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THE HOWE & HUTTON REPORT

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TRENDING NOW

CONFUSING DRUG POLICY OF FEDS, STATES LEAVE EMPLOYERS IN QUANDARY – Employers have been confused about how to enforce drug policies in their workplaces ever since states started declaring lawful various drug activities that federal law prohibits. A recent case in Arizona showed that employer enforcement of zero-tolerance policies is dangerous, as, in that case, a court found Walmart’s termination of an employee who tested positive for marijuana at work was a violation of the state’s Medical Marijuana Act. That law prohibited such terminations unless a worker “used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.” Apparently important to the court was the fact that the law did not specifically excuse termination when a worker “tested positive for drugs at work.” *What is the lesson for employers in the Arizona case? At the least, it indicates employers can’t rely on tests that could show a positive result if a worker used drugs lawfully (or maybe even unlawfully) before coming to work. But, under some state laws, an employer may not be able to safely terminate for drug possession or use at work, depending on the drug and what excuses the employee may have. (“It’s for medical purposes, boss.”) On the other hand, if a worker’s performance at work is seriously impaired by drugs, the employer would be pretty safe in terminating, just as the employer would be pretty safe in terminating if a worker’s performance at work was seriously impaired for any other reason. Otherwise, an employer might be best off leaving drug enforcement to whatever federal, state or local enforcers understand and still have an interest in enforcing America’s confusing anti-drug laws.*

TRENDING (cont.)

TRUMP MOVES TO EASE TRADE TENSIONS WITH ALLIES – *H&H Report Update* - President Trump moved to reduce trade tensions with U.S. allies and North American neighbors, delaying a decision on tariffs for imported cars and auto parts for six months and announcing a deal to exempt Canada and Mexico from last year's tariffs on steel and aluminum. The delay in imposing tariffs on cars and auto parts may provide time for negotiation of trade deals with the European Union and Japan. *The new easing in these tariff requirements came as negotiations with China failed to prevent tariff increases in both China and the U.S. Tariff exemptions for Canada and Mexico may help the Administration obtain Senate confirmation of a broader treaty the Administration negotiated with those countries last year.*

PROTECTIONS FOR TRANSGENDERS ROLLED BACK – The Trump Administration has proposed new rules rolling back certain legal protections for transgenders that were established in the Obama years. The new rules would end an Obama policy expanding the antidiscrimination policy in the Affordable Care Act (Obamacare) to cover discrimination against people who identify with a gender other than the one indicated on their birth certificate. The Obama policy had been blocked by a federal court in Texas anyway, saying that the Act itself didn't extend protections to transgenders. So, the Trump Administration is now proposing a substitute policy that does not exceed the protections in the Act. But the Trump rule also reverses a different Obama-era provision classifying discrimination against a pregnant person as sex discrimination so that health care providers couldn't refuse to offer abortion-related services. *The legal issues raised by the new rule probably will have to be resolved by the U.S. Supreme Court, though some may not even reach that Court till next year.*

REGULATION

WEBSITE AND APP MUST BE FULLY ACCESSIBLE TO BLIND CUSTOMERS – The U. S. Court of Appeals for the Ninth Circuit in San Francisco has held that Domino's Pizza, LLC could be sued for violating the Americans with Disabilities Act by not making its website and mobile app fully accessible to blind customers. Reversing a decision by a federal district court, the Court of Appeals held that the lower court wrongly decided that Domino's didn't have fair notice of its obligations under the Act because the U.S. Department of Justice had not issued specific guidelines indicating how the website and app could be made accessible to blind customers. The lack of specific regulations cannot eliminate a statutory obligation, the Court of Appeals said. *The appeals court didn't rule on the exact question of whether the website and the app violated the Act, remanding the case to the district court for a decision as to whether the Domino's website and app provided the blind with effective communication and full and equal enjoyment of Domino's products and services as required by the Act.*

REGULATION (cont.)

SUPREME COURT DENIES REVIEW OF ILLINOIS CAMPAIGN FINANCE LAW – H&H Report Update – The Supreme Court of the United States has denied review of a lower court decision upholding the constitutionality of the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act. That law limits individuals to making no more than \$5,000 in political contributions for any election, while corporations or labor unions are limited to \$10,000, political action committees \$50,000 and political party committees \$200,000 in primary elections, with no limit on such committee expenditures in general elections. Four party leaders in the state’s General Assembly are also allowed to create caucus committees that are treated like parties. *The U.S. Court of Appeals for the Seventh Circuit previously upheld the law, and that decision will stand now that the Supreme Court has decided not to take the case. Opponents of the law argued that limiting some people more than others in making campaign contributions violated the First Amendment to the U.S. Constitution.*

NO DEFAMATION IN CONSTITUTIONALLY-PROTECTED OPINION – H&H Report Update – The U.S. Court of Appeals for the Seventh Circuit has upheld a federal district court decision dismissing a defamation suit brought against the nonprofit American Bar Association because of an article published in the ABA’s peer-reviewed scholarly journal, *The Judges’ Journal*. The suit was brought by another nonprofit organization, the Board of Forensic Document Examiners, which certifies forensic document examiners. It took issue with an article written by an examiner who had been certified by another nonprofit, the American Board of Forensic Document Examiners. In it, the author urged judges to look for experts certified by the American Board, warned them to be “wary of other certifying bodies,” and said that the American Board was “the only certification board recognized by the broader forensic science community, law enforcement, and courts.” The BFDE wasn’t mentioned by name in the article, but sued the ABA for defamation, invasion of privacy, civil conspiracy, and false advertising. *Key to the Seventh Circuit’s decision was its conclusion that the article contained only constitutionally-protected nonactionable opinion so broad as to lack objective verifiable meaning. It didn’t hurt the ABA that the Journal warned readers its articles “represent the opinions of the authors alone” and “provide opposing views” for readers to consider. Furthermore, the article itself highlighted its subjective nature and presented the author’s views as suggestions, not facts.*

REGULATION (cont.)

IRS OKAYS USE OF BONDS TO FINANCE HOUSING FOR VETERANS – The Internal Revenue Service issued long-awaited advice clarifying that tax-exempt private activity bonds can be issued to finance multifamily housing for veterans and other specific groups. The IRS ruled that restricting housing to veterans and other specific groups Congress authorized for a federal housing tax credit in 2008 doesn't disqualify a project for financing through issuance of tax-exempt bonds because of a failure to meet the general public use requirement applicable to tax-exempt facilities. *The new IRS interpretation is retroactive, and it allows a significant number of projects to move forward that previously had been blocked by some uncertainty about the IRS position on their exempt status.*

SUPREME COURT RULES APPLE CAN BE SUED BY APP CUSTOMERS – The Supreme Court of the United States has ruled that a group of iPhone owners can sue Apple for antitrust violations arising from Apple's use of the iTunes App Store. Apple argued that the iPhone owners couldn't sue Apple because of alleged antitrust violations in the sale of apps since they weren't buying directly from Apple but from app developers. In a 5-4 decision, authored by Justice Brett Kavanaugh and joined by the four more liberal justices on the Court, that argument was rejected. The Court held that the suit could proceed because Apple takes 30% of sales revenue from the App Store and because Apple doesn't allow its customers to download apps from any source other than the App Store. Consequently, the owners were indirectly purchasing apps from Apple and could sue Apple if it was engaged in monopolistic practices through the App Store. *The Court didn't hold that Apple had engaged in any antitrust violations, but merely ruled that Apple had no automatic defense from suit just because it didn't produce and sell the apps available in the App Store. Some consumer advocates argue that the Court's decision could have substantial implications for how antitrust law is applied to other tech companies operating in today's online platform environment.*

INTELLECTUAL PROPERTY

CAN'T SUE CANADIANS IN ILLINOIS WITHOUT MINIMUM CONTACTS – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court's decision to dismiss a suit over intellectual property rights filed against Canadian companies in Illinois. The suit was brought by two Illinois residents who had founded a company called Gray Matter and later assigned it their intellectual property rights but retained a right to royalties on sales. Gray Matter then sold assets to Swimways, which sought to avoid royalty payments to the Illinois residents and then was acquired by Spin Master, bringing the Illinois residents to file suit against Spin Master and related entities. All of the defendants are Canadian companies with offices in Toronto, are not registered to conduct business in Illinois, and have no employees or registered agents in Illinois. But the attorney for the Illinois residents argued that the defendants could be sued in Illinois based on his submission of an online purchase receipt from a Swimways website and his declaration that he purchased and received a patented product in Illinois. Not good enough, said the Court of Appeals, finding that the Canadian companies had insufficient contacts with Illinois to establish jurisdiction over them or the case in that state. *You can't just sue anyone anywhere. They have to have "minimum contacts" with the state where you are suing them, and that applies whether they are from foreign countries or just other American states.*

NONPROFITS (cont.)

PANERA LOSES EXEMPTION FIGHT – The Internal Revenue Service denied a federal income tax exemption this year to Panera Bread Foundation, a nonprofit affiliated with and primarily funded by the for-profit Panera Bread. The Foundation had set up what some described as “fancy looking soup kitchens” called “Panera Cares” in five cities, where payment for food was entirely optional and where some indigent people apparently ate. The Service denied the exemption for a number of reasons. The soup kitchens looked a lot like Panera Bread restaurants, served the same quality food, and were, in fact, formerly operated as Panera Bread restaurants. The soup kitchens were located in geographic areas where the IRS determined that most patrons could afford to pay regular Panera Bread prices for food. Many patrons did, in fact, pay regular Panera Bread prices for food, even though they were told that payment was optional. The soup kitchens were primarily supported by Panera Bread restaurant earnings and not through charitable contributions. Although Panera accepted voluntary donations from soup kitchen patrons, Panera didn’t inform patrons about the deductible amounts for their meals or that a written acknowledgment is required for deductions of donations of \$250 or more. All of these factors, to the IRS, indicated that the Foundation had a substantial nonexempt private, rather than public, purpose. *Apparently, all Panera Cares locations have now closed down. We don’t know whether a federal income tax exemption would have kept them open.*

FAULTY INSURANCE SALES COST NONPROFIT – A nonprofit in Arkansas has been ordered to forfeit \$495,475 in insurance premiums to the state Department of Insurance. The organization purported to sell its members life insurance and dental and vision benefits, but it had no license from the Department to make such sales. Furthermore, it advertised that it purchased life insurance for its members, when, in fact, no such policies had ever been taken out. The nonprofit’s problems with the law may just be beginning, though. Because of some limitation on the Department’s ability to levy fines, it has referred some matters to other officials for consideration of additional actions against the organization. *Perhaps the scariest aspect of this story is the Department’s conclusion that the nonprofit had relied in good faith on the advice of licensed insurance professionals to engage in the activities that drew the Department’s attention. Many nonprofits are looking at ways to raise money from new sources of income, and some are turning to insurance programs of various sorts. This case shows, though, that there are some risks.*

EMPLOYMENT

DISOBEYING ORDER SUFFICIENT TO DISQUALIFY WORKER FOR UNEMPLOYMENT COMP - An Illinois Appellate Court has held that a worker was disqualified from receiving unemployment compensation for failure to obey a lawful order from a supervisor, even if the disobedience was health-related and not willful. Persaud was employed at a hospital and was ordered to meet with a supervisor to discuss a disciplinary action report and a performance improvement plan a few days before she began a medical leave for surgery. She refused, saying she was too stressed out and would meet with the supervisor after her surgery. She was then terminated and denied unemployment compensation because she was discharged for “misconduct.” She pursued her claim for unemployment to a claims adjudicator, who found that she was not terminated for “misconduct” because her failure to obey an order wasn’t willful. Rather, the administrator said, she had committed an “error in good faith,” and was eligible for unemployment. But the case went up to the 1st District Appellate Court, which found she could not collect unemployment because termination need not involve willful failure or disobedience by an employee to constitute a discharge for “misconduct” disqualifying a worker for unemployment. Failing to comply with a reasonable and lawful instruction was sufficient to show “misconduct” where the failure to comply was not within statutory exceptions for disobedience due to a lack of ability, skills or training or the unwillingness to take an unsafe or unlawful act. *Some might think a hospital should have been a little more willing to accept the surgery excuse, at least to the point of not contesting an unemployment comp claim through several administrative reviews and two layers of the court system. But they won their case.*

ILLINOIS BARS LOCAL RIGHT-TO-WORK LAWS – The Illinois General Assembly has passed, and the Governor has signed into law, a measure prohibiting local governments in the state from creating “right-to-work” zones in their areas, as some are trying to do. The Collective Bargaining Freedom Act says that only the state can enact laws relating to collective bargaining in Illinois, including “right-to-work” laws that prohibit employers from requiring union membership as a condition for employment. *A number of states have enacted laws promoting the “right-to-work” without belonging to a union. But Illinois isn’t in that camp. The courts have also struggled over the question of whether local “right-to-work” ordinances violate federal law. A panel of the U.S. Court of Appeals for the Seventh Circuit in Chicago recently held that a right-to-work ordinance in Lincolnshire, Illinois was illegal for that reason. But the U.S. Court of Appeals for the Sixth Circuit, based in Cincinnati, Ohio, upheld a local right-to-work ordinance in Kentucky back in 2016 against similar arguments. So, there is now a conflict in the Courts of Appeal as to whether any local “right-to-work” laws are proper. Such conflicts are often eventually resolved by the Supreme Court of the United States.*

EMPLOYMENT (cont.)

THERE'S NO EMPLOYMENT DISCRIMINATION AGAINST NON-EMPLOYEES – Only employees can bring an employment discrimination suit, said a federal Court of Appeals in a suit brought against a hospital by a surgeon whose practice privileges at the hospital had been revoked. The surgeon contended that the hospital discriminated against her on the basis of her sex, Jewish religion and Russian ethnicity in violation of Title VII of the federal Civil Rights Act of 1964. But the hospital contended the surgeon lost her privileges because peer review indicated she had not provided a proper degree of care to certain patients (including operating on one patient without appropriate sedation). For purposes of her suit under Title VII, though, none of that mattered, because the Court of Appeals determined that, in her work at the hospital, the surgeon had been acting as an independent contractor, not an employee, and an independent contractor couldn't bring a Title VII suit, as such suits could only be brought by employees. *Evidence of the surgeon's independent contractor status was the fact that the hospital did not offer the surgeon employment benefits or pay her professional licensing fees, and the surgeon owned her own medical practice, billed her patients directly, filed taxes as a "self-employed physician," could set her own hours, obtained privileges at other hospitals, used her own employees in the operating room, and made treatment decisions for her patients. The fact that she was subject to peer review was not considered to make the surgeon an employee.*

OTHER

NEW RULE PROTECTS MEDICAL WORKERS WITH OBJECTIONS TO PROCEDURES – The federal Department of Health and Human Services has released a new rule aimed at protecting medical workers with moral or faith-based objections to performing certain procedures. The rule indicates that the Department will withhold funding from hospitals and other facilities that force medical personnel to perform procedures to which they object. Supporters of the rule say it adds muscle to laws already passed by Congress. Opponents say it jeopardizes funding for facilities if they provide abortions, assisted suicides, sterilizations and vaccinations using fetal tissue. They plan lawsuits to block the new rule, which will not take effect till July, at the earliest, in order to allow public comment. *More than 600,000 facilities now receiving federal funding may be impacted by the new rule, including dentists' offices, state and local governments and medical schools.*

PROPERTY OWNER MAY BE LIABLE FOR TRESPASSER'S INJURY – The Illinois Appellate Court, 1st District, has ruled that a hotel could be liable to a trespasser who was injured on hotel property. The trespasser fell while crossing a hotel driveway to get to her office. A trial court ruled that the hotel couldn't be liable to the complaining woman, regardless of any other facts, because she was trespassing when she fell. But the Appellate Court reversed that decision and remanded the case to the lower court for further proceedings and consideration of whether the hotel permitted the use of its driveway by trespassing pedestrians to such an extent that those trespassers became "licensees" who could legally sue the hotel for trip-and-fall injuries. In this case, testimony at trial indicated that "a hundred a day or more" pedestrians used the hotel driveway, and there were no signs restricting it to hotel customers only. *Is your property routinely used by pedestrians without any clear permission from you? You could be liable for injuries they suffer.*

NEWS AND EVENTS



Mike Deese will be speaking to account executives at an association management company on intellectual property, GDPR and hotel contracts.

Mike will also be making a presentation in Philadelphia to the Mid-Atlantic Society of Associations on “Intellectual Property Issues for Associations.”

Naomi Angel will be giving a legal report on trends to mid-year meetings of associations of manufacturers in Chicago.



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