LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay. We are going to begin. This is the April 13th telebrief, as you know we do these the second and fourth Wednesdays of every month. So here we are. There is plenty to report today as there always is.

First of all those of you who are out there following the goings-on in the Maryland legislature know that one of the big bills that unions and employees lobby for was the Maryland Healthy Working Family Act, which would have mandated of course paid sick leave at different rates, for employers in the state of Maryland. It got very close it seems to me to passing in one iteration or another. I think it got tied up with the governor's tax bill and because neither one of them passed this is probably going to resurface next year in the Maryland state legislature and it may very well passed but it did not pass in the 2016 legislature and more to come on that probably in 2017.

However, I do want to report that on April 5th, that is only you know a week ago more or less, San Francisco became really the first United States city to mandate paid parental leave in order that parents can bond with their children. A fairly sort of out there piece of legislation, I always tell clients who want to potentially locate businesses in California to think twice about it because of the difficulty with which employers have to face very pro-employee legislation and ordinances in California. Anyway, what happens under this statute just to give you some information as to whether or not this will serve as a model for future legislation and East Coast cities I do not know but frequently that does happen so let me tell you a little bit about it. Already existing in California was a statutory scheme under which employees would get partially paid leave through the California disability insurance program in order for them to be able to take parental leave and that would be 55% of their pay up to $1,129 per week, but under the ordinance passed by San Francisco Board of Supervisors employers as of January 1, 2017 who have 50 or more employees have to make up the difference between what the employees would get under the California pay, the disability pay, and what their regular pay would be up to six weeks. In order to be eligible for this particular benefit employees must have worked for their employer for 180 days before the leave period. Interestingly, this benefit will cover part-time employees as well as temporary employees, which I find to be pretty unusual. In most cases as you probably know temporary employees are not covered by statutes of this kind but under the San Francisco ordinance they are covered. This statute or ordinance has bite to it because those employers who do not comply with it are subject to a private right of action on behalf of the employee which includes restitution, liquidated damages, injunctive relief and attorney's fees. The statute does allow an employer to apply two weeks of paid PTO to the six weeks of

leave, but it also says that if an employee is terminated while he is entitled to the six weeks of leave he is still entitled to the six weeks of leave irrespective of the fact that he may have been terminated by the employer. So you can see it is a very, very pro-employee piece of legislation and as I said I do not know its reach beyond San Francisco, beyond California, but it is an indication of a trend that seems to be I think in vogue and probably on the march throughout the country so stay in touch.

Turning the page to something that I think has probably even more practical import to those of you out there in the HR field. Its sort of a scary case coming out of the Second Circuit, the Second Circuit as some of you know covers the states of New York, Connecticut and Vermont, but the Second Circuit is a very influential circuit when it comes to making law throughout the country, next to the DC circuit probably the Second Circuit is the most influential that we have in the country, and in a very recent case called Cathleen Graziadio v. Culinary Institute of America, again coming out of the Second Circuit. The Second Circuit denied or reversed a grant of summary judgment to an employer, which is the Culinary Institute of America in this case and what happened in this case is a former employee of the Culinary Institute sued the Culinary Institute for violating her rights under the FMLA and retaliating against her. The scary part about this suit was that not only did the ex-employee sue the Culinary Institute but it also sued the HR director with whom she had the most contact with her request for FMLA leave, she wanted FMLA leave to take care of two children that she had who were experiencing some medical problems, and what the Second Circuit dealt with was a situation in which there were numerous emails, the Second Circuit characterized them as almost egregious or excruciating between the HR director and the employee, gone back and forth with regard to the employee's request for FMLA leave and what the HR director was insisting upon with regard to the employee. Ultimately one of the questions that the Second Circuit faced was whether or not there would be individual liability on the part of the HR director in addition to potential liability on the part of the Culinary Institute of America and ultimately what the Second Circuit decided was that they would apply what is called an economic reality test to determine whether or not the HR director exercised in a regular way sufficient authority over FMLA matters to be deemed to be "an employer" under the FMLA. As you know under the Fair Labor Standards Act, there can be individual liability on an officer or an executive of a company who is deemed to be an employer under the act if under this economic reality test under the Fair Labor Standards Act someone exercises enough control over the decision that a court could find that particular officer or executive to be equally responsible as the corporate entity for whom that particular person works. And this was a very…what lawyers call a case of first impression with the Second Circuit adopting that economic reality test and deciding that for purposes of the Fair Labor Standards Act somebody could be considered to be, in this case an HR director, could be considered to be an employer under the following four factors that were considered. The following four factors that the court considered were 1) whether the person had the power to

hire and fire the employee and in this case what the Second Circuit found was that the HR director's recommendation that the employee who was accused of abandoning her position when she did not supply sufficient information to return to work. Return to work information under the FMLA, that he could be considered to be the employer along with the Culinary Institute. So the first factor whether the person had the power to hire and fire the employee the Second Circuit found in favor of the fact that the HR director was in fact the employer in this case. 2) Whether the person supervised and controlled the employee's work schedule or conditions of employment. Again, what the Second Circuit found was that by her interactions with the particular employee that she had interjected herself so far into whether or not this person was coming back to work that yes indeed the HR director controlled the conditions of employment of this particular employee. 3) Whether the person determined the rate and method of payment. Here, the Second Circuit again found that the factors militated in favor of the HR director be considered to be the employer of the employee and lastly whether the person maintained employment records. Essentially what the court found was that, as they described it, that the overarching question of whether the HR director controlled the employee's rights under the FMLA was that there seemed to be ample evidence to support the conclusion that she did and the Second Circuit cited the fact that the HR director reviewed the employee's FMLA paperwork, determined its adequacy, controlled the employee's ability to return to work and under what condition and sent the employee nearly every letter including the termination letter concerning her leave. Given this, the Second Circuit concluded that the HR director ‘‘exercised sufficient control over Graziadio's employment to be subject to liability under the FMLA.

I think the case is instructive and it's scary for those of you out there who have control over FMLA decisions in the sense that depending upon what is done or what is not done with a particular employee that employee may be able to sue or claim rights under the FMLA of retaliation or substantive rights not only against the company but against the HR director who was intimately involved in the decision. It does not mean that in every case obviously if you or someone that you know as an HR director or who was responsible for administering those benefits is going be responsible. I think what it does do is militates greatly in favor of if somebody is in charge of FMLA administration or FMLA decision-making that person needs to be well trained on substantive FMLA rights on what needs to be done to administer the rights under the act and to make sure that whoever is administering the FMLA on behalf of your company is well schooled in terms of how to handle certain things and if he or she is really up to their neck or unsure of what to do in a particular situation that employment counsel be consulted. The last thing that anybody wants to do is to be hit with personal liability with regard to FMLA decisions. It also militates obviously in favor of strong indemnification provisions or protection between the company and the HR director. In any of these situations where FMLA rights are being determined or the FMLA administration is left up to a singular person or persons. So again this is the Second Circuit decision it does not necessarily bind the courts in other

districts for instance Maryland is in the Fourth Circuit, we do not know how the Fourth Circuit would rule but again the Second Circuit is an influential circuit so I bring this to your attention and I indicate to you that you need to pay attention to this because it is kind of a scary decision.

Talking about you know EEOC and these FMLA things I wanted to bring to your attention an interesting case. On March 22nd, just a couple of weeks ago the EEOC filed suit in the United States District Court for the Western District of Missouri against a company called Grisham Farm Products, Inc., alleging that its employment application violated the ADA and the Genetic Information Nondiscrimination Act, GINA, because according to the EEOC's complaint the company violated both acts by requiring job applicants to fill out a three-page health history before they would be considered for a particular job. In this case the Plaintiff had applied for a warehouse position and the application contained 43 yes or no health-related questions related to whether the applicant had seen a physician for a variety of things in the past 10 years including allergies, arthritis, bladder infections, eating disorders, gallstones, sexually-transmitted diseases etc., And the application health history section stated in bold large letters that "all questions must be answered before we can process your application." Now as you all know, or hopefully know, that under the ADA you can conduct a health inquiry but only under a situation where a conditional offer of employment has been made and if the inquiries are made and they are job-related and consistent with business necessity and that all other applicants for the particular position are subjected to the same particular requirements. In this particular situation I think it is an egregious case and I do not know why this particular company, it probably was not well advised by any competent employment counsel, would have such a detailed health application requirement but it did and I have no doubt that either this case will be settled or the company will lose if it goes to trial. So the take away for you is you know make sure that if you are using health-related inquiries that they come after conditional offer of employment has been made and only in that particular situation.

Another thing that has come to light and I had this question come up from a client in the last few weeks pertains to video surveillance in the workplace. Some of you may use video surveillance, video surveillance is certainly countenanced in various jurisdictions including Maryland. However, if you use video surveillance it needs to be done in an area where there would be no reasonable expectation of privacy on the part of an employee so for instance you would not have video surveillance set up in a men's room or a woman's restroom and also you would not have video surveillance that also has audio on it. Because in Maryland as you probably know and in other jurisdictions, it's a two-party audio authorization, which means that you cannot record employees unless both parties to the conversation are authorizing that particular recording. So I caution you that in video surveillance you can do it but you need to do it in an area where there is no expectation of privacy and there is no audio involved. Interestingly in an article very recently it was brought out that Amazon, and we all know who Amazon is,

had video surveillance in its warehouses and what they did was they caught certain employees who allegedly were guilty of theft. And what they did was they installed flat screen TVs in their warehouse displaying the alleged offenders with the word "terminated" across blackened silhouette along with the details of what these employees stole and the value of what they stole. Now, I would caution you that employers can defame employees not only by what they say about them verbally but in many cases about what certain other displays may portray. So in this case if Amazon is wrong or was wrong about the fact that somebody may have stolen something from their warehouse simply by showing the particular silhouette of the employee or the picture of the employee on a flat screen TV with the word that is "terminated" across the screen would be very problematic from a defamatory standpoint if the information was incorrect. So you have to be careful about defamation in the workplace but the main take away in this is whether or not you are recording things in a way that would defame employees or in an area where there would be a reasonable expectation of privacy.

The last case I wanted to mention is a case, very recent case decided last week by the Eighth Circuit, in a case called Morriss v. BNSF Railway and the main issue in the Eighth Circuit case was whether or not obesity in and of itself is considered to be a disability under the ADA. What the Eighth Circuit decided in this case was that obesity in and of itself unrelated to a physiologic condition, which emanates out of obesity is not protected under either the ADA or the ADA amendments act. And in this case you had an employee who applied for a warehouse job, which was a safety sensitive position, excuse me a machinist's job, which was a safety sensitive job in this particular company, and his obesity was that he was like I think 5'10" weight 270 pounds and was over the body mass index permitted by the company and the company's assumption was that if he weighed this much and was that much over the body mass index requirement that he would be much more prone to disability issues in the workplace. Now, what the court was faced with was a situation where the employee denied that he had any health issues, his own expert denied that he had any health issues, so it was not a case where for instance he may have been diabetic associated also with the obesity or he may have had breathing or heart problems, in fact his own evidence and the evidence of his own expert was that he did not have any particular health issues. And so the issue before the Eighth Circuit was in conjunction with decisions that had already been decided in the Second Circuit and Sixth Circuit finding similarly that obesity in and of itself is not a disability. What the Eighth Circuit agreed and said that in this case the company was within its rights to determine that they would not go forward with this person's application because of his alleged obesity and his excess weight in relation to the requirements of the company. So those of you who have obesity-related requirements know that at least under the Feds, the federal requirements of the ADA it is not a protected classification in and of itself. In most states it's the same thing, but if it is physiologically related, that is if there is a disability related breathing issue or if

there is a disability related diabetic issue you may be into a different circumstance.

So those are the developments of the day. Michelle, can you take it off of mute please.

Michelle: Presentation Mode is now disabled.

Howard Kurman: Okay, so as we always do I will be happy to take any questions or comments if those of you out there have any particular questions you can call me at (410) 209-6417 or my email hkurman@offitkurmna.com.

Ann: In the Second Circuit Court of Appeals case versus the Culinary Institute what was the name of the employee I did not catch your citation.

Howard Kurman: Oh, one second.

Ann: I wrote down Graziano but I know that is not correct.

Howard Kurman: No it is it the, give me one second.

Ann: And this is something we all aught to be really alert to.

Howard Kurman: I totally agree with you, give me one second. Its Graziadio not Graziano its Graziadio.

Ann: Could you spell that please.

Howard Kurman: It is Cathleen Graziadio G-R-A-Z-I-A-D-I-O.

Ann: Thank you. And did you say that this is economic realities test currently exists under the Fair Labor Standards Act?

Howard Kurman: It does; so if you are ever in a situation where a company is sued in an FLSA count, many times Plaintiff's attorney may in fact include the president of the company or vice president company who was intimately involved for instance in denying overtime to an individual because under economic realities there are certain situations where an executive may be jointly and severally liable with the company for an FLSA violation.

Ann: Got it. Thank you.

Howard Kurman: Okay, any other questions comments out there. Okay, well if not we will see each other on the 27th of April. I think that is the date and until then if you have any questions or comments give me a call or send an email and we will look forward to the next telebrief. Thanks a lot.