

LABOR & EMPLOYMENT TELEBRIEF

By

Howard B. Kurman, Esquire

April 24, 2019

Howard Kurman: Okay. We are at 9:02 on my official clock, so Casey can you mute. Hi, good morning everybody. There is a lot to cover this morning, as always and welcome to any new participants.

I wanted to start off as we probably should at the Supreme Court, so the Supreme Court on Monday, you probably all read about it, but if you haven't I will bring it to your attention. The Supreme Court on Monday agreed to accept for argument a case which will decide whether the discrimination provisions under the Civil Rights Act of 1964 prohibit discrimination on the basis of gender identity and sexual orientation. Very big case to be heard in the fall term of this year. Of course many states including Maryland have their own statutes prohibiting discrimination on the basis of at least sexual orientation and some on gender identity. But this has been percolating around for a while at the Supreme Court and there is a split among the circuit, so it is not a surprise to me that they have accepted this for oral argument. The interesting thing will be that they will hear oral argument in the fall of this year with a decision coming out sometime in 2020 in the heat of the presidential campaign. So we don't know what will happen, it will be interesting to see how Justice Kavanaugh comes down on this issue. We have a number of so called strict constructionist on the court and its likely to be a very close call on whether or not the Civil Rights Act of 1964 and its prohibition on sex discrimination will be expanded to include gender identity and sexual orientation. Oral argument again to be heard this fall.

Another development at the Supreme Court is that this past Monday, oral argument was heard on an interesting sort of procedural case. The case is called Fort Bend County v. Davis, comes out of a county in Texas. What happened here was a woman filed an EEO charge, got a right to sue letter and then sued this county in Texas, but in her lawsuit, she brought a claim for retaliation. As most of you know, it is not unusual at all when a substantive EEO charge is accompanied by a retaliation charge, so in this case, what happened was she filed her charge with Equal Employment Opportunity Commission, got a right to sue letter, filed a suit, but in the suit, she included a claim for retaliation which had never been adjudicated or handled in any way at the Equal Employment Opportunity Commission. Most of you who have ever dealt with the EEOC know that an employee generally starts the process by filing a charge under oath. The question that was put before the Supreme Court this past Monday was if an employee bypasses the filing of a charge, even in this case like a retaliation charge, does that divest a Federal Court of jurisdiction to hear

that particular case. So while most times employees do file charges, this is going to come out most times in a retaliation charge or a retaliation claim and the Supreme Court heard arguments Monday, I don't know whether they will decide it this term or next term. Another interesting side light to this just for your information is that the lead attorney for the Fort Bend County which is the Defendant in this case was Neal Katyal. Some of you may recognize that name, may have seen him very recently on TV, various news shows talking about the Mueller Report because Neal Katyal in fact was the department of justice attorney who promulgated the rules and the regulations governing the appointment of special counsel. So its sort of an interesting side light on that.

Okay, let me turn my attention to legislative developments in Maryland. So as you know the 2019 general assembly session ended at midnight on Monday, April 8th and there were many particular pieces of legislation that will impact Maryland workplaces if they are signed into law and not vetoed or if this veto is not overwritten by Governor Hogan. The first of course is the one that got the most publicity, that's the minimum wage statute and obviously you know that for employers with 15 or more employees in the State of Maryland as of January 20th you will have to pay your employees at least \$11 per hour. With increments going up year by year until you reach January 1, 2025 when the actual minimum wage in the state will be \$15 an hour. For those employers who have 14 or fewer employees you still need to raise your minimum wage by January 20, 2020 to a \$11, which you don't get to the \$15 level until July 1, 2016. Significantly, the new minimum wage law also allows an employer in the state of Maryland to pay a training wage which is set at 85% of the state minimum wage for employees under the age of 18.

Alright. A second bill, which I don't think got very much play was an expansion of employer obligations and liability for work place harassment. So this was House Bill 679, Senate Bill 872 and it has many tentacles to it and I will go through them fairly quickly. So first, the definition of employee under this particular new piece of legislation is expanded to include independent contractors. So remember generally, we say that independent contractors under many statutes are not considered to be employees, under this new statute they will be considered to be entitled to the protections of this workplace harassment act. Secondly, the definition of employer under this statute applies now to any employer **Audio Cut** employee, so under the general discrimination statute, you know that it applies to employers of 15 or more employees, this bill would extend work place harassment protections to a single employee of an employer. The definition of harassment is expanded to include not only sexual harassment but harassment based on race, color, religion, ancestry, national origin, sex, age, marital status, sexual orientation, gender identity or disability. So going back to the sexual orientation and gender identity,

it is useful to know that of course in Maryland we have protections that we do not have on the federal level. And another aspect of this law is that it imposes liability on an employer for actions taken by anyone who even supervises or evaluates the work of an employee so that person may not have the indicia of being a statutory supervisor or manager but still may through his actions or her actions impose liability for harassment. Another significant element to this statute is that it expands the period of time within which an individual can file a charge with the Maryland Commission from six months to two years; that is significant. And it also expands the time for filing a lawsuit from two years to three years. So assuming that Governor Hogan does not veto this law, this will become effective in October. The next statute that I really did not realize got any play at all was the so-called Organ Donation Leave Statute. This is House Bill 1284, Senate Bill 705, and what this statute requires is that employers with 15 or more employees in the state of Maryland must provide eligible employees with up to 60 days, 60 business days, of unpaid leave during any 12-month period to serve as an organ donor and up to 30 business days to serve as a bone marrow donor. The eligibility requirements are similar to those which are found under the FMLA, so that in order to be eligible, the particular employee must have been employed for the employer for a 12-month period and work 1250 hours during the previous 12 months. So in addition to being able to take this leave, like the FMLA, the employee is entitled to job reinstatement to the same or an equivalent position at the end of that particular leave. And if it does become law, this will be under the purview of the Commissioner of Labor and Industry. The last statute that I wanted to mention is a Statewide Ban-the-Box statute, and this will provide that any employer with 15 or more employees will be prohibited from asking an applicant's criminal record prior to the first in-person interview. When that interview occurs, information may be asked for and disclosed. Now remember, in the State of Maryland, there are three counties that have their own Ban-the-Box statutes. Those are Baltimore City, Prince George's County and Montgomery County. So, this statute will not supplant those, but it will be a statewide ban on asking pre-employment or until you have an actual personal interview questions about criminal background.

The last piece of legislative news that I wanted to pass on was that starting as of April 15th, just a week or so ago, there is a Baltimore City ordinance which requires all employers in Baltimore City to provide lactation accommodations for breast-feeding employees, and employers must develop a written lactation accommodations policy to be published either independently or in their handbooks. So, under the ordinance, this would apply to employers of two or more full-time equivalent employees, and the employers must provide both a reasonable amount of break time and a location for employees to use for purposes of either expressing breast milk and the breaks do not have to be paid other than the fact that if they do

have paid break time, then they are entitled to use it for that purpose. It is interesting how the ordinance has requirements regarding the actual physical accommodations. So, according to the ordinance, the location for this purpose has to be within close proximity to the employee's work area meaning no more than 500 feet and two adjacent floors from the work area being served. It is got to shield any occupants from view and from intrusion from others. It cannot be a bathroom or a closet. It is got to be safe, clean and free of toxic or hazardous materials. It has to have a door that is able to be locked from the inside. It has to have a surface such as a table or shelf on which a breast pump and other items may be placed. It has to have a place to sit and have at least one electrical outlet. Also has to have a sink with running hot and cold water and refrigerator for storage of breast milk unless those are elsewhere in close proximity to the employee's work area. So it is a very specific ordinance, and all employers are required to implement a written lactation accommodation policy stating that employees have the right, a legal right to request the lactation accommodation in setting forth the process for having that discussion. So those of you who have employees and do business in Baltimore City, you need to pay attention to that.

An interesting development in New York, and the reason I bring this up is I recently did a webinar with some colleagues on drugs and alcohol in the workplace and, in particular, the impact of medical cannabis and even recreational cannabis on drug testing. So, on April 9th, again a couple of weeks ago, New York passed a law which assuming that it is signed by Mayor de Blasio will prevent pre-employment drug testing for marijuana and THC. Now, THC is the active ingredient in marijuana. So, under the bill, those employers that submit or require applicants to submit to pre-employment drug and alcohol testing will not be able to test for marijuana or THC. And I find that this is probably something that, my guess is, will become more commonplace throughout the country. As you know, in Maryland, we have medical marijuana, but it is still prohibited on the federal side and so all of you in Maryland can continue to test pre-employment for marijuana, cannabis, THC, etc. But this may be the signaling of a trend. There are many employers throughout the country because of the complications with medical marijuana who have already forgone including marijuana or THC among their drug panels when they do drug testing. The statute would not apply to safety-related positions or those positions such as commercial driving positions where you have to obey federal laws on the restrictions of cannabis.

Okay, the EEOC came out with interesting statistics every year. They published their statistics on discrimination cases that are filed, resolved, etc., and so let me just review a couple of these because I found it interesting. As much as we know that the Me Too movement has had great impact on workplaces, it is interesting that employees according to

the EEOC filed fewer discrimination charges in the last fiscal year, the last fiscal year ended September 30, 2018, than they have in more than a decade. So during that fiscal year, the EEOC took a little more than 76,000 charges and this was down about 8,000 charges from the 2017 fiscal year. It is kind of an interesting development. Another interesting development is that workers complain statistically more about retaliation than any other cause. And as I said at the beginning of our discussion, it is almost uniform now that when an employee files a discrimination charge either with let us say the Maryland Commission on Civil Rights or the Equal Employment Opportunity Commission, it almost universally is accompanied by a retaliation charge claiming that once an employee brought to the attention of his or her employer a protected act that the employer then turns around and retaliated against that particular employee. In terms of sexual harassment complaints, those complaints made up a little less than a third of all sex discrimination charges were about 7,600 in total. The agency resolved in fiscal year 2018, 90,500 charges. Now the interesting thing about that resolution statistic is that about 64,000 were resolved by being dismissed as lacking cause. So it is like two-thirds during fiscal year 2018, two-thirds of the charges that were filed against employers, were resolved on the basis of either a no-cause finding or a dismissal and a right to sue letter. So that is an interesting statistic it seems to me and gives some of you out there some hope that the EEOC is not a rubber stamp simply hearing from employees and then finding in their favor. The other interesting thing is that the states with the most complaints or charges were California which is not hard to understand, Georgia, Illinois, and Pennsylvania. The state with the least number of charges was Wyoming, again really not hard to understand.

The last thing that I want to mention is that the senate has at long last confirmed Cheryl Stanton to head the Department of Labor's Wage and Hour Division. That is significant because Stanton comes from a management labor law firm Ogletree Deakins, which is a very well known firm. So she has a management orientation and there is some big issue, as you know at the Department of Labor Wage and Hour Department, among those the new white collar exempt salary adjustments. So those were the developments for the day. Casey, can you take this off of mute please?

Casey: All right.

Howard Kurman: Okay. As always I am happy to answer any questions that anybody may have?

_____ : I have a quick question about the organ donation leaves.

Howard Kurman: Yeah.

_____ : Because it, would you, if it does pass or whatever, would you recommend that we update our policy to include that it runs concurrent with FMLA?

Howard Kurman: I think that while FMLA would not expressly cover this because you know, it is not one of the cited reasons, certainly at least a portion of that would be a commencer with organ donation because when an employee donates an organ, there is a medical procedure obviously that takes place. So it would be covered by FMLA, at least a portion of it and certainly a portion of it would be covered by Maryland Safe and Sick. So, yeah, I think that your policy would be, you would be wise to amend it and the wording would have to be carefully crafted but I would not do anything until we see whether it is signed into law by the governor.

_____ : Of course, thank you.

Howard Kurman: Sure. Any other questions?

_____ : Yep.

_____ : Howard, this is _____.

Howard Kurman: Yeah, go ahead, I am sorry.

_____ : The question about the lactation policy mentioned that it is for Baltimore City, now **__Audio Cut__** Hanover is that still considered part of Baltimore City and would be included in that **__Audio Cut__**.

Howard Kurman: I am sorry, you cut, you cutoff. Could you just repeat the question?

_____ : Sure, being out in Hanover, would that be all inclusive of Baltimore City or is just Baltimore City proper?

Howard Kurman: It is within the confines of Baltimore City. Is Hanover Anne Arundel County?

_____ : Yes.

Howard Kurman: Yeah, so that would not be included but if you have employees working in a facility in Baltimore City, it would.

_____ : Understood. Okay, thank you.

Howard Kurman: Okay, sure, sure.

_____ : Howard, I have another question about the lactation policy. So **__Audio Cut__** from all of the conditions except hot and cold running water in the room but it is located...

Howard Kurman: No it does not have to be in the room, it just has to be accessible within a reasonable distance...

_____ : Okay, and it is accessible if a bathroom is considered accessible, yeah, then it would be.

Howard Kurman: Yep, yep, no problem with that. So all these statutes that we talked about for Maryland, I will keep you up-to-date as my information is that Hogan is not going to veto these, but you just do not know, but I will keep you....

_____.

Thanks everybody. I hope that it was useful and we will see you, at least figuratively, the second Wednesday in May. Thanks very much.