LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay. Good Morning everybody. It is Howard Kurman, and as we always say we do these telebriefs on the second and fourth Wednesdays of every month. Being as it is the end of September believe it or not, the next telebrief will be on the second Wednesday of October which is October 8th. So, it is hard to believe we are moving into the fall but we just arrived there as I think we did yesterday or the day before.

All right, I want to pick up on another lesson I think that we can learn from the Ray Rice case probably all of us are sick of this because it seems to make to news everyday but those of us in the profession either in labor relations or employee relations or human resources there is another good lesson to be learned by what has transpired in this case. Let me just review the chronology just a little with you because I think it has relevance with regard to hopefully the lesson that we will take away from the latest developments in this case. So Ray Rice met with NFL Commissioner Roger Goodell on June 16th and on July 24th of 2014. It was after the July 24th meeting with Commissioner Goodell that Goodell announced that as a result of his meetings with Ray Rice and his consideration of the evidence in this case that he was going to discipline Ray Rice by handing out a two game suspension without pay which for those of you who are in the middle income, the even upper middle income brackets, you will appreciate that his total fine for two games was $529,411.24. Pretty nice pay for two games. On September 8th, TMZ published the second video of Ray Rice which purportedly shows him violently punching his then fiancée who became his wife subsequent to that and rendering her unconscious. Of course after that video was released there was a torrent of publicity and commentary, most of it negative of course, and what happened was Goodell then converted the two game suspension that he had already meted out to Ray Rice to an indefinite suspension and the Ravens on the same day announced that it was terminating its contract with Ray Rice. On the evening of September 16th, so just last week or so the NFL Players Association, that is the union that represents the players, released the statement and I will quote from its statement “under governing labor law, an employee cannot be punished twice with the same action when all of the relevant facts were available to the employer at the time of the first punishment.” That is a very correct statement of the relevant principles in Labor Law and in general Human Resources Law. The fact of the matter is that when you go to discipline an employee you make a choice and you make your choice based upon the facts that you knew or could have known at the time. What is happening in this Ray Rice situation for those who are following it is the argument goes this way. When Ray Rice met with Commissioner Goodell on two separate occasions one in June and one in July he admitted to the commissioner that he had punched his then-fiancée and that she was rendered unconscious. The fact that Goodell did not see or could not have seen according

to his version the second video at that time is largely irrelevant so the argument goes because under the concept of industrial due process you cannot discipline an employee for the same offense under the same circumstances twice once less severely than the subsequent particular discipline. And it is commonly called a principle of industrial due process that an employer makes this choice in disciplining an employee and then to go back and to retroactively increase the discipline based on a purported version of new facts is probably not going to go over well with an impartial third party who will hear this dispute and that third party will be an arbitrator. What could Goodell have done differently? Well, he saws Rice on two occasions, once in June and once in July. It is certainly possible that he could have indicated to both Rice and the public at large that he wanted to see the second video and until he saw the second video he was going to withhold judgment or the league would withhold judgment on what it was going to do with Ray Rice. If he has done that certainly after viewing the second video he could have said, based on all the facts and circumstances and the evidence available to me I am going to suspend him indefinitely, but instead what he did was he heard Ray Rice's version of the facts, made the decision to discipline him by suspending him for two games and then when the second video came out and when all the hue and cry ensued decided to increase that suspension from a two game suspension to an indefinite suspension. I do not know what will happen in the ensuing appeal, but I have a strong feeling based on my experience that there is a good chance that a third party arbitrator will say Mr. Goodell and Mr. NFL you in effect have attempted to suspend Mr. Rice twice for the same offense based upon the facts and circumstances that you knew or should have known at the time. And that, therefore, I am not going to permit that to occur and the lesson to be learned by all of you out there who are involved in disciplinary decisions is that it is better to wait and to formulate your opinion based upon all the facts and circumstances rather than to discipline and then attempt to go back on retroactively adjust the discipline based upon purportedly new evidence. So follow this case along, we really do not have a choice because it is in the media almost every day, but I am telling you as an experienced employment attorney I believe there is a good chance in this case that the suspension on an indefinite basis may be overturned and he would be reinstated. The interesting thing is well the question will become reinstated to what? The Ravens have cut his contract. They said that he violated the morals clause and brought denigration and criticism on the Ravens as a NFL team and the probability of another team picking him up is probably pretty slim so the derivative question will be well if he is reinstated by the commissioner, does he have a derivative claim against the Ravens for an inappropriate extinguishing of his contract. These are all interesting legal questions, but the main point that I wanted to bring out for your benefit is that when you go to discipline an employee consider all the facts and circumstances that you know or should know at the time and do not count on the fact that you may be able to adjust that discipline upward based upon new facts and circumstances.

Speaking of domestic violence, let me mention to you that there is a new Massachusetts law which is immediately effective right now giving employees

who are the victims of domestic violence a right to job protected leave and the act is modeled really on the Family and Medical Leave Act. This was signed by Governor Patrick in Massachusetts on August 8, 2014 just a month ago and in effect employers with at least 50 employees in the State of Massachusetts are now required prospectively to provide Massachusetts employees with up to 15 days of protected leave, job protected leave, who work in any 12 month period if that employee or a family member of the employee is the victim of what is called "abusive behavior which the statute defines as domestic violence, criminal stalking or sexual assault. So the employee may take this leave to address or obtain medical treatment or evaluation, to obtain necessary psychological or psychiatric counseling, to go to court and get a protective order, to go before a grand jury as a witness, to meet with a district attorney or other police or law enforcement official about the purported abusive behavior, to attend child custody proceedings or to address any of the issues that come up in this type of domestic abuse. The employer basically will be permitted to require the employee to exhaust all available personal leave which would include vacation or personal or sick leave in taking this domestic violence leave. Also, the employee has got to give the employer advance notice of the need for leave unless of course it would be impractical or impossible because of imminent danger to do so. So what happens with the particular law is that the documentation which the employee supplies to the employer supporting the need for the leave can be maintained by the employer in the employee's personnel file but only for so long as is required for the employer to make a determination as to whether or not truly the employee is eligible for leave under the law. Also, the employer has got to keep this information confidential and not make it available to anyone other than someone who would have a legitimate right to know or other law enforcement officials. There are anti-retaliation provisions in the law and the employers got to make known just as it has to make known to employees under the Family and Medical Leave Act what that employees rights are under this particular act. The enforcement is handed over to the attorney general of the State of Massachusetts and if the employee is retaliated against or otherwise impeded in the exercise of rights he can bring an action against the employer and any employee who prevails is entitled to mandatory triple damages and attorney's fees. Now, many of you may not be doing business in the State of Massachusetts but just as though I have indicated in past telebriefs about the impact of anti-bullying laws or what may happen with regard to anti-bullying laws in the country. So, I believe based on recent events whether its Ray Rice or whether its any other issue of notoriety in the domestic violence field, I do not believe that Massachusetts will be the lone wolf out there with regard to processes and procedures and actual statutory protections for employees. I do believe that this will be a trend obviously in the mid-Atlantic. There is no state that has a statute which would allow the employee to take leave for domestic violence, although you may choose to do so, but keep in mind that once a state like Massachusetts enacted a law like this it is not unreasonable to believe that a particular statute like this or statutory protection would be enacted in other states or perhaps even introduced at the federal level. So it is an interesting development one that is now immediately in effect in the State of Massachusetts.

Let me bring out an interesting fact which I saw the other day this was just a study that was done by Quest drug testing. It is a very well known drug testing entity nationwide and they put out a new study on the increase in work force drug positive test and basically what they found was that there has been a large increase in positive marijuana test results, particularly in Colorado and Washington where recreational marijuana is now permitted. So what they found was a positivity rate of 3.7% with the 7.6 million urine drug tests in the combined United States work force that they took and an increase from 3.5% in 2012. They also found that marijuana continued to be the most commonly detected illegal drug with its positivity rate increasing from 6.2% in the combined United States workforce, 5.6% in safety sensitive workforce and 5% in the general United States workforce. They also found that amphetamine use is on the rise because the positivity results again reached their highest levels since 2007. So it is interesting that as the legislation and probably public attitudes towards marijuana use and other drug use has changed little but specifically for marijuana use and you see it going up what impact that will have on the workplace. And it is interesting that this was posted on the American Bar Association's electronic weekly legal posting that I get. It says that the Colorado Supreme Court will hear argument September 30th in a suit filed by a fired customer service representative who uses medical marijuana to control painful spasms he has suffered since he was paralyzed in a car crash. The post goes on to indicate the worker, Brandon Coats, was fired after a drug test. He argued that his job at Dish Network is protected by a Colorado law that bars companies from firing workers for legal off-duty activities. "It wasn't like I was getting high on the job" Coats told the New York Times. I would smoke right before I go to bed and that little bit would help me get through my day. Dish Network on the other hand argued that marijuana is still illegal under federal law and that it had the right to fire Coats. The intermediate appellate court here ruled 2-1 against Coats in this particular case. In some comments to the ABA post I think one of the relevant posts was the following stated by a lawyer. This isn't about the legality of smoking. The issue is if he is allowed to be under the influence at work even if it is legal for him to smoke it isn't okay to be under the effects of it at work. Alcohol is legal to drink, but if you were drunk or under the influence at work, then your boss should be able to fire you. Employer should have the right to ensure their employees are not impaired or under the influence of legal or illegal substances. So that is what we will find in the Colorado case, the Colorado Supreme Court, and as we know Colorado has legalized marijuana not only for medical use but also recreational use, is whether or not they will uphold the finding of the intermediate court that basically says that even if it may be legal under state legislation it is not legal under federal legislation and, therefore, Dish Network had the right to fire this employee. As we go forward, it is interesting that drug and alcohol testing was certainly in the vanguard of attention on the part of employers back in the 1990s and now it seems to be having a resurgent predicated upon the legalization of marijuana. Again, federal law does not permit the use of marijuana but you can always be on the safe side as an employer, if you are concentrating on the effects of a particular drug on the employee's fitness for duty as opposed to simply whether or not there may

be positive substances in that employee's system. There is more to be said about that as we get a decision from the Colorado Supreme Court probably in the next few months.

Let me bring to your attention another piece of legislation which will be enacted and go into effect in about 30 days in the District of Columbia. This is the District of Columbia's Ban-The-Box legislation, and you know that I have talked about Baltimore's Ban-The-Box legislation and other similar statutes passed by different states and local jurisdictions. Anyway this was signed by Mayor Vincent Gray on August 21st, and it is called the Fair Criminal Record Screening Amendment Act of 2014, and it says that an employer may withdraw a conditional offer of employment to an applicant based on criminal conviction information only for "a legitimate business reason" and what the law calls a legitimate business reason bears on one of six factors that the law pertains to or ask the employer to consider when withdrawing the conditional offer of employment. That is: 1) the specific duties and responsibility related to the job; 2) the bearing the crime will have on the applicant's ability to perform his or her job duties; 3) the time elapsed since the occurrence of the criminal offense; 4) the age of the applicant at the time of the crime; 5) the frequency and seriousness of the crime; and 6) the information produced by the applicant establishing his rehabilitation or good conduct. These are all things that will determine whether an employer has good cause or not to withdraw the offer and this law applies to any employer that has 10 or more employees in the District of Columbia. It even applies by the way to the use of independent contractors or unpaid interns interestingly enough. The act excludes from coverage certain employers, one of which if the employer is under an obligation under federal law to make such criminal enquires or if it is serving those members of society who are deemed to be vulnerable adults. But there are no enabling regulations here that will basically define what these are about and, therefore, the general rule would be that if you have 10 employees in the District of Columbia unless you are required to do criminal background checks you will have to abide by these restrictions contained in the act. Now, under this particular statute, if the employer is found to be in violation of the law it can face penalties of at least $1,000 and as much as $5,000, so these penalties are fairly steep. And, I think that it is certainly a much broader statute for instance than the criminal background check statute was recently enacted in the City of Baltimore. So, those of you who are doing business in the District of Columbia more about this law will be certainly specified particularly if they enact regulations and if you want more information about it you can also offline with me but it is going to be enacted and will take effect probably in the next 30 to 45 days.

The last thing that I want to mention to you is that in Illinois a federal judge on Thursday dismissed the EEOC's lawsuit that was brought against CVS Pharmacy in which the EEOC contended that the separation agreement violated the employee's rights to file discrimination charges. You may recall that I mentioned this case several weeks ago where the EEOC was trying to interject itself into a separation agreement entered into between an ex-employee and

CVS Pharmacy. The court in this case has agreed with the employer has granted the motion to dismiss and will be filing a written opinion where it will set forth its reasoning on why it is granting the motion to dismiss. As soon as that written opinion is filed I will certainly review it and give you the reasoning of the court but my sense is that the court will basically say that as long as certain restrictions are recognized in a separation agreement that comply for instance with the older workers protection act, that the EEOC has no business interjecting itself in a separation agreement between an employee and his employer or ex-employer.

So, those are the developments for the day as always I say if anybody has got a question or comment, feel free to bring it up now or if you want to do it privately give me a call at 410-209-6417 or my email hkurman@offitkurman.com. Any questions or comments out there?

_____: I have a question about the Massachusetts' regulation. You had said it is similar to FMLA, so is it those that are eligible would be if the employee has a child or may be a parent that is going through something, a domestic violence situation, would be eligible to apply for the leave as well.

Howard Kurman: Yes, Yeah it is the employee or someone in the employee's family. Any other questions? Okay, well, as always, I would appreciate your silent participation and we will reconvene on Wednesday, October 8th. Thanks very much.

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