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THE HOWE & HUTTON REPORT

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TRENDING NOW

DOJ BRINGS WAGE FIXING CHARGES – The Department of Justice Antitrust Division ("DOJ") has charged the former owner of a Texas-based physical therapist staffing company for conspiring with competitors to fix employee wages in violation of the Sherman Act. According to the indictment, the competing companies agreed to lower their physical therapists "pay rates." The conspirators communicated through text messages, and the indictment quotes statements among the conspirators to "collectively … move together" to lower pay rates for their employees. Under the Sherman Act, individuals convicted of price-fixing agreements face up to 10 years' imprisonment and a fine of $1 million. Both DOJ and the Federal Trade Commission have analogized wages to the "price" of labor. *Antitrust problems arise out of anticompetitive conduct in various markets for goods and services (such as labor). Criminal antitrust prosecution often leads to private plaintiffs challenging the same conduct in civil litigation and seeking damages. To avoid potential criminal and civil penalties, employers should be mindful that they do not engage in any conduct that may have the purpose or effect of restricting competition in the labor market.*

TRENDING NOW (cont.)

EEOC PERMITS EMPLOYER-MANDATED COVID-19 VACCINATIONS – The federal Equal Employment Opportunity Commission has published guidance indicating its acceptance of employer-mandated COVID-19 vaccinations with two exceptions. One is if an employee has a disability that prevents him or her from safely receiving COVID-19 vaccine. The other exception is if an employee objects to vaccination because of a sincerely held religious belief or practice. In that case the EEOC states that an employer should try to reasonably accommodate the belief or practice unless accommodation would create an undue hardship for the employer. *Note: the guidance from the EEOC is neither binding nor law, but represents the EEOC's current views on existing federal law. The EEOC notes that state and local laws may differ and employers should always review them before requiring that employees be vaccinated.*

WILL BUSINESS INTERRUPTION INSURANCE COVER COMMUNICABLE DISEASE? – The answer depends on the exact language in the policy. Some policies cover business shutdowns due to communicable disease contamination or infection, but other policies specifically exclude coverage for losses due to the spread of a virus like COVID-19. Still others have held that contamination of an insured's property is enough of a physical loss to require coverage by an insurer of business property. Additionally, a North Carolina state court recently held that government shutdown orders caused a physical loss to a group of restaurants, for which their insurance should have compensated them. However, insurers prevailed in defending themselves against business loss suits caused by government shutdown in California, Florida, Georgia, Illinois, Iowa, Kansas, Michigan, Minnesota, Pennsylvania and Texas. Even nonprofits may be able to collect on insurance when their "business" has suffered due to contagion and government protective action. As usual, stringent notice requirements may apply to claims filed too late. *Consult your insurance agent and your attorney for guidance*.

NONPROFIT

PROPOSED NEW SBA RULES MAKE CHURCHES AND RELIGIOUS BUSINESSES ELIGIBLE FOR LOANS – The Small Business Administration, in one of the last acts of the Trump Administration, proposed new rules making churches and religiously affiliated businesses eligible for small business loans. The proposed rules would do away with restrictions preventing taxpayer-backed loans from going to "businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting." The change in regulation would apply to for-profit businesses such as publishers of religious material that are affiliated with religious organizations, as well as nonprofit and tax-exempt places of worship. *The proposed new regulations face a lengthy approval process, starting with a public comment period.*

NONPROFIT (cont.)

IRS REVISES APPLICATION FOR EXEMPT 501(c)(4) STATUS – The Internal Revenue Service has issued a revised Form 1024-A, an application for recognition of tax-exempt status under Section 501 (c)(4) of the Internal Revenue Code, as well as instructions for filing. The application, revised to allow for electronic filing, is for nonprofits primarily organized and operated for the common good and general welfare, such as by bringing about civic betterment and social improvements. That doesn't include political activity. But if a group's primary purpose and activities are as stated in Section 501(c)(4), they are allowed to have incidental political activity. *The IRS user fee for filing the revised form, at least until the end of 2021, is $600, and it must be paid electronically from a bank account or by credit or debit card*.

HIGHER EDUCATION EMERGENCY RELIEF FUND GETS MORE MONEY – One provision of the Consolidated Appropriations Act of 2021, signed into law by President Trump December 27, 2020, allocated an additional $20.2 billion to public and private nonprofit higher education institutions through the previously established federal Higher Education Emergency Relief Fund. Recipients must continue to use at least half of this funding to provide emergency financial aid grants to students for expenses related to disruption of campus operations due to COVID -19. *Historically, black colleges and universities and Hispanic-serving institutions are eligible to receive grants with fewer restrictions from a portion of the Fund equal to $1.7 billion, while also being eligible to apply for grants from the more general $20.2 billion portion of the Fund.*

IRS NOTES PROCEDURE FOR CORRECTING REVOCATION OF EXEMPTION ERRORS – The Internal Revenue Service notes that exempt organizations failing to file Form 990 series information returns for three straight years may be subject to loss of exempt status. However, the Service notes that "there have been instances" where an organization met its filing requirement but the IRS revoked its exempt status anyway. If you believe your organization's exempt status was incorrectly revoked, you can send the IRS documentation, such as an IRS receipt for a filed return, showing that the three-year requirement has been met. The group's name will then be removed from the Service's Auto-Revocation List. *Such documentation can be sent to: Internal Revenue Service, 1973 North Rulon White Blvd., M/S 6552, Ogden, UT 84404, fax number 855-247-6123.*

NONPROFITS ESCAPE UNEMPLOYMENT TAX WITHHOLDING – The Internal Revenue Service has ruled that nonprofits exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code and established by a state are instrumentalities of the state. As such, their workers are not engaged in "employment" for purposes of the Federal Unemployment Tax Act. The ruling came at the request of two nonprofits established by a state university. As a result of the ruling, such organizations need not engage in federal unemployment tax withholding. On the other hand, the IRS noted that the organizations' employee wages are generally subject to taxes for Social Security and Medicare. *People responsible for calculating employment taxes and withholding have to work hard to keep up with changes in the law. Nonprofits had better make sure they have the assistance of experienced professionals in that area.*

NONPROFIT (cont.)

IRS ANNOUNCES NEW INITIATIVES AIMED AT TAX EXEMPTS – On January 5, 2021, the Internal Revenue Service Tax Exempt and Governmental Entity office announced several new initiatives aimed at exempt entities. First, they are going to review worker classification by exempt organizations to ensure they are not reducing their employment tax burden by incorrectly treating workers as independent contractors instead of employees. Second, they are going to review employee benefit plan participation to determine if plans are complying with vesting requirements and are accurately reporting other information on their Form 5500s. Third, they are reviewing Form 990-N postcard filings by supporting organizations exempt from federal income tax under Internal Revenue Code Section 509(a)(3), since most such organizations are ineligible to file Form 990-N and must file either Form 990 or Form 990-EZ. Fourth, they are going to check on excise tax payment by organizations paying over $1 million compensation to employees, since their information indicates organizations aren't properly reporting and paying a 21% excise tax on Form 4720. Fifth, they are going to investigate possible arbitrage violations by organizations investing tax-exempt bond proceeds in higher yielding investments. *The IRS updates compliance programs and priorities at the beginning of each fiscal year quarter.*

EMPLOYMENT

D.C. PROHIBITS NON-COMPETE AGREEMENTS – The District of Columbia Council recently passed the Ban on Non-Compete Agreements Amendment Act of 2020 and joins a number of other jurisdictions that prohibit employers from requiring employees to sign non-compete agreements. The law prevents covered employers from prohibiting employees from competing during their employment, does not have an income threshold, and applies to nearly all employees performing work in D.C. Additionally, the law prohibits employers from requiring or requesting that an employee sign an agreement with a non-compete provision. Existing non-compete agreements are excluded from the Act. However, any agreement with a non-compete provision entered into on or after the effective date of the law will be deemed void and unenforceable. Employers are also prohibited from maintaining workplace policies that prohibit employees from: (i) being simultaneously or subsequently employed by another person; (ii) performing work or providing services for pay for another person; (iii) operating the employee's own business; (iv) retaliating or threatening to retaliate against an employee for: refusing to agree to a non-compete provision; (v) failing to comply with a prohibited non-compete provision or workplace policy; and (vi) asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or workplace policy. The law requires employers to provide notice of these restrictions to employees and provides both an administrative complaint procedure and a civil right of action. Fines range from $350 - $3,000 per violation. *Courts have long disfavored non-compete agreements, and legislatures are increasingly following suit. Applicable laws vary widely, and the landscape is fast evolving. Whether you are the subject of a non-compete agreement or are looking to enforce one, counsel should be sought to ensure that the agreement in question is lawful and enforceable.*

EMPLOYMENT

APPEALS COURT FINDS EMPLOYEE PER DIEM PAYMENTS WERE WAGES – The U.S. Court of Appeals for the Ninth Circuit has held that a healthcare staffing company making per diem payments to workers for travel expenses was paying compensation for work, not business expense reimbursements. The court therefore concluded that such payments should have been considered part of the employees' regular rate of pay under the federal Fair Labor Standards Act and the California Labor Code. Key to the court's decision was the fact that the employer paid both traveling and non-traveling workers using the same per diem policies, reporting per diem payments to local, non-traveling employees as wages. Also important was the fact that the employer reduced per diem payments when an employee worked less than a scheduled shift, while hours worked in excess of those scheduled could be "banked" and used to offset missed or incomplete shifts. *This decision could have significant implications for employers with flat-sum or automatic expense reimbursement procedures not strictly dependent on expenses reported by employees, especially in states like California, where a worker's regular rate of pay is used to calculate not only overtime under federal and state law, but also double-time, sick leave and reporting time pay*.

FIRING FOR "REASONABLE CAUSE" REQUIRES DUE PROCESS – An employee was fired after allegations of sexual harassment were filed against him. The worker did not receive written notice of the charges or evidence against him or notice of the meeting at which he was terminated. But he did receive the notice of termination saying that the grounds for discharge included incompetence. He was told that he could request a written report, but when he requested one, it was not provided. A collective bargaining agreement governing the worker's employment provided that discipline could only be for reasonable cause and after a conference at which he was entitled to representation of his choice, as well as a written explanation for the discipline. The employee sued and a trial court dismissed the suit. The U.S. Court of Appeals for the Seventh Circuit reversed, saying that the collective bargaining agreement gave the employee a protected property interest for which he was entitled to due process before termination. *Failure to provide due process to an employee can result in liability for an employer that disciplines a worker without giving notice of charges and a reasonable opportunity to present a defense*.

COURT REJECTS DISCRIMINATION CLAIM AGAINST RESERVE DUTY PILOT TAKING MILITARY TRAINING – The U.S. Court of Appeals for the Seventh Circuit has reversed a lower court's dismissal of a suit filed against United Airlines by a pilot who claimed he was discriminated against because United didn't give him credit for leave to obtain military training that was required of him as an Air Force reservist. United didn't give the pilot credit for such leave taken in calculating pay and benefits under its profit sharing plan. However, United did give pay and profit-sharing credit for short-term leaves of absence in cases of jury duty and sickness. That was discriminatory, the Court of Appeals said, because the federal Uniformed Services Employee and Reemployment Rights Act requires employers to provide the same rights and benefits for military leave as it provides for comparable nonmilitary leave in connection with other absences. *Employers must not treat a reservist's request for required military leave any worse than the employer treats requests for comparable nonmilitary leave.*

TAXATION

RECEIPT OF PPP LOANS MAY TRIGGER STATE TAXES – The Internal Revenue Service has said that loans received under the federal Paycheck Protection Program are not taxable for federal tax purposes. What about state taxation? Many states generally follow the federal example in deciding what is and isn't taxable income. But not all states do. Some states are now specifically deciding that they won't tax such assistance, as New York State recently ruled. *Massachusetts, Virginia and Wisconsin are considering taxing such aid.*

EMPLOYER PARTICIPATION IN REPAYMENT ACT MAY GIVE STUDENT LOAN BORROWERS EXTENDED RELIEF – One of the provisions of the $900 billion coronavirus relief package proposed by President Biden and now being considered by Congress is a measure to relieve student loan borrowers of their debt by allowing employers to make payments for reduction of employee student loan debt tax-free. The Employer Participation in Repayment Act was originally passed by Congress as part of the CARES Act in March 2020. But the time period for such employer payments would be extended until January 2026 by the new legislation. *More than 271 lawmakers in the House and 64 Senators have co-sponsored the new legislation, which would allow employers to deduct payments for loan pay-offs as part of the $5,250 they are currently allowed to make for tuition assistance annually.*

CREDIT FOR PAID LEAVE EXTENDED – The U.S. Consolidated Appropriations Act of 2021 amended the Internal Revenue Code Section 458(i) tax credit for employers, providing paid family and medical leave to employees that are not eligible for leave under the federal Family and Medical Leave Act. The credit now ranges between 12.5% and 25% of the amount paid toward leave. It applies to employees who have been working with the employer for one year or longer and who, in the preceding year, did not have compensation greater than 60% of the highly compensated employee compensation limit for the prior year. *Among the amendments, the Act extended the 458(i) tax credit, which had been scheduled to expire at the end of 2020, to cover paid leave amounts provided prior to January 1, 2026.*

NEW LAW POSTPONES DEFERRED TAXES AS COVID RELIEF – The Internal Revenue Service has postponed the end date of the period during which employers must withhold and pay taxes under COVID-19 relief provisions of tax legislation recently enacted by Congress. The end date is postponed from April 30, 2021 to December 31, 2021, and associated interest, penalties and additions to tax for late payment of deferred taxes will begin to accrue on January 1, 2022 , rather than May 1, 2021. *The changes in law announced by the IRS modify previous advice from the Service based on the provisions of the Consolidated Appropriations Act of 2021.*

REGULATION

SBA ISSUES RULES ALLOWING SECOND DRAW PPP LOANS – The federal Small Business Administration has issued rules giving Paycheck Protection Program (PPP) loan recipients, including nonprofits, an opportunity to receive a second PPP loan. Eligibility requirements, to a certain extent, will be changed as compared with eligibility for PPP loans previously. Among other things, applicants for second loans must each employ 300 or fewer workers (compared with a 500-employee standard for an initial PPP loan). But hotels and restaurants may employ 300 or fewer employees per physical location. Applicants for a second loan must have used up all PPP loan funds received previously before a second PPP loan is disbursed, and they must demonstrate at least a 25% reduction in revenue in at least one quarter of 2020 relative to 2019. Most borrowers' maximum second draw loan amount will be capped at 2.5 times monthly payroll costs up to $2 million, except that eligible hotels and restaurants can receive a second draw loan of up to 3.5 times monthly payroll costs up to $2 million. *Importantly, "associations" are eligible for a second PPP loan only if they are tax-exempt under Section 501(c)(6) of the Internal Revenue Code, no more than 15% of their income comes from lobbying activities; lobbying activities comprise no more than 15% of their total activities, and they have spent no more than one million dollars on lobbying activities during their most recent tax year ended prior to February 15, 2020.*

SPECIAL ANNOUNCEMENT

HOWE & HUTTON IS PLEASED TO ANNOUNCE CHRISTINA M. PANNOS HAS BECOME A PARTNER OF THE FIRM

Christina serves as general counsel to multiple national and international trade associations, professional societies, charitable foundations and other related organizations. She also practices in the hospitality and meetings industries.

Christina specializes in contract drafting and negotiation. She has advised and represented clients regarding corporate and nonprofit structure and governance, intellectual property protection and registration, commercial real estate leasing, employment issues, ANSI and ISO standards development, certification and accreditation, antitrust, and data privacy.

Christina is a frequent speaker in the association world, as well as in the meetings and hospitality industries. She has presented to groups on issues including effective contract negotiation; licensing intellectual property; risk management; and data privacy, social media and security. Christina also has experience in the art world. She has managed and represented an international art gallery and has worked for major international auction houses and museums in London and Chicago.

Christina is an adjunct professor at DePaul University College of Law and teaches two legal drafting courses: *Art Market Transactions* and *Intellectual Property Licensing*.

Christina also serves as legal counsel to The Stork Foundation for Infertility.

In her spare time, Christina enjoys traveling, going to movies and spending time with her friends and family. She knows where to find a good restaurant in any city!

NEWS AND EVENTS

Jon Howe has been nominated to the Events Industry Council 2020 Hall of Leaders. Jon Howe is the first attorney to be nominated to the Hall of Leaders. The nominees will be honored along with the EIC Social Impact Award honorees during a March 25 virtual celebration.

https://usae.magtitan.com/magazine/issues/2-17-2021-hall-of-leaders/jonathan-howe

Mike Deese was a co-panelist at an AMC Institute Accreditation Workshop for association management company executives.

Nathan Breen recently presented a session on advanced nonprofit intellectual property issues to the Chicago Bar Association Trade and Professional Associations Law Committee.

Jerry Panaro is doing a presentation on USERRA (Uniformed Services Employment and Re-Employment Rights Act) to about 75 Marines of the 451st Combat Logistics Battalion on Feb 20 in Washington DC. The presentation will be virtual and for about an hour.

Jerry is a volunteer "ombudsman" with the District of Columbia Committee of Employers In Support of the Guard and Reserve (ESGR)

HOWE & HUTTON

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