LABOR & EMPLOYMENT TELEBRIEF
By
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October 22, 2014

Howard Kurman: All right, good morning everybody it is Howard Kurman and it's the last telebrief in October. As you know we do these the second and fourth Wednesdays of every month. And then the next telebrief in November, hard to believe it will be November, will be November the 12th, Wednesday, November the 12th. All right, so let me go over some stuff that had come to my attention and the stuff that is going on in the labor and employment world for the next several minutes.

First, a couple of weeks ago I had a client who came to me and the client had an issue with regard to an intended layoff which was going to impact an entire department in a particular company that I represent and along with that layoff was going to be one of the senior managers in that particular department. Complicating the picture is the fact that the company has been sued and I represent the company in a discrimination/harassment case in which the manager who is going to be laid off along with this department, the department of subordinates, in which the manager will be sort of a major player. So the question came up with my client and the question comes up frequently. What you do as a company if you are intending to get rid of an employee, a major employee, either by layoff or termination, where that employee is needed as a witness in either an existing or a potential case and where you need the obvious cooperation of that particular employee in the case going forward, or if you were incurring an audit by a departmental agency where you would need that person to testify.

It's thorny question but its not an impractical or an unusual question and I will suggest to you that one way of handling that and the way that we handled it is by virtue of what is called a cooperation clause. So that many of you when you would terminate an individual or layoff an individual will enter into a separation agreement and you will pay the particular person severance and you will get a release and non-disparagement and the confidentiality clause and all that we have talked about some of those in prior telebriefs. But I do not believe that we have discussed the so-called cooperation clause and a cooperation clause essentially says to the departing employee we are in the midst of litigation or an existing or potential audit and as consideration for our payment to you of X dollars, part of your obligation is going to be the obligation to cooperate with the company in the future should we need your testimony, should we need you to cooperate with regard to the attorneys in the discovery process, meaning that if there were a need for the particular individual to be deposed that is have his deposition taken, if we would need the individual to give an affidavit in support lets say of a motion for summary judgment in a court action or if we would need that particular person to testify on behalf of the company. And you can make it as detailed as you like. Generally cooperation clauses will also entail

the obligation of the company to pay that particular departed employee for his or her time. You are not going to pay for the person's testimony but you can basically say that we will pay your normal hourly fee and any customary and reasonable expenses that would be incurred for instance travel if you have the departing employee who is moving out of the state but you would need that employee to come back and testify or to come back and confer with or consult with your attorney, you would normally write in your agreement that you would pay for those normal and customary expenses. And the question normally comes up well if that person testifies ultimately can that agreement be subpoenaed in the discovery process or produced in the discovery process even if it confidential. Not a clear answer but I think you can assume that it would probably have to be produced in order for the other side to be able to impeach that person's credibility as a witness which is why in a cooperation clause you will also indicate that the employee or departing employee has an obligation to testify truthfully in any kind of proceeding because you do not want the inference by the opposing counsel that you are essentially or have essentially bought the testimony of that departed employee. So, if you have a standard separation agreement that you are using or may contemplate using and if you have a situation where you are laying off an employee, probably a high-ranking employee, or you're even terminating that employee and you're entering into a separation or severance agreement with that high-ranking employee, do not overlook the importance of a cooperation clause, particularly if you are in the throes of acting or impending litigation or acting or impending audit on the part of a governmental agency. They can go a long way towards helping you out because obviously somebody who is departing either involuntarily as a result of a termination or as a result of a RIF or a layoff may not ordinarily be your best friend, as an HR director or in-house counsel whatever. So you want to be able to tie that person's hands and say that by virtue of the separation pay that is being paid to the person, that person has an obligation to cooperate both with your in-house counsel if you have one or if not your outside attorney, and that should go a long way towards assuring that even though that person may be leaving and even leaving under unfavorable circumstances, that the person has an obligation to cooperate both pretrial and at trial in any kind of litigation or audit that is being brought against the company.

Okay, let me move on to a case that was recently decided by the United States District Court for the District of Maryland and essentially in this case it was decided very recently the issue is whether or not a release or a waiver in a separation agreement would be upheld and I will read you the terms of the release. It was that employee knowingly and voluntarily releases and forever discharges Omnicare, Inc., its parent corporation, affiliates, and subsidiaries from any and all claims known or unknown asserted or unasserted which employee has or may have against Releasees as of the date of execution of this Agreement including but not limited to any violation of the FMLA and any other federal, state, or local law, regulation, or ordinance. The reason that this case is somewhat significant in the Fourth Circuit, which includes Maryland is because prior to this case and under the old FMLA regulations it was very difficult to get an employee to effectively waive rights under the Family and Medical Leave Act.

In this case and its entitled Thomas Coyne v. Omnicare decided on September 3rd of this year, an employee who has been employed by Neighbor Care which was, as you probably know subsequently purchased by a company called Omnicare back in 2005 and on June 13th Omnicare sold its Neighbor Care Med-B Group to another company and then began laying off employees. This employee named Coyne was in a situation where he was going to take family and medical leave to care for his ill father and sort of in between his notice of leave to the company and the time that his leave was to begin, he was given notice that he was going to be riffed like the other employees in his particular department and so he had signed a separation agreement but even after executing the separation agreement he turned around and he sued his company on the basis that the purported release of his FMLA right under the agreement was invalid. And what the court said was under the revised FMLA regs that are in existence right now and under further Fourth Circuit decisions that its well-settled now that an employee may not waive prospective rights under the FMLA but certainly can release FMLA claims for past employee conduct or behavior. So in this case where the employee signs a separation agreement which waived all rights including existing FMLA rights or rights for any existing particular FMLA claim that that release would be held to be valid even though in the past under the FMLA regs and prior Fourth Circuit precedent it may not have been invalid. So when you have a release that you enter into with an employee in a separation agreement or severance agreement make sure that there is an acknowledgment that the employee has been given and entitled to all FMLA rights to which he would otherwise be entitled and that in terms of past FMLA claims or rights those are effectively waived under the separation or severance agreement that you are entering into with that employee and that particular waiver would be held valid certainly in the Fourth Circuit and probably in other circuits as well.

Okay, I saw press release a little while ago put out by the Department of Labor announcing that it was granting $10.2 million to 19 states to implement or improve worker misclassification initiatives. As you know I have spoken frequently in the past on these telebriefs regarding the action of the states and the Department of Labor with regard to the alleged misclassification of individual independent contractors who the Department of Labor and who various states would properly deem them to be employees as opposed to independent contractors. According to the Department of Labor and its grant of this $10.2 million, the funds are going to be used to improve state unemployment insurance programs ability to identify improperly classified independent contractors to improve or enhance employer audit programs and to conduct employer education initiatives. Interestingly enough there are four states Maryland being one of them. Maryland, New Jersey, Texas and Utah which under the terms of this grant will receive what is called “a high performance bonus” which is a share of $2 million in additional grant funds due to their success in detecting incidence of worker misclassification. So I think it behooves all of you again, those of you who are using independent contractors, to understand that the Department of Labor and the Internal Revenue Service and particularly states when it comes to unemployment compensation cases are

looking very carefully at whether or not an employer has properly classified a putative independent contractor as an independent contractor vis-a-vis an employee. Many states particularly Maryland and New Jersey, and in some respect Pennsylvania and DC, when they defined employees and independent contractors in the statute, in the unemployment statute, basically set up what's called an ABC test for independent contractors. And it's a pretty stringent test to me. I am now engaged in representing a client in New Jersey in a large unemployment compensation audit where the very issue of whether this particular company's independent contractors, at least individuals that they deem to be independent contractors, truly are independent contractors or whether they are employed under the very stringent ABC test in New Jersey. And I would just mention to you that if you have one independent contractor that you are using it is really not a big deal, but if you are using a cadre of independent contractors, you better make sure that you have written contracts with those individual, and if those written contract and the actual performance of those individuals under the contract meet the stringent test of both the unemployment compensation statutes as well as the other statutes under the Department of Labor and the IRS and the other tests that they establish for ascertaining whether or not somebody is an independent contractor or an employee, and here you have the Department of Labor putting out a press release just last month indicating that it was granting not an insignificant amount of money to 19 states to implement or improve your worker misclassification initiatives which is essentially telling the states go ahead and be aggressive with regard to the classification of individuals as independent contractors as opposed to employees.

Speaking of the Department of Labor they have recently promulgated and disseminated a notice of proposed rulemaking where they would propose a rule revising the definition of spouse under the Family Medical Leave Act. So this is really as you know probably a reaction to and a followup to the Supreme Court's decision in 2013 in US v. Windsor under which the Supreme Court found Section 3 of the Defense of Marriage Act which generally limited or constrained the definition of marriage and spouse, the opposite sex marriages and spouses to be unconstitutional. It was a landmark decision as we all know emanating from various state statutes which define marriage and spouse in a very traditional or religious way. The current FMLA regulatory definition of spouse is "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides including common law marriage in states where it is recognized." Now under the proposed rulemaking, the Department of Labor would change the definition to recognize same-sex marriages that are legally recognized in the place of celebration rather than where the state resides, and this is important because many times individuals of the same sex may marry in a state where it is legalized and then they may relocate because of employment to another state. Now, under the present definition of the spouse in the FMLA, the touchstone is whether or not that particular marriage is recognized in the state where the employee resides. Under the proposed place of celebration rule, the employer would then have to provide FMLA leave for all eligible employees and marriages that were valid in the place in which they

were entered into as opposed to subsequently where those employees or that employee lives, whether those marriages are same-sex, opposite sex, or common law. So a very significant change which would obviously change the way in which you all would administer FMLA leave. This notice of rulemaking was published on June 27, 2014, with the period for receiving comments closed on August 11th. Generally, he DOL would take at least 90 day to respond to comments and issue a proposed rule. So, we probably would be looking at a period of time sometime in 2015 in which this new rule if it is effective would go into effect and would be applicable to all those employers who ordinarily would be subjected to or covered by the FMLA, which would mean of course that you have 50 employees or more. So, I will keep in touch with you all with regard to how this proposed rule was proceeding through the pipeline but that would be a significant change in the FMLA regulations and definition because no longer would the marriage in a same-sex situation be tested by where the employee lives but rather where the marriage ceremony was celebrated, and of course, if it was celebrated in a state that recognizes same-sex marriage then you as an employer, irrespective of where that employee now resides, would have to give deference to the particular marriage that took place in a state where it was recognized.

The last thing that I wanted to mention to you is the Second Circuit's decision, Federal Circuit decision last week, in a case involving Fujifilm Medical Systems where an executive had been terminated for financial irregularities and he alleged in his lawsuit against Fuji Medical Systems that he had been terminated because of his race and national origin. After he was fired, the company discovered evidence that came to light that backed up its contention that he was fired for financial irregularities. The Lower Court, Federal District Court, did not allow Fujifilm to enter into evidence that particular set of documents which would have supported its reasons for terminating the employee in the first place. The Second Circuit reversed that and said that the company should have been able to use that evidence to support the contention that the employee in this case, a guy by the name of Weber, was fired for nondiscriminatory reasons. Now, the reason this case is significant is that those of you who have had employees who have been terminated and then brought discrimination cases know that there is a doctrine called the after-acquired evidence doctrine. Which means that after an employee has been terminated if you discover evidence that would otherwise have been justified in terminating that particular employee that that particular evidence can be used in limiting or eliminating any kind financial damages to which that employee believes he is entitled, he or she is entitled. So again it is called the after-acquired evidence doctrine. What was significant about the Second Circuit decision here is not only would that evidence be used according to the Second Circuit to bar financial recovery on the part of the employee, it also potentially could be used to support or buttress the employer's argument that it had good reason to either suspend or terminate that employee at the time it took the action even though it discovered corroborating evidence at a time after the employee was terminated. And that is a pretty significant kind of addition to the after-acquired evidence doctrine that is otherwise established in many circuits around

the country. What it does for you practically is as an employer when you terminate an employee and you believe that there is going to be litigation as a result or an EEO charge as a result of that particular employee's departure. It does not mean that you stop your investigation into whether or not an employee has engaged in inappropriate conduct or that there are not additional reasons for which the employee could have otherwise been terminated. And that falls again within the rubric or category of after-acquired evidence and it can be a very useful thing to investigate after an employee has been gone to see whether there is additional evidence that you can come up with which would otherwise have justified terminating the employee had you known about it at the time that the employee was terminated because at the very least it can help defeat a claim for financial damages on the part of that employee, and at most, not only does it do that but under the Second Circuit's decision that I just cited to you it may very well entitle you to buttress your argument about the justification for the termination in the first place.

So those are the developments for the day. As always, I encourage any questions that any one might have either in this forum or privately at my email hkurman@offitkurman.com or at my phone which is direct 410-209-6417. I am going to remind you that my partner Scott Kamins and I are putting on a seminar next Tuesday at the Hotel at Arundel Preserve, the title being "New Methods for Managing Unionized Workforces" and it is a seminar that begins at 8:30 a.m. and continues with breakfast and lunch until 2:30 p.m. So, if you are interested, send me an email or call me and I can put you in touch with our folks and get you registered for that. Any questions from today's material.

[________________]: Howard?

Howard Kurman: Yes.

[________________]: I was thinking back to the Ray Rice discussion we had a couple of conference calls ago where you mentioned principle of industrial due process.

Howard Kurman: Right.

[________________]: That sounds like kind of the opposite unless I am misunderstanding of the after-acquired evidence doctrine. Do you have any thoughts on that?

Howard Kurman: Yeah, I sure can comment on that. So, there are two different doctrines, one of course is that under industrial due process, generally an employer is not going to be able to discipline an employee twice for the same offense, and so that the reasons that would pertain to that particular termination, in this case Ray Rice, existed at the time, theoretically, that he was terminated, i.e. there were two videos, but one video and testimony by Ray Rice that he had struck his wife and he admitted to it. He admitted it to the commissioner of the NFL. So, he was first suspended for three games. Then, what happened was, supposedly the commissioner became in possession of a second video which corroborated Ray Rice's testimony that he had struck his wife and instead of being suspended for

three games he was suspended indefinitely, which again in my opinion is going to be problematic, and as you may know, Ray Rice just filed a grievance against the Ravens yesterday. Not only does he have a grievance pending against the NFL, but he has got a grievance pending against the Ravens, his employer. So that is the concept of the industrial due process that the reasons that you have at the time that you articulate to an employee for being terminated are the reasons that you are going to be generally stuck with. The after-acquired evidence doctrine generally is used not to buttress your reasons for the termination and not to create a different reason for the termination, but to stymie or to terminate any claim for financial damages that that employee may have because the theory goes that if you had known about the particular fact or issue that you would come across even after the employee was terminated that would have supplied independent reason for the termination even if it was a different reason than the one you articulated, and therefore the employee should not be entitled to any monetary damages at the time that he brings the lawsuits. So it is a subtle nuance you picked up on it. It is a good pick up on your part but it is an important distinction nevertheless.

[________________]: Thank you.

Howard Kurman: Sure. Any other questions? Okay, well, as always, I appreciate your participation and as I said we will pick this up in November, a couple weeks before Thanksgiving, and hopefully maybe I will see some of you next Tuesday at our seminar. So thanks a lot of everybody.

[________________]: Thank you.

[________________]: Thank you, Howard.

Howard Kurman: Thank you. Bye.

[________________]: Bye.

[________________]: Bye.