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THE HOWE & HUTTON REPORT

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TRENDING NOW

WHEN IS A HANDBOOK NOT A CONTRACT? – A federal judge in Chicago has held that a company couldn't enforce an employee handbook provision against a worker because the handbook contained language indicating that it wasn't a contract. The handbook said that employees with a pay dispute had to mediate it, and then, if mediation failed to resolve the dispute, submit it to arbitration rather than taking the employer to court. But the judge ruled the company couldn't require a dissatisfied employee to submit a pay dispute to mediation per the handbook because it contained provisions indicating that it was "not a contract of employment" and was "not intended to create contractual obligations of any kind." Quoting the words of the handbook against the employer, the judge ruled that, if it wasn't a contract, the handbook didn't obligate any employee to submit pay disputes to mediation and arbitration. *Employers and others drafting handbooks and other documents need to be careful when inserting language excusing themselves from liability. Too much language that disavows any obligation to abide by the document may make it impossible for that party to rely on the document in any legal action.*

EMPLOYMENT

ADDRESSING INDEPENDENT CONTRACTOR ISSUES PICKS UP STEAM – New York City has joined a national trend toward addressing independent contractor issues in the workplace. A new law adopted by the city government extends to independent contractors all of the protections employees receive under the city's Human Rights Law when the contractors are working for a business with four or more employees. But New York City isn't alone. California's General Assembly has passed legislation that, effective January 1, is expected to reclassify approximately 65% of the state's independent contractors as employees. Meanwhile, the Philadelphia City Council has passed a Domestic Worker Bill of Rights that guarantees in-home workers paid leave and sick days even if they work for more than one employer (a factor that has traditionally been one tending toward classification of a worker as an independent contractor). *The classification issue can be an important one. The New Jersey Labor Department recently announced that Uber owes the state approximately $650 million for misclassifying its drivers as independent contractors rather than employees. On the other hand, to the extent that laws, like New York City's new legislation, start treating all independent contractors the same as employees, the distinction between employees and independent contractors will have less meaning.*

COURT APPLIES EXCEPTION TO ILLINOIS EMPLOYEE CREDIT PRIVACY ACT – The Illinois Appellate Court, 1st District, has applied an exception to the Illinois Employee Credit Privacy Act (IECPA) in affirming a lower court's dismissal of a lawsuit filed against Commonwealth Edison for rescinding a customer service job offer after checking a job applicant's credit. The Act generally prohibits employers from using credit histories to make hiring decisions. But the Appellate Court noted that the Act contains an exception for prospective workers who would be tasked with handling sensitive information, and, in this case, the Appellate Court found that a customer service representative for Commonwealth Edison, the largest power supplier in Illinois, was subject to the exception. *In particular, the Appellate Court noted that customer service representatives for Commonwealth Edison have the ongoing ability to access customers' Social Security numbers, driver's license numbers, and bank and credit card info, and even if they frequently can only access partial data, that's enough to make the IECPA exception applicable.*

FEDERAL JUDGE REJECTS ANXIOUS EMPLOYEE'S DISABILITY CLAIM – A federal judge in Tennessee has rejected an employee's claim for a reasonable accommodation to her anxiety disorder under the Americans with Disabilities Act. There was evidence the employee had generalized anxiety, and the federal Equal Employment Opportunity Commission okayed bringing a legal action against her employer for refusing to give her intermittent leave from her laundry technician job and then firing her. But the judge found that the EEOC had not made out a claim under the Act because it did not show that the worker's anxiety rose to the level of substantially limiting a major life activity. *The EEOC focused on whether anxiety can be a disability under the Act (it can). But they didn't prove their case that this employee's anxiety amounted to a disability. Also, it didn't help their case that the worker's doctor had concluded she "could potentially need a few days off" to deal with her condition. When your doctor can't be more assertive than that in supporting your ADA claim, you will lose!*

EMPLOYMENT (cont.)

NLRB SAYS UNPAID INTERNS NOT EMPLOYEES – The National Labor Relations Board has issued an opinion that a nonprofit's unpaid interns are not employees protected by the federal Fair Labor Standards Act. The ruling came in a case involving a group of workers who were advocating for payment of the nonprofit's unpaid interns. The workers – including interns and some paid employees – filed charges with the Board after the group circulated petitions in support of payment for the interns, to which the employer voiced "disappointment," without threats, but merely seeking better direct communications from the workers about such matters. Considering the charges filed by the workers, the NLRB found that the employer had not violated the Act in its response to the petitions, and, in fact, the employer's response to the petitions was not in any way coercive and was protected under the Act. Furthermore, the Board, reversing an administrative law judge's opinion to the contrary, reaffirmed a more than 20-year-old principle that unpaid workers are not employees and have no rights under the Act. Nor did paid employees filing charges exercise rights under the Act in support of the unpaid interns because their actions did not concern "wages, hours or other terms and conditions of employment" of employees. *Though the nonprofit eventually won at the NLRB, the charges at the NLRB were just one problem the employer will have to resolve with its workers. When the nonprofit proposed that it might switch to paid interns, many of its employees took objection to that. Sometimes you just can't win.*

EEOC RESCINDS POLICY STATEMENT ON BINDING ARBITRATION – The Obama era Equal Employment Opportunity Commission, in 1997, issued a *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*. That Policy Statement stated the EEOC's general opposition to binding arbitration required of workers by their employers as a way to settle employment disputes at a lower cost rather than resorting to litigation. But that Policy Statement put the EEOC in opposition to the will of Congress as expressed in federal legislation favoring arbitration. So, who wins when an administrative agency thumbs its nose at Congress? Eventually, Congress will tend to win, and, following court decisions backing up Congress, including rulings by the U.S. Supreme Court, the EEOC, with a new Republican majority, has now rescinded the Policy Statement. *Though some states, notably California, still restrict mandatory employment policies requiring arbitration of employment disputes, the EEOC has changed its tune. Workers (and employers) who would rather go to court than arbitrate, and hope the EEOC will support them, now have an EEOC thinking differently about arbitration*.

EMPLOYMENT (cont.)

DEATH IS ONLY THE BEGINNING? – The Maryland Court of Special Appeals has held that the widow of an employee who died of a heart attack could sue for death benefits in a workers' compensation claim even though her husband had previously settled an occupational disease claim against his employer and its insurers for heart disease and hypertension in what was then deemed to be an agreed final settlement. The court ruled that the "final" settlement didn't bar the widow from suing for death benefits because the widow was not a party to the settlement agreement and the right of a surviving spouse to death benefits under Maryland law "is separate and independent of" an injured worker's claim for benefits. *Paying money to an injured worker under a settlement agreement? At least in Maryland, you had better make his or her spouse a party to that agreement. But, even then, the worker's death might create a new cause of action giving the spouse a right to additional compensation.*

MINIMUM WAGE INCREASES COMING UP – Throughout the U.S.**,** minimum wages mandated by state and local laws will be increasing in 2020. A minimum wage increase took effect in 21 states on January 1 (or December 31, 2019). But four other states and the District of Columbia raised minimum wages effective at some other point in 2020. Furthermore, there are at least 42 individual municipalities and locales imposing their own minimum wages that are scheduled for an increase in 2020. This poses a special problem for employers whose employees are working at different locations in a state or in different states. *Employers need to be aware of these changes and many other changes in state and local laws that were scheduled to take effect January 1 or at other times in 2020.*

TAXATION

REPEAL OF NONPROFIT EMPLOYEE BENEFITS TAX COMING UP – President Trump is expected to sign into law a repeal of the 21% unrelated business income tax on transportation fringe benefits, like free parking, provided by nonprofits to their employees. The repeal has received bipartisan support in Congress. The tax was part of the Tax Cuts and Jobs Act enacted in late 2017, which took effect in 2018. It was among a number of provisions increasing some taxes to pay for a general reduction in individual and corporate taxes. But, naturally, it was very unpopular in the nonprofit community. *The repeal is part of a $1.4 trillion spending package passed by Congress at year-end 2019. Among other things, that bill will also repeal the so-called "Cadillac tax," which was enacted to help pay for the Affordable Care Act (Obamacare) and would have imposed a 40% excise tax beginning in 2022 on employer-provided health care plans providing benefits exceeding $11,200 in value for an individual and $30,100 for a family. The repeal of the Cadillac tax also received bipartisan support, as lawmakers eventually concluded that the tax would have hurt working families receiving health insurance through their employers.*

NONPROFIT

NONPROFITS CAN BE SUED FOR DEFAMING MEMBERS (SOMETIMES) – If the board of a nonprofit takes up consideration of charges against a member that turn out to be false, can the nonprofit, as well as the board members, be sued for libel or slander? Yes, but, as a recent Florida case shows, liability can sometimes be greatly limited if discussion of alleged impropriety is restricted to the organization's leadership. In the Florida case, a state appellate court noted that defamation doesn't result in actionable libel or slander unless a defamatory statement has been "published" to a third party by the defamer. But the court ruled that persons hearing or seeing a purported defamation can sometimes be so closely connected with an alleged defamer that no "publication" has occurred. So, the court found that allegedly defamatory statements made at board meetings, strictly by and to board members, might not be considered "published" to a third party and therefore actionable. *It may depend on the state in which a nonprofit is incorporated or operating, because state laws on the subject may differ. But the Florida court's analysis of the law gives nonprofits a good reason to restrict discussions of possibly defamatory matters - for example, keeping them at board level as much as possible and not taking them to a membership meeting. Unfortunately, state laws and bylaws may require that discipline against some members, such as directors, must in some cases be imposed pursuant to a membership vote. So, that makes it hard for an organization to use a "no publication" defense if charges against such members aren't based in fact, resulting in a libel or slander suit against the person or persons making the charges and their organization.*

NONPROFITS NEED TO BE CAREFUL WITH ENDORSEMENTS – One way that nonprofits can raise money without having to pay unrelated business income tax on their revenues is by allowing for-profits to claim an endorsement from the nonprofits and pay a tax-exempt royalty in return. Nonprofits can benefit from such perfectly legal and exempt royalty arrangements as long as their involvement in promoting products of for-profits is "passive" in that the for-profit does the actual promoting and it's just allowed to use the nonprofit's name, logo and acronym to do so. But nonprofits risk tax trouble if they engage in too much active promotion of a for-profit's products and services – perhaps even loss of their tax-exempt status. Moreover, endorsements can get nonprofits in trouble of a different kind if they aren't careful of what they are endorsing. So can for-profits. Witness Amazon, which has been getting all kinds of negative publicity over its awarding of an "Amazon's Choice" designation to certain products that allegedly are promoted with false claims, have listings manipulated by sellers to get the "Amazon's Choice" badge of honor, may be violating consumer protection laws, and may not even conform to Amazon's own rules. *Nonprofits are sometimes encouraged to do almost anything to satisfy their need for more revenue to accomplish their worthy, tax-exempt purposes. But be careful out there. The companies you promote may not care at all if you get in tax and other legal trouble for promoting their products and services.*

NONPROFIT (cont.)

ICANN PROCEEDS WITH SALE OF .ORG DOMAIN REGISTRY – The Internet Corporation for Assigned Names and Numbers (ICANN), a worldwide entity that manages the Internet address system, is proceeding with the sale of the .org domain registry to the private equity firm Ethos Capital LLC, despite some opposition that may eventually sidetrack the sale. There are around 10 million .org domains, and Public Interest Registry has managed the .org domain registry for ICANN since 2002. But the Registry has reached agreement to be acquired by Ethos for an undisclosed price. *Concern has been voiced that Ethos will raise fees to register and renew .org domain names, especially after ICANN removed a longstanding cap on the price for renewals last June. Some believe that the Ethos acquisition of the Registry will lead to greater emphasis on realization of profits from the registry at the expense of the .org community. But then, it has been suggested that the .org registry wouldn't even exist if ICANN hadn't long been fixated on creating new domain name registration possibilities in order to raise money.*

INTELLECTUAL PROPERTY

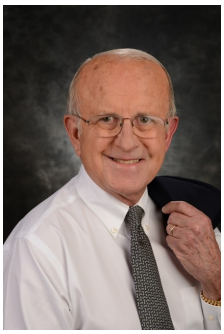
PARKED DOMAIN NAMES WERE USED IN COMMERCE AND INFRINGED - In a dispute over domain names, a federal district court in Alabama has ruled that names "parked" with GoDaddy infringed on the trademark rights of another entity, even if the owner of the "parked" names made no use of them in commerce other than permitting ads from unrelated persons to appear on its website pages. The case involved operators of competing student housing facilities, one of which had federally registered trademarks. The owner of the other facility began using domain names incorporating those trademarks to direct Internet traffic to its website, but, upon receiving "cease and desist" letters from the trademark owner, it simply "parked" those domain names with GoDaddy and made no use of them in commerce other than to let unrelated persons place ads on those domains. But that "parking" was enough use in commerce to trigger liability for unfair competition under the federal Lanham Act, the court ruled. *Be careful in using another's trademarks even if it's just in "parking" domain names. Otherwise, your "parking" violation may net you more than a traffic ticket.*

SECRETS PUBLISHED WITHOUT OWNER'S CONSENT AREN'T SECRETS – The California Court of Appeals for the Sixth Appellate District has ruled that the owner of trade secrets can't sue someone for profiting from them once those secrets have been published by someone else without the owner's consent. Intellisoft created software that it shared with Acer pursuant to a nondisclosure agreement. But Acer allegedly stole that software, rebranded it, and patented it without Intellisoft's consent, after which Acer transferred the patent to Wistron. When Intellisoft sued Wistron, claiming that Wistron was illegally profiting from Intellisoft's trade secrets in the software, the Court of Appeals rejected that suit, finding that Acer's patent registration made the software public information and Intellisoft could no longer rely on any trade secret rights in the software, even though it never consented to the publication by Acer. *All may not be lost for Intellisoft, though, as the Court of Appeals left open the possibility that Intellisoft could successfully sue Acer.*

REGULATION

93.6 MILLION REASONS NOT TO BOYCOTT - A federal jury has handed down a $93.6 million verdict against the International Longshore and Warehouse Union (ILWU) for unlawful boycotts carried out by its dock worker members. The jury award was recovered by ICTSI Oregon Inc., in the last of six separate actions it filed in 2012 that arose from a labor dispute in Portland, Oregon and concerned which of two unions was entitled to perform the job of plugging, unplugging and monitoring refrigerated shipping containers in Portland. The National Labor Relations Board issued a decision giving the job to members of the International Brotherhood of Electrical Workers, and the ILWU responded by inciting its members to engage in unlawful boycott activity in Portland, including encouraging its members to unnecessarily operate cranes and drive trucks in a slow and nonproductive manner, refuse to hoist cranes in bypass mode, and refuse to move two 20-foot containers at a time on older carts. All of that activity was intended to force ICTSI and carriers to cease doing business in Portland, and it caused significant damage to ICTSI's business, namely, the loss of service contracts with two major shipping companies. Consequently, litigation resulted in the huge damages award by the jury against the ILWU and its local - quite a bit more than the ILWU's listed assets of just over $8 million. *The ILWU has taken legal steps that may help it set the judgment aside, and it may also file for bankruptcy, which could come years from now. But the enormous jury award serves as a warning to trade associations and other nonprofits that may be tempted to engage in boycotts and other illegal anticompetitive action.*

NEWS AND EVENTS



Jon will be presenting "The Five Ws and One H of the City of Chicago Lobbying and Ethics Law and NFP Organizations" to the Chicago CFO Roundtable.

Jon also served as Parliamentarian for a large trade and professional organization Delegate Assembly.

Nathan Breen's recent Protecting Your Intellectual Property webinar is available online now."

"As another year comes to an end, we wanted to take a moment to wish you the very best in 2020!"

Happy New Year

HOWE & HUTTON

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