

THE HOWE & HUTTON REPORT

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TRENDING NOW

DECEMBER 1 IS EFFECTIVE DATE FOR OVERTIME CHANGES – *H&H Report Update* – The U.S. Department of Labor’s changes in the minimum salary required for a white collar exemption from overtime eligibility, raising it from \$455 to \$913 per week, will take effect December 1, 2016, unless opponents of the changes can block the changes or delay the effective date. Two separate lawsuits to prevent the changes from taking effect have been filed by 21 states and a coalition of more than 50 business groups in a Texas federal court. While Congress is out of session, multiple bills have also been introduced in the Senate to delay the effective date of the changes from six months to five years. The House has already passed a measure to impose a six-month delay, but that legislation now requires Senate approval. *Time is running out for opponents of the measure, and it is unlikely that they can stop the changes from taking effect or delay their enforcement before December 1.*

CONSUMER DEVICES TARGETED BY HACKER SOFTWARE – Security experts have warned that Internet speeds are going to be slowed by hackers using a new software tool called Mirai, which targets DVRs, cable set-top boxes, routers, surveillance cameras and other consumer devices connected to the Internet. Mirai allows even unskilled hackers to take over online devices and hijack so much of their bandwidth that they run slowly or suffer intermittent failures. Such “denial of service” attacks have existed since at least 1999. But what’s new about Mirai is that it targets devices connected to the Internet but not generally thought of as computers (now sometimes called the Internet of Things). *Laws and law enforcement continue to struggle in trying to cope with the ingenuity and insanity of hackers, who often gain nothing from their activities but cost the rest of us plenty.*

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NOT FOR PROFIT LAW DEVELOPMENTS

APPEALS COURT REJECTS CLAIMS AGAINST CERTIFYING ORGANIZATION – The U.S. Court of Appeals for the District of Columbia has rejected claims filed against a certifying organization after it issued a public letter of admonition regarding a certificant’s allegedly misleading advertising. The certificant charged the organization with breach of contract and an implied duty of good faith and fair dealing, as well as unfair competition, based on the organization’s alleged failure to follow its own rules for disciplining certificants. But the Court of Appeals found that the organization followed its internal disciplinary process and did not engage in arbitrary or capricious action in publishing the letter of admonition, since the organization’s rules, to which the certificant had agreed, specifically allowed such a public disciplinary action. Further, the Court of Appeals found that, even if the organization’s disciplinary process wasn’t perfect, there was no evidence that a perfect process would have led to a decision not to discipline the certificant. *Any adverse action by an organization against a member or someone seeking certification or accreditation may result in litigation challenging the fairness of procedures followed by the organization, the reasonableness of membership, code of ethics, certification or accreditation requirements, and the effect of any adverse action in restraining trade. Legal risks are multiplied when disciplinary actions are made public. Therefore, groups that plan to enforce requirements against members and others should consider thoroughly how they will deal with legal challenges when they occur, reviewing, among other things, insurance policies that may help minimize the organization’s losses in any litigation that may arise.*

CANDIDATE FOUNDATIONS CONTINUE TO DRAW CHALLENGES – *H&H Report Update* - A relatively new phenomenon in U.S. Presidential campaigns is for someone to question the use of charitable foundations established by the candidates. Most recently, New York Attorney General Eric Schneiderman issued an order, with corresponding press release, directing the Trump Foundation to cease soliciting donations in the Empire State until the Foundation complied with state registration requirements. *Allegations and admissions of improper activities dogged both the Clinton Foundation and the Trump Foundation this year. In earlier campaigns, it seemed to us that political use of 501(c)(4) social welfare organizations was drawing more scrutiny than use of foundations formed by candidates. Regulation of tax-exempt organizations, and publicity relating to wrongdoing associated with them, aren’t new. But this year’s campaign certainly has caused the spotlight to shine more brightly on foundation irregularities.*

CONCEALING INFO MAY ALLOW LONG-DELAYED SUIT TO PROCEED – Those who have suffered any form of injury normally have only a limited period of time within which they can bring suit in order to obtain a legal remedy. But lawsuits otherwise barred because of a delay in bringing suit may still proceed if a defendant has fraudulently concealed information that might have led a complaining party to file suit more promptly. For example, a man recently alleged that he was sexually abused as a child by a volunteer for a nonprofit. Although a lengthy period of time had passed since the abuse was said to have occurred, an Illinois appellate court has allowed the alleged victim to join a suit filed against the organization based on evidence that it may have concealed its knowledge of the volunteer’s activities as a sexual predator for years. *Readers should take note that the negative consequences of trying to cover up wrongdoing can be enormous. Among other things, a cover-up can prolong the period of time within which injured parties will be allowed to bring suit against an organization. For that and many other reasons, confronting and publicly disclosing wrongful conduct within an organization can sometimes be the best policy.*

NOT FOR PROFIT LAW DEVELOPMENTS (cont.)

CHALLENGE TO NONPROFIT INSURER’S LARGE RESERVES FAILS – The Illinois Appellate Court for the First District has affirmed a lower court’s dismissal of a lawsuit that alleged a major health insurer, organized as a nonprofit entity, had illegally amassed billions of dollars in reserves and paid millions of dollars in bonuses to its executives. The insurer was sued by a policyholder who alleged that the nonprofit insurer had been turned into a “corporate structure with a primary profit motive.” The policyholder wanted the insurer to enhance its insurance programs or lower deductibles and co-pays. But a trial court dismissed the complaint, and the appellate court agreed that the nonprofit insurer was not illegally acting as a for-profit entity based on the facts alleged by the complainant. *A corporation can be “nonprofit” under the law if it has no shareholders and pays no dividends to owners. The law does require tax-exempt nonprofits to make expenditures for tax-exempt purposes, and it does restrict payment of excess compensation to executives. But even exempt entities can accumulate sizable reserves to meet future contingencies or achieve a particular lawful goal, such as purchase of a new headquarters. Moreover, they can pay employees and others for services rendered based on the fair market value of those services.*

ILLINOIS SUPREME COURT TO HEAR FRAT HAZING CASE – *H&H Report Update* - The Illinois Supreme court has agreed to hear an appeal from a lower court’s ruling in a case that may change how the law assigns liability for hazing by fraternities and sororities. David Bogenberger died after participating in a Northern Illinois University fraternity initiation ritual that involved consuming large amounts of vodka. His estate brought a complaint for negligence against the fraternity, its officers and directors, its national parent organization, sorority members who participated in the initiation, and the fraternity’s landlord, only to have the complaint dismissed by a trial court. However, an appellate court earlier this year revived the suit against the fraternity and its officers and directors, but not the other defendants. They indicated that long-standing limitations of liability for “social hosts” serving alcohol in Illinois did not apply when an “exclusive, highly valued organization” used social pressure to require consuming excessive amounts of alcohol as a condition for joining. Now, the Illinois Supreme Court will have its say on the matter. *We’ll monitor this case to see how it impacts liability for fraternities and sororities, as well as other nonprofit organizations.*

MEETING AND TRAVEL DEVELOPMENTS

EU COURT SUPPORTS COMPENSATION FOR BIRD STRIKE DELAYS – The European Union Court of Justice recently ruled that airlines generally can’t avoid paying compensation under EU rules to passengers on flights from or to EU countries that are delayed for over three hours because of birds striking the plane. Airlines have sometimes tried to avoid compensating passengers, claiming that bird strikes are an “extraordinary circumstance” excusing compensation under the rules applicable in the EU. But the Court of Justice, considering a case referred to it by Czech courts, held that bird strikes are not an “extraordinary circumstance,” except, perhaps, in “a situation in which a *flock* of birds arrives near the plane that prevents the plane from flying.” *The United States has no general rules requiring airlines to compensate passengers for flight delays caused by birds or otherwise, although some airlines do offer payments to customers in some cases. Bird strikes are not all that uncommon, though, according to recent studies. Consequently, we wonder why the U.S. isn’t giving travelers the same rights as the EU affords to air passengers whose flights are delayed by bird strikes.*

REGULATORY LAW DEVELOPMENTS

COURT REJECTS EFFORT TO BLOCK RESETTLING OF SYRIAN REFUGEES – The U.S. Court of Appeals for the Seventh Circuit has upheld a lower court’s decision clearing the way for nonprofits to assist in the resettlement of Syrian refugees in Indiana. Vice Presidential candidate and Indiana Governor Michael Pence had sought to prevent nonprofits from receiving federal funds for such assistance in his state. However, the Court of Appeals agreed with a lower court’s order barring Indiana from withholding grant money for resettlement that had been dispensed to nonprofits through state governments under the federal Refugee Act. *The injunction is just a preliminary one that will allow use of funds for resettlement pending further proceedings. More than two dozen states have launched legal efforts to prevent resettlement of refugees in their jurisdictions. But the Court of Appeals was skeptical of Pence’s claims that terrorists are posing as refugees in order to gain access to Western countries, saying that no evidence had been presented that Syrian refugees had ever committed crimes of terrorism in the U.S. or been arrested or prosecuted for such crimes. Moreover, the Court of Appeals noted that if such evidence did exist, states having possession of such evidence should simply present it to the federal government for action rather than trying to “deport” refugees from one state to another in violation of federal law.*

HEFTY PREMIUM INCREASES APPROVED FOR INSURERS UNDER ACA – *H&H Report Update* - Insurers continuing to sell coverage on federal and state exchanges under the Affordable Care Act (Obamacare) have recently been approved for large premium increases, according to information published by state regulators and a federal website. Premium increases averaging 30% have been approved in Alabama, Delaware, Hawaii, Kansas, Mississippi and Texas. In Arizona, Illinois, Montana, Oklahoma, Pennsylvania and Tennessee, approved increases exceeded 50%. In Connecticut, Georgia, Indiana, Kentucky, Maine, Maryland and Oregon, approved increases are 20% or more, and insurers in Colorado, Florida and Idaho are approved for increases very close to that amount. But New Mexico handed out the highest approved rate increase, allowing Blue Cross Blue Shield to increase its rates by 93% from their 2005 level after the insurer declined to participate in the ACA for a year. *Most insureds under the ACA won’t pay the full premiums because they receive subsidies from the federal government that help cover the expense. Insurers say increased premiums are necessary because people covered under the ACA have serious medical conditions and there are not enough young, healthy insureds to balance out insurer costs. Rather than increasing premiums, some insurers are simply dropping ACA coverage.*

TAX LAW DEVELOPMENTS

BILL WOULD ALLOW POLITICAL SPEECH BY 501(c)(3) NONPROFITS – A bill has been introduced in the U.S. House of Representatives that would allow organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code to engage in currently prohibited political speech. The Free Speech Fairness Act would allow charities, educational organizations and churches, among others, to support or oppose a candidate for election without risking their tax exemptions. *The current law prohibiting such speech was adopted by Congress in 1954, and previous efforts to change it have failed. Congressional action on the bill this year is an extreme long shot. But it could be reintroduced in the 2017 Congress.*

TAX LAW DEVELOPMENTS (cont.)

HIGHER SOCIAL SECURITY TAXES, SMALL BENEFIT INCREASE COMING – The Social Security Administration has announced that higher-income workers and their employers will be paying more in payroll taxes next year, while recipients of Social Security will receive a small increase in benefits. Benefits will increase .3% as a cost-of-living adjustment after no adjustment this year. Meanwhile, the maximum amount of annual earnings subject to Social Security tax will climb to \$127,200 from \$118,500, resulting in the higher tax payments by employers and employees for salaries paid to highly compensated workers. *Increased premium payments for Medicare are likely also in store for some in 2017, but haven't been officially announced.*

REVOCATION OF EXEMPTION MAY NOT EFFECT 403(b) PLAN SPONSORSHIP – A recent study by the Internal Revenue Service shows that automatic revocation of an organization's exempt status for its failure to file annual returns with the IRS three straight years need not cause loss of eligibility to sponsor an employee benefit plan under Section 403(b) of the Internal Revenue Code. That's because, according to the study, a majority of 403(b) plan sponsors can be considered "educational organizations" that would still be eligible to sponsor their plans under the wording of Section 403(b), which applies to 501(c)(3) employers *and* certain "educational organizations" (chiefly public ones). *If an employer eligibility failure has not occurred because of automatic revocation, "corrective" measures with respect to the plan would not be required. But, an organization would still have to apply again for IRS recognition of tax-exempt status if it wanted to continue receiving the other benefits afforded to exempt organizations under the Internal Revenue Code.*

EMPLOYMENT LAW DEVELOPMENTS

\$1.5 MILLION IN DAMAGES FOR DISCRIMINATION AGAINST MUSLIM – A jury has awarded \$1.5 million in damages to a Muslim worker discriminated against because of his religion when he worked on highways for the Illinois Department of Transportation. The damages were strictly for emotional suffering when he was denied the right to pray on his break time, denied training, assigned work that should have gone to more subordinate employees, singled out for unfair discipline, and ultimately fired. Attorneys for the employee plan to ask the court for an additional \$500,000 in back pay and the wages that the worker would have earned if he had continued to work for the state until he retired at 69. The Department claimed that the worker was fired for stating in correspondence that he would defend himself if a supervisor carried out threats to inflict physical violence on him. But the evidence indicated that other Department workers had made threats and engaged in actual physical violence on the job without being terminated. *Giving workers unequal treatment is a good way for employers to get in legal trouble, whatever the grounds for employee disciplinary action may be. In particular, discrimination against Muslims in employment seems to be on the increase and producing much litigation.*

INTELLECTUAL PROPERTY AND LAW DEVELOPMENTS

COURT UPHOLDS SOCCER FEDERATION'S USE OF PLAYER PHOTOS IN ADS – The U.S. Court of Appeals for the Seventh Circuit in Chicago has permitted a soccer federation to use player photos in sponsored advertising for tequila without approval from the association that represented players in the U.S. The association claimed that applicable collective bargaining and uniform player agreements required its approval for an ad using the likenesses of six or more players. But the Court of Appeals overturned an arbitrator's decision for the association on that question, finding that the agreements contained no explicit approval requirement, but merely a provision that an ad sponsor be requested to make a contribution to a player pool for the use of creative works. *Many nonprofits have sponsorship agreements with for-profit entities, and some organizations are contractually required to arbitrate disputes that arise under the agreements they have signed. This case shows that arbitrators generally have no authority to rewrite agreements but must only interpret and enforce them as written.*

OTHER ISSUES

GUIDESTAR ISSUES NEW COMPENSATION REPORT – Information from 96,000 Form 990 reports provided to the Internal Revenue Service by tax-exempt organizations has been collected and published in the 16th edition of the *GuideStar Nonprofit Compensation Report*, downloadable for \$374 at <https://learn.guidestar.org/products>. Pay the money and you get 4,297 pages of information on compensation paid to nonprofit staffers, aggregated by national, state, metropolitan statistical area, gender and NTEE (National Taxonomy of Exempt Entities) classification. Among other information that can be gained from the Report: median compensation of female executives continues to lag behind that of males with comparable staff positions, the number of women CEOs is increasing, and median annual compensation increases for CEOs are going down. Also reported: Washington D.C. has the highest overall median salary for CEOs in the top 20 metropolitan statistical areas, and health and science organizations have the highest overall median compensation for executives, while arts, religion and animal-related organizations are at the other end of the spectrum. *The Report's information is interesting, but, being derived from Form 990s, its statistics are somewhat skewed. For one thing, smaller organizations aren't required to provide Form 990s to the IRS, but provide other, more abbreviated reports.*

HOWE & HUTTON NEWS AND EVENTS



On Thursday, December 1, **Jonathan Howe** will present “Business Resolutions to Make for 2017” at the Destination Texas Conference in Houston, Texas. His presentation will offer concrete pledges that both planners and suppliers should make, particularly with respect to negotiations and contracts.

On December 8th, **Jonathan** along with MaryAnne P. Bobrow, will present “Tech Swim Up: Risky Business: Cybersecurity” at the IAEE Annual Meeting and Expo in Anaheim, California. The presentation will cover essential risk management strategies to defend against a data breach along with developing a system that ensures due diligence from all parties.

Gerard P. Panaro presented a webinar for ASAE in November on the U.S. Department of Labor’s new overtime regulations.



On Thursday, November 17, **Mike Deese** will be presenting on Current Association Legal Issues at a Leadership Forum held by Association Headquarters, Inc. in Mt. Laurel, NJ for the volunteer leaders of its association clients.

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