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THE HOWE & HUTTON REPORT

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TRENDING NOW

DOL PROPOSES NEW RULE ON EMPLOYEE/INDEPENDENT CONTRACTOR STATUS The U.S. Department of Labor has proposed a new rule to determine whether workers are employees or independent contractors for purposes of the federal Fair Labor Standards Act. The new rule supersedes all previous interpretations of the Act by the Department; employers can rely on it as a "safe harbor" defense to liability and liquidated damages in failing to pay minimum wage or overtime to a worker (required for an employee, but not required for an independent contractor). The Department's new rule says that the "ultimate inquiry" as to whether a worker is an employee or an independent contractor is the "economic dependence" of the worker. An employer "suffers or permits" an individual to work as an employee if, as a matter of "economic reality," that individual is economically dependent on that employer for work. By contrast, an individual is an independent contractor if, as a matter of "economic reality," the worker is in business for himself or herself. According to the Department, two "core factors" should be considered in determining whether a worker is an employee or an independent contractor, namely, the nature and degree of the individual's control over the work (the more control, the more likely it is that the individual is an independent contractor) and the worker's opportunity for profit or loss (the more such opportunity exists, the more likely it is that the worker is an independent contractor). Other factors weighing in favor of independent contractor status (especially if the two core factors point in different directions) are: (1) a great deal of skill is required for the work and not provided by the employer; (2) the relative permanence of the working relationship between the worker and the employer is for a fixed period, as opposed to it being indefinite or continuous in duration; and (3) whether the work can be segregated from the employer's production process. *The proposed rule is subject to public comment for a period of 30 days after it is published in the Federal Register and then it may become final.*

TRENDING NOW (cont.)

ADA ACTIONS TARGET SMALL BUSINESS WEBSITES - Recently there has been a reported uptick in private Americans with Disabilities Act enforcement actions brought against small and medium business owners. The suits allege that the websites in question are not sufficiently accessible to individuals with disabilities. Accessibility can be achieved through various means such as using high-contrast color schemes and alternative text descriptions that can be read by screen-reading software for the visually impaired. There are considerable grey areas as to scope of the legal obligations in this regard, which exacerbates the situation. *This approach is reminiscent of the lawsuits that were commonly brought regarding unsolicited faxes in the early aughts. Keep your accessibility statement up to date and make sure it's easy to find – that is - it's accessible. Confer with your web team to ensure that you're adequately protected.*

CALIFORNIA CHARITY CLOTHING SCAM OPERATORS SENTENCED TO PRISON Operators of a charity scam in California have been sentenced to prison, convicted of conspiracy, mail fraud and tax evasion. Geraldine and Clayton Hill operated an organization that obtained more than $1.35 million in donated clothing, supposedly to provide assistance to needy persons. But they sold most of the donated items to assist themselves and their family members in obtaining luxury residences, automobiles and entertainment, making only about $13,000 in legitimate charitable expenditures. They also falsified tax returns and reports to government entities. They are supposed to spend prison time and pay restitution to the United States for tax evasion. *A hearing is to take place later that will determine how much restitution they must pay to those who contributed to their scam.*

POSTAL RATES TO INCREASE – Effective January 24, 2021, nonprofit postal rates will increase if the rate proposals are approved by the Postal Regulatory Commission. Within the category of Marketing Mail, nonprofit regular automation will see an increase for 19 of its 27 categories with some increases as much as 9 percent. Five of the categories would see rates drop as much as 5-7 percent. Eighteen of the 34 regular non-automation categories will see increases ranging from 0.2 percent to 9.1 percent. For the categories not facing an increase, rates are expected to drop from .02 -31 percent.

EMPLOYMENT

COURT EXPANDS WORKERS COMP FOR INJURIES DUE TO "COMMON BODILY MOVEMENTS" OR "ROUTINE EVERYDAY ACTIVITIES" - The Supreme Court of Illinois has overruled a number of prior case decisions to the extent that they held injuries attributable to "common bodily movements or routine everyday activities" are not compensable under Illinois workers compensation law. The ruling came in a case involving a restaurant chef who sought compensation for a knee injury that occurred as he stood up from a kneeling position while attempting to retrieve food from the restaurant cooler. He previously had surgery on that knee and received workers' compensation benefits at that time. However, the circuit court and Appellate Court hearing this case found that the chef was not entitled to compensation for an injury due to standing from a kneeling position. Those lower courts followed previous decisions that held compensation was not available for injuries due to "common bodily movements or routine everyday activities" unless a claimant could prove that his work exposed him to a risk of injury to a greater extent than the general public. The Supreme Court of Illinois has now reversed those lower courts and the previous decisions, holding that the chef was entitled to compensation because the act that caused his injury – standing from a kneeling position - was something his employer might reasonably expect him to do in order to perform his assigned job duties. He was injured on the job, no matter if the act of standing was common or everyday.

SUCCESSOR LIABILITY NOT APPLIED TO VIOLATION OF ILLINOIS HUMAN RIGHTS ACT – The Supreme Court of Illinois recently refused to adopt successor liability for violations of the Illinois Human Rights Act. A judgment covering back pay and pre-judgment interest had been entered against Oakridge Nursing & Rehabilitation Center, LLC for age and disability discrimination against a former employee in violation of the Act. That entity had already gone out of business and transferred the assets and operation of its nursing home facility to Oakridge Healthcare Center, LLC. The State of Illinois tried to enforce its judgment entered against Oakridge Nursing & Rehabilitation by suing Oakridge Healthcare. The Supreme Court held that it would not apply successor liability to cases involving violations of the Act, except in cases where existing limited exceptions to successor nonliability applied, such as when a transaction was entered into for a fraudulent purpose. That exception was found not to apply in this case and Oakridge Healthcare escaped liability. *The court said that the Illinois General Assembly had the power to abrogate the general common law rule of successor non-liability through appropriately targeted legislation for employment discrimination cases. But it hadn't done so.*

INTELLECTUAL PROPERTY

SUPREME COURT REFUSES TO PROVIDE GUIDANCE IN PATENT CASES - Generally, the Supreme Court doesn't like to provide guidance beyond what is necessary for the Justices to decide the cases before the Court. In line with previous decisions, the Court recently declined to review four patent cases in which the U.S. Court of Appeals for the Federal Circuit had invalidated patents for a number of claimed inventions. The issue in each case addressed the degree to which an abstract idea can be eligible for patent protection in the absence of an "added inventive concept." In 2014, the Supreme Court held that such additional novelty is required for protection. The courts and Patent Office have been grappling with the application of this requirement ever since. The cases the Court refused to hear involved patents for a smart garage door opener, a targeted advertising method, a process for producing surveys, and an innovation for eliminating coins from store transactions by giving shoppers store credit. The chair of the Senate Judiciary Committee, Thom Tillis (R- N.C.), had used the garage door opener case as an example of the need to reform patent law, saying that "nothing better demonstrates the madness" of patent eligibility law than the Federal Circuit's decision that a smart garage door opener involved only the patent ineligible abstract idea of "wirelessly communicating status information about a system." *By declining to review the scope of proper patent protection at this time, companies and their counsel must rely on the Supreme Court's 2014 ruling as interpreted by the lower federal courts.*

REGULATION

SCHOOLS LOOKING TO TAP INTO SPORTS BETTING CASH? – News that the University of Colorado has signed a five-year $1,625 million agreement with sports betting operator PointsBet may be the camel's nose in the tent showing that colleges and universities, hit hard by COVID-19, will turn to sports betting for cash. The National Collegiate Athletic Association, which regulates school athletics, has historically tried to keep sports betting away from its member institutions. But the schools badly need money, and if companies like PointsBet pay them for passive endorsements, that money isn't even taxed by the IRS. *The NCAA and college athletic conferences may continue to fight back politically. The Atlantic Coast Conference has asked Congress for a federal ban on college sports betting*

REGULATION (cont.)

DEBTOR NOT "CONFUSED" ENOUGH TO WARRANT PENALIZING DEBT COLLECTOR The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court's dismissal of a purported class action lawsuit that argued that he (the class) was "confused" by collection letters sent to him by a creditor and a debt collector and they therefore violated the federal Fair Debt Collection Practices Act. The creditor and the collector sent the debtor letters stating the amount of the debt, offering to resolve the debt, stating that interest and fees were no longer being added to the debt, and saying that "no interest will be added to your account balance through the course of" collection efforts. The debtor argued that this language was "confusing" and that the debtor believed the debt had been "charged off," meaning that the debt would no longer accrue interest or other fees for any reason. But the Court of Appeals said there was nothing wrong with these collection efforts because the letters sent to the debtor accurately disclosed the amount of the debt and did not imply fees or interest would be added in the future. The Court of Appeals also ruled that, even if collection efforts did imply that fees and interest would begin to accrue if the debt remained outstanding, that was not misleading because the law of Wisconsin, which governed in this case, provided for the assessment of fees and interest on "static" debts in certain circumstances.

TAXATION

ELECTRONIC TAX RETURN FILINGS REQUIRED FOR EXEMPTS – The federal Taxpayer First Act, enacted into law in July 2019, requires tax-exempt organizations to electronically file many information returns with the Internal Revenue Service instead of filing paper returns. The requirement first applies to Form 990 and Form 990-PF filings for calendar year 2020 tax returns and returns for a fiscal year ending on July 31, 2020. Form 990-EZ filing must be electronic for calendar year 2021 returns and returns for fiscal years ending September 30, 2021. Form 990-T cannot be filed electronically at present, and the Act's requirement for electronic filing doesn't apply to that form, but the IRS is planning to change its system to allow electronic filing of Form 990-T, possibly as soon as 2021. *In addition to these requirements, electronic Form W-2 and W-3 filings, currently required only for large employers, will soon be required for smaller employers as well. Every employer should be preparing to electronically file these forms when the requirement first applies to them.*

NEW IRS MEMO ADDRESSES ONLINE JOB PLACEMENT – The Internal Revenue Service has issued a Technical Advice Memorandum advising that a nonprofit operating an online job placement service was engaged in an unrelated trade or business that was subject to taxation under Internal Revenue Code Section 511. The Service concluded that the income produced from the service was not excluded from unrelated business income taxes as a royalty under Code Section 512(b)(2). *Tax exempts organizations have excluded considerable income from taxation as a royalty over the years. This time, the IRS said the organization was going a little too far.*

TAXATION (cont.)

2021 CONTRIBUTION AND BENEFIT LIMITS ANNOUNCED –The Internal Revenue Service has announced cost-of-living adjustments affecting contribution and benefit limitations for pension plans and other retirement-related items for tax year 2021. The limitation on deferrals under Internal Revenue Code Section 457(e)(15) for deferred compensation plans of tax-exempt organizations is $19,500, the same as for 2020. Other limitations are contained in Notice 2020-79, released by the IRS October 26. *Most limits for contributions and benefits have changed very little for 2021. But that's a change as compared with years before 2020. For example, the Section 457(e)(15) limit was $19,000 for 2019, $18,500 for 2018 and $18,000 for 2017.*

IRS POSTPONES CERTAIN DEADLINES DUE TO HURRICANE LAURA –The Internal Revenue Service has announced that it will be granting victims of Hurricane Laura extra time to file various individual and business tax returns. For example, deadlines for persons residing or having a business in the hurricane disaster area, previously set at any time from August 22, 2020 through December 31, 2020, have now been extended, in all cases, through December 31, 2020. This includes annual information returns of tax-exempt organizations. The tax relief granted initially applied to individuals and businesses in over 30 Louisiana parishes. But those persons in localities added to the disaster area later are going to receive the same filing and payment relief, and persons visiting the covered area who were killed or injured as a result of the hurricane will receive tax relief as well. *The IRS automatically identifies some taxpayers in a covered disaster area and applies filing and payment relief. Those with questions can call the IRS disaster hotline at 866-562-5227.*

BUSINESS LEAGUE EXEMPT STATUS DENIED – The Internal Revenue Service denied a Section 501(c)(6) business league tax exemption for an organization formed for the purpose of business and professional networking. Membership was restricted to one person from each particular business category. Each member was required to bring one guest each year to organization meetings, and the guest's profession must not overlap with that of an existing member. Members paid dues, and the organization held networking events with that money or on a "pay to attend" basis. The IRS denied an exemption because it found that the organization was not a "business league" with the purpose of promoting a common business interest, but performed particular services for members as a substantial activity, namely, attracting new clients for member businesses. By doing so, the organization was not operating for the improvement of business conditions generally in a line of business, but operating for the private interests of its members. *A "business league" is going to provide incidental individual benefits by improving conditions generally in a line of business, but it can't be operating to provide benefits to members as a substantial and not incidental activity*.

IRS DENIES TAX EXEMPTION TO IMPACT INVESTING NONPROFIT – The Internal Revenue Service has denied a tax exemption under Section 501(c)(3) of the Internal Revenue Code for a nonprofit created to "deploy capital into projects that promote a social good and that otherwise struggle to find financing in normal capital markets in low income and underserved communities." Capital for the nonprofit's work came from "impact investors," who made equity investments in pooled investment funds organized by the nonprofit and wanted to see their investments accomplish positive social and environmental objectives. The IRS didn't contest that the nonprofit was organized for purposes exempt under Section 501(c)(3) or that its activities furthered those purposes. But the Service denied the exemption because the nonprofit's impact investors expected to, and did, earn financial returns from their investments, even if they were at or below market rates and even if they helped to accomplish the otherwise laudable purposes of the nonprofit. *The IRS ruling fits in with the Internal Revenue Code language and previous IRS and court decisions denying exemptions for organizations pursuing exempt purposes by the wrong means, which, in this case, was the accomplishing of financial returns for investors.*

HOUSE COMMITTEE BERATES IRS FOR AUTOMATIC REVOCATION OF EXEMPTIONS – Seven members of the U.S. House of Representatives Committee on Ways and Means have sent a letter to the U.S. Department of the Treasury asking why many tax-exempt organizations have received correspondence indicating that their exemptions have been revoked automatically because they failed to file Form 990 information returns with the IRS for three straight years. The letter complains because (1) this is the most popular time of year for Americans to make charitable contributions, (2) organizations that should have had their exemptions revoked on May 15 of this year were given an extension by the IRS until July 15, and (3) there was a 20% increase in the number of charitable organizations that received exemption revocation letters between May 1 and October 8 of this year as compared to the number of organizations losing their exemptions during the same time period last year. This raises "serious questions," the letter said, as to whether the IRS's systems properly accounted for the extension of the filing date to July 15 and whether IRS processing and correspondence backlogs may have impacted the receipt of timely–filed Form 990s. In particular, the writers wanted to know why revocation notices were sent in August listing May 15 as a revocation date "when the IRS has not yet processed millions of pieces of unopened mail." Bottom line, the members of Congress wanted to know "how the Department of the Treasury and the IRS" will remedy this situation for all affected organizations before the end of October 2020. *The IRS has now admitted that the automatic revocation notices, in many cases, were erroneously sent, the organizations did not actually lose their exemptions, and the IRS is working to straighten things out*.

TAXATION

IRS WARNS OF NONCOMPLIANCE WITH TAX-EXEMPT RETIREMENT PLAN RULES

The Internal Revenue Service has issued FAQs on the tax consequences to participants and employers when deferred compensation retirement plans for tax-exempt organizations become "ineligible" due to their non-compliance with certain requirements. The IRS notes that Internal Revenue Code Section 457 (b) retirement plans are "eligible," and participants need pay no income tax on compensation deferred under such plans until compensation is distributed from the plan. But there are rules for "eligible" plans that (1) restrict participation to employees and independent contractors performing services for tax-exempt organizations and governmental entities; (2) limit a participant's annual deferrals under the plan ($19,500 for 2020); (3) require meeting specific distribution timing age 701/2 years or separation from service); (4) require that deferral elections be made the month prior to a deferral taking effect; and (5) treating amounts deferred as an asset of the employer subject to the reach of the employer's creditors (if the employer is nongovernmental). If these requirements are not met by a plan, participation must be limited to a select group of managers or highly compensated employees and the deferred compensation becomes taxable in the first year when the deferrals are no longer subject to a substantial risk of forfeiture to the employer's creditors. *The IRS notes its concern that there is an historical and ongoing pattern of noncompliance with the rules for these retirement plans. The Service is keeping an eye on them.*

NEWS AND EVENTS

Jon Howe recently gave the following presentations:

MPI Ottawa Chapter: "The Laws, They are a Changing"
Destination Caribbean-Mexico Conference: "The Lawyer is In"
Northstar: "New Contract Considerations for Live and Virtual Events"
Event Industry Council: "Contracts and Decision Making Pre, During and After COVID 19"

Jerry Panaro recently gave a presentation on COVID-19 Employment Issues for the Chicago Bar Association's Trade and Professional Associations Law Committee.

Naomi Angel is speaking about negotiation and risk management in regard to legal agreements including hotel and speaker contracts to the Nursing Organizations Alliance at its virtual Fall Summit Annual Conference.

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