LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Okay, it is 9:02 by my official clock. Elisa can you mute the phones please. All right good morning everybody. This is the last telebrief in February, so we are moving into March, hard to believe that. All right, yesterday the office of congressional and public affairs on behalf of the National Labor Relations Board published what will be the NLRBs final rule on what constitutes a dual employer under the National Labor Relations Act. You might remember that in either the last telebrief or the one before that I talked to you about the concept of dual employment under the Fair Labor Standards Act which of course is administered by the Department of Labor. And I indicated back then that it would be any day when the National Labor Relations Board would promulgate its rule regarding who constitutes a dual employer under that particular act and this is important because those of you out there even if you are a nonunion company have obligations under the National Labor Relations Act and if you have relationships with a contractor or staffing company, etc., you do not want to get pinged as a dual employer for purposes of a union organization campaign or other unfair labor practices under the National Labor Relations Act. So the National Labor Relations Board put out its public release yesterday. So I will read salient points from that to you. It says the National Labor Relations Board will issue its final rule tomorrow, meaning today, governing joint-employer status under the National Labor Relations Act. The final rule restores the joint-employer standard that the Board applied for several decades prior to the 2015 decision in Browning-Ferris. Browning-Ferris was a decision which was promulgated by the Obama NLRB back in 2015 and it created much more exposure to companies as potential dual employers. The Board went on to say in its press release to be a joint employer under the final rule. A business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. I will read that again, A business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. The final rule, it goes on to say, defines key terms, including what are considered "essential terms and conditions of employment," and what does, and what does not, constitute "direct and immediate control" as to each of these essential employment terms. So it goes on to say, evidence of indirect and/or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status under the final rule, but it cannot give rise to such status without substantial direct and immediate control. Importantly, the final rule also

makes clear that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer. Again they go on to say the joint-employer standard under the NLRA is a matter of consequence because it determines whether a business is an employer of employees directly employed by another employer altogether. If two entities are joint employers, both must bargain with the union that represents the jointly employed employees, both are substantially and potentially liable for unfair labor practices committed by the other, and both are subject to union picketing or other economic pressures if there is a labor dispute. In announcing the final rule, NLRB chairman John F. Ring stated, "This final rule gives our joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy." He added, "With the completion of today's rule, employers will now have certainty in structuring their business relationships, employees will have a better understanding of their employment circumstances, and unions will have clarity regarding with whom they have a collective-bargaining relationship."

So, if you compare the NLRBs final rule with dual employment with the rule promulgated by the Department of Labor, they are very similar. In that both stress that in order to be considered a dual employer that the putative dual employer must be found to have exercised direct and immediate control over terms and conditions of employment in a substantial way. This, of course, affects franchisors and franchisees. It affects those of you out there who engage contracted employees from a staffing company, etc. It is much more employer friendly than was the standard under the Obama administration's decisions and it is consistent with the new Department of Labor standard. It does not mean that it would not be challenged in court, but it does mean that it gives you a lot clearer indication as an employer as to what will be considered to be joint employment under the National Labor Relations Act and the obligations that flow from that particular status. So I will continue to monitor whether this final rule which will be issued today, by the way, is challenged in court and I will advise you accordingly in future telebriefs. But, of course, it should guide you in your relationships with your vendors of staffing employees or franchisor or franchisees as to what may or may not be considered dual employment under the National Labor Relations Act.

All right, while we are talking about the National Labor Relations Board, I wanted to apprise you of, I think, a fairly significant decision that was announced on February 5th, just a couple weeks ago, where that the Labor Board determined that an employer who has a phone use policy, a cell phone use policy, which would prohibit the possession and use of cell phones in the cabs of commercial vehicles does not violate the Section 7 rights of employees to engage in concerted or protected activity. So in this

case a company called Argos Ready Mix suspended and then fired an employee for his suspected possession of a cell phone in the cab of a concrete truck in violation of the company's cell phone policy which strictly prohibited cell phones in the cabs of its commercial vehicles and heavy equipment. The Labor Board, in assessing the propriety of this particular policy, utilized its relatively recent standard in taking a look at policies promulgated under handbooks and determined that where the employer here articulated safety reasons and legitimate safety reasons as a basis for the policy that it would be deemed to be not violative of the Section 7 rights of employees. So those of you out there who are contemplating or have cell phone usage policies which would prohibit the use or possession of cell phones in your commercial vehicles for safety reasons know that this is a decision that was just announced a couple of weeks ago by the National Labor Relations Board and essentially condone the use of such policies by employers.

Okay, turning my attention to the continued policy issues which employers face with the use of medical marijuana, this was a case very recently decided in New Jersey called Hager versus M&K Construction and it is a New Jersey state appellate court decision and it deals with the situation arising out of a workers' compensation situation. So that in 2001, an employee of this M&K Construction Company severely injured his back in a work-related accident, and over the course of the next 15 years underwent multiple surgeries for that and was prescribed on a continual basis opioids as a means of alleviating his pain. In 2016, the employee was experiencing bad side effects from these opioids and his doctor gave him a prescription for medical marijuana as a means of substituting the medical marijuana for opioids. The cost of this was about $600 out-of pocket that he was paying per month substantial cost to him. And he claimed and put in a claim under his workers' compensation continuing open claim that the employer should pay for this under a partial total disability. The employer balked at the financial obligation that was claimed by this employer. At first in the administrative procedure, the administrative law judge denied the employee's claim. The employee then appealed, and the appellate court decided that this was a cost that should be borne by the employer. And really one of the rationales, it seems to me, was the public policy that because opioids are such a societal issue and because medical marijuana is found to be a good substitute with much less side effects and much less addictive qualities than opioids, that it was deemed to be a sufficient justification for ordering the employer to pay for this under the New Jersey workers' compensation law. I bring this up because as I have said on multiple occasions in the past that the issue of medical marijuana and its impact on the workplace is continuing. That litigation will continue to clarify those rights and obligations, the rights of employees and the obligations of employers, I believe in the next probably five years. And so this is just another indication that this issue of medical

marijuana will come about as a means of challenge to employers, I believe, in the next three to five years. So, you know, pay attention to this. It gets a lot of publicity and I will continue to monitor and bring it to your attention as well.

One of the things that came up, not in last night's debate, democratic debate, but in the one week before when there was this whole brouhaha about non-disclosure agreements, particularly as they apply to claims of sexual harassment, and obviously it came about in that debate when Senator Warren challenged Mayor Bloomberg on this whole issue and her contention that he ought to excuse the employees from their non-disclosure agreements. I wanted to bring to your attention and I know I talked about this back in 2018, wanted to bring to your attention a Maryland law which sort of bears on this tangentially its called the Disclosing Sexual Harassment in the Workplace Act, which was signed into law by Governor Hogan on May 15, 2018. This law requires that Maryland employers with 50 or more employees submit a survey to the Maryland Commission on Civil Rights by July 1, 2020, this year, identifying, one, the number of settlements reached after an allegation of sexual harassment by an employee; two, the number of settlements concerning an allegation of sexual harassment against the same employee over the last 10 years of employment; and three, the number of settlements concerning sexual harassment that included an agreement by both parties to keep the terms of the settlement confidential. So, unlike in a few states in the country, Maryland does not prohibit non-disclosure agreements with regard to sexual harassment claims, but it does obligate you as an employer to make periodic disclosure of the numbers of these agreements, which subject employees to nondisclosure or confidential agreement with regard to sexual harassment claims, and you have to report that in your reporting to the Maryland Commission on Civil Rights, and the first of those reports is due a few months from now July 1, 2020. So, I wanted to remind you of that obligation in case you have any questions about that.

While we were talking about reporting, those of you who have OSHA requirements know that as of March 2, just days from now, you have to supply through the OSHA's injury tracking application your Form 300A report. The 300A is a second page of the OSHA Form 300 and essentially serves as a summary of all recordable work-related injuries and illnesses which you sustained as an employer in 2019, and OSHA defines a recordable injury or illness as any work-related fatality, any work-related injury or illness that results in a loss of consciousness, days away from work, restrictive work or transfer to another job, any work-related injury or illness requiring medical treatment beyond first-aid, any work-related diagnosed case of cancer, chronic irreversible diseases, fractured or cracked bones or teeth, and punctured eardrums, and lastly, any special recording criteria for work-related cases involving needlesticks and sharp

injuries, medical removal, hearing loss, and tuberculosis. The Form 300A also must include the number of cases, days missed from work, and the specific injury or illness along with your employee identification number. Again, those of you who have OSHA issues know that this needs to be submitted by March 2.

The last thing that I want to cover is that on January 9th, the Federal Trade Commission held a public workshop in Washington to assess whether there should be federal regulations and limitations upon non-compete provisions in employer and employee contracts. It should be noted that three out of the five existing commissioners favor some sort of national restriction on non-compete provisions and whether or not these provisions will be held to violate any restrictions on a national level subject to public comment. The Federal Trade Commission invited these comments on a national level and I am sure will receive many such comments. They talked about potential alternatives, you know, and some of these would be limiting the period of time within which a non-compete would be enforced as well as the geographical scope of the effectiveness or the limitations on the geographical area within which a non-compete would be enforced. As one of the commissioners Rebecca Slaughter said, she says – While it would be impossible to know how many workers have been prevented in practice from leaving or seeking to leave a job due to a non-compete, we know that all it takes to chill workers from seeking a better opportunity as a manager waiving a non-compete provision or threatening to sue them if they get a new job. So, I have spoken on many past occasions about the national trend that is out there towards the lack of enforcement for limitations on enforcement of non-compete, and of course, this has practical value to all of you who may have roles in drafting them or enforcing them remember there are alternatives to absolute non-competes, which you can also consider, which would be non-solicitation agreements of both employees and clients as well as confidentiality agreements to prohibit the dissemination and use and exploitation of confidential and proprietary information that an employee would be exposed to while employed with your company. But this is an issue that will not go away. It has been raised in Congress. Now it has been raised before the Federal Trade Commission, and I think it is probably fair to assume that in the future we may very well see some federal regulation on non-competes and I continue to say that when drafting them do not be piggish, do not overextend or overreach in the extent to which you seek to limit employees working for possible competitors either within your geographical area or beyond or beyond a reasonable period within which you need protection.

Okay, those are the developments for the day. Lisa, can you take this off of mute. Any questions or comments that anybody has on any of the issues that I covered today? Any questions or comments?

Male Speaker: On the non-disclosure agreement, what was the name of the law on that?

Howard Kurman: There is no law on it. It is a rule being discussed at the level of the Federal Trade Commission, but there is no federal law on it yet.

Male Speaker: No in Maryland under the non-disclosure, you said by the non-disclosure claim.

Howard Kurman: It is the act that was passed in Maryland back in 2018 and the formal name of it is the Disclosing Sexual Harassment in the Workplace Act, signed May 15, 2018.

Male Speaker: Okay, thank you.

Howard Kurman: Sure. Any other questions. Okay, if not, thank you for your attention, and of course, the next telebrief will be the second Wednesday in March or March 11th. Have a great day everybody.