Howe & Hutton, LTD.
The Law Firm for Associations ®
The Law Firm for Meeting Professionals®

Chicago
(312) 263-3001

Washington, D.C.
(571) 499-6686

THE HOWE & HUTTON REPORT

Volume 2020, Issue 6

TRENDING NOW

OSHA REMINDS EMPLOYERS OF DUTY TO PROTECT EMPLOYEES FROM HEAT - The federal Occupational Safety and Health Administration (OSHA) has reminded employers of their duty to protect employees from heat exposure during these hot summer months. But OSHA notes that heat exposure problems can arise even when temperatures are not extremely high. They say that protective measures are needed when the Heat Index is 80 degrees Fahrenheit or above, and sports physiologists warn that temperatures as low as 65 degrees Fahrenheit can pose a risk if a person's workload is very heavy or strenuous. *OSHA further notes that heat exposure risks can arise indoors or outdoors, especially when work clothing, like uniforms, holds in body heat .*

EEOC SAYS NO TO COVID-19 ANTIBODY TESTING – The U.S. Equal Employment Opportunity Commission (EEOC) has issued revised guidance saying that employers violate the federal Americans with Disabilities Act if they force employees to undergo COVID-19 antibody testing before returning to the workplace. The Commission's revised guidance follows the latest advice from the Centers for Disease Control and Prevention (CDC) that antibody test results "should not be used to make decisions about returning persons to the workplace." The CDC said it based its latest advice on the current accuracy and inaccuracy of antibody testing as well as uncertainty about the level of potential immunity antibodies may provide. *As opposed to antibody testing, the EEOC has already approved mandatory COVID-19 testing to see if an employee is infected with COVID-19 rather than just having antibodies that may have been triggered by COVID-19, and employers can require that workers provide a doctor's note certifying that workers are fit for duty.*

TRENDING NOW (cont.)

COURT UPHOLDS BAN ON ROBOCALLS TO CELL PHONES – The Supreme Court of the U.S. has upheld a federal law banning automated robocalls to cell phones. At the same time, the Court struck down an exception to the ban, as created by Congress, for calls to collect government debt. Political consultants and pollsters had challenged the federal ban on robocalls to cell phones, saying that, by excepting calls to collect government debt, the ban violated their free speech rights under the First Amendment to the U.S. Constitution. Seven members of the Court agreed to a point, eliminating the exception to the ban and then upholding the constitutionality of the robocall ban as a whole. *The Court's decisions here may be even more important than they seem on their face. In writing an opinion for the Court's majority, Justice Brett Kavenaugh indicated that "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls."*

MORE STATES ISSUE QUARANTINE RESTRICTIONS FOR TRAVELERS – In response to the COVID-19 pandemic, many states have announced travel restrictions on Americans traveling from one state to another, just as the federal government has announced travel restrictions on people coming to the U.S. from other countries, and other countries have responded by restricting Americans traveling outside the U.S. State restrictions, unlike some limitations on international travel, are typically not total bans, but requirements that travelers quarantine for a certain length of time. Governors in New York, New Jersey and Connecticut, for example, jointly issued a 14-day quarantine requirement applying to travelers going to that tri-state area from states that have a positive test for COVID-19 rate of 10 percent or more on a seven-day rolling average. New York State went their tri-state fellows one better (or worse, depending on your point of view) by denying paid sick leave benefits under that state's laws for anyone engaging in non-essential travel to states with high COVID-19 infection rates. *It wasn't that long ago when other states were passing laws aimed at keeping New Yorkers away because of the COVID-19 infection rate in the Empire State.*

COURT RULES FOR TRANSPARENCY IN HOSPITAL PRICING - *H&H Report Update* – A federal judge has rejected the American Hospital Association's challenge to a Trump Administration rule requiring hospitals to disclose prices negotiated with insurers. The Administration hailed the decision, saying that "patients deserve to know the price of care before they enter the hospital." *The judge rejected complaints from hospitals that a requirement to post their prices violates their rights under the First Amendment to the U.S. Constitution and will just confuse patients.*

INTELLECTUAL PROPERTY

.COM MARKS MAY BE REGISTRABLE - The Supreme Court of the United States has held that "Booking.com," unlike "booking" standing alone, is not a generic term because it is not perceived as such by consumers. Consequently, it is entitled to registration as a service mark. The same may be true of other "generic.com" marks. The Court's ruling came after the Patent and Trademark Office refused to register "Booking.com," finding that it was a generic name for "online hotel-reservation services" and, therefore, should be open for use by anyone providing such services. The U.S. Court of Appeals for the Fourth Circuit agreed. But the Supreme Court did not. The Supreme Court noted that generic terms can't be registered as a mark under the federal Lanham Act. But the Supreme Court ruled that whether a term is a generic name for a class of goods and services depends on whether that term, taken as a whole, is perceived that way by consumers, and the Court said "Booking.com" was not. The Court said that a "generic.com" mark could convey to consumers an association with a particular website, as in this case, and trademark law did not support a Patent and Trademark Office categorical rule against registration of "generic.com" terms. *Before you go rushing to register "Generic.com" marks, though, remember that, while you can apply to register a mark on an intent to use basis, registration will not issue until a mark has been used in commerce as a mark, and not merely a generic term, by the registrant. Rights in a registered mark will also generally belong to the first user of the mark, as such, in commerce.*

NONPROFITS

FOREIGN AFFILIATES OF U.S. NONPROFITS HAVE NO FIRST AMENDMENT RIGHTS - The U.S. Supreme Court recently held that foreign affiliates of U.S. nonprofits have no First Amendment rights. The ruling came in a case involving the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act, which, over the years, has provided billions of dollars in funding for domestic and foreign nonprofits. The Act requires organizations seeking funding to have, or agree to have, a policy explicitly opposing prostitution and sex trafficking (the "Policy Requirement"). Some nonprofits refused to have such a policy and, in 2013, managed to get the U.S. Supreme Court to rule that the Policy Requirement was unconstitutional as applied to domestic nonprofits with businesses based out of the U.S. or that have a physical presence in the U.S., because the Policy Requirement violates the "free speech" provision of the First Amendment to the U.S. Constitution. But what about foreign affiliates of U.S. nonprofits who want some money to combat HIV/AIDS, tuberculosis and malaria? The Supreme Court recently held that the Policy Requirement applies to such entities, because, if they aren't based in the U.S., they have no First Amendment rights. *The Court noted that it is "long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." That being the case, the Court reasoned that "domestic nonprofits cannot export their own First Amendment rights to shield foreign organizations from Congress's funding conditions."*

NONPROFITS (cont.)

COURT DISMISSES SUIT TO REQUIRE ASSOCIATION ADMISSION OF MEMBER – The U.S. Court of Appeals for the Seventh Circuit in Chicago has affirmed a lower court's dismissal of a federal antitrust suit filed against the Amateur Hockey Association of Illinois, Inc., by a company that owns Illinois skating rinks. The skating rink company alleged that the Association monopolizes the sport of amateur hockey in Illinois, and it sought a court order requiring the Association to admit the skating rink company as a member, permit the skating rink company to sponsor a club, and pay damages for business losses suffered until those things occur. The Seventh Circuit accepted the allegations as to the monopoly, but ruled that the lower court properly dismissed the suit for lack of jurisdiction, saying that the federal Sherman Anti-Trust Act cannot be used to regulate a cartel's membership or to force divvying up of a cartel's profits. *The Court of Appeals did note that the members and potential members of a cartel can enforce or contest its rules under state law, but that wasn't the case presented here. Further, the Court of Appeals noted that a private group receives considerable leeway in the interpretation and application of its rules.*

IRS PROPOSES CHANGES IN GROUP EXEMPTION PROCEDURE – The Internal Revenue Service has proposed changes in the procedure by which tax-exempt organizations with subordinate organizations such as chapters can obtain a group federal income tax exemption for those subordinates. Although the changes are merely proposed, the IRS said it would not accept any new requests for group exemptions after June 17, 2020 and continuing until publication of a final new Revenue Procedure for group exemptions or other guidance from the Service. Among the changes in the IRS proposal are the following: (1) all subordinate organizations must have a uniform governing instrument, (2) the parent organization must annually inform subordinates about requirements to maintain exemptions, (3) if the parent is going to file group Form 990-series annual returns on behalf of new subordinates, the parent organization must appoint a majority of each such subordinate's officers, directors or trustees or a majority of each subordinate's officers, directors or trustees must be officers, directors or trustees must be officers, directors or trustees of the parent organization, (4) there must be at least five subordinate organizations in each new group exemption recognized by the IRS, (5) each parent organization can have only one group exemption (instead of having different group exemptions for subordinates exempt under different sections of the Internal Revenue Code, and (6) detailed information must be provided to the IRS regarding each new subordinate added to a group exemption. *Group exemptions have long been a bargain because they have eliminated the need for submission of multiple exemption applications covering all of an organization's subordinates. The proposed changes will force many parent organizations to reevaluate the benefits and disadvantages of having a group exemption for subordinates, and even of having subordinates at all.*

TAXATION

STATE PROGRAMS AIDING PRIVATE SCHOOLS MUST INCLUDE RELIGIOUS SCHOOLS - The Supreme Court of the U.S. has held that a Montana program awarding tax credits for donations to organizations providing scholarships for private school tuition must not discriminate against religious schools and families who want to send their children to such schools. Montana awarded such tax credits that benefit private schools, but the state Department of Revenue promulgated a rule that prohibited use of such scholarships at religious schools, holding that such government aid violated a "no aid" provision of the Montana Constitution barring government aid to any school "controlled in whole or in part by a church, sect or denomination." The Montana Supreme Court then struck down the entire state tax credit program for that reason. But the Supreme Court of the U.S. has now held that the Department's rule violates the Free Exercise Clause of the U.S. Constitution, remanding the case to the state Supreme Court and mandating that the state Supreme Court disregard the "no aid" provision of the state constitution and comply with federal law. *The U.S. Supreme Court said that Montana didn't have to award tax credits for donations to organizations providing scholarships for private school tuition, but, having done so, could not deny such tax credits for donations to be used for scholarships to religious private schools.*

FORGOING OF PTO TO FACILITATE COVID-19 DONATIONS OKAYED – The Internal Revenue Service has issued a Notice explaining that employees can forgo their paid time off ("PTO") balances so their employers can make donations to charities assisting individuals impacted by the COVID-19 pandemic. Notice 1020 -46 expands existing law to allow employees to forgo vacation, sick or personal leave to allow their employers to make cash donations before January 1, 2021 to nonprofit Section 501(c)(3) organizations for the relief of COVID-19 victims. The donations will be tax-deductible by the employer, the employee will not be treated as receiving taxable income in the amount of the forgone leave, and both the employer and the employee will save the employment taxes that would otherwise be associated with the forgone leave. *Enough is enough with tax benefits, though. The employee may not claim a charitable deduction in the amount of the forgone leave.*

EMPLOYMENT

HOW TO AVOID LIABILITY FOR INJURIES TO INDEPENDENT CONTRACTORS – In a recent California Court of Appeals decision, the court considered a wrongful death suit filed by the family of a man who was killed while replacing a tire on a forklift. The deceased was employed by 24-Hour Tire Services, Inc., a tire shop providing tire repair and replacement services. 24-Hour was an independent contractor retained by Ahern Rentals, Inc., which leased forklifts and other heavy-duty construction vehicles, and the deceased died after being sent by 24-Hour to Ahern's premises to replace the tire on an Ahern forklift. The family of the decedent sued Ahern, contending that Ahern negligently failed to provide a stable and level surface for the tire change, allowed the tire change to proceed with the forklift's boom raised, and failed to properly train its employees and independent contractors to whom Ahern assigned the maintenance and storage of the forklift. But the Court of Appeals affirmed a trial court's granting of summary judgment to Ahern, finding that Ahern did not actively contribute to how the decedent's work was to be done, not having actively directed that the tire change was to be done in a particular way and not having failed to undertake a particular safety measure Ahern had promised to undertake. *If you can avoid liability for injury to a worker in California, you stand a good chance to avoid such liability anywhere. So, if that's what you intend when you hire an independent contractor to do a job, don't direct how they are to do their work (which might also make them your employees for tax and other legal purposes). Additionally, don't promise to provide safety measures for a worker, or, if you do make such a promise, do what you promised you would do.*

EMPLOYERS AND EMPLOYEES MUST MAKE RELIGIOUS ACCOMMODATIONS – The U.S. Court of Appeals for the Eleventh Circuit recently rejected an employee suit against a hospital for religious discrimination, finding that the employer hospital had tried to make reasonable accommodations for the employee's religion, but the employee hadn't. The employee said he couldn't work on Saturdays because of his religious beliefs, and the employer allowed him to avoid Saturday work assignments in his job for months until staffing changes made it impossible for the employer to change other employee work schedules for him. At that point, the employer told the worker about other jobs at the hospital that were available and could accommodate his religious needs. But the worker refused to apply for them. The worker was fired for not showing up for two straight Saturday shifts. When he sued, the Eleventh Circuit affirmed his dismissal. *The Court of Appeals decision highlights the need for both employers and employees to be reasonable about religious accommodations.*

EMPLOYMENT (cont.)

REQUEST FOR ACCOMMODATION MUST BE MADE BEFORE REASONABLE TERMINATION DECISION IS MADE - The U.S. Court of Appeals for the First Circuit has ruled for the employer in an employment discrimination case in which a worker at a call center alleged that the employer wrongfully failed to accommodate her disability, namely, post-traumatic stress disorder (PTSD). The employee threw temper tantrums at work, threw her equipment around, and repeatedly called her co-workers "a bunch of bitches" because she said they were making fun of her (although the employer found no evidence that the other workers had done so). The employer had a policy that required all workers to treat each other "professionally and cooperatively." The employer made the decision to terminate the worker for violation of that policy after she had a number of outbursts directed at her co-workers. The worker then informed the employer for the first time that she had PTSD and requested accommodations consisting of a move to seats away from certain co-workers or allowing her to telecommute. She also claimed that the employer's "professionally and cooperatively" policy couldn't be cited against her because the employer didn't enforce that policy consistently. The Court of Appeals found, however, that the employer's policy was reasonable and was consistently enforced. In addition, the Court of Appeals ruled that the employee couldn't complain about a failure to accommodate her disability because the employer had made a determination to discharge her for a terminable offense before being informed that she had PTSD and without any cause to know she had that disability. In addition, the Court of Appeals found that even if the employer granted the accommodations requested by the employee, that would not have permitted her to perform her position in a professional manner because all of the employer's workers were seated near each other for economic reasons and her PTSD outbursts were unpredictable and could have occurred anywhere. *In this case, the Court of Appeals made the point that an employee's request for an accommodation must be timely made and cannot simply be a cover for the employee's misdeeds, coming across as more of a plea either for forgiveness or a second chance, and where, as here, an accommodation request followed fireable misconduct, "it ordinarily should not be viewed as an accommodation at all."*

NLRB LIMITS DUTY TO BARGAIN WITH UNION BEFORE FIRST CBA – The National Labor Relations Board has reverted to a pre-Obama disciplinary rule that says employers have no duty to bargain over disciplinary action with a union after the union is certified but before a collective bargaining agreement has been reached, provided discipline is materially consistent with the employer's established policy or practice. The new ruling came in a case raising the question of whether an employer can terminate or otherwise discipline employees without giving a newly certified union notice and an opportunity to bargain over such things. The Obama-era NLRB said "no," but the current NLRB now says it won't necessarily follow that precedent. *Employers will welcome this new decision, as they can now discipline workers as they normally would while negotiating a first union contract.*

REGULATION

COURT WON'T FORCE OSHA TO ADOPT WORKER SAFETY STANDARD - The U.S. Court of Appeals for the District of Columbia Circuit has refused to order the U.S. Occupational Safety and Health Administration to adopt an emergency temporary worker safety standard aimed at protecting workers from COVID-19. The ruling came in response to a petition filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which argued that, in light of the "grave danger" posed by COVID-19 to the lives of workers, it was necessary to compel OSHA to adopt such a standard. But the Court of Appeals concluded that it would, for the time being, allow OSHA to determine when and if issuance of a worker safety standard was necessary, and the court noted that OSHA had regulatory tools at its disposal to ensure that employers are maintaining hazard-free work environments. *The court also stated its belief that OSHA had reasonably determined that an emergency temporary worker safety standard wasn't necessary at this time, and, if a new safety standard became necessary, OSHA could promulgate one through normal channels, including notice to the public and making an opportunity available for opposing viewpoints to be heard.*

40-MONTH JAIL SENTENCE HANDED DOWN FOR PRICE-FIXING – *H&H Report Update* – The former CEO and President of Bumble Bee Foods has been sentenced to 40 months in prison and given a $100,000 fine for organizing a canned tuna price-fixing conspiracy. After a lengthy investigation, the federal Justice Department charged him and other executives and companies in that industry with criminal violations back in 2018. Bumble Bee previously agreed to pay another $25 million fine. Among other things, competitors and colleagues in the industry were charged with sharing pricing information. *This case shows the government isn't ignoring antitrust violations during the Trump years. Other executives in the field may be sentenced next, and the companies and individuals involved in the conspiracy may be subject to related civil lawsuits from tuna purchasers. Bumble Bee was hurt badly enough by this prosecution that it filed for Chapter 11 bankruptcy protection at the end of last year.*

SUPREME COURT DECLINES CHALLENGE TO TRUMP TARIFFS – The United States Supreme Court has declined to hear a legal challenge to President Trump's steel tariffs brought by an association of steel importers and others. The tariffs were promulgated under the Trade Expansion Act passed by Congress in 1962. The complainants in this case argued that the Act itself was unconstitutional because it was an improper delegation of power to the President that should belong to Congress. The U.S. Court of Appeals for the Federal Circuit previously rejected their argument that tariff powers belonged to Congress and could not be delegated to the President. Now, the Supreme Court has opted to let the Federal Circuit's decision stand. *Some members of the U.S. House of Representatives have suggested that Congress should repeal or amend the Act in order to prevent Trump from establishing tariffs. Congress could do that, but hasn't.*

NEWS AND EVENTS

7/14/2020 Jon Howe participated in a webinar for Interact for the Independent Planners &Suppliers by Northstar Meetings Group

7/27/2020 Jon will participate in a webinar Incentive Live-Legal Issues by Incentives Magazine.

7/29/202 Jon will participate in a webinar for Preferred Hotels & Resorts on current legal issue in the hotel industry.

Jon Howe was appointed to continue to serve as a Special Advisor to the American Bar Association's Standing Committee on Meetings and Travel.

Nathan Breen served on a virtual panel for the Society of Government Meeting Professionals - Golden State Chapter discussing event contract negotiation and risk management issues.

Mike Deese will be participating on an association management company accreditation webinar panel at the AMC Institute's virtual "AMCs Engaged" conference on August 7th.

HOWE & HUTTON

Editor - James F. Gossett
Contributing Editors - Christina Pannos

www.howehutton.com

Chicago | McLean VA | Washington, D.C.