
THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

January 2015

VOLUME 2015, ISSUE 1

IN THIS ISSUE:

NOT FOR-PROFIT LAW 2

NCAA \$75 Million Concussion Settlement Turned Down By Judge

No Trade Association Too Small For FTC Scrutiny

REGULATORY LAW2-3

FTC Cracks Down On PSA Anti-competitive Code Of Ethics

Peapod Agrees To Internet ADA Compliance

Revised OSHA Requirements Take Effect

TAX LAW3-4

IRS Budget Cut To Lowest Level Since 1998

IRS Releases Standard Mileage Rates For 2015

Tax Laws “Extended”

EMPLOYMENT LAW 4-5

Reminder: Municipalities Also “Ban The Box” — *H&H Report Update*

New Employer Obligations In D.C.

Can Volunteers Bring Title VII Claims?

INTELLECTUAL PROPERTY 5

PTO Studying Trademark Over-Claiming

MEETING & TRAVEL LAW 5

Passenger Facility Charges: How To Pay For Them?

OTHER ISSUES, TRENDS 6

It Ain’t Over ‘Til It’s Over — And Maybe Not Even Then

H&H DEVELOPMENTS 6

MORE ILLINOIS EMPLOYMENT LAWS ENACTED —

H&H Report Update — Previously, we reported on some important new employment laws that took effect in Illinois this year. In addition, the General Assembly passed, and the Governor signed, Public Act 98-1037, amending the Illinois Human Rights Act to extend sexual harassment protection to unpaid interns, and Public Act 98-0862, amending the Illinois Wage Payment and Collection Act to regulate employer use of payroll cards, which allow employees to access accounts into which employers deposit their wages. The latter law, among other things, prohibits employers from requiring workers to receive wages through payroll cards, and it mandates that employers protect payroll card accounts from unauthorized access. *All nonprofits with Illinois employees should review their policies to make sure they are in compliance with the new state laws taking effect this year.*

ENJOY IT WHILE YOU CAN —

Remember a few years ago (December 2011) the Illinois legislature enacted and Governor Quinn signed an income tax increase which was promised to be temporary? The added revenues were to pay overdue bills. Instead, the legislature and governor increased spending so we still have billions of old bills. The temporary increase was not made permanent (not in an election year), and state agencies want \$760 million in supplemental revenues this fiscal year. *Enjoy the extra dollars from the lower income tax bite, but don’t be surprised if the legislature moves to make the former increase permanent in the near future. Promises are temporary, not taxes.*

HYATT JOINS THE TREND TO FREE WI-FI —

Hyatt Hotels Corporation has joined the trend to providing guests free Wi-Fi access in lobbies and guest rooms, beginning in February 2015. Marriott and Starwood have already announced plans to offer such free access to their guests who are members of their loyalty programs. Hyatt is taking free Wi-Fi access a step beyond by offering it to all guests. *The Hyatt explanation bears repeating. Internet connectivity is no longer an amenity; it is an expectation of and daily routine for guests. This is probably even more the case for business travelers and millennials. It used to seem strange that lower cost hotels provided free Wi-Fi but the pricier hotels charged for it. Now to explain this evolving trend to the airlines.*

GOOD READING ... See you in February

Howe & Hutton, Ltd., 20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685 • Email: hh@howehutton.com **Washington Office:** 1901 Pennsylvania Avenue, NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • © Copyright 2015. Howe & Hutton, Ltd. Chicago, Illinois, Washington, D.C., U.S.A. All Rights Reserved. Republication with credit to Howe & Hutton, Ltd. and “The Howe & Hutton Report” is allowed. Please provide us a copy of your use.

NOT-FOR-PROFIT LAW DEVELOPMENTS

NCAA \$75 MILLION CONCUSSION SETTLEMENT TURNED DOWN BY JUDGE — A federal court judge in Chicago has rejected a proposed settlement between the National Collegiate Athletic Association (“NCAA”) and a class of former players who claimed the NCAA had not done enough to address concussions suffered by players in contact sports. The judge decided the \$75 million settlement (\$70 million to satisfy monitoring expenses less \$15 million for the lawyers, and \$5 million for research) was likely to be inadequate, and sent the parties back to the negotiating table. The \$70 million was supposed to cover health monitoring expenses for 50 years for former players in contact sports. More important, the NCAA was required to impose a much stricter regimen on member schools regarding treatment of players’ concussions, having medical personnel available at games and practices, and imposing a ban on a player returning to play on the same day the player was determined to have suffered a concussion, among other provisions. One study indicated about 50% of concussed players returned to action the same day. *The way forward is unclear. A similar \$765 million concussion settlement by the NFL and former players was rejected by a judge, and a proposal for an uncapped amount is currently under review. This NCAA lawsuit was filed over three years ago, and the settlement presented last July. Meanwhile other claims against the NCAA are on appeal.*

NO TRADE ASSOCIATION TOO SMALL FOR FTC SCRUTINY — A small trade association, only 25 members, was not too small to escape Federal Trade Commission scrutiny for its anticompetitive bylaws and practices. The Professional Lighting and Sign Management Companies of America, Inc. (“PLASMA”) members are electrical companies that specialize in commercial and electrical sign installation and maintenance. Association members are few in number but cover the country. PLASMA’s bylaws provide exclusive territories for members, enforcement procedures to keep members out of other members’ designated territories, and impose other restrictions on price competition among members, even banning competition for customers or prospective customers of other members for a year after membership ends. A Grievance Committee handles complaints by members against other members for bylaws violations. *The FTC has filed a complaint and a proposed consent decree to end these anticompetitive practices of PLASMA. It still comes as a surprise to find such overt anticompetitive bylaws and enforcement activities in modern association practices.*

REGULATORY LAW DEVELOPMENTS

FTC CRACKS DOWN ON PSA ANTICOMPETITIVE CODE OF ETHICS — The Federal Trade Commission has cracked down on the Professional Skaters Association (“PSA”) for violations of the FTC Act, Section 5, and is entering into a consent decree, subject to Commissioners’ approval, with all the usual restraints and compliance requirements. PSA members include some 6,400 coaches from beginner level to international elite competition, plus judges, skaters and others. The PSA is alleged to have enforced a code of ethics which essentially barred its member coaches from competing with one another for student skaters on such bases as solicitations to pupils of any other PSA coach (even when the pupils or their parents wanted to change coaches for all sorts of legitimate reasons including cost or convenience), offering free classes, competing on fees, and requiring member coaches to abide by the code of ethics or face sanctions up to and including suspension or termination of membership. PSA membership is required for coaches of skaters in U.S. Figure Skating Association competition, and for access at many ice rinks. PSA membership provides other benefits including insurance and accreditation. *The PSA code of ethics contains the same sort of anticompetitive restrictions which have been struck down by federal courts and the FTC for over 30 years. The only surprise is the PSA has gotten away with it for this long, but not much longer.*

PEAPOD AGREES TO INTERNET ADA COMPLIANCE — The U.S. Justice Department and the owners and operators of Peapod have entered into a settlement agreement under which the Internet grocer is required to make its website and mobile applications more accessible to users with disabilities, remedying alleged violations of the Americans with Disabilities Act. Among other things, Peapod has agreed to hire a website accessibility coordinator, retain an independent accessibility consultant, solicit user ideas for improving accessibility, provide “automated accessibility testing,” and offer mandatory annual training on accessibility for its employees. *The Justice Department has continually taken the position that the ADA applies to the Internet despite conflicting court decisions on that point. Justice is pushing businesses for Internet ADA compliance while it develops formal regulations that, presumably, would cover both for-profits and nonprofits. But don’t look for those regulations any time soon. Originally thought to be in line for publication in 2013, they seem to have been pushed back following a Justice Department request for public comment on the subject. Additionally, Justice still hasn’t met its own deadline for developing regulations on ADA compliance by state and local governments operating websites, and that project is supposed to be further along than the regulations relating to privately owned sites. Do as I say rather than as I do.*

REVISED OSHA REQUIREMENTS TAKE EFFECT — Revised recording and reporting requirements adopted by the U.S. Occupational Safety and Health Administration took effect January 1. Members of twenty-five industries that did not previously have to comply with OSHA recordkeeping requirements unless asked to do so by OSHA, the Bureau of Labor Standards or a state agency under the authority of either of those two federal agencies now must keep routine records of employee injuries and illnesses, including performing arts companies, museums, historical sites and similar institutions. In addition, the new OSHA requirements expand the list of workplace injuries and illnesses that must be reported to OSHA. Added to the list are all work-related amputations, losses of an eye, and in-patient hospitalizations, including those due to a heart attack. The newly added injuries and illnesses must be reported within 24 hours if they occur within 24 hours of a work-related incident. *For more detailed information, see <http://www.osha.gov/recordkeeping2014>. In addition to federal requirements, 34 states have laws that may require recordkeeping and reporting for workplace injuries and illnesses. Make sure you know what federal and state laws apply to your operations. We can help you.*

TAX LAW DEVELOPMENTS

IRS BUDGET CUT TO LOWEST LEVEL SINCE 1998 — The 2015 appropriations bill developed by the House of Representatives cut the House-approved budget for the Internal Revenue Service to its lowest annual level since 1998, considering inflation-adjusted dollars. Even ignoring adjustment for inflation, the 2015 allotted amount for the IRS would be its lowest annual level from Congress since 2008. *Why? Since money allotted to the IRS should produce more efficient collection of tax revenue, it seems to make no sense. But politics and “punishing” the IRS for its perceived misdoings are often divorced from revenue considerations by Congress. One likely consequence: your organization is probably less likely to be audited.*

IRS RELEASES STANDARD MILEAGE RATES FOR 2015 — As it does every year, the Internal Revenue Service has released the optional standard mileage rates that can be used to compute the cost of driving a motor vehicle for business purposes by those who itemize their deductions when filling out tax returns. Beginning January 1, 2015, the standard rates are 57 cents per mile for business miles driven (up from 56 cents for 2014), 23 cents per mile driven for medical or moving purposes (down from 23.5 cents for 2014) and 14 cents per mile driven in service to charitable organizations (unchanged from 2014). *You can also calculate the actual costs of using a vehicle for business and deduct those instead of the standard mileage rates.*

TAX LAWS “EXTENDED” — At the very end of 2014, Congress passed, and the President signed, one-year extensions of numerous federal tax provisions that would otherwise have expired with the New Year. They included the following: ➤A moratorium on state Internet-specific taxes, such as email or bandwidth taxes. ➤Exemption from unrelated business income tax for rent, royalty, annuity and interest payments made from a controlled organization to a controlling organization, as long as the payments represent fair market value and are made pursuant to a binding contract in effect on August 17, 2006 or an extension of such a contract. ➤Enhanced deductions for contributions to charity of wholesome food from any trade or business of the taxpayer. ➤Extension of tax-free distributions from IRAs for charitable purposes up to \$100,000. ➤Increase from 30% to 50% of the donor’s contribution base for deduction of qualified conservation contributions. ➤For charitable contributions of property, a reduction in the basis of a S corporation shareholder’s stock by the pro-rata share of the contributed property’s adjusted basis rather than the shareholder’s pro-rata share of the contribution. *Nonprofits and contributors to those organizations, and anyone using the Internet, can take the new “extensions” into account in planning for 2015, and more than likely they will be extended again at the end of 2015. Thus does Congress avoid comprehensive tax overhauls year after year.*

EMPLOYMENT LAW DEVELOPMENTS

REMINDER: MUNICIPALITIES ALSO “BAN THE BOX” — *H&H Report Update* — As we have reported, “ban the box” laws and ordinances are spreading fast. Such laws prohibit employers from inquiring about a prospective employee’s criminal background on their application. But employers also need to be aware that many municipalities have gotten into the act, as Columbia, MO did last December, and their laws, if tougher than those of their state governments, will generally apply to employers operating within their jurisdictions. *Chicago’s “ban-the-box” ordinance, effective January 1, is even tougher than the recently enacted Illinois law as it applies to all private employers, including nonprofits, and requires the employer to inform the applicant of the basis for the decision not to hire the applicant. Such laws may even apply to organizations that just hold meetings in a locality, but have no permanent offices there. Employers should check on the existence of such ordinances, as well as state laws, in locations where they are or intend to be active.*

NEW EMPLOYER OBLIGATIONS IN D.C. — The New Year brought with it a new law in the District of Columbia applicable to nonprofits and other employers doing business there. The Wage Theft Prevention Act of 2014 contains increased penalties for employers failing to maintain proper employment records and violating other existing laws, strengthened anti-retaliation protections for employees who report employer violations of law, and a requirement that employers give current and future employees a new, written notice (in English and their primary language, if it is other than English). That new notice must include the employer’s name, addresses and phone number, employee’s rate of pay and the basis for it, allowances claimed as part of the minimum wage (such as tip, meal or lodging allowances), overtime rate of pay and exemptions from overtime, the living wage and exemptions from the living wage, the applicable prevailing wages, and the employee’s regular payday. Employers must also provide an updated notice when any notice item changes. *Nonprofits operating in D.C. had better spend time becoming thoroughly acquainted with these new requirements, and can obviously expect to spend more time and money defending employee wage claims and providing notices as a result of the new law.*

CAN VOLUNTEERS BRING TITLE VII CLAIMS? — In a recent case, a federal appellate court in Cincinnati tackled the issue of whether volunteers in service to a nonprofit could ever be considered “employees” capable of bringing a Title VII employment discrimination case against the organization under federal law. Two nuns who were unpaid workers providing disaster relief for a nonprofit filed suit under Title VII after their volunteer work was terminated, allegedly because of their religious beliefs. The appellate court held the

nuns were not “employees” for Title VII purposes and dismissed the nuns’ case, but not before reviewing aspects of their relationship with the nonprofit to determine whether they could be considered “employees” even though they were unpaid. The court noted that some factors weighed in favor of a finding of “employment” for Title VII purposes, including the nuns had workers’ compensation coverage, received reimbursement for expenses, and performed services directly related to the mission of the organization. But the majority of other factors reviewed by the court indicated the nuns were true volunteers, including not only their unpaid status but also that they received no employee benefits, made their own schedules, and had the discretion to turn down assignments from the nonprofit. *Most courts that have examined the question have concluded that lack of pay shows true volunteer status, and prevents the bringing of Title VII claims, without the need for consideration of other factors indicating that volunteers might be “employees.” But nonprofits wanting to ensure their workers will not be considered employees capable of bringing discrimination claims under federal law (or state law, which also contains prohibitions against employment discrimination) should nonetheless make sure that they give their volunteers the kind of discretion and freedom in providing services that typically does not apply to paid employees. Furthermore, they should obviously avoid prohibited discrimination, whether against volunteers or paid employees.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

PTO STUDYING TRADEMARK OVER-CLAIMING — The U.S. Patent and Trademark Office (“PTO”) has been studying over-claiming of goods and services in trademark registration applications, and has found that over half of the use-based applications filed may claim the mark to be registered is used by the applicant in connection with more goods and services than is actually the case. This is possible because trademark registrations protect the owner for all products and services claimed in an approved application, but the PTO only requires submission of one specimen demonstrating use for each “class” of goods and services to which an application applies, though each class may cover many goods or services for which protection is sought. *Over-claiming prevents or discourages legitimate trademark registrations that may be blocked by the excessive claims in an earlier application. Now, the PTO is considering ways to eliminate the practice, which may include requiring a specimen of use for all products and services claimed by a registrant, as well as creating a streamlined procedure, similar to one used in Canada, through which goods and services can be expunged from a trademark registration, upon a challenge filed by a member of the public, unless the owner can demonstrate use.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

PASSENGER FACILITY CHARGES: HOW TO PAY FOR THEM? — Passenger Facility Charges, or “PFCs”, are charges added to an airline ticket to fund airport improvements. These fees are currently capped at \$4.50 per flight but the Obama administration is proposing the maximum fee be increased to \$8.00. Airports would like the fee to go up to \$8.50, or \$17 for a round-trip flight, and double that for a connecting flight; with an inflation kicker for years to come. Airports want the fees tacked on to the cost of a ticket; airlines object, saying it will discourage flying for personal rather than business reasons. Airports note the inconvenience and delays to passengers of trying to collect such a fee separately at an airport, whether at a kiosk or at a flight counter. *We can safely assume the higher fees will soon take place. Will a person flying for other than business reasons be deterred if the higher fee is appended to the cost of a ticket rather than collected separately? These fees have been around since 1990, and are typically included in the cost of a ticket already. When we read about airlines earning high profits, flight occupancy rates at 86% or better on flights, projections for even more crowded flights, and business travel projected upward for 2015, airline claims that adding the higher fee to the cost of a ticket will discourage flying ring hollow.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

IT AIN'T OVER 'TIL IT'S OVER — AND MAYBE NOT EVEN THEN — Marriott has lined up with the American Hospitality and Lodging Association in an effort to persuade the Federal Communications Commission to allow hotels, and by extension other meeting venues, to monitor and control how customers connect to the Internet with their computers, tablets, cell phones, etc., while at a facility. The pitch is the hospitality industry needs to be aware of and able to cut off any unauthorized users who might corrupt systems, hack into devices, or interfere with legitimate users onsite. Of course this monitoring and control would not involve rendering inoperative all devices except those of the facility “unless absolutely necessary to thwart cybersecurity threats.” *And of course none of this is related to revenues lost when users use their own devices and Internet connections instead of facilities’ revenue-generating systems. Marriott, at least, is reportedly not wanting to interfere with devices in customers’ rooms or in common areas, perhaps in response to the settlement and fine it recently incurred as a result of complaints about blocking customer access at the Gaylord Opryland. Anyway, keep your eyes peeled for further efforts to persuade the FCC to allow facilities to impose controls on customers using their own devices and systems onsite instead of facilities’ systems at higher cost.*

H & H DEVELOPMENTS

In January...

Jonathan Howe traveled from one coast to the next with a full speaking schedule: He presented “The Affordable Care Act Fully Engaged — The Future Is Now!” in Orlando for an association of fence manufacturers and suppliers. He presented two webinars for a meeting jobs organization: “Vendor Contracts: Avoiding Costly Legal Mistakes” (A look outside the Hotel Arena)” and “Cancellations By The Hotel: It Does Happen So What Do You Do.” He presented “Finding Your Way Through The Special Events Legal Jungle” at an event for Academic Event Professionals in Anaheim, California and he presented four sessions relative to meeting and event contracts at a large convention for a religious conference management association at the Birmingham Jefferson Convention Center in Birmingham, Alabama: “Contingency Planning,” “Road Maps to Successful Meetings: Contracts, Legal Liabilities and Negotiations,” “Obtaining Maximum Value through Effective Negotiations,” and “The Lawyer Is In.”

Naomi Angel presented “Risk Management-New Challenges for Venues and Destinations” for an event service professionals’ annual conference held in Chicago. Among the new challenges: concealed carry and legalization of medical marijuana. She also gave a legal trends update at the annual meeting of a trade association of manufacturers in Phoenix.

PLEASE VISIT OUR [LINKEDIN](#) AND [FACEBOOK](#) PAGES

Contributors to this issue...

Terrence Hutton, John M. Peterson, and James F. Gossett

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 www.howe-hutton.com by clicking on “Publications.”