

THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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COURT REJECTS PRIVATE SETTLEMENT OF FLSA CLAIMS

— The U.S. Court of Appeals for the Second Circuit has ruled that litigants involved in a suit under the federal Fair Labor Standards Act can't settle the suit without approval of a federal district court or the U.S. Department of Labor. The decision arose in a suit filed against restaurant owners by a former restaurant server and manager who alleged, among other things, that he had been improperly denied overtime pay required by the Act. The parties then settled out of court, and the plaintiff, pursuant to the settlement, sought to dismiss the suit. But the trial court refused to approve the settlement and dismiss the suit unless (1) the settlement agreement was made public on the court's docket and (2) the parties demonstrated to the court that the settlement was reasonable. Since neither party wanted to disclose the terms of their settlement, they both appealed the trial court's ruling to the Second Circuit, which has affirmed the lower court's order, finding that FLSA wage and hour disputes can't be settled out of court in the manner sought by the parties. *The moral is, employers and employees fighting over wages and hours should make their best effort to settle their disputes before counting on the Department of Labor or the courts to do it for them. Otherwise, both sides may lose control of the dispute and wind up with a result neither wants.*

COURT'S "BLUE-PENCILING" OF RESTRICTIVE COVENANT UPHELD

— The U.S. Court of Appeals for the Seventh Circuit in Chicago has upheld a lower court's decision to "blue pencil" a restrictive covenant in a fired executive's employment contract after he went to work for a competitor of the former employer. The former employer sought a court order preventing all work for the competitor, but a trial court refused to enforce the covenant as written, finding it overbroad and confusing. Instead, the trial court took a "blue pencil" to the covenant, modified its terms to make it more reasonable, and enforced it only as modified, prohibiting, for a two-year term, certain contacts with actual customers of the former employer as of the termination date, provided the customers were located in certain states where the former employee had worked. The restrictive covenant, as written, contained no geographic limits and applied to any selling efforts directed at persons previously contacted by the former employer. *This case was decided under Pennsylvania law, which allows courts to "blue pencil" restrictive covenants in order to make them more "reasonable." Laws differ in different states. Courts in some states will not go to the trouble of modifying restrictive covenants, but will simply refuse any enforcement to a contractual provision they find overly broad, vague or oppressive.*

GOOD READING ... See you in October

NOT-FOR-PROFIT LAW DEVELOPMENTS

OBAMA PROPOSES RULES FOR FEDERAL GRANTS TO RELIGIOUS GROUPS — The White House has announced proposed rules for federal social service grants to private religious organizations. Federal agencies making such grants will be considering adoption of the rules, which would allow religious organizations to receive such grants for participation in programs like job training as long as their explicitly religious activities are privately funded and they separate their social services from their religious activities in time or location. The rules further state that religious groups receiving federal funding cannot discriminate against beneficiaries based on religion and that beneficiaries have a right to request other providers of services if they object to their provider's religious character. Government agencies also would be prohibited from taking "religious affiliations or non-religious affiliations" into account in the grant-making process. *The rules will be open for public comment at least 60 days before issuance in final form. No word yet on whether recipients of federally funded social services will be given the right to request other providers based on grounds other than their current provider's "religious character."*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

MJ WINS SUIT OVER USE OF HIS NAME AND LIKENESS — A Chicago jury has awarded Michael Jordan an \$8.9 million verdict in his suit against a local grocery chain for using his name and likeness in advertising without his consent. Dominick's published the ad in question with a \$2.00 voucher for steaks. Two customers redeemed the voucher, and Dominick's is now defunct. But if MJ is able to collect on the judgment, he says he will donate the money to charity. *Readers should never use someone else's name, photograph or other identifying characteristics in their advertising without consent, and they should never mess with Jordan in Chicago.*

REGULATORY LAW DEVELOPMENTS

NLRB WON'T LET PRIVATE SCHOOL FOOTBALL PLAYERS UNIONIZE — The National Labor Relations Board, reversing a decision from a local office, has decided not to take jurisdiction of a bid to unionize scholarship football players at Northwestern University, which essentially means that the players can't unionize. The NLRB noted that it could not consider unionization of players at state schools (not in the Board's statutory mandate and probably unconstitutional). That being the case, the Board thought it would be an inappropriate interference in the college football marketplace if it permitted unionization at private schools like Northwestern while leaving state schools alone. *Most private schools have a hard enough time competing with state schools on the gridiron as it is. Keeping up while negotiating with players who have a right to strike would make it more difficult for private schools, and the Board didn't want to make an unlevel playing field any worse for them.*

TAX PENALTIES INCREASED — Congress has increased penalties for not timely and correctly filing certain information returns with the IRS and providing those information returns to payees, including Forms W-2, the Form 1099 series, and Forms 1094-B and 1095-B as required to be filed by providers of minimum essential coverage under the Affordable Care Act. Filing of the Form 990 series is not affected. But for returns that are affected and are filed after December 31, 2015, the penalty for each such form not filed or provided as required is to greatly increase and, in some cases, will be doubling, depending on whether failures to file and provide correct returns are intentional and how tardy the filer has been in filing and providing correct returns. Penalties are lower for filers with annual gross receipts under \$5 million. *Filers first need to obtain accurate information from payees (names, addresses and Social Security numbers) and then need to make sure that information returns are timely and accurately filed and provided. The increased penalties for failing to do so make compliance more important than ever.*

GAO STUDY FAULTS IRS EXEMPTION REVIEW PROCEDURES — The U.S. Government Accountability Office, in a recent report to Congress, found deficiencies in IRS handling of applications for recognition of exemption and audits, which the GAO said could increase the risk that the Service's Exempt Organizations unit "could select organizations for examination in an unfair manner – for example, based on an organization's religious, educational, political or other views." Among other things, the GAO faulted the Service for not ensuring that IRS management consistently monitored staff decisions and gave them final approval. *This GAO review, of course, was triggered by criticism that the IRS has selected conservative organizations for special, and ultimately adverse, treatment. Not coincidentally, perhaps, the IRS, at about the same time the GAO was reporting to Congress, issued a Memorandum detailing new procedures for appointment of Political Activities Referral Committees, consisting of three managers selected at random and given special training, who will "review and recommend referrals" for auditing the political activities of exempt nonprofits "in an impartial and unbiased manner."*

IRS TARGETS POPULAR PENSION ANNUITY REPLACEMENT STRATEGY — The IRS has announced that, effective July 9, 2015, and with some exceptions for plan changes previously adopted or announced, it is going to prohibit a popular pension plan sponsor strategy of replacing annuities received under defined benefit pension plans with lump sum payouts or other accelerated forms of distribution. Such pay-outs are offered to recipients as an election, sometimes to individuals who have not yet begun receiving their pension benefits, but sometimes to current recipients of annuities as an alternative to continuing receipt of payments under their existing payment plan. It's the offering of a lump sum payment option to current annuitants that the IRS is after. The Service's announcement does not affect annuity replacement as a strategy applied only to people who have not yet begun receiving pension benefits, provided it is offered only as an option that the recipients can elect. *Annuity replacement is popular with sponsors because it transfers investment and life-longevity risks from sponsors to recipients. Now, the IRS is seeking to limit its use.*

STRESS CAUSED BY SUPERVISOR NOT DISABILITY — The California Court of Appeals recently ruled that the stress a worker experiences because they are working under a difficult supervisor is not a disability giving rise to an action under the California Fair Employment and Housing Act. In this case, an employee was diagnosed with an anxiety disorder after she informed her doctor that she was experiencing stress due to interactions with her supervisor. Her nonprofit employer granted her request for extended leave but denied a request that she be allowed to transition to a new position with a different supervisor, and she was eventually terminated, following which she filed suit in California state court. Now, the Court of Appeals has affirmed a trial court order that dismissed her suit, finding that the employee's inability to work under her supervisor was because of anxiety and stress related to standard supervisory oversight of her job performance, which didn't constitute a disability under the Act and thus didn't require any accommodation to her condition from the employer. *This is an unusual case because it was not brought under the federal Americans with Disabilities Act, but under state law. In ADA cases, courts today are usually more interested in whether the employer has provided a reasonable accommodation to a worker's condition, rather than the threshold issue of whether that condition constitutes a disability under the law.*

DELAWARE ENACTS SOCIAL MEDIA LAW — Delaware has enacted a new law prohibiting employers from interfering with the personal social media accounts of their current and prospective employees by, for example, requesting or requiring that usernames and passwords be disclosed to them or that personal social media be accessed in the employer's presence. There are exceptions to the rule that, among other things, allow reasonable and relevant investigation of alleged employee misconduct and exclude accounts, services and devices partly or entirely provided by the employer. *State laws vary on how much latitude employers have in accessing employee personal social media accounts, but there are at least 21 other states that have laws restricting employer access.*

EEOC SUES EMPLOYER FOR DISCRIMINATION BY ASSOCIATION — Employers who make adverse employment decisions against anyone because they have a relationship with a disabled person are violating the federal Americans with Disabilities Act. This was brought home recently when the EEOC sued an employer who allegedly terminated a worker from a temporary position as a medical assistant and failed to hire her for a full-time position because her daughter is disabled, apparently leading the employer to believe that the worker might need time off to care for the daughter or the worker's job performance might be hindered because of the relationship. *This case is still pending, but the suit tells us that the EEOC is on the lookout for such employment actions.*

TREATING WORKERS DIFFERENTLY BECAUSE OF LOCATION OKAYED — The U.S. Court of Appeals for the First Circuit recently upheld dismissal of a civil rights suit based on an employer's alleged discrimination against workers in a particular office location. A former employee sued after a multi-office government agency decided to close her office in Puerto Rico. She contended that the decision had a "disparate impact" on employees of a certain national origin, and was therefore illegal, even though she made no claim that the agency had any intention to discriminate. However, a trial court dismissed the suit, finding that the agency's treatment of its Puerto Rican office was based on non-discriminatory, valid business reasons, and the Court of Appeals affirmed the dismissal, finding that, even if there were no such reasons for the agency's actions, "disparate impact" claims are unavailable under federal statutory law when workers have simply been treated differently in different employment locations. *The former employee's suit might have succeeded if she had alleged intentional discrimination by the agency. Also note, even though the employer in this case was a government agency, the decision applies equally to private employers.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

COURTS SWAMPED WITH SUITS AGAINST AIRLINES — *H&H Report Update* - Following a recent announcement that the U.S. Justice Department is investigating the major airlines for allegedly violating the antitrust laws by colluding to hold down their flying capacity in order to maintain price levels, the courts have been swamped with private lawsuits against the airlines alleging essentially the same thing. At least 75 lawsuits have been filed in courts throughout the U.S. against American Airlines, Delta Air Lines, Southwest Airlines and United Airlines. *Keep in mind that the Justice Department hasn't charged the airlines yet, much less proven unlawful conduct. This demonstrates one of the hazards when anyone attracts the attention of the government antitrust enforcement authorities, as trade associations, professional societies and other nonprofits have sometimes done. With the risks of large judgments, high legal fees and adverse publicity, it pays nonprofits to steer clear of any activity that comes close to an antitrust violation.*

FTC SUIT AGAINST HOTELS FOR NOT PROTECTING PRIVACY UPHeld — The U.S. Court of Appeals for the Third Circuit has upheld the authority of the Federal Trade Commission to bring suit against a hotel chain for failing to take reasonable steps to protect the privacy of guests. The decision affirmed a lower court ruling that the FTC can bring such data security cases under Section 5 of the Federal Trade Commission Act, which outlaws unfair acts or practices in or affecting commerce. *Travelers can benefit from such protection for their information, but the FTC's authority to sue under the Act could allow for suits against many others who fail to adequately protect consumer information. Readers collecting such info should be aware of their responsibility to safeguard it.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

COLORADO COURT ORDERS BAKERS TO MAKE SAME-SEX WEDDING CAKES — A Colorado appellate court has ruled that state law requires bakers to make wedding cakes for same-sex nuptials. A baker had refused to do so, based on his religious beliefs, and the court held that the Colorado Anti-Discrimination Act required him to bake those cakes if he wanted to operate a public accommodation in the state. *The Colorado Act prohibits discrimination based on sexual orientation, and similar laws have been the basis for similar rulings in Oregon and New Mexico. However, businesses are still allowed to refuse gay and lesbian customers in most states.*

BILL WOULD HALT SECRET GOVERNMENT CELL PHONE SPYING — *H&H Report Update* - A bill is being considered in Congress that would defund a secret government cell phone spying program. According to investigations first undertaken by *USA TODAY* and Gannett newspapers last year, at least six federal government agencies and 53 state and local government agencies have been using devices called Stingrays, typically mounted on automobiles, to steal cell phone data from suspected criminals and other Americans who are suspected of no wrongdoing. The Stingray devices can penetrate the walls of any building, mimic cell phone towers, and trick cell phones into revealing data about a user's location, as well as user messages, calls and emails. According to the American Civil Liberties Union, the federal government has been providing the devices to state and local agencies through Justice Department grants, as well as agreements with the FBI requiring recipients not to disclose that the program exists. Now, the House of Representatives has voted to shut it down, and consideration of defunding will move to the Senate, as members of Congress are getting increasingly upset about the program's potential for violating constitutional rights. *This seems to be rather un-secret for a secret government program. Who would have thought that you couldn't trust government officials to keep the lid on a conspiracy?*

JUDGE SAYS LAW FIRM’S CLAIMS OF EXPERTISE JUST “PUFFERY” — A federal district court judge has dismissed claims filed by a company against its former law firm, contending, among other things, that the firm was negligent in obtaining a \$4 million settlement that the company had accepted in previous litigation with the U.S. Justice Department. The company’s claims alleged that the settlement should have been for \$10 million and that the firm misrepresented its abilities in saying that it had a “specialty” of speedy and efficient collection, it enjoyed a favorable relationship with government officials, its attorney could control the actions of the Department’s lawyer, and its own fees would be kept to a minimum. The company failed to pay the firm’s \$300,000 bill and counterclaimed when the firm sought a judgment for that money. But the district court judge now says the firm’s alleged misrepresentations were just “puffery,” and perfectly lawful, as the company couldn’t have reasonably relied on them. *No “puffery” here. We’re the greatest!*

FIRST AMENDMENT DEFENSE ACT WOULD PROTECT NONPROFITS — The First Amendment Defense Act, recently introduced in Congress, would prohibit the federal government from taking “discriminatory action” against anyone because they believe that (1) marriage is or should be recognized as the union of one man and one woman, or (2) sexual relations are properly reserved to such a marriage.” “Discriminatory action” is defined as including denying, delaying or removing tax exemptions for nonprofit organizations having such beliefs, and disallowing tax deductions for contributions to such organizations. If the Act becomes law, anyone asserting actual or threatened violations of the Act could sue the federal government for compensatory damages or other appropriate relief. *A reaction to the recent U.S. Supreme Court decision legalizing gay marriage nationwide, the Act has been endorsed by over 100 members of Congress.*

H & H DEVELOPMENTS

Naomi R. Angel presented “Antitrust — What’s It Really All About?” to a manufacturer trade association group of engineers at Fall Forum In Chicago. She also presented “A Legal Report On Trends & Developments of Interest” to a trade association of manufacturers at its Fall Technical meeting in Atlanta.

Jonathan T. Howe presented an association board orientation session for the benefit of new members to review fiduciary responsibilities and member duties. This session also explored the potential risks, how to avoid conflicts of interest, and how to maintain loyalty to the association when it seems loyalties are divided.

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Contributors to this issue...

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