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THE HOWE & HUTTON REPORT

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TRENDING NOW

NONPROFITS MAY BE TAXED ON COVID-19 RELIEF FUNDING – Are healthcare providers exempt from taxation on COVID-19 relief payments? The Internal Revenue Service recently answered that question with a lawyerly "it depends." If the provider is a for-profit business, "no." And what about generally tax-exempt nonprofits? The Service said nonprofits are not subject to tax on relief payments unless the payments are reimbursements for expenses or lost revenue attributable to a trade or business unrelated to their tax-exempt purposes ("UBIT"). *The IRS addresses these questions and more in amended "Frequently Asked Questions" appearing on the Service's website, www.irs.gov.*

NONPROFIT MUST MAKE RETIREMENT PAYMENTS AFTER BANKRUPTCY FILING – The U.S. Court of Appeals for the Sixth Circuit has ruled that the nonprofit Seven Counties Services Inc., a provider of mental health services, was required to make payments to the Kentucky Employees Retirement System while the nonprofit's bankruptcy filing was pending. This decision reverses the 2014 holding of the U.S. Bankruptcy Court for the Western District of Kentucky that had permitted the nonprofit to leave the state retirement system and stop making payments to the Kentucky Employees Retirement System because rising pension costs were creating an unsustainable financial burden for the nonprofit, according to the Bankruptcy Court. The current ruling is in sync with the Kentucky Supreme Court that had held that Seven Counties had a statutory obligation to make retirement payments. *Many nonprofits are under extreme financial pressure because of the COVID-19 pandemic. While obtaining relief from making retirement payments might help ease some of that pressure, the courts have now made it clear that the cost to current and former employees is not acceptable.*

EMPLOYMENT

NLRB MODIFIES STANDARD FOR REVIEWING DISCIPLINE DECISIONS DUE TO PROFANE, ABUSIVE, RACIST, AND SEXUALLY UNACCEPTABLE COMMENTS – The National Labor Relations Board (NLRB) has announced a new standard for review of employer disciplinary actions taken against workers because of their profane, abusive, racist, and sexually unacceptable speech while engaged in activity otherwise protected by the National Labor Relations Act, such as complaining about working conditions. The new standard covers encounters with management, offensive conduct on the picket line, and exchanges between employees and postings on social media ("totality of the circumstances" test). Employers said the old standards were confusing and made it difficult for them to discipline intolerable behavior. *Under the Board's new approach, employers' disciplinary action will not be challenged if it is motivated by offensive speech. Employees will no longer be given latitude for impulsive conduct that is not otherwise tolerated in today's workplace, even when engaging in activities protected under the Act. The new standard is expected to eliminate any conflict between the NLRA and antidiscrimination laws.*

COURT ALLOWS "SEX + AGE" CLAIMS UNDER TITLE VII – The U.S Court of Appeals for the Tenth Circuit has become the first federal appellate court to rule that workers can bring "sex-plus-age" employment discrimination claims under Title VII of the Civil Rights Act of 1964. This is a claim based on gender discrimination against people over the age of forty. In a suit alleging that an older employee would not have been terminated if she were a man, the Tenth Circuit ruled that the plaintiff worker did not have to prove that all older women were discriminated against in order to have a claim under Title VII, but only that she was subjected to unfavorable treatment compared to an older employee of the opposite sex. *This ruling is currently unique to the Tenth Circuit, which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. Additional federal appeals courts and/or the U.S. Supreme Court may follow it.*

EMPLOYEES USING PERSONAL VEHICLES TO SERVICE CUSTOMERS MAY BE ENTITLED TO PAY FOR COMMUTING – The California Court of Appeals reversed a trial court's conclusion that, under California law, an employee using his personal vehicle to travel to several customer sites in a day was never entitled to compensation for drive time from home to the first customer site in a day or from the last customer site in a day to the worker's home. The court held that service technicians may be entitled to pay for such drive time, as well as mileage reimbursement, in situations where an employer required the worker to carry tools that took up so much space in the vehicle that the driver was prevented from using the vehicle for personal pursuits, such as carrying family members. *In an actual case before the court, it was alleged that the tools were so sizable that the driver couldn't even see through the rear window.*

EMPLOYMENT (cont.)

EMPLOYEE WITH ELIMINATED POSITION FAILED TO SHOW REQUIRED "BUT FOR" EVIDENCE – A worker sued her employer for age and disability discrimination after her position was eliminated, claiming that the elimination of her position violated both the federal Americans with Disabilities Act and Age Discrimination in Employment Act. The employer argued that involuntary staff reductions were necessary because of the employer's financial problems. Further, the employee's supervisor noted that the employee had shortcomings in her ability to deal with conflict, work with others, communicate, and problem-solve with her coworkers. The U.S. Court of Appeals for the Seventh Circuit ruled for the employer, concluding that the employee failed to prove her case under either Act because she did not present evidence that, but for her age and disability, the employer would not have eliminated her position. *Take away – notes in a personnel file prevail over unsupported allegations.*

GENETIC MUTATION CAN BE DISABILITY UNDER ADA - The U.S. Court of Appeals for the Sixth Circuit has reversed a decision of a lower federal court in Ohio and held that an otherwise healthy person with a genetic mutation can meet the definition of a person with a disability under the Americans with Disabilities Act. In this case, Darby sued her former employer alleging that she was discriminated against when her employer terminated her employment after she underwent a double mastectomy following diagnosis of abnormal pre-cancerous cells along with a genetic mutation, known as BRCAI, which contributes to abnormal cell growth. The lower federal court dismissed Darby's complaint, finding that Darby's diagnoses did not indicate she was disabled at the time she was terminated because her genetic mutation merely indicated that she might develop cancer in the future. But the Court of Appeals concluded that a genetic mutation like Darby's, along with the actual growth of abnormal pre-cancerous cells that were serious enough to warrant a double mastectomy, could qualify as a disability under the Act. The Court of Appeals concluded that it was "at least plausible" that Darby was "substantially limited in a major life activity" under the wording of the Act if she was limited in normal cell growth. The Court of Appeals remanded the case to the lower court for further proceedings to determine if that was true. *Other cases have cast doubt on whether a genetic mutation could ever be the basis for a suit under the Act. This one leans toward erasing that doubt, at least in a situation where facts like these are present.*

LAY OFF AND RECALL CAN INVALIDATE NONCOMPETE – Novo Nordisk Inc. briefly laid off a worker and then recalled him, after which he obtained employment with a competitor. Novo sought to enforce a non-compete agreement the employee had previously signed. Novo argued that the employee hadn't been laid off and recalled, which would have required the signing of a new non-compete, but had merely been transferred to a different position within the same company when he returned from his layoff. A district court denied Novo's motion for a preliminary injunction against the worker's taking a job with the competitor. The U.S Court of Appeals for the First Circuit affirmed that decision, finding that Novo's recalling of the worker invalidated his previously signed non- compete and Novo's argument was "without merit." *Non-compete agreements are state specific and can be tricky. Always consult with legal counsel.*

EMPLOYMENT (cont.)

COURT UPHOLDS FLUCTUATING WORKWEEK OVERTIME CALCULATION – The U.S. Court of Appeals for the Second Circuit has upheld using the fluctuating workweek method of calculating overtime. That method is an alternative method of computing overtime for nonexempt employees under the federal Fair Labor Standards Act. It requires that there be a clear and mutual understanding that the salary covers straight time pay for all hours worked, no matter how few or many, with the additional overtime pay being at one-half the regular rate. So, if the employee's salary is $800 per week, and the employee works 50 hours, the regular rate is $16 per hour ($800/50). One-half the regular rate is $8 per hour. Therefore, for the overtime of 10 hours, the employer owes an additional $80 (10 x $8). In *Thomas v. Bed Bath and Beyond Inc.,* employees challenged the employer's use of this fluctuating workweek method of calculating pay under the Act. But the Second Circuit upheld the employer's use of that method, noting that the method does not require the employee's hours to actually fluctuate above and below 40 hours per week. The Second Circuit further concluded that the employer's practice of allowing workers to take paid days off on later days after working on holidays or previously scheduled days off was consistent with legal use of fluctuating workweek overtime calculation.

EMPLOYER SEARCHES OF WORKER PROPERTY OKAYED – The National Labor Relations Board (NLRB) has ruled that an employer does not violate the National Labor Relations Act by implementing searches of employee personal property on an employer's premises or by monitoring worker use of employer devices and networks. Verizon Wireless had adopted policies that permitted Verizon to monitor an employee on the job by searching worker personal property or company networks and devices. An Administrative Law judge had determined that these policies infringed on an employee's rights to engage in protected concerted activity because a reasonable employee would not be deterred from exercising such rights merely because evidence regarding such activity could be discovered through a search of employee personal property on the employer's premises or of employer-provided devices and networks. The NLRB has reversed the Administrative Law judge's determination, concluding that employer policies permitting searches of personal property, company devices and networks on an employer's premises would be interpreted by a reasonable employee as consistent with an employer's legitimate interest in preventing theft or other losses and ensuring a safe workplace. *The Board determined that even if Verizon's policies did have a minimal impact on employee rights under the Act, the employer's legitimate interests in conducting searches would "far outweigh" any negative impact on employee rights.*

EMPLOYMENT LOST WHEN ESSENTIAL DUTIES COULDN'T BE PERFORMED – A store manager lost her job when injuries prevented her from lifting more than two pounds with her right arm. She claimed discrimination and failure to accommodate her disability under the Americans with Disabilities Act. A trial court rejected her claim finding that the store manager couldn't perform the "essential functions" of her job, even with the aid of certain tools that were made available to her as an accommodation. The employer claimed that, because of its "lean staffing model," store managers were required to perform various forms of physical labor, such as unloading and shelving merchandise, as "essential functions" of their job duties. The U.S. Court of Appeals for the Seventh Circuit affirmed that judgment.

REGULATION

IRS WARNS OF LIABILITY FOR REPORTING "CASH" TRANSACTIONS – The Internal Revenue Service has warned persons in a "trade or business" - defined as including tax-exempt organizations - that they are responsible for reporting cash receipts of $10,000 or more in single or related transactions to the Service by the 15th day after receipt of the money on IRS Form 8300. Not included are charitable contributions. For purposes of reporting, "cash" includes currency of the U.S. or foreign countries, as well as cash equivalents such as cashier's checks, bank drafts, travelers checks and money orders.

TAXATION

IRS POSTPONES ASSESSMENT DEADLINES FOR HOSPITALS – *H&H Report Update* **-** The Internal Revenue Service has postponed hospital community health needs assessment (CHNA) deadlines because of the COVID-19 pandemic. Tax-exempt hospitals are required to conduct certain community health needs assessments and adopt implementation strategies to meet community health needs in order to maintain their exemptions and avoid significant excise taxes. If a hospital has previously been required to complete a CHNA or adopt an implementation strategy by a deadline falling between April 1 and December 31, 2020, that deadline is extended to December 31. If both CHNA and implementation strategy deadlines have previously fallen between April 1 and December 31, the new December deadline applies to both completion of a CHNA and adoption of an implementation strategy. The requirement to meet both the CHNA requirement deadline and the implementation strategy deadline applies to hospitals with tax years ending on or before July 31, 2020 for which July 31, 2020 was the end of the third tax year since their most recent CHNA was completed.

CONGRESS PASSES NONPROFIT UNEMPLOYMENT RELIEF – Congress has passed legislation that reverses an interpretation of the federal CARES Act by the U.S. Department of Labor that the Act requires certain "self-insuring" employers to do without federal reimbursement for half the cost of unemployment benefits paid to laid-off or furloughed workers. Those employers elect to pay the state at 100% after state governments dispense unemployment benefits, rather than paying taxes on a regular basis. The Department was going to reimburse half, but not all, of what those employers paid to states. Now, Congress has unanimously declared that reimbursement must be at 100%. *Reimbursing employers include not only many nonprofits, but also local governments and federally recognized Native American tribes.*

NEWS AND EVENTS

Jon Howe participated in a webinar for Attendee Management, Inc.'s Brunch With Nerds. In "Ask Me Anything," he discussed contracts and liability in this ever changing industry.

Nathan Breen begins a term as Chair of the Trade and Professional Associations Committee of the Chicago Bar Association in September.

Christina Pannos presented an educational webinar titled "Risk Management During Uncertain Times" which discussed how to avoid, transfer and mitigate risks through the use of contracts and waivers.

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