THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

December 2015 VOLUME 2015, ISSUE 12

IN THIS ISSUE:

DISABILITY DISCRIMINATION FOUND IN YOUTH SPORTS LEAGUE — The U.S. Justice Department has filed a complaint alleging disability discrimination by a youth wrestling league, which allegedly failed to allow a wrestler with dwarfism to "play down" one age division so that he could compete with athletes closer to his weight and size. The Department has also agreed to a consent decree with the league, subject to court acceptance, requiring that the organization adopt and publicize a disability nondiscrimination policy, pay compensatory damages to the wrestler in question, and conduct training for members in avoidance of disability discrimination. *The "play down" suggestion was an accommodation to wrestlers with dwarfism, which the league apparently rejected until the Justice Department got involved. Nonprofits need to be sensitive to making reasonable accommodations proposed to them by persons with disabilities. As this case shows, the alternative can be legal expenses, damages payments and harmful publicity.*

ILLINOIS COURT BLOCKS TRADE SHOW TRADEMARK INFRINGEMENT — Your organization owns and operates a trade show. But, in a dispute over control of that entity, you start a new one and begin presenting a competing trade show using names and logos that had been used by your former organization. Who in the world would think that was a good idea? A surprisingly large number of people in both the nonprofit community and the for-profit world do this very thing, and, in a recent case, the Appellate Court of Illinois affirmed a lower court order prohibiting disaffected individuals who were originally affiliated with a fashion show owner from operating a competing trade show under the same name and with the same logos. Furthermore, they were ordered to pay over $30,000 in damages to their former organization. *The moral: get some legal advice about trademarks and unfair competition before you get yourselves involved in a situation like this. And while you are at it, if you are starting a new entity, nonprofit or otherwise, you should get some legal advice on doing that. The individuals involved in this case had little knowledge about the operation of corporations, according to the Appellate Court, and they didn't seek any legal assistance in that regard, relying on an accountant to prepare corporate papers. Among other things, that naiveté complicated matters for the courts when they were called upon to decide who owned what and who could bring suit against whom.*

GOOD READING … See you in January

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CHANGES IN NFP FINANCIAL STATEMENT PRESENTATION PROPOSED — The Financial Accounting Standards Board has proposed significant changes in presentation of financial statements for nonprofits. The Board has proposed changing net asset classification reporting by combining temporarily and permanently restricted net asset classes. A Statement of Financial Position and Liquidity Information is proposed, including classification of underwater endowment funds with donor restrictions and disclosure of the nonprofit's policy on spending from underwater endowment funds, together with the aggregated original gift amount required to be maintained by the donor or by law. A Statement of Activities is proposed, reporting an analysis of operating expenses by function and nature, reporting investment income net of external and direct internal investment expenses, reporting expirations of donor restrictions on gifts used to construct or acquire long-lived assets, and disclosing internal salaries and benefits netted against investment return. The same statement would present all internal transfers on its face, present intermediate measures of operations, classify interest expense and fees with financing activities and not operating activities, and consider as operating revenue/support all unrestricted gifts of long-lived assets when received, and restricted gifts for such assets when placed in service, while presenting them as a transfer from operating to non-operating activities. A Statement of Cash Flows is proposed, closely aligning items with those on the Statement of Activities and using the direct method of stating cash flows. Finally, business-oriented health care nonprofits would not be required to present a classified balance sheet or report their performance indicators. *Reaction to the FASB proposals has been decidedly mixed, and the proposals may be changed before they are implemented.*

SUPREME COURT ALLOWS NONPROFIT EXPANSIVE FOIA PROTECTION — The Supreme Court of the United States has declined to hear a petition for review of a lower court's decision giving the nonprofit Planned Parenthood protection from government disclosure of certain documents it submitted to the federal Department of Health and Human Services in seeking grant money, thus letting the lower court decision stand. Disclosure had been sought by the nonprofit New Hampshire Right to Life under the federal Freedom of Information Act, which requires the federal government to disclose information it possesses, subject to certain exceptions. In this case, the lower court held that the Department was not required to disclose certain documents it had withheld from disclosure to the New Hampshire group under two exceptions, one being for "trade secrets and commercial or financial information and privileged or confidential," and the other being for "inter-agency or intra-agency memorandums or letters." The New Hampshire group failed in trying to convince the lower court that the first exception couldn't apply to a nonprofit's documents because a nonprofit couldn't possess "commercial" information, and the lower court also held that Planned Parenthood's documents could be "confidential" if they could be used by an actual or potential competitor to compete with Planned Parenthood for patients, grants or other funding. Additionally, the lower court held that the Department did not waive its right to withhold disclosure of documents under the second exception just because the Department discussed disclosing them with its legal counsel. *This case certainly should give nonprofits some relief from concerns that all documents they submit to the government in seeking grants will become subject to disclosure under the FOIA. As for the second exception, we would be offended if the government couldn't consult us lawyers for advice without waiving certain rights. What would the government do without us?*

SHARED SOFTWARE AND SOCIAL MEDIA CAN IMPROVE NFP OPERATIONS — Administration of revenue-generation and volunteer management reporting calls for cooperation among nonprofit staff and members, as well as professional advisors such as accountants, attorneys, and insurance, fundraising and investment advisors. Shared software services and social media tools can play an important role in improving organizational performance and its impact on lives and businesses, in addition to facilitating governmental reporting, including annual reports to the Internal Revenue Service. Member and volunteer engagement

using social media tools can lead to more resources at lower cost, more impacts for nonprofits and communities, and ready data for reporting to board meetings, contributors and oversight agencies. *Whether developed by "social good" organizations, professional advisor firms, or associations, revenue and administration tools using shared software and social media can provide for online access, often daily or at regular intervals, by organizations, stakeholders and cooperating advisors. Your organization could benefit from a periodic revenue generation and impact tracking review, taking a look, among other things, at how shared software and social media could be incorporated into your operations. Your attorneys can help.*

Intellectual Property & Computer Law Developments

UNREGISTERED TRADEMARK ENTITLED TO PROTECTION — A recent federal court case provides a reminder that trademarks can be given legal protection even if they aren't registered. The U.S. District Court for the Northern District of Illinois allowed a trademark infringement suit brought by one chocolate maker against another to survive a motion to dismiss, finding that the mark "Mon Aimee" could be infringed by the mark "Mon Ame" because the similarities in the marks could confuse consumers, and because the owner of "Mon Aimee" adequately alleged that its unregistered mark could have acquired distinctiveness in the market place through use. Further proceedings will require proof of the distinctiveness of "Mon Aimee," which, in the absence of a mark's registration, would usually be provided through survey evidence. *Nonprofits have many trademarks, and they should register them with the U.S. Patent and Trademark Office whenever possible because of the advantages registration provides in scaring off infringers, as well as in infringement litigation. As this case shows, though, even unregistered marks can sometimes become protectable through use.*

HUGE CYBER THEFT PROSECUTION ANNOUNCED — Federal prosecutors have announced an enormous cyber theft prosecution, alleging that three men stole data from more than 100 million people and a dozen companies, using hundreds of accomplices to funnel the stolen information into criminal enterprises around the world, including fraudulent stock schemes, illegal Internet casinos and money laundering, thus deriving hundreds of millions of dollars in illegal profits. *As awareness of cybercrimes becomes more widespread, one of the consequences is that everyone is trying to place the blame and the legal liability on someone else if lack of adequate security may have played a part in unlawful data access. Nonprofits will find that many of the people they contract with will be trying to include provisions in contracts requiring that the nonprofits bear responsibility for data breaches. But two can play at that game. If nonprofits have enough negotiating power, they can include provisions in their contracts requiring that others bear the liability if cyber theft occurs.*

Regulatory Law Developments

SCHOOL DISTRICT MUST PROTECT TRANSGENDER STUDENT RIGHTS — The U.S. Department of Education is requiring a suburban school district to give a transgender student unrestricted access to a school's locker room for girls, saying that the district's policy of requiring use of a separate area to change and shower violates the student's right to participate equally in school programs and activities. The district's failure to comply could result in loss of substantial federal funding. *The Department's website states the need to establish guidelines which "will ensure that gender nonconforming and transgender students can participate fully in the District's programs and activities in a safe, educational environment," precluding policies which single out anyone. Maintaining a similar environment for everyone who participates in the activities of an organization needs to be assured.*

U.S. AIRLINES TARGET FOREIGN CARRIERS AND NEW REGULATIONS — Hundreds of members of Congress have written to the Obama Administration, seeking to bar certain foreign airlines from flying to the U.S. because they receive subsidies from their home governments, which, along with the lower wages they pay, allow them to sell cheaper tickets than the larger U.S. airlines. Major lobbying efforts by domestic carriers have been successful in attracting such governmental support in blocking airlines based in the United Arab Emirates, Qatar and Norway from gaining greater access to the U.S. market, while also preventing, only temporarily, renewal of the lending authority for the U.S. Export-Import Bank, criticized because of the aid it has given carriers from the Persian Gulf and India in purchasing planes from Boeing, the nation's largest exporter. At the same time, the major American carriers are seeking to escape greater regulation aimed at them, such as a new Department of Transportation rule requiring carriers to display ticket prices that include taxes and fees, and a proposed rule requiring that the cost of checked and carry-on bags and advance seat assignments appear on the first computer search screen consumers see, rather than the last one they see before checking out of a search website. Airlines also don't like a proposed increase in the "passenger facility charges" included in airline tickets, but will have to fight the airports over that one, as the airports want increased facility charges to improve runways and gates. *Will lawmakers consider the travelers' interests in dealing with these matters? We'll have to see.*

OVERLY BROAD NONCOMPETE CLAUSES RULED UNENFORCEABLE — The Illinois Appellate Court for the First District has refused to enforce noncompete clauses in an insurance brokerage firm's contracts with former employees, finding that they were overly broad and unreasonable and their restrictive language was so deficient that it could not be narrowed by the courts so as to make the clauses enforceable. The Appellate Court found the clauses were too broad in preventing insurance brokers from working with any type of professional liability insurance, practicing insurance brokerage anywhere in the United States, contacting any potential customer of their former employer, and using any information in the future that was acquired while working for the former employer, even if that information was considered common knowledge in the profession. *Nonprofits often want to keep their employees, and even independent contractors, from competing with them after their working relationship has ended. But they need to be aware that the courts have refused to enforce noncompete clauses that they find to be overly broad and unreasonable, and have also refused to tailor them, in many cases, to make them narrower in scope so that they can be enforced as modified.*

TAX LAW DEVELOPMENTS

DON'T PUBLISH SOCIAL SECURITY NUMBERS IN IRS FILINGS — Social Security Numbers are a gateway into credit financial information and are a target for identity thieves. But, according to the Internal Revenue Service, many tax-exempt nonprofits are submitting the SSNs of donors, directors, employees and others to the IRS in filing Form 990s, either on the forms themselves or in attachments to the forms, even though these annual reports, including attachments, are publicly available from the IRS and must be made available to interested parties by the exempt organizations themselves under the tax laws. Some tax preparers even disclose their *own* Social Security Numbers when making these filings. *The IRS asks for Social Security Numbers when nonprofits make certain filings with the Service (such as employment tax filings and applications for Employer Identification Numbers), but not in connection with Form 990 filings and others that become public information. The Service doesn't want those numbers in connection with publicly available filings. Don't provide them!*

EMPLOYMENT LAW DEVELOPMENTS

EMPLOYEE PROTECTED FOR CALLING POLICE ABOUT SUSPECTED THIEF — Your employee has reason to suspect one of your members or clients is engaged in violating the law, and the employee calls the police rather than notifying you. But the police, upon investigating, take no action. Can you fire the employee for causing such trouble for your member or client? Not if you're in Illinois, because a federal court has held that such employee conduct is protected by the Illinois Whistleblower Act, ruling in a case that involved an assistant store manager who reported previously suspected shoplifters to the police after they returned to the store and were acting suspiciously. The assistant manager was later fired for violating a store policy that specifically barred employees from notifying law enforcement officials, mall security officers or any other third party about suspected shoplifting. But she then sued the store under the Whistleblower Act, which prohibits employers from retaliating against employees for disclosing information to government or law enforcement agents when the employees have reasonable cause to believe a violation of law has occurred. The store was required to pay damages for violating the Act after the court rejected the store's argument that the Act only applied to reporting employer violations of law. *Considering that falsely accused persons can sue, the store's policy in this case had some justification. But taking adverse actions against an employee who has grounds for reporting a suspected crime to law enforcement agents is dangerous. The key for employers is to investigate and determine if there was a reasonable cause for suspecting criminal activity.*

EMPLOYEES' FACEBOOK CRITICISM OF EMPLOYER RULED PROTECTED — The U.S. Court of Appeals for the Second Circuit has upheld a National Labor Relations Board decision that employees' profanity-laced Facebook criticism of their employer's tax withholding errors was protected activity under the National Labor Relations Act, and they were entitled to reinstatement with back pay after they were terminated for being in violation of the employer's Internet and Blogging Policy. The court held that the Policy violated the employees' rights under the NLRA because it could reasonably be construed as prohibiting any employee discussion of the terms and conditions of employment. The court also noted that the employees could have been terminated legally if their comments were "sufficiently disloyal or defamatory." But the court found that the employees' comments in this case did not rise to such a level because they did not disparage the employer's products and services and were not "maliciously untrue," though they did contain profanity and could have been viewed by the employer's customers. (One employee who knew the employer had made no mistakes in calculating her own withholding merely "liked" another employee's comments.) *Nonprofits need to be careful about disciplining employees for uses of social media. Policies on the subject should make it clear that employees are not prohibited from discussing terms and conditions of employment among themselves.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

MARRIOTT TO ACQUIRE STARWOOD IN LEGAL MERGER — Acting in the wake of the Paris attacks that frightened travelers and hurt stock prices for companies in the travel business, Marriott International and Starwood Hotels nonetheless announced that their boards of directors had approved a legal merger that would create the largest hotel chain in the world. Marriott would buy Starwood in a $12.2 billion deal still pending company shareholder and regulatory approval. The resulting company would have 30 hotel brands and 1.1 million rooms, allowing it to eclipse Hilton Worldwide, with 12 brands and 745,074 rooms, and InterContinental Hotels Group, with 10 brands and 727,000 rooms. *Good for these companies, as we would certainly wish that travel business could go on as usual. But will travel keep up if terrorist attacks continue?*

HILTON TESTS CANCELLATION FEE — Hilton Hotels & resorts has announced that it will be testing a new strict cancellation policy at approximately 20 of its properties across the U.S., including its Hilton, DoubleTree and Embassy Suites properties. A $50.00 charge will be assessed for all individual and group cancellations after booking. *Readers will need to address this new policy in making future hotel arrangements.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

STUDENTS CAN'T CHALLENGE SALE OF COLLEGE ENTRANCE EXAM DATA — The U.S. Court of Appeals for the Seventh Circuit in Chicago has upheld a lower court ruling that students who took college entrance exams could not sue test administrators for selling personal data to educational organizations when the students previously agreed to allow the administrators to share the data without charge. The Court of Appeals held that students had no standing to sue the test-givers because the students were no worse off than they would have been if the administrators had given away the data instead of selling it. The students had alleged that the test-givers were guilty of breach of contract, invasion of privacy, deceptive business practices and other misconduct in selling student names, home and email addresses, telephone numbers , genders, ethnicity, dates of birth, high schools and intended college majors. *For readers collecting personal data, this case shows the value of obtaining consents to use from those persons providing it. For readers providing personal information to anyone, it shows that you need to read carefully any releases you are asked to sign. But, as in this case, we really are forced to provide personal information to some people in order to engage in many normal life activities, and many of those people will, legally or illegally, find ways to make a buck from it.*

H & H DEVELOPMENTS

Gerald Panaro was one of two panelists in a webinar on taxes and employment law ("2016 Legal Trends for Nonprofits"). His segment covered the proposed Department of Labor rules to increase the salary levels necessary to be classified as an "exempt employee" and to expand the class of employees who will be entitled to overtime compensation and, with the efforts of DOL and IRS, to clamp down on the misclassification of workers as "independent contractors" rather than employees.

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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Contributors to this issue…

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