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Chicago
(312) 263-3001

Washington, D.C.
(202) 466-7252



THE HOWE & HUTTON REPORT

Volume 2018, Issue 10

TRENDING NOW

CALIFORNIA PROP 65 – NEW PRODUCT WARNING REQUIREMENTS - In 1986, California voters approved Proposition 65, a law that mandates California to publish a list of chemicals known to cause cancer or reproductive toxicity, and companies with 10 or more employees must provide warnings when they knowingly cause significant exposures to listed chemicals. For consumer products produced and sold in or into California after August 30, 2018, Prop 65 new warning requirements apply to wholesalers, distributors, dealers and other non-manufacturer sellers as well as to the manufacturer. Because the manufacturer knows the chemical content of its products, it has the ability to determine if a warning is required, and to apply that warning to the product before it enters the supply chain. More limited obligations are imposed on retail sellers who sell products directly to California consumers, including via the Internet. Prop 65 does not restrict the sale of listed chemicals, or products containing those chemicals. Rather, the warnings are intended to help people make informed decisions about the products they use and the places they go. *Consider having your upstream suppliers confirm that their products comply with the new California warning requirements. Get written assurances from existing suppliers that they place legally-mandated warnings on their products. Confirm that your website properly displays the required warnings for the products you sell to California consumers over the Internet. Consult with your management, quality assurance personnel and professional advisors. For more information, see <https://oehha.ca.gov/proposition-65>.*

TRENDING (cont.)

NATIONAL ID LAW POSTPONED – *H&H Report Update* -The effective date of the federal Real ID law has been postponed to October 1, 2020. Illinois and 14 other states failed to comply with the law by an October 10 deadline, causing the U.S. Department of Homeland Security to announce the postponement of the effective date. The law was passed by Congress in 2005, requiring implementation of new uniform security standards for identification cards and driver's licenses. Without a Real ID that complies with federal law, Americans will not be able to take commercial air transportation or enter federal facilities when that law takes effect. *Illinois has until June 1, 2019 to begin issuing driver's licenses and identification cards that comply with the federal law, and state officials say that Illinois will meet that deadline. To obtain a Real ID, Illinois residents will have to provide the state with a birth certificate or valid U.S. passport, Social Security card and two documents proving their address. See the Department of Homeland Security Real ID website to check whether your state ID is compliant: <https://www.dhs.gov/real-id>.*

NONDISCLOSURE AGREEMENTS LIMITED – Many states now are considering legislation that will limit use of nondisclosure or confidentiality agreements by employers and prospective employers to prevent lawsuits and related publicity arising from sexual harassment. In at least six states – Arizona, Maryland, New York, Tennessee, Vermont and Washington – the law already prevents employers from avoiding liability or publicity for sexual harassment by having their employees or prospective employees sign agreements that they will not disclose the circumstances of sexual harassment. California will probably have joined the list of states passing such legislation by the time this article is published. At least 16 states considered enacting such laws this year. The federal government also prohibits taxpayers from deducting as a business expense any cost of reaching nondisclosure agreements with sexual harassment and misconduct victims. *Many workers may feel that they have no choice but to agree to what employers and prospective employers may ask them, no matter how unreasonable, in order to get and keep a job. If what they are asked to agree to has anything to do with sexual harassment, they have some protections now, at least in some states.*

NEW NAFTA DEAL REACHED – *H&H Report Update* – A new treaty to replace the North American Free Trade Agreement has been negotiated by diplomats for the U.S., Canada and Mexico. The treaty is expected to be signed by President Trump and his Canadian and Mexican counterparts within 60 days. But the deal, like all U.S. treaties, is subject to ratification by Congress, and it requires approval by Mexico's Congress and in Canada during a federal election year. *Canada joined a bilateral deal previously negotiated for the U.S. and Mexico after arrangements were made to meet Canada's desire for some protection from U.S. tariffs on imported steel and aluminum, as well as automobiles from Canadian factories. Last minute details remained to satisfy U.S. desires for greater access to Canada's dairy market and a quota to be applied to Canadian automobiles shipped to the U.S.*

TRENDING (cont.)

U.S. REIMPOSES SANCTIONS AGAINST IRAN – *H&H Report Update* - The Trump Administration has reimposed sanctions against Iran and its trading partners and threatened initiation of tougher sanctions unless Iran complies with a dozen demands, including a cessation of support for militant groups in other countries and its enrichment of uranium. The 2015 nuclear accord with Iran lifted American sanctions, but the Trump Administration withdrew from that accord. Now, as thousands of Iranians protest in the streets against the country's deteriorating economy, Trump hopes U.S. sanctions will bring about a regime change that will make Tehran more inclined to cooperate with the U.S. in international matters and, especially, stop development of nuclear weapons, which some experts think will come on line in less than a year. *Current sanctions bar sale of U.S. currency to Iran's government, sanction Iranian trade in gold and other precious metals, outlaw purchase of Iran's debt, and punish Iran's automotive sector. Also prohibited is Iranian sale or acquisition of aluminum, steel and other industrial materials, as well as the importing of Iranian carpets and pistachio nuts into the U.S. But the threatened sanctions due to take effect soon would go much further, cutting off Iranian oil exports and imposing sanctions on Iran's shipping. Some of the American sanctions cannot be successfully imposed without the cooperation of countries in Europe and China, which is a major importer of Iranian oil.*

EMPLOYMENT

COURT OKAYS ELIMINATION OF PAY TO LAID-OFF EMPLOYEES – The U.S. Court of Appeals for the Seventh Circuit has affirmed a lower court judgment that Caterpillar could terminate a program under which it paid unemployment benefits to laid-off employees at its Joliet, Illinois manufacturing plant for over 50 years, even though terminating the plan had a disparate impact on older workers. Termination of the plan was part of a collective bargaining agreement with a local union. In exchange for the elimination of the unemployment benefits, Caterpillar paid \$7.8 million to certain employees who participated in the plan. Retirement-eligible employees received a pro-rata share if they agreed to retire. Employees ineligible to retire received the same share with no strings attached. Forty-eight retirement-eligible employees sued Caterpillar for age discrimination. But the Court of Appeals approved liquidation of the plan because it was justified by “several reasonable factors other than age,” even though it had a negative impact on older workers. It achieved one of Caterpillar's long-standing financial objectives – elimination of the unemployment benefits – while incentivizing early retirement, reducing administrative expenses, and contributing to labor peace between Caterpillar and the union. *We aren't sure whether this result would stand on further appeal, if the U.S. Supreme Court would take it up, but it shows that employers sometimes can cut costs even if the result is discriminatory. Each case probably stands on its own, though. Different employers might not be successful in cutting costs through somewhat similar actions.*

EMPLOYMENT (cont.)

ILLINOIS LAW REQUIRES PAID NURSING BREAKS – Illinois law now requires employers to give employee mothers at least some paid breaks for breastfeeding or collection of breast milk. The requirement applies until one year after a child is born. Nursing mothers can be required to use unpaid meal breaks for nursing or expressing milk, along with other breaks the employer chooses to provide to employees generally. But employers must also provide a “reasonable” number of additional nursing/expressing breaks, and those breaks must now be paid time. Employers are excused from providing additional nursing/expressing breaks if they can show that doing so would create an “undue hardship” for the employer. *The “undue hardship” standard is a difficult one for employers to meet, borrowed from the Americans with Disabilities Act and the Illinois Human Rights Act. The new law anticipates that employers and employees will discuss the timing of additional breaks needed for breastfeeding or collection of breast milk. But the “undue hardship” affirmative defense for employers is not one that employers will be able to rely upon very often. So, employers had better be extremely lenient in providing the additional breaks if they employ nursing mothers.*

MINISTER’S DEFAMATION SUIT FALLS ON FIRST AMENDMENT GROUNDS – The Illinois Appellate Court for the Fourth District has affirmed a lower court’s dismissal of a minister’s defamation suit against a church with which he was affiliated, saying that it was a matter of church governance that should be kept out of the courts. The suit stemmed from sexual misconduct allegations made against the minister and how they were handled by the church, which circulated allegations against the minister among other church members. The suit alleged defamation, invasion of privacy and intentional infliction of emotional distress. Now, the Appellate Court has found that a judicial doctrine stemming from a U.S. Supreme Court ruling in 1871, protecting churches from employment-related lawsuits by ministers, also applied to the minister’s suit in this case, because resolving the dispute in the courts would interfere with the church’s internal disciplinary proceedings. Said the court, “The First Amendment’s protection of internal religious disciplinary proceedings would be meaningless if republishing allegations of sexual abuse within those proceedings could be tested in civil court.” *Many employment disputes today also involve alleged defamation. So, it is not surprising that the judicial doctrine cited by the Appellate Court, which has been the basis for many court rulings protecting churches from suits based on employment termination and other adverse employment actions against ministers, should also be cited in a defamation case.*

RIGHT-TO-WORK REJECTED IN MISSOURI REFERENDUM – Missouri voters, by a margin of 2 to 1, voted against a right-to-work measure in a referendum on a state law prohibiting imposition of union dues on non-members in any private workplace. The measure had been adopted by the state’s Governor and the legislature. But unions successfully petitioned to suspend implementation of the law pending a statewide referendum, then outspent proponents of the measure by more than three to one in getting voters to reject it. *The U.S. Supreme Court prohibited imposition of dues on non-members in the public sector last June. Twenty-seven states have laws comparable to the one Missouri voters rejected.*

TAXATION

ARE YOU OUTSOURCING PAYROLL DUTIES? – The Internal Revenue Service has issued a notice recognizing that many employers hire third-party payroll service providers to perform payroll processing functions and tax-related duties, including the making of employment tax deposits. The Service notes that employers generally remain liable to the government for any unpaid employment taxes, including penalties and interest resulting from an underpayment, even if they have contracted with a third-party payroll service provider to make tax deposits and assume that liability. So, the IRS reminds employers that they can monitor deposits made by payroll service providers by accessing the Treasury Department’s free Electronic Federal Tax Payment System at www.EFTPS.gov. *You must be enrolled in the System to use it, and you can enroll on the website, after which you will be issued a PIN to protect your privacy and security via U.S. mail in five to seven business days.*

IRS REQUESTS COMMENTS ON CALCULATION OF UBTI – The Internal Revenue Service has issued a notice requesting comments on how to identify separate unrelated trades or businesses and how to separately calculate the unrelated business taxable income (UBTI) with respect to each trade or business when trying to implement a provision of the new federal income tax law approved by Congress in December. That provision requires that otherwise tax-exempt organizations subject to unrelated business income tax, which have more than one unrelated trade or business, must calculate unrelated business taxable income separately with respect to each trade or business. The IRS notice points out that the new tax law provided no criteria for determining whether an exempt organization has more than one unrelated trade or business or how to identify separate unrelated trades or businesses for purposes of calculating UBTI in accordance with the new tax law. However, the IRS needs to develop such criteria not only to do its job in calculating UBTI, but also to give guidance to exempt organizations on what the government expects them to do in calculating the UBTI they will have to pay. Comments from the public may help the IRS to resolve these problems with which Congress has presented it. But the IRS notes that ideas presented in comments should be “administrable,” and, hopefully, more administrable than a “facts and circumstances” test to identify separate trades or businesses. Such a test, the IRS notes, would require performing a fact-intensive analysis with respect to each trade or business, documenting that analysis, and tracking and keeping records consistent with that analysis, and it would likely foster inconsistency of application among exempt organizations. *The new statute with regard to calculation of UBTI applies to the current tax year. So, all readers, get going and come up with some great, “administrable” ideas on how the new tax law on UBTI should be implemented. Helpfully, the IRS suggests that it will consider “reasonable, good faith interpretations” in deciding how to implement the new statutory law. The Service also notes that it is “considering” some application of the North American Industry Classification System Codes as being “reasonable.”*

TAXATION (cont.)

IRS ISSUES WARNING ON FLORENCE SCAMS – The Internal Revenue Service has issued a warning about scammers trying to take advantage of people who want to help victims of Hurricane Florence. The FBI notes that criminals start by making unsolicited contacts with people by telephone, social media, email or in-person. The scammers may impersonate real charities, may ask for personal information as well as money, may use bogus websites, and may even claim to be working for the IRS to help victims file casualty loss claims and get tax refunds. This sort of thing happens whenever there is a major natural disaster. *The best way to avoid being scammed is to reach out to a legitimate charity that you know rather than responding to solicitations. The IRS has information on disaster relief opportunities at 866-562-5227. Readers can also obtain the same information at www.irs.gov and can investigate whether a claimed charity is legit by using the “Tax Exempt Organization Search” feature on that website*

INTELLECTUAL PROPERTY

NO LIABILITY FOR FAX SENT WITHOUT DEFENDANT’S PERMISSION – Darden Restaurant Inc., as owner of Olive Garden restaurants, was sued under the federal Telephone Consumer Protection Act when an unsolicited fax was sent out that told doctors about a free lunch offering at Olive Garden. While Darden had discussed the promotion, the fax was sent by a company that wanted to offer luncheon meetings at Olive Garden restaurants, not Darden. Further, it was sent out before Darden signed off on the free lunch offering or authorized use of the Olive Garden name and logo on the fax. That being the case, the U.S. Court of Appeals affirmed a lower court decision dismissing the suit against Darden, finding that Darden was not a “sender” liable for unsolicited faxes under the Act. *When someone else uses your trademarks, it can get you in legal trouble. But there was no free lunch at Olive Garden or other benefit gained by the people who sued Darden in this case. Moreover, it isn’t clear that they could have sued the company that actually sent out the fax, since the Act defines a “sender” as “a person or entity whose goods or services are advertised or promoted in the fax ad.”*

HOSPITALITY

FEDERAL HELP ELUDES MANY HOTELS SEEKING LIABILITY LIMITATION – A federal law enacted in 2002, providing liability limitation for many facilities in the event of terror attacks, has done little to help many hotels, who haven't been able to get the federal certification for their security arrangements that the law requires. The U.S. Department of Homeland Security has provided the certification for many other properties, including stadiums and business facilities. But hotels are rarely certified, primarily because guests and other visitors are able to come and go at will. *Currently, the 2002 law, and MGM Resorts International's interpretation of it, are in the middle of litigation arising from shootings at the MGM in Las Vegas. MGM has claimed certification by Homeland Security in an effort to avoid the many suits filed against it as a result of the shootings. MGM's security arrangements were certified less than six months before the shootings. But some experts say the Department needs to determine that the shootings were an act of terrorism in order for liability limitation to apply under the Act, and Homeland Security was slow in doing.*

NON PROFITS

SOME NONPROFITS SAY, "WE DON'T WANT YOUR MONEY" – RAICES, a Texas-based nonprofit assisting in reuniting immigrant families separated at the U.S. border, made news recently when it rejected a \$250,000 donation from Salesforce, an S&P 500 company that provides customer relations management software and services. The reason: Salesforce had a contract with U.S. Customs and Border Protection, which it did not want to terminate. That resulted in RAICES accusing Salesforce of supporting "oppressive, inhumane and illegal policies." And so began a dispute that has highlighted the need for nonprofits to carefully consider where they are getting their money, and for donors to ponder whether they will receive adverse publicity from rejection of a proposed donation that outweighs any benefit the donors might have hoped to gain from it. *A nonprofit can generally reject funding from any source, and it's not new for a nonprofit to distance itself from what it perceives to be a "tainted" contributor or supporter. But the decision to do so must be considered carefully. RAICES, for example, relies heavily on government funding, and could face serious financial repercussions from its decision to stand on its principles.*



HAPPY HALLOWEEN

HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe taught a day long course on Hotel Contracts at American University Washington School of Law which was co-sponsored by Northstar Meetings Group.

Jonathan delivered two presentations at IMEX America in Las Vegas on Contracts in the hospitality industry and one on the ongoing debate about

Nathan Breen will be participating in a panel discussion with a number of event professionals in January 2019 at “The Special Event” at the San Diego Convention Center.

The program is: "Cannabis and Events: A New Niche Market or A Risky Proposition?" For more information see thespecialeventshow.com.



This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or professional service through its distribution. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Past newsletters are available at howehutton.com.

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Editor - James F. Gossett
Contributing Editor - Christina Pannos—Naomi Angel

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