

LABOR & EMPLOYMENT TELEBRIEF

By

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Howard Kurman: Alright, it is 9:02, I am going to get started. Alissa can you mute the phones please.

Alissa: Yea Howard.

Howard Kurman: Alright, good morning everybody. Before I start on substance I want to announce something regarding the telebrief I have been doing this for six or seven years on the second and fourth Wednesdays of every month. I have some board commitments now that really take up a fair amount of time. As a result of that beginning in June with June 3rd I am going to be doing these only on the first Wednesday of every month, the first Wednesday of every month, so rather than doing it two times a month I will be doing it one time a month beginning the first Wednesday in June which is June 3rd and the first Wednesdays of every month after that. I hope everybody understands and certainly I will be able to keep you up-to-date as I have in the past several years, but I wanted to make that announcement. We will be sending out a fair number of written reminders so everybody can put them on your calendar if you wish.

Okay, substantively by popular demand the question was am I going to do anything with regard to the Coronavirus? The answer is yes. There are several things I think as an employer we need to pay attention to regarding the current health crisis which seems to be on the upward tick in the country. So, first, a little bit under the Fair Labor Standards Act. As you know employees are either exempt or nonexempt, let me just deal with the impact of a closure on exempt and nonexempt employees. So, as you know, under the Fair Labor Standards Act nonexempt employees only have to be paid for the time that they are actually working. So that if you close and send employees on a furlough obviously you would not need to pay your nonexempt employees because they are not working or even if you close a couple of days you wouldn't need to do that. On the other hand exempt employees, as you know, are paid a set salary for any work that they do in the course of a work week and therefore if you are closed for an entire week and an exempt employee did no work then you would not be obligated to pay that exempt employee anything; however, if you simply were closed for let's say two days out of the work week that exempt employee who is doing some work during the other three days would have to be paid his or her entire salary and even if you are closed for an entire week if you had exempt employees for instance answering emails or text or doing work at home that would create a wage and hour problem because again exempt employees are entitled to be paid for any

work that they would do during the course of the work week for the entire week. So keep that in mind if you contemplate any kinds of closures for your company. The EEOC recently put out a guidance, you can get it on their website and it's entitled what you should know about the ADA the Rehabilitation Act and the Coronavirus and in this particular guidance the Equal Employment Opportunity Commission has emphasized that the rules under the ADA and the Rehabilitation Act, which is of course the analog to the ADA for federal employees would apply and they also say on their website that their guidance obviously does not interfere or supersede guidance which have been promulgated and disseminated by the CDC. So, you know a couple things to note about the EEOC's publication. So, one of the questions is how much information can you as an employer request from an employee who for instance calls in sick in order to, you know, protect the rest of your employees during this Coronavirus event and the guidance put out by the Equal Employment Opportunity Commission specifies that you as an employer may in fact ask your employees who are if they are experiencing any symptoms of the illness which have been widely communicated as shortness of breath, fever, cough etc., and that of course if you get this information you need to retain it on a confidential basis and on a need to know basis as well and that another part of the guidance indicates that employers can ask employees who call out the reason for their absence in an attempt to ascertain whether it may be Coronavirus related. Another aspect of the EEOC guidance is that the question came before them as to whether or not you as an employer can require your employees to stay home if they have symptoms of the Coronavirus and according to the EEOC's guidance the answer to that is yes that if they are exhibiting signs of the Coronavirus they may either be sent home or required to stay home. The other question that they address themselves to was whether when employees are seeking to return to work can you permissibly require them to provide you with a medical certification which would indicate their fitness for duty. The answers to that question by the EEOC is yes, you could require that although they state "as a practical matter; however, doctors and other healthcare professionals may be too busy during and immediately after a pandemic outbreak to provide fitness for duty documentation. Therefore they say new approaches may be necessary such as reliance on local clinics to provide a form, stamp or an email to certify that an individual does not have the pandemic virus. So, while you technically have the right according to the EEOC's guidance they also caveat that in this particular time when probably doctors or clinics or hospital are so overwhelmed with visitors, some of who may actually have signs or the actual disease itself that it may be impractical for them to provide you with that return to work certification. Now, in terms of other practical kinds of tips having to do with the Coronavirus, I think any of you out there would be well advised to name an individual or imbue a named individual with the responsibility to be the key point of contact and this

person would obviously stay up-to-date on developments which are communicated by the CDC and also would be responsible for communicating updates to your employees if you have not done that already. I think it is critical that there really be one person or most probably two who have the responsibility for making sure they know what is going on in the country as well as publications of any advisories to your employees as opposed to spreading this responsibility out among many, many people where you may have mixed messages going out there. Obviously, those of you who have employees that do any amount of business travel may very well want to either curtail or eliminate that business travel until things quiet down. I know many clients that I have spoken to have eliminated any kind of business travel in the foreseeable future and you can see publications on the Internet indicating that airlines have severely cut down on the number of flights, particularly international flights, and that you all probably ought to heed those restrictions as you consider the criticality of any need for international travel or indeed any domestic travel for your people on-board. I also think that you want to consider teleworking policies that you may have in place or contemplating putting into place. Obviously not everybody can telework. People that are in the manufacturing business, people that obviously need to be present for one reason or another may not be able to telecommute, but for those who can, you certainly may want to consider that as an option, and certainly those of you with leave policies may indeed want to consider making exceptions in certain cases for your leave providing unpaid leave in certain circumstances or even pay extending paid leave if that is indeed practical or financially viable. The truth of the matter is we are living in a I think a very kind of unusual situation, while it is true that you all have to deal on an annual basis with the flu and, you know, there are probably many more deaths which are attributed to the flu as opposed so far to the Coronavirus, nevertheless an ounce of prevention as you know is worth a pound of cure, and I think it is time to take stock of what your policies are and certainly make sure that you are as up-to-date as you possibly can when it comes to this Coronavirus thing. Obviously, at some point, we will begin to see the downtick in the disease, but for now while it is on the uptick, I think it behooves us all as employers to be responsible and to be communicative with their employees.

I mentioned the EEOC a couple of minutes ago. I think there was a significant budgetary aspect impacting the EEOC which probably favors all employers out there, so just about 10 days ago Senators Warren and Murray commented publicly about “a dramatic decline” in staffing at the Equal Employment Opportunity Commission as a result of the Trump administration proposing a budget cut in the EEOC’s proposed budget for this coming fiscal year. The budget cut would reduce the staffing at the EEOC to about 1700 full-time employees down from about 1900 in the present fiscal year and more than 2000 in the year before that. Also it

would in absolute terms cut the EEOC's budget funding from about \$390 million to \$362 million. It is a significant cut and those of you who either have existing cases at the EEOC or of course may have future cases at the EEOC probably will see that even though there were no inordinate backlog and delays in the past regarding the handling of your case, it may even become more drastic in the future. So I mention it because I think that it is likely to pass from a budgetary standpoint and we may see practical impact for your operations.

Those of you who do business in Virginia and have employees in Virginia will be interested to know that a couple of days ago the Governor of Virginia, Ralph Northam, signed a bill which protects students and workers from being discriminated against with regard to how they wear their hair making Virginia the fourth state in the country to prohibit bias against an individual on the basis of his or her hairstyle. So that in effect, Virginia amended its human rights act to specify that discrimination "on the basis of race" would protect an employee from "traits historically associated with race including hair texture, hair type and protective hairstyles". So the governor signed this last Wednesday and there was unanimous passage in the senate and so Virginia joined New Jersey, New York and California as the fourth state in which sort of hairstyle and hair itself becomes a protected classification under the Virginia civil Rights Act. Note that this is not necessarily the federal law with the EEOC but it is certainly a trend which is worth watching as we feel with, you know, changes in civil rights statutes on a statewide basis.

The last thing that I wanted to mention is so-called recording policies in your workplace, I may have mentioned this a couple of telebriefs ago but, you know, the National Labor Relations Board has liberalized its scrutiny of employer-related policies. Those of you who contemplate or who have policies which would prohibit in the workplace any kind of recording of a conversation, surreptitious recording between an employee and co-employer, or employee and supervisor may want to either promulgate such a policy or enforce such a policy. There are extensions of that policy which may not be permissible under the National Labor Relations Act where an employee may be recording for instance concerted activity in the workplace, but certainly with regard to surreptitious recording between one employee and another or between one employee and a supervisor, that would pass scrutiny under current National Labor Relations Board interpretations. And so if you are modifying your handbooks or if you have such a policy already in your handbook you may want to enforce that particular policy.

All right those are the developments for the day. Alissa can you take this off of mute. Okay, any questions or comments.

Deidre: Howard, this is Deidre and I have a question. We are a small employer and so everyone knows everyone, and we just had a situation yesterday where someone fell ill, thought she might have been exposed through her spouse to the virus and is going to self-quarantine and we did not know what we should say to the rest of the employee base to give them a heads-up or not because for some degree, you know, it is personal information.

Howard Kurman: Yeah, I think that, you know, I do not know how small your workplace is, but if it is small, I will just use that in quotation marks, I am sure it has gotten around and I think in that situation transparency is probably the best policy which would indicate that you communicate to your other employees that one of your employees may or may not have been exposed but is voluntarily self-quarantining and if you have any other information that would impact them in the near future, you certainly will bring that up to date. So I think that is the way to handle that.

Deidre: Got it, thank you.

Howard Kurman: Sure. Any other questions?

Female Speaker: I just had one quick question. We got a question from a client yesterday about an employee who is self-quarantining after possible exposure, not really showing any symptoms or anything, and they wanted to know if the incubation or quarantine period would fall under FMLA. You know, after doing some research we determined that it would not because it would not yet be considered a serious health condition, but I wanted to get your take on that.

Howard Kurman: Yeah, actually I think that unless the person has signs of the actual disease itself that you are right, it would not qualify as FMLA leave. It may qualify under your personal leave policy that is, you know, depending on what your leave policy says, but I agree it would not be FMLA leave at this point. Now if the person begins to show signs, then that is a different story.

Female Speaker: Right, okay thank you.

Howard Kurman: Sure, sure. Okay, well as usual if you have any other questions that you want to, you know, raise privately you can send me an e-mail at hkurman@offitkurman.com, and again thanks for participating; and just a reminder, we will go on as scheduled for March, April or May but beginning June 3rd once a month on the first Wednesday of every month. Thanks everybody.