

THE HOWE & HUTTON REPORT

Volume 2017, Issue 4

TRENDING NOW

NEW TRAVEL BAN SIGNED, BLOCKED – *H&H Report Update* – President Trump signed a new order limiting travel to the United States from foreign countries, replacing an earlier order that had been enjoined by the courts. But federal district courts in Hawaii and Maryland then temporarily blocked enforcement of it nationwide. Like the previous order, the President’s new order would prevent entry to the United States for people from specified countries, namely, Iran, Libya, Somalia, Sudan, Syria and Yemen, with Iraq being removed from the list included in the previous order. This new ban would last for 90 days, but it would not apply to green card and visa holders, unlike the previous one. Travelers would also have an opportunity to challenge their denial of U.S. entry, which was seen as a major legal problem for the previous order. Refugees still would not be admitted to the U.S. for 120 days while the government reconsiders the refugee admission program, and the new order caps the annual total admission of refugees at 50,000, as opposed to the limit of 110,000 the Obama Administration had planned for 2017.

Syrian refugees were to be treated the same as other refugees, whereas they were subject to an indefinite bar on admission under the previous order. Finally, the new order, unlike the previous one, does not contain a preference for Christian refugees from predominantly Muslim countries. *While the new order was crafted to avoid some of the legal problems encountered by the previous one, the courts in Hawaii and Maryland said it had to be blocked temporarily, pending further court proceedings, because it was likely the product of unconstitutional religious discrimination. Key to the courts’ decision were statements Trump made during last year’s political campaign, which the court said “betray” the alleged lawful purposes of the order, demonstrating the true discriminatory purpose behind it and the previous travel ban.*

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TRENDING NOW (cont.)

GOVERNMENT WARNS MILLIONS ARE SUBJECT TO DEPORTATION – The federal government has issued a warning that millions of immigrants now living in the U.S. illegally are subject to deportation, calling on local authorities to assist in enforcement of the immigration laws. While illegal immigrants worry about their futures in the United States, some businesses indicated concern about possible labor shortages if deportations grow in number, and some schools have countered the feds with a warning that they will not allow immigration searches and arrests on their campuses without a warrant. *Enforcement of the Trump Administration's orders restricting immigration are constrained not only by court injunctions but by the limited resources of the federal government, which will limit mass deportations for at least a few months, as the government hires more immigration agents and revises enjoined procedures. The Administration says that, in the meantime, it will be concentrating on deporting immigrants who have violated some law other than being in the country illegally.*

MEETING AND TRAVEL DEVELOPMENTS

LARGE ELECTRONICS BANNED FROM CABINS ON MIDDLE EAST FLIGHTS – The United States has banned passengers from carrying electronic items larger than a cell phone in the cabins of all airline flights to the U.S. from Egypt, Jordan, Kuwait, Morocco, Saudi Arabia, Turkey, Qatar and the United Arab Emirates. Acting a few hours later than the U.S., the United Kingdom said it would enforce a similar restriction, though for a slightly different group of countries. *Devices in stored luggage are not affected by the ban. Supposedly, the new prohibitions were not based on a specific or near-term threat, but on more general intelligence about terrorists' desire to attack airlines coming from the Middle East.*

TSA ANNOUNCES EXPANSION OF PAT-DOWNS – The federal Transportation Security Administration has announced that it will be expanding pat-downs of air travelers, though it has not given the details on exactly where or how flyers will now be subjected to more invasive pat-down procedures. Previously, the TSA has said that its employees would use the back of their hands for pat-downs over “sensitive” areas of the body, except in “limited cases,” where the “front of the hand may be needed to determine that a threat does not exist.” Now, it appears that TSA personnel will be directed to use the front of their hands more frequently, taking passengers out of line and frisking them in a private screening area. *Despite TSA's failure to give many details at this time concerning the new screening procedure, its invasive nature can likely be deduced from the fact that TSA has notified local and airport police about the new process just in case passengers question them about “abnormal” federal frisking. One trade association that was given some information by the TSA has written that the enhanced pat-down directive was “intended to reduce the cognitive burden on (employees) who previously had to choose from various pat-down procedures depending on the type of screening lane.” In other words, frisk everyone and ask questions later?*

REGULATORY LAW DEVELOPMENTS

CONGRESS ROLLS BACK MORE OBAMA RULES – Congress has voted to disapprove the Obama Administration’s Fair Play and Safe Workplaces rules, and President Trump has signed into law the legislation killing those rules. The “Fair Play” rules would have forced federal contractors to disclose to the government their own “violations” of labor statutes and those of their subcontractors. The government would then have been able to use that information in considering eligibility for contract awards. “Violations” was defined broadly enough to include mere allegations of wrongdoing. These rules will now be permanently considered unenforceable. *Enforcement of the oddly named “Fair Play” rules had been enjoined by a federal judge last year, as the judge found them to be overreaching by the government’s administrative branch in violation of Congressional intent, not to mention embodying a kind of self-incrimination and inform-on-your-neighbor approach favored by totalitarian regimes. The judge’s order could have been overturned on appeal, though. So, Congress won a race with the courts to see which would strike the final blow to the rules.*

POLITICAL CONTRIBUTION LIMITS FOR 2017-2018 CYCLE ANNOUNCED – The Federal Election Commission has announced political contribution limits for the 2017-2018 election cycle. The \$5,000 per year limit on contributions by individuals to political action committees (PACs) will not change. Nor will the amount individuals and non-multicandidate PACs can give to each candidate in federal elections, which will remain at \$2,700 per election, with primary and general election contests being viewed as separate elections. On the other hand, individuals and non-multicandidate PACs will be allowed to give \$33,900 per year to each national party committee (up from \$33,400) and \$101,700 per year (up from \$100,200) to each of the national party committee special accounts for presidential nominating conventions, national party headquarters buildings, and election recounts and related legal proceedings. PACs with 51 or more contributors that have contributed to five or more federal candidates can still contribute \$5,000 per candidate per election, \$15,000 per year to a national party committee, \$5,000 per year to other PACs, and \$45,000 per year to each of the national party committee special accounts. Finally, candidates, leadership PACs and political parties must report to the FEC all contributions aggregated by a lobbyist exceeding \$17,900 in a semiannual period. *Bigger changes would be in store for 501(c)(3) exempt organizations, currently prohibited from making political contributions, if the Johnson Amendment portion of the Internal Revenue Code containing that prohibition is “totally destroyed,” as President Trump has promised.*

CLEAN POWER PLAN SHELVED – *H&H Report Update* - President Trump has signed an executive order mandating Environmental Protection Agency review of the Obama Administration’s Clean Power Plan, which was the centerpiece of Obama’s policy aimed at combating global warming. The Plan was intended to reduce carbon dioxide emissions from electrical power generation at coal-burning power plants, while also increasing use of renewable energy sources and encouraging energy conservation. But Trump, in signing his executive order, said that lifting carbon restrictions contained in the Plan would not only keep energy affordable but help revitalize the coal industry and communities dependent upon it. *Implementation of the Plan had been stayed by the U.S. Supreme Court anyway pending a review of its constitutionality by the U.S. Court of Appeals for the District of Columbia Circuit. That review was prompted by a lawsuit 27 states had filed to block the Plan, arguing that the Agency overstepped its legal authority in adopting it.*

REGULATORY LAW DEVELOPMENTS (cont.)

COURTS PONDER RESCISSION OF SCHOOL TRANSGENDER DIRECTIVES – *H&H Report Update* – The Department of Education and Justice Department have rescinded Obama Administration directives that all public schools give transgender students the right to use bathrooms and locker rooms corresponding to their chosen gender identity. As a result, the Supreme Court of the United States required the U.S. Court of Appeals for the Fourth Circuit to reconsider its earlier decision, based on the Obama directives, that students in Gloucester County, Virginia public schools must be given the right to use bathrooms aligning with their gender identity instead of their birth gender. These developments are the latest in a contentious battle over use of bathrooms and locker rooms by transgenders, which opponents say tramples on the privacy rights of other students. A joint letter issued by Education and Justice said that rescinding the directives would give them time to “more completely consider the legal issues involved.” *Many schools have already changed their bathroom and locker room policies to comply with the Obama Administration directives, as well as state and local laws protecting transgender students. Despite the Supreme Court’s remand of the Gloucester County case to the Fourth Circuit, a number of pending court cases could provide further guidance as to what school officials must do and can do to protect student rights, and, almost certainly, they will require further rulings from the Supreme Court.*

STREAM PROTECTION RULE UNDONE – President Trump has signed a bill passed by Congress to undo the federal Department of the Interior’s Stream Protection Rule. The rule made it harder for coal companies to dump mining waste into waterways and streams and was finalized in December, making it easy to undo under the Congressional Review Act, which targets recently promulgated regulations for quick elimination by action of the House of Representatives and Senate under provisions designed to avoid Senate filibusters. *Opponents of the rule said it would kill jobs in the coal mining industry, which is already having difficulties competing with cheap natural gas. The Department said it was essential for reducing water pollution and saving altogether the streams in coal country that haven’t already been literally buried by mining waste. There’s a federal statute still on the books, the 1977 Surface Mining Control and Reclamation Act, which says that mining companies cannot cause “material damage to the environment to the extent that it is technologically and economically feasible.” But that law, everyone agrees, is vague and difficult to enforce. Nonprofits have been on both sides of the public debate over the rule’s benefits and costs.*

TAX LAW DEVELOPMENTS

INFO ON APPROVED 1023-EZ APPLICATIONS NOW AVAILABLE ONLINE – The Internal Revenue Service has announced that publicly available information on approved nonprofit Form 1023-EZ applications for recognition of exempt status is being made available online for the first time. The data can be found in spreadsheet format on www.irs.gov and includes the name of the organization, its Employer Identification Number, and the names of officers and directors, as well as the state of incorporation, the organizing documents, and the purpose and activities of the organization. *Interestingly, the IRS, in the same notice announcing the online availability of this information, also warned taxpayers not to include their Social Security Numbers on submissions to the Service that will be made publicly available. But the Service provides online access to exempt organization Employer Identification Numbers (their identifying numbers, much like Social Security Numbers for individuals) so that anyone, including crooks, can more easily collect them.*

EMPLOYMENT LAW DEVELOPMENTS

IMPLEMENTATION OF FIDUCIARY RULE DELAYED – *H&H Report Update* – The U.S. Labor Department announced that it will be delaying indefinitely implementation of the “fiduciary rule” for financial advisors. Among other things, the rule, an Obama Administration initiative, increased potential legal liability and expenses for all employers and others who provide even bare minimum advice to participants in employee retirement plans. Employers frequently offer such advice, sometimes reluctantly, upon request. *The delay announced by the Department is thought to be a prelude to killing or revising the rule. Until the recent announcement, the rule had been scheduled to take effect April 10.*

SEXUAL ORIENTATION EMPLOYMENT DISCRIMINATION STILL IN THE COURTS – *H&H Report Update* – The full U.S. Court of Appeals for the Seventh Circuit in Chicago has reversed a decision by a three-judge panel of that court and held that Title VII of the federal Civil Rights Act bars employers from discriminating against workers because of their sexual orientation. Last month, the U.S. Court of Appeals for the Second Circuit in New York City and the Court of Appeals for the Eleventh Circuit in Atlanta, Georgia both ruled that Title VII of the federal Civil Rights Act does not bar employers from discriminating against workers because of their sexual orientation. Thus, we have a conflict in the circuits, and the Supreme Court could end up resolving that conflict. *The federal Equal Employment Opportunity Commission pushed the Seventh Circuit to reverse the panel’s decision, as did some members of Congress who are backing a new bill to amend the Act and specifically prohibit sexual orientation discrimination in employment.*

“JOINT EMPLOYERS” DECISIONS MAY BE CLARIFIED THIS YEAR – One of the legal issues that may receive some clarification in the courts this year is the question of when, and for what purposes, a for-profit or nonprofit entity can be considered a “joint employer” with a staffing agency from which it has contracted for workers. In line for consideration by the U.S. Court of Appeals for the District of Columbia Circuit is a National Labor Relations Board decision that a waste management company jointly employed workers with its staffing agency and unlawfully refused to bargain with the union for the joint employees under the National Labor Relations Act. But the “joint employer” concept has found its way into other cases not involving the NLRA recently. It arose in a case McDonald’s Corp. settled last year, paying \$3.75 million because one of its franchisees, as its alleged “joint employer,” was accused of cheating hundreds of workers out of wages and overtime. Still continuing is a suit by the New York Attorney General against Domino’s Pizza Inc., seeking to hold the pizza company liable for worker pay as a joint employer with its franchisees. *Can nonprofits be joint employers? The D.C. Circuit may not answer that question directly, since the case before the court involves a for-profit. But nonprofits are increasingly contracting for workers with staffing agencies. So, the D.C. Circuit case could create some precedent that would apply to nonprofits.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS

COURT LIMITS PATENT LIABILITY FOR COMPONENT PRODUCERS – You patented your product, consisting of multiple components, and you licensed rights to produce one component in the U.S. for shipping to another country where it would be assembled, with four other components, into a finished item. But the licensee began selling the finished product outside the licensed field of use, and you sued for patent infringement, confident that you would win because the U.S. Patent Act prohibits supplying “all or a substantial portion” of the components of a patented product from the U.S. for assembly into the finished product overseas, except with the consent of the patent holder, as in accordance with a license’s provisions. You think the one component shipped overseas by your licensee was an important one and should be considered a “substantial portion” of the whole. But you will lose your case, because the Supreme Court of the U.S. held recently, in the case of *Life Technologies Corporation v. Promega Corporation*, that a single component of a multicomponent invention can *never* constitute “all or a substantial portion” of such an invention’s components for the purposes of the Act, no matter how important that one component is. *The ruling in Life Technologies was based on the legislative history of this portion of the Patent Act, as well as the text of that provision, which the Justices thought was consistent in referring to plural “components,” indicating that multiple components would be required to constitute a “substantial portion” under this part of the Patent Act.*

COURT ASKED TO ALLOW REGISTRATION OF “DISPARAGING” MARKS – You’ve come up with what you think is an interesting trademark to represent your business, and you file an application with the U.S. Patent and Trademark Office to register that mark. But the Office refuses your application because they find your mark runs afoul of a provision in federal statutes that says a registration may be refused if a mark consists of “matter which may disparage...persons, living or dead.” What can you do about it? Simon Tam took his case to the Supreme Court of the United States when the Office refused to register “THE SLANTS” as the name for his rock group, all of whose members are Asian-Americans. Disparagement of Asian-Americans by Asian-Americans? The Office thought so, and now the Court is scheduled to rule soon on Tam’s argument that the “disparagement” provision of the U.S. Lanham Act, which has served as the basis for many Office decisions, should no longer be a part of U.S. trademark law. *One of the alleged problems with the Office’s enforcement of the “disparagement” provision is that most everyone agrees it has been totally arbitrary, with identical marks being granted registration or refused registration on “disparagement” grounds, depending on which examiner at the Office was assigned to consider a matter. The significance of the Tam case is shown by the fact that many other Office decisions involving claims of “disparagement” are under review in the lower federal courts and have been put on hold while those courts wait to see what the Supreme Court will do with Simon Tam. One of the more noted of those involves a petition to cancel a registration granted years ago for “REDSKINS” as used by the pro football team in Washington, D.C. So, will the Supreme Court sack Tam and the Redskins? We’ll see.*

OTHER ISSUES

STATES, FEDS PONDER SELF-DRIVING VEHICLES – Faced with a growing patchwork of new state laws regulating self-driving vehicles, auto manufacturers came to Congress early this year to ask for federal legislation that would preempt all of the state initiatives and create more uniform regulation of the technology nationwide. But, for now, all of the law-making on the subject is coming from the states, ranging from tough California regulations to rather lenient Michigan laws. All in all, according to testimony before Congress, legislators in more than 20 states have proposed nearly 60 bills to regulate autonomous vehicles since January 1 alone. *At present, consumers can only purchase vehicles that are partially self-driving. But fully autonomous vehicles are being tested, although Uber recently halted its tests after an accident involving a vehicle in self-driving mode occurred in Tampa, Florida. Lawmakers seem inclined to promote further research and testing of a concept that could have significant benefits for many, including drivers with special needs. Many lawmakers in Congress and state legislatures want to make sure that the emerging technology is well-regulated.*

HOWE & HUTTON NEWS AND EVENTS

Christina Pannos is presenting *The Dynamics of Art Gallery Consignment* at the Chicago Bar Association on April 18. She will discuss the common artworld practice of consigning artwork with a focus on consignment with art galleries. She will also address how to spot and draft important consignment contract provisions.



On April 5 **Naomi Angel** gave 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 were able to confirm what they knew and discovered what they didn't know about industry contracts and risk management.

Naomi will participate on April 19 on a panel to help trade association members learn how to combat companies that use questionable service and repair practices at the annual IDA (International Door Association) EXPO in Atlanta, GA.

Naomi will discuss current legal developments and trends at a manufacturers' trade association annual meeting in Naples, FL from April 23-26.

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