

LABOR & EMPLOYMENT TELEBRIEF

By

Howard B. Kurman, Esquire

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Howard Kurman: Okay, by my clock it is 9:02 which is I think the only clock that matters. And we will get started. It's hard to believe that there is one telebrief left after this in December, which is December 23rd. Hopefully, everybody will not be in their party mood too much. I guess more importantly I should hopefully be coherent on the 23rd, at least just coherent as I usually am. So without further ado let me get started there is plenty to talk about this morning.

Michelle: Would you like me to mute everyone for you.

Howard Kurman: Oh, yeah please do that Michelle. Okay.

I wanted to start out with something that within the news; actually in the sports news. I know everybody does not read the sports page but this seemed to me to have a lesson for all of you out there.

The coach, former coach of the University of Southern California, USC, Steve Sarkisian was paid multimillion dollars to coach the USC football team. And he was recently terminated because of a number of incidents where he appeared for instance at a big alumni function inebriated and that was evident by his speech and mannerism. He appeared to be inebriated on the sideline of a football game and Pat Hayden who was the athletic director fired him. I saw where just the other day where Sarkisian has filed a lawsuit against the University of Southern California complaining essentially that he is a disabled person within the meaning of the ADA and that the University of Southern California failed to accommodate him; i.e., to send him to rehab.

I thought that this was a valuable kind of teaching tool for everybody, I know that we have talked a little bit about this in past telebriefs, which is that yes the status of being an alcoholic or drug addict is a protected status under the ADA and of course most state analogs, statutory analogs, through the ADA. But it is clear under the ADA regs and most regs pertaining to state statutes that what is not protected in misconduct connected with the disability and that there is no obligation on the part of an employer to accommodate an employee once the manifestations of a disability show up as affecting that person's ability to do work, to do the essential functions of the job, and of course for a major college football coach to appear at an alumni event and to appear even on the sideline in an apparently inebriated state would invoke not necessarily the disability of him being alcoholic because he has since gone through rehab, and of course now the contention by his lawyer is that he is reformed and that USC should have and could have sent him to rehab and got him in a position where he then could perform the essential functions of the job, which I think beg the question of why was he not able to perform the essential functions of the job when he was at a

alumni event, when he was on the sideline etc. This is a multimillion dollar suit because as you probably know big time college coaches make multimillion dollars a year because they bring in multimillion dollars a year revenue for the universities and colleges for whom they perform their services. I think that this is a teaching tool because from my standpoint the mere fact that somebody is a reformed addict or even a current addict or alcoholic does not immunize them from the same rules of the game that you apply to all other employees, and to me it has always been my position with clients that when someone manifests in misconduct because of the impact of drug use or alcohol use, its too late for that person to say oh, but now I need rehabilitation, I need to go through your EAP etc. The time for anybody to do that is if they are recognizing on their own that they have a problem and that they then should seek help through the employer before the essential functions of their job are being impacted. My guess is it because of the dollars involved in this case eventually the University of Southern California will settle with him for some amount of money much less than they are seeking but probably in order to avoid costly and fairly well-publicized litigation. But I do think that it is a teaching moment and some of you may want to go back and look at your policies that are reflected in your handbook and indicate that while you recognize that people may have problems with drug use or alcohol use you will not permit that drug use or alcohol use to be manifested when they perform or cannot perform the essential functions of their job and if they are seeking rehabilitation it needs to be sought prior to the time that they have job related incidents that would throw doubt on their ability to do work as well as create embarrassment in the workplace or affect employee morale.

Okay, while we are talking about the EEOC I want to bring to your attention a press release that was published by the Equal Employment Opportunity Commission on December 1st, a little more than a week ago and the title of this press release is EEOC Issues Publications on the rights of job applicants and employees who have HIV infection. So I will read the salient points for you obviously you can go on the EEOC's website if you wanted a copy of this. But it says the US Equal Employment Opportunity Commission today issued two documents addressing workplace rights for individuals with HIV infection under the Americans with Disabilities Act of 1990 including the right to be free from employment discrimination and harassment and the right to reasonable accommodation in the workplace. They say the White House has issued a national HIV-AIDS strategy for the United States. One of the steps identified by the strategy is to reduce stigma and eliminate discrimination associated with HIV status and services. EEOC has a long history of enforcing non-discrimination rights of individuals with HIV infection and employment. During fiscal year 2014 alone EEOC received almost 200 charges of discrimination based on HIV status obtaining over \$825,000 for job applicants and employees with HIV who were unlawfully denied employment and reasonable accommodations. The EEOC now extends these efforts by issuing two documents that explain these rights. And they go on to assert and draw attention to these two documents, which are stated on their website. The first is entitled, "Living with HIV Infection - your legal rights in the workplace under the ADA," and it says that this explains

that applicants and employees are protected from employment discrimination and harassment based on HIV infection and that individuals with HIV infection have a right to reasonable accommodations at work. It also answers questions about the process for obtaining an accommodation, possible accommodations, the privacy rights of people who have HIV infection and the employer's obligation to keep medical information confidential, and the role of EEOC in enforcing the rights of people with disabilities.

The second document that they point to is entitled, "Helping Patients with HIV infection" who need accommodations at work. This explains to doctors that patients with HIV infection may be able to get reasonable accommodations to help them to stay productive and employed and provide them; meaning the doctors with instructions on how to support requests for accommodation with medical documentation. It also answers questions about the types of accommodations that may be available, the ADA's protections against employment discrimination based on having the condition or on the need for accommodation, the importance of disclosing the need for an accommodation before a problem occurs and what to do when an employer raises safety concerns. It appeared odd to me frankly that the EEOC felt compelled to put these out since the heyday obviously of attention being paid to HIV and AIDS seems to me to be probably 5 to 10 years ago. But nevertheless, the EEOC continues to get charges and issue complaints based on HIV and the failure to accommodate employees with HIV or with full-blown AIDS and it probably would bear some scrutiny by you all to take a look at the actual press release and the documents that are on the EEOC's websites regarding this as you compare your own policies on disability and accommodations for those disabilities in the workplace.

In further talking about the EEOC, I think it was the last telebrief I mentioned the emphasis that the EEOC is placing on systemic investigations and systemic charges. Obviously systemic charges and complaints have much more exposure, monetary exposure, to a company as opposed to an individual charge or an individual complaint. We see that in 2015 what data we have indicates that the commission completed more systemic investigations than in fiscal year 2014; in fact, the two years compared 2014 of 260 systemic investigations and 2015 of 268. There was a dramatic increase in the amount of funds that the EEOC received from these systemic investigations in 2014 they got \$13 million and in 2015 almost \$33.5 million. That is almost triple the amount of money that the EEOC obtained in its systemic investigations.

The problem with a systemic investigation if you are unfortunate enough to be the recipient of one, is that you know after the Supreme Court's decision in Mach Mining earlier this year. Mach Mining the issue in that case was the extent to which the EEOC has to engage in good faith conciliation efforts after it finds probable cause to believe that discrimination has occurred and what the Supreme Court said in the Mach Mining case was that as long as there were good faith attempts but not necessarily detail attempts at conciliation courts will not put the conciliation efforts under a microscope to assess the validity or lack thereof of the

conciliation efforts. So what happens is if you are unfortunate enough to get a probable cause finding in a systematic case you are going to be stuck probably with an unreasonable demand by the EEOC to remedy the case and that is where the very high dollar remedies come in. And so 37% of the suits filed by the EEOC fell into the category of ADA discrimination in 2015, or fiscal year 2015, and many of those result in systemic investigations and charges.

The other type of systemic charge which seems to have a lot of traction now is ADA cases paired with pregnancy discrimination under the ADA. So, I mean all of this portends, you know carefully auditing your EEO policies and procedures and mechanisms by which you assess whether you think you have any liability under the ADA or your pregnancy policy or how you go about remedying your complaints that is the processes and procedures that you utilize in remedying these complaints and what you do once a complaint is reached by HR or any other department in your company. We know that the EEOC is going to be increasingly devoting attention to systemic complaints and by systemic we mean hiring issues, promotion issues, termination issues and wage comparability issues; all of those are ripe for systemic investigation and charges. So while you do not necessarily have to worry too much about individual cases because most of them we know do not have a heck of a lot of merit, I think that again coming into 2016, I always think it is a good time to deal with your auditing of your EEO policies and your EEO procedures.

There was an interesting article in a corporate counsel publication that I came across in the last week, which basically indicates that age discrimination in the job market seems to hurt older women more than older men and there were two studies recently published by the National Bureau of Economic Research and what happened was the authors of the studies conducted very large experiments known as resume correspondence studies where they would create resumes and they would send out thousands of resumes wherein, the applicant's name and years of graduation, signaled their real gender and their age and they compared the callback rates and what they found was that there were substantially lower callback rates for women aged 64 to 66 which was 12% than for women ages 29 to 31 which was 19%, statistically significant. And in another study it found that older women have worse job prospects, that women ages 35 to 37 and 40 to 42 receive callbacks 11% to 12% of the time but women aged 55 to 58 only got a call back 9% of the time which the study called a significant difference. I think again what this portends is that there were many employers out there who trumpet the diversity of your workforce in terms of race, religion etc., but I think diversity of workforce also indicates or also invokes age and a generational diversity within your workforce and frankly what I have seen from clients many times is that experience in older workers cannot be replaced. And as one quote was in this article that says the season workers have a lot of opportunities, one person said we have a lot of enthusiasm, we have a lot of lives in us and I just recommend this to you because I think that when you are talking about layoffs for instance, mass layoffs, obviously sometimes you want to get the older less productive employees out of your workplace but I think you have to make an individualistic analysis

because frequently the older workers who have been in your employ for a substantial period of time have a great deal of institutional knowledge and expertise which cannot necessarily be replaced by a younger employee and also if you talking about systemic cases as we did a couple minutes ago with the EEOC if you have a habit or custom or trend of getting rid of only older workers, and particularly older women workers, as opposed to younger employees statistically you are going to have a problem with the EEOC as they take a look at your facts and figures.

At this time of the year I usually try and bring up a subject that is probably near and dear to many of you out there which is your typical holiday party and I always try to remind clients because I have had many situations that have been unfortunate that you need to pay attention to what goes on at your holiday parties, both from the standpoint of internal protection meaning that sometimes when people have too much to drink what they say and what they do can be embarrassing not only to themselves but to others. I have seen harassment cases arise out of people who have had too much to drink at parties or firm functions and perhaps most dangerous there had been many situations where someone who has had too much to drink has gone out driven his or her own automobile, caused an accident and where that accident creates great damage or even death in a another third person, that third person or that third person's family winds up suing the employer on the basis of negligent supervision that the employer had a duty to make sure that the employees within its employ even at a social function behaved accordingly and did not drink to excess in a manner, which would threaten the safety of the other employees or threaten the safety of the public at large; which all again implicates your policies that you have or do not have when you have social parties or functions around this time of the year where alcohol is served. I would encourage you to take a look at your policy if you do not have one, to think about how you want to administer your holiday party with regard to the use of alcohol and what you want to do with regard to limiting that use either by having drink tickets or making sure that there is close monitoring of the condition of employees so that anybody who may be drinking to excess would not be permitted to drive a car and that you have facilities to even have a cab that takes those particular employees home.

Anyway, those are the development of the day as always Michelle you can unmute this.

Michelle: Presentation mode is disabled.

Howard Kurman: Anybody who has any questions feel free to raise them at this point if you would rather do it obviously in private you can send me an e-mail at hkurman@offitkurman.com or a phone call on my direct line (410) 209-6417.

There is one other statistic that I wanted to read before any question comes up and that is you know the UAW and the big three recently came to contract conclusion and I just found these statistics to be kind of staggering so that Chrysler increased

its cost per worker by 2019 from \$47 to \$56, General Motors from \$55 per hour to \$60 and Ford by \$57 to \$60 by 2019. So much, it seems to me for reasonableness within the automobile industry and you wonder why there is such a trend to remove business at least in the auto industry to foreign countries that is just my editorial comment.

Okay, any questions or comments about any of the material we covered this morning? If not, you know we will have another telebrief on December 23rd, two days before Christmas and that will be the last one for 2015. I appreciate everybody's participation not only today but throughout the year and my hope is that you all find these to be useful. I always try and assess from an objective standpoint whether or not you know there is real value in doing these, I can tell you that I get value out of them because it forces me to keep up on things that I should be keeping up on with but I hope its of practical value to you all as well. So everybody else we will talk again on the 23rd and have a great next two weeks. Thanks a lot. Bye, bye.