

## LABOR & EMPLOYMENT TELEBRIEF

By

Howard B. Kurman, Esquire

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Howard Kurman: Okay, its 9:02 on the official clock, and we are going to get started. Welcome to everybody. I hope everybody's Christmas, Hanukah, etc., was good and is good and that I can't believe that we are in the midst of 2017 just about, but we are there. So, let me get started.

I came across an article, in that we are headed into the New Year and probably some of you may do some early training of your management staff, I wanted to go over some points that I thought were really good points, practical points from a fellow management labor lawyer that it was in a professional journal that I get. It is entitled "*11 Traits of Good Employer Documentation*" and I know that all of you who supervise or who have responsibility for documentation of various employment related issues primarily either investigatory or discipline try and imbue your management staff with some real practical hints about how to proceed and how to do it. I thought that this was a really good article, nothing absolutely profound, but as we head into the New Year something that I think may be worth, you know, having you guys who have training responsibilities or who engage others to train will remember. Let me mention the things that she mentioned in her article and this was again a fellow labor lawyer named Robin Shea and I commend her for this article.

The number one trait of good employer documentation that she indicates, it says, it shows who wrote it and I have seen many times when there are documents that are written by a manager supervisor when there is a first name written, but not a first and the last, so make sure that your management staff and your supervisory staff knows that there should be a first and a last name on the piece of paper that's written.

Secondly, it includes dates, times, and places. I would be remiss in saying that I have seen many, many pieces of management documentation where the date, the time, the place that something happened or something was said is not included. Its sort of a journalistic ethic which is who, what, when and where and you need to make sure your management and supervisory staff understands it when they write an investigatory piece or discipline piece, that those dates, times, and places are specified in the document.

Another very important hint, it is legible. I cannot tell you how many times clients have sent me personnel files which contain documents written by management or supervisors which is not legible, and I think it is critical that either it be redone in handwriting or that the document be typed on the person's computer so that it is legible.

Next, it provides enough of an explanation so that a complete outsider can get at least the gist of what it means. This is really important, you got, as the author

says, its very nice if you can include enough background and context so the documentation makes sense to someone who may not know much about your department or your company and what it does. Frequently, this kind of documentation if it winds up in the hands of the Equal Employment Opportunity Commission or a judge, arbitrator jury, you are going to need some context to the document, so this is an issue of training your managers and supervisors on how to appropriately put context into the document they are writing.

The next practical hint is that obviously if it is a discipline document it needs to be shared with the employee. It does not need to be signed by the employee, often times I am asked this question. I do not really care whether an employee signs it or not as long as there is evidence that it was given to the employee as a matter of course and as a matter of due process.

It states facts not conclusions. As the author states "David Brown told Mary Smith an inappropriate sexual joke" really does not say much. It would be much better to put in your documentation the specific joke that was allegedly told. The reader can judge for himself or herself whether it is a sexually inappropriate one, and if so, how severe.

Particularly important in a discipline it states whether the employee had committed similar infractions in the past; hopefully your disciplinary forms are simple enough and routine enough that it will leave a space for your manager or supervisor to detail prior disciplines.

Lastly, particularly on a discipline form it will state the consequences of future violations. I usually have a stock phrase in any discipline form that I do for a client which basically states that if you commit any future discipline or any future infraction of a similar kind you will be subject to future, further and more severe disciplinary action including the termination of your employment. Some phrasing like that which would give the employee notice of the future consequences of any kind of disciplinary infraction in the future. These are practical hints, again nothing exactly profound, but as we enter into the New Year I wanted to mention those so that you will have a better handle if you are going to be training your staff on that.

Another thing that I thought may be of practical concern as we head really into sort of the winter season is what happens in weather-related events from a wage and hour standpoint. If your office is closed for a few days, because of bad weather, what are the pay consequences for that. Well, as you probably know non-exempt employees, that is those employees who are paid on an hourly basis only get paid for the hours that they actually work. If a non-exempt employee cannot work because your office is closed or because they cannot make it into your office because of weather-related conditions the FLSA does not require that you pay that particular employee. On the other hand an exempt employee that is usually the salaried exempt employee administrative, professional, executive, computer, etc., would receive their full weekly salary for any week in which they perform any work, so if the office is closed, let's say for

a day and half and the exempt employee performs work during that week, generally the exempt employee would be paid for the entire week. Now, the exception really is if the office is closed for an entire day, technically an exempt employee could be paid let's say four days out of that week and use PTO for another day, whether or not you want to do that as a matter of employee relations on any of these things is really up to you as an employer, but from an FLSA stand point obviously any partial day that the exempt employee works would be paid for the entire day and the entire week with the exception being if you are closed for an entire day theoretically under the FLSA you could treat that employee as one who took a personal day off. That is if the exempt employee does not come and other employees do come in you could treat that as a personal day on the other hand if you are closed, that is there is nothing that could be done in terms of the exempt employee coming in and the exempt employee worked at all during that particular week you would have to pay that employee for the entire week. So it gets a little hairy. Again, from a summary standpoint if the exempt employee works during the week and the employer is closed even for an entire day you still have to pay the exempt employee but if the employer is open and that exempt employee just does not come in says he cannot come in his neighborhood is icy or whatever it is you can theoretically dock that exempt employee an entire day whether you do it as a matter of employer relations again is up to you. Those are the rules under the FLSA.

Let me turn my attention to the goings on at the Department of Labor. The Department of Labor has filed its brief in the Texas case that we have talked about in prior telebriefs regarding the exempt overtime rules, they filed their brief on December 15<sup>th</sup> and the opposition brief is due on or before January 17<sup>th</sup>. It is likely that because the inauguration of Trump occurs on January 20<sup>th</sup>, it is likely that we will not have a decision from the Fifth Circuit on the injunction case until sometime probably March or April. We do not know really what the import of the new Secretary of Labor will be as you know and as I have said before Trump has nominated Andrew Puzder who is the current chief executive officer of CKE Restaurant Holdings that is the company that operates Hardee's and Carl's, Jr., as the new Secretary of Labor. As I indicated on prior telebriefs, he is a very outspoken critic of the Department of Labor's regulations so in that it has been announced that confirmation hearings will be held on him in January and I do not know how long those confirmation hearings will take place. But assuming that he is confirmed because we have a Republican Senate and a Republican House all you really need in order to confirm him is 51 members of the Senate. Assuming he is confirmed irrespective of what happens at the Fifth Circuit it may not be out of the realm of possibility that he may say or indicate that he wants to withdraw the appeal even before there is a decision by the Fifth Circuit or even if the Fifth Circuit were to reverse the trial judge and say that injunction is inappropriate it is also possible that Puzder and the Department of Labor may roll back the regulations that actually it probably had been already implemented by many of you as of December 1<sup>st</sup>. There is much ado and much in doubt as we look at the probable incoming Department of Labor Secretary and what that will portend for not only the rules on white collar exemptions but other Department of Labor initiatives as well, whether that is

the independent contractor employee initiative, whether it is the issue of joint employer etc. An interesting statics involving the Department of Labor is that in 2016 so far the amount of back wages that is assessed against employers is \$246 million; that is a lot of money, and as I have indicated before the Department of Labor has been very, very aggressive in terms of its enforcement actions against employers in the last two or three years so assuming that Mr. Puzder is confirmed by the Senate it remains to be seen whether that figure will go down because of less aggressive enforcement actions taken by the Department of Labor. Again, the confirmation hearings on him will be in January and we will know probably I would assume by February or March where his confirmation status is and we may even have an idea where the Fifth Circuit is on the white collar exemption rule so stay tuned and as we move into 2017 and the telebriefs that we will do in the New Year, I will of course inform you about that.

In the meantime, it is interesting that United States Department of Labor put out a news release on Monday, December 19<sup>th</sup>, the week before Christmas on the issue of misclassification and this is right from their press release and it says "the misclassification of employees as independent contractors is a huge problem for workers, employers who play by the rules and our economy." It goes onto say as part of our efforts to address this issue the labor department has created a user friendly web page where workers, employers and government agencies can find information and resources. So right on their web page is a fairly expansive explanation and question and answer forum about the issue between independent contractors and employees for those of you who are interested.

I wanted to mention that the week before Christmas in Washington DC, those of you who do business in the District, the council passed a very generous paid family leave law. Under this law, which passed by a 9-to-4 vote the Washington DC City Counsel passed what is known as the Universal Paid Leave Act, which provides parents eight weeks of paid leave for the birth of a new child either through natural birth, adoption, foster care or any assumption of legal guardianship. That law also provides for six weeks of paid leave for individuals to care for sick relatives and two weeks paid leave for self-care. The way it is funded is that the council imposed a 0.62% payroll tax on employers, which would generate approximately \$250 million in revenue and allow for a maximum of \$1,000 weekly benefit for employees. Pretty generous law in my opinion and you know, it seems to me you know you are increasing the taxes on employers, it begs a question of whether employers will be running away from the district because of this very high tax, which is necessary in order to fund this particular statute or ordinance. In Maryland, interestingly, Governor Hogan has said that he is going to purpose a sick leave bill. You know that a sick leave bill was defeated in the 2016 legislative session in Maryland but under this proposed ordinance or law by Hogan companies with at least 50 employees would be required to offer full time workers five sick days per year and he is going to introduce this legislation in the democratically controlled legislature. The plan would allow smaller businesses to get up to \$20,000 a year in tax

deductions for offering paid sick leave so, more on this obviously the legislative session in Maryland begins in a couple of weeks and we will see how that will shake out but given the fact that we have a democratically controlled legislature this may be the year in which the sick leave bill passes and those of us who obviously do business in Maryland will have to provide for sick leave for employers.

The last thing I wanted to mention is that and I know I have mentioned this before there are two openings on the National Labor Relations Board it is rumored that a guy by the name of Peter Kirsanow, a very conservative Republican management side labor lawyer may be nominated by Trump to take one of those seats on the National Labor Relations Board. He has been pretty critical of some of the labor board's decisions particularly like the joint employer decision in Browning Ferris, which is in my opinion sort of way out there in terms of practical import. As I have indicated in past telebriefs, right now there is a 2-to-1 majority on Democrats on the National Labor Relations Board. Trump will have two appointments to be made during his term, which will probably convert a 2-to-1 Democratic majority into a 3-to-2 Republican majority and what I would foresee is many of the decisions that have been promulgated in the last two or three years under a Democratic majority will be modified in fact may be even turned back under Republican majority and be much more employer friendly as we move into the next four years under a Trump administration.

Those are the developments of the day the next telebrief will be in 2017 hard to believe the second Wednesday, which will be January the 11<sup>th</sup>. Okay Michelle can you take this off of mute please. Okay as we often do you know if there are any questions that anybody has feel free to ask them either in this forum or on my private line my work line. My private line is 410-209-6417 or by email at [hkurman@offitkurman.com](mailto:hkurman@offitkurman.com). Any questions from anybody out there?

Steve \_\_\_\_\_: Howard this is Steve \_\_\_\_\_.

Howard Kurman: Yeah Steve.

Steve \_\_\_\_\_: With the sick leave in the state of Maryland if you have got a bundled PTO package how will that affect it?

Howard Kurman: Well I think that it remains to be seen Steve, how it will be phrased if it is bundled, which is not uncommon, you know where you have vacation, sick leave personal time all bundled up.

Steve \_\_\_\_\_: Right.

Howard Kurman: My guess is that you are going to have to allocate in some form or fashion depending on how the statute is written Steve so that if there is a mandate of five sick days you may even have to delineate out of that, that out of the PTO five sick days are available in other words you may have to have a carve out for

sick days out of your PTO in order to comply with the statute. Obviously, we would have to see how the statute is written but if it is written in the way that I think it is you may have to delineate a separate sick leave package or carve out, out of your PTO in order to comply with the statute. We will know how you will have to do it when the legislature gets the package from Hogan or when a Democratic legislature introduces it into this legislative session so I just think we have to pay attention and I will be bringing you updates in future telebrief on that.

Steve \_\_\_\_\_: Super thanks.

Howard Kurman: Sure, any other questions? Okay well if not it has been an interesting 2016 I am sure it is going to be very interesting in 2017 both on the federal and state side so hopefully everybody have a safe and a happy and very nice holiday for the New Year and we will reconvene on Wednesday, January the 11<sup>th</sup>. Take care guys.

\_\_\_\_\_: Thank you.

Howard Kurman: Take care bye, bye.