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THE HOWE & HUTTON REPORT

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TRENDING NOW

JUDGE ACCEPTS NONPROFITS' STANDING TO SUE OVER PROPERTY TAX – A county judge has found that three nonprofit neighborhood groups have standing to sue the county assessor and county over alleged discriminatory tax assessment practices in Cook County, Illinois. Nonprofits often are found not to have standing to bring suits because they are not directly injured by the defendants' conduct. But a Cook County Circuit Judge has denied a motion to dismiss the organizations' suit as regards claims made under the Illinois Civil Rights Act and federal Fair Housing Act, while granting a motion to dismiss claims under the Illinois Constitution. Further proceedings will be held for the presentation of evidence to support those claims that were not dismissed. *In finding that the nonprofits had standing to pursue some of their claims, the court said that the alleged discriminatory assessing in Cook County did injure the nonprofits because of the diversion of their resources to investigate the alleged discrimination and to engage in advocacy and counseling aimed at combating it. Similar arguments for standing could probably be made by many nonprofits with a public mission who want to bring legal actions to remedy governmental injustice.*

TRENDING (cont.)

NONPROFIT CAN SUE FOR USE OF PUBLIC LAND TO BUILD OBAMA CENTER – A federal judge has denied a motion to dismiss a lawsuit filed by a nonprofit taxpayer advocacy group, Protect Our Parks, which is seeking to undo a transfer of Chicago parklands to a private foundation for the construction of the Barack Obama presidential center. The motion was filed by the City of Chicago, which approved the property transfer. Protect Our Parks claimed that the transfer of public land to a private entity was illegal. The judge didn't rule on the merits of the suit, but did rule that the advocacy group had standing to bring the suit because it represented taxpayers with concerns that providing parkland in the public trust to the private foundation violated their due process rights. *Nonprofits are on both sides of this case. For a nonprofit to be recognized as having standing to challenge any municipal action in court on behalf of a group of taxpayers would seem to be a victory for the nonprofit community. On the other hand, governmental entities have often transferred property to nonprofits for some project that has a public benefit. It would be surprising if a court ruled they could never do it, especially for an Obama presidential center in Chicago.*

STATE SUPREME COURT OKAYS SUIT UNDER BIOMETRIC PRIVACY ACT – *H&H Report Update* - The Illinois Supreme Court, reversing a lower court decision and resolving a conflict among the Illinois lower courts, held that one can qualify as an “aggrieved” person and sue for liquidated (statutorily mandated minimum) damages, as well as injunctive relief, under the Illinois Biometric Information Privacy Act, even if one hasn't suffered actual damages because the Act has been violated. The Act prohibits private entities from collecting, retaining, disclosing and destroying biometric identifiers, including retina or iris scans, fingerprints, voiceprints, and scans of hand or face geometry, without prior notice to and consent of the persons whose information is involved. In this case, a child was fingerprinted by an amusement park without a parent being informed of or consenting to the process. The child's mother sued the owners of the park on behalf of her child and a class of similarly situated persons, and the Illinois Supreme Court has now held that an individual is entitled to obtain liquidated damages for violations of the Act, as well as injunctive relief to prevent further violations of the Act, even if no actual damages or threat of actual damages have been suffered. *The liquidated damages for negligently violating the Act are \$1,000, but for reckless or intentional violations are \$5,000. In a class action suit like this one, on behalf of all similarly situated individuals, the damages could really mount up, depending on how many such people are in the class.*

MICHIGAN AGENCY STOPS UTILITY'S GIFTS TO NONPROFITS – Responding to public complaints, the Michigan Public Service Commission has prohibited a major utility, Consumers Energy, from making contributions to various nonprofit Internal Revenue Code Section 501(c)(4) and Section 527 entities involved in political activities. Critics targeted consumers for spending ratepayer money on political advocacy, legally or illegally, when its customers have no say in how the money is spent. The action of the Commission apparently had few, if any, precedents in utility regulation. *Members of the public brought complaints to the Internal Revenue Service as well as the Commission, but it is not known if the IRS has taken any action against the nonprofits that received funding from the utility.*

TRENDING (cont.)

DIRECTOR’S RIGHT TO REVIEW CORPORATE BOOKS NOT ABSOLUTE – A recent Illinois Appellate Court case dealt with the question of whether corporate directors have an absolute right to examine corporate books. The case was proceeding under the Illinois Business Corporation Act, but it may inform decisions on the same subject in other states when a director’s rights under the Illinois General Not For Profit Corporation Act are in issue. In this case, two sisters, who were directors and minority shareholders in a corporation controlled by their brothers, sought to examine the corporate books, asserting that they had an absolute and unqualified right to do so. A trial court agreed with them, but the Illinois Appellate Court reversed the lower court’s decision and agreed with the brothers that a director’s inspection of corporate books had to be for a proper purpose. Further proceedings will be held to determine whether the sisters had a proper purpose for inspecting corporate records if the brothers were right in asserting that the only purpose for inspection by the sisters was to force either the purchase of their stock at an excessive premium or, alternatively, the liquidation of the company. *The Illinois General Not For Profit Corporation Act doesn’t specifically address director rights to inspect, though it says that the board of directors has the authority to manage and direct the corporation. On the other hand, that Act says that any voting “member” has the right to inspect corporate books and to make “extracts” therefrom, “but only for a proper purpose.” If the member seeks to examine books of account, the burden of proof to establish a proper purpose is on the requesting member. If the member is seeking to examine corporate minutes, the burden of proof is on the corporation to establish that the member has no proper purpose for inspection.*

EMPLOYMENT

DISPARATE IMPACT CLAIMS CAN’T BE MADE BY MERE JOB APPLICANTS – *H&H Report Update* – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court decision that disparate impact claims against an employer under the federal Age Discrimination in Employment Act can only be brought by a current employee, not a mere job applicant. The case involved an attorney whose job application was rejected by an employer that advertised for someone with “3 to 7 years (no more than 7 years) of relevant legal experience.” The attorney claimed the ad had a disparate impact on older workers and was prohibited by the Act. But now a federal district court and the Seventh Circuit have concluded, based on their reading of the Act, that Congress, while protecting employees from disparate impact age discrimination, did not extend the same protection to outside job applicants. *The job advertisement spoke in terms of experience, and the result in the case might have been different if it had flat out stated that attorneys over a certain age need not apply. Clearly also, the court’s decision did not deny the Act’s protection to current employees seeking to move to a different job with the same employer.*

EMPLOYMENT

SUIT CHALLENGING ILLINOIS LABOR LAW SURVIVES MOTION TO DISMISS – A federal judge has ruled that a suit challenging an Illinois law requiring unions to represent nonmembers can survive a motion to dismiss. The law requires unions for certain types of public employees to collectively bargain on behalf of all workers in a bargaining unit, including nonmembers. The suit claims that the law is unconstitutional because the Supreme Court of the United States ruled last year that nonmembers cannot be forced to pay union dues. Now, a federal judge has held that the claims made in the union’s suit are “far from speculative” and will have to be considered in further judicial proceedings. *Although the court ruled against a motion to dismiss, the union claims that mandatory union nonmember representation is unconstitutional. The court dismissed other challenges to Illinois labor law made by the union in the same case. The court upheld the constitutionality of another state law provision saying that unions can only collectively bargain over matters directly affecting wages, hours and conditions of employment, not matters of “inherent managerial policy,” such as hiring practices and budgeting.*

REGULATION

COURT AFFIRMS CONTROLLED GROUP JOINT PENSION LIABILITY – T&W contributed to a pension fund for its employees until it went out of business. It then incurred a \$640,000 withdrawal liability under ERISA. The pension fund mailed a notice of that liability to T&W and affiliated entities, but it was ignored. However, a federal district court, and the U.S. Court of Appeals for the Seventh Circuit, have ruled in favor of the pension fund in a suit filed against T&W and the affiliated entities, who were found to be part of a controlled group jointly and severally liable for the withdrawal payment. Some of the defendants forfeited all defenses to liability because they failed to arbitrate the pension fund’s claim after receiving the notice, as was required by the applicable collective bargaining agreement. Other defendants had no credible claim of surprise (at being a member of a controlled group) to sidestep ERISA’s arbitration requirement. Even if they didn’t receive the notice as they claimed, they were each in a trade or business under common control with another party that received the notice. *Just as you can be liable for federal income tax after you die, so a company can be liable for pension payments after it has ceased doing business. So can members of its controlled group. Nothing is certain, they say, but death, taxes and pension payments.*

BIG REGIONAL BANK DEAL IS LARGEST IN OVER A DECADE – BB&T Corp. has struck a deal to purchase SunTrust Banks Inc., the largest U.S. bank combination in 15 years. The new joining of large regional banks will create the sixth largest commercial bank in the U.S. Larger banks are effectively forbidden to combine by federal law, but speculation is that the BB&T-SunTrust deal may usher in a wave of regional bank combinations that is facilitated by the loosening of bank regulation following President Trump’s election. *Such regional banks are struggling to compete with the big national banks and online competition. One effect of the new combination, and others that may follow, is bank closures. Reports are that the BB&T-SunTrust deal will lead to branch closures throughout the Southeast, where both BB&T and SunTrust have been operating. Will your bank be affected?*

REGULATION (cont.)

GOVERNMENT DROPS FIGHT AGAINST AT&T-TIME WARNER DEAL – *H&H Report Update* – After the U.S. Court of Appeals for the District of Columbia Circuit rejected the government’s efforts to block AT&T’s acquisition of Time Warner, the Justice Department abandoned its fight to prevent the \$80 billion deal in the first major antitrust action under the Trump Administration. The Court of Appeals ruled that the Department was “unpersuasive” in seeking to overturn a federal district court decision approving the transaction. The district court said the deal was unlikely to harm competition, and the Court of Appeals found that the lower court had not abused its discretion. *This case represented the first time in 40 years that the government fully litigated over a merger involving companies not directly competing with each other. Commentators suggested that this big loss for the government could make the Justice Department and Federal Trade Commission less eager to try preventing for-profit and nonprofit mergers in the future. But the government may still get involved in approving and disapproving acquisitions. The proposed purchase of Sprint Corp. by T-Mobile US Inc., which involves two direct competitors, is currently being reviewed by the government antitrust regulators.*

TAXATION

NEW TAX RULES FOR PASS-THROUGH ENTITIES ANNOUNCED – The Treasury Department announced rules for an income tax break applicable to pass-through entities, including partnerships, S corporations and limited liability companies. Such businesses aren’t taxed, but all their income flows through to their owners for tax purposes regardless of whether it is distributed. So, the owners pay taxes on it. The new rules recognize reduction of the top tax rate on such income from 36% to 29.6%, purportedly as part of a governmental effort to level their playing field with corporations, which saw a reduction of their top tax rate from 35% to 21% under the 2017 federal income tax overhaul. Corporations, though, are subject to “double taxation, in that they pay taxes on their income, and their owners pay tax on the same income when it is distributed to them. *Although the new Treasury Department rules will benefit many pass-through entities and their owners, the Treasury Department rejected appeals from baseball team owners, real estate settlement agents, writers and physical therapists to grant special favorable tax treatment for their businesses.*

HOWE & HUTTON NEWS AND EVENTS

Naomi Angel will participate in a product liability mock trial at the trade show of three associations in Indianapolis. The workshop will demonstrate what can happen in court when a product isn't installed in accordance with safety standards.



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