LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Alright! Good morning everybody. Christina, welcome as a newcomer and any other people that are joining for the first time, this is our first telebrief in June and the last telebrief in June will be the fourth Wednesday of June as we always do. Okay. Plenty to report this morning, a couple of things, sort of as we say ripped from the headlines. The first thing I want to report on is a little article that came across my desk on the American Bar Association Journal just the other day and I will just read it real quickly. This has to do with the whole brouhaha over the termination of Roseanne Barr and of course many of you may have read or had people talk to you about reading that after she was fired does not she have a First Amendment right to say what she wants without any consequence. And there was this little American Bar Association article that I thought that I would quote to you which says and correctly so, the First Amendment restricts the government from interfering with free speech rights, but it doesn't cover job-related consequences for private employees or even star comedians. As they say, the First Amendment begins with the words "Congress shall make no law" but does not restrict private employers, according to University of Illinois labor and employment relations professor Michael LeRoy. "Employees in private workplaces do not have a First Amendment right," he told Illinois News Bureau, "even though they mistakenly often think that they do." And that is what I have indicated in prior telebriefs but I think it bears repeating particularly when you see consequences of people in a public eye speaking out and perhaps even being terminated from contracts as a result of that. There are also in many employment contracts, you may even have some in yours for executives, so called morals clauses which indicate that an employee could be terminated for any kind of speech which would tend to shock or bring denigration or criticism on the employer or affect his reputation. So I just bring these to your attention because many people have this idea particularly probably some of your employees that they can say anything with impunity that they want while being employed by a private employer and that's just no so that First Amendment rights only apply to restrictions imposed by the government not by a private employer.

Okay, I want to turn my attention for a good part of the remaining time on a memo that was circulated on June 6th, so just a week ago today by Peter Rob. Peter Rob is the general counsel of the National Labor Relations Board and he in effect is a chief prosecutor for that agency and the memo and you can pick it up at your leisure on the website is entitled guidance

on Handbook Rules Post-Boeing. Now the Boeing Company was the National Labor Relations Board decision back in December of 2017 where in large part the National Labor Relations Board overturned a prior decision called Lutheran Heritage Village in which the board began an attack under the Obama administration on handbook policies or independent policies even outside of a handbook where the board then claimed that any particular policy or many particular policies could detrimentally affect the rights of employees to engage in what's called concerted protected activity. We have spoken about that many times under Section 7 of the National Labor Relations Board. The import of Mr. Rob's memo or guidance which he sent to all the National Labor Relations Board offices in the country is that in large part it clarifies what an employer can do or cannot do in its employee policies and handbooks which may have been suspect under board scrutiny in the Obama era and essentially what the board has done is divide handbook policies and rules into three categories. One, rules that are generally lawful to maintain and I am going to discuss them in some detail. Category two, rules that may or may not pass scrutiny depending on a case by case analysis. And category three, those policies which are inherently illegal under the National Labor Relations Board. Now, you might say why do I even care about this handbook or these policy changes if I don't have unionized employees and the answer is, because the National Labor Relations Act applies to all employees whether they are unionized or non-unionized and many employers don't understand that but it is the truth and therefore I wanted to spend some time on these three categories, so that when you go back and you look at and analyze particular policies in your handbook or independent policies, you can ascertain according to the current board status. Whether those will pass muster or whether you need to revise them. So category one are rules that are generally lawful to maintain. The first rule that the board or the general counsel delineated were civility rules, so many of you have civility policies in your handbook and the general counsel basically says that these rules should belong to category one which is those rules which are protected for employers to implement. So the examples he gives in his memo are statements like conduct that is inappropriate or detrimental to the employer's operation or that impedes harmonious interactions and relationships will not be tolerated. Behavior that is rude, condescending or otherwise socially unacceptable is prohibited. Employees may not make negative or disparaging comments about other employees, blah-blah-blah or disparaging the company's employee is prohibited. Rude discourteous or un-business like behavior is forbidden. Disparaging or offensive language is prohibited. You might say that all of these invoke common sense, but many of these rules did not pass scrutiny under the Obama era National Labor Relations Board and as a consequence many employers particularly non-union employers had their policy handbooks or employee handbooks under intense scrutiny and in some cases under violation of the law. So as the justification those

examples are examples of what the board has held that this rule type advances substantial employee and employer interest including the employer's legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence and its interest in avoiding unnecessary conflict or talks at work environment. The second perfectly permissible rule is what they call a no photography rule and a no recording rule. So in this category such rules as the board states include employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval and employees may not record telephone or other conversations they may have with their co-worker, managers or third parties unless such recordings are approved in advance. I have had clients in the past who have had situations where employees have insisted on recording conversations or even surreptitiously did so and under this clear statement you could have a policy which absolutely forbids that without prior approval. As the justification, the general counsel says employers have a legitimate and substantial interests in limiting recording and photography on their property. This interest may involve security concerns, protection of property, protection of proprietary confidential and customer information, avoiding legal liability and maintaining the integrity of operation.

The next perfectly permissible rule, the third one under this Category 1, is rules against insubordination, non-cooperation or on-the-job conduct that adversely affects operation. As the general counsel says, almost every employer with a rule book has a rule forbidding insubordination, unlawful or improper conduct, uncooperative behavior refusal to comply with orders or perform work or other on-the-job conduct that adversely affects the employer's operation. I would state in here, by the way, the insubordination either under a unionized or a non-unionized environment includes disrespectful attitude towards a supervisor such as profane language. So insubordination goes beyond simply the refusal to obey a legitimate order of management or supervision as well. And as the justification, the general counsel says an employer has a legitimate and substantial interest in preventing insubordination or non-cooperation at work. Furthermore, during working time an employer has every right to expect employees to perform their work and follow directions.

The fourth perfectly permissible rule under Category 1 are those rules prohibiting disruptive behavior on the job. So some examples that the general counsel gives are boisterous and other disruptive conduct creating a disturbance on Company premises or creating discord with clients or fellow employees or disorderly conduct on premises and/or during working hours for any reason is prohibited.

The fifth perfectly permissible rule according to the general counsel are those rules protecting confidential, proprietary, and customer information

or documents. As the general counsel says certain types of confidentiality rules also belong in Category 1 that is rules banning the discussion of confidential, proprietary, and customer information that make no mention of employee or wage information. I should say here, and will get to it in a minute, that while you can certainly prohibit employees from disclosing or discussing confidential or proprietary information under the National Labor Relations Act, you cannot prohibit employees from discussing with other employees wages, benefits and other terms and conditions of employment. So if you have these confidentiality policies, you certainly want to be mindful of the fact that you cannot prohibit employees from discussing wages, hours, and terms and conditions of employment; and therefore you could not have a rule and this is one of the prohibitory rules in Category 3 that basically prohibits employees from discussing with other employees their salaries or their wages.

The fifth protective category under this Category 1 is rules against defamation or misrepresentation. So the general counsel says rules prohibiting defamation or misrepresentation should be placed in Category 1 notwithstanding the defamation that occurs in the course of Section 7 activity is legally protected under certain standards. That is, they give examples of the policy statement which would be okay. Misrepresenting the Company's products or services or its employees is prohibited or do not email messages that are defamatory.

The next category is rules against using employer logos or intellectual property. So the general counsel says traditional rules prohibiting employees of employer logos and trademarks also belong in Category 1. Examples of such rules are employees are forbidden from using the Company's logos for any reason. Or do not use any Company logo, trademark or graphic without prior written approval. As the general counsel states employers have a significant interest in protecting their intellectual property, including logos, trademark or service marks.

And the next one is rules requiring authorization to speak for the company. So as the general counsel says, rules requiring authorization to speak for the Company or requiring that only certain persons speak for the Company fall into Category 1. Examples of such rules are, one, the Company will respond to media requests for the Company's position only through the designated spokespersons; and two, employees are not authorized to comment for the employer.

Last protected statements or protected policy are what the general counsel characterizes as rules banning disloyalty, nepotism or self-enrichment. So examples of those are employees may not engage in conduct that is disloyal, competitive or damaging to the company such as illegal acts in restraining of trade or employment with another employer. And

employees are banned from activities or investments that compete with a Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gain.

Then you move on to Category 2 which are the rules warranting individual scrutiny and these are rules which may or may not be illegal depending on the context in which they are written. So for instance, confidentiality rules which are overly broad but do not necessarily prohibit the discussion of wages and hours, may or may not be illegal; or rules regarding disparagement or criticism of the employer as opposed to disparagement of the employee may or may not be illegal depending on the context and other rules and regulations which it gives examples of. Again I think the real context is the fact that you have to look at these on a case by case basis, and really try and balance the legitimate business interest advanced by the employer against any negative impact on the Section 7 rights of employees.

And lastly the 3rd Category, these are rules that are unlawful to maintain and I have spoken about one already which is confidentiality rules specifically regarding wages, benefits or working condition. So the following policies would be prohibited in your handbook. Employees are prohibited from disclosing salaries, contents of employment contracts, etc., or employees shall not disclose any information pertaining to the wages, commissions, performance, or identity of employees of the Employer or rules that expressly prohibit discussion of working conditions, so a policy statement that would say something like employees are prohibited from disclosing to any media source information regarding employment at the company or the workings or conditions of employment of any particular employer.

So, you know, I certainly invite you to go on the National Labor Relations Board's website. You can download a copy of that or if you have questions about it I am obviously happy to answer those, but these ought to guide you in either the formation, if you don't have a handbook or the analysis and potential remediation or reformation of your handbook pursuant to these handbook policies and those things which may not have passed muster under the Obama Administration Board will certainly pass muster now. Now the question becomes, okay, well what happens in the future should the Republican Board turn into a Democratic Board. It's a good question, but I do think that there is a lot of common sense and a lot of good rationale and reasonableness in this memo and hopefully it will guide future generations or leadership in the National Labor Relations Board.

I wanted to mention, you know, a couple of weeks ago I talked about the Maryland statute that was signed by Governor Hogan called the

Disclosing Sexual Harassment in the Workplace Act of 2018 which really contains two major components for larger employers, one is the prohibition on having an individual arbitration agreement with an employee under which the employee would forego the ability to pursue a remedy for sexual harassment in court as opposed to arbitration and the second sort of branch of that statute which mandates that employers have to report on sexual harassment settlements that they reach with employees. Now as to the second branch of that I think that certainly would pass muster if it were challenged in the court. The real question in my own mind is whether the first branch of that will survive given the fact that under as we talked about last time the Supreme Court's decision in Epic Systems which was decided actually pretty much the same day or near the same day that Governor Hogan signed this Maryland statute. Under the federal statute which is the Federal Arbitration Act the supreme court said that an employer can indeed compel an employee to waive rights to class action remedies in court in favor of individual arbitration. And so the opening question, at least somewhat of a question at this point, is whether or not the Epic Systems' decision in the Federal Arbitration Act will preempt that portion of this disclosing sexual harassment in the workplace act of 2018 or whether the Maryland's statute will continue to be allowed to survive, at least the first rung of that, will be allowed to survive without challenge, we just have to wait and see.

I wanted to mention also that as you know, many of you use the existing FMLA forms which are part of the Department of Labor's website. Many of you download them and use them. They were supposed to have been extinguished in view of any kind of a revised form as of May 31st, but Department of Labor has put out a publication which indicates that the expiration date for the current FMLA forms has been extended from May 31st until June 30th the end of this month. I don't think it really will have any practical import on you because I don't think they are going to be any changes to the forms, but stay tuned so you can still continue to use those forms until you really learn otherwise or I see otherwise from the Department of Labor.

Okay, those are the developments of the day. Michelle, can you take this off of mute please? Okay. Any questions, comments, I'm glad to receive them either in this forum or privately on my email at hkurman@offitkurman.com or phone 410-209-6417. Any questions on anything that we covered? I would certainly recommend that everybody who has responsibility for handbooks probably download the general counsel's memo from the National Labor Relations Board. It gives you a good road map of certain policies that may have been controversial in the past. Okay. If there are no questions, we will adjourn and we will see each other figuratively if not literally on the fourth Wednesday in June which is June 27th. Okay, thanks everybody.