

## THE HOWE & HUTTON REPORT

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### TRENDING NOW

**TRUMP ISSUES EXECUTIVE ORDER ON RELIGIOUS FREEDOM** – President Trump has issued an executive order promoted as an effort to protect religious freedom by preventing the Internal Revenue Service from enforcing the Johnson Amendment, a statute that prohibits partisan political activity by organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. The order directs federal departments and agencies not to take adverse actions against individuals and organizations because they have spoken about moral or political issues from a religious perspective, if such speech has not ordinarily been treated as participation or intervention in a political campaign on behalf of or in opposition to a candidate for public office. Further, the order directs the Secretary of the Treasury, the Secretary of Labor and the Secretary of Health and Human Services to consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to a “preventive-care” mandate of federal law. *The first portion of this executive order protects nonprofits in their advocacy relating to public issues with which they are concerned (“issue advocacy”). But the order does not*

*protect advocacy for or against election of a particular candidate, which is a very different type of advocacy and is recognized by the order as still being prohibited under the Johnson Amendment. The latter portion of the order may apply to religious objections to birth control and abortion. But it remains to be seen what amended regulations the Secretaries may consider issuing.*

**COURT GIVES SANCTUARY CITIES RELIEF FROM TRUMP ORDER** – *H&H Report Update* – A U.S. District Court judge in San Francisco has entered a nationwide preliminary injunction against enforcement of President Trump’s order stripping federal funds from municipalities that serve as “sanctuary cities” protecting illegal aliens from deportation. Judge William Orrick, an Obama appointee, held that the President’s order appeared to violate the Tenth Amendment to the U.S. Constitution, which gives to the states “or to the people” all powers not specifically delegated by the Constitution to the federal government or prohibited by it to the states. Explaining his decision, the judge said that the President could not attach conditions to federal grants of money if the conditions were coercive and not clearly related to the

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## TRENDING NOW (cont.)

funds at issue, noting that the order appeared to apply broadly to all federal funds and not just those related to immigration enforcement. “Federal funding that bears no meaningful relationship to immigration enforcement,” he said, “cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.” *A significant number of nonprofits are involved in providing assistance to immigrants. The judge’s ruling came in a suit filed by San Francisco and Santa Clara County to challenge the President’s order. Other jurisdictions have filed similar suits, but this one was the first to receive a hearing in court. Further proceedings will also be held in San Francisco as the complaining parties seek to have the District Court’s injunction made permanent.*

## NOT FOR PROFIT LAW DEVELOPMENTS

**NONPROFIT SUES FEDS OVER IMMIGRANT SERVICES CUT-OFF ORDER** – The Nonprofit Northwest Immigrant Rights Project is suing the U.S. Justice Department after the Department ordered the nonprofit to stop providing immigrants with any legal assistance unless the organization commits to handling all of their legal matters. The nonprofit claims that it provides free and low-cost legal assistance to more than 10,000 immigrants each year through its 70 staff members and more than 350 volunteer attorneys, mostly helping them fill out forms and advising them of their rights. But the government says the group must refrain from providing this assistance unless the organization is willing to commit to providing full legal representation of every immigrant client in removal proceedings, which the nonprofit says it cannot afford to do. The Justice Department did not explain its order, beyond citing a rule it adopted in 2008 that was designed to curtail attorney misconduct and the unauthorized practice of law by nonlawyers who advertise themselves as able to help immigrants obtain lawful status. *The Project is arguing that the Department’s position effectively deprives immigrants of legal help and violates the First and Tenth Amendments to the U.S. Constitution. A hearing is expected in federal district court on the nonprofit’s request for a temporary restraining order that would allow the group to provide services while the case is being litigated.*

**NONPROFIT EXECs CONVICTED OF THEFT** – Recent news items hammer home the unfortunate truth that a few nonprofit executives and volunteers are abusing the organizations they represent and the public trust. The former head of a New York City nonprofit and his wife have been convicted of stealing hundreds of thousands of dollars of public funds provided to the nonprofit by the city Department for the Aging to feed needy senior citizens, spending the money on a lavish lifestyle for themselves, including clothes, luxury cars and a four-bedroom Long Island home. The former CFO of another nonprofit pled guilty in a New York federal court to stealing more than a million dollars from a trade advocacy group to pay for personal expenses, and he evaded taxes on the money as well. A Eugene, Oregon woman, who worked 30 years for a nonprofit, recently pled guilty to stealing more than \$200,000 from the group over a seven-year period, partly to support a child who had a substance abuse problem and partly for personal expenses. Finally, the former head of nonprofit in Minneapolis has been sentenced to four years in prison for mispending hundreds of thousands of dollars intended to help low-income people, using the money for extravagant trips with five different girlfriends. *Nonprofits do many good things. Unfortunately, we have to report cases in which people abused their nonprofit positions in order to enrich themselves.*

## NOT FOR PROFIT LAW DEVELOPMENTS (cont.)

**NONPROFITS AFFECTED AS STATES DEAL WITH SANCTUARY CITIES ISSUES** – Texas has passed a law banning sanctuary cities and punishing counties that fail to comply with federal requests to detain individuals suspected of being in the country illegally. California took the opposite approach to sanctuary, passing a law that blocks state and local police from cooperating with federal immigration authorities. *Clinics and other nonprofits that serve immigrants are certain to be affected by the current controversy over sanctuary cities and increased federal immigration law enforcement under the Trump Administration. Some such nonprofits are reporting a large drop in patronage whenever immigration arrests occur, including sharp reductions in the willingness of sexual assault victims to report such crimes to authorities. On the other hand, some nonprofits providing services at the homes of immigrants are seeing greater demand for assistance from clients afraid to leave home even to do grocery shopping.*

## MEETING AND TRAVEL DEVELOPMENTS

**SOME AIRLINES ADDRESS OVERBOOKING** – In the aftermath of the furor caused by United Airlines in forcibly pulling a passenger off an overbooked flight so that a United employee could fly to an assignment, airlines are under pressure to end overbooking and improve customer service in general. Southwest Airlines Co. and JetBlue Airways Corp. have announced an end to overbooking, which other airlines claim is still necessary to address the problem they have with passengers failing to show up for their flights, forcing the airlines to fly undersold and lose money. United says it will reduce overbooking, but only on flights that have historically generated few volunteers to give up their seats when planes were oversold. *Southwest and JetBlue may gain some popularity with flyers after ending overbooking. But it should be noted that Southwest badly needed to improve its overbooking record. Last year, Southwest required almost 15,000 passengers to give up their seats involuntarily – more than United, American Airlines Group, Inc. and Delta Air Lines Inc. combined. Southwest has said that 80% of its total was caused by overbooking, with the rest being a result of airlines crew pushing other passengers off flights to make their work assignments.*

**TRUMP LOSES AGAIN ON TRAVEL BAN** – *H&H Report Update* – The U.S. Court of Appeals for the Fourth Circuit has affirmed a lower court decision that President Trump's latest travel ban, blocking people from Iran, Libya, Somalia, Sudan, Syria and Yemen from entering the United States for 90 days and all refugees for 120 days, was discriminatory and unconstitutional. The ban never went into effect because its enforcement was enjoined nationwide by two federal district courts. The U.S. Court of Appeals for the Ninth Circuit is still considering an appeal of one lower court injunction, and the ban may also get a hearing in the U.S. Supreme Court. *The Fourth Circuit decision was by a 10 to 3 vote. Some of the judges in the majority essentially said that campaign statements made by the President last year evidenced a discriminatory intent and showed that the President's alleged grounds for the ban based on national security were a mere pretext for discriminating. Other judges in the majority were reluctant to strike down the ban based on the President's campaign statements, but said that he made enough discriminatory comments after his inauguration that it wasn't necessary to wholly base their ruling on his campaign remarks.*

## REGULATORY LAW DEVELOPMENTS

**SHIPPING LINE PLEADS GUILTY IN ANTITRUST CASE** – A “roll-on, roll-off” ocean shipping line has reportedly pleaded guilty to anticompetitive conduct in what may be the first criminal antitrust enforcement action under the Trump Administration, though a government investigation may have started while Obama was President. Wallenius Wilhelmsen Logistics AS was accused of conspiring with its competitors to fix prices, rig bids, allocate customers and engage in monopolistic conduct. Wallenius was fined, and agreed to pay, \$98.9 million. But the criminal case, filed in a Maryland federal district court, continues against its co-conspirators. *Wallenius and its co-conspirators may also face a civil antitrust suit by their customers and additional actions by various governments. These follow-up proceedings can stretch on for what seems like forever. Few companies and few trade associations involved in their members’ potentially illegal conduct can survive the cost of defending such antitrust actions, even if they are eventually found not to have engaged in any improper conduct.*

**TRUMP EXECUTIVE ORDERS MULTIPLY** – Though as yet unable to accomplish repeal of Obamacare and approval of tax reform in Congress, President Trump continues trying to make his mark by issuing executive orders at a record-setting pace. Before the end of his first 100 days in office, Trump issued orders requiring a review of locations available for additional offshore oil and gas drilling that have been under restrictions imposed by the Obama Administration. Additionally, the President directed a review of how “national monuments” have been designated by Presidents since 1996, focusing on whether lands have been appropriately classified as “historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest,” and whether reservations of lands as “national monuments” have affected “the smallest area compatible with the proper care and management of the objects to be protected.” *President Obama made ample use of executive orders, rather than laws passed by Congress, to advance his environmental agenda, and his administrative actions have been easy targets for reversal by the new President’s own executive orders. The two orders noted above, freeing up more federal lands for development, are perfect examples of that.*

**WAL-MART NEGOTIATING OVER FOREIGN BRIBERY CHARGES** – U.S. authorities have asked Wal-Mart Stores Inc. to pay \$300 million to settle an investigation into whether the company bribed foreign government officials. The Obama Administration, as it was leaving office, had sought as much as \$1 billion from the company, but negotiations over payment stalled. Issues involved more than the amount of the payment. Wal-Mart may lose government contracts as well, including the ability to accept food stamps. Charges revolve around alleged payments to the Mexican government to obtain permits for construction of stores. *If your organization has received money under a federal government grant, and perhaps under other circumstances, the U.S. government may ask you questions that relate to whether you have paid money to a foreign government. Such payments may be a violation of the U.S. Foreign Corrupt Practices Act. But failing to pay certain foreign governments may mean that you won’t be allowed to do business in their countries, including solicitation of contributions and memberships. Wal-Mart now employs 2,300 workers in ethics and compliance operations, but they still got into trouble with our feds. So, if you deal with foreign governments, or you just operate in foreign countries, you need to take the Act’s prohibitions into account.*

## TAX LAW DEVELOPMENTS

**HOSPITAL LIABLE FOR SALES TAX AS STATE SUBDIVISION** – In an unusual case, a judge of the South Carolina Administrative Law Court recently found Greenville Hospital System liable for sales tax on meals sold in an on-site cafeteria even though it qualified for an exemption from sales and use taxes as a charitable organization. The trouble was, it was also a political subdivision formed by act of the state General Assembly, and the general state law was that political subdivisions must collect and remit sales tax. The state Department of Revenue argued that the hospital system had to be classified for tax purposes as either a charitable organization or a political subdivision, not both. So, the Department decided to treat the hospital system as a political subdivision and levy sales tax on it. Now, the court has agreed with that decision. *Can an organization be both a tax-exempt entity and a taxable one? It can if the laws are written that way and lawmakers don't bother to clarify how conundrums like this one should be resolved. A careful reading of your organization's formational documents and state law may be in order.*

**IRS AGENTS TRY TO LIMIT TESTIFYING IN LAWSUIT** – Several lawsuits are still pending against the Internal Revenue Service arising from its discriminatory treatment of Tea Party tax exemption applications during the Obama Administration. In the latest development, IRS agents are trying to have their testimony in one case protected from public view, saying that making their testimony public would put them in danger, since they have been exposed to death threats and harassment after allegations of IRS bias against conservatives surfaced in 2013. *The allegations were that the Service slowed processing of tax exemption applications from Tea Party groups and other conservative organizations, and took other discriminatory actions against them under Obama. The IRS essentially admitted that this happened, but blamed the discrimination on low-level personnel in the Service's Cincinnati office who had not been given directions from political appointees in Washington. At least one judge hearing the cases has previously accused the IRS of stonewalling efforts to get to the truth. Whether for that reason or not, the cases certainly have dragged on.*

**IRS EXPANDS SAFE HARBORS FOR MANAGEMENT CONTRACTS** – The Internal Revenue Service has published new guidelines applicable to management contracts for projects financed with tax-exempt bonds. Among other things, the guidelines specify that such contracts must have a maximum term not exceeding the lesser of 30 years or 80 percent of the weighted average economic life of that portion of the project subject to the management contract. The manager's compensation can be based on fixed or variable factors, including a percentage of gross revenues or expenses for the project, but not both revenues and expenses. A manager's compensation must be reasonable and must not be based on net profits or result in the manager bearing any share of the net losses of the project. Also, the exempt entity must bear the risk of uninsured loss upon damage or destruction of the managed property and must exercise significant control over the use of the managed property. *The new guidelines apply to management contracts issued on or after January 17, 2017, but the issuer can elect to apply them to prior contracts. If the guidelines are satisfied, a management contract will not result in prohibited "private use" of the financed facility.*

## TAX LAW DEVELOPMENTS (cont.)

**TRUMP PUSHES TAX CHANGES** – President Trump has proposed tax law changes cutting the top corporate income tax rate from 35% to 15% and applying the same reduced rate to pass-through entities like partnerships, S corporations and limited liability companies, now with a top tax rate of 39.6. The proposal would also reduce individual income tax rates for many, double the standard deduction, but eliminate some other deductions, such as the one for state and local taxes. The deduction for charitable contributions would continue. *The proposal will require approval from Congress, but chances for approval might be increased by making the changes temporary. Tax legislation would normally require 60-vote approval in the Senate, where Republicans have a very narrow majority over Democrats. But the President may be willing to specify that the changes can last no more than ten years if they add to the federal budget deficit. In that case, a 51-vote majority would achieve passage in the Senate.*

## EMPLOYMENT LAW DEVELOPMENTS

**H-1B FAST-TRACK PROCESSING SUSPENDED** – U.S. Citizenship and Immigration Services suspended fast-track processing of applications for H-1B skilled-worker visas for up to six months, beginning in April. Fast-track processing offers responses to visa requests within 15 days for a fee of \$1,225. Regular processing can last from three to six months. Up to 85,000 eligible individuals can obtain visas through an annual lottery after applying for their visas. U.S. companies are allowed to sponsor up to 65,000 of those skilled workers with at least a bachelor's degree from any university, and an additional 20,000 visas are available for individuals with advanced degrees from U.S. institutions. But universities and nonprofits generally can use H-1B visas to hire foreign workers without being subject to any cap on the number of visas awarded. *USCIS says the suspension of fast-track processing is to improve overall processing times for H-1B visas. They say it has nothing to do with executive orders restricting immigration that were announced by President Trump this year or with the President's campaign rhetoric critical of the H-1B program, in which he urged employers to "hire American." The suspension may slow the hiring of foreign workers by some employers.*

## INTELLECTUAL PROPERTY LAW DEVELOPMENTS

**COMPANIES CAN'T USE PATENT LAWS TO PREVENT RESELLING** – The U.S. Supreme Court has ruled that once a patent holder sells its product, it cannot use patent law to control how the buyer uses the product, domestically or overseas. The dispute involved Lexmark, a manufacturer of printers and inkjet cartridges, and an independent company that was refilling, refurbishing and reselling Lexmark's cartridges in violation of a contractual restriction on reselling. Lexmark sued for patent infringement. By holding that patent rights cannot extend beyond the first sale, the court has sharply limited a company's ability to stop its products from being resold at a discount. The decision also prevents manufacturers from forcing consumers to buy supplies from only the original source. *Companies can still enter into contracts to control how their patented products are used. But if the buyer breaches that contract, the seller can only sue for breaking the contract, not for patent infringement. This decision is a victory for "remanufacturers" as well as consumers. Writing for the court, Chief Justice John Roberts said purchasers and all subsequent owners are free to use or resell a product just like any other item of personal property, without fear of an infringement lawsuit.*

## INTELLECTUAL PROPERTY LAW DEVELOPMENTS (cont.)

**INSURER REFUSES TO PAY FOR MISLEADING GOVERNMENT** – An insurance company is asking a court to rule that it is not required to pay defense costs for a law firm and its client accused of intentionally misleading the Patent and Trademark Office, or to cover sanctions that a court imposed against the insureds in a patent infringement suit. The insurer’s refusal to pay was based on a common policy provision excluding coverage for “intentional wrongdoing.” *There are two lessons here. First, don’t mislead the Patent and Trademark Office. Second, an insurance policy is just a contract, and contracts, some have said, are made to be broken. Insurance companies are not shy in looking for ways to avoid payment when they receive a claim. So, read the many exclusions found in any liability insurance policy. Know how broad and how narrow your coverage may actually be.*

**PATENT TROLLS CAN’T GO FORUM SHOPPING ANYMORE** – The U.S. Supreme Court has ruled unanimously that patent lawsuits should be tried where the defending company resides, meaning the state in which it is incorporated. The Court said that for the past 30 years lower courts have incorrectly interpreted the law and have allowed patent holders to sue companies wherever they had an established place of business – in other words, in almost any federal court in the U.S. In the first quarter of 2017, there were more patent infringement cases filed in the rural Eastern District of Texas than in all other federal district courts. The Eastern District is widely known for being “plaintiff-friendly” and awarding large judgments. *Firms that hold or buy patents but don’t use them to manufacture products, disdainfully referred to as “patent trolls,” demand royalties and sue companies for patent infringement in hopes they will settle rather than go through expensive and lengthy litigation. This decision is a big win for patent holders. It should significantly shift patent infringement suits to more neutral venues where a defending company has a better chance of fighting the patent troll in a court that has expertise in patent matters. Better to spend resources on development and invention, rather than frivolous litigation.*

## OTHER ISSUES

**SCHOOL CHANGES TRANSGENDER ACCESS POLICY** – The transgender access issue changed school policy in the Chicago suburb of Evanston, Illinois recently, as Evanston Township High School District 202 approved allowing transgender students to use locker rooms corresponding to the gender with which they identify. Students of the District had already been allowed to use the “multi-stalled gendered restrooms that correspond to their gender identity.” *Transgender access has “engendered” changes in law and litigation nationwide, sometimes raising the question of whether and to what extent transgender access to facilities is required by the U.S. Constitution. Still pending in Illinois is a lawsuit filed by parents and students in suburban Palatine Township High School District 211, alleging that the District created an illegally hostile and intimidating environment for other students when it allowed transgender students to use the locker room of the sex with which they identify.*

## HOWE & HUTTON NEWS AND EVENTS

**Jonathan Howe** will co-present an educational program on **Cybersecurity** at the PCMA Rocky Mountain Chapter Education Boot Camp to be held at The Village at Breckenridge on June 8. On June 9, he will co-present **“How To Really Succeed As An Entrepreneur”** for SPIN [Senior-level Planners Industry Network] in Dallas as part of a Small Business Owners Boot Camp.

On June 22, Jon will be presenting **“Cybersecurity: Threats, Risks and Lessons Learned”** at MPI WEC17 in Las Vegas/MGM Grand. And Jon will be joining two other speakers for **“Your Market, Your Contracts and How to Negotiate Them”** in Atlantic City for Meeting Quest on June 29.



**Nathan Breen** will be giving a presentation on **Risk Management and Contract Negotiation** at Stage Right in Mettawa, IL on June 9.

For more information, on Stage Right and Nathan’s program, please visit [Stage Right, Inc.](#)

**Mike Deese** will be speaking at the AMC Institute Regional Event in Philadelphia on June 9. He is participating on the Accreditation Workshop panel and is also presenting a session on **Association Copyright and Trademark Issues.**



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