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THE HOWE & HUTTON REPORT

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TRENDING NOW

CHICAGO'S PAID SICK LEAVE TAKES EFFECT JULY 1, 2017 - Chicago and Cook County employers, be ready to update your HR manuals and policies. As of July 1, 2017, Chicago and Cook County employers are required to provide paid sick leave for their employees. Both ordinances are similar in substance, but do differ in scope. Who is an employer? The laws apply broadly, and very likely most businesses, with even just one or two employees, are subject to the ordinance. Who is an employee? In most cases, an "employee" in Cook County is anyone who has worked for their employer for at least 2 hours in any two week period. In Chicago, "employees" qualify if they work at least 80 hours within any 120 day period.

How do the ordinances work? For every 40 hours worked, an employee earns 1 hour of paid sick leave. Employers may construct rules regarding minimum increments of time or type and timing of notice required for absences. Employers may NOT retaliate against employees for exercising their rights. Finally, employees may also be entitled to additional benefits if their employer is covered by the federal Family Medical Leave Act (FMLA). *Please contact us if you need assistance updating your policies.*



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TRENDING NOW (continued)

TRADEMARK CAN'T BE DENIED REGISTRATION BECAUSE IT'S OFFENSIVE – *H&H Report Update* – The Supreme Court of the United States has unanimously ruled that a trademark cannot be denied registration because some people might consider it offensive. The decision came in a suit filed by band leader Simon Tam, who wanted to register “The Slants” as the name for his group, all of whose members are Asian-American. The Patent and Trademark Office denied registration after determining that some people of Asian descent would likely find “The Slants” to be derogatory. But the Supreme Court ruled that a 70-year old provision of U.S. statutory law allowing the Office to refuse registrations for “offensiveness” violates the Free Speech Clause of the First Amendment to the U.S. Constitution. *The statute allowing such rejections has been the basis for many Office decisions over the years, and there are currently many cases pending in lower courts that will now be resolved in favor of trademark owners because of the Court’s ruling in the Tam case. One is a challenge to the Office’s cancellation of a trademark for the Washington Redskins football team, which apparently will not have to look for a new name because some Native Americans find “Redskins” offensive.*

SUIT AGAINST ASSOCIATION OVER INSURANCE ROYALTIES GETS NEW LIFE – A suit against an association over its receipt of insurance “royalties,” previously tossed out by a federal district court on the association’s motion to dismiss, has been reinstated by the U.S. Court of Appeals for the Ninth Circuit. A consumer class action had been filed against the American Association of Retired Persons for allegedly engaging in unfair and deceptive business practices violating California law in marketing insurance to its members. The class of plaintiffs argued that AARP deceived its members by leading them to believe the insurance was being provided by the Association when, in fact, it was provided by United Health, which had licensed the right to use AARP’s intellectual property, such as its name, logo and slogans, in soliciting insurance purchases from AARP members. The plaintiffs also alleged that payments made by United Health to AARP, which the Association characterized as “royalties,” were actually “commissions” that would require AARP to be licensed as an insurance provider or agent in California, where the Association had no such license. The district court dismissed the class action because AARP had clearly disclosed to consumers that it was not an insurance provider or agent. Further, the district court found that some of the allegations made by the plaintiffs, including those about “commissions,” had not been clearly stated. In reversing the district court’s decision, the Court of Appeals found it significant that materials provided to AARP members by the Association contained clear, specific and bolded statements that the materials were insurance solicitations, and the Court of Appeals held the plaintiffs’ allegations were clear enough to survive a motion to dismiss in the district court. *Given the significant number of nonprofits receiving “royalties” for allowing use of their intellectual property by insurance companies and other for-profits in sales activities, the AARP case could provide important guidance as to what is and is not permissible activity for such organizations. This case is a long way from over, though, as the motion to dismiss was presented at what may now be a very early stage in the litigation.*

NOT FOR PROFIT LAW DEVELOPMENTS (cont.)

NONPROFIT LANDLORDS TARGETED – The Massachusetts Attorney General recently reported on lawsuits filed against two nonprofit landlords for violating fair housing laws, noting that nonprofits are “not above reproach” just because they are tax-exempt. One case involved a blind tenant with post-traumatic stress disorder who was taken to court by a landlord for having unauthorized assistance animals. In that case, the landlord was ordered to pay \$15,000 to the tenant and \$5,000 to the Commonwealth of Massachusetts for not reasonably accommodating a disabled tenant’s needs. The other case involved a tenant who requested a wheelchair-accessible unit and other changes to her apartment to accommodate her daughter’s spina bifida, only to have the landlord impose unnecessary paperwork on her in an attempt to defeat her request. That case resulted in a court order that the landlord pay \$40,000 to the tenant, \$15,000 to the Commonwealth, and \$5,000 for a program to inform tenants of their rights. *Apart from the fines, cases like this can generate horrible publicity for a nonprofit.*

FRATERNITY CHAPTER SANCTIONED – *H&H Report Update* – Northwestern University has suspended its chapter of Sigma Alpha Epsilon (SAE) fraternity until September 1, 2018 and ordered students to move out of the fraternity house, saying that the chapter violated terms of a probation announced last year for hosting parties and providing alcohol to minors. However, the school says that it will help house residents find new accommodations. Last year’s probation was also for serving alcohol to minors, and the University issued a campus alert in February after four women alleged they were drugged, and two possibly sexually assaulted, at a party in the SAE house. *SAE chapters have had other problems recently. Earlier this year, Loyola University in Chicago suspended its SAE chapter for three years following reports of hazing. Also, less than a year ago, the University of Wisconsin suspended its SAE chapter for about six months following allegations of racist, anti-Semitic and anti-gay behavior by chapter members.*

NONPROFIT UNDER AG OVERSIGHT FOR DISCRIMINATION – The New York State Attorney General’s Office has announced settlement with a nonprofit over its discriminatory housing practices that have continued since the 1940s. The German American Settlement League, which owns land used for a housing community, has had bylaws that specifically limited membership in the community to those “primarily of German extraction and of good character and reputation.” Now, the League will be prohibited from discriminating against anyone on the basis of race or national origin and must change its president and treasurer, regularly file reports with the AG’s office for a period of three years, publish notices in its community affirming its commitment to cease discrimination, and implement better record-keeping and transparency. *After settlement of a private lawsuit in 2015, the League was supposed to correct its discriminatory policies, but didn’t do so. Now, they have to contend with the Attorney General’s oversight.*

NOT FOR PROFIT LAW DEVELOPMENTS

CANNABIS DONATIONS RAISE PROBLEMS FOR NONPROFITS – Sale, possession and use of cannabis (marijuana) has been legalized by some states. But federal law still contains prohibitions, and President Trump has indicated that he may reverse the Obama Administration’s policy of not enforcing those federal laws. So, what does a nonprofit do if it has the chance to receive a donation from a cannabis-based business? Technically, it’s drug money, and it could be forfeited to the government. *There are legal risks here, and many nonprofits are waiting to see where the Trump Administration goes with drug law enforcement before accepting contributions from a cannabis seller. But any nonprofit with a federal contract or grant should also review contract provisions and grant terms to see if they prohibit accepting contributions from such businesses.*

CHURCH “PRINCIPAL-PURPOSE” ORGANIZATION EXEMPT FROM ERISA – The Supreme Court of the United States has held that a pension plan maintained by an organization whose principal purpose is to administer the plan for the employees of a church is exempt from the requirements of the federal Employee Retirement Income Security Act (ERISA) as a “church plan,” regardless of who established that plan. ERISA requires private employers offering pension plans to adhere to rules designed to ensure plan solvency and protect plan participants. But ERISA exempts certain church plans from its coverage. *In this case, some church-affiliated nonprofits running hospitals sought to avoid the requirements of ERISA for defined benefit pension plans established by the hospitals and managed by internal employee-benefits committees. Current and former employees of the churches filed suit alleging that the plans were not ERISA-exempt plans because they were not established by a church. But the Supreme Court held that it was irrelevant whether a plan was established by a church or by church-affiliated hospitals, as in this case. A plan maintained by an organization whose principal purpose is administering the plan for the benefit of church employees is still ERISA-exempt as a “church plan.”*

MEETING AND TRAVEL DEVELOPMENTS

OVERSEAS TRAVELERS AVOIDING U.S. – Travel industry statistics show that tourism to the U.S. in recent months is trending downward while tourism to destinations outside the U.S. is on the rise. Residents of the Middle East and Latin America have been the primary groups avoiding the U.S., and some commentators believe that the Trump Administration’s policies and rhetoric relating to Muslims and Latin American immigrants have helped cause a shift in travel intentions for tourists. Other factors, such as a ban on laptops by the U.S. and U.K. on flights from the Middle East and North Africa, may have had some effect as well. *Some destination locations in the U.S. are forecasting the first drop off in foreign visitors since the financial crisis. Bookings for future travel to the U.S. are showing more of a decline than actual travel to the States, indicating that the coming months may see more foreign travelers avoiding the U.S. as the year goes on.*

PRESIDENT PLANS TO PRIVATIZE AIR TRAFFIC CONTROL – President Trump’s budget request for fiscal 2018 includes a move to privatize air traffic control, and the President plans to give that responsibility to a nonprofit organization spun off from the Federal Aviation Administration by 2021. A bill in Congress is already aimed at accomplishing that goal, providing that the nonprofit would be governed by a board composed of the Secretary of Transportation, airline company nominees, and representatives of the air traffic controllers’ and pilots’ unions. *Critics of the President’s plan argue that it would give the airlines too much control over the nonprofit. But industry groups have voiced support for it, and union representatives have also indicated that they may support the move if their existing contracts with the FAA carry over to the nonprofit and other conditions are met.*

REGULATORY LAW DEVELOPMENTS

COUNTY CAN’T PROHIBIT NONPROFIT’S RALLY ON COURTHOUSE STEPS – The U.S. Court of Appeals for the Seventh Circuit in Chicago has affirmed issuance of a preliminary injunction against Tippecanoe County, Indiana’s efforts to prevent a nonprofit from holding a rally for the legalization of marijuana on the county courthouse steps. In response to a controversy over a nativity scene on the courthouse grounds, the county had declared the grounds a “closed forum” at which only displays and events sponsored and prepared by the county would be allowed. But, in upholding issuance of the injunction by a lower court, the Court of Appeals concluded that the county’s efforts to block the nonprofit Higher Society of Indiana from holding its marijuana rally restricted private speech and likely violated the First Amendment of the U.S. Constitution. *Further proceedings may be held to determine if the injunction should be made permanent. Key to the Court of Appeals decision to uphold the preliminary injunction was its conclusion that the county was not enforcing its “closed forum” policy in a “viewpoint-neutral” way. The county had allowed events for the League of Women Voters, the Fraternal Order of Police, and Planned Parenthood to be held at the courthouse despite the policy, as well as events related to child abuse awareness, gun control, prevention of bullying and Syrian refugees.*

REGULATORY LAW DEVELOPMENTS

ASSOCIATION NOT SUBJECT TO FREEDOM OF INFORMATION ACT – H&H Report Update – The Illinois Supreme Court has held that the Illinois High School Association, an unincorporated nonprofit association that governs and coordinates athletic competitions for secondary schools in Illinois, is not a “public body” subject to the state Freedom of Information Act. The Better Government Association, itself a nonprofit, which serves as a “watchdog in the public interest,” had submitted a FOIA request to the IHSA and Illinois School District 230, seeking contracts for accounting, legal, sponsorship, and public relations/crisis communications services and all licensed vendor applications for the 2012-13 and 2013-14 fiscal years. When the IHSA and the school district refused to provide the requested materials, the BGA sought a declaratory judgment that both were violating the FOIA. Lower courts granted motions to dismiss the BGA complaint, and the Illinois Supreme Court has now affirmed those decisions. Although the IHSA is not one of the “public bodies” specifically enumerated in the FOIA as being the subject of its regulation, the BGA claimed that the IHSA, though a private association, was subject to the FOIA because that Act applied to “subsidiary bodies” of the government units listed in the Act. However, the Illinois Supreme Court held that the ISBA was not a subsidiary of its member public schools or the school districts to which they belonged, and it did not otherwise qualify as a “subsidiary body” because the IHSA was not created, controlled or funded by government. Furthermore, because the IHSA had not contracted to perform governmental functions on behalf of District 230, the Supreme Court concluded that the requested records were not the public records of the District that could be subject to the FOIA. *Private nonprofits in Illinois gain substantial protection from FOIA inquiries because of the Illinois Supreme Court’s decision in this case.*

APPELLATE COURT GRANTS TRANSGENDER STUDENT BATHROOM RIGHTS – H&H Report Update – The U.S. Court of Appeals for the Seventh Circuit in Chicago has recognized the school bathroom rights of a transgender high school student who was born female but identifies as a male. His school district had adopted a policy prohibiting the student from using boys’ restrooms, but allowing use of a gender-neutral restroom. The student sought a preliminary injunction against enforcement of the policy and lost at the trial court level. But the Court of Appeals held that the student was entitled to the injunction under Title IX of the federal Education Amendments Act of 1972 and the Fourteenth Amendment to the U.S. Constitution. The Court of Appeals found that a policy requiring an individual to use a bathroom not conforming with his or her gender identity punishes that person for gender non-conformance. The fact that the student in this case was allowed to use a gender-neutral bathroom was held not to be a sufficient accommodation to the student because no other students were allowed to use the gender-neutral bathroom, it was far from the transgender student’s classrooms, and the student was subject to continued and increased stigmatization in using the gender-neutral bathroom. The Court of Appeals also ruled that the transgender student was entitled to the injunction because the student was likely to suffer irreparable harm from enforcement of the policy, as medical experts had testified, including depression and thoughts of suicide. *As the Court of Appeals was ruling only on a motion for a preliminary injunction, further proceedings may be held in this case to determine if the student is entitled to permanent injunctive relief. The Court of Appeals, though, will almost certainly grant that relief.*

REGULATORY LAW DEVELOPMENTS (cont.)

SUPREME COURT CONSIDERS STATE CREDIT CARD SURCHARGE LAW – The Supreme Court of the United States has held that a New York state law prohibiting sellers in any sales transaction from imposing a surcharge for use of a credit card in making purchases thereby regulates speech and may violate the First Amendment to the U.S. Constitution. Five New York businesses and their owners argued that the law violated their right to free speech, but a lower court, considering the constitutionality of the law, held that price regulation was regulation of conduct, not speech, and consequently could not violate the First Amendment. On consideration of the lower court ruling, the Supreme Court held that the state law does regulate speech and remanded the case to the lower court for a ruling on whether the state law is unconstitutional, considering that it may violate the free speech rights of merchants. *This decision is good news – at least temporarily – for nonprofits and others who sell products and services interstate and wish to impose a surcharge on credit card purchasers. However, the lower court in this case, the U.S. Court of Appeals for the Second Circuit, now gets to decide whether the regulation of speech under the New York statute is such as to violate the First Amendment, a question that the Supreme Court did not reach.*

TAX LAW DEVELOPMENTS

NEW PARTNERSHIP AUDIT RULES COULD ADVERSELY AFFECT EXEMPT PARTNERS – For tax years beginning after December 31, partnerships are going to be subject to new Internal Revenue Service audit rules requiring that taxes and penalties assessed for partnership tax underpayment be assessed at the partnership level and not passed along to partners. This calculation of money owed to the IRS will be made regardless of whether partners are tax-exempt organizations, and so will make partnerships a less attractive investment option for exempt entities. *The audit rules were imposed by the Bipartisan Budget Act of 2015, and the IRS has been working on regulations to implement it. Preliminary regulations were withdrawn earlier this year because of the Trump Administration's general freeze on promulgating new regulations. But, regardless of when new regulations are finalized, since the new audit rules were imposed by statute, partnerships will have to deal with them for tax years beginning in 2018.*

SCOTUS WON'T REVIEW RETROACTIVE LOSS OF STATE TAX EXEMPTION – The Supreme Court of the United States won't review a decision by the Washington Supreme Court that changes in Washington state tax laws could be applied to retroactively strip a company of its state tax exemption after it moved to Illinois. The company had tried to obtain a refund of taxes paid to Washington State based on its exempt status under laws in force at the time of the move. But that request was denied by the state supreme court, and the denial will stand because of the U.S. Supreme Court's decision not to review the case. *In this case, the Washington Supreme Court found that retroactive removal of tax exemption was a rational and appropriate way for the State of Washington to discourage enterprises from leaving the state, and potentially causing the state a large loss of tax revenue. Any lawyer trying to move a nonprofit or for-profit corporation from one state to another may have found that some states will come up with pretty much any lame excuse to avoid approving a move out of their jurisdiction. But using a retroactive loss of tax exemption as a club to stymie such moves is a new one.*

EMPLOYMENT LAW DEVELOPMENTS

MINISTERIAL EXEMPTION LETS CHURCH FIRE GAY MUSIC DIRECTOR – *H&H Report Update* – A federal district court judge has ruled that a Catholic parish was within its rights in firing a music director after he publicly announced his engagement to his male partner. The court said that the parish did not engage in illegal discrimination because the music director’s position at his church fell within a “ministerial exemption” from employment discrimination laws, giving religious organizations the ability to control their own internal affairs. *A key issue in the case was whether the music director was covered by the ministerial exemption previously applied by the U.S. Supreme Court despite his not being an ordained minister. According to the district court judge, he was because he was responsible for conveying the church’s message, teaching the faith, and carrying out the church’s mission through his decisions on what songs should be played and how they should be played at church services and ceremonies.*

OTHER ISSUES

JUSTICE GIVES UP AMEX CASE, STATES PRESS ON – American Express won a victory recently when the federal Justice Department announced that it wouldn’t ask the U.S. Supreme Court to overturn a Court of Appeals decision exonerating AmEx in an antitrust suit Justice had filed against the company. The Court of Appeals found that American Express didn’t violate the antitrust laws by trying to prevent merchants from steering some customers to credit cards like Visa and Mastercard, which some merchants do because of the fees sellers must pay AmEx whenever one of their customers uses an American Express card. AmEx isn’t out of the woods in this suit yet, though. Eleven states had originally joined Justice in bringing the suit, and they aren’t willing to let AmEx off the hook, instead filing a petition for Supreme Court review of the Court of Appeals ruling. *The case against AmEx has been going on for seven years. A federal district court originally ruled against AmEx, but the Court of Appeals reversed. AmEx has said that losing this case would have a material adverse effect on its business.*

PUERTO RICAN BANKRUPTCY A WARNING FOR OTHERS – Proceedings began May 17 in a federal district court on Puerto Rico’s bankruptcy, with the Commonwealth \$123 billion in debt. Creditors are fighting over who will be first in line to receive Puerto Rico’s tax revenue and other assets. There will be large cuts in wages, health, pension and educational benefits for the Commonwealth’s employees. A mass wave of emigrants from Puerto Rico is expected, and the Commonwealth’s economy will be further strained. It isn’t just the millions of Puerto Rican residents who will be impacted. Wall Street once bought up tons of what are now nearly worthless Puerto Rican bonds, then considered a great investment, to fill portfolios of banks and major U.S. companies. So, the U.S. economy as a whole will feel the pinch of what is happening in San Juan, and nonprofits will certainly be asked to relieve some of the resultant suffering. *Who’s next to file for bankruptcy or something like it? A number of U.S. states will be seeking protection from creditors soon if current trends continue.*

HOWE & HUTTON NEWS AND EVENTS

Jonathan Howe will be presenting “Ask the Attorney” at Destination Colorado on July 27, 2017.

This will be an open forum where attendees will be able to submit their questions and will be moderated by Sarah J.F. Braley, Senior Editor at Meetings & Conventions.



Christina Pannos will be presenting a webinar “Risk Management in Times of Uncertainty” for Crowe Horwath on August 17th.



This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or professional service through its distribution. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Past newsletters are available at howehutton.com

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