

THE HOWE & HUTTON REPORT

Volume 2017, Issue 2

TRENDING NOW

QUESTIONABLE GOVERNMENT HACKING REPORT TRIGGERS “FRENZY” – On December 29th, the Obama Administration issued a technical report connecting Russian intelligence services to U.S. hacking, further encouraging Americans to watch for incoming traffic from a list of hundreds of Internet addresses that the Homeland Security Department had identified as indicating malicious Russian cyber activity. Worried citizens did as instructed, according to computer security specialists, who described a resulting “frenzy” of inquiries from customers wanting their computer systems scrubbed for signs of the Russians. But the Associated Press and others who checked the addresses found no sign of any malicious activity, Russian or otherwise, and security experts warned that the technical information included in the government’s report was bad and could not be trusted “at all.” Nearly a quarter of the sites traced back to computer servers that help users browse the Internet anonymously, using a service called “Tor” that was initially funded by the U.S. government and is now used chiefly by activists and journalists working in hostile countries who want to keep their identities a secret.

Some other addresses traced back to servers at American universities, Yahoo Inc., and Microsoft’s telemetry server, which notifies that company when an application crashes. *Do we need further evidence that the words “government” and “intelligence” should seldom be used confidently in the same sentence?*

SAME GREAT SERVICE ... NEW LOCATION

We are pleased to announce that as of January 1, 2017, our Chicago office has relocated to the following address

Howe & Hutton, Ltd.
125 S. Wacker Drive, Suite 2310
Chicago, IL 60606

All phone, fax numbers, and email addresses will remain the same.

VISIT OUR WEBSITE

NOT FOR PROFIT LAW DEVELOPMENTS

DISSOLUTION OF TRUMP FOUNDATION RAISES ISSUES – *H&H Report Update* - President Trump has announced that he intends to dissolve the Donald J. Trump Foundation in order to prevent any appearance of conflicts of interest involving the Foundation now that he has been elected President. But the New York State Attorney General (a Democrat and a very political one) has gone public with his intention to continue an ongoing investigation of the Foundation despite efforts to dissolve it, following up on his suspension of the Foundation's fundraising activities in the state. *Dissolution of a nonprofit always requires approval of certain state officials, and, in New York, such approvals are not always easy to come by. Efforts to dissolve any nonprofit, in fact, may bring on an official state investigation not previously launched. But if it's a nonprofit associated with a politician whose views differ from those of a prominent state official, investigations are pretty much a given, whether or not the organization is being or has been dissolved. We don't know whether it is at all connected to the New York investigation, but we note that the Eric Trump Foundation, founded by the President's son, recently announced that it is suspending operations after questions were raised about donors receiving special access to the first family.*

MEETING AND TRAVEL DEVELOPMENTS

U.S. APPROVES NORWEGIAN AIR ENTRY AFTER THREE-YEAR BATTLE – The U.S. Department of Transportation has given Norwegian Air International Limited its requested foreign air carrier permit to begin operating in the United States. The Department's action concluded a three-year effort by the low-cost carrier to obtain access to the U.S. market. A key component of the deal for the Norwegian airline is approval of its plan to establish an Irish subsidiary to serve the trans-Atlantic market, taking advantage of Ireland's lenient labor laws as compared with those of Norway. Opponents of the Norwegian Air deal have argued that this aspect of the Norwegian Air business plan violates provisions of the U.S.-European Union Air Services Agreement, which laid out goals for maintenance of high labor standards in U.S.-E.U. air travel. Proponents of the deal have contended that such approvals will lower airline passenger travel costs and complained that the U.S. has been ignoring its responsibility under the Agreement to quickly approve foreign carrier permits for properly designated carriers. *American carriers have lobbied U.S. regulators to keep low-cost foreign airlines out of the U.S. market and have been somewhat successful in doing so until now. Decisions on other proposed foreign entrants to the U.S. may be coming soon, although President Trump has yet to take a specific position with regard to foreign air carrier permits.*

REGULATORY LAW DEVELOPMENTS

TRUMP SINGLES OUT ENVIRONMENTAL RULES FOR THE AX – *H&H Report Update* - President Trump has publicly singled out two major environmental rules for an early trip to the dumpster in his new Administration, the "Waters of the U.S." Rule and the Clean Power Plan. Both rules were promulgated by the Obama Administration, and Trump regards them as "job killers." The first allowed the federal government to regulate small streams and wetlands previously regulated by the states. The second committed the U.S. to developing and implementing standards for the reduction of carbon dioxide emissions from electrical power generation by 32% within 25 years. *Enforcement of both rules is currently suspended pending court review of lawsuits filed to eliminate them by 27 state governments and private citizens. Congress has previously passed legislation to kill the first rule, but failed to overcome an Obama veto.*

REGULATORY LAW DEVELOPMENTS (cont.)

REGULATORY REFORM ADVANCES IN CONGRESS – The U.S. House of Representatives has passed and sent to the Senate two bills that advance regulatory reform, the REINS Act (or Regulations from the Executive in Need of Scrutiny Act) and a comprehensive regulatory reform bill called the Regulatory Accountability Act of 2017, which is actually a compilation of certain earlier reform bills that never became law. The REINS Act requires Congressional approval for all regulations promulgated by administrative agencies and having an estimated annual economic impact of \$100 million or more. The Regulatory Accountability Act would require fully transparent and documented agency hearings and require agencies to advance the least costly regulations that would achieve specific agency goals. It would provide that courts reviewing the legality of regulations should decide questions of law without special deference to previous legal interpretations from the agencies. It would require agencies to determine and explain how their actions will impact the owners, employees and customers of small businesses. Agencies would be required to publish “plain English” online summaries of proposed rules, and report the number of regulations each agency develops, their economic impact, and the number of regulations they supersede. Finally, the Regulatory Accountability Act would place a hold on implementation of regulations estimated to have an impact on the economy of at least a billion dollars annually until legal challenges to them filed within 60 days of their promulgation have been resolved in the courts. *Both the REINS Act and the Regulatory Accountability Act passed the House in previous years, but they never became law because they failed to achieve Senate approval. After the 2016 elections, the sponsors of the bills hope that they may be fully enacted and signed by President Trump.*

HOSPITALS AWAIT RESULT OF FTC SUIT OVER MERGER – Hospitals across the country are watching with interest a Chicagoland court case in which the Federal Trade Commission is seeking to prevent a proposed merger between Advocate Health Care and NorthShore University HealthSystem. The proposed merger is only one of an increasing number of finalized and proposed hospital mergers throughout the U.S., which some have described as a “merger frenzy.” Hospital leaders say such mergers allow hospitals to provide high-quality health care at lower prices. But the FTC says the Advocate-NorthShore merger would lead to higher prices for Chicago-area patients. *In other recent Chicagoland hospital merger news, Northwestern Memorial HealthCare, which has acquired a number of hospitals over the years, is in potential merger discussions with Centegra Health System, and University of Chicago Medicine finalized a merger with Ingalls Health System last fall.*

SOME FIELDS ARE RIPE FOR ANTITRUST LITIGATION IN 2017 – Several areas of business will likely see increased antitrust litigation in 2017. For example, on-going suits are targeting Silicon Valley companies for allegedly entering into agreements not to recruit each others’ employees. Proceedings will be held in lawsuits alleging price-fixing by generic and brand-name drug manufacturers, and a steady stream of litigation against the banking industry for allegedly anticompetitive practices will continue. National and international investigations and lawsuits are proliferating against the manufacturers and distributors of various computer parts. In addition, suits are being brought against companies alleged to have engaged in agreements to force up prices by limiting the quantity of various goods reaching the marketplace, such as a suit against egg producers that was settled in December, and a suit against producers of “broiler chickens” that is just getting started in Illinois. *One might have thought that antitrust legal activity would drop off during a Trump Administration. But maybe not.*

TAX LAW DEVELOPMENTS

GAS TAXES GOING UP – Gas taxes went up in seven states as of January 1, and more than a dozen other states will consider increases this year. The rise in gas taxes reflects higher state expenditures for road construction and maintenance, although other state sales and property taxes will pay part of the tab. Bucking the trend toward higher gas taxes are New York and West Virginia, which have seen slight reductions in gas tax rates due to automatic adjustments. However, New York will be one of the states where a gas tax increase will be debated in 2017. *One of the reasons states are raising taxes is that the federal government hasn't raised the federal gas tax of 18.4 cents per gallon since 1993 and hasn't been helping with the cost of highway construction and maintenance to the extent it once did. Lower gas prices and more fuel-efficient cars are also causing the public to drive more and increasing the need for highway maintenance.*

HOSPITALS WIN ONE IN CONTINUING LEGAL BATTLE OVER EXEMPTIONS – *H&H Report Update* - In a suit filed by a taxpayer, an Illinois appellate court has upheld the constitutionality of a law providing property tax exemptions for hospitals. Illinois law allows hospitals to obtain a property tax exemption if the value of their charitable services is at least equal to their estimated tax liability. But legal counsel for the complaining taxpayer says that any exemption for “rich hospitals” is ridiculous when the State of Illinois is in financial difficulty. *In a separate case dealing with similar issues, the Illinois Supreme Court is scheduled to decide soon whether another appellate court's decision that the current Illinois law is unconstitutional should be reversed.*

TAX REFUNDS DELAYED – The Internal Revenue Service announced in early January that it would be delaying tax refunds for many Americans this year while it steps up efforts to fight identity fraud and theft through more aggressive screening of certain tax credit claims. Refunds will be delayed for millions of Americans claiming the earned income tax credit or the additional child tax credit. Statutory law now requires the IRS to delay refunds for people claiming these credits until February 15. But the IRS says most of the impacted refunds will be delayed until the end of February, and the wait for a refund could be longer. A new report from an IRS watchdog says that 1.2 million legitimate refunds were delayed an average of 30 days last year because of such stepped up IRS scrutiny. *Why the perceived need to increase refund processing times? According to the Service, it issued \$3.1 billion in fraudulent tax refunds to identity thieves in 2014, the latest year for which the IRS has provided such figures. This actually reflected a better job by the IRS in catching crooks that year. The year before, the Service says it paid out \$5.8 billion in fraudulent refunds.*

EMPLOYMENT LAW DEVELOPMENTS

EMPLOYERS FACING NEW RULES IN ILLINOIS – The new year has brought into effect Illinois laws imposing new requirements on employers. These include laws providing that employees entitled to sick leave under employment contracts and policies can use their time off to care for family members who are hurt or ill. Additionally, a new law prohibits employers from enforcing non-compete agreements with hourly employees earning \$13 an hour or less. *The non-compete law arises from a highly publicized legal action brought by the state Attorney General against Jimmy John's, which was settled for \$100,000. Now, all Illinois employers are subject to legal restrictions arising from that one company's efforts to prevent employees from working at other sandwich shops for two years after leaving Jimmy John's.*

EMPLOYMENT LAW DEVELOPMENTS (cont.)

NLRB SUES OVER WORKER MISCLASSIFICATION, REQUIRED ARBITRATION – The National Labor Relations Board has sued Menards, alleging that the home improvement chain misclassifies delivery drivers as independent contractors rather than employees in order to deprive them of workplace legal protections that only apply to employees. As part of the same complaint, the NLRB also accuses Menards of violating federal labor law by having mandatory arbitration provisions in its employee handbook, prohibiting workers from filing class action lawsuits in court and unfair labor practice charges with the NLRB. A hearing on the charges before an administrative law judge is scheduled for April 4 in Minneapolis. *The U.S. Department of Labor has said that misclassification of employees as independent contractors is the biggest problem in U.S. labor law enforcement. This case could provide guidance on classification issues that will be important for employers and workers nationwide, as well as, perhaps, sounding a death knell for mandatory arbitration provisions in the workplace.*

UNIVERSITY SETTLES WHISTLEBLOWER SUITS FOR MILLIONS – *H&H Report Update* – Chicago State University has agreed to pay \$1.3 million in settlement of a lawsuit brought against the school by its former chief financial officer, who claimed that he was fired after reporting alleged misconduct by the school's former president. The University is also facing the prospect of having to pay more than \$5 million to its former attorney, who has alleged in a separate lawsuit that he was fired for reporting questionable contracts and refusing to withhold records pertaining to the former president's employment in response to a public records request. *Employees who report an employer's wrongdoing to appropriate public officials are protected from employer retaliation under various federal and state laws. Employers who fire such whistleblowers are playing with fire, as these lawsuits demonstrate.*

EMPLOYEE INJURED AT COMPANY PARTY CAN'T GET WORKERS COMP – A North Carolina court has held that an employee who was injured when she slipped and fell at a company holiday party can't get workers compensation because the injury didn't arise out of the course of her employment. Key to the court's ruling were its findings that the party was not officially sponsored by the employer, attendance was not required by the employer, the employer didn't encourage attendance at the party, the company didn't finance the party, the employees didn't regard the party as a benefit or entitlement and the party didn't provide the company with a benefit other than improving employee morale. *Seems like a very strange company party if the company didn't sponsor it or pay for it. The voluntary attendance factor alone would likely eliminate workers compensation in most cases. But the law on entitlement to workers comp varies somewhat from state to state.*

NEW WELLNESS PROGRAM REGULATIONS TAKE EFFECT – Among a host of new federal regulations that took effect January 1 were final rules regarding employer wellness programs. They require employers to provide workers with a notice explaining what medical information will be obtained in connection with such programs, how it will be used, who will receive it, the restrictions on its disclosure, and what methods employers will use to prevent unauthorized disclosure. The rules also set limits on employer inducements used to encourage worker participation in such plans. *Congressional Republicans are seeking to invalidate many Obama Administration regulations under the existing Congressional Review Act, which allows the House and Senate, voting by a simple majority, to overturn agency rules passed in the last 60 legislative working days, a period that started in June 2016. We'll have to see whether these wellness program rules will be among those Congress targets for the axe in the new year.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS

JORDAN WINS VICTORY IN CHINESE TRADEMARK FIGHT – Basketball legend Michael Jordan has won a legal victory in his efforts to keep a Chinese company from using a Chinese character mark for his name in China. Jordan asked Chinese authorities in 2012 to revoke the company's trademarks in that country, which featured a similar Chinese name, "Qiaodan," and a logo similar to one that had been used by Nike for a product endorsed by Jordan. He then suffered two lower court defeats in China while attempting to enforce trademark rights there. But, never known to easily accept losing in or on any court, he appealed those decisions, leading now to a People's Supreme Court ruling that a Qiaodan Sports Co. trademark registration for "Qiaodan" must be reconsidered by the Chinese trademark office, after which Jordan could obtain a registration of his own for the mark. *The Supreme Court refused to stop the company from using other possible phonetic spellings of Jordan's Chinese name. But even the ruling that the Supreme Court handed down was a win that someone not as well-known, and not as wealthy, as Jordan might have been unable to obtain. Chinese trademark law generally favors first registrants over first users and the company had a registration for the mark some ten years before Jordan objected to it. Jordan's "well-recognized" name was the key to his victory after his years-long legal fight.*

FACEBOOK IS LATEST TARGET FOR COPYRIGHT ENFORCEMENT – Record labels and the National Music Publishers' Association ("NMPA") are pushing Facebook to license music and take down user-uploaded videos containing copyrighted material. The immediate goal is to tackle copyrights for cover songs and other content posted to Facebook newsfeeds. Facebook is reportedly working on copyright tracking functionality similar to what YouTube has in place. Once the system is functional, the labels and Facebook will work toward negotiating a licensing arrangement. *The NMPA filed suit against YouTube in 2013. The resulting settlement paid \$1 billion to music rights holders last year. With the stakes so high and a working licensing model already in place, there is significant incentive to achieve a prompt resolution to tap into this revenue stream. The NMPA's efforts may eventually pave the way for an Internet-wide music licensing scheme.*

OTHER ISSUES

UBER, LYFT FACE LEGAL CHALLENGES OVER SERVICES TO THE DISABLED – Ride-sharing companies like Uber Technologies and Lyft have taken advantage of a relatively new business model that is becoming extremely popular. But both of those companies are under pressure from advocates for disabled persons. They say the companies violate the federal Americans with Disabilities Act because their drivers, who are independent contractors and not employees, sometimes refuse service to riders with service animals and riders in wheelchairs, or they charge excessive prices for such riders. Advocates for the disabled nationwide are pressuring ride-sharing companies to fix this problem, and the companies have to be concerned about government regulation, as well as litigation, if they can't. A Philadelphia Court of Common Pleas judge recently suspended the rideshare services of both Uber and Lyft in the City of Brotherly Love because of ADA issues. Meanwhile, a proposed ordinance to require that 5% of Uber's fleet become wheelchair-accessible failed in the Chicago City Council this past June, and, instead, Uber and its rivals are now required to submit wheelchair-accessibility plans to the city's Department of Business Affairs and Consumer Protection. *Many new businesses and nonprofits will be faced with a host of legal issues as they start up. Early planning for them is advisable.*

HOWE & HUTTON NEWS AND EVENTS



Nathan Breen recently presented an educational teleconference on antitrust and intellectual property issues for an association of professional organizers.

On February 28, **Nathan** will be presenting a webinar for the Association Trends newspaper entitled “Meeting Contract Best Practices: Maximize the Effectiveness of Your Agreements.” See www.associationtrends.com for more information.

Naomi Angel gave a report on current legal trends to Board of Directors for multiple trade associations in Dallas, Phoenix, Orlando, San Antonio, and Los Angeles.



© Copyright 2017. All Rights Reserved. Republication with credit to Howe & Hutton, Ltd. and “The Howe & Hutton Report” is allowed. Please provide us a copy of your use.

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 www.howehutton.com

Editor — James F. Gossett
Contributors — Christina M. Pannos and Nathan J. Breen
Staff — Susan L. Colter

