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THE HOWE & HUTTON REPORT

Volume 2019, Issue 11

TRENDING NOW

TRUMP EPA REPEALS OBAMA-ERA WORKPLACE CHEMICAL RULES – The U.S. Environmental Protection Agency has issued a final rule repealing much of the Obama-era Clean Air Act Risk Management Plan (RMP) regulations applying to facilities that use hazardous substances. Among other things, the new final rule will relax requirements related to technology and alternatives analyses, disclosures, third-party audits, incident investigations, and local emergency coordination. In addition, the new rule is intended to make RMP requirements more consistent with rules under the Occupational Safety and Health Act relating to the management of regulated chemicals, which, in some respects, carry less significant penalties for noncompliance. *The Trump Administration proposed amending RMP requirements in May 2018, but it had to deal with 77,360 submitted comments on its originally proposed rule, which partially accounted for the delay in finalizing a new rule. But the "final" rule may not be all that final, as many states and others are expected to challenge it in court.*

EMPLOYMENT

TITLE VII LIMITATIONS PERIOD CAN'T BE SHORTENED BY CONTRACT – The U.S. Court of Appeals for the Sixth Circuit has taken up the issue of whether employers can contract with workers in a way that shortens the amount of time employees have to file complaints for employment discrimination under Title VII of federal civil rights legislation. An employee had signed a job application that established a six-month limitations period for bringing any lawsuit against the employer, waiving any applicable statute of limitations. But the employee then resigned from her job, allegedly because of discrimination by the employer, waiting until 216 days later to file charges with the federal Equal Employment Opportunity Commission (EEOC). Too late, said the employer, citing the limitations period in the contract. But the Court of Appeals has ruled that the contract limitation was invalid, and the court allowed the worker to continue with discrimination claims against the employer, because the Court of Appeals concluded that the contract was improperly shortening periods for bringing suit specified in Title VII. *The Court of Appeals noted that a contract of employment might limit the time for bringing a suit against an employer under some federal statutes not themselves containing a specification of the time for bringing suit, such as the Employee Retirement Income Security Act (ERISA). But the Court of Appeals ruled that Title VII contains limitations periods that constitute a non-waivable substantive right.*

APPEALS COURT AFFIRMS PROHIBITION OF SECONDARY BOYCOTT – The U.S. Court of Appeals for the Ninth Circuit has agreed with two other federal courts of appeal and a 1951 U.S. Supreme Court decision that "secondary boycotts'' are not protected by the First Amendment to the U.S. Constitution. In doing so, the Ninth Circuit affirmed an order by the National Labor Relations Board finding that unionized employees of a subcontractor performing work at a construction site violated the National Labor Relations Act during a strike by delivering flyers to, texting and calling "neutral employees" of another subcontractor in an effort to get them to stop working. The union conceded that the Act prohibited such "secondary boycotts." But the union unsuccessfully argued that such a prohibition unconstitutionally violated the union's "free speech" rights, seeking to rely on case law that indicated "content based" restrictions on speech violate the First Amendment. *The Ninth Circuit distinguished "content based" restrictions from "purpose based" restrictions on speech, said the NLRA's secondary boycott restriction was the latter, and found that it was not unconstitutional for the NLRA to prohibit communications made to neutral employees for the purpose of inducing a secondary boycott.*

EMPLOYMENT (cont.)

SUIT FOR ALLEGED POLITICALLY MOTIVATED FIRING REJECTED – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court's grant of summary judgment for the defendants in a suit claiming that a geologist was fired from the Indiana Department of Transportation (INDOT) because of his political activities and affiliation, violating his First Amendment rights. The Court of Appeals found that the geologist had multiple disagreements with supervisors and was ultimately terminated, INDOT said, "because his behavior consistently defied INDOT culture and expectations." According to the Court of Appeals, the geologist presented "a long string of facts occurring over four years, but no evidence that his political activities or affiliation motivated his firing." The evidence, instead, showed that management had taken issue with the employee's conduct for years, but the decision to fire him was made after he made offensive comments during a training session. *If an employer has valid reasons for terminating an employee, it should create a record showing that the employer has been tolerant of poor behavior and tried to remedy it by counseling and disciplining the employee. Failure to create such a record can lead to charges that the "real" reasons for a termination were improper.*

McDONALD'S NOT A JOINT EMPLOYER WITH CALIFORNIA FRANCHISEE – *H&H Report Update* **-** The U.S. Court of Appeals for the Ninth Circuit has held that McDonald's is not a joint employer with its franchisees under California wage and hour law because it does not have direct control over employees or "suffer or permit" them to work. A group of workers had sued a California partnership that operated eight McDonald's franchises in the San Francisco Bay area. But they also sued McDonald's, claiming that the franchisor and the franchisees were jointly in violation of California's wage and hour laws because the workers were denied overtime premiums, meal and rest breaks, and other benefits. McDonald's filed a motion for summary judgment, and the trial court, as well as the Ninth Circuit, has found in favor of McDonald's, concluding that any control McDonald's had over the workers was geared toward quality control of products and services at McDonald's restaurants and maintenance of brand standards. But that didn't meet any definition of an employer under California law, because, among other things, McDonald's didn't exercise control over the wages, hours or working conditions of the workers. *The Ninth Circuit ruling is a major victory for franchisors across the country, which includes nonprofits licensing use of their names and other trademarks to franchisees. Had the Court of Appeals ruled differently, franchisors might have been saddled with significant potential liability under California law, and federal and state courts in other jurisdictions might have followed the Ninth Circuit's precedent.*

EMPLOYMENT (cont.)

FIRING OKAY WHEN DRUG TEST MAY HAVE REVEALED LEGAL DRUGS – The U.S. Court of Appeals for the Tenth Circuit has upheld an employer's termination of a worker for a failed random drug test even though the employee contended that he was only taking a legal sinus medicine. The drug test indicated that the employee was taking illegal methamphetamines, and the Court of Appeals found that the test met all government requirements. But the employee backed up his claim with a doctor's letter confirming that the worker was taking Sudafed, a legal drug that contains a key ingredient amateur chemists have sometimes used in making illegal substances. Key to the Court of Appeals decision was Equal Employment Opportunity Commission (EEOC) guidance that a test for the illegal use of drugs does not necessarily become an illegal medical examination relating to a disability just because it reveals the potential legal use of drugs. *Okay, but was this employee fired just because he had a sinus condition? Even if legal, was the termination the right thing to do? One thing for sure, there are alternative sinus medicines, and workers (and their doctors) ought to at least think about them if a worker has an employer who is implementing drug tests.*

5-HOUR ENERGY CLEARED OF ANTITRUST VIOLATIONS, BUT AT A COST – A jury has rejected a charge that the maker of 5-Hour Energy, Living Essentials LLC, engaged in illegal price discrimination when it offered Costco lower wholesale prices and instant rebates that were not available to other retailers. The charge was brought under the federal Robinson-Patman Act, a complicated piece of legislation that generally makes it illegal for sellers to discriminate in price between purchasers of products of like grade and quality when the effect is to substantially lessen competition or create a monopoly. In defending, Living Essentials argued that Costco was in a different market channel and not a competitor of the complaining retailers. *We don't see many Robinson-Patman Act cases these days, largely because there are significant defenses and exceptions to liability under the Act, some specifically applicable to nonprofits. But this case illustrates the difficulties nonprofits and their member companies may face if charged with antitrust violations under the R-P Act or other antitrust laws, namely, that they can still lose overall when they win a final judgment in court. Living Essentials spent a considerable amount of money defending itself, what with legal fees and payments to expert witnesses to testify on pricing and market analyses. Furthermore, press coverage of the case, and discovery of potentially embarrassing Living Essentials e-mail correspondence, could have a negative impact on public relations for that company. Some nonprofits and companies have insurance protection that may cover at least some antitrust liability and expenses. But getting involved as a defendant or potential defendant in an antitrust case is something most nonprofits and their members would be much better off avoiding whenever possible.*

NON-PROFIT

NONPROFITS LOSE SOME PROTECTION FROM LOBBYING ORDINANCE – Effective January 1, 2020, nonprofits will lose some protections they previously enjoyed from the lobbying registration and periodic reporting requirements of Chicago's Governmental Ethics Ordinance, which applies to those seeking to influence city government and is administered by the Chicago Board of Ethics. The ordinance previously indicated that those requirements didn't apply to any volunteer, employee, officer or director of a not for profit entity seeking to influence legislative or administrative action solely on behalf of that entity, unless that individual was compensated and the nonprofit lobbied on behalf of for-profit entities or individuals engaged in a for-profit enterprise. But the ordinance has been amended, effective January 1, 2020, to delete that provision for nonprofit personnel. *The general protection from lobbying registration and reporting requirements for nonprofits will be gone beginning next year. But the ordinance does, more specifically, exempt from those requirements persons who, either as a member of, or on behalf of, a not-for-profit entity: (1) undertake nonpartisan analysis, study and research; (2) provide technical advice or assistance; or (3) examine or discuss broad social, economic and similar problems.*

NCAA TO LET STUDENT-ATHLETES PROFIT FROM ENDORSEMENTS – The National Collegiate Athletic Association, regulator of college sports in the U.S., is responding to pressure from lawmakers and moving toward allowing college athletes to profit from endorsements. The association's governing board has directed its three divisions to consider changes in their rules that would permit student-athletes to profit from uses of their names and likenesses, including uses in various electronic games. The divisions are directed to make such rule changes effective no later than January 2021. It will represent a major change in policy for the NCAA, which, for many years, has tried to preserve the amateur status of college athletes. *The NCAA's move came a month after California legislators passed a law requiring schools in that state to allow their athletes to earn endorsement money*.

REGULATION

FEDERAL LAWS DON'T PREEMPT STATE BIOMETRIC PRIVACY ACT – A federal judge has ruled that the Illinois Biometric Privacy Act (IBPA) is not preempted by federal law. The decision came in a suit against the BNSF Railway Co. by a truck driver who picks up and drops off loads at BNSF yards. The driver said he was required at some of those yards to scan a fingerprint or palm print into an identity verification device. But he said the railroad wasn't properly handling his biometric data, as required by the IBPA. Now, the judge has rejected the railroad's argument that the Act was preempted by three federal laws – namely, the Interstate Commerce Commission Termination Act (giving the National Surface Transportation Board the exclusive jurisdiction to regulate railroad transportation), the Federal Aviation Administration Authorization Act (preempting state laws regarding carrier rates, routes and services), and the Federal Railroad Safety Act (allowing states to regulate railroad safety and security). *The judge quoted a prior U.S. Supreme Court decision saying that a federal law must "substantially subsume the subject matter of the relevant state law before the state law is preempted." In this case, the judge did not find that to be true. Rather, he found that the IBPA is a generally applicable statute that in this situation just happens to apply to a railroad.*

TAXATION

ADVICE FROM IRS ON PROBLEM OF UNCASHED DISTRIBUTION CHECKS – The Internal Revenue Service has issued advice on what plan administrators should do when employee plan beneficiaries don't cash checks that have been issued to them following termination of employment or the making of a distribution election. This is actually a recurring problem, and somebody wondered if employers still had to withhold and report taxes on the distribution. Not surprisingly, the IRS has advised that a participant's failure to cash a distribution check does not affect the employer's obligation to withhold and report taxes, and the employer should assume the participant had control of the check but, for one reason or another, just failed to cash it. *There are other questions not yet addressed by the Service. What if a plan administrator can't locate a participant after making a good faith effort to find him? Or, what if a check is returned to the employer as undeliverable? The government says it is still working on guidance covering these questions.*

NEWS AND EVENTS

Jon Howe recently presented "Big Power Contracts" at MPI Texas Education Conference in San Antonio .

Jon will be presenting "Understanding Today's Contracts" at the American Bar Association Meetings & Travel Department In Service Program for all ABA Meeting Professionals.

Jon will also be presenting at the Nassau Paradise Island Promotion Board in Nassau on "Unusual Risks In Today's World."

Christina Pannos gave a comprehensive Legal Issues presentation for a trade association meeting of manufacturers in Dallas, Texas.

Nathan Breen will be presenting a live Webinar, "Protecting Your Intellectual Property" that will cover steps on how to secure and maintain your intellectual property and assess potential action against infringement. To learn more about this webinar, visit www.lorman.com/IF404082 .

If you are a current client of Howe & Hutton and would like to attend the webinar, please contact Debbie Guth to receive a 50% off discount code.

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