LABOR & EMPLOYMENT TELEBRIEF
By
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July 23, 2014

Howard Kurman: Okay it is 9:02 on the official clock and we are going to get started. Before we do and this is Howard Kurman and I welcome everybody who is participating in today's telebrief; and as you know, we do these on the second and fourth Wednesdays of every month so the next telebrief will be on Wednesday, August 13th. I wanted to introduce you to Katie Makrides. Katie is a Marketing and Business Development Director for Offit Kurman. Jeanne Hyatt who used to be on these calls and who many of you know has really become an independent sort of contractor. She has always wanted to do some business development for many companies rather than simply just ours and she has decided to do that in her career, so I am sorry to say that, I still associate with Jeanne, but she is trying to develop her own business; and those of you out there who may have a need for any kind of business development feel free, I can give you Jeanne's contact information, but in her stead we have Katie Makrides. Katie will be on all these calls with me and certainly will be in touch with many of you if you have questions, comments, etc. So I welcome Katie to these telebriefs.

Let me get started because there is a fair amount to go over in the next 25 minutes or so. First, those of you who are federal contractors may know that on Monday, just two days ago, President Obama signed an executive order, which prohibits federal contractors from discriminating against either incumbent employees or applicants for jobs based on their sexual preference or gender identity. According to Obama, in signing this order, he said the federal government will become "just a little bit fair." In signing this executive order, Obama indicated that he hoped the Congress would pass the Employment Non-Discrimination Act. As you know, that bill which was introduced last fall passed the Senate, but it certainly has not gone through any kind of successful passage in the House; and according to Obama, he said federal law is needed, because in many states, being lesbian, gay, bisexual or transgender can be a fireable offense. I think that this is another reflection of executive action in an attempt to supplant inaction on the part of Congress. We have seen it over and over and over again, whether it is with President Obama or whether it with some of the other administrative agencies, like the National Labor Relations Board or the Equal Employment Opportunity Commission. Statistically, it is reported on the Internet that out of the 50 largest federal contractors, 86% of them already banned discrimination based on sexual orientation and 61% have policies against discrimination based on gender identity. This is probably another situation much like in some cases workforce bullying policies where you can get ahead of the curve probably by taking a look at your workplace discrimination and harassment policies, and will probably be a good time to include this kind of protection in your policy provisions even though you may not even be a federal contractor or required to include this in your particular policy, but again like social media policies, like workforce bullying policies, its always good to stay

ahead of the curve, so you may want to take a look at your policies and amend your policies to preclude any kind of discrimination based on a person's sexual identity or gender.

Speaking about administrative agencies let me talk a little bit about the Equal Employment Opportunity Commission, which on July 14th, just days ago, issued new enforcement guidance under the Pregnancy Discrimination Act. It is a very long document, which you can certainly access on their website but this was passed in a 3-to-2 vote. The EEOC, like the National Labor Relations Board, has five commissioners; and it happens that at the present time, three are Democratic and two are Republican. And not surprisingly this guidance was passed in a 3-to-2 vote with EEOC Chairperson, Jacqueline Berrien, and Commissioners Feldblum and Yang approving the guidance while two Republican Commissioners Constance Barker and Victoria Lipnic opposed it. Essentially, what the new guidance does is that it requires employers to offer their pregnant employees light duty, if they make such light duty available to nonpregnant employees similar in their ability or inability to work. A common example would be those of you who offer light duty for instance to those employees who are on workers compensation status, what this guidance would say is it if you offer light duty to them then you would by necessity and under this guidance also be required to offer light duty to pregnant employees. Now, the reason the timing on this is a little questionable is really for two reasons, one is the EEOC put this guidance out without giving the public the opportunity to review and comment on the proposed guidance which is certainly not the normal kind of an operative procedure followed by administrative agencies, but perhaps even more important, on July 1st, again a couple of weeks ago, the Supreme Court accepted cert. review in a case called Young v. United Parcel Service, Inc. or UPS, in which they have agreed to review a Fourth Circuit Court of Appeals decision in which the Fourth Circuit ruled that the Pregnancy Discrimination Act does not require employers to offer light duty to pregnant employees with any kind of work restrictions even if those same employers make such light duty available for certain categories of nonpregnant employees. So, the Republican Commissioners for the Equal Employment Opportunity Commission essentially said to their colleagues that the publication of this guidance was premature because obviously if the Supreme Court sides with the Fourth Circuit, then the guidance promulgated by the Equal Employment Opportunity Commission essentially would be moot and off no effect . So this is a fairly controversial dissemination of a guidance. Now, remember the fact that the EEOC puts out a guidance does not necessarily mean that it has the force of law; it is not self-enforcing. In other words, the EEOC can put out various guidances, and we have talked a little bit about one of those in our telebriefs weeks ago, that guidance was on the use or lack of use of criminal background checks by employers and they put out a long guidance. The guidances really are only enforceable by the Federal Courts of Appeal, so that if the EEOC seeks enforcement against the particular employer on the basis of the violation of one of its published guidances and the employer challenges that guidance in a Federal Court of Appeal, the Federal Court of Appeal has the choice of whether to enforce by giving deference to the EEOC's guidance; or not enforcing by

saying for one reason or another, it chooses not to defer to the EEOC's guidance. So the mere fact that the Equal Employment Opportunity Commission has put out a guidance does not necessarily mean that it will have the force of law, particularly if the Supreme Court affirms the decision of the Fourth Circuit in this UPS case, so we will just have to wait and see. Arguments in the UPS case will not be heard obviously until the session begins of the Supreme Court in October of this year with the decision probably to follow next year or sometime in the spring of 2015. So even though the Equal Employment Opportunity Commission has put out a guidance, it certainly is by no means enforceable on its own. It would have to be enforceable by virtue of a Federal Appeals Court filling it. In another situation, however, where if you have light duty policies as an employer, you may want to revisit them and analyze whether it has some sort of disparate impact on pregnant employees in your workforce. Again, you are not obligated to follow the EEOC guidance at this point, but you may want to take a look at it nevertheless, it is on the EEOC's website.

Let me turn my attention to a recent conference that was held in which an attorney for the National Labor Relations Board addressed what is called the Mid America Labor Management Conference in Missouri, and in that conference she was addressing how the National Labor Relations Board looks at policy provisions in handbooks, and we have talked many, many times in these telebriefs about your policy handbooks and the kinds of policies that the National Labor Relations Board would be looking at, to ascertain whether your particular policy in question violates the Section 7 rights of employees; and as we have talked about before, all employees have a Section 7 right under the National Labor Relations Act to band together for purposes of discussing wages, hours, and terms and conditions of employment; and according to this attorney, who addressed this particular conference, her name was Christal Key, she is a field attorney with the NLRB region 14, she basically said if a rule in your handbook could be reasonably construed to restrict or prohibit discussion of wages or other terms or conditions of employment, it could be found to be illegal. Now, one of the things that she did talk about and which the National Labor Relations Board does give credence to is statements in an employee handbooks that employers are increasingly using that basically state that nothing in the handbook or nothing in the rule is intended to prohibit employees from engaging in union activities or protected concerted activities or from exercising their rights under the National Labor Relations Act. I have talked about these sort of disclaimers before, and I have advised I think many of you, in reviewing your handbooks, to have at least a general disclaimer in your handbook which would indicate that nothing in your handbook or nothing in your rules and policies and procedures is intended to or will be enforced in a manner that would preclude the exercise by the employees of the rights guaranteed under the National Labor Relations Act to engage in concerted activity or to refuse to engage in such activity. And according to this particular attorney from the National Labor Relations Board she says "that kind of language will be given tremendous value as we look at a rule."

So, as I have stated many times in these telebriefs, I do not know when you typically look at your handbooks for purposes of possible revision. Some people do it at the end of the year, some people do it at the beginning of the year, some people do it at mid year, whenever it is that you do it, it would behoove you to include a statement in your handbook along those lines because we know that the National Labor Relations Board will pay particular credence and differ in many cases in a positive way to those employers who have included that sort of exculpatory language in their handbooks. If you need help with that particular language you can always e-mail me or call me and I can help you out with that.

I wanted to bring to your attention a pretty interesting case that was reported in the American Bar Association Journal which is of course disseminated for the most part to attorneys. This was the case that was posted on their website, July 14th, and I will just read from the particular statement or summary. It says the prosecutor in the Atlanta Schools cheating scandal has been suspended for three days without pay after she mistakenly hit "reply all" when commenting about a defendant's stage IV breast cancer. Assistant District Attorney Lori Canfield of Fulton County, this is in Georgia, mistakenly sent a two-word comment to dozens of lawyers and others associated with the schools case, report the Daily Report and the Atlanta Journal-Constitution. It said that Canfield commented after receiving notification that former schools superintendent Beverly Hall was too ill to attend trial or assist her lawyers according to a doctor's opinion. Canfield's response again, which she sent to reply all, was "Surprise, surprise," and she attempted to recall this, but of course recalling something after you sent it by virtue of e-mail is useless. I bring this to your attention because from the perspective of employers and supervisors and managers who frequently use e-mail on a daily basis, and may in many cases address a response to more people than was originally intended, it certainly would behoove you from a proactive standpoint to coach a little more your managers, your supervisors on proper e-mail etiquette, because from a legal standpoint if a e-mail message is directed to "reply to all" there is virtually no way of recalling it and those things are discoverable; and you see as in this case, it even involved a lawyer who was suspended by her employer for a very truncated but sarcastic message that she disseminated to more people than really should have gotten the message.

Speaking of I think attorney communications, very recently there was a case decided in the United States District Court for the District of California which basically ruled that attorney-client privilege did not protect an HR Manager's memo regarding an internal investigation into a discrimination complaint in his particular company. The internal memo had been ghostwritten by an in-house attorney but nevertheless was communicated and promulgated by the HR person and not by the attorney. And the question in this case was whether or not attorney-client privilege would obtain and would protect this communication from having to be disclosed in discovery in litigation by these employees who sued the company. Those of you who do not know there is an absolute privilege for communications which are directed back and forth

between attorney and client, and so I generally advise clients in the midst of an investigation, an internal investigation, to make sure that their communications are shielded by attorney-client privilege by having them be directed to your attorney. And you can have that same privilege be accessible and be applicable if you have an in-house attorney but it has got to be done in the right way, so you can have something that is ghostwritten by an attorney where the attempt is to shield that attorney's communication under the rubric of attorney-client communication privilege. For those of you who are conducting internal investigations, the best advice I can give you, and I have given seminars on this, is to make sure that your communications are directed to your counsel, so that they are protected by attorney-client privilege and that they are not disseminated to anyone else that would not be able to be classified as a agent or representative of your company. So if you have a rank-and-file employee and you mistakenly send the communication to a rank-and-file employee, you probably will not be able to assert attorney-client privilege because that person will not be deemed to be an agent of the company as opposed to a manager or a supervisor who would be deemed to have managerial or supervisory authority. So, a word to the wise, when conducting your internal investigations make sure that you can shield your attorney-client privileged information in the correct way.

Recently in the state of Maryland, many of you do business in the State of Maryland and its not unique, the hospital which is called Anne Arundel Medical Center announced that beginning in 2015 it would refuse to hire any employee who smokes or uses tobacco products, and that they would be tested for nicotine prior to the time that they would be hired. This is in keeping frankly with a trend in other medical centers across the country, for instance the Cleveland Clinic in Ohio, Baylor Hospital in Texas and the University of Pennsylvania in Pennsylvania. There are some states that would prohibit discrimination against tobacco users. These include Connecticut, the District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, South Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming. So in those states it is not a matter of federal law because there is no protected status as a nicotine user on their federal law, although under the ADA Amendments Act it will be curious to see whether there is a case that it is litigated in which the claim is that nicotine use is deemed to confer protected status on an individual. However if you compare it to, let's say, current drug use or current alcohol use where the person's use itself as opposed to status for instance of a recovering drug addict or alcoholic would be protected but not current use, you may say well you cannot discriminate against an individual under the Americans with Disabilities Act the amendments thereto on the basis that someone may have been a recovered smoker but not if that person is continuing to use. I only bring this out because those of you who do business in Maryland may be thinking at least at the current time to follow the example of the Anne Arundel Medical Center which said that for purposes of keeping our workforce healthy and keeping our health

insurance costs down we are going to prohibit and not hire anyone who has a history of nicotine use. So it is an interesting kind of development stay tuned.

The last thing that I will just mention is a very interesting case just sort of on the Internet the other day where an executive of Yahoo, her name is Maria Zhang, was sued by a female subordinate on the basis of alleged sexual harassment committed by this Yahoo executive. She turned around and she counterclaimed against the individual claiming defamation and claiming that the lawsuit that was generated by this person was maliciously initiated and in bad faith and for purposes of just holding this person up to defamatory ridicule and scorn. There has been a lot that is written on this on the Internet, so her name is Maria Zhang, Yahoo Executive. The reason I bring it up, for two reasons. One, simply points up the fact that workplace harassment is equally applicable as you all the same sex cases, so it does not just apply to male against female, female against male, but certainly can be equally applicable to male against male or female against female. Secondly, it points at the fact that there are cases where employers and their executives who had been sued in harassment cases have counterclaimed against the person bringing the case on the basis of an abusive process or malicious prosecution of a lawsuit. So, I invite you to go on the net, read about it, it is pretty interesting, I am not sure how it will turn out, but it certainly has been a very notorious case in the last week. So those are the developments for the day. As always, I invite any comments or questions, and if somebody would rather direct that comment or question to me in private, my e-mail is hkurman@offitkurman.com or my direct phone number is 410-209-6417. Any questions or comments? Okay, well if not, I hope everybody got something out of today's discussion, and we will be doing the next telebrief on August 13th and I appreciate everybody participating.