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THE HOWE & HUTTON REPORT

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TRENDING NOW

IMPENDING CALIFORNIA CONSUMER PRIVACY ACT (CCPA) INCLUDES PRIVATE RIGHT OF ACTION FOR VIOLATIONS – As of January 1, 2020, companies that collect personal information from California residents face the prospect of litigation for breaches of the California Consumer Privacy Act. The CCPA provides a limited private right of action for certain data breaches, putting a premium on ensuring "reasonable" security measures. Specifically, any consumer may bring suit if his or her "non-encrypted or non-redacted personal information is subject to an unauthorized access and exfiltration, theft, or disclosure" as a result of the business's violation of the duty to "implement and maintain reasonable security procedures and practices." *Significantly the CCPA does not specify what constitutes "reasonable security procedures." With statutory damages ranging from $100 - $750, the stakes are high, and statutes providing for a private right of action frequently generate a cottage industry of attorneys looking to profit at the expense of violators. The CCPA does not apply to nonprofits. Even though the CCPA may not apply to your organization, it may apply to your members. Please contact us for*

TRENDING (cont.)

PRIVACY CLASS ACTION INVOLVING FACEBOOK'S PHOTO TAGS PROCEEDS – A panel of the U.S. Court of Appeals for the Ninth Circuit unanimously rejected Facebook's attempt to dismiss a privacy class action alleging that it violated the Illinois Biometric Information Privacy Act ("BIPA") by not securing user consent before recording users' facial biometrics. The lawsuit revolves around Facebook's Tag Suggestion feature which uses facial-recognition technology to analyze whether the user's Facebook friends are in photos uploaded by that user. Facebook does so by extracting the biometric face-prints of the faces in the photo and then comparing them to the faces of those already stored in Facebook's face-print database. Under the BIPA, no private entity may collect biometric data of individuals unless it satisfies several pre-requisites, including the receipt of consent from the individual. In support of dismissal, Facebook argued that the plaintiffs failed to establish a concrete injury and therefore had no standing to sue in federal court. In rejecting this argument, the court held that, given the enhanced technological intrusions on the right to privacy, an invasion of biometric privacy rights harms the individual's concrete private affairs and interests. *While the expansion of facial recognition and other uses of biometric information continues to make everyday life more efficient, being on the leading edge of this technology is legally precarious. Though many welcome the use of biometric information over printed documents, passwords, and other more traditional means of identification, the concerns for its misuse are legitimate. Expect more litigation as this area continues to expand.*

ILLINOIS APPROVES BOARD DIVERSITY REPORTING REQUIREMENTS – The Illinois General Assembly has approved, and Governor Pritzker has signed into law, a measure requiring board diversity reporting by publicly traded companies headquartered in Illinois. But it was a watered down version of legislation promoted by some lawmakers, who wanted to require that all corporations in Illinois, and particularly nonprofits, have a certain number of women and minorities on their boards of directors. The bill that finally passed will only require that publicly traded for-profit corporations report to the Secretary of State once a year on the racial, ethnic and gender makeup of their boards. The reports must also outline each company's plans for having more diverse members on their boards. *Said the Governor, "As a result of this legislation, in the coming years, both the legislature and the public can review the gender, racial and ethnic makeup of the governance of large businesses that call Illinois home. Better diversity among leadership leads to reduced turnover, increased growth and improved market share. That's good business, and it advances my vision of an Illinois where both businesses and working families thrive."*

TRENDING (cont.)

DOXING CAN SUPPORT PERSONAL JURISDICTION – The practice of disclosing and publicizing an individual's identity, address, or other personal identifying information known as "doxing," has been held to support a court's jurisdiction over an individual who engages in such activity. A Michigan federal court recently held that claims could proceed against individuals residing in other states that falsely tweeted identifying information as to Michigan residents alleged to have been involved with the Charlottesville "Unite the Right Rally" that resulted in the death of a counter-protestor in August of 2017. The Michigan residents brought defamation and related claims against the doxers. The court held that the out of state defendants' publication of the Michigan residents' physical address made it reasonable to infer that the tweet in question was intended to cause some action in Michigan. *While people tend to be emboldened to engage in reckless behavior by the anonymity and seeming impunity provided by the Internet, this case serves as a reminder that online actions can have significant consequences. The defendants in this case now need to provide a defense to claims in a distant state or run the risk of a default judgment that ultimately could be enforced against their assets*.

TELEWORK NOT REASONABLE ACCOMMODATION FOR SOME JOBS – The U.S. Court of Appeals for the Seventh Circuit has held that telework wasn't a reasonable accommodation as proposed by a lawyer with carpal tunnel syndrome. She worked for the U.S. Department of Housing and Urban Development for over 20 years, and, for most of that time, HUD had a flexible telework policy that allowed the lawyer to work from home several days a week at a manager's discretion. But HUD reorganized its legal department to require more cross-training and collaboration among lawyers, and that didn't suit the employee's needs following some surgery she had for her condition. She requested at least three days a week of telework for six months plus two additional days per week as needed due to pain, medical appointments and recovery. She supported her request with a doctor's note, but HUD refused her anyway, offering other accommodations instead, including an ergonomic assessment, additional paralegal assistance to reduce the lawyer's typing, a compressed weekly schedule, and generous leave approval. She sued HUD for discrimination, and the Seventh Circuit has now supported a lower court's decision not to even allow the case to go to a jury, finding that no reasonable jury could conclude HUD had failed to accommodate the worker. *The Seventh Circuit said that "a general consensus exists among courts that jobs often require face-to-face collaboration." The lawyer's job in this case was one of them, the Court of Appeals concluded, and the lawyer did not show that her proposed accommodations were reasonable on their face. Rather, the Court of Appeals found that HUD had proposed reasonable accommodations, and the Seventh Circuit affirmed that employers don't necessarily have to provide an accommodation the employee would most prefer. Significant in this case was the fact that HUD had an updated job description for its attorneys requiring onsite attendance.*

EMPLOYMENT

TEMP MAKES OUT FAILURE TO PROMOTE RETALIATION CLAIM – The U.S. Court of Appeals for the Seventh Circuit has reversed a district court's conclusion that a worker did not make out a claim for discriminatory retaliation when his employer failed to promote him from a temporary employment position to a permanent one after the worker complained about discriminatory conditions in his workplace. The Court of Appeals found that the employer hired temporary employees like the plaintiff for one-year terms, but they were often converted to permanent positions within four to nine months if they met expectations. Since the complaining worker had received positive performance reviews in his first nine months of employment, he thought he was entitled to a permanent position. But he wasn't given such a promotion after he complained to management that female and white workers in his department were treated better than male and African-American employees. The worker sued for racial and sex discrimination and retaliation, but he lost at the trial court level, where he wasn't allowed to present his claims to a jury. The employer argued that this employee wasn't promoted because of a hiring freeze instituted around the worker's nine-month anniversary. However, the Court of Appeals remanded the case and allowed the employee's claims to go to a jury, deeming the timing of the employer's failure to promote "suspicious" and finding that retaliation against the complaining employee could be inferred from the employer's better treatment of similarly situated co-workers. *The employee's temporary status didn't prevent him from suing. Additionally, employers should note that repetitive positive performance reviews sometimes make it hard for an employer to successfully defend a discrimination claim.*

NEW YORK EMPLOYERS PROHIBITED FROM INQUIRING AS TO WAGE OR SALARY HISTORY - Following New York City's lead, the State of New York has now amended its Labor Law to ban employers from inquiring about a job candidate's wage or salary history or current employee's salary or wage history as a condition of employment, a condition to receive an interview, a condition of an offer of employment, or a condition for continued employment or promotion. In addition, employers are prohibited from relying on salary or wage history in determining whether to offer employment or in determining what wages or salary to offer an applicant. The law also prohibits retaliation against an individual for refusing to provide wage or salary history, or for filing a complaint with the New York Department of Labor. The law takes effect on January 6, 2020. *New York frequently tends to be a trend setter when it comes to employment law. With this in mind, employers may want to evaluate their practices, as this prohibition has been adopted by several other states.*

EMPLOYMENT (cont.)

EXPIRING LABOR AGREEMENT PRESENTED EMPLOYER WITH QUANDARY – The National Labor Relations Board recently analyzed the issue of whether a company was required to increase employer contributions to a union-sponsored health fund after the company's labor contract had expired. The expiring contract had provisions requiring an increase in employer contributions in 2016 and 2017. But the question before the Board was whether the employer was required to increase contributions post-2017 when the expiring contract was silent about such contributions, and, in this case, the Board said "no." The Board noted that the employer had a statutory duty to maintain the "status quo" on mandatory subjects of collective bargaining after the expiration of a labor contract until the parties reached a new agreement or reached a bargaining impasse, which had not yet occurred. But the Board ruled that the employer here was maintaining the status quo by keeping its contributions at the same level. It didn't have to increase them after 2017, even though the expiring contract had previously provided for annual increases. *Trade association members with unionized workers need to carefully consider their obligations under an expiring contract. What the "status quo" means can sometimes be a difficult question.*

PERFECT ATTENDANCE PROGRAM MUST FORGIVE FMLA LEAVE – The U.S. Court of Appeals for the Sixth Circuit has rejected an employer's interpretation of the federal Family and Medical Leave Act under which it penalized workers for taking FMLA leave by "resetting" a perfect attendance program clock to their disadvantage. The Court of Appeals noted that the Act prohibits penalizing employees for use of FMLA leave, and the Court of Appeals concluded that the employer was doing just that in this case, even if it treated all medical absences from work the same as FMLA leave by resetting its perfect attendance program clock. *Significant, perhaps, was the fact that the employer in this case did not reset its perfect attendance program clock for nonmedical leave such as vacation time, jury duty, and military leave. Had it done so, the Court of Appeals might, or might not, have ruled differently.*

EMPLOYMENT (cont.)

HARASSMENT POLICY AND DELAY IN SUING NIX LIABILITY – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court decision dismissing a sexual harassment complaint filed by a former employee against Walmart. The suit was dismissed because the store had promptly investigated the former employee's allegations of harassment by a supervisor, had implemented an anti-harassment policy, and had disciplined the supervisor, after which harassment reportedly ceased. Suit was filed only after the complaining former employee continued to work with the same supervisor, who reportedly no longer harassed her, for more than three years, and the former employee was then fired for failing to return to work following a medical leave. *The former employee's lengthy delay in filing suit, while she continued to work with the same supervisor and reported no further harassment, made it unlikely that her eventual termination was retaliation for her harassment claim. But Walmart's swift implementation of an anti-harassment policy in this case also led the Court of Appeals to conclude that Walmart had done everything a reasonable employer should do in dealing with the initial reported harassment.*

TRAVEL

ONLINE TRAVEL COMPANIES MUST PAY TAX TO ARIZONA CITIES – The Arizona Supreme Court has ruled that online travel companies must pay what could be millions of dollars in back sales taxes to cities for work in arranging hotel stays there. The case involves 11 Arizona cities suing nine travel companies for taxes on sales in an eight-year period ending in April 2009. But the taxes were only assessed in 2013, and the state supreme court has ordered the case back to a lower court for a calculation of the exact amounts owed for the period before the assessments, saying that the cities can't collect taxes if they had not provided the online companies with prior notice that taxes might be assessed for the earlier period. *The cities cited a 2002 ruling by one of the cities that online sales were taxable, as well as a letter from another city to an industry representative in 2007. But the state supreme court said that a city's actions with regard to one of the companies didn't provide notice to all nine travel companies that all 11 cities would be assessing taxes on them. The Supreme Court said it was possible the cities had all provided adequate notice to all of the online companies that they would be taxed on sales during the prior eight year period. However, evidence of that notice was not before the Supreme Court. Interestingly, the cities conceded that the hotels have paid their sales taxes, but the cities are still going after the travel companies for more.*

TAXATION

IRS PROVIDES SOME PENALTY RELIEF FOR FAILING TO REPORT ON DONORS – *H&H Report Update* **-** The Internal Revenue Service has advised that it will not impose a penalty on exempt organizations other than those exempt under Internal Revenue Code Section 501(c)(3) just for failing to report the names and addresses of their contributors to the IRS on their Form 990s or Form 990-EZs for tax years ending on or after December 31, 2018 and on or prior to July 30, 2019. The Service advises that the relief from penalties now being granted was made necessary by a court decision issued by the U.S. District Court for the District of Montana July 30, 2019, which set aside a Revenue Procedure telling non-501(c)(3) exempt groups that they did not have to provide names and addresses of contributors on their information returns. Because this court decision was issued after the due date for most 2018 Form 990s and Form 990-EZs, it raised questions from exempt organizations regarding the filing requirements for the 2018 tax year. Now, the IRS has said that, since returns for 2018 may have been filed in reliance on the Revenue Procedure that was later set aside by the court, the failure to provide contributor names and addresses on those 2018 returns was due to "reasonable cause," justifying the new IRS advice that penalties would not be imposed for that failure. *The new IRS guidance does not apply to Section 501(c)(3) exempt organizations, because they weren't given any relief from reporting names and addresses of contributors under the prior Revenue Procedure. Nor is the IRS now giving reporting relief to political organizations described in Internal Revenue Code Section 527. In addition, the Service notes that it may impose a penalty on exempt organizations failing to report to the IRS any required information unrelated to donor names and addresses.*

FEDERAL JUDGE RULES SCHOOL TAXES ARE STATE ISSUE – A federal judge recently ruled that school taxes are a state issue and, therefore, a group of taxpayers couldn't sue a public school district in federal court, making due process and equal protection claims under the U.S. Constitution. The taxpayers claimed that DeKalb, Illinois, for more than a decade, facilitated enrollment of around 1,200 nonresident students, costing the district nearly $9 million in extra expenses and requiring an increase in property taxes to foot the bill. Applying the doctrine of "comity," the court said, "Comity is a doctrine of abstention, and it reflects, among other things, the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in separate ways. Taxation is one such function." *The judge cited as precedent other cases in which the U.S. Court of Appeals for the Seventh Circuit and the Supreme Court of the United States recognized that challenges to state taxes, and especially those to finance public schools, should be adjudicated by state courts. But some would question whether it's fair to require that taxpayers challenge state tax schemes before judges whose pay at least indirectly depends on those taxes.*

NEWS AND EVENTS

Congratulations to Jon!

Northstar Meetings Group recently named Jon Howe as one of the "Top 25 Influencers of the Meetings Industry." The article names stars from all areas of the meetings industry who are shaping how corporate events are done. Read more about Jon along with the other industry influencers in this article.

Naomi Angel reported on current legal trends at a meeting of trade association manufacturers in Minneapolis.

Nathan Breen gave an antitrust and legal trends report to an association of manufacturers and also attended an inspector certification training course.

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