LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay it is 9:02 by the magic Kurman clock. So Sheila would you mute the lines and we will get started. All right, good morning everybody as I said it is a couple minutes ago it is hard to believe that we are pressing on to September but the summer always flies by and this is no exception. So the next, actually the first telebrief in September will be the second Wednesday in September or September 12. So we will be after Labor Day at that point again, kind of hard to believe.

Okay, I wanted to spend a little time on two cases that the Equal Employment Opportunity Commission filed against Maryland companies as a matter of fact last Friday. It is not unusual for the Equal Employment Opportunity Commission to put out press releases on cases that they believe are significant and of note and they did that last Friday with regard to two different companies I will address them separately and this is their way not only of announcing litigation but in my opinion also of giving notice to other employers who may be similarly situated that they need to pay attention to the allegations of the lawsuit and the principles that the EEOC is seeking to trumpet and to uphold. So the first one I wanted to talk about is where the EEOC announced that it had sued Stanley Black & Decker as you know Black & Decker was purchased years ago by Stanley now called Stanley Black & Decker and as the EEOC says or describes it Stanley Black & Decker a global diversified industrial company violated federal law when it terminated an employee with cancer who took leave for medical treatment related to her cancer the EEOC charged in a lawsuit announced today which was last Friday. So they go on to say according to the suit an inside sales representative who started working at Black & Decker's Towson facility in March 2016 told her supervisor she had been treated for cancer and would have follow-up doctor appointments throughout the year. In October 2016 so obviously just months after this employee began working when she needed further testing that included a biopsy the employee spoke to the human resources representative about her options. The human resources representative told the inside sales representative that there were no available options since she had been not been employed long enough to be eligible for medical leave under the FMLA. The press release goes on to say the EEOC charges that Stanley Black & Decker fired the sales rep for poor attendance in December 2016 even though she exceeded her sales goals and quotas, that is a significant point. Her absences were related to her prior cancer treatments or need for additional medical testing and she had requested a reasonable accommodation. Black & Decker's inside sales attendance policy does not

provide exceptions for people who need leave as an accommodation to their disability according to the suit. Moreover the company did not follow its progressive discipline policy and fired the rep instead of giving her a final written warning as set forth in its attendance policy. The press release goes on to say such alleged conduct violates the ADA which prohibits discrimination based on disability and requires employers to provide a reasonable accommodation to individuals with disabilities unless it is an undue hardship, they attempted to settle this case and were unable to do so and therefore filed a lawsuit. The press release states or quotes the regional attorney Deborah Lawrence in which she says "employers can run afoul of the ADA if they have a rigid attendance policy that penalizes employees taking leave as a reasonable accommodation for their disabilities. She goes on to say this case should remind all employers that they have an obligation to make exceptions to "no fault" attendance policies as a form of a reasonable accommodation unless doing so would be an undue hardship and they further state addressing emerging and developing areas of the law including inflexible leave policies that discriminate against individuals with disabilities is one of six national priorities identified by the EEOC's strategic enforcement plan. So there are several takeaways from this first case those of you out there who hire people even where those employees may not qualify for FMLA because they have not been with you long enough, may nevertheless have obligations under the ADA to have an interactive dialogue with an employee who otherwise requests or presents with a need for an accommodation as I have said over and over in these telebriefs the landscape today is not whether a particular condition qualifies as a disability under the ADA because almost everyone does, the real landscape surrounds whether or not there has been an interactive dialogue regarding an accommodation and whether there has been a reasonable accommodation that has been granted to an employee. Second, those of you who have points based attendance policies and many of you may, may obviously need to still have a conversation with an employee who otherwise might be covered by your attendance policy but still may be entitled to an accommodation because of a disability related condition even if that particular absence would be something that you would believe would fall within your points based attendance policy. I can tell you that the EEOC takes a very dim view of employers who do not even consider or attempt to accommodate the need for an accommodation and I think piled on that is certainly the nature of the purported disability. Here what you have is an employee with cancer and I think from a sympathy standpoint somebody who is undergoing active treatment for that and who needs what may be deemed to be small or minor accommodations is going to garner great sympathy from both probably courts and the Equal Employment Opportunity Commission unless you as an employer can demonstrate that there is an undue burden placed on you by virtue of the request for an accommodation. Now again and I have spoken about this in

past telebriefs somebody who is requesting six months off in order to get treatment probably would not be deemed to have a reasonable request for an accommodation or where there is a statement from a physician that says it is indeterminate or indefinite as to when the employee can resume full and active duties but outside of that you are going to have to seriously have a discussion with an employee regarding the need for an accommodation irrespective of the fact that you may have what appears to you to be a neutral attendance policy in place. The second sort of sister press release that the EEOC put out last Friday again both of these were put out very close to one another one at 1:15 p.m. last Friday and one at 3:21 p.m. last Friday so this is a case brought by the EEOC where they have sued a company called Protocol Communications, Inc., and the press release reads Protocol Communications, Inc., a company that markets energy price protection in eight states violated federal law when it refused to provide a reasonable accommodation to a telemarketer during her training and instead fired her because of her disability the EEOC announced today meaning last Friday. So in this suit according to the EEOC, Protocol hired an individual for a telemarketer position in its Laurel Maryland headquarters. So the employee began a three-day training program which included reading a particular script I am sure that the company had created for these telemarketers, the press release goes on to say the trainer expressed concerns about the employee's ability to read the script as it had been written and asked if she had a learning disability. In response the release says the employee disclosed to the director of training and director of HR that she had dyslexia. The EEOC says the director of HR told the employee that the company "did not want to set her up for failure" and that there was no point in continuing the training. The employee asked if she would be able to take the script home to practice it, the company refused her request for that accommodation and instead according to the lawsuit the company fired her. The lawsuit where the press release goes on and says such alleged conduct violates the ADA which prohibits discrimination based on disability and requires employers to provide a reasonable accommodation to individuals with disability. The regional attorney again Debra Lawrence said and I quote "employers must provide reasonable accommodations including during an employee's initial training period unless they could prove it would be a significant cost or disruption". Here it goes on to say "the employee even proposed a free accommodation but the employer wrongfully refused to consider that or other possible reasonable accommodations that would have allowed her to remain employed". And the Philadelphia District director went on and stated employer should explore reasonable accommodation options instead of rushing to terminate an employee. We encourage employer's responding to accommodation request to review the many free resources and guidance on reasonable accommodations the EEOC provides on its website and they gave the website www.eeoc.gov as well as resources provided by other organizations such as the Job Accommodation Network

and they give that website as www.askjan.org. So this was the companion lawsuit to the first lawsuit I mentioned and then again the issue was accommodation and you might say well what could the employer have done differently here and I think the employer obviously from the lawsuit could have said to the employee look take this script home you know try and memorize it come back and we will you know sort of give you another test and will see how you do. And if you can you know substantially repeat it and do a good job then we are okay if the employee having done that really would have a material problem in following the script then it would give the employer in my opinion good reason to probably say look this is not the job for you. And so a lot of times what the EEOC is looking at is the effort that you expend as an employer and I have often talked about the documentation of those efforts so here for instance it would have been good for the employer to give that script to the employee, to document the conversation, to document the effort and then once the employee returned to work and was unsuccessful in being able to repeat in material ways the substance of that script the fact that the effort failed. Instead I think the employer assumed that the employee could not do it even though the accommodation would not have cost the employer anything other than maybe a day or two of time. So you know I think the lesson to be learned again from these lawsuits is that the EEOC has a major initiative going on with regard to accommodation issues not whether something is disability but whether the employer has adequately accommodated the employee. So I will follow these lawsuit and I will let you know how they go on remember these are just allegations in a lawsuit obviously if the employer goes to trial it is up to the EEOC to prove them but for right now I think they have some good lessons to be learned by you all when you are faced with disability accommodation issues.

One of my clients had an issue with regard to the Maryland Safe & Sick Law that I wanted to pass along to you in case any of you face a similar situation and the issue really was you know the under the Maryland Safe & Sick Law you can either have employees accrue safe and sick leave as it accrues during the course of the year in which case you are obligated to allow them to carry over at least to a certain extent the unused sick leave into the next year or you can front load the safe and sick leave at the beginning of your calendar year or whatever year you are using. But the question came up and it is a good question and some of you may wonder well what happens if you let us say are on a calendar year and you front load your safe and sick leave and you hire an employee some point during the year. Are you obligated in that particular case to front load 40 hours of safe and sick leave even though the employee has started during the course of the year. My instinct told me that you would not have to do that and I reached out to I have a connection at the Department of Labor Licensing & Regulation Matt Himmelneck and I sent him an email and he wrote me back the following email and I think it is instructor for you if you have this

issue so he wrote back and he said an employer who elects to front load the full 40 hours of safe and sick leave to employees at the beginning of the benefit year may front load a pro-rated amount of safe and sick leave to an employee who starts employment after the beginning of the benefit year provided that there is no policy that effectively prevents the employee from using the sick and safe leave. For example if an employer establishes January 1st as the beginning of its benefit year for purposes of the law the employer could front load 40 hours of safe and sick leave to employees on January 1. If an employee was hired on October the 1st that is ten months later the employer could front load 10 hours of sick and safe leave that is one quarter of 40 hours for that employee to use between October 1st and January 1st. However the employer could not have a policy that required the employee to wait a 106 days before using sick and safe leave because under this example the employee would be effectively precluded from using the ten hours of sick and safe leave. Upon receipt of a complaint the commissioner would consider the reasonableness of an employer's policy and whether it afforded the employee a meaningful opportunity to use the sick and safe leave. So again those of you out there who are contemplating or have a policy where you are front loading because you do not want employees to carry over unused sick and safe leave should know that if employees are hired during the course of the year you can pro-rate the front loaded amount of sick and safe leave but they would have to be given the opportunity to use that during the course of the year without a 106 day waiting period that the statute would otherwise provide. So again I think that you know I would say to you those of you who have not established your policy yet or who may be considering tweaking your policy or changing it from an accrual basis to a front loaded basis take into account the advice which has been given by the Department of Labor Licensing & Regulation.

The last thing that I want to mention and I have probably mentioned this before has to do with wage and hour issue with overnight travel and I got this from our client couple of weeks ago and I thought I would just mention it to you. So there are some of you out there who have employees that may need to travel to a different city overnight for one purpose or another and the question frequently comes up is that considered to be work time? And the answer to that depends on whether or not the travel is during the normal working hours of the employee. So to take a simple example if you have an employee whose normal work hours are 9:00 to 5:00 if you have that and we are dealing with a non-exempt employee not an exempt employee because for an exempt employee it would not matter. But for a non-exempt employee whose normal work hours are 9:00 to 5:00 Monday through Friday if that employee is sent on travel by airplane or train or whatever mode and the travel is during those 9:00 to 5:00 hours even if it is on a Saturday or Sunday those are considered to be work time for that non-exempt employee. Which basically means that those of you

who are contemplating sending a non-exempt employee on travel overnight would be well advised to make the travel outside of the non-exempt employee's normal work hours. So if the employee needs to travel from Baltimore to Texas you would be well advised to have that non-exempt employee even if it is on a Saturday or Sunday travel beginning at 6:00 o'clock at night as opposed to 9:00 to 5:00 during the day. Because if it is 9:00 to 5:00 during the day even if it is a Saturday or Sunday it would be considered to be work time and therefore compensable. I know it is confusing and I am not going to go into all of the other travel rules we could spend three hours probably on that but I thought this was worth repeating to you for those of you who do require, who have a need for your nonexempt employees from time to time to travel where that travel is overnight and where you are considering whether or not to have that travel coincide with work time or non-work time.

Okay those are the developments for the day. Sheila can you take this off of mute. Okay as always I invite any questions, comments etc. Either in this forum or in a private forum at my email at hkurman@offitkurman.com or my phone 410-209-6417. Okay any questions or comments?

Catherine: Hey Howard, it is Catherine Hannon over at the Sun.

Howard: Yes.

Catherine: Hi, I wanted to ask you a little bit more about that on the sick and safe with regard to a pro-rata for a new hire that starts mid-year. I guess if you could I don't know just elaborate a little bit on that whole why the 106 day waiting period would not apply for a new higher regardless of when they started.

Howard: Because I guess politically it was deemed to be a tradeoff Catherine for allowing the employer to pro-rate that front loading of safe and sick leave and in that situation what the department is saying is look you are certainly welcome to pro-rate it but just know you got to give the employee in that situation an opportunity to use it otherwise it is a illusionary. So I think it was probably a political compromise and it is a political football anyway but you know unless you want to do that and unless you want to accrue safe and sick leave which is the other option that you have where you obviously can have the employee wait 106 days what the department is saying is hey if you are going to severely pro-rate this sick leave during that first part of the year then you got to have the employee be able to use it outside of a 106 day waiting period. That is the best answer I can give you I think it was more or less a political compromise.

Catherine: Thanks.

Howard: It does I agree with you but hey I read to verbatim the answer from the Department Of Labor and I think it could be different, if I were you all I would probably follow the restrictions imposed on that by the department.

Catherine: Thanks Howard.

Howard: Sure, any other questions? Okay, well if not I know it is hard to believe but Labor Day is upon us so we will be speaking after Labor Day I wish you all a good holiday and a safe one and we will reconvene the beginning really of the fall season. So everybody take care.