LABOR & EMPLOYMENT TELEBRIEF
By
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[DICTATION STARTS ABRUPTLY]

Howard Kurman: [_____] clarified the role entrepreneurial opportunity plays in its determination of independent contractor status. So, this was a case involving SuperShuttle at the Dallas Fort Worth Airport and it involved the individuals and I am sure you have seen them in Baltimore where ever you are, the shuttle van drivers, who drive the SuperShuttle vehicles and the board concluded that the drivers of these vehicles are not considered to be employees under the National Labor Relations Act but rather independent contractors who would therefore be excluded from coverage under the National Labor Relations Act. Importantly for purposes not only of the National Labor Relations Act because what happened was, these individuals were sought to be organized by the teamsters Union and the National Labor Relations Board in its press release stated as follows: The Board found that the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain. These factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, resulted in the Board's finding that they are not employees under the Act. The reason I say that its significant is those of you who utilized independent contractors and this is outside really of the ambit of the National Labor Relations Act but whether its under the Fair Labor Standards Act or any other provision need to look at the factors that the Board cited in this particular case which are, you know, lack of control over the individual, the individual's opportunity to make a profit or loss in his or her own venture. In other words entrepreneurial opportunity being the point that the labor board emphasized, so that those of you who have any kind of questionable relationships with individuals that you are currently classifying as independent contractors need to look at the nature of your relationship with these individuals and as I have stated in prior telebriefs the extent to which you have written agreements with these individuals in which the classification of these individuals as independent contractors is emphasized the extent to which the person can make a profit or a loss based on the venture or the extent to which there is a lack of control by your company over the terms and condition under which this person can make a profit or a loss is very important in making sure that the individuals that you are classifying as independent contractors are indeed independent contractors whether it is under the National Labor Relations Act, the Fair Labor Standards Act or any state provisions for instance your

unemployment compensation statutes, whether it is Maryland, Virginia, DC, Pennsylvania, etc. So this is a significant development that you need to pay attention to and again the National Labor Relations Act is as I have spoken before not only applies to unionized employers but non-unionized employers as well.

Okay, you have heard me talk about in the past several telebriefs the national trend in non-compete law towards very strict scrutiny of non-compete from the standpoint of restricting employee mobility from one company to another. So, I wanted to make you aware that last month that would be in January, Marco Rubio, who as you know is one of the senators in the State of Florida and also anecdotally a prior candidate for president back a couple of years ago, introduced legislation in the senate, and the name of the legislation is the freedom to compete act and the basis of this act would essentially eliminate the ability of an employer to subject any non-exempt employee to a non-compete agreement. Whether or not this will get traction in the senate in the house is anybody's guess, because there is not much going on as you all know in the senate and the house of representatives today other than immigration stuff, but its significant, so as you know under the Fair Labor Standards Act obviously employees are classified as either exempt or non-exempt. This act would not touch non-competes where they are covering exempt employees, so whether you have a legitimate administrative professional or executive employee with a non-compete this act would not apply. This act would basically say those non-exempt employees who you are attempting to subject to a non-compete agreement or have already subjected to a non-compete agreement would be void as a matter of public policy. Now last year, 2018, there was another similar bill, this was called the workforce mobility act and it was introduced by Chris Murphy, a democrat in Connecticut and Elizabeth Warren who has announced her candidacy for president from Massachusetts. The difference between that act was it would have voided all non-competes as opposed to the present proposed legislation just having to do with non-exempt employees. That act called, again the Workforce Mobility Act went no where. I do think that this current act introduced by Marco Rubio may gain some traction because after all when you look at it and you think about the public policy implications there is much less of a justification for subjecting a non-exempt employee to a non-compete then it is for an exempt employee. So I will keep you updated as to, you know whether or not this gains any traction in the senate and in the house, but it is in keeping frankly with the national trend that looking at non-competes, now I am not talking about non-solicitation agreements or confidentiality agreements, both of which are given a lot more credence by courts in most states. But this is yet a true non-compete that is making sure that any employee who departs from your company cannot accept a job with a competitor within a certain geographical area and a certain temporal restriction. So, I will keep you updated on that, but

I wanted to make sure that you all know, that sort of in the legislative hopper, at least on the federal side.

In that we are into 2019, we are two months in, I wanted to be make a couple of statements about some handbook provisions particularly those of you who do business in the State of Maryland, which I assume is of course most of you. As you know the Maryland Safe and Sick Leave Act was passed in February of 2018. That act requires that covered employers include in their handbook provisions, the requirements and the coverage under the Maryland Working Families Act otherwise known as the Safe and Sick Leave Act. So you want to make sure that your current handbooks cover those particular provisions under the Maryland Safe and Sick Leave Act and that they are consistent with the requirements of the statutes, so not only do you have to have a poster where you post your employee notices, but you need to include those provisions in your handbook. So, those of you who haven't looked at or reviewed your handbooks in the recent past, make sure that your Maryland provisions include those. Also, many of you include in your workplace harassment policies a prohibition on bullying and I came across an article in the professional sort of publications that I get which I thought was just first rate. This was an article published in a little blog by a law firm called Foster, Swift, Collins & Smith, its out of Michigan, and its really one of the best statements that I could find on really the definitions of bullying. So many of you obviously prohibit bullying along with workplace harassment. But I wanted to just quote from certain provisions that they put in this blog because I found it to be the most comprehensive definition and application of bullying that I have come across in a long time, so again this law firm puts out this blog and they define bullying as, bullying is defined as unwanted, recurring aggressiveness that causes psychological and/or physical harm, while at the same time creating a psychological power imbalance between the bully and their targets. They go on to say there are three concepts that are central to defining bullying in the workplace. One, it must be repeated. So they say bullying does not refer to rudeness or someone simply having a bad day. Research indicates that bullying happens at least once a week for a period of six months and on average can last for a period of two to five years. So again just as though I have spoken about with workplace harassment that it does not usually refer to one single act unless that single act is particularly egregious. So bullying does not usually occur in a single occurrence either and again, this is in their first item or their first bullet point that it refers to bullying happens at least once a week for a period of six months. I do not know that I would agree that you need six months, but it is clearly longer than a single occurrence. Two, it causes harm, physical and psychological to targets as well as individuals who witness it. And that is an important point that we are really talking about the effects of bullying in the workplace. Three, it is all about psychological power so they go on and

they say gradually and as long as the target says or does nothing the bullying will continue more frequently and aggressively. Two, eventually an understanding is reached that the bully has power and the target does not. Three, the target is left feeling helpless from the abuse. And then, they go on, and I think this is important too, to say bullying in the workplace falls into three categories. One, aggressive communication. So they say this includes insulting remarks, shouting, angry outbursts, finger pointing, invading someone else's personal space and harsh emails or texts. Two, humiliation. This includes ridiculing or teasing, spreading rumors or office gossip, ignoring peers, playing inappropriate jokes and talking over social media or the internet. And three, this is manipulation of work behavior such as removing tasks that are imperative to job performance, giving unmanageable work loads or impossible deadlines, changing tasks unnecessarily and purposely withholding important information. So as we all know workplace harassment really predicated upon egregious acts or a series of offensive acts that are based upon a person's protected characteristic whether its race, sex, gender, religion, national origin, disability, etc. Whereas bullying does not depend upon a protected classification or characteristic but really more of an imbalance of power between the bully and the person who is subjected to the bullying. So those of you who are looking to define with little more specificity workplace bullying in your standalone policies or your handbook I find that this was a pretty comprehensive and good definition of workplace bullying.

Okay, I wanted to make you all aware that the Equal Employment Opportunity Commission has recently published the fact that those of you who have to submit EEO-1 reports usually those EEO-1 reports are due by March 31st. Because of the shutdown, the Equal Employment Opportunity Commission has indicated that it would be permissible to submit these by May 31, as opposed to March 31st. So again those of you who have those responsibilities make sure that you know that you have an extra couple of months to report those for purposes of getting them into the Equal Employment Opportunity Commission. Those of you who deal with ADA accommodations, I think the trends today seem to be many employees who make requests for flexible work schedules and also remote work options. I think that depending on your operational needs and requirements, you may or may not be able to accommodate flexible schedules. Again, the standard is whether or not it is reasonable under the facts and circumstances and whether such a request would impose an undue burden on your company. Same thing with remote work. I find that it is increasingly common today for employees to request the ability or opportunity to work from home one day, two days, three days. I have even had some clients who have consulted with me about FMLA request or ADA request for accommodations where the employee wants to work from home at least on a temporary basis on a regular schedule. And those

have to be really analyzed on a case-by-case basis depending upon the particular job description that the person has, the needs that your company has for the person to be in the office as opposed to working remotely from home. What operational issues will be posed by the individual working remotely, and whether you can really tolerate that particular work schedule. So, I think you need to look at that on a case-by-case basis, and there is no bright line test. It is a question of whether you can reasonably accommodate the employee at the same time as avoiding operational issues in your workplace. I had another client about a week ago who consulted with me about the time-keeping for non-exempt employees. Now as you all know, you have to have a system for accurately keeping track of time that non-exempt employees work. The question here was those employees who may be clocking in 15 minutes before the beginning of the shift or clocking out more than 15 minutes after the time that the shift ends, do you have to pay those employees and can you discipline those employees. So you all ought to have a policy which is clear for non-exempts, generally under the Fair Labor Standards Act, you will be able to have a 10 minute leeway, 10 or less leeway, that is employees who clock in within 10 minutes generally will necessarily have to be paid and same thing with clocking out within about 10 minutes after the end of the shift. The FLSA considers that to be de minimis. However you got to make it clear to your employees that more than 10 minutes on either side of the shift needs to be minimized if not eliminated. Now if the employee continues to do that you may have to still pay the employee under the Fair Labor Standards Act as time worked but you can discipline the employee ultimately for clocking in more than 10 minutes before the beginning of your shift or clocking out more than 10 minutes after the end of the shift. So you need to pay attention to that, you need to have a time-keeping system, which obviously indicates that the employee should be clocking in no more than 10 minutes before the beginning of a shift or clocking out no more than 10 minutes after the end of the shift, and you do not want to get stuck with a situation where the employee makes a claim for working off the clock or working on the clock for time that you say should not be counted as time worked. Remember, you can discipline an employee as violating your policy against time-keeping, but at the end of the day docking the employee is not going to work for the non-exempt employee where the non-exempt employee claims time worked under the Fair Labor Standards Act.

Finally, I want to mention a case, it was just decided on February 5th by the Second Circuit in a case called Velarde has to do with the issue of intern versus employee, and again, as you know, in a recent telebrief I talked about the Department of Labor changing its test essentially to looking at to whether or not the intern is primarily benefiting himself or herself or the company as to whether or not that individual be classified as an intern or an employee and this Velarde case the Second Circuit, a very

influential appellate circuit, in the context of an individual working for a for-profit cosmetology training school again basically restated the situation as to whether or not the benefit was primarily flowing to the individual or to the putative employer and stated that the primary benefit in this case was to the individual and not to the company, and therefore, the company properly classified the individual as an intern as opposed to a paid employee. So, if those of you out there who are looking to engage individuals as interns, you know, you really need to look at factors that the Second Circuit looked at in terms of whether there is a clear understanding that that person is going to be an unpaid intern, as to whether or not it looks more like an academic program than an industrial replacement for an employee, and above all, whether or not the primary benefit is flowing to the individual as opposed to the company in terms of whether or not the individual should be classified as an intern or an employee. Okay, those are the developments for the day. Casey, can you take this off of mute.

Okay, thank you. Any questions or comments by anybody?

_____: Howard, will I get a copy of that thing you talked about.

Howard Kurman: I'm sorry, copy of what.

_____: You mentioned that article…

Howard Kurman: On bullying?

_____: Yeah.

Howard Kurman: Yeah, if you send me an email, I'll get it back to you at hkurman@offitkurman.com.

_____: Okay, thank you.

Howard Kurman: Any other questions?

_____: That ruling about the independent contractors, does that have any effect on IRS consideration of whether or not someone is an independent contractor or not?

Howard Kurman: Well, as you know, each of the agencies have their own tests and traditionally the IRS has used the 20 factor test, but the truth of the matter is that the factors that the NLRB enunciated are similar really in general scope that what the IRS is looking, so I do think it has some influence although each agency has its own test, again, the IRS has traditionally used its own 20-factor test.

_____: Okay, thank you.

Howard Kurman: Sure. Okay, I appreciate everybody's participation and the next telebrief will be on the fourth Wednesday in February. Thanks a lot.