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THE HOWE & HUTTON REPORT

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TRENDING NOW

JUDGE BLOCKS RULE EXPANDING ACCESS TO NON-ACA PLANS – *H&H Report Update* **-** A federal judge has struck down a Trump Administration rule expanding public access to health insurance plans that don't meet the requirements of the Affordable Care Act (Obamacare). The rule loosened requirements for "association" health plans sponsored by groups or organizations, including nonprofits, which would not meet all ACA requirements but would be cheaper to purchase. U.S. District Court Judge John Bates said the rule was illegal as an "end run" around ACA requirements. *Opponents of the ACA, including the Trump Administration, are still fighting it in the courts. But, for now, the ACA will continue to require such things as pregnancy coverage for men, and some cheaper insurance options will be banned .*

SUPREME COURT RESTRICTS GROUP ARBITRATION – The Supreme Court of the United States has held that employees and consumers who are bound by arbitration clauses in contracts they have signed cannot pursue group arbitration proceedings unless the contracts specifically so provide. Writing for the majority in a 5-4 decision, Chief Justice John Roberts explained that individual arbitration of claims offers businesses "lower costs, greater efficiency and speed" over lawsuits, whereas arbitration of claims by groups offers none of those advantages for businesses. So, businesses can't be presumed to have agreed to it by including a typical arbitration clause in their contracts. *The Court's decision will make it harder for employees and consumers to pursue group arbitration and likely encourage more businesses to include arbitration clauses in their contracts without specifying anything about group arbitration.*

TRENDING (cont.)

LOBBYING AND CAMPAIGN ACTIVITY DISTINGUISHED– We recently read an article by a columnist who stated that a 501(c)(3) exempt organization had broken federal tax laws by "lobbying," which, the columnist said, such organizations can't do. Wrong! It's true such organizations are not supposed to engage in any partisan political campaign activity in support of or opposition to a political candidate. But that's completely different from "lobbying" by communicating with lawmakers about proposed legislation. According to the Internal Revenue Code, they can do lobbying, as long as it isn't a "substantial" part of their activities. But if you get into the way the Internal Revenue Service interprets "substantial," such an organization can do quite a lot of lobbying without it being considered "substantial," and it's entirely legal. Furthermore, some communications with lawmakers aren't really even considered by law to be "lobbying." So, for example, a (c)(3) can respond to an invitation from a member of Congress to present testimony regarding a proposed law, and they can do as much of that as they want, even if they openly solicited the invitation, which we have occasionally done on behalf of clients. *We wish that more columnists would do their research before castigating some nonprofit for doing something that is perfectly legal (but something the columnist doesn't particularly favor). They could then make a more intelligent contribution to public discourse.*

BE CAREFUL IN DONATING FOR NOTRE DAME CATHEDRAL – Damage to the Notre Dame Cathedral, like many other disasters, may prompt individuals and organizations to donate funds for rebuilding. But be careful out there. As has been the case with other disasters, crooks are taking advantage of well-intentioned donors, who need to take special care to make sure they are donating to the proper people. Some of these criminals are using the names of well-known charities, like the Red Cross, but have no actual connection to them. There are at least four legitimate entities in France who have been identified by the French Ministry of Culture as having the authority to receive funds for the rebuilding of the Cathedral, namely, la Fondation du Patrimoine, la Fondation de France, la Fondation Notre-Dame, and le Centre des Monuments Nationaux. For those wishing to contribute to an American entity, the Better Business Bureau in your area may have a list of such organizations, as BBB is compiling such a list. Additionally, some readers may be with American organizations that can assist in the rebuilding effort. Keep in mind there are consequences for contributors, associations and recipients, so spearheading a donation campaign should be carefully thought through. Organizations must get good legal and accounting advice when undertaking such efforts. *Experts say it will take at least ten years to rebuild the Cathedral. So, potential donors have time to do careful research on a proper recipient and claim a charitable donation tax deduction.*

TRENDING (cont.)

FIFTH AMENDMENT APPLIES TO DIVULGING PHONE PASSCODE – The Illinois Appellate Court, Third District, has held that the Fifth Amendment to the U.S. Constitution prohibits arresting officers from asking a man to divulge the passcode for his phone so they could search it, because that was essentially self-incrimination. Officers had obtained a search warrant that applied to the phone and much of the information on it, but the court said the officers couldn't require disclosure of the passcode so that they could engage in a "fishing expedition" for evidence of illegal drug distribution. Curiously, the Appellate Court found that the only way the police could compel disclosure of the passcode was to prove that they already knew everything on the phone! *Nonprofits are familiar with how easy it is for litigants to subpoena information from them even when they aren't parties to litigation. Further, they, like everyone else in the world, find themselves constantly asked or required to disclose sensitive information to banks, insurance companies and others, to such an extent that one can almost doubt that there is any information anyone can maintain as personal or confidential. Heck, yes, there is, Mr. Policeman! You can't have that passcode.*

EMPLOYMENT

ILLINOIS REQUIRES REIMBURSEMENT OF EMPLOYEE BUSINESS EXPENSES – Effective this year, Illinois law requires employers to reimburse all necessary expenses or losses incurred by employees within the scope of the worker's employment and directly related to services performed for the employer. The employee must submit a request for reimbursement within 30 days after incurring the expense. Supporting documentation must also be submitted, or, if it is unavailable, a signed statement regarding receipts. Employers are not required to reimburse for losses due to an employee's negligence, normal wear or theft, unless the employer's negligence caused the theft. Importantly, if the employer has a policy providing for reimbursement of less than the full amount of an expense or loss, but the reimbursement isn't minimal, the employer's policy will control. *Illinois joins a small number of other states that require employer reimbursement of employee business expenses, but Illinois has added a new wrinkle in allowing employers to enforce a policy that provides for reimbursement of less than 100% of expenses as long as the reimbursement isn't minimal.*

DELAY OF DEADLINE FOR REPORTING DATA TO EEOC STRUCK DOWN – *H&H Report Update* **-** A court has blocked an effort by the federal Office of Management and Budget to delay the effective date of a federal Equal Employment Opportunity Commission requirement that employers of more than 100 workers annually report to the EEOC data on employee pay broken down by sex, race and ethnicity within 12 pay ranges for each of their physical locations. The EEOC pay disclosure requirement was finalized in 2016, but the OMB froze its taking effect once President Trump took office because of the burden that the new requirement would impose on employers. Now, in deciding a suit filed by the National Women's Law Center and other groups, the court has held that OMB failed to adequately justify its decision to delay putting the EEOC disclosure requirement into effect, which means it may go into effect almost immediately unless the court's decision is appealed. *Proponents of the EEOC requirement say it is a necessary step in ensuring that employers will follow equal and fair pay policies. Opponents note that the EEOC already receives demographic employment data provided by employers, but will now be required to make reports in greater detail, completing a ten-page form instead of a form on one page of paper.*

REGULATION

NO VIOLATION OF KICKBACK LAW IN GIVING FREE FOLLOW-UP CARE – The federal Office of the Inspector General has issued an Advisory Opinion that a medical center would not be violating anti-kickback laws by offering free, in-home follow-up care to certain eligible patients with congestive heart failure or chronic obstructive pulmonary disease. The opinion was provided in response to a request from the center and was based on facts being as they were presented in the request. The Office indicated that, if facts regarding the follow-up care program were somewhat different, indicating that the free care was being offered as an inducement or reward to attract business, a violation of the anti-kickback laws might have been indicated. In this case, there was a certification by the center that the goals of the free care program were to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions, which would actually decrease utilization of the center's services in general. In addition, the center certified that it would not attempt to persuade uncertain patients to select the center for follow-up services by offering them the free arrangements. *The anti-kickback laws are no joke, even though the rationale for their application to the giving away of medical services may seem a little murky when high medical costs are a great concern to the public. Violations can result in substantial civil penalties.*

TCPA STATUTORY DAMAGES MAY BE AWARDED WHEN REAL DAMAGES ARE SLIGHT – The U.S. Court of Appeals for the Seventh Circuit has held that a plaintiff suing for violations of the federal Telephone Consumer Protection Act by unsolicited faxing is entitled to statutory damages even if actual damages are slight. Even an "identifiable trifle" of real damages suffices for a award of $500 per fax ($1,500 per fax if the violation was intentional), the appeals court said, reversing a lower court ruling to the contrary. *The Court of Appeals found that the plaintiff businesses in a case before the court alleged concrete damages from the defendants' unsolicited fax advertisements, saying that printing the faxes used costly paper and toner, and reading the incoming faxes diverted employees' time. So, statutory damages should have been awarded by the lower court. Whether it was good public policy to use "cumbersome and costly litigation to resolve disputes about annoying fax ads" the appeals court said, was for Congress to decide.*

CONNECTICUT COURT ALLOWS SUIT AGAINST GUNMAKER REMINGTON – As many argue for more federal action to stem gun violence, the Connecticut Supreme Court has found its own way to attack the problem. Federal law provides significant protections for gunmakers when their weapons are used to commit crimes. But, by a 4-3 ruling, the Connecticut court has ruled that, despite the protective federal law, gun manufacturer Remington can be sued for how it marketed its Bushmaster military-style rifle, rather than for manufacturing it. The court reinstated a wrongful death lawsuit against the gunmaker that was dismissed by a lower court. The suit was filed by a survivor and relatives of nine people killed in the massacre at a Sandy Hook elementary school that took the lives of 20 children and six educators in 2012. In the suit, the plaintiffs argue that Remington's weapon was too dangerous for the public and that the gun manufacturer glorified it in marketing it to young people. *Further proceedings will be held in this matter. One problem for the plaintiffs, if they want to obtain damages from Remington, is the bankruptcy protection for which Remington's parent company filed last year*.

NON-PROFITS

FAILURE OF NOTICE TO MEMBERS VOIDS UNION REAL ESTATE CONTRACT – The Illinois Supreme Court has voided a union's real estate contract for failure to provide statutory notice to its members and obtain their approval before executing the contract. The notice and approval requirement is part of the Illinois Property of Unincorporated Associations Act, and it applies to unincorporated bodies generally if they have members. The Illinois Supreme Court held in this case that a real estate contract executed without compliance - including a lease or mortgage as well as a sale contract – would be null and void and could not be enforced by any party to it. *Different states have different rules governing the legal rights and obligations of unincorporated entities. In many cases, they do not have the same legal capacities as incorporated entities, and that's a good reason for incorporation of nonprofits.*

TAXATION

IRS REPORTS UPSWING IN THEFT OF DATA FROM PRACTITIONERS – The Internal Revenue Service has reported a "steep upswing" in the number of reported thefts of taxpayer data from tax practitioner offices. (That's not from the IRS offices, but from people who help others file their tax returns.) The Service is especially warning authorized IRS e-filers to follow rules for participation that are designed to keep taxpayer data safe, including destruction of taxpayer documentation after a required retention period. Furthermore, the Service is urging practitioners who send the IRS more than 2,000 returns per year to provide the IRS with certain information regarding fraud schemes. *Not new, but something the IRS has warned about previously, is the tendency of taxpayers to include their Social Security Numbers and Employer Identification Numbers on documents that don't ask for that information.*

CLERGY HOUSING EXEMPTION UPHELD AGAIN – *H&H Report Update* **–** A panel of the U.S. Court of Appeals for the Seventh Circuit has upheld the constitutionality of a federal law excluding housing allowances from the taxable income of clergy members. The decision overturns a ruling by a federal district court judge in Wisconsin that the clergy housing exemption, enacted by Congress in 1921, violates the First Amendment to the federal Constitution, which prohibits the government from establishing a religion in the U.S. The Court of Appeals concluded that the clergy housing exemption was not unconstitutional because it merely put clergy members on an equal footing with certain secular employees who are not required to pay taxes on the value of food and lodging provided to them by their employers – sailors living on ships, for example. Furthermore, the Court of Appeals held that the statute did not specifically endorse religion and did not cause "excessive entanglement" of the government and religion. *The federal law granting clergy exemptions specifically exempts housing for a "minister of the gospel." However, the courts have interpreted the statutory language as applying to leaders of any religious group.*

NEWS AND EVENTS

Jon presented an update on the hotel industry and negotiations to the American Bar Association Standing Committee on Meetings and Travel.

Jon presented to the Association Forum Association Law Program on Legal Issues in Hotel Contacts and on Association Law issues.

Jerry Panaro will be giving a presentation to LeadingAge in early May on Federal and DC employment laws.

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