LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, good morning everybody. This is the last telebrief in June as we move into July and the year is flying by and again no shortage of things in the labor and employment ambit. So I came across an interesting article and I will just give you the highlight of what I think is the practical advice and the article essentially said that ironically as unemployment has gone down to sort of record lows you have more people moving around from one company to another and as they do frequently they attempt or actually do take proprietary or secretive or trade secret information, and I only bring this to your attention because I know that we have spoken about this on numerous occasions in the past about whether or not you have confidentiality and nondisclosure agreements which you subject your employees to both your current and your new employees that you hire. And even if you do not have restrictive covenants or non-solicitation agreement it certainly behooves you to take a look at whether or not you have effective trade secret information protection confidentiality and nondisclosure agreements with certainly most of the employees that would have access to being able to walk away with keys to your confidential or very secretive business information, so take a look at those and again I will remind you that you may have a provision in your employee handbook that prohibits the taking away or the disclosure of confidential information that is not going to help you at all at the time that an employee leaves because almost every employee handbook is going to have a statement that it does not constitute a contract or any kind of agreement between the company and the employee, so just a word to the wise.

On a related topic, there are increasing numbers of Maryland companies that do business in the Commonwealth of Virginia, notice I said Commonwealth because they do not refer to themselves as a state even though they are but in any event many of you have employees who do business in Virginia and may be interested to know whether Virginia looks at restrictive covenants the same way that Maryland does. As you know in Maryland, typically courts will look at how long the restrictive covenant is in effe0ct, what geographical area it will cover and what the scope of the restriction is on the departing employee. Virginia, as you probably may or may not know, is similar to Maryland. So in Virginia the employer would have the burden of proof in establishing the reasonableness of any kind of a noncompete agreement. Again, Virginia courts would look at the duration of the restrictive covenant. I generally advise as you have probably heard me say before that I think two years is the outer limit of enforceability both with regard to Maryland and Virginia. They will look

at the geographical scope of the restrictive covenant. Typically the courts are going to restrict the covenant to the areas in which the company actually does business, and then they are also going to look at the scope of the activity which is sought to be restrictive. And if any of those are deemed to be overbroad or overreaching, Virginia, like Maryland, may strike the whole restrictive covenant as opposed to trying to reform it or rehabilitate it. So those of you out there who have employees that work in Virginia, just a word to the wise about restrictive covenants that the restrictions that are imposed by Virginia courts are pretty similar to those which are imposed by Maryland courts.

Speaking of Virginia again, on March 21, 2019, the governor of Virginia signed into law an access to personnel record law. Prior to that private sector employers in Virginia had their choices to whether or not they were going to provide current or former employees with access to their HR or personnel records. Now under the law the way it reads is that every employer shall upon receipt of a written request from a current or former employee or employees attorney furnish a copy of all records or papers retained by the employer in any format reflecting 1. The employee's dates of employment with the employer; 2. The employee's wages or salary during the employment; 3. The employee's job description and job title during the employment; and 4. Any injuries sustained by the employee during the course of the employment with the employer. It actually brings up a practical issue that many of you have faced and probably do face somewhat on a continuing basis which is the extent to which you should allow your employees or former employees to have access to their personnel files. I am generally of the view for those of you out there that there really should not be all that much secretive stuff in a personnel file; your medical information obviously should be in a different file, a separate file; and in any kind of litigation, whether it is a EEO charge or whether it is a arbitration or judicial case, employees or even ex-employees are going to have access to the personnel file anyway. And prior to an employee examining that file, you certainly will have an opportunity to look through the file and if there is any confidential memo from a supervisor to HR, something like that, you certainly would have the opportunity at least in the short term to cleanse the file of that kind of information, but I wanted to make you aware that this is new legislation in Virginia. It is effective now. So those of you who have employees who work in Virginia need to understand what that law now provides.

The Supreme Court which we talk about a fair amount has agreed in a case involving Comcast to settle a sort of a legal nicety in a discrimination matter. This is a case that emanates out of the Ninth Circuit where a company called Entertainment Studios which is an African-American owned media company has alleged that under one of the federal civil rights statutes having to do with making contracts that Comcast has discriminated against this African-American

owned media company on the basis of race. The issue that the Supreme Court will decide is whether the standard under this particular statute which is similar in many respects to Title VII is whether the company that is suing Comcast has to only prove that race was a factor in the decision not to award the contract or whether there was a but-for test that is used. That is but-for racial discrimination that the company would have been awarded a contract. Obviously the latter is a more severe and tough burden for the company to make, and this is a case that could have reverberations for Title VII cases as well and I think that it will be argued in the fall, it will be decided I am sure sometime next year. But it could have ramifications again for cases decided under Title VII. Again given the composition of the present Supreme Court where in essence we have five conservatives for the most part and four liberals. It would not surprise me that the way the court will come down is to indicate that in order to meet the burden in these so-called section 1981 cases that the plaintiff, the party bringing the case, will have to demonstrate that race was the motivating factor behind the adverse decision as opposed to a factor and again that could spill over into Title VII cases as well. This was a case which was also trumpeted by the US Chamber of Commerce, which had indicated that the so-called mixed mode of standard could result in frivolous litigation being brought against companies. So stay tuned. Again, this is a case involving Comcast. Obviously, Comcast has the resources to defend these kind of cases to the utmost and they are represented by a very white shoe firm Gibson Dunn & Crutcher, many of you have heard of that law firm, so keep an eye out for that case and I will talk about it in future telebriefs as well, probably not until may be even after oral argument has been heard in the fall of 2019.

A couple weeks ago turning our attention to the National Labor Relations Board, the board ruled in a 3-to-1 decision in a case involving the University of Pittsburgh Medical Center—some of you may have read about this—that in its cafeteria which would be open to the public that the University of Pittsburgh Medical Center could permissibly forbid a union from coming in and soliciting the employees of the University of Pittsburgh Medical Center as long as the prohibition would be equally applicable to any other entity seeking to solicit or distribute literature in this public area. It is a significant decision because it overruled a decade's long decision called Montgomery Ward which said that unions could in fact engage in solicitation and distribution in a public cafeteria, public area maintained by a company and that this decision basically states that as quoting from the decision to the extent that board law created a public space exception. It requires employers to permit non-employees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination, we overrule those prior decisions. Accordingly,—this is the board stating—we find an employer does not have a duty to allow the use of its facility by

non-employees for promotional or organizational activity. Significant decision. And again as long as the company or entity does not discriminate that is supposed it allowed representatives of United Way to come into its cafeteria willy-nilly or some other non-profit entity and solicit employees and solicit and distribute literature, you may have a problem, but if you have a general rule that would be okay. So let us see what happens, I mean it would not apply to everybody out there because some of you do not have public areas that are accessible to the public, but those of you who do, I think it is an important and significant decision.

I wanted to also mention two bills that were introduced in the Maryland legislature that passed in the Senate but not in the House, but may portend future action in the next legislative session. So Senate Bill 854 was passed by the Senate and it would have stated that a covered or dependent employee is not entitled to workers' compensation or associated benefits. If his or her accidental injury or occupational disease was caused solely by medical cannabis and the medical cannabis was not administered or taken with a written certification of a certifying provider with the written instructions of a physician. So that is an interesting concept that would have said of course in workers' comp situation if the injury or occupational disease was solely related to the use of medical cannabis and it was not taken in accordance with a prescription that the employee would be disqualified for receiving workers comp benefits. The second Senate Bill which passed but did not pass the House was Senate Bill 863, which would have prohibited employers from requiring employees or applicants to disclose their use of marijuana and cannabis, and it actually had pretty stringent penalties associated with it including criminal prosecution. So both of those Senate bills did not pass the Senate, but they may be introduced again in the 2020 legislative session, so we will have to see what happens in line, and I have spoken about this in prior telebriefs – the whole cannabis issue is really coming to the forefront as it has an impact on the workplace, workplace drug testing, and other issues that are impacted by both prescribed medical cannabis and unprescribed recreational use. I also want to talk about an advice memo which was just published by the National Labor Relations Board a couple weeks ago. This has to do with those of you out there who have a handbook policy which would generally prohibit employees from making disparaging comments about a company on social media, and essentially what the board is indicating is that a general rule in which a company would prohibit an employee from disparaging the company without any kind of limiting language or context maybe violative of Section 7 of the National Labor Relations Act. So those of you out there who have social media policies need to make sure that for instance you indicated that no posting can be made which would be defamatory against either the company or any individual in the company which would be violative of your workplace harassment policies and which would be violative of any

Section 7 right. So a general statement that employees cannot generally disparage the company would probably run afoul of this advice memo recently published by the National Labor Relations Board.

And the last thing I wanted to mention is a decision coming out of the Seventh Circuit. The Seventh Circuit covers the states of Illinois, Indiana, and Wisconsin, and this is a case that agreed with similar cases in the Second Circuit, the Sixth Circuit, and the Eighth Circuit, the finding of which was that obesity in and of itself is not deemed to be an Americans with Disabilities Act Impairment unless there is evidence of an underlying physiological cause, and in this case it involved a bus driver who weighed 596 pounds and after he returned from leave he was required to undergo a medical assessment because he weighed over 400 pounds and the driver seats were designed to hold only 400 pounds and he failed the test and basically was terminated and then claimed that the bus company violated his rights under the Americans with Disabilities Act. And the finding of the Seventh Circuit was that an individual's weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder. Here there was no evidence that it was caused by a physiological disorder and therefore did not qualify as a covered disability either under the Americans with Disabilities Act or the Americans with Disabilities Act Amendments. So those of you who have faced this issue or may face the issue in the future, know that there is substantial federal case law which would indicate that the mere fact that somebody is obese, even morbidly obese, is not ____**Audio Cut**_____.

If nobody has any questions, again my apologies for the technical glitch, and we will see you the second Wednesday in July. Thanks everybody.