LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
March 8, 2017

Howard Kurman: Okay, so we are going to get started. Michelle can you put this on mute please. Okay, good morning everybody welcome to my bi-weekly telebrief. There is always stuff to report as you well know in this field.

The first thing I want to talk about is something that some of you may use some of you may not know about I happen to use it with some clients; it's called a jury trial waiver. As you know in today's litigious workplace when you get sued in court generally a Plaintiff's attorney is going to ask for a jury trial because on the whole juries are much more prone to be sympathetic to Plaintiffs than judges are or arbitrators etc. One of the things that has evolved in the last several years is the use of a document which is called a jury trial waiver, essentially it means that if you have somebody who is applying for a job or even somebody that who is an incumbent employee that you as a condition of employment indicate to that particular applicant or your employee that all disputes that arise out of employment or any employment related issue for which that applicant or employee would otherwise bring a lawsuit asking for a jury trial would have to be decided by a judge as opposed to a jury. It is a pretty valuable tool because most times when Plaintiff's attorney sue companies they depend on this sort of the term effect of a jury on a company in order to procure a more favorable settlement.

On the other hand if they know that a case is going to be tried before a judge as opposed to a jury their settlement demands usually go down. I have used these with several clients throughout the years, but in order for them to be valid they have got to be written in clear language, they have to be unambiguous and they have to be sufficiently broad to cover all related employment disputes not simply disputes over an employment agreement.

There is a very recent case in New Jersey called Noren versus Heartland Payment Systems in which case an employee sued his company and raised the statutory claim and the jury trial waiver that the company had used in this case only pertained to an employment agreement, disputes over an employment agreement that this person had signed as opposed to all related employment related issues. The jury trial waiver's that I generally use have a cover memo which indicates that it is an important document that they even have the right to have it reviewed by an attorney if they want but that as a condition of employment they are going to be compelled to sign a jury trial waiver. I have also used it with incumbent employees as well, they have to again be pretty clearly written in plain English, obviously you don't want a three page long jury trial waiver because then it looks like it's such a legalistic document that a lay person would not be able to understand it anyway. But if you are contemplating ways to cut down on your exposure either for discrimination cases or other kinds of workplace disputes you may very well want to utilize a

jury trial waiver along with that some companies use mandatory arbitration agreements which basically state that if employees have any disputes related to any workplace issues that they will be compelled to submit them to arbitration as opposed to a judicial forum. There are all kinds of pluses and minuses in using arbitration agreements which I will not go into now some of them are legalistic, but my real purpose in discussing with you for the first part of today's discussion was the jury trial waiver, which some of you may want to think about using. Obviously, it is a major step if you are seeking to hire somebody and that person has an objection to signing it then the question is what are you going to do, similar to almost a non-compete where you ask a applicant to sign a non-compete agreement, but I can tell you that I have used them with several clients and it has a very good deterrent effect on plaintiff's attorneys. If you have any questions about that I can certainly answer them or help you with that but contemplate using them because I find that they can be a very useful tool in employment litigation.

I wanted to bring to your attention a very recent case that was decided February 17th by the highest court in West Virginia in a case called Lane versus Kanawha County Board of Education. This case has to do with reasonable cause drug testing. Many of you may have that in your policies but this was a pretty good primer it seems to me on the proper way to go about conducting it and documenting the reasonable cause drug testing.

What happened in this case was the employee in this case was employed as a middle school sign language interpreter and on this particular day she was observed by no less than five employees behaving very erratically, so that she, as the case reports, was waving her arms about as if she were fighting with somebody, she was in the parking lot apparently chasing down pieces of paper, she was staggering in the classroom, she was leaving a bathroom that apparently smelled like it had been lit on fire. These individuals reported these observations to the Principal who then met the employee and he observed that she had glassy eyes, she really was very agitated, could not sit still, she was talking much more than she usually did, very engaged and very quick moving actions and seemed to have disheveled hair and some other things, which he noted on a document that served as sort of the recounting in a organized way of his observations which is a good primer for any of you who do training or have reasonable cause drug testing in your workplace. The Principal asked the employee to submit to reasonable cause drug testing, which the employee refused on a couple of occasions and ultimately when the employee refused the last time the Principal documented this and ultimately the employee was fired after which she challenged the termination and said that her behavior was caused by several medical conditions, in my opinion laughingly, including scoliosis, anxiety and carpal tunnel syndrome. What carpal tunnel syndrome would have to do with this I have no idea. All of these arguments were rejected by West Virginia's highest court and I think the important lessons for all of you first of all I do not know how many of you have drug and alcohol testing policies and procedures I assume many of you do but if you do you certainly want to train your managers and supervisors on the proper way to observe and to

document things that appear to be different in character and behavior with this person then that which you normally observe. That is really important point, how different is what the person is doing, saying or acting from what that person usually is engaged in and it would behoove you to have a form where you even recount or have the manager or supervisor recount those observations in an organized fashion. Obviously, you want to have your policy or procedure enumerate the basis upon which testing can occur so that could be post-accident testing and reasonable cause testing and even random if you engage in that, but you got to train your managers on what to observe and how to document it and how to record it. I think recording is important you want to stick to the who, what, when and where, you know very objective observations as you can. The employee seemed to be staggering, his voice was affected etc., Obviously your policy or procedure should indicate that if an employee refuses to take a drug test that would be tantamount to either lack of cooperation with a workplace investigation or tantamount to a positive drug test, which in and of itself can result in discipline up to and including termination. It's only a two week old case in West Virginia but a really good primer seems to make on what you have to look for in your policies and more importantly how you implement them in terms of reasonable cause testing. Take a look at your policies and it may be a good idea to do some retraining on your managerial and supervisor workplace.

I wanted to address just for a minute, the status of the DOL overtime rules, as you know that that has been challenged in Texas. Obviously with the Trump administration we do not know really what is going to happen but there is speculation that the Trump administration would withdraw the appeal in the federal court in Texas that the government implemented after the Texas federal judge imposed an injunction on the enforcement of the DOL overtime rules, which as you know would have taken the annual salary exemption test up to $47,476. There is talk in Congress that some Republicans have discussed the new level that is withdrawing the current proposed rule and then replacing it with something akin to a $35,000 salary level, which would seem to make probably more sense and probably be more passable in Congress and passable as a regulation as well than the $47,000. There is no indication at this point that that will happen with any degree of definiteness and so where we stand is that the case is sort of in lingo. It remains to be seen whether the Trump administration will withdraw the appeal but if it remains in the judicial pipeline we will have to wait and see during the spring as to what they do with it but, those of you who have already adjusted your salary levels there is probably not much you can do, you are certainly not going to probably want to go back and readjust them at this point, but this is in the pipeline.

The other thing that is in the pipeline as you know from President Trump's speech to Congress on February 28th was his at least broad outline to establish a new Parental or Family Leave Act, and there been several iterations of these acts already introduced in Congress, so as reported by the Bureau of National Affairs in its weekly labor report. They state as for Congress legislation it is already in the works that includes the family act which is HR 947, which would

establish according to them a national paid family and medical leave insurance program funded by contributions from employers and workers. Senator Kirsten Gillibrand of New York who introduced the Senate version of the bill in February is hoping to get Trump support. There is another bill that has been introduced by Senator Deb Fisher. She is from Nebraska, who has introduced another measure that would offer tax incentives to employers that provide paid family and medical leave. Obviously, you know with the legislative battles going on now about what happens to the affordable care act I think that this will certainly take a backseat, who knows when it will really get addressed even if Trump addressed it in his February 28 speech to Congress but certainly I think for the next several weeks and months perhaps we will be mired in discussions about the Affordable Care Act, I do not believe that it is going to be quickly passed in some iteration at all but the Paid Family Leave Act will be on the back burner and probably addressed sometime this year or next year in Congress as well as of course in states and as you know in the Maryland legislature there is a bill pending right now about it.

I have mentioned in the past telebriefs about the case that is pending in the District of Columbia Court of Appeals on the so-called joint employer issue. This has to do with the National Labor Relations Board's ruling in a case called Browning-Ferris, which I have discussed on a few occasions in these telebriefs, where the board essentially created a new joint employer standard by which let us say a franchisor would be deemed to be the joint employer along with its franchisees employees for the purposes of collective bargaining or remedying unfair labor practice charges and it would have a spillover effect probably into the Equal Employment Opportunity Commission and Department of Labor both of which consider joint employer standards in certain types of cases. Anyway, this case is going to be heard tomorrow at the DC Court of Appeals on March 9th, tomorrow and it will be heard by a three-judge panel and if this panel overturns or refuses to recognize the so called Browning-Ferris standard it will go back to the old standard, which is that there will not be found to be a dual employer status unless the employer that is deemed to be the dual employer has direct as opposed to indirect control over the terms and conditions of employees. Because under Browning-Ferris what the labor board did was say that in a vague and ambiguous way if one employer has indirect control over the terms and conditions of employment of another that that employer would be deemed to be the joint employer or the dual employer of the other employer's employees, which is a very imprecise, ambiguous and seems to me very unworkable standard. The tea leaves to me indicate that I think the board will have a difficult time justifying this before a three-judge panel tomorrow at the DC Circuit. We do not know when they would render an opinion but I'm sure it will be sometime in 2017 and when that comes across then I will certainly give you guys every indication of where we stand on that joint employer business. In the meantime as I have said to you in the past if you have a situation where you are engaging the services of temporary employees or leased employees you better make sure that you have written agreements with that other agency or supplier of employees under which that other employer agrees to indemnify

you and hold you harmless for any employment related issues or litigation that arises as a result of a claim of joint or dual employment.

As I have indicated to you right now there is a three-member board on the National Labor Relations Board with two vacancies. There are three names that have surfaced as additions, two additions to the board one is a fellow by the name of Marvin Kaplan who was in a governmental position at OSHA, also was Policy Council on the House Education and Workforce Committee. His statement in the past is that he has fought the DOL overtime and many of the NLRB issues for which the Obama board has come down very very favorably on the part of employees so he would be very much to the right of the former board members of the Obama administration. There is a guy named William Emanuel. William Emanuel is a labor attorney having represented exclusively employers in his practice, and the last guy is of fellow by the name of Douglas Seaton also a labor attorney and in an interview with BNA has stated the board has gone very very far to the left or to the pro-union side of things and I would be happy and honored if I could bring it back to the middle. It is clear to me that any two of these three individuals should they be appointed by President Trump would shift the balance of the National Labor Relations Board fairly dramatically to the point that you would certainly have a Republican majority and a much more pro-business environment than has existed in the last eight years under the Obama administration.

The last thing that I would mention those of you who follow these kinds of things in publicity is that Kay Jewelers is the subject of a widespread Washington Post and other publicity on having to do with claims of hundreds of former employees who have claimed that they were the victims of sexual harassment by a very very male-dominated culture and the things kind of things that were reported in the Washington Post article were that you know high-level managers were sent out to different stores to scope out female employees that they wanted to have sexual relations with, that managers essentially promised female subordinates better jobs and higher pay in exchange for sexual favors and other things, it is a long Washington Post article. I would advise you to read it, it's pretty interesting in terms of what's been alleged, now of course we all know there is a big difference between what is alleged and what is proven and this is a February 27th article. The reason I bring it to your attention is that not only do you need policies and procedures in place that obviously prohibit workplace harassment and discrimination but the culture under which those policies and procedures is actually effectuated and maintained is equally important. You can have terrific policies and procedures but at the same time have a culture which sort of disregards those policies and procedures and invites behavior of the sort that has been alleged anyway in this article in the Washington Post. Again, it begs the question as I always do of adequate training and periodic training with your management and supervision as well as the fact of a culture being created from the top down in your company with regard to workplace harassment. You can do all you want to train and you can do all you want to have an effective policy but if the top down effectuation of these policies is wanting or worse if it sort of disregarded you will be in real

trouble with regard to these kinds of cases and obviously this is not the kind of publicity that any company wants. An unintended consequence of any of these cases is perhaps unwanted publicity that arises out of any kind of workplace harassment or discrimination case.

Okay those are the developments of the day. Michelle can you unmute this please. Okay, as I always do any questions I am happy to answer either in this forum or privately and my phone number is (410) 209-6417 or my email hkurman@offitkurman.com. Any questions?

John: Quick question, can you update us on the Maryland Sick Leave Law.

Howard Kurman: Well you know, I wish I had definitive information on it John it still through the pipeline as far as I understand. There have been different versions of it in hearings, so I think look between now and April 15th something is going to happen. Unlike last year where I think that it just died I think this year something will happen. I mean obviously Hogan had his bill, others had their bills and I am sure there are backroom negotiations that are going on right now but I just do not know what the current status is, I will try and find out by the next telebrief comes along which will be in two weeks and by then we will be a little closer to the end of the session.

John: All right, good. Thank you.

Howard Kurman: Any other question? Okay, if not well I welcome your participation and as always I am sure the next two weeks will bring plenty of stuff that we will be talking about so, take care and thanks for listening.