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THE HOWE & HUTTON REPORT

TRENDING NOW

Volume 2018, Issue 7

CALIFORNIA PASSES DATA PROTECTION LAW – In June, on the heels of the implementation of the General Data Protection Regulation (GDPR), California passed the California Consumer Privacy Act of 2018. The new law goes into effect January 2020, and like the GDPR, focuses on transparency and providing consumers the right to know what information is being collected about them and who is sharing data with whom. Consumers will be able to opt out of having personal data sold and can request that data be deleted. Unlike the GDPR, the California law applies only to large corporations and associations, namely those with annual gross revenues over \$50 million among other specifications. The law applies to California companies and those doing business in California, which effectively includes most major businesses, including large tech companies. *Just when you thought you were GDPR compliant, now strict data privacy is heading to the U.S. This law will not go into effect for a year and a half, but may incite other states to enact similar legislation. Stay tuned for updates.*

SUPREME COURT REMOVES BARRIER TO INTERNET SALES TAX – The Supreme Court of the U.S. has overturned one of its own earlier decisions and ruled that states can impose sales tax on purchases by their residents even if the seller has no “connection” to those states. The 5-4 decision in *South Dakota v. Wayfair, Inc.*, with a majority opinion authored by Justice Kennedy, paves the way for states to tax purchases by their residents over the Internet. Such taxes were prohibited under the 1992 *Quill* decision unless the seller had brick-and-mortar offices, sales personnel, or various other activities in the buyer’s state. *Justice Kennedy explained the Court’s reversal from its Quill decision, saying flatly that the Quill decision was in “error” and that the Internet revolution has made that error “all the more egregious and harmful.” He also said that the Quill decision was rendered when the Court “did not have before it the present realities of the interstate marketplace,” where the Internet has changed the dynamics of the national economy.*

TRENDING NOW

COURT DEALS BLOW TO PUBLIC SECTOR UNIONS – The Supreme Court of the United States has ruled that public sector unions cannot compel non-member workers in a collective bargaining unit to pay dues to defray the cost of the unions’ worker representation activities. All five of the Court’s Justices appointed by Republicans joined the opinion of the Court while the four Justices appointed by Democrats dissented. The Court’s opinion was based on First Amendment rights, and it overturned judicial precedent established by the Court 41 years ago, which allowed such union practices. *Although the Court’s decision technically applied only to public sector unions, the decision may have consequences in the private sector as well, where employees may be more inclined not to vote for unionization, or, at least, exclusive representation by one union in their workplace. Union collection of dues from non-members was justified by the dissenting Justices based on the argument that unions are legally required to represent non-members in their collective bargaining units. But that is only true of unions given the right of exclusive representation in unit elections, preventing non union workers from bargaining together for themselves and preventing other unions from engaging in representation of workers in their units.*

TRUMP-CHINA SUMMIT DOESN’T STOP NEW U.S. TARIFFS – *H&H Report Update* – In the wake of the Singapore summit between the nations’ leaders, focusing on national security and economic issues, discussions/threats continue between the U.S. and China over tariffs each country has announced. Both countries agreed it was a good idea to denuclearize the Korean peninsula, President Trump said the U.S. would conduct no more “war games” with South Korea, and the most recently scheduled one was called off. Meanwhile, on the economic front, China has promised to buy more U.S. goods in response to U.S. concerns over the American trade deficit with China. The Trump Administration hasn’t backed down as yet from going ahead with \$50 billion in previously announced tariffs on Chinese products, and, in fact, has identified a new list of \$200 billion in Chinese goods that would be penalized. Beijing has threatened that it would not comply with any deal for greater Chinese imports of U.S. products if those new tariffs on China’s goods are imposed.

FINANCIAL DEREGULATION BILL APPROVED – Congress has passed new legislation to relax some regulation of small and midsize banks under the federal Dodd-Frank laws. When he was running for president, Trump promised to substantially change Dodd-Frank by reducing restrictions on financial institutions. Now, he has been able to enact such legislation, with substantial bipartisan support in Congress. The new law leaves in place many of the most significant Dodd-Frank provisions, such as emergency government powers and curbs on sale of derivatives, which curbs were thought to be necessary when Dodd-Frank was enacted during the 2008 financial crisis. However, the new law makes community banks eligible relief from mortgage-underwriting standards, and it exempts banks with less than \$250 billion in assets from stress tests and other rules. *Passage of the new law with bipartisan support is expected to set off a wave of other deregulatory actions by federal agencies.*

TRENDING (cont.)

NAFTA REPLACEMENT NEGOTIATIONS COULD SPILL INTO 2019 – *H&H Report Update* - U.S. Secretary of the Treasury Steven Mnuchin has said that negotiations with Canada and Mexico over a replacement for the North American Free Trade Agreement (NAFTA) could continue into 2019. Mnuchin has said negotiators are far apart, though they are continuing to work through many trade issues that divide the U.S. and its neighboring countries. The Trump Administration failed to meet an informal deadline imposed by Speaker of the House Paul Ryan for giving Congress a NAFTA replacement in time for Congressional action this year. *President Trump pulled the United States out of NAFTA, which went into effect in 1994, because he said it was bad for the U.S. and American workers, and he says he is more concerned with coming up with a new agreement benefitting the U.S. than in meeting any deadline for action. Of course, Canada and Mexico would want any new agreement to benefit them as well.*

SUPREME COURT OKAYS TRUMP'S LATEST TRAVEL BAN – *H&H Report Update* - The Supreme Court of the United States has put an end to litigation over President Trump's travel bans affecting individuals from several majority Muslim countries and other nations seeking to enter the U.S. By a 5-4 vote, the Court upheld the President's most recent version of a ban after several lower courts had declared it unlawful as discriminatory against Muslims. Following two earlier bans that ran into trouble in the courts, the President's latest ban applies to travelers from Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen. Chad was dropped from that list in April. Writing the opinion of the Court, Chief Justice Roberts stated that, even if the President was moved by bigotry against Muslims in creating the latest ban, the President's motivations were irrelevant because the ban itself wasn't discriminatory, saying nothing about religion. The Court concluded that the ban was premised on legitimate purposes, namely, preventing entry of nationals who were not being adequately vetted in their home countries to ensure they were not a terrorist threat, and inducing listed nations to improve their vetting practices. That being the case, the Court concluded that creating the ban was squarely within the President's authority. *Chief Justice Roberts also noted that, if the ban was meant to be an instrument for discrimination against Muslims, it was a highly ineffective one, since it applied to only eight percent of the world's Muslim population. The Chief Justice was joined in supporting the ban by four other Justices appointed by Republican Presidents, while all four Justices voting to strike down the ban were appointed by Democrats.*

COURT REFUSES TO DELAY DEFAMATION CLAIM AGAINST TRUMP – A New York court has refused to delay a defamation suit against President Trump until after his presidency. A former "Apprentice" television show contestant is suing Trump for comments he made about her after she publicly alleged that he was sexually abusive to her when they were both on that television show. While Trump's lawyers have tried to stall the case, her attorneys are seeking discovery of documents concerning Trump's behavior and comments regarding women, which the attorneys are now free to pursue. Trump's lawyers are going to appeal, and arguments will be heard in an appellate court this fall. *It is interesting that the alleged victim is barred from filing a lawsuit for sexual harassment by Trump because the statute of limitations for such suits expired. However, Trump's tweets to the effect that the former contestant is perpetrating a hoax allowed her to sue for defamation, which was subject to a statute of limitations that had not expired. In legal matters, it's generally better to keep your mouth shut than to make comments that may come back to bite you later.*

TRENDING (cont.)

JUSTICES DECIDE CAKESHOP/SAME-SEX MARRIAGE CASE – H&H Report Update The Supreme Court of the United States has ruled that members of the Colorado Civil Rights Commission were openly hostile to a baker who refused to serve a same-sex couple on religious grounds and the Commission therefore couldn't enforce the state civil rights law against him. The baker had refused to provide the couple with a wedding cake, and the Commission decided that the baker had violated the state law, which forbids discrimination based on sexual orientation. The Supreme Court found that the baker was not given neutral and respectful consideration of his religion-based defense, and overturned the Commission decision, because several Commission members had made comments "implying that religious beliefs and persons are less than fully welcome in Colorado's business community." Some commentators were disappointed that the Court didn't decide more clearly whether the baker had the right to decline service to the couple. *There are several other cases that may be on the path to a Supreme Court decision regarding a merchant's asserted right to deny service on the basis of religious objections to same-sex marriage. One, involving a florist's refusal to sell wedding flowers to a same-sex couple, is already being considered by the Court.*

CONGRESS, TRUMP IN SCRAP OVER CHINA TRADE POLICIES – Congress is indicating a willingness to try and curtail the Trump Administration's initiative to improve relations with China if it is seen as endangering national security. A lightning rod for congressional concerns has been Chinese telecommunications giant ZTE Corp. That company has been accused of producing equipment used to spy on Americans and failing to punish employees who violated American sanctions against Iran and North Korea. But now it may benefit from preliminary agreement on a deal between the Trump Administration and China that would lift an April Commerce Department ban on American companies selling parts to ZTE, which hurt ZTE badly, as well as its American trade partners. The Senate Banking Committee recently gave bipartisan approval to legislation that would ostensibly prohibit the Administration from eliminating such penalties, and a bipartisan group of 27 senators has urged the heads of the U.S. trade representative's office and Treasury and Commerce departments to reject any proposals to ease export controls on China as a way to boost American sales to that country. *The White House says it is not using ZTE as a bargaining chip in China negotiations. However, Trump has tweeted that he and Chinese President Xi Jinping would be "working together to give massive Chinese phone company, ZTE, a way to get back into business, fast." He added: "Too many jobs in China lost. Commerce Department has been instructed to get it done!"*

TRENDING (cont.)

CVS DEFAMATION VERDICT LARGELY REVERSED – A federal appeals court has largely, though not entirely, reversed a \$1 million plus verdict in a defamation suit filed against CVS pharmacy by a doctor who claimed his reputation was damaged because of false statements made about him by CVS employees when refusing to fill his opioid prescriptions. The CVS employees told the doctor’s patients that he ran a “pill mill,” had been or was going to be arrested because of his prescriptions, was being investigated by the U.S. Drug Enforcement Administration, and was going to jail. But the U.S. Court of Appeals for the Seventh Circuit reversed a trial court verdict for the doctor with respect to all but one of those statements because the doctor had not proven that the statements were made with “actual malice,” that is, with knowledge that the statement was false or with reckless disregard for whether it was false or not. The Court of Appeals found that Indiana law controlled the suit and prescribed the “actual malice” standard for application to statements about someone’s misconduct in his or her profession. The appellate court ordered a new trial with respect to the statement about a DEA investigation because the trial court made errors in ruling on admission of evidence concerning that statement. *Workers can get their employers in plenty of legal trouble by making statements about someone that damage that person’s reputation. In this case, it is interesting that the CVS executive office might have had prior knowledge that some of the statements made about the doctor were false. But the appellate court found that it was the state of mind of the employee speakers that was relevant in the defamation suit, and there was no evidence that they had any knowledge that their statements might be false, even if someone in the CVS executive office might have had such knowledge.*

EMPLOYMENT

AGE DISCRIMINATION LAWS PROTECT JOB APPLICANTS – The U.S. Court of Appeals for the Seventh Circuit has held that federal prohibitions on age discrimination protect job applicants as well as current employees. An attorney with extensive experience in private practice, who worked as general counsel for a major national company, led a national trade association, and worked for a real estate development company and a medical device company, could not find new employment after sending out more than 150 applications. One application was to a company that stated job applicants for a particular position must have “three to seven years (no more than seven years) of relevant legal experience.” That company never interviewed the attorney and filled the position with a younger applicant, prompting the experienced job applicant to sue that company for age discrimination. The company defended with the argument that federal age discrimination laws apply only to discrimination against current employees, not job applicants. Not so, said the Court of Appeals, reversing a dismissal of the attorney’s suit by a federal district court. *Federal law prohibits employment practices that discriminate intentionally against older workers, and prohibits practices that have a disparate impact on older workers, the appellate court ruled. The Seventh Circuit noted that it simply “could not imagine why Congress might have chosen to allow employment discrimination claims by current employees, including internal job applicants, while excluding outside job applicants.”*

NON-PROFITS

WATCH OUT FOR EMINENT DOMAIN POWER – A landlord sued the City of Joliet, Illinois, contending that the City violated the federal Fair Housing Act by interfering with the way the landlord set rents for federally subsidized apartments. While that dispute was unresolved, Joliet took the landlord's property under its eminent domain power, proposing to add the land to a public park. The landlord claimed that, as a recipient of federal financing, it was immune from eminent domain takings, but the U.S. Court of Appeals for the Seventh Circuit held that federal financing under the Act conferred no such immunity and upheld the City's eminent domain taking of the landlord's property for fair market value set at \$15 million. *Many nonprofits receive federal funding, but that won't insulate them from an eminent domain taking if they tick off the local government. In this case, the landlord had the \$15 million as consolation, but fair market value is sometimes subject to dispute.*

TAXATION

IRS PROVIDES NEW TOOL TO ACCESS EXEMPT ORGANIZATION INFO – The Internal Revenue Service has unveiled a new online tool that provides information on tax-exempt organizations, designed to replace EO Select Check. TEOS will feature newly filed Form 990s and favorable determination letters newly issued by the IRS, which were not available on EO Select Check. This information will be phased in, starting with the newest Form 990s and determination letters, with older ones being added to the new tool over time. TEOS is supposed to make searching for data easier, as well as providing more information, and it is intended to work better than EO Select Check on mobile devices. *Tax-exempts still have to make their exemption applications, exemption determinations, and three most recent Form 990s available to requesting members of the public per federal law.*

BILL TRIES TO REMOVE EXEMPTION FOR PROFESSIONAL SPORTS LEAGUES – Getting a lot of publicity now is a new bi-partisan effort in Congress to enact legislation that would strip professional sports leagues of their federal income tax exemptions. Not all leagues have them, and it's the tax-paying teams and individual participants in the leagues, not the leagues themselves, that make much of the money people tend to talk about in connection with professional sports. But proponents of removing league tax exemptions say it will result in \$100 million in savings for the federal government over ten years. *Some people in Washington are looking for ways to increase federal tax revenue without raising tax rates, and some are targeting exempt organizations. A provision that would have removed exemptions for professional sports leagues from the Internal Revenue Code was in an early draft of the tax bill that passed Congress in December. But it was removed before the bill achieved final passage. We'll see what happens with this new effort.*

HOWE & HUTTON NEWS AND EVENTS



Naomi Angel presented a report on current legal issues to a Board of Directors in New Orleans, LA.

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