LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
December 11, 2019

Howard Kurman: Alright, it is 9:02 by my official clock, so Casey can you mute these phones. Alright, good morning everybody. Welcome to our December telebrief. Just a logistical announcement. Obviously, two weeks from today is Christmas, and, hopefully, you all have better things to do than listen to me, so there will not be a telebrief obviously on Christmas day, the 25th, so the next telebrief will be the second Wednesday in January, January the 8th, and we will send out a reminder e-mail but I just wanted to make sure everybody understands that there will not be a telebrief either live or prerecorded for December the 25th.

Okay so I wanted to start off as I sometimes do with legislation that is relevant in the HR world. So Congress and the Senate have passed a statute called the National Defense Authorization Act and in that there is a provision entitled to the Federal Employee Paid Leave Act, and under this particular provision federal workers will begin receiving 12 weeks of paid time off to care for a newborn or adopted child as Senator Gillibrand of New York said "I'm pleased that parental leave to nearly 3 million American workers is set to be included in the final act. She said, "This means that the largest employer in the country will provide basic parental leave, a huge step, and we must work to ensure that paid leave for other family emergencies will be added in the future." So those of you out there I know that, I do not believe we have any representatives with the federal government, but nevertheless there are things that are passed in Congress which sort of presage, you know, what may have been in the private sector and this may be one of those things and so while the FMLA obviously pertains to unpaid leave in some circumstances to care for a newborn or adopted child, it does not mandate of course that it be paid. Now we see that there is an act that will cover federal employees and it may be a harbinger of things to come with regard to the private sector. So those of you out there who have leave policies may certainly want to take a look at whether or not in the future you want to pay for this and of course again there are state sensitive laws such as safe and sick leaves under Maryland law, etc., but this is a significant development which did not get a lot of publicity as far as I can tell.

All right, I want to move away from that to there was a recent settlement that did get some publication in certain media, having to do with Dollar General Corporation, where after several years of litigation with the Equal Employment Opportunity Commission, they agreed to pay $6 million to resolve the discrimination suit where the issue was Dollar General's use of

broad criminal background checks, that according to the Equal Employment Opportunity Commission discriminated against African-American applicants and employees. Now, many jurisdictions now have ban-the-box statutes which in most cases would preclude the use in some circumstances of criminal background checks. So for instance in jurisdictions like Baltimore and Montgomery County and Philadelphia and Prince George's County, there are relevant ban-the-box statutes on the books, but I wanted to review with you some of the factors that the Equal Employment Opportunity Commission utilizes in its mandate that when considering criminal background checks and criminal background convictions of applicants or employees, that employers utilize what they call an individualistic analysis of the particular circumstances surrounding the particular conviction, and I have often advised clients as well to look at these things on an individual basis in ascertaining whether or not a particular conviction would disqualify either an applicant or perhaps an existing employee who is applying for a promotional opportunity from obtaining either a new job or a promotion. And often I basically advise clients to take a look at what are the particular facts surrounding the particular convictions. So for instance, you may have an applicant who was convicted of assault or battery, but when you really look into it, it involved a domestic situation as opposed to a situation where there was an assault or a battery on a third party and whether those emotions are a precipitating factor behind the particular assault or battery. On the other hand, if you are looking an applicant who may have been convicted of fraud or theft, that to me is in some cases more serious and more indicative of the lack of trustworthiness of an applicant than even a battery case arising out of a domestic situation. Also, you want to take a look at how old is that particular conviction. Of course, under the Fair Credit Reporting Act, you are not even supposed to get information from a third party on convictions that are older than seven years, but of course, if you do your own conviction search, then you can come up with convictions that may be older than that, but you need to take a look at that. If something is 15 years old, it may have much less relevance than a conviction that occurred, you know, six months ago or a year ago. Also, has the employee worked both before and after the particular conviction at issue. The short hand way of looking at this is that blanket policies which state that you will never hire an applicant with a conviction on his or her record or promote an employee with such a thing on the record is problematic not necessarily from a ban-the-box statute itself, but from the position that the Equal Employment Opportunity Commission takes, again which mandates an individualistic analysis, and sometimes I have even been involved as counsel to companies in talking to the criminal attorney that an applicant has had to get and to delve into the particular facts and circumstances of a case to be able to advise a client on whether it is problematic or not in considering the particular applicant for employment. So, again the Dollar General case got some publicity and I think that I

thought that it was worth it just to mention again that you have to be fairly careful in today's day and age in having a blanket policy which just says we will never consider somebody with a conviction on his or her record or somebody who is applying for a promotion in the organization.

All right, since we are into December and I know even yesterday the weather people were talking about potential snow this morning, I wanted to review fairly quickly as we head into winter, which I think officially starts on December 21st, the rules under the Fair Labor Standards Act for weather-related incidents and what you are obligated to do and not obligated to do. So, let us first look at the situation where your business because of weather-related situations may be closed for a day and we need to break it down in terms of what is obligated to be done for nonexempt employees as opposed to exempt employees. So, if you have a storm and it is bad enough where your business is absolutely closed, the question is what would you do for nonexempt employees and what do you do for exempt employees. So, under the Fair Labor Standards Act for nonexempt employees, that is those employees as you know who are paid on an hourly basis and are eligible for overtime, they are only paid for hours that are actually worked, and therefore, if your business is closed for the entire day you do not have to pay nonexempt employees. You could certainly say that nonexempt employees can use available leave time or vacation time however you define it to be paid, but they are not obligated to be paid if your business is closed for the entire day. How about exempt employees? And again, the exempt employees as we know salary test has changed or is going to be changing as of January 1. We have talked about that in prior tele-briefs. But for exempt employees, as you know, one of the requirements for an exempt employee is that if that exempt employee does any work during the particular work week, he or she has to be paid the entire salary so if you are closed for a day, under most circumstances, an exception will be and I will talk about that in a minute, if the employee has performed any work during that week—the exempt employee I am talking about—you can require an exempt employee to use vacation or leave, but at the end of the day if that exempt employee does not have enough vacation or leave time to cover it that exempt employee still must be paid for the entire week his or her predetermined salary, otherwise you have impaired that exemption for that particular week.

Okay, so we move from that situation where the business is closed to where the business is open but the nonexempt employee chooses not to come into work either because the nonexempt employee believes that it is not safe to do so or the nonexempt employee may need to stay home and care for children whose school is closed, etc. Again, if the nonexempt employee chooses not to come into work, then that nonexempt employee is not paid. Again, you may want to extend the opportunity to use paid leave. This is not required, but you do not have to pay that nonexempt

employee if the nonexempt employee chooses not to come in. Well, how about the exempt employee? So, you have a situation where your business is open but many employees say well, I am just not going to make the attempt to come in including an exempt employee. So, one of the exceptions under the Fair Labor Standards Act for a salaried exempt employee is if that salaried exempt employee takes an entire day off for personal reasons, which would be the case here, you can dock, legitimately dock that exempt employee. You could also require that exempt employee to use available leave whether it is vacation or personal leave, etc., but again if that exempt employee does not have available leave, then you have to pay that employee the entire week, if that salaried employee for instance does any kind of work during that day. So, if that exempt employee is answering emails or taking phone calls, you would have to pay that exempt employee for the entire week, but if the exempt employee does absolutely no work, chooses not to come in, that exempt employee could theoretically be docked for that particular day. Now, you do not have to, and from an employee morale standpoint, you know many companies would say well, I am not going to dock that particular employee, but that would be up to you, and so, you know, I just wanted to review those rules for you as we enter the winter season.

All right, I want to move onto an issue that sometimes comes up under the Family and Medical Leave Act and has recently come into question as a result of a federal decision in a case called Rick Stowell v. Blackhorse Pike Regional School District, and this case points up the issue of an employer having knowledge or being put on notice of the fact that an employee's absence would be FMLA qualifying and where the employer does not provide written notice of the employee's rights and responsibilities under the Family and Medical Leave Act. It really stands for the principle that, you know, an employee does not have to use some magic incantation to let an employer know that an absence or the need for an absence is FMLA related. So that in this particular case the employee was ill, had gastrointestinal issues, which should have put the employer on notice that it was FMLA qualifying, and if that is the case, the employer, as you know, is obligated to provide written notice to the employee of his obligation to obtain medical certification, the right to utilize or the employer's requirement of the right to use paid leave during the period of time, any duties that the employee would have to pay for health insurance premiums, and that if an employee is considered to be a key employee under the Family and Medical Leave Act, that that would be designated in that particular writing. If an employer fails to do that, it can be deemed to be interference with one's FMLA rights and that in itself can impose financial liability on the part of the employer. In this case the school argued, it was a school district. The school argued that while there was general information that was provided to the employee by notices which are posted on the school district bulletin boards through the regular

employee handbooks and in school's website and essentially the court found that was not sufficient that the school district had sufficient notice and should have been on notice that the absences and illnesses of this person were FMLA eligible, which would have triggered the official written notice to that employee. So as you deal with employee illnesses or disabilities, know that again it's not the obligation of the employee to say "oh this is a request for FMLA leave." If you know that there is potential FMLA leave liability there then you need to make sure that you provide the written notice that is required under the FMLA leave.

Okay, sort of related, I wanted to bring to your attention an employer favorable decision out of the 11th Circuit. So in a case called Hartwell versus Spencer this dealt with a Navy firefighter who was chronically late and under an accommodation that had been granted in 2008 under a memorandum of agreement, firefighters were allowed to help each other out by exchanging up to 59 minutes at the beginning or end of a shift thus allowing their fellow firefighters to be late in question and allow for a fellow firefighter to cover for him or her for this lateness. This particular case had to do with a firefighter who was diagnosed with posttraumatic stress syndrome and his request was that he be allowed to be habitually late and utilize other firefighters to cover for him as an accommodation. Eventually there was a new sort of boss in town, a new supervisor who said, look we need people here on time and therefore the accommodation that may have been granted years ago is no longer applicable and that since punctuality is an essential function of a firefighter's job after the safety sensitive position we need you to be here on time and if you are not you are going to be disciplined. The firefighter was eventually progressively disciplined up to termination and filed a lawsuit claiming that there was a failure to continue the accommodation that had been granted years before. The 30,000-foot level on this case decided by the 11th Circuit was that: A. Punctuality is indeed an essential function of any job just like regular attendance and almost more important the 11th Circuit noted "prior accommodations do not make an accommodation reasonable and that therefore an accommodation may have been reached years ago may not be applicable in today's workforce or in the particular work environment that you are dealing with" and I think it is significant because as we talked about on prior tele-briefs, the issue of reasonable accommodations is being litigated in a multitude of jurisdictions both State and Federal today and what may be a reasonable accommodation that was reached in 2019 may not be operationally feasible at some point in 2020 or beyond and there needs to be a continuing evaluation and analysis of what made the reasonable on a continuing basis so the fact that you may have reached a reasonable accommodation through an interactive dialogue with an employee at some point doesn't bind you as an employer for all times and there may be increased cost or increased operational inefficiency etc., that may come about as a result of granting the particular

accommodation previously and just because you engaged in an interactive dialogue and determined that a particular accommodation may have been reasonable months ago or even years ago doesn't perpetually find you as an employer to that accommodation for all times and if it becomes operationally inefficient or costly then you certainly have the right under the ADA to change that accommodation or in fact even terminate it under a justification of inefficiency cost, etc. So significant case out of the 11th Circuit and it bears noting as you deal with request for accommodations by employees in the future.

Okay those are the developments for the day. Casey can you take this off of mute please.

Casey: Okay.

Howard Kurman: Okay, as always if there any questions about anything I have covered, feel free to raise it now or in a private forum with my email at is hkurman@offitkurman.com. Any question, comment. Okay well if not it has been a interesting year, that is for sure those of you who have participated in my tele-briefs, I appreciate it and I am sure 2020 will be no less significant in terms of the labor and employment world in which we all operate. So I want to wish you all a happy holiday season, a great New Year and we will reconvene as I indicated on January 8, 2020. Thanks a lot.