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THE HOWE & HUTTON REPORT

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TRENDING NOW

OVERTIME RULE CHANGE RESURFACES – The Trump Administration has introduced a modified overtime rule that splits the difference between the status quo and a prior Obama Administration proposal that was the source of much consternation for employers. Most workers that earn less than \$23,000 a year are currently eligible for overtime. In 2014, the Obama Administration proposed more than doubling the threshold to \$47,000. A federal court invalidated the proposed rule in 2017, finding that the Department of Labor did not have the authority to make such a drastic change. The Trump Administration proposal raises the eligibility threshold to \$35,000. *The proposal now enters a 60 day comment period with workers' advocates largely supporting it and business groups denouncing it. Watch for updates as the process unfolds, with an eye toward the impact the change may have on your operations.*

FEC RAISES CONTRIBUTION LIMITS – The Federal Election Commission has raised individual contribution limits for the 2019-2020 election cycle. Individuals can now give a candidate \$100 more, up to a maximum of \$2,800 for a primary election and another \$2,800 for a general election. Individual contributions to the main account of a national party committee can now be \$1,600 more, to a maximum of \$35,500 per year. Contributions to party accounts for presidential nominating conventions, legal and election recount expenses and building funds may now be \$4,800 higher for each committee, to a maximum of \$106,500 each. *While some talk about taking money out of politics, the FEC, in this case, is going the opposite direction. But the Commission is merely indexing limits for inflation.*

TRENDING (cont.)

TIME TO REVIEW 403(b) PLANS – Those nonprofits with Section 403(b) employee benefit plans may find this a good time to review them for compliance with tax laws. The Internal Revenue Service has established a “safe harbor” plan preapproved by the IRS, and nonprofits can now amend their current plans retroactively at any time prior to March 31, 2020 in order to adopt the “safe harbor” and be certain their plan is in compliance with the law. A 403(b) plan is tax-exempt and especially designed for certain tax-exempt and educational entities. Plan sponsors were initially required to adopt a written plan document by December 31, 2009. However, at that time, the IRS provided nonprofits very little guidance to use in ensuring that their plans complied with the requirements of Internal Revenue Code Section 403(b), which made such plans exempt. Many existing plans may not be compliant with the law. But the “safe harbor” gives plan sponsors an opportunity to “fix” their plans without penalty. *The complexity of plan design options for 403(b) plans has also increased significantly over the years. Plan sponsors should review their plans to see if any modifications are desirable, even if they are not legally required*

TRUMP EXTENDS CHINA TARIFF DEADLINE – *H&H Report Update* - President Trump extended a deadline for imposing new tariffs on China, citing progress in trade talks between representatives of the two countries and saying he hoped to meet soon with Chinese leader Xi Jinping in order to complete a broad trade agreement. Among accomplishments the President cited as arising from recent trade talks with China is an agreement to curb currency manipulation. But critics said neither the President nor the Chinese provided specific details about that agreement. *People briefed on recent talks, as well as the U.S. Trade Representative and Secretary of Commerce, said the two countries remain far apart on major issues, such as Chinese government pressure on U.S. firms to transfer technology to Chinese partners, government subsidies to Chinese state-owned firms, and protection for intellectual property rights, as well as a means for enforcement of any agreements the two countries reach.*

EMPLOYMENT

STATES HIT BACK AT TEACHERS UNIONS – Some states recently hit by teacher strikes appear to be in the mood to hit back. Union officials find themselves increasingly under attack from lawmakers who are pushing legislation that steers away from union policy preferences. Legislation in West Virginia, for example, while raising teacher pay by 5%, rejected teacher union preferences by providing funds for charter schools and promoting education savings accounts from which payments for private schools and home schooling could be drawn. But perhaps even worse, from the standpoint of union officials, it would require teachers to re-enroll in their union each year. Meanwhile, legislation in Arizona would prevent school districts from shutting schools in the event of a strike, while also punishing teachers for “politicking” on the job. Then there’s legislation in Oklahoma that would deprive teachers of their licenses if they strike in the future. *Statewide teacher strikes and protests have given a boost to some of the recent anti-union sentiment in some places. But pro-union federal law may be a weapon unions can use to limit the damage states can cause to them, even though states have more leeway in countering union activity that impacts schools than they would in other areas where states have not traditionally had as much authority as they do in connection with education.*

EMPLOYMENT (cont.)

NO COMP TO INJURED WORKER FOR CONTRACTOR HIRED BY NONPROFIT – The Supreme Court of Virginia has held that a worker injured while rehabbing a school building was not entitled to compensation from the company for which he was directly working because he was working for an unlicensed contractor. That contractor was hired by a nonprofit historical society that was renovating the building, but the court determined that the worker also couldn't get worker's comp from that organization or a church with which it was affiliated. A deputy commissioner for the Virginia Workers Compensation Commission had held that the worker "was the direct employee" of the society as well as "the woman in charge," who was acting as the society's agent. Further, the deputy commissioner found that the society "was a part" of the church, making the church also an employer of the worker. But the full commission disagreed in part, finding that "the woman in charge" and the society were not the worker's employer, though the church was "because no party had appealed that decision" of the deputy commissioner. Finally, after a stop at a state court of appeals, the case made its way to the state supreme court, which determined that the unlicensed contractor wasn't liable for compensation and neither the society nor the church was liable for worker's compensation because neither was a "construction-related" organization. *As this case shows, worker's compensation cases can get complicated if it is hard to determine who a worker's employer is. That decision is made more difficult if various entities that might be an employer have contracted with and affiliated with each other.*

CALIFORNIA HIGH COURT PERMITS PUBLIC PENSION ROLLBACK – The California Supreme Court has upheld a state law creating a chink in the armor of the "California Rule," a doctrine created by California court rulings, and followed in some other states as well, that says workers enter into a contract with their employer on their first day of work, entitling them to retirement benefits that can never be diminished unless replaced with similar benefits. The state supreme court's latest ruling upheld a state law denying public employees the continued right to pad their pensions when they retire by paying for recognition of more years of service than they actually have. *The state supreme court rejected the opportunity to discard the California Rule altogether in deciding the case, saying that the ability to pad pensions by purchasing additional retirement service credits was not one of the "core pension rights" to which the California Rule applies. Consequently, employers in California still can't roll back those rights, hopefully to be more adequately defined in future cases, or by legislation.*

EMPLOYMENT (cont.)

ERA FAILS IN VIRGINIA – H&H Report Update – An effort to obtain state ratification of an Equal Rights Amendment to the U.S. Constitution failed by a single vote recently in Virginia. Supporters of the Amendment, prohibiting discrimination based on gender, had hoped for Virginia’s approval of the Amendment, as it would then have the 38-state approval required for ratification under the Constitution. Proponents of the Amendment say it would give Congress a firmer ground to pass legislation against gender discrimination, while giving anti-discrimination lawsuits more of a foundation. Opponents say that the Amendment isn’t necessary and could lead to unintended consequences, such as invalidation of legislation giving women-owned businesses advantages in obtaining government contracts. *If ratified now, the Equal Rights Amendment would likely draw a legal challenge based on a 1982 deadline for ratification set by Congress, as well as various other issues.*

INTELLECTUAL PROPERTY

KEEP NATIONAL LIMITATIONS OF TRADEMARK LAW IN MIND – One of our U.S. clients with chapters in foreign countries told us recently that one of its members formed a competing organization in India that was using the same acronym by which our client is known. Furthermore, the other organization is providing programs that some individuals signed up for purportedly in the mistaken belief that it would help them obtain a valuable certification from our client. Learning the truth, they went to the police in India, who began an “investigation” and told our client it could “go away” if the police were paid a bribe, which the client’s local counsel told them was standard procedure there, but was something the client rightly didn’t want to engage in. So, the client is considering other options. *If you pay a bribe to a foreign official, you are likely violating the U.S. Foreign Corrupt Practices Act. It’s illegal. Somebody creating confusion in the U.S. by using your organization’s name, acronym, logo and other trademarks without your permission could be sued in the U.S. for such deceptive practices. But such a suit is not necessarily possible in foreign countries without a foreign registration, because trademark law is largely national in scope, not international. That being the case, U.S. organizations doing business in foreign countries, through chapters or otherwise, need to become familiar with how to protect their identities under the laws of those countries (without paying bribes). Then, they need to decide what steps, if any, they want to take in order to prevent some competing entity from using their names, acronyms, logos, etc.*

TAXATION

IRS GROUP EXEMPTION REPORTING CHANGED – The Internal Revenue Service will no longer be mailing out lists of subordinate organizations in a group federal income tax exemption so that parent organizations can update those lists. Parents must now annually submit updated information, or a statement that there are no changes, at least 90 days before the close of the parent organization’s annual accounting period, in a letter addressed to Department of the Treasury, Internal Revenue Service Center, Ogden, UT 84201. The letter should include the names, addresses, and employer identification numbers of subordinate organizations that should be added to the group exemption or removed from it, as well as changes in names and addresses of subordinates remaining in the group exemption. *For those organizations with calendar year annual accounting periods, the annual update for 2019 will be due in October. You have lots of time. But for those organizations with annual accounting periods ending June 30, 2019 (and there are a bunch of you), your report due date would be April 1 for this year. Even if you are late, you should get the annual updates in to the Service.*

NON-PROFITS

NONPROFIT,” “TAX-EXEMPT” NOT THE SAME – Recent news articles criticized several nonprofits for not having a current tax exemption, revealing that the writer was either ignorant of the fact that he was talking about two different things or, since the organizations were involved in politically hot-button issues, the writer wanted to confuse the public and create bad publicity for the organizations in order to score political points. “Nonprofits” are organizations created under a state’s nonprofit corporation law, generally through an incorporation with the secretary of state. They are generally prohibited from having shareholders and must plow all earnings into their continuing nonprofit activities rather than paying dividends to anyone as an owner of the organization. A significant number of “nonprofits,” though, are not recognized as “tax-exempt” by the Internal Revenue Service because they didn’t seek such status, were refused such status by the IRS when they didn’t qualify for it, or lost their tax exemptions after failing to file annual reports with the Service and meet other IRS requirements. But it isn’t necessarily improper for a “nonprofit” to operate without a tax exemption, as long as they don’t claim to be tax-exempt when they aren’t, they pay tax on their net income, and they keep up their nonprofit corporate status by meeting the requirements of the state that incorporated them (such as filing periodic reports with the state). Then there are some tax-exempt charities that are required to maintain a special registration with some states (typically, but not always, under a “charitable trust” law and with the state attorney general), while other non-charitable, nonprofits, including some that are tax-exempt, aren’t subject to such registration requirements. Finally, some such “trusts” are not required to be incorporated but are created in a different manner. *Clear as mud? Well, nonprofits – and especially those involved with controversial issues – had better make sure they use the right language in describing themselves, or they may face a ton of bad publicity, even if they aren’t necessarily doing anything improper. Likewise, people writing and talking about nonprofits should be careful to keep their own minds straight about what makes an organization a nonprofit, a tax-exempt entity, or a registered charity.*

NONPROFIT EMPLOYEES LOAN FORGIVENESS ELIGIBILITY GOES TO COURT – A federal district court judge has ruled that the U.S. Department of Education acted “arbitrarily and capriciously” in changing its interpretation of certain federal regulations in a way that disadvantaged certain student loan borrowers – particularly employees of non-501(c)(3) nonprofits. The regulations relate to a federal program called Public Service Loan Forgiveness, which allows people who work for government entities and certain nonprofits to have their student loan debts forgiven if they have made “qualifying payments” over a minimum 10-year period. Employees of nonprofits that are not exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code must show that their employers perform “public service-type work” if they are to qualify for loan forgiveness under the program, and the Department of Education determines on a case-by-case basis whether that burden has been met. But the Department, in this case, was sued for changing its interpretation of the regulations illegally, and the district court judge has concluded that was true in some ways. The judge found that the Department changed its interpretation of the regulations without displaying awareness of its changed position or providing affected individuals with a reasoned explanation of the change in position. Furthermore, the judge criticized the Department for not taking into account the fact that student loan borrowers had relied on the Department’s earlier position in making payments to lenders for years that they thought were “qualifying payments,” only to find they weren’t under the Department’s new interpretation of the regulations. The judge ordered the Department to reconsider its determinations in light of the court’s conclusions. *Importantly, the judge didn’t find that the Department couldn’t change its interpretation of the regulations, but only that it had denied student loan borrowers due process of law in not following a fair procedure with regard to that determination. Now, affected borrowers will be given a second chance at getting a fair shake from the Department.*

FOUNDATION, SCHOOLS INVOLVED IN ADMISSIONS CHEATING SCANDAL - The Federal Bureau of Investigation unveiled an indictment charging more than 50 individuals nationwide with involvement in an illegal scheme that saw parents paying bribes to college coaches and administrators in order to get their children into schools such as Yale, Stanford and Wake Forest. According to the FBI, money was paid into a tax-exempt foundation called Key Worldwide Foundation so that parents could claim a tax deduction for the bribe money “contribution”. The FBI says the parents were the prime movers in the scam. Coaches and administrators allowed the students to be treated as “recruited athletes” eligible for admissions breaks, including “fixed” test scores and faked applications for admission. But the students “benefitted” weren’t, in fact, athletes, just kids of wealthy parents, including actresses Felicity Huffman and Lori Loughlin. Some spouses and some students admitted to the schools because of the bribery were allegedly unaware of the scheme. *The foundation involved will lose its tax exemption, and the parents will get bills for taxes and penalties relating to their “contribution”, plus prison time, perhaps. The real victims here are the more highly qualified students denied admission to the universities because of the bribes paid by the indicted parents, and some of these have filed a class action lawsuit against schools involved.*

COURT OVERTURNS NO-STALKING ORDER AGAINST PASTOR’S CRITIC – The Illinois Appellate Court, 1st District, has overturned a no-stalking order entered by a lower court against a man who had been criticizing a pastor through letters and other writings to the minister and his church staff for more than ten years. The order prohibited Wilk from “publishing or communicating in any form any writing naming or regarding” the minister, his family or any employee, staff or member of the church run by the churchman. Wilk blamed the pastor for causing his wife to leave him, repeatedly told the minister to send his wife back to him, and said he would not stop harassing the pastor unless the minister “renounces what he did wrong in the strongest possible terms.” He also claimed that the minister and his church were corrupt and an example of “how the devil gets into churches.” However, the Appellate Court found the lower court’s no-stalking order unconstitutional because Wilk had never made any specific threats of harm to the pastor. *The Appellate Court acknowledged that Wilk’s writings had “distressed” the minister, raised questions about his credibility, and distracted him and cost him wasted time in responding to them. But the Appellate Court said it could not silence Wilk because he was voicing criticism protected under the First Amendment to the U.S. Constitution.*

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