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THE HOWE & HUTTON REPORT

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TRENDING NOW

LAX BANS TAXI AND RIDESHARE CURBSIDE PICKUP– Travelers will no longer be able to hail a cab or catch a rideshare vehicle like Uber or Lyft curbside at Los Angeles International Airport (LAX) starting October 29, 2019. In order to decrease congestion and actually make airport pickups more efficient, travelers will now have to take a free shuttle from the lower (arrivals) level to a new pick-up lot called "LAX-it." The lot will also be walkable. Taxis, UBER, Lyft and private cars will still be able to drop off travelers at the departure terminals.

SEXUAL HARASSMENT PREVENTION TRAINING REQUIRED – One of many changes in Illinois employment law enacted by the General Assembly recently is a requirement that every employer "with employees working in" Illinois provide sexual harassment prevention training annually. The new law isn't entirely clear on who must receive such training. Presumably, it must be received by every employee working in Illinois. But it may also be required for every worker employed anywhere, as long as the employer has at least one employee working in Illinois, even if that employee works in Illinois only occasionally. The new law requires the Illinois Department of Human Relations to establish a model program for dissemination to employers and the public online at no cost. But an employer can create its own sexual harassment prevention training program as long as it contains (1) an explanation of sexual harassment consistent with Illinois law, (2) examples of conduct constituting harassment, (3) a summary of federal and state laws relating to harassment, including remedies available to victims, and (4) a summary of employer responsibilities with regard to the prevention, investigation, and corrective measures relating to harassment. *The new law on training takes effect January 1, 2020. Employers violating the training requirement are subject to a civil penalty between $500 and $5,000, depending on the number of their employees and the number of their prior offenses. Specific additional anti-harassment requirements are now imposed on restaurants and bars.*

EMPLOYMENT

DRAW RECONCILIATIONS AREN'T DEDUCTIONS FROM WAGES – The U.S. Court of Appeals for the Seventh Circuit was faced with a class action suit claiming that a specialty retailer violated the Illinois Wage Payment and Collection Act because it paid its sales associates based on a semimonthly "draw." The draw was $1,000 when earned commissions totaled more than that amount, but the retailer recovered any shortfall between earned commissions and the draw in subsequent pay periods when earned commissions totaled less than $1,000. The Act prohibits employers from deducting more than 15% from an employee's wages per payment as repayment for previous cash advances, except under certain circumstances. But the Court of Appeals ruled that the employer's draw reconciliations in this case weren't "deductions" restricted by the Act. *The Court of Appeals found that the "reconciliations" in this case determined an employee's gross wages before tax withholding and other deductions. Referring to the context of the Act, the Court of Appeals concluded that the Act only restricted withholdings from gross wages, not the formula used to calculate gross wages.*

APPEALS COURT REJECTS HOSTILE WORKING CONDITIONS SUITS – Recently, the U.S. Court of Appeals for the Fourth Circuit rejected two race discrimination suits based on allegedly hostile working conditions. In one case, the complaining worker alleged that she was forced to resign because white co-workers yelled at her, said they hoped she would not return from maternity leave, and criticized her work, hairstyle and behavior. But the Court of Appeals found the situation did not rise to the level of a hostile working environment based on race, noting that the complaining worker had received a promotion and generally positive evaluations from her employer, while previously expressing satisfaction with her job. In the other case, a worker complained that he was forced to quit his job because he and other African-American employees were subjected to disparate treatment under company work rules, made to work overtime, and given low employee rankings. But the Court of Appeals found that the alleged incidents were infrequent, did not involve threats or humiliating conduct, and, though difficult and unpleasant, were not so intolerable that they would legally justify resigning due to a hostile work environment. *Had the two workers in these cases been fired, instead of resigning and alleging "constructive" discharge, the legal results might have been different, even though "constructive" discharge is a concept recognized by the courts in some cases.*

GOLFING EMPLOYEE COULD BE TERMINATED FOR ABUSING FMLA LEAVE – The U.S. Court of Appeals for the Sixth Circuit has ruled that an employer did not violate the law by terminating a worker because he took leave under the federal Family and Medical Leave Act, along with paid time off days or weekends and golfed the entire time he was off. The Court of Appeals said the employer reasonably believed the worker was abusing FMLA leave, which he was taking, he said, because of a painful shoulder condition. The worker in this case said his golfing wasn't damaging his shoulder because "80 percent of your swing is legs and core." *Despite this case, employers should be careful in disciplining workers for use of FMLA leave. Other courts in other cases have found that a worker's going to the beach and engaging in other recreational activity wasn't an abuse of FMLA leave because such employee activities were not inconsistent with an employee's specific health problems that prompted FMLA leave.*

EMPLOYMENT (cont.)

TERMINATED HARASSER LOSES RACIAL DISCRIMINATION CLAIM – The U.S. Court of Appeals for the Fourth Circuit has dismissed a racial discrimination claim filed by a man who was terminated by a university for sexually harassing a co-worker. The former employee claimed that the sexual harassment charge against him was a pretext and he was actually denied a promotion and then fired because he is Mexican. He pointed out that a white co-worker allegedly engaged in sexual harassment yet remained employed by the university. He also alleged that some anti-Mexican statements had been made to him by the decision maker who denied him the promotion. But the Court of Appeals said there was a difference in the severity of the harassment in his case that justified his employer's taking different remedial action from that taken in the case of the white co-worker. Moreover, the Court of Appeals found the anti-Mexican statements made in his case were isolated and sufficiently removed from the promotion decision to avoid any reasonable connection. *The Me Too movement claims that employers, the police and the courts don't protect them, and that explains why some victims fail to file legal complaints against their harassers or delay filing them. But here is a case where an employer and the courts took harassment very seriously, even when an alleged harasser filed his own complaint for discriminatory termination.*

COURT REVIVES CLAIM FOR RETALIATION UNDER FALSE CLAIMS ACT – If one of your employees has a reasonable suspicion that you are doing something illegal, and if the worker complains about it, firing the employee can be hazardous. This was brought home to Howard University recently when a federal appeals court reversed a lower court's dismissal of a suit brought against the university under the anti-retaliation provisions of the federal False Claims Act. A veterinarian complained internally and externally about the conditions in which lab animals were being maintained by the school. The university terminated the vet's employment when she brought her concerns to the U.S. Department of Agriculture and the National Institutes of Health under the federal Animal Welfare and Health Research Extension Act. But now, the U.S. Court of Appeals for the District of Columbia has ruled that the vet can sue the school for retaliating against her because of her complaints. *The university, like many nonprofits, was a recipient of federal grant funds, and those who take federal money often find themselves subject to federal laws they otherwise wouldn't have to worry about. In this case, the vet's suit was revived because she was alleging that the university was out of compliance with the conditions of its federal grants.*

NON PROFITS

COURT SETTLES CONTROL DISPUTE IN CHURCH – The Illinois Appellate Court, First District, was recently called upon to decide whether a lower court had properly resolved a dispute over control of a religious corporation. The corporation had a founder, Rev. R.J. Roff, and a set of bylaws making him General Bishop and President of the corporation for life, with the power to appoint directors and other officers. A land trust holding title to the corporation's real estate gave Roff the power of direction. But neither the bylaws nor the trust provided for what would happen when Roff died, and his death led to litigation between competing pastors about who should be running the corporation. The trial judge could have dissolved the corporation, since it didn't have the minimum three directors required by the Illinois General Not For Profit Corporation Act. But the judge appointed a custodian over the corporation, ordered an election of five directors, with the litigants each getting a vote, and further ordered the development of a new set of bylaws, leading some of the litigants to complain to the Appellate Court that the judge didn't have the authority to take these steps in resolving a religious dispute. "Wrong," said the Appellate Court, affirming the trial court's resolution of the case. It wasn't a religious dispute because it didn't require the trial court to examine religious doctrine or practice in order to decide the case, and the trial court properly applied neutral principles of Illinois law to craft an alternative to dissolving the corporation. The judge correctly relied on Section 112.55 of the Act, which said judges "may retain jurisdiction to craft alternative remedies in lieu of dissolution." *Courts don't like to get involved in religious disputes, and the judge's decisions in this case may not have satisfied everyone. The law rarely does when religious organizations are having control problems. All the more reason for such organizations to get good legal advice when they are established, to try and anticipate such problems before they occur.*

JUDGE PROHIBITS ENFORCEMENT OF N.J. DONOR DISCLOSURE RULES – *H&H Report Update* **-** A federal judge has preliminarily prohibited enforcement of New Jersey campaign finance reporting and donor disclosure rules pending further proceedings to hear evidence on a charge that they violate the First Amendment to the U.S. Constitution. The judge's decision included a finding that challenges to the rules would likely succeed after a trial on the merits of the case. The rules apply to social welfare organizations exempt from federal income tax under Internal Revenue Code Section 501(c)(4), as well as Section 527 political organizations regulated by the Federal Election Commission. *The New Jersey ruling follows a recent decision by another federal judge that New York laws requiring donor disclosure by nonprofits also violated the First Amendment.*

OTHER

EVENT PLANNING CONTRACT PRODUCES LAWSUIT – The U.S. Court of Appeals for the Seventh Circuit has ruled against an event planner in its bid to recover losses on an event from its client, Indianapolis Motor Speedway, Inc. Karma International, LLC sued the Speedway for $817,500 in alleged damages resulting from the failure of a ticketed party at the 2016 Indianapolis 500 race to cover its own costs. The Speedway counterclaimed. Karma said poor ticket sales for the event resulted from the Speedway's failure to adequately promote the party. But the Speedway's counterclaim alleged that Karma failed to place a promised banner on *Maxim's* website or provide marketing support on *Maxim's* social media channels. The Court of Appeals said Karma's claim failed because it was based entirely on speculation as to the gross revenue expected from the event. But the Court of Appeals concluded that a jury properly awarded the Speedway $75,000 in damages on its counterclaim. *While the Speedway isn't a nonprofit, associations and other nonprofits do conduct major events, and they often hire event planners to arrange and promote them. Here, speculative damages couldn't be awarded under Indiana law, which governed the case. The laws of other states might have been more generous to Karma.*

WATCH OUT FOR ILLUSORY INSURANCE COVERAGE – DVO was to design and build an anaerobic digester for WTE to generate electricity from cow manure, which WTE would sell to an electric power utility. The deal fell apart, and WTE sued DVO for breach of contract. DVO relied on its liability insurer to defend the suit, but its insurer declined to do so, and a court ordered DVO to pay $65,000 in damages to WTE, plus $198,000 for WTE's attorney's fees, leading DVO to then sue its insurer for a failure to defend. The insurer successfully defended at the trial court, arguing that it did not have to defend DVO in the WTE suit since an exclusion in the insurance policy said that it didn't cover claims or damages "based upon or arising out of" a contract. But the U.S. Court of Appeals for the Seventh Circuit reversed the trial court's decision. Basically, the Court of Appeals said that the exclusion was so broad it rendered the policy "illusory" (not meeting what DVO's reasonable expectations were in purchasing its policy). So, there have to be further proceedings to "reform" the policy to what DVO's reasonable expectations were in purchasing it. *If you decide to sue your insurer for some reason, don't count on the courts always being as generous as the Seventh Circuit was to the policy holder in this case. Insurers pay their lawyers big bucks to draft policies that benefit them (little coverage and lots of premiums). But they sometimes go a little too far for the courts, as in this case. We once saw an "errors and omissions" insurance policy with an exclusion for claims based on "errors" and another exclusion for claims based on "omissions". Talk about illusory insurance policies!*

REGULATION

COURT SIDES WITH WEB SCRAPERS BANNED FROM PUBLIC WEBSITE – The U.S. Court of Appeals for the Ninth Circuit has unanimously sided with web scrapers hit with cease and desist instructions from owners of public websites the scrapers have targeted in their collecting of data. The Court of Appeals was faced with a case in which LinkedIn sent a cease and desist letter to a scraper known as hiQ Labs that scraped publicly accessible user profiles from LinkedIn's website and analyzed that information for its customers. LinkedIn argued that hiQ's activity was prohibited by the federal Computer Fraud and Abuse Act, which criminalizes accessing a computer "without authorization." LinkedIn contended that it terminated any "authorization" for hiQ when it sent them a cease and desist letter. But the Court of Appeals found that the Act was not meant to allow owners of otherwise publicly accessible websites to pick and choose who would be "authorized" to use data they contain. Rather, the Court of Appeals upheld a lower court's interpretation of the Act, which was that it applied only to "hackers" accessing "private" information stored on computers. *What in the world is "private" these days? Certainly nothing that gets on the Internet.*

SIGN ORDINANCE OKAYED BY COURT OF APPEALS – The U.S. Court of Appeals for the Seventh Circuit has upheld a Village of Downers Grove (IL) sign regulation ordinance against a challenge that it violated the First Amendment to the U.S. Constitution. The challenge was based on exceptions in the ordinance that made it inapplicable to holiday decorations, temporary signs for personal events such as birthdays, "memorial signs and tablets" and "noncommercial flags or political and noncommercial signs not exceeding 12 square feet." Though the exceptions made the ordinance "content based" in a way, the Court of Appeals rejected the challenge because the individual challenging the ordinance couldn't satisfy the ordinance due to its size and surface limitations, not any content issues. His signs were painted on a wall, which was prohibited, or they were too large. *The Court of Appeals noted that the Supreme Court of the U.S. has upheld sign limits specifying the time, place and manner for the posting of signs, without reference to the content or viewpoint of speech, because they serve a significant government interest (signs painted on walls tend to deteriorate faster than other signs and many people believe smaller signs are preferable). Anyway, the ordinance in question left open ample ways to communicate.*

JUDGE UPHOLDS HARVARD ADMISSIONS POLICY CONSIDERING RACE – A federal district court judge has upheld a Harvard University admissions policy that considers race among other factors in determining whether a student should be admitted to the school. A group of Asian-Americans filed suit against the school, alleging that the university imposed a penalty against Asian-American applicants by holding them to a higher standard than applicants of other races, which Harvard admitted. Judge Allison Burroughs ruled that Harvard's admissions policy didn't violate U.S. civil rights law and was justified as an effort by the school to achieve a more diverse student body. *Despite that policy, Asian-Americans now make up roughly a quarter of Harvard's admitted class, though they only account for about six percent of the U.S. population. The Harvard case is expected to eventually reach the U.S. Supreme Court and could reshape collegiate admissions policies.*

NEWS AND EVENTS

Jon Howe recently spoke at Destination Caribbean on Legal Issues in the Hospitality Industry held in Punta Cana, Dominican Republic.

Jon will be speaking at the Texas Education Conference in San Antonio on "Big Power Contracts."

Jon will participate as a life member of the Board of Visitors of the Duke University School of Law in the Dean's seminar.

Jerry Panaro is a special guest speaker on a webinar put on by Virtual, Inc. The webinar is titled "**11 Legal Issues That Board of Directors Must Understand**". This webinar will cover 11 key areas of the law that directors should understand and why. The webinar is scheduled on Tuesday, October 29, 2019. More information on this webinar can be found at:

https://virtualinc.com/webinar/11-legal-issues-that-board-directors-must-understand/

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