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THE HOWE & HUTTON REPORT

Volume 2020, Issue 2

TRENDING NOW

COVID -19/CORONA VIRUS

DON'T PANIC BUT ENGAGE IN DEVELOPING AND ENFORCING BUSINESS CONTINUITY PLANNING

Disruption to everyday life and or your business may be impacted.
Most businesses have not prepared for this type of business interruption.

MEETING CANCELLATIONS

⇒ If you have an event planned in the near future and are considering cancellation, consult your legal counsel to assist in determining your options;

⇒ Gather all contracts from convention centers, hotels, and vendors;

⇒ Review insurance policies to determine if you have event cancellation insurance, and don't forget to keep an eye out for exclusions. Most policies issued after January 2020 will specifically exclude COVID -19.

⇒ Become familiar with force majeure provisions. These provisions can differ in every single contract, so be sure to have your legal counsel read the fine print. Just because you have a force majeure doesn't mean you can use it against COVID -19;

⇒ Be sure to comply with the notice provisions of the contract if you do exercise your right to cancel for a force majeure event;

⇒ Update your force majeure clauses for future events.

REMOTE WORKFORCE

⇒ Determine if all or part of your workforce will have to work remotely and/or decide which tasks and responsibilities can be done outside of the workplace and which need to be done in the physical office and how you will accommodate them;

⇒ Audit your phones and computer systems both hardware and software to determine what needs to be done in order to accommodate a remote workforce;

⇒ Set up communication methods in advance for reaching out to employees, customers and vendors;

TRAVEL RESTRICTIONS

⇒ If your employees travel for business make sure your business strictly adheres to all travel restrictions being enforced by federal and local government and determine any additional restrictions your business needs to put in place;

⇒ Set up procedures for any employees that have recently taken or will be taking personal trips to any restricted or "hot spots" – Example: Incubation period upon return before being allowed back in the office.

KEEP YOUR OFFICE CLEAN AND DISINFECTED AND SET UP EMPLOYEE "SICK" RULES

⇒ Keep all office areas clean and disinfected at all times; Have employees do the same with their space

⇒ Set up procedures for any employees who are sick or exhibiting any COVID-19 symptoms (update your office manual to include these procedures);

WASH YOUR HANDS -WASH YOUR HANDS - WASH YOUR HANDS

KEEP INFORMED

The following links provide consistently updated information on COVID 19 from the CDC.

https://www.cdc.gov/coronavirus/2019-ncov/index.html

https://www.cdc.gov/media/dpk/diseases-and-conditions/coronavirus/coronavirus-2020.html

https://www.osha.gov/SLTC/covid-19/

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TRENDING NOW

EMPLOYERS MUST START USING NEW FORM I-9 – U.S. Citizenship and Immigration Services has promulgated a new Form I-9 (Rev. 10-21-19), and employers must start using the new form for new employee verification, beginning May 1, 2020. It will not be necessary for employers to have employees complete this form if workers have a properly completed older Form I-9 on file. Changes from the previous Form I-9 (Rev. 07-17-17) are not substantial. But failure to use the new form would still be a violation of federal immigration laws. *The new version of Form I-9 is available on the USCIS website, www.uscis.gov*.

NYC PROVIDES GUIDANCE ON ANTI-SEXUAL HARASSMENT TRAINING - The New York City Commission on Human Rights has amended its guidance on anti-sexual harassment training under the Stop Sexual Harassment in NYC Act, making it clear that entities doing business in New York City can either provide their independent contractors with sexual harassment training or ensure that their independent contractors have otherwise completed training required by the Act by demanding proof of compliant training. *Independent contractors became covered January 11, 2020. If an independent contractor works for an employer of 15 or more people and, in a calendar year, works (a) more than 80 hours and (b) for at least 90 days, the employer must ensure that they are trained. Those independent contractors required to be trained may provide the same proof of training for multiple workplaces. The Commission has an interactive training module that is free and complies with training requirements under both New York State and New York City law.*

ERA RATIFIED? – *H&H Report Update* - Indiana has become the 38th state to ratify the Equal Rights Amendment to the U.S. Constitution, ("ERA") providing that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." That's enough state votes to ratify the ERA. Now, however, the legal battle will begin over whether ratification came too late. Congress proposed the ERA in 1972 and placed a time limit on securing the three-fourths super-majority of states needed to approve it. That deadline, later extended by Congress, has long ago passed, even as extended. But the Constitution doesn't mention anything about deadlines for ratification of amendments. *Congressional Democrats have introduced a number of measures intended to revive the ERA in the event that courts declare it hasn't been timely ratified. But, to become law, those measures would need, and don't appear to be receiving, some Republican support. A further question that will have to be answered if ratification is considered final is what effect the ERA would have on the current federal and state laws that, facially, or in application, favor women over men, such as laws giving women-owned businesses greater access to government financing.*

TRENDING (cont.)

BIPA SUIT AGAINST MANUFACTURER OF MEDICAL TECHNOLOGY TOSSED – A U.S. district court judge in Chicago has dismissed a suit against a manufacturer of medical technology under the Illinois Biometric Information Privacy Act, finding that the manufacturer wasn't alleged to have taken an active step to collect biometric information just because it sold devices that hospitals and other customers were using to collect and store fingerprints. Such an active step was required in order to violate the Act, Judge Rebecca Pallmeyer found. In addition, the judge said the manufacturer was not properly alleged to have "possessed" anyone's biometric data in violation of the Act in the sense of exercising any form of control over the data or being free to dispose of such data. The manufacturer sells the Pyxis Medstation medication-dispensing system and related Pyxis devices. The plaintiff in the case alleged that he had worked for at least five hospitals using Pyxis devices, and he said that he was required, as a condition of employment, to allow scanning of his fingerprints in order to access the devices. *The manufacturer may not ultimately be in the clear under the Act. The judge allowed the complainant to file an amended pleading adequately alleging violation of the Act, if he chooses to do so.*

EMPLOYMENT

CALIFORNIA COURT SAYS SEARCH TIME IS COMPENSABLE – The California Supreme Court has held that employers must compensate their workers for time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags and technology devices. The court reasoned that workers were under the employer's control during such searches and the searches were being performed for the employer's benefit. *The court's opinion was based on California law, not the federal Fair Labor Standards Act. The same result might not be reached in other states. But, we have seen in the past that many employment law trends begin in California and then creep eastward.*

INABILITY TO PERFORM SPECIFIC JOB DOES NOT MAKE ONE DISABLED – The U.S. Court of Appeals for the Second Circuit has held that a worker's inability to perform a particular job as a result of migraines and stress did not mean that person had a "qualifying disability" so that he was covered under the Americans with Disabilities Act (ADA). The employee in this case made multiple requests to transfer to a less stressful position, but was denied by the employer. Instead, the employer encouraged the worker to take medical leave and provided him with intermittent paid leave to address his condition. But the employee was terminated after subpar performance reviews and a disciplinary warning, following which he sued the employer unsuccessfully. The worker conceded that his migraines were related to the stress caused by working under his direct supervisors, and that doomed his case. The Court of Appeals explained that when a plaintiff's condition leaves him unable to perform only a single, specific job, he has failed to establish a "substantial impairment to his major life activity of working," which is a requirement for a suit under the Act. *The Court of Appeals noted that every other federal appellate court addressing the question of eligibility for ADA protection as presented in the case had come to the same conclusion. The Act, said the Court of Appeals, requires an employee to show that a work-related disability precludes him from working in a class or broad range of jobs in order to bring an ADA claim.*

SUPREME COURT WON'T HEAR APPEAL OF RULING ON DISPARATE IMPACT – *H&H Report Update* – The U.S. Supreme Court has decided not to hear an appeal of a ruling by the U.S. Court of Appeals for the Seventh Circuit that external job applicants cannot sue employers under the federal Age Discrimination in Employment Act (ADEA) if their employment practices have a "disparate impact" on older workers but are neutral on their face. The Seventh Circuit's decision came in a case involving an employer that advertised for a position in its legal department by saying that applicants should have "3 to 7 years (no more than 7 years) of relevant legal experience." A job applicant sued the employer saying that its maximum experience requirement might have appeared neutral on its face, but it had a disparate impact on him as an older worker. The Seventh Circuit, though, held that the plain language of the ADEA's "disparate impact" provision applies only to "employees" and not job applicants. Consequently, now that the Supreme Court has refused to hear an appeal of that decision, it will provide a defense for employers in the states for which the Seventh Circuit has jurisdiction – Illinois, Indiana and Wisconsin. *The Eleventh Circuit – covering Alabama, Florida and Georgia – has ruled similarly. No other Circuit has ruled on this issue yet. Employment practices that are discriminatory on their face are still illegal under the ADEA as applied to employees and job applicants throughout the U.S.*

EMPLOYER MUST TRAIN PERSONNEL ABOUT FMLA-QUALIFYING LEAVE – The U.S. Court of Appeals has remanded a case to a federal district court for consideration of whether an employer had trained its personnel to recognize leave qualifying under the federal Family Medical Leave Act (FMLA). Phillips injured his ribs and, for two weeks, called his employer to report that he would miss work. Then, he stopped calling, did not report for work and was fired. He sued, alleging, among other things, that his employer had failed to properly notify him of his rights under FMLA. His wife attested that, if he had "known that the employer offered FMLA," he would have taken it. But the trial court in this case didn't allow a jury to determine if the employer had trained its employees to recognize FMLA-qualifying leave. The Court of Appeals found that was an error because a reasonable jury could have found that the employee had a serious health condition and had given the employer information sufficient enough to require the employer to notify him whether he qualified for FMLA leave, which the employer may not have done. *This case shows that employers have a duty to train their workers concerning FMLA so they can claim FMLA leave in appropriate circumstances.*

MAKE SURE ARBITRATION AGREEMENTS ARE REASONABLE – An appellate court in Ohio recently refused to enforce an arbitration agreement between an employer and employees because the agreement could reasonably be construed as requiring the employees to arbitrate even claims arising outside the employment relationship, although the ruling came in an employment discrimination suit. The agreement defined "covered disputes" as "any actual or alleged claim or liability, regardless of its nature" that employees might want to bring against the employer. That made the arbitration agreement "unconscionable" because it unreasonably favored the employer, the appeals court said, and the employees in the case had been given no reasonable choice but to sign it. *Lawyers tend to draft agreements to give maximum protection for their clients, and clients demand it. But drafting a contract as too one-sided can make it unenforceable.*

LOSS OF OUTSIDE INCOME DOES NOT INVALIDATE ACCOMMODATION - The U.S. Court of Appeals for the Fifth Circuit has found that an employer offered reasonable accommodations to an employee's religious needs after he refused a vaccination that was required for his job as a firefighter. The employer offered two accommodations – either to transfer to a code enforcer position with the same pay and benefits, but no vaccination requirement, or to remain in his current position but wear a respirator mask during his shifts, keep a log of his temperature, and submit to medical testing. The firefighter rejected both of those accommodations, but proposed to stay in his firefighter position without a vaccination, wearing a mask only when in contact with people who have coughs or communicable diseases. When the employer refused that proposal, the firefighter was terminated and he sued the employer, arguing that the employer's code enforcer proposal wasn't reasonable because it would have required him to accept less favorable hours and it would have prevented him from working at his second job – running a construction company – and reduced his total income by half. Finding for the employer, the Fifth Circuit noted that an employer wasn't required to provide the accommodation preferred by an employee, and further found that an accommodation's effect on outside income does not make an accommodation unreasonable. *In fact, the Fifth Circuit observed that a transfer to a position involving a cut in pay could be reasonable, depending on the circumstances.*

FMLA DOESN'T COVER LEAVE TO CARE FOR SICK SIBLING'S HEALTHY KIDS – Your sister has a serious medical condition. So, to help her care for her children, you want to take leave from work under the federal Family and Medical Leave Act. Is that a problem? Yes, according to a recent decision from a federal district court in Ohio. The court held that such leave was not FMLA-qualifying. The Act, said the court, permits leave for self-care and "care for the spouse, or a son, daughter or parent" of an employee if such spouse, son, daughter or parent has a serious health condition. But, in a case in which an employee sought FMLA leave to care for his sick sister's healthy children, thecourrt said that, even if the employee was standing in for his sick sibling to care for that person's children, there was no allegation that the children were sick, much less suffering from a serious medical condition. Moreover, the court found that FMLA doesn't cover leave to care for a sibling with a medical condition. So saying, the district court dismissed the employee's lawsuit claiming he was fired for exercising FMLA rights. *Family only goes so far under the FMLA. Not every member of what an employee regards as their family will necessarily be entitled to care under the Act.*

DOJ APPROVES GROUP PURCHASING ACTIVITIES OUTSIDE SAFETY ZONE – The federal Department of Justice Antitrust Division has released a business review letter approving expansion of an association's group purchasing activities beyond what previous "antitrust safety zones" have authorized. In reviewing a request by the American Optometric Association, the Division noted that the Association's proposed expansion of its group purchasing activities would not fit in previously recognized safe harbors for such activities because the aggregate cost of optometric products purchased jointly under the Association's expanded purchasing program would amount to more than 20 percent of total revenues from all products or services sold by participants. But the Division found that the proposed expansion of activities still didn't raise antitrust concerns because the group's joint purchases would account for less than 35 percent of total sales in the relevant market for the purchased products, nobody was required to make any purchases through the Association's group purchasing program, a third party negotiated prices for purchases under the program, and communications with individual participants were kept confidential from other participants. Additionally, there were other group arrangements for the purchase of optometric products, and there was significant competition – in the form of large retail stores, online channels, other healthcare providers, and vertically-integrated manufacturers – that would defeat any attempt by the Association to raise prices. *Safe harbors established by the Justice Department and the Federal Trade Commission have clarified that many association activities previously considered questionable under the antitrust laws actually create no antitrust concerns.*

CERTIFICATION PROCESS NOT PROHIBITED "TYING" – The federal courts have recently entertained a number of lawsuits in which professional organizations were sued for allegedly violating the antitrust laws because they required certified individuals to purchase a "maintenance of certification" component along with their initial certifications. The U.S. District Court for the Northern District of Illinois and the U.S. District Court for the Eastern District of Pennsylvania ruled that the American Board of Radiology and the American Board of Internal Medicine did not violate the law in imposing such a requirement because the organizations were not "tying" the purchase of one product (certification) to the purchase of another product (the maintenance program). Rather, they were selling only one product, that is, certification. Under the antitrust laws, it is illegal for sellers to require that buyers purchase one product that is not in demand so that they can purchase another product for which there is a demand. But, as the Northern District court explained in its decision, if certification has become a multistage process, that does not mean it consists of separate products that are tied together. *The decisions in these cases could have gone differently if there were, in fact, separate markets for certification and maintenance of certification. But the "separate markets" test is critical to illegal tying analysis. "Almost every product can be viewed as a package of component products", one court noted years ago, if the "separate markets" requirement is ignored. But it is not illegal to require the purchase of a left shoe with the purchase of a right shoe or to require purchasing the walls of a prefabricated building along with the floors.*

PERMISSION NOT TRANSFERABLE UNDER TCPA – AMS, a seller of medication distribution services, sent a fax to 11,422 numbers from a recently acquired customer list. In a subsequent class action suit against AMS and its CEO under the federal Telephone Consumer Protection Act, a federal district court entered a $6 million judgment against the defendants, and the U.S. Court of Appeals for the Seventh Circuit has now affirmed that judgment. AMS conceded that the fax was an advertisement and lacked any provision explaining how recipients could opt out of receiving future faxes, as required by law. Nor did AMS meet its burden of proving that it had prior express invitation or permission to send faxes, even if the company from which it had obtained the customer list had such permission, as the Court of Appeals found that permission is not transferrable under the Act. *A $6 million judgment, especially against a company AND its CEO, is nothing to sneeze at, even if you provide medication distribution services that could help calm such sneezing. Better be careful about sending fax ads without including opt-out language if you personally have no permission for such faxing.*

DON'T PULL THAT RIPCORD! – Your organization has an agreement to merge with another one. But, subsequent to signing an agreement, you discover that an executive of the other organization has falsified expense reports, stealing $2.6 million from it and landing a 33 month prison sentence for fraud. Can you terminate the merger? Better be careful about it, as Boston Scientific Corp., a medical device company, learned when it terminated a merger deal with Channel Medsystems Inc. A court ruled that Boston Scientific had to close the merger when it failed to prove that the fraud would reasonably be expected to have a material adverse effect on Channel. The court noted Boston's alleged concerns that the completion of the merger would expose Boston to products liability litigation, competitive harm and future regulator action. But the court concluded that, at the time when Boston Scientific terminated the merger, Boston had not sufficiently analyzed those risks and, in fact, had terminated the merger without a valid basis. *According to the court, the evidence of Boston's concerns consisted of "seemingly after-the-fact rationalizations," was highly speculative, and did not come close to proving that, as of the termination, Boston reasonably expected those concerns would rise to the level of a "material adverse effect." Instead, the court found that Boston breached its obligation to use commercially reasonable efforts to consummate the merger and should have engaged with Channel in an effort to vet any of its concerns, rather than "pulling the ripcord," as it did by terminating the merger.*

NEWS AND EVENTS

Nathan Breen will be a speaking during the session “Cannabis and Events: A New Niche or a Risky Proposition?” at The Special Event at Mandalay Bay in Las Vegas.

For more information visit https://schedule.thespecialeventshow.com/session/tse-cannabis-and-events-a-new-niche-or-a-risky-proposition/871484

Naomi Angel presented a product liability mock trial at trade association EXPO in Salt Lake City, educating manufacturers, installers and technicians as to best safety practices to and industry standards.

Naomi Angel conducted an antitrust training workshop at annual sales meeting of distributors in Phoenix, and delivered a report on legal trends to Board of Directors of trade association of manufacturers in Dallas.

HOWE & HUTTON

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