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THE HOWE & HUTTON REPORT

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TRENDING NOW

REAL ID ACT AND WHAT IT MEANS FOR TRAVELERS – *H&H Report Update* - The Real ID Act was passed in 2005 in response to tightening security standards regarding how states issue and use identification. The Act attempts to insure that all identification has certain features that prevent tampering such as the holograms on many state issued licenses. Beginning January 22, 2018, travelers residing in certain states may need alternate forms of identification in order to get on an airplane, even if flying domestically. Currently, 28 states are compliant, but several states have been granted an extension or are under review. Travelers from those states that have been granted an extension can continue to use their state issued IDs while the state works to be in compliance. Travelers from states that are under review may need to provide alternate identification. Check here to see if your state is compliant: <https://www.dhs.gov/real-id>. *As of the date of this update, Illinois is one of the states under review. Passports fall into the difficult to tamper category, so one option is to bring along your passport as an alternate ID.*

ASKING ABOUT APPLICANT'S SALARY HISTORY – NOT IN CALIFORNIA - The California General Assembly amended the state's Equal Pay Act to prohibit employers from asking job applicants about prior salaries, considering salary histories when making hiring decisions, and looking at salary histories when determining a new hire's compensation. Additionally, the Act now requires employers to furnish salary scales to applicants for the jobs they are seeking. *The amendment goes into effect January 1, 2018. California employers were already prohibited from justifying an otherwise unlawful difference in pay based on an applicant's or employee's prior salary alone. Affected employers are well advised to inform and train their HR personnel on this new amendment.*

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TRENDING NOW (cont.)

SOCIAL MOVEMENTS, HASHTAGS CAN'T BE SUED – A federal judge in Baton Rouge, Louisiana dismissed a suit filed by a police officer after he was struck by a rock thrown during a protest over a fatal police shooting. The officer sued Black Lives Matter, the hashtag “#BlackLivesMatter,” and a prominent social activist. But the judge held that Black Lives Matter is an unincorporated social movement, like the tea party or the civil rights movement, and not a juridical person capable of being sued, and the judge ruled a hashtag “obviously” could not be sued for the same reason. As for the activist, he was not alleged to have thrown the rock, and the judge found that the officer’s own claims plainly demonstrated that the activist had solely engaged in speech protected by the First Amendment while at the protest. *The law differs somewhat from state to state, but unincorporated entities are often found not to have the capacity to sue or be sued. With protests and social activism abounding, violence and related lawsuits of various kinds will certainly increase as well.*

EXECUTIVE ORDER KICKS INSURANCE COST-SHARING TO CONGRESS – President Trump has ended federal cost-sharing payments to insurance companies under the Affordable Care Act (“Obamacare”) until Congress appropriates the money for such payments, arguing that it would be unconstitutional for him to allow such payments by the federal government without Congressional appropriations. In addition, the President issued orders encouraging small businesses to pool together to buy more health insurance in bulk, permitting employers to provide health reimbursement accounts usable by employees for the purchase of non-group insurance, and legalizing short-term limited-duration insurance good for up to a year, which was the law until the Obama Administration limited the duration of such insurance to three months and barred individuals from renewing longer-term existing policies. *Critics accused the President of seeking to abolish Obamacare indirectly by making other insurance options more widely available.*

APPEALS COURT LETS TRUMP ENFORCE THIRD TRAVEL BAN, FOR NOW – *H&H Report Update* - The U.S. Court of Appeals for the Ninth Circuit, based in San Francisco, has overturned a lower court ruling that prevented President Trump from enforcing his third and most recent travel ban, this one applying to travelers from Chad, Iran, Libya, Somalia, Syria, Yemen and North Korea, as well as some Venezuelan government officials. Two federal district courts had struck down the latest ban, finding that it had constitutional and statutory problems, partly because it was motivated by the same animus toward Muslims that tainted Trump’s prior travel orders. But the Court of Appeals now has reversed one of the lower court decisions – from a U.S. District Court in Hawaii – ruling that the President could enforce the third ban, pending the conclusion of ongoing litigation over it, as long as it wasn’t applied to travelers with close connections to U.S. resident individuals or other resident entities. *More litigation over the third ban is certain, and the Supreme Court of the United States may be called upon to resolve it.*

EMPLOYMENT LAW DEVELOPMENTS

COURT REJECTS LONG-TERM LEAVE AS REASONABLE ACCOMMODATION – The U.S. Court of Appeals for the Seventh Circuit in Chicago has ruled that a request for extended medical leave is not a request for a reasonable accommodation that must be considered by an employer of a disabled worker under the Americans with Disabilities Act (ADA). The case before the court involved a fabricator of retail display fixtures who suffered from back pain. After his employer granted him 12 weeks of leave under the federal Family and Medical Leave Act (FMLA), he requested an extension of medical leave (five to six months), which was denied, and he then sued the employer under the ADA. The federal Equal Employment Opportunity Commission filed a brief and argued to the court in support of its general position that extended medical leave is a reasonable accommodation. But the Court of Appeals rejected that argument, finding that such an accommodation is one that allows an employee to continue working at the essential functions of his job despite a disability, not an “excuse” for not working. *The Court of Appeals did allow that intermittent time off or a short leave of absence “say, a couple of days or even a couple of weeks,” could be a reasonable accommodation under the ADA. However, the court said that the fabricator in this case was essentially asking for an open-ended extension of the FMLA, which was an “untenable interpretation” of the term “reasonable accommodation” under the ADA.*

ANOTHER GAY MUSIC DIRECTOR’S SUIT AGAINST CHURCH NIXED – *H&H Report Update* – A federal judge has dismissed a gay music director’s suit against the Roman Catholic Archdiocese of Chicago and a Catholic church in Calumet City, Illinois, alleging employment discrimination. The music director was fired after marrying his homosexual partner. The music director alleged discrimination prohibited by Title VII of the federal Civil Right Act, the Illinois Human Rights Act and the Cook County Human Rights Ordinance. But the judge found that the music director was a “minister” prohibited from suing his church employer for discrimination by the long-recognized “ministerial exception” to the laws prohibiting employment discrimination. The judge ruled that the music director was a “minister” for purposes of the exception, even though he was not the pastor of his church, because he selected the worship music used during services. Though the music director argued that the church had violated the constitutional right of same-sex couples to marry, as recognized by the U.S. Supreme Court in *Oberkfell v. Hodges*, the judge in this case held that the constitutional right to marry is a right to be free from governmental discrimination, not private discrimination. *The Archdiocese and another suburban church, Holy Family Parish in Inverness, Illinois, have previously used the “ministerial exception” to successfully defend against employment discrimination claims filed by a gay music director in another case.*

OTHER

REFUGEE ADMISSION RESUMES UNDER TOUGHER RULES – *H&H Report Update* – While the courts struggle with the legality of the President’s latest travel ban (see Trending Now section in this issue of the *Report*), the Trump Administration has resumed processing of applications for admission of refugees to the United States under new, stricter screening procedures. Processing of refugee admissions had been temporarily suspended under a previous executive order from the President. The new “enhanced vetting” for all refugees includes collecting more biographical and other information from them, improving information-sharing between federal agencies, some additional screening to be undertaken abroad, and better training for screeners. Meanwhile, the Administration says it will impose even tougher scrutiny on refugee admissions from 11 unnamed countries believed to pose especially great security problems. That greater scrutiny will be imposed on a case-by-case basis, though what it entails has not been announced. *Trump has separately capped refugee admissions for the year starting last October 1 at 45,000, a significant reduction from the limit of 110,000 applied a year earlier by President Obama. But the number of refugees actually admitted to the U.S. could be lower than the cap with implementation of the new vetting procedures.*

TAXATION

IRS APOLOGIZES TO CONSERVATIVE AND TEA PARTY GROUPS – *H&H Report Update* – The Internal Revenue Service has apologized to conservative and Tea Party groups whose applications for recognition of exempt status were improperly delayed after the Service singled out such applications for heightened scrutiny based on the names of the applicants during the Obama Administration years. The apology was issued by the IRS as part of a settlement of lawsuits brought against the Service by those groups. Separately, the U.S. Treasury Department has issued a new report on the manner in which the IRS has previously selected organizations for special consideration, and often adverse treatment, based on their perceived political leanings. The new report confirms that the Service selected “potential political cases” for review from May 2010 through May 2012 based on their names, and that the criteria used in selecting such cases were intended to identify some “liberal” and “progressive” organizations as well as conservative groups. *The new report has been hyped by the political left as disproving contentions by conservative organizations that the IRS targeted such groups for adverse treatment during the Obama years. However, the Service’s apology to conservative and Tea Party groups pretty much speaks for itself. The new Treasury report also cites an earlier IRS memo noting that 84 instances of actual “heightened scrutiny” afforded to applications by 501(c)(3) charitable and educational groups during the relevant time period showed slightly over half with conservative leanings while the remainder did not “obviously lean to either side of the political spectrum.” Additionally, of 199 instances involving 501(c)(4) social welfare groups, three-fourths appeared to have conservative leanings and fewer than ten appeared to be liberal/progressive.*

TAXATION (cont.)

FAKE NEWS SURROUNDS NFL TAX STATUS - Much hubbub has arisen recently over the National Football League and its taxes. Numerous complaints have made their way into the media from President Trump, members of Congress and the public over the amount of money allegedly made by the NFL on a tax-free basis. The only problem is that money from game tickets, television contracts and the like is earned by the NFL's teams, which are taxable entities and pay plenty of taxes on their earnings. Furthermore, while the NFL itself was exempt from federal income tax as a trade association at one time, it gave up its exemption in 2015 because the League said it was a "distraction." *Giving up its tax-exempt status also allowed the NFL to avoid the regulations that apply to tax-exempt organizations, such as the requirement of publicly disclosing salaries of its top executives. Some other sports leagues are tax-exempt. But that may be temporary now. The recent furor over the NFL's supposed exemption may prompt Congress to revise the Internal Revenue Code and make other sports leagues taxable.*

JUDGE STRIKES DOWN TAX-FREE HOUSING FOR CLERGY - A federal judge in Wisconsin has struck down a law providing an income tax exemption for housing allowances received by a "minister of the gospel." The judge ruled that the provision of the U.S. Tax Code authorizing the exemption, which the Internal Revenue Service applies to Christian and non-Christian religious leaders, is a benefit to some religious persons and not secular employees (as well as other kinds of religious employees). Therefore, the judge said it violates the U.S. Constitution's provision that prohibits Congress from enacting laws "respecting an establishment of religion." *The same judge issued a similar ruling in 2013, but she was reversed by the U.S. Court of Appeals for the Seventh Circuit because the secular people challenging the "parsonage" exemption at that time had never applied for a tax-free housing allowance themselves, and consequently lacked "standing" to object to the exemption. This time, the co-presidents of the nonprofit Freedom From Religion Foundation, who challenged the parsonage exemption in 2013, had requested a housing exemption and been rejected by the IRS.*

REGULATION

MUG SHOT SITE NOT ENTITLED TO FREE SPEECH PROTECTION - A federal judge has ruled that people who publish mugshots of others on the Internet and then charge to have the photos removed are not entitled to complete First Amendment "free speech" protection. Owners of the sites mugshots.com and unpublsharrest.com tried to dismiss a suit filed against them under various federal and state laws, citing the First Amendment to the U.S. Constitution. But the judge ruled that, as described in the complaint against them, the site owners could reasonably be construed as engaged in commercial speech not entitled to full First Amendment protection. Therefore, the judge denied the site owners' motion to dismiss and allowed the suit to proceed to trial. *The moral here: don't think you can say anything you want on your website and claim the First Amendment as a defense. Besides the "commercial speech" argument that a First Amendment defense doesn't apply, the First Amendment has a few other holes in it under previous court decisions, including some relating to libel and slander.*

REGULATION (cont.)

LICENSE REMOVAL REQUIRES DUE PROCESS – The U.S. Court of Appeals for the Seventh Circuit has ruled that a county government can be sued for violation of a citizen’s rights when it deprives him of a license to operate his business without notice of the reasons for the deprivation and a proper hearing of his objections. In reversing a federal district court decision to the contrary, the Court of Appeals held that Simpson, a septic tank contractor, could sue Brown County, Indiana after its Health Department rescinded his license to install septic systems without giving him procedural due process. Ironically, the dispute between the parties arose when the Department sent Simpson a letter demanding that he immediately repair a septic system on his mother’s property. Two weeks later, the Department sent Simpson a letter announcing that, based on some unspecified “findings,” his name had been removed from the County’s list of approved septic contractors. Simpson responded by suing the county under federal civil rights law. The Court of Appeals has now remanded the case to the district court for consideration of what remedy to provide Simpson, saying that Simpson should have been told what the Department’s “findings” were and he should have been given an opportunity to present opposing arguments before his license was rescinded. *Local governments not infrequently act like they are a law unto themselves, and challenging their actions isn’t easy or inexpensive. In this instance, Simpson had to “make a federal case out of it,” lose in trial court, and appeal to the Seventh Circuit just to find out why his license was being rescinded and get some county official to hear his objections before his livelihood was taken from him.*

DISTRIBUTOR IS NOT COMPETITOR FOR PURPOSES OF NONCOMPETE – The U.S. Court of Appeals for the Seventh Circuit Court deciding a case involving the enforcement of a noncompete agreement, ruled that a distributor is not a competitor to whom the agreement would apply. Miller signed such an agreement when he sold his fuel-additives business to E.T. Products. About a year later, he sold another business, Petroleum Solutions, to Kuhns, and he provided assistance to Kuhns as he learned the Petroleum Solutions business. E.T. then sued Miller, claiming that the assistance to Kuhns was in violation of the agreement. But a trial court and the Court of Appeals ruled that the noncompete agreement hadn’t been violated because, at the time Miller gave assistance to Kuhns, Petroleum Solutions was E.T.’s distributor, and a company’s distributor is not its competitor. *For-profits and nonprofits sign and try to enforce noncompete agreements. This case shows that anyone expecting to rely on such an agreement as executed by someone else should ensure that the agreement is carefully worded to cover all of the situations in which it might be invoked.*

INTELLECTUAL PROPERTY

TRUMP TRADEMARKS GIVEN SPEEDY ACTION BY CHINA – Since he took office, Chinese trademark authorities have given speedy provisional approval for many trademark registration applications filed by President Trump, members of his family, his employees or companies he controls. At least nine of these applications were previously rejected by the Chinese government. “Provisional approval” means that registrations will be given final approval in 90 days unless someone files a formal objection. Applications were for registration of marks used in connection with a broad range of products and services, including spa and massage services, golf clubs, hotels, insurance, finance and real estate companies. However, that does not mean these products and services will actually be offered in China by Trump and his connections, since many people register marks in China to prevent their use by others. *The number of these registrations in China is not surprising, as the President and his organization own over a hundred trademark registrations in China for their global enterprises, some granted years ago. But the speed with which Chinese officials are acting on Trump applications recently has prompted some criticism about preferences being given to the President, especially since the trademark registration process in China is effectively controlled by the Chinese Communist Party.*

VERDICT IN SUIT TOSSED BECAUSE OF FAULTY CONSUMER SURVEY – A federal judge in Chicago has overturned a \$54 million jury verdict in favor of The Black & Decker Corp. in its suit against two competing companies that allegedly infringed the trade dress of Black & Decker’s tools by selling tools with a yellow-and-black color scheme similar to B&D’s. The verdict was overturned because evidence presented by B&D at trial included a “deeply flawed” survey that asked consumers if boxed tools in two rows of products were sold by the same company when, in fact, only one of the boxes was for the defendants’ products and all of the others were for Black & Decker tools. *Suits for trademark or trade dress infringement frequently feature surveys intended to show consumer confusion caused by the defendants or lack thereof. But a party relying on such a survey should make sure that it is properly designed and administered by an expert in such survey techniques.*

HOWE & HUTTON
would like to wish all of you a
Happy Thanksgiving



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