LABOR & EMPLOYMENT TELEBRIEF
By
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DICTATION STARTS ABRUPTLY.

Howard Kurman: _____ that nearly a third of the approximately 90,000 charges of discrimination filed with the agency in the last year included allegations of workplace harassment that is a lot of charges; and many of you out there who have had EEOC charges know that frequently whether the underlying basis for the charge is race, sex, or national origin or religion it is followed up with an accompanying allegation of workplace harassment. So the EEOC has in this report laid out essentially a three-tranche or three-pronged strategy to decrease and to hopefully drastically reduce the number of workplace harassment charges and I think that those of you who have responsibilities for dealing with these kinds of charges should pay some attention to what the EEOC is saying in this because a lot of it has practical value to you all.

The EEOC in this report starts off by identifying what it believes are multiple reasons for the increase in workplace harassment cases and I will briefly review these for you. One is what the EEOC classifies as a homogenous workforce that is they indicate harassment is more likely to occur where there is a lack of diversity in the workplace. Secondly the workplaces for some employees do not conform to workplace norms. Thirdly , cultural and language differences in the workplace as the EEOC quotes workplaces that are extremely diverse also pose a risk factor for harassment. Next coarsened social discourse outside the workplace. Here the EEOC describes this as "event outside of workplace may pose a risk factor that employers need to consider and proactively address." Next, young workforces. The EEOC states that workers in their first or second jobs may be less aware of laws and workplace norms. Next factor, workplaces with "high value" employees. So the EEOC says senior management may be reluctant to challenge the behavior of their high-value employees. I note this because last week many of you probably read about the high profile new sexual harassment case brought by Gretchen Carlson who was a news anchor on Fox News in which she alleged that the head of Fox News, Roger Ailes, a very well known and very powerful figure in the media was guilty of sexual harassment with regard to her, in the sense that he either explicitly or impliedly demanded sexual favors in order to keep her on as an anchor, made very caustic and boorish remarks to her of a sexual nature. This was filed not against Fox News but against Roger Ailes personally in the Superior Court of New Jersey, and actually you can read the complaint online, but it's indicative of what the EEOC characterizes as workplaces with high-value employees. This will be obviously in the news for weeks and months to come, but those of you who have faced situations where there have been allegations against a high profile or high-level executive in your company know that it can create multiple levels of problems for you.

The next issue that the EEOC identifies as problematic and as a predicate probably too many workplace harassment cases is workplaces with significant power disparity. The next factor they identify is isolated workplaces. The next to last factor they identify are workplaces that tolerate or encourage alcohol consumption obviously and I have had cases like this before. There are many situations where for instance companies have parties or functions in which alcohol is served or a culture where alcohol use is encouraged and as a result many times behavior gets out of line because of the effects of the alcohol. The last factor that the EEOC identifies is a decentralized workplace that is as they describe the workplaces where corporate offices are far removed from front-line employees are first-line supervisors. Those of you have companies or represent companies where there may be a centralized home office but then field offices in various locations will know that obviously it's much harder to control the behavior of those people that are not in your direct line of sight than it is if they are under one roof.

After identifying the predicates or the causes of many cases of workplace harassment, the EEOC in this sort of omnibus report goes on to describe training efforts that they believe will help eliminate or at least dramatically decrease the number of workplace harassment charges and problems for employers. They strongly endorse what they call a live interactive delivery as the preferred method of educating and training your employees including your supervisory and management staff so that the following items or the following action processes are recommended in this report by the EEOC.

First, training that not only helps employers comply with the legal requirements of employment discrimination laws but also describes conduct that if left unchecked might rise to the level of illegal harassment. Two, training that is not canned training but rather tailored to the specific realities and operational issues in your workplace. Three, if appropriate, training in various languages so that your employees all can get the benefit if English is not their first language. Next, training that discusses and distinguishes and clarifies what conduct is not harassment and is, therefore, acceptable in the workplace. Often times when we conduct training for clients we know that there are many questions regarding what is permissible in the workplace, as opposed to what is not permissible in the workplace. Next, they recommend training that focuses on and educates employees about their rights and responsibilities if they experience or observe conduct that the employer has identified as not appropriate in the workplace. And the last thing that they talk about or recommend is training that describes in simple terms how the formal complaint process will proceed. Obviously, those of you out there who have handbooks and policy manuals want to make sure that the exact process and procedure by which and under which complaints are processed is laid out in plain English and is very understandable and very accessible to your employees.

In addition to the kinds of focus training that I just outlined, the EEOC in this report places great emphasis on what they call workplace civility training. And

of course while most courts will indicate that they will not legislate a personal code of conduct for employers, the EEOC I think makes a good point in talking about the need for an employer to create a culture that is not only free of workplace harassment but is conducive to workplace civility and a lack of bullying in the workplace. So that is another emphasis that you will see in the long report that the EEOC has published.

All told, I think that while I often take issue with the EEOC, I think that there is some very practical value in the suggestions that they have made in this very, very long report. Suggestions that I think they are noting and a fair amount of deference by those of you who deal with these issues and have any volume of employees in your workplace. Because aside from the fact that its probably the right thing to do is a very self-serving reason, which is that you want to reduce the cost and the burden administratively and otherwise of any of these charges, and you want to make sure that your supervisors and managers know what the law is and are on the lookout for any kinds of behavior in the workplace by other employees as well as regulating their own code of conduct. So I would commend you to take a look at this long report obviously you do not need to read the whole thing as I said its pretty extensive, but I do think that it has some very real practical suggestions for you and one that will stand you in good stead if you are ever faced with a workplace harassment charge because one of the things that the Equal Employment Opportunity Commission always takes a look at is whether or not you have trained your employees and subjected them to an educational course in what workplace harassment is and what it is not.

Another interesting aspect of this report is a treatment by the Equal Employment Opportunity Commission dealing with the NLRB's position, which it has recently taken regarding the confidentiality of workplace harassment investigations. You have heard me talk about in prior telebriefs the fact that in recent cases, particularly one which is called Banner Health System, the NLRB has taken the position that an employer who has a blanket policy regarding the obligation of employees to maintain confidentiality and workplace investigation may be violating Section 7 of the National Labor Relations Act because in the Board's view it may intrude upon the Section 7 rights of employees to discuss with each other wages, hours, and terms and conditions of employment. You know I have criticized that view because I think that in workplace investigations, it is important to the extent that you can to maintain confidentiality of that investigation. Interestingly, in this report that I just cited the Equal Employment Opportunity Commission has taken the position or has raised the issue of whether or not the National Labor Relations Board's policy regarding confidentiality comes into stark contrast with the Equal Employment Opportunity Commission's position that these workplace investigations need a certain amount confidentiality. As they quote in this report and I will quote it. They say "we heard strong report support for the proposition that workplace investigations should be kept as confidential as is possible consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality specifically to request that witnesses and others involved in a harassment investigation keep all

information confidential has been limited in some instances by decisions of the National Labor Relations Board relating to the rights of employees to engage in concerted protected activity under the National Labor Relations Act. In light of the concerns we have heard we recommend that EEOC and NLRB confer in consultant good faith and a good faith effort to determine what conflicts may exist and is necessary work together to harmonize the interplay of federal EEO laws and the National Labor Relations Act." I found that to be a fascinating quote that here you have one governmental agency the EEOC questioning the need for confidentiality in workplace investigations that has been articulated very recently by the National Labor Relations Board. It will be interesting to see whether and how this is reconciled by the two agencies going forward, the EEOC which basically takes I think a commonsense position regarding confidentiality with regard to workplace investigations, and two, the position taken by the NLRB which I think is impractical and in many cases an impediment to completing a thorough and transparent investigation into workplace harassment charges.

Another interesting development coming out of the Equal Employment Opportunity Commission you may remember that back in January the Equal Employment Opportunity Commission published proposed regulations that would require in the future in 2017 any businesses with 100 or more employees to provide detailed information about their pay practices when they filed their EEO-1 reports. Obviously, this would be a dramatic change because heretofore when employers would file EEO-1 reports you know the kind of statistical data that is submitted to the EEOC and it does not include pay data. The EEOC in proposing these regulations in January indicated that one of the reasons for this was that it would be better able to ascertain whether there are any unequal pay disparities between the sexes and to essentially be able to remedy what it deemed to be these disparities in the equal pay standards. There were many, many comments that were submitted particularly by the management labor bar to these comments, and just a couple weeks ago on June 22nd the chair of Equal Employment Opportunity Commission, Jenny Yang, announced that the EEOC would in the near future be issuing new proposed guidelines on this regarding its pay data collection rules and in quoting her she said in an effort to "think about how we minimize the burden on employers." One of the major complaints by employers who commented on these proposed rules was that including this pay data would be administratively burdensome for most employers. So I guess the EEOC heard what many of these employers were saying, it remains to be seen how and if they really will weaken the requirement that will be imposed on employers, but it sounds to me like there will be some diminution in the responsibility of employers to report this pay data, so stay tuned and then I will certainly bring this to your attention as soon as they are published.

There was an interesting development very recently in the non-compete field, which I wanted to bring to your attention. You may remember several telebriefs ago I reported on a White House study that was very critical of the need for non-competes that are used with clerical employees or other

employees who really should not be subjected to those non-competitive restrictions, and I think that it is indicative and that report was indicative of the movement afoot in many states to restrict the use of non-competes with employees. Well, the Massachusetts House of Representatives recently passed a bill which they have enacted has four provisions, which I think that are pretty telling that the trends that many states will be following with regard to non-compete legislation. The aspects of this particular Massachusetts bill are as follows: One, it contains what they characterize as a garden leave provision, which would indicate under this law that any non-compete agreement must contain what they call a garden leave clause, which would require the employers who impose non-compete on their employees to pay them post-termination "at least 50% of the employee's highest annualized base salary during the two years before the termination." Sometimes these payments are referred to as shelf payment. In other words, an employer trying to keep an employee on the shelf for a period of time is obligated to pay that employee. Massachusetts refers to it in this legislation as garden leave. In any event it's indicative of many of the trends that you see with regard to case law and statutory law in this area. The second aspect under this Massachusetts law would be that an employer would not be able to enforce a non-compete against an employee who is laid off or terminated without cause, many states under the relevant case law adhere to this proposition anyway but this would be enacted in the legislation itself so that the non-compete would only be enforceable against an employee who was terminated for cause or who voluntarily resigned to take another job. The third aspect of this particular statute pertains to the so-called blue penciling of a non-compete. In many states a court will be able to so-called blue pencil what may be viewed as an overbroad non-compete either because the term of the non-compete is too extensive or the geographical region is deemed to be too extensive. Anyway, under the Massachusetts law, the new law would restrict employers from having its overbroad non-competes enforced and, in fact, if a court found in Massachusetts a non-compete to be overbroad, it would render the entire clause unenforceable and it would not amend the agreement to make it enforceable. Lastly, under the Massachusetts law, the Massachusetts employer would not be able to avoid complying with the Massachusetts law by designating another state's law as controlling. Often these are referred to as forum choice or choice of law provisions in an employment agreement, and what they are saying is that if an employee has been a resident of Massachusetts or has been employed in Massachusetts for 30 days before the termination of employment that Massachusetts law would apply irrespective of whether or not there is some other choice of law provision.

While most of you, of course, do not do business in Massachusetts, nevertheless, I raise this because I think it is indicative of the fact that many states are trying to restrict the enforceability of non-compete on the basis that in many cases it is too restrictive on employee's mobility and imposes too much of a financial burden on an employee who may want to leave a company. Now, that does not mean that you cannot have an effective confidentiality and non-disclosure provision most of which will be enforced or in some cases a non-

solicitation provision which means that an employee who has departed your company may not be able to solicit your existing customers.

The last development that I will mention is a case out of the United States District Court for the northern district of Texas and it involves a challenge by many employer groups to the Department of Labor's so-called persuader rule. I have talked about the persuader rule in the past and in a Reader's Digest summary, I will just tell you that a federal judge in this case handed the Department of Labor a bitter, bitter defeat and in fact enjoined nationally that is issued an injunction against the enforcement of this persuader rule until the entire case has been decided on the basis that for many reasons the Department of Labor's persuader rule violated many, many different theories of relief whether it is on the First Amendment basis, whether it is on the basis that it would violate attorney-client privilege, whether it is on the basis that the Department of Labor departed unreasonably from over 50 years of past history, it is a long 80-page opinion and those of you who are interested in reading it I can certainly give you the citation to it at some point in the future, but keep in mind this is only one court. There many other judicial challenges to this particular persuader rule, but this is a very thoroughly treated decision and opinion and as I have indicated to you in the past, I really do not believe that the Department of Labor persuader rule will survive in the form in which it was promulgated and issued very recently and certainly because the Department of Labor said that it wanted it to go into effect July 1st that is, therefore, a moot issue since there has been a national injunction issued by this court in Texas. So stay tuned, I will keep you informed about developments in this field.

Those are the developments for the day. So I could not be with you personally, but I will be with you the next telebrief which is on Wednesday, July 27, 2016. Hope everybody _____**audio cut**_____.