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THE HOWE & HUTTON REPORT

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TRENDING NOW

TAXPAYER FIRST ACT REQUIRES E-FILING FOR EXEMPT ORGANIZATIONS – The President has signed into law the Taxpayer First Act of 2019 (TFA) following passage by Congress. The Act makes changes in Internal Revenue Service management and tax compliance. Among many other things, it requires all exempt organizations to e-file their Form 990 series annual returns and, for political organizations, their Form 8872 reports of contributions and expenditures. Additionally, the TFA requires that the IRS notify organizations that are on the verge of losing their tax exemptions because they haven't filed a Form 990 series return for two straight years (a third year without a return bringing with it an automatic loss of exemption, as previously required by Congress). *This legislation was long in the works and no surprise. Plus, the notice requirement should be very helpful to nonprofits, who sometimes forget about filing those 990s.*

DOJ ANNOUNCES MITIGATION FOR ANTITRUST COMPLIANCE PROGRAM – The U.S. Department of Justice has announced that, for the first time, it will begin considering corporate antitrust compliance programs in mitigation of alleged criminal antitrust law violations. The programs must be "effective and robust" to be considered. According to guidance issued by the Department's Antitrust Division, that means the programs must be "well-designed," applied "earnestly and in good faith" and "working." *Of course, if a program is "effective" and "working," there wouldn't be an antitrust violation to be alleged, would there? The accused would be innocent. Also, there doesn't seem to be any agreement from the Federal Trade Commission, the federal government's other antitrust prosecutor, to go along with the Department's new policy.*

TRENDING (cont.)

WAR MEMORIAL CROSS ON PUBLIC LAND IS NOT UNCONSTITUTIONAL – The Supreme Court of the United States, over two dissenting votes, has held that the presence of a Latin cross in a World War I memorial on public land, maintained by public funds, does not violate the U.S. Constitution, which prohibits the federal government from being involved in the establishment of religion. The American Humanist Association filed suit to have the cross removed from its site at a busy intersection, saying that their rights were violated because they could view the cross when driving by. The American Legion intervened to defend the cross. Two Justices concluded that "offended observers" such as the Association's members had no standing to bring the suit, while a plurality of the Justices ruled that, even if the original purpose of including the cross in the memorial was infused with religion, the monument had historical significance and a place in a common cultural heritage, which made it constitutional. *The Court might not have ruled in favor of the memorial if it had been newly established, but the passage of time since it was erected in 1925 allowed it to remain because of its acquired historical and cultural significance. The Court's decision also relied on the fact that the monument included the names of fallen Jewish, as well as Christian, and black, as well as white, soldiers. The plurality noted its conclusion that the memorial followed "in the tradition of the First Congress in respecting and tolerating different views, endeavoring to achieve inclusivity and nondiscrimination, and recognizing the important role religion plays in the lives of many Americans." Similar monuments, symbols and practices, the plurality said, "are likewise constitutional."*

WORKER MUST INFORM EMPLOYER ABOUT ACCOMMODATIONS – The U.S. Court of Appeals for the Seventh Circuit has rejected a suit under the Americans with Disabilities Act, finding that an employer can't be guilty of failing to offer reasonable accommodations to an injured worker when the employee hasn't provided sufficient information to determine the necessary accommodations. Graham was a maintenance supervisor for a skating rink owned by Arctic. After he was injured on the job, medical restrictions required that he work sitting down. Arctic then assigned him to skate sharpening and evening work because of seasonal need. He considered that a demotion, but never told Arctic of his belief that skate sharpening also failed to meet his medical restrictions. Eventually, he was fired, which Arctic blamed on his poor attitude, lack of timeliness, insubordination and a Zamboni accident he caused. But a federal district court and then the Seventh Circuit tossed Graham's suit against Arctic under the ADA, finding that he had not given Arctic sufficient information to determine what accommodations were necessary for his disability and had not given the courts enough evidence to support an inference of bad faith in his termination. *The ADA envisioned that employers and workers would engage in a good faith dialog about reasonable accommodations. That didn't occur in this case, and the courts blamed Graham.*

TRENDING (cont.)

COURT FINDS STALKING LAW UNCONSTITUTIONAL – *H&H Report Update* **–** The Illinois Appellate Court, First District, has declared unconstitutional all that remained of anti-stalking legislation passed years ago by the state General Assembly, most of which had been struck down previously by the Illinois Supreme Court. The provision voided by the Appellate Court criminalized making threats that could cause distress. Like the anti-stalking provisions invalidated by the state Supreme Court, the "no threats" law was found unconstitutional because it criminalized innocent conduct, and not, for example, threats to commit unlawful violence. *The Appellate Court noted that coaches may threaten their players with benching if they don't play defense, and parents may threaten to take away their children's dessert if they misbehave. Such "threats," the court said, "merely incentivize good behavior," but would carry felony criminal liability under the anti-stalking law.*

EMPLOYER'S BARELY MISSING ERISA DEADLINE ISN'T GOOD ENOUGH – A deadline is a deadline, said the U.S. Court of Appeals for the Seventh Circuit in rejecting an employer's claim that it had "substantially complied" with a deadline for responding to an employee's argument for long -term disability benefits under the employer's ERISA plan. The Court of Appeals noted that an employer's "substantial compliance" claim might work when an administrator commits some procedural violations in connection with an ERISA plan. But an employer's argument that it was only a little bit late in complying with a deadline established by ERISA regulations won't cut it, because "substantial compliance" does not apply to blown deadlines. *A deadline is a bright line, said the court, and even missing a deadline for response to an employee claim by a couple of days, as in this case, isn't good enough.*

NON PROFIT

ASSOCIATION SUCCESSFULLY INTERVENES IN SUPREME COURT FOIA CASE – Nonprofits with the right arguments can sometimes (respectfully) tell even the Supreme Court of the United States what to do. That happened recently when a media company filed a Freedom of Information Act request that the Department of Agriculture provide the names and addresses of all retail stores participating in the national Supplemental Nutrition Assistance Program (SNAP), plus each store's annual food stamp redemption data. The Department declined, saying that the information sought was protected from disclosure under the Act as "trade secrets and commercial or financial information obtained from a person as privileged or confidential." After a lower court required the disclosure, the Department gave up on appealing that decision. But a trade association of grocers intervened, successfully arguing to the Supreme Court that the Department need not provide the requested information because SNAP data were customarily not made publicly available by retailers, and the federal government, to induce retailer participation in SNAP, had long promised retailers it would keep their information private. *The association first had to convince the Supreme Court that it had "standing" to get involved in the case, something that intervening nonprofits can't always manage. Then, the association won its case when the Court interpreted "confidential" under the Act as including information customarily and actually kept private by its owner and provided to the government only under an assurance that it would remain so.*

EMPLOYMENT

EVOLVING RESPONSIBILITIES PRECLUDED ADA SUIT – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court decision that American Airlines, Inc. could legally terminate a worker with multiple sclerosis whose changing job responsibilities resulting from her employer's merger with another company made her no longer qualified for her job. Bilinsky worked for American Airlines in Dallas until she was diagnosed with her disease Then, because excessive heat aggravated her condition, she was permitted to transfer to American's Chicago office, where she performed successfully for several years, traveling to Dallas an average of one day a week as work required. But, after American merged with US Airways, her employer decided that she had to transfer to Dallas, which she refused, resulting in her termination. She then filed suit under the Americans with Disabilities Act, and the Seventh Circuit decided that the merger fundamentally changed Bilinsky's job responsibilities so that she was no longer qualified to perform them, because the job now required consistent physical presence in Dallas. Consequently, there was no ADA violation. *The Seventh Circuit noted that Bilinsky's team "evolved" from working on independent activities to team-centered activities requiring face-to-face meetings on short notice in Dallas. Even though this "evolution" was slow and was not reflected in her written job description, the Seventh Circuit found that consistent physical presence in Dallas "at some point" had become an essential function of her job.*

DENIAL OF BUSINESS CARDS DOESN'T SUPPORT DISCRIMINATION SUIT – A federal court has dismissed a discrimination suit filed by a doctoral candidate at the University of Chicago who sued the school partly because it denied her request for business cards to be used at upcoming meetings and conferences. The student claimed the school was prejudiced against her because she was a Muslim and Indian-American woman, which tainted its decisions regarding the business cards, in assigning her office space, and in pulling financial aid from her research project in India. The school, though, claimed she overreacted to the school's decisions to deny her requests, repeatedly disrespected professional boundaries, and made unreasonable demands for feedback on her research. The judge hearing the case ruled that the student did not demonstrate that the school used false accusations against her to cover up discrimination. He noted that she didn't receive the business cards because she was only a part-timer at the school, while only full-time employees received cards. *Ultimately, in this and other instances, the court found that the evidence in the case merely indicated that the student disagreed with the school's evaluation of her. But there was no evidence from which it could reasonably be concluded that the school did not honestly believe its stated reasons for its decisions.*

REGULATION

SUPREME COURT REJECTS CHALLENGE TO TRUMP STEEL TARIFFS – The Supreme Court of the United States has ruled against an early challenge to President Trump's decision in 2018 to impose a 25% tariff on imported steel. The Supreme Court decided to leave in place a ruling by the Court of International Trade against steel importers and others who challenged the tariff, which the President justified as based on national security concerns. *This is certainly not the end of litigation over the President's tariffs. Some dispute the President's authority to impose tariffs without Congressional approval, and some just question the wisdom of the President's tariff decisions. In any event, additional lower court actions will probably be forthcoming as various claims against the President are resolved, one way or another.*

COURT BACKS CEMETERY OWNER ON LOCAL MANDATE – Does your organization operate a cemetery? Some nonprofits do, and they are subjected to various state and local laws regulating such activities. But when a town in Pennsylvania passed an ordinance requiring that all cemeteries be open to the public during the day, one cemetery owner contended that the ordinance essentially took her property without fair compensation. She fought the ordinance all the way to the Supreme Court of the U.S. and won an important ruling. Under a 1985 Supreme Court decision, property owners contending that a state or local law violated their property rights couldn't challenge it in federal court without first going to state court. But if they went to state court and lost, they were barred from further litigating in federal court. That decision was "not just wrong" but also "exceptionally ill founded," Chief Justice John Roberts wrote for the majority of the Court in the new decision, overruling the 1985 ruling and finding that the state-litigation requirement imposed an unjustifiable burden on the property owner who brought her case to the Court. *If you don't like a state or local law, you may not want to fight it in a state or local court, which you might think would be influenced by local politics. Now, you don't have to if you think the law violates your property rights. You can go directly to federal court. That's an important ruling for property owners. But the new decision may be notable more for its overruling of a Supreme Court precedent than for anything else.*

COURT STRIKES DOWN DRUG AD RULE – *H&H Report Update* **-** A federal judge in the District of Columbia has blocked enforcement of a Trump Administration rule requiring drug makers to disclose their prices in television ads. Judge Amit Mehta found that the rule would violate the free speech protections of the First Amendment to the U.S. Constitution and exceeded the statutory authority of the federal Department of Health and Human Services, which promulgated the rule. *Judge Mehta invited Congress to regulate drug advertising rather than leaving it up to the Department, although, if free speech protections are implicated, it is hard to see how even Congress could force drug companies to disclose their prices in television ads. The U.S. is one of only a few countries that allow any television advertising by drug companies.*

TAXATION

TREASURY KILLS STATE TAX WORKAROUND – *H&H Report Update* - One of the provisions of the 2017 federal income tax law changes was a limitation on the deductibility of state tax payments for federal income tax purposes. Individuals and married couples were prohibited from claiming a federal income tax deduction for more than $10,000 in state and local tax payments in any year. But, because this made residence in states with high tax rates less appealing, an increasing number of states began giving taxpayers a credit on their state taxes if they made "voluntary charitable donations" to funds run by the states, which were used for various governmental purposes. *Charitable donations, see? Fully deductible for federal income tax purposes? Not so fast, said the U.S. Treasury Department, which just issued regulations intended to restrict people from converting nondeductible state tax payments into deductible charitable contributions. Some states, like Georgia, Arizona, and Alabama, implemented credit-for-donation laws for years prior to 2017. But when high-tax, states started passed similar laws in response to the 2017 federal tax changes, the IRS looked into this practice. And what do you know? The Service now says, beginning with contributions made after April 27, 2018, these voluntary "contributions" to state-run programs will be subject to the $10,000 limit just like real state and local tax payments.*

NEWS AND EVENTS

Jon presented a program to meeting professionals at **Destination West** dealing with current legal issues impacting the hospitality industry. Jon also made a presentation to a Board of Directors Orientation on legal responsibilities for not for profit corporation directors.

HOWE & HUTTON

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