

## LABOR & EMPLOYMENT TELEBRIEF

By

Howard B. Kurman, Esquire

August 14, 2019

Howard Kurman: Alright, it is 9:02 by my official clock, so Casey, can you mute these phones please?

All right, good morning everybody. This is the first telebrief in August as the summer is quickly passing by. All right, so let me get to it, a lot as always to report on. I recently came across an article by a law firm called Davis Wright Tremaine, and I want to give them the appropriate credit for this. The title of the little article is Move Over, Millennials: Make Room for Gen Z. I have never heard of Gen Z but it has some practical implications for those of you who do hiring and retention. So, let me get right to it because I want to read this little article to you, I found it pretty interesting. So here it goes:

Generation Z has hit the job market. The workplace now has several distinct generations working together, each with its own unique perspectives, communication styles, and perceptions. Although these differences may present collaborative challenges, family businesses can anticipate and overcome difficulties by learning about their future employees and leveraging each generation's strength. Keep in mind there are generational norms that characterize Generation Z even though individuals may not exhibit all or any of these norms. So, who are they? The article goes on to say Generation Zs are those born between 1995 and 2010. In other words, employees who are or at least probably 24 or 25 years old. This generation has grown up in a connected world where they constantly receive updates from their buzzing smart phones. Accustomed to flipping between a range of stimuli, many Gen Z employees are natural multitaskers. Due to their information intake level, many will also be self-starters who know how to do research and find innovative solutions to problems. Shaped by events like 9/11 and the housing crisis, Gen Z has developed a pragmatic attitude towards achievement. Their outlook on social and economic stability has additionally been driven by soaring college debt and the polarized political climate. Gen Z understands the need to work hard to get ahead; motivated by security, they will become competitive players in the workforce.

What do you need to know? For starters, recruiting methods need to be updated. Gen Z'ers are digital natives and will expect online and easy-apply processes. By investing in new technology, traditional forms of hiring can be transformed to creatively showcase a business's culture and

growth opportunities. Businesses should utilize social media platforms to reach Gen Z and increase candidate applications.

Glassdoor economic research analyst, Amanda Stansell, affirmed that Gen Z applicants will likely favor employers who can demonstrate via their job descriptions, interview processes, and other online forums, that they value culture, career opportunities, and trust in senior leadership, along with a balance of benefits.” The most diverse generation to date, businesses should address diversity and inclusion and how they engage in related efforts as well.

Focused on job security and predictable growth, fewer Gen Z’ers are seeking graduate degrees before entering the workforce. With an earn-to-learn and ready-to-work mentality, they expect to be rewarded for their hard work and receive frequent promotions throughout their career.

Instilled with a sense of caution, Gen Z employees will repay being aided in their advancement by being loyal and long-term employees.

Finally, What they can contribute? If properly embraced, the talents and skills Gen Z’ers can provide will particularly benefit family businesses. Their entrepreneurial spirit paired with their knowledge of technology will encourage progress in both the physical and digital realms. By diversifying the workforce, this generation can have a positive impact on the family business culture and online presence. By facilitating a social connection between its employees, family businesses will create a constructive, yet encouraging work environment. Each generation can work together to identify weaknesses and then provide training to one another in their respective strengths. If family businesses can build bridges to mend generational gaps, they will foster a functional workplace for all generations.

I found the article very, very provocative and I don’t believe, by the way, that it only applies to family businesses. It seems to me that it would apply to any organization today and those of you who have hiring and retention responsibilities may want to think about some of the points that were made in this little article. Again, you know, I think we all tend to think of a lot of the recent articles and space devoted to millennials, but I wasn’t even aware that there was this so called Generation Z out there.

Okay, probably onto less esoteric stuff. Back in the beginning of August, so just a couple of weeks ago, the Senate confirmed Sharon Fast Gustafson as the new General Counsel for the Equal Opportunity Commission. The General Counsel’s position is an important one because the General Counsel for the EEOC in large part determines litigation strategies and initiatives on behalf of the agency. Interestingly, Ms.

Gustafson is a solo practitioner from just south of Baltimore, in Arlington, Virginia and interestingly she represents both employers and employees. So at least in the new General Counsel's position we have somebody that has somewhat of a practical bent, we hope, when it comes to litigation issues on behalf of employers. It remains to be seen, of course, what the major initiatives will be under her tenure but she has been confirmed and I am sure we can await some public statements from her as to the major litigation initiatives of the Equal Employment Opportunity Commission. Speaking again about the Equal Employment Opportunity Commission, and this comes out of Los Angeles, the EEOC in Los Angeles, which recently denied sort of a routine request by an employer for an extension of time within which to respond to an EEOC charge, those of you who have handled internally EEOC charges or who have participated with your outside employment counsel, know that in the past, the EEOC has routinely granted extensions of time within which to submit position statements but in this situation in Los Angeles, the EEOC responded to this particular company that while in the past they have granted such extensions routinely, that there is now a mandate from the administration to move cases along quickly and that extensions will be granted only under extraordinary circumstances. What we don't know is whether this is simply relegated to the LA district of the EEOC or whether it is really a nationwide initiative on behalf of the EEOC. If you go on their website, the EEOC notes that an extension of time will only be granted "when it is clear that the respondent, meaning the employer, is working with due diligence to supply all of the necessary information." So assuming for a second that the EEOC nationally may take a more stringent view towards extensions of time in responding to a charge, I think the correct assumption now is that it may not be granted as a matter of course and that you need to be careful about missing deadlines with the Equal Employment Opportunity Commission. It does not mean that you can't request an extension of time if you have a legitimate reason for doing so, I know most of the charges that I defend on behalf of my clients, I usually as a matter of course will request via email and the EEOC's portal that an extension of time be granted because in many cases the period of time within which they give you for responding to any EEOC charge is not all that large. So I generally as a matter of routine send an email and just assume that it will be granted but I think you have to be a little careful about that. In any event, just a word to the wise, this particular aspect, if you do get an EEOC charge in the future, bear in mind that it may not be routine for the agency to grant your request. Now, again talking about the EEOC, in a very recent case decided by the Fifth Circuit Court of Appeals this will cover the state of Texas, The Fifth Circuit Court of Appeals struck down the EEOC guidance that was promulgated under the Obama administration back in 2012, in which they said that using criminal background checks as a matter of course instead of a case by case basis would be a violation of Title VII, so harkening back to the Obama

administration, in 2000, the EEOC adopted an enforcement guidance which indicated that employers would violate Title VII by a blanket policy forbidding the hiring of an individual who had a felony conviction in his or her background. The case came to the Fifth Circuit because in the State of Texas, they have certain laws which would prohibit the hiring in the government, in the State of Texas, of any convicted felon and one of these convicted felons filed an EEOC charge which went through the administrative process and eventually wound its ways through the courts and up to the Fifth Circuit and essentially what the Fifth Circuit said in its decision and it remains to be seen what impact this will have throughout the country. Remember a decision which is handed down by one of the Circuit Courts of appeal doesn't necessarily govern, for instance, how App circuit, the Fourth Circuit would view the particular decision but sometimes the decisions are adopted by other circuits and in this decision what the Fifth Circuit said is that when the EEOC promulgated this guideline back in 2012, it did not adhere to the strictures of the Administrative Procedures Act, which would have mandated that they publish this in a the Federal register and go through the comment period in order to validate their particular guideline. So it remains to be seen whether this decision will gain traction nationally, now I want to caution you that of course there are Ban the Box statutes in many jurisdictions and local statutes which indicate that you cannot consider a conviction of an individual until for instance you have conditionally offered position to an applicant or gone through the personal interview process, but it is an interesting decision and one that we will just have to wait and see how much traction is gained by this particular decision nationally. Another sort of EEO question or question that comes up and I have had this in the recent past, is whether an employee's treatment for substance abuse may qualify as a serious health condition for purposes of FMLA leave. The answer to that is, yes, that an individual who is seeking rehab for instance as a result of a drug or an alcohol problem may certainly qualify for FMLA leave and it may even be viewed as a disability under the Americans with Disabilities Act which would require an accommodation, meaning that as an employer you would have to allow that person to take leave or FMLA leave in order to treat or get treatment for a substance abuse problem. Now, you have to keep in mind that there has always been a distinction between a prohibition on current use of alcohol or drugs or impairment in the workplace, so an individual for instance who would test positive for drugs under a drug testing program that you would have, would not be able to say to you, well I need to go into rehab, either under a theory of a disability or FMLA leave as opposed to the person who comes to you as an employee and says I have a substance abuse problem, I need to take leave either as an accommodation under the Americans with Disabilities Act or as a serious health condition under the FMLA. So I had this issue that came up with a client of mine about a month ago, and I am just reminding you that there is a distinction to be made between the

employee who requests such leaves either as an accommodation under the ADA or as a serious health condition under the FMLA, and the situation where a person is abusing drugs or alcohol either in the workplace or reports to work in an unfit condition for work and therefore would be justifiably disciplined or even terminated under appropriate circumstances. Those of you out there who do any business in New Jersey need to be aware that as of the end of July, New Jersey employers are now prohibited from using an applicant's salary history as a factor in a hiring decision. So this was a statute enacted at the end of July, violations are quite stiff under this New Jersey statute where there are monetary penalties of up to \$1,000 or \$5,000 or \$10,000 for the first through the third subsequent offense and I just bring this to your attention, so that if you have employees in the State of New Jersey, you are aware that asking about an applicant's prior history is really forbidden now unless the applicant reveals it voluntarily to you, so keep that in mind if you have employees in the State of New Jersey.

Finally, in a very recent case coming out of the Eighth Circuit, the Eighth Circuit has joined many other Circuits in indicating that regular attendance can indeed be an essential function of the job for which an employer can discipline, even terminate or not have to accommodate by changing the essential functions of a job, and in this case an employee sued, it wound up at the court of appeals at the Eighth Circuit, and the employer's job description in this particular situation listed regular attendance as an essential function and the employer's attendance policy stated that employees need to be available to work their assignment whenever they are scheduled to work. And I know that in prior telebriefs I have spoken about this, both in the sense of looking at your job descriptions and I can't imagine a job description which would not enunciate the fact that regular attendance is an essential function of the job and that your attendance policy as set forth, for instance in a standalone policy or in your handbook, would not articulate that regular attendance and that is an essential function and that employees need to be available to perform their work assignments at the beginning of their articulated or specified shift. So, you know, I would advise you to go back and look at your job descriptions and look at your attendance policies and make sure that those things are articulated in order to protect you from any kind of claim that you haven't accommodated a particular employee under the ADA. The last thing that I would say again, under the National Labor Relations Board, recent actions is you have a series of things which the NLRB a series of rules have promulgated and published and ask comments on in order to accommodate the election processes and make it more employer friendly, so for instance there used to be what is called or there is commonly called a blocking charge which means, typically in a decertification action, unions will frequently file an unfair labor practice charge which in the past would block an election held by the National Labor Relations Board. This is a

very technical area and all I will say is that the National Labor Relations Board has promulgated a proposed rule which would in essence not permit the Labor Board to block the election, instead it would go ahead and hold the election and determine the unfair labor practice charge subsequent to the election itself, and that would mean that it would probably be easier for those of you who have unions and those of you who may have employees who are interested in decertifying the union, would make it easier for that decertification election to be held. Okay, those are the developments for the day. Casey, can you take this off of mute please.

Alright we are off of mute, you so if anybody has any questions, I'll be glad to answer them either in this forum or via email at [hkurman@offitkurman.com](mailto:hkurman@offitkurman.com) or my phone 410-209-6417. Any questions from anybody?

Mike: Hey Howard, it's Mike.

Howard Kurman: Hey Mike.

Mike: Is it possible to get a copy of that Generation Z information that you read?

Howard Kurman: Sure, I will be happy to send it to you and if anybody else wants it, just send me your email and I will email you back.

Mike: Thanks Howard.

Howard Kurman: Sure. Any other questions. If not, the last telebrief in August as you know it is the fourth Wednesday, will be August the 28<sup>th</sup>, so we will figuratively see each other on that day. Thanks everybody.

Mike: Thank you Howard.