

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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**TWO LARGEST OBAMACARE STATE CO-OPS GO OUT OF BUSINESS** — Toward the end of 2015, the two largest state cooperatives established under the federal Affordable Care Act (Obamacare), namely, Health Republic Insurance of New York and Kentucky Health Cooperative, announced that they would not be enrolling new members in 2016 owing to financial losses. Claims owed by the cooperatives far exceeded premiums they were collecting. Doctors and hospitals are owed millions of dollars by these two bankrupt cooperatives and are hoping the federal and state governments (that is, taxpayers) will arrange payment somehow. These co-ops join Co-Opportunity Health in Iowa and Nebraska, Louisiana Health Cooperative and Nevada Health CO-OP in the ranks of insolvent Obamacare state co-ops. The Centers for Medicare and Medicaid Services, which help oversee implementation of the federal health care law, recently sent warning letters to a total of 11 state co-ops (out of the 23 formed), placing them on “enhanced oversight” due to their financial difficulties. *What will happen now? Insureds will have to find new insurers, and health care costs will continue to rise.*

**IRS WITHDRAWS RULE ON CHARITABLE DEDUCTION SUBSTANTIATION** — *H&H Report Update* — The Internal Revenue Service has withdrawn a proposed rule that would have allowed charities the option of directly reporting to the Service donor contributions of at least \$250 a year, rather than forcing contributors to provide the IRS with acknowledgements of receipt in order to substantiate claimed tax deductions. Donors have been giving the IRS acknowledgements from the charities, as currently required by law, in claiming tax deductions for contributions of \$250 or more. But the IRS, in initially publishing the proposed rule, said that some charities and donors wanted a direct reporting option, since some donors lose their acknowledgements and cannot provide them in claiming deductions. Critics responded that the proposed rule was just a first step in requiring all charities to report all donations to the IRS. Comments also panned the proposal for requiring that direct reports include donor Social Security numbers, since they questioned whether charities and the IRS could keep reported information secure from hackers. *The direct reporting option was mandated by Congress years ago, and it has just taken the Service some time to propose a way for nonprofits to directly report the information if they wanted to. Some nonprofits have been trying to use their Form 990s to directly report, which is a bad idea because (1) the IRS is not accepting that as substantiation of a contribution and (2) Form 990s become public information. The IRS had proposed that nonprofits use a different, nonpublic form to directly report under the rule that has now been withdrawn. With the withdrawal of the proposed rule, whether and how direct reporting can be implemented is very much left up in the air.*

GOOD READING ... See you in February

## NOT-FOR-PROFIT LAW DEVELOPMENTS

**MUSEUM EMPLOYEE EMBEZZLED CASH RECEIPTS FROM MEMBERS** — A former employee of a Chicago museum has admitted embezzling more than \$400,000 from the museum, and investigations show she may have stolen more than twice that amount over more than ten years of employment, all of it apparently coming from cash receipts paid to her by museum patrons for memberships and event drink tickets. Now, she faces a possible sentence of up to 37 months in prison plus a requirement that she pay back the money. The museum's insurance company paid the museum's claim for \$903,000 less a \$10,000 deductible after investigating the theft. *This major museum paid for loads of insurance coverage and got what it paid for, something most nonprofits likely couldn't afford. But really, where was the oversight that should have caught the embezzlement before losses mounted up so?*

**NEW YORK NONPROFIT CONTRACTED STATE WORKERS WANT EMPLOYEE WAGE** — Nonprofit workers serving as independent contractors for the State of New York are pushing for the same minimum wage that applies to state employees, which may be \$15 per hour, since Governor Andrew Cuomo has proposed such a minimum wage for all state workers. Nonprofit representatives have said that they will need government subsidies to pay their employees at that level. The State of New York has hired roughly 40,000 to 50,000 workers at 2,500 nonprofits, about half of whom make less than the proposed \$15 an hour minimum, serving, among other things, as social service caseworkers and teachers. *As previously reported here, the \$15 per hour minimum wage is gaining ground. Nonprofits that provide workers for state jobs as independent contractors should be able to pay them at the same level as government employees would receive for doing the same work, whatever level that is. If they need government subsidies to do that, fine. Why should governments be able to avoid the consequences of their own minimum wage laws by contracting employee work out to nonprofits?*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**“12<sup>TH</sup> MAN” FIGHT SHOWS HOW FAR TRADEMARK OWNERS WILL GO TO PROTECT MARKS** — Your organization has a logo or other trademark it wants to start using. You know someone else is using it, or something similar to it, but you can't imagine that they will give you any trouble, because nobody could confuse your organization with the other user, for one reason or another. Well, you may be sued anyway, as the Indianapolis Colts professional football team learned when it started a fairly minimal use of the “12<sup>th</sup> Man” mark previously used for years by Texas A&M University to identify support for its athletic programs by students and other fans. The University has sued the Colts, claiming that football fans might see a connection between Texas A&M and the Colts' use of the mark at its stadium and in solicitations for purchase of tickets. *Usually, you are safe from a successful trademark infringement suit if you are using a mark someone else has used for completely different products or services, unless the mark is a “famous” one, like ROLLS ROYCE, which, by law, couldn't generally be used by anyone except the mark's owner for any product or service. But then you have really active trademark owners who will sue anyone for anything, even if they have no chance of winning. So, be careful out there. Even a successful defense of a trademark infringement suit can be expensive. Wait a minute, wasn't BE CAREFUL OUT THERE used a lot on some old cop show? Hope we're not in trouble!*

## REGULATORY LAW DEVELOPMENTS

**WHEN FEDS AND STATES ATTACK...EACH OTHER** — Nonprofits seeking to settle Syrian refugees in the United States have recently found themselves caught in a war between the states and the federal government that is not yet reminiscent of 1861 but getting there. Many states don't want the refugees, but the President insists upon taking the refugees into the U.S. Texas even took the extraordinary step of suing the federal government and the nonprofit International Rescue Committee to prevent the IRC from settling Syrians in the Lone Star State, but backed down and allowed it after the Obama Administration rightly pointed out that the federal government, not the states, controls immigration under U.S. law. *Nonprofits helping to settle refugees generally sign contracts with both the federal government and the states in order to do so, and they have to cooperate with both Washington and the states to do their job. But that becomes difficult when the feds and the states can't get along.*

**YOU THINK YOUR NONPROFIT HAS PROBLEMS?** — Five current and former members of the Executive Committee of the Federation Internationale de Football Association (FIFA), a nonprofit headquartered in Switzerland that organizes and promotes international football (soccer) tournaments, were recently arrested in a pre-dawn raid and charged with corruption. The arrests bring to ten the number of current and former members of the Committee who have been charged by law enforcement agents in a widening investigation of corruption, including bribery and vote-rigging related to FIFA's decision to award the 2018 and 2022 World Cup tournaments to Russia and Qatar, respectively. *Even if your organization is not involved in something considered to be of such international importance as the awarding of World Cups, you know bribery and vote-rigging are not good things. Maybe such activities in your organization will not result in nighttime arrests, but they are certainly to be avoided, if only for the bad publicity.*

## TAX LAW DEVELOPMENTS

**NONPROFITS MUST MEET WITHHOLDING RESPONSIBILITIES** — Nonprofits are, for the most part, responsible for employment taxes and withholding, just like other employers, some exceptions being that Section 501(c)(3) organizations do not have to pay federal unemployment taxes (FUTA) on employee wages, while churches and church-controlled organizations do not have to withhold or pay Social Security or Medicare taxes when doing so would be inconsistent with their religious beliefs. Among other tax responsibilities of nonprofits is the requirement that they withhold 28% of payments they make to employees (as well as independent contractors) if the payee hasn't previously furnished them a valid Social Security Number or other Taxpayer Identification Number ("backup withholding"). If they improperly classify one of their employees as an independent contractor (a very common problem, according to the IRS), nonprofits may be responsible for not only employment taxes but also tax penalties. Moreover, recognizing members and other volunteers with even a small cash payment can turn them into employees, triggering the same reporting and withholding as applies to any other employee. *Nonprofits must know the rules for tax withholding and payment, including how to properly classify employees and independent contractors. The consequences for violating these rules, especially for multiple violations, can be severe.*

**WHAT EIN IS AND ISN'T** — The EIN, which can easily be obtained online from the Internal Revenue Service, is an identifying number for a nonprofit or business organization, much like an individual's Social Security Number, and a nonprofit will need one to open up a bank account, engage in many other business dealings, and communicate with government agencies, including the IRS. EIN is short for Employer Identification Number, but an organization need not have employees to obtain one. Though obtained from the IRS, it isn't recognition of a nonprofit's tax-exempt status by the Service. If your organization wants such recognition, it must specifically apply to the IRS for that, using Form 1023 or Form 1024, depending on the nature of the organization. Also, while nonprofits need them, the Service notes that applying for EINs before a nonprofit is fully organized can have one major drawback. The IRS presumes a nonprofit is fully organized as soon as it applies for an EIN, and that starts the clock ticking on a three-year time period during which a tax-exempt or would-be tax-exempt nonprofit must start filing Form 990, Form 990-EZ or Form 990N annual returns with the IRS, even if its exemption hasn't been recognized by the IRS at that time and it isn't actually operating. When an exempt nonprofit fails to file one of these forms for any three consecutive years, it automatically loses its exemption, and that includes nonprofits recently recognized as exempt by the IRS if they failed to file annual returns for three straight years after applying for an EIN! If your group has affiliates, chapters and the like, and you want them treated as separate legal entities, each of them will need a separate EIN, as will your group federal income tax exemption if you obtain one for those entities. *Best to learn about the EIN and use it properly.*

**501(c)(3) AND POLITICAL CAMPAIGNS DON'T MIX** — As the 2016 political campaigns ramp up, the Internal Revenue Service is reminding nonprofits that if they are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, they can lose their exemptions, and become subject to certain excise taxes, by engaging in any amount of political campaign intervention. Such organizations, including charities, churches and educational organizations, can receive contributions that are tax deductible by donors. But one price those nonprofits pay for their ability to receive such deductible donations is that they are not supposed to participate in any political campaign on behalf of, or in opposition to, any candidate for elective office at the federal, state or local level. Examples of such participation include making political contributions and making public statements supporting or opposing candidates. But prohibitions only extend to partisan political involvement and do not apply to nonpartisan activity, such as “get out the vote” drives, sponsorship of debates, and objective publication of candidate voting records and positions. *The IRS has hesitated in enforcing the political campaign prohibition against certain organizations, particularly churches. But this is the law, and 501(c)(3) organizations ignore it at their peril.*

**IRS ANNOUNCES EARLY INTERVENTION INITIATIVE** — An agent from the Internal Revenue Service shows up at your door. Trouble, right? Not necessarily, as he may be part of the Service's recently announced “Early Intervention Initiative.” See, like Santa, the IRS has a list that they check frequently, in their case being a list of employers who, based on previous patterns of making electronic federal tax deposits, appear to be falling behind on payroll or employment tax payments even before an employment tax return is filed. When that happens, overdue payments, interest and penalties can start “spiraling out of control,” the Service notes. But now, thanks to Early Intervention, the IRS will try to help employers avoid such problems, contacting them early on when they appear to be behind in their payments, and offering “helpful information and guidance through letters, automated phone messages, other communications and, in some instances, a visit from an IRS revenue officer.” *This is good, we guess, especially since employers may accidentally miss a payment by, for example, trusting it to payroll processors or others and having miscommunications about who is doing what. Was the IRS seized by holiday spirit when they decided to start this new Initiative, or did they just want to collect the taxes sooner than they might otherwise? Maybe it's a win-win.*

## EMPLOYMENT LAW DEVELOPMENTS

**ACA 2016 DEADLINES AFFECT LARGE EMPLOYERS** — Beginning in 2016, “large employers,” as defined by the federal Affordable Care Act, must make certain new reports to the federal government and their employees regarding health insurance coverage offered by the employer to employees in 2015, or stating that it was not offered. “Large employers” are those with 50 or more full-time employees in 2014, or the equivalent of 50 or more full-time employees after taking part-timers into account and adding up their time. Large employers must file information reports with the Internal Revenue Service and provide reports to each employee who was a full-time employee for at least one month of 2015. IRS Form 1095-B *Health Coverage* and IRS Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage*, must be used to report required information to employees and to report information about each employee to the Service. IRS Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Return*, must be used to report to the IRS summary information for each employer and to transmit Forms 1095-C to the Service. Forms 1095-B and 1095-C must be provided to employees by March 31, 2016. Forms 1094-C and 1095-C are due to the IRS by May 31, 2016, if filed on paper, or June 30, 2016, if filed electronically. *All forms and other information on these requirements are made available by the IRS online at [www.irs.gov/aca](http://www.irs.gov/aca).*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**COOK COUNTY RAISES TAX ON HOTEL ROOMS** — Cook County, Illinois has decided to impose a new 1% tax on hotel rooms, effective in May 2016, making the total tax on hotel rooms in Chicago 17.4%. The new county tax was part of a package of tax hikes approved by the Cook County Board in an effort to cover a \$6.5 billion government worker pension shortfall, repay other debt and finance technology upgrades. The county sales tax will also increase January 1 by a penny on the dollar, making the sales tax in Chicago 10.25%, the highest for any major U.S. city. *Hopefully, the tax on hotel rooms won't dampen tourism in Chicago. The Board raised taxes on a wide range of activities, including the filing of lawsuits. Will that reduce litigation? Not likely.*

**AMERICAN AND UNITED ANNOUNCE PLANS FOR “NO FRILLS” FARES** — Following an earlier move by Delta Air Lines to compete with low cost air carriers like Spirit with “no frills” fares on a number of routes, American and United are planning to do the same in 2016. It is unclear what “frills” will be dropped, but passengers may not have the ability to obtain complimentary and paid upgrades, same-day confirmed and standby flights, priority boarding privileges, and other perks valued by some travelers. *If this trend continues, will you be able to fly for peanuts? Not if you expect peanuts onboard.*

**STUDY SHOWS AIRLINES PADDING SCHEDULES** — A recent study shows that airlines are changing their schedules to reflect increasing times for some flights, a result of congestion that has come with growing demand for air service. But critics also say it's reflective of poor airline performance. *Maybe the airlines, pressured by the government and passengers to be honest with travelers, are taking a step in that direction. We say, good for them. It's about time (no pun intended).*

**HOTEL COMPANIES MERGING IN 2016** — The marketplace is full of news as to mergers and acquisitions of hotel companies, for example, the Marriott/Starwood deal and the AccorHotels/FRHI Holdings. In such an environment, it is more important than ever to ensure that you will be the beneficiary of the terms and conditions of your contract. *Be aware, one or more of these mergers/acquisitions may result in a review by the Department of Justice Antitrust Division. There may be additional spin offs of brands within the business.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**FTC CATCHES UP TO SCAM TARGETING NONPROFITS** — The U.S. Federal Trade Commission, with the assistance of Canadian officials, has announced sanctions against Canadian companies that targeted nonprofits and others with a business directory sales scam. A U.S. court, at the urging of the FTC, has banned a group of Montreal-based businesses from operating directory businesses in the U.S. and has ordered them to pay more than \$1.2 million in restitution for their victims. The companies imitated “Yellow Pages” advertising for their online business directories and invoiced nonprofits \$480.95 or a similar amount for ads they never ordered. When nonprofits ignored invoices generated by the companies, they were told that they owed more than \$2,000, and the companies then started calling the nonprofits, posing as third-party debt collectors. *Be on the lookout for scams like this. Many criminals seem to think that nonprofits are easy marks.*

**FTC ORDERS LIFELOCK TO PAY \$100 MILLION FINE** — LifeLock is a company that claims it can provide protection to those at risk of identity theft for a monthly fee of \$10. However, the Federal Trade Commission isn’t buying it, determining that customers’ personal data such as Social Security, bank account, and credit card numbers were not adequately protected, if protected at all. The FTC has ordered LifeLock to pay a \$100 million fine for misrepresenting the strength of its security services. \$68 million of that amount will be distributed to members of a class-action lawsuit that was brought against the firm. In 2010, LifeLock had previously settled with the FTC and 35 state attorneys general, paying \$12 million because it had not secured its customer data and was found guilty of exaggerating its services. Remember when LifeLock’s CEO posted his Social Security number online to prove how well the system worked? And then it was stolen 13 times! *Identity theft/fraud continues to be the #1 consumer complaint and is a worldwide problem. Keep your computer hardware, software, and virus protection systems up to date. And if you’re considering identify theft or online cyber liability insurance, do your research before you select a company.*

## H & H DEVELOPMENTS

Naomi Angel has been giving reports on current trends and legal developments to trade associations’ annual meetings in Nashville, Marco Island, and Dallas.

While attending the Convening Leaders 2016 meeting at the Vancouver Convention Centre in British Columbia, Jonathan Howe will be presenting a session on cyber security.

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