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THE HOWE & HUTTON REPORT

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TRENDING NOW

LINKEDIN INVITE DOESN'T VIOLATE NONCOMPETE – A panel of the Illinois Appellate Court, 1st District, has held that networking with a former colleague on social media does not amount to a violation of a noncompete agreement. In this case, a former employee of Bankers Life and Casualty Co. was sued for allegedly violating a noncompete agreement that prohibited him from recruiting other Bankers Life employees in a particular geographic area. All he did, though, was to update his LinkedIn page to reflect a new job and invite three current employees from the territory he previously serviced to connect with him. This, the court said, was generic enough a contact that it could not be construed as part of a directed recruitment effort toward certain Bankers Life employees such that it would violate the noncompete agreement. *The court opined that, as social networking websites continue to grow, the issue of social network usage would repeatedly arise in noncompete cases. Key to the court's decision in this case was the fact that the LinkedIn page didn't mention Bankers Life or the worker's new place of employment, contained no suggestion that anyone view the worker's job description, and offered no solicitation for anyone to leave Bankers Life.*



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NOT FOR PROFIT LAW DEVELOPMENTS

NONPROFITS ALLOWED TO VOTE ON BUSINESS IMPROVEMENT DISTRICT – The Pennsylvania Commonwealth Court has held that owners of tax-exempt properties rightly were allowed to vote on approval of a levy to create a business improvement district in the city of Lebanon. One taxpayer had challenged the legitimacy of the vote, which could have stopped the levy per state law if 40% of the “affected” property owners had voted against it. The Commonwealth Court, an intermediate appellate court, ruled that the city correctly allowed owners of 78 tax-exempt properties to vote on the creation of a district where new exemptions would be applied. *Some taxpayers keep finding ways to express displeasure over tax breaks for nonprofits, despite the benefits such organizations provide for a community.*

NONPROFITS CONTEST IRS SUBPOENA OF COINBASE – A number of nonprofit groups have filed briefs with the U.S. District Court for the Northern District of California asking that court to quash a subpoena served by the Internal Revenue Service on Coinbase Inc., the largest virtual currency exchange in the U.S. The nonprofits argue that the subpoena, which has already been narrowed once by the court, is still too broad, seeking information on more than 8.9 million transactions and 14,355 account holders. The subpoena relates to customers who conducted transactions in a convertible virtual currency from 2013 to 2015. Objections to the subpoena say that allowing it will encourage litigants to serve overbroad subpoenas, thinking they can always pare back their demands if they are challenged and then agree to something reasonable, thus wasting the resources of other litigants and the courts just to see what they can get away with. *Litigants can “get away with” a lot in issuing subpoenas and engaging in other “discovery” procedures, and it isn’t just the IRS that engages in serving overbroad subpoenas. Nonprofits are often the targets of such subpoenas, served on them as third parties in a lawsuit, because they collect and retain so much information that litigants may find useful in proving their cases in court. Furthermore, nonprofits may not have to money to challenge those subpoenas in court. Unfortunately, telling a court that a litigant isn’t entitled to subpoena information is not far from telling that same court it has no reason to consider the information subpoenaed in a case before it.*

NONPROFITS CAN KEEP HELPING IMMIGRANTS – *H&H Report Update* – A federal judge has issued a preliminary injunction prohibiting the U.S. Justice Department from forcing nonprofit legal groups to give up providing assistance to illegal immigrants unless they are willing to offer free legal representation throughout deportation proceedings. The Justice Department, reflecting the President’s anti-immigration policies, had been threatening the Seattle-based Northwest Immigrant Rights Project with legal reprisals if they did not give up preparing motions and other documents for immigrants who, for the most part, represented themselves in deportation proceedings. The group challenged the Department’s attempts in court, noting that it had insufficient funds to provide full, formal representation of immigrants in court. Now, the federal judge has ruled that the Department’s threatened action against the Project violated the group’s rights under the First Amendment to the U.S. Constitution. *The Justice Department had argued that the group was violating a rule it adopted in 2008 to prevent unauthorized practice of law by nonlawyers who advertised themselves as able to help immigrants obtain lawful status. However, most of those working for the Project in assisting immigrants are licensed attorneys, and they supervise other workers. This case may not be over. The judge’s injunction is only a preliminary one and gives the Department an opportunity to justify its actions in further proceedings.*

EMPLOYMENT LAW DEVELOPMENTS

COURT OKAYS TERMINATING WORKERS IN RETIREMENT PLAN – The U.S. Court of Appeals for the Seventh Circuit has rejected an age discrimination and equal protection lawsuit filed by county employees who were terminated because of their coverage under a particular supplemental health insurance plan that had previously been offered as a retirement incentive to employees age 65 or over. Retired workers were later allowed to work as part-time employees and remain on the plan, but the insurance company then informed the county that if retirees worked as part-time employees, the plan would no longer qualify for special exemptions under federal law and the county's costs would skyrocket. As a result, many rehired part-time employees covered by the plan were terminated. But the Court of Appeals upheld the terminations because it said that employees were not terminated because of their age but because of their participation in the insurance plan. *Key to the Court of Appeals decision was the financial hardship the county was in, as the county was running more than \$1 million in the red. Other government entities, including the State of Illinois, are in financial trouble at least partly because of previously granted retirement benefits, but they haven't found a way out of their dilemmas yet. Similar problems can impact for-profits and nonprofits that don't carefully think through the consequences of offering various employee health insurance and retirement plans.*

WATCH OUT FOR “CONSTRUCTIVE NOTICE” – The U.S. Court of Appeals for the Seventh Circuit has held that employers can be found to have “constructive notice” of employees being sexually harassed in the workplace, even if they don't actually know it has occurred, if supervisors are required by an employee handbook to report such violations, know they have occurred, but don't report them to management. “Constructive notice” is a legal fiction that comes up in a variety of circumstances when the law holds somebody liable for something they didn't know occurred, but should have, based on the circumstances. Here, the Court of Appeals found that an employer ought to have known harassment was going on, had “constructive notice” of it through the employer's supervisors, and could be held liable for it. *If you have an employee handbook that requires reporting of sexual harassment and other violations of law in the workplace, good, notwithstanding this case. We lawyers generally think that requiring such reports is helpful to the employer in avoiding legal liability. But not always, as this case demonstrates.*

WISCONSIN RIGHT-TO-WORK LAW UPHOLD – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court decision that Wisconsin's right-to-work law is not preempted by the National Labor Relations Act and therefore invalid. The International Union of Operating Engineers argued that the Wisconsin law was preempted because it prohibits anyone from requiring membership in a labor union as a condition of obtaining or continuing employment, among other things. But the Seventh Circuit noted that it had already upheld Indiana's nearly identical law against a similar preemption challenge in 2014, and it said that the earlier decision controlled in this case. *Not considered by the Seventh Circuit was another union argument that Wisconsin's law was unconstitutional because it took union property without just compensation. The Seventh Circuit said that argument was “premature” because the union hadn't sought “just compensation” in state court before challenging the Wisconsin law's constitutionality in federal court.*

EMPLOYMENT LAW DEVELOPMENTS (cont.)

OVERTIME PAY NOT REQUIRED FOR WORK BOSS DIDN'T KNOW OF – The U.S. Court of Appeals for the Seventh Circuit in Chicago has ruled that an employer isn't required to pay workers overtime for work the employer didn't know about. Current and former members of the Chicago Police Department's Bureau of Organized Crime sued to collect overtime pay for work they did off-duty on their mobile electronic devices without advising the Bureau. The Court of Appeals noted that the federal Fair Labor Standards Act requires employers to pay time and a half for work in excess of 40 hours per week, and the court said that rule applied to all work an employer knows about, even if the employer never asked for that work to be done, never wanted the work to be done, and had a rule prohibiting such work. However, the court said that strict rule "stops short of requiring the employer to pay for work it did not know about and had no reason to know about." *In this case, the Court of Appeals also noted that the claimants hadn't submitted slips documenting their overtime work, and the Bureau had never reprimanded or disciplined anyone for submitting such slips.*

TRAVEL DEVELOPMENTS

PRIVATIZING AIR TRAFFIC CONTROL HITS CONGRESSIONAL TURBULANCE - *H&H Report Update* - President Trump's plan to privatize air traffic control has run into objections in both houses of Congress. Senate and House budget proposals for the Federal Aviation Administration rejected the President's plan to turn air traffic control over to a new nonprofit organization that would be funded by fees from aircraft using the system. Instead, bills included continued funding of the FAA for air traffic control. *Some airlines and the air traffic controllers' union supported the President's proposal, but members of Congress called it short-sided, counterproductive and "a solution in search of a problem." In Congress, apparently, it won't fly.*

INTELLECTUAL PROPERTY

COURT CONSIDERS WHETHER "SECRET" SALES CAN INVALIDATE PATENT – The U.S. Court of Appeals for the Federal Circuit, the most influential court in intellectual property matters short of the U.S. Supreme Court, has considered the question of whether "secret sales" that do not disclose the details of an invention can block a subsequent patent application by someone claiming a "new" invention. The court ruled that the details of an invention need not be disclosed by a sale or offer of sale in order for it to serve as "prior art" that would block a subsequent patent application, provided the existence of the sale or offer of sale itself was made publicly known at the time of the application (for example, by announcement in a public filing). *Members of trade associations and other nonprofits own many patents. This case shows the importance of having a thorough patent search completed before an application for a new patent is prepared.*

OTHER ISSUES

INSPECTOR GENERAL REVEALS IRS REHIRING OF FIRED EMPLOYEES – The Office of the Inspector General for Tax Administration in the U.S. Treasury Department has issued a report detailing how the Internal Revenue Service, between January 2015 and March 2016, rehired 213 employees previously fired for avoiding payment of their own taxes, falsifying documents, stealing and making unauthorized use of taxpayer data. During the rehiring, the IRS official in charge was John Koskinen, an appointee of President Obama, who is under fire in Congress for obstructing a congressional probe of how the agency admittedly targeted conservative nonprofit groups for adverse actions, including delayed and rejected applications for recognition of tax-exempt status. *The Service’s mass rehiring of employees with records of previous misconduct has partly been blamed on the fact that IRS hiring officials don’t have access to much of the information that would have prevented rehiring. Some former employees, upon being considered for rehiring, failed to disclose on paperwork that the agency had previously terminated them.*

NEW ACCOUNTING RULES PROPOSED FOR CONTRIBUTIONS AND EXCHANGES – The Financial Accounting Standards Board has proposed for comment certain new rules expected to result in more transactions being considered contributions rather than an exchange transaction. Under the proposed new rules, transactions with a “resource provider,” including receipt of funds from a government grant or contract, should be evaluated to determine whether the resource provider or someone else is receiving “commensurate value” (not just “value”) in exchange. If not, the transaction would be a contribution, which could be either “conditional” or “unconditional.” *The FASB expects that, under the new guidance, more grants and contracts will be accounted for as contributions (often conditional ones) than under current generally accepted accounting principles. The determination of “conditional” or “unconditional” would then affect the timing of revenue recognition, with revenue being recognized only after all conditions on receipt have been overcome. The FASB is accepting comments on its proposed new rules until November 1.*

COURT WON’T EASE ASSOCIATION STANDARDS FOR DISABLED RUNNERS – A federal judge has refused a request from a disabled high school runner to order the Illinois High School Association to lower qualifying standards for state finals races and standards needed to earn a medal. The runner argued that, because of his disabilities, he needed an accommodation of that sort. However, the court found that the Association’s standards didn’t discriminate against disabled runners because they also prevented 90% of nondisabled runners from competing in the finals or earning a medal, “excluding the nondisabled with comparable ruthlessness.” The court also said that the runner failed to show that he would have a meaningful chance of running in the finals or earning a medal even if he wasn’t disabled. He demonstrated that he had an intense work ethic and had been dogged in his high school sports pursuits. But the court said that “it is an unfortunate fact of athletic life (and life in general, for that matter) that hard work is no guarantee of competitive success....” Furthermore, the court said that the runner’s requested accommodation was unreasonable, since it would fundamentally alter the nature of the Association’s athletic program. *The court did refuse to grant summary judgment for the Association on the runner’s claim that a different accommodation should be granted to resolve certain safety concerns with disabled runners competing in races. To prevent disabled runners from being knocked to the ground in a crowded field starting a race, the court suggested that disabled runners be allowed to start races at different times or in different lanes than nondisabled runners.*

HOWE & HUTTON NEWS AND EVENTS



Naomi Angel will be reporting on current legal trends at meetings of trade association manufacturers in New Jersey, Fort Worth, Nashville and Dallas.

Naomi presented a webinar for Connect on “How to Minimize the Crisis in Crisis Management”



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