LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Welcome everybody. Hard to believe that it is June 22nd but here we are, the last telebrief in June, and the next telebrief will be the second Wednesday in July or July 13th.

Okay, as usual, plenty of stuff to talk about. The first thing that I wanted to mention is that on June 14th and 15th, just a week or so ago, the Equal Employment Opportunity Commission participated in a White House conference called the United States of Women's Summit. It was the White House's United State of Women's Summit, and at this summit, the Equal Employment Opportunity Commission or at that time or concurrently with that issued three sort of position statement documents regarding the various challenges that women face in the workplace and all of these documents are found on the EEOC's website. I am going to make detailed reference to one in a minute, but the three documents are entitled, first, "Equal Pay and the EEOC's Proposal to Collect Pay Data." This has to do with something that we talked about in an earlier telebrief in the year, which is the EEOC's proposal in February to start collecting data from employers with a 100 or more employees starting in 2017, which would be detailed pay data, and this would include not only straight wage data but data regarding overtime, bonuses, profit-sharing, other forms of compensation, stock options, etc. So again, this is published on their website. Another document that they published is entitled "Helping Patients Deal with Pregnancy-Related Conditions and Restrictions at Work," which has its focus not only on employers but to healthcare providers, and this document explains in some detail examples of accommodations that pregnant workers may be entitled to such as reduced schedules, work adjustments, and that recommendations to physicians who may be able to recommend certain accommodations when they are examining pregnant employees who may have work-related issues.

The last document that I want to pay some attention to this morning, again found on the EEOC's website, is a document entitled "Legal Rights for Pregnant Workers under Federal Law," and I will quote from relevant sections of this because I think it raises issues that you all may need to pay some attention to in the future. So, the document starts off and it says, if you are pregnant, have been pregnant or may become pregnant and if your employer has 15 or more employees you are protected against pregnancy-based discrimination and harassment at work under Federal Law. You may also have a legal right to work adjustments that will allow you to do your job without jeopardizing your health. And then the document goes into a series of seven questions, and I want to pay some attention to each of them because I think from a practical standpoint it offers some advice for all of you.

So question number one is: 1) If my employer knows that I am pregnant or may become pregnant could I get fired? And the EEOC's response is under the Pregnancy Discrimination Act, employers are not allowed to discriminate against you based on the fact that (a) you are pregnant, (b) you were pregnant, (c) you could become pregnant or intend to become pregnant, (d) you have a medical condition that is related to pregnancy, or (e) you had an abortion or are considering having an abortion. They go on to say, in general, this means that you cannot be fired, rejected for a job or promotion, given lesser assignments or forced to take leave for any of these reasons. An employer does not have to keep you in a job that you are unable to do or in which you would pose a significant safety risk for others in the workplace. However, your employer cannot remove you from your job or place you on leave because it believes that work would pose a risk to you or your pregnancy.

The second question: 2) What if I am being harassed because of pregnancy or a pregnancy-related medical condition? Peremptorily, I would say that when we typically think of workplace harassment, we generally think of racial harassment or sexual harassment, but this is clearly putting into focus the issue of pregnancy-related harassment and the EEOC states harassment based on pregnancy or pregnancy-related medical condition is not allowed under the PDA or the ADA. You should tell your employer about any harassment if you want the employer to stop the problem. Follow your employer's reporting procedures if there are any. If you report the harassment, your employer is legally required to take action to prevent it from occurring in the future, which, of course, dovetails I am sure with all of your workplace harassment policies that you have, which outline hopefully and delineate with some specificity the procedure that employees would go through and are expected to go through if they have a workplace harassment issue.

The third question that is posed in this document is: 3) What if I am having difficulty doing my job because of pregnancy or a medical condition related to my pregnancy? The EEOC's response is you may be able to get an accommodation from the employer that will allow you to do your regular job safely. Examples include altered break and work schedules, permission to sit or stand, ergonomic office furniture, shift changes, elimination of marginal job functions and permission to work from home. You will notice that the EEOC distinguishes marginal job functions, which may be expected to be changed from essential job functions and, of course, you would not be under an obligation, under a pregnancy-related situation to change an essential function of the job unless you are doing it for other kinds of disabilities, but barring that you are not obligated to change, reduce or modify an essential job function. So it goes on and says you may be able to get an accommodation under the PDA if your employer gives accommodations to employees who have limitations that are similar to yours but were not caused by pregnancy. It proceeds to say you may be able to get an accommodation under the ADA if you have a pregnancy-related medical condition such as cervical insufficiency, anemia, sciatica, preeclampsia, gestational diabetes or depression that meets the ADA definition of disability.

Now, of course, we have talked about in the past telebriefs that under the ADA Amendments Act the definition of disability is very broadly interpreted and there are probably very few conditions that do not satisfy the definition of disability under the ADA Amendments Act. The EEOC continues and says the condition does not have to be permanent or severe or result in a high degree of functional limitation to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time consuming to perform compared to the way that most people perform them. If your symptoms come and go what matters is how limiting they would be when present.

The fourth question is: 4) What if there is no way that I can do my regular job even with an accommodation? The agency or the EEOC goes on and says first if you are being told by a healthcare provider that you cannot do your job safely and, for example, need light duty or cannot do your job because of the limitation or restriction you may want to make sure that it is really true. Your healthcare provider may not have considered the possibility that an accommodation would allow you to do your regular job safely. Things like reduced workloads and temporary reassignments often come with reduced pay, but your employer is not allowed to reduce your pay because you need an accommodation to do your regular job. That is an important point. The mere fact that you enter into an accommodation agreement with a pregnant employee does not mean that you have the right to reduce that employee's wages unless of course one of the accommodations is to allow that employee to work part-time as opposed to full time.

The fifth question is: 5) What if I cannot work at all because of my pregnancy? The answer if you cannot work at all, you have no pay time, you still may be entitled to unpaid leave as an accommodation and then they explain rights under the FMLA.

The sixth question is: 6) What do I do if I need an accommodation, light duty or leave because of my pregnancy? He EEOC's answer starts by telling a supervisor, HR manager or other appropriate person that you need a change at work due to pregnancy. You should inform your employer of the source of your problem at work is a pregnancy-related medical condition because you might be able to get an accommodation under the ADA. An employer cannot legally fire you or refuse to hire or promote you because you asked for an accommodation or because you need one. The employer also cannot charge you for the costs of an accommodation that is an important point.

The last question that they state is: 7) What should I do if I think that my rights have been violated? Here, they give information on filing charges with the Equal Employment Opportunity Commission or various state agencies. The important point here other than obviously reading this in detail at your convenience is the fact that pregnancy-related cases are on the increase. The EEOC's scrutiny of these cases are on the increase, and I think that its important for all of you to investigate all cases of potential pregnancy-related request for accommodation or

disability issues and to make sure that whosever making these decisions is well trained and brought up-to-date on the latest EEOC pronouncements and cases having to do with pregnancy discrimination.

I wanted to mention to you a new statute, a federal statute, which has some practical import for all of you out there who may have nondisclosure agreements with your employees. So on May 11, 2016, a federal statute called the Defend Trade Secrets Act, acronym DTSA, was enacted and the import of the Defend Trade Secrets Act is that it establishes a very comprehensive and uniform body of federal law under which employers can obtain remedies in a civil forum for the misuse and/or misappropriation of trade secrets by either current or former employees. And it also has a remedy structure, which is embodied in this particular statute, which includes exemplary damages and counsel fees for those employers who can prove that a current or ex-employee or even a consultant or a contractor has violated in the provisions of a nondisclosure agreement. Prior to this enactment of this statute, many states have their own trade secret acts. And the United States as a Federal statute had a criminal statute which made certain misappropriations of trade secrets within the realm of the criminal statute, but there was not a civil remedy to which employers could rely upon or upon which they could rely to gain damages and to get property back. Because importantly in this new statute there is an ex parte relief provision, which means that under certain circumstances an employer can even resort to self-help and get property back that may have been inappropriately taken or misused by a current or ex-employee. It is a fairly comprehensive statute. I commend that to your reading. But one thing I do want to mention and that is critical, is that in order to get the remedies that you would be entitled to as an employer, if you have nondisclosure agreements with your employee or even with a consultant or a contractor, you need to include language in that particular agreement that would notify the employee or the contractor or the consultant that they have certain whistle-blower rights that will be protected under this particular statute and unless you include this language in the agreement that you have, you will not be able to assert access to those particular damages or counsel fee. And the language is pretty specific. And I think that from your standpoint it is worth making a note of and its pretty technical language. If you're interested I could send you via email that particular language, but it's a two-paragraph statement. It says an individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that: (A) is made (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. And there is another paragraph as well. So this is language that comes right off the statute and it should be included in your nondisclosure agreements and confidentiality agreements if you want to make use of this new statute. Pretty important development in the protection of both intellectual property and other trade secrets.

Another thing that I want to mention is that the Department of Labor as you know is seeking to enforce what it calls the persuader rule as of July 1, 2016. And I have mentioned in prior telebriefs that there had been numerous challenges in various state and federal courts to the persuader rule because the persuader rule, and I have mentioned this in past telebriefs, is a very, very comprehensive and in my view overreaching statute, which in some cases would, I believe, unfairly and inappropriately invade the attorney-client privilege by having both attorney and client report that an attorney has provided advice to a client in the midst of a union campaign on services that are provided to so-call persuade that employer's employee not to vote affirmatively in a union election. This has been the subject of great controversy and as I said litigation and because of the fact that the Department of Labor's rule ostensibly goes into effect on July the 1st, I think that we can probably foresee that there will be various rulings that come about prior to July the 1st, and hopefully we will give some credence to the challenges that have been raised to the enforcement of this particular statute, which in my opinion has really serious flaws in terms of the enforceability of the particular statute.

Apropos all of the Department of Labor I wanted to indicate that the cases are replete of misclassification and independent contractor status and the Department of Labor posts these on their website, and so just a couple of examples for you, one of their headlines in the last week was staffing agency to pay more than $151,000 in overtime back wages damages after misclassifying 275 hotel employees as independent contractors. They go on to say on their website misclassifying employees as independent contractors or some other nonemployee status often denies them minimum wage overtime, workers' compensation, unemployment insurance, and other work place protections. Employers often intentionally misclassify workers to reduce labor costs and avoid employment taxes. Again, we have seen this with Uber, we have seen this with FedEx, and many other nationally renowned companies, and the Department of Labor is making this a national priority.

Another headline on its very recent website was Molina Healthcare of New Mexico to pay $700,000 to more than 400 caseworkers after US Labor Department investigation finds them eligible for overtime. They go on to say that the investigation found Molina Healthcare violated the overtime provisions of the Fair Labor Standards Act and they go on to say that the employer incorrectly applied an exemption from the FLSA's overtime requirements meant for salaried executive, administrative and professional employees, to case managers. So they go on to say that not only to gain the exemption must the putative exempt employees be paid a minimum guaranteed salary, but they must perform certain job duties specific to that exemption. While case managers working for Molina Healthcare met the salary requirements, their job duties did not support the employer's determination that these employees were exempt from overtime. So again, I know I am sort of probably preaching to the choir and have indicated this on more than one occasion, but even with the Department of Labor's new salary test that will go into effect in December, one has to pay very close attention to the duties that these people are performing as well to make sure that they fit within

one of the categories of executive administrative or professional, outside sales or computer professional employees, because even if they meet the salary test, if they don't meet the duties test, they will be found to be statutory employees under the FLSA.

Okay, those are the developments for the day. As always, questions or comments are welcome either in this forum or privately at my email address at hkurman@offitkurman.com or by my phone number, which is 410-209-6417. Michelle if this is on mute, take it off mute. Any questions or comments from anybody? Okay, well, that is either a good sign or bad sign, not sure. But in any event hopefully as always you come away with some practical information and we will see each other figuratively in the second week in July. So, have a good 4th July everybody and take care.

Ann Barnes: Thank you, Howard.

Howard Kurman: Right, bye-bye, bye-bye.