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## THE HOWE & HUTTON REPORT

### TRENDING NOW

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**PLAN AHEAD FOR EXCISE TAXES** – The Internal Revenue Service has issued proposed regulations for implementation of the new law imposing 21% federal excise taxes on an exempt organization’s compensation in excess of \$1 million paid to its five highest compensated employees and excess parachute payments to former employees, beginning in 2018. The excise taxes were part of the Tax Cuts and Jobs Act passed by Congress late last year. The Service says that employers must pay the tax and file IRS Form 4720, *Return of Certain Excise Taxes*, by the 15<sup>th</sup> day of the fifth month after the end of the organization’s taxable year (May 15 for organizations with taxable years coinciding with the calendar year). *The IRS has yet to update Form 4720 to account for the excise taxes, but they say they will get to it. Note that the new excise tax is not being treated as an unrelated business income tax, unlike other tax burdens arising under the Act, such as the tax on employee parking.*

**STATES PUSH MANDATORY RETIREMENT SAVINGS PLANS** – California and Illinois have recently required that employers automatically enroll workers in individual retirement accounts invested in mutual funds if the employers don’t offer other retirement savings plans to employees. Both states require deductions of 5% from worker paychecks in order to fund their programs, but workers are free to opt out of the IRA arrangement or change the savings rate dictated by law. Oregon adopted a similar requirement in 2017, and six other states are considering legislation that would achieve the same goal. *Rather than taking a mandatory coverage route, Vermont and Washington have enacted plans to encourage retirement savings without an employer mandate. Several other states are exploring that option. A potential fly in the ointment for all of the mandatory plans, at least, is that they may violate federal pension laws, as a pending lawsuit in California contends.*

**BACK PAY ALLOWED FOR HARASSMENT-BASED UNPAID MEDICAL LEAVE – *H&H Report Update*** - The U.S. Court of Appeals for the Seventh Circuit has upheld an award of back pay to a worker partly as compensation for unpaid medical leave she was forced to take due to a hostile work environment. The worker was harassed by a customer who asked her personal questions, hid behind merchandise in order to watch her, tried to give her his telephone number, asked her out on dates, attempted to hug or touch her, screamed profanities at her, and videotaped her in the workplace. Although the employer made some efforts to keep the customer away, his constant attentions despite those efforts made the worker seek a medical leave of absence that eventually lasted more than a year. At that point, the employer terminated the worker, and she went to the federal Equal Employment Opportunity Commission with a complaint for sex discrimination, which the EEOC took to court, obtaining a ruling that the employer had discriminated against the worker by maintaining a hostile work environment. In the calculation of damages, the employer questioned whether the worker could make a claim for back pay that included the time she was on unpaid medical leave. Now, the Seventh Circuit has ruled that, where the worker was forced to take unpaid medical leave because of sexual harassment, such a claim was proper. *Sexual harassment, increasingly, is in the courts and the headlines. If some cases lead one to wonder what sexual harassment is and isn't, this case presents a perfect example of what harassment is, and why it's illegal, though perhaps more unusual is employer liability for customer harassment, as in this case.*

**IRS ANNOUNCES RELIEF FOR EXEMPT ORGANIZATIONS** – The Internal Revenue Service has made several announcements designed to help exempt organizations burdened by nondeductible parking expenses resulting from the tax law passed by Congress at the end of 2017. First, the Service says it will allow exempt organizations to use already published IRS guidance or any reasonable method to calculate nondeductible parking expenses for employer-provided parking, at least until further guidance is issued. Second, until March 31, 2019, exempt organizations may reduce or eliminate the number of parking spots they reserve for employees, and, applicable retroactively to January 1, 2018, reduce their associated unrelated business income tax, or, in some cases, avoid filing a Form 990-T tax return altogether. Finally, the Service says it will provide estimated tax penalty relief for 2018 if organizations would be required to pay such penalties because of liability for the parking tax. *Thanks, IRS, but exempts just really don't want to pay the tax, period. Congress is to blame for that, though, not the Service.*

## TRENDING (cont.)

**SENATE VOTED TO OVERTURN DONOR DISCLOSURE PROTECTION** – *H&H Report Update* - The U.S. Senate has voted to overturn an Internal Revenue Service decision made last summer relaxing donor disclosure requirements for Section 501(c)(4) social welfare organizations. Such nonprofit organizations had previously been required to disclose on annual reports to the IRS the names and addresses of donors from whom they received contributions of \$5,000 or more, providing copies of the reports, with donor information redacted, to members of the public on request. But the IRS decided they didn't really need the donor identity information in order to enforce the tax laws, and they eliminated the donor disclosure requirements for 501(c)(4) groups. Now, the Senate, with all member Democrats and Republican Susan Collins in favor, has voted to reverse that IRS decision. *The Senate's decision must be acted upon by the House of Representatives before the reversal of the IRS becomes law, and that won't happen until newly elected Democrats are seated in the House in early 2019.*

## REGULATION

**TRUMP SIGNS NEW FEDERAL CYBERSECURITY MEASURE** – President Trump has signed into law new legislation intended to help stop threats to the nation's energy grid and critical infrastructure. The law renames and reorganizes a division within the Department of Homeland Security, to be called the Cybersecurity and Infrastructure Security Agency, which will head the government's security programs in that area. Operating with independence similar to the Secret Service, but within the Department, the reorganized agency is supposed to have the autonomy needed to speed up government functions and better enable a governmental response to a nationwide digital crisis, according to Department Secretary Kirstjen Nielsen. *Hopefully, the reorganization will remedy a problem Nielsen identified in October, when she testified to Congress that the Department was "not built for a digital pandemic."*

**COURT CONFLICT ARISES OVER FINGERPRINTING** - *H&H Report Update* – A conflict between districts of the Illinois Appellate Court has arisen over interpretation of the state Biometric Information Privacy Act, which prohibits taking a person's biometric information without their permission. The Second District has held that a person cannot sue a violator under the Act unless they can demonstrate an injury or adverse effect arising from the violation, although the Second District has stated that the injury or adverse effect need not involve monetary loss. Now, however, the First District has held that a plaintiff need not demonstrate an injury or adverse effect in order to sue for "liquidated damages," noting that the Act provides for both "liquidated damages" and "actual damages." The First District was deciding a case in which a person's fingerprints were required in order for her to purchase membership in a tanning salon business. Besides finding that the prior Second District case was "wrongly decided," the First District said that, even if "actual injury" was required for a suit under the Act, the plaintiff in the case before the First District met that requirement by alleging injury from mental anguish and disclosure of her biometric information to third-party vendors. *Fortunately, Illinois has a Supreme Court to resolve such disputes between Appellate Court districts, and, no doubt, it eventually will.*

## NON-PROFIT

**COURT OKAYS POLICY LIMITING BUSING FOR RELIGIOUS SCHOOL** – Faced with a case in which a school district and the Wisconsin Superintendent of Public Instruction were sued by parents for failing to provide bus transportation to and from a religious school, the U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court order upholding the defendants’ decision not to provide such transportation. The Court of Appeals found this was not a case of discrimination against a particular theology, ecclesiology or ritual. Rather, the evidence indicated that the decision was based on a secular statute limiting busing benefits to only one school in the district affiliated with any one sponsoring group. In this instance, the school for which busing was denied had declared itself Catholic when there was another Catholic school in the district for which busing benefits were provided. *Had the defendants made their decision based on non-neutral religious criteria, the parents’ suit might have succeeded. But they were not found to have done so in this case, even though the impact of the statute might have been felt more by Catholic schools because of their number as compared with other religious schools.*

## EMPLOYMENT

**RETALIATION PROVISION OF ADA GIVEN BROAD APPLICATION** – Can an employer fire a worker because he accused someone else of employment discrimination? It can be dangerous, as a hospital in Chicago recently discovered. A federal judge ruled that a podiatrist could sue a hospital for firing him after he sued another employer for allegedly discriminating against him in violation of the Americans with Disabilities Act. The podiatrist contended that the suit against the other employer angered the co-director of podiatric residency at the hospital, who was also a partner at the other employer’s practice, leading to the worker’s termination from work at the hospital. Now, the judge has rejected the hospital’s argument that the podiatrist couldn’t state a claim for retaliation against the hospital under the ADA because it was the other employer, not the hospital, that allegedly discriminated against the doctor. Instead, the judge held that the retaliation provision of the ADA clearly means “no employer may retaliate against someone who makes or supports a charge of discrimination against any employer.” *The two employers in this case were related through the co-director/partner. But the judge’s decision didn’t depend on that relationship. So, if one employer fires a worker deemed predisposed to suing because he has previously sued another unrelated employer for disability discrimination, the court’s rationale would support a claim of retaliation for that discharge.*

## EMPLOYMENT

**“COMBATIVE WORK BEHAVIOR” HELPED JUSTIFY FIRING** – A U.S. Court of Appeals has rejected a dental assistant’s suit for alleged employment discrimination, finding that the assistant was terminated for legitimate reasons, namely, his “combative work behavior,” illegally recording of a supervisor, and absences from work, plus his filing of three complaints against his employer with the federal Equal Employment Opportunity Commission, all of which were ultimately rejected by that body. The assistant claimed that his supervisor “harassed” him, was “short-tempered,” and did not allow him to schedule patients, use computer resources, or make ward visits, treating a new female assistant more favorably than he was treated. But, contrary to the assistant’s claims that he was subjected to race and sex discrimination amounting to a hostile work environment, the Court of Appeals held that the workplace conditions he described were not “objectively offensive, severe or pervasive,” noting also that the evidence as a whole did not permit a finding that race and sex caused his termination. *The EEOC complaints weren’t rejected until after the assistant was fired, and the employer might have been safer to employ the assistant until they were, rather than risking a charge that the employer retaliated against the assistant for making them. But some employees’ behavior in the workplace is just too inappropriate to support any employment discrimination claim absent some very strong evidence of it.*

**FAULTY PLEADING KILLS EMPLOYMENT DISCRIMINATION SUIT** – The U.S. Court of Appeals for the Seventh Circuit has affirmed judgment by a lower court rejecting employment discrimination claims and other claims filed by a worker against her former employer, pointing out that the worker failed to plead her case properly. Riley claimed that, during her employment with the Kokomo Housing Authority (KHA), she suffered from seizures, anxiety disorder, post-traumatic stress disorder, bipolar disorder and depression, which required her to take leaves of absence. She claimed that KHA improperly denied her requests for medical leave and retaliated against her for making those requests by disciplining and terminating her, in violation of the federal Family and Medical Leave Act, Americans with Disabilities Act, Civil Rights Act and Fair Housing Act. But the Court of Appeals noted that five months elapsed between the end of FMLA leave she had taken and the first disciplinary action taken against her by the Authority, a written warning. The court also said that, although the Authority then told her that her FMLA leave eligibility had been exhausted, she was allowed time off for medical appointments nonetheless. When she filed an EEOC charge against KHA, Riley omitted any allegation that KHA denied her a reasonable accommodation for a disability. And finally, in rejecting Riley’s retaliation and FHA claims, the Court of Appeals found there was no evidence Riley reported a discriminatory housing practice to the U.S. Department of Housing and Urban Development.

## TAXATION

**IRS ANNOUNCES TAX RELIEF FOR CALIFORNIA FIRE VICTIMS** – The Internal Revenue Service has announced that it will provide some tax relief for victims of the wildfires raging in California. Nonprofit, residential and business taxpayers will receive additional time for select tax filings due before April 30, 2019. This includes tax-exempt organizations that had an extension for filing Form 990 information returns running out on November 15, 2018. Affected individuals and organizations located in Butte, Los Angeles and Ventura counties of California will automatically receive an extension until April 30, 2019. Other affected persons and entities should call the telephone number listed on any penalty notice they receive from the Service or call the IRS disaster hotline at 866-562-5227. Information on qualification for disaster relief can also be found at [www.disasterassistance.gov](http://www.disasterassistance.gov) and [info@ssflp.com](mailto:info@ssflp.com). *The assistance announced by the IRS is similar to that granted earlier to victims of hurricanes striking the U.S.*

## INTELLECTUAL PROPERTY

**GIRL SCOUTS SUE BOY SCOUTS** – The Girl Scouts of the United States of America is suing the Boy Scouts of America over their recent efforts to recruit girls, which the Girl Scouts allege are deceptive. The Girl Scouts allege that the Boy Scouts are eliminating the gender designation in their promotions, calling themselves simply the “Scouts,” and promoting services for girls as well as boys. The Girl Scouts argue that such efforts are infringing upon their trademark rights, confusing consumers, and represent a deliberate effort to undermine their group. The Boy Scouts say they are just being “inclusive” and haven’t violated anyone’s rights. *To hear the Girl Scouts tell it, though, the Boy Scouts have done more than infringe on their identity. They say that at least some Boy Scout branches have been discouraging businesses from having anything to do with the Girl Scouts, and even claiming that the two organizations are the same or are related (they aren’t). If true, that would give “scout’s honor” a new meaning.*

**Warmest Wishes for a wonderful Holiday Season  
and a Happy New Year!**



## HOWE & HUTTON NEWS AND EVENTS



Jon Howe presented “Disruption in the Market Place-Contracts” at the Nassau Paradise Island Promotion Board.

Jon also presented “The Lawyer Is In – Open Q&A Forum” at Destination Texas.

Jon attended the “US Chamber Association, Committee of 100”– Association Executive CEO Forum.

Nathan Breen gave a report on legal trends to the Board of Directors of a trade association of manufacturers.

Nathan will be participating in a panel discussion with a number of event professionals in January 2019 at “The Special Event” held at the San Diego Convention Center. The program is: "Cannabis and Events: A New Niche Market or a Risky Proposition?"

For more information see [thespecialeventshow.com](http://thespecialeventshow.com)



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