LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, Good Morning everybody. We are almost in October so; the year is passing quickly and much to talk about this morning as always. I wanted to start out with probably a little civics lesson as it applies to the employment world that you all live in and it's a pickup on all of the publicity following the NFL protest to the national anthem this weekend and you might say well what does that have to do with the employment world. Well it has a lot to do with the employment world, which really has not been dealt with in the media,

Let me start with just reviewing with you something that we probably all intuitively know, so that is the First Amendment to the Constitution says Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press with the right of people peaceably to assemble and to petition the government for a redress of grievances. There have been a lot of things written and stated following the NFL protest on Sunday about players exercising their First Amendment rights. Now, I am not getting involved in the politics of whether the protests were good, bad or indifferent, I will leave that to everybody because everybody has their own opinion. I do want to make sure everybody understands from an employment standpoint that the NFL players are employed by private sector employers not public sector employers and that the First Amendment and the right for free speech only apply where the government or some sector of the government is seeking to limit or constrain the rights protected by the First Amendment to the Constitution.

As long ago as 1891 Oliver Wendell Holmes said "an employee may have a constitutional right to talk politics, but has no constitutional right to be employed" and that pretty much says a lot. To follow that up there is an NFL sort of rule it is not in the rule book but it is in their sort of game operations manual and it says national anthem must be played prior to every NFL game and all players must be on the sideline for the national anthem. During the national anthem players on the field and bench area should stand at attention face the flag hold helmets in their left hand and refrain from talking. The home team should ensure that the American flag is in good condition. It should be pointed out it goes on to say to players and coaches that we continue to be judged by the public in this area of respect for the flag and our country failure to be on the field by the start of the national anthem may result in discipline such as fines, suspensions and/or the forfeiture of draft choices, etc. Now again, I am not talking about politics here, what I am really talking about is if any of the teams as an employer wanted to discipline any of the employees participating in this protest theoretically they could unless it would be judged as being without just cause under collective bargaining agreement that governs the relationships between the players and the owners and that applies to you all as well being in the private sector as it certainly applies to whether or not employees can

protest social activities, political views etc., in the workplace and the short answer is that they do not have the right being employed by you to engage in these kinds of activities if you seek to prohibit them. Whether you do so or not is up to you as a private employer and as a matter of employee relations. I want to make sure that because there has been so much publicity on both sides of this position and this issue since the NFL protest on Sunday that putting the politics aside I think it's important that you understand from an employee and employer standpoint that unless you are a public employer that employees do not have the right inherently to engage in political speech or political activities or social protest at the workplace. They certainly have the right to do so off the job and off the workplace unless such protest and we have talked about this in the past would impair or impede the reputation of your company. For instance, if somebody engages in Pro-Nazi protest and it's caught on some sort of media and you see it, you certainly would have the right to terminate that employee as a result of its impact on the company's reputation. I am not getting involved at all in the politics of the situation I am merely telling you that from an employer/employee standpoint the First Amendment does not come into play and that frankly if the NFL wanted to or individual teams wanted to it could as a matter of employee relations, unless otherwise prohibited by the collective bargaining agreement, discipline employees for having engaged in the social protest. Again, just a word to the wise keep in mind the perspective that as a private employer you do have the right outside of any contractual prohibition to regulate speech in the workplace and activities on behalf of any particular political persuasion.

All right having dealt with that let me turn my attention to probably more pragmatic things, which are developments that may have an impact on you at the National Labor Relations Board. Two days ago, September 25, 2017, the US Senate confirmed William Emanuel to fill the fifth spot on the National Labor Relations Board. He is a Republican and he joins a fellow Republican Marvin Kaplan as well as the board's chairman Philip Miscimarra as a 3:2 Republican majority on the board. In addition, the Trump administration has nominated Peter Rob as a new general counsel to take over on November 13th when Richard Griffin who was the current Democratic General Counsel term ends. Now, the General Counsel is a very important position at the National Labor Relations Board because he or she essentially acts as the prosecutor in deciding what cases come before the National Labor Relations Board and what cases get prosecuted as an unfair labor practice charge. With a Republican majority and a Republican General Counsel it is likely as I said in the past that many of the cases that have been decided by the Obama Democratic National Labor Relations Board will be modified in some way or perhaps even vacated as we move further on into the New Year. I should say that Philip Miscimarra has given notice that he is resigning in December, so in December rather than having a 3:2 majority as a Republican majority will again be back in a situation where we have a 2:2 constitution of the National Labor Relations Board, but again the Trump administration will no doubt appoint a successor to Miscimarra in December who will be a Republican and sometime in 2018 again we will have a Republican majority. I know that many of you and particularly those who have

participated in my prior telebriefs know that we have talked about the wide ranging impact that the Obama administration has had even on nonunion companies and it stands to reason that many of the decisions including the Browning-Ferris decision, which was the infamous joint employer standard and a case called Purple Communications under which the Obama administration found that those of you out there who permit employees to use your email systems to engage in work-related activities must also allow your employees to use those email systems for non-work related purposes on non-work time even to solicit for union purposes. Those decisions may be modified or reversed by a Republican majority. Many of the cases having to do with social media policies and policies having to deal with your handbooks I think may very well be reversed or modified under a Trump Republican majority on the National Labor Relations Board. This will have an impact going forward probably in the next three years and obviously again if there is a renewal of a Republican administration in 2020 would continue into 2024. I will keep an eye out on this I will certainly let you know how that works out as time goes on, but again we now have at least for the time being a Republican majority on the National Labor Relations Board and I think you will see many decisions to coming forth that will be substantially more employer friendly than the ones we had under the Obama administration particularly for nonunion companies and those of you out there who are nonunion and run nonunion shops.

I turn my attention to the fact that I have talked about the fact that the Department of Labor asked for comments regarding any amendments or modifications to its salary exempt rules, which you know under the case in Texas were reversed and that has to do with the salary test that the Department of Labor implemented or attempted to implement under the Obama administration taking it off from about $24,000 a year to $47,000 a year. The Department of Labor asked for comments and a request for information and that comment period closed on Monday and they got about 165,000 comments, many of which basically stated that they were in favor of continuing some salary test along with a duties test for the exemption or the white-collar exemption and many of them came in and said that they thought that the appropriate salary test would somewhere be in the 30s if not the low 30s. As you know in prior discussions I have had with you all I indicated that my prediction was and is that there will be a continuation of the duties test and I do believe there will be a salary test for the white-collar exemptions and I believe it will be someplace between $30,000 and $35,000 a year and I still believe that and I think that after all said and done and after all these comments are taken into account by the Department of Labor and the fact that this is a Republican or Trump administration I do believe that it is going to be some place between 30 and 35 and that really should not pose any practical problems for any of you out there who can satisfy the duties test under the white-collar exemption rules of the Department of Labor. I will keep you filled in on that, but I want to let you know Monday was the day that the request for information from the Department of Labor expired.

Yesterday, the Second Circuit which is the one of the circuits of the federal appellate circuits and a very influential one at that heard oral arguments in a case called Zarda v. Altitude Express in which the issue of whether Title VII governs sexual orientation in the workplace was squarely hit and orally argued at the Second Circuit. As you know in an appellate case they hear oral arguments by the attorneys on all sides and then they write an opinion. Now, there were many parties that were represented in this case including the Equal Employment Opportunity Commission and many others and it's hard to predict how the Second Circuit will come out on this. Ultimately, this is an issue that I know will be decided by the Supreme Court because there is a split in the circuits as to whether or not sexual orientation is deemed to be a protected classification under Title VII. For many years it was not protected, it was not deemed to be protected under Title VII and this case squarely hits that and again the Second Circuit is a very influential appellate court though we probably will get a decision sometime in the next three to four or five months. When that comes out, I will let you know but I wanted to give to you the fact that just yesterday there were oral arguments that were heard on this case.

On September 20, 2017, the Seventh Circuit speaking about EEOC matters issued a decision, which again has some practical import for you under the Americans with Disabilities Act. This is a case called Severson v. Heartland Woodcraft again it was decided September 20th and it is a Seventh Circuit case and what it found was “a multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA. In this case, the Plaintiff Severson worked as a fabricator of retail display fixtures. He asked for and was granted a 12 week FMLA leave because of a back issue and during his leave he actually scheduled back surgery to occur on the very last day of his FMLA leave, why he would do that I do not know, and as a consequence of scheduling a surgery in the last day he requested an additional three months of leave. The employer denied his request for that three months of leave and actually terminated his employment and invited him to reapply when he was medically cleared to work. He turned around and sued basically saying that he was the victim of retaliation under the FMLA and the ADA and the Seventh Circuit affirmed summary judgment in favor of the employee and basically said “the ADA is an anti-discrimination statute not a medical leave entitlement” and they went on to say that “an employee who needs long-term medical leave cannot work and thus is not a qualified individual under the ADA” that is “an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.” The Seventh Circuit in essence was saying look you have an employee whose FMLA leave is expiring and who needs a short extension of leave that is an accommodation that the EEOC would say must be considered by the employer in determining whether that is a reasonable accommodation, but a three month extension is not deemed to be reasonable when you get down to the fact that the ADA cannot stand for the proposition that an employee has to be given a long-term leave extension as a reasonable accommodation. There is good language in this case, now of course those of you who are in Maryland, near the Fourth Circuit is the applicable Circuit Court and the Fourth Circuit's approach is similar in that these cases have to be decided on a case-by-case

basis but it would be certainly unusual for a court to say that an employer faced with a request for a long-term extension of a leave should be under an obligation to do that as a matter of accommodation.

While we are on the EEOC developments there was a recent case coming out of a federal court in Connecticut called EEOC v. Day & Zimmerman NPS. In this case what happened was an employee sued the company alleging that they improperly contacted or notified their employees of an existing EEOC charge with all kinds of information pertaining to the employee. The reason I'm bringing this to your attention is the employee had filed an EEOC charge and then the employer got the information and the employer sent a letter to its employees, which included the name of its charging party, a brief description of the allegations against the company, the company's position, the employees right to decide whether they wish to speak with the EEOC if they were contacted, the name and contact number of the company's attorneys and a description of the company's anti-retaliation policy. Which brings into focus what an employer would be entitled to do or should do if it gets an EEOC charge and knows or any other kind of employment related litigation and knows that the employee who isn't the person bringing the charge may be contacted. There, I think that you have to be very careful and consult with your employment attorney because while you may want to indicate to the employee that they may be contacted by a governmental agency to give too much detail is inappropriate and I will just say that you have to be very sensitive to what you disseminate to your employees and as this case indicates too much information is not a good thing and can land you into trouble in a retaliation context. If you are on the fence as to what if any information you should disseminate and communicate to your employees you really should consult with your employment counsel and let them know that you would like to communicate with your employees about an existing piece of litigation but you are just not sure how to proceed or how much information to communicate.

Those are the developments for the day. Michelle, can you take this off from mute please? All right as I always do I invite any questions or comments that you may have if you rather send them privately you can certainly contact me at my email address hkurman@offitkurman.com or my phone number of 410-209-6417. Any questions or comments about any of the things that I have covered?

________________: Hi, I have a question and I apologize it sounds like a wind tunnel Can you hear me?

Howard Kurman: Yes I can.

________________: Okay, so with regards to the First Amendment issue as it relates to state employees or public employees what sort of guidance or counsel should we provide employees with regards to their rights given the updates in the recent protests. I ask because the State of Maryland does offer state employees protection for political affiliation.

Howard Kurman: Right, that is a very complicated issue and has sort of many subparts to it. My preference would be honestly if you could you know sort of off-line with me about that it would be glad to deal with it but, it's really beyond the scope of a cryptic answer and I don't want to do that.

________________: Okay. I understand.

Howard Kurman: Okay, sure.

________________: Yes, thank you.

Howard Kurman: Any other comments or questions? Okay well if not as always I appreciate your participation. The next telebrief will be the second Wednesday in October, which happens to be October 11th and I look forward to speaking with you then have a good next two weeks.