

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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## THE LAW FIRM FOR ASSOCIATIONS®

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**EXPECT HIGHER AIRFARES** – One of the consequences of the political upheaval in Egypt is the likelihood of higher airfares. Egypt may be a very small player as an oil supplier, but the prospect of political turmoil having an effect on Suez Canal operations is one of those uncertainties that usually results in price gyrations for oil price speculations on world markets. That immediately translates into higher fuel costs for airlines. The other major and longer term factor is the current uptick in commodity prices broadly as economies around the world improve and demand more raw materials, including oil. *And if the current political unrest spreads to Saudi Arabia, Iran, Russia or the major African producers, look for a surge in oil prices on spot markets and an immediate pass-through to airlines – and truckers and even U.S. consumers who howl as gas prices go past \$3.00 a gallon. You may want to add some cushion to your travel budgets just in case.*

**“SIC TRANSIT GLORIA” – IS YOUR ASSOCIATION VULNERABLE?** – A reminder how companies come and go was seen in a recent news report that among those filing for bankruptcy in 2010 were such old-timers as the A&P (Great Atlantic and Pacific Tea Company) where you or your parents shopped in years past; the Pontiac Division of GM; Blockbuster, the biggest of the rental movie chains; the Mercury Division of Ford; and the Uno Chicago Grill (Uno's and Due's in Chicago for deep-dish pizza which spread around the country). *This is just a sampling of companies quietly or not so quietly disappearing. Numerous reports of charities quietly failing as state and donor funding tailed off the past three years are another reminder how tenuous our hold is. Associations have not skated through this deep recession without losses. Every day we all must rethink our value to members, clients and vendors.*

**ONE ATM TRANSACTION PER PIN ENTRY** – In an effort to reduce ATM thefts and other misuses, banks have been requested by regulatory authorities to allow only one transaction per PIN number entry. For example, if you want to make a deposit and withdrawal, you must go through the card insertion and PIN number entry routine twice. *Just one more of life's little inconveniences to try to slow ATM card misuse and fraud.*

GOOD READING ... See you in March

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**HOW FAR CAN §501(C)(3) GROUPS GO WITH POLITICAL ADS?** – Can a §501(c)(3) group run ads identifying rival political candidates’ positions on specific issues during election campaigns if the ads appear to favor one of the candidates? The group says it is merely informing voters of the candidates’ positions and is not recommending a vote for or endorsing any candidate. The Internal Revenue Service guideline on political campaign prohibitions on §501(c)(3) groups states that a statement favoring or opposing a candidate may violate the guideline even if the statement does not directly endorse or urge support for a particular candidate. This issue came up last fall during the Massachusetts governor election race when a §501(c)(3) group ran ads contrasting the two candidates’ positions on support for the wind alternative energy project off Nantucket which has drawn national as well as local attention. The ads stressed the incumbent governor’s support for the project, a project the group opposed. *Did the ads violate IRS and state guidelines on prohibited campaigning by a §501(c)(3) group? To be determined – maybe. But before participating in political campaign activities, §501(c)(3) groups are well advised to get knowledgeable legal advice. A wrong step could lead to an unexpected excise tax or even worse, loss of the group’s tax exemption.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**ASSOCIATIONS CAN CLAIM FACEBOOK COMMUNITY PAGES** - Facebook has begun displaying a link labeled “Is this your page?” on Community Pages. By clicking on the link, an authorized representative from an organization that is the subject of such a page can undertake a brief verification process to claim the page. Doing so will allow greater control over the page’s contents. *With associations trying to take advantage of the benefits of social media while attempting to maintain a level of control over the association’s name and related goodwill, this is a promising development and should prove to be a useful tool. Community Pages are not without risks for an association’s “brand” so you should be knowledgeable about Facebook, its self-licensing procedure, and about maintaining and protecting your “brand.”*

**IS YOUR WEB SITE’S LOOK AND FEEL BEING INFRINGED?** – There is an emerging line of legal precedents offering some infringement protection to web sites. There are two basic forms of protection, the first under the (federal) Copyright Act, and the second under the Lanham Act which addresses trademark infringement. Copyright claims take precedence but may be difficult to establish for a web site although individual components may be copyrighted. Trademark infringement gets into the look and feel of a web site. The “look” is akin to traditional trade dress infringement claims and considers such factors as overall appearance, color, graphics, spacing and fonts, the site’s layout, etc. The “feel” part is the more functional part covering how one navigates through the site. *It is not enough to allege infringement generally or simply say that another site infringes because its look is similar. Why would there be confusion in a viewer’s mind as to one site versus the other? Be specific — allege details of copying or overt similarities. These are difficult lawsuits so get expert help to determine if you have a likely claim.*

## REGULATORY LAW DEVELOPMENTS

**ONE RECENT EXAMPLE OF REGULATORY FALLBACK BY LABOR DEPARTMENT** – The U.S. Department of Labor has withdrawn a proposed regulation requiring more detailed logging by employers of employees’ workplace muscle sprains and strains, an apparent response by the Department of Labor to the president’s recent announcements of paying more heed to regulatory burdens imposed on employers. An underlying concern for employers was that the proposed regulation might be an early indicator of the administration’s intention to impose a much broader workplace ergonomics regimen long sought by organized labor and fiercely opposed by the business community. *One swallow does not a summer make, but this may be a harbinger of things to come which would be welcomed by the business community.*

**PRICE “CO-OPETITION” ALLEGED RESULT OF ASSOCIATION MEETING** – A complaint alleging a conspiracy among Sprint/Nextel, Verizon, AT&T, and T-Mobile to fix the price of text messaging services contained sufficient detail to survive a motion to dismiss, according to a recent ruling by a federal appellate court in Chicago. Among the complaint allegations cited in support of the court’s ruling, which allowed the case to proceed to the discovery stage, were that the defendants exchanged price information directly at trade association meetings, and that the defendants, along with two other large sellers of text messaging services, met with each other in an elite “leadership council” within the association and that the council’s stated mission was to urge its members to substitute “co-opetition” for competition. *Co-opetition (also coopetition or coopertition) is a neologism to describe cooperative competition. While associations can certainly encourage member competitors to cooperate on many association activities that benefit members and the industry, price fixing remains per se illegal under the antitrust laws. Associations are wise to have and follow an antitrust policy, and to seek advice from competent antitrust counsel before scheduling or condoning meetings of competitors which could include discussions that may involve both the association and its members in an expensive antitrust investigation or litigation. Antitrust cases can be costly in staff and volunteer time, as well as heavy defense costs and potential treble damages and even criminal penalties.*

## TAX LAW DEVELOPMENTS

**IRS TAX EXEMPT 2011 WORKPLAN DISCUSSED** – The Internal Revenue Service Exempt Organizations Division recently issued a report discussing its workplan for 2011. Among other things, the division says that in recent years it has focused many of its examination activities on Section 501(c)(3) organizations but now the division will begin increasing the attention it pays to Section 501(c)(4), (5) and (6) organizations, looking at issues including political activity and inurement of income to “insiders.” In addition, the division will be examining exempt organization claims for payroll tax exemptions and new hire retention credits under the Hiring Incentives to Restore Employment Act signed into law March 18, 2010, as well as the employment tax returns of exempt organizations claiming available subsidies to employers for COBRA health insurance premiums. The division will examine 2009 employment tax returns of randomly chosen exempt organizations as part of a larger, on-going IRS study of employment tax misreporting, and will focus on international activities of exempt organizations as an on-going priority, along with the growing number of organizations now involved in assisting debtors facing mortgage foreclosures. The division will continue its scrutiny of payments between controlled entities and exempt “parents,” and will continue examining nonprofits with relatively high levels of fundraising expenses, officer compensation and unrelated business income, and with relatively low levels of program service expenditures. Misfilings of Form 990-N will be studied. Furthermore, the division will expand cooperative efforts with state gaming regulators to discover organizations that may have registered at the state level to conduct gaming but failed to file Form 990 with the IRS. *It’s rare that government enforcement personnel give you advance notice of their planned activities. Nonprofit execs should take advantage of the notification provided in this report and consult with their legal and accounting advisors to ensure tax compliance.*

**EVERY LITTLE BIT HELPS – OR HURTS** – The Internal Revenue Service has announced a one-cent increase in the IRS-approved standard auto reimbursement expense rate for 2011 from 50 to 51 cents-per-mile. The medical and moving standard rates went up two cents to 19 cents-per-mile but the charitable standard rate remains at 14 cents-per-mile. The change is said to reflect higher gas prices. *If you are receiving it helps, paying maybe it hurts. But why the different rates, and why go up by different amounts? Anyway, factor this into your expense budgets.*

**SOME SUGGESTIONS FROM THE IRS FOR CHOOSING A TAX PREPARER** – The Internal Revenue Service may not be your first choice for advice on picking a tax preparer but a recent IRS release offers some helpful suggestions. First, check the preparer’s qualifications and then the preparer’s history. Next, check the fees and their basis. Make sure the preparer will be available after the return is prepared and filed, just in case you have more questions or the IRS asks questions. Provide the preparer with all the records and receipts needed for the return. Never sign a blank return. Review the return before signing it, and make sure the preparer has done so as well. *Pretty basic stuff, but think back and ask if you have always done each of these recommended steps.*

## EMPLOYMENT LAW DEVELOPMENTS

**CASE SETTLED – PRECEDENT? – H&H REPORT UPDATE** – Readers will recall the story about the employee who was fired after posting negative comments on Facebook about a co-worker. The employer said she was fired for a number of serious violations as well as the Facebook comments. The National Labor Relations Board stepped in and said the worker, a Teamsters union member, was engaging in “protected concerted activity” under the National Labor Relations Act. After all the national publicity about the case, the employer and employee quietly entered into a settlement, terms confidential. But the NLRB has announced the employer has agreed to not discipline or discharge employees for engaging in discussions about wages and work issues when not on the job. *If there is a precedent from this case, that may be it. Frankly, it seems a bit of a stretch that when an employee goes on a social media account such as Facebook or Twitter to complain about fellow workers, that amounts to “protected concerted activity” under the National Labor Relations Act. However, the Obama administration NLRB is decidedly pro-labor now and we can expect other decisions of this sort. In addition, the social media outlets are a new medium for regulators, employers, employees and unions to deal with, so novel decisions may be the norm for some time.*

**ILLINOIS APPELLATE COURT UPHOLDS DENIAL OF UNEMPLOYMENT COMPENSATION** – An Illinois appellate court upheld denial of unemployment benefits to an office manager of a small professional office who was terminated for using her company credit card for personal spending in excess of \$1,100. When confronted about this the manager said she had intended to repay the company. She was terminated and filed for unemployment compensation benefits. The employer objected. A referee awarded her benefits because the company did not have a written policy regarding use of company credit cards. An Illinois Department of Employment Security Board of Review reversed that decision. A Circuit Court of Cook County judge reversed the Board of Review, saying its decision was clear error. This decision in turn was overturned by the appellate court. *After all the arguing about lack of written policy versus common sense regarding use of a company credit card, what comes through loud and clear is that an employer issuing a company credit card should have a written policy made known to employees regarding permitted and prohibited uses of the card. End of story. It would probably have prevented this employer from going through at least two of the four levels of review.*

**A LESSON FOR EMPLOYERS AND EMPLOYEES** – An appellate court in California has denied application of the attorney-client communication privilege to prevent disclosure of emails between an employee and her lawyer because the employee used her employer-provided workplace computer to send and receive the emails in question in connection with her employment discrimination lawsuit against her employer. The employer argued the emails should not be protected against disclosure because the employer had told its employees that emails on company computers were subject to monitoring by the employer. In a similar situation, the New Jersey Supreme Court ruled in 2010 that an employee’s emails to a lawyer were protected against disclosure because they were in a personal account on the employer’s computer. *This is one more practical issue to be kept in mind by employers and employees. Employees should not use their workplace computer (or employer-provided cell phone or other electronic device) to communicate with their lawyer. Employers should warn their employees in writing that messages sent on company computers and other devices are subject to monitoring at any time by the employer. Employers and employees should also recognize privilege and disclosure disputes are inherently fact-based, and courts around the country will reach different conclusions so it can be difficult to predict in advance which way a court will decide.*

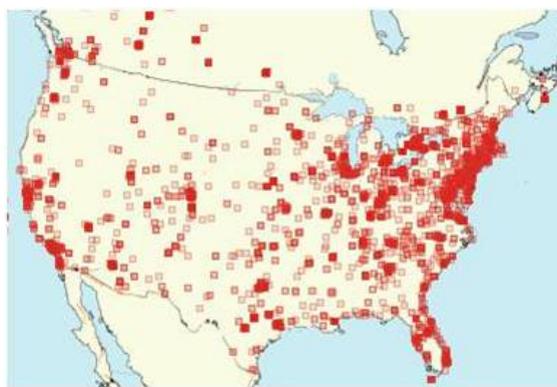
**ONE MORE THING TO COVER ON EMPLOYEE’S W-2 FORM** – Employers are reminded that the W-2 forms they are required to provide employees after 2010 must disclose the value of health insurance provided to employees. This is for informational purposes only and does not change an employee’s individual income tax liability. *We have long recommended that employers tell their employees the cost to the employer or value to the employee of employer-provided benefits including health coverage, pension or 401(k) plan contributions and other benefits. Employees frequently are unaware of the actual cost of benefits.*

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## MEETINGS & TRAVEL LAW DEVELOPMENTS

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**WHERE ARE THE BEDBUGS?** – There is a significant concern in the meeting and travel industries about the resurgence of bedbugs which were believed to have been eradicated in the early 1940’s. Since they cannot fly, bedbugs burrow into someone or thing and are then carry them along, including suitcases, briefcases, clothing, anything else that may be repacked and moved from point A to point B. What appears to be a massive re-infestation of these creepy crawler insects, which are hard to detect, has caused consternation, concern and liability not only in the hotel industry but everywhere from clothing stores, offices and taxi cabs to home bedrooms. Though bedbug infestation is not deemed to be a public health problem since no known diseases are carried by bedbugs, they have, nonetheless, become the source of litigation in the hotel industry. *There is a positive note, however, one can now check for bedbugs before booking rooms. See the Bedbug Registry, a free, public database of volunteer reports on North American hotels* [<http://bedbugregistry.com/>] or Twitter: @BedbugRegistry] *for more information.*



Infestation map from bedbug registry: (2/15/2011)

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## OTHER ISSUES, TRENDS & DEVELOPMENTS

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**SOME EXPERTS ARE PREDICTING AN END TO ACCOUNT PASSWORDS** – Are passwords likely to join 8-tracks, VCRs, old cell phones and outdated computers on the electronics industry’s rubbish pile? It is too early to be sure but some experts say passwords will go away soon. The basic problem with passwords is they don’t provide much security. They are easily hacked. Many of us cannot remember all the passwords we have or should have so we tend to use just one and a breach of that one opens up many or all of our other accounts. Think of your workplace computer log-in, cell phone account, home computer, Facebook account, passwords for your online shopping accounts and various online subscriptions, and the list goes on. We also don’t change them from time to time. So what are the near-term alternatives? One approach pushed by the U.S. Department of Commerce is the National Strategy for Trusted Identities in Cyberspace or NSTIC. The need for an industry standard such as NSTIC is promoted by the Open Identity Exchange, a group with such major players as Verizon, AT&T, Google and others. Apple is pushing biometric tools for its devices. Google is adopting its own biometric approaches. *Competition being what it is, you can bet if one company solves the password problem with a different approach, others will quickly adopt it, develop competing fixes or an industry standard will emerge. Let’s face it, our security needs require a “better mousetrap” than passwords.*

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## H & H DEVELOPMENTS

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### In February ...

C. Michael Deese participated on a panel regarding association management company accreditation. He also taught a session on current legal issues facing association clients of association management companies and a session on key legal issues which need to be addressed by new association management companies as part of a major association’s Building an Association Management Company program.

Barbara Dunn presented sessions regarding attrition and negotiating concessions in hotel contracts to a group of meeting professionals in San Francisco, She also presented an open forum on legal questions and a risk management session for destination management professionals in Las Vegas. Barbara also presented a session on risk management and crisis planning to a group of meeting professionals in Washington DC

Naomi R. Angel presented “Manage Your Legal Risk” and “Liability Risk Assessment, Code Compliance” to a major manufacturers association.

Jonathan T. Howe presented webinar for meeting professionals on “Contracts, Valentines, Or Dear Non Letters — What Do You Do?” He also presented, “Legal Update — A Refresher Course for Association Executives: Those Things You thought You Knew and Do... but Have Not Been Updated” to a group of association executives in Wisconsin.

### Contributors to this issue...

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