LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, well good morning everybody. As I just said it is hard to believe tomorrow is Thanksgiving and just because it is Thanksgiving there is no shortage of news to talk about.

In the continuing saga of sexual harassment and work place harassment to all of you out there it may seem like it is not real big news because you deal with this, but it really is big news in several ways, and I am not going to talk about every issue that has come up or every person for whom complaints or against whom complaints have been made, but there are several issues that I do want to address from the HR standpoint. One is that there does not seem to be any nuance in the media about what should be done in certain cases or any differentiation between acts of workplace harassment and the penalties for that workplace harassments, so the media treats every complaint of harassment or alleged harassment as sort of deserving capital punishment or firing and while that has happened in many cases most recently with Charlie Rose and I will get to that in a minute, from a HR standpoint, of course, we need to recognize that when complaints or charges of workplace harassment come in there really needs to be a detailed analysis of the facts and circumstances of each one of these cases because each case does not necessarily deserve capital punishment or in our parlance in the HR world, termination. There needs to be a nuanced analysis. Some may involve a written reprimand, some may involve a suspension, some may actually involve termination, but there really needs to be an individualistic analysis of the facts and circumstances of each case prior to the time that any kind of penalty is imposed. I invite you all as HR professionals and as executives to make sure that when you are faced with any particular complaint of workplace harassment whether it is based on sexual harassment or any other kind of harassment on a protected classification that you look at it as an individual case meriting an analysis of the facts and circumstances and whether or not the penalty in any particular case is appropriate because some may involve a less stringent penalty than others and I think that that is a nuance that has been lacking in the hysteria that has evolved since the Harvey Weinstein, Roger Ailes, Bill O'Reilly, Charlie Rose, etc., etc., etc., has come up. I know the media gloms onto this and I think that it is really appropriate for all of us in the industrial relations world to look at these things as an individualistic case as opposed to just a knee jerk reaction of every case deserving a termination.

Along those same lines, the Equal Employment Opportunity Commission just announced that they will be releasing updates on sexual harassment guidelines in the workplace, and according to the EEOC, this is the first time in more than 20 years that they will have updated their guidelines, which will be published to the entire public. In media interviews, acting EEOC Chair Victoria Lipnik has

been quoted as saying, "the update comes at a time of burgeoning publicity, sexual harassment, and assault in the workplace," but that is in her words purely coincidental. So whether it is purely coincidental or not, I think you stay tuned for what that will mean for all of you out there as HR professionals and what the EEOC comes up with in terms of updated guidelines.

I also read an interesting statement yesterday in the Washington Post, which I will quote and this relates to the Charlie Rose termination and the statement that was put out by CBS, which I think is a pretty responsible statement on the part of an employer facing the kind of allegations against Charlie Rose that have come up. Here is what the executives at CBS put out in conjunction with the Charlie Rose termination. They said, "a short time ago we terminated Charlie Rose's employment with CBS news effective immediately. This followed the revelation yesterday, which was two days ago, of extremely disturbing and intolerable behavior said to have revolved around his PBS program. Despite Charlie's important journalistic contribution to our news division, there is absolutely nothing more important in this or any other organization than ensuring a safe, professional workplace, a supportive environment where people feel they can do their best work, we need to be such a place. I have often heard that things used to be different and no one may be able to correct the past, but what may once have been accepted should not ever have been acceptable. CBS news has reported on extraordinary revelations of other media companies this year and last. Our credibility in that reporting requires credibility managing basic standards of behavior. That is why we have taken these actions. Let us please remember our obligations to each other as colleagues. We will have human resources support today and every day and this is interesting, and we are organizing more personal and direct training, which you will hear about from senior management shortly." This follows on the heels of what I have spoken about in prior telebriefs for those of you who know, which is that from the EEOC's perspective and from the perspective of the right thing to do as well as a self-protective and prophylactic standard, training of your workplace is essential now on workplace harassment and that training should entail not only your rank and file employees as well as mid and upper level management but your executives as well because it is simply, I think, futile to pretend that workplace training will be effective unless it has the support of your top level executives in your company.

The last thing I want to say about this particular subject is that those of you who have employment practices liability insurance, EPLI insurance, should pay attention based on recent developments. The three issues that I think you need to look at in your EPLI policies; first you need to make sure that your EPLI coverage will cover independent contractors, will cover employees of subsidiaries or affiliates of your company and that the definition of covered individual will include all of these particular parties. Most policies today do, but I think you need to make sure in looking at your EPLI policies that it does cover employees of affiliates if they are the ones that are the offending employees, independent contractors or even foreign equivalents of your companies. Secondly, you want to make sure that the definition of claim with regard to

workplace harassment or discrimination includes any kind of administrative claim or charge or investigation as opposed to simply litigation claims. For instance, EEOC claims or charges or charges filed with like the Maryland Commission on Civil Rights, etc., should be covered under your EPLI policy in the definition of claims. The last thing is a something called a hammer clause, which is found in many EPLI policies, and basically a hammer clause is where if the insurance company wants to settle, and you say, no, I do not want to settle because this is a matter of principle, which sometimes happens, the hammer clause will give the insurance company relief. If the insurance company wants you to settle for instance $25,000, and you say, no, we are not settling for that, and the case eventually settles for $50,000 or more or it is tied to a verdict and the verdict is more than the $25,000 that the insurance company would offer, a hammer clause will say that you as the insured will be on the hook for some percentage of that differentiation or the difference between what the insurance company wanted to settle for and the eventual settlement or a verdict. Obviously, you are better off from an EPLI standpoint without any hammer clause at all, but if you do have a hammer clause, you want to make sure that the percentage that the insurance company can put you on the hook for is as low as possible; so rather than 50% you want to see if you can lower it down to 10% or 20%, etc. A hammer clause is something that you want to protect yourself against in analyzing and looking at your present EPLI policy.

Okay, other developments of the day. The Department of Transportation, for those of you out there who have drivers or individuals who are covered under the DOT standards for drug testing, the DOT recently announced that it is expanding as of January 1, 2018 its drug testing panel to include four new semisynthetic opioid drugs, and these are hydrocodone, hydromorphone, oxycodone and oxymorphone. Obviously, this was done in conjunction with all the publicity surrounding the issue with opioids throughout the country, and so, the Department of Transportation has included these four semisynthetic opioid drugs, which by the way go by the sort of street names of Vicodin, OxyContin, Lortab, Norco, Percocet, and Dilaudid. These will be included. Those of you out there who have drivers that are subject to the Department of Transportation drug testing panel, these will be new drugs that are included on that panel, and those of you who describe your drug testing program in your employee handbooks or in standalone policies will need to amend your policies or your handbook to include these new drugs. There are other technical aspects of the DOT drug testing regs, and they are very detailed and technical—I am not going to go into them now—but certainly if you go on the DOT website, you can pick those up, but again those of you who have drivers that are subject to the DOT guidelines, pay attention to these because they will go into effect as of January 1, 2018.

Turning my attention to some developments at the National Labor Relations Board, which affects all employers, not just unionized employers. On the good side, we have the new General Counsel, Peter Robb, who has been confirmed and who has assumed his responsibilities as General Counsel at the National Labor Relations Board. The good news is that he has a management bent, and

the General Counsel at the National Labor Relations Board, as I have indicated in prior telebriefs, really plays the role of national prosecutor in determining what cases will be prosecuted as unfair labor practice cases before the full National Labor Relations Board, which by the way now has a Republican majority of three to two. The reason that I think it is good news is that many of the decisions of the Obama administration from the past couple years, I think, will be modified if not rescinded. You have decisions under the Obama administration on dual employment, which is currently being litigated right now, which may be reversed. You have decisions on social media and the impact on whether or not statements that are made by employees on social media constitutes protected concerted activity under Section 7 of the National Labor Relations Act. All of these decisions may be modified or rescinded under the Robb administration as General Counsel, and I think that the issues of workplace rules promulgated under your handbook many of which came under extremely close scrutiny under the Obama administration may in fact be liberalized, modified or even rescinded under the administration of the new National Labor Relations Board and the Peter Robb administration as new General Counsel. I will keep an eye out on this going in the 2018, but I think it is safe to say that there will be a liberalizing of many of the decisions that were communicated and passed under the Obama administration, and these do impact nonunion employers as well as unionized employers.

Other sort of optimistic news from the Department of Labor; so we move from the National Labor Relations Board to the Department of Labor. We have the new Secretary of Labor Alexander Acosta expressing his pessimism and dissatisfaction with the joint employment test promulgated by the National Labor Relations Board. I think that that is important because the Department of Labor under Obama sort of followed the National Labor Relations Board decision and philosophy for joint employment and those of you out there who, you know, use staffing companies or who use temporary employees, you know, I think that will be a little safer based on what Secretary Acosta is saying, at least from the Department of Labor's viewpoint. He has also indicated that he does not believe that the test for independent contractors being part of the employer's workforce which was again a major initiative of the prior Department of Labor and the National Labor Relations Board, he has indicated that he has got skepticism with regard to whether or not the test for independent contractors that were used by the Obama DOL and National Labor Relations Board are really relevant or should be applied going forward; so that is good news for you all out there where the issue of so-called misclassification of independent contractors has been the bane of many employers existence in the last two to three years. Secretary Acosta has also indicated though that he is considering whenever the new salary test comes into play for the white collar exemptions, and again, as you know, I have predicted that in the future I think the salary test will come in for white collar exemptions somewhere between $30,000 and $35,000 Acosta has indicated that he is considering an automatic indexing of that salary test per the inflation rate going into 2019, 2020, etc. In other words whatever the salary test is that the Department of Labor settles on and again I think it will be between 30 and 35, there will be a certain indexing of

that for inflation, which I do not think is unreasonable and would come about so that you would not have to go through rule making every time they want to increase the salary test in order to accommodate the rate of inflation.

Talking about salaries, those of you who do business in Montgomery County, Maryland, should know that the Montgomery County legislature has approved bill 28-17, which will in phases increase the minimum wage from a $11.50 to $15.00 depending on the number of employees that exists. For instance on July 1, 2018, those employers with 51 or more employees in Montgomery County will have a minimum wage of $12.25, employers with 11 to 50 employees will have a minimum wage of $12, and employers with 10 or fewer employees will go up to $12 as well. On the following July 1, 2019 and 2020, they will go up accordingly depending on how many employees, so that when you reach July 1, 2021, employers with 51 or more employees will go up to $15. The statute has exemptions for home healthcare companies and nonprofits, so you know I invite you to take a look at that but those of you who have business where you employ employers in Montgomery County pay attention to this new minimum wage that you will have to increase your wages for.

The last thing that I want to mention is a case that came out of Washington State having to do with progressive discipline in handbooks and it's a case called Nicholson v. Public Utility District No. 1 and briefly what happened in this case was an employee sued contending that there were statements made in the employee handbook where the employer promised that despite its progressive discipline system it will treat employees fairly and non-arbitrarily. The Washington Supreme Court said that despite attempts by the employer to disclaim any kind of employment other than employment at will that in particular case that the employee could get by a motion to dismiss and claim that he had the right to be treated non-arbitrarily and in a fair way. I say this because it is a good time to look at your handbook and to make sure of a couple of things. One, that you strongly disclaim any kind of contractual mandate or any contractual impact of your handbook, so you want to say right out front with your handbook that the statements made in there are merely guidelines and not contractual in nature, you need to state that strongly and that those of you who employ a progressive discipline approach, particularly described in your handbook, should state expressly that despite the fact that you have a progressive discipline system that it does not in any way change the employment at will aspects of employment and that you are free to skip any step or to resort to any step including termination depending on the facts and circumstances of your case and you certainly do not want to have any statement, which indicates that your goal irrespective of the employment at will statement is to treat employees fairly and with just cause or with cause before any discipline is imposed. Because you do not want to get accused of sending mixed messages to employees and you certainly do not want to give employees the right to rely on that language in getting by a motion to dismiss or a summary judgment motion should they bring any kind of claims to your attention through litigation in court or in an administrative claim. It is a good time to make sure that your employee handbook has the right language and if you have any

doubts about that certainly, you know, talk to your employment counsel about that.

Okay, those are the developments for the day.

Any questions or comments that anybody might have and if not, if you rather send them to me you know in my email hkurman@offitkurman.com or phone (410) 209-6417 let me know. Any questions or comments?

Male Speaker 1: Howard any update on the sick days for the State of Maryland.

Howard Kurman: No, except that we know that we are headed into the legislative session, and as you know it ran into some wrinkles in the last legislative session. My guess is there is probably a negotiation going on behind the scenes between the Hogan administration and the leaders of the legislator right now, and I think that there will be obviously a bill introduced come January, and I think that there will be a successful piece of legislation coming out of that in the next session.

Male Speaker 1: Thank you.

Howard Kurman: Any other questions. Okay, well if not, you know, I hope everybody has an enjoyable Thanksgiving, and we will reconvene in the second week or second Wednesday of December, and for anybody who joined, that was a new joiner, I hope that we lived up to some minimal expectations. Anyway, have a good holiday tomorrow, a good day off if you are off Friday and we will see you in December.