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THE HOWE & HUTTON REPORT

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TRENDING NOW

EEOC GREEN LIGHTS VACCINATION INCENTIVES – The EEOC has confirmed that an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination. The new EEOC vaccine guidance makes clear that an employer may offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent as long as it is not so substantial as to be coercive. While the EEOC does not provide much detail on what is considered "coercive," the guidance states that very large incentives may be considered coercive because they can place pressure on employees to disclose protected medical information during the pre-vaccination screening questions process. However, the incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or its agent. *While employers have substantial latitude with respect to vaccination policies, there are exceptions. Employers should ensure that any decisions made comply with the most recent guidance and they should seek legal counsel when necessary.*

TRENDING NOW (cont.)

DEPARTMENT OF LABOR WITHDRAWS INDEPENDENT CONTRACTOR RULE – On May 6, 2021, the U.S. Department of Labor formally withdrew regulations promulgated earlier this year which set forth the analysis the DOL would use to determine whether a worker was an employee or independent contractor under the federal Fair Labor Standards Act. The regulations clarified the seven factors the DOL and most courts used to analyze a work relationship to determine whether workers are in business for themselves, and therefore independent contractors; or are economically dependent on an employer for work, and thus employees under the FLSA. The two core factors under the economic reality test were: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss. The withdrawal is currently subject to a legal challenge in the U.S. District Court for the Eastern District of Texas. If upheld by the court, the withdrawal means that employers will again have less clarity as to how the DOL and courts will determine independent contractor status under the FLSA. *Incorrect determinations in this regard can be disastrous for businesses as retroactive back pay is the primary measure of damages. Always consult with counsel regarding employee/independent contractor categorization*.

MISSOURI FEDERAL COURT DISMISSES BUSINESS INTERRUPTION INSURANCE LAWSUIT ARISING FROM PANDEMIC - A Missouri federal district court has thrown out a suit filed by Seoul Taco restaurant chain owners who sought to collect on their business interruption insurance because of a government shutdown order triggered by COVID-19. U.S. District Court Judge Ronnie L. White ruled that the owners weren't covered for forced closures during the pandemic because they didn't suffer a direct physical loss covered under their policy since the virus and shutdown orders didn't physically alter restaurant property. *Judge White explained that the virus can be cleaned and disinfected from property surfaces and so does not make property "unsafe and unusable" as required for a claim under the policy at issue in this case.*

JUDGE IN WASHINGTON TOSSES SUITS OVER BUSINESS INSURANCE FOR CORONA-VIRUS – A U.S. District Court judge in Washington state has dismissed ten cases consolidating hundreds of thousands of suits seeking business interruption insurance coverage for losses related to COVID-19. The judge explained that the "overwhelming consensus" is that the coronavirus only "hurts people," not property, and, for that reason, could not result in business losses. *Courts have been inconsistent in dealing with business losses alleged to have resulted from the virus. The judge is right, of course, if one's business has nothing to do with people. But how many of those are there?*

EMPLOYMENT

NONPROFIT REQUIRED TO PAY NEARLY $45,000 IN BACK WAGES TO WORKERS – The U.S. Department of Labor has required a Pennsylvania nonprofit to pay $44,858 in back wages to 80 employees for time spent at meetings and training outside of scheduled shifts. The Department noted that the meetings included discussion of policy changes, completion of required training and review of safety procedures – all so that the employees would be prepared to help at-risk youths served by the nonprofit. *While the nonprofit paid employees for time spent at meetings and training during scheduled shifts, it did not record and pay workers for time spent outside of their regular shifts. The Department considered that to be a violation of the federal Fair Labor Standards Act.*

EMPLOYEE WINS APPEAL DUE TO EMPLOYER'S INADEQUATE PERSONNEL RECORDS A black employee in a local Sheriff's Office was fired shortly after she asked for Family and Medical Leave Act leave. Prior to her request, the employee had been verbally counseled for poor performance. Two days after her request, her supervisor scheduled a disciplinary review board hearing for five infractions. The board, however, reviewed only one infraction – sleeping on the job – and recommended her termination. The employee sued, alleging violations of Title VII and the FMLA. In support of her claims, she noted that a white employee holding the same position had been counseled but not fired for sleeping on the job. The trial court dismissed her claims, finding that a variety of performance issues were legitimate reasons for her termination. The Sixth Circuit Court of Appeals reversed and found that the justifications offered were a pretext for discrimination. This finding was bolstered by the employer's more lenient treatment of the white employee. Although the Sheriff pointed to performance issues beyond the sleeping which may have been a sufficient basis for the disparate treatment, only the employee's sleeping was offered as a reason for termination. *In a cautionary tale for employers*, *lax performance records are often used by employees as the foundation for discrimination claims. Businesses are well advised to conduct and document regular comprehensive employment evaluations. Failure to do so can be costly.*

DEPARTMENT OF LABOR SUES EMPLOYER FOR FIRING WORKER OVER REPORTED COVID-19 CONCERNS – The U.S. Department of Labor is suing a Staten Island community health center and its CEO after one of the health center's workers was fired for reporting COVID-19 health and safety concerns, including possible exposure of workers to the virus and alleged lack of proper social distancing protocols. The worker had complained that attendance at a staff meeting could lead to transmission and contraction of the virus. The employee tried to reschedule the meeting by telephone, but after management refused the scheduling change. The employee wouldn't attend the meeting and was terminated. Thereafter, the worker filed an anti-retaliation complaint with the Department's Occupational Safety and Health Administration, asking a federal court to order the center to pay the worker damages, plus interest, for all past and future lost wages and benefits; appropriate front pay in lieu of reinstatement; reimbursement for costs and expenses; compensation for emotional pain and distress; and punitive damages in an amount to be determined at trial. *The Department maintains that the suit sends a clear message to employers that they are not allowed to punish workers for raising valid health and safety concerns related to COVID-19.*

EMPLOYMENT (cont.)

COMPANY MUST COMPLY WITH UNION REQUEST FOR RELEVANT INFORMATION – The U.S. Court of Appeals for the Seventh Circuit in Chicago has granted a request to enforce a National Labor Relations Board order requiring a company to provide a union with a complete record of new hires. The union contended that the company unlawfully discharged union officials and made unilateral changes to conditions of employment related to short-term disability leave, union access to new hires and employee shift schedules. Moreover, the union charged that the company failed to provide a complete record of new hires as reasonably requested by the union. The Court of Appeals concluded that the employer's justification for discharging the officials was pretextual, and substantial evidence supported the Board's findings concerning unilateral changes to conditions of employment. Furthermore, it was reasonable for the Board to conclude that the employer had failed to provide a complete record of new hires as requested by the union, which was relevant to charges filed against the employer by the union. *Employers must cooperate with reasonable union requests for relevant information relating to employment.*

NONPROFITS

NONPROFIT POSTAL RATES READY TO JUMP – The U.S. Postal Service has given notice to the Postal Regulatory Commission that it intends to increase rates for nonprofit mail, to take effect August 29, 2021. The rate increases will go from 5.7% to 14.6%, depending on categories of mail. Letters would increase 5.7%; flats 10.4%; parcels 8.6%; HD/Sat/CR letters 10.1%; HD/Sat flats 14.6%; and CR letters, flats and parcels 13.9%. *The increases may at least partially offset declining postal volume, which has resulted in declining postal revenue. However, the increases may actually cause a further decline in volume and revenue.*

IRS WARNS OF SCAMS - The Internal Revenue Service annually publishes a list of various scams of which you should be aware. This year, the Service notes that many crooks will impersonate the IRS or a person's family, friends or co-workers and ask for personal or confidential information by phone, email, text or social media. Some of these contacts will request information so that the recipient can claim a stimulus payment or unemployment compensation. Some will request clicking on a link that contains malware. But they will all turn out to be bogus. *If you receive one of these contacts, do not provide any information in response, deleting such contacts without opening them to the extent possible.*

ORGANIZATION LOSES EXEMPT STATUS FOR PROMOTING ART EXHIBITS – The U.S. Tax Court has revoked the tax-exempt status of a nonprofit under Section 501(c)(3) of the Internal Revenue Code after the court found the organization's activities to be primarily benefiting the private interests of a close group of persons that owned certain African art. *The nonprofit had been promoting exhibits of that art. Had the nonprofit itself owned the art, there might have been a different result.*

INTELLECTUAL PROPERTY

MINIMAL DAMAGES AWARDED FOR COPYRIGHT INFRINGEMENT – A recent case in the Eastern District of New York illustrates that even successful copyright litigation can be a high stakes gamble. In 2015, blogger Lee Golden used photographer Michael Grecco's photo of actress Lucy Lawless as her television character Xena to illustrate a story about a potential Xena series reboot on his blog, Film Combat Syndicate. In 2019, Grecco's attorneys contacted Golden and demanded $25,000 for copyright infringement – the same amount Grecco earned for his Xena photo shoot in 1997. Golden sued and asked the court to find that his use of the photo was a non-infringing fair use. The judge found that Golden's use of the photograph was not a fair use and rejected his innocent infringement claim. The court then proceeded to award Grecco minimum statutory damages of $750. In response to Grecco's demand for attorneys' fees, the court noted that the Copyright Act gives judges discretion to consider various factors, including "frivolousness, motivation, objective unreasonableness … and the need in particular circumstances to advance considerations of compensation and deterrence." Applying the factors, the court decided that because Golden "acted in good faith, immediately removed the offending post upon notice, and likely caused little or no actual damages," the statutory award served the purpose of the Copyright Act, thus making an attorneys' fee award unnecessary. Grecco's photo had a limited licensing history. He had licensed it only 11 times for minimal revenue, which may have influenced the court's decision to deny his attorneys' fee motion. *This case serves as an important reminder that litigation is uncertain and even a "win" might not justify the costs involved.*

GOOGLE COPYING CODE FROM ORACLE RULED FAIR USE – The U.S. Supreme Court has ruled that Google's copying of 11,500 lines of code from Oracle's Java SE was fair use, and therefore not a copyright infringement, because Google copied only lines of code needed to allow programmers to "put their accrued talents to work in a new and transformative program." The copied lines amounted to only 0.4 percent of Oracle's Application Programming Interface (API). They were "inherently bound together" with uncopyrightable ideas (the overall organization of the API), as well as the creation of new creative expression (code independently written by Google). These factors convinced the Court that Google's use of the Oracle Java SE was "fair." *The Court also determined that reimplementing an interface, as Google had done, can further the development of computer programs, and, in this case, was "consistent with the creative process that is the basic constitutional objective of copyright itself."*

TAXATION

PERSON WITH NO FORMAL ROLE IN ORGANIZATION MAY BE "DISQUALIFIED" – The U.S. Tax Court has held that a formal role in an exempt organization is not required for a person to be considered "disqualified" under Internal Revenue Code Section 4958(a)(1). The Internal Revenue Service was seeking to impose a 25 percent tax on an "excess benefit" provided by a charity to a "disqualified person." The Tax Court held that Vincent Fumo, a former state senator, was a "disqualified person" under Code Section 4958(a)(1) with respect to a charity that he had directed members of his staff to create, even though he had no formal role in the charity. Therefore, he was obligated to pay the tax on excess benefits he received from the charity, including $43,000 in tools and the use of charity-owned vehicles. Factors the Tax Court considered in determining that Forno was a "disqualified person" included his having founded the organization by directing his staff's creation of it, his significant authority over the charity's major decisions, and his having raised significant funds on the charity's behalf. *The Forno case shows that a person can be a "disqualified person" with respect to a charity even without any formal officer or director position if facts demonstrate that the person has had substantial influence over the organization.*

ONE NONPROFIT OWES ANOTHER ATTORNEYS' FEES FOR INFRINGING TRADEMARK – The U.S. Court of Appeals for the Fifth Circuit has held that the nonprofit Coalition for Better Government and its attorney and principal owe fellow nonprofit Alliance for Good Government nearly $150,000 in attorneys' fees after infringing a logo trademark. The infringement appears to have occurred largely in the endorsement of political candidates, which both parties participate in. The Court of Appeals decision was by a 2-1 vote, with a dissenting judge arguing that the Coalition shouldn't have been held liable for use of a logo in purely noncommercial political speech. *The dissenting judge said the ruling violated the Coalition's rights under the First Amendment to the U.S. Constitution, noting that neither party offers or advertises commercial goods or services. The extension of trademark law protection to political speech in this case is unusual, but, in this day and age, when so much political speech stirs up hard feelings, this kind of litigation may become more common.*

REGULATION

CALIFORNIA LAW REQUIRING NONPROFITS TO REVEAL DONOR NAMES TO STATE IS UNCONSTITUTIONAL – The U.S. Supreme Court has ruled, by a 6-3 vote, that a California law requiring nonprofits to reveal the names of their major donors to the state facially violates the U.S. Constitution. Chief Justice John Roberts, writing an opinion to strike down the California law, said the law had a "chilling effect" on speech and actual and potential donations to nonprofits. *In its ruling, the Court sided with two organizations that brought suit to challenge the law, Americans for Prosperity Foundation and the Thomas More Law Center.*

REGULATION (cont.)

BIDEN ISSUES EXECUTIVE ORDER TO PROMOTE COMPETITION, INCREASE GOVERNMENT CONTROL OF BUSINESS - President Joe Biden has issued an executive order aimed at promoting competition and increasing government control in the U.S. economy. It urges many federal agencies to crack down on anti-competitive business practices that keep prices high, reduce wages, exclude new businesses from markets, and give workers and consumers fewer options. Among other things, the President blamed abusive actions by monopolies and bad mergers that lead to massive layoffs. The President's order directs antitrust authorities to carefully review mergers and challenge prior deals that have closed. But the President also wants to end excessive internet contract termination fees; stop abusive practices of some meat processors from reducing the number of buyers for animals; require airlines to refund baggage fees for delayed luggage; allow hearing aids to be sold over the counter; end non-compete clauses for workers in many occupational licensing arrangements; make it easier for customers to switch banks and take transaction data with them; and restore net neutrality rules that require companies to treat all internet services equally. *The executive order will no doubt face opposition in Congress and the courts. The U.S. Chamber of Commerce has pledged to "vigorously oppose calls for government-set prices, onerous and legally questionable rulemakings, efforts to treat innovative industries as public utilities, and the politicization of antitrust enforcement."*

FCC ADVISES ABOUT ROBOCALLS – Do you hate robocalls? Most people do, and enough so that the Federal Communications Commission has provided advice on how to avoid and complain about them. First, a robocall is a call made with an autodialer or containing a message with a prerecorded or artificial voice. Many of them are legal, but the FCC does have rules relating to them. They require a caller to obtain the recipient's written consent before an autodialed or prerecorded telemarketing call or text can be sent to a home or wireless phone number. But there are exceptions, such as market research or polling calls, informational messages such as school closings, and, important to our readers, calls on behalf of tax-exempt nonprofit groups. FCC rules do, however, require that all prerecorded calls include identification of the caller at the beginning and a contact phone number. Further, telemarketers must allow recipients to opt out immediately at the outset of the call, and the mechanism for opting out must be available throughout the call. As for complaints from recipients, they can be made with the FCC at *www.fcc.com/complaints*. *The FCC isn't the only government entity that sometimes regulates robocalls. Upset recipients of calls of robocallers can contact the Treasury Inspector General for Tax Administration (TIGTA) at www.tigta.gov or 800-366-4484. Finally, if telemarketers engage in fraud or disregard a do not call warning, a complaint can be filed with the Federal Trade Commission at www.ftccomplaintassiatant.gov.*

NEWS AND EVENTS

Jon Howe recently spoke about hotel contract shortfalls for events at Northstar Meeting Group's-Destination Caribbean at the Ritz Carlton In Aruba.

Jon recently did a Q&A with members of the New England Society of Association Executives.

Jon will be a speaker for the Global Enterprise Solutions Meetings & Incentives Worldwide, Inc. Industry Future Forward Virtual Panel on Monday, August 9th.

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