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THE HOWE & HUTTON REPORT

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TRENDING NOW

SESSIONS ISSUES RELIGIOUS FREEDOM ORDER – Attorney General of the United States Jeff Sessions has issued a directive to all federal government agencies advising that “to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity.” Some conservative religious groups hailed the directive as a protection of religious freedom, while a national LGBT-rights group said it represented an “all-out assault” on civil rights and a “sweeping license to discriminate.” The U.S. Justice Department, headed by Sessions, will reportedly now be reviewing all federal agency actions to make sure they don’t conflict with federal laws protecting religious freedom. *The directive doesn’t constrain the courts, and how the order will be applied to some real-life disputes, even by the Trump Administration, remains to be seen. The Department of Health and Human Services immediately indicated that it would allow more employers with religious objections to opt out of birth control insurance protection required by the federal Affordable Care Act. On the other hand, over the years, many taxpayers have claimed a religious objection to paying taxes. But we doubt that the Internal Revenue Service or the courts will be any more receptive to such arguments than they have been in the past. We also note that the directive itself has holes in it. Are civil rights violations “permitted by law” if perpetrated by a religious objector? And what will be a “reasonable accommodation” in specific cases?*



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TRENDING NOW (cont.)

RETIREMENT PLANS GET OKAY TO AID HURRICANE VICTIMS – Rules governing retirement plans have been changed to allow them to provide relief for victims of the recent hurricanes. They can now provide loans and hardship distributions to aid participants without incurring penalties. The new rules will allow loans and distributions even before plans are formally amended to provide for them. One exception to the new rules is that IRA participants are still barred from taking out loans, although they can receive hardship distributions. *Similar changes were made to assist victims of previous disasters, including Louisiana flooding and Hurricane Matthew.*

IRS PROVIDES FILING RELIEF FOR HURRICANE VICTIMS – The Internal Revenue Service has announced tax filing relief for victims of the recent hurricanes. Included are tax filing extensions for individual and business tax returns and extensions for making certain tax payments. Different extensions apply to different localities. *For the latest information on localities impacted and relief afforded by the IRS, see the Service's web pages dedicated to hurricane relief at www.irs.gov.*

IRS PROVIDES DISASTER DONATION GUIDANCE – The Internal Revenue Service has published guidance on its treatment of leave-based donation programs to aid victims of the recent hurricanes. The Service noted that some employers have adopted leave-based donation programs under which employees can elect to forgo paid leave in exchange for cash payments that the employer makes to charity for disaster relief. The IRS has announced that it will not assert that employees receive taxable income when employers make such payments or employees elect to forgo such paid leave in order to relieve hurricane victims, but employees also may not claim charitable deductions for such payments and elections. This tax treatment will apply only if contributions are made to charity before January 1, 2019. *The same treatment will apply to relief for victims of the recent hurricanes before they became hurricanes, when they were just far from innocuous tropical storms.*

WATCH OUT FOR DISASTER-RELATED FRAUD – After every national disaster, criminals try to take advantage of the situation, including some who make phony charity appeals. Authorities report that some were setting up hundreds of fraudulent Internet domain names and websites to solicit contributions for Harvey relief when that hurricane first became a blip on the weather map. But fake charitable solicitations aren't the only way crooks benefit from disasters. The U.S. government notes that disasters breed identity theft because of the large amount of personal information people are willing to place on the Web in order to help the unfortunate. Some criminals also fraudulently obtain emergency assistance and file fraudulent home repair and disaster loan applications. Some corrupt government officials engage in contract and kickback schemes. *Disasters bring out the best and worst in people. Those with good intentions want to relieve the suffering caused by disasters by donating to charities. But they need to check out the people who are receiving their donations.*

EMPLOYMENT LAW DEVELOPMENTS

COURT STRIKES DOWN OBAMA OVERTIME EXPANSION – *H&H Report Update* – A federal court in Texas has struck down an Obama-era rule raising the minimum salary required for application of “white collar” exemptions from overtime pay requirements. The rule increased the annual salary minimum from \$23,660 to \$47,476. Other job duty requirements for exemption of professional, administrative and executive workers still apply, and, in fact, the duties test figured in the federal judge’s decision to strike down the rule raising the minimum salary requirement, as the judge said the salary level increase was so great that it made the duties test, imposed by Congress, irrelevant. “Congress unambiguously intended the exemption to apply to employees who perform bona fide executive, administrative or professional capacity duties,” said the court. Consequently, the Obama Department of Labor, in promulgating the rule last year, exceeded its authority. The court also struck down another portion of the rule, which provided for automatic increases in the salary minimum every three years. *The same court temporarily blocked enforcement of the new overtime rule last November, but had not permanently invalidated it. Speculation is that the Trump Department of Labor may yet increase eligibility for overtime pay, but not to the extent of the now defunct rule, which reportedly would have made more than 4 million currently exempt employees eligible for overtime pay.*

ANOTHER OBAMA PAY RULE DIES – The federal Office of Management and Budget has stayed implementation of an Obama-era Equal Employment Opportunity Commission rule because the Office found compliance with it to be too costly and too much of a hassle. The rule required government contractors and any company with more than 100 employees to annually provide data on workforce pay to the federal government on a form known as EEO-1, effective March 2018. That form previously required employers to provide about 180 pieces of information, including workforce breakdowns by race, ethnicity, gender and job category. Adding new pay questions brought total information requested up to 3,660 data points per report. *According to the Obama EEOC, compliance with the new rule would have cost employers about \$50 million per year and required employers to expend 1.9 million hours annually for completion of a new EEO-1. But a Chamber of Commerce survey showed direct compliance costs would be closer to \$400 million per year, with eight million hours of labor expended annually and indirect overhead costs bringing annual compliance expenditures up to \$1.3 billion.*

EMPLOYEES WORKING OUTSIDE U.S. CAN FILE WHISTLEBLOWER CLAIM – A federal labor appeals panel has held that a worker can file a claim against his American employer under the whistleblower protections of the U.S. Sarbanes-Oxley Act if the worker was fired after reporting concerns about potential employer violations of U.S. law in Afghanistan while the employee was working in that country. A private employee at a U.S. military base in Afghanistan accused his supervisor of trying to cover up a security breach and filing inaccurate time sheets, after which the worker was terminated. An administrative law judge rejected the employee’s claim that his employer retaliated against him in violation of the Act, finding that the Act had no application outside the U.S. But an Administrative Review Board has now concluded that the Sarbanes-Oxley whistleblower protections extend to workers abroad who suffer retaliation for reporting possible violations of U.S. law. *Despite the Board’s ruling in this case, it is possible that there would have been a different result if the worker had not been a U.S. citizen, the employer had not been U.S.-based, and the worker’s allegations against his employer had not been based solely on violations of U.S. law.*

NONPROFIT HOSPITAL LOSES TAX-EXEMPT STATUS TO OBAMACARE – The Internal Revenue Service has revoked the tax-exempt status of a nonprofit hospital for failure to make its community health needs assessment widely available to the public and adopt an implementation strategy for that assessment. The assessment process is required on a triannual basis by Section 501(r) of the Internal Revenue Code, which was added to the Code by the Affordable Care Act in 2010. The IRS characterized the hospital’s failures as willful and egregious. The hospital explained that it didn’t have the will, financial resources or staff to follow through on the assessment process. The hospital wasn’t named by the IRS, but the Service said it was a “small, rural facility” operated by a county government agency and designated by Medicare as a “critical care access facility” for Medicare billing purposes. *This is the first known instance in which a nonprofit has lost its exemption for failing to comply with 501(r). Previously, the IRS assessed \$50,000 in excise taxes on a hospital that failed to comply. It’s a trade-off when a nonprofit applies for recognition as a tax-exempt entity. If it wants the exemption, it has to prove entitlement under the Code and IRS regulations. Sometimes a nonprofit judges that an exemption isn’t worth the cost.*

DOJ WON’T PROSECUTE LERNER – The U.S. Department of Justice has announced that it won’t reopen a criminal investigation of former IRS official Lois Lerner for her role in the Service’s admitted targeting of conservative and Tea Party groups for adverse treatment in the processing of applications for recognition of exempt status and other requests. Several Congressmen had asked the Justice Department to reconsider an earlier decision by Obama’s Justice Department not to prosecute Lerner, whose husband has been a fundraiser for the national Democratic Party. But Assistant Attorney General Stephen Boyd closed the door on further investigation in a September letter responding to that request, saying that reopening the criminal investigation “would not be appropriate based on available evidence.” *Lerner was in charge of the Service’s division that regulated tax-exempt entities when the IRS delayed action for conservative and Tea Party groups by months or even years, according to a report by the Treasury Department’s Inspector General for Tax Administration in 2013. She and some other IRS management officials resigned or retired in response to the scandal. Civil actions against the IRS and Lerner are still on-going years later, largely because the IRS has failed to cooperate with discovery requests.*

INTELLECTUAL PROPERTY

MISUSE OF LOGO CAN DAMAGE A REPUTATION – You see your organization’s logo and name used in an unflattering way by someone who doesn’t have permission for that use. What can you do? The Detroit Red Wings professional hockey team faced that problem when members of a small white supremacist organization based in Michigan, calling themselves the “Detroit Right Wings,” carried signs with an altered version of the hockey team’s logo during the “Unite the Right” rally in Charlottesville, Virginia last August. Both the team and the National Hockey League issued statements denying any connection with the marchers, and the white supremacist group has apparently ceased using the logo. Could the team have sued them? It might have been difficult to argue that trademark infringement occurred because that would require showing that the logo misuse was likely to cause consumer confusion. On the other hand, a suit under the Federal Trademark Dilution Act might have succeeded if the Red Wings logo was “famous” enough to warrant protection under the Act and if the Red Wings could have demonstrated that their logo was “blurred” or “tarnished” in the public eye because of misuse by the “Right Wings.” *People who misuse a logo will sometimes back down in the face of a cease and desist letter, especially from a lawyer. Curbing the misuse is usually the main thing a nonprofit or other trademark owner is interested in, and often the only thing they can hope to achieve, especially given the fact that suits for infringement or dilution are quite expensive and those expenses are generally borne by the organization bringing suit.*

REGULATION

ARBITRATION CLAUSE BESTS STATE CONSTITUTION – You signed a contract with an arbitration clause, but another party violated the contract and you want to sue rather than arbitrate, especially since the arbitration clause requires proceedings to take place in an inconvenient state. Is there any way to bring suit despite the arbitration clause? Maybe, but you may have an uphill battle judging from a recent decision by the Supreme Court of the United States. In *Kindred Nursing Centers v. Clark*, the Court was faced with a contract dispute arising in Kentucky. One party relied on an arbitration clause in the contract, but the other wanted to take the matter to court, relying partly on a provision in the Kentucky Constitution saying that the right to jury trial on matters is “sacred.” Although the Kentucky Supreme Court said that no arbitration was required because of the language in the Kentucky Constitution, the Supreme Court of the United States has now reversed that decision, holding that Kentucky’s law on the subject violates the Federal Arbitration Act, because it “singles out arbitration agreements for disfavored treatment.” The U.S. Supreme Court allowed that arbitration agreements could be invalidated based on “generally applicable contract defenses” like fraud. But the Court said state laws specifically disfavoring arbitration, outright or even covertly, were invalidated by the federal Act. *Apparently, it’s the Act that’s pretty “sacred.”*

REGULATION (cont.)

ROBOCALL CRACKDOWN IN PROGRESS – A federal judge has ruled that a Virginia man and companies he controlled must pay \$32.4 million for making robocalls to more than 3.2 million recipients in order to promote a new movie. Robocalls are automated telephone calls delivering a prerecorded message. Earlier this year, another federal judge held that Dish Network Corp. must pay \$280 million to the U.S. and four states for making robocalls to consumers on do-not-call lists, and the Federal Communications Commission imposed a \$120 million fine, its largest ever, on a Florida-based robocall network accused of making more than a million such calls per day to promote timeshare services and other products. *Robocalls are prohibited by the federal Telephone Consumer Protection Act, (TCPA) and the FCC has announced a crackdown on such calls, which the Commission says represents the top source of consumer complaints it receives. Readers should avoid making such calls. They probably aren't worth the potential cost.*

WORDS MATTER IN CONSUMER PROTECTION – A federal judge has dismissed five consolidated class-action lawsuits accusing several companies of violating consumer protection laws in the sale of products labeled “100% Grated Parmesan Cheese.” The lawsuits alleged that the labels were deceptive because the products were not wholly composed of cheese. However, the judge found that the labels were merely ambiguous, not deceptive, because they could be interpreted as saying that the products were 100% cheese and nothing else, that 100% of the cheese in the products was parmesan cheese, or that the parmesan cheese in the products was 100% grated. Furthermore, the judge said the ambiguity in the labels should prompt reasonable consumers to resort to an ingredient list on the products disclosing the presence of non-cheese ingredients, namely, an anti-caking agent made from wood pulp. The situation would be different, he said, if the labels contained a clear – but false – statement about the products. *Ambiguities in the description of products may not lead to successful consumer protection claims when clarified by ingredient panels. But do they sell products? Wouldn't nonprofits and others selling products and services attract customers more effectively if they clearly told potential customers what they were being asked to buy? Maybe not if it's wood pulp.*

HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe attended the IREM/ Institute of Real Estate Management's Global Summit 2017. He presented a Chapter Leaders session titled "Who's Minding the Store." This session dealt with the duties of leadership overall, including fiduciary duties, loyalty, and obedience.

Jonathan Howe attended the IMEX America 2017 Trade Show in Las Vegas at the Sands Expo & Convention Center and spoke to senior associates of Conference Direct on "Rule World vs. Real World."

Naomi Angel conducted a Leadership Orientation session for the Board of Directors of a professional society in Kansas City, MO, and will report on current legal trends at a Board of Directors meeting of manufacturers in Houston.

Naomi will also present a hospitality mock trial and a Pop Quiz workshop on hotel contracts at Connect Faith in Cincinnati.



Mike Deese will be providing legal orientation sessions to several client Boards of Directors this month .

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