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THE HOWE & HUTTON REPORT

TRENDING NOW

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TSA CRACKDOWN ON POWDERS IN CARRY-ON LUGGAGE – Since last summer, the Transportation Security Administration (TSA) has been inspecting carry-on luggage with containers of powder that are at least 350 millimeters (roughly the size of a pop can). Beginning June 30, 2018, TSA will ask foreign airports sending flights directly to the US to also crack down on searching carry-on luggage with powder containers. TSA may also ask passengers to remove smaller containers of powder for additional screening, much like liquids. To be clear, this security measure is not a ban, but travelers are still taking a risk that they will be asked to throw away souvenir or personal items that may look suspicious. *TSA recommends checking your protein powders, cosmetics, and souvenir spices to avoid backups in the security line.*

DR. DRE CAN'T PREVENT REGISTRATION OF "DR. DRAI" – The Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office has refused to allow rapper and record producer Dr. Dre to prevent registration of "DR. DRAI" as a trademark by a Pittsburgh gynecologist named Dr. Draion M. Burch, who engages in media appearances and speaking events. Dre claimed that Burch could be confused with him because they both engage in entertainment and "Dre" and "Drai" are pronounced the same. In addition, Dre claimed that Burch's use of "DR. DRAI" falsely implied a connection between the parties. However, the Board said that Burch, who has been known as "Drai" all his life, was entitled to the registration because his entertainment and motivational speaking services are specifically limited in content to osteopathic medicine, obstetrics and gynecology, "a subject matter which is obviously far removed from music." *People in completely different fields are often allowed to register identical or very similar trademarks if there is little likelihood of public confusion as a result. The gynecologist testified that he really didn't want to be confused with the rapper because "it's a bad reflection on me as a doctor."*

TRENDING NOW

TRUMP IMPOSES TARIFFS ON ALLIES, WHICH THREATEN RETALIATION – The Trump Administration has imposed tariffs on goods imported from the closest American neighbors and allies, including Canada, Mexico and the European Union, which swiftly threatened retaliation. Trump rejected exemptions so that America’s friends would not be affected by a U.S. 25% tariff on imported steel and a 10% tariff on imported aluminum previously imposed by the Trump Administration. Canada now has threatened to impose a 25% tariff on steel imports, a 10% tariff on aluminum imports, and tariffs on whiskey, ketchup, toilet paper, ballpoint pens and other American products imported to Canada, while commencing trade litigation against the U.S. Mexico said it would levy tariffs on some American steel and pipe products, lamps, berries, grapes, apples, cold cuts, pork chops and cheese products “up to an amount comparable to the level of damage” linked to U.S. tariffs. The EU said it would levy tariffs on about \$7.5 billion of U.S. products, including steel, motorcycles and some agricultural products, while filing a complaint against the U.S. with the World Trade Organization. *The Trump Administration argues that national security justifies its actions. Opposition to them is coming from Democrats and other Republican leaders. But Trump’s authority to impose the tariffs hasn’t been seriously questioned in the U.S.*

JUDGE ENJOINS TRUMP FROM CUTTING PLANNED PARENTHOOD GRANTS – A federal judge in Spokane, WA has issued an injunction preventing the Trump Administration from cutting grants to Planned Parenthood for a teen pregnancy prevention program. Judge Thomas Rice ruled that the U.S. Department of Health and Human Services “arbitrarily and capriciously” terminated the program, and he issued the injunction because “the public interest” weighed in its favor “as it would prevent harm to the community and prevent loss of data regarding the effectiveness of teen pregnancy prevention.” *A Department of Justice attorney, arguing for HHS, said the program had been created by HHS and could be ended by the Department at any time. However, federal district court judges are increasingly using their power to usurp such government funding decisions, pending reversal of their rulings by higher courts. President Trump has decried such district court actions, which, temporarily at least, have nationwide effect, noting the length of time it normally takes for appeals in such cases to wend their way through the federal court system.*

HACKING SUIT AGAINST BARNES & NOBLE PROCEEDS – The U.S. Court of Appeals for the Seventh Circuit has reversed a lower court decision to dismiss a consumer class action suit against Barnes & Noble, Inc., arising from computer hacking that compromised customer names, card numbers and expiration dates. The complaint alleged that Barnes & Noble owed members of the class money because some class members lost use of their funds while waiting on banks to reverse unauthorized charges, some spent money on credit monitoring services, and some had to acquire new account numbers. While the lower court dismissed the suit because it found that the class didn’t adequately plead what their damages were, the Court of Appeals found that federal rules of procedure allowed the suit to survive a motion to dismiss, subject to further legal proceedings, based on a general allegation that the class members had been injured. *Suits arising from computer hacking continue to crop up. These suits are sometimes being stymied and sometimes not. But the current cases at least give warning to those who collect consumer information, including credit card information, that they should be on guard to protect it.*

EMPLOYMENT

CALIFORNIA COURT CHANGES RULES FOR WORKER CLASSIFICATION – In a decision some critics called a “contractor apocalypse” and a “seismic shift,” the California Supreme Court has scrapped a test used for nearly 30 years in that state to determine whether a worker is an employee or an independent contractor. Under that *Borelo* control test, numerous factors had to be balanced, none of which was more significant than the others. But now, the court says it will presume all workers are employees unless proven otherwise, and three factors must all point to an independent contractor relationship if workers are to be proven contractors: (A) the worker must be free from the direction of the hiring entity in performing work, both under contract and in fact; (B) the worker must perform work outside the usual course of the hiring entity’s business; and (C) the worker must be customarily engaged in an independently established trade, occupation or business. As explained by the court, the third factor of the new test will be particularly hard for employers to meet. The court said that independent contractors can be expected to have “independently made the decision to go into business” and “taken the usual steps to establish and promote” that independent business, such as incorporation, licensure, advertisements, and “routine offerings to provide the services of the independent business to the public or to a number of potential customers.” *Strictly speaking, the new decision by the California Supreme Court will apply only to wage claims in that state. States like Massachusetts and New Jersey previously applied tests favoring a finding that workers are employees. However, given the influence of the California court, its new “ABC” test will likely be adopted by courts in numerous other cases beyond the borders of the Golden State.*

SUIT FOR PAID LEAVE DURING NATIONAL GUARD SERVICE REJECTED – A federal judge has dismissed a suit filed by a Joliet, IL police sergeant who was denied paid leave during service with the National Guard. The sergeant sued the City of Joliet and two police officials under the federal Uniformed Service Members Employment and Reemployment Act, which bars employers from discriminating or retaliating against employees because they serve in the uniformed services. But the judge found that the Act only applies to members of the National Guard when their unit is under federal control, as when the President federalizes the Guard to beef up the active armed forces during wartime, assist in hurricane relief and deal with rioting and other civil unrest. In this case, the judge noted that the sergeant received his deployment order from an Illinois state official, and the Illinois Governor was serving as the sergeant’s commander-in-chief at the time. *Control of the National Guard is divided between the federal government and the states, and the sergeant, unfortunately, got caught on the wrong side of that division.*

EMPLOYMENT

COURT REJECTS BROAD COVENANT NOT TO COMPETE – A federal judge rejected enforcement of a noncompete agreement signed by a former executive when he left a staffing agency. The agreement was an 18-month ban on working for any such employer with an office within 50 miles of the agency’s. The executive argued that it would prevent him from working as a janitor at another company in the staffing industry. While the judge found that example “a bit far-fetched,” she concluded that the agreement was too broad, noting that, if enforced, it would prevent the executive from taking any number of more plausible roles at another industry player “no matter how far removed from actual competition” with the former employer. In particular, the judge faulted the agreement for preventing the executive from taking positions having no connection to the work the executive did for his former employer, saying “without some connection to the work he did..., this restriction cannot possibly serve to protect a legitimate business interest of (the former employer) and is in essence an impermissible restriction on competition...” *Covenants not to compete are disfavored by the law and are held to a very high standard. It is not unusual that a court will refuse to enforce them, sometimes because they are too restrictive as to time, extending for a period of years, and sometimes, as in this case, because they aren’t tailored to a particular type of work.*

NO DISCRIMINATION IF JOB ENVIRONMENT IS “HOSTILE” AS ADVERTISED – The U.S. District Court for the Northern District of Illinois has rejected an employment discrimination suit partly because the worker’s job environment was “inherently hostile.” The employee worked at a treatment center for the mentally ill. She received specialized training on how to deal with disruptive residents and even defend herself if necessary. But, after working at the facility for nearly 15 years, suffering racially derogatory name-calling, threats and one attempted assault, all from one particular resident, she requested a transfer, was placed on administrative leave, and sued her employer on various grounds, including a “hostile work environment” claim under the federal Civil Rights Act. The court dismissed her claim that her employer subjected her to a hostile work environment because “she was hired into a working environment that might be inherently hostile” and accepted the position knowing that she would have to deal with people who were severely mentally ill. *Interestingly, the court noted that the worker’s claim of a hostile working environment might not have been rejected if it was a supervisor or co-worker who was the source of the behavior that made the work environment hostile, rather than a mentally ill resident under her supervision.*

REGULATION

STATES TACKLE PRICE GOUGING BY DRUG COMPANIES – A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit has declared unconstitutional a Maryland law giving the state attorney general the ability to regulate generic drugs, monitoring price changes and seeking fines or court orders to reverse price increases dubbed “gouging.” The bill is similar to legislation considered in other states, including Illinois. The Court of Appeals said the law violated the commerce clause of the U.S. Constitution because it affected trade extending beyond Maryland’s borders. *Critics of this legislative initiative note that the bills being considered in some states regulate generic drugs but not price increases for patented brand name drugs sold by large pharmaceutical companies. In fact, it is argued that the legislation may scare some companies out of the business of making generic drugs and promote drug price increases.*

NON-PROFITS

NONPROFITS HIT FOR PAYING LOW WAGES TO DISABLED WORKERS – Two nonprofits in Illinois and Washington were recently ordered to pay back wages to disabled workers who were being paid below minimum wage. The U.S. Department of Labor allows payment of lower wages to disabled workers if their employers obtain a certificate from the Department based on a showing that the lower wages are justified due to hindered employee work capacity. But one of these nonprofits failed to obtain a certificate, while the other hid information from the government about the work its disabled employees were performing, failed to conduct wage surveys required by federal law, and sometimes paid disabled workers with gift cards instead of wages. *Some nonprofits may want to provide therapy, education and work opportunities for disabled individuals, and they may not be able to pay such workers as much as other employees. Still, they have to follow the Department’s rules permitting such pay disparities. One of the nonprofits recently punished by the Department was paying disabled workers 16 cents per hour while handing out large executive bonuses. This is not the way to win friends at the Department.*

COURT REJECTS CITY ORDINANCE PROHIBITING POSTED ADS – *H&H Report Update*
A federal judge has held unconstitutionally vague a Chicago city ordinance prohibiting the posting of commercial advertisements on lampposts, fire hydrants and other public surfaces. A nonprofit publishing organization challenged the ordinance in court, fearing that it would be applied to such an entity, and the judge said that it might apply to a nonprofit bar association that invites members to have lunch with federal judges and charges \$10 a person to help cover the cost of food. Said the judge, “How would a reasonable person determine whether a flyer promoting such an event, posted on a light pole...right outside The John Marshall Law School, would constitute prohibited ‘commercial advertising material’? Or what if the flyer referenced the event but made no express reference to the price for lunch...?” Because of such concerns, the judge ruled the ordinance violated the due process clause of the U.S. Constitution, since it allowed enforcing officials to make “wholly subjective and arbitrary decisions” about what was commercial advertising. *It didn’t help the ordinance’s chances that, after arguing “commercial advertising material” has a common sense meaning, the City gave conflicting definitions of the term in filings with the court. But one wonders if the possible application to a bar association might have been the ordinance’s downfall.*

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NON-PROFITS

ASSOCIATION WINS TCPA CASE – A federal district court in Louisiana has rejected a suit that alleged violations of the federal Telephone Consumer Protection Act by the American Heart Association, Anthem, Inc. insurance company, and Anthem Foundation, Inc., the insurer’s nonprofit affiliate. The suit alleged that unwanted text messages had been sent to the complaining parties by the defendants. However, the court found that the complainants had consented to receiving the text messages, which were sent by the AHA and concerned CPR and healthy living. The plaintiffs’ theory was that, while they had consented to receiving informational messages from the Association, these texts mentioned the Anthem Foundation and were, in fact, disguised commercial messages intended to promote brand awareness for Anthem insurance. But the court examined the text messages, found they did not contain information about purchasing insurance, and ruled that they were exactly the type of informational messages to which the plaintiffs had consented. Moreover, the court said that the fact the messages contained links to CPR course providers, whether for pay or free, did not convert the messages into commercial texts prohibited by the Act. *In this case, the Anthem Foundation was supporting the Association’s campaign to help people respond to a cardiac arrest, and no doubt helped pay for the messages partly to promote the Anthem name. Many nonprofits receive similar assistance from for-profits that benefit from connecting themselves with a worthy cause. But this case shows that people consenting to receipt of informational messages from a nonprofit may be deemed to have consented to dissemination of such messages even if a for-profit may have benefited indirectly from that dissemination, provided the messages do not explicitly promote the for-profit’s products and services.*

INTELLECTUAL PROPERTY

DON’T MONKEY AROUND WITH THIS COURT – *H&H Report Update* – The U.S. Court of Appeals for the Ninth Circuit in San Francisco has upheld a lower court decision that animals can have no copyrights in photographs. The decision came in the famous “monkey selfie” case involving rights to photos taken by a crested macaque named Naruto using an unattended camera. The Ninth Circuit court said that Congress could amend the Copyright Act to allow assertion of copyrights by or on behalf of nonhumans. However, the appeals court said the current Act has no provision for such a thing. *People for the Ethical Treatment of Animals had sued the owner of the camera to obtain financial control of the photographs on behalf of the monkey, leading PETA and the camera owner to reach an agreement under which 25% of any future revenue derived from the monkey photos will be used for the protection of crested macaques in Indonesia, where Naruto resides. Both parties wanted the Ninth Circuit to dismiss the lawsuit without a decision after that settlement was reached. But the appellate court refused, saying that its decision in such a “developing area of the law” would help guide lower courts. Furthermore, the Ninth Circuit felt that the far from unfriendly parties in this case were both inclined to “manipulate” the law on behalf of nonhuman photographers, and the Ninth Circuit wanted none of that.*

TRAVEL

HOTELS SUED FOR ALLEGED AGREEMENT ON BIDDING FOR KEYWORDS – A class action lawsuit has been filed against six major hotel chains, claiming that they agreed not to bid on computer search keywords that contain competitor brand names. (So, for example, Hyatt would not bid on “Marriott” as a computer search keyword.) The same suit alleges that the hotel chains agreed to force online travel services like Priceline and Expedia not to bid on hotel-branded keywords. The suit claims that the hotel chain agreements “effectively reduced the ability for consumers to conduct a reasonable comparison between various hotel chains to get the best price for their hotel rooms.” *Do you want to conduct a computer search for “Hilton,” for example, and have a bunch of hits for Wyndham hotels pop up? The lawsuit claims that consumers need to be able to obtain such search results and that it would be a violation of the antitrust laws for the hotel chains to agree on preventing it.*

TAXES

USE OF STANDARD MILEAGE RATES SUSPENDED – The Internal Revenue Service has published a notice addressing the suspension of standard mileage rates for taxpayer use in computing income tax deductions for automobile operation. For tax years beginning after December 31, 2017, the new federal tax law suspends all miscellaneous itemized deductions. Consequently, standard mileage rates cannot be used to claim such deductions for unreimbursed employee travel expenses or moving expenses. The new tax law did not change deductions used in determining adjusted gross income, such as deductions provided to members of the Armed Forces, state and local government officials and certain performing artists for travel and moving expenses. The new tax law does, on the other hand, increase to \$50,000 the allowable depreciation for passenger automobiles used in business (including trucks and vans) under a fixed and variable rate plan, provided they were placed in service after December 31, 2017. *Congress and the IRS giveth and taketh away.*

EXEMPTION REVOKED FOR PRACTICING LAW WITHOUT LICENSE – The U.S Tax Court has upheld the action of the Internal Revenue Service in revoking, retroactively to 2010, the tax-exempt status of the “Association for Honest Attorneys” (we kid you not). The nonprofit was used substantially by its founder to practice law without a license. In addition, the founder used the nonprofit’s corporate funds for home and automobile expenses, and the organization published news updates on the founder’s being “falsely” jailed for hosting an underage drinking party, as well as decrying “how govt officials continue to try and thwart a Medal of Honor Award” for the founder’s father. All things considered, the Tax Court agreed with the IRS that the nonprofit was operating primarily for the benefit of private rather than public interests, with much of its net earnings inuring to the benefit of the founder. *While she was practicing law without a license, the founder really should have read up on the laws governing exempt organizations. The primary activity of a tax-exempt organization must be pursuing at least one public purpose, and any inurement of income to corporate insiders can kill an exemption.*

HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe presented an educational session for meeting professionals (both planners and suppliers) entitled, “Disruption in the Market Place – Contract Issues.” Material presented covered basic negotiations and “contract orphans” often referred to as “boilerplate” issues.

He also did an in house session for a client entitled “Negotiating and Contracting In Today’s Environment. He led a panel discussion on legal issues which included harassment, marijuana issues at meetings, and force majeure for key corporate and association meeting professionals.

Jerry Panaro participated in an AMC Institute Webinar on Sexual Harassment and the Workplace - Creating a Respectful Workplace : The Legal and HR Perspective.



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