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THE HOWE & HUTTON REPORT

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TRENDING NOW

NEW YORK INSTITUTES PROGRESSIVE PAID FAMILY LEAVE LAW - Starting January 1, 2018, the New York State Paid Family Leave Law (NYPFL) provides New Yorkers job-protected, paid leave to care for their loved ones without risking their economic security. Job protection is defined as returning an employee to the same or a comparable job he/she held prior to taking leave. The new measures apply to adopted or foster children, as well as ill family members, including children, in-laws, domestic partners, and those who are experiencing family pressures when someone is called to active military service. All full-time and part-time employees are eligible for NYPFL benefits, which increase over a four-year period. In the first year, eligible employees will be entitled to eight weeks of paid family leave within a 52-week period (either 50% of their average weekly wage or 50% of the state average weekly wage, whichever is less). Employers must also continue to provide health insurance benefits to employees during the qualifying leave period, but they may require their employees to pay their portion of insurance premiums. All businesses in the state, regardless of size, have to comply. This is different than the federal Family Medical Leave Act, which guarantees up to 12 weeks of unpaid leave to workers at businesses with 50 or more full-time workers. Most private employers with one or more employees are required to obtain Paid Family Leave insurance. *If you haven't already done so, immediately inform your New York employees about paid family leave, update your employment policies, and make sure you are complying with the new law. If you do not have an employee handbook, provide written guidance to New York employees on their rights and obligations under NYPFL, including information on how to request leave. Update your payroll processes to collect the employee payroll withholdings or contributions that pay for the insurance. And remember: an employer may not discriminate or retaliate against employees for requesting or taking paid family leave.*

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TRENDING NOW (cont.)

SUPREME COURT LETS TRUMP ENFORCE TRAVEL BAN PENDING APPEAL – *H&H Report Update* **–** The Supreme Court of the United States has allowed President Trump to enforce his latest travel ban while the Court reviews lower court orders regarding the restriction. This is the first time the Court has allowed the President to enforce one of his bans into pending arguments and briefings on its legality. The most recent direction from the President applies to travelers from Chad, Iran, Libya, Somalia, Syria, Yemen and North Korea, as well as some Venezuelan government officials, but not travelers with close connections to U.S. resident individuals or other resident entities. Two federal district courts had struck down the latest ban, finding that it had constitutional and statutory problems because it was motivated by the same animus toward Muslims that tainted his prior travel restrictions. *Some analysts believe that the Supreme Court's most recent order indicates that the Court is ready, after further briefings and arguments, to end all of the litigation over the President's travel bans by ruling that he can limit travel from specific countries any way he likes in the interest of national security.*

EMPLOYMENT LAW DEVELOPMENTS

DISCRIMINATION NOT SHOWN BY PAY DISPARITY AND ONE COMMENT – The U.S. Court of Appeals for the Seventh Circuit has upheld a district court dismissal of a suit for reverse discrimination where the only evidence of it was a disparity in pay between one employee and another, along with one possibly racist, but ambiguous, comment made by a supervisor who had no say in deciding pay rates. Golla, a white employee, alleged that Taylor, an African-American employee, was paid a significantly higher salary than Golla received despite their working in the same department and performing the same duties under essentially the same title. However, though he received a right-to-sue letter from the federal EEOC, the only evidence that the disparity in pay was caused by racial discrimination was one possibly racist, but ambiguous, comment made by a supervisor who had no say in determining how much either employee was paid. The pay grade for each employee appeared to have been carried over when each was transferred to the department from a different job, and the pay Golla received was agreed to by him when he settled an earlier discrimination suit. Furthermore, there were 17 other employees, both white and African-American, in the same department who had basically the same duties as Golla and were paid less than he was. *A discrimination suit based on a disparity in pay needs to establish that the disparity is the result of discrimination, not, as here, that it resulted from a less than totally fair and reasonable pay grade system.*

EMPLOYMENT LAW (cont.)

SUIT AGAINST GOOGLE RAISES ISSUES ABOUT "BIOMETRIC INFORMATION" – A suit against Google in an Illinois federal district court raises issues regarding collection and use of "biometric information" or a "biometric identifier" as regulated under the Illinois Biometric Information Privacy Act. The class action suit alleged that photos uploaded to Google were scanned for facial features to create facial templates that were made publicly available by Google without its users' permission in violation of the Act. The Act requires "private entities" possessing "biometric identifiers or biometric information" to publish a written policy regarding retention and destruction of such materials, dispose of such materials within three years or once the purpose for collecting them has been satisfied, provide written notice to individuals before collecting any of their material as covered by the Act, and treat all biometric data in a confidential manner. Damages can be obtained in a suit filed under the Act, but, in this case, the court first had to decide whether the photos collected by Google actually constituted biometric information or identifiers covered by the Act. The court rejected Google's motion to dismiss based on the argument that all photos were excluded from the Act, but the court required further proceedings to make a determination as to whether Google's specific practices constituted a violation. *An increasing number of states are enacting laws protecting "biometric information" and "biometric identifiers" and suits alleging violations of such laws, especially by employers, are proliferating. So, readers collecting data such as finger prints, voice prints, iris or retina patterns or facial characteristics should investigate the laws applicable to such practices.*

REASONABLE EXPECTATIONS JUSTIFY PAY INCREASES – The Illinois Appellate Court, Fifth District, has ruled that state workers who had received certain pay increases for decades had a reasonable expectation that they would continue to receive pay increases while their employer negotiated with their union on a new labor contract, and thus should receive them. The decision came despite the fact that the union workers did not continuously receive the increases during previous years, pay increases during three previous periods when a new labor contract was being negotiated had been handled in different ways, and the Illinois Labor Relations Board had previously decided that the workers were not entitled to continued pay increases. *Although the workers were members of a union, the decision did not turn on provisions of statutory labor law, but on the "reasonable expectations" of the workers. In addition, the court did not apply an earlier Illinois Supreme Court decision holding that state workers weren't guaranteed certain pay raises absent an appropriation of funds from the General Assembly. The Appellate Court said that it was "not clear" whether the lack of appropriations during the previous case would be a problem in the current case as well.*

EMPLOYMENT LAW (cont.)

ILLEGAL TERMINATION NOT PROVEN BY MERE ALLEGATIONS – The U.S. Court Of Appeals for the Seventh Circuit in Chicago recently upheld a lower court decision that a female supervisory employee failed to prove that she was the victim of sex discrimination when she was discharged because of an undisclosed sexual relationship with a subordinate. She alleged many actions by her employer that she believed represented discriminatory treatment of her as a woman. But the Court of Appeals noted that many of them were unrelated to the adverse employment action of which she complained, namely, her discharge. And while she alleged that she was treated differently than male supervisors having sexual relationships with subordinates, which might have been actionable employment discrimination, she presented no evidence of a male supervisor who was in an undisclosed relationship with a subordinate and was given better treatment than she was. Therefore, the lower court could reasonably find that her sex hadn't caused her termination. *Allegations aren't evidence. Courts aren't likely to find that a legal case has been made based on mere accusations, though the media and some government officials often seem perfectly happy to brand someone guilty of misconduct based only on an alleged victim's word and without due process.*

TAXATION

DO YOU WANT TO BE MY PARTNER? – Tax-exempt entities increasingly are entering into relationships with for-profit entities that they characterize as "partnerships." True partnerships involve the potential for joint and several liability for debt and other obligations in connection with "partnership" activities. Furthermore, unless the "partnership" provides substantial control for the nonprofit and advances the tax-exempt purposes of the nonprofit (aside from just producing income for it), a "partnership" can jeopardize the nonprofit's tax-exempt status. *What a relationship is certainly has more legal importance than what the participants call it. But arrangements that are called a "partnership" can create a legal presumption that they are partnerships for all legal purposes, which will have to be overcome by evidence indicating otherwise if a "partner" doesn't want to be treated as such. Better not to enter into "partnership" agreements in the first place unless you mean for your nonprofit to be treated legally as a true partner. Use just about any alternative language instead, such as "alliance".*

IRS RECOGNIZES LEAVE-BASED DONATIONS TO AID WILDFIRE VICTIMS – The Internal Revenue Service has announced that it will offer tax benefits for employer leave-based donation programs to aid victims of the California wildfires that began on October 8, 2017. Under such programs, employees can elect to forego vacation, sick or personal leave in exchange for cash payments the employer makes to charities that provide such aid. The Service says it will not assert that employees making such elections are receiving taxable income as a result, provided payments to the charities are made before January 1, 2019. But the employees will not be able to claim a charitable donation deduction for such payments. *This treatment of employer leave-based donation programs is similar to the treatment the IRS gave such programs that benefitted victims of the hurricanes occurring earlier this year.*

REGULATION

ACA WAIVER PROCESS STYMIES IOWA – *H&H Report Update* – The State of Iowa is giving up on plans to reshape its Affordable Care Act (Obamacare) implementation following the federal government's failure to approve the state's petition for a waiver of certain ACA requirements. The Trump Administration had signaled its support for such efforts, but the federal Centers for Medicare and Medicaid Services refused to give Iowa an estimate of the amount of federal money that would be available to implement Iowa's reshaped program before enrollment for 2018 insurance was scheduled to start *The ACA exchange in Iowa was down to one insurer for 2018, and that insurer, Medica, was increasing premiums around 57%. The state's largest insurer, Wellmark Blue Cross, had said that it would reverse plans to exit the state's individual insurance market and would sell plans throughout Iowa if the state obtained its requested ACA waiver.*

FEC FINES GROUPS COLLECTIVELY FOR HIDING DONORS – The Federal Election Commission has collectively fined three conservative groups $350,000 for transferring funds between organizations in order to hide the true source of $1.7 million in campaign contributions given for use in several 2012 Congressional races. Though fines were levied against the three groups, one is no longer in existence, one is said to be "relatively inactive right now," and the leaders of the groups five years ago reportedly "no longer have any affiliation" with them. *They say the wheels of justice turn slowly but grind exceedingly fine. In this case, that appears to be only half true.*

HOSPITAL OWNER FINED FOR CONVERTING TO NONPROFIT – The Rhode Island Department of Health has fined the owner of Landmark Medical Center $1 million for converting a hospital from for-profit to nonprofit status without required regulatory approval, and then giving the state false information about the change. The owner transferred assets to a charitable nonprofit affiliate, potentially avoiding millions of dollars in property taxes, and then falsely advised the Department that the asset transfer would not take place until later, when the Department approved it. *Health regulators uncovered the deception when the owner submitted annual financial information to the state, thus informing on itself! The fine is reportedly the largest issued by the Department in at least thirty years.*

DISTRIBUTOR IS NOT COMPETITOR FOR PURPOSES OF NONCOMPETE – The U.S. Court of Appeals for the Seventh Circuit deciding a case involving the enforcement of a noncompete agreement, ruled that a distributor is not a competitor to whom the agreement would apply. Miller signed such an agreement when he sold his fuel-additives business to E.T. Products. About a year later, he sold another business, Petroleum Solutions, to Kuhns, and he provided assistance to Kuhns as he learned the Petroleum Solutions business. E.T. then sued Miller, claiming that the assistance to Kuhns was in violation of the agreement. But a trial court and the Court of Appeals ruled that the noncompete agreement hadn't been violated because, at the time Miller gave assistance to Kuhns, Petroleum Solutions was E.T.'s distributor, and a company's distributor is not its competitor. *For-profits and nonprofits sign and try to enforce noncompete agreements. This case shows that anyone expecting to rely on such an agreement as executed by someone else should ensure that the agreement is carefully worded to cover all of the situations in which it might be invoked.*

REGULATION (cont.)

LICENSE REMOVAL REQUIRES DUE PROCESS – The U.S. Court of Appeals for the Seventh Circuit has ruled that a county government can be sued for violation of a citizen's rights when it deprives him of a license to operate his business without notice of the reasons for the deprivation and a proper hearing of his objections. In reversing a federal district court decision to the contrary, the Court of Appeals held that Simpson, a septic tank contractor, could sue Brown County, Indiana after its Health Department rescinded his license to install septic systems without giving him procedural due process. Ironically, the dispute between the parties arose when the Department sent Simpson a letter demanding that he immediately repair a septic system on his mother's property. Two weeks later, the Department sent Simpson a letter announcing that, based on some unspecified "findings," his name had been removed from the county's list of approved septic contractors. Simpson responded by suing the county under federal civil rights law. The Court of Appeals has now remanded the case to the district court for consideration of what remedy to provide Simpson, saying that Simpson should have been told what the Department's "findings" were and he should have been given an opportunity to present opposing arguments before his license was rescinded. *Local governments not infrequently act like they are a law unto themselves, and challenging their actions isn't easy or inexpensive. In this instance, Simpson had to "make a federal case out of it," lose in trial court, and appeal to the Seventh Circuit just to find out why his license was being rescinded and get some county official to hear his objections before his livelihood was taken from him.*

NON-PROFITS

GROUP FOUND LIABLE FOR PREDECESSOR ORGANIZATION'S CONTRACT – The Illinois Appellate Court for the First District has upheld a lower court's ruling that an unincorporated local Teamsters chapter was liable for violating a contract executed by a previous chapter for the development of certain property, even though the contract was executed contrary to state law and the previous chapter's bylaws. The Illinois Property of Unincorporated Associations Act required that the previous chapter's members formally approve a deal for development of real estate, which wasn't done in this case. Furthermore, under the bylaws of the previous chapter, two officers were required to sign such a deal, while this contract was signed only by the secretary-treasurer of the chapter. Nevertheless, in this case, the defendant new chapter was set up after the former chapter encountered financial trouble and dissolved, the previous chapter's executive board had accepted the property deal, and its members had never voiced opposition to it. Consequently, the Appellate Court concluded that the secretary-treasurer had "apparent authority" to sign the contract, even if not "actual authority," and the contract was valid and enforceable against the new chapter as the "successor" of the old chapter. *This is apparently the first case in Illinois where "successor" liability was imposed on an unincorporated entity. But "successor" liability has often been imposed on corporations set up in an attempt to avoid liabilities assumed by a predecessor, and the Appellate Court said it saw "no sound reason to exempt an unincorporated association from ordinary public policy considerations favoring enforcement of contracts or from general contract principles."*

NON-PROFITS

FUNDRAISER CALLS ON BEHALF OF CHARITY NOT COVERED BY TCPA – The U.S. District Court for the Northern District of Illinois in Chicago has held that professional fundraisers for a charity did not violate the federal Telephone Consumer Protection Act by making calls to residential numbers on the national Do-Not-Call list. A group of professionals had sued fundraisers under the Act. But the court noted that the Act and regulations promulgated under it specifically exempted from the Act's restrictions all calls made "by or on behalf of a tax-exempt nonprofit organization." Further, the court found that telephone calls to solicit donations were not the type of "telephone solicitations" covered by the Act, defined in the Act and regulations as "calls or messages for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." In reply to the plaintiffs' argument that defendants in the case were not making calls on behalf of a true charity, the court found that the fundraisers were authorized to make calls for, and supervised by, an organization recognized by the Internal Revenue Service as a "tax-exempt nonprofit organization," and they had a genuine agency relationship with the charity. That, the court said, was the "only thing that matters for purposes of the TCPA," since the court could not second-guess the IRS designation of a tax-exempt nonprofit. The fact that the fundraisers may have contacted the charity first (as opposed to the charity reaching out to the fundraisers), and the fact that the fundraisers kept 85% of the funds they raised, were together ruled insufficient to create a genuine issue for trial in the case, where it was clear and undisputed that the charity hired and supervised the fundraisers, could and did review and veto solicitations, and controlled the flow of cash from the fundraising. *Interestingly, the court said that, while the TCPA did not require fundraising contracts to be favorable to the nonprofit, a one-sided contract in favor of fundraisers could be evidence that a purported agency relationship actually was a sham. But the court said that other evidence in this case showed that the fundraisers were genuinely acting as the charity's agent.*

PHOENIX NONPROFIT BARRED FROM FILING ADA SUITS – A nonprofit in Phoenix, Arizona has been barred by a court from filing suits alleging violations of the Americans With Disabilities Act. The nonprofit filed more than 1,700 suits last year alleging that Arizona businesses had parking lots that were not ADA compliant. Many were, in fact, noncompliant, but had relatively minor issues that could easily be remedied. The number of suits upset the court, though, and the nonprofit has been ordered to help solve the Phoenix parking lot problems that it identified by paying $25,000 to the Arizona Attorney General's Office, from which a fund will be created that local businesses can use for parking lot compliance measures. *Courts really don't like voluminous frivolous lawsuits, as this nonprofit discovered. But, in this case, suits were deemed frivolous even though they had a basis, apparently because the nonprofit was using an elephant gun approach to dealing with a problem that the court felt should have been resolved in a manner less costly for the state and local businesses.*

OTHER

NO EXCUSE FOR INATTENTION TO LITIGATION – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court order granting a default judgment against a transportation company and its owners for failing to answer a legal complaint filed against them. The suit was filed by former employees and the U.S. Secretary of Labor under the federal Fair Labor Standards Act and state wage payment laws. The company argued that a default judgment against it was inappropriate, since it only failed to answer the complaint because the company had closed, it no longer received mail at the office address, and one of its owners was in poor health so that he did not keep in touch with the company's lawyer. Too bad, said the Court of Appeals, more or less. The defendants had not shown good cause for their "inattention to the litigation" or that they had a legitimate defense to the suit. *Readers should know that if they don't keep in contact with their lawyers, bad things can happen. Lawyers receive legal documents intended for their clients, and they need to know where those documents should be sent. Moving or closing, and failing to correct contact information with lawyers and government officials, can be disastrous.*

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

Howe & Hutton, Ltd.

HOWE & HUTTON NEWS AND EVENTS

Jerry Panaro presented a webinar on "Trends in Employment Law for 2018".

Jerry is also presenting a webinar titled "Sex and the Workplace In the Wake of Recent Headlines" for BankersOnline.com.

Nathan Breen co-presented the "Trial of the Century" hospitality mock trial in Atlanta at a Connect Georgia event.

Jonathan Howe presented "Risk Management In Uncertain Times" for meeting professionals held by the Nassau /Paradise Island Promotion Board.

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