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THE HOWE & HUTTON REPORT

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TRENDING NOW

EEOC ISSUES GUIDANCE ON EMPLOYEE TESTING FOR COVID-19 - The federal Equal Employment Opportunity Commission (EEOC) has issued guidance on employer testing of workers for COVID-19 before they are allowed to enter a workplace. The EEOC states that such testing is not considered by the Commission to be an "unnecessary medical examination" prohibited by federal law, because an employee with COVID-19 is a "direct threat" to the health and safety of others. Therefore, such testing can be done, consistent with the Americans With Disabilities Act (ADA) standard for mandatory medical tests, which requires that they be "job-related and consistent with business necessity." The EEOC notes, however, that it is the employer's responsibility to ensure that such tests are safe, accurate and reliable, referring employers to recognized public health authorities to determine what may or may not be safe, accurate and reliable testing. After testing, the ADA also requires that documents and information obtained from employees be treated as confidential medical information and stored separately from an employee's general personnel file. *Keeping the federal government happy with an employer's testing is essential. But employers must also keep in mind that states may have additional laws with which they must comply in testing employees for COVID-19, and some of them may differ from, or even conflict with, the federal government's advice.*

The SBA has released the Paycheck Protection Program Loan Forgiveness Application. You can download the loan forgiveness application here: PPP Loan Forgiveness Application

TRENDING NOW

GOVERNMENT ADDRESSES WAYS COMPETITORS CAN COLLABORATE DURING CORONAVIRUS CRISIS - The U.S. Justice Department and Federal Trade Commission, apparently in response to public requests, have jointly issued a statement regarding how competitors can collaborate in an effort to check the spread of COVID-19. The agencies note that competitors can collaborate in ways that do not restrain competition. More specifically, they say that the following examples of collaboration among business competitors are generally lawful: (1) collaborating on research and development, (2) sharing technical know-how that may be necessary to achieve the procompetitive benefits of certain collaborations (as opposed to company-specific data regarding prices, wages, output or costs), (3) collaboratively developing patient management standards to assist in clinical decision-making, (4) most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, and (5) private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19. The agencies also note that competitors can request Business Review Letters from the Antitrust Division of the Justice Department and can request Advisory Opinions from the Federal Trade Commission regarding proposed action that may raise antitrust concerns but is related to COVID-19 and addresses public health and safety concerns, pledging to respond to such requests expeditiously, and generally within seven calendar days. *The agencies say that they will be on the lookout for businesses using the COVID -19 outbreak to "subvert competition or prey on vulnerable Americans." That tells you their general attitude toward business collaborations. But, they say they will take "exigent circumstances" into account in evaluating proposed practices such as businesses temporarily combining production, distribution or service networks to facilitate production and distribution of COVID-19 supplies.*

YOU CAN'T SUE THE FEDS FOR QUARANTINE ISSUES - If you aren't terribly happy about "social distancing" and threats of federal government quarantines, you might be surprised to learn that, even if you suffer property damage or other injury as a result of improper efforts by the federal government to enforce a quarantine, there's nothing you can legally do about it. So said the U.S. Court of Appeals for the Fifth Circuit recently in deciding a case in which cattle owners sued the federal government for injuries and deaths to their cattle that resulted from enforcement of a "fever tick" quarantine by the U.S. Department of Agriculture. The cattle owners sued, alleging among other things, that some of their cattle died because the Department treated them with a chemical in clear violation of government warnings on packaging for the chemical. A federal district court dismissed the suit, and the Court of Appeals affirmed that decision, finding that no suit could be brought against the government, regardless of whether the suit otherwise had merit, because the federal government had immunity from suit under the Federal Tort Claims Act for anything the government might do in enforcing a "quarantine." *The federal government has "sovereign immunity" from suit except in cases where the government has waived that immunity under the Act. But there is a specific "quarantine" exception in the Act applying to wrongs the government might commit in enforcing a "quarantine."*

TRENDING NOW

IRS REJECTS DOUBLE TAX BENEFIT UNDER PPP - The Internal Revenue Service has issued guidance providing that certain otherwise deductible expenses paid by an organization receiving a loan under the federal Paycheck Protection Program (PPP) will not be deductible to the extent paying back the loan has been forgiven. The PPP was established under the federal Coronavirus Aid, Relief and Economic Security Act (CARES), and, under the PPP, recipients of covered loans can use loan proceeds to cover payroll costs, certain employee benefits related to health care, interest on mortgage obligations, rent, utilities, and interest on certain other existing debt obligations, all of which payments might be considered tax-deductible. Under certain conditions, a recipient of a PPP loan can receive forgiveness of the indebtedness on the loan in an amount equal to eligible expenses paid in the eight-week period immediately following the loan's origination date. So, the IRS has now concluded that forgiveness of the debt, along with deductions for expenditures made with the proceeds of the loan, would give the borrower a double tax benefit, and the IRS won't permit that.

LABOR DEPARTMENT REQUIRES EMPLOYER TO PROVIDE PAID SICK LEAVE – The U.S. Department of Labor signaled its readiness to take action against employers for failing to provide paid sick leave to workers as provided under the new federal Emergency Paid Sick Leave Act. Investigators from the Department's Wage and Hour Division found that Discount Tire Centers failed to pay an employee paid sick leave after the worker spent some time at home when given doctor's instructions to self-quarantine due to COVID-19. Consequently, the Department ordered Discount to pay a worker for two weeks of home leave required by the Act. *Employers must provide up to 80 hours of paid sick leave to workers who must take time off from work for reasons related to COVID-19. The Act's effective from April 1, 2020. So, employers need to adapt their compensation practices to it immediately, while also remaining alert for additional new payroll requirements that may be passed by government in response to the coronavirus pandemic*

CALIFORNIA ADOPTS COVID-19 WORKERS COMP PRESUMPTION - The Governor of California, Gavin Newsom, has adopted an executive order establishing a presumption that employees in that state with COVID-19 are eligible for workers compensation because they have contracted the virus in the course of employment. The order says that the presumption will apply if the employee tests positive for or is diagnosed with any COVID-19 related illness between March 19 and July 5, 2020 and within 14 days after the employee performed work at their place of employment and at their employer's direction, provided the employee performed work for the employer on or after March 19, the place where the employee performed work was not his place of residence, and any diagnosis of the illness has been confirmed by further testing within 30 days. *This presumption can be overcome by contrary evidence, but proving where and when anybody contracted the virus is bound to be difficult when it may be everywhere and nobody knows for sure (as opposed to just having an opinion) where or how it got started. Clearly, the presumption gives California employers an incentive to keep employees working at home at a time when many employers are worrying about how they will ever be able to convince work-at-home employees that they should return to their normal place of employment.*

EMPLOYMENT

VIRUS IN THE WORKPLACE - With more states and businesses opening up and employees returning to work (or refusing to do so), our clients have been asking us the following questions:

Can an employer bar older employees from coming back to work altogether for the reason they are particularly susceptible to the coronavirus? No. Absolutely not. A blanket prohibition on older employees returning to work would violate the Age Discrimination in Employment Act or its state or local equivalent. An employer cannot exclude from the workplace an employee who is 65 years old or older and who does not have COVID-19, or symptoms associated with this disease, solely because the Centers for Disease Control has identified this age group as being at a higher risk of severe illness if they contract COVID-19. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave. One way to show that an action was based on age would be if the employer did not take similar actions against comparable workers who are under the age of 40.

Can an employer ask employees questions about their health or require them to have their temperature taken before starting work? Yes. These questions arise in the context of the Americans With Disabilities Act (ADA) and state and local laws prohibiting disability discrimination. At the present time, the COVID-19 pandemic permits an employer to take the temperature of employees who are coming into the workplace. Employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace on the ground their presence would pose a direct threat to health or safety. For those employees who are teleworking, however, they are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask these questions. The ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19, as well as the ability to bar this employee's presence if he refuses to have his temperature taken. If an employer wishes to ask *only one particular employee* (as opposed to asking all) questions designed to determine if s/he has COVID-19 or require a particular employee to have his/her temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee. Do not ask employees who are physically coming to work if they have *family members* who have COVID-19; ask whether the person has had contact with *anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms* associated with the disease. The Genetic Information Nondiscrimination Act - **GINA** for short - prohibits employers from asking employees medical questions about family members.

Can an employer require an employee to assume the risk of contracting the virus in the workplace? Absolutely not! An "agreement" by an employee that s/he will assume the risk of getting sick on the job and "hold harmless" the employer if s/he does violates state workers compensation laws and is void and unenforceable. Even if an employee signed such an agreement, it would be worthless.

NLRB SAYS EMPLOYERS MAY SOMETIMES ENCOURAGE WORKERS TO SOLICIT OTHER EMPLOYEES AGAINST UNION ELECTION - The National Labor Relations Board has ruled that an employer, under certain circumstances, may encourage workers to solicit other employees to vote against unions. However, such encouragement can only be generally offered to all employees and preferably in a written form that is 'indirect" and "impersonal." *Such encouragement cannot be offered to selected employees by their supervisors because the Board believes supervisors can exert extensive pressure on their subordinates, particularly during a union organizing campaign.*

COURT RULES "UNLIMITED VACATION" POLICIES MAY TRIGGER OBLIGATION TO PAY EMPLOYEES FOR LEAVE NOT TAKEN - The California Court of Appeal has ruled that a so-called "unlimited" vacation policy may trigger an employer's obligation to pay workers for untaken vacation time upon separation from employment. Under California law, employers must pay workers for accrued but untaken vacation time upon separation. But some have thought that an exception might be if the employer has no policy providing for accrual of a specified amount of vacation time, but provides an unspecified amount of vacation time to employees whenever they want to take it, if they have completed their pending work (perhaps more accurately called a "professional" or "reasonable use" vacation policy). In *McPherson v. EF Intercultural Foundation, Inc.,* the Court of Appeal was asked to decide whether a nonprofit was required to pay three employees wages for vacation time not taken when their employment ended, even though the nonprofit had no policy providing for accrual of a specific amount of vacation time. The Court of Appeal responded with a resounding "maybe" in a partial judgment allowing that an obligation to pay for vacation time not taken might arise in such cases, and an employer could escape having to pay for such time if (1) its "unlimited vacation" policy is in writing, (2) the policy "clearly provides" that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule – including employees' ability to decide when and how much time to take off, (3) the policy spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off, (4) the policy, in practice, allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off" and (5) the policy is administered fairly so that it neither becomes a de facto "use it or lose it policy" nor results in inequities, "such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off." *Seems like quite a burden to bear for an employer seeking to follow an "unlimited vacation" policy. But if it works for the employer and the workers, maybe it would be worth sacrificing the relative clarity of a written policy either clearly providing for accrual of vacation time or not. In any event, the Court of Appeal, in this case, concluded that EF didn't actually have an 'unlimited"vacation policy, since it expected employees to take vacation within the amounts typically taken by corporate employees, "such as two to six weeks."*

EMPLOYMENT (cont.)

EMPLOYEES SHOULD BE PAID FOR CALL-IN TIME - The U.S. Court of Appeals for the Ninth Circuit, applying California law, has held that an employer could have been obligated to pay workers for time they spent calling their managers to see if they would be required for scheduled shifts. A group of workers alleged that they were required by their employer to call their managers 30 minutes to an hour before a scheduled shift began to determine if they would actually be needed for a shift. The workers alleged that they were required to make such calls three to four times per week and the calls lasted five to 15 minutes each. They alleged that they were expected to use their own phones for such calls and could be disciplined for failing to make them. They said they were expecting to work when they made the calls, incurred costs in rearranging their activities to comply with the employer's "call -in" requirements, and, after calling in, were often not allowed to work. The Court of Appeals, based on those allegations, concluded that the employees properly alleged that they were "reporting for work" when they complied with the employer's call-in requirements and should have been paid for time spent making the calls. Consequently, the employer's motion for a judgment on the pleadings was denied. *When more and more employees are working from home due to coronavirus restrictions, employers need to be aware that they may be required to pay workers for time spent complying with "call-in " obligations***.**

DISCRIMINATION IN OFFERING SEVERANCE PACKAGES MAY BE BASIS FOR SUIT - The U.S, District Court for the Northern District of Alabama has ruled that an employer can be sued for sex discrimination in offering severance packages to workers. In a recent case, the court considered a complaint filed by three female employees who alleged that a company separated them from employment but did not offer them severance packages comparable to those male employees received. Airbus Defense & Space Inc. lost a military contract and decided to reduce its workforce accordingly. Allegations made in the complaint said that Airbus tried to transfer as many employees as possible to other facilities and offer them positions substantially equivalent to their previous jobs in pay, status, position and location, while other employees were offered severance packages instead. One of the plaintiff employees alleged sex discrimination in that she believed the new position she was offered was not substantially equivalent to the position she lost, while the two other plaintiffs initially accepted new positions and rejected them later after finding that they might have to accept transfer to another location. All three plaintiffs then rejected severance packages, claiming that they were not as favorable as those offered to male employees. Upon review of the allegations, the court agreed with the plaintiffs that employees could make out a case for sex discrimination based on disparate treatment in the offering of severance packages. But the court found that the plaintiffs hadn't sufficiently pleaded discrimination in their individual cases. *With many employers reducing their workforces owing to COVID-19, it is important that they keep an eye on their severance practices to ensure they are not discriminating in implementing them.*

EMPLOYMENT (cont.)

BIPA VIOLATIONS CAUSE CONCRETE INJURY TO PRIVACY RIGHTS – *H&H Report Update* - The U.S. Court of Appeals for the Seventh Circuit in Chicago has reversed a lower court and held that violations of the Illinois Biometric Information Privacy Act (BIPA) lead to invasions of personal rights that are both concrete and particularized, allowing injured parties to sue in federal court. Bryant's employer had a cafeteria containing vending machines owned by Compass. The machines did not accept cash, requiring that users create an account using their fingerprints. Bryant sued Compass under the Act, claiming that fingerprints are "biometric identifiers" protected under the Act and, in violation of the Act, Compass never made publicly available a retention schedule and guidelines for permanently destroying the fingerprints and information it was collecting, never informed Bryant that her identifiers were being collected and stored, never informed Bryant in writing of the purpose and length of time for which her fingerprints were being collected, stored, and used, and never obtained Bryant's written release to collect, store and use her fingerprints. A federal district court held that it did not have jurisdiction to hear Bryant's complaint because Compass's alleged BIPA violations were bare procedural violations that caused no concrete harm to Bryant. But the Court of Appeals reversed, finding that a failure to follow the Act results in an invasion of personal rights that is both concrete and particularized. *It is a change to see a court protecting personal rights when other recent court cases reported here have indicated that even a person's most fundamental constitutional rights can be violated with impunity by state governments in attempting to deal with the current emergency presented by COVID-19.*

NEW SUPERVISOR'S EXPECTATIONS MUST BE MET - The U.S. Court of Appeals for the Eighth Circuit has rejected an operations manager's claim that he was terminated for filing a discrimination charge with the federal Equal Employment Opportunity Commission. The manager had received positive performance evaluations until his supervisor changed. But he had problems with the new supervisor, filed his EEOC charge, and then received his first "unsatisfactory" performance evaluation at a meeting during which the manager became angry. He was suspended and fired, and he then filed suit for retaliation, relying especially on the short time between his discrimination charge and his unsatisfactory review. But the Eighth Circuit said timing alone was not sufficient to establish that the manager was fired on a pretext because of his discrimination charge. Rather, the Court of Appeals found "another rational explanation" for his termination, namely, "the shifting expectations of a different supervisor." *The Eighth Circuit, quoting one of its own earlier decisions, noted that protection from retaliation for filing an EEOC complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct...."*

NONPROFIT

NONPROFIT SOCCER FEDERATION WINS RULING IN PAY EQUITY DISPUTE - Judge Gary Klausner of the U.S. District Court for the Central District of California has granted a partial summary judgment to the nonprofit U.S. Soccer Federation, Inc. in a pay equity class action lawsuit brought by members of the U.S. women's national soccer team, who claimed that U.S. Soccer systematically underpaid members of the women's team in comparison with the earnings paid to members of the U.S. men's soccer team. Rejecting claims for nearly $66 million in damages, the judge noted that the women's claims were based on the federal Equal Pay Act and Title VII of the federal Civil Rights Act. But while both Acts make it illegal for employers to vary employee compensation based on gender, the judge also pointed out that both Acts allow differing payment of compensation when factors such as collective bargaining agreements and seniority systems are considered. In this case, representatives for the men's national soccer team and the women's national soccer team had separately negotiated different collective bargaining agreements with U.S. Soccer, and the women had rejected an offer that they be paid under the same pay structure as the men, negotiating instead for something different (forgoing higher bonuses, for example, in return for other benefits, such as the guarantee of a higher number of contracted players). Accordingly, the judge said the women could not retroactively deem their collective bargaining agreement worse than the men's agreement by reference to what they would have been paid under the men's agreement, when they themselves had previously rejected the structure on which the men were paid. *The judge also rejected a claim the women made that U.S. Soccer made them train and play under unsafe conditions because they trained and played on artificial turf. Additional claims made by the women still remain and will be tried in front of a jury, with a court date tentatively set for June 16. These include claims based on medical and training support services issues and claims based on travel accommodations. The women also have the right to appeal the district court decisions for U.S. Soccer to the U.S. Court of Appeals for the Ninth Circuit.*

MUNICIPALITIES MAY JOIN NONPROFIT PROMOTING POLITICAL AND LEGISLATIVE AGENDA - The U.S. Court of Appeals for the Seventh Circuit has held that municipalities have the right to join a nonprofit, and pay dues to it, even if it promotes a particular political and legislative agenda. The Village of Lincolnshire, Illinois joined, and paid dues to, the nonprofit Municipal League. Individual residents of Lincolnshire and unions sued, claiming that their rights under the First Amendment and Equal Protection Clause of the U.S. Constitution were violated because the nonprofit sent email promoting a particular political and legislative agenda (including adoption of "right to work" zones), dues were paid from the Village's taxpayer-supported General Fund, and, consequently, some residents were being compelled to subsidize private speech with which they disagreed. However, the Seventh Circuit affirmed a lower court's dismissal of the suit, concluding that Lincolnshire had the right to speak for itself on matters related to municipal government and could do it directly or through a "surrogate" like the League. *This is an important decision for nonprofits seeking to recruit government entities and their employees as members.*

TAXATION

IRS REJECTS HEALTH INSURER EXEMPTION APPLICATION - The Internal Revenue Service has released a letter ruling rejecting an application for recognition of exemption under Section 501(c)(3) of the Internal Revenue Code for an organization providing health insurance for a fee. The IRS noted that the organization's information indicated that its insurance activity would be substantial during its first several years of operation, and the Service concluded that it was a substantial nonexempt purpose, not a charitable purpose as the organization claimed in its exemption application. In addition, the organization was providing "commercial-type insurance," and it was not an HMO, which might have allowed it to provide such insurance on a tax-exempt basis under the limitations of Code Section 501(m). *The IRS and the courts have long held that not every activity promoting health will be considered charitable. For example, the sale of pharmaceuticals for a fee is not charitable, and neither is the sale of health insurance for a fee that is not substantially below cost (which was not true of the applicant's fees in this case).*

ARKANSAS TAXES NON-RESIDENT EMPLOYEE ON PERSONAL INCOME The Arkansas Department of Finance and Administration has issued an opinion that a computer programmer employee of an Arkansas-based company, who was working entirely from her home in Washington State, was liable for Arkansas personal income tax on all of her compensation. The Department found that the employee's maintenance and manipulation of computer systems at the employer's Arkansas location directly impacted the employer's ability to carry out its mission and purpose and, consequently, constituted carrying on an occupation in Arkansas, making the employee subject to the Arkansas tax. Most states take the position that a nonresident is not liable for the state's taxes unless they have more of a connection to the state than simply being an employee of an employer based in that state. But the Department said it sees things differently. *If nonresident employees are subject to a state's income tax, then the employer may be subject to different and additional withholding responsibilities for them that do not apply to their employees residing in the employer's home state. Furthermore, the employees may face taxation on the same income in their home states and may not be able to claim a credit in one state for taxes paid to the other. The Department's ruling comes at a time when more and more people are working remotely because of COVID-19, which gives the decision extra significance.*

NEWS AND EVENTS

Jon Howe has participated in the following webinars:

April 7. 2020 Survival Skills for Independent Planners
April 7, 2020 Payroll Protection Program: Legal Issues
April 15, 2020 Ask the Attorney - A Town Hall
April 16, 2020 Brunch With Actual Nerds—Legal Issues in a Digital World
April 21, 2020 Critical Information for the Invisible/Invincible Industry-Legal Issues
May 5, 2020 Survive and Advance Important Contract and Insurance Issues for Businesses in the COVID Era
May 12, 2020 Ask the Lawyers Town Hall

Jon has an upcoming webinar with Association Forum Chicago on Legal Issues in Meetings and Conventions today.

On May 27th Jerry Panaro is participating in a webinar hosted by Bankers on Line regarding Legal Issues during COVID-19 and the Workplace including FFCRA, FLSA, OSHA, COBRA, ACA.

Topics to be covered include emergency family leave, sick leave, options for reduced pay and/or hours, furloughs, eligibility for unemployment compensation, right to continued health care coverage in the event of reduced hours or furlough and the duty to provide a safe workplace. These topics apply to nonprofits as well as for-profit companies in any field, regardless of size.

For more information or to register for this event visit: Bankers on Line

Nathan Breen's webinar "Protecting Your Organization's Intellectual Property" is now available on the Lorman Live webinar page. Please visit LORMAN LIVE for more information and your chance to register with a 50% savings.

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