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THE HOWE & HUTTON REPORT

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TRENDING NOW

NEW HOTEL CANCELLATION POLICIES- More and more hotels are instituting 48-hour minimums for cancelling reservations last minute. Marriott and Hilton are the two largest hotel chains to recently announce this new policy. Intercontinental Hotel Group has just enacted a 24-hour minimum, but may follow suit with its competitors soon. With the numerous booking sites and apps, travelers often try to get the best deal by booking multiple rooms in advance and waiting until the last minute to cancel in order to rebook at a cheaper rate. *Cancellation policies may still vary by region and whether a property is franchised, so business travelers beware and double check the cancellation policy before you try to beat the system.*

RESEARCH SHOWS ONLINE HOTEL BOOKING SCAMS INCREASING – Research by the American Hotel and Lodging Association shows that online hotel booking scams are on the rise. American travelers are booking rooms on what they believe is a hotel website, only to find out, in 22% of reported cases, that they have booked on a fraudulent site, have no reservations and have lost money. Just two years ago, that number was six percent. The AHLA reports that the 55 million "bad bookings" made on fraudulent sites each year translate to $3.9 billion taken in by crooks. *Be careful out there. Look before you book!*

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NOT FOR PROFIT LAW DEVELOPMENTS

CHURCH ENTITLED TO COMPETE FOR PUBLIC BENEFITS – The Supreme Court of the United States has ruled that Missouri violated a church's rights under the U.S. Constitution's First Amendment by denying it a public benefit solely because it was a church. The Trinity Lutheran Church of Columbia, Inc. needed to replace the gravel surface of a playground at its Child Learning Center. It applied to the Missouri Department of Natural Resources for a grant that would enable the church to install a new surface made from recycled tires. But the Department refused the grant because it had a policy of denying grants to churches and other religious entities. The church then sued the Department, arguing that the Department's policy violated its right to the free exercise of religion, and the Supreme Court has agreed. *The Court rejected the state's argument that simply denying the church a benefit it was not obligated to provide did not meaningfully burden the church's rights. Rather, the Court concluded that the state had refused to allow the church to compete with secular organizations for an otherwise available public benefit solely because it was a church, and that amounted to an unconstitutional indirect coercion or penalty on the free exercise of religion.*

GUIDESTAR INSTITUTES, THEN REMOVES "HATE GROUP" LABELING – GuideStar, which provides online tax information on nonprofit organizations and has always called itself a neutral aggregator of such data, started and then stopped labeling some organizations "hate groups" in its published material. The labeling produced a furor of opposition, and at least one lawsuit, from the conservative organizations that made up the lion's share of the labeled entities. As a result, GuideStar's President and CEO, described on its website as a social change strategist, announced that the "hate group" labeling would be dropped from published material "for the time being," though it will make its labeling information available on request. *GuideStar had planned to incorporate in its material "hate group" designations produced by the Southern Poverty Law Center, an organization with an admitted left-wing political agenda. Consequently, groups labeled by them include not only entities that have violated the law and encouraged violence, but also groups with a right wing slant that have engaged in peaceful protests.*

TRAVEL DEVELOPMENTS

JUSTICES ALLOW PARTIAL ENFORCEMENT OF TRAVEL BAN – *H&H Report Update* - Overruling lower court decisions temporarily blocking enforcement of President Trump's latest travel ban, the Supreme Court of the United States has held that the President can enforce a partial prohibition on travel to the U.S. by individuals from six Middle Eastern countries pending further review in October. The ban will apply to travelers from Iran, Libya, Somalia, Sudan, Syria and Yemen. However, it will apply only if they have no credible claim of a "bona fide relationship with a person or entity in the United States" and it will not apply to people who already have legal visas or green cards or who have dual citizenship and are traveling on a passport issued by some other nation. Admission of refugees will also be suspended temporarily unless they are already scheduled for transit to the U.S. or have a "bona fide relationship" with a person or entity in the U.S., and a cap of 50,000 will be set for this year on the number of refugees that will be admitted to the country, though the government may allow waivers that could push the number higher. The Court's decision was by a 6-3 count, with three Justices dissenting because they would allow a ban with no exceptions for "bona fide relationships." The Court gave no guidance as to what a "bona fide relationship" is, but the Trump Administration wasted no time in trying to determine what such a relationship is, issuing determinations on the subject so that it could put the partial ban in place immediately. According to the Administration, a formal, documented business relationship with a U.S. entity that was formed in the ordinary course of business and not created for the purpose of evading the ban will be sufficient to allow a person admission to the U.S, and that would apply to students admitted to U.S. educational institutions, along with people accepting a job offer in the U.S. As for family relationships, government determinations indicate that spouses, children, parents, siblings, half relations such as half brothers, sisters, etc., and in-laws and step relatives, as well as people engaged to be married to Americans, will be allowed into the country. The Trump Administration would not allow admission for aunts, uncles, grandparents, grandchildren and cousins. However, as with pretty much everything connected with the travel ban, the details of what relatives will be allowed in are still being considered in the courts. Recently, the federal judge in Hawaii who previously enjoined enforcement of Trump's bans has issued an order prohibiting the government from enforcing a ban on grandparents, grandchildren, aunts, uncles, nieces, nephews and cousins of people in the U.S. *Would membership in an American nonprofit count as a bona fide business relationship? We'll have to wait for further guidance.*

HOMELAND SECURITY DROPS LAPTOP BAN – The U.S. Department of Homeland Security has announced that it is stepping back from its limited ban on air travel with laptops. In its place, the Department is instituting new requirements that include enhanced screening of passengers and their luggage at foreign airports and safety protocols for planes while on the ground there. The ban previously applied to aircraft flying to the U.S. from ten airports in the Middle East and North Africa. *Airlines complained about the ban, saying it would disrupt their operations and inconvenience passengers. Those airlines and airports not complying with the new security measures may be subject to a total prohibition of large electronic devices and on all flights to the U.S. Estimates are that the new security procedures will affect 325,000 passengers a day.*

REGULATORY LAW DEVELOPMENTS

COURT BLOCKS EPA LOOSENING OF EMISSIONS STANDARDS – A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit has held that the Environmental Protection Agency cannot suspend Obama Administration controls on emissions of methane and other greenhouse gases from new or recently modified facilities without providing public notice and a period for public comment on the suspension. Earlier this year, the EPA granted an industry request to suspend the emissions controls for two years while the controls were reviewed by the EPA. But the panel noted that, under the federal Administrative Procedure Act of 1946, government agencies must provide notice and allow for public comment before issuing new regulations, and the panel ruled that the same procedure must be followed when revoking or suspending existing regulations like the emissions controls. In this case, that had not been done when the EPA announced its suspension decision. *The Obama Administration occasionally tried adopting regulations without notice and a public comment period, only to face judicial rebukes for doing so. Now, the Trump Administration is finding that the same procedures apply when they try to revoke or suspend some Obama-era regulations.*

EPA RELEASES NEW RULES ON TESTING – The federal Environmental Protection Administration has released new rules intended to give the agency more discretion in deciding which chemicals used in consumer goods and other products will be tested by the EPA for environmental and health risks. Deputy Assistant Administrator Nancy Beck said that the agency's new rules were necessary because prior directives to the agency, formulated during the Obama Administration, were unworkable, requiring the agency to test every chemical for every potential use and misuse. The new rules attempt to establish priorities for testing some chemicals rather than others, distinguishing, for example, chemicals that have been made, sold or used in the last decade from others that haven't. The new rules mandate that the best scientific practices be employed to assess risks associated with various chemicals and products, and they give low priority to testing for intentional misuse of products. "Just because some people sniff glue," Beck said, "we're not going to spend time testing for that." *The new rules were praised by industry groups, such as the American Chemistry Council. But they drew immediate criticism from environmentalist and consumer advocacy organizations, which worry that the new rules will weaken environmental and consumer protections established by the Obama Administration.*

STATE ACA ROLLBACK MAY BE GETTING UNDERWAY - While Congress may be having trouble agreeing on provisions for rollback of the Affordable Care Act (Obamacare), and insurers are abandoning coverage under the ACA, states are also faced with growing Medicaid expenditures under the Act. Kentucky may be leading a state rollback of the Act's health insurance provisions. The Blue Grass State's health-insurance exchange under the ACA was once hailed as a model of success, and Kentucky embraced the Act's Medicaid expansion. But that was under former Governor Steve Beshear, a Democrat. Current Governor Matt Bevin, a Republican, has dismantled the state exchange and proposed conditions for Medicaid that would require recipients to pay premiums of up to $15 per month and either work or perform community service activities. *Other states are also pursuing changes in their Medicaid programs, encouraged by the Trump Administration. Maine is looking at work requirements and financial penalties for missing medical appointments. Wisconsin wants to add premiums and drug screenings for recipients. Such changes must be approved by the federal Centers for Medicare and Medicaid Services, now headed by an administrator who crafted Bevin's Medicaid plan.*

EMPLOYMENT LAW DEVELOPMENTS

DEPARTMENT OF LABOR RETHINKS EMPLOYMENT - The U.S. Department of Labor has withdrawn two prior Wage and Hour Division administrative interpretations on independent contractors and joint employers, signaling that the Trump Administration is going to look at employment very differently than Labor has done previously. One of those interpretations stated that most workers are employees, not independent contractors, effectively creating a presumption that workers are employees under the federal Fair Labor Standards Act, subject to minimum wage and overtime requirements. The other interpretation called for an expansive definition of "joint employment," suggesting, for instance, that a business or nonprofit retaining a contractor to provide workers for them may be joint employers with that contractor, responsible, along with the contractor, for the proper treatment of workers under federal wage and hour law. *What guidance will the Trump Administration provide to replace the withdrawn interpretations? Maybe none at all, but we'll see.*

FIDUCIARY RULE TAKES EFFECT AFTER ALL – *H&H Report Update* **-** After President Trump took office, the effective date of the previously promulgated "fiduciary rule" was delayed while the federal Labor Department began re-evaluating it pursuant to an order from the White House. The rule, among other things, provides for greater regulation of many people who offer investment advice to retirement plans and plan participants, including employers who give such advice, as many would be considered to be doing under a broad interpretation of the rule. The rule had been opposed by the financial industry, and the new Administration indicated that it had no love for such Obama-era regulation of business. So, it was assumed by many, including us, that the rule was doomed and would never take effect under the Trump regime. But, surprise! While Labor continues to study it, the Department, starting in June, began taking the first steps in implementing the rule. Now in effect is the requirement that people who provide investment advice be "fiduciaries," who must act in the best interest of the plans and participants. Other aspects of the rule are scheduled to be implemented later, including a requirement that such advisors disclose their conflicts of interest. That portion of the rule may not take effect until January. *Implementation of the rule may be taking place partly because of delay in the appointment of senior officials at Labor, who would be capable of unwinding the rule. Career lower-level officials at Labor helped write the rule under Obama and they are still in their positions, shepherding while they can.*

NO TITLE VII SUIT POSSIBLE WITHOUT ADVERSE EMPLOYMENT EFFECTS – The U.S. Court of Appeals for the Seventh Circuit has rejected an Equal Employment Opportunity Commission "EEOC" suit filed on behalf of a store manager who alleged that his employer violated federal law by transferring him from store to store in the Chicago area. The EEOC argued that the transfers violated a provision of Civil Rights Act Title VII that makes it unlawful for employers to limit, segregate or classify employees in a way that would deprive them of employment opportunities or affect their employee status because of race, color, religion, sex or national origin. However, the Court of Appeals held that the transfers in this case did not amount to an adverse employment action that would trigger Title VII protection, since none of the transfers entailed any loss of pay, benefits or responsibilities. *The EEOC said the manager was transferred from one store location because he is not Hispanic and the employer wanted that store to be a "predominantly Hispanic" store. If true, that would have been an action based on race. But the Court of Appeals said Title VII still wouldn't have been violated, since the employee hadn't suffered a loss of employment opportunities or status.*

EMPLOYMENT LAW (continued)

RESTITUTION TO ASSOCIATION ORDERED FROM RETIREMENT ACCOUNTS – The U.S. Court of Appeals for the Seventh Circuit in Chicago has affirmed a lower court order requiring a former association director to make restitution to the organization from his retirement accounts after the worker was found guilty of wire fraud in violation of federal law. The director was ordered to pay mandatory restitution to the association in the amount of $940,000, pursuant to the federal Mandatory Victims Restitution Act, and the federal government sought to enforce the restitution order for the association. When the government sought to collect around $327,000 from the criminal's retirement accounts, the former director argued that the retirement accounts could only be reached subject to a 25% garnishment cap contained in the federal Consumer Credit Protection Act. However, the Court of Appeals held that the garnishment cap only applied to periodic distributions from a retirement account, and not an account from which the worker was entitled to withdraw all of his funds at will, as was the case with the former director's accounts. *Nonprofits that have lost money to an employee's criminal scheme in violation of federal law can sometimes find a friend in the government. Employees who want to bilk their organizations should take note that their retirement accounts may suffer.*

TAX LAW DEVELOPMENTS

JUDGE REFERS IRS/TEA PARTY DISPUTE TO MEDIATOR – *H&H Report Update* – An Ohio federal judge has ordered mediation of a class action suit brought against the U.S. government by various conservative groups targeted for adverse treatment by the IRS during the Obama Administration. The IRS admitted that such tea party groups were given special scrutiny by the Service when they requested a federal income tax exemption or asked for other assistance from the government, resulting in denial and delay of approval. *The mediator in the case is another federal judge, and he will make an effort to work out a settlement of the matter. If a settlement cannot be reached, the litigation will proceed in court.*

EFFORT TO OVERTURN IRS "FACTS AND CIRCUMSTANCES" TEST FAILS – The conservative group Freedom Path Inc. has failed to persuade federal court judges in Texas that the Internal Revenue Service violated the U.S. Constitution by relying on a "facts and circumstances" test in denying the group a federal income tax exemption for prohibited political campaign activity. Freedom Path argued that it engaged in exempt "issue advocacy" rather than prohibited political activity when it produced television ads and pamphlets centering on the records of Senate and congressional candidates. Further, the group argued that the IRS test applied in the case, allowing the Service to consider various factors, rather than a clearly defined bright-line rule, in separating issue advocacy from political campaign activity, was vague, subjectively applied and burdensome on free speech. But the decision in this case upheld the "facts and circumstances" test and the denial of exemption, finding that the test was not overbroad just because it let the Service look at all of the facts in a case and balance them in coming to a conclusion. *Not only the IRS, but the courts in other contexts, frequently look at all "facts and circumstances" in determining various matters, rather than following some clearly defined rule. So, Freedom Path's effort may have been doomed from the start for that reason alone.*

OTHER ISSUES

COURT SAYS APPROPRIATIONS REQUIRED FOR STATE PAYMENTS – A state appeals court has ruled that 61 human services providers that contracted with the State of Illinois had to wait for appropriations and a budget approval to be paid. The Democrat-controlled General Assembly passed appropriations that would have covered the payments, but Republican Governor Bruce Rauner vetoed the appropriations in an effort to force the General Assembly's approval of a budget. In response to a suit filed by the providers, the appeals court found that it had no authority to order payment on the plaintiffs' contracts. The court noted that the Governor and the General Assembly were constrained by the state constitution to pass budgets and appropriations not exceeding estimated available funds, which the previously vetoed appropriations did. In addition, the court pointed out that each contract contained language allowing the state to terminate or suspend it if no funding was appropriated by the state. *The Illinois General Assembly was considering new appropriations as this article was written. If you are considering a state contract, you might check to see if it contains language allowing the state to withhold payments if no appropriations are made for them. Interestingly, the appeals court said that judges' salaries must be paid regardless of appropriations per the state constitution.*

SUPREME COURT LIMITS SUITS AWAY FROM DEFENDANT'S DOMICILE – The Supreme Court of the United States has placed a significant stumbling block in the way of people who want to sue someone in any state other than the defendant's domicile. The ruling came in a suit filed against Bristol-Myers Squibb Co. by patients who alleged that the BMS drug Plavix damaged their health. They sued in California, though most of the patients were not California residents, BMS is incorporated in Delaware and BMS is headquartered in New York. The California Superior Court and the California Supreme Court found that California courts could take jurisdiction of the suit because BMS engages in business activities in the Golden State, sells Plavix there, contracted with a California company to distribute Plavix nationally, and did some research in California on matters unrelated to Plavix. However, the U.S. Supreme Court held that the plaintiffs couldn't sue in California because they failed to allege an adequate link between that state and their claims, noting that, for general jurisdiction, the "paradigm forum" is the defendant's home. Suits filed anywhere else must allege that the suit arose out of or related to the defendant's contacts with the state where the suit is filed. *The U.S. Supreme Court indicated that the patients in this case might have been able to sue in the Golden State if they alleged that they had obtained Plavix from a California source, were injured in California or were treated with Plavix there. California is a favored forum for plaintiffs because some courts there tend to award large judgments to plaintiffs. But the Supreme Court didn't want to see defendants dragged into a California court unless they had more connections with the state than the plaintiffs alleged. "The primary concern," said the Court, "is the burden on the defendant."*

HOWE & HUTTON NEWS AND EVENTS

Jon Howe will be attended the ASAE Annual Meeting & Expo, Toronto, Ontario, Canada August 13-16, 2017.

Jon will present *"Minimize the Crisis in Crisis Management"* at CONNECT Corporate in New Orleans on Aug. 21-23, 2017.

On August 31st Jon will present an educational session at the Nassau Paradise Island Promotion Board's event for Meeting Planners.

Christina Pannos will be presenting a webinar "Risk Management in Times of Uncertainty" for Crowe Horwath on August 28th.

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