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IN THIS ISSUE:

NOT-FOR-PROFIT LAW 2

The NCAA Is Having A Really Difficult Year — *H&H Report Update*

EMPLOYMENT LAW 2

EEOC Says Dollars Recovered Are Up Even If Cases Are Down A Bit

INTELLECTUAL PROPERTY 3

One Of The Strangest Copyright Fights Yet

REGULATORY LAW3-4

FTC Violation Found Even Though No Agreement On Price

Court Upholds Legality Of Member's Suspension

NLRB Ratifies Its Decisions While Lacking A Proper Quorum

Did Jewel-Osco Violate A Settlement With The EEOC?

TAX LAW4-5

Here's Another Strike Against Cook County Use Tax

IRS Addresses Revocation Confusion

Court Again Denies ABA Affiliate Exempt Status — *H&H Report Update*

MEETINGS & TRAVEL LAW 5

Even More Discomfort Ahead For Coach Class Passengers

OTHER ISSUES, TRENDS..... 6

Will We Or Won't We Get Smart(er) Credit Cards?

Former Legal Adversaries Undertake Teacher Tenure Fights

H&H DEVELOPMENTS 6

IRS SIMPLIFIES ADDRESS REPORTING REQUIREMENT

— The Internal Revenue Service recently updated its Form 1023-EZ instructions, and its most recent revision for instructions downloaded after August 4 permits officers, directors and trustees to use their organization's mailing address rather than their personal addresses on Part 1, line 8. Form 1023-EZ is the IRS's streamlined application for tax-exempt status under §501(c)(3). But its use is limited to a class of organizations with various limitations including annual revenues less than \$50,000 and assets under \$250,000. Applicants must answer 14 questions on a worksheet when applying. A "yes" answer to any of the 14 disqualifies the applicant and requires filing the more comprehensive Form 1023. *Many officers, directors and trustees would prefer not to have their home addresses as part of a filing which is available for public disclosure so this is a welcome change.*

A HICCUP IN COLORADO'S LEGAL POT SUPPLY

— It seems Colorado needs to grow more legal marijuana. The current legal supply for medical and recreational use from licensed growers is too small to meet demand, even when coupled with marijuana that people are now permitted to grow at home for their own use. The supply shortage leads to higher prices which are not competitive with illegal pot, which legal pot was supposed to undercut and replace. *That old bugaboo, the law of supply and demand and its effect on price.*

SUPREME COURT SAYS GET A WARRANT TO SEARCH

THAT CELL PHONE — The U.S. Supreme Court ruled in late June that police need a search warrant to examine the contents of a detainee's cell phone in connection with an otherwise lawful arrest. The unanimous decision recognized that the contents of a modern cell phone are akin to a small computer, in fact is a small computer with all sorts of information. Chief Justice Roberts said a cell phone might contain more personal information than a search of a person's home. *The moral of the story: if the police want to search someone's cell phone, they need a search warrant, and that means going before a judge and explaining why just a search is necessary, i.e., warranted. And remember, different rules may apply about searching your cell phone or computer without a warrant when you cross a U.S. border.*

GOOD READING ... See you in September 2014

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NOT-FOR-PROFIT LAW DEVELOPMENTS

THE NCAA IS HAVING A REALLY DIFFICULT YEAR — *H&H Report Update* — The past 12 months have been difficult for the National Collegiate Athletic Association on various legal fronts. The NCAA and Electronic Arts, a media game company, were sued by former college athletes for continuing to use their likenesses in video games after the players were out of school. After several pretrial defeats, EA settled for \$40 million but the NCAA vowed to fight on. A former UCLA basketball player Ed O'Bannon and other athletes sued the NCAA under federal antitrust laws. The trial judge just announced her decision which rejected the amateurism defense asserted by the NCAA ever since college sports became big business. The judge entered an injunction that the NCAA, conferences and member schools may not agree to prohibit deferred compensation of \$5,000 or less per year to be set aside in a trust fund for the licensing of prospective, current or former Division I men's basketball and Football Bowl Subdivision football players' names and, likenesses payable upon graduation or expiration of athletic eligibility, and may not agree to prohibit those same athletes compensation for such licensing up to a full grant in aid that covers the *full* cost of attending those colleges and universities, starting in 2016. The NCAA has already announced it will appeal. A separate antitrust lawsuit, Jenkins v. NCAA, which seeks to essentially turn college athletics into a free market, is still pending. The plaintiffs' lead attorney has previously sued several professional sports with victories leading to free agency at the major league level. The National Labor Relations Board has yet to rule on an appeal from a regional administrator's decision declaring that Northwestern University football players are university employees and permitting them to form a union and bargain collectively. And now five of the largest athletic conferences, all the major powers included in the injunction, have asked to be allowed to operate under a different set of rules for providing even greater benefits such as guaranteed four-year scholarships and health benefits to injured players after college, among other things. That could lead to further repercussions since the great majority of NCAA members are not among the favored conferences which already dominate the football and basketball revenues from television and merchandise sales. *If ever there was a time when the NCAA faced a variety of challenges to its overall authority and multiple revenue streams, now is the time. It is difficult to claim nonprofit status when operating on tens of billions in revenue from television, selling player' likenesses in a variety of ways, and coping with several different antitrust claims in various courts with most rulings going against you. Stay tuned. This is just starting and college sports may never be quite the same.*

EMPLOYMENT LAW DEVELOPMENTS

EEOC SAYS DOLLARS RECOVERED ARE UP EVEN IF CASES ARE DOWN A BIT — The Equal Employment Opportunity Commission announced its fiscal year 2013 monetary recoveries on behalf of employees were the highest in EEOC history, over \$372 million, and that was while new filings against employers were down slightly, about 5% under FY 2012. Retaliation claims continue to top all forms of discrimination claims for the fifth year in a row. *As FY 2014 winds down, we don't know yet how this year's numbers will look, but the EEOC has been very active, along with the NLRB, and employers will not be surprised if 2014 is another record-setting year. Anyone paying much attention to employment litigation is well aware that retaliation claims continue to be asserted on behalf of employees by the EEOC and by plaintiffs' attorneys. Be sure to get good legal advice in termination situations.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS

ONE OF THE STRANGEST COPYRIGHT FIGHTS YET — A British photographer is in a dispute with Wikipedia Foundation, which runs the wikipedia.org website, over the rights to a set of photographs. It seems while he was on a trip to Indonesia in 2011 the photographer’s camera was taken by a monkey which managed to click the camera numerous times and in the process take some very unusual photographs including a highly publicized “selfie.” The photographer claims he allowed the monkey to take his camera in anticipation it might do something such as click the camera button and take some photos. Wikipedia has included the selfie and others in its public domain collection. The photographer says he owns the photos because they were taken with his camera, and he was able to sell them until they appeared on the Wikipedia site. Wikipedia says he does not own them because he did not take the photos, a monkey did, therefore no one owns them. So who owns the copyright on the photographs? *Hey, we don’t make this stuff up. We don’t have to. It appears Wikipedia has the better argument since materials produced by nature, plants or animals are not copyrightable, at least not under U.S. law. British law may differ from U.S. law in the circumstances of this instance, however.*

REGULATORY DEVELOPMENTS

FTC VIOLATION FOUND EVEN THOUGH NO AGREEMENT ON PRICE —The Federal Trade Commission has voted unanimously to settle charges that two companies through their principals had exchanged emails with explicit invitations to collude to raise barcode prices. Because a third company failed to go along with the plan, no agreement was reached and no prices were raised. Under the terms of the settlement, the two individuals and their companies are required to cease and desist from communicating with their competitors about rates or prices, dividing markets, or allocating customers, and to comply with FTC reporting and compliance requirements for 20 years. *If an agreement had been reached, the FTC would have referred the matter to the Antitrust Division of the Department of Justice, which could have sought monetary penalties and/or prison time for a criminal violation of the Sherman Act. This should serve as a reminder that competitors should avoid any communication about price, quantity, dividing markets or customers, or future plans regarding such matters.*

COURT UPHOLDS LEGALITY OF MEMBER’S SUSPENSION — A federal appeals court recently affirmed a district court’s summary judgment in favor of the American Academy of Orthopaedic Surgeons and the American Association of Orthopaedic Surgeons (collectively “the Academy”), but on different grounds. The plaintiff had been suspended for one year by the Academy for violating its ethical standards. The district court had concluded that the one-year suspension would devastate the plaintiff’s income, but nevertheless granted summary judgment for the Academy after finding that the Academy had followed its rules in suspending the plaintiff. The appeals court determined that Illinois law does not allow judicial review of a private organization’s membership decisions unless membership is an “economic necessity” or affects “important economic interests.” In that regard, the appeals court found that the plaintiff merely made allegations, but failed to provide evidence that would create a material dispute requiring trial. Therefore, the appeals court affirmed the district court’s granting of summary judgment without reaching the parties’ arguments about the Academy’s procedures. *Of course, this does not mean that following appropriate procedures is not important in disciplining a member. Rather, the opinion lends further support to the proposition that a plaintiff challenging a private association’s disciplinary action must overcome the high evidentiary hurdle of showing that membership is an “economic necessity” or affects “important economic interests.”*

NLRB RATIFIES ITS DECISIONS WHILE LACKING A PROPER QUORUM — *H&H Report Update* — The National Labor Relations Board voted unanimously on July 18 to ratify all of its actions taken while lacking a quorum of validly appointed commissioners, in response to the U.S. Supreme Court’s Noel Canning decision the last week of June ending its 2013-14 term. The vote means the NLRB will not undertake a case by case review and approval of approximately 400 actions and appointments during the period from January 4, 2012 to August 5, 2013 when three of the five commissioners were appointed by President Obama while the Senate was in a three-day recess, a period which the Supreme Court ruled was not truly a recess as a matter of constitutional law. *This may or may not end challenges to actions taken while the NLRB lacked a properly appointed quorum. Parties that challenged NLRB decisions during 18-month period can still go back to the various federal appellate courts and argue this subsequent ratification is inadequate and all those decisions must be subjected to a de novo review.*

DID JEWEL OSCO VIOLATE A SETTLEMENT WITH THE EEOC? — A federal magistrate judge in Chicago has issued a scathing 51-page report to the presiding federal district court judge stating that Jewel-Osco has systematically violated a settlement with the Equal Employment Opportunity Commission regarding the return to work of employees who were out on disability leave. His recommendations include extending the consent decree by one year and awarding back pay of \$82,000 to three former employees. Jewel-Osco strongly defends its post-settlement actions, and claims it has complied with the settlement over the past three years while addressing some 3,400 requests for accommodations, and granting some 2,300 of them. Jewel-Osco also noted the EEOC could only come up with three claimed violations. Jewel-Osco’s 2011 settlement with the EEOC provided for better training on reaching accommodations and payment of \$3.2 million to 110 former employees, among other provisions. *One takeaway is employers are advised to be creative and comprehensive in attempting to respond to employees’ requests for accommodations under the Americans With Disabilities Act (“ADA”). This EEOC response and magistrate judge’s report shows that even a few departures from a consent decree may have major repercussions.*

TAX LAW DEVELOPMENTS

HERE’S ANOTHER STRIKE AGAINST COOK COUNTY USE TAX — *H&H Report Update* — Cook County nonprofits purchasing property outside the county will be happy to know that an Illinois appellate court has upheld a lower court decision striking down a Cook County ordinance imposing a 1.25% “use tax” on the value of non-titled personal property (i.e., not motor vehicles) bought outside the county and then moved into it for “use” there. The appellate court concluded the tax violated the Illinois County Code, which prohibits county use taxes based on the sales price of property. The county argued that its tax was legal because it was based on the “value” of property, rather than its sales price. But the appellate court concluded that sales prices would generally be used to establish the value of property (as opposed to, for example, paying for an appraisal). Moreover, the court noted that the preamble to the ordinance imposing the tax made it clear the county’s purpose was to close a “loophole” allowing county residents to avoid the county’s sales tax by purchasing property outside the county. Hence, to the appellate court, “[T]he unmistakable conclusion is that this proposed ‘use’ tax is in reality a sales tax upon the purchase of the property.” *Moral of the story, when you are drafting a local ordinance, make sure that your preamble doesn’t take away any argument you may have that the ordinance doesn’t violate state law. Duh....*

IRS ADDRESSES REVOCATION CONFUSION — The Internal Revenue Service has issued new guidelines for its examiners processing exemption recognition applications (Form 1023 or 1024) from organizations that have failed to make required Form 990, Form 990-EZ or Form 990-N annual report filings three years in a row. Such a failure, per federal law, is supposed to result in automatic revocation of exempt status, and the IRS has been issuing revocation letters in an automated fashion. But, since

organizations claiming exempt status are supposed to file annual report forms even before their exemptions are recognized by the IRS, some entities have received automatic exemption revocation notices from the IRS even before the IRS has acted on their exemption recognition applications. So, now the IRS, recognizing this problem created by the automatic revocation law, has told its examiners that, in such cases, they should continue processing the exemption recognition application, but treat it as an application for reinstatement of an exemption that has been revoked. Then, if the organization is judged to be entitled to an exemption, the examiner is supposed to grant recognition retroactively to the date on which the exemption would have been recognized as effective had there been no revocation (formation date or date application was postmarked). And, finally, the examiner is supposed to note, in the IRS records and in an exemption letter given to the organization, that the automatic revocation and reinstatement to exempt status occurred on the same date, with the result that there was no gap in exemption recognition. *Got all that? This is what happens when things are supposed to happen “automatically” and not through the exercise of the human brain. But maybe the IRS’s new guidelines, developed by actual humans trying to come up with a work-around that will solve problems created by the automatic revocation law while not quite ignoring the law entirely, will resolve all the confusion. Maybe...*

COURT AGAIN DENIES ABA AFFILIATE EXEMPT STATUS — *H&H Report Update* — Upholding a lower court’s decision, the federal appellate court in Chicago has ruled that ABA Retirement Funds, a nonprofit affiliate of the American Bar Association, is not entitled to an exemption from federal income tax as a “business league” under §501(c)(6) of the Internal Revenue Code. The appellate court found that “[S]ave for the fact that it is a nonprofit corporation, ABA Retirement Funds fails every necessary condition for business league status.” Rather than being organized and operated to improve conditions of the legal profession generally, the court determined the affiliate’s primary activity was to perform “particular services for individuals” by promoting its own retirement plans to lawyers, while secondarily promoting general retirement savings in the legal profession. Further, the court noted the affiliate was entirely involved in the conduct of a business “ordinarily conducted for profit.” *Chief Judge Wood’s opinion in this case is entertaining as well as informative. Responding to the affiliate’s efforts to compare some of its characteristics with those of other organizations that had received exempt status, the judge said, “A cucumber has characteristics similar to a zucchini but it is not, in fact, a zucchini. And, while having characteristics similar to a zucchini may be enough for some purposes (for instance, to stand in as a zucchini in an impressionist still life), it will not be enough when an object possessing all of the characteristics of a zucchini – in other words, a zucchini itself – is required (say, when making zucchini bread).” Will the appellate decision induce the affiliate to switch from a nonprofit to a for-profit entity?*

MEETINGS & TRAVEL LAW DEVELOPMENTS

EVEN MORE DISCOMFORT AHEAD FOR COACH CLASS PASSENGERS — Boeing and Airbus are about to squeeze coach class passengers even more by adding more seats to Boeing’s 737 Max 8 plane and the Airbus 320neo plane, two airline industry workhorses. This may include shrinking the fore and aft distance between seats by two inches or more, narrowing seats and making them thinner (and even less comfortable). Other modifications including changing bathrooms and galleys on aircraft are also likely. *It’s all about getting more revenue from every flight. But as passengers get larger and seating gets smaller, passenger dissatisfaction and discomfort as well as revenues will rise. That’s one of the tradeoffs for low airfares. Let your airlines know how you feel about it.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WILL WE OR WON'T WE GET SMART(ER) CREDIT CARDS? — Most of the rest of the world has moved on to more secure, so-called smarter credit cards based on a “chip & pin” system which provides an embedded computer chip and plugging in a four-digit PIN (personal identification number) rather than the more easily hacked magnetic strip cards used in the U.S. Among the reasons we don't have chip & pin cards is that retailers want the card-issuing banks to pay the cost of the upgrading and the banks want the retailers to pay the cost. Congress is beginning to stir and rumbles to require such cards are starting to be heard in D.C., some state capitols, and even some cities. The California state senate was considering legislation to require a smartcard standard but ran out of time this session. *The issue is not going away, despite state banking association claims that such legislation at the state level would be an undue burden on interstate commerce, or industry association claims that industry can better handle this on a voluntary standard basis than through legislative mandate. Maybe so, and there are predictions we will see such cards in 2015. But if you want to speed up the process, call your credit card issuer and ask if it has a chip & pin version of your card. One reason to get one is for international travel where chip & pin is the norm and magnetic strip cards may not always work.*

FORMER LEGAL ADVERSARIES UNDERTAKE TEACHER TENURE FIGHTS — Litigation superstar lawyers Theodore Olson and David Boies who argued the George Bush-Al Gore election appeal before the U.S. Supreme Court in 2000, and later teamed up in 2013 to successfully challenge California's Proposition 13 ban on same-sex marriage, and they are each involved in challenging teacher tenure laws, Olson in California and Boies in New York. The challenges claim that teacher tenure laws deprive minority students of equal protection under state constitutions because minority and poor students are most likely to have ineffective teachers. *First blood to Olson in California where a trial court ruled teacher tenure laws are unconstitutional. If upheld on appeal, expect similar challenges all over the nation.*

H & H DEVELOPMENTS

In August . . .

C. Michael Deese participated on a panel entitled “Association Management Company Best Practices & Accreditation Standards” at The AMC Institute's recent conference in Nashville immediately prior to the ASAE annual meeting.

Samuel Erkonen presented “Risk Management in Uncertain Times” for CMP Credit to a group of meeting professionals attending a meeting at the Sandals Royal Bahamian Island Promotion Board's (NPIP) most recent incentive planners trip.

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