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ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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HE'S ON TO SOMETHING – Rick Cohen who does the *NPQ Cohen Report* recently commented that the incoming 113th Congress "feels special and scary." He noted it will be faced with tough issues including comprehensive tax reform, immigration, and may even have to come up with a real budget, not just more kick-the-can-down-the-road spending resolutions. He advises getting to know who the key players will be come January for your specific issues. *That sounds like good advice to us. Remember many of the committee and subcommittee chairman positions will change so there will be new power brokers. If what goes on inside the Beltway is a matter of concern for your association, you will need an updated scorecard.*

LESSON SENT! LESSON LEARNED? – A judge in Massachusetts sentenced a teen driver to two years in prison for causing a car accident resulting in the death of an oncoming driver while the defendant driver was sending and receiving text messages on his cell phone. The judge said the maximum jail time sentence under the Massachusetts statute prohibiting texting while driving was intended to send a lesson to the defendant and others of the seriousness of the offense. *Texting while driving is prohibited in 38 states, but the prohibitions are widely ignored, especially by younger drivers who think they can multitask while driving. Associations should warn their staff members this is prohibited by statute – and by your employment policies when on association business.*

IT MAY DEPEND ON YOUR PERSPECTIVE – A sign of the times from Los Angeles comes in a recent decision to shut down 10 county courthouses, closing many criminal and civil courts, for fiscal year 2013-14, as part of efforts to address government deficits there. What it means is a substantial slowdown in dealing with litigated matters throughout Los Angeles County, one of the largest court systems in the nation. *Some will say good news, slowing the crunch of lawsuits. But if it is your business or personal litigation matter, your car accident, or your family member in the criminal court system as a defendant, victim or witness, maybe not so good. The old maxim, justice delayed is justice denied, may make more sense when it is your matter. Can the courts in Cook County (Chicago) and Wayne County (Detroit), and a host of other cities and counties be far behind?*

GOOD READING ... See you in January 2013

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NOT-FOR-PROFIT LAW DEVELOPMENTS

HERE WE GO AGAIN: “WHEN WILL THEY EVER LEARN...?” – A small credit union in Michigan in the Toledo, OH-Monroe, MI area was declared insolvent last August. Prosecutors recently charged its sole employee with embezzling \$2.1 million over 20 years. Among her deceptive practices were forging checks, using numerous aliases, and not recording certificates of deposit. The victims included more than 200 members from Roman Catholic parishes in Monroe County, MI. *Members’ accounts are insured up to \$250,000 which ought to mitigate their losses. Even so, one has to wonder what sort of oversight the credit union’s officers and directors exercised? Were there audits? All too often we read about these embezzlements and wonder why they occurred? Why? Temptation accompanied by lack of internal controls and oversight makes embezzlement all too easy a choice. Twenty years....*

ASSOCIATION WITH AN UNWELCOME MESSAGE BEFORE CONGRESS – The International Academy of Compounding Pharmacists headed into the fray before skeptical senators conducting a hearing into the activities of compounding pharmacies following a deadly meningitis outbreak traced to contaminated steroid shots compounded and distributed by the New England Compounding Center of Framingham, MA. The outbreak has contributed to more than 30 deaths nationwide and over 450 attacks. The Senate Health Committee hearing was to seek information on whether more federal regulatory oversight was needed to address the activities of compounding pharmacies which are regulated by state pharmacy boards rather than the Food and Drug Administration. The Academy’s CEO argued that no additional regulation was needed, because the New England Compounding Center was a rogue operation that violated the laws of Massachusetts and should have been shut down years ago. *The Academy has led the largely successful charge against FDA oversight of its members’ compounding activities. Will this meningitis outbreak lead to a change? With the Academy’s successful track record opposing FDA controls and Congress focused on other issues, this outbreak has already faded from public attention and memory.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

BATTEN DOWN THE BYOD HATCHES – Is there anyone in your office or facility who does not have a cell phone, most likely one with a camera, or an iPod or iPad or similar device, or any of the other electronic devices we can no longer seem to live without? How many of their BYODs (“Bring Your Own Devices”) are linked to your office server, or capable of obtaining or making copies of your confidential and not-so-confidential information? How many employees routinely keep your information on their BYODs? What policies are in place to protect against unauthorized access to your information? What policies are in place to retrieve or erase your information if the employee should leave, be terminated or retire? What policies cover physical security of the devices on which your information may be stored by an employee? How secure are their BYODs against unauthorized access? Are they password protected? Malware protected? *The use of BYODs has sort of snuck up on employers because we all have them, and we probably don’t want to ask these questions because we either don’t know the answers or the answers would embarrass us. But it is your information that is at risk, your intellectual property, your business plans, your internal communications, or worse, your clients’ or members’ information. But until you ask the right questions, you probably lack a coherent policy and remain at risk until something goes wrong and it is too late to be rectified.*

EMPLOYMENT LAW DEVELOPMENTS

FREE ENTERPRISE ASKS IF A RETIREMENT BENEFIT MANDATE IS NEXT – The U.S. Chamber of Commerce *Free Enterprise* weekly e-newsletter recently raised a red flag for employers, speculating that a mandatory retirement benefit proposal by Senate Health, Education, Labor and Pensions Committee chairman Tom Harkin (D. Iowa) may lead to the next benefit required of employers. Harkins’ proposal calls for employers not offering retirement plans with automatic enrollment and a minimum level of employer contributions to automatically withhold a portion of their employees’ compensation and send it to a “USA Retirement Fund,” accompanied, of course, by a “modest” employer contribution. Harkins says the fund would be privately managed, offer lifetime income benefits, and be portable for workers. *The Chamber is opposed to another mandated benefit imposed on employers. But isn’t there such a system already in place, mandatory for employers and employees, called Social Security (except for the privately managed part)?*

IRS ANNOUNCES 2013 PENSION PLAN CONTRIBUTION LIMIT CHANGES – The Internal Revenue Service has announced the cost of living adjustments for pension and other retirement plans for tax year 2013. Some limits were raised to reflect statutory thresholds triggering adjustments; others did not. Among the most relevant for associations are the following: elective deferrals for employees participating in 401(k), 403 (b) and 457 plans increased \$500 to \$17,500 but the catch-up provision for employees age 50 and over remains at \$6,500. Employees may contribute \$6,500 to their Individual Retirement Plans (IRA), up \$500. But for single employees and heads of households who are covered by an employer plan, the deduction of IRS contributions from income phases out between \$59,000 and \$69,000 adjusted gross income (“AGI”), up \$1,000. For couples filing a joint return and the contributing spouse is covered by an employer plan, the AGI phase-out range is \$95,000 to \$115,000, up \$3,000. *Whatever happened to the original simplicity of IRAs? Now you need good advice and careful reading of the tax code and regulations. See IRS Notice IR-2012-77 for more detailed information.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

WHATEVER IT TAKES TO ATTRACT YOUR GOOD BUSINESS – It is no secret that state and local governments have been sweetening the pot to attract new business, with tax holidays, credits and similar benefits, training of employees, building infrastructure, and other goodies funded by taxpayers. The convention and trade show industry knows this trend all too well. With convention and trade show facility space up about one-third in the past decade and flat or down convention and trade show attendance, the competition to attract the big and not so big shows and conventions is fierce, according to major meeting industry association executives. *If ever there was a time for associations to negotiate better terms or concessions, now appears to be the time. Your meetings and shows bring a lot of value to cities. Involve convention and visitor bureaus in the process. While it still needs to be a win-win process for all concerned, take advantage of the competition to reduce your costs or to enhance your meetings and shows.*

FREE LOCAL, NATIONAL AND INTERNATIONAL PHONE CALLS – Here’s an interesting marketing approach. The Denver International Airport (“DEN”) is offering free local and national telephone call service and free international calls up to ten minutes at more than 200 stations in the terminal and gate areas. The service is provided by advertising concessionaires. You simply dial the number you want. The “cost” is viewing ads on 17-inch LCD screens connected to the phones while you are making your calls. *It’s an interesting concept. If it is successful at DEN, perhaps it will spread to other airports and travel facilities.*

REGULATORY LAW DEVELOPMENTS

NEW TAX AND BENEFIT REPORTING REQUIREMENTS IN JANUARY – The Patient Protection and Affordable Care Act of 2010 has a few wrinkles that not-for-profit entities will need to keep in mind as soon as January 2013. An additional 0.9% Medicare tax will be imposed on annual employee compensation of \$200,000 or more. Executives in the \$200,000 and above compensation range will have the choice of having additional tax deducted on a pay as you go basis or waiting until they file their 2013 tax returns. Another requirement for employers is informing employees of the (nontaxable) value of their 2012 group health coverage benefit on their 2012 W-2 forms due in January 2013. *While this new reporting requirement does not currently apply to employers with 250 or fewer employees in 2012, and that would mean the great majority of nonprofit entities, it has been a recommended practice so that employees have a greater appreciation of the cost of their medical coverage. There are other new reporting requirements, so talk to your accountants and benefits providers before year-end to be ready to comply starting January 2013.*

TAX LAW DEVELOPMENTS

FEDERAL AGENCY ISSUES REPORT ON AFFINITY CREDIT CARDS – The federal Consumer Financial Protection Bureau recently issued its annual report to Congress on affinity agreements between credit card issuers and colleges or their affiliated organizations. Such agreements, requiring issuers to pay colleges and their affiliates for use of their names and other intellectual property in marketing credit cards, are big business for the issuers. The revenue from the top ten such agreements with the largest payments made by Affinity card issuers totaled more than \$14 million in 2011, and the Bureau says that was about 24% of all payments made by issuers pursuant to such agreements that year. The Bureau not only reports to Congress on such matters, but it also maintains a public database of these college affinity agreements which issuers are required to provide to the government. *Affinity agreements are an important source of revenue for many nonprofits, and the Bureau's database is one source for information on how those agreements can be structured. But, in order to minimize tax and other legal liability, nonprofits need to seek advice from experienced legal counsel before entering into such agreements with credit card issuers and others who want to profit from use of a nonprofit's name, logo and other intellectual property.*

HERE WE GO AGAIN WITH THE ANNUAL AMT PATCH – OR MAYBE NOT – It seems every year we come down to the end of the year before Congress addresses the Alternative Minimum Tax (“AMT”) patch to avoid entrapping millions of taxpayers in a taxing situation aimed at about 155 millionaires back in 1970 who because of all their deductions and investment income managed to pay little or no income tax. But the amounts were never indexed for inflation so each year more and more taxpayers find themselves facing the prospect of having to compute their income tax under two tax formulas and many also facing having to pay the higher alternative minimum tax. So each year Congress patches the system and ratchets up the amounts before the AMT calculation is required to be computed or paid. Each year the IRS warns that a large number of taxpayers will have to compute their taxes conventionally and using the AMT formulas, about 60 million this year. Further, as many as 33 million taxpayers this year may have to pay the higher AMT income tax because last year's patch is wiped out as part of the draconian fiscal cliff tax code changes due January 1, 2013. If nothing else, the IRS warns the 2012 tax season could be delayed

for a month the longer the IRS has to wait to print tax forms and instructions just for the AMT part of 2012 tax returns. *We elect the same people over and over who do this to us every year and think this time will be different. Shame on them and shame on us. And that is only one of the major uncertainties as the fiscal cliff approaches January 1 while they play their political games in D.C.*

IRS INCREASES STANDARD MILEAGE RATES FOR 2013 – The Internal Revenue Service has published its standard mileage rates for 2013. The new rates are 56.5 cents per mile for business mileage, 24 cents per mile for medical or moving expenses, and 14 cents per mile for charitable driving expenses. *This is a cent-per-mile increase for standard business and moving/medical mileage rates while the charitable expense rate is unchanged. The business rate is intended to reflect the fixed and variable cost of driving, while the moving/medical rate only reflects variable costs. For more detailed information see IRS Notice 2012-72.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

NUANCES OF AUTOMATIC CONTRACT RENEWAL PROVISIONS – Many contracts provide for automatic renewal unless one party to the contract gives notice to the other of an intention not to renew the contract. Such provisions, often called “evergreen” provisions, are common in association executive contracts, software leases, and other service contracts. But the provision is often not well understood, or remembered, by one of the parties to the contract, and all too often a decision is made to cancel or not renew a contract without taking into consideration the notice requirements of its evergreen provision. One party decides an arrangement is not working out, or as sometimes happens, an incoming board of directors, executive committee or elected leader decides it wants a different vendor or staff executive and it decides to cancel or not renew a contract. The recipient of the cancellation or nonrenewal notice invokes the evergreen provision and says you cannot cancel without cause, or more commonly, you owe for an additional year or whatever period is spelled out in the evergreen provision. Such provisions are generally upheld in court if they are reasonably specific and unambiguous, but some states, including Illinois, have imposed limitations on such provisions by statute. Illinois says, for example, such provisions must be clear and conspicuous, but the statute does not define those terms. *How you feel may depend on the relative bargaining strength of the parties. So what should you do if you encounter such a provision? First, be aware of them in what you may regard as the pages of boilerplate of a service agreement. Try to negotiate it if you can. If not, then put a tickler or other notice to yourself about any contractual notice deadlines in the agreement. Require the provision be clear and conspicuous, e.g., boldface type and even in capital letters. Something else to consider is a requirement that the party(s) approaching an evergreen notice date must give written advance notice to the other party of the deadline or the deadline is waived. There are pros and cons to such provisions so get knowledgeable counsel.*

A BETTER WAY TO OBTAIN YOUR SOCIAL SECURITY INFORMATION – The Social Security Administration is offering a better way to obtain information regarding your history of your annual earnings and benefits than the paper statement sent annually. You can sign up to receive the statement online instead. Go to www.socialsecurity.gov and apply at “my Social Security Account.” Setting up your SSA account involves going through a number of application steps. Be prepared to answer some personal questions to establish your bona fides and to protect your account information from being discovered by others. *You can do this at any age. Take the time to do it so you have access to your information at any time, and not be reliant on waiting for (and later finding) that annual statement.*

MONTANA VOTERS SAY “CORPORATIONS ARE NOT HUMAN BEINGS” – Montana voters passed an initiative at the November elections declaring that “corporations are not human beings entitled to constitutional rights.” The initiative also directed the state’s congressional delegation to introduce a proposed constitutional amendment in Congress that would overturn the U.S. Supreme Court’s *Citizens United* decision and let Montana prohibit independent corporate political expenditures (those not coordinated with a candidate, a candidate’s authorized campaign committee or a political party) in the state. Montana earlier tried to ban all corporate political expenditures, but that law was struck down in court on the basis of the *Citizens United* ruling that found restraints on independent corporate political expenditures to be in violation of the U.S. Constitution. *Given the laborious procedure and super-majority approval requirement for amending the Constitution, it seems to us unlikely that this proposed amendment, or perhaps any other amendment that is the least bit politically controversial, would have a chance for approval in the partisan atmosphere that prevails these days. But who knows?*

H & H DEVELOPMENTS

In December ...

Jonathan T. Howe presented a session to a CEO/Executive Director Roundtable in Chicago Association Executive Contracts and Other Things. He also co-presented a webinar entitled, “What Is Your Contract Missing?” to meeting professionals., offered by Meetings & Conventions; and “The Lawyer Is Here in the Bahamas to meeting planners attending an educational familiarization program sponsored by the Nassau Paradise Island Promotion Board.

Samuel Erkonen spoke to a HelmsBriscoe group in Newport Beach, CA. Topic was current trends in the hospitality industry and contracts.

Barbara Dunn presented two webinars for meeting professionals regarding liability, risk management, insurance, and indemnification.

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Contributors to this issue...

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