistics which I think bear on this issue is that along with this report the EEOC said it filed 66 harassment lawsuits in fiscal 2018 which of course descended of which 41 contained allegations of sexual harassment and in these particular lawsuits and others the EEOC recovered about $70 million for sexual harassment victims in fiscal 2018

compared with only $47 million in fiscal 2017. Finally as part of this report, just so you know the EEOC created a harassment prevention action team to "provide internal coordination on harassment effort across the agencies, offices and programs" and it indicated that the EEOC plans to implement a new training program for all EEOC investigators using a "cognitive interviewing approach" whatever that means, I'm not sure what it means, but I think the take away from Lipnic's report and her interview that I quoted from is that this is not an issue that is going away anytime soon and again harkening back frankly to the confirmation hearings for Judge now Justice Kavanaugh, you can see that it is top of mind in many different context. And so while its nice that the EEOC is offering free training for companies, again because of their re huge backlog and any of you who have any charges that have been filed may see that some of these charges sit through very long period of time without the EEOC doing anything. Because I think of the importance of training at least on some regular basis may be once a year, may be once every 18 months, if you haven't scheduled your employees and your management staff to be trained, I think it is a good time to do that coming into the end of the year. So whether you do it sort of at the end of the year or whether you do it at the beginning of the year, I think its time to do it and as I have said in prior telebriefs one of the things I always recommend to clients and I am pretty sure I said this before is have your CEO publish on an annual basis, I usually have clients do it at the beginning of the calendar year, have your CEOs publish a restatement of the importance of your workplace harassment and discrimination policy. Generally you can append a copy of that policy to the CEOs letter which should go to all employes, shouldn't be any longer than one page, nobody is going to read it if it is longer than a page and I think that it serves many different purposes all useful whether it is adding a layer of protection in case you do get a charge or from a altruistic standpoint because it's the right thing to do, so think about getting your CEO or top level executive to do that either at the end of the year or the beginning of 2019.

Okay, turning to a few different other things. Had a client the other day who really asked me the difference between an offer letter and an employment agreement, and its not as simplistic as you would think, but many of you utilize offer letters and of course some of you use employment agreements for higher level executives. There is a distinct difference between the offer letter and the employment agreement. Typically an offer letter is going to only have the broad parameters in a letter sort of, you know, the welcoming of the candidate into your company, the position that the person will occupy a little bit about typical hours and most important frankly two things, one that it is usually stated in an offer letter that it is a contingent offer predicated upon a successful background check and any other kinds of conditions that you may have with regard to a particular job including a post offer physical examination

and the other critical component of an offer letter would be a restatement of your employment at will policy. So it is not sufficient simply to have it in you handbook, your offer letter should restate the employment at will policy that is applicable to all employees with the exception obviously of those employees or higher level executives who have employment agreement under which the employee may be employed not subject to employment at will but where there may be termination clauses without cause and termination clauses with cause. So there are distinctive differences really between an employment agreement which tends to be much more detailed and longer and an offer letter which is probably one or at most two pages but which also should state unequivocally that employment at your company is employment at will.

Okay, another very recent case restates a doctrine that I stated previously in telebriefs. This is a case called Easter versus Arkansas Children's Hospital. It was a case decided by the Eastern Federal Court, Eastern District of Arkansas, October 3, 2018, and in this case an employee who was employed as a nurse was unable to return to work following the exhaustion of her FMLA leave and what happened was from a factual standpoint the plaintiff in this case was a specialty nurse, and as part of her job duties she was obligated to speak telephonically with patients and insurance companies and doctors, and she eventually developed a medical condition with her esophagus, which affected her speaking ability. So, she went out on FMLA leave and after a period of time on the FMLA leave, her physician sent the hospital a note which indicated that she would be unable to perform her current line of work for an indefinite amount of time. She completed the FMLA leave and then she requested that her leave be extended because she had an appointment with the physician in 20 days to determine whether she would be able to return to work, and so she requested additional leave on top of the extinguished FMLA leave. The hospital in which she was employed denied the request and terminated her employment. She sued and complained that, of course, she was being discriminated against under the FMLA and retaliated against and also claimed ADA violations for failure to accommodate her disability. The Federal Court disagreed and said that the most recent medical information that the hospital had was that she would be unable to work for an indefinite period of time and as opposed to a finite period, let us say, if she had said I need one week, extend my FMLA, or I need to come back in two to three weeks something like that, the court made it a point of distinguishing between a finite extension and the indefinite request for extension of leave, which would not be viewed as a reasonable accommodation. The decision by the Federal Court in Arkansas is certainly not an outlier. You see this over and over both at the Federal District Court level and at the circuit court level of appeals and it is a commonsensical kind of a doctrine which says that, yes, there are occasions when you would be obligated as a reasonable accommodation to

extend a period of leave beyond the 12 weeks that have been extinguished under the Family and Medical Leave Act. But where it is indeterminate or where there is substantial doubt as to the ability of an employee to return to work, that in most cases would not be viewed as a reasonable accommodation. Now the caveat here, of course, is that you look at this on a case by case basis, but I think that you can judge your leave request and handling of leaves pretty much according to the doctrine that if it is really indeterminate, if you get medical information which indicates or you simply do not know when the person will be able to come back and fulfill the essential functions of his or her job that is not deemed to be a reasonable accommodation under the ADA. Along with leave questions, I often get questions on the intersection between the workers comp and the FMLA and the ADA, and I will say that you really need to understand that most workers' compensation statutes are not job protecting statutes. They are merely compensation protecting statutes. So, if one of your employees has a workers' comp illness and goes out on a workers' compensation absence, generally it is also going to be FMLA qualifying, what you do not want is an employee to go out on a workers' compensation case, be out for four months, then come back and say, oh, by the way, I am also now going to take FMLA leave for the following reasons: A, B, C, D, or E. So that your practice should be that when somebody goes out on a workers' compensation absence, that you deem that and designate it as eligible FMLA leave and tap the leave balances accordingly. Now, for instance in Maryland, the only illegality contained in this statute with regard to a termination of employee is that you cannot as an employer fire an employee solely because that person has filed a workers' compensation claim, but you can fire an individual who is out on a workers' compensation case for months at a time, particularly where you have designated that workers' compensation absence as FMLA, so that after 12 weeks of being out on a workers' compensation case, that person's FMLA will have been extinguished and then you can make your decision as to whether or not you are going to fire that person or terminate that person because the person has not returned to work irrespective of the fact that the person may be on a workers' compensation case. So, keep in mind the purpose and the details under the workers' compensation statute as opposed to your rights and obligations under the ADA and FMLA.

The last thing that I will mention is there have been actually a spate of cases, and one a very recent case where the EEOC has filed suit about a week and a half ago against a Pennsylvania company for its condoning of the use of the N-word in the workplace and actually firing an employee who complained about the use of the N-word in his presence, and while generally under the law as most of you know, in order to be actionable as a hostile work environment, there needs to be severe and pervasive kinds of activities or misconduct in the workplace, but courts have increasingly held that the use of the N-word is in itself so destructive of any kind of

culture that it may be the case that even one or two usages of that word in the workplace may be enough to create an actionable hostile work environment. So again, this goes to training, this goes to observation, this goes to appropriate dealing with these situations in the workplace, if in fact you have somebody who is engaging in that kind of conduct. It really has to be nipped in the bud immediately otherwise you risk a viable workplace harassment claim even on the basis of perhaps one isolated situation or use of some really vile word like the N-word in the workplace.

Okay, those are the developments for the day. Sheila, can you take this off of mute. Okay, thanks. As always, I invite any questions, comments from anybody out there on anything that we have covered or anything that I did not cover and that, you know, think bears answering. Any questions or comments?

Mike: Hey Howard, it is Mike. How you doing this morning?

Howard Kurman: Hi Mike, how you doing?

Mike: I got a quick question for you. Regarding the offer letter and the disclaimer that you put in there, do you have some cookie cutter language that we could use, I mean should we just restate exactly what is in our handbook as far as we are an employer at will?

Howard Kurman: Yeah, I mean you could modify it a little, Mike, I mean generally it is going to be a pretty simple statement that says irrespective of anything else that said in this letter, we want to make clear and emphasize that employment at the ABC Company is employment at will, which means that, of course, you can terminate your employment at any time and we can terminate your employment at any time. You know, you may want to modify it depending on what the position is or something like that, and I can confer with you offline if you have a question Mike, but that is essentially it. There is no magic to it.

Mike: And I was always taught with offer letters to state compensation as either a weekly or biweekly number whatever your payroll is and then, you know, show the annualized amount as opposed to saying, you know, your are hired for $75,000 a year because just quoting the annual amount could result in some liability in case you part company.

Howard Kurman: Yeah, I mean, I think there have been cases where departed employees have said, well, in my offer letter it says I am going to earn $75,000 a year, which means that I had a one-year contract. Generally, that is not effective, but the better way to do it is the way that you just articulated, which says you will be paid $75,000 annually, which breaks down to, you know, X amount of dollars every week or every other week and then

accompanied by your employment at will statement should not have any problem.

Mike: Okay, thank you.

Howard Kurman: Any other questions?

Winsome: Howard, this is Winsome, good morning.

Howard Kurman: Hi.

Winsome: You mentioned something about if they are out on workers compensation and, you know, they come back, we have to provide basically accommodation, but if there is no end date to that accommodation, the employer does not have to, is that what you said?

Howard Kurman: Yeah, what I am saying is that there is a difference between an employee who has used up 12 weeks of FMLA leave but nevertheless produces, let us say, a medical document which says individual X may need two more weeks or three more weeks in order to be able to perform the essential functions of the job in which case you might say that is a reasonable accommodation both commonsensically and under the ADA. On the other hand, if that same employee says, hey, I am not exactly sure when I am going to be able to return to work or the medical information says the same thing, that is a different story and most courts today will say that is not a reasonable accommodation.

Winsome: Okay.

Howard Kurman: Okay?

Winsome: Okay, all right, thank you. I just needed clarification.

Howard Kurman: Sure, no problem. Okay, all right, well everybody, I appreciate your participation as always and as I said no telebrief in two weeks, so enjoy the rest of the month and we will see each other figuratively in November.