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THE HOWE & HUTTON REPORT

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TRENDING NOW

COPYRIGHT LITIGATION CONTINUES OVER PHOTO POSTED TO SNAPCHAT IN 2016 – In the summer of 2016, a photographer posted a photo he took of Tom Brady, Danny Ainge, and multiple Boston Celtics players. The photo was quickly disseminated through social media platforms, eventually making its way to Twitter where it was accompanied by additional commentary. The photographer filed suit against several news outlets and blogs, none of which had copied or saved the photo onto their own servers. The Second Circuit Court of Appeals has upheld the ruling that embedding tweets in news stories and blogs constituted copyright infringement, and the photographer is now looking to file suit against the owners of additional websites. *While technology makes it easy to reproduce photographs for all manner of purposes, this is a cautionary tale illustrating that copyright law still applies regardless of the fact that it is so easily and widely disregarded in the digital age. Do you have sufficient rights to the images used on your website? Could you demonstrate such rights if challenged? With penalties for copyright infringement ranging up to $150,000 in some cases, it's a good idea to ensure that your digital house is in order.*

U.S., CHINA SIGN "PHASE ONE" TRADE DEAL – *H&H Report Update* **-** Representatives of the U.S. and China have signed what they referred to as "phase one" of a trade deal between the two countries. The U.S. agreed to reducing some tariffs on some products made in China, leaving duties on $375 billion worth of Chinese goods in place. In return, the Chinese agreed to purchasing from $205 billion to $220 billion in products, services and energy from the U.S. over two years (depending on which country's reports you believe are more accurate). In addition, Beijing agreed to stop theft of intellectual property from the U.S. and refrain from manipulating its currency to boost Chinese exports and discourage U.S. exports to China. *The governments of China and the U.S. have both said negotiations on a "phase two" trade deal have begun.*

NON PROFITS

STATES SETTLE TRANSPARENCY CHARGES AGAINST CHARITY – A bipartisan group of 23 state attorneys general has settled with the charitable arm of PayPal over allegations that it provided inadequate information and disclosures to charitable donors. The attorneys general investigated allegations that PayPal Charitable Giving Fund, Inc. aggregated and distributed donor-contributed funds more quickly if a donor had a PayPal account and the Fund failed to adequately disclose that discrepancy to donors, while also, in some cases, redirecting contributions from donor-selected charities to other entities without notice to the donors. *Under terms of a settlement agreed to by the AGs and the PayPal group, the Fund will amend its disclosures to inform donors when they are contributing to that organization rather than the charity of their choice, the timeframe within which donor-selected charities will receive donated funds, and when contributions will be redirected to a different charity than one selected by the donor. In addition, the PayPal charity agreed to pay $200,000 to the National Association of Attorneys General's Charities Enforcement and Training Fund in order to defray its investigation and litigation costs and expenses for providing training and education to state charities*

GROUP SETTLES CHARGES RULES FOR COLLEGE ADMISSION WERE ILLEGAL – The U.S. Department of Justice and the National Association for College Admission Counseling have settled over Department charges that some of the Association's rules governing college admission limited competition among member colleges for applicants or transfer students and, therefore, violated the antitrust laws of the United States. The government charged that the Association's rules limited colleges' incentives to lower tuition costs and offer better admissions packages. In settling, the Association stated that its rules served the best interests of students, but the Association said it had retracted the rules that the Department had challenged because of the cost of a Department of Justice investigation and potential litigation. *Even if you win, you lose. Many nonprofits and others have discovered that the cost of fighting with the government or private litigants over allegations of antitrust violations are prohibitive, even if, in the end, a successful defense can be raised. That's often true, not only in terms of legal fees, but also time spent by an organization and adverse publicity.*

TEXAS BARS REFUGEES, CITES NEED FOR NONPROFIT HELP TO RESIDENTS - Texas has become the first state to bar new refugees from being resettled there. A recent administrative order by President Trump purported to give states the right to opt out of refugee resettlement, and other states may try to do it, though the order has been preliminarily enjoined by a court, subject to further court action. Texas is at the top of the settlement list for refugees coming to the U.S. In fact, the United Nations High Commissioner for Refugees has noted that Texas took in more refugees than any other state in the 2018 governmental fiscal year. The Texas Governor, in announcing his state's new policy, noted that Texas has participated in resettlement for years and specifically said that the state's nonprofit organizations should focus on "those who are already here, including refugees, migrants, and the homeless – indeed, all Texans." *Nonprofits have always taken up a special role in refugee resettlement.*

EMPLOYMENT

COURT BLOCKS CALIFORNIA ARBITRATION BAN – *H&H Report Update* - In December, a federal district court temporarily blocked enforcement of a California law that prohibited employers from requiring that workers sign agreements mandating that they arbitrate grievances rather than commencing litigation. The court's action in issuing a temporary restraining order was requested by a coalition of business groups led by the U.S. Chamber of Commerce. The court noted that the California law may be preempted by the federal Arbitration Act as interpreted by the U.S. Supreme Court, which clearly promotes arbitration. *This case is moving quickly, as the same district court is scheduled to consider issuing an injunction against the Act's enforcement before the end of January.*

COURT DOESN'T BELIEVE DISABILITY CAUSED RESCINDING OF JOB OFFER – The U.S. Court of Appeals for the Seventh Circuit has held that a job applicant couldn't successfully sue an employer for disability discrimination when a jury found that she wouldn't have been hired even if she wasn't disabled. An applicant for a job with the Social Security Administration claimed she received an offer of employment at the end of her job interview but that the offer was withdrawn when she disclosed certain physical and mental disabilities. The Administration denied her employment, she appealed to the Equal Employment Opportunity Commission, and she filed suit. The Administration defended, saying that it never extends an offer of employment during interviews and, anyway, it did not deem the job applicant suitable for public service due to her answers in the interview. Subsequently, a jury determined that she had a disability, the Administration regarded her as having a disability, and she wasn't hired by the SSA. However, her winning streak ended there, because the jury determined that she wouldn't have been hired by the SSA even if she had no disability. On that ground, she lost at the trial court level. The Court of Appeals then threw out her case, concluding that such a result was not against the manifest weight of the evidence. *Oh, those juries! You just never know what they might do!*

NLRB REVERSES THREE BOARD DECISIONS TO END 2019 – The National Labor Relations Board celebrated the end of 2019 by reversing three Obama-era Board decisions by a 3-1 vote. With a new Trump-appointed majority, the Board ruled that employers are presumed to be acting lawfully if they require workers to maintain the confidentiality of workplace investigations for the duration of the investigations, rather than having to produce specific evidence on a case-by-case basis that preserving the integrity of an investigation outweighs worker rights under the National Labor Relations Act (NLRA). In addition, the Board held that employer rules prohibiting workers from using company email systems for nonbusiness purposes are generally lawful and do not have to specifically permit use of such systems for NLRA activities on nonworking time. Finally, the Board held that employers can unilaterally stop deducting union dues from paychecks at the expiration of a controlling collective bargaining agreement, rather than having to wait until a lawful, good faith bargaining impasse has been reached between the employer and the union.

EMPLOYMENT (cont.)

GOOD FAITH BELIEF IN EMPLOYEE'S MISCONDUCT JUSTIFIES FIRING – The U.S. Court of Appeals for the Eighth Circuit has held that an employer's good faith belief that a worker engaged in misconduct was sufficient to support the employee's termination, even if the employer had no conclusive proof of that misconduct. The case involved a complaint by female employees that a male worker had viewed pornography at work, gambled and touched them inappropriately. There was no evidence of worker misconduct other than the testimony of the female employees when the employer interviewed them, and the male employee denied the allegations against him, except that he admitted visiting sports and dating sites on his work computer. But the Court of Appeals ruled that the employer's interviews with the female employees and the male worker's admissions as to the sports and dating websites provided the employer with a good faith belief that the male worker had violated the employer's Internet and conduct policies, which was good enough to support the employer's decision to terminate. *Employers should be careful about relying solely on statements by other employees in disciplining a worker. But an employer can make decisions based on such statements if they provide the employer with a reasonable and rational basis for taking action, even if such statements cannot be conclusively proven to be true.*

NLRB ALLOWS LIMITED BAN ON WEARING UNION INSIGNIA – The National Labor Relations Board has allowed Wal-Mart Stores, Inc. to prohibit employees from wearing logos or graphics – including union insignia - in store areas where they would encounter customers, except when the insignia are no larger than the employee's name badge and are "non-distracting." The Board reasoned that Wal-Mart's justifications for the "selling floor" limitations on wearing logos and graphics – enhancing customer service and protecting merchandise from theft and vandalism – outweighed any effect on an employee's right to wear union insignia. But the Board found that Wal-Mart's justifications were much weaker as applied to store areas off the "selling floor," so that Wal-Mart couldn't lawfully apply its rule against wearing logos and graphics to wearing a pro-union pin in such areas. *The decision indicates that the Board will review dress codes on a case-by-case basis, and employers need a strong justification for rules that apply to the wearing of union insignia*.

NEW YORK GOVERNOR VETOES WAGE LIEN BILL – The Governor of New York State, Andrew M. Cuomo, has vetoed a bill passed by the state Senate and General Assembly that, if signed into law, would have allowed current and former employees to obtain liens on their employers' personal and real property for alleged wage and hour violations without any judicial determination as to the merits of those claims. The Governor said he vetoed the legislation because of due process concerns and an expansive definition of "employer" in the bill. But legislative supporters of the measure say they will submit a revised bill this year that would address the Governor's stated reasons and concerns. *As the Governor has recently indicated, he is very concerned about businesses leaving the state in droves. This bill wouldn't have helped to stanch that flow.*

REGULATION

OSHA ISSUES ENFORCEMENT POLICY RE CERTIFICATIONS – Does your nonprofit issue certifications for any government agency? The federal Occupational Safety and Health Administration (OSHA) requires crane operators to be certified by an entity accredited by a nationally recognized accrediting agency, and Crane Institute has been providing such certifications. Problem is, the Institute lost its accreditation. So, what happens to the crane operators that have been certified by the Institute? According to an enforcement policy issued by OSHA, the Administration does not intend to cite anyone if operators, in good faith, obtained certifications issued by the Institute before December 2, 2019. But, until further notice, OSHA says it will not accept Crane Institute certification issued on or after December 2. *If you certify, better keep your accreditation in force if such accreditation is required by government.*

GOVERNMENT PROPOSES "TRANSPARENCY IN COVERAGE" RULE – The federal Department of Health and Human Services, Department of Labor and Department of the Treasury have jointly issued a proposed "Transparency in Coverage" rule that would require most employer-sponsored group health plans to disclose price and cost-sharing information to participants, beneficiaries and enrollees upon request before services are provided. The proposed rule would require plans and issuers in the group and individual markets to provide a "Cost Sharing Disclosure" estimating the potential cost-sharing liability for requested items and services. In addition, the rule would require a "Rate Disclosure" consisting of information regarding negotiated rates for in-network providers and historical out-of-network allowed amounts. *The rule is intended to provide data that would allow individuals to make more informed decisions when selecting a health care provider for a particular item of service. Public comments on the proposed rule are being processed by the Departments prior to issuance of a final rule.*

OSHA CAUTIONS AGAINST MUSIC IN WORKPLACE – The U.S. Occupational Safety and Health Administration has issued an "interpretation" warning against the use of headphones and music in the workplace. OSHA warns that safety hazards may accompany such use, especially, but not only, in construction areas. The noise may create a hazard to employee hearing. Loose headphones can become caught in machinery or pose an electrical hazard. Furthermore, listening to music may pose a safety hazard by masking environmental sounds that need to be heard, such as alarms and warnings. *OSHA is pretty serious about this, issuing citations to employers following accidents caused by the inability of employees to hear horns and other warnings. OSHA regulations also require employers to train employees about audio warning devices, such as fire alarms.*

DON'T FORGET CHICAGO BUSINESS LICENSE – If you operate a business in the City of Chicago, you need to obtain a business license from the Chicago Department of Business Affairs and Consumer Protection. Furthermore, you need to "prominently display" that license at your place of business and make sure it remains in force by obtaining renewals per the Chicago Municipal Code. Associations and other nonprofits are not exempt from the licensing requirement. In fact, associations are specifically listed in the Code as being among those entities to which the license requirement applies. *If you have concerns about meeting the license requirement, you can call the City of Chicago Business Contact Center at 312-744-6249 and obtain an appointment with a business consultant, who can advise you about obtaining, maintaining and displaying a license.*

ANTI-RAIDING PROVISION UPHELD BY MASSACHUSETTS COURT – The Massachusetts Supreme Judicial Court, highest court in the state, recently defied the trend toward protection of employees in left-of-center states by ruling that an employer could enforce an anti-raiding provision in an employee's contract as being supported by a legitimate business interest. McGovern was the founding member and CFO of Prime Motor Group, but nearly a decade after he first became connected with that company, he was fired in connection with disagreements over the company's future. In selling an ownership interest he held in Prime, he agreed not to "directly or indirectly …solicit for hire or hire Prime employees", or encourage them to leave that company, for a period of approximately sixteen months. Then, he did exactly that while the anti-raiding provision was still in effect. Prime went to court and tried to reverse the hiring of certain Prime employees, but got nowhere with that effort in the courts. On the other hand, the courts found the anti-raiding provision valid, concluding that it was necessary to protect Prime's confidential information. Consequently, Prime was found to be entitled to a damages award against McGovern. *Massachusetts is certainly a left-of-center state, and its courts have established common law that "greatly disfavors" restrictions on an individual's ability to freely earn a living. But even in such a climate, employers can sometimes enforce restrictive covenants. Key to the final decision of the Supreme Judicial Court in this case was its conclusion that the Prime anti-raiding provision did not "preclude anyone from earning a living."*

DOL FINALIZES "JOINT EMPLOYER" RULE – *H&H Report Update* - The U.S. Department of Labor has issued a Final Rule interpreting "joint employer" status under the federal Fair Labor Standards Act. The final regulations confirmed that the Department will consider four factors in determining whether a business is a "joint employer" responsible, along with another entity, for violation of the Act in terms of the wages and hours for a particular worker. A business will be considered a "joint employer" if it 1) hires or fires a worker, 2) supervises and controls a worker's work schedule or conditions of employment to a substantial degree, 3) determines a worker's rate and method of payment, or 4) maintains a worker's employment records. In a comment accompanying the Final Rule, the Department said "no single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances." *Courts have lately been considering worker arguments relating to "joint employer" status, particularly when workers have argued that a franchisor, like McDonald's, should be held at least partly responsible for FLSA violations by its franchisees. It has been suggested that the same arguments might be applied to a nonprofit with chapters, so as to make the nonprofit at least partly responsible for violations by its chapters.*

NEWS AND EVENTS

Mike Deese will be a co-presenter at the AMC Accreditation Workshop being held in conjunction with the annual meeting of The AMC Institute in Long Beach, CA.

Naomi Angel will be presenting a program: "Antitrust – What's It Really All About Anyway?" to a distributor's sales team in Phoenix.

Naomi will also be presenting a Report on Legal Trends to a trade association's Board of Directors in Las Vegas.

Christina Pannos will be presenting three programs next week to a group of meeting planning professionals at the Emerge2020 Conference in in Irving Texas.

- The Hotel Industry– An Industry In Disruption
- Top Ten Legal Mistakes and How to Avoid Them
- Beyond the Hotel Contract Maze

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