

June 2023 Legal Update

I. Federal Trade Commission (“FTC”) Updates regarding Funeral Rule Amendments

A. Funeral Rule

- Public comment period ended earlier this year and CFDA submitted its own comments.
- On May 17th, the FTC announced that it will host a workshop on September 7, 2023 regarding proposed changes to the Funeral Rule; topics to be discussed may include the general price list, 3rd party crematory fees and other 3rd party fees, embalming disclosures, new forms of disposition of human remains; you can request to participate in person (in D.C.) up until June 19th; **public comments will remain open until Oct. 10, 2023**; there will also be a webcast from a link the FTC will post that morning.

B. Recent Case law – An example of what NOT to do and potential consequences.

- Last year the Department of Justice (on behalf of the FTC) filed a complaint against a funeral and crematory group (doing business as Heritage Cremation Provider, Evergreen Funeral Home and Crematory and Carolina Central Crematory. In April of this year, the case was decided.
- Lawsuit claimed that the provider misrepresented its location (configured website to imply that the town a consumer searched was where provider was located), advertised deceptively low prices, failed to provide required disclosures under the Funeral Rule and threatened and failed to return cremains to extract higher fees, and failed to disclose that some services would be contracted to a third party not owned by provider.
- Essentially a bait and switch.
- Civil penalties of \$275 thousand were imposed on the provider.
- While the provider may still operate its business, strict requirements were imposed, which include:
 - sharing important information on the landing page of its website, such as actual physical location, general price list and a notice when goods or services will be provided by a third-party company not owned by the provider;
 - disclosing price list up front;
 - providing information about third parties, including name, address and contact information; and
 - ongoing compliance reporting for 20 years

II. **Central Hill and Laurel Hill Cemeteries (“Cemeteries”), Brookfield, CT**

- CFDA became aware of issues affecting families and the funeral homes with whom they were working with regard to the Cemeteries.
- The cemetery association dissolved without being purchased by another party and the cemeteries are currently closed; essentially, the Board of Trustees all resigned and there is no one operating/administering the cemetery.
- A forensic accounting investigation and report indicates problems stemming from generational accounting and business practices that may lead to liability and potential criminal prosecution; families who own plots in the cemetery are unable to bury loved ones, make arrangements, etc.
- Numerous organizations, including the municipality and Probate Court, among others, have been contacted but have been unable to help.
- A complaint was filed in Danbury Superior Court in April seeking a judicial decree to appoint an interim receiver to take over administration and help affected families while no other alternative seems available.
- In Connecticut, there are four types of organizations authorized to operate cemeteries in the state:
 - Ecclesiastical societies;
 - Municipalities;
 - Veteran’s organizations; and
 - IRS 501(c)(13) cemetery associations.
- In addition, a bill was introduced in the legislature to allow the state to temporarily assume management, care and administration of a cemetery when such cemetery association seeks to be dissolved and cannot find a successor or purchaser to take over – until such time as a successor can be found to resume operations; but meanwhile, until such a bill is adopted, families are unable to plan burials; so the complaint was filed to hopefully achieve a resolution in the interim and provide business continuity.

III. **Employment Related Matters**

Adoption and enforcement of written policies and procedures for your business can mitigate risk of liability and provide for a safer workplace for your employees and visitors/families you serve, while also reducing risk of negative impacts to your reputation/brand.

A. Incorporating an anti-harassment policy into employee handbooks (this is in addition to a sexual harassment policy)

- Harassment includes verbal or physical conduct designed to threaten, intimidate, or coerce.
 - Verbal harassment includes derogatory comments regarding an employee’s race, color, religion, age, sex, pregnancy, marital status,

national origin, ancestry, physical or mental disability, sexual orientation, gender identity or expression, genetic information, disability, veteran status, or any other legally protected class in accordance with all applicable laws; and

- Nonverbal harassment includes display of any written or graphic material that ridicules, denigrates, insults, belittles, or shows hostility or aversion toward an individual or group because of their status.

B. Update your Sexual Harassment Policy to reflect the legal expansion of sexual harassment definition.

Definition now includes:

- (1) Repeated, unwanted sexual flirtations, advances, or propositions;
- (2) Uninvited physical contact, such as touching, hugging, patting, brushing, or pinching;
- (3) Display of sexually suggestive objects, pictures, posters, or cartoons;
- (4) Written or spoken references to sexual conduct, gossip regarding one's sex life, comments on an individual's body, sexual activity, deficiencies, or prowess;
- (5) Unwelcome leering, whistling, or sexual gestures;
- (6) Continued or repeated jokes, language, epithets, or remarks of a sexual nature; and
- (7) Direct or implied request for sexual favors, accompanied by an implied or overt threat concerning an individual's employment status or promises of preferential treatment.

C. Adopt a Workplace Violence Policy

- Such a policy can demonstrate the funeral home's commitment to providing a safe, healthy workplace that is free from violent or potentially violent behavior that affects employees, members, clients and visitors.
- State that you do not tolerate threats, threatening behavior, acts of violence, or any related conduct that disrupts another's work performance or the funeral home's ability to provide its service and products to clients.

For purposes of such a Policy, "Workplace Violence" generally means behavior, whether direct or through the use of funeral home facilities, property or resources that:

- Is violent;
- Threatens violence;
- Harasses or intimidates others;
- Interferes with an individual's legal rights of movement or expression; or
- Disrupts the workplace.

Workplace Violence may include, but is not limited to, beatings, stabbings, shootings, sexual assaults, psychological traumas such as threats, obscene phone calls or e-mails, an intimidating presence, and harassment of any nature such as stalking, swearing or shouting.

Employees should be required to report actual or alleged incidents of Workplace Violence to their supervisor, regardless of whether those involved are employed or associated with your funeral home, and you should make it clear that employees who, in good faith, report what they believe to be Workplace Violence or who cooperate in any investigation will not be subjected to retaliation.

D. Data Security and Privacy Policies and Procedures

- All businesses, including funeral homes, should have policies and procedures in place that help protect the privacy of employees and the families they serve.
- Disciplinary actions should be taken for breach of confidentiality by an employee.

E. Electronic Monitoring Policy

- Electronic communications systems may include Telephones / Voicemail, Text messages, Computers, Internet, Email and Faxes.
- It is prudent to communicate to employees that such communications are to be used primarily to conduct the funeral home's business.
- Make it clear that employees should have no reasonable expectation of privacy with respect to communications transmitted by the funeral home's owned electronic communications systems and all such messages remain office property and that the funeral home may access and/or monitor electronic communications at any time and for any business purpose.
- The funeral home should comply with state law regarding electronic monitoring requirements.

F. Policy regarding Use of Social Media

- Social media includes multi-media and social networking websites such as YouTube, Facebook, Twitter, LinkedIn, blog postings and other social networking channels.
- Social media can pose reputational and confidentiality risks to the funeral home, its employees and the families it serves.
- Having a written policy can help mitigate such risk. Such policy should include the following guidelines:
 - Unless an employee has been authorized by the funeral home, the employee should not speak on behalf of the funeral home in social media channels.
 - When participating in social media activities, employees must be responsible, ethical and respectful. Communications may be seen by a

large number of people (funeral home associates, vendors, clients, competitors, etc.) and once posted online can be virtually impossible to delete.

- Employees are legally responsible for the content you publish on any social networking medium. Caution should be exercised regarding exaggeration, colorful language, guesswork, obscenity, copyrighted materials, legal conclusions and derogatory remarks and characterizations.
 - Social media content must not disclose information that is confidential or proprietary to the funeral home, including non-public financial or operational information.
 - Employees must follow all applicable laws and regulations such as privacy protection (HIPPA) and intellectual property laws.
 - Social media activity should not violate any other applicable policy of the funeral home.
-
- Let employees know that the funeral home has the ability to monitor social network sites to identify and avoid risk and protect its brand and reputation.
 - Any Social Media policy shall be sure not to violate the employee's rights under the National Labor Relations Act.

Policies are only effective if they are enforced. You should address violations of the Policy with appropriate disciplinary action, up to and including termination of employment.

G. Use of Non-Compete Provisions in Contracts

The FTC has proposed a rule that would ban/invalidiate non-compete provisions in certain contracts.

- The rule would provide that non-compete clauses are an unfair method of competition. As a result, the rule would ban employers from entering noncompete clauses with their workers, including independent contractors.
- The rule would require employers to rescind existing non-compete clauses with workers and actively inform their employees that the contracts are no longer in effect.
- The proposed rule, which would supersede all contrary state laws, is remarkable for its sweeping definition of “non-compete clauses” that fall within the ban.
- The ban would extend to “de facto” non-compete clauses — that is, other contractual provisions that have the “effect” of prohibiting workers from seeking or accepting employment or operating a business after the conclusion of the worker's current employment. In this regard, the ban may implicate broadly drafted non-disclosure-of-confidential-information restrictions and repayment-of-training-costs provisions. The

ban also could implicate customer non-solicitation restrictions, depending on the surrounding facts.

- If adopted, the proposed rule will require all employers that use any agreement with a non-compete clause (or with a clause that could be deemed to be a non-compete under the expansive definition in the rule) to take action to *rescind* the non-compete clause. This rescission action will require individualized communications from the employer to all current employees, as well as former employees.
- The proposed rule declares it to be an “unfair method of competition” for an employer to:
 - Enter into or attempt to enter into a non-compete clause with a worker;
 - Maintain with a worker a non-compete clause; or
 - Represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause.
- The restriction applies to employees, independent contractors, interns, and volunteers alike.
- Provisions of a final rule are in flux. Even then, if the final rule is issued, there will likely be significant and substantial legal challenges to it.

Key Takeaway: What is important now is the same as it has been pursuant to many years of well-developed caselaw pertaining to restrictive covenants. Restrictive covenants should be drafted narrowly to protect a legitimate business interest of the employer, such as trade secrets, confidential information, or customer goodwill. The restrictions should be no broader than necessary to protect those legitimate interests, and they must be reasonable in terms of duration, geography, and scope of activities prohibited. Agreements should be drafted in a way to increase the likelihood that any provisions found to be unlawful can be severed from the agreement, leaving other restrictions intact.

H. Clean Slate Law

- Became effective on January 1 of this year.
- The law erases certain police and court records related to misdemeanor offenses 7 years from date of conviction, along with Class D and E felonies that have prison sentences of 5 years or less, after 10 years from date of conviction (Class D includes voyeurism, prostitution offenses, assault in 2nd degree, burglary, larceny and robbery in third degree (i.e. using a weapon to steal property)).
- Family violence crimes and sexual offenses are not included/not erased under this law; also doesn't require DMV having to erase criminal history record on driving record.
- Why could this matter to your business operations? Anti-Discrimination component – employers cannot discriminate in the hiring, firing or retention of an employee or job applicant based on erased criminal records – can subject you to a CHRO claim and investigation and monetary damages/fines.

- Safe best practice is to consider any public or private act that discriminates on basis of an erased criminal record to be unlawful.