LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, well, good morning everybody. It is the first telebrief of 2018. I know it's hard to believe the holidays are over, but we are headed into an interesting year, it seems to me in Labor and Employment law.

Many of you were on the last telebrief, I think it was the last telebrief in 2017 when I indicated that there was a lot going on at the National Labor Relations Board, which for a change was pro-employer as opposed to pro-union or pro-employee and I wanted to report on a couple of those developments, which happened right around the holidays.

The first was a decision of the National Labor Relations Board called Hy-Brand Industrial Contractors and Hy-Brand essentially reversed the Obama Court or the Obama board decisions having to do with joint employment. You will recall that the old National Labor Relations Board that determined whether or not two employers were joint employers and for those of you, who weren't participating in the past, joint employment can be found under the National Labor Relations Act or under the Department of Labor Rules. You, for instance, are an employer that uses subcontracted employees or you use staffing company employees, etc. The question is if some claim is being made by one of those staffing company employees or if there is a union campaign, are the two entities viewed as one employer for purposes of the National Labor Relations Act or the Department of Labor, etc.? The old National Labor Relations Board Rule was that in order for one company to be viewed as the dual employer of subcontracted employees or staffing employees, they had to have direct control over the terms and conditions of employment of that particular employee. The Obama board reversed that and under the Obama board test, the question now was whether or not the employer could exercise so called indirect control or potential control over that staffing company employee or subcontracted employee. It was a much more vague, and in my opinion, unworkable test.

Well, a couple of weeks ago in December, the new Trump Republican board promulgated a decision called Hy-Brand and in Hy-Brand they essentially reversed the decision of the Obama board and went back to a direct and immediate control test. This is a pretty significant decision and I think it will stand for the duration at least of the Republican board. Again, it's a reversal of the Obama decision; we are back in a situation now where if you are using subcontracted employees or staffing company employees, the test will be whether or not you have direct and immediate control over the terms and conditions of employment of that subcontracted

employee. You still in your contract, you have contracts where you were using staffing companies or you were using subcontracted employees, you should still have a provision which indicates that the employees that your were subcontracting or using remain the statutory employee of the staffing company or the subcontracting company and that those entities will be responsible for any employment related claims.

The second significant case that was decided by the National Labor Relations Board just a couple of weeks ago was a case called Boeing Company and the Boeing Company was a decision having to do with the reversal of the Obama board's decisions on handbook policies and rules, many of which we reviewed in the 2017 series of telebriefs and essentially what the Obama board's position was that any rule in your handbook, any provision in your handbook or any stand alone policy which in some way could be in anyway construed as a violation or potential violation of the rights of employees to engage in concerted protected activity under Section 7 of the National Labor Relations Act would then subject the employer to be found in violation of the National Labor Relations Act. Many of you had policy provisions, which dealt typically with prohibiting insubordination or incivility or impoliteness in the workforce and a lot of those policies came under the microscope of the National Labor Relations Board under Obama and were found to be illegal because they might have a potential impact on the rights of employees to engage in protected concerted activity.

In the Boeing Company case the National Labor Relations Board reversed the Obama board decisions and stated that they will prospectively consider in handbooks and other policies two factors; one is the nature and the extent of the challenge, rules, potential impact on the rights of the employees under the National Labor Relations Act, so they want to take a look at does it really have a significant or actual impact on the Section 7 rights of the employees and secondly is there a legitimate business justification for the particular rule. In the Boeing Company case, it dealt with the prohibition by the Boeing Company of cell phone pictures, photographs and recordings in the workplace, well Boeing is a big defense contractor, as you all know, and of course what the board found was there was ample business justification for such a rule, so the trend will continue in my opinion into 2018 having to do with Workplace Civility Rules and other comparable rules in your handbooks. You should go back and look at them. I would still recommend that those of you who have employee handbooks have a provision, which indicates some place toward the beginning that nothing in the handbook would be construed as prohibiting the exercise of rights under the Section 7 of the National Labor Relations Act language that we have discussed previously in our telebriefs. The big news really from the National Labor Relations Board is certainly a mitigation of if not outright reversal of many Obama era board decisions,

decisions that were clearly pro-union, pro-employee and in many cases unworkable from a practical standpoint. A significant development and I will keep you apprised of further developments that take place. One of the things that I think will come up is the sort of weakening of the Obama rule on confidentiality of investigations. I think I had reported last year on the fact that the board had said that when you prohibit employees from talking to one another during the course of an investigation that alone if it is a general overall prohibition can constitute a violation of Section 7 in the National Labor Relations Act. The Labor Board, I think, will be revisiting that and my guess is we will turn to a more practical approach similar to the EEOC when it comes to workplace investigations.

Those of you who have interns, you know I have spoken about interns before and the difference between an intern and an employee. At the beginning of January of this year, few days ago, the Department of Labor basically put out a fact sheet and basically stated that they were going to a standard similar to that which has been applied by many courts, which is a determination of whether or not the internship primarily benefits the employer or whether it primarily benefits the particular intern. If it benefits the intern, the intern is classified legitimately as an intern and not as an employee; if it primarily benefits the employer, the Department of Labor would say that that would mean that the person should be classified as an employee. In looking at this and in looking at its fact sheet 71, you can take a look at it on the Department of Labor's website, the following seven factors are considered and articulated by the Department of Labor in considering whether someone is legitimately an intern or not: 1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation expressed or implied suggests that the intern is an employee and vice versa; 2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; 3) the extent to which internship is tied to the intern's formal education program by integrated course work; 4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; 5) the extent to which the internship's duration is limited to the period in which the internship provides the internship with beneficial learning; 6) the extent to which the intern's work complements rather than displaces the work of paid employees. That is important that the intern really is not taking the place of a regular paid employee, and lastly, the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. Again, I invite you to look at or visit the Department of Labor's website if you want to take a specific look at the new guidance, but it is significant guidance on this issue for those of you in the sort of for profit sector who use interns.

I wanted to mention next that on January 4th and this did get a fair amount of publicity, Attorney General Jeff Sessions issued his memorandum rescinding a prior Obama guidance having to do with marijuana and the legalization of medical and recreational marijuana under federal laws. You may know that currently there are 29 states that have some sort of permissible medical use of marijuana, eight states including the District of Columbia permit recreational use as well and essentially what Sessions did was he indicated in his memo that the federal government and of course the United States Attorney General would continue to prosecute under certain circumstances the violation of the federal prohibition on use, distribution, etc. of marijuana.

As you may know, marijuana has remained a so-called Schedule 1 drug, prohibited drug, since 1970 with the passage of the Nixonian Controlled Substances Act and the confusion that has come about since the 29 states have legalized the use of medical marijuana and some of the states, as I indicated, have legalized the use of recreational marijuana is certainly the contradiction between the federal statute on the one hand, which prohibits the use, distribution, possession of marijuana and on the other hand the use of marijuana being legally allowed in those states, either for medical or recreational purposes. The truth of the matter is for those of you out there in HR or representing companies. The Sessions' memo does not have a direct impact on you all because if you are doing business in states where the use of marijuana is not legalized, either medically or recreationally, it is not going to affect your so-called drug-free workplace policies, procedures, etc, and even those of us who do business or represent companies who do business in states where the use of marijuana is at least permitted for medical purposes if not for recreational purposes, the law does not in any way prohibit you from having a zero tolerance policy or prohibiting the use or possession of marijuana or the effects of marijuana if it impairs the fitness for duty of a particular employee.

Now, last year, in a telebrief, I reported on a case in Massachusetts in which in a workers' compensation context the court said that an employer may have to accommodate the medical use of marijuana in order to alleviate pain and pay for that as part of a workers' compensation benefit. Nevertheless, those of you and I am sure most of you out there have drug-free workplace policies or drug testing policies, the Sessions' memo really will not have much of an impact on you; this has much more of an impact on those in the general society who are using it either for medical purposes or recreational purposes. Nevertheless, it was a significant development, it got a lot of play of course in the press, and I wanted to just indicate that from an employment standpoint it really should not vitiate or in any way diminish the validity of those of you who have drug and alcohol policies in place.

I had a client call me actually before the holidays having to do with an ex-employee and the question was whether or not the ex-employee's post on LinkedIn violated his no solicitation provision in his employment agreement. The particular employee for the company, a client of mine, had a no solicitation of prior client provision and a no solicitation of employee provision in employment agreement; he left the company about three months ago, the company saw on LinkedIn, sort of a general announcement by this employee as to where he was, and I thought that I would just spend a minute on our telebrief indicating that the courts do make a distinction between those social media posts, which are essentially generic in nature, just indicating whether it is on LinkedIn, Facebook, etc, just indicating that the employee is located at a certain company, may have his title, etc. as opposed to a specific solicitation that may be contained within the text or body of a particular LinkedIn notice or Facebook notice, where a court or a fact finder would not have difficulty concluding that it is a disguised method of soliciting either employees or clients of the terminated employee. There is a dichotomy as to how the courts treat these. I wanted to bring it to your attention it may mean by the way that when you construct employment agreements, which have post-employment restrictions on solicitation of employees, solicitation of customers or clients who are non-competition that you may want to in your non-solicitation provision define it or expand the meaning of solicitation to include any kind of solicitation on the various social media modes be it LinkedIn, Facebook, Twitter, etc. but the courts have come to grips with this and while there are not a plethora of decisions, there are some decisions, which deal with this and I invite your attention to that.

I also wanted to mention the new tax law as it applies in the employment context in one significant way. Many of you of course have read about or heard about the new tax law signed in to law by President Trump. What many of you may not know is that there is a provision, which is contained in the new tax law, it's Section 13307 and it provides that no business deduction shall be allowed for; one, any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement; or two, attorney's fees related to such a settlement or payment. Section 162 of the IRS code will be amended or is amended to include those provisions. Essentially, this is a sort of sequelae to the Harvey Weinstein et al developments and basically says that if you have a plaintiff who claims sexual harassment or abuse in your workplace and you eventually settle that case, under the old law, payments that were made pursuant to a settlement and even if some of the payments were for counsel fees either for your own or the plaintiff's counsel fees those fees and those expenses could be deducted as an ordinary and reasonable business expense. Under the new tax law, those expenses and those fees are no longer deductible as a business expense and the public policy of course is that if you are going to have a non-disclosure or confidentiality

provision in your settlement agreement, which would preclude the plaintiff from talking about it or raising the issue to family members or others in the community then you are not going to be able to deduct those expenses. On the other hand if you don't really care about deducting the expenses, if it is not a big deal to your company, then you can have a non-disclosure or confidentiality provision. Again, the clear distinction is between those settlement agreements in a sexual harassment or abuse case where you want to impose a non-disclosure or confidentiality agreement on the employee making the claim. If you are going to impose that you can't deduct it. If you are not going to impose it, you can. I think that you know it will usher in a new era in some cases having negotiated many many, many of these in my career. I think this may even in some cases make it more difficult particularly for those companies who really want to be able to deduct the expenses. Now, obviously if it is not a major expense where you are not talking about big dollars in a settlement, it probably is not worth making it an issue but you know there are some sexual harassment cases that settle for big dollars and in those cases you know the companies want to impose confidentiality and non-disclosure provisions on the plaintiff and under the new tax law you are not going to be able to do that if you want to deduct those expenses.

Alright those are the developments of the day. Michele can you take this off on mute please? Alright as I always indicate I am happy to answer any questions either in this forum or in a private forum by email or phone. This is going to be a very active year I can tell in the labor and employment field. Any questions, comments out there?

Ann Barnes: Howard, the change in the tax deductibility of severance benefits, which you just described, it is going to be quite a surprise to a number of employers who probably don't realize this is buried in the tax law change.

Howard Kurman: Yeah well remember Ann it is not that you can't deduct expenses in a severance arrangement, if the severance is allocated at all to a sexual harassment case or a sexual abuse case.

Ann Barnes: That is what I mean and there is a non-disclosure requirement.

Howard Kurman: That's right. That's right. So many employers don't know about it, you are right. The quirk will be you know sometimes an employee will accompany a sexual harassment claim with other kinds of claims.

Ann Barnes: That's true.

Howard Kurman: You might have a claim for race discrimination or sex discrimination.

Ann Barnes: Right. Right.

Howard Kurman: You are going to have to allocate settlement amounts so that if you want to deduct certain amounts and have a non-disclosure agreement it's going to create all kinds of wrinkles and I am sure like you said Ann that many employers don't have the foggiest idea that this is contained in the law.

Ann Barnes: Yeah, I don't think this has gotten any press.

Howard Kurman: It really hasn't. Right, it really hasn't. I got it because you know I belong to professional stuff and I get that stuff.

Ann Barnes: Right.

Howard Kurman: But you are right. It really did not get a lot of publicity.

Ann Barnes: Thanks it is really important thanks for drawing our attention to it.

Howard Kurman: Sure. Sure. Any other questions? Okay well if not you know we have these on the second and fourth Wednesdays of every month, the next one will be towards the end of January and welcome to any new members and I hope that you find it valuable as we go through the year. Thanks very much everybody.