THE HOWE & HUTTON REPORT

July, 2016 VOLUME 2016, ISSUE 7

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SUPREME COURT DODGES RESPONSIBILITY FOR BIRTH CONTROL RULING — The Supreme Court of the United States has asked lower courts to reconsider whether the Obama Administration's arrangement to spare faith-based groups from having to pay for birth control under their health plans is constitutional. In a rare step, the Court issued an unsigned but unanimous opinion that expressed no view on the subject. The Obama Administration mandates that women covered by the health plans of faith-based groups receive birth control, except for those covered by the plans of churches and similar religious institutions. Groups that are required to provide birth control can tell the government or their insurers that they object to paying for it, in which case either their insurers or their third-party administrators must foot the bill. *This case presented the question of whether faith-based groups like colleges and charities, and their insurers, can be involved in providing birth control to the extent that the Administration has insisted. But the Supreme Court's nondecision, an opinion without an opinion, leaves that question up in the air. Lower courts have overwhelmingly, but not unanimously, okayed the Administration's approach to the thorny birth control issue. Now, however, they are being asked to think again.*

KEEPING COUNT OF EMPLOYEES IS CRITICAL UNDER ACA — The Internal Revenue Service notes that it is critical for employers to keep count of their employees in order to comply with the federal Affordable Care Act (Obamacare). Two provisions of the Act – employer shared responsibility (tax payments) and employer information reporting for offers of minimum essential coverage – apply only to applicable large employers ("ALEs"). Employers must average the number of their full-time employees and full-time equivalent employees during the previous year in considering whether they are an ALE for the current year, and they are an ALE if the average is 50 or more. A full-time employee, for the purposes of this calculation, is one employed, on average, per month, for at least 30 hours of service per week, or at least 130 hours of service in a calendar month. A full-time equivalent employee is defined as a combination of employees, each of whom is not a full-time employee, but, when combined with each other, is the equivalent of a full-time employee. *Simple, right? Don't worry. Over time, it will likely grow more complex.*

GOOD READING … See you in August

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CHURCH WARS, EPISODE 1 — The Supreme Court of the U.S. has rejected an appeal from parishioners who have been occupying the St. Frances X. Cabrini church in Scituate, Massachusetts for over 11 years in defiance of efforts by the Roman Catholic Archdiocese of Boston to close the church. Parishioners have been at the church day and night trying to save it, but they will now comply with a court order evicting them, having exhausted all appeals. St. Frances was involved in the clergy sex abuse scandal featured in the movie *Spotlight*. The Archdiocese is trying to sell the land under St. Frances in order to pay rising costs, including expenses related to settlement of suits arising from the scandal. St. Frances parishioners have been holding services unsanctioned by the Archdiocese, without ordained priests, and they now say they will start an independent church in another location. *Members of nonprofits are often very passionate about their organizations, and not just churches. Efforts to dissolve or merge them out of existence sometimes meet with member resistance, resulting in legal disputes.*

CHURCH WARS, EPISODE 2 — A federal district court recently ruled that Congregation Jeshuat Israel of Newport, Rhode Island could continue worshipping at Touro Synagogue in Newport, as the court rejected efforts to evict them from the synagogue by New York's Congregation Shearith Israel, which has claimed that it is the synagogue's rightful owner. The court said that the guiding light behind its decision was the intention of the community that established the synagogue in 1763. Congregation Shearith Israel became Touro's legal trustee by court ruling in the 1820s, when many of Newport's Jews had moved to New York. But many Jews returned to Newport, and the two congregations occasionally have struggled over control of the synagogue through the years. Now, the district court has decided that the Newport congregation at Touro should control it independently of Shearith Israel, removing that congregation from its trustee status because its eviction efforts made it unfit to serve in that role. *Nonprofits sometimes find themselves pitted against each other in court over issues relating to their missions. But more than religious freedom was at stake in this case, as it is also about money. The synagogue, visited by George Washington in 1790, has a set of ceremonial bells valued at $7.4 million.*

CHURCH WARS, EPISODE 3 — The Illinois Appellate Court for the Fourth District has ruled that the Episcopal Church can't claim around $775,000 in funds that have been the subject of a dispute with the Quincy, Illinois diocese. The Appellate Court noted that Illinois courts, in previous litigation between the parties, had awarded $3.6 million in disputed funds to the diocese, and the Appellate Court ruled that the $775,000 now claimed had been part of the funds that the courts had disposed of earlier, as the Church then acknowledged. So, the Appellate Court concluded that the Church's attempt to claim that portion of the funds in new litigation was barred by a doctrine that prevents people "from taking two bites out of the same apple." *This battle over money arose from a vote by the diocese to break away from the Church when it ordained its first openly gay bishop in 2008. A dispute over other issues has come down to money, and resolving financial disagreements is a proper role for the courts. But, as this case shows, deciding the same issues twice is something courts really don't want to do, swamped as they are with suits.*

SUPER PAC SEEKS AUDIT OF CLINTON FOUNDATION — American Crossroads, a conservative super PAC, has filed a complaint with the Internal Revenue Service requesting that the Clinton Foundation be audited following media reports that the foundation aided a for-profit company with ties to Bill and Hillary Clinton. The IRS has not responded to requests for comment, which is in keeping with its general policy of maintaining confidentiality for public complaints against nonprofits unless exempt status is revoked. *So, the IRS may be giving trouble to an organization with liberal leanings after the Service's admitted previous targeting of conservative groups for enhanced scrutiny. But we're not betting on any IRS action in this matter till after the election, if then.*

WIFE'S NONPROFIT SUES ILLINOIS GOVERNOR — Diana Rauner, wife of Illinois Governor Bruce Rauner, is the president of a nonprofit social service organization that is one of 82 such organizations suing the Governor and state agencies over government spending reductions brought on by the political deadlock over budgetary issues in Illinois. Diana Rauner is a lifelong Democrat and longtime social services advocate. Her husband is a Republican and advises that his wife is just as angry at the Democrat-controlled General Assembly as she is at him over the state's operating without a budget for nearly a year because of political differences in the capital. *Nonprofit officers and directors sometimes have conflicts between their home and professional lives, but not many have handled them like Ms. Rauner.*

Intellectual Property & Computer Law Developments

NEW FEDERAL TRADE SECRETS LAW ENACTED — President Obama has signed a new Defend Trade Secrets Act providing a federal right to sue for trade secret theft. Previously, such suits could only be brought under state laws that vary from one jurisdiction to another, although federal law did make theft of trade secrets a crime. The new federal law allows trade secret owners to sue for monetary damages, including exemplary damages up to twice the amount of actual losses, and injunctive orders forbidding employment of a worker seeking to misuse a previous employer's trade secrets. Violators can also be required to pay a trade secret owner's attorney's fees and court costs in bringing suit, and a court can order seizure of property without notice to prevent imminent unlawful disclosure of a trade secret, though the law also provides a right to sue for damages resulting from wrongful seizure of property. Finally, the new law grants immunity from suit to those confidentially disclosing trade secrets to government in order to report illegal activity, and it requires employers to inform employees of this whistleblower right in conjunction with any document they may be required to sign concerning trade secret protection. *Not only trade secret owners, but all employers, should be mindful of this new legislation. In addition to providing whistleblower protection and requiring its disclosure to employees, the Act should make employers wary about hiring someone who may have had access to a previous employer's trade secrets. Doing so can make the new employer subject to court orders intended to protect such secrets, and if a worker takes proprietary information to a new employer, law enforcement may be able to seize a server, file cabinets or any other receptacle for such information at the new workplace.*

Regulatory Law Developments

RELIGIOUS COLLEGES LOSE REGULATION CHALLENGE — A federal judge in Chicago has rejected an effort by a group of Bible colleges to avoid the Illinois requirements that such colleges meet state-created standards before they can award "degrees," as opposed to "diplomas" or "certificates." The colleges say they should not be subject to state regulation, but the court disagreed. The judge noted that the standards are not discriminatory because they apply with equal force to secular and religious institutions. Moreover, the judge found they do not violate the U.S. Constitution by burdening the practice of religion or involving excessive entanglement of the state with religious matters. *The judge granted a motion by the Illinois Board of Higher Education to dismiss a suit filed by the Bible colleges, finding that it did not state a claim upon which relief could be granted by a court. Attorneys for the colleges say they likely will appeal this decision.*

DOJ AND FTC WANT CONSUMERS TO GENERATE LEGAL FORMS ONLINE — The federal Department of Justice and Federal Trade Commission have jointly written to the North Carolina legislature promoting the potential competition and perceived consumer benefits of proposed legislation that would allow websites run by non-lawyers to generate legal forms for consumers in that state. "Competition between lawyers and non-lawyers for certain legal services can drive down prices, provide consumers with new and more convenient options, and expand access to legal services," said Principal Deputy Assistant Attorney General Renata Hesse of the Department's Antitrust Division. *Most lawyers tend to look upon this sort of thing the way they would a website run by a non-doctor telling people how to operate on themselves. But never let it be said that we don't tell readers both sides of the story.*

TAX LAW DEVELOPMENTS

FIVE ARRESTED IN IRS PHONE SCAM — *H&H Report Update* **—** The U.S. government has announced the arrest of five individuals who are charged with participating in a telephone scam that has resulted in taxpayer losses of more than $36 million. The scammers call people, falsely claim to be the IRS, and demand that the victims pay tax debts immediately by MoneyGram or other wire service or be arrested. The government says other unknown persons are involved in the scam that "continues to sweep the country." *Don't be a victim of this scam. The IRS never originates calls with people about their debts and never demands payment by wire. If you owe, you'll just get a polite letter in the mail, followed by not so polite legal papers.*

IRS PROPOSES REVOCATION OF RACETRACK AND CASINO'S EXEMPTION — The Internal Revenue Service has proposed to revoke the federal income tax exemption of the Prairie Meadows Racetrack and Casino in Altoona, Iowa, subject to a right of appeal. The exemption had previously been granted under Section 501(c)(4) of the Internal Revenue Code because the IRS deemed Prairie Meadows to be a "social welfare" organization. Prairie Meadows, which includes a hotel, as well as the racetrack and casino in its operations, also engages in community benefit activities and employs many residents of the area. But the IRS is concerned that Prairie Meadows pays back 90% of its revenue to winning gamblers, overcompensates its executives and, in many ways, is indistinguishable from for-profit gambling businesses. *Nonprofits must always try to distinguish what they do from what for-profits do if they want to obtain and keep exempt status. Look! Over in the Prairie Meadows! It's a racetrack! It's a casino! It's a...tax-exempt entity*?

EMPLOYMENT LAW DEVELOPMENTS

PARTIAL WIN FOR EMPLOYERS ACCESSING EMPLOYEE EMAIL — A federal judge recently gave employers wishing to access employee email a partial win in a suit filed against a company that accessed a personal e-mail account belonging to a former employee. The worker had filed a complaint against the employer with the Illinois Human Rights Commission, alleging that she had been sexually harassed and subjected to a hostile work environment. During discovery in that case, she learned that a technology consultant for the company had accessed her personal emails on a company computer, and the company attached some emails to an affidavit that the employer submitted to the Commission. As a consequence, the worker sued the company under the federal Wiretap Act, Computer Fraud and Abuse Act and Stored Communications Act. Now, the federal judge has dismissed the Wiretap Act claim because the judge found that the Act prohibits only interception of email when transmitted or received, whereas the employee's email was at least two years old when accessed by the employer. The judge dismissed the claim under the Computer Fraud and Abuse Act because the judge found that the Act didn't apply to accessing one's own computer, as opposed to accessing someone else's computer without authority. But the judge refused to dismiss the worker's claim under the Stored Communications Act for accessing and obtaining email "in electronic storage," permitting further proceedings on that count. *The worker in this case must still prevail at a full trial on the SCA count, and she may be able to re-file her suit under the Wiretap Act if she can allege a more contemporaneous accessing of her email communications, since the Wiretap Act count was dismissed without prejudice to such a re-pleading.*

EMPLOYERS NOT REQUIRED TO PAY FOR SICK DAYS — The Illinois Appellate Court for the First District has held that a worker who resigned from employment has no right to payment for accumulated but unused sick days under the state Wage Payment and Collection Act. The Act requires employers to pay final compensation to employees at the time of separation and no later than the employee's next payday. The Appellate Court noted that the Act contains an express provision requiring employers to pay for accumulated vacation days upon separation, but no provision regarding sick days. *By agreement with employees or under a policy created by an employer, such a right to payment for sick days could still be created, even though it isn't mandated by the Act.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

TSA STRUGGLES TO COPE WITH LONG LINES — Summer brings increased airline travel, and both Congress and the Transportation Security Administration are struggling to deal with the long lines materializing at the major airports. In the past three years, they have cut the number of front-line security screeners by 4,622, or about 10%, on the expectation that more travelers would be signing up for the fast-track screening procedure known as PreCheck. But not enough flyers have enrolled in PreCheck to bring about any reduction in the lines at airports. Now, Congress has shifted $34 million in TSA funding forward, allowing the agency to pay overtime to its existing staff and hire 768 more screeners. But the agency loses about 100 screeners a week through attrition. *Some airlines and airports are hiring workers to handle non-security tasks at checkpoints, and the president of the union representing TSA officers recently sent a letter to Congressional leaders suggesting that 6,000 additional TSA screeners are needed. Something certainly needs to be done about airport delays or it's going to be a long, hot and hot-tempered summer for travelers trying to get into and through airports.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

COURT ALLOWS SUIT OVER SECURITY BREACH — The U.S. Court of Appeals for the Seventh Circuit in Chicago has allowed a suit to proceed against a restaurant chain after its computer system was hacked and former customers alleged they found fraudulent charges on their debit or credit cards or that they spent time and money trying to ensure that the security breach hadn't created such problems. The court's decision is noteworthy because it did not require the former customers to allege that they had suffered credit card fraud or identity theft in order to bring suit. The court said the suit could survive the chain's motion to dismiss all charges because the former customers alleged they had a fear that they might suffer an injury from fraud or identity theft because of the data breach, as well as the existence of imminent or certainly impending future harm and their own resultant efforts to protect their credit. *The Court of Appeals allowed the suit to survive a motion to dismiss that was based on the former customers not having "standing" to sue due to their not yet having suffered "a concrete and particularized injury." The court didn't think they should have to wait till such an injury occurred before bringing suit. But the former customers will still have to prove their cases at trial of the matter, not just make allegations.*

JUDGE RULES AGAINST OBAMACARE REIMBURSEMENT PROVISION — A federal judge has ruled that the Obama Administration improperly reimbursed insurers billions of dollars to cover discounts to low-income consumers under the Affordable Care Act (Obamacare). The judge stayed the effect of her ruling to allow the Obama Administration time to file an appeal. Her reasoning was that the reimbursement money had not been appropriated by Congress. The Administration had argued that funds were available and could be shifted from other government subsidies for reduction of health insurance premiums. But the judge said Congress never intended to give the Administration authorization to do that and Congress was the only source for appropriation of funds to such a purpose. *Obamacare requires insurers to offer the discounts to low-income consumers, but it would be a major financial challenge for the insurers if no subsidy money is available. Insurers have already been withdrawing from Obamacare exchange marketplaces because of financial losses they have suffered in complying with the ACA, and other insurers are reportedly planning to raise premiums significantly.*

IMPEDING DISCOVERY IN LAWSUIT COSTLY, EVEN WHEN SUIT IS WON — How do you win a lawsuit and still wind up having to pay more than $135,000 to the other party? By impeding the other party's right to receive information and documents in the "discovery" phase of the case, as one company found out recently. A security firm successfully defended itself in a personal injury lawsuit, but found itself socked with the six figure obligation for sanctions imposed on it after a judge ruled that the company unreasonably

delayed responding to discovery requests, falsified documents and impeded the conduct of depositions by the other party. *"Discovery" is rarely featured in television and movie litigation, but it's an important part of any lawsuit in real life. If you are required to provide information and documents to the other party for discovery, any form of "stonewalling" can get you in big trouble with the court.*

STATEMENTS TO SCHOOL SECURITY PRIVILEGED — The Illinois Appellate Court for the First District has held that statements made to school security forces in reporting a sexual crime are absolutely privileged, making those who submit such reports essentially immune from a defamation suit for falsely making allegations of criminal conduct. In a case involving reports of sexual assaults at a private art school in Chicago, the Appellate Court held that such reports are protected from defamation suits to the same extent as reports made to a police officer to initiate legal proceedings, since school security forces act as police officers and conduct their own investigations into reported crimes by and against students, *Nonprofits these days are rightly concerned about how they should respond to reports of alleged sexual violence and harassment in connection with their activities. The court's ruling in this case should make it easier for victims and others to file such reports. The Appellate Court viewed its ruling as in furtherance of existing federal and state policy to limit sexual violence on college campuses, saying that it would be "counterintuitive and have a chilling effect" if victims reporting sexual attacks could be sued for defamation. Whether the ruling will be applied equally in cases involving reports of other crimes is uncertain.*

H & H DEVELOPMENTS

Naomi R. Angel will deliver a legal report on trends and recent developments to an engineering society in Nashville at the end of July.

Jonathan T. Howe presented "Ehh, What's Up Doc — Market Negotiations and Contracts" to a group of meeting professionals in Nassau.

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