LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire

Howard Kurman: Okay, Good Morning everybody and welcome. Plenty of stuff to report this morning. I will start off as we should at the Supreme Court so that on April the 24th just a week and half ago or so the Supreme Court came down with a decision called Lamps Plus and the issue in Lamps Plus was whether an employer's arbitration provisions with its employees even though the provisions were ambiguous would allow class actions to be heard in arbitration. The reason I think it is significant is many of you out there either may have arbitration provisions with your employees in which disputes over any kind of work place issue instead of being heard by a judge in a court would be heard by a third party arbitrator. And many of you may be contemplating the use of these arbitration agreements. In a 5 to 4 decision as you might expect because many of these decisions now by the Supreme Court in the work place disputes are rendered in a 5-4 manner and usually pro-employer. In a 5 to 4 decision the Supreme Court stated that really unless your arbitration agreement with your employee expressly allows or permits class actions to be brought in arbitration that they would not be permitted once they do get to arbitration and then why is that significant. Well it is significant in many ways but first of all with the plethora of wage and hour complaints emanating from the workplace. There are some employers who are stuck with class-based arbitrations where they have allowed that in their arbitration provisions, but the Supreme Court has made it clear that "arbitration is strictly a matter of consent" and therefore unless your arbitration agreement with your employees right now or if you are contemplating an agreement, an arbitration agreement with your employees, provides for class action litigation and arbitration the Supreme Court would say you are not obligated as an employer to permit such class based arbitration cases, and that is significant because many of you may contemplate the use of arbitration as a substitute for judicial litigation and usually not all the time but it usually is quicker and less costly than traditional judicial litigation, and so the Supreme Court is spoken and it's pretty clear that unless you expressly allow for class based arbitration in your agreement with employees that you would not be obligated to permit such class based arbitration should there be a claim by an employee on behalf of other employees, whether it is wage and hour, whether it is discrimination etc. So again the name of the case is Lamps Plus decided Wednesday, April 24 just a couple weeks ago.

Secondly the Department of Labor on April 29 dealt with in an opinion letter the issue of whether somebody in a so-called gig economy was an independent contractor or an employee. This is again a significant opinion

letter by the Department of Labor and essentially what they did was they laid out a roadmap in which they restated six factors in determining whether an individual would be classified as an independent contractor or not in the so-called virtual marketplace company and by that they generally mean where there is a platform usually on the Internet that links up a service provider with the ultimate consumer you might think of this as Lift or Uber or some such similar kind of a service, and while they limited this opinion letter to workers in the gig economy and they did not identify the particular company that had requested the opinion letter. Nevertheless its roadmap I believe is significant in terms of providing advice for all of you out there who may be considering the use of independent contractors either in a gig economy or in your own business and I will review these six factors that they enunciated and described because I think they are particularly applicable whether you are in a gig economy or you are simply using independent contractors or at least those people that you are currently classifying or would like to classify as an independent contractor. So let me review these fairly and succinctly. The first is the nature and degree of the potential employers control and what the Department of Labor articulated here was that the so-called workers have complete autonomy to choose the hours of work that are most beneficial to them, that there is no minimum amount of work and significantly that the workers have the right to work simultaneously for competitors. That is a very important point and those of you who have independent contracts, written independent contracts, with your so-called independent contractor will always want to articulate and specify in those contracts that the putative independent contractor has the right to work will provide services to other entities because the extent to which you try and bind your independent contractor exclusively to your company the more it looks like an employment relationship as opposed to an independent contractor relationship. The second factor described by the Department of Labor was the permanency of the worker's relationship with the potential employer and here what the DOL was saying is that if they are an independent contractor they should have a high degree of freedom to exit the working relationship and they are not restricted again from interacting with competitors. Thirdly the DOL has articulated or the third factor which is that the workers who were deemed to be independent contractors are those who purchase all the necessary resources for their work and are not reimbursed for those purchases. So you obviously want to take a look at your independent contractor contract and make sure that for the most part you are not reimbursing those individuals for necessary resources that are inherent in the contractor doing his or her particular service. The fourth factor that the DOL mentioned was the amount of skill, initiative, judgment or foresight required for the workers services. And here what they are talking about is that the so-called independent contractor would show considerable independence from the business and that they do not undergo any kind of mandatory training by the putative

employer thus increasing their economic independence. Some of you I know, and I have had clients in the past who will provide some sort of training for the putative independent contractors, you want to stay away from that and again this is the fourth factor that the DOL has described. The fifth factor that the DOL has described is that the putative independent contractor must have an opportunity for profit or loss. That is sort of the entrepreneurial aspect of being an independent contractor, that you can make a profit but you can also incur a loss and so you want to be able to articulate in your written contract hopefully that they will have the opportunity to negotiate the price for their service and that you do not guarantee any profit nor do you incur any reimbursement for a loss that may be sustained by an independent contractor. And lastly the sixth factor is the extent of integration of the workers services into the potential employers business. Generally what this means is that if you are using an independent contractor first that independent contractor is not going to generally be supplanting a service which is rendered by one of your employees and that they generally are not well integrated into the business so if you are taking the gig economy as an example. The service provider, the gig provider, is not really part of the platform for that particular company, the particular company is simply the go-between between that service provider and the ultimate consumer. So again you know I think that even though this opinion letter is pretty much devoted to an unnamed company in the gig economy it is very applicable to those of you out there who utilize the services of independent contractors and the following statement was I think significant. This was by Keith Sunderland who is the acting administrator of the Department's Wage and Hour Division in putting out this opinion letter he said today the US Department of Labor offers further insight into the nexus of current labor law and innovation in the job market. So again I think that this is a significant development for those of you out there who utilize or contemplate the utilization of independent contractors in your business.

Now let me turn to the Equal Employment Opportunity Commission so that on April 25 again a couple weeks ago the US District Court for the District of Columbia ordered the EEOC to collect detailed data on employee compensation and hours worked. This is the so-called component two to the EEO1 report, and so that by September 30 of this year those of you out there who have 100 or more employees and who traditionally in the past have had to file the so-called component one data with the EEOC, which is simply your division demographics in different job categories as you know, will now by September 30 have to submit this so-called component two data for the years 2018 and 2017 and these include different pay bands and hours worked and actual pay that you have paid these employees in the different pay bands. So it is going to involve a fair amount of work on your part and even though the Department of Justice has filed an appeal to this particular ruling by the United States District Court for the District of

Columbia. So far there is not a stay of the application of this EEOC requirement and therefore you all are going to have to sort of boot up and make sure that not only do you file your component one data by May 30 at the end of this month. But that you are well situated to file component two data by September 30. So if you go on the Equal Employment Opportunity Commission's website you will see a notice and it says notice of immediate reinstatement of revised EEO1 pay data collection for calendar years 2017 and 2018 and I will quote from their website. Says EEO1 filers should begin preparing to submit component two data for calendar year 2017 in addition to data for calendar year 2018 by September 30, 2019 in light of the courts recent decision which I just mentioned in National Women's Law Center et al v. Office of Management and Budget and they give the caption of the case. The EEOC expects to begin collecting EEO1 component two data for calendar years 2017 and 2018 in mid-July 2019 and will notify filers of the precise date the survey will open as soon as it is available. On May 3, 2019 the Department of Justice filed a notice of appeal in this case the filing of this notice appeal does not, I repeat does not stay the District Court orders or alter EEO1 filers obligations to submit component two data. EEO1 filers should begin preparing to submit component two data as described above. Filers should continue to use the currently open EEO1 portal to submit component one data from 2018 by May 31, 2019. So you know this is significant and it does really impact all of you out there who have a 100 or more employees and who have historically filed simply the component one data with the Equal Employment Opportunity Commission and will you know involve substantial work it seems to me in conjunction with your HR department and your payroll department. I would expect that the EEOC will be putting out some advisory kind of guidance in the next several weeks and I will keep you up to date on that.

Speaking of departments, interesting that those of you who have dealt in the past with the Maryland Department of Labor Licensing and Regulation should know that as of July 1 of this year the new name for this department will simply be the department of labor. So now we will have two departments of labor. One on the federal side, one on the state side. Again those of you who have dealt with and recognized the administrative agency known as the Maryland Department of Labor Licensing and Regulation, the name change will be Department of Labor. And according to the accompanying fiscal note which precipitated this and I quote the department has received inquiries related to marriage, firearm and health related licensing. So I suppose the belief was that there was too much confusion as to what the jurisdiction of DLLR was and therefore the need for a new name. Interestingly, in the interest of I guess efficiency and cost the law provides that the old letterhead with the old name will be continued to be uses until they have all been used instead of having the new name. So typical bureaucratic confusion but again I just wanted to

bring that out and make sure that you understand that there is a new name for that department.

The last thing that I will mention is that there was a case decided at the end of March in New Jersey. So those of you may say well why is it being even mentioned here. Well the case was called Wild v. Carriage Funeral Holdings and the short and long of this case was that an individual who had been using medical marijuana under New Jersey Compassionate use of Medical Marijuana Act was employed by a funeral home you know the short summary was that he was a driver for that funeral home he had an accident he went into the ER the ER patched him up and the individual self-identified that he had used and was using medical marijuana by prescription off duty. The employer had mandated that he undergo a drug and alcohol test prior to coming back. Obviously he tested positive for cannabis but the cannabis was not used on the job it was used off the job pursuant to his prescription and the employer then turned around and terminated him because of the positive test. The case was brought against… he brought a case against the employer under New Jersey Discrimination Act on the basis of disability, it was initially dismissed and then it went up on appeal and the Appellate Division reversed that dismissal basically stating that there should have been consideration from a disability stand point of the accommodation that was needed for the off premises use of cannabis under the prescribed use and under the medical marijuana act even though New Jersey's Medical Marijuana Act like Maryland does not contain an employment related protection for license users of medical marijuana in the workplace. The reason I bring this up and I have spoken about this in prior telebriefs is that we are really in the throws of a plethora of litigation involving the use of cannabis pursuant to medical cannabis prescriptions and I think in the next five years we will see a great deal of litigation on many levels, state, initial trial levels, appellate levels, regarding the use of cannabis and positive tests for cannabis and as I stated several telebriefs ago there are many employers who have foregone the use of cannabis testing in conjunction with their workplace testing of drug panels simply because of this. Now those of you who have commercial drivers obviously cannot do that because it is still outlawed under Federal Law, so you have this intersection of state law and federal law and ADA and state disability law it can be confusing and if you are in a situation where you are either contemplating the termination of an employee because of the use of cannabis, you need to be pretty careful today as to whether or not its prescribed and if so is there an accommodation that needs to be made etc. So while New Jersey obviously doesn’t control Maryland employers it is indicative of the state of litigation that's currently occurring over the use of cannabis prescribed or not and whether there is a disability or not and whether you have to accommodate it or not so anyway stay tuned and I will keep you apprised of these developments.

Casey can you take this off of mute please.

Ann: Howard you make really good points about this whole dilemma with cannabis because its not just the licensed drivers many of us operate production facilities where people are around moving equipment, moving machinery and we have reasonable suspicion drug testing, sometimes random drug testing. And we have fired people for being under the influence while working so it's a coming dilemma.

Howard Kurman: It is a dilemma and of course in presentations I have made in the past most recently a few weeks ago I did with some of my colleagues, we talked a lot about safety sensitive jobs and the need to make sure that people are fit for those particular jobs and the threats that are posed by cannabis and other drugs and of course one of the problems with cannabis as many of you know is that unlike heroine or other prohibited drugs, cannabis has a longer shelf life in ones body. And so somebody could use cannabis or smoke a joint over a weekend, come in on Monday and be perfectly fit for a job and yet test positive because the shelf life is longer and that really poses a problem for employers. But yes in safety sensitive jobs obviously.

Ann: But if someone is still under the influence that's the rub right?

Howard Kurman: That is the rub and I always emphasize rather than concentrating on the terms under the influence I concentrate on is the person apparently fit or not fit to do his or her job. Are there objective criteria or objective indicia, that you can observe, you know slurring of speech, lack of coordination movement etc., that would impact on that particular persons apparent ability to do the job, but you are absolutely right Ann it is a ticket and a complicated one at that. Any other questions comments?

Darlene Triver: Howard, Darlene Triver here.

Howard Kurman: Hey Darlene.

Darlene Triver: Hello how are you. Going back to the EEO filings, so we file EEO but you know we are well under 100 employees would we still be involved in providing the part two data?

Howard Kurman: No, not if you do not have a 100 employees. So you are one of the lucky ones, you do not have to comply.

Darlene Triver: Yah.

Howard Kurman: Any other questions? Okay, well as always I appreciate everybody listening in and we will see you in the fourth Wednesday of the month. Hope everybody has a good day.