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Chicago
(312) 263-3001

Washington, D.C.
(202) 466-7252



THE HOWE & HUTTON REPORT

TRENDING NOW

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RULE EXPANDS “ASSOCIATION PLANS” – *H&H Report Update* - Discussed for some time, a new rule has now been issued by the Trump Administration that will enable many small businesses and self-employed persons to purchase health insurance plans not subject to all Affordable Care Act coverage requirements, and therefore, presumably, cheaper to purchase. Such businesses and individuals will be able to purchase “association health plans” for workers, and some will be subject to the same rules now governing plans for larger employers. Generally, the new plans won’t have to provide the comprehensive benefits previously mandated under the ACA (such as coverage for pre-existing conditions and pregnancy cost coverage for men). *Supporters of the new rule say that it may make health insurance policies thousands of dollars cheaper, provided purchasers are willing to do without benefits mandated for Obamacare insurance. Opponents say that relatively healthy people will desert Obamacare coverage in order to purchase the cheaper policies, driving up healthcare costs for those who purchase ACA insurance. Healthier individuals may also simply forego purchasing health insurance at all and self-insure, now that tax penalties for failing to purchase health insurance (the “individual mandate”) have been eliminated under the new tax law passed by Congress in December.*

COURT REQUIRES WARRANT FOR CELLPHONE TRACKING – The Supreme Court of the United States has ruled that law enforcement must obtain a search warrant before obtaining historical cellphone data in order to track a user’s location. The 5-4 decision by a split court specifically didn’t apply to law-enforcement “emergencies,” and it didn’t address the question of when law enforcement can seek real-time cell-location information rather than historical records generated over a number of days or weeks. *Together, AT&T Inc. and Verizon Communications Inc. report receiving over 100,000 requests per year from law enforcement for cellphone location, most of them without a warrant.*

TRENDING NOW

EQUAL RIGHTS AMENDMENT ONE STATE SHY OF ADOPTION (MAYBE) – The Illinois General Assembly has voted to add an Equal Rights Amendment to the U.S. Constitution, placing the measure only one state shy of being ratified by two-thirds of the states, as is required for adoption. The Amendment provides: “Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.” *There are still 13 states that haven’t approved the Amendment. But even if the Amendment is approved by one more state, it may have to survive a legal challenge due to the length of time ratification has taken. Congress set a 1982 deadline for state ratification. Proponents of the Amendment argue, though, that the deadline can be ignored because other amendments have been added to the Constitution after a longer ratification period. Those in favor of and opposed to the Amendment also argue over what its effect would be if it is ratified, given that federal and state laws not a part of the U.S. Constitution currently prohibit sex discrimination.*

NON PROFITS

TRUSTEE USED NONPROFIT’S MONEY FOR PERSONAL EXPENSES – A foundation trustee in Manhattan has agreed to pay \$550,000 as restitution to the nonprofit after using its funds for personal travel and entertainment and to settle litigation against him in his personal activities. The payment by the trustee followed an investigation by the New York Attorney General’s office, which found that misappropriation of the foundation’s money was made possible, in part, by lack of internal controls and failure of other trustees to oversee the nonprofit’s expenditures. The foundation has agreed to reforms required by the A.G.’s office, including trustee training and addition of independent trustees to the nonprofit’s board. Meanwhile, the trustee who misused the foundation’s funds will be barred from serving in an officer, director or other fiduciary role for any nonprofit operating in New York. *Unfortunately, this news item isn’t all that novel. Misuse of nonprofit funds is regularly reported throughout the U.S and overseas, to the extent that such news items can take the public’s attention away from the many good things nonprofits do.*

EMPLOYMENT

CONFUSION OVER EMPLOYER'S IDENTITY DOOMS DISCRIMINATION SUIT – A worker's confusion over the identity of his employer can make it hard for him to file an employment discrimination suit. The U.S. Court of Appeals for the Seventh Circuit has affirmed a federal district court's dismissal of an employment discrimination suit filed by a worker, after the court found that the defendant in the case was not the worker's employer. Carleton Harris worked at the Allen County Juvenile Center. His offer of employment included the seal of the Allen County Superior Court, and he signed the Superior Court's employee handbook, acknowledging that he had entered into an employment relationship with the Superior Court. On the other hand, his job description bore the seal of the Allen County Board of Commissioners, and his medical records authorization identified the Board as his employer. When he injured his back at work, he lost his job, and he sued both the Superior Court and the Board of Commissioners for failing to accommodate his disability in violation of the Americans with Disabilities Act. But he then voluntarily dismissed his suit against the Superior Court, for some reason, only to have the federal district court and Court of Appeals rule that he could not proceed with a suit against the Board alone because the Superior Court, not the Board, was his employer. Evidence indicated that Harris's hiring, firing, day-to-day duties and salary were statutorily delegated to the Superior Court and the Allen County Board only had ministerial duties in the payment of the Juvenile Center's expenses (such as issuing checks to people like Harris). *Mixed up employment relationships like this one may have some legitimate basis, but they sometimes seem to be set up for the primary purpose of avoiding employer responsibilities and legal liability. Many employees just care that they have a job, and they may not take the trouble to sort out a convoluted employment relationship until they need to call on their "employer" to perform some legal duty. Some courts have reacted to such situations by holding that a "joint" employment relationship has been established, with more than one entity having employer duties. Too bad for Harris that his case wasn't resolved that way.*

THREATS TOO OBLIQUE TO BE SEVERE OR PERVASIVE HARASSMENT – The U.S. Court of Appeals for the Seventh Circuit has affirmed a federal district court decision that a worker for the Cook County Adult Probation Department did not have a case against her employer for severe or pervasive harassment after she was subjected to verbal intimidation by two superiors on one occasion. She testified that, after she had successfully sued their shared employer for earlier discrimination and harassment, she heard one superior say to the other that he should figure out a way to get her away from her partner and, when they were leaving a facility, "do it to her when she gets out the door." Then, she testified that one said to her in the office parking lot, "I could hit you and nobody would give a f___." But there was no accompanying physical abuse. The Seventh Circuit reasoned that the threat to the worker was "too oblique" to be considered severe or pervasive harassment. *We don't know about "oblique," but because the abuse occurred on only one occasion, it may not have reached the level of being "severe or pervasive" in the eyes of the judges.*

EMPLOYMENT (cont.)

COURT OF APPEALS BACKS NLRB OVER ARBITRATION – *H&H Report Update* – In a continuing dispute over who should be the labor representative for full-time staff members who also teach part-time at Columbia College Chicago, the U.S. Court of Appeals for the Seventh Circuit held that a ruling on the subject by the National Labor Relations Board had primacy over a contrary ruling by an arbitrator. The dispute involved the College and two of its employee unions, one of which had obtained an NLRB decision that it was the appropriate representative of such people. However, a collective bargaining agreement gave the College a right to arbitration of labor disputes, and an arbitrator held that the other union was the proper representative of those workers. Further litigation ensued, and first a federal district court and now the Court of Appeals have held that the NLRB’s decision had primacy and the arbitrator’s ruling could not stand. *The courts didn’t rule that the NLRB made a correct determination, but that the National Labor Relations Act confers broad discretion on the Board to determine representational questions. So, right or wrong, no arbitrator could nullify an NLRB decision on such matters. Normally, the Court of Appeals and courts in general are keen on arbitration as a means of dispute resolution, but not here.*

BANK’S CHANGE TO DEFINED-BENEFIT PENSION PLAN OKAYED – A bank changed its defined-benefit pension plan to reduce the pension-accrual rate, provoking a lawsuit from a pension plan participant whose benefits didn’t increase over time under the new formulation. The participant claimed that the plan amendment violated the federal Employee Retirement Income Security Act and, because it harmed older workers relative to younger workers, violated the federal Age Discrimination in Employment Act. However, a federal district court dismissed the suit, and a federal appeals court affirmed that decision. Essentially, the courts held that the bank had never guaranteed that pension benefits would increase over time, and, while ERISA protects entitlements constituting “accrued benefits,” it does not protect anyone’s hope that the future will improve on the past. Nor did the new formula for benefits violate the ADEA, because benefits were calculated on the number of years of credited service, not age. *Read your pension plan carefully. Can it be changed in a way that would be a detriment to employees, but might be advantageous to the employer?*

COURT ALLOWS BUSINESSES TO REQUIRE WORKER ARBITRATION – The Supreme Court of the United States has ruled that individual businesses can contractually require workers not represented by labor unions to arbitrate disputes with their employers instead of resorting to the courts. The decision was by a divided court, split 5-4, with new Justice Neil Gorsuch writing the opinion for the majority. The Trump Administration sided with the businesses involved in the case, reversing a position of the Obama Administration. *Lawyers for the workers in the case said that many workers will now have to arbitrate even claims of discrimination and sexual harassment if their employment contracts require it. However, as Justice Gorsuch noted, the Supreme Court’s decision reflects a long line of Supreme Court rulings favoring arbitration over lawsuits in the resolution of disputes.*

OTHER

JUDGE GIVES BOOT TO SUIT OVER L.L. BEAN LIFETIME GUARANTEE – A federal judge has dismissed a class action suit filed against L.L. Bean after that company scrapped a lifetime guarantee it had given customers of its outdoor gear for over a century. The court ruled that no one can pursue a suit in federal court unless they can show they have suffered an “injury in fact” from an invasion of a legally protected interest, that injury is “concrete and particularized” as well as “actual or imminent,” the injury is “fairly traceable to the defendant’s actions,” and it can be remedied by a favorable court ruling. In this case, the individual who filed the suit did not meet that test because he did not contend that he had tried – successfully or unsuccessfully – to return any product that should have been covered by the guarantee, and that he would not have bought the product if it had not come with a lifetime guarantee. Further, the court noted that the plaintiff customer had not alleged that any product he bought from L.L. Bean had suffered diminished value or become unusable. Rather, the court found that the suit was based entirely on an announcement made by L.L. Bean that it would be discontinuing its guarantee, which could be most reasonably read as discontinuing it only for products bought thereafter (perfectly legal, according to the court) and not products bought previous to the announcement (which might be legally questionable). *Words matter in any lawsuit, and, in this case, L.L. Bean’s words in its announcement were critical, as well as the plaintiff customer’s deeds, or lack thereof, in actually buying and trying to return a product.*

REGULATION

REPEAL OF NET NEUTRALITY RULES TAKES EFFECT – Obama-era “net neutrality” rules promulgated by the Federal Communications Commission have now been officially rolled back by President Trump’s FCC. Those rules prohibited Internet service providers from blocking or slowing down some Internet traffic and charging some companies extra for so-called “fast lanes.” To give itself the authority to issue the rules, the FCC reclassified broadband as a utility, potentially subjecting broadband to the same strict government regulation that governs telephone networks. The rules were adopted at least partly to prevent service providers like Comcast, which owns NBC Universal, from favoring their own content, or content provided by a related entity, over the content of a competitor. But opponents of the rules said they went too far, deterred innovation in charging for internet service, and depressed investment in building and expanding broadband networks. *Not content with just repealing the net neutrality rules, the new Trump-era FCC has taken the extraordinary step of giving away some of its authority, letting the Federal Trade Commission regulate broadband in the future. Some commenters have wondered, though, whether the FTC, which regulates interstate commerce and isn’t strictly focused on telecommunications, can give sufficient attention to how the Internet is run. We’ll see.*

TREASURY ISSUES RULES ON STATE TAX DEDUCTION WORK-AROUNDS – *H&H Report Update* – The U.S. Treasury Department has issued rules showing how it will deal with taxpayers who claim federal income tax deductions for “contributions” to state governments intended as a work-around to reduce the impact of new limits on federal income tax deductions for state tax payments. The federal income tax laws that went into effect this year put a \$10,000 cap on federal income tax deductions for state and local tax payments. High-tax states moved to skirt the cap by letting taxpayers effectively turn their state tax payments into voluntary “contributions” to which the \$10,000 cap, presumably, would not apply. In addition, some other states already had programs of various kinds under which donations to schools, hospitals or land conservation programs could offset state taxes. Now, the Treasury Department says that, effective immediately, no federal income tax charitable contribution deduction will be allowed for donations to state funds except to the extent they exceed state tax breaks received by contributors in exchange for those donations. There is one exception. If state tax benefits don’t exceed 15% of the amount “contributed,” the taxpayer can claim the full amount as a charitable deduction for federal income tax purposes. *Four high-tax, heavily Democratic states – Connecticut, Maryland, New Jersey and New York – have already sued the federal government over the \$10,000 cap, asserting that Republicans in Congress had a political motivation for enacting it. We’ll see how the courts feel about the cap and the state work-arounds.*

SOCIAL SECURITY COSTS EXCEED INCOME – The Social Security program’s costs will exceed its income this year for the first time since 1982. Consequently, the program will have to use up some of its multi-trillion dollar trust funds, consisting largely of government bonds, to keep paying out benefits. Current estimates are that the program will be unable to pay retirement benefits after 2034 and hospitalization benefits after 2026 unless the government shores up the program’s finances. In both cases, the deadlines come sooner than was reported last year. On the other hand, disability benefits are now projected to run out in 2032, as opposed to 2028, the forecast last year. *The tax cuts signed into law by President Trump are expected to slightly reduce money going into Social Security. But long-range demographic trends are the biggest problem for the program, as the aging of the U.S. population means fewer workers are paying into the program and more people are receiving benefits.*

HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe presented “How to Adapt Your Negotiation Style for Successful Meetings “Featured Webcast Series.” His session detailed the elements that can play a role in such a negotiation – from outside forces such as the economy and politics to situations unique to an event such as lead time and group size.

Jon also presented “Disruption in the Market Place – Contract Issues” for the Nassau Paradise Island Promotion Board.

Jon co-presented “ETHICS” with Carla Balakgie, President and CEO of NAMA at the ASAE Annual Meeting and Legal Symposium in Chicago. This presentation was an engaging robust discussion around ethical considerations in association management and how to best handle them.

Jon Howe also co-presented “GDPR, Privacy Shield and You - Are You Compliant?” at the ASAE Annual Meeting and Legal Symposium in Chicago with MaryAnn Bobrow, President Bobrow & Associates. This presentation included an overview of GDPR, Data Privacy Updates, identifying whether your organization is required to comply and formulating procedures for compliance with GDPR.

Jon Howe, Panelist along with Moderator, Loren Edelstein, Editor in Chief, Meetings & Conventions, Northstar Travel Group, presented “When Attendees Say #MeToo: How to Handle Sexual Harassment at Meetings and Events” at the Global Business Travel Association (GBTA) 2018 Convention in San Diego, California.

In an interview format at the Global Business Travel Association (GBTA) 2018 Convention, Jon Howe and Loren Edelstein, Editor in Chief, Meetings & Conventions, Northstar Travel Group co-presented: Hotel Commissions: Who, What, Where, When, Why and What's Next for Independent Meeting Professionals. Participants were invited to take part in the discussion, asking questions and sharing opinions and insights. This presentation offered a better understanding to the shift in the meetings marketplace and issues from the commission challenge.

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Editor - James F. Gossett
Contributing Editor - Christina Pannos

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