LABOR & EMPLOYMENT TELEBRIEF
By
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**Howard Kurman**: All right, Good Morning everybody. It's the first telebrief in October. The next telebrief, as you know will be on the fourth Wednesday of October, which is October 25, 2017.

All right, I am going start out with some Supreme Court developments worth noting in the employment field; so on October 2nd, which was the opening day at the Supreme Court. They heard oral arguments on a pretty important case having to do with whether or not an employer can impose a waiver on an employee in an arbitration agreement of a class action. There were many splits in the federal circuits over this issue and the import of this is that if the Supreme Court upholds these class action waivers, as a practical matter many of you may want to have agreements with your employees under which the employee agrees that any dispute arising out of the employment relationship would be relegated and resolved by arbitration as opposed to judicial litigation and that the employee in consideration of being employed or continued employment would waive any right to bring a class action. This would have probably a dramatic impact on class actions under the FLSA, which of course have gotten a lot of publicity in the last five years and have been very lucrative for Plaintiff's attorneys. My best tea leaves tell me based on the oral arguments from the opening day, I believe its probably going to be a 5:4 decision in favor of class action wavers, which again would be a pretty significant decision by the Supreme Court and I think the five will be the five conservative justices including Gorsuch and of course the four will be the four liberal justices. Stay tuned on this. My belief is that we probably won't get a decision until next spring, but if the decision comes down the way I believe, it probably will, I will be back in touch, because I think many of you at that time may want to consider imposing those waivers on your employees or at least your new employees.

A second Supreme Court development is that the Supreme Court last week agreed to hear the issue of whether or not public sector unions can impose mandatory union dues on those people under their bargaining units even if the employees are not so called members of those unions. You may recall, I talked about this in March of 2016 when the court split 4:4 on this particular issue and the reason it split 4:4 is because it was after Justice Scalia died and before there was a substitute justice on the Supreme Court. Now that Gorsuch is on the court, again my prediction will be and I think that there will be a 5:4 decision and that 5:4 decision in the spring probably would be that the Supreme Court will invalidate mandatory union dues in the public sector unions. What if any impact that would have on private unions we are not sure, but it would be a strong signal regarding the Supreme Court's attitude or philosophy towards mandatory union dues, at least in the public sector. More on that of course, in the spring when the decision comes down.

Let me turn my attention to two stories, which are to turn a phrase ripped from the headlines. The first one being the brouhaha over the Harvey Weinstein firing from his own company, which of course is a little unusual. No need for me to sort of recount what you probably have all seen in the news in the last couple of days regarding the numerous women who have come forward to complain about Mr. Weinstein. Both actresses who may not be connected with the Weinstein Company as well as former employees of the Weinstein Company.

Why do I bring it up? While I'm not going to repeat many of the things that have been obviously front and center in the news, but I do want to comment on an aspect of this from the HR standpoint that should interest all of you and should concern all of you who have responsibility for workplace harassment policies and enforcement and that issue is this. Despite the fact that I'm sure Fox News had strong workplace harassment policies during the reign of Bill O'Reilly and Roger Ailes. Despite the fact that I'm sure there were strong workplace harassment policies in place at the Weinstein Company, those policies and procedures really are meaningless, if there is a culture, which is both tolerated, condoned, even encouraged at a work place that says despite the fact that we may have these policies if you have an individual who is high enough in the organization that the policies may or may not apply to that particular person. You wind up with a situation like you do or had at Fox News and the Weinstein Company, that is, that irrespective of strong workplace harassment policies the culture that is created and maintained is counter-cultural and counter-productive to any kind of workplace policy that you have in place. I know that it puts HR folks and HR professionals and other C-level executives in a difficult position when you have high-level executives who may be guilty of violating those policies because there has been a culture created and an unequal power situation between those individuals at a very high level and subordinates who may be either afraid or discouraged or even retaliated against for making complaints. All of which cries out, I believe for strong training including high-level executives on workplace harassment and workplace culture.

I know I have said it numerous times before that this is what you wind up with when you have a situation that involves high-level executives even if you have strong workplace harassment policies in place and I think that it does put people like yourselves who are charged with enforcing these policies in a difficult position, but I think you have to stand your ground and I think that it does cry out for regular and I mean regular workplace training at which C-level executives would attend along with subordinates and in which anti-retaliation policies and an ethos of enforcement irrespective of who is the offender is trumpeted and really enforced at your company. I find it probably unbelievable that people on the board at the Weinstein company, all of whom by the way were males, didn't know what was going on over the course of several years, particularly since there were numerous settlements of reputed workplace harassment cases that went on and I think its probably shameful that this went on in the face of all the publicity surrounding workplace harassment that has taken place in the last several years, if not decade. Go back, look at your

policies, but be aware that you know a policy that's not enforced or a policy that is just there, because you think that it's a good policy to have in your handbook, is not going to be sufficient when the workplace harassment is being done and being executed by people in high places.

The second thing that sort of ripped from the headlines is an interesting story having to do with ESPN. Those of you out there who watch ESPN probably know that there is an anchor, Jemele Hill who is a female, and what happened was she was recently suspended based upon a tweet that she put out Sunday that in essence said that fans of the Dallas Cowboys could put pressure on its owner, Jerry Jones, by bringing pressure to bear on the advertisers of the Dallas Cowboys because Jerry Jones implemented or was about to implement a policy that any of his players who refused to stand for the national anthem pre-game would not be allowed to play. She put out a tweet, you know, basically saying that of course people could bring pressure to bear on Jerry Jones by bringing pressure to bear on the Dallas Cowboys advertisers. ESPN indicated on Monday that it was suspending her for two weeks for a reputed second violation of its social media guidelines. The first was after a tweet last month in which she indicated that President Trump is and was a white supremacist.

It's interesting because many of you have social media policies that you may or may not be in a position to enforce from time to time. I think you got to go back, you should look at your social media policies, and you should make sure that your social media policies indicate that it would be a violation of that policy for an employee to say anything, either in a tweet or Facebook post that would reflect negatively on the reputation of your company and that it would mandate that employees who voiced certain political opinions or certain opinions about philosophical or political issues indicate in their posts that they are not speaking on behalf of their employer but certainly simply expressing their own personal opinions. Once again, of course, you have issues where employees postings that may be joined by other employees and then you get into the issue of whether or not those posts are protected under the National Labor Relations Act as we've seen under the Obama administration, but as I've said in the last few telebriefs the composition of the National Labor Relations Board is changed and my best guess is that many of these decisions including social media issues and social media cases that have been articulated and disseminated by the Obama board may be either modified or rescinded by the Trump board. I would advise you that in conjunction with employment counsel advice look at your social media policies and make sure that they contain those particular sort of caveats.

Turning to another issue or another topic, I wanted to mention that again in this era where we've heard so much about cyber breaches and about reputed Russian hacking having to do with our 2015 election, et cetera, et cetera, one of the things that I think as HR professionals that you want to look at is whether or not your organization has cyber insurance to protect you in the event that there are cyber breaches where you might have HR data that is lost or hacked into or where there have been inadvertent disclosures of personal information of your

employees, etc. Obviously some of you may have responsibilities regarding your insurance policies at your company, which may include your CGL policies, your EPLI policies, etc. You can and probably should have cyber security insurance, which would protect you at least in the case of hacking or other kinds of cyber security breaches and would allow you to have a forensic expert come in, see what the damage is, recommend changes, etc. Obviously, you need to take a look at your whole kind of portfolio of insurance; and if you don't have cyber security insurance, you ought to talk to your broker about it. If you already have it and you're not sure what it covers or what it should cover, you know, you should talk to your attorneys about that or if you need some help on that, certainly we can help you on that because it needs to have certain required provisions in it, but its an important part of your overall protection going forward, and I think that just like EPLI insurance this is something that you very well may want to consider.

Another development, very recent development, so that on October 4th, Attorney General Jeff Sessions put out a memo, which reversed the Department of Justice's position on whether transgender employees and workers are covered by Title VII of the Civil Rights Act. Back in 2004, then Attorney General Eric Holder had issued a memo in which the Department of Justice indicated that from their standpoint Title VII protected the status of transgender workers and protected the status of gender in the workplace. Jeff Sessions put out a memo, which reversed that on October 4th. Bear in mind that the Equal Employment Opportunity Commission takes the position and has taken the position that Title VII does, as a matter of law, extend protection to transgendered employees and protects employees on the basis of gender. There is a split in the circuit over this and I would expect that at some point this will be an issue that is accepted for review by the Supreme Court, and we will see what the Supreme Court says about whether or not Title VII includes gender or transgender status as a protected classification under Title VII.

I wanted to shed light on a recent Fourth Circuit decision called Waag v. Sotera, and the reason I am citing this is because it is an important decision for those of us within the jurisdiction of the Fourth Circuit on whether or not an employer satisfies the requirements of the FMLA when it brings back an employee after an FMLA leave and does not put that employee in the same position but nevertheless puts that employee in an equivalent position to one that the employee departed from when he or she started his FMLA leave. The Fourth Circuit unequivocally has said that an employer will satisfy the requirements of the FMLA when the employer brings back the employee and has the option when the employee returns to work of returning that employee to the same position that the employee vacated or to an equivalent position and whether or not a particular provision is equivalent is based upon really a factual intensive analysis of comparing the old position with the new position. But in this case, they basically analyzed the fact that in this particular case, the employee came back. He was put in a position where his salary was the same in the new position. He was eligible for bonuses as he was in the prior position. He was in the same work site in the second position as in the first. His title was the same

and he reported to a senior vice-president in both positions. The reason the employee brought the case was because after a period of time of being put in the second position after coming back from his FMLA leave, that position was eliminated along with other positions due to the fact that the employer lost a government contract. I think the important lesson for all of you out there who have responsibilities for enforcing the FMLA and for administering the FMLA is it, look ideally, when an employee goes out on an approved FMLA leave, you would like to bring that person back to his or her exact former position, but sometimes that is just not possible because of the mandates of your company, the economic situation involving your company, it may be that when the employee leaves, you immediately need to fill that position for one reason or another or there are other facts and circumstances that militate in favor of changing that position, etc., and what the Fourth Circuit has said significantly is that as an employer you have the unfettered right under the FMLA to bring back that employee in the same position or to an equivalent position. Now, whether or not a position is equivalent obviously is a factually intensive inquiry as to what are the facts and circumstances surrounding the new job or the job in which you put the employee comparing pay benefits, working conditions, status, etc., but assuming that the second position in which you reinstate the employee is comparable, maybe not in every respect, but in most respects under the Fourth Circuit's case, you would be held to have complied with the FMLA and that is a significant decision for those of you who have those responsibilities.

Okay, those are the developments for the day. All right, as always I invite any questions or comments in this forum or if you would rather do it in a forum, certainly you can call me on my private number or my office number, my office number is not private. My office number is 410-209-6417 or my email at hkurman@offittkurman.com. Okay, any questions, comments on any of the things that I have covered this morning? Okay, it looks like there aren't, so I am sure hopefully all of you understood everything that we covered, hopefully with a practical value, and as always, I say we will see you, maybe not literally but figuratively, in the next telebrief which is the fourth Wednesday in October. Thanks everybody for your listening and have a great rest of the week.