LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Okay, good morning everybody. It is Howard Kurman and as you know we do these telebriefs on the second and fourth Wednesday of every month so this is the second Wednesday of June. I know it is hard to believe but the year is going to be half over in a couple of weeks. Okay let's get started.

I think for those of you who have followed in Maryland the paid sick leave legislation and brouhaha interesting development on May 25th when Governor Hogan vetoed the passage of the legislation that both houses of the Maryland legislature passed requiring businesses with 15 or more employees to provide five days of paid sick leave. This will certainly come up as the first item probably on the agenda in the 2018 legislature. It is questionable whether or not the legislature will have enough votes to override the veto of Governor Hogan. We have a lot of time that will pass between now and then so there may be some back room dealing between the governor's office and two houses of the legislature; just not sure what will happen but I am sure there will be some discussion even before we get to the point where the legislature reconvenes in January. As you know, the governor had submitted a different kind of bill in which he would have provided tax credits for those employers who passed his particular piece of legislation and in his reasoning for vetoing the legislation he indicated that he thought that it would be harmful as passed to small businesses. Stay tuned for this; I do not know that we will really hear anything until January when the legislature reconvenes but we will follow it and if I hear anything then I will certainly let you know.

An interesting situation developed in the news in the last week or so involving Uber. Those of you out there who are regular Uber users will know that the current CEO, Travis Kalanick, has taken an indefinite leave of absence from Uber following a report that came out from former Attorney General Eric Holder who is now a partner in the white-shoe firm of Covington. Covington was hired to do a study after February when an ex-Uber engineer, Susan Faller, posted on a blog alleging that the company was replete up and down the line with harassment and discrimination. There were actually two law firms that were engaged to do an investigation; one was Eric Holder's law firm and the other was a law firm from a firm called Perkins that was engaged to investigate multiple claims of harassment and discrimination. From our standpoint, it is very strange that a super large company at this point, which has a value of you know billions of dollars, capital value of billions of dollars, will be so replete up and down with problems. I wanted to review a couple of these things with you that were part of the report by Eric Holder because I think that they are kind of ironic when you view them as emanating from such a large company. One is that Eric Holder recommended that from a diversity standpoint they implement a rule, which is analogous to the rule that has been implemented by the National Football League, the so called Rooney Rule, which requires all NFL teams to interview at

least one minority candidate for all general management head coaching positions. Another thing that the Holder report recommended was that the company bolster its harassment and discrimination policies. They found them very wanting and deficient and they also indicated that they did not believe that there were adequate procedures up and down Uber within which employees could articulate and field complaints or charges of harassment or discrimination. The Holder report also indicated that the company should prohibit romantic relationships between people who are in reporting relationships. Now, many of you out there may have in your handbooks anti-romantic relationship policies particularly for those employees who are in a direct reporting relationship, which is simply common sense and it really strikes me as pretty odd that the company as big as this is would not have such a policy. The Holder report also annunciated its concern with alcohol use in the company at social functions where apparently the use of alcohol was very dramatic and very systemic. I point this out to you because not only were the policies inadequate but the other law firm that conducted the investigation indicated that they were investigating 215 cases of workplace violations and out of these the statistics were that 47 were related to sexual harassment and involved some form of discrimination.

In any event, the fact that such a big company can have such systemic and universally wide problems is simply an indication that with growth of a company often comes these kinds of issues that would otherwise be resolved or prevented by the use of proactive policies and training which the Holder report also indicated. From my standpoint, it is a lesson learnt for those of you out there and I know I preached this on a redundant basis but I think that it is important to understand that you need to have proactive policies, you need to have training and it cannot be simply on a once every five year basis, because if companies like Uber are under crosshairs, your companies can certainly be under crosshairs as well.

Okay, let me move on, move off Uber onto some developments at the Department of Labor. The Department of Labor on June 7th indicated that it was withdrawing its informal guidance on joint employment and independent contractors effective June 7, 2017. As you may know under the Obama administration the Department of Labor issued informal guidance's on joint employment and so they had a very, very broad based test to joint employment. Similar really to the tests on to the National Labor Relations Act that the National Labor Relations Board has promulgated finding various entities to be joint employers and, of course, the significance of that is that if two entities are found to be joint employers they would be jointly liable under a variety of statutes including the National Labor Relations Act or the Fair Labor Standards Act. The Department of Labor has indicated that it is withdrawing that guidance, now that does not mean that they cannot promulgate a formal rule on this but it does signal the direction that the Department of Labor will be going under Secretary of Labor Acosta. The second guidance that they withdrew is the guidance on independent contractors. Now, we have talked on prior telebriefs about independent contractors and the liability that employer's

face when categorizing certain individuals as independent contractors as opposed to the employees. In the Department of Labor under the Obama administration issued a guidance, which again would indicate that there were very, very broad based tests for determining whether or not an individual would be characterized as an independent contractor as opposed to an employee and similar to the tests under many state statutes particularly unemployment compensation statutes. The Department of Labor's test was very broad based in favor of characterizing an individual as an employee as opposed to an independent contractor. Again on June 7th, the Department of Labor withdrew its guidance and indicated at least influentially that it may not be coming down as strictly and as highly scrutinizing on these relationships as the prior Obama administration was. We will keep an eye out on this but I do think that it is significant that on one day the Department of Labor withdrew its guidance on both of these particular issues, which had been problematic for those of you who have either characterized individuals as independent contractors or who have relationships either as a franchise or franchisee or where you have staffing relationships with a company and where you would otherwise under an Obama administration test be found to be a joint employer with that staffing company or employee leasing company so we will stay tuned to that.

Another hopeful development at the Department of Labor is that the Department of Labor has taken steps to formally withdraw the persuader rule that was going to be amended under the Obama administration. In 2016, I talked frequently about the persuader rule under the Obama administration and briefly under the persuader rule what the Department of Labor was proposing was that at any time a consultant or an attorney consulted with a client with regard to for instance an anti-union campaign under the Obama rule that consultant or law firm would have had to have disclosed financial arrangements with the client and the nature of the communications and the nature of the engagement. This was thought to be by many individuals and entities including the American Bar Association, a gross violation for instance attorney client privilege. I spoke about this in 2016 on prior telebriefs and a Texas Federal Judge had issued an injunction preventing the enforcement of this rule in 2016. Well now, the Department of Labor has formally announced that it will take steps to withdraw this regulation and significantly I think that I doubt very much whether this regulation will find the light of day again under Secretary of Labor Acosta and under the Trump administration. We will revert to the old persuader rule under the Department of Labor and that basically says the only time that these financial arrangements have to be disclosed between a consultant and a client or an attorney and a client in an anti-union campaign for instance, is when that consultant or attorney would be utilized to directly communicate with employees that appear before employees in physical setting or to communicate in writing with those employees. Most consultants and most attorneys who were involved with a client who faced union campaigns will never be in that situation anyway. Their communications will be with the client but not with the employees. It is another hopeful indication that the persuader rule will not see the light of day and that is a good thing.

Switching to the Equal Employment Opportunity Commission for minute, I think that the EEOC sometimes periodically posts on its website certain things that are actually helpful to those of you out there whoever may have EEOC cases or charges or want to see the direction in which the EEOC is traveling in and so in May the EEOC announced that on its website they put up what they call the Fiscal Year of 2017, _____ Volume II Digest of Equal Employment Opportunity Law. The reason that I think that that is helpful for those of you have a number of employees or who are interested in some form or fashion in the Equal Employment Opportunity law, Equal Employment Opportunity commission law is that this particular volume on the website catalogues the various pieces that come to the EEOC under specific topics or issue address for instance if you had an interest in sexual harassment or if you had an issue of age discrimination or disability they catalog these issues and I think that it is a helpful digest for those of you who want to keep up with sort of the direction that the EEOC is going in. They also have published on their website an article that is entitled "Age Dissemination, An Overview of the Law and Recent Commissions Decisions." That is another helpful thing for those of you who may have an aging work force where you have concerns about particular actions that you may take with regard to somebody who may be over the age of 40.

There was an interesting article for those of you who are Shrm registrants or participants or members. It was published on May 24, 2017, I do not know whether you saw this by a woman by the name of Lisa Nagele-Piazza and the title of the article is "Failed Workplace Drug Test Reach 12 Year High," and it starts off again this is published May 24th. She starts off and I will quote, "she says American workers are testing positive for drug use at the highest rate since 2004 according to the annual Quest Diagnostics drug testing index. This makes it critical for employers to review and possibly update their substance abuse policies and drug testing procedures." She goes on to say that the Quest study revealed positive year in drug screens for 4.2% of the United States workforce in 2016 up from 4.0% in 2015 rate had not reached this level since hitting 4.5% in 2004. I think that she indicates and I agree I think the time is right to review your policies on drug and alcohol abuse and from a training standpoint I know that I have always preached training even if you do it either internally or by the use of an external source on drug and alcohol policies and prevention and dealing with it in the workplace, just as though you would deal with harassment and bullying in the workplace because this is not a helpful trend and those of you obviously who have workforces that may be prone to more drug and alcohol use than others should pay particular attention to this. She goes on to note that although marijuana use is still illegal under federal law courts sided with employers that enforce their marijuana-related drug policies even in the states where it is legal. Again, that is another noteworthy statement because you know there has been great attention paid in many states including Maryland on the legalization of marijuana use and the fact that even though a state may have a permissible statute with regard to either medical use or recreational use it does not mean that under federal law it is permissible and you need to look at your policies, look at what they say.

Another noteworthy statement in here is that the Quest study showed that the positivity rate for cocaine use rose for the fourth consecutive year in the general United States workforce and for the second consecutive year for safety sensitive jobs that require drug testing under federal law. Again, I think that it is mandatory that you go back and look at your policies, look at the last time you conducted training on drug and alcohol use and on whether or not you are using it for drug and alcohol testing post-accident, pre-hire, random, etc. Just as though, you do training and you pay particular attention to bullying and harassment unfortunately it looked like the fact that you may have a drug and alcohol testing policy that has been in your handbook for many years but you have not paid much attention to it, it looks like you need to do that from a standpoint of a prophylactic measure because the trend that is noted in the Shrm article is not an optimistic one and it is one I think that as HR and employment law professionals we need to pay some attention to. I would welcome you to read that article if you want but I think that I have noted the highlights for you and I would say go back and pay some attention to it and if you need training in that you know look at how you want to conduct it whether you do it internally or whether you use an external source to do that.

Okay those are the developments for the day. Michelle can you take it off from mute please. Okay, I apologize if there were some sound issues in the beginning I got a note from Michelle saying that that was the case and that is why I took it off the speaker. I am hopeful that everybody heard pretty much what I was saying. If not, I can review whatever the deficiency was. Anybody have any questions or comments based on what we covered today?