

THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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IN THIS ISSUE:

NOT-FOR-PROFIT LAW 2

Will Nonprofits Buy Into
“Sharing Economy”?

REGULATORY LAW 2-3

Regulators Promote Crash Prevention Technology
Justices Shoot Down EPA Power Plant Emissions Regs
FTC Targets Illegal Robocalls
New Oil Train Safety Rules Draw Fire

INTELLECTUAL PROPERTY 3

Supreme Court Won’t Review API Copyright Decision

TAX LAW 4

Credits For Insurance Through Federal Exchange Upheld

EMPLOYMENT LAW 4-5

Overtime Pay May Expand For Managers And Professionals
Do You Make These Employment Mistakes?
Cities Experiment With \$15 Minimum Wage

MEETING & TRAVEL LAW 5

Airlines To Charge Flyers For Not Booking Directly With Them

OTHER ISSUES, TRENDS 5-6

Consumer Groups Leave Face Recognition Code Effort
Computer Chip Credit Cards Replace Magnetic Strips

H&H DEVELOPMENTS 6

WALMART ACCUSED OF USING FOUNDATION FOR BUSINESS PURPOSES — More than a dozen nonprofit organizations have filed a complaint with the Internal Revenue Service accusing Walmart of using its foundation for business purposes. The groups say that the foundation primarily targets donations and influences grantees to help Walmart overcome opposition to its entering certain large urban areas, including Boston, New York, the District of Columbia and Los Angeles. *Though foundations connected with for-profits certainly produce some public good will for corporate parents, tax law prohibits them from providing more than an incidental benefit to private entities.*

MALIGNED ON SOCIAL MEDIA? CONSIDER SUING THE MEDIA — Twitter refused to remove a fictitious webpage containing damaging material that was set up on the social medium using someone’s name and likeness without their permission. The damaged party sued Twitter, Inc. and several then-unknown defendants who created the website. Result: Twitter quickly removed the webpage, and the suit caused discovery of the individual webpage creators, who now may be liable for defamation and trademark violations, among other things. *It may seem like an extreme course to take, but it worked, and it may prompt social media to be a little more willing to remove material when properly requested.*

FIND YOUR LOST PHONE BY GOOGLING — Google recently announced that if you have lost your cell phone, you may be able to find it by a Google search, provided you are an Android user. You can open the Google search engine, type in “find my phone,” and you will be shown a map with the last known location of your phone. This approach works with your desktop and with the Google search app. But you need to make sure you sign in to the same Google account on your desktop as on your phone. *Privacy concerns? If you can find it, Google (and probably the government) can find you, wherever you are, if you have your cell phone with you.*

GOOD READING ... See you in August

NOT-FOR-PROFIT LAW DEVELOPMENTS

WILL NONPROFITS BUY INTO “SHARING ECONOMY”? — *Fortune* and the *Wall Street Journal* have reported that Amazon may join Uber, the ride-sharing company, in the “sharing economy,” by hiring retailers in urban areas to store packages and pay “regular people” to make deliveries for them. Those individuals could pick up their own packages and then grab other parcels to deliver, at their convenience, but for a small fee, to other people. *Non Profit Quarterly* has opined that nonprofits, always pressed to contain costs, may see this “sharing economy” business model as a way to do so. *Is it a cheaper way of doing business? Probably. It would, or might, strip away many of the protections for regular employees that government has been trying to create, such as minimum wages, health insurance and other employee benefits. But interviews with people who now work in this “sharing economy” show that they would rather have good, well-paying regular jobs.*

REGULATORY LAW DEVELOPMENTS

REGULATORS PROMOTE CRASH PREVENTION TECHNOLOGY — Federal regulators have now “strongly recommended” that car companies install crash prevention technology as a standard feature that would either alert drivers by beeping and flashing or automatically brake a car when it senses a collision coming. Such systems are becoming increasingly available as a standard feature on cars, but in some models, the technology is still an option and an expensive one. Regulators who want the technology installed as a standard feature, like seat belts, air bags and anti-lock brakes, point out that it could cut rear-end collisions, which kill 1,700 people in the U.S. every year, up to 80%. Unfortunately, such technology will come at a price, and consumer studies have shown that drivers are much less willing to pay for safety features than they are for comfort and convenience in their automobiles. Then there’s the problem with crash prevention technology that reportedly has slammed on brakes because of phantom hazards, like garbage bags in the street, while not reading pedestrians as a hazard on a potential collision course. *When regulators “strongly recommend” something, it tends to come about. Look for more standard crash prevention technology on cars in the future.*

JUSTICES SHOOT DOWN EPA POWER PLANT EMISSIONS REGS — The U.S. Supreme Court, in a major blow to the Obama Administration’s environmental agenda, has struck down proposed power plant emissions regulations promulgated by the Environmental Protection Agency, saying that the regulations were flawed because the EPA, from the outset of its rule-making procedure, failed to consider the economic impact of the proposed regulations. The decision was reached by a 5-4 vote of the Justices, and Justice Antonin Scalia wrote the opinion for the majority, in which Chief Justice Roberts and Justices Alito, Kennedy and Thomas joined. Justice Scalia explained the decision by saying that the proposed regulations were not “reasonable” because the EPA had not weighed their economic cost, but had focused entirely on the impact of emissions on the public health and “considered cost irrelevant.” *It is not clear what the EPA will do now about its power plant regulations effort, which began under the Clinton Administration, but was blocked by President George W. Bush, only to be reinstated by the Obama Administration. The rationale of the Court’s decision may be more important than the decision itself, considering that power plant emissions are going down sharply anyhow, partly because of strict state regulations. When does the federal government ever really consider the economic cost of its proposed new laws and regulations? And how many other new laws and regulations could be struck down using the same reasoning as guided the Court in this case?*

FTC TARGETS ILLEGAL ROBOCALLS — Testifying before Congress, representatives of the Federal Trade Commission recently commented on the Commission’s stepped up efforts to target illegal robocallers for prosecution. Such calls, involving prerecorded phone messages, allow scammers to send out millions of messages at low cost, and they are frequently used in fraud schemes, often directed at senior citizens. FTC spokespersons advised Congress that the Commission has brought enforcement actions against 121 corporations and 90 individuals for illegal calling, collecting \$28 million dollars from violators. The Commission also coordinates its actions with and refers matters to state and other federal law enforcement agencies that seek criminal and civil penalties from robocallers. *Some violators may not even be aware that what they are doing is illegal. It may seem like just a convenient – and cheap – way to reach potential customers. But there are significant penalties for doing so.*

NEW OIL TRAIN SAFETY RULES DRAW FIRE — The U.S. Department of Transportation has announced tougher regulations for lengthy trains carrying crude oil, but critics say they aren’t tough enough. The new rules apply to “high-hazard flammable trains,” defined as a continuous group of 20 or more tank cars loaded with a flammable liquid, or 35 or more tank cars loaded with a flammable liquid dispersed through a train. The regs call for a three to five-year phase-out of older-model tank cars on such trains, requiring that they be retrofitted or replaced with newer cars that have stronger shells and valves, along with protective shields that will better withstand a derailment or collision. Additionally, the new rules provide that tank cars on such long trains be equipped with a new electronically controlled pneumatic brake system designed to cut stopping time and distance, as well as accordion-like car pileups. But critics say that the older tank cars are unsafe and should not be used on trains of any length carrying flammable liquid. They contend that the new braking system is unproven and will not provide meaningful safety benefits. Further, they complain that the new rules failed to strengthen the “thermal protection” standard for new and retrofitted tank cars. The current standard requires that tank cars be able to withstand being engulfed in burning liquid for 100 minutes without exploding, but critics want that time extended to 800 minutes. *We need oil, but how to get it from place to place is a problem. Pipelines? Lengthy trains? Every solution has its opponents, and some environmentalists seem only to want flammable liquids to stay in the ground.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

SUPREME COURT WON’T REVIEW API COPYRIGHT DECISION — The U.S. Supreme Court has decided not to review a decision by the U.S. Court of Appeals for the Federal Circuit that Oracle America, Inc. can claim a copyright in computer source code known as the Java Application Programming Interface (“API”), which Oracle has claimed Google infringed in the Android OS. Google claimed that the source code wasn’t subject to copyright protection, or, if it was, then Google made “fair use” of it. The Supreme Court’s refusal to review let the Federal Circuit decision stand, but more proceedings will be conducted by a lower court on whether Google’s “fair use” defense should prevail. *Generally speaking, APIs are specifications that allow computer programs to communicate with each other. The issue here was whether they are creative works in which copyright protection can be claimed, as by Oracle here, or, like the names, addresses and phone numbers in a nonprofit’s membership directory, not a fit subject for copyright protection (per previous court decisions). Oracle won on that question in the Federal Circuit. But a person can still make “fair use” of someone else’s copyrighted work, though the “fair use” defense is somewhat complicated under the law. Further proceedings in this case may give us more insight into what “fair use” is, and not only with respect to computer source code.*

TAX LAW DEVELOPMENTS

CREDITS FOR INSURANCE THROUGH FEDERAL EXCHANGE UPHELD — The U.S. Supreme Court, by a 6-3 vote of the nine Justices, recently upheld an Internal Revenue Service interpretation of the Affordable Care Act making income tax credits available to eligible purchasers of health insurance through a federal health insurance exchange. Critics of the ACA had argued that Congress, in adopting the ACA, had intended for credits to be available only to individuals who purchased health insurance through state-run exchanges. Had that interpretation prevailed at the Supreme Court, many individuals who depend on the credits to pay for health insurance would have been left without coverage unless Congress passed new legislation making provisions for them. *Chances are that Congress would have done exactly that, but ACA critics in Congress had hoped that the Supreme Court would decide differently in this case, giving them an opportunity to negotiate with the Obama Administration for changes in the ACA to eliminate some of the Act's least popular provisions, such as the provision requiring all Americans to purchase health insurance or pay a tax/penalty. Now, this "individual mandate" will remain in effect. Furthermore, employers with a certain number of employees (generally 50 full-time employees or an equivalent combination of full-time and part-time employees) will have to make an "Employer Shared Responsibility" (tax) payment if (1) they do not offer "affordable" health insurance with a minimum level of coverage to full-time employees and their dependents, and (2) at least one of their full-time employees receives a premium tax credit for purchasing individual coverage on one of the new health insurance exchanges established under the Act. That payment would be due in 2016 based on insurance offered and premium tax credits received in 2015.*

EMPLOYMENT LAW DEVELOPMENTS

OVERTIME PAY MAY EXPAND FOR MANAGERS AND PROFESSIONALS — The Obama Administration has announced plans to expand overtime eligibility for millions of American workers now classified as “managers” or “professionals” and therefore ineligible for overtime pay required by federal law for those who work more than 40 hours per week. Under draft rules described by the President in a blog recently, workers earning \$970 or less per week could no longer be classified as “managers” or “professionals,” regardless of their duties. Consequently, they could be eligible for time and a half overtime pay for hours worked in excess of 40 in a week. The proposal would take effect in 2016 and would affect about 5 million workers, according to the President, who said that many employees receiving less than the federal poverty level amount for a family of four – currently \$455 per week or \$23,660 per year – are nonetheless classified by their employers as “managers” or “professionals.” *This rule change has been anticipated for a long time and has been criticized in advance by many business interests and their representatives in government. But this may not be the only change in overtime eligibility requirements to be proposed by the Administration, as the Labor Department is said to be considering further changes in the regulatory definition of a “manager.”*

DO YOU MAKE THESE EMPLOYMENT MISTAKES? — The *NonProfit Times* has listed the “Top Ten Nonprofit Employment Mistakes.” They included such things as being in too big a rush to hire someone, not properly checking applicant employment backgrounds, not being honest with prospective employees about the “challenges” presented by a particular job, not properly documenting disciplinary decisions, misclassifying employees as independent contractors, misclassifying employees as exempt from overtime pay rules, letting employees work “off the clock,” and not properly addressing disability and medical issues. *These mistakes are not unique to nonprofits, of course. Membership organizations will find that their members – nonprofit and for-profit – are making them also.*

CITIES EXPERIMENT WITH \$15 MINIMUM WAGE — An emerging trend is for cities to experiment with a \$15 minimum wage requirement. Cities such as Los Angeles, San Francisco and Seattle are phasing in such an increase, which, in some cases, has amounted to a 50% hike in the minimum wage requirement imposed locally on employers. Research on the impact of minimum wage increases has been inconclusive, with most studies showing minimal effect on employment but a significant number of other studies showing that employment may be falling, or may be tending not to increase as much, in certain areas because of local minimum wage hikes. Also, some theorize that the effects of such increases on unemployment may be masked because workers losing their jobs because of minimum wage hikes in one area are simply moving out of town to find jobs. *Most studies of local minimum wage increases have focused on small increases in the minimum wage, which have been the norm. It will be interesting to see whether the larger hikes now taking effect in some cities will reveal greater negative impact on employment there.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

AIRLINES TO CHARGE FLYERS FOR NOT BOOKING DIRECTLY WITH THEM — Lufthansa Group and related airlines are going to be charging flyers for booking through online services such as Expedia and Priceline instead of booking directly with the airlines. Beginning in September, the airlines will be charging an \$18 fee for all bookings not made over the airlines' own websites. *Some airlines don't list their fares on such third-party sites, and some airlines offer incentives, like bonus frequent flyer miles, for directly booking with them. But we believe this is the first time an airline actually penalized flyers for using Expedia, Priceline and their ilk. Will other airlines follow suit? Will flyers desert airlines that impose such penalties? Some buyer groups are already pushing back against the concept. Will Expedia, Priceline and other "indirect" bookers retaliate in some way? Stay tuned.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

CONSUMER GROUPS LEAVE FACE RECOGNITION CODE EFFORT — Nine consumer organizations have announced that they will no longer participate in the National Telecommunications Information Administration's effort to develop a privacy-protective code of conduct for companies using face recognition databases, saying that other participants in the NTIA's multi-stakeholder process couldn't agree on even the most modest arrangements to protect privacy. The consumer groups warned that the federal government and state and local law enforcement agencies are building ever-larger face recognition databases, with the FBI already having a database of 14 million face images, which is expected to increase to 52 million soon using such tools as warrants issued to social media companies like Facebook for copies of uploaded images. The organizations also advised that communities like San Diego are now using mobile biometric readers to take pictures of people on the street or in their homes for face recognition databases. Few, if any, safeguards exist, they say, to prevent widespread government and private sharing and use of such images. *The next time you walk down the street or look out your window, smile. Who knows who may be recording your image or what they may do with it?*

COMPUTER CHIP CREDIT CARDS REPLACE MAGNETIC STRIPS — *H&H Report Update* — Banks in the U.S. are currently issuing credit cards with embedded computer chips to card holders, hoping to replace all cards with magnetic strips by autumn. The computer chips make cards more secure against fraud, and banks, which pay billions of dollars each year to reimburse customers for stolen funds, are convinced that the chips will greatly reduce these losses. Chip cards have been in use throughout Europe for more than a decade. About half of all credit card fraud occurs in the U.S., which only accounts for roughly 25% of all credit card transactions worldwide. Unfortunately, U.S. merchants are way behind in purchasing equipment to read the new chip cards, and they face a soft October 1 deadline, imposed by banks and payment processing companies, to obtain and start using such equipment, or they may have to pay for any fraud that happens because they have not made the shift to chips. As they do make the change, consumers should be prepared to insert their chip cards into a machine and keep them there till they are told to remove the cards, as opposed to swiping their cards through machines. At first, they will also have to provide signatures. But banks hope to eventually issue “chip and PIN” cards, commonly used outside the U.S., which will require entry of a password to complete a transaction instead of providing a signature. *Security experts say the new cards are the safest way to pay for things, although there are bound to be a few glitches. One already encountered is that some banks issuing the new cards may also change customer account numbers associated with the cards, unbeknownst to unwary cardholders. When the new cards are first used, they automatically cancel the use of the old cards, and if cardholders' automatic payments for such things as car insurance have been made from accounts using the old cards and account numbers, the cardholders may find out that recent payments have been refused by their banks, leading to problems like cancelled insurance.*

H & H DEVELOPMENTS

Gerard P. Panaro recently gave a presentation on latest D.C. and Maryland employment laws to a Nonprofit HR organization.

Naomi R. Angel delivered: a Legal Trends Report to the board of directors of a trade association of manufacturers in Chicago, a Legal Trends Report to the board of directors of an engineering society in Cleveland; a Legal Trends Report to a mid-year meeting, and a Legal Trends Report to the board of directors of a trade association of contractors and manufacturers in Dallas.

Jonathan T. Howe presented “Legal Issues – The One N, Four C’s, and Two S’s;” [Negotiations, Contracts, Currency, Customs/Immigration, Challenges, Security and Safety] for a meeting professionals event in the Caribbean at Casa de Campo.

James F. Gossett provided an update on legal and regulatory trends and developments to an international manufacturers group.

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Contributors to this issue...

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