

LABOR & EMPLOYMENT TELEBRIEF

By

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Howard Kurman: Good morning everybody. This is our last telebrief in the month of April, headed into May. Kind of hard to believe the year has gone so quickly but there is always plenty to report on the labor and employment end.

Let me start with something that I know that you all have followed in the news a lot in the last couple of weeks and I think it has some lessons for us as HR and labor and employment professionals and that is the elimination of Bill O'Reilly from Fox News. Why do I bring it up? Well, I think it teaches us several lessons as HR and employment professionals. As you know, just last week Bill O'Reilly had a precipitous exit from Fox News. For years and years, he was a major moneymaker for Fox News, in fact their biggest moneymaker and reported directly to Roger Ailes who as know was precipitously himself terminated last summer because of multiple claims of sexual harassment as was Bill O'Reilly. It was reported in the New York Times a couple weeks ago that over a period of some years, both the network, Fox News and O'Reilly himself paid out more than \$13 million in settlements to five different women who complained about sexual harassment and other inappropriate workplace wrongdoings. It is an extraordinary amount of money as you all know for paying out claimants in this kind of a case and so as I thought about it and I know that we have talked about workplace harassment and sexual harassment multiple times through these telebriefs, I thought it would be appropriate to recap some of that discussion and to revisit some rehabilitative and proactive things that we all need to make sure of as labor and employment professionals.

One of the things that I think comes out of the Roger Ailes/Bill O'Reilly debacle for Fox News and they really are debacles, is that you can have the best workplace policy in the world, which by the way Fox News did not, but you can have the best workplace harassment policy in the world, you can claim that you have zero tolerance for harassment but it really starts at the top from a cultural standpoint. If your organization is not prepared to enforce that kind of a cultural environment, then it does not matter how strong your policy is. It took a long time really for Fox News to terminate Roger Ailes and to terminate Bill O'Reilly in the face of multiple claims of sexual harassment by multiple women. One of the things that an organization is faced with and you all are faced with as senior management people is what to do when there are accusations against the very senior manager of a workplace or sexual harassment. Obviously, the short answer to the question is that if you have a policy in place, that policy should be enforced equally irrespective of the position of the person who may be the putative offender in the workplace. If you are not prepared to do that, then your policy has little teeth and realizing from a practical standpoint that that may pose real problems, financial and otherwise, succession planning in there, you still need to be prepared to take proactive action and remedial action if there are claims against a senior manager that turn out after a thorough vetting and investigation, that have merit because after all, if you are not prepared to do that and you sort of make an excuse because somebody is in a high position or somebody brings in a lot of revenue to your

organization, you leave yourself open for valid claims as well as claims for punitive damages because if that person is engaged in multiple offenses as was Roger Ailes and Bill O'Reilly, then you know if it's the third or the fourth offense, you leave your organization exposed to claims for punitive damages on the basis that your organization knew about it and failed to address it in a proactive way. That's one thing that I think that you need to keep in mind, which is that again, irrespective of your policy language, if you are not prepared to enforce it as a cultural value and if you don't get buy in from the top down as opposed from the bottom up, your policies have little value from a legal standpoint.

As you go about perusing, monitoring and looking at your policies, just a couple of things that I think you need to pay attention to which is certainly a mandatory provision in your policy that if anybody experiences any kind of workplace harassment, that it is the responsibility of that employee to immediately report it through multiple channels so if the person is uncomfortable reporting it obviously to a supervisor, the person reports it or can report it to a manager, a senior manager or obviously human resources.

A second, I think, critical provision in all these policies is that there is got to be a strong statement in your policy that your organization will not permit, condone or allow any kind of retaliation against any employee who files or pursues any kind of a workplace harassment complaint.

Thirdly, there has got to be a provision, not only in your policy but in its enforcement, that there be a thorough investigation of the matter. Frequently, if there is a putative offender against whom a complaint has been made, it may be worth it to suspend even with pay if you have to that putative offender or separate the offender from the alleged victim. You may even want to have an outside third party conduct the investigation. You will note in the Fox situation that the people that did the investigation were not internal to Fox, they were an outside law firm that conducted the investigations.

All of these things certainly are useful, and at the end of the day, when you have completed your investigation, you really need to make sure to document your decision, whether it is a decision to discipline the offender or even if it is a decision that indicates that there is not sufficient evidence to substantiate the claim of the alleged victim in the particular case. Documentation is very important both internally and to an external agency like the Equal Employment Opportunity Commission or the Maryland commission on human relations, etc.

I know a couple of weeks ago or a couple of telebriefs ago, I talked a little bit about hotlines and while Fox News supposedly had a hotline to report sexual harassment or workplace harassment claims, there was an article in the New York Times just on April 21st, a long article on the dangers and pitfalls of using these anonymous hotlines if they're not well publicized and communicated to the employees, and there was a quote in this article, again, the title of the article was "*Anonymous Harassment Hotlines Are Hard to Find and Harder to Trust*," April 21, 2017 by Noam Scheiber, reporter for the New York Times. In it, stated Deborah Katz, a longtime lawyer representing whistleblowers and clients alleging sexual harassment and discrimination said in an email that it is "very common for companies to bury information about how employees

can file confidential complaints and for employees to be completely unaware of the existence of hotlines.” She added in a followup interview that many companies also neglect to mention the hotlines in training sessions. The last thing I will say, we’re talking about training, is that I think that it is critical that in addition to training and onboarding new employees when it comes to harassment issues, that it be an ongoing annual thing with regard to not only supervisory and managerial employees but rank and file employees as well. The degree to which you are transparent, re-publish your policy on an annual basis from your CEO and conduct training even if it’s something as perfunctory as having employees watch a podcast or video or training video, all these things cumulatively make a difference and indicate your organization's commitment, both internally and externally, to enforcing on an evenhanded basis throughout your organization, workplace harassment and sexual harassment policies.

I think these are lessons that we can take from something that had such notoriety throughout the media in the last month, and as HR professionals and employment labor professionals, we need to take a look back and we need to make sure that again, not only are our policies thorough and complete and understood and communicated to employees but they are enforced evenhandedly and there is adequate training that takes place on a regular basis to enforce and make known these policies.

Turning my attention to other things, I think I mentioned a few weeks ago that the NLRB has a new chair and that is Philip Miscimarra, and he is a Republican. He had been appointed to his acting chair by President Trump shortly after Trump took office on January 20th, now he has been appointed as the permanent chair of the National Labor Relations Board, so even though his prior term is due to expire in December, he will then be the permanent chair of the NLRB.

It is significant because as I’ve told you, probably in the last year, the Obama administration had an NLRB that was a Democratic majority; remember there are five members to the NLRB, and under the Obama administration, there were three Democrats, two Republicans, one of whom was Phil Miscimarra. There are two vacancies now, as soon as those vacancies are filled by President Trump, you’ll have a three-member majority on the National Labor Relations Board and that three-member majority will be Republican and my prediction is that many of the kinds of extensions that we’ve seen in the past under the Obama administration, of Section 7, protected concerted activity, may in fact be modified if not rolled back in some form, in order to make it a little more reasonable for employers who are, you know, who have suffered I think in many cases through the extension and great extension of the Obama administration National Labor Relations Board. We will pay attention to that and we’ll see what happens but my prediction is, there will be some relief for employers coming up under a Republican National Labor Relations Board and again, remember, this will not only pertain to unionized employers but non-unionized employers as well, because non-unionized employers have obligations under Section 7 of the NLRA to allow employees to engage in protected concerted activity and as we have seen in the last year or two, the boundaries of that Section 7 activity have been greatly expanded by the Democratic National Labor Relations Board, which is why you had such a liberalization and such an attention being paid to employee handbooks, social media postings, and the rest of that by a Democratic NLRB.

I bring to your attention an interesting piece of legislation that was introduced just a week and a half ago, by House and Senate Republicans, it is called the "Working Families Flexibility Act of 2017" and the crux of this piece of legislation is that if enacted, and that's a big if, but if enacted, it would amend the Fair Labor Standards Act to permit private sector employer to provide to provide comp time to employees in lieu of overtime pay. Now, I have talked about comp time in the past and as you know, with the exception of public employees where there are provisions under the FLSA for comp time, for the most part, private employers are under a restriction in utilizing comp time for private sector employees because in order to do that, you have to have the comp time used in the same pay period in which it's earned and that is a very difficult thing and most employers who use comp time inappropriately today, use it in the sense of allowing private sector employees to bank it. Well, you can't do that under the FLSA so under this "Working Families Flexibility Act," what would happen is, if the employer and the employee agree, so it would be a bilateral agreement between the employer and the employee, or if it's provided in a collective bargaining agreement, the employer would permit the employee to bank comp time at the rate of one and a half times every hour of overtime. For instance, if you had an employee who in a particular work week worked 10 hours of overtime, instead of under the present situation paying that person time and a half for 10 hours of overtime, under this "Working Families Flexibility Act," that employee would be able to bank 15 hours of comp time to be used at some point later in the year. Under this provision, under this putative act, if the employee asked the employer to use the comp time, the employer would be obligated to allow the request if its requested within a reasonable period of time after the request is being made unless it would "unduly disrupt the operations of the employer."

There are other provisions in here but this is a concept that has been talked about really for many years and of course under a Democratic administration and a democratically controlled Congress, it never had much chance of being passed. Now that we have a Republican Congress and a Republican Senate and a Republican President, it may have some traction, and from a practical standpoint, it's probably something that both employers and employees alike may desire, so I will keep track of it and let you know what happens in the future.

Speaking about, sort of Congressional activity, in the last couple of weeks, there was activity introduced by Senator Lamar Alexander, he's a Republican from Tennessee. He heads the Senate Health, Education, Labor and Pensions Committee, who asked the Trump administration to roll back the EEOC's expanded data collection on the EEO-1 Form. As you know in prior telebriefs, I have talked about the fact that the Equal Employment Opportunity Commission has an expanded role for employers to pay beginning March 31, 2018, so in addition to submitting the standard data on gender, race, etc. on your EEO-1 forms for those employers with more than 100 employees, under the Obama administration, the EEOC, you have to submit a boatload of more data including pay data. Well, Senator Alexander, as well as Senator Roberts, a Republican from Kansas, sent a letter to the White House office of management to, in essence, scrap that particular expansion. We won't know what happens but given the anti-regulatory atmosphere, which is favored by the Trump administration and some statements by the new chair of the EEOC, Vicki Lipnic, she was one who actually, as a

regular Commissioner of the EEOC, opposed this particular expansion. We'll have to see what happens but there is a chance that even though this was set for enforcement in 2018, there is a chance that this would be rolled back along with some other executive orders that were passed under the Obama administration, and that would include, of course, the white collar exemption rules that have been stayed and are currently in a state of flux and on appeal arising out of a federal court decision in the state of Texas. As you know, those white collar exemption expansions would have increased the salary exemption from \$24,000 and change to \$27,000 and change, and that is currently in a state of flux and I doubt whether it will be enforced in its current form. If, in fact, there is going to be some enforcement of that particular white collar expansion salary test, my guess is, it will be someplace between \$24,000 and \$47,000, maybe in the mid midpoint \$30,000-\$35,000, something like that but many of you have already made changes I know and certainly from a practical standpoint, you don't want to go back in time and make those changes but nevertheless, those things are something that we'll have to pay attention to.

Those are the developments for the day. Michelle, can you take this off of mute please. Okay, so as always, I invite any questions or comments that anybody might have on what's going on. If you'd rather direct them to me personally as opposed in this forum, obviously you can send them to me at hkurman@offitkurman.com or give me a call at (410) 209-6417. Any questions or comments from anyone?

Anne:

Howard it's Anne, I think this whole thing with Fox News where you can be sure the HR people were apoplectic about what was happening but how do you control people at the levels and notoriety of a Roger Ailes and Bill O'Reilly? We all have them in our organizations, maybe not as publicly known so it's really a dilemma on how can HR people get assistance in corralling this kind of behavior that is certainly damaging to the organization and to the employees, I think that's a real problem for those of us working in the field.

Howard Kurman:

It is a problem, Anne ,and I think the answer lies in the fact that there is got to be a commitment from top executives that this is an important priority for the organization and if your organization is big enough where it's not possible for a CEO or someone of that ilk to directly address employees on a regular basis, if not annually, then certainly through podcast or Intranet etc. If you do not get buy in from those kinds of people at the top, it does make it virtually impossible for it to be enforced. There was a statement in the article that I mentioned in the New York Times, and I'll read it to everybody real quickly, it says amid complaints that the Fox News human resources department was insensitive and even hostile to complaints from employees during the tenure of the former Fox News Chairman, Roger Ailes, the network recently brought on a new executive vice president for human resources in a wide-ranging effort to revamp the department a network spokeswoman said. My thought in reading that in the New York Times article was, where was this person before? It is not like Fox News network is some mom and pop operation, it's a multibillion dollar operation and so you would think that they would have had a top HR executive anyway, so to announce that they are bringing in somebody like that right now, to me seems like closing the barn after the horse has already gotten out, I don't know where they were before. So you're right Anne, as HR and employment specialists, it behooves all of us, particularly after this and

maybe it is an incentive for top executives and a wake-up call to say, look, even though we may have EPLI insurance, this is not kind the publicity that any organization wants and look at the damage that's been done to Fox News as a result of this, terrible image problems. So your question is a good one, Anne, there is not exactly a precise answer to it but I think the closest I come is that unless there is buy in and active involvement from the top down, HR people will be swimming in futility to think that just having policies will be sufficient. Any other questions?

Anne: Howard, any idea of when, are there nominations for these two open seats on the board or has the administration not gotten to that yet.

Howard Kurman: I don't think they've gotten to it yet, Anne, I think that, you know, there are too many other positions to fill, there have been names bandied about but none definite that I know of.

Anne: Yeah that is what I thought, thanks.

Howard Kurman: Sure.

Kathy: Howard, this is Kathy.

Howard Kurman: Yeah, hi Kathy.

Kathy: Hey, On the Working Families Flexibility Act, you said that it would permit private sector employer, so it would be up to the employer whether or not they chose to do that, correct?

Howard Kurman: Sure, it would be up to the employer but again under this provision in order to dictate that an employee could do that, there would have to be an agreement between the employer and the employee.

Kathy: Okay, thank you.

Howard Kurman: Sure. Okay, well as always, I appreciate everybody's participation and we will see everybody on the second Wednesday in May.