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THE HOWE & HUTTON REPORT

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TRENDING NOW

WATCH OUT FOR TRADEMARK-RELATED SOLICITATIONS – If you have a trademark registered with the U.S. Patent and Trademark Office, you may be receiving notices from private companies urging you to buy various products and services. They search the Office's records and then solicit trademark owners to buy additional "registrations" with them, for example. Usually, what they are doing is legal unless they resort to misleading communications to convince people how important they are. But some mimic government entities in their letterhead, trying to persuade registrants that they are "official" and their products and services *must* be purchased to keep trademark protection current. Some others are outright offensive because of the prices they charge. Do you want to pay over $1,000 for an unnecessary ad in a foreign publication nobody will read? Probably not. *If you receive one of these solicitations, check it out with your trademark attorney before paying them any money. Some periodic additional filings with the Office are necessary to keep registrations current, and deadlines in some of these communications are accurate. But you need to know what you are buying and who you are dealing with before you pay. If you suspect it's an actual crook and not just an overly aggressive salesperson, you can file a complaint with the Federal Trade Commission at www.ftc.gov.*

EMPLOYMENT

CHICAGO ENACTS "PREDICTIVE SCHEDULING" ORDINANCE – The Chicago City Council has enacted a "predictive scheduling" law, set to take effect July 1, 2020. Larger employers will be required to provide certain employees with 10 days' notice of changes in their schedules, increasing to 14 days' notice July 1, 2022. Employers will also be required to give new hires a good faith estimate of their days and hours of work for the first 90 days of employment. The new ordinance applies to salaried employees earning no more than $50,000 a year and hourly workers earning no more than $26 per hour and who work in the hotel, health care, manufacturing, restaurant, retail, building services or warehouse services industry. Covered employers are those with 100 employees globally (250 employees for nonprofits) if at least 50 of those employees are covered under the ordinance. For restaurants, the threshold is 250 workers in at least 30 locations globally, and franchises with 4 or more locations in Chicago. Violators of the ordinance will face a fine of from $300 to $500 for each offense, and anyone discriminating against an employee for filing a complaint with the City will face a fine of $1,000 per violation. *Chicago's ordinance is one of the broadest such laws in the country.*

ILLINOIS REGULATES USE OF ARTIFICIAL INTELLIGENCE IN INTERVIEWS – The Illinois General Assembly has enacted legislation regulating an employer's use of artificial intelligence when interviewing prospective employees. The Artificial Intelligence Video Interview Act, believed to be the first of its kind in the U.S., prohibits an employer from using "artificial intelligence" (a term undefined in the Act) in analyzing videotaped interviews of job applicants unless (1) the employer has notified applicants that the applicant's videotaped interview may be analyzed using artificial intelligence for purposes of evaluating the applicant's fitness for a position, (2) the employer provides the applicant with information about how the artificial intelligence works and what characteristics it uses to evaluate job applicants, and (3) the employer has obtained consent from the applicant to use artificial intelligence for an analysis of the video interview. An employer can refuse to consider a job candidate who refuses consent for use of artificial intelligence in evaluating the candidate. The employer must also obtain consent of the prospective employee for the videotaping, whether or not artificial intelligence is used to evaluate the applicant. The employer cannot share applicant videos, except with people who have expertise or technology necessary to evaluate an applicant's fitness for a position. If an applicant asks that a video interview be destroyed, the employer must comply within 30 days and instruct anyone who received a copy of the video to destroy it, which those persons are required to do. *Relatively few employers use artificial intelligence to evaluate job applicants, but the new Illinois law may act as a model for future laws in other states.*

EMPLOYMENT (cont.)

LAW NIXING MANDATORY ARBITRATION OF HARASSMENT CLAIMS TOSSED – The U.S. District Court for the Southern District of New York has found that a state law prohibiting employers from requiring arbitration of sexual harassment claims by their workers was preempted by the Federal Arbitration Act and, therefore, invalid. The case involved a New York law that was eventually extended to prohibit employers from requiring arbitration of any discrimination claims, not just those involving sexual harassment. But that law can no longer be enforced because of the court's ruling, unless it is overturned on appeal. Other states, including Illinois, have similar laws, or are in the process of enacting them. Consequently, the enforceability of any of these laws is in question. *The district court's decision relied on a U.S. Supreme Court ruling last year declaring that the Federal Arbitration Act preempts all state laws in conflict with it, as well as the idea that arbitration agreements are generally favored by the courts.*

NLRB SAYS EMPLOYEE GAG POLICY ILLEGAL – The National Labor Relations Board has issued advice in a case involving a company with an employee gag policy. That policy stated that "employees must refrain from engaging in conduct that could adversely affect the Company's business or reputation…including publicly criticizing the Company, its management or its employees." But after a charge against the company was filed with the Board, the Board General Counsel issued an advice memo stating that the policy violated the National Labor Relations Act because it unlawfully chilled employees' rights to comment publicly on workplace matters. *While the NLRB has become more employer-friendly under the Trump administration, this advice memo reminds us that employees have protections under the protected concerted activity doctrine. Employers often face challenges to personnel policies, either with administrative agencies or in the courts.*

CALIFORNIA BANS DISCRIMINATION BASED ON HAIR STYLE California has recently become the first state to ban discrimination based on hair styles that have been historically associated with race, such as afros, braids, locks, cornrows, and twists. California's anti-discrimination statute now defines race and ethnicity to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Those prohibited from discriminating include employers and schools. Other states are considering similar laws though they may define things differently. *Although the new California law doesn't explicitly prohibit policies on appearance and grooming, enforcing such policies may become difficult. Employers should review their policies to ensure that they are race-neutral, not overbroad, and are uniformly applied.*

EMPLOYMENT (cont.)

VACATION WHILE ON FMLA LEAVE NOT ALWAYS GROUNDS FOR DISCIPLINE – DePrato took medical leave under the federal Family and Medical Leave Act while recovering from a foot injury. He wound up at a beach resort in Mexico, and he was terminated. But DePrato went to court, claiming retaliatory discharge for exercising his rights under the Act, and the Supreme Judicial Court of Massachusetts has affirmed a judgment in his favor, concluding that DePrato's vacationing might have been consistent with leave under the Act. The Supreme Judicial Court in this case noted that some vacations might be inconsistent with claimed reasons for medical leave, but the employer terminated DePrato when it had no information to indicate that this particular vacation was inconsistent with recovering from a foot injury, as it would have been, for example, if he had been playing golf, rather than sitting around a pool. *Employers need to investigate thoroughly before terminating anyone for taking FMLA leave. The employer's mistake in this case reportedly may cost it over $2 million when compensatory damages, punitive damages, statutory liquidated damages, attorney's fees and court costs are added together.*

NEW JERSEY PROHIBITS DISCRIMINATION AGAINST MEDICAL MARIJUANA USERS – Under the newly enacted Honig Act, employers are prohibited from taking "adverse employment action" against employees based solely on their status as a registrant with the newly formed state Cannabis Regulatory Commission. An "adverse employment action" includes refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment. The Act makes clear, however, that nothing in the law requires employers to allow employees to use or possess medical marijuana in any form during work hours, or to take any action that could compromise federal funding. An employee can also be disciplined for possessing or using medical marijuana after work hours on work property. *With rapidly changing marijuana laws and a strong job market to contend with, employers are reconsidering their policies in this area. Expect continued confusion as a state-by-state patchwork of laws continues to evolve.*

STATES PROHIBIT RELIGIOUS DISCRIMINATION BASED ON APPEARANCE – States are beginning to approve new laws prohibiting religious discrimination based on appearance. New York, California and other states are moving forward with laws specifically prohibiting employment discrimination based on attire, clothing or facial hair worn as a form of religious observance. New York, for example, now makes it unlawful for an employer or an employer's agent or employee, to impose on a person a condition of obtaining or retaining employment, or obtaining promotion, advancement or transfers, any terms or conditions that require that person to violate or forego a sincerely held practice of their religion. Depending on the state, an employer may raise the defense that compliance with these laws would create an undue hardship for the employer. But an employer should engage in a discussion with employees about reasonable accommodation of an employee's religious observances in a way that does not create an undue hardship for the employer's business. *These new laws are not the same as other new laws in some states that prohibit racial discrimination based on grooming.*

NON PROFITS

IRS GUIDANCE REDUCING DONOR DISCLOSURE REQUIREMENTS ILLEGAL – A federal judge in Montana has struck down IRS guidance reducing obligations of some tax-exempt groups to disclose donor names to the Service. Judge Brian Morris found that the IRS should have followed procedural public notice and comment requirements of the federal Administrative Procedure Act before promulgating the guidance. The Service argued that the guidance was an interpretive rule that didn't need a notice and comment period. But the judge said the procedure must be followed because the IRS guidance amended a long-standing regulation. A suit to block the guidance was brought by the Governors of Montana and New Jersey. The IRS argued unsuccessfully to the court that the Governors had no standing to bring the suit. But the judge ruled that the states had standing to bring their suit because they may need the names of donors to determine whether a group was violating requirements for tax exemptions and limits on its political activity. *Since the judge ruled strictly on procedural grounds, the IRS now has the choice of appealing his decision or re-publishing the guidance for public comment before it takes effect, which might take only a few months. But opponents also may have the time to pursue more substantive legal objections to the guidance.*

SETTLEMENT REACHED IN NCAA SUIT – *H&H Report Update* – A federal judge has approved a $75 million settlement in a suit filed against the National Collegiate Athletic Association by student-athletes at risk of developing concussion-related symptoms because of their participation in college athletics. The NCAA will pay $70 million into a medical monitoring fund for athletes who played on or before July 15, 2016. A medical science committee will determine whether an athlete qualifies for medical evaluations at one of 33 sites throughout the U.S., and the money in the fund can be used to provide two medical evaluations for the athletes over the next 50 years, with a possible third evaluation as approved by the committee. The NCAA will also provide $5 million for research into concussions, and the settlement requires the NCAA to continue making changes in its concussion management and return-to-play policies, some of which were instituted while the case was pending. *The court also approved $12.7 million in fees and $750,000 in expenses to the lawyers who represented the class of student-athletes that brought the suit.*

NEW JERSEY PUSHES DONOR DISCLOSURE – *H&H Report Update* **-** The New Jersey Division of Consumer Affairs has announced new donor disclosure requirements that will impact many nonprofits domiciled in or soliciting contributions in New Jersey. The Division will be requiring federally tax-exempt Section 501(c)(3) and 501(c)(4) organizations to identify people providing them with $5,000 or more in a tax year. Names, addresses and amounts provided by these donors will now have to be given to the Division annually, though such information will not be considered a public record under New Jersey law and is not supposed to be made available for public inspection. *Only a handful of states now require disclosure of such donor information. But the Internal Revenue Service used to, and the IRS has warned donors that the Service's information was sometimes impermissibly leaked or accidentally made available. While enacting their own donor disclosure rules, some states are also suing the federal government to reimpose federal disclosure requirements not currently enforced by the IRS.*

REGULATION

FINE AGAINST COMPANY PRESIDENT FOR OSHA VIOLATIONS UPHELD – The U.S. Court of Appeals for the Third Circuit has held that the president and sole director of a company must pay $412,000 in penalties assessed against the company for its numerous violations of the federal Occupational Safety and Health Act. The Occupational Safety and Health Administration (OSHA) had tried to get the company to pay penalties for years, since it was technically the employer in the case and liable for the violations under the Act. But, since that effort was unsuccessful, the Court of Appeals is giving the president 30 days to pay or face other consequences for contempt of court, which can mean a jail term. *The president's liability will decrease by any amount the company pays and any amount the president shows he is unable to pay. However, this case shows that individuals can't always hide behind companies, organizations and committees to avoid responsibility for what they do.*

TAXATION

LIMIT ON DEDUCTIONS FOR CONTRIBUTION TO EDUCATIONAL NFP KILLED – A federal district court in Minnesota has ruled that a Treasury Regulation is invalid to the extent it limited individual tax deductions for contributions to an educational organization engaging in more than "incidental" non-educational activities. The decision came in a case involving the Mayo Clinic, and it construed federal tax law permitting deductions for contributions to educational organizations if they normally maintain a regular faculty and curriculum and normally have a regularly enrolled body of pupils or students at the place where their educational activities are regularly carried on. Though the Mayo Clinic met those requirements, the IRS denied deductions for certain contributions to the Clinic because its non-educational activities were more than "incidental." But the court said that the government's decision against Mayo was invalid to the extent it relied on a "no more than incidental non-educational activities" rule that, while in the Regulation, was not part of the Internal Revenue Code statutory law passed by Congress. *The court said the IRS exceeded the bounds of its statutory authority in enforcing a "no more than incidental non-educational activities" rule. It will be interesting to see if the IRS appeals and if a final decision is going to be more clearly given effect outside of the district court's Minnesota jurisdiction.*

NEWS AND EVENTS

Jon Howe presented a program on legal issues before the Global Business Travel Association.

Jon also presented a program on Risk Management for the Nassau Paradise Island Promotion's Board.

Jon gave an overview of legal issues confronting the hospitality industry to hotel executives at the ALHI Executive Council conference at the Broadmoor in Colorado Springs, CO.

HOWE & HUTTON

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