LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Okay, it is 9:02 by my official clock. Casey, can you mute these phones please?

All right, good morning everybody. This is the last telebrief in November, and we are moving into December, hard to believe. Okay, lots to report on this morning. I think in the last telebrief that I had I reported that there had been a bill introduced in the Senate on October 15 by Senator Murphy, he is the democrat from Connecticut and Senator Young, the republican from Indiana, called the 2019 Workforce Mobility Act, which in effect would ban non-compete agreements under most circumstances. Well, on November 14th, so just a couple weeks ago, the U.S. Senate committee on small business and entrepreneurship held a hearing on this introduced bill and surprisingly it got some bipartisan support. There were a couple speakers who testified regarding this bill. One was a fellow named Evan Starr who actually is an assistant professor of management and organization at the University of Maryland School of Business down in College Park, and what Professor Starr testified to was largely in support of the Workforce Mobility Act, and he along with another witness testified that they believed that less intrusive means could be utilized by employers to protect business interests such as non-solicitation agreements, confidentiality agreements, and trade secret laws, things that I have talked about in prior telebriefs as sort of less drastic and aggressive forms of employer protection than total non-compete agreements, and one of the things they also recommended was that if there were going to be any non-compete agreements that would be permitted that employers would be obligated to pay employees for the so-called shelf time that they would be out of the market during the period of the non-compete. So I think it is an interesting development and I am a little surprised that some of the bipartisan support on this you would think that this would mostly be the support of the democratic caucus, but it does seem to have some republican traction, and I am sure we will hear more about this in 2020. I will keep you updated, but I wanted to bring this to your attention for those of you who either have existing non-competes or are contemplating the use of non-competes in the future, at least for managerial employees. As you know in Maryland, and I have stated this on several occasions, in Maryland you can no longer have non-compete agreements for rank-and-file non-exempt employees.

Okay, second, those of you who have been on telebriefs, you know we have spent a lot of time during 2019 talking about the new exempt salary

levels that will be in effect come January, that is January 1, 2020. Many of you out there need to make sure that if you are currently classifying any individual as exempt, that they must meet the new exempt test as of January 1, 2020, and that if you decide that people who are making less than that new salary level are not going to be brought up to that level, that they be converted to non-exempt employees and of course that has both morale and legal implications to what you are going to be doing from a wage-hour perspective, and if they are going to be non-exempt, then of course they would have to be notified that in order to be in compliance with the Fair Labor Standards Act, they would have to be paid time and a half for any hours spent or worked over 40 in a particular work week. So I leave that to you. You may want to take a look at your job descriptions, make sure that they meet the duties test, if in fact you are increasing the salary level to bring them in compliance with the FLSA, but not only is there a salary requirement, but as you know there is a duties test for those classified as administrative, executive, computer or professional employees.

Okay, I wanted to move on. I had a client about a week and a half ago who really was inquiring with regard to how to go about conducting an in-house workplace investigation, and there are certain things that need to be done and those of you out there who regularly do these workplace investigations or who have not done one in some period of time, I want to remind you that there are certain things I think to keep in mind when doing these workplace investigations unless you outsource them to let us say your employment attorney or some other person. So, let me mention several things that I would have want to check with to validate your internal workplace investigation. So first, the employee who is bringing the complaint to you, which would merit a workplace investigation and let us say a workplace harassment allegation, obviously you would want under ideal circumstances to get a written statement from that particular complainant in which the complainant is asked to specify the names of any witnesses that that person may identify particularly the specifics about the facts and dates of any incidents that led to the complaint being brought to your attention and the identity of any specific tangible evidence such as text, emails, telephone messages, etc., which may bear on a particular allegation. Now, you know, I think I have spoken about this before, I would not insist as a precondition to conducting the investigation that it be in writing, but obviously under ideal circumstances, you would want that complaint to be in writing. But keep in mind, verbal complaints are just as meritorious in terms of precipitating an investigation as a written statement from that complaining witness. Secondly, it is very important that you tell the witness or the complaining person that you have a non-retaliation policy in place and that you not promise confidentiality at least in the absolute terms that you just indicate to that person that while you cannot guarantee confidentiality, you will protect it to the extent possible

under the circumstances of the case. Thirdly, that hopefully you would gather during the investigation whatever tangible evidence would be appropriate whether that, again text messages, emails, phone messages or you know security footage from cameras that you might have, anything that you think would be of use in advancing the investigation should be preserved and be requested from either the complaining witness or fact witnesses themselves. People always ask me, well, how long should the investigation take. Generally, I think workplace investigations need to be completed as quickly but as thoroughly as possible, so hopefully that would be within a matter of a couple days, maybe two or three days, but again, if particular witnesses are on vacation or on sick leave etc., that may have to be extended, so there is no artificial barrier to an investigation lasting perhaps a week or two but you certainly do not want to go out more than a week or two unless there really is an extreme extenuating circumstance. And next, you want to interview whatever salient witnesses that are identified as having information that will advance the inquiry, and again like my statement on the complaining witness, in the ideal circumstance, you would want written statements from fact witnesses, but again, some of those may not be willing to give written statements. In those circumstances, what you would do is hopefully at the end of your interview, you can read back your notes to the fact witness and ask that fact witness whether or not your notes are accurate and reflect the statements made by that particular witness. Also, your note should be dated and they should be timed, so that you have on your interview notes the date of the interview, the time of the interview, and how long the interview took. Next, obviously, at some point, you need to make a decision based on your conclusions of the interviews that you made, the evidence that you have gathered, and in many cases, you are going to have to make credibility determinations. Those credibility determinations are made pretty much on a preponderance of the evidence standard, not a standard of beyond the reasonable doubt, and you know, you are just going to have to make those determinations as if you were pretty much sitting in a jury in any kind of a civil case that is what is the preponderance of the evidence show you, is it more likely than not that wrongdoing was established or is it more likely than not that wrongdoing was not established. Under any circumstances at the end of the day, you would theoretically meet with the complaining witness separately from the alleged perpetrator to announce your findings and make sure that you document your meetings with both and that you have a written investigatory summary because frequently these investigations may be the subject of a legal claim down the road, and you want to be able to demonstrate that you conducted a thorough and efficient workplace investigation and so that you would have, theoretically anyway, a pretty complete accounting of your investigation from beginning to end, and importantly, during the course of a workplace investigation, if in doubt as to what steps to take or how to take them, you would want to confer with

your employment counsel in order to get his or her guidance for the completion of the investigation as well as to shield certain communication either under the attorney-client privilege or the attorney work product privilege itself. So, I know that many of these statements or many of the things that I have just stated may be sort of old hat to you to those of you who regularly conduct these investigations, but it never hurts to review these concepts for purposes of going forward for these workplace investigations.

Okay, in the sort of realm of administrative agencies and what is up with them, I will tell you that the EEOC and the National Labor Relations Board and the Department of Labor all will be publishing in the very near future their positions on joint employer status. I have talked in the past about the National Labor Relations Board. Basically, I think coming down with a joint employer rule or regulation which will basically indicate that two employers will be deemed to be joint employers under the National Labor Relations Act, where one of the employers exerts substantial direct and immediate control over the essential terms and conditions of employment, such as hiring or firing, discipline, etc., of the second company's employees. The Equal Employment Opportunity Commission joint employer rule may be similar to the NLRB's or may be a little different as may the Department of Labor's, but we will see probably in early 2020 what those three agencies have to say on how they deemed two employers to be the joint employer of a particular secondary employer, and that will be an important thing to pay attention to. Also, with regard to the Equal Employment Opportunity Commission on November 19th, the Equal Employment Opportunity Commission released what it called its Agency Financial Report or the acronym AFR for fiscal year 2019, in which they report on several aspects of its operations – political, financial and otherwise, and this is under the Chair Janet Dylan. She was approved during 2019 as the new Chair of the Equal Employment Opportunity Commission. As I have reported on before, the Equal Employment Opportunity Commission itself is made up of five individuals and that is the EEOC's Chair, the Vice Chair and three commissioners. Of the five members three must be at least acting commissioners to satisfy a quorum and exercise their powers and like the National Labor Relations Board we now have a Republican-controlled Equal Employment Opportunity Commission. In terms of the finances statistically during fiscal year 2019 and that would be the year ending September 30, 2019 the Equal Employment Opportunity Commission reports that it recovered more than $486 million for alleged discrimination victims during that fiscal year. Significantly also they report that during the fiscal year they reduced the charge workload by an additional 12% but that there are still pending charges in the amount of $43,850 which they report is the lowest level in 13 years. Some of you out there may have pending charges which have been in existence for months if not a couple

years, I know that I have some clients who have had position statements pending at the Equal Employment Opportunity Commission for 12 months or more and usually that's not a problem except in discharge cases where the back pay potential clock continues to run. Hopefully in fiscal year 2020 EEOC will proceed and will continue to reduce that backlog so the charges can be resolved one way or another in a more efficient and quick manner and talking about things at the EEOC and dealing with the EEOC I wanted to remind you since I have had several situations during 2019 of clients who have had employees with mental health impairments. Where those employees indicate that they have the need for FMLA leave or an ADA accommodation and suffice it to say that under the ADA mental health impairments are treated the same as physical health impairments under the ADA that is they are deemed to be disability under the Americans with Disabilities Act and thereby precipitating the need for accommodations where appropriate. So mental health conditions which have gotten a great deal of publicity recently whether that is OCD or whether it's anxiety, depression etc., are viewed as worthy of treatments of disabilities under the ADA and certainly worthy of the need for either interactive dialogue between the employer and the employee for purposes of an accommodation or sometimes where you simply don't have enough information as the employer from the employees health care provider to enable you to determine whether or not there is a legitimate need for an accommodation or for what that accommodation may require and I have been involved in several cases during 2019 where I recommended that the employer go back to the employee and perhaps the employees health care provider to get more specific information regarding whether or not under the job description of that particular employee that there is a need for more specific information and there is always this question that I get from employers that is whether they are entitled to get more information from the healthcare provider and the answer to that is yes, if you need that information in order to enable you to make a determination as to whether or not there is a need for an accommodation and if so what is that accommodate like to be able to have the employer have the interactive dialogue with the employee to assess whether an accommodation can be made and if so whether it would place an undue burden on you as the employer either from a cost standpoint or an operational standpoint to implement that particular accommodation. So I suspect that in the upcoming year you will get more of these kinds of requests or requests for FMLA or ADA support either in the need for an accommodation or what that accommodation would look for and are your simply going to have to take these on a case-by-case basis but be aware of the fact that mental health and emotional health kinds of disability issues are just as prevalent frankly if not more prevalent today than physical impairments and you need to be cognizant of that and make your line supervision manager and management aware of the fact that these are just as worthy of your time and attention than if they were physical accommodation issues.

Okay those were the developments for the day. Casey can you take this off of mute please.

Casey: Alright.

Howard Kurman: Okay. Well if anybody has any questions or comments, happy to answer them now in this forum or if you want to email me as you know my email is hkurman@offitkurman.com. Any questions.

Unknown Speaker: I have got quick question on the review for accommodation, is there a cadence that which is appropriate to ask for additional information after you have certified that someone is eligible for mental health accommodation. Is it a six-month or an annual.

Howard Kurman: Well is your question how long does an accommodation need to be honored once there is a legitimate need for an accommodation?

Unknown Speaker: Yes.

Howard Kurman: Okay. So the answer to that is it is obviously determined on a case-by-case basis and it really is dependent upon how long you can accommodate a particular accommodation without it imposing an undue burden on you. So for instance you may have an accommodation which says that in the next four weeks or six weeks the employee needs to be able to work remotely from home in order to perform his or her duties and responsibilities. On the other hand you may make an assessment that after six weeks it's a real problem to accommodate that particular request so the answer really is that it s an ongoing assessment on the part of the employer and there is not an obligation to indefinitely accommodate a particular employee if doing so would impose an undue burden on you so it s really an ongoing assessment. What may be reasonable for six weeks for instance, may not be reasonable for 12 weeks and that is something that you have to take a look at as the determining factor. That answer your question.

Unknown Speaker: It does. Thank you very much.

Howard Kurman: Sure. Any other questions. Okay. Well if not the first telebrief in December will be Wednesday, December 11, 2019 and in the meantime I hope everybody has a happy and safe and healthy Thanksgiving.

Mike: Same to you Howard.

Howard Kurman: Take care everyone, right out, bye-bye.