



# Howe & Hutton, LTD.

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## THE HOWE & HUTTON REPORT

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### TRENDING NOW

**IS YOUR ORGANIZATION GDPR COMPLIANT?** – The European General Data Protection Regulation (GDPR) is perhaps the most comprehensive data protection regulation passed to date. GDPR affects all businesses that acquire, store or process personal data of individuals in the EU. The definition of “personal data” under GDPR includes any information relating to an identified or identifiable natural person. This could include name and address to bank details to IP addresses. Consent is a huge component of this new regulation and pre-checked boxes will no longer suffice.

There is no compliance exception for nonprofit organizations. The GDPR will not just apply to businesses in the EU but globally, including organizations in the US. If you are a US based company doing business with EU citizens, the GDPR applies to you. The GDPR goes into effect on May 25, 2018, so if you haven’t reviewed your data collection and privacy policies, now is the time to do so.

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## TRENDING NOW

**JUDGE WON'T IMMEDIATELY STOP PUNISHMENT OF SANCTUARY CITIES** – A federal judge in San Francisco has refused to issue a preliminary injunction to prevent enforcement of President Trump's policies aimed at punishing sanctuary cities and states that seek to protect undocumented immigrants from deportation. The ruling came in a suit filed by the State of California to prevent the President from denying certain federal grants to cities and states not cooperating with federal requests for information about the citizenship and immigration status of individuals the cities and states encounter, such as persons placed under arrest. The judge indicated that he was not convinced by federal arguments and justifications for the required state and local cooperation with such federal information requests. But he said that many of the legal issues involved in the case were unclear and did not tip so much in favor of the State of California as to warrant issuance of a preliminary injunction. Rather, they “will benefit from further development” through presentation of evidence and arguments to the court. *Although the judge in San Francisco wouldn't issue an immediate injunction, a federal judge in Chicago has issued an injunction barring the U.S. Department of Justice from requiring that federal immigration agents be allowed access to local jails and be given notice before suspected illegal immigrants are released. That judge's decision was appealed to the U.S. Court of Appeals for the Seventh Circuit, which has heard arguments in the case but has yet to rule on the propriety of the judge's injunction.*

**TRAVEL BAN STRUCK DOWN AS APPLIED TO BONA FIDE RELATIONSHIPS** – *H&H Report Update* - The U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia has upheld a lower court's issuance of an injunction against President Trump's enforcement of a travel ban against people from six countries who have bona fide relationships with people in the U.S. The ban, as reviewed by the Court of Appeals, applied to travelers from Chad, Iran, Libya, Somalia, Syria and Yemen. The Fourth Circuit court held that it was “unconstitutionally tainted with animus toward Islam.” In December, the U.S. Court of Appeals for the Ninth Circuit in San Francisco also ruled against the ban. But the U.S. Supreme Court has already said it will be reconsidering the President's travel bans in April. So, that high court will likely provide the final legal word on the subject. *Not seeming to give a lot of hope to those who say the President's bans are unconstitutional, the Supreme Court has also said that the President's latest ban can be fully enforced while challenges to it make their way through the courts. The President's latest travel ban actually does not apply, on its face, to people who have bona fide relationships with Americans, though earlier versions did. The President has proven that he can rewrite his bans faster than the courts can consider their constitutionality.*

## TRENDING NOW

**SEVERE OBESITY ALONE IS NOT BASIS FOR ADA SUIT** – A federal district court has dismissed a suit filed by a severely obese man who claimed he was fired from his job as a bus driver in violation of the Americans with Disabilities Act. The complainant didn't blame his weight – 594 pounds – on any underlying physiological disorder. The court relied on previous interpretative advice from the federal Equal Employment Opportunity Commission saying that amendments to the Act in 2008 distinguished between conditions that are “impairments,” on which an ADA suit can be based, and physical characteristics “such as eye color, hair color, left-handedness or height, *weight* or muscle tone,” that are not “impairments.” So, the complainant lost his case for that reason among others. *The EEOC's advice applied to psychological, environmental, cultural and economic “characteristics” and deemed them not “impairments,” as well as physical characteristics that are “within ‘normal’ range and not the result of a physiological disorder.” In this case, the complainant argued that his weight was not within “normal” range and could still qualify as an impairment even if his obesity was not the result of a physiological disorder. But the court said that was an “overly broad interpretation” of the amended Act and the EEOC's guidance.*

## EMPLOYMENT

**SCHOOL USES MINISTERIAL EXCEPTION TO AVOID ADA LIABILITY** – The U.S. Court of Appeals for the Seventh Circuit has allowed a Milwaukee private school to avoid liability under the Americans with Disabilities Act for firing a teacher who had a brain tumor. The Court of Appeals held that a ministerial exception to the ADA protected the school from liability because the school provided non-orthodox Jewish education, the teacher taught Hebrew and Jewish Studies, and her role furthered the school's religious mission. *The teacher had argued that the school's policy of not discriminating against non-Jews in hiring teachers indicated that the school had waived the protections of the ministerial exception in relation to teacher employment. The Court of Appeals, however, held that the nondiscrimination policy did not constitute a waiver of the exception's protections.*

**ILLINOIS SALARY HISTORY BILL DEBATED AGAIN AFTER VETO** – *H&H Report Update* – A bill to prohibit employers from asking job applicants about their salary histories is again being considered in the Illinois General Assembly after the state Senate failed to override Governor Rauner's veto of the same legislation last year. The bill, intended to address under-payment of women employees as compared with men, allows workers to recover amounts they were “underpaid” due to questions about their job histories, special damages up to \$10,000, and punitive damages if an employer acted with “malice” or “reckless indifference.” *Governor Rauner, in applying an amendatory veto to the bill last year, argued for changes allowing employers to see applicants' salary histories once they offered a job at a negotiated price. He also wanted employers to have an affirmative defense if they could show that they had completed a “self-evaluation” of their payment practices within the previous three years and that “progress has been made” in eliminating gender-based pay differences.*

## EMPLOYMENT

**TRANSFER WASN'T ADVERSE EMPLOYMENT ACTION** – The U.S. Court of Appeals for the Seventh Circuit in Chicago has affirmed a lower court decision to give summary judgment to an employer sued for employment discrimination and retaliation. The Court of Appeals noted that suing an employer for discrimination and retaliation required proof of an adverse employment action. But the only such action alleged by the employee in this case was a transfer to another department, and that transfer had no effect on the complaining worker's title or salary, although co-workers described it as a demotion and "a total humiliation." Because the Court of Appeals found that the transfer did not cause a material change in the worker's employment, the court ruled that it could not be the basis for a claim of employment discrimination. Further, the worker's retaliation claim could not succeed, even if the transfer had been an adverse employment action, because the employee could not show a sufficient causal link between the transfer and the worker's earlier filing of an internal discrimination complaint against her former supervisor. *In fact, far from being adverse to the worker, the transfer enabled the employee to work for a supervisor with whom she got along well instead of one who had criticized the worker for billing errors and use of unprofessional language.*

**ILLINOIS WAGE ACT APPLIES TO OUT-OF-STATE WORK** – The Illinois Appellate Court for the 1<sup>st</sup> District has held that two Illinois-based long-haul truckers could state a claim for payment under the Illinois Wage Payment and Collection Act even if most or all of their work was performed out-of-state. A lower court denied the truckers payment for three trips between their home base in Illinois and Portland, Oregon, finding that only 168 miles of the 2,110 miles they covered were in Illinois. But the Appellate Court reversed that decision, noting that, while the Illinois Department of Labor had a series of regulations prior to 2014 stating that the Act did not apply when a "substantial portion" of an employee's work for an Illinois employer occurred out-of-state, those regulations were amended in 2014. Now, said the Appellate Court, the amended regulations do not require that any particular percentage of work performed for an Illinois employer must be performed in-state. *The defendant employers in the case argued that they were entitled to rely on a Frequently Asked Questions section of the Department's website, which said that a truck driver who lives in Illinois but works outside of the U.S. "is likely not covered by the act." But the Appellate Court found that the FAQ section was "hardly dispositive."*

## REGULATORY

**WHISTLEBLOWERS DON'T HAVE TO PROVE ALLEGATIONS** – An agent fired by the federal Bureau of Alcohol, Tobacco and Firearms was able to prove his case against the Bureau under the Whistleblower Protection Act, even though he didn't prove allegations he had made that another agent improperly shot at a fleeing suspect, provided an inaccurate report and testified falsely about the incident, prompting retaliation against the complaining agent by the Bureau. He reported his suspicions about the other agent to his supervisors, who declined to investigate, telling him that he had not provided enough evidence to support his allegations. He then sued over his termination, alleging that the Bureau retaliated against him in violation of the federal Act, and the U.S. Court of Appeals for the Seventh Circuit in Chicago has now agreed, noting that he was not required to prove his allegations regarding the other agent in order to avoid retaliation for making such allegations. He only had to provide enough specifics in his report to superiors about the other agent's actions to allow for investigation by the proper authorities, which he had done in this case. *Those who report illegal and improper activities are well protected by the Act and state laws. Retaliation against whistleblowers is risky business.*

**REGULATORS REJECT GOVERNMENT-BUILT AND OPERATED 5G NETWORK** – The Federal Communications Commission has rejected the idea of a 5G next-generation wireless network built and operated by the U.S. government. The idea had been floated recently by National Security Council officials, but it was rejected by the FCC as overly expensive and unrealistic. *The proposed service was expected to offer significantly faster user speeds and expanded capacity as compared with the current Internet. Interest by the NSC was partly kindled because of China's expected effort to develop a 5G service.*

**TIPPING RULE CHANGE UNDER ATTACK** – Seventeen attorneys general from states around the country, all Democrats, have banded together to oppose a federal rule change proposed by the Department of Labor in December. The change would rescind a 2011 Obama administration rule mandating that tipped workers be allowed to keep their tips. Under the proposed rule change, employers who pay the federal minimum wage could pool tips received by service workers so that they would be shared with “back of the house” workers, like cooks and dishwashers. The attorneys general say the change would allow employers to pocket tips for their own gain. *The attorneys general will have their comments reviewed by the Department, along with over 200,000 other public comments, before the rule change is finalized, modified or withdrawn. At the same time, the Department's Inspector General will be conducting an audit of the rule-making process that led to the proposed change, following accusations that Department officials shelved an internal report indicating that workers would lose billions of dollars in tip money under the change*

## REGULATORY

**COURT DENIES ACCOMMODATION TO DISABLED RUNNER** – *H&H Report Update* – Affirming a lower court decision, the U.S. Court of Appeals for the Seventh Circuit in Chicago has held that a disabled runner was not entitled to require the Illinois High School Association to establish a separate division with different time standards for para-ambulatory runners in Sectional and State championship track meets. A runner with spastic quadriplegia related to cerebral palsy had sued the Association under the federal Rehabilitation Act and Americans with Disabilities Act, requesting such an accommodation so that he could better compete for and win medals at such meets. But the Court of Appeals held that the accommodation requested by the runner in this case was not required under the wording of either Act. The Court of Appeals reasoned that the runner had not shown he could not attain qualifying times “by reason of” or “on the basis of” his disability, since it was likely that disabled runners could not meet the high standards set by the Association even if they were not disabled, as only a few runners without disabilities were able to do so. Further, the Court of Appeals found that the accommodation requested would have required the Association to alter the fundamental nature of its track events. Therefore, as a matter of law, the runner’s accommodation requests were unreasonable. *The Association does not organize or regulate individual school meets, but it manages the most important high school track meets in Illinois. It had implemented events and divisions within particular sports for disabled student-athletes. However, it did not have a separate division in track and field events for para-ambulatory runners.*

## INTELLECTUAL PROPERTY

**ENFORCEMENT OF TRADEMARKS RAISES JURISDICTIONAL ISSUES** – The U.S. Court of Appeals for the Seventh Circuit in Chicago has found that a company based in Illinois couldn’t sue a Florida company in Chicago for infringing the Illinois company’s trademarks in Florida. The Court of Appeals noted that the federal trademark statute, the Lanham Act, does not allow suing an alleged infringer in any state unless he has a substantial connection with that state. In this case, the Court of Appeals said it was easy to describe the relation between Illinois and the alleged infringer: none. If infringement occurred, it happened in Florida or some other state where people who wanted to do business with the trademark owner ended up dealing with the defendant because it had used marks similar to the owner’s. But, based on the evidence, that wasn’t Illinois. Further, the Court of Appeals concluded that the defendant’s knowledge of the trademark owner’s operations in Illinois and its intent with regard to selling in Illinois were not enough, in themselves, to justify compelling the alleged infringer to defend himself there. *Especially with the advent of the Internet, a trademark owner can find that others are using that mark, or something similar to it, in areas of the owner’s home country, or even the world, far removed from the owner. Prosecuting any infringement may require legal proceedings in the infringer’s geographic locale, which can be difficult for the owner, even if the owner and the alleged infringer are both located in the U.S. Proceeding against an infringer in the courts, and under the laws, of a different country can be even more harrowing for the owner.*

**THREE OBAMACARE TAXES SUSPENDED BY CONGRESS** – During negotiations to prevent a national government shutdown, Congress, with bipartisan support, suspended three taxes that were part of the legislation creating Obamacare. Suspended were taxes on medical devices, high-cost healthcare plans and health insurance companies. *Some experts said the suspension of these three taxes would add \$32 billion to the federal deficit over the next ten years, on top of the \$1.5 trillion loss in government revenue resulting from the sweeping changes in the tax code that the President signed into law at the end of 2017.*

**DONOR-ADVISED FUNDS GET BOOST FROM NEW TAX LAW** – Last year turned out to be a big one for donor-advised funds as a result of the new federal income tax legislation signed by the President at the end of 2017. Many donors wanted to make charitable contributions in 2017 before the new tax law took effect and limited the value of itemizing deductions due to the increased standard deduction the new legislation afforded. Donors to such funds were able to lock in an itemized deduction for gifts to such funds in 2017 and then designate when and where to send the money to various charities gradually after the new law took effect. *Although donor-advised funds saw a boom in contributions late in 2017, the advent of the new tax law may have more lasting consequences for charitable giving. Experts say that if it doesn't cause a diminishing of charitable giving overall because of the enhanced standard deduction, it may at least cause contributors to do more bunching of contributions in specific years. By bunching their contributions in those years, donors may find that their donations, along with other itemized deductions, will exceed the standard deduction for those years, while, in other years, the standard deduction will make the most sense for the contributors.*

**IRS APOLOGIZES FOR STANCE AGAINST PRO-ISRAEL ORGANIZATION** – *H&H Report Update* - The U.S. government has reached a settlement with a pro-Israel nonprofit that sued over “special scrutiny” the group’s tax exemption application received because it promoted Jewish residence in territories Israel acquired in the Six Day War. The settlement included an apology from the Internal Revenue Service for delaying the processing of Z Street’s application for an exemption. Z Street has alleged that the IRS was under a direction to freeze processing of Z Street’s application because the group’s advocacy for Jewish residences in disputed territories was “not helpful” to the Obama Administration’s efforts at brokering peace in the Middle East. Announcing the resolution of Z Street’s case, Department of Justice attorneys vowed that IRS action on tax exemption applications would, in the future, be based on “whether an organization’s activities fulfill requirements of the law, not a group’s policy positions or the name chosen to reflect those views.” *The IRS has previously admitted discrimination against conservative and “Tea Party” organizations during the Obama Administration. But Z Street was one of the first organizations to successfully attack Obama’s use of the IRS in the courts, leading, ultimately, to the resolution of Z Street’s case. Politicization of the Service received much publicity during the Nixon Administration, but very little afterward until lately.*

## TAXATION (cont.)

**HOSPITAL LOSES EXEMPTION FOR CEDING CONTROL TO FOR-PROFIT** – The Internal Revenue Service has revoked the federal income tax exemption of a nonprofit hospital because it ceded too much control of its operations to a for-profit. The hospital operated for many years on a charitable basis, but eventually ran into financial trouble, causing it to seek an alliance with a for-profit that leased its facilities and managed its operations. Although the nonprofit’s governing documents required it to operate for the benefit of the community, and an agreement with the for-profit provided for charitable care, the IRS concluded that the nonprofit was unable to ensure that such care was made available. The Service noted that the for-profit had complete control of the hospital’s income, the for-profit had ultimate control of the hospital’s operations, and the nonprofit didn’t even retain access to the for-profit’s books and records so that it could determine whether the for-profit was providing the charitable care it was supposed to provide under its agreement with the nonprofit. *Increasingly, nonprofits are entering into agreements with for-profits in order to obtain the revenue they feel they need to operate. But the Service has pointed out that a charitable nonprofit will lose its exempt status if it cedes too much control over its operations to a for-profit without safeguards to ensure that the for-profit will give deference in those operations to the welfare of the general public rather than its own bottom line.*

**COURT REQUIRES TRAVELOCITY TO COLLECT AND REMIT SALES TAX** – The Maryland Tax Court, deciding a case that was pending for a number of years, has ruled that Travelocity should have been collecting and remitting state sales and use taxes from its customers since 2003 on the sale of hotel rooms and car rentals. Travelocity argued that it was not the entity responsible for collecting and remitting, but that the hotel and rental car companies providing services to people using Travelocity were the ones who had that responsibility. The Tax Court disagreed, though it did find that Travelocity was entitled to receive credit for any sales taxes actually paid to Maryland by the hotels and rental car companies. *There was so much confusion over who should be collecting and remitting these taxes that the General Assembly found it necessary to amend the tax statutes in 2015 for the express purpose of removing any doubt that online travel companies should be collecting and remitting these taxes to the state. That was good for Travelocity in one way, though, because the court found the General Assembly’s action suggested such uncertainty about the collecting and remitting responsibilities of online travel companies that it was unfair to require Travelocity to pay penalties and interest on taxes it had not collected and remitted.*

**RESTRUCTURING GENERALLY WILL NOT REQUIRE NEW EXEMPTION** – The Internal Revenue Service has issued a new Revenue Procedure indicating that the IRS will no longer generally require an exempt organization to submit a new exemption application to the Service when it changes its form or place of organization. Thus, the IRS has said that it will no longer generally require exempt entities to submit a new exemption application if they change their state of incorporation or change from a corporation to a trust or vice versa. The Service advises, however, that the new policy does not apply to restructuring involving limited liability companies or foreign entities. Therefore, a new exemption application will be required when an organization changes from a corporation to an LLC or vice versa, and when an exempt entity seeks to be organized in a different country. *The Revenue Procedure advises that a new exemption application is generally unnecessary and duplicative in restructuring because significant organizational changes must be reported to the IRS in annual Form 990 filings. Furthermore, the Service wants to treat exempt entities as continuing under the same Employer Identification Number in most restructuring cases because doing so reduces administrative burdens for the IRS.*

**HOSPITAL LOSES TAX EXEMPTION AFTER FOR-PROFIT BUYS IT** – A hospital in Delaware County, Pennsylvania has lost its property tax exemption because it was bought by a for-profit corporation. A Payment In Lieu Of Taxes (PILOT) agreement entered into by the hospital's prior owner, a nonprofit, was found to allow it. Local tax authorities argued that the agreement had made the property taxable if it was ever bought by a for-profit entity, and a judge of the Delaware County Court of Common Pleas agreed. The hospital then unsuccessfully appealed that decision to the Pennsylvania Commonwealth Court, arguing that the entire Court of Common Pleas should have been disqualified from hearing the case because one of its judges sat on the board of the hospital. The hospital contended that an out-of-town judge should have been appointed to hear the case instead of the Court of Common Pleas. But the hospital's motion for the entire Court of Common Pleas to recuse itself was presented too late, and a three-judge panel of the Commonwealth Court found that, even if it had been presented in a timely manner, the hospital had not demonstrated that the one judge of the Court of Common Pleas who ruled on the case had a conflict. *Points to the hospital's attorney for a novel attempt to disqualify a court's entire bench, but the hospital still lost.*

## HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe presented “Road Maps to Successful Meetings: Contracts, Legal Liabilities and Negotiations” and “Contract Clauses You Should Pay Attention to, But Probably Don’t” at the Michigan Chapter of the Society of Government Meeting Professionals held at the Great Wolf Lodge in Traverse City, Michigan.

Jon also presented “Safety and Security: The Critical Role of Meeting Planners and Suppliers” at Meeting Quest in Biloxi/Beau Rivage.

Jon was also involved in a discussion at SITE’s Northeast’s Meeting in Boston. The topic: “Hotel Commissions: What’s the Future?” He was joined by Loren G. Edelstein, Editor in Chief, Meetings & Conventions Magazine, David Landgraf, Founder & Chief Experience Officer at Make It Happen Management and Matt Davis, Director Global Accounts New England for Omni Hotels & Resorts.

Christina Pannos presented "Hope for the Best, Plan for the Worst: The Emergency Continuity Plan" at CALSAE's ELEVATE Conference on March 20, 2018.



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