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THE HOWE & HUTTON REPORT

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TRENDING NOW

EMPLOYERS CAN'T DISCRIMINATE AGAINST LGBT– The Supreme Court has ruled that employers who discriminate against gays, lesbians, bi-sexuals and transgenders violate Title VII of the federal Civil Rights Act. The 6-3 decision of the Court came in three consolidated cases. In one, a county employee in Georgia was fired from his job as a child welfare advocate after he joined a gay softball team. In another case, a skydiving instructor was fired days after mentioning that he was gay, and in a third a funeral home worker was fired after she told her employer about her sexual identification six years into her employment. *None of the cases involved much doubt about whether the employers discriminated, but only the legal question concerning whether discrimination against gays, lesbians, bi-sexuals and transgenders violated Title VII's prohibition of sex discrimination. The Court ruled that it did.*

NLRB ALLOWS EMPLOYERS TO BAN CELL PHONES IN WORKING AREAS

The National Labor Relations Board has reversed a prior administrative ruling so that employers can now ban cell phones in working areas. The prohibition applies only to production floor and warehouse areas. It is justified as a business necessity in order to ensure the integrity of the production process and reduce potential workplace accidents. Therefore, the NLRB reasoned that the employer's justifications for such a rule far outweighed the impact on employees' Section 7 rights to take photos, record audio and video, and make legally protected phone calls in work areas.

TRENDING NOW

OSHA IMPOSES COVID-19 INVESTIGATIONAL RESPONSIBILITIES ON EMPLOYERS - The Occupational Safety and Health Administration (OSHA) has issued new guidance to employers requiring them to investigate how their employees may have contracted COVID-19. Such an investigation must be instituted if there is objective evidence that a COVID-19 case may be work-related. Employers must make a reasonable investigation, but do not have to undertake extensive medical investigations. The employer should ask the employee how he or she believes the virus was contracted, discuss with the employee the work and outside activities that may have led to the illness, and check the workplace for exposure risks, all the while respecting employee privacy rights and ensuring the confidentiality of any medical and health information collected. Information provided by public health authorities and medical care providers must also be considered. If the employer determines that it is more likely than not that workplace exposure caused or contributed to a worker's COVID-19, the employer must record the illness as work-related in reports to OSHA. OSHA says evidence weighing in favor of such a determination would include several cases developing among employees who work closely together, if the illness was contracted after lengthy, close exposure to a customer or co-worker with a confirmed case, and if the employee's duties require frequent, close exposure to the public where there is an ongoing community transmission. On the other hand, OSHA says an illness is not likely work-related if an employee is the only one in a workplace area with COVID-19 and the employee's job duties do not include frequent public contact, or if the employee frequently spends time with someone who has COVID-19, is not a co-worker and likely exposed the employee to COVID-19. *OSHA promises to consider employers' good faith efforts to comply with OSHA standards given the many difficulties due to the ongoing COVID-19 health emergency.*

CHICAGO PASSES LAW NIXING EMPLOYER RETALIATION FOR COVID-19 ABSENCE - The Chicago City Council has passed a new ordinance prohibiting employers from retaliating against employees for missing work due to COVID-19. The ordinance applies to employees who stay at home in compliance with public health orders to minimize the spread of COVID-19, stay away from work because of their COVID-19 symptoms, obey a quarantine or isolation order, or stay away from work to care for someone with COVID-19. The ordinance allows workers to sue employers for three times the amount of any wages lost and other damages they may suffer because of ordinance violations, plus reinstatement to any position lost because of employer retaliation and their reasonable attorney's fees. In addition, the City may sue violators for fees in the amount of $500 to $1,000 per offense, and each day a violation continues is deemed a separate offense. *The ordinance applies to every employer with a business facility within the city limits and every employee who has worked within the city limits for two hours in any two-week period.*

TRENDING NOW

PPP FLEXIBILITY ACT BECOMES LAW – Congress enacted and the President signed into law the Paycheck Protection Program (PPP) Flexibility Act of 2020. It extends the period for which certain expenditures will qualify for PPP loan forgiveness from eight weeks to 24 weeks, though borrowers who obtained PPP loans before June 5, 2020 may still elect to use the eight-week period instead. The end date during which borrowers may spend their loan proceeds has been extended from June 30 to December 31, 2020. The maturity date for PPP loans has been extended from two years to a minimum of five years for all PPP loans made on or after June 5, and, for PPP loans outstanding as of June 5, the maturity date may be extended beyond two years upon the mutual agreement of the borrower and the lender. The maximum amount of loan proceeds that a borrower may use on non-payroll costs, mortgage interest, rent and utilities and remain eligible for loan forgiveness has increased from 25% to 40%. The measurement date before which borrowers must restore a reduction in salary/wages and/or employee levels in order to avoid reductions in their forgiveness amount has been extended from June 30 to December 31. Exceptions for reductions in employee headcount for purposes of reducing a borrower's forgiveness amount have been created based on an inability to rehire an employee by December 31, or inability to return to the same level of business due to federally mandated COVID-19 employee and customer safety requirements or guidance. The deferral of debt service payments on a PPP loan has been extended from six months to the date that the lender receives the forgiveness amount from the Small Business Administration as determined for the loan. A borrower must apply for loan forgiveness within ten months of the last day of the forgiveness covered period. Finally, borrowers that receive PPP loan forgiveness are no longer prohibited from deferring payment of their employer payroll taxes for the period beginning on March 27, 2020 and ending before January 1, 2021. *The changes in law provided for in the Flexibility Act are intended to give PPP loan recipients more flexibility in spending loan proceeds and extend loan forgiveness eligibility.*

COURT HOLDS PARTICIPANTS CAN'T SUE FOR PLAN MISMANAGEMENT – The Supreme Court of the United States has held that participants in defined-benefit pension plans have no standing to sue plan managers for alleged plan losses because, win or lose in such a suit, their right to monthly pension benefits wouldn't change. The Court also stated that, merely because all plan participants have a general cause of action for violations of the federal Employee Retirement Income Security Act of 1974 ("ERISA"), that did not, in and of itself, confer standing to sue for plan losses. *The Court rejected the idea that, if the participants couldn't sue managers for losses, nobody would have any relief in cases of plan mismanagement, noting that employers and the Department of Labor could pursue actions for fiduciary misconduct against managers in such cases. However, four Justices, dissenting from the Court's 5-4 ruling in this case, contended that the Court's decision would effectively prevent pensioners from taking any action for plan mismanagement until their pensions were on the verge of default.*

TRENDING NOW

DOL UPDATES COBRA NOTICES, EXTENDS DEADLINES – The U.S. Department of Labor has revised model COBRA notices. Federal law requires employers to provide employees and their families with notices explaining their rights under COBRA. Employers that use the Department's model COBRA notices are deemed to be in good faith compliance with COBRA notice content requirements. The new model notices, among other things, contain a new discussion of the advantages of enrolling in Medicare prior to or in lieu of COBRA continuation coverage. In addition to modifying its model COBRA notices, the Department has extended deadlines for exercising COBRA rights based on the duration of the federally declared national emergency for the COVID-19 outbreak. *Employers should use the Department's revised model COBRA notices and include a supplemental disclosure with their notices explaining how the temporary extension of deadlines will impact exercise of COBRA rights.*

NO AIRLINE DUTY TO AVOID CANCELLATIONS – Have you ever wondered what remedy you have for airlines cancellations? Hopefully, you will have better luck than one flyer whose flight to Chicago on Southwest Airlines was cancelled just before it was to board. He chose an alternate flight through Omaha, but he also sued the airlines for his additional costs for lodging and similar expenses due to the cancellation, saying the flight was cancelled because Southwest ran out of de-icer and no other airlines had a similar problem. The U.S. Court of Appeals for the Seventh Circuit affirmed a lower court's dismissal of the traveler's breach of contract claim. The Seventh Circuit said there was no breach because Southwest had no express or implied duty to avoid cancellation. *Southwest's duties, the Court of Appeals said, were to reschedule or refund the exact amount paid for tickets, not pay additional costs.*

NONPROFITS

CLASS ACTION CLAIMS AGAINST LEAD PAINT ASSOCIATION DISMISSED - The Illinois Supreme Court has dismissed class action tort claims brought against an association that promoted the use of lead pigments in paint, as well as some of the association's members. Suit was brought by a group of parents and guardians of children who had to be tested for lead poisoning pursuant to Illinois state law in a long-running case involving various types of claims, but, in particular here, a claim that the plaintiffs should be compensated for the cost of the tests and related expenses. The Supreme Court dismissed that claim because the plaintiffs had not alleged that any particular defendant caused any physical injury to themselves or their children, and, absent such allegations, they could not be allowed to maintain a class action suit to recover strictly economic losses they incurred because the State of Illinois required them to obtain lead poisoning medical screenings, assessments and monitoring for their school children. *A separate issue, not reached by the Supreme Court, was whether the defendants could be required to pay the plaintiffs for expenses that, in many cases, were covered by their insurance.*

NONPROFITS (cont.)

APPEALS COURT GIVES ASSOCIATION PARTIAL WIN ON PAYING STUDENT-ATHLETES - *H&H Report Update* - The U.S. Court of Appeals for the Ninth Circuit has ruled that the National Collegiate Athletic Association (NCAA) can prohibit member colleges and universities from paying student athletes "cash payments akin to salaries," but cannot prohibit schools from offering student-athletes legitimate noncash "education-related" benefits ranging from computers and science equipment to post-eligibility scholarships and internships, as well as academic and graduation awards. The Court of Appeals ruling arose from lawsuits brought by student-athletes alleging that the NCAA and athletic conferences violated the antitrust laws by fixing the price of scholarships and other benefits The Court of Appeals ruled that prohibitions on cash payments serve a procompetitive purpose by preserving the popularity of college sports as a product distinct from professional sports. But the Court of Appeals said that NCAA prohibitions on schools providing legitimate noncash "education-related" benefits do nothing to further that purpose and, if anything, competition among schools to offer such benefits reinforces consumer perceptions of student athletes as students. *The Court of Appeals cautioned that, while it was prohibiting NCAA restrictions on schools providing legitimate education-related benefits to student athletes, that did not mean the NCAA couldn't prohibit schools from giving student-athletes luxury cars or expensive musical instruments for non-music majors. Some issues not resolved by the Court of Appeals decision are sure to be the subject of further litigation.*

SBA CLARIFIES PPP LOAN ELIGIBILITY FOR NONPROFIT HOSPITALS - The Small Business Administration (SBA) has released guidance clarifying that nonprofit hospitals are eligible to receive Paycheck Protection Program (PPP) loans even if they are not exempt from federal income tax under Section 501(a) of the Internal Revenue Code. The federal CARES Act provisions indicated that PPP loans from the SBA are available to "nonprofit organizations" described in Section 501(c)(3) of the Internal Revenue Code and exempt from federal income tax under Section 501(a) of the Code. Many nonprofit hospitals, however, are specifically exempt from federal income tax under Section 115 of the Code and not Section 501(a). So, they wondered if they were eligible for the PPP loans, for which many nonprofits have applied and which some have been granted. Now, the SBA has come to their rescue, clarifying that, yes, they can receive PPP loans, provided that they have reasonably determined, in a written record maintained by the hospital, that they are an organization described in Code Section 501(c)(3) and have so certified on the Borrower Application Form. *The SBA administers such loans. So what the SBA thinks about the intentions of the CARES Act draftsmen should control, one would think. But it might have been nice if the draftsmen had just said what they meant in the CARES Act itself so that the hospitals could timely, and with something of a clear conscience and mind, make the certification in the applications for the loans, which the SBA now says they must make, and which some have already made!*

EMPLOYMENT

NLRB REJECTS UNION INTIMIDATION OF WORKERS - The National Labor Relations Board has held that a union's retaliation against members who participated in an employer investigation that resulted in the discharge of the union president violated federal law. A fellow employee had reported to the employer that the union president had verbally harassed another worker for more than a year. The employer investigated and ultimately discharged the union president. But, during the investigation, union officials yelled at the harassed employee and the union posted a memo saying that union members who "turned in" other members could face union fines and black listing from all union jobs. Finally, the secretary-treasurer of the union lodged multiple safety-violation complaints against the harassed worker with the employer. That resulted in the Board ruling that union actions against workers who cooperated with the employer investigation, as well as threats and intimidation by the union and union officers, including the filing of the safety complaints, all constituted violations of the National Labor Relations Act. *Just as an employer can be found to have violated the Act for engaging in conduct that infringes on employee rights protected under the Act, such as unionizing, this case shows that unions can violate the Act through disciplinary threats, such as fines and blacklisting, and a union cannot use an employer's safety policies as a "cat's paw" to discipline an employee for participating in an employer investigation.*

COURT CONSIDERS CHOICE OF LAW AND CONSIDERATION FOR NON-COMPETE - The U.S. Court of Appeals for the Fifth Circuit recently had occasion to consider the effect of choice pf law and non-compete provisions in a Restrictive Covenants Agreement signed by an employee. The agreement provided that disputes regarding it should be governed by Delaware law, and the employer was incorporated in Delaware. But the Court of Appeals applied Texas law in construing the agreement, since employment was in Texas and the non-compete provisions restricted the employee's activities only in Texas. Normally, that would make things difficult for an employer seeking to enforce a non-compete provision, since Texas takes a dim view of non-competes. But the Court of Appeals ruled that the employer could enforce the non-compete provisions even under Texas law, since there was adequate consideration given to the worker for signing the agreement in terms of certain special confidential information being provided to the worker by the employer for signing, as well as access to a potential award of restricted stock units (even though that access was lost upon termination of employment). *The Court of Appeals was also inclined to rule for the employer in enforcing the non-compete because there was evidence the employer, in requiring the non-compete from the worker, was specifically trying to prevent him from working for the company for which the employee eventually sought to work, which was recruiting the employer's top workers at the time the agreement was signed.*

EMPLOYMENT (cont.)

PUNITIVE DAMAGES REVERSED IN WOMAN-ON-MAN HARASSMENT CASE - The U.S. Court of Appeals for the Fourth Circuit has rejected a $600,000 punitive damages award won by a male commercial driver in a suit against his employer for allegedly ignoring complaints of sexual harassment the driver had filed against a female co-worker. The plaintiff alleged that the co-worker had repeatedly groped him and made sexually explicit comments to him. The driver complained to the company as many as 20 times about this harassment, but the conduct by the co-worker continued until the driver quit his job and sued the employer, contending that he had been subjected to a hostile work environment on the basis of sex, had been constructively discharged, had been retaliated against for complaining of the co-worker's conduct, and had been intentionally inflicted with emotional distress. A jury awarded the driver compensatory damages and $600,000 in punitive damages. But the Court of Appeals reversed the punitive damages award. According to the Court of Appeals, a party seeking to collect punitive damages from a company must show more than that managerial employees had "mere knowledge" of sexual harassment and had failed to adequately respond to it, which was the basis for the punitive damages award in this case. Instead, they must show that managerial employees engaged in intentional discrimination themselves with malice or reckless indifference to the rights of plaintiffs, which the Court of Appeals did not find in this case. *The Court of Appeals went on to explain that allowing punitive damages claims based on "mere knowledge" would "open the floodgates" to liability for employers in all similar hostile work environment cases.*

COURT DISMISSES SUIT FOR SAFETY MEASURES TO COMBAT VIRUS - The U.S. District Court for the Western District of Missouri has dismissed a suit workers filed to force their employer to adopt additional safety measures to combat COVID-19 in their workplace. Not surprisingly, the suit was filed by workers at a meat packing plant, since such plants appear to be a hotspot for the virus. The additional controls sought by the employees included requiring workers to wash their hands while on line at the plant, providing employees with tissues, changing leave policies to discourage workers from showing up at work if they have symptoms of the virus, giving employees access to testing for the virus, and adopting a contact-tracing policy. But the court found that, due to its experience and expertise in dealing with workplace regulation, the U.S. Occupational Safety and Health Administration (OSHA) was better positioned to determine what safety measures were required in the workplace to combat COVID-19, and the court felt that it had to defer to OSHA's primary jurisdiction in cases involving workplace safety. The court also noted that, rather than going to court, the complaining workers in this case could petition the U.S. Secretary of Labor for relief under Section 662(a) of the federal Occupational Safety and Health Act to restrain any conditions or practices in any place of employment that could reasonably be expected to cause death or serious bodily harm. So, the court's decision to dismiss the employees' suit in this case did not leave them without a remedy for their safety issues. *The court noted that its decision to refer the workers to an OSHA administrative remedy might cause them some delay in obtaining the relief they were seeking, but, ultimately, following this procedure ensures that OSHA can take a "measured and uniform approach" to the regulation of meat-packing plants.*

TAXATION

IRS ISSUES FINAL REGULATIONS ON TAX-EXEMPT REPORTING - *H&H Report Update* - The Internal Revenue Service has issued final regulations excusing some tax-exempt organizations from reporting the names and addresses of substantial contributors to the IRS on their annual Form 990 series information returns. Under the final regulations, the only exempt organizations that will be required to so report will be Internal Revenue Code Section 501(c)(3) entities (including charitable and educational entities) and Code Section 527 political organizations. Other tax-exempt entities will no longer be required to report the names and addresses of substantial contributors on their annual reports to the Service, though they will have to collect that information and make it available to the IRS on request. The final regulations are also exempting all organizations with annual gross receipts not exceeding $50,000 from filing Form 990s, although, they will have to file the postcard Form 990-N return, as they have in the past. *The IRS had previously published a revenue procedure to exempt all but 501(c)(3) and 527 entities from having to report names and addresses of substantial contributors. A court found that approach did not comply with the federal Administrative Procedure Act requirements for notice to the public and an opportunity to respond. So, the IRS published new regulations instead.*

INTELLECTUAL PROPERTY

COURT WON"T CONSIDER SUIT FOR USE OF DANCE MOVES IN VIDEO - The U.S. District Court for the District of Maryland has dismissed with prejudice claims filed by two former college basketball players against Epic Games for alleged misappropriation of their dance move in a video game. The plaintiffs claimed to have invented, named and popularized a dance move called the "Running Man," which was later made a part of a popular online multiplayer game called *Fortnite* that was produced by Epic Games. The plaintiffs claimed that their invention was misappropriated by Epic, and there was really no question as to appropriation, since the district court found that *Fortnite* allowed players to customize avatars in the game by purchasing emotes that could be made a part of the game, and one of those emotes depicted the "Running Man." Nonetheless, the district court dismissed all claims made by the plaintiffs, including claims for invasion of privacy/publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution and false designation of origin. It did not help the plaintiffs' case that the court concluded dances are not copyrightable under the federal Copyright Act and the plaintiffs could not plausibly allege that the "Running Man" was a valid trademark because a trademark identifies unique goods and services, which, according to the court, the "Running Man" didn't do. Even assuming that the game appropriated the likenesses of the plaintiffs in the game, which the court didn't assume, the court noted that, as a general rule, images and likenesses are not considered trademarks. *Nonprofits create and utilize arguably protectable intellectual property in their activities, and such property can become so valuable that it becomes the subject of litigation. But people wanting to sue others for misappropriating their inventions are obliged to demonstrate how the misappropriation has involved the taking of a right protected by laws that have not often been amended to keep up with the times. So it was in this case. Avatars, emotes? The court probably had no idea what the plaintiffs were complaining about, and the authors of the copyright and trademark laws likely wouldn't have known anything about it either.*

NEWS AND EVENTS

Jon Howe has participated in the following webinars:

May 5, 2020 Survive and Advance Important Contract and Insurance Issues for Businesses in the COVID Era

May 12, 2020 Ask the Lawyers Town Hall

June 2, 2020 Protecting Both Parties: Contracts, Agreements and Waivers

June 3, 2020 IAEE Contracts and Insurance for the Exhibition Industry During a Pandemic

Nathan Breen's webinar "Protecting Your Intellectual Property" is now available on the Lorman Live webinar page. Please visit LORMAN LIVE for more information and your chance to register with a 50% savings.

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