

THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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CHARITY LEAVES RUSSIA AFTER BEING LABELED “UNDESIRABLE” — The MacArthur Foundation recently announced that it was pulling out of Russia, after new laws caused it to be placed on a list of “undesirable” organizations. The Foundation had been operating in Moscow for more than 20 years, financing higher education, human rights and anti-nuclear proliferation campaigns. Its president noted that “[w]e are entirely independent of the United States government and receive no funding from it. We have never supported political activities or other actions that could reasonably be construed as meeting the definition of ‘Undesirable’.” *The MacArthur Foundation appears to be the latest casualty in a global tightening of restrictions on charitable activities by authoritarian governments. According to a recent article by the Thomson Reuters Foundation, more than 60 countries in the last three years have sought to curb the ability of non-profit organizations to receive or use overseas funds.*

NO RELIGIOUS ACCOMMODATION REQUEST, EMPLOYER STILL LIABLE — The Supreme Court of the United States has ruled that a worker can demonstrate religious discrimination by an employer in taking an adverse employment action, even if the worker never requested a religious accommodation. The ruling came in a case where an employer refused to hire a Muslim woman who wore a headscarf in compliance with her religious beliefs. The employer told her that any headwear, religious or otherwise, was a violation of the employer’s policy governing employee dress. She took the employer to court and lost in a lower court because she didn’t provide the employer with actual knowledge of her need for a religious accommodation by requesting one. The Supreme Court, however, held that the worker didn’t need to request an accommodation in order to show religious discrimination, because she demonstrated that her need for an accommodation was a motivating factor in the employer’s adverse treatment of her. Furthermore, the Court rejected the notion that an employer could enforce a facially neutral dress policy if the result was an employment decision motivated, at least in part, by discrimination, as an otherwise neutral policy must give way to accommodation of a worker’s religious observance and practice. *Notably, the Court’s approach in this religious discrimination case contrasts with disability discrimination law under the Americans with Disabilities Act. Under that Act, no violation of law arises until a worker has informed the employer that an accommodation to the worker’s disabilities is needed.*

GOOD READING ... See you in September

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NOT-FOR-PROFIT LAW DEVELOPMENTS

LOANS TO DIRECTORS AND OFFICERS NIXED BY IRS — Do your organization’s governing documents authorize it to make loans to directors and officers? State nonprofit laws sometimes permit such loans under specified circumstances. But the IRS frowns on them, and one nonprofit was recently denied recognition of tax-exempt status by an IRS examiner until a bylaws provision authorizing loans to officers and directors was deleted, even though it was written in language tracking that of the Illinois statutory provision permitting loans in some cases. *The IRS doesn’t care what state law permits. If there is a provision authorizing loans to directors and officers in your organization’s governing documents, you can expect that it may be challenged by the Service when they are considering your application for recognition of exempt status or they are auditing your nonprofit.*

REGULATORY LAW DEVELOPMENTS

UBER AIRPORT PICKUPS PROMPT DISPUTES — Uber ridesharing has recently encountered problems with airport authorities around the country, mostly involving licensing and the extent of regulation that should be imposed on such arrangements. Some officials have chosen to negotiate issues with Uber, while others have taken Uber to court. *The City of Chicago took the former approach earlier this year when it granted Uber a transportation network-provider license in exchange for Uber’s agreement to certain security measures.*

ANTITRUST SUIT AGAINST REPRODUCTIVE MEDICINE GROUPS PENDING — An antitrust suit is pending in the U.S. District Court for the Northern District of California against two nonprofit organizations involved in reproductive medicine that have promulgated voluntary guidelines on how much fertility clinics should pay women who are providing eggs to couples struggling with infertility. A group of women brought the suit, claiming that the guidelines amount to illegal price-fixing. The suit survived a motion to dismiss earlier this year. *It isn’t illegal, of course, for anyone, acting individually, to decide how much they will pay for anything. But collective decisions on prices can violate the antitrust laws, and, unfortunately, the cost of defending a private suit or a government enforcement action for alleged price-fixing can be extremely high. Even if a nonprofit successfully defends itself against such allegations, it may lose financially from the high costs of the defense effort and associated adverse publicity.*

SEC APPROVES “PAY RATIO” DISCLOSURE RULE — The federal Securities and Exchange Commission has approved a rule requiring publicly traded companies to disclose to shareholders the difference between what their CEOs are being paid and the median compensation paid to all other company employees. The pay-ratio disclosure was required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law in 2010, and the SEC rule was supposed to have been promulgated within the following year. Consideration of the rule by the SEC prompted more than 287,000 comment letters from business groups that argued the new rule was unnecessary and hard to implement. However, more than 200 consumer and other groups wrote to the SEC in support of the rule, with some noting studies showing that CEO compensation overall has grown to 300 times what typical employees earn. They argued that investors, when buying stock in a company, should be able to weigh whether a CEO is really providing hundreds of times more value to the business than other employees. *Critics of pay inequality in the U.S. will certainly gain ammunition.*

tion from the required disclosures. Meanwhile, whatever the merits or demerits of the rule, critics of government will question why it took the SEC so long to decide it would enforce a law passed by Congress in 2010. Can we have a government of laws when, in regard to all sorts of laws, enforcement is so often delayed and less than efficient? Is the solution just to pass more laws? Some seem to think so.

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT TOSSES EVIDENCE FROM LAPTOP SEIZED WITHOUT WARRANT — A federal judge has ruled that the government can't prosecute a traveler for arms dealing using evidence found in a laptop seized in a border search without a warrant and with little prior suspicion of ongoing or imminent criminal activity. The government had tried to get the evidence admitted in the prosecution of a man accused of selling weapons technology to Iran. But the judge said seizing a computer wasn't similar to searching a handbag, which the government has a right to search when you cross the border. The judge said it's more like a cell-phone, which the U.S. Supreme Court has previously ruled cannot be searched by police without a warrant. *The search in this case was deemed "unreasonable" under the "totality of the unique circumstances," which included the imaging and searching of a laptop's entire contents, using specialized forensic software, for a lengthy period of time, in order to gather evidence in a pre-existing investigation that could have allowed for obtaining a warrant and apparently had not pointed to any wrongdoing by the traveler in question. Not all intrusive border searches of electronic devices are going to be covered by the decision, but it's a small victory for the innocent travelers who may not be quite as likely to see his computer searched by federal agents in the future.*

SMELLS LIKE A TRADEMARK TO ME — Want to trademark a fragrance? It won't be easy, but the U.S. Patent and Trademark Office is now registering trademarks for fragrances. Verizon Wireless, for example, recently secured a registration for a "flowery musk" that perfumes its "destination stores" in Chicago, as well as Boston, Houston and the Mall of America in Bloomington, Minnesota. If a smell serves to identify a brand, it can be registered, but the trick is that it must have no important practical function, which lets out air fresheners and perfumes, among other things. *Registrations for fragrances are a relatively new development, and there are only a few that have been given full trademark registration protection in the U.S. so far. But if your nonprofit has an event for which it wants to protect a distinctive smell, you can see if the PTO will give it a whiff.*

TAX LAW DEVELOPMENTS

IRS TARGETS CAPTIVE INSURANCE COMPANIES — The Internal Revenue Service has named small captive insurance companies to its "Dirty Dozen" list, an annual compilation of income tax issues that are of particular concern to the Service. While acknowledging that captive insurance companies can be legitimate, the IRS says that many are being created and operated for tax rather than business reasons, and there are ongoing audits of many such companies, focusing on how they are marketed and run and, basically, whether they should continue to be treated as insurance companies. *Numerous nonprofits have small captive insurance companies that provide insurance for their members. If the IRS finds that a captive is not legit, it may reverse deductions for insurance premiums paid to it and add interest owed plus penalties of up to 40% of that total.*

GOVERNMENT INVESTIGATING WORKER DEVICE USAGE — The U.S. Department of Labor has announced that it is requesting information on “[T]he use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours.” The Department’s concern appears to be that nonexempt employees are doing off-the-clock labor, such as checking and responding to email, that is not being considered toward the 40-hour-per-week limit beyond which overtime is owed. *The federal Fair Labor Standards Act says that “de minimis” work done beyond the regular workweek should not be considered toward the overtime limit, and that has usually been considered to be work of five minutes or less. But employers that require, or even allow, employees to use their smart phone for business in their “off” hours may be in for a shock if the Department begins requiring overtime pay for all business device usage outside the normal business day.*

EEOC PROTECTS TRANSGENDER EMPLOYEES — In a recent decision, the federal Equal Employment Opportunity Commission ruled that denying transgender employees use of a restroom consistent with their chosen gender identity constitutes sex discrimination under federal law, and an employer’s persistently refusing to use such a worker’s chosen name and gender in identifying them may create an illegal “hostile work environment.” *The ruling specifically dealt with policies of the U.S. Army, but private employers should take note that the EEOC’s efforts to protect transgender employees could also be applied to them.*

COURTS EXPAND RETALIATION CLAIM RIGHTS — Recent federal court decisions have expanded the rights of employees who suffer retaliation after filing complaints with their employers. In one case, the Court of Appeals for the Second Circuit held that a worker’s verbal complaint that he had not received earned wages was sufficient to support a retaliation claim under the federal Fair Labor Standards Act. When the complaint prompted his boss to point a gun at him, which the worker assumed was intended to end their employment relationship. In another case, the Court of Appeals for the Sixth Circuit affirmed a lower court award of \$1.5 million in damages against an employer who fired a group of workers after they asked their supervisor to stop making sexually explicit comments to them. *Nonprofits and other employers must make certain that they treat employee complaints seriously and properly investigate them. In addition, they should ensure that any subsequent disciplinary action against complaining workers will not appear to be retaliation.*

DISABLED WORKERS MUST BE GIVEN PREFERENCE FOR VACANCIES — The federal circuit court in Chicago recently ruled that workers who lose their jobs because their disabilities prevent them from performing essential job functions must be given preference over other workers in seeking a transfer to other open positions. The appellate court held that such workers must be assigned to vacant positions for which they are qualified, ahead of more qualified applicants, unless such an accommodation would be unreasonable or present an undue hardship for the employer. The ruling came in a suit by the Equal Employment Opportunity Commission against United Airlines, which United settled for a \$1 million payment and its agreement to revise its reassignment policies, train employees on the policy changes, and report to the EEOC on disabled individuals who are denied reassignment. *Demonstrating that such an accommodation for disabled workers is unreasonable can be difficult and showing undue hardship for the employer even more so.*

ONE-EYED OIL RIG WORKER WINS EMPLOYMENT SUIT — A jury recently awarded a one-eyed oil rig worker over \$245,000 in an Americans with Disabilities Act suit after a company doctor found him unqualified for a job he was seeking as a junior rig manager. The doctor disqualified him because of his monocular vision, saying that he could find work at other drilling companies, but not the one to which he applied.

Apparently, the jury felt that the worker's prior 37-year career working on oil rigs in Alaska, despite his visual disability, demonstrated that he could work for any drilling company and had suffered discrimination in being denied the job he sought. *Maybe his 37-year career was his real disability. Finding bogus reasons to fire or not to hire older workers is very common in business, despite the federal Age Discrimination in Employment Act. Or, maybe this doctor was ignorant of, or had no respect for, the law, which maybe shows that employers should be wary of "blindly" following the advice of company doctors (pun intended).*

MEETINGS & TRAVEL LAW DEVELOPMENTS

AIRLINES TRY TO SPEED BOARDING — Airlines are trying to speed the boarding process to avoid missed connections and angry customers. Among the latest efforts is Delta's pre-loading of carry-on bags at some of the busiest airports. Airline employees offer to take carry-on bags at the gate and load them in the bins above assigned seats. *Delta isn't just being kind to passengers. Studies show an airplane idling at a gate can cost a carrier \$30 per minute.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

BOY SCOUTS LET LOCAL UNITS DECIDE ON GAY SCOUT LEADERS — Boy Scouts of America has decided to lift its ban on gay scout leaders and let individual local units decide whether gays should be allowed to lead scout troops. The decisions will actually be made by the churches and civic or school groups that sponsor the local troops. The new policy of the national organization states that churches "may continue to use religious beliefs as criteria for selecting adult leaders, including matters of sexuality." *Maybe there are good reasons why such controversial decisions should sometimes be made at the local level of a nonprofit organization, as long as the locals aren't creating legal problems for the national. But locals will sometimes do that, and a national entity may face an impossible choice in deciding whether to try regulating the locals or let them do their own thing. Either choice may result in legal liability for the national. Best way to avoid that, if the national can take the political heat from the locals: require them to incorporate and purchase insurance.*

APPELLATE COURT APPROVES ENJOINING ENFORCEMENT OF BYLAW — The Appellate Court of Illinois, Second District, has affirmed a lower court's order preliminarily enjoining the Illinois High School Association from enforcing a bylaw to prevent a Congolese student from playing basketball on his high school team. The Association's bylaw prohibited "international" students from playing high school athletics unless they were living with a parent or guardian or participating in an approved student exchange program. The Association had ruled that the bylaw prohibited the Congolese student from playing basketball at his high school because he lived in a high school dormitory and was not participating in an approved program. But the student challenged the bylaw in court as denying "international" students equal protection of the laws, and a preliminary injunction was issued. Now, the Appellate Court has affirmed, finding that the Association failed to adequately demonstrate that the bylaw helped to achieve its purported goal of preserving competitive balance in high school athletics. *The injunction was preliminary, and there may be further proceedings in this matter. But the Appellate Court's ruling shows that nonprofits must be prepared to defend their bylaws in court if enforcement will adversely affect anyone, and particularly if, as in this case, enforcement may be challenged as denying anyone their constitutional rights.*

GOVERNMENT PROJECTS RISE IN HEALTH CARE COSTS — A new study by federal government economists projects that increases in health care costs will outpace economic growth over the next decade, threatening to make health care increasingly unaffordable. The good news is that health care costs are not rising as fast as they used to. Annual increases near 9% in the 80s, 90s and 2000s have given way to projected annual increases of 5.8 % for the next ten years. But the average American’s annual health care costs, including insurance premiums, copays and deductibles, are still expected to top \$4,216 by 2024, up from \$2,618 in 2014. *Nonprofits, like other employers, will be struggling to find ways to meet the health care needs of their workers. Some nonprofits in the health care arena will be challenged more than others to find creative solutions to this problem.*

H & H DEVELOPMENTS

Jonathan T. Howe co-presented two sessions at the at the ASAE Annual & Exposition in Detroit, Michigan: “Landing your First CEO Job: Tips on Recruiters, Search Committees and Negotiating” and “Disruptive Developments: A Candid Conversation About The Future.” He also presented “Risk Management in Uncertain Times,” a CMP program for meeting professionals at the Sandals Cable Beach in the Bahamas.

Mike Deese participated on a panel discussing association management company accreditation during The AMC Institute’s preconference at the ASAE annual meeting in Detroit.

—◆—
*This issue of the Report
is dedicated to
Terry Hutton,
our “Editor In Chief,”
who passed away July 30, 2015.*
—◆—

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Contributors to this issue...
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