LABOR & EMPLOYMENT TELEBRIEF
By
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**Howard Kurman**: Okay it is 9:02, we are going to get started. Michelle, can you put this on mute please? Okay good morning everybody. It is Howard Kurman and the first telebrief in May of this year. There is plenty to talk about as always.

I thought about this last night in view of all the news going on in the political sphere and I do not have a political comment with regard to the termination of FBI Director Comey but as HR professionals I think there are some lessons in this for us. One of which is when you terminate an individual irrespective of the category of that individual, whether the person is an executive or the person is a lower level employee, you got to make sure of the rationale for your termination and of course in this case and I am not talking politics whether you are Democrat, Republican or whatever and what is behind the termination. Obviously, the political commentary has been well was this a pre-textual reason for the termination of Director Comey? Those of you out there who have responsibility from time to time for termination decisions need to make sure that when you are articulating a reason for somebody's termination that you know you're doing it in a way that makes logical sense. I do not know nor does anybody really know what went on here but the odd part about it is that the rationale and the articulated reason for the termination seems to be events that were longstanding in nature. That is you know part of it Comey's response to the Hillary Clinton emails in 2016 and whether you approve or disapprove or whether you were a Hillary supporter or a Hillary opponent it seems to me rather odd that part of the rationale for the termination would have been articulated as acts that took place some time ago prior to the termination. So I just think again not a political statement but those of us who have responsibilities in the termination sphere or in reviewing terminations need to make sure that the articulated reasons for the termination, which would appear to a third party outside of your company. Whether that third party is for instance, an unemployment appeals referee or whether it is the Equal Employment Opportunity Commission or a state agency like the Maryland Commission on Civil Rights, you need to make sure that the pieces fit together and that somebody looking at your termination won't infer that the articulated reason for the termination seems to be pre-textual; that is not the real reason for the termination. That is all I will say about this because we need to let this play out, we do not know how it will play out but I thought that that is one lesson that we all can take from all the goings-on that happened last night and all the commentary etc., so we will just have to see how that plays out.

In the last telebrief, I mentioned that the house was considering a bill called the Working Families Flexibility Act of 2017, essentially which would amend the Fair Labor Standards Act to permit employers along with the agreement of employees to substitute comp time for overtime, the payment of overtime. Well on May 2nd, the House of Representatives indeed passed a law called HR

1180 The Working Families Flexibility Act 2017 again which would amend the Fair Labor Standards Act and allow under certain circumstances employers and employees to substitute banked comp time under certain conditions for the payment of overtime. A parallel bill has been introduced in the Senate and the sponsors of that are Mitch McConnell, the Senate Majority Leader and Lamar Alexander both Republicans, Lamar Alexander being on the United States Senate Committee on health education, labor and pensions. Both of them are co-sponsors of this Senate bill. Previously, the White House has articulated its sympathy for and approval of this particular legislation. We do not know whether there will be enough support in the Senate to pass this bill, but there seems to be some bilateral support for it. The big opposition is from organized labor which basically sees this as a way of shorting employees who work overtime, although many of you out there who are responsible for employee relations and hear from employees on a daily basis if not hourly, I am sure there are some employees if not many who would approve that under certain conditions they would prefer to have banked comp time as opposed to overtime in a particular week. We will just have to wait and see whether or not this passes the Senate, obviously there are a lot more important things that are going on in both houses of Congress with the budget bill, with the health insurance bill, etc., but it's interesting that the house bill passed and that it has been forwarded to the Senate and we will just have to see where that goes.

I wanted to mention that any of you out there who do business in New York City on May 4th, Mayor DeBlasio approved a law that had been passed by the New York City Council on April 5th of this year, which would prohibit and does prohibit employers who do business in New York City from asking applicants for jobs about their salary and benefits history. We talked about this before in prior telebriefs. As you know, I talked about the fact that Massachusetts has a similar law as does Philadelphia but the Philadelphia law is currently in judicial challenge on First Amendment grounds. But in any event this act will go into effect in New York City on October 31st of this year and so what it will do is it will preclude an employer from asking applicants about their salary history and it is a pretty broad prohibition, the only sort of exception to it is where the particular applicant for a job "where the applicant voluntarily and without prompting discloses his or her salary history." If you have an applicant who voluntarily discloses that that would be an exception to this otherwise the employer would not be able to ask the applicant about his or her prior salary history. Those of you who interview candidates all the time you know that one of the things that you do want to know of is how is this applicant progressed up the ladder with regard to salary and with regard to what you are prepared to pay that applicant should the applicant be hired, it is a relevant piece of information. I think most employers would articulate that as a major piece of information that they would like to have. But of course if you are doing business in New York City then you are not going to be able to do that and I think that it puts employers at a disadvantage. Now, you can reveal to an applicant even under the New York City law what your range is for the particular position that you are seeking to fill, but again one of the things even from a negotiation standpoint that you would like to know as a prospective employer is

what is the applicant making now and how has the applicant progressed with regard to his or her salary through the years. If this takes hold not only in New York City, in Philadelphia and Massachusetts, the question will be where else does it go? Does it go in many of the big cities as a trend or is this a sort of one-off in New York City, Philly and Massachusetts. I do not think it will be a one off if it gains traction so stay tuned on this.

A couple of developments at the National Labor Relations Board that impacts non-union employers. Last week, the National Labor Relations Board declined to extend Weingarten rights to non-union employees and just to make sure you all understand what this is I know that we have probably spoken about this in prior telebriefs. But, under a 1975 United States Supreme Court decision called NLRB v. Weingarten Inc., what the Supreme Court set out was a right given to unionized employees, so that a unionized employee who is being grilled or investigated or participating in an investigatory interview by an employer where as a result of the investigatory interview the employee may be subjected to disciplinary action in that case a unionized employee has the right to ask for and receive the representation of another unionized employee or a business agent of the union or a union shop steward. It is thought that this is inherent in the Section 7 rights of an employee to engage in protected concerted activity. Again, that is a 1975 Supreme Court case. Well the labor board has gone up and down as to whether or not non-union employees would have a similar right, so in a 2000 decision, in a decision called Epilepsy Foundation of Ohio, the board said well non-unionized workers had that right as well as unionized workers. That was subsequently overruled by the board in 2004 in a decision called IBM and that really is the prevailing law today. Since 2004, from 2004 to 2017 obviously a period of 13 years the law has been under the NLRB non-unionized employees do not have the right to ask for and receive any kind of joint representation when they are being interviewed by you in an investigatory fashion or as a result of the investigation they might be disciplined. Some of you may have been in situations or maybe in situations currently, where you want to interview an employee and the employee says I would like to have an employee with me when you interview me. Under current board law and even as recently as last week the board has refused to extend that representational right to employees in a non-union setting. If you are in a situation where a non-union employee asks you to have a representative present, including by the way an attorney, in an investigatory interview that employee has no rights, no representational rights, under current board law to do that. Of course, it is a different situation if you're talking about a unionized environment. But in a non-unionized environment the board as recently as last week has refused to overturn the 2004 line of cases indicating that a non-unionized employee has no such representational rights and you can legitimately decline that employee's request for representation and not violate the law.

Speaking of the NLRB, I have told you before that there are two openings on the board, that there is a five-member board, currently there are three members of the board, Chairman Philip Miscimarra, he is the acting chairman he is a Republican, and two Democrats members Mark Pearce and Lauren McFerran. It

is now known that there are two labor lawyers who are in the sort of front seats for these two open positions, one is a labor lawyer named Marvin Kaplan, Kaplan is an attorney for the Occupational Safety and Health and Review Commission and another attorney named William Emanuel, William Emanuel is a management labor lawyer for a firm called Littler Mendelson, some of you may have heard of this firm. It is a national boutique labor and employment firm, he is based in Los Angeles and represents management clients. These two labor lawyers seem to have the edge on the appointment and if that is the case if they are appointed by President Trump you will now have a three to two Republican majority and of course many of the expansions that have taken place by the National Labor Relations Board to non-union employer shops may either be modified or rescinded under a 3-2 Republican majority. Again, there is so much going on in the administration, obviously and we all know about that, we do not know how quickly these two individuals if, in fact, they are the individuals will be confirmed but I want to make sure you understand that if in fact it is the case that these two people will be confirmed then we will have a Republican majority and of course that will bode well for non-union employers as well.

The last thing I wanted to mention about the NLRB, which impacts all of you is that very recently the NLRB has confirmed its decision in a case called Purple Communications. I have spoken about this decision in the past. Purple Communications basically is a case that says that employers who allow their employees to have access to their email systems for normal business use cannot, presumptively, cannot preclude employees from using that email system either for private use or on behalf of organizations e.g. a labor union if they are doing so on non-working time. In Purple Communications, they dealt with a policy, which read as follows and I will quote, "the computer, Internet, voicemail and email systems and other company equipment in connection with any of the following activities, engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company, sending uninvited email of a personal nature." That was the policy of Purple Communications to which the NLRB found that violative of Section 7 of the National Labor Relations Act on the basis that it negatively impacted the ability of employees to engage in concerted protected activity. What the NLRB concluded was that employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email systems with the only exception of this being "an employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees rights." This standard is very difficult to meet in my opinion and was attacked by acting chair Phillip Miscimarra who basically called the standard incorrect and unworkable. This seems to me a prime case that if we have a new Republican majority that the NLRB will revisit this policy in one case or another and I think there is a good chance that it would be modified if not rescinded on the basis that an employer's property rights should trump the rights of employees to use the employer's own email system for non-work related issues. Stay tuned on that

but the current state of the law is those of you who allow employees and expect employees to use your email systems for business purposes, which is probably everyone of you out there will necessarily be in a situation where you have to allow those employees to use your email systems on non-working time for personal use or on behalf of organizations, which may include unions or unionized campaigns.

The last thing that I will say and this arose with regard to a client of mine is that in your employee personnel file one of the most important documents in my opinion that you can have is the signed acknowledgment form by an employee to your handbook. When you hire an employee or when you revise your handbook you want to make sure that you have a separate acknowledgment form by the employee, which acknowledges receipt of either the handbook or the republished policy and that the employee had the right to ask questions about it and that the employee acknowledges receipt of this particular form and that form should be in every employees personnel file. Because at the end of the day if you go to terminate an employee either for violating a policy in your handbook and you are appearing before an unemployment administrative hearing or you are appearing at the Equal Employment Opportunity Commission etc., you want to make sure that you have those acknowledgments that indicate that the employee received these policies. Of course, many of my clients I advise, particularly with regard to workplace harassment, to have a republished policy on a yearly basis and that republished policy and restatement would be by the CEO and I believe that it helps to have that acknowledgment form on an annual basis as well to indicate that on an annual basis the employee was reminded of such a policy and was reminded of the fact that if he had questions about it that he or she could certainly ask those questions or bring any issue to the attention of the HR department or any upper-level executive in the company. I think those acknowledgments are important and if you do not have signed acknowledgments but you do it electronically you want to make sure that you have a system for maintaining and retaining those electronic acknowledgments by the employee to indicate receipt of and acknowledgment of your particular acknowledgment form.

Okay Michelle can you take us off mute please? All right, as usual I invite any questions or comments either in this forum or privately with my email at hkurman@offitkurman.com or by phone call 410- 209-6417. Are there any questions or comments about anything that we covered today? Okay well if not we will speak again two weeks, the fourth Wednesday in May and in the interim I guess we will all be following from an employer relations the termination of Mr. Comey and see how that all shakes out. Thanks again.