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THE HOWE & HUTTON REPORT

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TRENDING NOW

CLASS SUING STEEL PRODUCERS CAN'T AMEND COMPLAINT YEARS LATER – A class of plaintiffs sued eight U.S. steel producers in 2008, claiming that they colluded in violation of the antitrust laws to slash output so as to drive up the price of steel, which resulted in the members of the class overpaying for steel sheets, rods and tubing. This year, the purchasers tried to amend their complaint, asserting that what they really overpaid for was end-use consumer products, including vehicles, washing machines and refrigerators, that were manufactured by third-parties using steel. "No dice," said a federal district court, which dismissed the suit. A federal court of appeals affirmed that decision. The suit was time-barred because the amendment sought to include an entirely different and exponentially larger universe of plaintiffs and failed to plead a causal connection between the alleged conspiracy and the plaintiffs' alleged injuries. *Noted the appeals court, "No reasonable defendant, reading the original complaint, would have imagined that plaintiffs were actually suing over the thousands of end-use household and commercial goods manufactured by third parties – a reading so broad that it would make nearly every person in the country a potential class member." Further, the appeals court said that it was unclear how to trace the effect of an alleged overcharge on steel "through the complex supply and production chains that give rise to consumer products."*

TRENDING (cont.)

ADMINISTRATION PROPOSES BAR TO OBTAINING GREEN CARD – The Trump Administration has proposed a bar to prevent legal immigrants from obtaining a green card which grants permanent residency as a step to citizenship and facilitates obtaining a job. The proposal would deny green cards to anyone in a family that has received government assistance, such as Medicaid and food stamps. Refugees are exempted. The proposal wouldn't go into effect until the public has had 60 days to comment on it. The Administration notes that the proposal will further implementation of a long-standing federal law that immigrants, other than refugees, must show they can support themselves financially in order to enter the U.S. *The proposal comes on top of a recent Administration announcement that it will seek an end to a decades-old court settlement that bars the government from jailing children with their immigrant parents for more than 20 days while the parents' immigration status is being determined.*

APPEALS COURT UPHOLDS CALIFORNIA DEMAND FOR DONOR LIST – A panel of the U.S. Court of Appeals for the Ninth Circuit has upheld a demand by the California Attorney General that charities located or doing business in the Golden State annually provide the AG's office with an unredacted Form 990, Schedule B as filed with the Internal Revenue Service, including names, addresses and contribution amounts for individual donors. The panel found that the requirement is substantially related to the important state interest of policing charitable fraud and does not create a burden on the donors' rights under the First Amendment to the U.S. Constitution. *The AG's office has said the collected information will not be made public. However, the nonprofit community has significant concerns about state protection of donors' identities. So has the Internal Revenue Service, which has warned nonprofits in Schedule B instructions not to provide Schedule Bs to states that do not require it, as those states may "inadvertently" disclose donor information to the public. Although Form 990s are generally required to be made publicly available under federal law, the U.S. government does not require charities, except for private foundations, to make donor names and addresses public.*

GOVERNMENT MANDATES DISCLOSURE OF DRUG LIST PRICES IN TV ADS – The U.S. Department of Health and Human Services has announced that in television advertising it will require disclosure of the prices for pharmaceuticals that have a list price of more than $35 per month. The drug industry opposes the new requirement, preferring that ads direct consumers to a website showing price information. They point out that consumers often pay less than the list price for drugs because of rebates, discounts and insurance payments. Critics also say the new requirement runs afoul of First Amendment free speech protections. But HHS insists that list prices matter to patients, and the list price disclosure requirement is a marquee element of President Trump's plans to lower drug prices. *Although the list price disclosure requirement was announced as applying only to television ads, HHS is taking comments on whether it should also apply to radio ads and ads in newspapers, magazines, websites and social networking sites.*

TRENDING (cont.)

FEDERAL COURT UPHOLDS ILLINOIS CAMPAIGN CONTRIBUTION LIMITS – *H&H Report Update* - The U.S. Court of Appeals for the Seventh Circuit has rejected First Amendment challenges to the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act, which were filed by a political action committee that alleged provisions of the Act are not narrowly drawn to prevent quid pro quo corruption or its appearance. Such, the PAC argued, was the test for state political campaign contribution regulation, according to previous court decisions. But in this case, the Court of Appeals held that prior U.S. Supreme Court cases foreclosed any argument that contribution limits for individual donors, as contained in the Act, are too low; that limits for other donors, like corporations and unions, are too high; or that the Act failed constitutional requirements simply by favoring certain classes of donors over others. More specifically, the Court of Appeals affirmed a ruling by a lower court that the Act was justified in treating "legislative caucus committees," formed by legislative leaders, like political party committees and letting them make unlimited contributions during a general election. *A law passed by the Illinois General Assembly drawn to prevent quid pro quo corruption or its appearance? What a concept! Unfortunately, politicians doing favors for support has made Illinois politics run from as far back as we can remember, even if nakedly soliciting money for political influence is going a little too far, as former Governor Blagojevich found out.*

EMPLOYMENT

SUSPICIOUS TIMING OF TERMINATION SENDS RETALIATION CASE TO JURY – A panel of the U.S. Court of Appeals for the Seventh Circuit has reversed a lower court verdict for a defendant company in a sexual harassment and retaliation case because the lower court hadn't allowed a jury to rule in the matter. The Seventh Circuit thought a reasonable jury could have found that the timing of the plaintiff's termination was "suspicious." Donley had filed a sexual harassment claim against her sales manager who was fired as a result, but still given a generous severance package. Almost immediately, the company began investigating an earlier incident in which Donley allegedly circulated photos of a vendor's CEO while the CEO was intoxicated, and that was the reason proffered by the company for Donley's termination. The panel noted that the company had given inconsistent descriptions of the circumstances for Donley's termination. The panel found that a reasonable jury could have ruled in her favor based on that evidence and the suspicious timing of the termination, which indicated that the company might have used the earlier incident as a pretext for retaliation. *The trial court should have sent the case to a jury, as Donley requested, and the Court of Appeals has now remanded the case to the trial court for correction of that error.*

EMPLOYMENT (cont.)

COURT FINDS JOINT EMPLOYMENT IN HOTEL MANAGEMENT – A federal appeals court has concluded that a hotel manager and a hotel had a "joint employment" relationship that would allow workers to sue both of them for sexual harassment, pregnancy discrimination and retaliation by the manager. A lower court had awarded a worker $45,000 in compensatory damages and $13,520 in back pay when her complaints of unwelcome sexual comments and advances by the manager did not prevent continued abuse. That court found the hotel alone responsible and dismissed charges against the hotel manager, because all of the workers at the hotel were on the hotel's payroll and the manager's contract stated that all workers at the hotel were "in the employ" of the hotel. However, the U.S. Court of Appeals for the Seventh Circuit vacated dismissal of the manager from the suit, finding that the hotel and the manager had a "joint employment" relationship that allowed suit against the manager. *The Court of Appeals applied an "economic realities" test that considered the manager's control over the worker, the manager's responsibility for the costs of the operation, and the method by which the worker was paid, among other things.*

NLRB PROPOSES ROLLING BACK JOINT-EMPLOYMENT RULING – *H&H Report Update* - The National Labor Relations Board has proposed rescinding its own Obama-era ruling that made it easier for unions to organize franchised businesses and collectively bargain with big franchisors like McDonalds. The 2015 ruling found that a franchisor could be held liable for illegal interference with workers' attempts to organize a union at its franchisees' places of business, even if the franchisor wasn't technically the employer of its franchisees' workers. But the ruling also could be considered support for workers having legal rights under employment law, not only against franchisors, but also against other entities having certain contractual relations with their employers that make them, in theory, joint employers, including organizations with chapters that employ workers. *The joint-employment theory has been considered by a number of courts in different contexts.*

IRS ISSUES NOTICE ON CREDIT FOR PAYING FAMILY AND MEDICAL LEAVE – The Internal Revenue Service has issued guidance for employers claiming a tax credit for payment of family and medical leave. The credit was created by the tax law enacted at the end of 2017. The employer must provide full-time employees at least two weeks of paid leave (prorated for part-time employees) at a rate of at least 50 percent of the employees' normal wages for all workers employed for at least a year and who were not paid more than $72,000 in 2017. *Employers claiming the credit must have a written policy providing for paid leave as specified. "Family and medical leave," for purposes of the credit, has the same meaning as in the federal Family and Medical Leave Act of 1993.*

EMPLOYMENT (cont.)

WISCONSIN STATUTE ON DUES-CHECKOFFS PREEMPTED BY FEDERAL LAW – The U.S. Court of Appeals for the Seventh Circuit has held that a Wisconsin statute on dues-checkoffs for the payment of union dues was preempted by federal labor law. Federal law allows employees to pay union dues through deductions from their paychecks, which the employer is to forward to their unions. Terms of check-offs are to be collectively bargained for between unions and employers, but each check-off must be authorized by the individual employee, in writing, and the authorization must be irrevocable for no longer than one year per federal law. The Wisconsin statute attempted to shorten that one-year period to 30 days. But first a federal district court and then the Court of Appeals invalidated the statute as an attempt to short-circuit the collective bargaining process and to impose a different dues-checkoff standard than the one dictated by federal law. *A number of other states have tried to legislate with regard to dues check-offs lately. Whether the courts will shoot them all down in this manner is yet to be seen. But the situation isn't all that hopeful for them.*

EMPLOYER'S RIGHT TO CHOOSE AMONG ACCOMMODATIONS UPHELD – The U.S. Court of Appeals for the Seventh Circuit has upheld dismissal of Americans with Disabilities Act claims filed by a policeman who argued that his county employer failed to reasonably accommodate his back pain and retaliated against him for filing a complaint with the federal Equal Employment Opportunity Commission. The back pain led the policeman to request a squad car with more legroom than the Crown Victoria he was then using. He asked for an SUV, but his employer found that an SUV owned by the county had no more legroom than his current squad car. The county declined the officer's request. He then filed his EEOC complaint, and his employer assigned him to courthouse duty, which required no time in a squad car. He eventually had hip surgery and returned to courthouse duty. He then was given active enforcement duty, first on a midnight shift and then on his original daytime shift. A federal district court dismissed his accommodation claim, finding that he was not disabled under the Act because his back pain never prevented him from driving, though he might have been unable to drive a certain model of vehicle. Further, the district court gave summary judgment for the county on the policeman's retaliation claim because the court found that the county hadn't taken any adverse employment action against him. On appeal, a panel of the Seventh Circuit Court of Appeals found no mistake in the district court's decision, both as to the accommodation claim and his retaliation claim. *Explaining its decision, the panel concluded that the officer was not disabled under the Act because his back pain did not affect a major life activity, though the inability to drive at all had been found in some cases to be an effect on a major life activity. The Court of Appeals also found that it was the employer's prerogative to choose a reasonable accommodation for a disability. The county's decision to accommodate the officer's back pain in a way other than what he had requested was not an adverse employment action that could constitute retaliation. Further, the Court of Appeals concluded that none of the county's actions in response to the officer's request for accommodation and his EEOC complaint were the type that would dissuade an employee from exercising his rights.*

EMPLOYMENT (cont.)

BACKGROUND CHECK FOR JOB APPLICANTS RAISES FCRA CONCERNS – Allied offered Robertson a job but withdrew the offer after running a background check. Robertson then sued Allied alleging violation of the federal Fair Credit Reporting Act because (1) Allied didn't notify Robertson in advance and get her consent before obtaining the background report and (2) Allied didn't give Robertson a copy of the report and a written description of her rights under the Act before making an adverse employment decision. After a trial court refused to approve a settlement in the case and dismissed Robertson's complaint, it reached the U.S. Court of Appeals for the Seventh Circuit, which reversed the dismissal, holding that, even if Allied didn't violate the FCRA before obtaining the report (which the Court of Appeals didn't decide), Robertson was entitled to a copy of the report and the description of rights before Allied withdrew the job offer. *One of the interesting things about this case was the trial court's refusal to accept the settlement between the parties, essentially because the court believed that it didn't have jurisdiction to hear the case at all. In the court's judgment, Robertson hadn't alleged that Allied caused her an injury that was "concrete and particular." Courts don't usually reject settlements. However, in this case, the Court of Appeals said that the trial court could properly have rejected the settlement if, indeed, it had no jurisdiction to hear Robertson's case. On the other hand, the appellate court said the lower court should have heard the claim that Allied violated the Act after receiving the report, because withdrawal of the job offer caused Robertson a concrete injury that had to be remedied by the courts.*

TAXATION

STATE SUPREME COURT UPHOLDS HOSPITAL EXEMPTION LAW *– H&H Report Update –* The Illinois Supreme Court has upheld the constitutionality of the state's hospital property tax exemption law. That law, effective in 2012, essentially allows hospitals to obtain property tax exemptions if they can show that they provide as much charitable assistance in a year as the property tax bills they would have to pay if they weren't exempt. The Supreme Court ruled in a suit challenging the statute on the ground that the law unconstitutionally provides for an exemption without regard for a provision in the Illinois Constitution that exempt property must be used exclusively for charitable purposes. The Supreme Court said that the "exclusively used" provision in the state Constitution requires only that the "primary purpose" for which property is used must be charitable. *The court's treatment of the word "exclusively" in this case is not unlike the way the IRS and courts have treated the same word in the federal statute relating to income tax exemptions.*

HOWE & HUTTON NEWS AND EVENTS

Jonathan Howe presented three sessions at the Events Industry Council's CMP Conclave 18 held in Birmingham, Alabama.

- "Do the Math - Attrition and Cancellations"
- "Bring the Kids - Legal Issues to Event Programs for Minors"
- "Open Forum - Ask the Lawyer" (co-presented with Carol Norfleet, MBA, CMP, DMCP, Executive Vice President, Destination Nashville)

Nathan Breen will be participating in a panel discussion with a number of event professionals in January 2019 at "The Special Event" held at the San Diego Convention Center. The program is: "Cannabis and Events: A New Niche Market or a Risky Proposition?"

For more information see thespecialeventshow.com

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