EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay we are going to get started. Good morning to everybody. It's Howard Kurman and as you know this is our end of August telebrief so let me get started on some developments that I think are significant.

There is a recent case about a week and a half ago a Federal Court in Connecticut dealt with the issue of marijuana use in a state that is legalized the use of marijuana for medical purposes and you might say well really what is that have to do with the issues that we deal with in Maryland, Virginia, DC, etc.? Significantly, in this Connecticut case they dealt with the issue on a motion to dismiss and the issue was whether or not the federal law, which as you know prohibits the use of control substances would preempt Connecticut statute, which allows for the medical use of marijuana. In this Federal Court case in Connecticut the issue was whether or not the federal statute on controlled substances would preempt the state statute and in Connecticut they have a provision, which specifically indicates that an employer cannot discriminate against an applicant or an employee for the medical use of marijuana.

In this case what happened was there was a job offer to an applicant and the applicant was offered a job and then in a pre-employment drug test tested positive for cannabis. The employee had been using this particular medical marijuana for post traumatic stress syndrome and took one pill, which contained cannabis at night. There was no indication that this employee was impaired in any way, no indication that she would not be able to do her job, but nevertheless the employer contended that the mere fact that the employee tested positive for cannabis when she took her pre-employment drug test, after she had quit her job and been offered a position, would nevertheless bar her from employment. She sued under a number of theories and one of the major arguments of the employer was that the employee could not prevail because federal law under the Controlled Substances Act would preempt the Connecticut state statute and on the motion to dismiss the federal court in Connecticut denied that motion to dismiss and basically stated that where a state statute like the Connecticut statute, would contain specific provisions protecting any applicant or employee from discrimination on the basis of cannabis use would prevail over the federal statute.

Now, this is the second case that comes out of New England actually in the last two months. Those of you who participated in prior telebriefs will know that I reported on a case a couple of weeks ago emanating from Massachusetts along the same lines. Now, I think that we are about to enter into a spate of cases throughout the country having to do with the issue of medical use of marijuana in the workplace. Just so you know, I am sort of bringing it into our own geographical area let me indicate that or go through the jurisdictions that some

of you may do business in which is in Maryland, Virginia and the District of Columbia.

Maryland does not have a statute similar to Connecticut's in that it prohibits any kind of discrimination or retaliation against an applicant or employee who may be using prescribed cannabis although it does have more general language, which theoretically could give an applicant or an employee some degree of comfort having to do with the use of prescribed cannabis. We are going to have to see how it plays out in Maryland as cases come up and employers take adverse action against applicants or employees on the use of cannabis which has nothing to do with their fitness for duty and I will come back to that in a minute.

In the District of Columbia, there is a medical marijuana statute but again it does not have the same kind of prescriptions of retaliation or adverse action against an applicant or employee that you would find for instance in the Connecticut statute or in the Massachusetts statute so again sort of like Maryland will have to see how that plays out in future situations involving the prescribed use of cannabis for applicants or employees.

Virginia does not have a medical marijuana statute at all. As you go back and you contemplate your drug and alcohol policies or drug-free workplace policies for those of you who have sort of federal contracts etc. know that this whole area of the use of marijuana in the workplace and as it sort of butts up against the Controlled Substances Act, which is a federal act is really in limbo and I think that you have to consider these cases on a case-by-case basis as to whether or not a) you might need to engage in an interactive dialogue with your applicants or employees regarding the prescribed use of cannabis and always the touchstone should be whether or not there would be any kind of a negative impact on the employee's ability to do the job. Obviously, the greater the extent there is a safety risk or a risk involved in the applicant who may become an employee, being a risk to himself or to others or the public, the more leeway that you would have in your determination as to whether or not to go ahead and either, a) not hire that particular applicant or b) if the person is already an employee to take adverse action against that employee. Just bear in mind and I have said this before on a prior tele-brief that we really are entering into a new age of determination as to whether or not it will be appropriate to take adverse action against an applicant or employee and those jurisdictions where the use of medical marijuana is sanctioned by the state legislatures in those particular jurisdictions and I and I think that in the early 90s when drug and alcohol policies and drug and alcohol issues were really at the forefront in the HR world I do believe that in in the next probably two, three, four years we will see a spate of cases being litigated at both the state level and the federal level having to do with the interplay between medical marijuana statutes, which are promulgated by different state jurisdictions as opposed to the Controlled Substances Act on the federal level. Now of course, it is always possible that the federal government will in fact amend its statute at some point to take out cannabis as a controlled substance in deference to many of the states, which

have passed protective legislation, but there is certainly nothing that is imminent on the federal level and it remains to be seen how if it all such a statute or such an amendment of the statute again would come into play and be consistent with the state statutes on this particular subject.

Stay tuned, we have two very recent cases coming out of New England, one in Connecticut, one in Massachusetts, we don't have similar cases coming out of the mid-Atlantic states but in terms of a neighboring state Delaware does have such an anti-retaliation statute so those of you who may be doing business with our neighbor state in Delaware bear in mind that that state statute does prohibit any kind of retaliation or discrimination against an applicant or employee who has prescribed use of cannabis. Always you know what you want to be paying attention to is the effect on one's fitness for duty as opposed to simply whether there is a negative or positive drug result of the particular individual.

Let me turn my attention if I can to something that's been extraordinarily covered in the news in the last two weeks and that is the whole issue, which was forefront in the Charlottesville situation. The tragic situation in Charlottesville that is been so controversial since President Trump addressed himself in various ways to the situation in Charlottesville, which brings up the whole topic of the ability or the opportunity of an employer to discipline or even to terminate employees who participate in a variety of contexts outside of work. Let me just address a couple of big issues.

One is a question comes up as to whether or not employees who engage in social protest, political protest or even align themselves with political groups or socially active groups that are considered to be sort of countercultural or antithetical to values that an employer would trumpet can be terminated because of their alignment with their activities on behalf of those organizations. You may or may not know that the first amendment, which is you know the so-called free speech amendment, only applies to public employers or to employees who are engaged in public employment that is on the state level or the federal level. The first amendment does not afford protection to private employees; that is employees who work for private employers as opposed to public employers. The fact of political activity or social speech being a protected classification is non-existent so neither under Title VII or under most states jurisdiction including Maryland, will you find that in an employee's social speech or political speech or political affiliation is protected. For instance, if you as an employer saw one of your employees on a video or a news feed who was engaged on behalf of the protest in Charlottesville last weekend or the weekend before and that employee was holding a torch along with other employees the question would come up as to whether or not as a private employer you would have the right to terminate that employee? The answer is in most jurisdictions, with the exception of a few, like Michigan or California, you would have the right to terminate that employee if you believed that that employee's activities or even alignment with a counter cultural kind of political movement was antithetical to the values you espouse and articulate as an employer. Now

sometimes you want to make a distinction between simply an employee's alignment with those kinds of groups as opposed to employee's activities. If you saw an employee of yours who actually was throwing bottles or engaging in some sort of violent activity or found information, which verified that that employee was engaged in that kind of activity, then it would be wholly appropriate on your part as an employer or within your rights as an employer to terminate that employee. Which is not to say that even if that employee were engaged in the mere alignment with or holding a torch or espousing on a social media type, whether it is Facebook, Twitter, etc. views that you thought were contrary to the values that you support as an employer or you thought that the articulation of those views would be categorically hostile to or perceived by co-employees as being an antithetical to main stream views you would have the right as a private employer as opposed to a public employer to terminate that employee or to take adverse action against that particular employee.

It is important to understand as we may see more of these activities in the future that you understand that whether an employee posts something on Facebook, which may impact negatively on the reputation of your company or be perceived by you as impacting negatively on your workforce or actually being violative of your anti-harassment discrimination or bullying policies, that you certainly have the right to terminate that employee because after all most employees are employees at will, including Maryland as you know, and you know political speech, political activity is not a protected classification either under Title VII of the Civil Rights Act of 1964 or the Maryland Civil Rights statute or other jurisdiction statutes.

Now, the caveat here just so you know is that if you have a unionized employee who operates under a collective bargaining agreement where there may be a just cause provision for the termination or discipline of an employee that may not be determined by an arbitrator to be just cause for a termination. Or suppose you even have a mid to upper level manager or an executive who has an employment agreement, where that employment agreement states that the employee can only be terminated for good cause and good cause is defined in such employment agreement and does not include political activities, political speech etc. then you might have to have a real close scrutiny of the situation in order to determine whether or not it would be appropriate under those circumstances to terminate or to take adverse actions against a particular employee. Again, generally from a private employer stand point again as we move into this era of perhaps similar situations to Charlottesville keep in mind that an employee's social media post, an employee's alignment with or activities on behalf of political organizations that you may find offensive as an employer or antithetical to your values and philosophies as an employer may be cause for termination but in a doubtful situation make sure that you certainly check with your employment attorney to make sure that you are on firm ground.

The last thing that I wanted to cover is that there was an interesting statute that was introduced into the Senate on July 13th. It was introduced by a South Dakota Senator John Thune and the bill is entitled "The New Economy Works to

Guarantee Independence and Growth Act of 2017" or sort of a shortened version called the new GIG Act of 2017. The goal of this statute is really to codify much of the confusion that has surrounded whether or not an individual is properly classified as an independent contractor as opposed to an employee. The attempt in this statute is essentially to lay out particular parameters and criteria that an individual would have to meet as well as the entity that is engaging that person's services in order for the person and the entity to properly classify that person as an independent contractor. I will not go into too much detail here but it does indicate in the statute itself that one of the parameters is whether or not there is a written contract between the so called independent contractor and the entity that is receiving the services acknowledging that the service provider is responsible for his or her own taxes and indicating that that person's has to report to the IRS the amount of money that is paid pursuant to the contract and it also indicates that the contract should not be for a period of time longer than two years.

Other things that are mentioned in here are that the individual providing services would do so with his own tools and equipment that he predominantly would not be appearing at the so called entity's place of business and other parameters, which in the past have been recognized as an indicia of independent contractor status as opposed to an employee status. Those of you who have participated in prior telebriefs know that at least under the Obama Administration there has been a great emphasis and a great spate of litigation on the issue of whether individuals have been improperly classified as independent contractors as opposed to employees and what this statute would do would be to clarify both the Department of Labor and IRS test and to sort of a consolidated test as to whether or not there would be comfort provided to both the individual who views himself as an independent contractor and the entity, which engages the services of that independent contractor or putative independent contractor. How far this statute will go I am not sure I will keep track of it but it does at least advance the ball and attempt to clarify the situation as to whether or not an individual is properly classified as an independent contractor or not. I know that there are other major priorities in the senate and the house and we have seen those in the past several weeks whether it is healthcare reform, whether it is going to be the infrastructure, tax reform, etc. I am sure that this statute is probably fairly low on the administration's totem pole but nevertheless it is a statute worth following and I will follow it as it proceeds or does not proceed and keep you updated on that.

Those are the developments for the day. Michelle can you take this off of mute please. All right well as I always indicate anybody who has got any questions or comments feel free to raise them now or if you want to do it in a private setting feel free to do that at my private email, which is hkurman@offitkurman.com or my direct phone number which is 410-209-6417. Any questions or comments on any of the stuff that I have covered today? Okay, well if not I appreciate as always your participation and unbelievably or not the next telebrief will be after Labor Day so we will see you then and have a good couple of weeks and

hopefully everybody will be able to participate in two weeks. So thanks very much.