

THE HOWE & HUTTON REPORT

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TRENDING NOW

“BATHROOM BILL” BACKLASH INTENSIFIES – With laws requiring individuals to use the restroom corresponding with the gender stated on their birth certificate pending in twelve states, organizations that hold high profile events are increasing their pressure against such legislation. North Carolina lost the 2017 NBA All-Star Game due to the adoption of such a law, and the National Collegiate Athletic Association is threatening to pull all future championship games from the state unless the law is repealed. Visit Charlotte recently announced that the city had lost fourteen events due to the law, which would have accounted for \$83.9 million in direct spending. The National Football League has insinuated that events in Texas may be in jeopardy if it enacts a “Bathroom Bill,” and the American Society of Association Executives has vowed to pull its 2021 annual meeting from Dallas if such a law is passed. *The “Bathroom Bill” issue exemplifies the difficulties groups can encounter when trying to harmonize the sensitivities of their attendees with contractual obligations. Many events are scheduled years in advance, and a government’s adoption of a controversial law is not generally going to provide a basis to cancel without liability. Meeting sites are*

justifiably hesitant to provide groups with the ability to cancel based on legislative developments. Great care should be exercised in the contract negotiation process, especially as to groups that are likely to be particularly sensitive to this issue.

OBAMACARE REPEALER IN THE WORKS – Following an order from President Trump directing federal agencies to use their authority to relieve Americans from “burdens” placed on them by the Affordable Care Act (Obamacare), Congress has also opened efforts to dispense with some Obamacare requirements legislatively. One Obamacare provision in the crosshairs for elimination is the “individual insurance mandate,” which requires Americans to purchase health insurance or pay a tax/penalty. However, the tax/penalty is still a feature of tax forms Americans will have to file in 2017. A Republican legislative proposal would also allow insurance companies to offer slimmed down, cheaper health insurance policies and, on the other end of the scale, expensive, benefit-filled “Cadillac” policies, both of which are prohibited by Obamacare. *Much of Obamacare is written into statutory law, and it will take an act of Congress to repeal it or create some other healthcare program as a large-scale replacement for it.*

NOT FOR PROFIT LAW DEVELOPMENTS

NO FEDERAL FUNDING FOR COLLEGES AFTER CAMPUS VIOLENCE? – After a scheduled speech at University of California at Berkeley by a right-wing speaker drew violent protests by what the school called “150 masked agitators,” forcing the University to cancel the speech, President Trump tweeted, “If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view – NO FEDERAL FUNDS.” The University had verbally defended the speaker and canceled the speech only after some protesters smashed windows, set fires and threw rocks at police. Nevertheless, the President targeted the school in his remarks. *So what does a school have to do to prevent violent protest in order to avoid the wrath of Trump and protect its federal funding? Universities and other schools need to be asking themselves and, perhaps, the President that question.*

ORDERS ON DISCRIMINATION, RELIGIOUS FREEDOM MAY CLASH – President Trump surprised many by renewing Obama’s Executive Order 13672, which prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. In contracting with the federal government, then, nonprofits and others will have to continue affirming that they do not discriminate and that they will require the same of their subcontractors. *Purportedly, though, Trump is working on a new executive order called “Establishing a Government-Wide Initiative to Respect Religious Freedom” that, among other things, will establish exemptions from federal laws for those who claim religious or moral objections to things like same-sex marriage and the gender identity of others. So, would that order allow organizations to become federal contractors or subcontractors if they have religious or moral objections to complying with Executive Order 13672? We’ll have to see. Maybe, between Obama and Trump, we’re just going to be living in an age where numerous Executive Orders currently in effect conflict with each other. It’s not like that hasn’t happened already with laws passed by Congress.*

NEW GOVERNMENT ETHICS RULES TAKE EFFECT – The U.S. Office of Government Ethics has adopted new gift rules that took effect January 1. Continuing previous restrictions, the new rules state that government employees generally cannot accept gifts from “prohibited sources,” defined as persons regulated by or having business with them, or gifts given because of the recipient’s official position. “Gifts” are defined broadly to include meals or anything of value. In addition, the new rules specify that government employees now must obtain written agency approval before accepting an invitation to a gathering such as an industry conference from a “prohibited source.” A government employee who speaks at an event can now attend a “speakers’ dinner” in conjunction with the event. Moreover, executive branch employees now can accept informational materials related to their duties from outside sources, as members of Congress do. But written agency approval will be required for materials valued at over \$100 per year. *Significant changes in these gift rules may be made as the Office follows through on a directive from President Trump that all government employees be subject to the prohibitions he has imposed on his own appointees in an Executive Order regarding their past and future lobbying activities. That Order is discussed elsewhere in this issue and should not be confused with the new rules just issued by the Office of Government Ethics.*

MEETING AND TRAVEL DEVELOPMENTS

COURTS CONSIDER TRAVEL RESTRICTION ORDERS – Many nonprofits are involved in foreign travel on a regular basis, and others at least occasionally. Some are involved in settling refugees in the U.S. Other nonprofits or their members may employ immigrants or people who are at least citizens of other countries. Consequently, nonprofits may have a special interest in the legality of executive orders issued by President Trump, which, till their enforcement was enjoined by a federal court in Seattle and limited by other courts, restricted some foreign travel to the U.S. The orders initially caused mass confusion and delays at airports, as well as detention and deportation of some travelers, including some with valid visas, who were arrested and handcuffed as they sought to enter the U.S. Specifically, the President’s orders prohibited the entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen into the U.S. for 90 days, while also halting for 120 days all refugee admissions and resettlement into the U.S. The Department of Homeland Security was directed to work with the State Department and the intelligence community to review the existing refugee admission program, while collecting information from the governments of the seven listed countries, to ensure that foreign travelers don’t pose a security threat in the U.S. *Hundreds of refugees initially barred from entering the U.S. and detained at airports per Trump’s orders were later allowed into the country. Meanwhile, responding to suits that were immediately filed in response to the President’s orders, at least four federal courts began considering the lawfulness of the President’s actions and started blocking or limiting enforcement of them, at least temporarily, pending further court review, with the Seattle court’s injunction order being the broadest. An effort to overturn that injunction was later rejected by the U.S. Court of Appeals for the Ninth Circuit in San Francisco.*

AMERICAN, UNITED ROLL OUT “BASIC ECONOMY” AIRFARES – American Airlines and United Airlines have separately announced they will be offering a “basic economy” or cheap-fare option on some routes, joining Delta Air Lines, which earlier made that effort to compete on price with discount carriers like Spirit Airlines Inc. and Frontier Airlines Inc., and with cheaper European carriers for trans-Atlantic traffic. *Discount fares may be expanded to additional routes, depending on their popularity with customers. But the cheap-fare option will come with the loss of certain flyer privileges. Travelers will be able to bring only one carry-on item aboard, and it must fit under the seat in front of them, not in the overhead bins. Seats will be assigned at check-in, not in advance, with no ability to upgrade, change travel plans or stand by on other flights. Some of the economy offers also will give flyers only \$15 -\$20 in savings.*

REGULATORY LAW DEVELOPMENTS

JUDGES BLOCK INSURANCE MERGERS – Two federal judges have separately blocked the merger of health insurers Aetna Inc. and Humana Inc. and the acquisition of health insurer Cigna Corp. by rival Anthem Inc. on antitrust grounds, finding that the deals would unlawfully threaten competition and could increase costs for purchasers of health insurance. The Obama Administration’s antitrust officials had challenged the deals as one of their last major enforcement actions before President Trump took office. *Republicans have been seen by many as generally favoring less rigorous antitrust enforcement than Democrats, at least as regard to mergers. But that may not hold true with Trump, who has promoted a populism that tends not to favor big businesses getting bigger.*

REGULATORY LAW DEVELOPMENTS (cont.)

LOBBYIST EMPLOYMENT RULES CHANGED – President Trump has issued an executive order changing the rules for lobbying activities by his appointees to government positions. Eliminating a prohibition Obama imposed on his appointees, it allows anyone Trump appointed to accept a government position despite being a registered lobbyist in the two years preceding appointment, and they can work for an agency they formerly lobbied. However, continuing a restriction imposed by Obama on his appointees, the order prohibits a Trump appointee from accepting a lobbyist's gifts, and the new order contains a new rule that prohibits a Trump appointee from lobbying his former agency for five years after he leaves a government position (with a one year "cooling off" period, down from a previous two-year prohibition, for certain senior executive branch officials). In addition, Trump has subjected his appointees to a new lifetime ban on accepting work from foreign governments or political parties if it would require registration under the existing Foreign Agents Registration Act. *These rules are touted as part of the President's efforts to comply with a campaign promise to "drain the swamp" in Washington, and they are not to be confused with new Office of Government Ethics gift rules applying to all government employees, which are discussed elsewhere in this issue of H&H Report.*

RESOURCE EXTRACTION DISCLOSURE RULE SCRAPPED – *H&H Report Update* - President Trump has signed into law a bill passed by Congress that eliminates a Securities and Exchange Commission rule requiring that companies extracting oil, gas or minerals abroad report to the SEC on any money paid to a foreign government or the U.S. government for the right to do so. The signing was one of what Republicans promise will be a string of actions rolling back regulations promulgated during the Obama Administration without Congressional action. *Although companies weren't required to file reports till 2018, opponents of the disclosure rule had calculated that it would cost American businesses between \$173 million and \$385 million annually and erode their global competitiveness. Proponents of the rule said it was an anti-corruption measure and noted that similar requirements have been imposed on foreign companies by the European Union, Canada and Norway.*

TAX LAW DEVELOPMENTS

EVOLVING W-2 PHISHING SCAM TARGETS NONPROFITS – The Internal Revenue Service has warned of a dangerous phishing scam targeting nonprofits, hospitals and school districts. Expanding on a scheme previously aimed, for the most part, at the for-profit world, scammers are now increasingly sending email disguised as coming from a nonprofit organization executive to employees in payroll or human resources departments. The email asks for a list of all employees and their Forms W-2. In a new twist, the cybercriminal follows up on the "executive" email by asking that a wire transfer be made to a certain account. *The IRS notes that any organization previously targeted by this scam may be targeted again. Organizations should forward the phishing email to the Service at phishing@irs.gov and place "W2 Scam" in the subject line. In addition, they can file a complaint with the Internet Crime Complaint Center operated by the Federal Bureau of Investigation.*

TAX LAW DEVELOPMENTS (cont.)

IRS RELEASES NEW FORM 990-EZ WITH HELP FOR NONPROFIT FILERS – The Internal Revenue Service has released an updated Form 990-EZ, *Short Form Return of Organization Exempt From Income Tax*, containing assistance intended to help tax-exempt organizations avoid common mistakes when filing the return. The updated form includes 29 “help” icons containing key information to help small and mid-size exempt organization filers. The icons also link to additional information available on www.irs.gov. *The printed instructions for the form are available at that IRS website.*

EMPLOYMENT LAW DEVELOPMENTS

WORKER CLASS ACTION WAIVERS HEADED FOR SUPREME COURT – Splits in rulings by U.S. Courts of Appeal in different parts of the country likely mean that the Supreme Court will soon be taking up the issue of whether employers can require workers to waive their right to file class action suits, making it more expensive for employees to take the boss to court. Employers have been concerned about the issue since January 2012 when the National Labor Relations Board ruled that homebuilder D.R. Horton Inc. illegally required its employees to sign such waivers. The Courts of Appeal for the Seventh Circuit and the Ninth Circuit have since agreed with the NLRB’s approach to class action waivers. But the Courts of Appeal for the Second Circuit and the Fifth Circuit have ruled in favor of an employer’s rules requiring workers to waive class action rights. *When Courts of Appeal disagree about matters, the Supreme Court often steps in to straighten them out. Four petitions have been filed asking the Court to settle the class action waiver dispute, and it’s expected to be on the Court’s docket for decision in the first half of 2017.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS

CRIMINAL COUNTERFEIT GOODS PRODUCERS CONVICTED – You think you can pass your goods off as those of a successful company? Not a good idea, as one couple in California learned recently when a jury found them in violation of criminal counterfeiting laws, setting them up for prison terms possibly exceeding ten years and \$2 million in fines. According to the complaint filed against them, not only did the couple try to sell millions of bottles of fake 5-Hour Energy products, with ingredients not entirely known to prosecutors, but they also produced their goods in an unsanitary facility. *The convictions followed settlement of a civil suit filed last year against more than 20 people allegedly involved in a conspiracy to sell fake 5-Hour Energy shots. The convicted California couple also profited earlier from violating an agreement with Living Essential, manufacturers of the real thing, to distribute 5-Hour Energy drinks in Mexico. Instead, they removed Spanish labels on the goods they were supposed to distribute and sold the legit products in the U.S. at below the U.S. market rate. Now they can speculate on the evils of greed from their prison cells.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS (cont)

PHOTO COMPANY AWARDED \$8.2 MILLION IN COPYRIGHT INFRINGEMENT SUIT – VHT Studios, a Rosemont, IL- based photo company, filed suit against real estate giant Zillow Group in Seattle in July 2015 for copyright infringement. The photo studio claimed that Zillow Digs, Zillow’s home design and renovation site, used thousands of images without proper permission. A jury sided with VHT, and Zillow has been ordered to pay more than \$8.2 million in actual and statutory damages. Zillow plans to appeal the verdict. *In this day and age of instant information and social media, it is very easy to find readily accessible images from the Internet and re-post on your website. Think twice before you copy and paste, though. Get permission before you post and be sure that permission specifically covers the type of use you intend.*

OTHER ISSUES

TRUMP WITHDRAWS U.S. FROM TRANS-PACIFIC PARTNERSHIP – President Trump has issued an executive order formally withdrawing the U.S. from the negotiating process for the Trans-Pacific Partnership, a large multi-country trade deal that President Obama and many Republicans, as well as Democrats, had promoted. The President says he favors bi-lateral trade deals with specific foreign countries, as opposed to large multi-country arrangements, which he thinks have not proven favorable to the U.S. *The Trans-Pacific Partnership was never ratified by the U.S. Senate and, for that reason, never became binding on the United States. Opinions are divided on whether the new President’s rejection of the TPP will have positive or negative consequences for the nation and world trade.*

CALIFORNIA MAY BECOME SANCTUARY STATE? – Planning continues for construction of a physical wall along the U.S. border with Mexico, fulfilling a campaign threat/promise by President Trump. In addition, the President has threatened to cut off federal funds for sanctuary cities, like Chicago, that shelter illegal immigrants, while targeting for deportation all “criminals” in the U.S. illegally, which he defines as including anyone merely charged with a crime or labeled by an immigration officer as being a risk to public safety. Lawmakers in California responded to Trump’s action on sanctuary cities by advancing legislation to make the Golden State the first “sanctuary state” in the U.S., leading the President to threaten termination of all federal funding for California if that legislation becomes law. *Estimates are that the border wall could easily cost \$10 billion, though the President says Mexico will reimburse the U.S. for that expense. Mexico’s officials are incensed at the whole border wall idea and say Mexico will provide no such reimbursement. Meanwhile, the President called for the hiring of 5,000 additional U.S. border agents and 10,000 more Immigration and Customs Enforcement officers to police immigration while “the wall” is going up.*

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HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe will present three sessions to meeting professionals attending “Experient” as part of a global event in Cleveland, Ohio on March 15: *Beyond The Hotel Contract Maze, Market Negotiations and Contracts*, and *The New World of Negotiations (Contract Clauses You Should Pay Attention To, But Probably Don’t)*.

On March 20-21 Jon Howe will be with the Sports & Fitness Industry Association attending National Health Through Fitness Day (NHTF Day). Approximately 150 leaders from the sports, fitness, and PE industries are expected to attend and champion the cause to overcome obesity and sedentary lifestyles.

Christina Pannos is presenting *The “Art” of Negotiating License Agreements* at the DePaul University College of Law, Arts Law Colloquium on March 29. She will discuss licensing agreements for the benefit of artists.



Naomi Angel is co-presenting a mock trial concerning a cancelled contract at the Connect Diversity event in Las Vegas on March 29.

She is also discussing current legal developments with an engineering society’s Board of Directors in Washington, D.C. on March 21.

On April 5 Naomi is giving a *Pop Quiz on Contracts (No Study Needed)* at the CalSAE (California Society of Association Executives) annual ELEVATE conference in Newport Beach, CA. Through an interactive group quiz session format, participants will confirm what they know and discover what they don’t know about industry contracts and risk management.”



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