LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, good morning everybody. It's Howard Kurman. As you know, we do these telebriefs on the second and fourth Wednesdays of every month and it is kind of hard to believe that this is the end of August and that when we do the next telebrief we will be almost into the fall season and that will be on September 10th. So let me start off.

Those of you out there who do any business in Virginia will be interested to know that on August 14th the Governor of Virginia, Terry McAuliffe, signed Executive Order 24 which established an interagency task force on what is called worker misclassification and payroll fraud. So this is really a response to a legislative finding in 2012, which concluded that one-third of the Virginia employers that were audited in certain industries misclassified their employees resulting in a failure, of course, to pay workers comp insurance, unemployment insurance and payroll taxes and to comply with minimum wage and overtime laws. So, they are going to set up this task force which will be made up of representatives from the Virginia Employment Commission, Department of Labor and Industry, Department of Professional and Occupational Regulation, the State Corporation Commission's Bureau of Insurance, the Department of Taxation and the Workers Compensation Commission.

Obviously, the intent here is to deal with those Virginia employers or those companies that who do business in Virginia who misclassify their individuals who were engaged probably primarily as independent contractors as opposed to employees. You recall that in 2009 Maryland created a similar work force for all task force. So again, this points of the issue that I have talked about on many prior telebriefs, which is the misclassification of individuals as independent contractors rather than as employees. So those of you who do business in Maryland or who do business in Virginia, be aware that not only from the state side but also the federal side, there is increasing scrutiny on those of you who utilize independent contractors and as I have indicated in the past if you are using independent contractors with any degree of volume or frequency make sure that you have appropriate contracts in place which delineate these individuals as independent contractors, make sure that from the standpoint of control that you do not exercise the degree of control that will put you into the situation where an outsider would view these individuals that you are engaging more as employees as opposed to independent contractors.

There are a series of factors that are considered by both the state to deal with this issue and the feds namely the Department of Labor and the IRS in ascertaining whether one is an independent contractor or an employee. I have talked about these before but now would be a good time again to assess whether or not the individuals that you are calling independent contractors really are independent contractors.

Let me turn my attention to a press release that was put out by the Equal Employment Opportunity Commission just two days ago and its entitled "EEOC Sues Costco for Sex Discrimination." A fairly significant lawsuit filed in Federal District Court in Illinois and I will read the salient points from the actual press release put out by the EEOC. So they say warehouse retail giant Costco violated federal law by fostering a sexually hostile work environment against one of its female employees. According to the EEOC's complaint, Costco violated Title VII of the Civil Rights Act of 1964, which protects employees against sex discrimination when the company failed to take steps to protect one of its female employees from unwelcome advances of one of its warehouse member customers. Those of you who know that Sam's Club, Costco, BJ's, etc., they are classified as retail warehouse establishments where in order to get in you have to pay a membership fee.

In this press release it further states John Roe, the EEOC District Director in Chicago, said that the agency's administrative investigation revealed that the employee repeatedly complained to her managers at the Glenview, Illinois Costco where she worked about being pursued, approached and confronted in the Costco by the man. In addition, Roe said the employee eventually obtained an order of protection against the warehouse member for the unwelcome stalking. The press release goes on, the employees efforts were not enough for Costco Roe said. One of her managers apparently told the young woman that he agreed the man was "not right" and that Costco would monitor the situation. But what actually happened was when the situation persisted and the employee complained to the police, Costco Management allegedly yelled at her and told her to be friendly to the customer. John Hendrickson, the EEOC Regional Attorney in Chicago said "All employers have a duty to protect employees from sexual harassment whatever form that harassment may take – whether it is lewd remarks, groping, propositioning or stalking. No employer gets a pass because it is a customer targeting its employee, rather than a manager or fellow employee. That's particularly true when the harassment is especially egregious. If the employer permits the harassment to continue, it's compounding its liability and troubles." I think, and by the way this case is captioned as EEOC v. Costco Warehouse Corporation. It was filed in the United States District Court for the Northern District of Illinois in Chicago and assigned to Judge Ruben Castillo. More about this as the case proceeds and I will let you know about that, but there are really two things that I think are takeaways from this press release again that was just put out two days ago, on Monday.

First, make sure that your established and communicated and disseminated workplace harassment policy prohibits harassment by third parties as well as employees. Particularly those of you who are out there who have employees who were subjected to outside third parties, whether they are customers, whether they are vendors, make sure that your management staff knows that sexual harassment or workplace harassment is equally forbidden when it takes place by third parties or vendors than by employees, themselves. So if your policy statements in your handbooks or your stand-alone policies do not

prohibit sexual harassment or other workplace harassment by third parties as well as employees, you need to pay attention to this and to remedy that and to amend your policies and if you need help with that let me know.

The second takeaway is that those of you who have employment practice liability insurance or who are contemplating in purchasing employment practice liability insurance make sure that your policies preclude harassment on the part of vendors and third parties. That is that it provides protection for your company in the event that the harassment is committed by a third party rather than simply by just an employee. Because if you purchase employ practices liability insurance, and of course more and more companies do that, you need to make sure that the definition of a claim will include a charge by an employee that he or she has been harassed not only by an employee but by a third party or by a vendor. So go back and look at your policies. If you have a policy and if you do not have a policy and you are contemplating purchasing a policy make sure the definition of claim includes harassment by a third party or by a vendor and I think the training of your management staff is important here. Make sure that they understand that they have a duty to prohibit and to monitor any activities by third parties including vendors and customers that would fall into the classification of workplace harassment.

Let me turn my attention to one of my favorite agencies in the National Labor Relations Board and bring to your attention a decision by the National Labor Relations Board that was published on August 22nd, less than a week ago, and the case is entitled "Triple Play Sports Bar and Grille." In this case, you had two employees who worked for a bar and grill who were terminated by their employer as a result of a Facebook post that were published and commented on by other employees where they criticized the employer because of the employer's tax withholding mistakes and essentially what the Labor Board found was that these employees were engaged in protected concerted activity, protected by Section 7 of the National Labor Relations Act, I have talked about this on numerous occasions in the past, and that because of the fact that they were engaged in this protected concerted activity, they could not be interrogated by the employer about this activity and they could not be terminated as a result of the exchange which happened on the public Facebook post. To give you an idea of what happened, and I will quote from the Board case, the Board decision, and obviously these Board decision are public, so that on January 31st, this is back in 2010, one of the employees posted with regard to the tax withholding issue, "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax work correctly!!! Now I OWE money…WTF!!!" For those of you out there who are not familiar with that, it means what the F in terms of the abbreviation. The following comments were posted to her comments so he had another employee who posted, "You owe them money that's f****d up." Another employee posted, "I f***ing owe money, too." Then another post, "The state, not Triple Play, I would never give that place a penny of my money. Ralph who was the owner f****d up the paperwork as per usual." Another employee then posts, "Yeah I really don't go to that place anymore." And other employee then posts, "Its all Ralph's fault."

Ralph is the owner here. He did not do the paperwork right. I am calling the Labor Board to look into it because he still owes me about $2,000 in paychecks. Then at that point another employee selected the like option under this particular comment. Then the discussion continued as follows. We shouldn't have to pay it. It's every employee there that it's happening to. Another employee posts, You better get that money…that's bullshit if that's the case I'm sure he did it to other people, too. Another employee post, Let me know what the Board says because I owe $323 and I've never owed. The next employee post, I am already getting my $2,000 after writing to the Labor Board and them investigating but now I find out that he f****d up my taxes and I owe the state a bunch. The next employee comments, I mentioned it to him and he said that we should want to owe. The next employee post, and this is particularly in my opinion pretty egregious, ha, ha, ha he's such a shady little man. He probably pocketed it all from our paychecks. I've never owed a penny in my life until I worked for him. Thank goodness I got out of there. And on and on it goes. And then the Labor Board analyzes all these statements and basically states that while they may be offensive to the employer nevertheless they constituted protected concerted activity, and let me remind you what that is. A concerted protected activity is when two or more employees band together either inside the workplace or in this case outside the workplace, and comment on wages, hours or terms and conditions of employment, and despite the fact that in this case some of the statements either bordered on or actually in my mind constituted unprotected defamation, the Board nevertheless disagrees and finds that in this case whether an employee actually said a particular thing or whether an employee liked, as we do on Facebook, the comments, those particular comments constituted protected concerted activity. And so I remind you again, and I have done this repeatedly in these telebriefs. Go back and look at your social media policies, make sure that they are not overly broad, because in this case not only did the Board pay attention to the actual statements that were made but it focused on the social media policy of the company or the bar and grill, itself. So, you got to look at your social medial policies to see whether or not they are over broad, and then if you are ever in a situation where an employee, because in this case it was a co-employee who brought to the attention of the employer statements that were made on these Facebook pages, if you are faced with critical statements made by more than one employee on a Facebook page, make sure that you scrutinize and analyze those statements within the context of whether or not they would violate the strictures of Section 7 of the National Labor Relations Act. Bear in mind that if you have an employee who merely posts on his own criticisms of a company where they are not liked or commented on by other employees, that is not concerted protected activity. But where you have an employee who was either liked or joined in those comments by other employees, certainly that could constitute protected concerted activity so, it is very, very dangerous to go ahead and interrogate employees about statements that are made about the employer on Facebook unless they are clearly and egregiously defamatory that is personally attacking in an egregious way of a member of management or another employee. But in all cases it behooves you before you would take a fairly dramatic action such as termination, that you discuss it with your

employment attorney because we are in very dangerous waters here given the constitution of the National Labor Relations Board is democratically controlled and, therefore, if there is ever a gray area in a case; and again, this applies to nonunion employers as well as union employers, you are going to be in a situation where you are facing reinstatement and back pay by the National Labor Relations Board. So again, a case decided less than a week ago, it behooves you to scrutinize your policies on social media and if you are ever in a situation where you could be faced with a claim, make sure that you scrutinize it very carefully and discuss it with your employment attorney.

Another case that I want to bring to your attention was a case decided in Federal Court on August 13th, and this was the Federal Court in the Federal District Court of Minnesota, and the case was called Bloom v. Group Health Plan. In this case, you had an employee who went out on a maternity leave, an approved maternity leave, and during her maternity leave from this particular healthcare institution she came back during her leave and she took samples of baby bottle samples and Vaseline and when this was reported to the employer by another employee she was eventually terminated. What she had done was she took six cases of formula constituting 36 cans okay, and she complained that the reason that she was terminated was because of interference with her statutory rights under the Family and Medical Leave Act. Now, the Federal Court granted summary judgment to the employer in this case and it quoted other cases and it basically stated and I will quote from this decision, the mere fact of discharge during FMLA leave does not mean an employer must be held strictly liable for violating the FMLA's interference provision. In fact, the court went onto say Bloom should not be shielded from wrongdoing simply because she was on FMLA leave. He found that Bloom had failed to demonstrate material fact questions that the real reason she was terminated was because she was exercising her right under the FMLA. In fact, Group Health fired Bloom the court said citing its policy against employees taking samples for personal use. Group Health said Bloom also violated its code of conduct barring employees from leveraging their jobs to obtain gifts or favors from vendors as Bloom said a sales representative gave her the formula. So that what the court said was even if Bloom established the prima facie case, Group Health had a legitimate nondiscriminatory reason for her termination that is she took samples for personal use in violation of company policy. This decision follows on the heel of many other published decisions which basically states that the fact that an employee is on an approved FMLA leave or an approved medical leave, even if its not FMLA leave, does not immunize that employee from disciplinary action; and its not unusual that during an approved FMLA leave or during a medical leave or even a personal leave, a company may discover improprieties that the employee committed, during the employee's period of employment, either very much prior to the employee taking the FMLA leave or almost concurrent with the employee taking the leave. And again, if you look at the regulations under the Family and Medical Leave Act its clear that an employer is free to discipline an employee if it otherwise would discipline the employee if the employee were actively engaged in employment outside of the leave. So those of you out there who are faced with situations where an

employee is on approved leave, whether its FMLA leave, whether its medical leave or even personal leave, you need to be aware of the fact that if you discover improprieties on the part of that particular employee, it does not mean that you cannot take steps to discipline or even terminate the employee. What it does mean is you have to be pretty careful about making sure that the reason for the termination or the discipline is not connected with the leave because obviously an employee probably will say well the reason that I was terminated was because I was on leave and the employer interfered with my approved leave. So again, I would caution you that if an employee is on leave, it does not immunize that employee from being disciplined or terminated, but if you are going to terminate that employee, its probably a good idea to review the facts and circumstances of that situation with your employment attorney to make sure that there are very good nondiscriminatory reasons for the termination that are not connected with that employee taking leave.

So those are the developments for the day. As always I invite any questions or comments by anybody out there. If you would rather ask me a question in person on the phone, my direct number is 410-209-6417 and my e-mail is hkurman@offitkurman.com. Any questions or comments out there? Okay, well if not, I guess enjoy what is left of the summer and we will pick up where we left off in the next telebrief on September 10th, a couple of weeks from now. So, everybody enjoy Labor Day, have a safe Labor Day and I will talk to you soon. Bye, bye.