LABOR & EMPLOYMENT TELEBRIEF
By
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July 9, 2014

Howard Kurman: Okay, 09:02 on my official clock and we are going to get started. Good morning everybody this is Howard Kurman. This is our twice a month, first in July telebrief, the next one will be on July 23rd. So let me start off by saying that many find the summer sort of in the summer doldrums and may be not much is happening, but that is never the case in the labor and employment world, so all of you who are professionals know that. There is always something going on and particularly as you have heard me talk about many times the Supreme Court usually renders its important decisions at the end of its term in June, sometimes even in early July. In this case, in our case for this morning's discussion, we have three very significant cases decided by the Supreme Court which I will comment on and try and give you my take on them.

The first case, and I know that I discussed this in prior telebriefs before, was the challenge to the National Labor Relations Board's decisions between January of 2012 and around mid 2013 when, as a result of recess appointment made on January 4, 2012, involving Sharon Block and Richard Griffin and Terrence Flynn, the Board rendered many decisions one of which was in the Noel Canning case and Noel Canning appealed that case, and its contention to the Court of Appeals was that when the National Labor Relations Board decided the case against Noel Canning, it was improperly constituted because three of the members who were on that decision had been appointed by President Obama in a so-called recess appointment, and that case went all the way to the Supreme Court, and the reason that it is significant is because it not only deals with the Noel Canning case frankly but it deals with the whole presidential ability or power to make recess appointments under the constitution, and in this case, at the National Labor Relations Board. There were about 450 cases, precisely 436 cases, decided between January 2012 and mid 2013 involving this so-called improperly constituted Board at the National Labor Relations Board, and there were many cases decided by the board during this interim period of time that were certainly controversial, particularly from an employer standpoint. Many employers absolutely were flabbergasted by the extent and the reach of the National Labor Relations Board, particularly involving nonunion employers which I have spoken about repetitively on these telebriefs. For instance, the whole concept of social media and the Board's attention to and perusal of social media policies of employers as well as disciplinary actions of employees who may have violated those social media policies. So, many of these cases now are thrown really in the twilight zone of whether it is good law or not. Now, before everybody out there basically claps and goes high five and say well none of these decisions will really hold up, it is not necessarily the case because the Board is now properly constituted and certainly has the wherewithal to set as a priority going back and reaffirming decisions that they had promulgated during this period of January 2012 to mid 2013. Nevertheless, the Supreme Court's

decision was a slap to Obama and certainly an indication to the Board that they are going to have to go and rethink, if not redo, many of the decisions that came out and were published during this period of time. In addition to which the decision had impact beyond simply the labor sphere because it has to do with the whole issue of whether or not the presidential so-called recess appointments are valid. As the court stated in its opinion when the appointments before us took place the Senate was in the midst of a three-day recess. Three days is too short a time said the Supreme Court to bring a recess within the scope of the recess appointment clause. Thus we conclude that the president lacked the power to make the recess appointments here at issue. According to the court, the decision stated basically that breaks of three days or less are not recesses which would be countenanced by the constitution. So it is a very significant decision, not only for laborer and appointment practitioners but for many other constitutional powers as well.

Let me turn my attention to the second Supreme Court case, very, very controversial, and I mentioned that this was coming to the court long ago and it involves a company called Hobby Lobby which is a Christian-owned arts and crafts chain store and also a companion case involving an employer named Conestoga Woods Specialties store which was owned by a Mennonite family. Now both of these cases involved closely held corporations and a closely held corporation for those of you who do not know is obviously a company that is not publically traded and is owned by shareholders in a non-publically traded domain, and so the issue before the Supreme Court was whether or not a privately held company could assert under the freedom of religion and religious freedoms whether or not those companies could in essence state that the mandate under the Affordable Care Act that companies provide insurance for contraceptive care for women could be invalidated on the basis that these companies supposedly had religious beliefs that would contravene that particular mandate in the Affordable Care Act. The case was decided on five-to-four basis and there was an extremely vigorous dissent by the four liberal justices on the Supreme Court, and I would invite you to probably take a look at the dissent because it is not often that there is the degree of aggressiveness and really kind of, I think, very forceful advocacy that you find in dissent in this case basically stating that the decision which was disseminated by the majority in this case is leading the country down a very slippery path, so that the dissent pointed out that there may be situations in the future involving vaccinations, blood transfusions, etc., where under the guise of religious freedoms and liberties, a privately held corporation could in essence state that it was not going to provide insurance coverage because of bona fide religious beliefs. So this decision that was handed down is a very, very significant decision. I think the broad outlines and parameters and impact of this particular decision will not be known for months and perhaps even years, and given the fact that it was a five-to-four decision and bitterly refuted by the dissent. We just have to pay attention to how this is all going to shake out in terms of the future. Because as I said, it is a slippery slope and the dissent pointed that out, so we do not know whether this issue simply stops with the mandate of contraceptive coverage as opposed to other kinds of insurance issues, whether its vaccinations, whether

its blood transfusions, whether its treatment for psychological or psychiatric diseases or illnesses, one could easily see that a privately held company would say that we are not going to provide coverage for some of these things because of our religious beliefs. Now, the majority in the Supreme Court tried as best as it could to say that its decision was limited to this particular situation, but as the dissent pointed out, it is going to be very hard to limit the impact of this decision to the facts and circumstances which surrounded this particular case.

So, between Noel Canning and Hobby Lobby, you can see that there was a very busy Supreme Court at the end of the term; and you have two cases which directly bear and could bear on many, many employers and companies throughout the country, whether they are unionized or not.

The third case in the Supreme Court's triumvirates of cases is not one that it decided but one that it agreed to accept for review which I also think would be a significant case and that is the case of Mach Mining. I talked about this a couple of telebriefs ago. This is a case that comes out of the Seventh Circuit and it arises out of a challenge by the employer, Mach Mining, to the alleged insufficiency of the EEOC's conciliation process once they find probable cause to believe the discrimination has occurred under Title VII. So just to review for a minute. What happens under Title VII is that the EEOC investigates a particular charge of discrimination. If it finds that there is probable cause to believe the discrimination occurred, the EEOC is statutorily required to engage the employer and the charging party in the conciliation process in an attempt to settle the case and remove it from the docket. In Mach Mining, the employer challenged the EEOC essentially saying that the EEOC's conciliatory efforts or conciliation process was superficial and not made in good faith and, therefore, violative of the statutory mandate that the EEOC engage in the conciliation process because the argument goes if its superficial and its really not done in good faith, then it really is not a bona fide conciliation process. Those of you out there who have ever had dealings with the EEOC and have lived there regret it probably know that the conciliation process with the EEOC is no fun. They typically come in with a first proposal which is usually otherworldly in terms of its demand and it goes from there. By the way, the EEOC asked the Supreme Court along with Mach Mining to accept review which is a little unusual, and my prognosis is that given the current composition of the Supreme Court and the fact that many decisions are five-four decisions, it would not surprise me that as a result of the Supreme Court's decision, we will see the EEOC be somewhat chastised in terms of the conciliation efforts that went on here, and you may have a general pronouncement by the Supreme Court on the duties and requirements that the EEOC has to go through in order to hold a bona fide conciliation process.

So, those of the triumvirate of cases from the Supreme Court which I think are pretty useful and pretty significant for employers and particularly those employers who have any dealings with the National Labor Relations Board arising out of the Noel Canning decision.

Let me turn my attention, if I can, to some administrative matters. The Department of Labor has announced through its branch chief, a woman by the name of Helen Applewhaite, that the Department of Labor is planning an increased enforcement of the FMLA in 2014 which will include more on-site visits by federal investigators. Those of you who are covered by the FMLA, meaning that you have 50 employees, will need to make sure that your recordkeeping is up-to-date because what they will do or what they will concentrate on, in terms of any audits, and these by the way will on-site audits not simply desk audits, they will be coming in and they will want to verify your employee data in the form of any records that you keep regarding when employees take FMLA leave; when they go; when they come back; hours of intermittent leave taken by employees, if they are taking such incremental leave; copies of all the notices that you as an employer give to employees as well as any received by the employer requesting FMLA leave by the employees, so in other words any correspondence going back and forth between the company and the employee regarding a request for and the granting of or denial of FMLA leave. They will want to take a look at your policies and procedures with regard to your FMLA policy, where it is communicated and disseminated, that is whether it is in your handbook, whether it is a separately or standalone policy, records of any disputes that you may have with employees regarding the taking of FMLA leave or the designation of FMLA leave. So these investigations, these on-site audits will by definition according to the Department of Labor increase in 2014 and I would say that it is a good time now as the half a year mark in 2014 to make sure that your house is in order and that your FMLA records are up-to-date. Should you be unfortunate enough to be the recipient of a notification by the Department of Labor that they want to conduct an FMLA audit should make sure obviously that your records are in order and probably it is a good time yet to be represented by counsel. These on-site audits start off with an investigatory meeting, may proceed from there and there is always a closing conference at which the DOL will render its findings, and if it finds for instance that an employee was inappropriately denied FMLA leave or at worst terminated during what should have been a protected FMLA leave, then you as the employer would be subjected to back pay and reinstatement of that particular employee. So, it goes without saying that I think that if you are in the unfortunate situation of being audited that is probably a situation that you ought to utilize employment angle for.

Another administrative matter, I do not know if any of you saw this, but this was a press release that was put out on June 23rd of this year by the White House which conducted a Summit on Working Families; and according to the press release that was put out by the White House, it states: "Already this year, the President has acted to move our country forward by raising the minimum wage for federal contractors, expanding retirement opportunities, strengthening overtime protections, and signing an Executive Order that protects workers from being retaliated against by their boss if they discuss their wages. At the Summit, the President will build on this progress by signing a Presidential memorandum to help families better balance work and spending time at home, and announcing a package of both public and private sector efforts they will

take a strong stand to protect pregnant working women, increasing investments for research to understand the economic benefits of paid leave, expand apprenticeships for women, target resources to help more women enter higher-paying scientific and technical jobs and other fields, and make child care more affordable for working families." It says, the President will continue to work with Congress and make progress on his own because working families can no longer wait for Washington to move forward. I invite you to take a look at this, it is easily accessible on the web, and to me it's simply a further indication, again this was put out June 23rd, and its called the "Fact Sheet: The White House Summit on Working Families." This is another indication that I think the White House is intending to get through the back door what it cannot get through their front door of Congress for good, bad, or indifferent reason. So for instance this press release talks about supporting the Pregnant Workers Fairness Act. It says while the Pregnancy Discrimination Act of 1978 took a crucial step toward protecting pregnant workers, too many women still face discrimination in the work place in a serious and unmet need for reasonable accommodations that would allow them to keep working while they are pregnant. For that reason, President Obama will urge Congress to pass the Pregnant Workers Fairness Act which would require employers to make reasonable accommodations to workers who have limitations from pregnancy, child birth, or related medical conditions unless it would impose an undue hardship on the employer. The legislation also would prohibit employers from forcing pregnant employees to take paid or unpaid leave if a reasonable accommodation would allow them to work. There is another aspect to this. It says empowering pregnant workers with better information about their rights says, at the President's direction, DOL will release a new online map that will be a one-stop shop where working families can learn about the rights of pregnant workers in each state and goes on to talk about more affordable child care and supporting the creation of state paid leave program. So it says the DOL is targeting funds for Paid Leave Analysis Grants to fund up to five states to conduct research and feasibility studies to support the development or implementation of state paid leave programs. So you can see really what the emphasis on this is which is broadening the so-called or perceived needs for pregnant women employees, introducing paid leave initiatives, so not only are we talking about the protected job status of employees, particularly pregnant women under the FMLA, but a corollary which would be providing for paid leave for people in this particular status. So there is a lot more to that, but I think it gives you the flavor of that. Again through executive fiat, there are certainly attempts which are ongoing to try and make employers and the business community responsive even outside of legislation which may be passed by Congress which as you know, given the composition and the antipathy of the Republicans towards the Democrats and vice versa would be very, very minimal in terms of the probability of such legislation passing.

The last thing that I will point out and we talked about social media in conjunction with the Noel Canning case, interesting case out of the Idaho Supreme Court involving a nurse, a male nurse, who was fired after he posted the following on his Facebook page which was seen by a so-called "friend" who

then reported the post and showed the post to the employer so he says, ever have one of those days where you'd like to slap the ever loving bat snot out of a patient who is just being a jerk because they can. Nurses shouldn't have to take abuse from you just because you are sick. In fact, it makes me less motivated to make sure your call light gets answered every time when I know that the minute I step into the room I will be greeted by a deluge of insults. No surprise he was fired. He filed for unemployment benefits, they were denied on the basis of his misconduct, and the Court upheld this on the basis of his threatening statements that were made on a Facebook page.

I bring this to your attention because more and more I see employers who come to me with Facebook posts of employees and the question is can we fire this employee because of the Facebook post, and of course it is a complicated analysis which begins with whether or not the particular post could be considered to be protected concerted activity, that is whether or not the employee was commenting on work conditions in conjunction with other employees. Here, clearly this employee was not involved in any kind of concerted protected activity. It was a singular complaint on his part and it was also extremely inappropriate and not the kind of thing obviously that a hospital would want publicized. A year ago, he was fired and the termination was bound to be as a result of his own gross misconduct. So whenever you are faced with a so-called friend who comes in with his other friend's posting or you have noticed it yourself on a Facebook page which is not privately password protected, certainly you are in a position to analyze that and to ascertain whether or not severe disciplinary action or even termination.

So, those are the big developments of the day. I invite always any questions or comments. If you do want to do it in this forum certainly you can e-mail me at hkurman@offitkurman.com or call me on my direct line at 410-209-6417. I will not be in the office today until after lunch, but certainly call me later if you have a question.

Any comments or questions that somebody has?

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Howard Kurman: Okay, well. As always I appreciate everybody's participation even if silent, hopefully you got a lot out of it and we will meet each other again on July 23rd. Thanks very much.