

## **LABOR & EMPLOYMENT TELEBRIEF**

**By**

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Howard Kurman: Okay we will get started. Lots to talk about today as usual being as though it's the second Wednesday in November; kind of hard to believe that Thanksgiving is almost upon us.

So first, I found it interesting on November 2<sup>nd</sup>, President Obama gave a speech at the New York campus of the Rutgers Law School. In that speech he made a proposal and continued to push for a national ban-the-box legislation. We have talked about in prior telebrief ban-the-box legislation on local and state levels, but this was a pretty overt response by the President and what he said was, "Like a lot of big employers, the federal government should not I believe screen out applicants simply because of a mistake they made in the past, he said some really good, really successful companies are already doing this, naming Walmart, Target and Home Depot." He went on to say that there are 600,000 inmates released from incarceration each year, while 70,000,000 citizens have some degree of criminal record. He went on to propose in sort of a peripheral way, he announced the creation of, what he called a National Clean Slate Clearinghouse where the Labor and Justice Departments would aid legal aid programs and public defenders and reentry programs with providing expungement and other legal services. So clearly both at the local level and at the state level we see a major move afoot regarding ban-the-box legislation.

I would also point out that there was an article on Corporate Counsel, which is on an Internet publication that I get very recently where they talked about the interplay between those individuals who may be applying for jobs with criminal records and those with disabilities and often the two intersect because many people who have criminal records also have some sort of mental disability and so they quote a little bit about a woman named Marsha Temple of Los Angeles, Integrated Recovery Network, says knows full well the stories of many of the individuals for whom the box is a major barrier. For more than 15 years she has worked to improve mental health services for people who are homeless and/or have mental health disorders. About 44% of who have spent time in jail, prison, or community corrections, and as the article explains from California alone there are about 33,000 prisoners with mental health disorders, roughly 30% of the incarcerated population.

This is an issue that is not going away anytime soon. I think that all of you out there need to investigate what your processes are because as you know in prior telebriefs I have talked about the EEOCs position even in the absence of ban-the-box legislation on the consideration of criminal background vis-a-vis hiring decisions. And what the EEOC has said, and I know I have covered this before but I think bears repeating, is that decisions when it comes to individuals with possible criminal background should be made on an individualistic background;

that a bright line policy of never hiring an individual with a criminal background is probably not going to suffice or pass muster under the EEOCs latest guidance, certainly not on their local or state level ban-the-box legislation or Federal legislation is enacted at some point in the near future, it will not pass muster there. Does that mean that you as an employer have no ability to in effect consider criminal backgrounds of individuals, the answer clearly is no, that you can consider it but there has got to be an individualistic determination, which assesses how long ago did this criminal conviction occur. Obviously, if it was in the last six months or a year, it is a lot more relevant than a conviction that may have happened 20 years ago. Secondly, what is the nature of the particular conviction? Is a conviction for drug possession, which is fairly mundane in today's world as opposed to a conviction for a violent offense or an offense where the individual is convicted of fraud or embezzlement and you know that that person may have access to money or other kinds of sensitive financial data or proprietary information. So, you look at when did it occur, what was the nature of the offense. Thirdly, look at the connection between the offense and the job for which that person may be applying. Obviously, some criminal convictions may have little relevance to a particular job that the person may be applying for. So you still have, in my opinion and I have been asked this by many clients, why discretion in determining whether or not you are going to hire somebody, but I would advise you that if you make your decision not to hire on the basis of a criminal conviction that you document your decision and the reasons why, because if you are challenged down the road you do not want to be fumbling around trying to figure out what it is I did or did not do in terms of due diligence with regard to a particular individual.

Also, with regard to criminal convictions, I stressed the word conviction because arrest really cannot be considered under clear EEOC guidance, as to whether or not you are going to allow the applicant to be further considered for employment. Its convictions and it is not something that is a mere arrest because as you know the theory is that disproportionately minorities and other protected classifications are arrested much more often than unprotected employees.

So, we are consequently bombarded with issues in connection with this and it is not an issue that has gone away, so I think that based on what President Obama has said, and certainly if there is a Democrat who is elected into the White House in 2016, this will be no less of an initiative of that President than it is with this particular President. So be wise and use your discretion and use your due diligence in a very careful way; and by the way, there is nothing that would preclude you from talking to an applicant's attorney to get more information about a particular conviction, I know that I have done that many times on behalf of clients and most times if the attorneys know that the client is being seriously considered for a job they will be forthright in giving you information.

Okay, let's move on. I wanted to mention that a few weeks ago on Monday, October 19<sup>th</sup>, the OFCCP which is the Office of Federal Contracting Compliance Programs published then onto website, you can go on its website, a sort of pocket

card that they invite employees to use which is called requesting a reasonable accommodation, the intention of which was articulated as helping employees identify what they need to do in requesting an accommodation for disability when applying for a job or a job transfer or promotion. The contents, some of which I think fine, some of which is questionable because of its omissions and I will review these with you because I think they are instructive in certain respects so the card if you go on the OFCCP website will have the following subpart.

Number one is what is a reasonable accommodation? OFCCP instruct employees or applicants that it is an adjustment or modification made to a job or the workplace or the usual manner or the circumstances of performing the job that allows an applicant or employee with a disability to successfully apply for the job, perform the duties of the job, or enjoy the benefits and privileges of employment. Reasonable accommodation also applies to the application process. I think that that is fine I do not have any problem really with that part of the card.

The second part of this instructive piece is how do I request a reasonable accommodation? And here the OFCCP says typically just ask. There is no special process to request an accommodation and you do not have to use special words nor do you have to put your request in writing, however, some contractors do have a specific process to ask your employer. What I find wanting and deficient about this is the instruction that you do not need any specific words to request an accommodation. Clearly, I think that if you want a situation where the applicant or employee is not talking past the employer, I do think it helps when the employee or applicant says specifically to the employer I need an accommodation to do this particular job.

Thirdly, what do I need to tell my employer? The OFCCP instructs simply tell your employer that you need an adjustment or change of work due to your disability, be prepared to provide your employer with enough information to show that you have a disability. It is important to note that you are not required to provide your entire medical or mental health history to obtain an accommodation you only need to provide pertinent information to request an accommodation, that clearly in my mind is insufficient to satisfy the legal requirements because employers always have a right to make further inquiries in order to get further medical substantiation to show: a) that the applicant or employee has, in fact, a disability; and b) a medical opinion as to what if any real accommodation needs to be made in order for that employer or applicant to do the essential functions of a particular job. So, I do not believe the OFCCP has really accurately stated that particular obligation on the part of the employee.

The fourth part of its little card says what happens next? After the request is made the employer may ask that you complete certain forms or follow other procedures, any procedures you are asked to follow cannot be used to prevent a timely accommodation from being provided or addressed. Now, of course this does not say that just because you asked for an accommodation that one will be granted as we all know the employer has to weigh the administrative and financial burdens

on the organization with a specific request made by the employee and if there is an undue burden, which is placed upon the employer that the employer is under no obligation to accept the employee's suggested accommodation. They do list in here the various types of accommodations that frequently can be made these are also listed in the EOC's guidelines, but these are providing written materials in accessible formats such as large print, braille, etc. Adjusting or modifying work schedules. Providing readers or sign language interpreters. Holding recruitment interviews, tests, and other parts of the application process in accessible locations. Holding staff meetings in accessible locations. Providing or modifying equipment and devices adjusting or modifying policies and procedures, changing the work environment in ways that improve accessibility.

The last slide, so to speak, or card on it is that they say if you believe you have experienced discrimination contact the OFCCP and they give the OFCCP's number. They really do not mention in here the process by which there should be an interchange in other words an interactive process between the employer and the employee, which of course is really the critical component of any of this discussion on the accommodation of any kind of disabilities. Significantly, the OFCCP does not indicate that it is the employer's duty to give this card for want of a better word to employees so it is not like the employer has Miranda warnings written on a little card when it comes to disability and it has to provide these warnings to an employee.

The last thing I want to talk about this morning is that I had a question from one of the people that was listening to a prior telebrief about wage and hour audit and the preparation for an wage and hour audit either internally conducted by the wage and hour division of Department of Labor and I thought I would spend a couple minutes going over some details about what I think it is that you need to do, whether you are doing your own internal investigation or hopefully not subject to the DOL investigation or audit. So, I know that we have talked about this before but certainly you should check all of your current 1099 relationships and vendor agreements to make sure that you are paying people as independent contractors appropriately as opposed to employees, which is the subject in and of itself but suffice it to say that an essential part of the audit. I think that you need to investigate very closely your written job description to make sure that they really do accurately reflect the work that is being done pursuant to each of those job descriptions, that they have been updated periodically when necessary and that if you have exempt divisions with exempt job descriptions that you would feel comfortable presenting those job descriptions to the Department of Labor in order to confirm or corroborate your contention that they are indeed exempt positions. I think you need to review your timekeeping systems to make sure that your nonexempt employees are indeed being accurately paid for all time work that includes pre-shift work, post-shift work and even lunch periods or meal periods if they are not being relieved of their particular duties during the meal period. Under the DOL rules and regulations you are entitled to rounds but you cannot round to 20 minutes. Really in my opinion 12 to 15 is the outside limit so you need to make sure that you are not rounding down or up more than that as you

keep time for your nonexempt employees. Payroll records should be checked to make sure that they are accurate, current, and obviously reflect all hours worked on a weekly basis by particularly your nonexempt employees. Obviously, you need an accurate timekeeping system and you really should have a system by which employees who are complaining in any particular pay period that they have not been paid correctly, have an avenue by which they can raise those questions because obviously in your handbook it would be helpful to say that employees who believe that they have been paid inappropriately in any pay period or any pay week have a particular procedure to follow, so that if the DOL is dealing with the claim of unpaid overtime for instance over a long period of time, you can point the provisions in your handbook which impose obligations on employees to raise these issues on a timely basis in order that they can be remedied, and I think that you need to educate your supervisors and managers on the appropriate timekeeping systems that you have, on the need to make sure that employees are being paid for all time worked and certainly that you want to make sure that your exempt employees, those employees that you are counting as exempt employees, are not having their salary deducted for inappropriate reasons. There are some reasons that you simply cannot deduct from an exempt employee without impairing the exemption of that employee, that is they need to be paid the same salary on a weekly basis irrespective of the quality or quantity of their work and so if you have an exempt employee who is just a crappy performer you need to address that by virtue of a performance evaluation or discipline but not by docking that particular exempt employee.

So, these are things that you can do prophylactically, as I said before, if you are conducting an internal wage and hour audit the smartest thing to do is to have it done in conjunction with your employment attorney so that communications will be shielded by either the attorney-client communication privilege or the attorney work product privilege either of which were both of which may be applicable, and in the unfortunate situation, of course, where you are randomly audited by the DOL or the DOL responds to a particular employee complaint or ex-employee complaint, all of those particular things will be appropriate but there will be a lot more that you will need to do in conjunction with your employment attorney including attending an opening conference with the DOL making sure that there is a good flow of information and a careful flow of information with the DOL and making sure that all communications really are herded through and processed through your employment attorney so as to protect those communications by virtue of the attorney-client privilege.

So, I know I stressed this before that wage and hour audits are a good thing prophylactically to do because of the real activism of the Department of Labor that is going on now. We see it in our firm with many, many clients and I do not think that it is going to decrease dramatically anytime soon. I really believe that the Department of Labor is using whatever power it has and whatever resources it has to come after companies and when they come after companies they very seldom leave without finding some sort of deficiency so it behooves you to act in a proactive way prior to the DOL's either showing up at your doorstep... By the

way they have no right to appear and come into your place of business without a warrant. Whether you choose to allow them to come in is up to you but usually what happens is you can arrange within 72 hours or more for them to show up if they need to show up.

Those are the developments for the day. As always I take whatever questions you have, comments you have, and if you want to do it in private as I always indicate feel free to email me at hkurman@offitkurman.com or my private personal phone line which is (410) 209-6417. Any questions or comments?

Lori: Howard.

Howard Kurman: Yes.

Lori: This is Lori. I just have one quick question because it has come up a couple of times in the past month or two. Are you allowed to actually come out and ask a candidate who is applying for a position if they are US citizen?

Howard Kurman: No.

Lori: Okay, because...

Howard Kurman: No, if you are filling government jobs where that is a requirement because of security and all it is different, but generally the answer to that is no, you know, it goes really to the I-9 issue, which is they have to be able to present evidence that they have the ability to work in the United States but that does not necessarily entail citizenship.

Lori: Because we have a client who requires a federal background check of all of their...

Howard Kurman: It is different.

Lori: Okay.

Howard Kurman: It is different in the public sector. Any other questions?

Lori: Well there.

Howard Kurman: Yeah, I am sorry Lori.

Lori: No, it is okay. They are a public company, but because they were bank so they require that all other people...

Howard Kurman: Yeah, again, statutorily there are many financial regulations and such that do require, so you just have to, you know, it depends on where in the queue you are dealing with. Any other questions? Okay, well, our next telebrief I guess will be

the day before Thanksgiving Wednesday, November 25 and I wish you all good next two weeks and we will talk soon.