LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: It is 9:02 by my official clock, which is the one that counts. Casey, can you mute the phones please?

All right, good morning everybody. Hard to believe we are in mid September, but here we are, and the year is flying by. All right, I wanted to start off with actually a question that a client asked me about a week ago, which has to do with termination letters and what should be in there and he had to provide a termination letter, etc. So, the law does not require a termination letter when you are terminating an employee but in most cases I believe that a termination letter is the preferred way to go and the reason for that is obviously if you are involved in litigation post termination. The termination letter really is exhibit 1, whether you are in an arbitration or a trial or any other kind of fact finding or adversarial proceeding, but I want to caution you that sometimes employers in a termination letter, only cite in the termination letter sort of the triggering incident or triggering event such as an absentee problem or a punctuality problem, etc, and I always believe that in an effective termination letter, you basically want to cite to all the reasons that went into the decision to terminate an employee even if one or two of those reasons was not necessarily the triggering event, but if you want to rely on more than simply a triggering event to justify the termination you really should cite in the letter because most times you are going to get stuck with the reason or reasons that you cited in the termination letter if you are put to the test so while you are not under any obligation to give an employee a termination letter as I stated, in most cases, I think you are better off with one but if you are going to have one, pay particular attention to the reasons that you cite for the termination of an employee, and if there is more than one reason make sure that you articulate that in the letter otherwise it is going to be tough to come back at some time you know a month or two or whatever it is after the termination and rely on reasons that you did not state in the termination letter.

Okay, I wanted to turn my attention to some labor developments. There is an interesting paradox that I have seen recently and this emanates out of a Gallup poll. While we know that the percentage of the private sector workforce that is unionized is only a 6.4% now and that is pretty low it is less than 1 out of 10 employees in the private sector is unionized. On the other hand, there is a recent Gallup poll and I will just read that to you, the conclusion, which is 64% of Americans approve of labor unions. I will repeat that 64% of Americans approve of labor unions surpassing 60% for

the third consecutive year and up 16 percentage points from its 2009 low point. This comes 125 years after President Grover Cleveland signed a law establishing the Labor Day holiday after a period of labor unrest in the United States. The reason I think there is a paradox here is on the one hand the percentage of the private sector which is unionized is certainly at an all time low. On the other hand, there seems to be an up-tick in the approval for which many Americans hold labor unions, and I think, as HR professionals out there it bodes well to consider doing some union vulnerability assessments and union vulnerability training with your management. This is particularized training and it has to do with recognizing those elements which indicate that you may or may not have a union knocking on your door and also apprising your management staff of the do's and don'ts of what to do and what to say if there is some indication that there may be a union that seems to be approaching some of your employees. So I know in this era of Me Too movement most of the movement in the world has been on training and workplace harassment. But I caution you that if you are considering training toward the end of this particular year or the beginning of next year, consider doing some union vulnerability training because even though the percentage of the private work force that is unionized is certainly low there seems to be an up-tick in the approval and I am not sure what to attribute that to, but I think it would be wise to consider doing some union vulnerability and union sort of assessment training with your management staff. It is certainly not all that time consuming, it is pretty easy to do, and if anybody is interested I can talk to you about that, but do not just assume because you are a nonunion shop now that you will always remain that.

Now I wanted also to go over some developments, very recent developments at the National Labor Relations Board, which again impacts all employers, not simply unionized employers, and you know, I have spoken in the last several telebriefs about the fact that the Republican National Labor Relations Board now which has a majority is either undoing or modifying a lot of the Obama era board law which was very, very restrictive on employers, very, very liberal in terms of its impact on employees so let me talk a little bit about that. Just yesterday, the National Labor Relations Board promulgated or announced a decision, which essentially makes it a lot easier for employers to make unilateral changes without having to bargain with the union. I know that there are many of you out there who do not have collective bargaining agreements or are not negotiating first agreements with the unions, but this is a pretty significant case in that the National Labor Relations Board has really canned a very old standard which it used in assessing whether an employer had an obligation to bargain with the union over changes that it sought to make and the impact of the decision is that it now has created or agreed to a "covered by the contract" test. So in other words if you have a broad management rights clause in a contract or are negotiating a first contract

with the union you may want to pay attention to this new standard that the National Labor Relations Board has created because it will give you more latitude in making unilateral changes in wages, hours and terms and conditions of employment.

There has been another development at the National Labor Relations Board and this is probably more common to all of you. So on September the 5th, just a week ago, the Office of Congressional and Public Affairs of the National Labor Relations Board put out this notice and it states as follows: The National Labor Relations Board request briefing on whether the board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature. In a notice issued today, the Board seeks public input on whether to adhere to, modify, or overrule the standard applied in previous cases in which extremely profane or racially offensive language was judged not to lose the protection of the National Labor Relations Act. So the context here is, and I know that I probably covered a couple of these cases last year, under the Obama National Labor Relations Board there were cases under which employees seemingly acting on behalf of other employees would confront their supervisors about different wages, hours or terms and conditions for employment or overtime and actually get into cursing out a supervisor and in one case calling a supervisor a MF. And the Obama Administration Board said well this was in the context of protected activity and therefore a termination of an employee who engaged in this conduct would be overruled and the employee would be reinstated. Well what the National Labor Relations Board is doing now is strongly signaling that they will not tolerate that anymore, and they are asking for public comments, but it seems to me pretty clear that the signal of the National Labor Relations Board is that employees who engage in verbal confrontations of an egregious nature with their supervisors or managers, under the guise of engaging in protected activity, are no longer going to be protected under Section 7 of the National Labor Relations Act which as you know protects employees who are engaged in collective activity for the purposes of discussing wages, hours and terms and conditions of employment. But the key word is protected activity and what the board is strongly signaling is that they will no longer condone that activity under which employees are engaged in verbal confrontations with their supervisors or managers. I really think it is a formality for the NLRB to asking for public comments on this because I have no doubt what the board will promulgate is a new interpretation which says that employees who engage in that activity or those activities will no longer be deemed to be protected under the guise of Section 7 of the National Labor Relations Act.

The last development at the Board emanates out of an announcement at the National Labor Relations Board on August 29th, just a week-and-a-half ago, and that announcement said the National Labor Relations Board held

employers do not violate the National Labor Relations Act solely by misclassifying employees as independent contractors. The board majority held that an employer's communication to its workers of its opinion that they are independent contractors does not, standing alone, violate the National Labor Relations Act if that opinion turns out to be mistaken. Again this reverses an Obama Administration Board decision which held that if an employer misclassifies individuals that they deem to be independent contractors but are wrongly held to be independent contractors instead of employees, and where adverse action is taken against those individuals, the Obama Board held that that was a prohibited activity. This Republican Board is saying that a misclassification of individuals on its own does not in and of itself violate the National Labor Relations Act.

Again, you know, I do not want to spend too much time on this, but I do want you to be aware that you know the republican majority of the National Labor Relations Board is now undoing or modifying several Obama era decisions which were extremely employee friendly. Now caveat here is that you know we have an election coming up in November of next year. If there were a democratic president elected and at the end of the republican terms of this Republican Board we get another democratic National Labor Relations Board as has happened historically you may see again a modification or reversal of this Board's decision. So you know it is best described as cyclical. It is what has happened historically, so you cannot go too off the rails if you are an employer and again these decisions apply not only to unionized employers but non-unionized employers as well.

Okay, enough about the Board. The Fourth Circuit recently, as you know, the Fourth Circuit decisions cover Maryland, North Carolina, South Carolina, Virginia, the Fourth Circuit in a case called Matias v. Elon University recently decided a case in which a custodial employee who had been terminated for sexually harassing a coworker brought a case against the University alleging that the University failed to promote him and later terminated him because of his Mexican heritage and he claimed that the termination of him for having committed a workplace harassment violation was pretextual. The Fourth Circuit found his claims to be unavailing and ruled that the University was entitled to summary judgment. I think that it is a somewhat significant decision in that many of you out there, I am sure have had situations in which you have terminated an employee for workplace harassment only to have that employee turn around and file a charge on the basis that you, as in the employer, have committed some sort of discriminatory act or committed some sort of violation of either a federal or state statute and I will tell you that courts whether it's State Courts or Federal Courts are very unsympathetic to those employees who had been terminated for

commissions of workplace harassment or discriminatory acts within the workplace. They just don't buy in most cases that an employer has discriminated against the particular employee, where the employer has acted responsibly, has done an investigation and has wound up terminating an employee for committing a workplace harassment violation or discrimination violation. So, again the Fourth Circuit had joined many other circuits and it's as I said a somewhat significant decision.

The Department of Labor, switching topics a little, has announced that it is proposing revisions to its forms that are you know on its website having to do with the Family and Medical Leave Act many of you have FMLA responsibilities and the Department of Labor has announced that it's seeking public comments on many of the forms that are used and you know they are trying to make it, you know, more user friendly for employer so if you go on the DOL's website, they have characterized many of these changes, so I will just review some of them so the DOL has stated forms hopefully will have fewer questions requiring written responses replaced by statements that can be verified by simply checking a box. The forms they say will have a reorganization of medical certification forms to more quickly determine if a medical condition is a serious health condition is defined by the FMLA. The forms they say will contain certifications to reduce the demand on healthcare providers for follow up information. I think that is significant because a lot of times you get pushed back by doctors I'm sure who don't want to necessarily take the time to fill out these forms. They say that there will be more information on the notification forms to better communicate specific information about leave conditions to employees they indicate that there will be changes to the qualifying exigency certification form to provide clarity to employees about what information is required. They also indicate that there will be changes to the military curricular leave forms to improve consistency and ease of use and that the lay out and style changes will be there to reduce blank space and improve readability in other words format changes. So you can see these changes, they are explained and articulated on the DOL's website. Again they have asked for public comments and I'm sure there won't be a lot of push back on these proposed forms because they were deemed to be more user friendly for employees.

The last thing that I want to mention is that and this is in the area of the ADA and this is a Seventh Circuit case essentially and it is a case called Yochim v. Carson where an attorney for the department of housing and urban development sought reasonable accommodation against his employer and what he was seeking to do was he wanted to be able to either have full or part time telecommuting and the department, that is Department of Housing and Urban Development offered other accommodations such as a modified work schedule or flexible leave. He

refused the accommodations and the department wound up terminating her. She filed a lawsuit under the ADA and significantly the Seventh Circuit joined other circuits in saying that you know an employer who makes multiple reasonable accommodations to the employee doesn't have to give the employee a choice as to which accommodation the employee wants. If there are multiple reasonable accommodation, it really is up to the employer and it doesn't have to be the best accommodation or one that the employee chooses it just has to be one that would enable the employee to be able to perform his or her job and the essential functions of the job so it's not a unique decision but again it is a reiteration of the decisions of multiple circuits and when you are assessing in a disability situation what to do with regard to a an employee who is requesting an accommodation if there are multiple ones that could accommodate that employee and one is more preferable to you as an employer you certainly have the right to pick the one that you think it is going to be the best from an operational standpoint.

Okay those are the developments for the day. Casey, can you take this off of mute please.

Okay, thank you. As always if there any questions, I'm happy to answer them here or if you prefer in a private form just email me at hkurman@offitkurman.com. Any questions.

[_____]: No. Thank you.

Howard Kurman: All right well, if not then we will see you at least figuratively hopefully on the fourth Wednesday and in September hope everybody has a good couple weeks out. If anybody out there wants a change in career, seems to me that there is a position open in the Federal Government for National Security Advisor. You know, you will only be the fourth or fifth, so don't worry about it, get your resumes in and, you know, you may have a chance to be in the cabinet. You will never know.

[_____]: …as a temporary job…

Howard Kurman: Yes, temporary job. Anyway good luck to all of you and we will see in a couple weeks thank you.

[_____]: Thank you, bye.