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THE HOWE & HUTTON REPORT

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TRENDING NOW

TUNA COMPANY CEO SENTENCED TO 40 MONTHS IN PRISON FOR PRICE FIXING - Christopher Lischewski, former Chief Executive Officer and President of Bumble Bee Foods LLC, was sentenced to serve 40 months in jail and assessed a $100,000 criminal fine for his leadership role in a three-year antitrust conspiracy in which three companies acted together to fix the prices of canned tuna. After a four-week trial, the court found that Lischewski was a leader or organizer of the conspiracy, which affected over $600 million dollars of canned tuna sales. Bumble Bee pleaded guilty and was sentenced to pay a $25 million criminal fine. StarKist Company was sentenced to pay a statutory maximum $100 million criminal fine. As the whistleblower in the case, Chicken of the Sea avoided criminal prosecution. However, it is still liable for civil litigation as a result of its behavior. Three other executives also pleaded guilty and testified in Lischewski's trial. *His sentence is one of the most severe penalties ever imposed on a corporate executive in a criminal price-fixing case, and it serves as a warning that unlawful business decisions can have dire personal consequences. Both the Department of Justice and the Federal Trade Commission have announced that they are stepping up antitrust enforcement efforts during the pandemic.*

EMPLOYMENT

COURT STRIKES DOWN PORTIONS OF DOL RULE ON PAID SICK TIME AND FAMILY MEDICAL LEAVE – A federal judge in New York has invalidated portions of U.S. Department of Labor regulations interpreting the Families First Coronavirus Response Act's requirements for paid sick time and family medical leave. The judge struck down the Department's "work availability" requirement that excludes persons from receiving paid leave under the Act if their employers would have no work for them even if the employees did not have a qualifying condition related to the COVID-19 pandemic. The court also faulted the Department's expansive definition of a "health care provider" that can exclude its employees from receiving paid leave under the Act because of the employer's need to provide health care during the pandemic. And, finally, the court struck down the Department's requirement for employer consent before intermittent leave can be taken by a worker, as well as the Department's requirement that workers provide certain documentation to employers before taking leave. The court's ruling came in response to a suit by the State of New York claiming that the Department's requirements were inconsistent with the Act, overbroad in denying leave provided for under the Act, and unreasonable. *The court's decision may be appealed, but, if left to stand, it creates a great deal of uncertainty for employers seeking to comply with the Act, not that there still wouldn't be plenty of uncertainty even without the court's guidance on the subject. It also isn't clear whether the court intended its decision to apply only to employers in New York State or employers nationwide.*

NATIONAL LABOR RELATIONS BOARD (NLRB) REINSTATES ORIGINAL "JOINT EMPLOYER" RULE - On Feb 26, 2020, the NLRB issued a final rule governing joint-employer status under the National Labor Relations Act (NLRA). *Why is this important?* Because it determines whether a business is an employer of employees directly employed by another employer altogether. If two entities are joint employers, both must bargain with the union that represents the jointly employed employees, both are potentially liable for unfair labor practices committed by the other, and both are subject to union picketing or other economic pressure if there is a labor dispute. <u>For example:</u> Your association contracts with ABC Show Management Corp. to manage its show, but you also have some degree of control and influence over what ABC's employees do. If the employees of ABC were petitioning for a vote on whether to unionize or not, and your association were deemed a "joint employer" of these employees, then you would be liable under the NLRA as well as ABC Show Management. If your association is deemed to be a "joint employer" with ABC, and the jointly-employed employees were represented by a labor organization, then, as stated above, you could potentially be liable for violations of the NLRA by ABC and you would be subject to union picketing or other economic pressure. What is the "new" standard? The NLRB's final rule actually reinstates the rule that was in existence for some 30 years before being overturned in 2015. The essence of the rule is this: *To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees.* This standard makes clear that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer. So, your association does not have to worry about becoming a "joint employer" with ABC of ABC's employees, in the example. *A word of caution. The "joint employer" rule established by the NLRA is not necessarily the same rule that will be applied by the Department of Labor in enforcing the Fair Labor Standards Act or the EEOC in enforcing Title VII (federal anti-discrimination law).*

NLRB FINDS HANDBOOK FOOTER ABOUT CONFIDENTIALITY VIOLATES LAW – The National Labor Relations Board (NLRB) has held that a footer in an employee handbook about confidentiality violated the National Labor Relations Act. The footer warned that the handbook was "confidential and for internal use only." A worker challenged the footer language, saying that it violated employee rights under the Act to engage in "concerted activities" for "mutual aid or protection," and the NLRB found that this was the case because the footer tended to restrict employees from discussing pay and working conditions among themselves. However, such a provision might also discourage them from seeking the assistance of others who might help them protect their rights, including their attorneys. *The NLRB does consider legitimate justifications for a confidentiality policy in deciding whether a handbook provision violates the Act. But employers should be careful in enforcing such policies and should consider whether such rules are really necessary.*

EMPLOYER COULD LAWFULLY FIRE HR MANAGER WHO SOLICITED SUIT AGAINST IT – The U.S. Court of Appeals for the Eleventh Circuit has ruled that an employer could lawfully terminate an HR manager who secretly solicited a co-worker to file suit against their company for employment discrimination. In the Eleventh Circuit, employees who oppose discrimination do not have license to engage in acts that so interfere with the performance of their jobs that they are rendered ineffective in the position for which they were hired. Here, the HR manager was hired to investigate complaints of discrimination and try to internally resolve conflicts so that the employer wasn't sued. So, when the HR manager solicited another worker to sue the employer, the Court of Appeals concluded that the manager acted in contradiction of obligations owed to the employer. That made the manager ineffective in her position, according to the court, and the employer could terminate her without violating federal antiretaliation law. *Courts in other states might not have been so accepting of an employer's actions under these circumstances, especially if the terminated employee had a less sensitive position than the HR manager.*

EMPLOYER PENALIZED FOR DISCRIMINATION BY SUPERVISOR WHO DID NOT MAKE FINAL TERMINATION DECISION – Morris was a train conductor who was terminated after he committed two speeding violations on the same shift while working on a train that carried hazardous chemicals. He sued his employer, BNSF Railway Co., for race discrimination, contending that his employer treated his violations more severely than similar infractions committed by others who were not, like Morris, African-Americans. After a jury trial ending with a judgment in his favor, Morris was awarded $531,292 in back pay, $137,450 in front pay, $275,000 in compensatory damages and $370,000 in punitive damages. The U.S. Court of Appeals for the Seventh Circuit affirmed that decision. Although the supervisor responsible for any race-based discrimination in this case did not make the termination decision, that supervisor's decision to "channel Morris down the path of formal discipline" was based on race. *This case is an example of an employer suffering a penalty for discrimination in terminating a worker when the person making the termination decision had not engaged in discrimination but merely followed up on a discriminatory decision made by a supervisor. The result isn't that unusual. Employers can't keep too close an eye on supervisors if they want to avoid really expensive judgments, as in this case.*

EMPLOYMENT (cont.)

COURT HOLDS EMPLOYEES ARE BOUND BY UNION'S ARBITRATION AWARD – The U.S. Court of Appeals for the Second Circuit has held that individual employees are bound by an arbitration decision their union has obtained. The ruling came a case where the International Union of Operating Engineers, Local 30, prosecuted a dispute to arbitration under the terms of its collective bargaining agreement. An arbitrator ruled against the union and ordered certain terminated employees to repay termination pay to their employer. The employer sought enforcement of that award, and a federal district court then held that the arbitrator had no business ordering the employees to pay anything to the employer, since the employees hadn't signed the collective bargaining agreement between their union and the employer. Wrong, said the Court of Appeals, finding that the employees were bound by the CBA their union had signed and they had to abide by the arbitration decision. *Key to the Court of Appeals decision was the fact that the employees in question had initiated the dispute their union had taken to arbitration on their behalf and the union had followed the grievance procedure set out in the CBA to the letter.*

STATEMENTS OF FACT AREN'T EMPLOYEE REQUEST FOR UNION REPRESENTATION AT HEARING – A federal Court of Appeals has vacated a National Labor Relations Board (NLRB) decision that an employer shouldn't have conducted a hearing on an employee's refusal to submit to a mandatory medical examination when the worker didn't have union representation at the hearing. The Court of Appeals for the District of Columbia Circuit noted that the worker didn't specifically ask for union representation but had merely told the employer, "I called the union three times (and) nobody showed up, I'm here without representation." The Board had said that was enough to invoke the worker's right to union representation at the hearing. But the Court of Appeals said it wasn't, finding that it constituted mere statements of fact and not an actual request that would require the employer to terminate the hearing until union representation arrived. *The Court of Appeals said that the employee had a right to request union representation, but also had a right to proceed with the hearing in the absence of such representation, and the comment made by the worker in this case didn't put the employer on notice that the employee wanted union representation before the employer proceeded with the hearing.*

TAXATION

IRS EXAMINES PRIVATE FOUNDATIONS CREATED BY HIGH-WEALTH TAXPAYERS – The Internal Revenue Service has reportedly begun special examination and collection activities focused on hundreds of high-income individuals and the private foundations they sometimes create. The activities are being conducted by the Service's Global High Wealth Industry Group, which was created to take a holistic approach in addressing the total financial picture of high-wealth individuals and enterprises they control, including corporations, partnerships and trusts. *Recent recommendations of the Treasury Inspector General of Tax Administration included a greater focus on certain global high-wealth taxpayers with a significant number of "actionable" tax returns that had not been audited over the past few years.*

IRS ISSUES GUIDANCE FOR PROCESSING OF CHURCH REFUND CLAIMS AND REQUESTS FOR ABATEMENT – The Internal Revenue Service has issued some interim guidance to IRS examiners considering church requests for tax refunds or abatements. Internal Revenue Code Section 7611 contains several procedural steps that the Service must follow before commencing an inquiry or examination of a church, the idea being to protect churches, as much as possible, from unfounded governmental interference. A church can waive the requirements of Section 7611, in writing. But, absent a written waiver, the Service has been required to follow the procedures of Section 7611 even if a church has initiated contact with the Service, rather than the other way around - which a church might do in seeking a tax refund or abatement. Now, however, the IRS has developed a voluntary written waiver process that is supposed to allow more expeditious IRS processing of church refund claims and requests for abatement. The IRS is supposed to contact a church in writing to offer the option of executing a written waiver of Section 7611 procedures. The church doesn't have to agree to a waiver, and if the church doesn't respond to the IRS contact, then the Service is supposed to issue a Notice of Church Tax Inquiry and follow Section 7611 procedures. *It can get complicated when some people are trying to protect churches from the IRS in circumstances where the organizations may not want, or know they can avoid, the protection.*

ORGANIZATION OF COMMUNITY HOMEOWNERS DENIED TAX EXEMPTION – The Internal Revenue Service has denied a federal income tax exemption to an organization of homeowners in a geographic area with a purpose of representing and assisting those homeowners in resisting environmental degradation and overdevelopment. The organization applied for a tax exemption as a charitable organization under Section 501(c)(3) of the Internal Revenue Code. But the IRS denied the exemption because the organization served a private, rather than a public, purpose and primarily or exclusively benefitted residents of the geographic area. The IRS noted that the organization was mainly funded by its board members, all of whom were residents of the geographic area. Because the organization was a mutual benefit organization, the IRS found that it was neither formed nor operated for a public purpose. *This ruling follows a long line of precedents in which the IRS denied an exemption to similar entities. Organizations exempt as charitable under Section 501(c)(3) must be organized and operated exclusively (or nearly so) for the benefit of the general public or a substantial segment of it. Not that the purposes and operation of this organization were found to be bad ones. They just weren't found to be in accord with the descriptions of tax-exempt entities as stated in Section 501(c)(3) of the Code.*

REGULATION

HEARING ACUITY TEST MAY NOT HAVE TESTED ESSENTIAL FUNCTION OF CONDUCTOR'S JOB – The U.S. Court of Appeals for the Seventh Circuit in Chicago, reversing a lower court ruling, is reviewing a train conductor's suit against the Union Pacific railroad for terminating him because of a hearing disability. Union Pacific's defense was that it was administering hearing acuity tests to its conductors pursuant to regulations of the Federal Railroad Administration, and the plaintiff conductor couldn't pass the test without relying on custom-made hearing aids that didn't have certain factory-issued or laboratory-tested noise reduction ratings required by regulation. The custom-made hearing aids allowed the conductor to pass a hearing acuity test, but only by violating a railroad hearing conservation policy that required additional protection in reliance on the Federal Railroad Administration's regulations. A federal district court granted the railroad's motion for a summary judgment. But the Court of Appeals reversed because the hearing protection mandated by the railroad and the Administration may not have been an essential function of the conductor's job, and reasonable accommodations for the conductor may not have been properly considered.

KENTUCKY JUDGE RESTRICTS GOVERNOR'S EXECUTIVE ORDERS; STATE SUPREME COURT BLOCKS THAT ORDER – A judge in Kentucky issued a temporary restraining order against Governor Andy Beshear issuing or enforcing executive orders relating to COVID-19 that do not meet specific criteria for emergency action under state law. But the state supreme court then blocked that judge's order from taking effect until further proceedings take place before the supreme court. The rulings came in a suit by state agricultural interests, who argued that arbitrary executive orders issued by the Governor to combat COVID-19 have caused families and businesses to suffer financial losses and economic hardship. Among other things, the judge's restraining order against the Governor said he could no longer issue or enforce executive orders based on a "state of emergency" without specifying the emergency, the location of the emergency within the state, and the name of a local emergency management agency that had determined the emergency was beyond its capabilities. But that went by the board, for now, with the decision by the state supreme court. *Governors in a number of states have issued executive orders in response to COVID-19 that, in some cases, have met with successful legal challenges. This one has not been successful, yet .*

DISGORGEMENT OF PROFITS ORDERED FOR OFFICER'S COMPETITION WITH COMPANY – A recent case showed what can occasionally happen when an officer of any corporation decides to compete with it. A vineyard company ("Continental") declined an opportunity to produce a custom wine for a grocery chain, after which Continental's vice president formed his own vineyard company that began doing business with the grocers, all while the vice president continued to work for Continental. Continental sued. A jury found the vice president guilty of unfair competition but awarded no damages, after which the court ordered the vice president to pay $285,731 as a "disgorgement of profits" he had gained from his actions, finding that the jury's verdict was "merely advisory" as to the issue of equitable disgorgement.

INTELLECTUAL PROPERTY

COURT UPHOLDS DAMAGES CLAIM FOR USE OF CONFIDENTIAL INFORMATION, TRADE SECRETS – The U.S. Court of Appeals for the Seventh Circuit has upheld damages awards in the millions of dollars for downloading of confidential information and trade secrets to create a "comparative analysis" for use against a competitor. TCS downloaded thousands of documents containing confidential information and trade secrets to create a spreadsheet comparing its health-record software to that of competitor Epic. Epic sued and won a jury award of $140 million in compensatory damages for the benefit TCS received from the spreadsheet, $100 million in compensatory damages for the benefit TCS received from using Epic's other confidential information, and $700 million in punitive damages. The U.S. Court of Appeals struck down the $100 million award because there was insufficient evidence to support it, and the Court of Appeals vacated the punitive damages award, which a district court had already reduced to $280 million, reflecting a statutory punitive damages cap. But the $140 million award was upheld by the Seventh Circuit. *Note: there was no finding that anything in the "comparative analysis" was false. Even a truthful comparison of software with that of a competitor was a basis for suing because TCS used Epic's confidential information and trade secrets without permission.*

NO INFRINGEMENT FOR USE OF INSTAGRAM IMAGE – Stephanie Sinclair, a professional photographer, posted one of her photos to Instagram. The website Mashable wanted to use the photo and offered her $50 for a one-time use license. She refused, but Mashable used it anyway, prompting Sinclair to sue. However, Mashable didn't take a screen grab of the photo; it used Instagram's application programming interface ("API"), which essentially created a miniature version of Instagram displayed on Mashable's site. That approach proved critical to the outcome of the suit since the court noted in its holding that Instagram's terms of use provided Instagram with a license to use posted material, as well as an unlimited right to sublicense such use. Further, Instagram's privacy policy provided that material posted as public (like Sinclair's photo) is subject to use by others via Instagram's API. The court found that, by embedding the photo using Instagram's API, Mashable used it with Instagram's authority, and Sinclair had consented to uses of that nature by consenting to Instagram's terms of service *This case illustrates the need for both content creators and users to be cognizant of the intersection between intellectual property law, contract principles, and enterprising use of technology. Note that Mashable likely would have been held liable for infringement if it had simply used a screen shot of the image.*

NEWS AND EVENTS

Jon Howe was recently named one of Northstar Meetings Group's "Top 25 Influencers of the Meetings Industry" for 2020. Read more here .

Christina Pannos recently presented "**Hotel Contracts in the Age of COVID-19"** before the Chicago Bar Association Trade and Professionals Associations Law Committee.

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