LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning to everybody I hope everybody is well, we will report on a bunch of stuff today as always and I know that some of you participated in the last telebrief where I had my colleague, Greg Currey, talk about immigration matters, which has certainly arisen to the forefront in both general societal perspective as well as an employment perspective so I know he talked about using the new I-9 form and making sure that you kind of look over and scrutinize your work practices and policies when it comes to employing people who may not be American citizens. Just a word to the wise we know what is going on right now politically and without any editorial comment it behooves all employers to take a good look at their practices.

I wanted to start off with probably something that everybody knows but I wanted to make sure give you little context to this so we know last week that Andrew Puzder withdrew his nomination for Secretary of Labor and in his place President Trump nominated Alexander Acosta to be the next Secretary of Labor. My sense is that Mr. Acosta will be much less controversial than Mr. Puzder was going to be. Mr. Acosta has really very good credentials. He served under President George W. Bush, as an assistant attorney general for the Civil Rights Division in 2003, he served there for two years and then he served as the United States attorney for the Southern District of Florida from 2005 to 2009 and prior to that Mr. Acosta served on the National Labor Relations Board from December 2002 to August 2003 where he participated in over 125 opinions.

In looking at some of these, and I will not go over them now, I think that he is probably a pretty mainstream Republican. He tends to be more employer oriented than employee oriented but nowhere near as controversial in terms of his viewpoints and perspectives as Mr. Puzder certainly would have been. For the last eight years, he has been the dean of the law school at Florida International University and he has got impeccable educational credentials having graduated from both Harvard Undergrad and Harvard Law school and having clerked for Samuel Alito when Judge Alito was on the Circuit Court of Appeals obviously now he is a Justice on the Supreme Court. I do not foresee Mr. Acosta having any difficulty being confirmed, I doubt whether there will be strong opposition other than simply opposition coming from Democrats who would not approve of anybody but I think that given the pure mathematics in Congress, I do not see him having a problem being confirmed and in terms of what will happen when he takes over at the Department of Labor I would think that he would be pretty much a mainstream Republican. It

remains to be seen whether his administration will engage in the same degree of rule making that we saw the Obama Secretary of Labor and labor administration engage in and we do not know for sure what will happen to the overtime rules, which as you know is a subject of litigation in the Federal Court in Texas. We will just have to wait and see about that but I think that from the standpoint of all of you out there who are on the management side, I would think that on balance he will be a good Secretary of Labor from an employer standpoint although certainly not as countercultural as Mr. Puzder would have been. I am not sure when the confirmation hearings will be scheduled for him but I really do not think that they will pose much of a problem for him when he comes before the applicable committees in Congress.

A couple of things for those of you who do business in the district, that is the District of Columbia, on February 17th so just a week ago, the Mayor of DC, Mayor Muriel Bowser, signed into law the so-called Fair Credit in Employment Amendment Act of 2016. I have reported on this act in prior telebriefs and it essentially would amend the current District of Columbia Human Rights Act to prevent employers from discriminating against job applicants and incumbent employees based on credit information.

What will happen now pursuant to normal procedure is that this act will be submitted to Congress for its review, which is a period of 30 legislative days and we will see what Congress does with it, it is probably interesting from a political standpoint because as we know obviously the mathematics in Congress favor the Republicans. I do not know what will happen once this reaches Congress whether they will not approve it or approve it in some modified fashion. But those of you who do business in the district and who utilize credit information of some form or fashion after this act takes place will now be very much more limited in the ability to do so.

Staying on the District of Columbia back in December I reported on a development, which was the passage in the DC City Council of what they call the District of Columbia Universal Paid Leave Amendment Act of 2016 and, of course, under this act a very, very liberal act, which would be largely paid for by a tax on those employers who do business in the district. It would allow and permit employees in certain circumstances going out on leave to actually be paid as a benefit from the District of Columbia, which would be financed by employer taxes. Again, just last Wednesday, February 15th, Mayor Bowser decided not to veto the act but not to sign it either. She cited major concerns with the act including the overall cost of the act on DC businesses, which is estimated in the literature at about $250 million per year, the cost of technology, which would be needed to implement this particular benefit, which again is estimated at $40 million to $80 million for the District of Columbia to effectuate. The establishment of a DC agency, separate agency, in order

to implement the benefits pursuant to this act and the concern over the fact that DC residents who work outside of the city would not be covered and the fact that these benefits would not begin until the year 2020. This act will go to Congress; again we do not know what the reaction will be. It is also possible that even during this interim period of time the DC Council having heard these strong reservations from the mayor may in fact voluntarily choose to amend it or to modify it in some form or fashion. I will keep you abreast of this but it is interesting that both of these acts came to the mayor's attention on the same day that is last Wednesday, February 15th; one having been signed one having not been signed.

A couple of interesting cases that have received some publicity; you know that in the last few days the New York Times reported, and it was reported on all the major news stations, that a woman engineer who worked for Uber blogged on her personal account about having experienced sexual harassment at the hands of a manager of Uber. It was also reported that when she notified upper management of this particular action on behalf of, or a series of actions on behalf of this so called offender, she stated upper management told me that he was a high performer and they would not feel comfortable punishing him for what was probably just an innocent mistake on his part. Which of course begs the question of, even though Uber I am sure as a big company had probably a well communicated and disseminated workplace harassment policy, that when you know, assuming that what she says is true and we do not know at this point, assuming what she says is true, i.e. that she reported it and was essentially told that the person who was the alleged offender was an important cog in the performance machine of the company and that, therefore, they would not feel comfortable punishing him is a recipe for disaster for any company. I have often talked in these telebriefs from a practical standpoint about workplace harassment and the fact that it can have dire consequences if not addressed promptly, thoroughly and in a manner which is proactive. Certainly, the mere fact that you may have a comprehensive workplace harassment policy stated in your handbook or posted or even in a separate standalone policy does not take you to the goal line in defending one of these cases. What outside agencies like the Equal Employment Opportunity Commission or the Maryland Commission on Civil Rights or any of the other judicial forums want to look is not only do you have a policy but when a complaint is registered how do you react? I think I have mentioned before in prior telebriefs when you have a situation where there is an upper level manager who is the alleged offender it does pose problems from a practical perspective on how to deal with it because on the one hand you certainly from a business perspective do not necessarily want to get rid of a profitable or high performing executive on the other hand if you do not take proactive measures you could subject yourself to liability even in the face of a very strongly worded workplace harassment policy. The ideal action, of

course, is to investigate in a timely way, to sort of let the chips fall where they may with regard to repercussions and the results of an investigation and making sure that at the end of the day if the alleged harassment is substantiated that appropriate remedial action is taken.

Along those lines there was a case decided very, very recently by the Massachusetts Supreme Judicial Court involving Lexus of Watertown in which a plaintiff alleged that she was subjected to a regime of workplace harassment and that on the day that she was being terminated ostensibly for poor performance she notified the company that her supervisor had subjected her to an ongoing course of workplace harassment over the period of time of a year. While the company investigated these allegations and found no evidence to corroborate her claims, they never interviewed the plaintiff or any of her coworkers and she brought suit and the short and long of this is that not only was she awarded compensatory damages of $40,000, she was awarded $500,000 in punitive damages, which was thrown out by the trial judge but then reinstated by the Massachusetts Supreme Judicial Court on the basis that Lexus even though it had a comprehensive sexual harassment policy did not take immediate action to remedy the offending behavior and to address it in a proactive way.

I caution you that from the standpoint of going forward it is one thing to have a policy it is even another thing to investigate but it is certainly a third thing once having investigated once having determined that there may have been some element of truth to the allegation that you need to be proactive and you need to address it in a way that an outsider will say this was a reasonable approach to the workplace harassment issue even if a court or someone else may have done something different that is not the issue, the issue is whether based on the fact that you have you remedied any potential problem in a proactive and comprehensive manner.

Let me turn my attention to the Equal Employment Opportunity Commission for a second. I think I reported in the last telebrief that there is a new chair, acting chair in the EEOC it is Victoria Lipnic, she is a Republican, she was a former Assistant Secretary of Labor before joining the EEOC and she has made certain pronouncements that I just want to bring to your attention. One thing she has recently said is with regard to the 50th anniversary of the Age Discrimination & Employment Act she said and we will be doing a number of things related to that it should get a high profile this year. A word to the wise it seems that under her regime certainly any kind of age discrimination charge or complaint will probably be given some sort of substantive attention by the EEOC. She also mentioned equal pay cases and she said I am very interested in equal pay issues it is something I would consider a priority and lastly with regard to the modified EEO1 report, which I have brought to your attention back in the summer and fall of last year this would be a much more

comprehensive report requiring you all with more than 100 employees when you file your EEO1 report, to report not only classifications and the number of employees in those classifications as you historically have done but also a much more comprehensive reporting of compensation as well. That is going to be on her plate that is something that they are going to be taking a good look at the Equal Employment Opportunity Commission. I think that from the standpoint of what will happen I am not sure that it will not be modified under her regime you know being a Republican and the EEOC having vacancies come summer on EEOC, it is not unlikely that that may be changed around, modified or potentially even rescinded.

The last thing I want to talk about is a really interesting development it seems to me with regard to cannabis in the workplace. Last month, an administrative law judge in New Jersey held that in a Workers Compensation claim brought by an injured employee that the compensation carrier would have to reimburse the particular claimant who was injured on the job for a prescription for medical marijuana. In 2010, New Jersey became one of 14 states to enact legislation permitting the use of medical marijuana. What happened was this individual was hurt on the job, hurt his hand and experienced chronic pain as a result of that and was given a prescription for medical marijuana and interestingly the reporting on this says that the medical marijuana in New Jersey is very expensive so that the price of an ounce of marijuana, medical marijuana, ranges from $425 to $520 not including a 7% sales tax so, it is not cheap. When he injured his hand, the workers compensation carrier said we are not going to pay for that; you should use a different pain reliever such as Percocet, which is an opiate as you all know. He brought this claim before the New Jersey Workers Compensation Commission and the ALJ ruled that according to him the effects of marijuana are not as debilitating as the effects of Percocet and as a result of his improved pain management, Mr. Watson has achieved a greater level of functionality and the ruling was that he would have to be reimbursed for the expenses that he had for the prior use of medical marijuana and that the insurance carrier would then have to reimburse him for future use of medical marijuana as a means of pain control. I do not think that this will be the last word whether it is in New Jersey or Maryland as you all know that has legalized the use of medical marijuana. Those of you who have employees that may have a high incidence of injury because you run a manufacturing facility or some such kind of a business where you have employees who may have chronic pain it remains to be seen what will be happening along these lines but I thought that this was an interesting case to report to you because it may signal that this maybe the beginning of many insurance carriers, workers compensation carriers who are involved in litigation over prescribed use of medical marijuana in order to control pain out there.

Okay, those are the developments for the day. As always, I say if there are any questions feel free to raise them now or comments or you can call me on my line at 410-209-6417 or my email hkurman@offitkurman.com. Michelle, can you unmute this please. Okay any questions out there?

Mike: Hey, Howard it is Mike, how are you doing?

Howard Kurman: Hey Mike.

Mike: Regarding the new Secretary of Labor will we have to wait for that person to be confirmed before we get additional people on the NLRB because I know there is two openings on the NLRB is that a job of the new secretary?

Howard Kurman: No. The Labor Department and the NLRB completely different agencies Mike so not connected in anyway.

Mike: So who would make those appointments to the NLRB?

Howard Kurman: President Trump.

Mike: And he could do that at any time without congressional approval?

Howard Kurman: Well there are couple of board members whose terms are not expiring until later this year, so when they expire he will have the right to appoint somebody.

Mike: Okay thank you.

Howard Kurman: Okay, any other questions? Okay, if not, I appreciate everybody's participation and as you know we do these on the second and fourth Wednesdays of every month so the first one in March will March the 8th. So everybody have a great day and I will talk to you then.