PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ▪ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ▪ Fax: (415) 433-9434 ▪ www.sfcounsel.com

APRIL 2020

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Wire Fraud Alert

Recently we have been seeing and hearing about a proliferation of fraudulent scams. Sadly, this is almost certainly the result of more (indeed nearly all) people working from home these days. I'll explain the two frauds we have witnessed below but if you take one thing away, it is to always independently verify wire requests before sending any money to anyone. For example, rather than calling a phone number that is in a suspect email, look up the individual or company and call them directly to verify that the situation is legitimate.

In the first instance, which happened to one of our clients, a fraudulent third-party hacked into someone's email and began to monitor email traffic. When a customer of our client inquired about paying an invoice, the third-party, using a fake domain name (that was one letter off so that it looked like the right domain name), interjected themselves into the conversation and responded to the customer (by impersonating an individual at our client) that the customer should wire payment for the invoice rather than sending a check. The customer then, unfortunately, "paid" our client a significant sum of money by wiring the funds to the fraudulent party's bank account. The customer never realized that they were not communicating with our client. Had the customer simply picked up the phone and called my client (using her phone number on the Internet or in their personal database (and not the one listed in the email, which was false) they would have immediately learned that the request to wire the funds was a fraud. There were other red flags they missed as well, such as the domain name being slightly off, the fact that the bank they were to wire funds to was in Texas while our client was in California etc., but regardless, a simple verification call would have protected against this situation.

In the second instance, which happened to our firm, an individual contacted us saying they has been referred to us by the San Francisco Bar Association and that they needed assistance with a purchase agreement. They signed our Retainer Agreement and provided us with a detailed Letter of Intent on the deal for review. Then, rather than send in the retainer fee, they, unexpectedly, sent us a very large cashier's check allegedly drawn on a large national bank and asked us to deposit it as part of the purchase price, take our retainer fee, and remit the balance to the seller. After reviewing the domain names and communications and noticing some irregularities in the email addresses (extra letters in names, gmails rather than company domain names for some of the emails etc.) we contacted the buyer and seller in the transaction by looking up their information independently and confirmed that while they were indeed real companies they were not involved in the

In This Issue

Denis Kenny

Writer's block. It is a term frequently used but not easily defined. I can say that is what I am feeling as I try to write this Spring 2020 version of Partner Notes. There is so much news bombarding me that I am pretty sure any poignant comments I may try to write about, will be obsolete or outdated within days and perhaps hours of publication. The upcoming Presidential election, the COVID-19 pandemic and resulting shelter-in-place orders, the economy, the closures of schools, and the cancelation of sporting events, concerts and

deal. It was all a fraud and the individuals who had contacted us were impersonating both the buyer and the seller. The "cashier's check", which looked completely real, was a fake and they were hoping that we would deposit it and wire funds out before learning that the check bounced.

Our bank confirmed that they also are seeing a spike in wire fraud. They feel that this is because of the dramatic increase in people working from home and who therefore are unable to easily talk in person with people they work with to easily verify wire requests.

During this time of people working from home, please take extra precautions before wiring funds out to confirm that the communications are legitimate. The scam artists are relying on people using email or text only to communicate and hoping that you don't go the extra step and give someone a call.

Scherer Smith & Kenny LLP remains available to guide you through these issues. For additional information, please contact Brandon Smith at bds@sfcounsel.com or Heather Sapp at hgs@sfcounsel.com.

- Written by Brandon Smith

COVID-19 and Paid Sick Leave

The COVID-19 pandemic has brought seismic changes to nearly every facet of our lives. The same has been true for federal and local employment laws. Although the law typically evolves and changes at a near glacial pace, the COVID-19 pandemic has produced new sick leave laws in a matter of weeks that would have before taken nearly a generation to draft and enact.

A. Families First Coronavirus Response Act

The Families First Coronavirus Response Act ("FFCRA") is federal legislation that went into effect on April 1, 2020. The FFCRA provides both paid sick leave and paid family leave, the latter of which may extend for up to twelve weeks.

Under the paid sick leave portion of the FFCRA, an employee who is unable to work (i) because of quarantine due to a federal, state, or local government order, (ii) on the advice of a health care provider, or (iii) because the employee is experiencing COVID-19 symptoms and seeking medical diagnosis may receive up to two weeks (or eighty hours) of paid sick leave. Such leave is paid at the employee's regular rate of pay up to a maximum of $511 per day (or an aggregate amount of no more than $5,110 over a two-week period.) The leave is not available to employees who are unable to work only due to a shelter-in-place order. Employees may also be eligible for up to two weeks of paid leave if they are caring for a family member that is subject to quarantine, but in such case the employee's sick pay is capped at two-thirds of the employee's regular rate of pay up to $200 per day (or an aggregate amount of no more than $2,000 over a two-week period).

Under the paid family leave portion of FFCRA, an employee who is unable to work due to a child's daycare or school closing because of the COVID-19 pandemic may receive up to twelve weeks of paid sick leave. Such leave is paid at two-thirds of the employee's regular rate of pay up to $200 per day (or an aggregate amount of no more than $12,000 over a twelve-week period).

The United States Secretary of Labor has issued temporary regulations concerning the FFCRA (Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020), https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf), but an exhaustive discussion is beyond the scope of this article. However, highlights for employers to be aware of include the following:

conferences, are each so pervasive in our lives and media coverage, that I don't want to think about these anxiety-ridden and divisive topics, let alone write about them.

Although this may make me appear socially irresponsible, in general, I try to avoid watching or reading the news. I have obvious exceptions to this self-made policy, as I devour articles and publications relating to the law and my specific focus in employment matters, since these topics excite me and allow me to remain at the forefront of my dynamic law practice. And, I also closely follow all types of sports including all topics relating to "my teams": all Cal Bears sports, the Warriors, the A's and da Raiders (on the latter, I am an admitted glutton for punishment having remained loyal to perhaps the most disloyal franchise in professional sports but, "teaser alert" that is a topic for a future Partner Notes). But aside from this type of news, most of the time the headlines alone about current events news including politics and the economy, make me feel a pit in my stomach and cause me to spiral into worrying about things that I can't control. So, I choose to engage in an ongoing fight to focus on positive thinking about things I can control in my everyday life.

I try at some point, and, ideally at many times during my day, to consciously think about how thankful I am for my own and my family's health and well-being. Thankful for having a job and being in a profession that allows me to help others. Thankful for living in a country that allows its citizens to speak and write about whatever they choose,

• The law exempts several types of employers, including employers with over 500 employees and certain health care providers. The law also provides potential exemptions for small employers with fewer than fifty employees if they can demonstrate either (i) providing paid leave would cause business expenses to exceed revenues, (ii) the absence of the particular employee requesting leave would "entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities," or (iii) granting the request for leave would leave the business without a sufficient labor force "to operate at a minimal capacity."

• In order to be eligible for twelve weeks of paid family leave, the employee must have been employed for at least thirty days before the leave is requested. Any employee can request paid sick leave or up to two weeks of paid family leave.

• The FFCRA – like the Family Medical Leave Act – contains anti-retaliation provisions to prevent employers from retaliating against employees who request leave under the new law.

• Covered employers must post a notice of the FFCRA's provisions in a conspicuous location on their premises.

• Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.

B. Expanded San Francisco Paid Sick Leave

San Francisco already mandates companies employing workers within the city provide a certain minimum amount of paid sick leave, the accrual of which is capped at up to seventy-two hours for larger employers. However, in March Mayor London Breed announced that the city would enact expanded paid sick leave provisions in response to the COVID-19 pandemic. Under these expanded provisions, the city has made a pool of $10 million available to employers to reimburse them for providing expanded sick leave benefits to employees. Under this program, the city will reimburse $15.59 per hour for up to forty hours of additional sick leave, or up to $623 per employee. Businesses are required to pay any difference in wages if the employee's rate of pay is greater than $15.59 per hour. Employees must also exhaust any previously accrued paid sick leave before an employer can seek reimbursement for the provision of additional paid sick leave. These reimbursement amounts are available to employers with less than 500 employees.

Additionally, on April 17, 2020, Mayor London Breed signed into law an emergency ordinance requiring companies with 500 or more employees to provide an additional two weeks of paid sick leave to employees due to circumstances created by the COVID-19 pandemic, the San Francisco Public Health Emergency Leave Ordinance. The qualifying reasons for use track nearly identically the reasons for use of paid sick leave and paid family leave under the FFCRA, and the emergency ordinance is clearly meant to cover large employers who were exempted under the FFCRA. As of April 16th, the emergency ordinance is currently awaiting Mayor Breed's approval. If approved, it will go into effect immediately and continue for the sooner of sixty-one days or whenever the declared public health emergency ends.

We here at Scherer Smith & Kenny LLP remain available to address any questions you may have related to these or other employment- or business-related issues. For additional information, please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr., at jbl@sfcounsel.com

- Written by Ryan Stahl

including expressing opinions which may be hostile to government leaders or the popular majority's positions or views.

Some may describe these types of self-reflective thoughts as meditation grounding. Whatever the term, it seems like a good idea to me. So, the next time you may find yourselves thinking about and spiraling in negative thoughts, take a deep breath, and visualize something that comforts you and brings a smile to your face. Perhaps it is an idyllic place you frequently visit or a special vacation destination. Or it may be as simple as a photo of your significant other or your children.

Waxing philosophical is what best describes this iteration of Partner Notes. But that is my way of tackling writer's block in these trying times. With that, I will conclude with a simple, comfort food, suggestion that I discovered during a recent ski trip to British Columbia: breaded, deep fried cauliflower, with ranch dressing and spicy BBQ dipping sauces. Personally, anything deep fried tastes pretty good. But this hit the spot as a great, seemingly healthy, finger food, bite size, appetizer. We can all use a little comfort so adding a simple food idea to your positive thoughts should help us all stay the course.

Here's to a brighter remainder of our Spring and a return to normalcy as we prepare for Summer.

- Written By Denis Kenny

Contributory Trademark Infringement

A relatively unknown area of trademark law could potentially hold significant liability exposure for landlords.

In a recent case, Luxottica Grp., S.P.A. v. Airport Minim Mall, LLC, 932 F.3d 1303, 2019 U.S.P.Q.2d 292644 (11th Cir. 2019), landlords were found to have contributorily infringed Oakley and Ray Ban trademarks on counterfeit sunglasses being sold by their tenants. The landlords had rented space to their tenants and took no action against the tenants after the tenants were raided for selling counterfeit goods. The landlords even renewed some leases where the tenants had been arrested for counterfeiting. The court found that the landlords should have used the common lease clause requiring tenants to "comply with all applicable laws" to have terminated the lease. By failing to do so, the landlords, because of their knowledge or at least constructive knowledge of, the counterfeiting contributed to the infringement and became liable themselves.

While this case is extreme, in that raids had occurred and the landlords were copied on communications with police, it highlights that landlords can be liable for the actions of their tenants where the tenants are selling false goods if the landlord knew or should have known of the infringing activities. It is critical that landlords not turn a blind eye to situations where they fear that their tenants may be selling goods that are counterfeit, or, even where the goods are legitimate but that where the tenant may not have a license to sell or market the goods or services.

If you, as a landlord, are contacted by the owner of trademark or copyright alleging that your tenant is operating without the proper right to sell or market their good or service you should take such an allegation seriously to determine whether you need to take action against your tenants to protect yourself from liability.

Scherer Smith & Kenny LLP remains available to guide you through these issues. For additional information, please contact Brandon Smith at bds@sfcounsel.com or Heather Sapp at hgs@sfcounsel.com.

- Written by Brandon Smith

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts