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THE HOWE & HUTTON REPORT

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TRENDING NOW

REAL ID ACT REPRIEVE – *H&H Report Update* – The Department of Homeland Security has issued a reprieve to travelers from states that have not yet complied with the Real ID Act. Originally, January 22, 2018 was the date for compliance. Now travelers from states that have been issued extensions will be allowed to travel without additional identification until October 11, 2018. *Check here to see if your state is compliant:* ***https://www.dhs.gov/real-id.***

BIG FEDERAL TAX CHANGES SIGNED INTO LAW – Congress has enacted, and the President has signed, new legislation making many changes in federal tax law. Rates for individual income taxes will, for many people, be cut. The standard deduction is almost doubled. A more generous child tax credit will go into effect. People choosing not to buy health insurance, but to self-insure, will no longer have to pay a special tax/penalty under the Obamacare individual mandate. The alternative minimum tax will apply to only about 200,000 households instead of 4.4 million. The corporate income tax rate will drop from 35% to 21%. Businesses paying taxes as individuals (such as sole proprietorships and partnerships) will receive generous tax rate cuts, and, for five years, businesses will be able to write off expenses for capital equipment immediately instead of depreciating it over several years. On the other hand, many popular tax deductions will be limited, such as deductions for payment of state and local taxes and mortgage interest, and an existing deduction for payment of alimony will be eliminated for payments made under new divorce decrees, while such payments will no longer be taxable to the recipients. *The upshot of all these changes is that an estimated 48% of American households will receive a tax cut of greater than $500 per year, even though the largest tax cuts in the new legislation will go to businesses. Some of the tax changes will be phased in over a year or so, and, in order to avoid filibustering in the Senate, some of the tax reductions were not made "permanent," but were scheduled to sunset in a few years unless reenacted.*

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TRENDING NOW (cont.)

BUT WAIT! THERE'S MORE! – Tax-exempt organizations were especially affected by some provisions in the new tax legislation. The reductions in taxes to be paid by individuals and businesses will, like any tax cuts, give people more money that they could contribute to charity, but will also diminish incentives for making tax-deductible charitable contributions. Tax deductions for payments made to some tax-exempt entities may be eliminated under a provision that disallows deductions for payments made to "any club organized for business, pleasure, recreation or other social purposes." A new 21% excise tax is imposed on compensation over $1 million paid to nonprofit executives. For unrelated business income tax purposes, gains in one line of business can no longer be offset by losses in another line of business, and a new tax is imposed on large endowment funds of private colleges and universities. But, contrary to the expectations of some analysts, the Johnson Amendment, an existing law prohibiting churches and other 501(c)(3) organizations from engaging in partisan political activity, was not repealed. Tax-exempt qualified 501(c)(3) bond financing was not eliminated. Nonprofit royalty income wasn't taxed, and professional sports leagues didn't lose tax exemptions for which they were previously qualified. *Passage of the new tax legislation doesn't, of course, end for all time any further tinkering with the tax laws that apply to tax-exempt organizations. We may even see more of it in the new year.*

ILLINOIS COURT OVERTURNS STALKING CONVICTION – The Illinois Supreme Court has unanimously struck down a provision in state anti-stalking and anti-cyberstalking laws, finding that it was so broad as to prohibit many types of conduct protected as free speech under the First Amendment to the U.S. Constitution. The ruling came in a case involving a man who had unsuccessfully applied for a job at a a Chicago radio station. He then visited the station to complain to its program manager and began a series of profanity-laced, obscene and threatening Facebook postings and other communications to her. Police arrested him, and he was sentenced to six years in prison for stalking and cyberstalking under state laws that prohibited engaging in multiple, nonconsensual communications to or about someone that the maker of the communications knew or should know could cause distress. But, on appeal, his conviction has been vacated, and the state Supreme Court has held that the law under which he was convicted is invalid as violating the First Amendment. For example, the court noted, the law as written could prohibit someone from repeatedly attending town hall meetings to complain about a certain business after being told by the business owner that doing so would cause him emotional distress. *A spokesman for the state Attorney General's office has said that the office is disappointed in the state Supreme Court's decision and will work with members of the General Assembly to change the state law so that it will meet First Amendment requirements.*

REGULATORY

JUDGE PERMANENTLY BLOCKS CRACKDOWN ON SANCTUARY CITIES – *H&H Report Update* – A U.S. district court judge has issued a permanent injunction blocking execution of President Trump's Executive Order directing that the federal government withhold funding from cities not cooperating with immigration authorities. Judge William Orrick ruled that the Executive Order was unconstitutional because the President had no authority to impose new conditions on spending already approved by Congress. *The decision came in a suit filed by two California counties, San Francisco and Santa Clara, against the Trump Administration. The ruling was in line with the same judge's temporary injunction decision in April. An appeal of the latest decision is likely.*

COURT REJECTS CHARGES AGAINST MEDICAL SPECIALTIES BOARDS – A federal judge in Chicago has dismissed charges that an umbrella medical specialties board and constituent boards violated antitrust laws in administration of programs for recertifying physicians in their specialties. An association of physicians and surgeons brought suit in the case, alleging that the umbrella board and constituent boards violated Section 1 of the federal Sherman Act by entering into agreements with a private company that provides accreditation for healthcare organizations and hospitals. For many hospitals, that company's accreditation rules included imposition of recertification requirements on physicians as a condition for renewing their medical staff privileges. But the judge ruled that the association did not demonstrate antitrust violations by the boards because it failed to present evidence that agreements between the private company and the boards were clearly anticompetitive or unreasonably restrained trade. Missing from the association's case, the judge said, were sufficient allegations that the agreements had cut back output in any market or driven up prices to consumers, that they rendered any physician unable to practice medicine, that participation in physician recertification was required by all or even a large portion of the hospitals in the U.S., and that any purported restraints imposed by the defendants were unreasonable. *The judge dismissed the association's suit "without prejudice," meaning that the association could file an amended complaint fixing the inadequacies in its original complaint, provided that amended complaint was filed by January 16, 2018.*

FCC ENDS "NET NEUTRALITY" – The Federal Communications Commission has repealed its "net neutrality" rules, which said that internet service providers must treat all internet traffic alike. Providers will now be allowed to slow or block certain websites and apps as they see fit, while providing service at higher speeds for those willing to pay extra for the privilege. They just have to post their policies online or tell the FCC. *"Net neutrality" has many proponents, and there is a good chance that the courts or Congress will act to restore it.*

REGULATORY (cont.)

FEDS WORKING TO BLOCK AT&T-TIME WARNER DEAL – In something of a surprise for people who thought the Trump Administration might be soft on antitrust enforcement, the federal Justice Department is pursuing a lawsuit to block a merger of AT&T Inc. and Time Warner Inc., arguing that it would give one company too much control of the media. The government points out that the deal would allow AT&T to charge higher prices to cable television competitors wanting to provide popular Time Warner programming like HBO and Turner sports. *Antitrust suits normally involve a challenge to "horizontal" mergers between direct competitors, rather than "vertical" deals like this one, not involving traditional rivals. The government hasn't pursued this kind of suit in decades. But President Trump vowed to block this merger even prior to his election. Opponents have suggested his opposition to the merger stems from his hatred for CNN, which is part of the Time Warner family, and which the President has called a "loser."*

EMPLOYMENT

NLRB OVERRULES "JOINT EMPLOYERS" DECISION – *H&H Report Update* - The National Labor Relations Board has overruled an Obama-era NLRB decision that a company could be considered a "joint employer" with its subcontractor if it had "indirect" control over terms and conditions of employment for the subcontractor's workers or had "reserved authority" to exercise such control. In its new ruling, the Board said that two or more legal entities should be deemed "joint employers," each having responsibilities to workers under federal employment laws, only if one company actually exercised control over the essential employment terms of another entity's workers directly and immediately. *The new ruling resulted from President Trump's filling of two vacancies on the Board, giving Republicans a 3-2 majority. The previous decision indicated that many companies with relationships such as franchisor/franchisee and principal/temporary agency could be deemed "joint employers." But the new Board is taking a different approach.*

ARCHDIOCESE ORDERED TO PAY FOR RETALIATING AGAINST EMPLOYEE – A jury has awarded a worker $700,000 in compensatory and punitive damages in her suit against the Archdiocese of Chicago, finding that she was fired in retaliation for complaining about an employee of the Archdiocese's information technology support vendor viewing pornography. The former employee had complained that the tech support worker's conduct created a hostile work environment. The Archdiocese told her that it had investigated her complaint and found no evidence that the tech support worker had engaged in inappropriate conduct. However, she later found out that the Archdiocese had allowed the vendor to investigate its own worker's activities and that the worker had admitted looking at women in swimsuits on the computer and was reprimanded for his conduct. *For-profit and nonprofit employers can get in trouble if they retaliate against employees who complain about other workers. Instead, employers should be conducting a full and fair investigation of such complaints.*

EMPLOYMENT (cont.)

STATE COURT OKAYS CALIFORNIA LAW ORDERING LABOR TERMS – Do workers at your job disagree with the boss on how much they should be paid and other working conditions? Maybe your state government could helpfully resolve the dispute by compelling mediation of any disagreements in accordance with state guidelines. At least, that might be the case if you are in California. The state Supreme Court there just upheld the constitutionality of a state law giving the California Agricultural Labor Relations Board the authority to compel mediation of such disputes between unions for agricultural workers and their employers, as well as the authority to set terms of a labor agreement if there is an impasse and then force those terms on companies and unions. *Opponents of the state law say that it deprives both agricultural workers and their employers of their rights under federal labor law, and they plan an appeal of the latest state court decision to the Supreme Court of the U.S.*

COURT REJECTS CLAIM BY WOMAN PAID LESS THAN MALE COLLEAGUE – The U.S. Court of Appeals for the Seventh Circuit in Chicago has rejected a discrimination claim filed by a woman paid less than her male colleague despite having twice his responsibilities. The claimant had previously managed a school overseen by the Illinois Department of Human Services, and her colleague had managed another school also overseen by the Department. When the Department decided to hire one superintendent to manage both schools, it offered the job to the claimant, but for less pay than her colleague had received for managing one of the schools. She then filed a federal lawsuit for violation of the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and her right to equal protection under the Fourteenth Amendment of the U.S. Constitution. A federal district court ruled against her because it found no illegal discrimination had occurred, and the Court of Appeals affirmed that decision, concluding that the record in the case showed the pay discrepancy resulted from budgetary concerns. *Budgetary concerns in bankrupt Illinois are real, and they have caused many arguably unfair results. In this case, the courts basically said they couldn't do anything about it.*

SUPREME COURT WON'T DECIDE LESBIAN DISCRIMINATION CASE – *H&H Report Update* **-** The Supreme Court of the United States has refused to grant review of a case involving allegations that Title VII of the federal Civil Rights Act prohibits employers from discriminating against gay and lesbian workers. Title VII prohibits sex discrimination in the workplace, but lower courts have been divided on whether sex discrimination includes discrimination against gays and lesbians because of their sexual orientation. In this case, Jameka Evans sued a Georgia hospital she claimed discriminated against her because she is a lesbian. However, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta rejected her argument that Title VII covers such discrimination, and that decision will stand in the Evans suit, since the Supreme Court won't be hearing the case. *The U.S. Court of Appeals for the Seventh Circuit in Chicago has held that Title VII does cover discrimination based on sexual orientation, and such a difference of opinion among the Courts of Appeal sometimes invites the Supreme Court to step in and resolve that disagreement. It didn't happen in the Evans case, but it may soon, if not soon enough for Evans. There is a third case presenting the same issue now pending in the U.S. Court of Appeals for the Second Circuit in New York City.*

EMPLOYMENT (cont.)

JUDGE RULES NLRB DECISION PREVAILS OVER ARBITRATION AWARD – A federal district court judge has held that a National Labor Relations Board ruling can overturn an arbitrator's decision under a collective bargaining agreement. The judge's conclusion was reached in a dispute over union representation of faculty members at the nonprofit Columbia College Chicago. At issue was whether the school's Part-Time Faculty Association should represent full-time faculty members having some part-time responsibilities. At the school's urging, the NLRB Regional Director issued a ruling that those employees were included in the PTFA's bargaining unit rather than that of a union generally representing full-time faculty members. But the PTFA decided it didn't want to represent any such full-time workers because they didn't pay required dues or agency fees for such representation, and the PTFA filed a grievance against the college under its collective bargaining agreement with the school. That grievance went to an arbitrator, who ruled that the PTFA had no authority to represent the "dual function" employees. However, the federal district court, at the school's urging, now has vacated the arbitrator's award on the grounds that it was inconsistent with the decision of the NLRB Regional Director, the Regional Director had jurisdiction, the arbitrator exceeded his authority under the collective bargaining agreement, and the award "violated public policy." *You don't see courts overturning labor arbitration awards very often, and you seldom see unions arguing that they shouldn't be representing a group of workers. This case was an unusual one.*

TRAVEL

ONLINE TRAVEL AGENCIES ESCAPE MUNICIPAL TAXES – The U.S. Court of Appeals for the Seventh Circuit in Chicago has ruled that online travel agencies are not required to pay municipal taxes levied on hotels and motels. Thirteen municipalities in the Chicago area had levied taxes on the "use and privilege of renting, leasing or letting hotel and motel rooms" or persons engaged in the business of doing such things. The municipalities filed a class action against online travel agencies, seeking to collect those taxes. But the Court of Appeals ruled for the agencies, finding that, while the agencies made reservations, processed financial transactions, and handled customer service with respect to those transactions, they did not rent hotel or motel rooms. Further, though they performed one set of functions of a hotel or motel, that did not transform them into operators of hotels and motels. *Any tax imposed on the agencies would likely have been passed along to their customers. So, the Court of Appeals decision is a boon to travelers.*

OTHER

IRS IMPERSONATION SCAMMERS ARRESTED – A group of scammers has been arrested for impersonating IRS agents in order to collect money that victims were told they owed in taxes. Some of the crooks called victims and told them they needed to wire money to the IRS. Other crooks then collected the money using fake government identifications. According to criminal complaints, the scammers obtained $666,537 from 784 victims this way between January 25, 2016 and August 8, 2017. But the false identifications used by the crooks led authorities to link the criminals with 6,530 additional fraudulent acts that netted them $2,836,745. *Be on the lookout. The IRS doesn't encourage use of wire services for payment of taxes or use the phone to make initial contact with taxpayers alleged to owe the government money.*

CONFIDENTIALITY CLAUSE AGAINST PUBLIC POLICY NOT ENFORCED – The Illinois Appellate Court, First District, has affirmed a lower court's decision not to enforce a confidentiality agreement found to violate public policy. The agreement was between two related parties who jointly owned two corporations. Wishing to purchase a Red Roof Inn, the pair sought to borrow money for that purpose and agreed that their loans would be considered in default if there were certain changes in the ownership of their corporations without lender approval. But the two then had a falling out and, trying to resolve their dispute, entered into an agreement under which each would obtain full ownership of one of the two corporations they had jointly owned. The two further agreed they would not disclose the terms of that agreement. However, one of them did disclose that agreement in an affidavit given to a court in a foreign country, and the other party sued to enforce the confidentiality provision and collect damages from the disclosing party, unsuccessfully. A trial court and the Appellate Court ruled that the confidentiality provision violated federal and state criminal laws prohibiting the defrauding of financial institutions, and, even if it didn't violate the law, was "against public policy." Because both parties were equally at fault and acted against public policy, the courts in this case found it appropriate to leave each party as they started, effectively washing their hands of the contract dispute. *Those signing and trying to enforce confidentiality agreements should take note. This is just one of numerous cases where courts, for various reasons, have refused to enforce them.*

HOWE & HUTTON NEWS AND EVENTS

Mike Deese will be co-presenting a session entitled "What's Around the Corner…from a Legal Perspective" on February 9 at the 2018 AMC Institute annual meeting in Vancouver, British Columbia.

Naomi Angel presented legal report on current trends to Boards of Directors in Dallas, Bonita Springs, FL and Atlanta.

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