LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, welcome everybody, its 9:02. Michelle can you put this on mute, please? All right, welcome to everybody this is the last telebrief in July, kind of hard to believe that the summer is moving along but it is. And welcome to new members or new participants, we always welcome them and hopefully you know the 25 minutes or so that we spend will be of practical value.

So there is a lot to talk about as always in the labor employment field and let me get started right now. The first thing I wanted to mention is something that came into the news a few weeks ago, this has to do with the lawsuit that Gretchen Carlson filed against Roger Ailes of Fox News Network. Those of you who follow the news know that Gretchen Carlson filed a sexual harassment suit in New Jersey State Court against Roger Ailes, the majordomo of Fox News and somebody who has been a very powerful person for decades in the Fox News world and reporting directly to Rupert Murdoch. She filed a lawsuit and then Fox News assigned the investigation of the harassment case to an outside law firm and in the midst of that investigation the outside law firm interviewed scores of people including women who also complained of alleged sexual harassment against Roger Ailes, which resulted at the end of last week in Roger Ailes resigning albeit with a reputed $40 million severance package. So those of you out there who are listening and who can get your company to pay $40 million to resign I would encourage you to do so.

The practical things that I wanted to bring up from this thing, from this whole investigation and whole lawsuit are these, that when you have a harassment case or charge that is brought against a high profile person in your organization it can be a very sensitive and emotionally trying set of facts and circumstances. But I think Fox News reacted appropriately in that number one they undertook an investigation quickly. As you know in any kind of workplace harassment cases, whether they are sexually based or otherwise, its important to do a very quick investigation as quickly as you can, which does not mean superficial it means thorough and it means complete and it means very timely and something that is done in a matter of probably days if certainly not weeks. So I think this is the prototypical example of something that was done quickly and thoroughly completely in fact its not even over as we speak. The second take away I think from this and the second thing that is very important is that in doing the investigation in a high profile case like this oftentimes politically its not expedient and its not really the smart thing to do to conducted internally by your own personnel as opposed to having an outside third party conduct the investigation. The outside third party can interject some objectivity into the process and can be politically gifted as opposed to your own internal HR department or general counsel where there is not necessarily the degree of objectivity that you need. So keep in mind if you have a situation where a highly placed individual is being accused of workplace harassment, sexual or otherwise, one, you want to undertake the investigation quickly, you want it to be done thoroughly and probably when you are dealing with a highly placed person you want to assign that or delegated to somebody who is on the outside as opposed to

somebody on the inside. Now when we are talking about investigations I think that it's important to understand that you want your policies to be such that you indicate to employees that if they refuse to comply or to cooperate with an internal investigation that in itself can be grounds for termination. I point to you and I discussed a case that was just decided on June 16th by the Second Circuit. Now, the Second Circuit governs New York, it is a Federal Circuit that governs New York, and in this case it's is called Gilman vs Marsh and McLennan. This had to do with an internal investigation that was conducted by Marsh and McLennan in response to claims that were brought against it having to do with alleged internal misbehavior on the part of certain employees or criminal conspiracies committed by certain of its employees. The Second Circuit went out of its way to basically state that the termination of employees who refused to comply or to submit to internal investigations being conducted by attorneys for Marsh and McLennan were grounds in and of themselves for termination thus denying them benefits to which they believed they were entitled after they were terminated. So, I think the take away, and the Second Circuit is a very influential Federal Circuit, the take away from this is that those of you out there who have handbooks or have policies with regard to workplace investigations should make sure that in your policies and procedures you make clear that the failure to cooperate or comply with requests for investigations and interviews is in itself a terminable offence, because you want employees to be able to give you honest answers in response to an internal investigation and if you have an employee who refuses to comply or to submit to interviews you want to make sure that that employee understands that the failure or refusal to do so is in itself a separate offense thus justifying severe discipline up to and including termination. And in this Gilman versus Marsh and McLennan case, again just decided a month ago by the Second Circuit, influentially the Second Circuit decided that the failure or refusal of employees to submit to these interviews was a terminable offense in and of itself. So go back, look at your policies make sure that you make clear to employees that the failure or refusal to submit to interviews is in itself a terminable offense.

I wanted to bring to your attention something that's been in the forefront of the news so much in the last six months it seems like every week there are acts of violence that are committed not only in places of public accommodations such as bars, restaurants and even two days in France in a church, but also in the workplace. The workplace has been the subject of increasing violence, many of you have workplace violence policies but I wanted to bring to your attention the fact that the Department of Homeland Security has extensive materials on its website entitled workplace violence prevention, active shooter preparedness programs and on the website through videos and through other materials you can certainly access recommendations and materials that you may want to use in developing, maintaining and communicating to your employees that you have an active shooter preparedness program and that you want to proactively deal with this issue in the workplace. Obviously, this is not so much of an issue of employment law as it is employment preparedness and communication to your employees. So you want to probably go on their website access the materials that are free and that you may want to communicate to your employees and drill to your employees, I know even our law firm has developed a workplace preparedness program and has communicated that to our employees in our law firm. I think you know in today's society unfortunately its become commonplace and its become sort of a routine

development that you see occurring weekly if not biweekly or on a monthly basis where employees either themselves or outsiders who get access to an employment setting commit acts of violence and I think it behooves you in your workplace violence policies and procedures to make sure that you have training and communication on active shooter situations. Again, I would invite you to go onto the website of the Department of Homeland Security to access those materials because I think they are effective and again they can be communicated easily to your employees.

Okay, another development that is of very recent vintage and I think has practical impact to you is that on July 11th the National Labor Relations Board in a three to one decision in a case called Miller and Anderson Construction handed down a decision which basically stated that employers who use the services of staffing agencies, so those of you out there who regularly use staffing agencies to get employees for you, even on a temporary basis, in this case the National Labor Relations Board held that the employer that both uses those staffing agency employees and the staffing agency, itself would be deemed to be a single bargaining unit and would be deemed to be a dual employer for purposes of labor relations and labor law impact. The significance of this is that when employers of the company that uses the staffing agency employees when you use these employees you are buying into, at least according to current board law now, which actually reversed a 2004 board decision, you are buying into a situation where unfortunately when you are using these regular staffing agency employees you are going to be deemed to be the joint employer for purposes of not only a union organization campaign but if that staffing agency is an organized employer, meaning that it has unionized employees, you may, itself be responsible for that staffing agency's unfair labor practices, you may be responsible for employee claims that have monetary liability associated with it and you even could be responsible for picketing because you may be deemed to be a single employer with that staffing agency so that if a union is picketing that staffing agency they also could picket you meaning the employer that is using those staffing agency employees and you would not be deemed to be a neutral employer.

So, really what are you supposed to do I have covered this before but it certainly bears mentioning. That if you are an employer out there who regularly uses, and I am not talking about the occasional staffing agency employee, I am talking about if you are an employer that regularly uses staffing agency employees it would behoove you to look at your contract, you certainly want to have a contract between your company and the staffing agency, that contract should enumerate the fact that for all purposes you are different employers, that you are not deemed to be the joint employer of the employees of the staffing agency, that the staffing agency will have an obligation to indemnify you for any financial liability or legal liability resulting from an action which is brought against both the staffing agency and you as the company that is using the employees of the staffing agency meaning that if there is a claim that is brought against the staffing agency and you and an outside agency whether its the National Labor Relations Board or whether it is the Equal Employment Opportunity Commission or whether it is the Department of Labor, deems you to be a single employer along with the staffing agency it behooves you to have a contract in place that would then obligate the staffing agency to both defend you, to pay your counsel fees and any potential financial liability that results out of the relationship between you and the staffing

agency. So I implore you to go back if you do not have a contract between your company and the staffing agency develop one or if you need some help with that let me know and even if you do have a contract make sure that it has appropriate provisions in it that would give you protection and indemnification in the situation where any claim is brought either by an employee or an outside agency contending that you as the engaging employer can depend upon indemnification provisions in the contract between yourself and the staffing agency. Very important in today's day and age when there is the concept of dual employment going on.

Okay, I wanted to bring to your attention a settlement in a case, I first reported on this case actually a couple of years ago, it has to do with the issue of unpaid interns, those of you who know or who utilize interns know that under the Department of Labor's wage and hour regulations there are very strict tests that are utilized in determining whether somebody is really an employee or whether somebody is an intern thus entitling that person to work for you without being paid. It is a very technical area and just last week on July 13th or a week and half ago, this was reported in BNA, and I will quote to you Fox Searchlight Pictures, Inc., agreed to settle for up to $276,000 claims by interns in New York and California that they should have been paid for their work on the movie Black Swan, some of you may have seen that movie, and other film projects according to a motion filed in Federal Court in Manhattan. The formal name of the case is Glatt versus Fox Searchlight Pictures. It was filed in the Southern District of New York. As the BNA report stated the preliminary agreement filed July 12th covers about 80 interns who worked in New York and 557 in California who would receive $495 each and actually what the Second Circuit did in this case was adopt a new test to determine whether somebody was indeed appropriately classified as an intern or whether that person was misclassified and should be classified as an employee and the test that they developed was whether or not the relationship was primarily for the benefit of the person who was the intern or really was the primary beneficiary the company who was getting a lot of the benefit out of the use of the unpaid intern. And that was the test that was developed by the Second Circuit, which has subsequently been adopted by other circuits around the country. So those of you, and I have stated this before in prior telebriefs, those of you who utilize the services of interns make sure that if you are not paying those interns that you are meeting the test with the Department of Labor, you can go on the website of the Department of Labor, there are various tests, which are utilized by the Department of Labor or the Second Circuit test which has been adopted which is who is the primary beneficiary of the services of this particular person, is it the so-called intern who is receiving instruction, mentorship and really the experience of being an intern or is it the company who is getting essentially unpaid services by the person that will inure more to the benefit of the company than to the individual. So, if you are using interns on a more voluminous basis pay attention to this case, pay attention to the test that have been utilized.

The last thing that I want to discuss with you today again is something that comes up repeatedly now because as you know the Department of Labor overtime rules for exempt employees or nonexempt employees goes into effect on December 1st. One question that came up to me last week by a client was whether the final regulations impact outside sales people at all? The answer to that is no, the regulations, the change in the regulations do not impact outside sales people, that there is no salary

requirement either under the old Department of Labor regulations or under the new Department of Labor regulations. So, if you have outside sales people know that you are still okay that there's no salary requirement for them either under the old regs or under the new regs. The second thing that I will say that although we have sometime between now and December 1st, which is the implementation date for the Department of Labor regulations I would make sure that you are starting the analysis now of how you are going to implement these particular regulations, you ought to be taking a look at your job descriptions, you ought to be taking a look at who you are classified currently as exempt, whether they are truly exempt or non-exempt, if they are non-exempt you certainly want to start determining what their real hours of work will be including overtime to assess what the cost will be upon implementation. And then you want to develop your communication plans as to how you will communicate this to particularly those employees who may be exempt now but who will not be exempt under the new regulations that will go into effect on December 1st. Because you are going to have to do some public relations work on convincing employees who are currently classified exempt and who may be non-exempt under the new regulations, you are going to have to do some public relations because they may view it as a demotion. And you are going to have to indicate that this was caused by compliance issues with the Department of Labor and I think that you are going to have to really look at the text of your communications; both written and otherwise and figure out how it is you are going to communicate this to those people who will be directly impacted by the new regulations and we can help you out with that.

Just as an aside I was interviewed by Jeff Falcon at Maryland Public Television the other day on the new Department of Labor regulations, it is going to be televised on their business show tomorrow night that is Thursday night on Maryland Public TV at 7:30 for those of you who want to tune in.

Okay, so those are the developments for the day. Michelle, can you take it off mute please. Okay, well for those of you who are new participants I always end this by indicating that anybody who has any questions feel free to ask them right now or if you have any comments I am certainly happy to answer them or if you would prefer to ask them in a private environment certainly you can call me on my direct line which is (410) 209-6417, or my email at hkurman@offitkurman.com. Any questions or comments out there on things that we were covered this morning?

Lynn: Hi Howard this is Lynn Happel with the Housing Authority of Annapolis

Howard Kurman: Hi Lynn.

Lynn: How are you doing?

Howard Kurman: Good.

Lynn: On that joint employer dual employment relationship that also has effects on the affordable care act?

Howard Kurman: Yes it does.

Lynn: Okay.

Howard Kurman: And you know unfortunately whether you are dealing with the Department of Labor, ERISA or any other kind of governmentally administered act you run into this dual employer concept. It is a little more technical Lynn under the Affordable Care Act. But you still got to make sure and you got to document the fact that employees from a staffing agency are not really your employees for any purpose including benefits and that would include health benefits. So appropriately document it and make sure that those individuals that are coming into your facility are not deemed to be your employees for any purposes.

Lynn: Okay.

Howard Kurman: Any other questions or comments? If not, again I welcome your participation. The next telebrief will be the second Wednesday in August, which is August 10th. Now, I just want to let you know that we will be having a telebrief, it will be pre-recorded a day or two before August 10th because I am going to be out of town on business in New York. But tune in, certainly we will cover the major developments in the next two weeks even though it will be pre-recorded and Michelle who is on the phone, and who is our marketing person at our firm, will be there to guide you through the process. So I just wanted to let you know that. Again, thank you very much, welcome to the new participants and we will see each other at least figuratively on August 10th. So take care and have a good two weeks.