vaLABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Alright! Good morning everybody. I hope everybody enjoyed their July 4th holidays and I always find once July 4th comes the summer just really flies by. Okay, I want to start right in, got plenty to report, and I will start as we probably should with the Supreme Court nominee Mr. Kavanaugh or Judge Kavanaugh and most of you, I'm sure, along with me watched this introduction on Monday night. I'm not going to comment on the political end of this. Everybody has their own political leanings and feelings but as an employment lawyer I thought that I would just give you a couple observations and particularly if history is any indication of how we will do in the future so assuming that Judge Kavanaugh is confirmed and I think despite all the Sturm Und Drang that will happen in the next several weeks and months, I do think that he will be confirmed. There is certainly no argument that this judge is qualified from simply an academic or an experiential basis. Whether he will pass muster, I leave to the folks in the senate, but from an employment standpoint, while Justice Kennedy was somewhat of a swing vote in many situations. I don't think that if Kavanaugh is confirmed that he will be that kind of a moderate swing vote, rather I do think that he will be much more of a starch conservative voice ala someone like Justice Galea, etc. and I think that in many of the employment cases that we will see coming up through the system and winding up at the Supreme Court it seems to me very likely that we will have a 5 to 4 majority in favor of business for the most part unless there is some issue that will coalesce all the justices to have a consensus opinion. A couple of things about his appointment though I think are note worthy or his pending confirmation. So you have a couple of quotes from labor leaders and one of these is from AFL-CIO President Richard Trumka who indicated that Judge Kavanaugh has a "dangerous track record of protecting the privileges of the wealthy and powerful at the expense of working people" and SEIU International President Mary Kay Henry who called Judge Kavanaugh "a narrow-minded elitist who would further rig our economy and democracy against working Americans." I think that those statements probably are very extremist and you would expect that frankly from the heads of those two labor organizations. But just a couple sort of notations of his past employment decisions, so there was a case called Southern New England Telephone v. NLRB. This was a situation involving AT&T Connecticut which had banned its employees during the course of a union campaign from wearing union shirts that said Inmate on the front and Prisoner of AT&T on the back. The National Labor Relations Board held that that was an unfair labor practice that the employees had a right to do that i.e. concerted protected activity and Judge

Kavanaugh started off his opinion by saying "common sense sometimes matters in resolving legal disputes" and he was part of a three judge panel who unanimously overturned the NLRB decision and stated "put simply was reasonable for AT&T to believe that the inmate prisoner shirts may harm AT&T's relationship with its customers or its public image therefore he wrote lawfully prohibited its employees here from wearing the shirt. On the other hand, in a case that came again before the DC Circuit involving Fannie Mae, this was the case where he joined the majority opinion reversing a lower court award of summary judgement where the employee was ultimately fired after complaining of a racial bias incident in which he was called the "N" word and his concurring opinion Judge Kavanaugh indicated that one isolated incident can indeed be so serious, so egregious as to constitute a hostile work environment as he called it "in my view being called the "N" word by a supervisor suffices by itself to establish a racially hostile work environment. "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." So it remains to be seen exactly which side of the fence a justice, as supposed to Judge Kavanaugh will come down on, but currently before the Supreme Court are two petitions for Certiorari on the issue of whether under Title-7 the prohibitions on sex discrimination also include discrimination on the basis of sexual orientation and the circuits are split on this, two circuits having decided in favor of including sexual orientation within the meaning of sex one deciding against it. Whether the Supreme Court takes this up or not remains to be seen, if it does, my best prognosis or prediction is that I don't think that Justice Kavanaugh would come down on the side of including sexual orientation within the meaning of sex discrimination and my again prediction would be a 5 to 4 decision against that, but again we will have to wait and see whether he is confirmed or not. So enough said about that I think the next weeks and months as I indicated would be pretty interesting in terms of the substance of the confirmation hearings and whether all senators would have an open mind on this particular individual.

Just yesterday, the National Labor Relations Board put on its website and published a statement that quoted NLRB launches pilot proactive alternative dispute resolution program. I do not know how many of you out there have any kinds of pending cases before the National Labor Relations Board, but this was the statement that the Board put out yesterday; today meaning yesterday. The National Labor Relations Board announced it is launching a new pilot program to enhance the use of its alternative dispute resolution (ADR) program. The new pilot program will increase participation opportunities for parties in the ADR program and help to facilitate mutually satisfactory settlements. Under the new pilot program, the Board wrote, the Board's office of the executive secretary will proactively engage parties with cases pending before the

Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties may contact the office of the executive secretary and request that their case be placed in the ADR program. There are no charged fees or expenses for using the program. So, this may be a significant program for anybody who is accused of an unfair labor practice, hopefully none of you out there are, but in my opinion it would be a good program to have. I see little downside, sometimes it is useful to get the opinion of a third party as to the merits or lack thereof of a particular case and assuming that you get an objective party who would serve as a mediator in these cases, it would be a valuable exercise even if the case does not eventually settle. So you can check the National Labor Relations Board's website for the exact wording of this, but again, it appeared just yesterday.

Now, those of you who do business in the District of Columbia, I wanted to make sure you saw or are aware that on June 19, so just a couple of weeks ago, the DC populous voted to approve what was labeled as Initiative 77 by which the minimum wage in the district, which is currently $12.50, would increase to $15 by 2020 and after that would increase proportionately to any increases in the CPI, the consumer price index. Now, this does not automatically become law. First, there is a 30-day review period under Federal Law by which Congress would review this. Rarely has Congress overturned these kinds of initiatives. However, just so you know the Mayor of the District of Columbia and several council members have articulated their opposition to this particular ballot passage. So, I do not know exactly whether this will ultimately become law or not, but I wanted to bring it to your attention for those of you who do business in the district. I will make sure to keep my eye on this and let you know whether or not it is going to become law or not.

In a very sort of ironic, paradoxical way, because we know that President Trump is in Europe, he has recently this morning engaged in some spirited discussion on NATO. But in any event, just this past week there was a lawsuit filed against the Trump organization, you may have seen it, by his long-time personal driver by the name of Noel Cintron who has alleged in a suit filed Monday, just this past Monday, couple of days ago, in New York State Court that he worked regularly 50 hours plus for decades as his driver, as Trump's personal driver, without being paid overtime. So, he sued the Trump organization and Trump Tower Commercial, LLC, alleging that he is due thousands of hours of unpaid overtime over a period of two decades, and somewhat of a hyperbolic statement, this is in the complaint, it stated in an utterly callous display of unwarranted privilege and entitlement and without even a minimal sense of noblesse oblige President Donald Trump has through the defendant entities exploited and denied significant wages to his own long-standing personal driver. The lawsuit claims that this guy Cintron would owe him 3,300 hours of unpaid

overtime over the last six years. Now, you may say, well, how does it go back six years? Well, the reason it goes back six years is that although under the Fair Labor Standards Act, the Federal Act, you can only go back a maximum of three years, under the New York State Law, an employee can go back six years, so they calculate the amount owed him as a $180,000 in possible back wages and amount equal in liquidated damages plus interest fees and attorney's fees. They claim in this lawsuit that he was paid a fixed salary of $62,700 in 2003 and was only given two increases in that base salary, one to $68,000 in 2006 and one to $75,000 in 2010 though they say that the latter salary increase was given at the expense of being offset by the Trump organization cutting off his health benefits. So, we will see how this lawsuit develops. But as the lawsuit or as the attorney for the plaintiff says, it is clear by any stretch of the imagination that Cintron does not fall with any of the overtime exemptions, and I think that that is useful to point out to those of you who say, well, if I merely pay somebody on a salary basis, that will mean that that person is exempt from overtime and that is fallacious, as we know that the mere fact that you may pay somebody a salary does not obviate the need to analyze whether or not that person falls within one of the white collar exemptions of professional, administrative, executive, or outside sales person; and they have to satisfy not only the existing salary test but also the duties test as well. It also should remind you that from a timekeeping standpoint it is pretty important that you keep scrupulously accurate time records, that your policies indicate that an individual should not be allowed to work overtime without the expressed permission of management that should be in your policy. And I often find that it has been useful for employers to mandate that on a regular basis, on a payroll basis employees have to acknowledge or attest to the fact that they have accurately recorded their time, that they haven't worked off the clock, that they recorded their hours worked in an accurate way and that they were provided with any meal breaks or rest breaks that are mandated by law. Not that that is dispositive in the event of a lawsuit but is certainly probative of the fact that they have been paid accurately and there is nothing wrong with mandating or requiring that employees acknowledge on a regular basis that they have been paid everything to which they have been owed.

The last thing that I wanted to mention is that two weeks ago the EEOC filed a lawsuit in Federal District Court in Texas accusing a painting company of discriminating against a recovering drug addict by hiring and then firing him because he was on a supervised methadone treatment program; and what happened in this case was that the person was hired, obviously they gave him a drug test; and after a week on the job, the drug test came back positive for methadone and eventually the company very soon after that came back, terminated the employee. It turns out that the employee was on methadone because he had been recovering and was

recovering from an opioid dependency that he developed when he was on oxycodone following surgery and physical rehab for surgery. And the company according to the complaint had a practice, according to the HR department, of "We don't hire people on methadone." Now as you know under the EEOC's regs and under the ADA the fact that somebody is a recovering addict whether alcoholic or drug as opposed to a current user, is a protected status under the ADA. And in this case there was no evidence that he was impaired in anyway or could not perform the essential functions of his job; it is just that simply rather than being on oxycodone or some other opioid, he was using methadone which certainly was prescribed medically for him. And in this case it is styled Equal Employment Opportunity Commission versus Steel Painters the United States District Court for the Eastern District of Texas. We will see how it comes out in terms of what eventually will happen in the lawsuit, but it is, I think, pretty prescient and also prohibitive for any of you who do drug testing that you got to be careful. You cannot just have a blanket policy of saying we won't hire somebody who is on methadone maintenance when there is no indication that the person's methadone maintenance impairs or could impair that person's ability to perform the essential functions of the job. And in this case, again, what happened was the person was on the job for about a week and then, you know, what happened was they found out that he was positive and he was terminated; very problematic from the standpoint of the Americans with Disabilities Act.

So, those are the developments of the day. Sheila, can you take this off of mute please? Okay. Anybody have any questions or comments about things that have been covered either in this forum or certainly privately you can get in touch with me on my email at hkurman@offitkurman.com or my phone number 410-209-6417. Any questions, comments? Okay, well it seems like either things I said resonated or everybody was playing solitaire on their computers or whatever, but in any event I know we covered a lot of stuff, and as always I appreciate your participation. The next telebrief will be the last Tuesday or the fourth Tuesday in July, so that will be July the 25th. Okay, hearing no descending voices, no questions or comments, we'll adjourn for the morning. Thanks very much. Take care. Bye-bye.