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THE HOWE & HUTTON REPORT

TRENDING NOW

Volume 2018, Issue 5

FEDS, STATES AND EUROPEAN PARLIAMENT HOT OVER FACEBOOK LEAK – Facebook Chief Executive Mark Zuckerberg has testified or been called to testify before at least three congressional committees, as well as the European Parliament, about leaks of confidential Facebook user information. The Federal Trade Commission launched a “broad” investigation of Facebook, and a bipartisan group of 37 state attorneys general questioned Zuckerberg about such incidents. *Facebook shares of stock fell significantly in value after the accessing of the user information was disclosed. New regulation of Facebook and other Internet giants to protect privacy rights is likely to come.*

SEXUAL HARASSMENT CLAIMS ROIL NONPROFIT WORLD – A *New York Times* editorial recently noted allegations coming to light of a British charity’s personnel “using prostitutes” and “possibly exploiting vulnerable women” for entertainment at offices “around the globe.” Worse, the editorial accused the organization of being reluctant to “fully confront the problem” despite hearing complaints about it for many years. Other accusations of sexual misconduct arise daily in the for-profit and nonprofit worlds, in government, in sports, in the military, pretty much everywhere. Although there hasn’t been much of a response in terms of new legislation or ground-breaking litigation yet, some people who can are struggling to respond by punishing perpetrators, adopting “zero tolerance” policies, and publicizing the problem with demonstrations, among other things. *Sexual misconduct certainly isn’t new. Maybe it’s just more widely discussed than ever before, which is for the good.*

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TRENDING NOW

U.S. AND CHINA STEP BACK FROM TARIFF THREATS ? – *H&H Report Update* – First, U.S. Secretary of State Steven Mnuchin announced that the Trump Administration and China agreed to refrain from applying major tariffs on international trade that were previously announced, at least for the time being. In a television interview, Mnuchin said that the U.S. and China had made “meaningful progress” in two days of talks about reducing the American trade deficit with China, which resulted in Chinese promises to “significantly increase purchases” of U.S. goods. More recently, President Trump announced that he would be finalizing a list of \$50 billion in imports from China that would be subject to 25% tariffs. *Will the Chinese actually purchase more American goods, and, if so, will it be enough to make for a significant change in the trade deficit, something that most analysts doubt? We will have to see.*

OTHER

WRONG ACCOUNT NUMBER COMPLICATES DEBT COLLECTION – A debt collection agency, EOS, tried to collect a debt of \$268.47 allegedly owed to AT&T by Walton. AT&T had swapped the first three digits of Walton’s nine-digit AT&T account number with the second three when reporting the alleged debt to EOS, and Walton disputed the debt with EOS solely because the account number was stated incorrectly by EOS in a demand letter. EOS tried to use Walton’s Social Security Number to confirm the debt, but Walton tried to prevent that by falsely denying that the last four digits of his SSN matched the one EOS was using. EOS reported the alleged debt to credit reporting agencies, informing them that the debt was disputed. Then, Walton wrote to the agencies to dispute the debt, and the agencies contacted EOS, which advised them to delete Walton’s debt record. But Walton then sued EOS under the federal Fair Debt Collection Practices Act for not verifying the debt with AT&T, and the federal Fair Credit Reporting Act for not reasonably investigating the disputed AT&T account number. Now, the trial court and a federal appeals court have given EOS summary judgment on those claims. *If you treat people like numbers and then don’t get the numbers right, or they don’t get the numbers right, or somebody else doesn’t get the numbers right, legal problems can ensue.*

SUIT PROCEEDS FOR FITNESS APP’S THEFT OF DATA FROM SMARTPHONES - A federal judge has refused to dismiss a class action lawsuit against a mobile-advertising company for allegedly placing a tracker in a fitness app that extracted data from users’ smartphones without their permission, even when they weren’t using the app and even when they weren’t using their phones. The suit was filed under the federal Wiretap Act, which the judge said had not been properly alleged as a basis for the suit. However, it was also filed under the Illinois Eavesdropping Act, and the judge said the complaint properly pleaded a violation of that Act by the defendant company. That statute provides that people who are not a party to a private electronic communication may not surreptitiously intercept, record or transcribe any portion of the communication. *Further proceedings will be held in this case to see if allegations against the defendant under the Eavesdropping Act can be proven. In addition, the judge gave the attorneys for the class an opportunity to amend the complaint so as to properly state a claim for violation of the Wiretap Act, and he even suggested that additional federal claims might be alleged under the Stored Communications Act and the Computer Fraud and Abuse Act.*

EMPLOYMENT

MEDICAL LEAVE DOESN'T END ADA PROTECTIONS – *H&H Report Update* - A federal district court judge has held that an employer could be sued for violating the Americans with Disabilities Act when it fired an employee who took medical leave to deal with cancer and then sought to return to work. The employee was on medical leave for almost a year, was treated for two different types of cancer, fractured a hip, went through surgery and physical therapy, and then got clearance from his doctor to return to his job just when his medical leave was about to end, only to be told by his employer that if he wouldn't retire, he was fired. The federal Equal Employment Opportunity Commission sued the employer for violating the ADA, and the judge dismissed as “nonsense” the employer's defense that the medical leave voided the employee's ADA protections. *The judge distinguished an earlier court decision, reported here, that a worker who can't work because of a long-term medical problem is not a “qualified individual” protected by the Act. This worker, the judge decided, “wasn't terminated because he couldn't work; he was terminated because he could.”*

COURT TOSSES RETALIATORY DISCHARGE SUIT – A federal court has dismissed a retaliatory discharge suit filed against Comcast Business Communications Inc. by a former employee who claimed he was fired because of his repeated requests for benefits Comcast owed him. A federal district court in Chicago applied Illinois law to the case and concluded that no retaliatory discharge claim was recognized by that state's laws under such circumstances, though, if Comcast owed the former employee money, he could sue for it. The court said Illinois law only allowed retaliatory discharge suits to be filed by workers fired for making worker's compensation claims or “blowing the whistle” to government officials regarding employer wrongdoing. So, the former employee in this case had no claim for reinstatement to his job and/or damages arising from his termination. *The court in this case wasn't dealing with federal laws, such as laws against discrimination, because the worker made no complaint under them. Illinois law, the court noted, has recognized retaliatory discharge as a “limited and narrow” exception to the general Illinois rule of at-will employment when a worker has no contract. Expanding retaliatory discharge rights under Illinois law was something the court felt it had no authority to do.*

REGULATORY

FALSE CLAIMS BRING \$60,000+ IN SANCTIONS – It isn't always easy for a nonprofit to get justice when someone has brought false accusations against them in court. But the Archdiocese of Chicago recently obtained a judgment for more than \$60,000 in sanctions against a man who brought a lawsuit based on false accusations of sexual abuse by a former priest. It helped the Archdiocese that the accuser was later jailed on unrelated charges and, while behind bars, admitted to his girlfriend in a recorded telephone conversation that he had not been abused. *The accuser said that he had noted other sex abuse allegations had been made against the former priest, which the Diocese had settled, and the accuser wanted to “get my little slice of the pie.” The court awarding sanctions to the Archdiocese was not amused by what it viewed as a fraud on the court, giving the Archdiocese its attorneys fees and costs associated with the abuse case.*

REGULATORY

COURT REJECTS SUIT AGAINST ASSOCIATION FOR WRITER’S OPINIONS – A federal court has dismissed a libel suit against the American Bar Association and a magazine writer based on statements about the qualifications of document examiners in an ABA magazine article. The court noted that the article discussed the writer’s conclusions about the difference between “true professionals” and “unqualified” or “lesser qualified” practitioners. The author was certified as a document examiner by the American Board of Forensic Document Examiners, and the lawsuit was filed by a different entity, the Board of Forensic Document Examiners, as well as some of its members, who felt that their qualifications were disparaged in the article. Finding that there was no libel in the case, though, the court noted that the article explicitly contained only “suggestions” for judges to consider in evaluating the expertise of document examiners, and a disclaimer in the publication stated that all articles appearing there represented only the authors’ opinions. Those opinions, the court said, are protected by the First Amendment to the U.S. Constitution, and defamation claims cannot be premised on an opinion. *Publishers must be careful. Saying that something is an opinion doesn’t always make it one. An opinion that is not actionable under the libel laws is usually said to be something that is incapable of being definitely proven true or false, such as, “Joe Smith isn’t a good man.” Saying that “in my opinion, Joe Smith is a Communist” could be a libel if Joe Smith’s reputation is damaged by the statement and he is not, in fact, a Communist Party member.*

TAXATION

NO PENALTY FOR GOVERNMENT IN DELAYED RULING ON EXEMPTION – The U.S. Tax Court refused to award litigation costs against the Internal Revenue Service when it delayed in processing a nonprofit’s tax exemption application for over a year, forced the applicant to file suit in order to obtain recognition of exempt status, and then immediately conceded that the applicant was entitled to an exemption. The court was sympathetic to the nonprofit Friends of the Benedictines in the Holy Land, Inc., saying that it shouldn’t have been put to the trouble and expense of filing suit. However, examining statutory language that provided for the awarding of litigation costs against the federal government, the court noted that it allowed such an award only when the government’s position in litigation was not “substantially justified.” In this case, though the IRS delayed in processing the exemption application, the Service’s position *in the litigation itself*, that is, conceding immediately after the filing of suit, was “substantially justified” and, in the court’s view, would always be so in similar cases where the IRS immediately caved on receiving a complaint. Said the court, the Friends’ case “falls into a gap in the statute, but it is not our role to bridge that gap.” *On a different issue, the court said that, in some cases, an applicant might have been able to sue the government for pre-litigation administrative expenses forced on the applicant by an IRS delay in processing. But, in this case, the Friends presented no evidence of having incurred any such pre-litigation administrative expenses.*

IRS WILL SCRUTINIZE EXEMPT ORGANIZATIONS FOR PRIVATE BENEFIT – The Internal Revenue Service has announced that it will be focusing on the examination of Section 501(c)(3) exempt organizations that show indicators of providing “private benefit or inurement.” The Service notes that charitable, educational and other organizations are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code only if no part of their net earnings 1) inures to a private shareholder or individual who is in a position to control that entity or 2) benefits a private individual or class of individuals. The private benefit and inurement prohibitions preclude individuals and officers of an organization, as well as other private individuals or entities, from unfairly or unreasonably receiving an organization’s benefits, income or assets. *Even the smallest amount of private benefit or inurement can jeopardize an organization’s exempt status and cause the IRS to impose severe penalties on those who approve or benefit from such an arrangement. Consequently, the IRS warns that organizations should review their business operations, hiring practices and compensation packages to address any problematic characteristics apparent in such transactions or practices.*

IRS QUESTIONS WHETHER MAYO CLINIC IS EXEMPT SCHOOL – The famed Mayo Clinic is engaged in a \$11.5 million lawsuit against the Internal Revenue Service after the IRS questioned whether Mayo is primarily a tax-exempt educational organization. Mayo enrolls more than 3,800 students for graduate, post-graduate and other medical education, and it provides continuing medical education for more than 100,000 health care professionals. But it does not grant degrees, it treats patients, and it makes a great deal of money from debt-financed real estate investments, which the IRS is anxious to tax. The Service has examined seven years of Mayo’s returns and came up with the \$11.5 million figure for taxes Mayo owed. Mayo paid, but then sued the IRS for a refund plus interest. That was two years ago, and a trial in the matter has just recently been set for March 9, 2019, with the delay largely being caused by Mayo’s extensive discovery requests. *The Service and Mayo have been in the courts before, and it didn’t turn out well for Mayo. The two parties previously disputed whether Mayo’s medical residents were students or employees, and the disagreement went all the way to the U.S. Supreme Court, which ruled the residents were employees subject to payroll taxes.*

IRS AUDIT RATES DECLINE - The Internal Revenue Service reported that tax audit rates declined in 2017 for individuals and for all categories of businesses except partnerships, for which the audit rate remained the same as it was in 2016. The IRS audited about 1 in 160 individual tax returns in 2017, with the biggest drop in audit rate coming for taxpayers with incomes of \$1 million or higher. The audit rates for other groups of individuals also declined, but not as much, as the overall audit rate for individuals declined for the sixth consecutive year. The audit rate for businesses dropped for the second consecutive year in 2017, down to 0.44%. *IRS officials blamed audit rate declines on budget cuts, resulting in declining numbers of IRS enforcement personnel. The Service has lost nearly a third of its enforcement employees since 2010.*

INTELLECTUAL PROPERTY

TRADEMARK INFRINGEMENT SUIT SETTLED WITH SIMPLE NAME TWEAK – If you don't think things can get ugly between nonprofits over a name, check out the dispute between established charities in Michigan and Ohio over their use of similar names in providing wigs for children with health issues. A 30-year-old Ohio charity that had trademarked Wigs For Kids found out a 14-year-old Michigan group was using Wigs 4 Kids and demanded that it change its name. The Michigan group thought it was “outrageous that a nonprofit organization would sue another nonprofit” and tried unsuccessfully to settle the matter by adopting the name Wigs 4 Kids of Michigan. But the Ohio organization said it was being deprived of sizeable donations and publicity because of public confusion created by the Michigan group. A suit was filed in federal district court, and it was finally settled when the Michigan organization agreed to change its title to Maggie's Wigs 4 Kids of Michigan, Maggie being the name of its founder and CEO. *Lawsuits are filed by and against nonprofits frequently over their use of similar marks, and a trademark registration can help resolve them. Fortunately, this nonprofit dispute was settled on a friendly basis. At the end, the principals of the two groups even embraced in front of the judge's bench. Kids now will benefit from the operation of both groups.*

HOWE & HUTTON NEWS AND EVENTS



On June 6th Mike Deese will be presenting a webinar for ASAE's Association Management Company Section Council on Management Services Agreements between AMCs and their association clients.

Naomi Angel recently presented reports on current legal trends at an annual meeting of manufacturers in San Antonio, Texas and a Board of Directors meeting of manufacturers in Chicago, Illinois.

Naomi will be co-presenting a session entitled "Your Legal Team & My Legal Team, the Great Divide! – Point/Counterpoint" at the Marriott Association Masters Conference held in Las Vegas, Nevada.



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