

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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**RED CROSS OVERSIGHT BILL INTRODUCED** — A bill has been introduced in Congress providing for independent oversight of the American National Red Cross by the federal Government Accountability Office and Inspectors General at the federal departments of Homeland Security, Treasury and State. The proposed legislation, dubbed the American Red Cross Sunshine Act, was introduced after questions were raised in recent years, by government and others, regarding the organization's performance in disasters. *No ordinary nonprofit, the American National Red Cross has been designated by law as an instrumentality of the United States. Nonprofits should remember that with great recognition and other benefits from government, great responsibilities to government often come as well. Everything comes with a price.*

**NO CHARGES FILED AGAINST LERNER** — *H&H Report Update* — In what shouldn't be much of a surprise to anyone, President Obama's Justice Department has decided not to press criminal charges against Lois Lerner, the former head of the Internal Revenue Service Exempt Organizations unit, who was suspended with pay and then retired after it was revealed that her office singled out conservative "Tea Party" and "Patriot" groups for special scrutiny when they applied for recognition of exempt status, delaying the processing of their applications, some of which were rejected. The Justice Department has now advised that there was "substantial evidence of mismanagement, poor judgment and institutional inertia" in the targeting of conservative groups, but that "poor management is not a crime." *Maybe not, but who authorized the targeting of these groups should still be an issue. Nixon tried to politicize the IRS, and we know what happened to him. Lerner, whose husband was a fundraiser for the Democratic Party, pinned the blame on unnamed lower-level "front line" people in her unit, and she took the Fifth Amendment when refusing to testify before Congress. The Justice Department, at the time, did not give her immunity from criminal prosecution, which would have prevented her from relying on the Fifth Amendment in her refusal to testify. And then there were missing emails she blamed on computer malfunctions. Maybe we will never really know how far up the targeting decision-making went. But these things usually come out, sometimes with a change in office holders at the top.*

GOOD READING ... See you in December

**FOUNDATION'S PURPOSES CAN BE CONSIDERED IN INVESTMENTS** — The Internal Revenue Service, in a recent notice, confirmed that the managers of private foundations can consider the charitable purposes of their organizations when making investments for the foundations. The notice provides that, in exercising the “ordinary business care and prudence” for foundations as required by law, managers are not required to select only investments that offer the highest rate of return, the lowest risks, or the greatest liquidity, but may consider all relevant facts and circumstances prevailing at the time of the investment. Those facts and circumstances may include the relationship between an investment and the foundation’s charitable purposes. *“Jeopardizing investments” (those that jeopardize the carrying out of a foundation’s tax-exempt purposes) can result in the levying of excise taxes on private foundations and their managers. But the latest IRS notice clarifies that a manager can make an investment that furthers a foundation’s charitable purposes, even if it isn’t otherwise as attractive as an alternative investment unrelated to those charitable purposes, without thereby subjecting the foundation and the manager to excise taxes.*

**COURT SAYS NCAA CAN LIMIT NON-SCHOLARSHIP PAY FOR ATHLETES** — The U.S. Court of Appeals for the Eighth Circuit, considering the question of whether the National Collegiate Athletic Association can limit payments made by its member schools to college athletes, has decided that such rules properly maintain amateurism in college athletics if they apply to payments that are unrelated to educational expenses. However, the Court of Appeals also held that the NCAA would violate the antitrust laws in prohibiting schools from offering athletic scholarships that cover the full cost of attending college, because such a rule would not be necessary to preserve the amateur status of the athletes. In a previous ruling, a lower federal court had enjoined the NCAA from enforcing rules that limited the amount of scholarship money schools could provide to athletes, and the lower court had also held that the NCAA could not prevent schools from providing up to \$5,000 in additional deferred compensation to athletes, because such a low level of payments should not be considered as violating the players’ amateur status. Now, the Court of Appeals has held that the district court’s ruling was proper only in its application to scholarship money, and the court has vacated the lower court’s decision as applied to any payments unrelated to educational expenses. *Even before the Court of Appeals ruling, the NCAA backed down from enforcing rules that limited the scholarships provided by member schools so that they could only cover certain expenditures, including tuition, books, room and board. Now, the athletes have won the right to payment for other expenses related to education, such as travel, if their individual schools wish to provide such assistance. But the athletes want additional compensation for their athletic services, as well as the use of their names and likenesses by schools and their licensees in such things as video games. The athletes will continue to push such issues in the courts.*

**CHICAGO ASSOCIATION SPENDING, STAFFING UP POST-RECESSION** — Chicago-area nonprofits report growth in spending and staffing due to post-recession trends for professional and trade associations. In an annual survey by real estate brokerage firm CBRE, 35% of Chicago-area nonprofits say they plan to expand staff or office space in 2015, an increase from 24 percent in 2011. This compares with the national average of 14 percent of nonprofits with expansion plans and is driven by Chicago-area trade and professional groups, which make up the bulk of local survey respondents, but less than half of national respondents. Chicago social service and cause-based organizations project continued constraints due to public budget cutbacks. Like all businesses, nonprofits nationally report a reduction in the square footage per employee, to 314 this year from 403 in 2009, and a movement toward open layouts for organizations with over

20 employees. Chicago-area nonprofits are historically space efficient, with average square footage of 319 per employee in 2015. *A recent Chicago Tribune article reported the struggles of associations during the recession with fewer dues-paying members, noting that recent growth reflects a return to normal bounce. Chicago is the second most popular home to associations, after Washington, D.C.*

**INDIANA TURNS TO NONPROFITS TO FUND GOVERNMENT OPERATIONS** — The State of Indiana has recently passed laws to facilitate funding of government operations by nonprofits. One new law establishes a statewide foundation to raise funds from private investors for public health initiatives, while other legislation lets local governments operate foundations funded via municipal property sales, hire investment consultants and money managers for the nonprofits, invest foundation funds in the equity market, and use proceeds for government programs. The Indiana Constitution generally restricts state government agencies from investing other than for a fixed income over a term not exceeding five years. But it is intended that the new foundations would not be subject to such requirements. *As governments reach the limits of what residents are willing to pay in taxes, this bow to nonprofits by the State of Indiana may open a new era in public finance.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**RESTATEMENT OF FACTS NOT COPYRIGHT VIOLATION** — The U.S. Court of Appeals for the Seventh Circuit in Chicago recently decided a copyright infringement case that should be instructive for the many nonprofits engaged in publishing. The Seventh Circuit refused to find any copyright violation by author Robert L. Snow, who was sued by another writer, Carol Sissom, after Snow admittedly relied on Sissom’s previously published work as source material in writing his own book about a triple murder. The Court of Appeals found that Snow merely retold historical events previously discussed by Sissom, using his own, more succinct style of expression, without copying Sissom’s own form of expression of facts and ideas concerning those events. Since the court noted that “it is a foundation of copyright law that only the form of an author’s expression is protectable, not the facts or ideas being expressed,” there was no infringement. *Publishing nonprofits often find themselves considering whether one writer’s creative work might infringe on someone else’s copyrights. This case illustrates one of the most significant legal limitations on copyright protection.*

**GOOGLE AGAIN WINS COPYRIGHT CASE INVOLVING DIGITAL DATABASE** — *H&H Report Update* - Google has again successfully defended a copyright infringement suit involving its creation of a searchable digital database with tens of millions of books, from which it posts “snippets” online. On appeal of a lower court decision for Google in a suit filed by a group of authors, the U.S. Court of Appeals for the Second Circuit held that Google was making “fair use” of the authors’ works under U.S. copyright law and providing a public service, because Google’s “snippets” provide just enough context surrounding a searched term to allow a searcher to evaluate whether a book falls within the scope of that person’s interest without revealing so much as to threaten the author’s copyrights. The authors bringing suit claimed that Google was depriving them of revenue. Google argued that its digital library actually boosted sales of the authors’ works by making it easier for readers to find them, while also exposing readers to books they might not otherwise have seen. *The same court previously rejected a similar suit by a group of authors against a consortium of universities and research libraries that created a searchable online library. Nonprofits are major publishers, and it’s likely that some of the works in the Google and consortium libraries are owned by nonprofits.*

## REGULATORY LAW DEVELOPMENTS

**COURTS DISAGREE ON ACA CONTRACEPTIVE MANDATE** — The U.S. Court of Appeals for the Eighth Circuit, disagreeing with other courts that have considered the issue, recently found that a lower federal court had rightly entered a preliminary injunction against the federal government’s enforcing certain provisions of the Affordable Care Act that involve religious organization employers in the provision of contraceptives to their employees, despite the employers’ religious objections. The Act requires contraceptive coverage in group health plans, but exempts churches and church-affiliated entities from the “contraceptive mandate.” Other employer organizations with a bona fide religious objection to contraception coverage must either provide it to their employees anyway or, under an “accommodation” offered by the government, must submit a notification to their insurers, which then must provide such coverage at their own expense or find someone else to pay for it. And that’s where the ACA went wrong, according to the appeals court, which held that the ACA and the “accommodation” process could be found to unconstitutionally burden the free exercise of religion, since the government had not demonstrated that there were no less restrictive means of furthering the asserted goals of the Act to safeguard public health and ensure women have equal access to health care through the provision of contraceptive coverage. *Among other things, the Court of Appeals noted that the government could simply have furnished contraceptives to needy women, rather than making employers and insurance companies do it against their religious objections. But where’s the fun in being a government official if you can’t force people to do things they don’t want to do, right?*

## TAX LAW DEVELOPMENTS

**IRS ANNOUNCES PRIORITY PROJECTS FOR FY2016** — The Internal Revenue Service has announced its priority projects for fiscal year 2016, including a reduction of processing time for exemption applications and developing a program to make Form 990 available in modernized e-file format with automated redaction and restriction processes. Also on the list of projects is distribution of self-training materials for taxpayers affected by the Affordable Care Act. *Reduction of the processing time for exemption applications is sorely needed, and the IRS says it will achieve that by assigning applications directly to application processing specialists rather than managers, while closing exemption applications within 35 days if an applicant fails to respond to a request for additional information. The self-training materials on the Affordable Care Act are appropriately coupled with reducing processing time, since one suspects that the new role for the IRS in enforcing the Affordable Care Act is one of the reasons getting any non-ACA related service from the Service, including prompt processing of exemption applications, is becoming increasingly difficult.*

## EMPLOYMENT LAW DEVELOPMENTS

**STAFFING AGENCY USE MAY AFFECT EMPLOYER ACA COMPLIANCE** — Final regulations under the federal Affordable Care Act make it clear that employers who use staffing agencies must consider how it may impact their compliance with the Act. Starting in 2016, larger employers must make an offer of qualified affordable health insurance coverage to 95% of their full-time employees or be liable for a penalty if one of their workers obtains coverage on an ACA exchange and receives a premium subsidy from the federal government. But if workers supplied by a staffing agency are “common law employees” generally under the control of the employer, they will have to be taken into account as individuals to whom health care insurance must be offered in 2016, and that would be a problem for many employers, because health insurance typically is not

provided to staffing agency workers unless the agencies do it. Moreover, the regulations make it clear that employers cannot take credit for health insurance offered to staffing agency workers by their agencies unless the employer pays the agency more for a worker who accepts the coverage than a worker who doesn't. *Employers utilizing staffing agencies should evaluate how that use will affect their ACA compliance, and, if appropriate, consider negotiating staffing agency contracts that contain provisions allowing the employers to count staffing agency workers as "offered" employees for ACA purposes.*

**CONGRESS MAY AUTHORIZE ACA WORK-AROUND** — Bills introduced in Congress with significant support would authorize employers to provide workers with untaxed money to pay for insurance premiums and other out-of-pocket medical expenses under a stand-alone plan that includes limits on the amount of money an employer will contribute to the plan. The Small Business Health Relief Act would override Obamacare regulations that, effective July 1, imposed penalties on employers who provided such stand-alone plans (not a part of an employer's group health insurance plan) as an alternative to Obamacare. Acting under the ACA regulations, the IRS has advised that it will be imposing a \$100 per day per employee penalty on employers establishing such healthcare arrangements, because the Service considers that such plans with set employer contributions violate the ACA's prohibitions on lifetime and annual limits. *The proposed legislation's becoming law doesn't seem likely while President Obama is in office. But in 2017?*

**DISCRIMINATION SUIT AGAINST JUDGE'S OFFICE WRONGLY DISMISSED** — The U.S. Court of Appeals for the Seventh Circuit in Chicago has reversed a lower court decision dismissing a "hostile work environment" employment discrimination suit filed against the Office of the Chief Judge of the Circuit Court of Cook County. In the suit, an employee claimed that she was subjected to a hostile work environment because of her religion (Islam) and her nation of origin (Saudi Arabia). A lower federal court dismissed her suit without a trial on the basis that she had failed to state a claim upon which relief could be granted, in a decision that, according to the Seventh Circuit court, was rife with error and, in some respects, unclear as to its basis. In reversing, the appeals court pointed to her allegations that supervisors allegedly screamed at her, shunned her for weeks, prohibited her from accessing her office early (other employees had 24-hour access), refused to allow her to keep non-work items in the office, denied her time off for an Islamic holiday, and prohibited her daughter from waiting for her in the lobby, even though the children of other employees were admitted to the lobby *and* the offices. All of this occurred, the employee alleged, while supervisors held Christian prayers in the office and repeatedly commended others for being "good Christians." *Further proceedings would have to be held in this case to determine if the employee's allegations are true, but we join the Seventh Circuit in being mystified as to why her claims were dismissed for failing to state a claim upon which relief could be granted if a trial showed they were true. Do some people think judges and their offices are above the law? Thank God, Allah or whoever, the Seventh Circuit court doesn't think so.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**ARE YOUR EVENTS GREEN?** — It's not just recently that big events began producing garbage and otherwise doing environmental damage, but scrutiny of their ecological impact has increased. From large trade shows to the Sochi Winter Olympics in 2014, criticized for damaging sensitive regions in Russia, holders of such events have been held to account, at least in the media, for allegedly poor waste management and environmental harm. Some government entities are even asking event organizers to help pay for clean-up efforts. *We know many event organizers want to "go green," and the Convention Industry Council produced a "Green Meetings Report" years ago with detailed recommendations that can help. Readers might consider checking it out. It's available online at [www.conventionindustry.org](http://www.conventionindustry.org).*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**STOLEN BUT UNUSED DATA PROVIDE NO STANDING FOR SUIT** — If someone’s personal data is stolen from your organization due to alleged faulty security, but there’s no proof that the thief or anyone else used the data, can the victim still sue your group? Not according to the rationale of a decision by the Appellate Court of Illinois, Second District, in a case involving a burglary at a medical group. Four computers containing patient data were stolen from the group’s offices, and patients sued, alleging that, even though they had no proof that the information had been used in any unauthorized manner, they faced a risk of identity theft and fraud. Claims against the medical group for negligence, invasion of privacy, and violation of the Illinois Personal Information Protection Act and Illinois Consumer Fraud and Deceptive Business Practices Act were all dismissed by a trial court, whose decision was affirmed by the Appellate Court, finding that disclosure of confidential information, by itself, did not constitute an injury sufficient to confer standing to bring a suit against the medical group. Potential injury was too speculative for the courts in this case, and the anguish the patients claimed to be suffering in the fear of further wrongful actions by the thief wasn’t sufficient to confer standing either. *No harm (yet), no foul, we guess!*

## H & H DEVELOPMENTS

Jonathan Howe presented “Real Legal Issues – Top Trends” at the Industry Advisory Council Meeting held at the Trump National Doral Miami.

Lee Badger provided legal counsel in Tampa FL at a two-day meeting involving international architectural construction industry-related laboratory testing and product certification through a not-for-profit newly ANSI -accredited product performance and test standards-related 501(c)(3) organization with public-interest and industry-interest Board members, relating to ASTM product standards and test methods, and related not-for-profit organization governance fiduciary duties and antitrust compliance and certification mark licensing.

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