LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay we are at 9:02 on my official clock so we are going to get started. Michelle, if you can mute the phone I would appreciate that. Thank you.

All right well there is plenty to report this morning I apologize for you know having the last couple of meetings; one being postponed and one being prerecorded is just one of those things where schedules were messed up. In any event there is a lot to report coming out of the Equal Employment Opportunity Commission, which has a practical effect I think on all of you. So in prior telebriefs I have talked about the fact that the Equal Employment Opportunity Commission was working on a new what they call strategic enforcement plan and actually on October 17th just about a week ago they disclosed what their new strategic enforcement plan is going to be for fiscal year 2017 to 2021. This will replace the one that they first issued back in 2012. There are many similarities to the prior one but some differences as well and I will focus on some of the high points. Obviously, if you want to take a look at the entire plan you can go on the Equal Employment Opportunity Commission's website but I will try and hit the high marks for you.

The new strategic enforcement plan continues the directed focus and attention that the EEOC has on what they call systemic litigation, meaning that they want to continue their focus and direction on strategic and sort of high focused and high visibility litigation that has an impact not only on the particular victim that they are choosing but really on the nationwide collection of employers who would be subject to EEOC jurisdiction. You know when I am talking about this we are talking about recruitment and hiring. They will continue their emphasis on looking at an employer's recruitment and hiring ease in procedures, they will continue to look at barriers to employment, which are set up by qualifications and standards which they have an issue with in which they believe may have a disparate impact on certain segments of the population.

Another aspect of their plan, their strategic enforcement plan, is what they call protecting vulnerable workers including immigrant and migrant workers and underserved communities from discrimination.

The third aspect of their plan is addressing selected what they call emerging and developing issues. This is where they concentrate essentially on things that are really on the forefront of what the EEOC sees as big issues coming down the pike. These would include for example pregnancy-related limitation under the Americans with Disabilities Act and LGBT protection for large segments of the population. Additionally, they have identified ensuring equal pay protections for all workers as part of their strategic enforcement plan, preserving access to the legal system and preventing what they call systemic harassment. In addition, the EEOC identified in its strategic enforcement plan issues related to

what they call complex employment relationship. So these would have to do with temporary workers, placement agencies, staffing agencies, independent contractor relationships and what they call the on demand economy. So obviously they are going to be looking at, much like the Department of Labor, much like the National Labor Relations Board of sort of the new kind of worker relationships whether that is job sharing, whether it is a joint employer status all of those kinds of things that call into question whether or not the so-called entity is deemed to be a responsible employer under title VII of the act.

They also have identified a new term in this strategic enforcement plan called backlash discrimination. And this backlash discrimination would be discrimination against those individuals who are Muslim or Sikh or persons of Arab, Middle Eastern or South Asian descent and obviously the reason why they call it backlash discrimination is because of all of the attention that has been paid to these groups actually post 9/11 in the workplace and beyond. So they also want to focus their attention on the lack of diversity in certain industries such as technology and I think it bodes well for all employers to take stock of their general employment policies to see whether or not there are any policies out there or procedures hiring, firing, promotion etc., that under a systemic microscope could be deemed to be deficient according to the EEOC.

The strategic enforcement plan also pays some attention to what they called qualification standards and inflexible leave policies that discriminate. I have talked about this before where any of you may have leave policies that are not flexible in terms of having the requirement that an employee absolutely has to report back to work as of a certain time irrespective of the fact that he or she may need a reasonable accommodation coming back into the workforce.

They also talk about in their strategic enforcement plan what they call the priority charge handling procedure, which would essentially set up a triage system that when the EEOC with its limited resources looks at charges that they would triage those charges based upon the merit, the impact that it might have nationally and the potential irreparable harm to the particular charging party or claimant. There is a lot in this strategic enforcement plan and there is a lot that probably will make its way into charges if any of you have the unfortunate occurrence of having a charge during this next four or five year period, so as I always say it is probably good to take stock of the fact that handbooks, policies particularly Equal Employment Opportunity policies, harassment policies, hiring policies and procedures, promotion policies and procedures need to be looked at and revised, if necessary. Along with that on September 29th just a month ago essentially the EEOC announced the finalization of its revised EEO 1 report, we have talked about this in prior telebriefs, as you know the EEO 1 reports have to be filed by employers who have a 100 or more employees and heretofore the EEO 1 report would only require paid data by gender, race and ethnicity. Under the new EEO 1 form, which will effectively require data to be gathered in the 2017 calendar year from October 1st to December 31st of calendar year 2017 to be reported in March 2018, not only will you need to gather this data and report data on gender, race and ethnicity but under the

new EEO 1 report you will need to submit data on salary range and aggregate hours worked for salaried, bands which are included in the new EEO one report. Again, this is really an outgrowth of the strategic enforcement plan that I just mentioned, which is that the EEOC wants to pay attention to barriers to hiring, to disparities between male and female workers and the fact that this new EEO 1 report reflects the fact that they want to acquire aggregate data on salary range and aggregate hours worked is another indication of its intent to focus in on those disparities, which they can analyze and potentially enforce against the particular employer on the basis of sex discrimination or ethnic discrimination, which has a practical impact on pay of employees.

Again, this will be effective as of the period of time October 1st to December 31st, 2017 to be reported in March 2018 so you have time to take a look at what your statistics show but you know word to the wise I know that many of you simply by rote fill out the EEO 1 reports without much attention being paid to possible disparities in certain aggregate ways between males and females and ethnic groups. You are going to have to pay some attention to that beginning the last part of 2017 to be reported in 2018.

In a prior telebrief, I talked about a decision emanating out of the 7th Circuit which was a Federal District Court case finding that sexual orientation was not deemed to be discrimination under Title VII of the Civil Rights Act. I think significantly the Court of Appeals for the 7th Circuit in Chicago recently vacated that three-judge panel decision of July 28, 2016 and has agreed to hold what is called an en banc hearing, which is simply a full court hearing on the issue of whether sexual orientation is deemed to be discrimination or a protected classification under title VII of the Civil Rights Act. Oral argument is scheduled on this particular issue on November 30th just next month and it remains to be seen what will happen but I doubt whether the 7th Circuit would have required oral argument on this if the entire court did not signal the fact that probably they view the three-judge panel decision finding sexual orientation not to be a protected classification to be deficient. I indicated I know in a prior telebrief that I think ultimately the issue of whether sexual orientation is a protected classification under Title VII will be decided by the Supreme Court and obviously depending upon the November 8th results of the election and what happens in the composition of the Supreme Court we will know a lot more on this particular labor case as well as other labor cases in the future. But of course as you know many states already include, including Maryland, already include sexual orientation as a protected classification so you may want to adjust or take a look at your EEO policies to see whether or not you want to include that ahead off any kind of federal clarification in this particular issue.

Again paying attention to the EEOC significantly the EEOC's Miami district director recently advised that at the end of the year the EEOC intends to issue new guidance on separation agreements. Many of you obviously when you have separation agreements with employees include provisions on non-disparagement, confidentiality, waiver of an employee's right to obtain monetary damages as a result of the separation agreement even if that

employee winds up filing a charge with the EEOC even after signing a separation agreement. The signal at least from the Miami district director of the EEOC is that the EEOC intends to provide further guidance on this issue by the end of the year. And this could have a significant impact, a practical impact, on many of you who use typical separation agreements with executives or other mid-level managers when they depart your company because you always include provisions such as non-disparagement provisions, confidentiality provisions and waiver of monetary damage provisions just as a standard part of those agreements. And I will keep an eye on that but it does not mean obviously that just because the EEOC issues guidance on that that it necessarily will become law. But I think that it behooves all of us to pay attention to what the EEOC is going to do on that particular issue.

Let me turn my attention to a practical issue that sometimes comes up under the Family Medical Leave Act. I know I have gotten questions on this and there are some recent cases having to do with the issue of whether an employee who is out on family and medical leave can actually do any kind of work while that employee is on family and medical leave. You should know that the Family and Medical Leave Act regulation which of course are byzantine and long and arcane, do say and I will quote that the FMLA regulations permit "voluntary and un-coerced acceptance of work by employees on medical leave so long as acceptance is not a condition of employment." I will read that again, that the regulations permit voluntary and un-coerced acceptance of work by employees of medical leave so long as acceptance is not a condition of employment. Where employers have gotten into trouble is where they have expressly or impliedly required that employees, and particularly managers this sometimes happens, respond to emails, respond to texts, phone calls etc., that can be considered to be work and if it's required as a condition of employment then you are under the restrictions of the FMLA, which basically state that it is unlawful for any employer to interfere with, restrain or deny the exercise of or the attempt exercise an employees right to medical leave. What the cases basically state is that an employers de minimis contact with the employee for limited purposes such as an occasional brief call or responding to an isolated email that sort of thing is not really work or interference with the FMLA rights of the employee. But when you get into the regular requirement that an employee respond to an email or phone calls on a regular basis, you get in to questions of interference with the employee's right to be essentially free from work during the period of an FMLA absence and so it probably behooves you to take a look at your FMLA policies and make sure that in your FMLA policies and in your writing to employees when they go out on FMLA leave that it is stated that they are not required to perform work while on FMLA leave as a condition of employment and they are not permitted to perform work other than on a de minimis basis while they are out on FMLA leave and that way you can clarify and protect yourself on the basis that you do not want some employee saying to you that they have been required to do work while they are out on FMLA leave.

Which also brings up the point of firing an employee while the employee is on FMLA leave, I know that I have touched on this in prior telebriefs. There are

numerous cases, which deal with a situation where an employee who is out on FMLA leave engenders an investigation for one reason or another by the employer into things that may have been done or not done while the employee was out on FMLA leave and of course while FMLA leave essentially protects from a job protection standpoint the employee who is out on FMLA leave and permits that person to come back into the same or comparable job upon expiration of the leave the regulations are also clear that FMLA leave does not immunize the employee from being disciplined or even terminated if that same evidence would be used against an employee who is not on FMLA leave. And there are many, many cases where this particular principle is articulated, many appellate cases federal appellate cases, basically on this very point.

A recent case out of the 10th Circuit confirms this very point on a manager who went out and where an investigation indicated that not only was he guilty of serious work-related misconduct but he had also lied to a supervisor about certain things that should have been done during the course of his employment. The case is Olsen v. Penske Logistics, it's a 10th Circuit case decided on August 26, 2016. And essentially what Penske discovered was that the manager who was out on FMLA leave had lied and had fraudulently submitted data which showed that work that supposedly had been done was not done during the course of his tenure as an active manager and they wound up firing him and he filed suit against Penske, it was dismissed at the Federal District Court level and affirmed by the 10th Circuit and again the 10th Circuit repeated the principles that I've just articulated.

The problem is that you need very careful documentation during the period of time that the employee has been employed or during the period of time that the employee is out on FMLA leave and make sure that the claim is not that you fire the person because he exercised his FMLA rights but on the basis that he was guilty of misconduct it would have precipitated either discipline or termination of the employee had he not been out on FMLA leave. These are very sticky situations and probably ones that you need to review with employment counsel prior to implementing a termination decision. But nevertheless, again and it gets really critical to know that the mere fact that an employee is out on FMLA leave does not insulate that employee from disciplinary action up to and including termination.

Okay, those are the developments for the day. Michelle, can you take it off on mute please? Thank you. Okay, as I always indicate I am happy to answer any questions or take any comments that anybody might have. If you would rather do it in private certainly you can do that on my own number, which is (410) 209-6417 or my email hkurman@offitkurman.com. Any questions or comments?

Anne: Howard its Anne, on the inflexible leave policies issue under the EEOC and maybe the ADA there is no protection for indefinite leave is there?

Howard Kurman: There is no protection for indefinite leave, indefinite leave would generally be deemed to be an unreasonable accommodation. And these things are really

decided on a case-by-case basis and you know there is a big difference between a employee who submits a physician's note that says the employee should be able to return to work within another three weeks or four weeks on the one hand and on the other where the physician says it's just indeterminate at this point whether the employee will be able to return to work. Generally, the Appellate Courts are pretty much in accordance with one another in saying that indefinite leave or the opinion of a physician that is just unknown when the employee can return to work is simply not a reasonable accommodation under the ADA.

Anne: Okay that is what I thought. Thank you.

Howard Kurman: Sure. Any other questions? Okay well I appreciate everybody's attention and as you know we do these on the second and fourth Wednesdays of every month so the next telebrief will be Wednesday, November 9th. So I shall look forward to seeing all of you or at least hearing all of you. Thank you.