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# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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**NOT THE SORT OF HEADLINE NONPROFITS WANT TO SEE** — “Nonprofits Can’t Afford San Francisco” was the headline that appeared in Bloomberg BusinessWeek recently. The problem is high rents are forcing many nonprofits, especially social services, out of their current locations and forcing them into lesser facilities or forcing them to pay for construction upgrades in leased spaces with borrowed money that undercuts their ability to provide services. *High tech tenants are more than willing to pay higher rents, even double what the nonprofits were paying. Landlords are riding the boom market, the same as San Francisco’s residential rent market.*

**GIRL SCOUTS TO SELL COOKIES ONLINE** — What next? Girl Scouts are authorized to sell their cookies online now. The stated rationale is to introduce the Scouts to the world of business and finance, and develop their entrepreneurial skills in the digital age. Others, including many parents, are less sanguine about this development, worrying about cyberbullying, stalking, and children dealing with strangers online. It will be up to parents to police their Scout children’s websites, credit card processing, and limiting personal information made available by Scouts. It is all supposed to be safe, personal information beyond a first name either encrypted or not listed, and Scouts and parents trained on online safety. *Scouts and their local Scout councils are not required to participate, but there are incentives to sell cookies, and Scouts are competitive. So be prepared to receive online requests from families and friends, even strangers, as well as the old-fashioned solicitations from co-workers, Scouts selling in malls and outside grocery stores, etc. Is your association selling online?*

**“WHEN WILL THEY EVER LEARN?”** — A recent news item in the Chicago Tribune once again illustrates the need for executive and board oversight of how expenses are handled by not-for-profit personnel. A small Chicago group’s new executive director was checking credit card use by staff and discovered a five-year history of unauthorized charges for obviously personal expenses, including plastic surgery, by the staff person overseeing their use. The staffer is now charged with felony theft of about \$82,000. *Five years? Where was the oversight by the previous executive director and the board of directors? Were audits performed? It is not just the alleged thief who is culpable when this occurs.*

GOOD READING ... See you in January

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**IRS FACILITATES CHANGING STATE OF DOMICILE** — The Internal Revenue Service has issued a new private letter ruling that indicates the IRS’s willingness to allow tax exempt organizations to change their state of domicile, under limited circumstances, without obtaining a new letter from the IRS recognizing their continuing tax exempt status. The IRS had previously ruled that such changes of domicile required an organization to file a new application for recognition of tax exemption with the IRS. But the spread of new state conversion and domestication laws has now led the IRS to change its policy. The letter ruling recognizes that a new application to the IRS isn’t necessary if an exempt organization converts its state of domicile from one state to another and is domesticated in the second state, but does not change its basic organizational form, provided the laws of both states recognize that the exempt organization will continue to exist as the same entity following the process, with the same liabilities and obligations. *Not all states allow such conversions and domestications (Illinois doesn’t). On the other hand, some states allow conversion and domestication with a change in organizational form (between corporation, trust and limited liability company, for example). Only a process that does not result in a change in form is sanctioned by the new letter ruling. But when an exempt entity can change its state of domicile as provided in the letter ruling, and finds that such a change will benefit it, the change in IRS policy will save the organization filing fees, legal costs, time, and the uncertainty involved in filing a new application for recognition of exempt status.*

**NO SUPRRISE HERE: NCAA APPEALS ANTITRUST DECISION** — *H&H Report Update* — As expected, the National Collegiate Athletic Association has appealed a decision by a federal judge in California earlier this year that the NCAA had violated federal antitrust laws by its rules banning compensation to college players for exploitation of their likenesses and limiting compensation in the form of scholarship aid to players by Division I universities and colleges. The NCAA appeal claims its rules do not involve commercial activity and seek to promote and protect amateurism. *The commercial activity claim is a wee bit difficult to make in the light of major universities filling stadiums six or seven times a year at home with 100,000 screaming fans paying \$100 each, luxury skyboxes, TV revenues, and licensing their players’ likenesses in numerous ways. The NCAA also claims it protects amateurism by capping scholarship aid and expense money to players even if these do not cover players’ actual expenses for room, board, tuition and fees. The trial judge saw it differently. This appeal is headed to the U.S. Supreme Court whatever the federal appellate court in California rules in 2015.*

**WE SUPPORT RAISING THE ILLINOIS MINIMUM WAGE, BUT** — The “but” for many social service agencies in Illinois is how to pay for any of the proposed minimum wage increases currently under consideration by the state legislature and approved by the Chicago City Council, especially for those agencies which are largely dependent on state funding, because of the state’s own dire finances. The State of Illinois is reducing funding for social services and faces uncertain revenues going forward in 2015. The City of Chicago is looking at hundreds of millions of dollars for pension funding in 2015 mandated by the state. *So social service agencies that may support increasing the minimum wage in general are wondering how they will afford such increases in 2015 and beyond for their own employees. Will the state come through with more money? Will they be able to raise more funds on their own? Or will they have to cut employment or cut services?*

## REGULATORY LAW DEVELOPMENTS

**COURT UPHOLDS OBAMACARE “ACCOMMODATION” FOR RELIGION** — A federal appellate court for the District of Columbia, which is often regarded as the most influential appellate court after the U.S. Supreme Court because it hears so many important federal appeals, has rejected constitutional challenges filed by religious nonprofits to a regulatory “accommodation” permitting them to opt out of ObamaCare requirements that they provide contraceptive care for their employees and other health insurance plan beneficiaries. The accommodation allows employers to notify their health insurance plan administrators or the U.S. Department of Health and Human Services that they object on religious grounds to providing contraceptive care, at which point the administrators, though still legally required to provide contraceptive care, cannot specifically use the employers’ premiums for that coverage and must notify beneficiaries that the employers had no role in facilitating that coverage. Considering the constitutionality of the accommodation, the court found that the opt out accommodation was constitutional because it did not “substantially burden” the religious freedom of the nonprofits, but, at most, created a “de minimis” (minimal) burden for them. *The nonprofits’ contended, to some extent, they were still being required to “play a role” in providing contraceptive care under the “accommodation,” despite their sincerely held religious objections to contraception, because as employers they still had to provide the health insurance, and the health insurer still had to provide for contraceptive care, though the nonprofits didn’t have to pay for it. In effect, the court said, “Too bad.”*

**FTC CRACKS DOWN ON “FREE CREDIT SCORES” SCAM** — The Federal Trade Commission has cracked down on a number of companies and individuals operating a “free credit scores” scam. Individuals were induced to obtain a free credit score and then billed a recurring fee of \$29.95 per month thereafter for a credit monitoring program they had never ordered or been informed of when they obtained the free credit score. The defendants then made it as difficult as possible for individuals to cancel and/or receive a refund of the monitoring charges. More than 200,000 persons were scammed. The defendants settled, agreeing to refund \$22 million, and cease the practices involved including violations of the FTC Act, the Restore Online Shoppers Confidence Act (Have you ever heard of that one?), and Illinois and Ohio statutes. *You have to wonder if the refunds will actually occur. So often they are announced but are they actually paid? Once again, watch for scams. This one was widely promoted on Google and Bing.*

**PROGRAMS LIKE THIS MAKE YOU WONDER WHAT WERE THEY THINKING** — The Federal Trade Commission has filed a complaint in federal court in California alleging AT&T Mobility, LLC has misled millions of customers with a program promising smartphone customers with “unlimited” data plans (at a higher monthly fee, of course), but then greatly reducing the speed of the data to customers who took advantage of the plans with applications generating lots of data such as web browsing, streaming videos, GPS applications, etc. The FTC says some customers experienced speed reductions up to 90%. And if customers terminated their AT&T provider, they faced hefty early termination fees. The practice is called “data throttling,” and has been the subject of complaints in the past. Apple iPhone customers seem to have been those most affected. AT&T responded that it informed customers data slowdowns would happen. *However this turns out in the end, why would a company knowingly and intentionally institute a program which was almost certain to generate anger, disgust, bad press and induce customers to terminate doing business with you? Strange....*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**JET BLUE’S INTERESTING LOGIC ON INSTITUTING BAG-CHECKING FEES** — A spokesman for Jet Blue explained the airline’s rationale behind instituting fees in 2015 to check bags, a practice already in place at most other domestic airlines. “Less than half our customers check a bag, so most customers already are paying for the service without using it.” *Come again? If we offer a service you don’t use, you are paying for it anyway so we might as well charge you, seems to be the thinking. Jet Blue will also cram more seats in coach class.*

## EMPLOYMENT LAW DEVELOPMENTS

**HOW NOT TO DO A TERMINATION ANNOUNCEMENT** — An employee termination gone viral in the Chicago area was the recent management decision by (Chicago) Tribune radio station WGWG-LP 87.7 to shut down a program called “The Game” nine months after the program began. Management was calling in employees in small groups to tell them the bad news, and the story quickly ended up on social media. The program co-host learned about the shutdown while he was on the air in the middle of his morning show. He responded immediately and very unhappily while on the air to getting the news that way. He blasted management which had planned to tell him and some others later in the day. *The takeaway for employers is social media can spread news good or bad very, very quickly. For an announcement of this sort affecting a number of people, employers may be wiser to bring them together as a group and announce it to all rather than try to do it piecemeal and hope no one spills the beans before all have been notified. Social media make a difference at spreading the word and employers can quickly lose control of the message.*

**SLOPPY AGREEMENT DRAFTING KEEPS EMPLOYER IN COURT** — An employer learns the hard way that sloppy drafting of an employment severance agreement which allows an ambiguity can be the catalyst to a jury trial on what was intended by the parties. The employer thought its severance package was for eight weeks’ salary spread over four payments. But the wording used was for “[A]n annual salary in the amount of \$56,398 from the Termination Date of April 1, 2013 through May 24, 2013.” After receiving eight weeks’ pay, the terminated employee sued for pay for an entire year, or an additional amount of nearly \$48,000. His claim was dismissed by a Florida trial court, but a Florida appellate court reversed the dismissal, saying the employee’s interpretation is sufficiently plausible to proceed. *Was it a year’s salary over four payments or four payments at the employee’s pay rate for eight weeks? It seems unlikely the employee was misled into thinking he would receive a year’s pay, but sloppy drafting left an opening for such a claim so the employer is looking at expensive litigation which will cost nearly as much as the claim. Ambiguity invites litigation. Be precise, be specific.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**WHAT CONSTITUTES “DISTRIBUTE” IN VIOLATION OF A COPYRIGHT?** — A federal appellate court in Chicago recently raised but did not answer that question in reversing the dismissal of a copyright violation claim which a trial court had dismissed as filed beyond a three-year statute of limitations period under the Copyright Act. An architectural firm provided design drawings used by a Chicago restaurant to obtain a “repair and replace” city building permit in 2006. The work was done in 2006-07, but the restaurant defaulted on payment for the design work. In 2008 a firm employee happened to see what looked like its design with another architect’s name on it in the city office which issued permits, but the firm was not allowed to inspect the

design to determine if it was the firm’s original work. In March 2009 the city issued a new permit for work at the restaurant based on the design signed by the second architect. Just under three years later in February 2012, the firm sued the restaurant, its owners and the second architect for copyright infringement and various claims under state law. The copyright claim was dismissed in 2012 for being beyond three years after the 2008 incident which gave rise to a duty to inquire, A “continuing violation” claim was also dismissed. The appellate court relied on the May 2014 Petrella v. Metro-Goldwyn-Mayer U.S. Supreme Court decision holding that acts within the three years preceding a copyright lawsuit could state a claim for copyright violation. The three years runs from when a reasonably diligent plaintiff did or could have reasonably discovered the violation. *The Copyright Act provides the copyright owner has the exclusive right to distribute his work “by sale or other transfer of ownership, or by rental, lease or lending.” The appellate court raises but leaves for the trial court on remand the question whether submitting a copyrighted design with another person’s name on it to a city office for a permit comes within the definition of “distribute.” Keep that question in mind as well as the three-year running statute of limitations when making or defending a copyright claim.*

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## TAX LAW DEVELOPMENTS

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**APPEALS COURT TOSSES CHALLENGE TO PARSONAGE EXEMPTION — *H&H Report Update*** — A federal appellate court in Chicago has vacated a Wisconsin district court ruling that the exemption from federal income taxes for expenses connected with a minister’s home violates the provision of the U.S. Constitution forbidding the federal government from establishing a religion. The appellate court ruled that Freedom from Religion Foundation, a nonprofit group of atheists and agnostics, had no standing to bring a lawsuit challenging the parsonage exemption just because they believed they couldn’t claim a similar exemption for expenses connected with the residences of the group’s co-presidents. As the appellate court noted, the Foundation had never sought a parsonage exemption from the IRS for the housing expenses of the co-presidents, and the Foundation had to seek the challenged exemption, and be denied it, before they could take the IRS to court over its constitutionality, even if seeking the exemption from the IRS might be futile because the co-presidents were not ministers. *The appellate ruling follows many other court decisions in which constitutional claims have been tossed for similar reasons. Lawsuits challenging the favorable treatment given to others by government are not something the courts want to deal with. They are busy enough hearing suits that challenge the constitutionality of unfavorable treatment given by government to the people actually affected by the treatment.*

**TWO MORE RECENT DEVELOPMENTS ON INTERNET SALES TAX ISSUES** — In December 2013 the U.S. Supreme Court did not accept the appeal by Amazon and Overstock from a New York high court decision requiring them to collect New York sales taxes on sales through affiliates of the two online retailers which promote the retailers’ sales even though Amazon and Overstock do not maintain a physical nexus in New York. Twelve other states have similar laws. A year later the Supreme Court heard oral argument on a Colorado law requiring online retailers to inform Colorado and customers of online sales to Colorado. The Direct Marketing Association is opposing that state law. This approach could go nationwide if upheld by the Court. And it appears the federal ban on Internet sales taxes will be extended as part of the funding deal Congress has been negotiating to avoid another government shutdown. *So win some, lose some, on taxing sales on the Internet. Ultimately, this will take federal legislation one way or the other; meanwhile the states continue to look for ways around the Supreme Court’s “physical nexus” test for state sales taxes across state lines.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**THE TIMES THEY ARE A-CHANGING** — When you see articles such as “Marketing Marijuana” in the Harvard Business School online newsletter, you know the times are changing. Whether for the better is a matter for debate. The HBS article raises such issues as whether companies will be obtaining licenses across state lines to increase market share or even prepare to go national, whether major tobacco companies are assessing the market, potential creation of brands, and price competition between legal and illegal marijuana sellers. *With four states’ voters and the District of Columbia’s voters having passed referenda approving recreational marijuana and many more states having legalized medical marijuana, plus the federal (so far) hands off on enforcing federal laws prohibiting the sale and use of marijuana, it appears legalization across the board may not be that far off. Then what? Will we see association receptions with marijuana as an “adult beverage” option, or marijuana cookies as a dessert option? With so many changes in attitude about formerly taboo subjects, staying current and relevant remains a struggle.*

**IS AMTRAK A PRIVATE OR A GOVERNMENT ENTITY?** — That was a question underlying much of the oral argument before the U.S. Supreme Court recently in determining whether Congress gave Amtrak an unconstitutional grant of authority to set performance standards which could have a detrimental effect on other railroads, i.e., competitors. A federal appellate court in the District of Columbia had ruled Amtrak was a private entity and Congress could not give Amtrak the right to develop standards, which the court characterized as regulations, applicable to other railroads with which Amtrak shared rail lines. Amtrak should not be allowed to develop standards giving Amtrak priority over freight railroads using the same rail lines. Counsel for the Association of American Railroads insisted Amtrak is a private entity; some of the justices disagreed, saying it is a creature of government in most respects. *One justice raised the issue of the Supreme Court striking down a statute on the ground that Congress had improperly delegated authority to a private entity, a position the Court has avoided since the famous “Switch In Time That Saved Nine” back in 1936 when the Court reversed itself on striking down Roosevelt’s New Deal legislation. The Court’s decision in 2015 will be closely scrutinized for its impact on other private entities, including associations, developing standards which may impact competitors.*

## H & H DEVELOPMENTS

In December...

Jonathan T. Howe presented “Risk Management in Uncertain Times” to a group of meeting professionals meeting in Nassau for an educational familiarization program hosted by the Nassau Paradise Island Promotion Board [attendees received CMP Credit: 1 Hour]

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