LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
December 13, 2017

Howard Kurman: Okay, well, good morning everybody. It is going to be the last telebrief in 2017. You will get an email. The last telebrief would normally be scheduled as you know on the fourth Wednesday of December, which will be December 27th, but in view of the holidays and the fact that so many people take vacation during that week, we are going to skip the last normally scheduled telebrief in December, and so the first telebrief in 2018 will be Wednesday January 10th, but you all will get an email about it.

Okay, onto substantive stuff. There was an interesting bill introduced into Congress on a bipartisan level last week. This was introduced by Senator Kirsten Gillibrand, who was the subject of an interesting tweet by President Trump yesterday and Lindsey Graham. It is called the Ending Forced Arbitration of Sexual Harassment Act, a very weird title seems to me, but nevertheless, the import of this piece of legislation would make it illegal for any employer to attempt to enforce arbitration provisions against employees if those employees raise or claim either sexual harassment or sex discrimination on the job under Title 7 of the Civil Rights Act. Obviously, this is a response to what we have seen in the last two and a half to three months, beginning with the Harvey Weinstein saga, and continuing through many other noteworthy people like Bill O'Reilly, Matt Lauer, etc. As you know, many employers and I know some of you even on this call, I am pretty sure, have arbitration agreements with employees that you would have a new employee sign, which would indicate that if that employee has a work-related issue or dispute, rather than submitting that dispute to judicial litigation, the employee would be relegated to private arbitration and, of course, the benefit to an employer in private arbitration, particularly in a case of sexual harassment, is that arbitration is private as opposed to a public forum and generally the arbitration awards that you would get for damages are much less because they are not as emotionally driven as you would have before a jury. It is interesting that this bill had bipartisan support and we do not know whether it will eventually pass or not. I also find it a little weird that the only subject that would take it out of arbitration would be claims of sexual harassment or sex discrimination as opposed to let us say racial discrimination or age discrimination, but nevertheless, I know that this is a direct result of all of the actions that we have seen and all the publicity in the last two months. I will keep you apprised on how this goes. It would be a pretty important development if it were ever enacted and I do not know what the chances of it are being enacted, but it would really be a dramatic change for those of you who either right now have arbitration

agreements with your employees or are contemplating having arbitration agreements with employees so, stay tuned. I will let you know what happens in 2018, but I wanted to let you know about this because it is a pretty dramatic development and the fact that it had bipartisan support, as opposed to simply being a Democratic initiative is pretty significant I think.

Along sort of similar lines, I found it interesting that both the House of Representatives and the Senate have recently mandated that all of their members undergo sexual harassment training. As some of you know, who have participated in my telebriefs in the past, I have stressed the fact particularly in today's day and age on how important it is for rank-and-file employees, as well as management and executives, to undergo sexual harassment training and workplace harassment training. I guess the message has reached the hallowed halls of Congress on both sides of the aisle and again, whether this is the result of the Al Franken situation or etc, etc, etc. We find that at least facially Congress is mandating for themselves what really should be mandated through our private industry. We will see how that works, but it was just in the last week or two that this has developed.

One of the last things I wanted to say about this whole harassment issue at least in 2017, because I am sure they will be plenty more to say about it in 2018, is that we all have definitions of sexual harassment probably in your handbook or stand alone policies and, of course, under the Supreme Court's decisions in the past, I want to make sure that everybody understands that it is not every action that is committed in the workplace, that is a capital offense constituting sexual harassment in the workplace. The Supreme Court has set up really a disjunctive standard for assessing whether Acts of workplace harassment, particularly sexual harassment, are actionable, and that disjunctive standard is whether particular actions are severe or whether they are pervasive, and those are two different standards. So severe, meaning that there can be a singular act of sexual harassment or workplace harassment, which would impose liability on a company. For instance, if a manager physically accosted or molested an individual employee, that singular act under the Supreme Court's test of severe could well impose liability on an employer. The disjunctive standard that the court has used and that the Circuit Courts of Appeal have interpreted is that of pervasive meaning that something may not be severe, but if it is repeated over and over and over again, you have the serial offender who constantly invokes either bad gestures, bad jokes, name-calling, etc., even though taken individually, a particular act, may not be viewed as severe. Nevertheless, the cumulative effect of these actions day after day after day or at least committed with some degree of regularity would impose liability on a company. I just want to make sure everybody understands the standard that the Supreme Court has established, severe or

pervasive, not severe and pervasive so severe in the sense that a singular act can impose liability on a company or pervasive, that is even if an act is not severe, but if it is repeated time after time after time, that alone can impose liability on a company.

The last thing I will say about this particular subject in 2017 is on the flip side of your policies, I think you want to make sure that your policies also indicate that false reporting or malicious reporting of alleged acts of workplace harassment or sexual harassment are just as bad as the actual act of sexual harassment, so you want to make sure that your workplace harassment policies make clear that an employee who maliciously makes a false report or in bad faith makes a report against another employee is just as serious as an act of actual harassment and should be disciplinable up to and including termination.

Let me switch my attention to another one of my favorite agencies, the National Labor Relations Board. Actually, there is good news to report here for all employers, unionized and non-unionized alike, so that just last week the new General Counsel of the National Labor Relations Board, and remember the General Counsel of the National Labor Relations Board is in effect the prosecutor against employers and makes decisions on what cases to prosecute through the regional offices of the National Labor Relations Board. In any event, the new general counsel of the National Labor Relations Board essentially put out a memo, and he said that henceforth, actually beginning now into 2018, etc, he wants the regional offices of the National Labor Relations Board which are spread out throughout the country to rather than litigate cases that come to the regional offices on certain subjects to send them to what is called the Division of Advice at the National Labor Relations Board, and these would include the cases that were decided under the Obama administration on handbook rules. You heard me talk about these in prior telebriefs, where the National Labor Relations Board, put your handbook policies under a microscope and in many cases, decided that particular handbook rules violated Section 7 of the National Labor Relations Act with regard to concerted protected activity on the part of employees. Anyway, what the General Counsel has said and signaled is that these decisions and cases involving interpretations of handbook rules will now go to the Division of Advice, and I have no doubt that many of these Obama decisions, which we looked upon with great skepticism, will probably be modified, if not rescinded or reversed by the new Republican majority at the National Labor Relations Board. Some of these involve, for instance the Obama board's decision in Purple Communications, I talked about this in prior telebriefs, which essentially indicates that employees have the right, as long as they are given access to your email system, have the right to use your own email system on non-work time to discuss wages, hours, and terms and conditions of employment, whether that is with other employees

or outsiders, i.e. union organizers. The Purple Communications decisions under the Obama administration reversed the prior decision and register guard, which had been the law for a long, long time and essentially said that a company's email system is its own private property and employers can essentially establish its own rules and regulations as to how and when that email system will be used and, as you know, in Purple Communications that was turned on its head under the Obama administration labor board.

Another standard that may change is the joint employer standard and that is being litigated right now in the D.C. Circuit; but under the Obama administration, the joint employer standard was greatly expanded so that many companies would be deemed to be joint employers under the National Labor Relations Act, which would not have been the case under prior law. I think the real import of what the general counsel has signaled is that eight years of law under the Obama administration labor board will certainly be modified and in some cases rescinded, and many of you who modified your own policies in your handbooks, and who are still doing that, may be able to get by on liberalizing your handbook and going back to a prior standard unless to do so may signal poor employee relations or something that you don't want to signal to your employees. I'll keep track of this and obviously keep you apprised of what's going on at the National Labor Relations Board, but it is a very significant development not only for unionized employers but for non-unionized employers as well.

Along those same lines, just yesterday there was a publication by the three-member Republican majority of the board, it will be published in Federal Register today, essentially asking for a public input on the so-called quickie election rules that were promulgated and communicated under the Obama administration. As you may know under the Obama administration, they greatly shortened the process by which a union could obtain representational rights and the time between the filing of an election petition and the time of election was greatly shortened. Again, the National Labor Relations Board now under Republican majority has signaled that they are asking for public comment clearly with a view that they may in fact modify those quickie election rules.

The last thing I'll say from a labor standpoint is that it is interesting, this is a statistic, the number of strikes that have been held were conducted by unions have really dramatically decreased. This was a Bloomberg BNA article, the number of strikes in 1990 was 793. In 2015 that number has decrease to 102, which is also reflective of the fact that only 6.4% of the private workforce is unionized today. For those of you who have relationships with unions should be cognizant of the fact that there has been a dramatic decrease in the efficacy and use of strikes as a labor weapon by unions out there.

I know I have spoken about this topic before, probably in the last month or two in telebriefs, but there was a very recent case at the end of November filed in federal court in California. It involves a company called L3 Technologies, Inc. and there was a class action filed in federal court alleging that the company's new employee paperwork violated the Fair Credit Reporting Act by combining background check consent with a liability waiver. I know I've spoken about this before and I'll repeat it. Under the Fair Credit Reporting Act, those of you who use a third party to do background checks, whether its criminal background checks, employment background checks, etc, you know that you need to have a separately signed and acknowledged form under the Fair Credit Reporting Act by an employee, and you cannot combine a liability waiver with that acknowledgement or signature page. That is a violation of the Fair Credit Reporting Act, and these cases are burgeoning across the country and there's great liability to be imposed on an employer if you do that. Many of you in the past anyway, even in your employment application may have an authorization to conduct background checks and in that authorization, you may have a statement which absolves the company of any liability as a result of obtaining information or conducting a background check. That combination, I would warn you is violative of the strictures of the Fair Credit Reporting Act. You want to have a separate Fair Credit Reporting Act authorization, and you do not want to have on that authorization an absolution of liability for conducting that check, because that combination will get you into trouble. Keep that in mind as you look at your onboarding documents and make sure that you don't combine any kind of liability waiver with your Fair Credit Reporting Act authorization.

The last thing I wanted to mention today is because of the time of the year, and that is some of you may have your supervisors and managers conduct performance evaluations at the end of the year. Some of you obviously are on different schedules, but I would just say often times what happens is if you have performance evaluations being conducted at the end of the year, they are rushed, managers and supervisors rush them through to get them done by the end of the year, and as a result of that, you have many mistakes, which are committed on the performance evaluation. You do not have the attention that needs to be paid in a performance evaluation and you often will have a performance evaluation, which either is inaccurate, because of what I will call the halo effect, i.e. supervisors and managers unreasonably compliment their employees or basically indicate that they are performing well, when, in fact, they really are not. As I always say, a poorly done performance evaluation is much more damaging than no performance evaluation at all. Just like many other areas that you have with your supervisors and managers, I believe whether it's the end of the year or whether your performance evaluations are done at some point during the year, there really needs to be training of your managers and

supervisors on how to conduct performance evaluations not only in the sense of substance, but logistics. How long should they be, how long should it take to do an actual performance evaluation? When you meet with an employee, where should they be conducted? All these are kinds of things that are really significant. Because I can tell you as somebody who has litigated many, many, many cases on employee performance, discrimination, harassment, etc., often Exhibit 1, in employment litigation is a performance evaluation, and a performance evaluation that does not accurately reflect the actual performance deficiencies of an employee is a very, very dangerous document in employment litigation, and it is often very difficult to take the position in litigation that the performance evaluation really was not accurate and that even though it indicates for instance that the employee exceeded expectations, because you have that as a standard on your employment performance evaluation, was not really exceeding standards of performance, very difficult to persuade a fact finder, whether it is a judge, jury, or arbitrator that would have said on a performance evaluation does not accurately reflect the actual performance of the employee. Those of you who have performance evaluations being done at the end of the year, just a caveat, pay particular attention and make sure that these are not perfunctorily done in a manner that will come back and bite you.

Alright, Michelle can you take this off of mute? Okay, now we covered a lot of stuff this morning, as always anybody who has a question, I am happy to answer in this forum or in a private forum with my email or my phone number 410-209-6417. Any questions or comments from anybody out there?

Ann: Howard, all that stuff going on at the NLRB is really important for nonunion employers as well as union employers of course, so do you get the good odds of success that some of these onerous things like the Purple Communications ruling, and all that handbook stuff and the quickie election rules, do you get those good odds of being changed?

Howard Kurman: I think that there are better than 50:50 odds of many of these being either rolled back entirely Ann or certainly gutted to a significant extent. Again, you have a 3:2 Republican majority and you have a Republican general counsel, and many of these new rules and many of these interpretations were extremely controversial when they were passed to begin with.

Ann: Oh yeah, oh yeah.

Howard Kurman: I think if you couple that with some common sense, not that everyone of them will be entirely rolled back, but I do think many of the controversy or rulings will be modified, at least modified if not rescinded, and again I think there is more than a 50:50 chance of that happening in 2018.

Ann: Yeah, because we have been stung by both Purple Communications and the quickie election stuff in my big company.

Howard Kurman: Yeah, no, and I think that there will be relief for all of you out there in 2018 and beyond.

Ann: That is great.

Howard Kurman: Yeah, any other questions, comments? Okay, well, if not, you know at this point, I will thank everybody for participating in the telebriefs in 2017. As always, I am sure 2018 will not lack any substance as we go forward and I look forward to speaking with all of you in 2018 and wish you all a happy and healthy holiday season and a great 2018.