LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, it is 9:02, so we are going to start and I am hoping the technology is working here. We will find out when we un-mute the phone. So welcome to Labor & Employment Telebrief and a lot to go over this morning. So first, reminiscent of what happened a couple of years ago in Maryland safe and sick leave law, on January 30th, just a couple of weeks ago the Maryland General Assembly actually voted to override Governor Larry Hogan's veto of the Ban-the-Box Act. As you may know this act statewide prohibits employers of 15 or more employees from requiring an applicant to disclose whether the applicant has a criminal record or has had criminal accusations against that applicant prior to the applicant's first in-person interview. So just as though the legislature did with the safe and sick leave law two years ago in overriding Governor Hogan's veto, they did the same thing on January the 30th. This act actually is effective January 1, 2020. So those of you in Maryland, those of you with 15 or more employees, who have employment applications that applicants must fill out need to make sure that you eliminate that particular question and that you will only be able to ask that question at the time of a first in-person interview and of course there are penalties for violation of this particular statute. It is enforced by the Maryland Commissioner of Labor and Industry. Now, you know, there are other Ban-the-Box statutes already in Baltimore City, Montgomery County and Prince George's County but this applies statewide. Interestingly it does not apply to those employers who provide program, services or direct care to minors or to vulnerable adults. It also does not apply where an employer is required to make this inquiry pursuant to federal or state law, but it is applicable now to all other employers with 15 or more employees. So pay attention to this. It did not get a lot of publicity as far as I can see but it is currently the relevant law in Maryland and those of you out there who utilize written employment applications which is probably most of you need to strike that question from your application. Again you can ask it in a first in-person interview.

All right, on February the 4th, more or less about a week ago the Chair of the Equal Employment Opportunity Commission, Janet Dhillon, released her new set of priorities for the Equal Employment Opportunity Commission in 2020, sort of a telling list of priorities and probably on balance good news for you employers out there. So she outlined five priority categories for the Equal Employment Opportunity Commission in 2020. These include (1) continuing to provide what they deemed to be excellent customer service to those who access the commission's

processes. That essentially would be complainants of course; (2) continuing to provide what they call robust compliance assistance; (3) enhancing efforts to reach vulnerable workers. By vulnerable workers essentially they mean migrant or immigrant workers or those workers of different national origins; (4) strategically allocating the commission's resources; and (5) continuing the commission's effort to be a model workplace. Going into a little more detail. Essentially one priority emphasizes the EEOC's desire to rely much more on outreach and conciliation and mediation rather than litigation. To use Dhillon's phrase in these priorities "litigation is truly a last resort and not an appropriate substitute for rule making or legislation." Again good news for employers, those of you who had been engaged in the past in litigation with the Equal Employment Opportunity Commission know in so many cases the Equal Employment Opportunity Commission has taken unreasonable positions, particularly when they have suggested settlement proposals to employers where they have found probable cause to believe that discrimination has occurred. Another statement by the Equal Employment Opportunity Commission is an ongoing effort to decrease charge backlogs. Those of you who have charges pending or in the past who have had charges pending know that some of these charges have remained in the backlog of the Equal Employment Opportunity Commission for weeks, sometimes months and sometimes years. So there is a recognition on the part of the Equal Employment Opportunity Commission to substantially reduce the number of charges that have been in backlog for a substantial period of time. Overall I think it is a favorable outlook for employers at the Equal Employment Opportunity Commission, particularly as it relates to the Equal Employment Opportunity Commission's stand on litigation, and if truly litigation is a last resort for the EEOC that bodes well for employers. Now accompanying the statement of the Equal Employment Opportunity Commission regarding priorities for 2020 are pretty significant statistics as they relate to the end of the 2019 fiscal year regarding the EEOC's initiatives, charges, etc. One of the things that you all need to pay some attention to is that in fiscal year 2019 employers paid out a record $68.2 million to employees alleging sexual harassment violations through the EEOC in fiscal year 2019 which far eclipsed by over $10 million the prior record on payments. This is probably largely due to, again the impact of the me-too movement, so the $68.2 million represents a 20% increase from the previous all-time high set of $56.6 million in 2018 and is nearly double the total from just five years ago in 2014. Again I think this militates greatly in favor of employers taking a proactive approach to training its workforces both rank-and-file and management on the importance of remedies and complaint procedures through your workplaces whenever there is a workplace harassment complaint. I know that we have talked about this repetitively in prior telebriefs, but I cannot stress the importance enough of having a substantial and periodic

workplace harassment training program which is in person as opposed to simply by video in the workplace.

Another interesting statistic released by the Equal Employment Opportunity Commission is that by a large volume, the most common Equal Employment Opportunity Commission claim that employers faced in 2019 involved allegations of retaliation. We have talked again about this in prior telebriefs, but these claims proved to be the most popular which have been filed by employees in fiscal year 2019, so that over 39,000 retaliation claims were filed representing nearly 54% or more than half of all such claims filed in the Equal Employment Opportunity Commission in fiscal year 2019.

Another very voluminous kind of a charge were those charges related to disability. Again as I have talked about in prior telebriefs, generally the disability claims relate much more to accommodation claims than as to whether or not a particular condition constitutes a disability under the act, but accommodation claims are on the rise and these are very common which are filed by employees at the Equal Employment Opportunity Commission.

Another kind of claim on the rise relate to LGBT claims filed throughout the fiscal year 2019. So in that particular year almost 2000 LGBT discrimination claims were filed which were at an all-time high and pursuant to these claims almost $7 million was recovered by employees. So we can see changes in the trends, disability, retaliation, LGBT claims. Interestingly and sort of paradoxically, even though the workforce is aging, statistically we saw another reduction in the number of claims filed involving ADA/ADEA allegations, and they were at a four-year all-time low. I cannot explain that because you would think logically that as the workforce ages that the number of age discrimination complaints would increase, but apparently it has not been the case, so we will just have to wait and see what 2020 shows, but it is an interesting statistical sort of anomaly which I view in when you look at all the claims being filed. Talking about disability discrimination, there was a significant case decided by the Second Circuit, which involves Bloomberg Information—again not Bloomberg the candidate, but his company—in which the Second Circuit in the last couple of weeks decided, and this is not unique but it is an important significance, decided that a claim of disability discrimination would not be entertained where an employee indicated that he could no longer perform his particular job because of migraines. The employee wound up suing Bloomberg contending that he should have been offered a transfer and different supervision because of migraines related to stress in his particular job. The Second Circuit, which as you know is a very influential circuit and includes New York and probably next to the DC circuit is the most influential circuit in the country, and in

the context of their decision, they indicated "Nothing in the ADA Amendments Act or its legislative history for that matter suggests that Congress intended to modify let alone abandon altogether the well-established understanding that an employee's inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working. Again, what the employee wanted was to be transferred to new supervision and a new job, and the Second Circuit said that because the employee had not shown that his condition limited the major life activity of working, in other words he was not able to show that he was unable to perform a broad range of jobs to prove that he was disabled, that he could not sustain his claim against Bloomberg Information. And so those of you out there who may get claims disability discrimination from an employee who says that he or she cannot perform his or her particular job as opposed to a broad range of jobs does not under relevant law substantiate a claim under the ADA or the ADA Amendments Act. In other words, an employer in order to be able to sustain a claim of disability discrimination has to be able to show that the employee cannot perform a broad range of jobs as opposed to a singular job which may be causing stress or some other kind of a job impact for that particular claimant.

Let me just mention very quickly that Congress passed in the last week, the US House of Representatives just passed a bill called the PRO Act, which would in many cases turn the National Labor Relations Act upside down in favor of employees. So, it would restore recognition by a car check; the quickie election rules that were a hallmark of the Obama administration; it would permit secondary boycotts against neutral employers; it would overturn essentially decades long law and prohibit employers who were faced with economic strikes from permanently replacing employees; it would rescind all right to work laws in the country. As you know right to work laws basically prohibit in those states where they are enacted, unions from requiring employees to pay union dues under penalty of termination. It would also disallow or prohibit employers from communicating with their employees during the course of a recognition campaign and would restore the Obama persuader rule, which as you know was struck down ultimately by the Department of Labor during the Obama administration. I think that this act or proposed statute has no absolutely no chance of succeeding in a Republican-controlled Senate and the Trump administration has vowed to overturn by veto any enactment of the statute. It is just another indication of where the sentiment of the current House of Representatives lie in the case of a declining union membership, which again has been demonstrated by current Bureau of Labor Statistics numbers showing unionization on the decline, particularly in the private sector, which shows unionization in the private sector at about 6.4%. So, again I will keep my eye on this. I do not think it has got any chance in the world of succeeding, particularly

with a Republican-controlled Senate, but it is very, very draconian in favor of employees, and we will just have to keep our eye on it.

The last thing that I will mention is that the Department of Labor has stated very recently its new rule on joint employer rules status. Joint employer status under its rule which will go into effect next month on March 16th and it is a much more employer favorable rule than existed under the Obama administration, and essentially what the Department of Labor has said is there are four tests to determine whether or not two employers are deemed to be joint employers under the Department of Labor's jurisdiction. One, whether that putative second employer actually hires or terminates the employee as opposed to simply having the power to hire or fire the employee. Second, weather that putative dual employer actually supervises and controls the employee's schedule or conditions of employment to a substantial degree. Third, whether that putative employer determines the employees rates and methods of payment. And fourth, whether that putative employer maintains the employee's personnel or employment records. Taking all of this together and cumulatively you can see, and you go on the Department of Labor's website for this, but you can see that in order to be deemed to be a dual employer now by the Department of Labor and again it is just under the Department of Labor rules—both the EEOC and the National Labor Relations Board will be publishing their respective rules or interpretations of joint employment in the near future—but under the Department of Labor's interpretation, these four tests in general will determine whether or not a second employer is deemed to be a joint employer for let's say overtime or wage and hour liability and they are much more stringent tests focusing on actual control which is exercised by that putative second employer than was the case under the Obama administrations much more liberal interpretation of dual employment.

Okay, those are the developments for the day. Alissa, can you take this off of mute. Okay, any questions or comments by anybody out there on any of the material that I have covered? Okay any questions, comments?

Male Speaker: Could you repeat the takeaway for employers from the Bloomberg Information tape.

Howard Kurman: Sure. Essentially, what the Second Circuit said and this is not a unique interpretation but because it comes out of the Second Circuit fairly influential, their position is that the mere fact that an employee desires an accommodation under the guise of having a disability related to stress in one particular job as opposed to a broad range of jobs is not sufficient to constitute a claim under the Americans with Disabilities Act. Any other questions? Okay, well, if not, as you know we do these on the second and fourth Wednesdays of every month and at least by my calendar the last

Wednesday, the fourth Wednesday is the 26th of February, so we will see everybody on that particular date. Thanks everybody.