

LABOR & EMPLOYMENT TELEBRIEF

By

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Howard Kurman: Good morning everybody. It is hard to believe it is September and close to Labor Day, with everything that has gone on since March, but time marches on and we are where we are, so hope everybody is staying safe and healthy and as always there is plenty to talk about this morning.

The first thing I wanted to do is remind everybody—I know that I have spoken about this before in prior tele-briefs—but in less than a month that is on October 1 of this year there is a new Maryland law that will go into effect which prohibits employers from requesting or relying on job applicant's prior pay history to make decisions about whether they are going to hire an applicant or in establishing initial pay for any particular applicant. This is a provision that is contained in Maryland's existing equal pay for equal work law and again what it does in many cases is restrict you as an employer from inquiring as you may have done in the past or as one of your search firms or headhunting firms may have done to ask directly an applicant what he or she was making, and it is a restriction, and it is similar to the laws in many other states which have similar kinds of constraints on employers. It does not prohibit an applicant from voluntarily disclosing that but you should remove that question in your Maryland employment applications. The other restriction or actually constraint on Maryland employers is that if an applicant asked what the wage range is for particular job you have to reveal that to that particular applicant. Some of you may not even have wage ranges, so obviously it is a takeaway in preparation for the implementation of this act on October 1. You all want to take a look at your job descriptions and your salaries which are associated with any particular provision or any particular position and establish a wage range if you do not already have one. So again, this act takes place on October 1st and you are going to have to make sure that if you utilize search firms or headhunters, that they know not to be asking on your behalf what the employee has made in prior salaries. So just the word to the wise – make sure that you comply with this in a matter of you know about three weeks.

I have been asked this week, as I have been asked many times during the pandemic, of whether or not an employer should have a waiver for its employees to sign which would at least purportedly do away with any future liability associated with that employee getting COVID-19. The simple answer to this question is no. That these waivers are ineffective as a matter of public policy, that is as most of you know, in many cases, in most cases, in Maryland and many other states, the sole and exclusive

remedy for an employee who is injured or obtained or sustained an occupational disease arising out of and in the course of his or her employment is worker's compensation, the exception to that would be where there is an intentional or deliberate act by the employer which is precipitating an injury or occupational illness to the employee. The waivers simply are ineffective in this case, and I am not talking about waivers that you might implement for visitors to your office or vendors etc., that is a different story, but in terms of your employee it is not a good idea they are ineffective and I would stay away from that. You can, however, certainly distribute and communicate those policies and procedures which you expect employees to follow as a result of the pandemic and get them to sign an acknowledgment that they understand those policies and procedures and will do their best to adhere to that, but that is different than requiring them to sign a waiver, which as I have said is ineffective usually and held by courts to be against public policy. Again with the issue of the pandemic so ubiquitous in the workplace, on August 24, that was just a little more than a week ago, the Department of Labor and its Wage and Hour Division promulgated guidance addressing your obligations as an employer to track employee hours for those people who were teleworking, and while this obviously would be applicable to the pandemic, it is also applicable even after the pandemic for any of those nonexempt employees who were remotely working. Now I want to stress that this would only apply of course to the issue of what happens to those nonexempt employees who are working remotely. Your exempt employees certainly do not need to track hours because as you know irrespective of the number of hours that an exempt employee would be working whether it is in your physical space or working remotely they are paid the same salary irrespective of the number of hours that they work, but for nonexempt employees it is different, and as a result of this guidance, which you can find on the Department of Labor's website, you really need to figure out an effective way of tracking hours whereby your nonexempt employee because you are going to be charged with paying these employees, whether you have really authorized that time that is purportedly worked or not because under the Wage and Hour Act, Fair Labor Standards Act, employers are required to pay for any hours which are worked or suffered or permitted to be worked. So, a word to the wise, figure out the best way of tracking time you may need to establish either a daily tracking system or reporting system or weekly tracking or reporting system, but however you do it, you are going to have to have a system in place which enables you to track accurately the hours which are purportedly worked by your nonexempt employees. So again I think that you can go on to the Department of Labor's website, the Wage and Hour Division, read the guidance for yourself, but the bottom line is you are going to have to figure out a way to really understand and to be able to track accurately the hours that are worked by your nonexempt employees. Now again in a very recent guidance this was as soon or as recent as

August 27, this was last Thursday the Wage and Hour Division of the Department of Labor put out a new edition of its frequently asked questions regarding the Families First Act as it pertains to school age children and whether or not your employees would be able to take leave or be protected under certain conditions which are reflected, in particular, three frequently asked questions which I will review with you in a minute. So the Wage and Hour Division guidance states as follows, and this is from last Thursday. Again easily accessible by you on the Department of Labor's website. So what the Department of Labor said was today, meaning last Thursday, the US Department of Labor's Wage and Hour Division published new frequently asked questions for workers and employers about qualifying prepaid leave under the Families First Coronavirus Response Act related to the reopening of schools. The guidance explains eligibility for paid leave relative to the varied formats and schedules schools have announced as they plan to reopen including blending in person with distance-learning. Wage Hour Department offers this information to explain the benefits and protection available under both the paid sick leave and the expanded family and medical provisions of the Families First Act. They go on to say the Families First Act allows certain employees to take up to two weeks off of paid sick leave and take up to 12 weeks of expanded family and medical leave, 10 of which are paid for specified reasons related to COVID-19. An eligible employee can take both types of paid leave because of the need to care for the employee's son or daughter whose school or place of care is close or whose child care provider is unavailable due to COVID-19 related reasons. Since the Department has received many requests for guidance on this topic we believe publishing these frequently asked questions will help the public schools and employers clarify eligibility for this paid leave.

Now I am going to go over the particular questions that they circulated which really have direct application to employers with school age children. So frequently asked question 98 is this. My child's school is operating on an alternate day or other hybrid attendance basis. The school is open each day but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in person attendance days. May I take leave under the Families First Act in these circumstances?

The answer by the Department of Labor is yes, you are eligible to take paid leave under the Families First Act on days when your child is not permitted to attend school in person and must instead engage in remote learning. As long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the Families First Act and implementing regulations the school is effectively "closed" to your child on days that he or she cannot

attend in person. You may take paid leave under the Families First Act on each of your child's remote learning days.

99. That is frequently asked question 99. My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the Families First Act in these circumstances?

The answer by the Department of Labor is no, you are not eligible to take paid leave under the Families First Act because your child's school is not "closed" due to COVID-19 related reasons. It is open for your child to attend. Families First leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to Families First paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See frequently asked question 63.

Also as explained more fully and frequently asked question 98 if your child school is operating on an alternative date or other hybrid attendance basis you may be eligible to take paid leave under the Families First Act on each of your child's remote learning days because the schools effectively "closed" to your child on those days.

Finally frequently asked question 100 again this was from last week. My child's school is beginning the school year under a remote learning program out of concern for COVID-19, but has announced it will continue to evaluate local circumstances and make a decision about reopening for in-person attendance later in the school year. May I take paid leave under the Families First Act in these circumstances?

Answer: Yes, you are eligible to take paid leave under the Families First Act while your child's school remains closed. If your child's school reopens, the availability of paid leave under the Families First Act will depend on the particulars of the school's operations.

So these were the frequently asked questions that were added, these three by the Department of Labor last Thursday, but I think that in this pandemic age it is a good resource to have all of the 100 frequently asked questions at your disposal because the Department of Labor has done its best to provide guidance on many different situations under the families

for staff relative to which again with these three questions that were added last Thursday.

The last thing that I wanted to mention this morning is that on August 5 the Equal Employment Opportunity Commission issued guidance on employers facing issues of oxycodone, codeine and other opioid use among its employees and they issued this guidance as public policy and while it's not necessarily binding, it certainly is persuasive as to how you will need to conduct yourself in the future with regard to employees or applicant who may have opioid issues and by opioid the EEOC defined them as codeine, morphine, oxycodone, Percodan, Percocet, hydrocodone and meperidine as well as illegal drugs like heroin and this guidance can be found easily on the EEOC's website, but I want to review certain of these because I don't know whether you have seen publication of these or gotten them since they are less than a month old at this point. So let me go over some of these.

1. Could I be automatically disqualified for a job because I use opioids or because I used opioids in the past?

The EEOC answers the ADA allows employers to fire you and take other employment actions against you based on illegal use of opioid even if you do not have performance or safety problems. Also employers are allowed to disqualify you if another federal law requires them to do it. For instance, those people that are covered under Department of Transportation restrictions on drug testing etc. but if you are disqualified by federal law and your opioid use is legal that is by prescription and employer cannot automatically disqualify you because of opioid use without considering if there is a way for you to do the job safely and effectively.

2. What if I am in an MAT Program. MAT Program is a Medication Assisted Treatment Program for opioid addiction that requires me to take opioid medication?

Answer: If you are taking an opioid medication as directed in a MAT Program then you have a valid prescription and your use of the medication is legal under the ADA, you cannot be denied a job or fired from the job, because you are in an MAT Program unless you cannot do the job safely and effectively or you are disqualified under another federal law.

3. What if a drug test comes back positive because I am lawfully using opioid medication?

Answer: An employer should give anyone subject to drug testing an opportunity to provide information about lawful drug use that may cause a

drug test result that shows opioid use. An employer may do this by asking before the test is administered whether you take medication that could cause a positive test result or it may ask all people who test positive for an explanation.

So those of you obviously out there who are doing drug testing be aware again of this public policy guidance because you are going to have to take certain explanatory steps with the employee if it comes back positive opioid. Performance and safety this is number 4 by the EEOC.

What if my employer thinks that my opioid use, history of opioid use or treatment for opioid addiction could interfere with safe and effective job performance? This an important one.

Answer: If you want using opioids illegally and are disqualified for the job by federal law the employer may have to give you a reasonable accommodation before firing you or rejecting your job application based on opioid use. If the employers let you know about this concern then you need to ask for a reasonable accommodation if you want one. Then they define of course reasonable accommodation but they have this caveat; however, an employer never has to lower production or performance standards, eliminate essential functions that is fundamental duties of the job, pay for work that is not performed or excuse illegal drug use on the job as a reasonable accommodation.

Question, this is number 5 by the EOC – Could I get a reasonable accommodation because I take prescription opioids to treat pain?

Answer – You may be able to get a reasonable accommodation if the medical condition that is causing pain qualifies as a disability under the ADA. A medical condition does not need to be permanent or stop you from working to be in ADA disability. Many conditions that cause pain significant enough for a doctor to prescribe opioids will qualify. Next question – Could I get a reasonable accommodation because
_____ hello...

Casey: Hey Howard, we lost you there.

Howard Kurman: I don't know. I am not sure what is going on, technical problems I guess. We, could you hear me saying unmute the phones, Casey?

Casey: Oh no, no, I lost you completely. But we are all still hanging on for you.

Howard Kurman: Okay, alright. Well I apologize. I don't know what happened, but as always I appreciate everybody's participation, if anybody has a question, please let me know.

Casey: Patty?

Patty: Hi Howard, this is Patty, I have a question.

Howard Kurman: Yeah.

Patty: So I am aware that the, the leave under FSCRA is available for intermittent leave?

Howard Kurman: That's right.

Patty: So in this situation where an employee is allowed to telework, right we have deemed that they can effectively do their job at home, we give them all the equipment necessary to do so; however, on certain days based on how they need to support their children they find they are not able to effectively do their job, they just don't have the time to focus on work but they have to support their kids. On those particular days can they use the emergency sick leave, can they be paid under that?

Howard Kurman: Yeah. So, so you are saying that on the days when they really can't work even though there would be work that would be available, I don't believe under that circumstance they would be entitled to the leave unless you voluntarily want to pay and reduce their balance but the question is really whether you would be entitled to claim that payment as a tax credit...

Patty: Right.

Howard Kurman: Because that you know, as you know you can claim tax credits for the leave that you pay.

Patty: Right, right.

Howard Kurman: So, I don't think it would qualify under that circumstance. Of course if the employee had other leave available and wanted to use it and you, you know allow that employee to use it I think that could be done, but technically I don't think it qualifies for family first leave.

Patty: Okay. Even though their children's school is closed and they are doing virtual learning and on that particular day they need to take care of their children.

Howard Kurman: Well on that, yeah but I thought what you are saying is that on that particular day there was not any, there is work for them to do but they cannot do it.

Patty: Correct, that is correct.

Howard Kurman: Okay.

Patty: They are taking, they are at home taking care of their kids but for the most part they can do their job but on some particular days like, for example, this particular person has a stepchild, so she has more children sometimes than others and then its gets more complicated. So on that particular day she may not be able to do her work.

Howard Kurman: You know what Patty, you know I don't think it qualifies but I will offline with you to make sure...

Patty: Okay.

Howard Kurman: Because I don't want to give you the wrong answers.

Patty: Sure, sure.

Howard Kurman: I mean all this stuff has many nuances and benefits to it. So let me check on that and offline and I will get back to you.

Patty: Okay. I have one more question?

Howard Kurman: Sure.

Patty: So, our company has a policy under our COVID protocols that requires an employee with symptoms that are related to COVID to quarantine for 10 days per the CBC guidelines.

Howard Kurman: Right.

Patty: If that employee gets a COVID test and lets say, five days in they find out they are negative but our policy is 10 day quarantine regardless, can they use the emergency sick leave for the remaining five days to complete their 10 days of quarantine?

Howard Kurman: God, you are asking difficult questions Patty.

Patty: And these are real situations so I am asking.

Howard Kurman: You know...

Patty: And if you need to get back to me, I understand.

Howard Kurman: Yeah. If it is a matter of company policy but it, it is essentially if the employee tests negative I guess my basic question would be why would you continue to need that employee to quarantine if the employee is negative at that point.

_____: _____ on the pay leave thing.

Howard Kurman: I am sorry, what?

Patty: That was not me, somebody has not muted themselves, I am sorry.

Howard Kurman: Oh okay.

Patty: The reason that we require the full quarantine, one because our Board of Directors has advised that because of the false negative. We actually had an employee that took two tests, one was negative, one was positive within one day of each other.

Howard Kurman: I see, I see.

Patty: So we realized that depending on when you test if you test too soon, you can get a negative even though you really are positive.

Howard Kurman: Right.

Patty: We have had a couple of scenarios where we confirmed that.

Howard Kurman: Right. So you know certainly as a matter of company policy you can do it. That's not the point.

Patty: Yeah.

Howard Kurman: Your question is whether or not it qualifies for families first leave, you know and therefore it is compensable for the company if you pay it. Again, I am going to have to get back to you on that.

Patty: Okay. Thank you.

Howard Kurman: Sorry about that.

Patty: No, no worries.

Howard Kurman: You know...

Patty: I know it is complicated.

Howard Kurman: Yeah it is, it really is. So any other question? Any other questions that I cannot answer.

Sandy: Howard, this is Sandy. I want to go back to the EEOC guidelines around opioid use and...

Howard Kurman: Yeah.

Sandy: And drug testing. So we, we just picked up a government contract where we do have to drug test those individuals, they are shuttle bus drivers for the government...

Howard Kurman: Right.

Sandy: And so are you saying that we should be asking them prior to the drug testing if they are on any medications?

Howard Kurman: Well, first of all Sandy if your, if your company has entered into a government contract, remember the EEOC's guidance is that these are general policy guidelines unless you are covered under a different federal law. My sense is that with your government contract you are required to do this and that any positive would be a reason not to continue either hiring or retaining that employee.

Sandy: Exactly, exactly.

Howard Kurman: Yeah, so these guidelines would not necessarily apply to you.

Sandy: Okay.

Howard Kurman: Okay.

Sandy: Great, thank you.

Howard Kurman: Well at least I was able to answer one question. Any other questions out there?

Anise Williams: Howard, this is Anise Williams from PMCG. I wanted to know the same thing. The first question that was asked that you are going to get back to us about, is there any way that we can circulate some type of e-mail or should I e-mail you directly to make sure that I am included in those findings?

Howard Kurman: Well, yeah so Casey you are on the phone right?

Casey: Yeah.

Howard Kurman: So, I think it is a good question, is there a way for me to just get an e-mail circulated to everybody who is on this call?

Casey: Sure.

Howard Kurman: Okay. So what I would do is, I will probably send an e-mail answer to Casey, who obviously is in our firm and helps me on these calls and then she can circulate it to everyone else on the call, if that is okay?

_____: Thank you.

_____: That's good.

_____: _____.

Howard Kurman: Okay. Any other comments, question? You know what Patty if you are still on the phone?

Patty: I am.

Howard Kurman: Okay, here, here is my request to you. Why don't you send me an e-mail with those questions and then, then I will send an answer to you with a copy to Casey and she can forward it to everybody on the call.

Patty: Sure.

Howard Kurman: Okay?

Patty: Got it.

Howard Kurman: Okay, that will be good.

Casey: Alright.

Howard Kurman: Any other questions? Okay. Well listen, you know this, these are really crazy times, there are all kinds of questions that come up and you know I have been doing this a long time and I do not profess to have all the answers as I have just indicated, at least off the top of my head. So you know I appreciate everybody's participation and in between these telebriefs which occur on the first Wednesdays of every month, if you have a question that comes up, feel free to e-mail me at hkurman@offitkurman.com and I hope that everybody has a safe and enjoyable Labor Day and we will

meet again so to speak on the first Wednesday in October if not before. Thanks a lot everybody.

Casey: Thank you.

_____: Bye.

Howard Kurman: Bye-bye.

_____: Thank you.