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THE HOWE & HUTTON REPORT

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TRENDING NOW

NEW RULES FOR EMPLOYERS APPROVED IN ILLINOIS –The Illinois General Assembly has recently passed numerous laws impacting employment that have the blessing of Governor J.B. Pritzker. Among other things, the state minimum wage will increase to $15 per hour in 2025 by way of a phase-in schedule beginning with an increase from $8.25 per hour to $9.25 per hour January 1, 2020, and incorporating dollar per hour increases each year thereafter. (Chicago will likely stay ahead of those increases for workers in that city, as it has in the past.) Employers in Illinois are also now prohibited from requiring employees to sign nondisclosure and arbitration agreements related to sexual harassment and discrimination. Protections against such harassment and discrimination are extended beyond employees to contract workers. Potential employers will no longer be able to require that job applicants disclose their salary histories, and they will also no longer be allowed to seek that information from current or former employers. All employers are now required to provide workers with annual anti-harassment training, and hotels and motels must train employees on how to recognize human trafficking, which workers must report to authorities. *Employers may be able to catch their breaths for a few months. But more of the employment laws typically promoted by Democrats can be expected to be adopted by Illinois in the future, what with the Democratic majority in both houses of the General Assembly pretty well entrenched and Governor Pritzker serving until at least 2022.*

TRENDING (cont.)

SUPREME COURT REQUIRES RECONSIDERATION IN OREGON BAKERS CASE – *H&H Report Update* - The Supreme Court of the United States is requiring a lower court to reconsider its finding that two Oregon bakers illegally refused to bake a wedding cake for a lesbian couple. The Oregon bakers cited religious grounds for their refusal, as did a Colorado baker in a similar situation who previously won a Supreme Court ruling that Colorado officials exhibited bias when deciding for an LGBT couple that filed a complaint against him. The Court held previously that the Colorado officials should have more fairly balanced the religious rights of the baker against the LGBT rights of the couple he wouldn't serve. *Now, the lower court in the Oregon case will have to do the same thing, balancing different parties' rights against each other. The Oregon bakers had to pay a $135,000 judgment to the couple they refused to bake for, and they had to go out of business. But they are continuing to pursue their case with the help of a nonprofit group that promotes religious liberty. Likely also on its way to the Court is another case in which the Washington Supreme Court recently ruled that a florist violated the rights of a gay couple by not providing services for their wedding, and the Justices may not have seen the last of the Colorado and Oregon cases either.*

EMPLOYMENT

NLRB DECISION NARROWS CONCERTED ACTIVITY PROTECTION – The National Labor Relations Board has issued a ruling in which it narrowly applied the protected concerted activity doctrine, which was previously applied by the Board to give maximum protection for employees during the Obama Administration. In its recent decision, the Board considered the firing of an employee by Quicken Loans Inc. after he engaged in a bathroom discussion with another employee over the routing of a client's telephone calls within the Quicken Loans organization, during which the other employee used profanity in referring to clients. The employee who was fired filed an unfair labor practice charge against Quicken Loans, alleging that he had been fired illegally for engaging in protected concerted activity with another employee. But the Board found that the bathroom discussion could not be considered protected concerted activity because evidence failed to show that either employee involved in that discussion was seeking to commence any kind of group action about client call routing. Rather, the other employee was airing a personal gripe and the fired employee's reaction to it was "perfunctory." *Key to the Board's determination was the absence of any evidence indicating that Quicken Loans employees as a group had any prior issues with the way customer calls were routed.*

EMPLOYMENT (cont.)

FEDS GIVE WORKERS OPTION FOR NON-ACA PLANS – *H&H Report Update* **-** The federal Department of Health and Human Services has finalized a rule that will allow employees to use health reimbursement arrangements (HRAs) for health insurance, including insurance plans that do not comply with provisions of the Affordable Care Act (Obamacare). Such arrangements are funded by employers with pretax dollars, and workers have been using them to pay medical expenses. But the Department is now proposing to make them more widely available for purchase of health insurance policies. *Some will say this rule is part of a Trump Administration plan to undermine the Act, and courts may declare this new rule illegal as being preempted by it. They've done that with other administrative rules and decisions that gave consumers an alternative to Obamacare coverage.*

NEVADA LAW PROHIBITS EMPLOYERS FROM DISCRMINATING AGAINST MARIJUANA USERS – Nevada's governor has just signed into law a bill that makes it "unlawful for any employer . . . to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana." The law is not applicable to prospective employees seeking certain safety sensitive positions, such as those seeking employment as firefighters, emergency medical technicians, or federally licensed drivers. *Such laws appear to be a trend, as New York City recently enacted municipal legislation barring non-safety sensitive employers from administering marijuana drug tests to prospective employees. Urinalysis drug screening, the test most commonly utilized by employers, detects the presence of inactive marijuana metabolites, which may be detectable in urine for several weeks or even months following cannabis use.*

TRAVEL

U.S. HALTS CRUISE SHIP VISITS AND GROUP TOURS TO CUBA – *H&H Report Update* **-** The Trump Administration has halted cruise ship travel and group tours to Cuba from the United States, part of a continuing campaign to isolate the island nation and force regime change or the moderation of the Communist nation's policies. The restrictions apply to educational trips sponsored by nonprofits, among others. Most private planes and boats will be subject to them. *Treasury Secretary Steven Mnuchin announced the ban, saying it would help to keep U.S. dollars out of the hands of Cuban military, intelligence and security services. The U.S. is also responding to what it calls Cuba's "destabilizing role" in the Western Hemisphere, such as its support for President Nicolas Maduro in Venezuela.*

REGULATION

STATE SUPREME COURT TOSSES WHISTLEBLOWER SUIT – *H&H Report Update* – The Illinois Supreme Court has rejected a whistleblower suit filed against City Colleges of Chicago by a college official who claimed he was fired because he objected to the hiring of unqualified instructors. The Supreme Court advised that the state whistleblower law protected employees from termination because they refused to engage in an illegal activity. But the court found that the instructor in this case failed to show that his firing undermined public policy, one of the tests for stating a retaliation claim, or how appointment of unqualified instructors violated the law. *For potential claimants under the whistleblower statute, the court did have some good news. The court ruled that, contrary to a lower court's conclusion, the refusal to participate element of a claim did not have to be preceded by the employer's overt request for the employee to engage in unlawful conduct*.

SCOTUS PUNTS ON RIGHT-TO –WORK ZONE CASE – *H&H Report Update* – The Supreme Court of the U.S. has refused to entertain a challenge under federal law to a lower court ruling that invalidated a Lincolnshire, Illinois ordinance declaring that workers there had a right to choose whether or not they would join a union and pay union dues. The ordinance was intended to prevent employers from agreeing with unions that employees must join a union. But the U.S. Court of Appeals for the Seventh Circuit ruled that ordinance conflicted with federal labor law. Now, the Supreme Court has decided it will defer to a new Illinois state law saying that only the state, and not local units of government, can enact laws pertaining to collective bargaining in Illinois. Consequently, it ruled the case was effectively "mooted" because the ordinance was invalidated by the new Illinois statute, whether or not it conflicted with federal labor law. *The choice to consider the case "mooted" by the Illinois statute meant that the Supreme Court didn't have to decide whether the ordinance was contrary to federal law, which also meant that the Supreme Court did not have to consider whether a 2016 decision by a U.S. Court of Appeals upholding a local right-to-work ordinance in Kentucky was still good law*.

GOOD OR BAD FAITH RELEVANT TO CONTEMPT CITATION IN BANKRUPTCY – The Supreme Court of the United States has ruled that good or bad faith is relevant to determining whether a creditor should be cited for contempt when violating a bankruptcy order. The Court was faced with a case where a company and some of its owners successfully sued another owner for violating the company's operating agreement. But that owner, Taggart, filed for bankruptcy, and the bankruptcy court released him from most pre-bankruptcy debts, including debts to the company and its other owners. Notwithstanding that, the company and the other owners tried to collect their attorney's fees incurred in their suit from Taggart, which resulted in the bankruptcy court finding them in contempt of court, punishing them accordingly. They argued they had a good faith belief the bankruptcy discharge didn't apply to them, and a federal Court of Appeals held that such good faith automatically precluded a contempt citation. But, the Supreme Court found that such a good faith belief should not necessarily excuse them from a contempt order, remanding the case for further proceedings in a lower court. *The Supreme Court noted that subjective belief will not ordinarily insulate a party from a contempt citation if that subjective belief is unreasonable. But, the Court said subjective intent, good or bad, can be relevant in determining whether a contempt citation is warranted.*

OTHER

EPA BACKS EXPANDED USE OF ETHANOL – The U.S. Environmental Protection Agency has issued a decision authorizing expanded use of ethanol as fuel. The EPA will now allow sale of gasoline with a 15% mix of ethanol year-round. Such sales are currently permitted only eight months a year because of the fear that sale in the summer months will increase air pollution. *The EPA decision should be a benefit to farmers hurt by the U.S. trade conflict with China. On the other hand, oil companies and environmentalists have found rare common ground in opposing the increased sale of ethanol fuel, and they are expected to file suit in order to block the EPA's move.*

OPEN, OBVIOUS DANGERS NEED NOT BE REMEDIED? – Do you operate a business establishment in which there are open, obvious dangers to customers and other people passing through? Do you have to remedy them? It might seem like a good idea if you care at all about those people. But you won't have to worry about being sued by injured parties if courts apply the "open, obvious" doctrine the way a federal appeals court recently did in finding that Menards wasn't liable to a customer who tripped over the protruding base of a knee-high display sign in one of their stores. The danger of tripping was "open and obvious," said the court, and the customer should have been on the lookout for such dangers when walking through the store.

NEWS AND EVENTS

Jonathan Howe recently presented "You, the Jury" at MPI WEC in Toronto.

Jon was reappointed as Special Advisor to the American Bar Association Standing Committee on Meetings & Travel

Lee Badger recently met with the directors of a 501(c)(3) tax-exempt public-interest not-for-profit industry standards and certification organization to discuss directors' fiduciary duties and standards-making antitrust guidance.

HOWE & HUTTON

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