Newsletter | Summer 2018

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

Major Developments Regarding Local Taxing Powers

By Michael G. Colantuono

There is much recent news for local government finance, with decisions extending agencies' power to tax electronic commerce and a deal to keep the onerous Business Roundtable Initiative off the November ballot.

South Dakota v. Wayfair is the U.S. Supreme Court's blockbuster decision on e-commerce taxes. For 50 years, the Court required a business to have a physical presence in a state or a locality for that government to tax it. In the 1960s, mail-order businesses did business nationwide, but located in low- or no-tax jurisdictions to avoid taxes in most of their markets. E-commerce has made the physical presence rule more and more irrational. As the Court noted, an internet vendor with a pervasive presence in South Dakota paid no tax while a competitor who warehoused a bit of inventory there would. Now, significant participation in an agency's marketplace triggers tax jurisdiction.

Congress may weigh in on e-commerce taxes. In the meantime, local agencies adopting new taxes (with voter approval) can tax any business with a meaningful local market. Very small vendors (like those who sell crafts on Etsy or Craig's List) should be exempted. The case will immediately enhance use tax collection. Sales in California are subject to sales taxes, collected by sellers from buyers and paid to the State and the locality where the sale occurred. Use taxes apply to sales by out-of-California businesses, but few sellers collect them (Amazon now does) and even fewer buyers pay them (as the law requires). *Wayfair* allows the State to compel all businesses which do meaningful volume here to collect use taxes for it and its local agencies.

The onerous Business Roundtable Initiative — funded by Big Soda and requiring 2/3-voter approval for all new taxes and many fees — will not appear on the fall ballot. Backers withdrew it for the Governor's signature on A.B. 1838, an immediately-effective budget-trailer bill forbidding taxes on "groceries" — including "carbonated and noncarbonated nonalcoholic beverages" and excluding alcohol, cannabis, tobacco and electronic

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ELECTION LAW

Election season is coming and CH&W can help! We have broad experience advising public agencies and elections officials in all aspects of elections law, both advice and litigation.

Our experience covers regular and special election procedures, ballot titles and impartial analyses, agency-sponsored measures, initiatives and referenda, ballot arguments, campaign finance regulations and election contests.

We recently advised a special district on a referendum of a fee and obtained a court order striking misleading language from a ballot argument against a tax measure.

More details are on our website. Let us know if we can help!

Social Media Blockers Beware!

By Ryan Thomas Dunn

Government is an expressive business and expressive activity these days is commonly done electronically — including by social media. As President Trump recently discovered, if you do public business via Twitter or another social media platform, you can create what is known as a "public forum" under the First Amendment from which you may not exclude political adversaries or critics.

A federal judge in New York held the "interactive space" in President Trump's Twitter feed — where other Twitter users can "follow" him and respond to his tweets — is subject to First Amendment protection as a "public forum." The court concluded the federal government's ownership or control of the President Twitter account — the parties agreed the President and the White House social media director control the account — and the President's use of the account to announce executive actions — like announcing the appointment of cabinet secretaries — makes a public forum of the "interactive space" in which other users could reply. Thus, the President's practice of blocking users who disagree with him is viewpoint discrimination in a public forum violating the First Amendment. The President has appealed.

Mr. Trump is not alone. Plaintiffs blocked on social media by other public officials have filed similar suits around the country. In San Diego County, a labor leader alleged a First Amendment violation by National City, claiming the mayor blocked the labor leader from commenting on the mayor's Facebook page. The mayor admits he uses his Facebook page for City purposes, and thus the court may find the interaction portions of his page to be protected by the First Amendment just as the New York federal court found the President's Twitter feed to be.

The line between creating a public forum in a public official's social media accounts and limits them to private speech can be hard to draw, so there is some risk in suppressing views by deleting comments or blocking critics. The federal judge in New York distinguished an official's "purely personal Twitter account," which is "one that she does not impress with the trappings of her office and does not use to exercise the authority of her position[.]" It is safer for officials to ignore competing views on their social media or to respond by stating disagreement. Alternatively, officials can use separate accounts for public and private purposes or let agency staff handle official communications.

The law typically follows society and sometimes has to race to keep up. That is certainly true as to information technology and social media. These issues will continue to evolve. As they do, we will keep you posted!

For more information on this subject, contact Ryan at RDunn@chwlaw.us or (213) 542-5717.

Revenue Law Developments

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cigarettes — from 2018 to 2030. Soda taxes in San Francisco, Oakland, Berkeley and Albany are exempted. The statute applies to all local governments, including charter cities, but a strong argument can be made that no state interest justifies this interference with charter city home rule power. The statute restricts litigation of such cases to Sacramento Superior Court, a venue the State has found favorable in post-redevelopment disputes with local government. Public health advocates rue the deal, but many in local government — and public-employee unions which participated in the negotiations — are relieved the Business Roundtable Initiative is off the table.

Other significant developments in local finance law are pending in appellate courts and the Legislature. We will update you on those next time.

For more information on this subject, contact Michael at MColantuono@chwlaw.us or (530) 432-7359.

Court Applies Age Discrimination Statute to the Fire Service

By Pamela K. Graham

The country's high court will soon decide whether all state agencies, regardless of size, are subject to the federal Age Discrimination in Employment Act (ADEA), which protects workers over 40 from age discrimination. In February, the U.S. Supreme Court granted Mount Lemmon Fire District's petition for certiorari to decide whether the Act's exemption for private employers with fewer than 20 employees also applies to government agencies, or whether **all** government agencies are subject to the ADEA.

In *Guido v. Mount Lemmon Fire District*, two employees sued the Arizona district for age discrimination. The two Captains were the oldest full-time employees of the District when it terminated their employment.

The ADEA prohibits employers from discriminating against employees based on age, but excludes private employers of fewer than 20 people. Though the Act was amended in 1974 to apply to states and their political subdivisions (cities, counties and special districts), the Mount Lemmon employees argued all government agencies — regardless of workforce size — must comply with the ADEA.

29 U.S.C. § 630(b) defines an "employer" under the Act as:

> [A] person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year …
>
> The term **also means** (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States." [Emphasis added.]

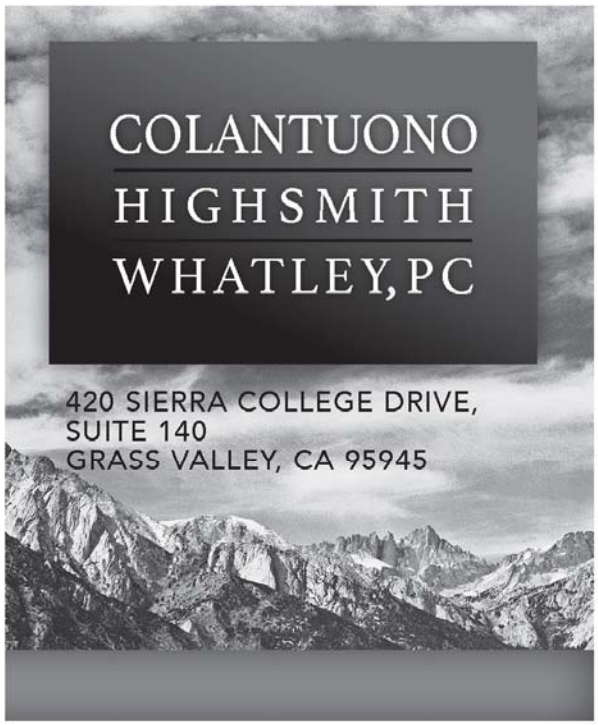
The federal trial court granted summary judgment to the District, ruling the 20-employee threshold applies to government employers, too. Because the Fire District employed only 11, it was exempt from the ADEA.

The Ninth Circuit reversed, finding the statute's plain meaning applies the 20-employee minimum only to private employers: "[T]he use of separate sentences and the word 'also' combine to create distinct categories, in which clarifying language for one category does not apply to other categories. … The twenty-employee minimum does not apply to definitions in the second sentence and there is no reason to depart from the statute's plain meaning." Because the Ninth Circuit ruled on the statute's text alone, it did not consider that four other circuits have declared section 630(b) ambiguous and interpreted the 20-employee minimum to apply to political subdivisions. They did so to avoid an anomalous result — why should small private employers be exempt, but not small governments?

The Supreme Court will now decide the issue. The case is now being briefed and expected to be decided by June 2019.

Of course, no employer should discriminate based on age. Like the ADEA, California's Fair Employment and Housing Act (FEHA) prohibits age discrimination. FEHA covers any employer —public or private — with five or more employees. An employer may enforce bona fide occupational qualifications, especially for physically demanding occupations like fire-fighting. But, if a court rejects such a justification, age discrimination can be costly. Policies establishing physical qualifications for employment should be written and the basis for employment decisions should be documented to overcome any allegation an employment decision was motivated by membership in a protected class.

For more information on this subject, contact Pamela at PGraham@chwlaw.us or (213) 542-5702.



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