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THE HOWE & HUTTON REPORT

Volume 2021, Issue 2

TRENDING NOW

BUSINESS CITED FOR FAILING TO PROVIDE VIRUS SAFEGUARDS – The U.S. Department of Labor has penalized a Lynn, Massachusetts tax preparation business for refusing to provide coronavirus safeguards to employees. The DOL cited the business for:

> Prohibiting employees and customers from wearing face coverings in the workplace despite a statewide order mandating businesses to require that employees and customers wear masks;
>
> Requiring that employees work within six feet of each other and customers for multiple hours while not wearing face coverings;
>
> Failing to provide adequate ventilation in the workplace; and
>
> Failing to implement controls such as physical barriers, pre-shift screening of employees, enhanced cleaning and other methods to reduce the potential for person-to-person transmission of the virus.

Penalties of $136,532 have been assessed against the firm. Readers should consider whether adequate safeguards have been or can be provided in their workplaces.

TRENDING NOW (cont.)

CHICAGO PASSES VACCINE RETALIATION ORDINANCE – The City of Chicago has adopted a Vaccine Anti-Retaliation Ordinance. Effective immediately, all Chicago workers – including independent contractors – have the right to take time off from work to get vaccinated; they cannot be terminated or disciplined in any way. They can use accrued paid sick leave or paid time off to get a vaccination. If an employer requires workers to get vaccinations, workers can be vaccinated at any time during work hours if they choose, and the employer must pay the worker up to four hours per dose. In that situation, workers will not have to use paid sick leave or paid time off. The employer cannot require workers to get vaccinated during off-shift hours. *Violations of the ordinance will subject employers to fines of between $1,000 and $5,000 per offense.*

INSURANCE EXCLUSION FOR TCPA CLAIMS ALSO BARS COMMON-LAW CLAIMS – The U.S. Court of Appeals for the Seventh Circuit has upheld an insurance company's "Information Laws Exclusion" as applied to claims under the federal Telephone Consumer Protection Act and other claims arising out of conduct underlying the TCPA claims. Mesa was sued for sending unsolicited fax advertisements prohibited under the TCPA. Mesa notified its insurer, but the insurer declined to provide a defense. So, Mesa sued the insurer. The insurance company relied on the "Information Laws Exclusion" in its policy, which provided that the policy "does not apply to any damages, loss, cost or expense arising out of any actual or alleged or threatened violation of" the TCPA "or any similar regulatory or statutory law in any other jurisdiction." Mesa was sued not only under the TCPA but also for common-law conversion, nuisance and trespass to chattels (for Mesa's appropriation of the fax recipients' fax equipment, paper, ink and toner). The trial court awarded summary judgment to the insurer on Mesa's claim against it, and the Seventh Circuit affirmed that decision. The court held that all of the claims against Mesa arose out of the same conduct by Mesa, even though they were not all covered under the TCPA or any other similar federal or state law. *Because of policy language, insureds can only stretch policy language so far to win a claim against any insurer. Takeaway: read and discuss the terms of your policy with your insurance broker.*

COURT APPROVES SETTLEMENT OF CLAIMS BY WOMEN'S SOCCER TEAM AGAINST FEDERATION – *H&H Report Update* – A federal judge has approved settlement of a claim filed by players on the U.S. women's national soccer team against the U.S. Soccer Federation over unequal working conditions. Those working conditions included limited use of charter flights for travel, venue selection, the number of support staff and hotel accommodations for the women's team as compared with the men's team. *This settlement paves the way for further litigation of equal pay claim filed by the women against the Federation. Previously, the judge had ruled against the women on that equal pay claim . The women have said they will concentrate on appealing that decision in order to obtain equal pay for women players from matches controlled by the Federation, as well as from World Cup events for which pay is controlled by the international body FIFA. The women want the Federation to make up the difference in what FIFA allows men and women players, including shares of prize money.*

EMPLOYMENT

OSHA TO INVESTIGATE WHISTLEBLOWER RETALIATION – The U.S. Department of Labor has announced that its Occupational Safety and Health Administration (OSHA) will be investigating complaints of whistleblower retaliation under two new federal laws, the Criminal Antitrust Anti-Retaliation Act and the Anti-Money Laundering Act. *OSHA already enforces whistleblower protection provisions in more than 20 federal statutes that protect employees from retaliation for reporting violations of laws relating to workplace safety and health, airlines, commercial motor carriers, consumer products, environmental protection, financial reform, food safety, health insurance, motor vehicle safety, nuclear energy, pipeline operations, public transportation, railroads, maritime operations, securities and taxes.*

FORMER UNION MEMBER CAN'T SUE UNION OVER "FAIR-SHARE" FEES – The U.S. Court of Appeals for the Seventh Circuit has ruled that a former union member can't sue the union for deducting "fair-share" fees from her wages and continuing to represent her with her employer when she agreed to such an arrangement while a union member. Bennett's union told her she had to become a union member and pay union dues or decline membership and pay "fair-share" fees for union representation. She chose to resign union membership and sue the union, arguing that deducting "fair share" fees from her pay violated her First Amendment rights under the U.S. Constitution. Additionally, she claimed that allowing the union to exclusively represent her with her employer violated her constitutional rights. A trial court granted judgment to the union. The Court of Appeals affirmed, saying that Bennett could not establish that deduction of dues from her wages violated her First Amendment rights when she had voluntarily agreed to payment of those fees in return for the benefits of union representation. Further, she had not established that the long-standing exclusive union bargaining representation system of labor relations was unconstitutional. *Bennett seems to be permanently bound to "fair-share" fees because she arguably benefitted from union representation that she no longer wants (at least until this case gets to the U.S. Supreme Court).*

NONPROFITS

FCC ORDER CREATES CONFUSION FOR ASSOCIATIONS – The Federal Communications Commission has recently issued proposed guidance for callers subject to the federal Telephone Consumer Protection Act (TCPA). But it seems to have created confusion for associations, and several organizations have asked the FCC to clear it up. The Act, as implemented by the FCC, caps the number of calls that can be made to residential phone lines using artificial or prerecorded voice technology. The FCC has set a maximum number of calls that can be made (generally three calls every thirty days), but says calls beyond the maximum can be made with "prior express written consent" from the call recipient. Some trade associations have asked the FCC to amend its regulations to eliminate that requirement for calls beyond the maximum made by tax-exempt nonprofit organizations, citing the burden of the written consent requirement. *Unless changed, the written consent requirement would apply for calls made by nonprofits effective some time later in 2021. But the FCC may respond to criticism of its proposed guidance before the requirement takes effect.*

NONPROFIT NOT A "STATE ACTOR" BECAUSE OF LEASE – The U.S. Court of Appeals for the Ninth Circuit has held that the Western Justice Center, a private nonprofit club leasing property from the City of Pasadena, CA, was not a "state actor" that could be held jointly liable with the City under federal law. The Center rescinded a rental agreement it had with the Pasadena Republican Club for an evening speaking event after the Center learned that one of the scheduled speakers promoted causes antithetical to the Center's values. The Club sued the Center and the City under 42 U.S.C. Section 1983, a federal statute that provides individuals a cause of action for government actions that infringe on their constitutional rights. The Court of Appeals dismissed the action against the Center because the court concluded that there was no "state action" by the Center required for a claim under Section 1983. *Among other things, the Court of Appeals noted that the Center and the City managed their operations independently of each other, the City did not perform any City functions on the property, the City did not financially support the Center's operations, and the City did not profit or receive revenue from the Center's rental agreements. The fact that the City may have intangibly profited off the Center's civic activities was not considered sufficient to make the Center a "state actor."*

COURT OF APPEALS DISMISSES UNION SUIT TO SETTLE NONMEMBER REPRESENTATION ISSUE – The U.S. Court of Appeals for the Seventh Circuit in Chicago has dismissed a union's suit over "fair share" or "agency" fees. Unions have tried to collect such fees from nonmembers to compensate the unions for the representation services provided to nonmembers under laws such as the Illinois Public Labor Relations Act, which requires that unions provide fair representation to nonmembers in their bargaining units. However, Supreme Court of the United States ruled in the 2018 "Janus" case that unions compelling the payment of such fees violated the First Amendment of the U.S. Constitution by forcing nonmembers to subsidize union speech. In the present case, union Local 150, which represents municipal employees, argued that obligating unions to represent nonmembers without the ability to collect "fair share" or "agency" fees infringes a union's First Amendment rights of free speech and association under the U.S. Constitution. They lost at the trial court level, as a federal district court entered summary judgment against the union. The Court of Appeals has ordered dismissal of the union's suit because the Court of Appeals said the union had not alleged any concrete and particular facts showing that the union faced a predicament in its representation of nonmembers "free riding," that is, getting the benefit of union representation without paying for it. *The union alleged that the duty of fair representation owed to nonmembers under Illinois law cost the union at least $5 million annually. Perhaps the Court of Appeals thought the union should take that up with the Illinois lawmakers who imposed that duty on the unions.*

NONPROFITS (cont.)

COMMUNITY SERVICE CONTRIBUTIONS IMPOSED ON NEW JERSEY HOSPITALS – *H&H Report Update* - New Jersey has adopted new legislation imposing annual community service contributions on nonprofit hospitals. The law clarifies and preserves a statutory property tax exemption historically afforded to such hospitals. Additionally, the new law is a response to a New Jersey Tax Court decision holding that a nonprofit hospital in Morristown was not entitled to the exemption because it operated too similarly to a for-profit business. The Tax Court found that there were insufficient proofs to draw a distinction between for-profit and nonprofit activities conducted on hospital property. It further found that if other nonprofit hospitals operated in the same manner as the Morristown facility, their nonprofit status was a legal fiction because of their level of for-profit type activity. *Effective for tax year 2021, nonprofit hospitals in New Jersey will now be subject to a community service contribution equal to $3.00 a day for each licensed bed at the hospital on January 1, 2020. Satellite emergency care facilities will be subject to contributions of $300 for each day in the prior tax year. For each tax year thereafter, required contributions will increase by two percent for nonprofit hospitals and satellite emergency care facilities. Exemptions from contributions will be available if facilities can be shown to have provided community benefit over the preceding three years averaging at least 12% of the facilities' total expenses and, in the prior year, did not bill any patient for services.*

INTELLECTUAL PROPERTY

COURT RULES AGAINST COPYRIGHT TROLL – Copyright "trolling" is the practice of sending cease and desist letters to alleged infringers of dubious copyrights (including nonprofits) hoping to obtain prompt but modest nuisance settlements. In a recent case, the U.S. Court of Appeals for the Seventh Circuit affirmed a lower court judgment for Signature Construction after it was sued by Design Basics for alleged infringement of its registered copyrights held in ten of its floor plans for suburban, single family tract homes. The Supreme Court of the United States had found in one previous case that Design Basics' copyright in its floor plans was "thin." The courts in the Signature Construction case found that, despite the registrations Design Basics held, that company's copyrights were not violated by Signature. Much of the floor plans' content was unprotectable stock elements - a few bedrooms, a kitchen, a great room, etc., dictated by functional considerations and existing design conventions for affordable, suburban, single-family homes. In such cases where copyrights are thin, only a "strikingly similar" work with extremely close copying is actionable as unlawful infringement. But the courts didn't find such infringement in the Signature case. *The Design Basics floor plans, in other words, proved to be, a little too basic.*

TAXATION

IRS ISSUES USEFUL GUIDANCE ON EMPLOYEE RETENTION CREDIT AND PPP – The Internal Revenue Service has issued useful guidance on taking the Employee Retention Credit and PPP loans. Among other things, that guidance clarifies that it is possible to take the credit for federal tax purposes if an employer has received a loan under the federal Paycheck Protection Program. Further, the credit can be claimed even if an employer has not realized a reduction in revenue during a calendar quarter when a COVID-19-related shutdown or reduction of operations has occurred. It will apply to any such shutdown or reduction of operations from March 12, 2020 through January 1, 2021. And it can be claimed by PPP loan borrowers, although an employer cannot count the same wages for the credit and PPP loan forgiveness. According to the IRS, employers can "elect out" of claiming the credit so that wages can count toward PPP loan forgiveness, but not the credit, or vice versa. *Previous to issuance of the IRS guidance in Notice 2021-20, it was thought by many that employers could not claim a credit after receiving a PPP loan, and it was unclear how the credit and PPP loans interacted.*

COURT REVERSES ITSELF ON PROPERTY TAX EXEMPTION FOR CHURCH-RELATED RETREAT CENTER – The New Jersey Tax Court has reversed its own denial of a 2018 property tax exemption for a church-related retreat center run by Ocean Grove Camp Meeting Association. Looking at the case anew, the Tax Court found that the Township of Neptune had provided no evidence that any portion of income had been diverted from the center for any for-profit or non-tax exempt activity, nor were any of the trustees or officers of the center paid. All revenues generated by the center were spent on adult- and youth-based benevolent program services. *If at first you don't succeed in getting a tax exemption, sometimes you just have to keep trying.*

NEWS AND EVENTS

Jon Howe presented three programs at the RMCA Emerge Conference in Charlotte, NC.

- Risk Management in Pandemic and Post Times
- The Hybrid Meeting and its Ramifications
- What to do Post Covid-19 and Its Progeny

Jon presented a zoom webinar to the Mt. Diablo California Hospitality Group:

- Legal Things I Need to Know Post Covid

Jon also presented a webinar for Cadre, Inc.

- Concerns for the Independent - A Zoom Candid Conversation with Jon Howe

Jon presented at the IPEC in Louisville, KY

- Ask the Attorney-Legal Concerns for Covid-Era and Beyond-An Open Q&A Session

Jon will take part in the Spark & Speak Panel on Industry Needs on May 19 for the SITE Midwest Group

Christina Pannos recently provided an educational session at a trade association's annual training school that covered a wide range of legal issues, including:

- Product Liability
- Intellectual Property
- Social Media
- Cyber Security
- Covid-19 Liability and Waivers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or professional service through its distribution. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Past newsletters are available at howehutton.com.

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