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## THE HOWE & HUTTON REPORT

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### TRENDING NOW

**TRUMP, EUROPE TO NEGOTIATE ON TRADE** - *H&H Report Update* - President Trump and European Commission President Jean-Claude Juncker have jointly announced that they will begin negotiations aimed at reducing tariffs and other barriers to trade. Meanwhile, Juncker said the countries of the European Commission will buy more liquefied natural gas and soybeans from the U.S. in an effort to reduce the \$152 billion U.S. merchandise trade deficit with the 28 EC countries. *There is no schedule for the announced negotiations, and the deal may amount to no more than a temporary truce in the trade war that has roiled the U.S. relationship with the EC recently. Juncker, for one thing, may have difficulty in resolving differences in the trade policies of the EC's members.*

**U.S. SANCTIONS ANNOUNCED AGAINST RUSSIA** - The Trump Administration announced that it was imposing sanctions against Russia that will halt sale of sophisticated U.S. equipment to Russian state-owned companies and halt aid to Russia, except for humanitarian assistance such as food and agricultural products. All arms sales to Russia will be banned, along with financing assistance for military purposes. A second round of sanctions will be triggered if Russia doesn't halt the use of chemical and biological weapons, and it will downgrade or suspend diplomatic relations, restrict importing of Russian goods, and suspend flights between the U.S. and Russia. *The sanctions follow a non-fatal nerve-agent attack on a former Russian spy and his daughter in the United Kingdom, as well as the death of another woman inadvertently exposed to nerve agents, both of which U.K. authorities blamed on Russia. Canada and more than a dozen European countries expelled many Russian diplomats after the attacks in the U.K., and Russia responded by throwing dozens of Western diplomats out of that country.*

## EMPLOYMENT

**JUDGE TOSSES ORGANIST’S SUIT AGAIN** – A federal judge has ruled against a suit filed by a church organist who alleged he was fired and discriminated against because of his age and national origin. The court said the suit was barred by the “ministerial exception,” which prevents ministers from pursuing employment discrimination suits against their churches. That exception is a court recognized doctrine designed to prevent courts from interfering in religious matters in violation of the First Amendment to the U.S. Constitution. This particular organist had taken his archdiocese to court before, alleging that he was discriminated against when he was demoted from a position as Director of Music to a part-time organist job, and the court, at that time, recognized that the “ministerial exception” applied to his demotion because someone other than “the head of a religious congregation” can be a minister. The organist was found to qualify as a minister at that time because his duties as music director – including selecting liturgical music, holding choir practice, teaching music to children and participating in the budget process – showed that he performed important religious functions, conveyed the church’s message and carried out the church’s mission. Now, the court has concluded that the organist continued to be limited in litigation by the ministerial exception when he was fired. Among other things, the court said that courts should accept a religious institution’s determination of what constitutes religious activity “where there is no sign of subterfuge,” which the court couldn’t find in this case. On the contrary, the court found that musicians – especially organists – play a religiously significant role and convey a church’s message to its congregants. *Organists in general would have been better off, perhaps, if this plaintiff hadn’t continued to pursue a termination case after losing in his bid to fight his demotion. Instead, his termination suit was shot down on a broader interpretation of the ministerial exception, which would apply to all church organists, and maybe all church musicians, rather than just music directors with significant administrative duties*

**DISCRIMINATION, RETALIATION CLAIMS AGAINST LAW FIRM REJECTED** – A federal judge has rejected employment discrimination and retaliation claims brought against a law firm by a legal secretary who claimed that she was given written warnings and a lower-than-expected raise because of her epilepsy and progressive hearing loss. The judge found that the legal secretary had established that she was disabled and that she was subjected to adverse job actions. However, the judge ruled that the secretary did not meet elements required for a prima facie case of discrimination because she did not show that she was meeting the firm’s legitimate expectations when the alleged discrimination occurred and that she was treated differently than similarly situated co-workers who were not disabled. In fact, the evidence indicated that other nondisabled secretaries received written warnings from the law firm and were given even lower pay raises than the complaining party. *Explaining the actions taken against the secretary by the firm in this case, the court noted, and accepted the fact, that the firm considered feedback from co-workers in determining compensation, and the judge pointed out that the complaining secretary received low ratings from her co-workers. Whether that was a good management practice was not considered. It was discussed by the court simply as a practice that explained the firm’s actions in nondiscriminatory terms.*

## EMPLOYMENT

**MALE WORKER SHOWS ILLEGAL SEXUAL HARASSMENT BY OTHER MEN** – The U.S. Court of Appeals for the Seventh Circuit has affirmed a jury verdict that a male grocery store worker was subjected to illegal sexual harassment by his male coworkers and supervisor in violation of the federal Civil Rights Act and the Illinois Gender Violence Act. In a suit against his employer, evidence showed that the worker was groped and taunted and that, in his mixed-sex grocery store, only men were subjected to such treatment. Because none of the women in the grocery store were so treated, the Seventh Circuit held that a reasonable jury could conclude the plaintiff was illegally harassed because of his sex.

**APPEALS COURT CONSIDERS NEED TO TRANSFER DISABLED WORKER** – The U.S. Court of Appeals for the Seventh Circuit has reconsidered the circumstances under which an employer must accommodate a disabled worker under the Americans with Disabilities Act by transferring the employee to a new position. A lower court had interpreted an earlier Seventh Circuit decision as indicating that there is no requirement for an employer to consider new jobs for employees who are no longer physically able to perform in their current positions. But the appeals court, considering the case of a bus driver who was unable to drive because of low blood pressure and progressive eye problems, has now ruled that the worker must be given a chance to work for the employer in a different position. The Court of Appeals said that its earlier decision merely indicated that an employer need not create a new job or strip a current job of its principal duties in order to accommodate a disabled employee. But the Seventh Circuit has now said that the Act does require employers to appoint disabled employees to vacant positions for which they are qualified if doing so is reasonable and would not present an undue hardship for the employer. *In this case, though a doctor for the employee had stated she could no longer drive because of problems with her left eye, the doctor said she might be able to work in another position because her right eye was still functional. So, the Court of Appeals has ruled that she must be given an opportunity to prove that the employer had vacant positions for which the driver was qualified and wrongfully fired her rather than considering whether she could be transferred to one of those positions.*

**PROFESSOR WINS SUIT OVER TERMINATION FOR BLOGGING** – The Wisconsin Supreme Court has ruled in favor of a conservative professor who sued Marquette University for firing him after he blogged about gay marriage. The court held that the university failed to give the professor the academic freedom he was guaranteed under his contract, exhibiting “unacceptable bias” against him. The blog post that got the professor fired discussed an incident in which a graduate student instructor of philosophy shut down any speech opposing gay marriage in her class and suggested that a conservative student drop her class because of his views. The university argued that the professor was terminated because he named the instructor in his blog and posted a link to her personal website, causing her to receive a barrage of hateful messages and threats that eventually forced her to leave the university and go to another school, where she had to repeat three semesters and revise her doctoral thesis. The professor argued that he was a whistleblower exposing the instructor’s misconduct at the school and he had only blogged publicly available information. *There may be limits to what one can do in defending free speech and serving as a whistleblower, but the professor evidently didn’t exceed those limits in this case, according to the court.*

## REGULATION

### **NONPROFITS SOLICITING FUNDS MUST CONSIDER REGISTRATION LAWS** –

Nonprofits that solicit contributions for charitable purposes must consider whether they need to register with one or more state governments that regulate such solicitations, and even require periodic financial reports from charities operating in their jurisdictions. At least 39 states, plus the District of Columbia, do something of that sort. But registering and reporting in all states where solicitation occurs can be expensive and time-consuming if a nonprofit is soliciting nationwide, by mail or by way of the Internet. Furthermore, even among the states that require registration, the laws aren't uniform in defining what activity will trigger registration responsibility. Failing to register can cost a nonprofit all funds it has solicited illegally or result in a fine. So, what is a nonprofit to do? *Fortunately, there are some firms that will undertake nationwide state charitable registration and reporting for a nonprofit for a fee. These services may eliminate any uncertainty as to whether an organization is complying with the law. Though we don't always support federal regulation of various activities, this might also be one area where one federal registration law preempting all state registration requirements would make some sense. But it doesn't appear to be on the horizon.*

### **IRS RELAXES DONOR DISCLOSURE BY SOCIAL WELFARE ORGANIZATIONS** –

The Internal Revenue Service has announced that it will no longer require social welfare organizations to disclose to the IRS the names and addresses of donors contributing \$5,000 or more to these groups. These organizations, exempt from federal income tax under Internal Revenue Code Section 501(c)(4), have previously been required to disclose such information on annual reports to the Service, while providing copies of reports with donor identifying information redacted to interested members of the public. But Treasury Secretary Steven Mnuchin says the IRS doesn't need names and addresses of donors in order to enforce tax laws, and donor privacy must be respected. *Conservatives worry about harassment from liberals over their contributions to (c)(4) groups, which cannot receive charitable contributions but, unlike charities, can be extensively involved in politics. Democrats say that relaxing disclosure rules will facilitate entry of foreign money into U.S. politics. Disclosure requirements by the Federal Election Commission are a separate legal rein on contributions, also generating disputes in the courts.*

## REGULATION

**COURT VACATING OF FEC RULE ON “DARK MONEY” GETS NEW LIFE – *H&H Report Update*** – The Supreme Court of the United States has allowed a federal district court decision to go into effect, requiring the Federal Election Commission to toughen up its enforcement of laws mandating that Section 501(c)(4) exempt organizations report to the FEC the identities of donors giving them more than \$200 a year. The FEC had proposed relaxing enforcement of such laws if donations weren’t made specifically for the purpose of furthering independent political expenditures (those not coordinated with candidates or their campaigns). But a federal district court judge for the District of Columbia overturned the FEC’s decision and ruled that the names of all donors of \$200 or more had to be reported to the FEC under federal statutory law that the Commission couldn’t avoid enforcing. Chief Justice Roberts issued a stay on enforcement of the district court order, only to have his stay now lifted by the full Supreme Court. *This dispute over the FEC’s enforcement of reporting requirements may not be over. There may be other legal pronouncements coming from the courts, or from Congress, which could change the statutory law on the subject. However, as of now, (c)(4) groups have to comply with the district court ruling.*

## OTHER

**DATA SCRAPING COMPLAINT TOSSED** – A federal judge in Chicago has dismissed a suit filed against a search engine over alleged data-scraping practices in violation of the federal Computer Fraud and Abuse Act and state law. The case involved an industrial equipment seller, Alan Ross Machinery Corp., and a search engine for buying and selling used machinery, Machinio Corp. According to the complaint filed in the case by Alan Ross, the equipment seller was originally working with Machinio to list certain products on the search engine’s website. But talks between the parties ended with Alan Ross deciding not to list the products with Machinio and expressly demanding that the search engine not scrape the equipment seller’s website for product information, after which Machinio allegedly indexed 2,000 of Alan Ross’s products on its search engine without the equipment seller’s permission. The judge, though, dismissed the complaint in the case, with leave to amend it, because the judge found that the equipment seller hadn’t raised a reasonable expectation in its complaint that Alan Ross had suffered damage or loss sufficient to bring a claim under the CFAA. Moreover, the judge did not accept Alan Ross’s argument that consumers would be misled into believing that the equipment seller endorsed Machinio’s website just because Alan Ross products were listed there. *The judge gave Alan Ross time to amend its complaint to more clearly allege the damages it had suffered, and convince the court, as the complaint alleged, that the disputed issues in the case would impact not only its industry, but web content creators in general. It won’t help the equipment seller’s case, though, that Machinio ultimately delisted the Alan Ross products that found their way onto its website. That’s a good move. If you are doing something that causes you to be sued, not doing it anymore, in many cases, will at least reduce any potential judgment against you.*

## OTHER (cont.)

**NEIGHBOR, NOT POOCH, PRIMARILY AT FAULT FOR PETTING ACCIDENT** – Do you own a dog or cat cute enough to attract the attention of a neighbor who wants to pet them? Beware. Petting said animal may cause that neighbor to sue you, as it did recently when petting a neighbor’s dog named Moxie caused a woman to fall off the dog owners’ porch and injure her foot. The suit alleged that Moxie was a distraction that caused the fall. But a court has dismissed the suit, finding that, while a landowner owes a duty of care if they have reason to believe a guest may be distracted by or forget about a potentially risky condition on their property, nothing about the premises caused the fall in this case. Rather, Moxie was, at most, a “voluntary distraction” created by the injured woman, and Moxie’s owners weren’t responsible for it. *In fact, the evidence indicated that Moxie was moving closer to the injured woman in order to facilitate petting when the fall occurred. Clearly, the dog was wrongfully accused.*

## TRAVEL

**TCPA “FREE CRUISE” CASE SETTLED** – *H&H Report Update* -The U.S. Court of Appeals for the Seventh Circuit has approved settlement of a suit under the federal Telephone Consumer Protection Act against a cruise line and related entities that directed unsolicited phone calls to a million people in 2011-2012 offering a “free cruise” in exchange for taking a political survey. The defendants agreed to pay between \$56 million and \$76 million into a fund from which recipients of the calls will be paid damages. Depending on the number of approved claims in the class action suit, it is estimated that claimants will receive around \$400 each, with a large chunk of the fund going to pay incentive awards to the named plaintiffs who brought the suit, administrative expenses and attorneys’ fees for the class counsel. *Though \$400 isn’t much these days, \$56 million to \$76 million is. Don’t place unsolicited phone calls in violation of the TCPA. The penalties can be great.*

## HOWE & HUTTON NEWS AND EVENTS



Naomi Angel will present a report on current legal issues at a trade association meeting of manufacturers in Louisville, KY and Las Vegas, NV.

Gerry Panaro did a sexual harassment training for Association Management Strategies.



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