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THE HOWE & HUTTON REPORT

Volume 2018, Issue 2

TRENDING NOW

NONPROFIT CAN'T CHALLENGE VOTE FRAUD COMMISSION'S WORK – A three-judge panel of the U.S. Court of Appeals for the District of Columbia recently held that a nonprofit privacy group couldn't pursue a court action to prevent President Trump's election fraud commission from collecting millions of voter records. But the court ruling quickly became a moot point, as the President began the new year by dissolving the commission. The President created the commission after alleging that widespread voting fraud cost him the popular vote in the 2016 election, though he won the Presidency anyway in the Electoral College. The commission sought state records including the name, address, date of birth, party affiliation, felony record, last four Social Security digits, and voting history of all registered voters. But the commission's efforts met with considerable opposition, most importantly from the states that had custody of the records the commission sought. The nonprofit Electronic Privacy Information Center filed suit to require an assessment of privacy concerns before the data was collected. But the Court of Appeals panel concluded that the Center had no standing to challenge the commission's collection of data, since the Center is not a voter, hasn't a membership composed of voters, and has only an "abstract social interest" in the commission's work. Nevertheless, the President has dissolved the commission, citing as a reason the refusal of many states to provide the information the commission requested. *Maybe the Center just needed to sign up some members in order to proceed with its litigation. Some nonprofits have members, but many don't. It's unusual that a group's legal rights should turn on that distinction.*

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NON-PROFITS

CHURCHES ALLOWED FEMA AID TO REBUILD - The Federal Emergency Management Agency has repealed a longstanding rule barring churches and other houses of worship from receiving federal assistance to rebuild after disasters. Advocates for separation of church and state have contended that providing FEMA funds to rebuild houses of worship amounts to unconstitutional support for religion. *Churches were previously eligible to be reimbursed by the federal government for providing certain public services in the event of a disaster, such as sheltering families whose homes have been destroyed by fires or hurricanes. But they couldn't receive money to rebuild their own structures, prompting a number of suits against the federal government to free up FEMA money for that purpose.*

NEW REGULATIONS PROPOSED FOR ASSOCIATION HEALTH PLANS – The federal Department of Education has proposed new regulations that would govern ERISA health plans offered by associations for their member employers. The regulations would expand the number of associations allowed to offer such plans, increase the number of employers allowed to participate in such plans, and make it more likely that such plans will qualify for the large-group insurance market, possibly lowering premiums for participating individuals. *Like all proposed federal regulations, the new regulations proposed by the Department of Education must go through a public comment period before they are finalized.*

SUIT AGAINST FRATERNITY CHAPTER GOES FORWARD – *H&H Report Update* – The Illinois Supreme Court has held that a father whose son died in a Northern Illinois University fraternity hazing event can sue the fraternity chapter holding the event, chapter officers and board members, active chapter members, and even nonmembers who were part of a sorority that participated in the event. "Hazing is illegal," said the court, and those individuals who choose to participate in such acts should bear the consequences of their actions." On the other hand, the court dismissed claims against national fraternity affiliates, which had rules against hazing, saying that they didn't have strong enough ties to the chapter that they could be held liable. *Death in this case resulted from consumption of alcohol, vomiting and passing out at an event where the overconsumption of vodka was required of pledges in order to join a fraternity. While "social hosts" are generally shielded from liability for selling or giving away alcohol in Illinois, this case is one of a number of recent ones in which "social host" rules were found not to apply when excessive consumption of alcohol is a precondition for membership in an organization.*

EMPLOYMENT

NO RETALIATION IF BOSS DIDN'T BELIEVE THERE WAS PROTECTED ACTIVITY– The U.S. Court of Appeals for the Seventh Circuit in Chicago has upheld dismissal of a retaliation suit brought by a railway employee who claimed that he was fired because he reported a work-related injury. If the worker had proved that reporting the injury was at least one motivating factor in his firing, the suit might not have been dismissed. But a jury in this case determined that the employer didn't believe the worker had engaged in a legally protected activity in good faith, and the Court of Appeals concluded that, without such a motivating belief, the employer could not have been found liable for "retaliation." *The evidence showed that the employee in this case was fired after he failed to wear the proper uniform three times in two weeks and cursed at his supervisor. So, the employee clearly didn't have the best record with which to work in filing his complaint. But, he really lost his case because he didn't show that his employer had a mind set, at least partially, on retaliation for a legally protected act by the employee.*

NO "WHISTLEBLOWING" IN TELLING BOARD WHAT IT ALREADY KNOWS – Dismissal of a company executive who claimed that he was fired by his board for "whistleblowing" has been upheld by the U.S. Court of Appeals for the Seventh Circuit in violation of federal law. The court noted that federal law prohibits retaliation against an employee for "whistleblowing," including reporting illegal company practices to appropriate government officials. But all this executive did was complain to the board, continually, about things such as outside counsel's billing practices, potential patent infringement, potential conflicts of interest involving a board member, consumption of alcohol at a meeting, and the handling of a defamation suit. *The court found the executive had not provided the board with any information the board didn't already know, and he was not a "whistleblower." Rather, the executive had been fired over differences of opinion with the board, and no federal law prevented a board from firing an executive over such differences.*

TERMINATION BEFORE MEDICAL LEAVE OKAYED – The U.S. Court of Appeals for the Seventh Circuit has upheld a lower court decision that an employee who took medical leave from work, and then was informed he had already been terminated for misconduct, was, in fact, lawfully terminated. Ennin's car broke down on his way to work, and he called another employee he supervised, Chavez, to leave work and help him. Ennin then permitted Chavez to follow him through the supervisor's entrance at his place of employment, in violation of company policy, and he neglected to adjust Chavez's time sheet to reflect that Chavez was absent from work for 46 minutes. Ennin met with supervisors about the incident, went home for medical reasons, and received Family and Medical Leave Act absence from work from the company's third-party administrator, Prudential, which approved short-term disability benefits for him. But his company sent Ennin a letter saying that he had been terminated *before* he took medical leave, and that termination has now been upheld by the Court of Appeals over Ennin's objection that he had been fired because of his race, national origin, disability, and decision to take FMLA leave. *The Court of Appeals found that the company's termination of Ennin was due to his violation of company policy and was not discriminatory, although it would seem that the employer and Prudential certainly could have better coordinated their actions in the matter.*

REGULATORY

COMMISSION REJECTS TRUMP ENERGY PLAN – The Federal Energy Regulatory Commission has rejected the Trump Administration's plan to help struggling coal-fired and nuclear power plants, saying that there was no demonstrated need for such action. The Energy Department had submitted a proposal to help coal and nuclear power compete with burgeoning gas and renewable energy, saying that coal and nuclear plants are under threat of closing, which could cause a rising risk of electricity outages and price spikes. But the Commission, which includes four out of five Trump appointees, said the government hasn't provided adequate justification for changing the rules that currently govern electricity markets. Moreover, FERC noted that extensive comments submitted by electricity grid operators failed to point to any threat to electricity grid resilience as a result of past or planned retirement of generators. *Notwithstanding FERC's decision to stand pat with its rules for now, the Commission ordered the nation's grid operators to submit new evaluations of the risks facing the grid within 60 days, with another 30 days being allowed for public commentary on those evaluations.*

FTC SUES FUNDRAISER – The Federal Trade Commission has filed a complaint against charity and political fundraiser InfoCision, Inc., alleging violations of the FTC's Telemarketing Sales Rule. The complaint charges that some of that company's telephone calls to consumers contained misrepresentations. The FTC alleges that the fundraiser began calls by saying that their purpose was not to ask for a donation, but that telemarketers would then ask for a donation and ask consumers to solicit friends, family members and neighbors for donations to InfoCision's charity client. *The FTC is seeking $250,000 in civil penalties from the fundraiser. Readers should remember the need to comply with the Telemarketing Sales Rule in all charitable solicitation campaigns.*

NO "BLIND" COPYING OF COURT'S "SAFE HARBOR" LANGUAGE – The U.S. Court of Appeals for the Seventh Circuit has found that a debt collector violated the federal Fair Debt Collection Practices Act by copying language from a previous decision by that court in fashioning debt collection letters. The collector pointed out that the previous decision contained "safe harbor" language allowing collectors to charge interest, and he had merely copied that language. However, the Court of Appeals ruled in the current case that the collector's letters violated the Act because the letters were sent to Wisconsin residents and because Wisconsin law prohibited the imposition of "late charges and other charges." In this case, the court said that the collector shouldn't have "blindly copied and pasted" safe harbor language from the court's previous decision in debt collection letters "without regard for whether that language is accurate under the circumstances." By doing so, the collector misled debtors into believing that they could avoid late charges if they immediately sent payment, when, in fact, those charges were illegal. *Guess "safe harbors" aren't always very safe.*

REGULATORY (cont.)

NO SUITS FOR TECHNICAL VIOLATION OF BIOMETRIC DATA LAW – The Illinois Appellate Court has held that a woman couldn't sue an amusement park for fingerprinting her son so that he could obtain a season pass. Suit was filed under the state Biometric Information Privacy Act, which gives "aggrieved" individuals a right to sue for violations of the Act. The Act requires private entities collecting data like retina or iris scans, fingerprints, voice and facial data to obtain consent before collecting or selling any such data, publish information about what they collect, and inform the public about what they will do with the data, how long they will store it and how they will get rid of it. In the suit, the amusement park was charged with failing to ask for consent before fingerprints were collected and with failing to disclose what it would do with the data. But the Appellate Court for the Second District ruled that the suit should be dismissed because no actual harm was alleged as a result of the fingerprint collection and no one should be considered "aggrieved" by mere "technical violations" of the Act. *The plaintiff alleged that she and the other members of a class of similarly "aggrieved" persons were entitled to sue the amusement park for the maximum payments specified in the Act, $5,000 for each violation. The Appellate Court was not amused, saying that if the legislature had intended suits to be filed for "technical" violations of the Act, which had caused no actual harm, it would have omitted the word "aggrieved" from the Act when it was passed, simply specifying that every violation was actionable.*

SHIFT IN FEDERAL POT LAW ENFORCEMENT RILES STATES - It wasn't bad enough that the federal government was at odds with some state and local officials over their refusal to cooperate with the feds' immigration law enforcement. Some of the states also wouldn't surrender voting data to the President's now defunct commission to investigate voter fraud. Now, the feds are set to fight with some states over a change in enforcement of federal drug laws, which long have proscribed marijuana to the same extent as crack cocaine (not counting medical marijuana, which has had some protections under federal law). Eight states have passed laws purportedly legalizing use and sale of recreational marijuana in their jurisdictions, despite federal laws against it. But now, U.S. Attorney General Jeff Sessions says the Trump Administration will not follow its predecessor's policy of ignoring enforcement of federal laws relating to recreational marijuana, and has even refused to rule out federal prosecutions relating to medical marijuana. *What is all this leading up to? Will we see another Civil War over states thumbing their noses at the U.S. government to protect drug users and illegal immigrants? That didn't work out so well for the southern states that defied federal law in the 1860s to protect their "rights" to maintain slavery and secede from the Union. But who knows?*

REGULATORY (cont.)

ILLINOIS REQUIRES SEXUAL HARASSMENT POLICIES FOR LOBBYING – A new law that took effect January 1, 2018 required all Illinois entities employing lobbyists to have a policy prohibiting sexual harassment. The law, passed by the Illinois General Assembly, was an amendment to the state Lobbyist Registration Act, and it gave the Inspector General of the Illinois Secretary of State's office the jurisdiction to review allegations of sexual harassment. Affected entities are now required: (1) to have a policy addressing the prevention, prohibition, and investigation of sexual harassment, including how to report harassment and the consequences of harassing or retaliating against complainants; (2) to provide the policy to all employees required to register as lobbyists, securing an acknowledgment of receipt; (3) to provide the policy, within two business days, to any individual making a written request for it; and (4) to have an authorized agent prepared to receive allegations of harassment by the entity or its lobbyists. *All natural persons registered as lobbyists also have to complete an annual sexual harassment training program under the new law.*

TRAVEL / HOSPITALITY

COMMUNIST CHINA KNOWS CAPITALISTS WELL – Marriott International has complied with the Chinese government's request that Marriott shut down its Chinese website and apps for approximately one week as punishment for Marriott identifying contested Chinese territories Hong Kong, Macau, Taiwan and Tibet as separate countries in a loyalty program member survey. Marriott apologized, as Delta Air Lines and other companies recently did, under pressure from China, for making such a "mistake." *Marriott has been aggressively expanding in China, and a Marriott spokesman said China is one of the company's "most important markets."*

INTELLECTUAL PROPERTY

BREXIT BRINGS TRADEMARK PROTECTION ISSUES – The exit of the United Kingdom from the European Union raises concerns about protection of intellectual property rights. Among other things, trademark owners with rights secured by the EU will now have to think about obtaining separate trademark protection in the U.K., and those with rights secured by the U.K. will now have to consider separate EU protection. *As other countries, including the United States, are on the path toward rejecting treaty obligations and cooperation with international bodies, international trademark rights protection will likely become more difficult in many ways. This will especially be the case if international enforcement structures are controlled in the future by countries that, unlike the U.S. and U.K., do not favor strong trademark protection.*

HOWE & HUTTON NEWS AND EVENTS

Jonathan Howe recently conducted an interactive session on legal issues at the Independent Planner Education Conference at MGM National Harbor in Oxon Hill, Maryland.

Nathan Breen is teaching a six week online Hospitality Contracts Course as part of Association Trends magazine's eLearning program.

The course is titled "*Negotiating Meetings & Events Contracts: What You Need to Know to Avoid Costly Disputes"*.

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