LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
July 10, 2019

Howard Kurman: Okay, it is 9:02 by my official clock. Casey, can you take this off on mute please? Okay, thank you.

All right, well, good morning everybody and it is hard to believe we are into July, but so be it we are into the doldrums of summer as they say. Again, I apologize in the last telebrief those of you who were on it, my mistake at the end, I just kicked my phone and that was that. Okay, many things to report as usual today. We will start just with, you know, sort of a half political note and half labor note, which it will be interesting to see whether our present Secretary of Labor Mr. Acosta stays in its position in view of all the brouhaha surrounding Jeffrey Epstein situation and the criminal charges that are pending against him. It does seem to me as a lawyer that there was much irregularity that took place in the prior case with Mr. Epstein. I do not know what happened, but I am not sure that Mr. Acosta will be able to withstand the pressure on him. So my guess is before too long you will see a tweet from Mr. Trump who will say he is getting rid of Mr. Acosta.

Okay, talking about agencies those of you who have a responsibility for filing EEO-1 reports know from prior telebriefs that I have talked about that in addition to the traditional EEO-1 report that it is required to be filed. The EEOC has now required that it's so-called component 2 compensation data will need to be filed by September 30th for the years 2017 and 2018. As you know this will require that you include classification and pay data and hours worked for those two years and again has to be done by September 30. Well, the EEOC has now on its website posted guidance and some sample forms and frequently asked questions in a guide book on its website, so there is a component to form, an 18-page instruction book, and a two-page fact sheet and it also provides useful links to the EEO-1 and the job class and the NAICS job classification guide. So those of you again who have responsibility for filing your EEO-1 reports, just know, you do not have all that much time to start getting this data together in view of the fact that the report, the component 2 report is due by September 30th. So go on the EEOC's website and you will be able to get information regarding this particular requirement. Talking further about sort of an EEOC-connected issue, as you know, in the next Supreme Court term, actually on October 8th, the Supreme Court will entertain oral arguments on three cases having to deal with whether or not under Title 7 of the Civil Rights Act of 1964 the prohibition on sex protects an individual employee on the basis of either gender

discrimination or gender identity. And of course this would be a very controversial oral argument it will be much reported on by the media and I think that interestingly to me there has been a great deal of support for the, I guess, employee viewpoint on this by people or associations that you would not think would be in support of it. So, leading businesses and some prominent Republican ex-officials, advocacy groups have submitted amicus briefs, friend of the court briefs to the Supreme Court which was submitted last Wednesday that was the deadline. And there were some interesting things about this that you probably would not have anticipated. So for instance, Amazon Google and more than 200 other companies argued in support of an expansive reading of Title 7 in its brief saying "the alternative would have wide ranging negative consequences for businesses, their employees and the United States economy." They went on to say our nation's employers and employees would benefit from this court's recognition that members of the nation large and productive LGBT work force are protected from sex-based discrimination in the workplace. They went on to say in their brief that a narrow reading of the statute would undermine the nation's business interests and they also stressed that workplace diversity helps the economy. So it is interesting to me that it is sort of counter intuitive, you may have thought that in the amicus brief they would argue for a narrow view of Title 7 discrimination ban on sex but that is not the case. And it will be interesting to see who is in the majority on this case or in fact whether we have more than a 5:4 decision one way or another, but oral argument is scheduled in this case on October 8th, and it is interesting also that those of you who have such an interest that you may not know that all oral arguments are recorded and you can certainly listen to those oral arguments if you like. I think they go on the Supreme Court's website a day or two after the oral argument. So stay tuned for that and we will see how that develops. I do not think that we will have a decision by the Supreme Court until the winter or spring of 2020. Assuming another EEOC matter, assuming that we do not have anybody on the call for our MedStar, the EEOC reached an out-of-court settlement very recently with MedStar and its outpatient services division. However, claims by employees that its healthcare service providers attendance policies failed to accommodate disabled employees. So I know that MedStar is a very large employer, employees more than 30,000 employees, and the claim was that they were not making appropriate exceptions to accommodate disabled employees. The terms of the settlement were not made public, but it was publicized that there was a settlement and the statement from the regional EEOC director was we commend MedStar Health and MedStar Ambulatory Services for working cooperatively with the EEOC to resolve this matter prior to litigation. He goes on to say we encourage all employers to review their policies and procedures including attendance policy to ensure that they provide for reasonable accommodation and equal opportunities for people with disability. So again word to the wise, it is one of the things that obviously

the EEOC looked at in today's day and age both with regard to individuals who are in an FMLA leave individuals who are coming off an injury or illness and you got to make sure that your attendance policies are flexible enough to account for reasonable accommodation when it is necessary.

Speaking about the FMLA, as many of you know, it has been a long time more than a decade since the Department of Labor made any changes to the FMLA regulation which in and of themselves are voluminous. I have often said in an editorial comment, that for a statute which should not have been really that complicated there are over presently a 100 pages of regulation implementing the FMLA. There is an indication that the Department of Labor next year may be considering issuing new regulations which would take into account, according to the DOA, solicit comments on ways to improve the regulations under the FMLA to one, better protect and suit the needs of workers, and two, reduce administrative and compliance burdens on employers. I have no idea what they would have in mind in terms of reducing the administrative and compliance burdens on employers which are already substantial and if they are talking about increasing the rights of employees under the statute, I am not sure how you will reconcile both of those things but I guess we will just stay tuned.

Very recently the National Labor Relations Board released an advice memo. This comes from their office of general counsel and this has to do with handbook provision which is I think comprised a good deal of what the National Labor Relations Board has considered both under the Obama administration and now seemingly under the Trump administration. The difference being that the National Labor Relations Board under the Trump administration is much more employer friendly, as you might imagine, than it was under the Obama administration. So I want to review some of the rules that were contained in this advice memo and how it may apply to your particular provisions in your handbook or your standalone employment policy. So they passed on a number of rules in rendering this advice or rendering a number of policies, so I am going to go through some of these. One, the policy stated "Obtaining unauthorized confidential information pertaining to clients or employees." The general counsel said that because this rule addressed accessing or obtaining of confidential information, it would not affect employees' rights under Section 7 to discuss their terms and conditions of employment and therefore would be permissible. Secondly, they considered a policy which stated that "Rude, discourteous or unbusinesslike behavior; creating a disturbance on company premises or creating discord with clients or fellow employees would also be permissible." The general counsel found that the rule to be a lawful civility policy and it said that requiring criticism of fellow employees or supervisors to be civil does not affect the protected right under Section 7 to criticize. So that is a little change from

what we saw under the Obama administration which found similar types of rule to be impermissible under Section 7 of the National Labor Relations Act. Thirdly, it passed on a policy which stated "Unbusiness-like conduct, on or off Company premises, which adversely affects the Company services, property, reputation or goodwill in the community, or interferes with work." They found that to be permissible because in the general counsel's mind this would serve the employer's legitimate business interest of maintaining discipline and productivity on-duty, as well as prohibiting offensive or inappropriate conduct off-duty. Another policy which they approved stated "Disparaging, abusive, profane or offensive language" and "illegal activities." So they approved that. They also approved the solicitation rule which stated that solicitation activities during non-working time must be "in good taste." That surprised me a little since I think "in good taste" is a little ambiguous and is probably in the eyes of the beholder, but the general counsel found this to be a lawful place, time, and method restriction. Another significant policy which they approved, they call it the Electronic assets rule. So the rule prohibited employees from using company "electronic assets" to access social media accounts. And as you know I talked about in prior telebriefs a case called Purple Communications in which the existing Board Law under Obama, and I think it will be reversed under Trump, said that employees have the right to use company email systems to engage in protected communications during nonworking time. But this Electronic assets rule did not extend Purple Communications to these different kinds of electronic assets. And lastly, they found permissible social media rule which stated were prohibited posting "that reasonably could be viewed as disparaging to employee." Again, its kind of surprising to me because some thing like this would not have passed muster under the Obama administration. On the other hand, a General Confidentiality Rule is found to be illegal and this rule stated that all information gathered by, retained or generated by the company is confidential. The GC found that this was overbroad because it could have confident information such as wages and working conditions about which employees obviously have a Section 7 right to comment and to discuss among themselves that was found to be illegal as well as the social media policy which simply stated employees should refrain from posting derogatory information about the company on social media sites and proceed with any grievances or complaint through the normal channel. The GC found this to be overbroad and generally again invoked the protections of Section 7 of the National Labor Relations Act. So its an interesting memo, sometimes the actual National Labor Relations Board gives deference to GC's memo, sometimes it does not, but it's a good indication of the direction in which the National Labor Relations Board is following and of course those of you and I have spoken about this numerous time. The National Labor Relations Act does not just pertain to unionize employees that is a assumption they did tell by many people who don't have connection with

National Labor Relations Board or Act but that is a policy, the protection to the National Labor Relations Act apply to all non-supervisory employees whether they are unionized or not.

And the last thing that I mention this morning, in a 5:4 decision couple of weeks ago in a Supreme Court case. The case involved the degree to which the Supreme Court or a court has to give deference to agency interpretations of its own regulation and this would pertain to you all with regard to the Department of Labor, kinds of interpretation, EEOC, OSHA, etc. You know, what the Supreme Court basically said in a case called Kisor v. Wilkie, essentially what the Supreme Court said is that where an administrative agency like Department of Labor or EEOC's interpretative regulations or interpretations of its regulations are ambiguous. They will give deference to the agencies interpretation. If certain conditions are met, so that means that the regulation must be genuinely ambiguous and the agency's interpretation has to come within its zone or reasonableness that a court would find before it would defer to the expertise of that particular agency. It's a very technical point that I just wanted to raise it to you because we all deal with regulations whether those regulations are from the Equal Employment Opportunity Commission or whether they come from the Department of Labor or the National Labor Relations Board, all of these agencies that cross our desk from time to time in the HR and employment law field, so you should know that there has been a very recent decision by the Supreme Court having to do with the degree to which courts must give deference or should give deference to the agency's interpretation of its own regulations.

Okay, those are the developments for the day. Casey, can you take this off of mute.

Casey: Okay.

Howard Kurman: Are we off mute, Casey.

Casey: Yeah.

Howard Kurman: Okay. If anybody has any question, I am happy to field it.

Anne: Howard, in your experience how much, I am thinking of the NLRB General Council's advise memo, in your experience how much deference is there given to the General Council's advise memos by regional directors.

Howard Kurman: I think, Anne, in my experience there is a great deal of deference by board members towards General Council's memo, but just keep in mind that, you know the composition of the board goes up and down depending on

who the president is and with that, you know, you can have different General Council and that's what happened here. We have different General Council than we had under Obama and we have a much more employer friendly board as well as the General Council. Whether that will extend past 2020 remains to be seen, but they usually do give a fair amount of deference.

Anne: Thanks.

Howard Kurman: Sure. Any other questions.

_____: Howard, what's the status of the litigation with regard to the EEO _____ I thought I read that it was ongoing even though this day _____.

Howard Kurman: You know, you cut out, I am sorry, the litigation involving the EOC and what?

_____: Yeah, the EEO regarding component to compensation data, I thought I read somewhere that the EOJ was still fighting it, but the pay is no longer in place and wondered if you knew the status of _____.

Howard Kurman: As far as I know the appeal is still pending and I don't know whether we will have any kind of disposition prior to September 30th which is why I indicate that you should assume that those of you who have more than 100 employees are going to be obligated to file that second part of the EEO-1 report by September 30th. If something changes, between now and then I will certainly let you guys know on an ensuing telebrief. Any other questions. Okay. If not we will literally not see you in two weeks but figuratively we will. So everybody have a good rest of the week and we will catch up soon. Thanks.