LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right its 9:02 a.m. by my official clock. We are going to get started. Michelle, can you mute the line please. All right good morning everybody as I said its hard to believe its mid-July but it is and the summer is just flying by but that does not mean there's not a lot of stuff to talk about because there is always a lot to talk about in the realm of labor and employment so, let me start off with some sort of departmental news.

The President has nominated and selected as the new general counsel of the Equal Employment Opportunity Commission, a woman by the name of Janet Dhillon. Interestingly, she began her career in spending 13 years with a white shoe law firm Skadden Arps, which is essentially located in New York City and she also served as in-house counsel for JC Penny and US Airways. I think it's an interesting development for those of you who have EEO responsibilities because you know with her as the new chair of the Employment Opportunity Commission it remains to be seen what those initiatives will be but it is certainly not going to be bad news for those of you who do have EEO responsibilities. My guess is that it will mark a little turn to the right for the Equal Employment Opportunity Commission, which under the Obama administration along with other administrative agencies like the National Labor Relations Board, The Department of Labor etc., certainly had an extreme movement to the left. Again, her name is Janet Dhillon and she will be the new head off the Equal Employment Opportunity Commission and of course will pay attention to what her pronouncements are in the future.

Keeping our eyes on departments, I think that in the last telebrief I indicated that the president had nominated two new people to the National Labor Relations Board by the name of Marvin Kaplan and William Emanuel, both of whom have backgrounds as management labor lawyers. At it turns out, the hearing for both of these individuals is now going to be held tomorrow, July 13th, before the Senate health education labor and pensions committee. Assuming that they get a favorable report, it will be turned over to the entire Senate for the vote and I have little doubt that they will be confirmed as two new members of the National Labor Relations Board, which will mean for the first time in the last nine years the National Labor Relations Board, which consists of five members, will have three Republican members and two Democratic members. I think the significance of that I have spoken about in the past but there is great significance to that, in the past eight years the National Labor Relations Board has been controlled by a Democratic majority and that Democratic majority has really in my opinion turned many traditional labor board decisions and philosophies on their heads and has gone out of its way to be friendly to employees and unions. I would expect to see in the next year or two, assuming these two new individuals are confirmed, I would expect to see a rollback of some sort and a modification of some of the decisions that have come out of the NLRB in the last eight years. Again, the hearing is tomorrow I would expect that in the next month or so these two will get final confirmation by the Senate and then we will have a Republican majority on the National Labor Relations Board.

An interesting piece of legislation was passed in the city of Philadelphia for those of you who do business in Philadelphia or whose companies do business in Philadelphia. The

mayor of Philadelphia, Mayor Kenney, signed a bill on June 22nd, just a couple weeks ago, in which under the city's fair practices ordinance the Philadelphia commission on human relations will now have the authority to absolutely shut down business within the city of Philadelphia for an undefined period of time if they find that a business severely or repeatedly has violated Philadelphia's antidiscrimination laws, which is a rather severe remedy in my experience, I do not know of any other ordinance or statute which has as its remedy the absolute shutdown of a business for a serious or repeated violation of a civil rights statute. This new ordinance, which is effective immediately gives that Philadelphia commission on human relations the authority to do that, that is to shut down a business and it is undefined as to what a severe or repeated violation is, I think that they will be defined in upcoming regulations. I think what it really portends for those of you out there who do business in the city of Philadelphia is to make sure that you have strong anti-discrimination policies and anti-harassment policies in place, that you have proactive training of your managers and supervisors that take place either by internal sources or by external sources, and that if any charge is filed or any claim comes up that you immediately investigate it and immediately take remedial measures if such measures are warranted. Because this is a rather draconian remedy in my opinion and you certainly do not want to be in a situation where your business could get shut down for either a serious or repeated violation of the Philadelphia statute. Just a word to the wise if you are doing business in Philadelphia, new law effective June 22nd, just a couple of weeks ago.

I wanted to mention a couple of things that have their origin or are related to sort of the social media issues that come up in the workplace. In one very recent case and a case decided by the Illinois Appellate Courts called Bankers Life versus American Senior Benefits, this had to do with a LinkedIn issue. What happened was an employee had a no pirating provision in his employment agreement, which meant that he could not solicit employees of the company that he left and what happened was as many individuals are today he was on LinkedIn and just on his LinkedIn entry he invited certain employees that he had worked with to simply join him on LinkedIn, that is to become connections on LinkedIn, his former employer got wind of this and filed suit contending that his mere indication or mere invitation to these employees to be connected with him on LinkedIn constituted a violation of his non-pirating provision. The case went to court, court said no this was not a violation of the non-pirating provision because there was not any kind of either explicit or implicit invitation for them to join him in his new company, he did not even identify himself as a member of the new company and that, therefore, because of that it was a fairly innocuous kind of publication and there would not be found to be a violation of the non-pirating provision. I would distinguish this situation from cases that have come up where people have gone on LinkedIn and where they have solicited employees that they used to work for in a much more explicit way and where courts have found that even though whether it was on Facebook or LinkedIn that such actions could constitute a violation of either a non-pirating provision or a non-solicitation provision or even a non-compete. You really have to look at the content of what is being posted either on Facebook or LinkedIn etc., to ascertain whether the post would be a violation of the post-termination restrictions contained in an employment agreement. In this case, the court found that it was not explicit enough to be a violation of the post-termination restriction i.e., the non-pirating provision that he had in his agreement.

Interestingly, the National Labor Relations Board in a case called RHCG Safety Corp. & Construction found very recently that a company, mainly this Safety Corp., violated the

National Labor Relations Act because a supervisor had in a text message to an employee asked that employee where his loyalties lay in the midst of a union campaign. As you know, under the National Labor Relations Act it is illegal for an employer acting through a manager or supervisor to interrogate an employee as to union affiliations or union activities in a face-to-face conversation. But this didn't occur in a face-to-face conversation this took place in a text message. Nevertheless, the National Labor Relations Board found that such an interrogation of the employee by the supervisor was illegal whether it occurred face-to-face or through a Facebook post. Again, so we are in the era of social media whether it's on LinkedIn or whether it's on a Facebook post as to whether or not a company or an individual be found to violate any particular agreement, in this case the National Labor Relations Board found that a company had violated Section 7 acting through its supervisor who interrogated an employee regarding his affiliation or activities on behalf of an union. Of course, it does not mean that it just has to be in the context of a union campaign, you can violate the National Labor Relations Act by virtue of asking an employee regarding his or her union activities or affiliations or philosophies even outside of the context of a union campaign so be aware of that.

I had a question that came up from a client of mine a couple weeks ago. The client had an individual who had taken… who was out on workers comp and the accident happened several weeks if not months ago and the question was whether or not the client could terminate the employee because the employee had expended his FMLA leave and the question was can we terminate this employee because there is no hope or expectation that this employee is going to come back to work. It brought to mind a very common question that I get, which is can you in fact fire an employee who is filed a workers compensation claim if that employee has been out a significant period of time and where there is no expectation that that employee is going to be back or be able to return within some reasonable period of time. I would stress to you that there is a big distinction between job protective acts such as the FMLA or the Americans with Disabilities Act and workers compensation statute. Workers compensation statutes are not necessarily protective of the employee's right to be reinstated to a particular job. The intent behind workers compensation statutes is to replace the lost earnings of an employee who either is temporarily totally disabled or has some permanent disability as a result of a work-related illness or injury. I think there is a misconception even among HR people that somebody who has filed a workers compensation claim is protected with regard to his or her job for an indefinite period of time under a respective workers compensation statute, when that is really not the case. For instance, in Maryland the workers compensation statute says that it is illegal to fire an employee solely because that individual has filed a worker compensation claim. For instance, if an employee is hurt on June 1st and on June 3rd files a workers compensation claim and you wind up firing that employee on June 4th yes prima facie it would look like you may have fired that employee solely because that employee has filed a workers compensation claim. On the other hand take the case where the employee is hurt on June 1st, files a claim on June 3rd and lo and behold on October 2nd you get information of a medical sort, which indicates that it is indeterminate when that employee may be able to return to work. I would suggest to you that it is not illegal to fire that employee where you have allowed that employee to be on workers comp, you have paid benefits, the employee has expended or has used up his or her FMLA leave of 12 weeks and there is no expectation that that employee may be able to return in the near future. That would not constitute a violation of the relevant workers compensation statute for you to terminate that employee, irrespective of the fact that many plaintiffs' attorneys do not understand the

distinction either, between job protective statutes such as the FMLA and the ADA and workers compensation statutes. Keep in mind that there is an important distinction to be made and of course you have to be careful of terminating an employee under situations where it looks like almost immediately after the filing of a workers compensation claim you are terminating the employee. But if, there is good reason to fire an employee or terminate the employment of an employee who has filed a workers compensation claim you can go ahead and you can do that. I think that that's an important distinction to keep in mind when you have employees who were out for a long period of time out on worker's Comp and where there's no expectation of that employee coming back or where in fact you may have done an investigation during the employee's absence and found that the employee was engaged in misconduct for which the employee could be terminated.

Another related kind of issue, it is not the same but another related issue, is where you are seeking medical information on an employee who is out on an ADA or FMLA basis and you want to get more definite medical information as to whether the employee needs a particular accommodation or whether you are even dealing with an applicant who may need medical accommodation or some sort of accommodation in the workplace. This brings into play the Genetic Information Nondiscrimination Act often referred to as GINA. Under GINA, of course, as you know an employer cannot make use of genetic information to discriminate against an applicant or employee. What many of you may not know is that even if you inadvertently get genetic information that may be passed along by a physician or a hospital or a healthcare provider, even if you didn't ask for it, you may be violating GINA in its restrictions on the receipt of such information. The way to deal with that is in your letters to healthcare providers whether it's a doctor, hospital etc., or a clinic you really need to include language in there, which would indicate that you do not want and will not obtain or accept information of a genetic information type and there is specific language that you should include in that, it is a little more detailed and I really cannot include it right now but I can certainly deal with that if you have a specific question about that language or what you have in your forms. So let me know if you need help on that, but again the main issue here is you certainly do not want to be accused of receiving, even inadvertently, language that would violate the Genetic Information Act.

The last thing that I wanted to mention is the Department of Labor has now sort of shifted its focus on the white collar exemptions. We know that they were supposed to have taken effect on December 1st and as you know under those exemptions the salary test was going to go up to $47,000 a year or $913 per week. The Department of Labor in its brief to the Fifth Circuit has indicated that they are backing off of that particular salary requirement and the Department of Labor Secretary Acosta indicated in his confirmation hearings as follows and I quote, "if you were to apply a straight inflation adjustment I believe the figure if it were to be updated would be somewhere around $33,000 give or take." That was what Secretary Acosta said in his confirmation hearing. I think that it is likely depending on how the Fifth Circuit comes down on this injunction hearing, I think that it is likely that the Department of Labor will adhere to a salary test to go along with a duties test for the white collar exemptions of professional, administrative, executive, computer etc. but, I don't think it is going to be anywhere near the $47,000 that many of you sort of revised your policies back in December to accommodate. I believe that it is much more likely that if there is a salary test, and I mentioned this last year in my telebriefs, it would be much more likely that there would be a very modest increase in the salary test from the existing level of $24,000 to

somewhere in the mid-30s and I think based on what Secretary Acosta said in his confirmation hearing that is much more likely to be the test than the $47,000 that they are moving off of and which were reported as his testimony when he was subjected to the confirmation hearings. Stay tuned for that and I will let you know what that position seems to be as its officially stated by the Department of Labor.

The last thing I wanted to mention was for those of you who are considering wage increases for your employees, particularly unionized employees or even non-unionized employees, BNA has stated in its publication that as of June 26th the average wage increase for 2017 is 2.5%. This compared to 2.8% for the same period in 2016 with the median first year wage increase of 2.3%. If you are looking at your wage increase, it looks like 2.5% is the relevant and applicable wage increase at least for collectively bargained contracts and probably even for some of your rank-and-file or clerical increases as well as according to the Bureau of National Affairs - BNA.

Okay those are the developments for the day. Michelle, can you take this off of mute please? All right as always I invite any questions or comments or if you don't have any in this forum and you prefer to do it personally you can certainly call me at 410-209-6417 or email me at hkurman@offitkurman.com. Any questions out there from anyone?

Leda Hill: Good Morning Howard my name is Leda Hill I do have a question. I had read an article recently from Sherm and it talked about when does HR cross the line into practicing law and it gave examples of going through unemployment hearings or dealing with any kind hearings where you go and you represent the company.

Howard: Right.

Leda Hill: Have you heard anything about that or is that dangerous territory at all or when would it be?

Howard: Well, I do not think that it is required for instance that either at the state unemployment proceedings or through administrative proceedings as at the Equal Employment Opportunity Commission or the Maryland Commission on Human Relations, you are not required to have an attorney represent you, so I don't believe you crossed the line there. The question really is whether you can effectively represent your company and whether you have the knowledge to do that. That is really determined on an individual basis and the basis of your experience and how knowledgeable you are on the proceedings. But there is not a requirement that I know of either under the EEOC or Maryland commission on civil rights or unemployment that you be represented by an attorney, certainly you can and in some times it is certainly advisable because there may be litigation implications to it but, there is nothing that would indicate that you cannot represent your company in those proceedings.

Leda Hill: Okay great, thank you.

Howard: Any other questions, sure any other questions?

Ron Adler: Yeah, hi this is Ryan Adler speaking about unemployment your comments from Maryland are correct but other states do require that you be an attorney to represent an employer for an employment purposes so it becomes very state specific.

Howard: Well you are right Ron, it is state specific but I would say that in the majority of states, in the majority of states you do not need to be an attorney you just have to check whatever jurisdiction that you are in.

Ron Adler: Yeah that's the point in Maryland you don't but other states you may need an attorney to represent the employer but…...

Howard: Certainly, you do not in Maryland.

Ron Adler: Right.

Leda Hill: Yeah that's what I needed to hear.

Howard: Right, sure, any other questions? If not as always, as always I appreciate your participation and we will see you figuratively in the fourth Wednesday in July so take care and have a good next two weeks.