LABOR & EMPLOYMENT TELEBRIEF
By
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September 26, 2018

Howard Kurman: Okay, it is 9:02, as you know we get started at 9:02. Sheila would you mute the phones please. All right, good morning everybody, well into September almost October, hard to believe that, but its true. So, I wanted to start of, I know that great attention has been paid in the last couple of years about states that have legalized cannabis and its been a lot of discussion about cannabis in the workplace, etc, etc, but I wanted to bring to your attention that just the other day the United States Department of Health and Human Services, the office of Surgeon General released a report its entitled Facing Addiction in American - The Surgeon General spotlight on opioids. Just the other day published and in this report, Alex Azar, secretary of HHS notes that "the opioid misuse and overdose crisis touches everyone in the United States. In 2016, we lost more than 115 Americans to opioid overdose deaths each day, devastating families and communities across country. Preliminary numbers in 2017 show that this number continues to increase with more than a 131 opioid overdose deaths each day. The effects of the opioid crisis are cumulative and costly for our society and estimated $504 billion a year in 2015 placing burdens on families, workplaces, the health care system, states and communities". I raise this because really compared to the issue of cannabis or the use of cannabis by employees, it seems to me that more attention needs to be paid on those employees who may be suffering from the effects of opioid overdoses, misuse, addiction, etc and I think that as we move forward all of you out there aught to be paying attention in your workplaces to reducing work-related injuries or working conditions that actually may increase the risk for opioid misuse or overuse, offering education and support and treatment benefits for workers that are affected by this particular ill in society. HHS also authors what the Surgeon General refers to as a postcard entitled what can you do to prevent opioid misuse and this card encourages employers to have conversations with its employees regarding the impact of addiction to learn how to read certain signs or symptoms of this kind of problem within the workforce and to essentially open up conversations with its employees regarding this particular issue. This is a 40-page report. Its very comprehensive and those of you who want to download it can go to https://addiction.surgerongeneral.gov and as I said it is just been published and it's a very, very comprehensive report on the problem with opioids and it touches on many things that you may want to look at in terms of being proactive in the workplace and addressing this issue.

Okay, I know that most of you know that on the first Monday in October, which is next Monday, the Supreme Court opens its 2018-2019 term

putting aside for a minute all of the stuff that has come up with Judge Kavanaugh and whether he will be confirmed or he won't be confirmed, I just wanted to mention a couple cases where cert. petitions have been filed and which will be considered by the Supreme Court and which are significant and bear on the workplace. So, as you know a cert. Petition is a petition that emanates out of the circuit courts of appeal where one side or the other in litigation is petitioning the Supreme Court to hear a case. It takes four justices to agree to hear a case. So, obviously not every cert. petition that is filed results in the Supreme Court agreeing to hear a case, but it does take four justices to agree to hear a case. There are couple cases of note that I would bring up and which may or may not be heard during the 2018-2019 term. The first has to do with whether or not under Title 7 and Title 7's proscription on sex based discrimination whether that would include discrimination based on sexual orientation. So there are two cases, one that emanates out of the 2nd Circuit, it's a case called Zarda. I have spoken about this. Before Zarda was a, now deceased, skydiving instructor who accused his employer of wrongfully terminating him for him telling a client that he was gay and the 2nd Circuit overruled a 20-year precedent reopening the Zarda case and indicating that it agreed with the EEOC's position that the protections of Title 7 extend to sexual orientation. His employer in that case, Altitude Express is challenging that decision and seeking cert. in the Supreme Court. That directly contradicts the position taken by the 11th Circuit in a case called Bostock in which the 11th Circuit indicated or ruled that Title 7 did not protect employees on the basis of their gay status under Title 7, so you have actually a mix between circuits, so the 2nd, 6th and 7th Circuit have agreed that Title 7 does protect employees on the basis of sexual orientation and the 11th Circuit which denies that protection. In addition, there is a second line of cases which emanates out of a case called Harris Funeral Home in which the question is whether or not under Title 7 the protections of Title 7 under sex discrimination protect individual employees on the basis of their gender identity in this case its alleged that an employee named Stevens was fired by the funeral home after she told her boss that she was going to transition to a female gender identity. So, both of these cases are significant obviously because they invoke the protections of Title 7 under sex discrimination. We don't know whether or not four justices will deem them appropriate for purposes of hearing the cases and depending on what happens with Kavanaugh, Kavanaugh were confirmed and put on the Supreme Court, one would say there is a good chance that probably in a 5:4 decision, a conservative supreme court might say that neither gender identity nor sexual orientation would be protected by the parameters of Title 7's prescriptions on sex discrimination. So we will just have to wait and see as to whether both of these cases will be accepted by the Supreme Court to be heard during the 18-19 term, but I will keep you informed as to what happens as time goes on.

There is news also out of the National Labor Relations Board. I think that I have mentioned the case of Purple Communications before. During the Obama administration, the case of Purple Communications was decided in 2004 which overturned a long NLRB precedent saying that an employer was under no obligation to provide access to its employees to its email system for purposes of those employees communicating with other employees or even outsiders concerning either terms and conditions of employment or union organization attempts. Just a week and half ago, the general counsel who actually is the prosecutor of the National Labor Relations Board filed a brief in a case called Caesar's Entertainment Corporation in which the general council took the position that the 2014 Purple Communication's decision should be overturned and reverted back to the former NLRB precedent of registered guard in which it was determined that employers should not have to provide access to employees for purposes of using their employer's email systems in order to communicate with other employees on non-business related issues. In his brief the general counsel states that the Purple Communication decision actually reverses decades of old board president and "impermissibly created a right by employees to use employer owned and financed communication systems even though employees would have means of communicating with employees in other ways other than the use of their employers email systems" and the brief went on to say that the board should overrule Purple Communications for a variety of legal and practical reasons adding that these reasons included the loss of worker productivity, security concerns and potential disruption of employers' operations. So stay tuned on this. The NLRB has asked for public comment from both employers and employee organizations as I have told you before the present composition of the board is three republicans and two democrats. So again from the standpoint of, you know, a prognosis of what may happen, I believe that what the NLRB will do is go back to the registered guard line of cases and indicate that Purple Communications again which was decided under the Obama administration is no longer good law and that an employer will not be under an obligation to allow its employees or permit its employees to use the email systems of employers for purposes of union organization attempts or to communicate with other employees on non-business related reasons including comments on terms, conditions and wages of employment. So stay tuned on that, we will see what happens, what develops in the next few months.

Another NLRB development which again bears on non-union employers as well. We know that the National Labor Relations Act pertains not only to unionized employers but to non-unionized employers as well. This has to do with the so called joint employer rule under which two employers may be found to be liable either under an obligation for collective bargaining in an organization campaign or under the National Labor Relations Board's rules on unfair labor practices and there has been a great

deal written about this and I just wanted to let you know that the proposed rule now by the National Labor Relations Board seeking comments from both employer and employee groups is that in order for two employers to be found to be a joint employer the NLRB has stated that both employers would have to possess and actually exercise substantial, direct and immediate control over the employees essential terms and conditions of employment in a matter that is not limited and routine. So again, back in the Obama days, specifically in August 2015 in a case called Browning Ferris, and I have talked about this before in prior telebriefs, the Obama Board stated that they could find joint employment status or joint employer status even if one of the so-called employers only exercised indirect control over the employees terms and conditions of employment. The board now is proposing a rule and asking for public comment, which again states that in order for two employers to be considered to be one employer under the National Labor Relations Act, they both have to exercise direct and immediate control over the employees essential terms and conditions of employment in a matter that is not limited and routine and there are many examples that the National Labor Relations Board have given and provided, you can take a look at those on the National Labor Relations Board's website, but there are many, many examples that they have given. One example for instance is, they say company A supplies labor to company B. The business contract between company A and company B is a cost plus arrangement that establishes a maximum reimbursable labor expense while leaving company A free to set the wages and benefits of its employees as it sees fit. Company B in this example does not possess and has not exercised direct and immediate control over the employees wage rates and benefits. So it just gives you an idea of what the labor board is looking at and determining whether there has been really direct control over the terms and conditions of employment in a non-routine way by the second so-called employer. Again, I will keep an eye out on this. I am sure there will be much written about this as we move forward, and I think that ultimately what is going to happen is what the board has proposed will become effective law under the current composition of the board, three Republicans and two Democrats and, this by the way, impacts on franchisors and franchisees or staffing companies that supply employees to its clients, etc. It is an important issue not only under the National Labor Relations Act but other acts as well. So, stay tuned and I will keep you apprised of that.

Another thing that I wanted to mention is really an outgrowth of the recent news about the termination really of Les Moonves from CBS. Most of you know that he was a very powerful guy, was accused by many women of workplace and sexual harassment and ultimately was terminated, and one of the issues coming out of that is a disclosure that was filed with the US Securities and Exchange Commission by CBS indicating that under his separation agreement with CBS, the company is going to give a total of

$20 million to "one or more charitable organizations that support the Me Too Movement and equality for women in the workplace." Also an accompanying aspect of this, CBS is going to put $120 million into a trust, and the resulting handling of that money will depend on an investigation as to whether or not Les Moonves was guilty of these accusations because if he was under his employment agreement with CBS, he would walk away with zero as opposed to tens of millions of dollars in severance payments resulting from the termination. Now I bring this up and I know that I have mentioned it before. Those of you out there who have employment agreements with executives, whether that is your president, CEO, executive vice-president, etc or whether you are contemplating entering into employment agreements with anybody, in which you have severance as a consequence of termination, either with cause or without cause, etc, you need to make sure that not only under an executive employment agreement, but really in your policies and procedures and your handbook for instance, that you know that violation of workplace harassment policies as articulated and described would be deemed to be in "cause" for purposes of avoiding any kind of severance arrangement. It is really important that you do so under your employment agreements or under any definition of cause for termination. What you do not want to happen is that you terminate an executive or terminate somebody who has got an employment agreement and then have that executive make a claim for contractual severance or severance under your policies and procedures. So, you should definitely make a determined monitoring or look back at your employment agreements or certainly in prospectively your employment agreements with executives and make sure that if you have for instance a for cause termination provision in your executive employment agreements that you indicate that violation of workplace harassment or sexual harassment policies will be deemed to be cause that would void or vitiate any obligation to pay severance to the executive on the way out it. It is pretty important in today's day and age.

The last thing I wanted to mention is I had a call by a client few weeks ago regarding an employee who had been on board for about four months recently hired, who was pregnant and who needed to take leave to deal with a medical issue and while the employee is not entitled to FMLA, right, and the answer to that is, of course, that is correct, but you need to understand that just because the employee may not be eligible for FMLA leave does not mean that there is not an obligation to accommodate that employee, for instance, under the ADA or the Pregnancy Disability Act. So that just because the employee, a newly hired employee, does not have the requisite service to be entitled to FMLA leave or leave under your general policies and procedures does not mean that you are not obligated under the ADA or the Pregnancy Disabilities Act or even appropriate Maryland statutes to enable that employee to ask for an accommodation under the prescriptions of both of those particular statutes. So, keep that

in mind, if you have a situation where you have a relatively newly hired employee who may have a medical issue that does not qualify for FMLA leave because of a lack of time of service but still may be entitled to leave.

Okay, as always, I invite any questions or comments. If you have them in this forum, that is fine; if not, happy to address them personally in my email hkurman@offitkurman.com or by phone 410-209-6417. Any questions?

_____: Howard, I didn't hear the last piece that you were saying, for some reason the phone just kind out muted out and I couldn't hear you.

Howard Kurman: Well, I don't know how much you didn't hear, but what I was talking about is the fact that somebody can, an employee can request an accommodation for a medical reason, even if that person does not necessarily qualify for FMLA leave. So you have to take a look individually at whether or not the person needs to be accommodated under the ADA or some other statute.

_____: Got you. Thank you.

Howard Kurman: Sure.

Kathy: Howard I have a question.

Howard Kurman: Any other questions…yeah?

Kathy: This is Kathy. I have an employee who is relatively new and she is pregnant and she has notified us that she will need time off, so we told her we would accommodate either six weeks or eight weeks for the leave, even though she is not eligible for FMLA, but she is insisting that she gets the entire 12 weeks off for not only her personal healing but baby bonding, and we told her we would not do that. Are we required under any statutes to provide baby bonding leave on top of the accommodation we are making for her medical leave?

Howard Kurman: No, you're not required to do that. You know, that is a situation where the FMLA would be invoked if she were eligible, but she is not and I think you're accommodation is sufficient.

Kathy: Okay, all right. Thank you.

Howard Kurman: Sure.

_____: I have a question on the same issue actually. Are you there?

Howard Kurman: Yeah, I'm here.

_____: So we have an employee who was pregnant and took medical leave because she had the baby early. The baby was in the hospital for months, so we actually, you know, she was here sporadically and we gave her for that time, you know, which, I know we didn't have to but we did, now the baby is home. Is she also due the, like is there an extension of FMLA that she should like.. for two different medical reasons because one is medical and one would be maternity.

Howard Kurman: No, you know, the FMLA is clear that, you know, you get the leave for whatever the reasons are which are articulated, but they don't sort of piggyback on one another. Whether it's due to bonding, medical reasons, to care for a close family member, it's all you know bundled up, but you don't piggyback on one on top of the other, so the answer is no, you don't get separate FMLA leaves.

_____: Okay, thank you.

_____: Howard this is _____, good morning.

Howard Kurman: Sure. Hi.

_____: Howard, yes, good morning.

Howard Kurman: Yes, I'm here, good morning.

_____: Same question that the lady asked prior to the lady that just spoke. If the employee is not eligible for FMLA, is the employer obligated to make any type of accommodation for the pregnant lady, so if the, what if the employee can chose not to, is there any ramification?

Howard Kurman: If the employee chooses, I'm sorry, what did you say if the employee chooses what?

_____: Oh, not to make any form of accommodation for the pregnant lady if the employee is not eligible for FMLA, are we obligated to?

Howard Kurman: Oh, you would only be, well first of all it's an individualistic determination. It depends on what the medical reason is and what the medical information would be that you're in possession of, but just because the person would be pregnant does not mandate that you accommodate, you know, the person if the person isn't eligible for FMLA leave, but again I caution you that these have to be determined on a case by case basis.

_____: Okay, okay, okay. Alrighty, thank you Howard.

Howard Kurman: I know it is complicated stuff and you know…

_____: It is, it is.

Howard Kurman: If you're in a question where you're just not sure obviously you need to reach out to your employment attorney, your, you know, give me a call or whatever.

_____: Okay, thank you.

Howard Kurman: Okay, I appreciate everybody's participation, and as you know we do these on the second and fourth Wednesdays, so the next telebrief will be October the 10th, so we will see you all figuratively on October the 10th. Thanks a lot.