Employment Telebrief-011316

Howard Kurman: All right, welcome everybody to the first labor employment telebrief in 2016 as we were saying before we started cannot believe that is the case but apparently it is. So while we were all enjoying the holiday season the labor and employment world did not stop and a lot to talk about this morning as usual.

Let me start off by pointing out an interesting statistic that I read in Bureau of National Affairs as a subscriber of that service. What they did you have heard me talk about it last year 2015 the NLRB's so-called quickie election rules, which basically shorten and truncate the time within which an election will be held after representation petition is filed with the National Labor Relations Board and what the Bureau of National Affairs did was to look at the four months of time after the quickie election rules went into effect that was May, June, July and August of last year and compared it to the same four months that existed in 2014, which was prior to the quickie election rules going into effect. In that survey or in that study what BNA found was that there were 31 more resolved elections in the four-month period following the rule change than in the same period in the year before and that every one of those 31 additional elections the union won as opposed to the employer. In essence, what the study showed was in the four months following the rule change the NLRB according to BNA resolved more elections than in the same period the previous year these elections were resolved more quickly, the unions prevailed more frequently and the overwhelming majority of the quickest election went labors way and when you look at this actually from a rational standpoint you can understand why that traditionally and historically when an employer has had more time to campaign against an impending union it has succeeded more often than the union has. The nature of the quickie election rules and the reason I bring it up to those of you out there who either represent or associated with nonunion companies is that you should not get too complacent in 2016 you want to make sure that from the standpoint of union avoidance and your own union vulnerability study or analysis that you are proactive about it because under the quickie election rules when you are talking about a period of time between the filing of a petition and the actual election being in about 24 days or a little more than three weeks that does not give anybody particularly an employer a lot of time to do the groundwork that is necessary in order to combat a union petition and, therefore, what it really portends is that if you are a nonunion company and you have any kind of idea or concept or feeling that you may have some vulnerability in 2016 and beyond now is the time to start dealing with that vulnerability by doing some communications with your employees, assessing what kind of grievances or complaints or major issues your employees may be having, training your managers and supervisors to recognize the signs of perhaps an impending union campaign. Because by the time the union petition is received by any of you or any of the clients that you may represent it may be too late because if you only have a little more than three weeks to combat a union organization campaign chances are it is going to be more likely than not that the union will succeed rather than you as an employer. So I bring this up because I think it was an interesting study the statistics are not surprising but nevertheless they are pretty stark.

Talking about the NLRB, there was a recent decision in 2015 called Rocky Mountain Eye Center and in this case the NLRB considered unfair labor practices committed by an

employer that operates eye clinics, ophthalmology and optometry services and among the allegations in this case the employer was accused of violating the NLRA by entering into a confidentiality agreement with certain employees that the NLRB deemed to be overly broad and intrusive and violative of the employee's Section VII rights under the National Labor Relations Act and as we have talked about numerous times all really Section VII is, is a pronouncement by Congress that employees have the right to band together or to talk together in order to promote or to talk about wages, hours and terms and conditions of employment and in these confidentiality agreements the agreement defined confidential information to include patient information, physician information and personnel information and what the NLRB concluded was that by the employer attempting to restrict or prevent discussion about so-called personnel information the employer was intruding on the Section VII rights of the employees. And again as I said in the past when you talk about confidentiality either in your handbook or in a standalone confidentiality agreement that you may have with employees, the best way that you can protect yourself is to make sure that you are not precluding employees from discussing or revealing what is called personnel information and/or that you include a disclaimer in your statement, which I have talked about in 2015, the essence of that disclaimer would basically say that employees are not precluded from engaging in any activity or statement that would be protected by Section VII of the National Labor Relations Act or any other comparable state or local law. The NLRB puts credence and defers in many cases to those kinds of protective statements and so those of you who are looking at you are confidentiality agreements in the beginning of 2016 or your handbook keep in mind that you do not want to have an overly broad confidentiality policy and you certainly want to have protective language in your policy or in your agreement, your standalone agreement, along the lines that I have stated. Again, if you want some assistance on that or you want me to take a look at it let me know, but bear in mind at least for the next year under the Obama administration I see no cessation or diminution in the pro-employee and union activity of the National Labor Relations Board and this pertains to both unionized as well as nonunionized companies.

This also is reflected in a second circuit case which was decided in November 2016 involving Hyundai where they looked at not only the confidentiality policies of the employer but also a blanket restriction that Hyundai attempted to impose on employees in disclosing anything having to do with a workplace investigation. We talked about some of these issues in 2015, this came up again in the second circuit case, excuse me in a DC circuit case, in November 2015 in which they concluded that Hyundai had, like the National Labor Relations Board had found, violated the restrictions imposed on employer activities under Section VII by preventing in a blanket way employees from talking about things that go on in a workplace investigation.

Remember, as I indicated last year in several telebriefs you can limit the employee's ability or opportunity to talk about things having to do with a workplace investigation if it is necessary to protect the integrity of the investigation or to prevent the destruction of evidence or any kind of threats or intimidation of witnesses but a general blanket rule which attempts to prevent employees from talking about the results of an investigation will run afoul of the National Labor Relations Board pronouncements on this issue. So take a look at your pronouncements in your handbook on workplace investigations, make sure that there are no blanket prohibitions but basically you amend your

statement to say that in a workplace investigation confidentiality will be respected to the extent that it is necessary and that it will not violate the provisions of Section VII of the National Labor Relations Act.

Let me turn my attention if I can to an interesting case that was recently decided in Federal Court this was back in mid-December, December 15th, in a case involving a major retailer, Costco, all of you have heard of Costco, and in this case it is called EEOC vs. Costco Wholesale Corp. because it was brought actually by the Equal Employment Opportunity Commission against Costco. They brought a complaint in Federal Court against Costco alleging that Costco had created a hostile work environment by virtue of a customer of Costco in Illinois having committed acts of harassment against an employee of Costco and where Costco did not do or take sufficient remedial actions or conduct in order to cease that harassment. This was decided not on the substance or the merits but what happened was Costco filed a motion for summary judgment against the equal employment opportunity commission and the Federal Court said that there was enough differences of fact here to justify it going forward and perhaps being decided by a jury. In this case, a customer of Costco had committed various acts of alleged harassment against an employee including videotaping this particular employee and while Costco allegedly knew about this particular action it did not ban this employee from the store until the passage of about a year after it actually happened. The employee eventually went out on medical leave and sued Costco through the Equal Employment Opportunity Commission. The court made it a point of indicating that employers can be liable under title VII for a third-party's known sexual harassment of an employee unless the employer takes prompt and appropriate corrective action it was reasonably likely to end the harassment and of course there is a fact intent enquiry as to whether or not the employer's actions are sufficient to satisfy the standards set up under title VII. I bring this to your attention because those of you out there who have dealings with customers or who have employees who have dealings with customers or third party vendors or any visitor to your place of work need to make sure of two things: 1) that your workplace harassment policies include prohibitions on harassment by third parties. It is not sufficient simply to prohibit actions by either supervisory staff or employees you also need to make sure that your policies also prohibit the alleged harassment of employees by a third-party weather that is a vendor or customer, etc. And that is an important thing because again under title VII if the employer knows or should have known of actions by a third-party, this is not an employee but a third-party, and fails or refuses to act that failure or refusal can impute liability to the company unless it can be shown that the company acted promptly and responsibly and reasonably to end the harassment. 2) The second thing that you need to do is those of you who have EPLI insurance that is Employee Practices Liability Insurance need to make sure that your policies include protection from the acts of third parties. Most policies today will include that but you need to make sure in your face page, the page that is at the top of your policy and which outlines the limits of your liability and your retention or deduction amount that it will include actions of third parties because of it does not you need to talk to your broker about that and if it is time for renewal or even if you do not have EPLI insurance at this time and you want to purchase it, if you have questions about it you can ask me, but it needs to include third party coverage. So this case that was decided in mid-December is a good reminder of the kind of things that you might not typically think of when you think of workplace harassment and the fact that

generally you think of that being committed only by a member of management or co-employee when in fact it can be equally committed by someone who is not even connected with your company that is a customer or a vendor.

I want to bring to your attention a case that was decided by the Eighth Circuit this was December 29th right before the New Year in the case called Hassen Winkle vs. Mosaic that is a mouthful but it was decided by the Eighth Circuit and in this case a registered nurse in Iowa was fired after she exhausted her FMLA absence and leave. What happened was this was an employee who actually was physically unable to work after having neck surgery and when she was physically unable to come back after the expiration of her leave the company actually gave her another 90 days of unpaid leave but even after that 90 day period she was unable to come back. Now, she was terminated by the company and her claim was that not only was her FMLA rights interfered with but that there were actions committed by the company even prior to her going out on this final FMLA leave, which created a hostile work environment. Significantly, the Eighth Circuit pointed out that under the FMLA regulations this is 29 CFR Section 825.216 (c) those of you who have these regulations I am sure right on your desk, which takes up about probably half of your desk, but they pointed out that an employer may discharge a worker who exhausts FMLA leave and is unable to perform an essential function of the position because of a physical or mental condition. Importantly and significantly in this case as I indicated the employee never returned to work after her neck surgery and as the Eighth Circuit said an employer may lawfully fire an employee who exhausts leave and cannot perform an essential job function because of a physical or mental condition.

Now, you need to be aware of the fact that there is an intersection and I have talked about this before but there is an intersection between the FMLA and the ADA. So while the FMLA gives an employer the right to terminate an employee who cannot return to work after the expiration of 12 weeks of protected leave nevertheless under certain circumstances the ADA may say to an employer you have an obligation to attempt to accommodate that employee if for instance that employee's physician says well the employee has a disability but may be able to return to work in three weeks or four weeks. So you have to really look at these on an individualized basis, on the other hand if you get a medical report from a physician that says that not only will the employee not be able to return to work following the expiration of the 12 weeks of protected leave but the employee may not be able to return to work for an indeterminate period of time or for the foreseeable future or for the next six months or 12 months or 18 months, the ADA is not implicated there either because an employer has no obligation to accommodate an employee where the extent of the employee's disability would preclude or prevent that employee from coming back to work and doing the essential functions of the job within a period of six months, 12 months or where it is indeterminate. So while there is a intersection between the ADA and the FMLA and at this FMLA case points out from the Eighth Circuit an employer has no obligation irrespective of what went on prior to the period of time that the employee went out on FMLA leave to accommodate or to reinstate an employee who cannot return to work nevertheless you have to look at these things on an individualized basis to make sure that even though the employee’s FMLA rights have been extinguished that there may

also be a continuing duty under the ADA under certain circumstances to accommodate an employee if you can.

The last thing that I will indicate or the last kind of situation that I will talk about implicates wage and hour law, this was a very recent case decided by the Fourth Circuit, a case called Calderon v. GEICO Insurance Company, this implicates the white-collar administrative exemption and in this case insurance investigators for GEICO were in a unit that probed and investigated fraudulent claims and they brought suit against GEICO claiming they were entitled to overtime pay on the basis that they were not exempt under an administrative exemption and the Fourth Circuit agreed and concluded that these investigators did not fall within the FLSA's white-collar exemption for employees performing administrative functions. Remember the administrative exemption applies to those employees who on a regular basis are using independent judgment and discretion in a matter that implicates major policy decisions or the actual business of the employer. In this case what the court found, what the Fourth Circuit found, was that merely conducting factual investigation where they were gathering facts to be submitted to the company and not making any independent judgments or using independent judgment or discretion did not bring them within the administrative exemption under the Fair Labor Standards Act. They did not have supervisor's responsibility as the court said; they did not develop, review, evaluate or recommend GEICO's business policies or strategies. And, therefore, they really were not involved in carrying out major business operations or affecting the major business operations of GEICO. Again, I bring this to your attention because as we know the Department of Labor sometime in 2016 will be revising its salary requirements under the white-collar exemption and may or may not be looking at or revising the requirements for the white-collar exemption, which include the executive exemption, the administrative exemption, the computer exemption, the professional exemption and the outside sales exemption. So this case points out, very recent case Fourth Circuit which governs all of Maryland by the way, that if you are looking at an administrative exemption someone who is merely gathering facts for you let us say in a workplace harassment investigation is not going to be automatically exempt as an administrative exemption unless that employee is using independent judgment and discretion and is making major policy decisions or affecting major policy decisions of the company. So those of you who have questionable classifications in the administrative area or the executive area again the beginning of the year is a good time to take a look at that in preparation for what may be coming down the road later on probably somewhere around the fall of 2016.

All right Michelle you can unmute this if you can please.

Howard Kurman: Okay as I always do you know I throw it open for any questions or comments anybody may have again if you want to do that now that is fine if you want to do it in a private session or a call with me and you can call me on my direct line 410-209-6417 or my email at hkurman@offitkurman.com. Any questions or comments from anybody on anything that was covered out there?

Anne: Howard EPLI what are those first two initials stand for?

Howard Kurman: It is Employment Practices Liability Insurance and EPLI.

Anne: Employment practices okay got it thank you.

Howard Kurman: You may want to talk to your carrier or broker or whatever. Any other questions out there. Okay well if not we have much to talk about going forward in 2016 as usual no shortage of stuff in the labor and employment field and I look forward to doing that with you for the balance of 2016. The last telebrief in January will be on Wednesday, January 27 hopefully no snowstorms intercede between now and the 27th, so take care everybody. Take care bye, bye.