THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

SOME TIPS ON AVOIDING THEFT OF YOUR LAPTOP IN AIRPORTS – They may not have the cachet of tablets and smartphones of late, but laptop computers are still prime theft targets in airports. Chicago's O'Hare Airport only ranks third, trailing Atlanta and Miami, in reported thefts. The luggage area leads in thefts followed by the terminal and gate areas. Early summer and around Christmas are peak theft seasons. *So be aware of your laptop at all times, carry it separately from luggage, use some sort of identification on it that stands out from the crowd, and avoid leaving it unattended even briefly, e.g., while getting checked luggage. Keep track of it while going through security lines, another vulnerable time. And back it up before you go! Pretty basic stuff, but laptop thefts occur all too often in airports here and abroad.*

NOT WHAT YOU MIGHT EXPECT – Take those tales of greedy business owners with a grain of salt, especially when applied to small businesses. According to a recent Citibank survey, more than half of small business owners have had to go without one or more paychecks in lieu of laying off staff or reducing staff pay or benefits. *They also dealt with lower profits (if there were profits) and worked longer hours. Associations with small businesses as members need to keep such trends in mind as we address a slow to no-growth economy and face an uncertain business climate. Dues and budget increases will be scrutinized!*

KEEP THIS IN MIND WHEN USING SOCIAL MEDIA – One more thing to keep in mind when using social media such as Facebook, LinkedIn, etc., is that your information and entries may become fair game if you are involved in litigation. Users have been warned repeatedly that what is posted and publicly available may be subject to scrutiny by employers, identity thieves, and others, but now insurers and their lawyers are seeking and often getting access in whole or part to what litigants have posted on their social media which may relate to their litigation claims. *Courts may or may not protect your privacy. So it behooves you to keep a very careful eye on what you post. It may not be as private as you think, despite confidentiality agreements.*

GOOD READING … See you in August

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ILLINOIS DEFINES THE CHARITY CARE REQUIRED FOR TAX EXEMPTION – Illinois Governor Pat Quinn has signed into law a bill passed by the General Assembly that will define the amount of charity care a hospital must provide in order to obtain or retain a property tax exemption. The law requires exempt hospitals to provide an amount of charity care greater than or equal to their estimated property tax liability without an exemption. It also establishes a broad definition of charity care to include not only free care for the needy, but also such things as charitable contributions for health care, community educational programs, subsidies to physicians providing care to low-income patients, and a hospital's annual shortfall in income from treating Medicaid patients. *The new law is a compromise that was reached with representatives of hospitals after the Department of Revenue began denying exemptions to certain institutions for lack of sufficient free medical care to low-income patients. Only time will tell whether it will result in more and better care for the needy.*

COURTS HIT NONPROFITS' EFFORTS TO KEEP SEX ABUSE CHARGES PRIVATE – Recent court decisions will make it difficult for nonprofits to maintain confidential records involving sex abusers in their organizations, despite the desire of many groups to address such matters internally and away from public scrutiny. The Oregon Supreme Court upheld a lower court order to the Boy Scouts of America in a lawsuit that involved alleged sex abuse by an assistant scoutmaster, requiring that the group make public around 20,000 documents it compiled concerning possible abuse by Boy Scout leaders nationally, redacting the names of alleged victims and those who reported suspected abusers. Additionally, a Northern California jury found that the national Jehovah's Witnesses organization should pay 40% of a $28 million judgment against that organization and a convicted sexual offender who molested a fellow member of a Fremont, CA congregation after local church elders allegedly followed a national policy of keeping sex abuse allegations secret and failed to inform other church members about the prior conviction. *Nonprofits sometimes make good faith efforts to clean up their own houses by investigating charges of legal and ethical violations internally. They often try to maintain their records as confidential in order to collect information from reluctant accusers and witnesses, and because many complaints filed with nonprofits are ultimately found to be without basis. But court rulings like these two recent ones should serve as a warning that the courts may not be all that interested in keeping such nonprofit proceedings a secret.*

TRAGIC STORY OFFERS SOME CAUTIONARY NOTES – The Georgia Supreme Court split 4-3 to turn down a family's wrongful death lawsuit against a Savannah, GA golf club and homeowners association. The family of an elderly woman, who was killed by an alligator while walking near a lagoon on the premises of property jointly owned by the club and association, sued them under premises liability and negligence theories. The Supreme Court granted summary judgment to the defendant club and association because the association had posted warnings about large and dangerous alligators in the lagoons in its publications and on its website, and the elderly woman was aware of the alligators. The court said she assumed the risk of an attack when she walked near the lagoons. *Sometimes sufficient warnings are enough to protect against liability, but don't count on it. Remedy a potentially dangerous situation if you can. As a dissenting justice said in this case, the association said in its advertising that it removed alligators over seven feet and the one that killed her was eight feet, presenting a factual issue that should not have been decided by summary judgment. Meanwhile, you have to wonder about having alligators inside a gated community.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

MAY FOR-PROFIT ENTITIES USE ".ORG" DOMAIN NAMES? – It all depends. We tend to assume that only not-for-profit entities can use the ".org" but that is not a requirement of the Internet Corporation for Assigned Names and Numbers ("ICANN") which authorizes such Top-Level Domain designations ("TLD"). *Why would a for-profit entity want to use an ".org" TLD? Well, for one thing we and others have recommended fencing in your entity's domain name by using ".com," ".org" and ".net" TLDs to head off others using one or more misleading designations linked to your entity. With the expanding universe of generic TLD designations authorized by ICANN, putting up protective barriers will be more important than ever to protect your intellectual property.*

ADD CHICAGO TRIBUNE TO THE CONTENT SUBSCRIPTION CATEGORY – The Chicago Tribune has joined the category of newspapers requiring subscriptions to access content online, at least in part. The announcement states basic content will remain available to the online reader without a subscription, but "premium features" will require registration. While the basic and premium content will remain free for the time being, registration of free subscriptions is seen as the precursor to paid subscriptions at a to-be-determined date in the future. *Keep this in mind, Chicago-based association road warriors who want to see what is happening back home. The Tribune announcement cites trade journal Newspapers & Technology for the statistic that more than 220 newspapers around the country, including all but one of the Tribune's other newspapers, are requiring digital subscriptions. While Tribune executives are looking at digital subscriptions, they might also address the newspaper's content which has slipped substantially in the last half dozen years even before the current bankruptcy proceedings.*

EMPLOYMENT LAW DEVELOPMENTS

HOW NOT TO DISCIPLINE AN EMPLOYEE – An employee terminated for rule violations took her case to the National Labor Relations Board which ordered her reinstated with four years' back pay and interest. The employer appealed and a federal appellate court in Richmond, VA upheld the NLRB administrative judge's ruling despite the rule violations. The employee's evidence showed that after being warned not to wear a hat at work and doing so again on Halloween she was written up for insubordination. She then telephoned other employees ("protected concerted activity") to complain about what she regarded as unfair enforcement of the employer's dress code, and used her cell phone to photograph others at work wearing hats. She was terminated for violating her employer's rule against taking pictures at work without written permission. The appellate court agreed with the NLRB judge that the employer had treated her unfairly in violation of the National Labor Relations Act regarding the hat rule and terminating her for the photography rule violation because it did not enforce the no-hat rule and no-photography rule against other employees. *If you have a rule, enforce it consistently and fairly or you open yourself to expensive litigation and often unhappy results. Be particularly wary of violating current NLRB enforcement policy regarding "employees' protected concerted activity," which applies to nonunion employers as well as unionized employers. If unsure what constitutes protected concerted activity, call your employment lawyer.*

SHOULD YOU USE SOCIAL MEDIA TO CHECK JOB APPLICANTS? – Now that is a hot-button employment law question these days. The answer, depending on your circumstances, is probably yes but with *caveats*. First, who should do it? Usually not the person making the hiring decision, but that may not always be practical for small employers such as many associations. Limit searches to finalists for a position. Get authorization from the candidates to do the check as part of the application and interview process. Check the major social media sites, and note the jury (and state legislatures, regulators and Congress) is still out on asking applicants for passwords to their accounts. Decide in advance what you are looking for that might lead to a denial of employment. *This is still a dicey area, so tread warily and get good legal advice in developing a process for conducting such checks. Some states already prohibit asking for applicants' and employees' passwords. Discrimination theories abound.*

DOES THIS SOUND LIKE A REALLY DANGEROUS IDEA? – Legislation is being introduced in a number of states, including California and New York, to establish a new type of pension plan for private sector employees. These plans are aimed at smaller companies less likely to have a pension plan. The proposal in a nutshell: use the efficiencies of state-run public retirement systems to administer pension plans for private sector employees. Variations on this theme would require or simply permit employers to enroll in these state-run plans. Employees would have the option of contributing some portion of their earnings into these plans. An employer contribution to their employees' plan is among the options being proposed. Employers would not have a fiduciary responsibility for their employees' contributions, but would have to allow them to use payroll deductions if they wished to participate. *One may reasonably question the phrase "efficiencies of state-run pension plans." When one considers how badly many state pension plans have operated, how unwise the choices made in investments, how political the choice of fund trustees, how lucrative the business of brokering pension funds, is this really the way to go? How long before optional participation becomes mandatory, how long before employer contributions are mandated? What happens if a plan does poorly? Who is responsible? If this crops up in your state, take a good, hard look at it before going ahead.*

Regulatory Law Developments

NLRB'S NEW POSITION ON SOCIAL MEDIA POLICIES A MESS? – Are you confused about the National Labor Relations Board's recently announced policy on employers' social media policies in the workplace? So are we all. For a critical review and tearing apart of the policy, go to www.ohioemployerlawblog.com and scroll down in the "Popular Posts" section to "NLRB's position on social media remains a tangled mess." *It provides a short but very pointed critique of what is so, so wrong about the NLRB's policy. Very useful reading! Keep a copy in case your policy is ever challenged.*

Meetings & Travel Law Developments

TSA – THOUSANDS SLEEPING AROUND? – *H&H Report Update* – Our readers will recall that the Transportation Security Administration responded earlier this year that TSA did not mean "Thousands Standing Around," referring to the work force seen in many airports. *Could it mean "Thousands Sleeping Around," as reported about some TSA employees napping on the job in Newark, NJ?*

NOT JUST SAMUEL GOMPERS WHO SAID "MORE!" – One-time labor leader Samuel Gompers was famously quoted as saying "When they ask us what we want we'll say 'More!'" The airline currently raising the most revenue from add-on (also called "ancillary") fees is Delta, some $767 million in

cancellation and change fees and $863 million in baggage fees last year. Also, according to industry sources, Delta is looking to add another billion to that total within the next two years. *We all know Delta is not alone in the add-on fee chase. The art of raising and adding fees without driving customers away must be done carefully, but Delta and the other airlines will not drop them, not with those sorts of revenues coming in. One airline will try a new fee, others will watch and slowly follow suit. Expect new wrinkles, new irritations, and new differentiations among passengers seated side by side. Watch for more boarding and seat preference charges, in-flight promotions, not just movies but Wi-Fi connections, and sales of retail items. Free soft drinks, coffee and water may soon be history.*

TAX LAW DEVELOPMENTS

IT APPEARS SALES TAXES ARE SLOWLY COMING TO AMAZON – Amazon has now inked agreements with New Jersey and Indiana to collect sales taxes on online sales to residents there. Other recent deals include Virginia, Nevada, Texas, and Tennessee. Amazon insists it wants a federal tax solution to online sales tax collections instead of the current hodge-podge of state and local taxes that vary all over the lot. *Those of us in Chicago can relate not only to Amazon's concerns but to all the other online sellers trying to figure out the plethora of state and local taxes which vary by location and product, plus all the variations and exceptions for food, health and clothing purchases. "There oughta be a law." In Chicago we look at sales tax variations in Chicago, Cook County, the so-called "collar counties" to Cook County, and then other Illinois counties on the same products and services. Is this a reasonable way to run a tax system?*

IT'S A BIRD! NO, IT'S A PLANE! IT'S SUPERTAX! – Legendary Hall of Fame baseball umpire Bill Klem would feel right at home these days. Remember his famous cry, "It ain't nothing' till I call it." A current and perhaps more important variation on that theme may be seen in Chief Justice Roberts' interpretation of the mandate to purchase individual health insurance or pay a fine in the U.S. Supreme Court's historic 5-4 decision on June 28, 2012, upholding the Patient Protection and Affordable Health Care Act of 2010. He called it a tax within the taxing power of the Congress, but not a tax as understood in the Anti-Injunction Act ("AIA") which would have put off the entire litigation until 2014 when the mandate fines, which Roberts characterized as a tax in effect if not in name, will begin. *So is it a tax that only a Supreme Court Justice can understand? Even the Solicitor General arguing to uphold the Act responded to the Court during oral argument that the mandate fines did not constitute a tax. Constitutional scholars, commentators, pundits, bloggers and barroom debaters are going to be dissecting and debating the Supreme Court's 193-page opinion for some time to come, with its something for everybody wording. Good luck complying with the still to be read provisions of the Act and the still to be drafted regulations implementing it. We will need some luck to pay for it all.*

MANY AN ASSOCIATION CAN IDENTIFY WITH THIS PROBLEM – Microsoft is dancing that cautious business ballet of trying to introduce Windows 8, its newest version of its PC operating system, without diminishing the current market for Windows 7, its mainstay operating system used worldwide. Windows 8 is currently being introduced at trade shows, and test versions are already circulating on the Internet, and it is expected to be available before the busy Christmas season this year. Meanwhile Microsoft continues to push Windows XP users to switch to Windows 7, and certainly does not want others to hold off on new computers (using Windows 7) until Windows 8 is available. *Many an association or standards group developing a new version of a cash cow standard can relate to this marketing dilemma. How to not kill the current market for a soon-to-be-supplanted standard while also not angering the current buyers who might have held off until the new version was available? Microsoft has a lot of experience with this, and many associations have as well, but it is always a dicey proposition.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

THE BLAME GAME – *H&H Report Update* **–** First, $53 million was embezzled over some 20 years by the former Dixon, IL treasurer and controller despite annual audits of the city's finances and oversight by a city council finance committee. Now comes the city's predictable response: sue the very small audit firm and its name partner who provided audit services since 2006. *Good luck collecting even if the city wins the lawsuit. Perhaps the city fathers should also sue themselves for failing to oversee the city's finances and to implement reasonable internal controls and separation of duties which would have thwarted the embezzlement from the start two decades ago.*

CAN TWO SHORTAGES BE LINKED TO SOLVE TWO PROBLEMS – The trucking industry is lamenting a growing shortage of long-haul drivers, citing retirements and other workers' reluctance to take on driving chores that often require extensive periods away from home, long hours and hard work. Many veterans returning from extended tours overseas are finding jobs all too scarce as their enlistments end and the armed forces reduce their personnel numbers. Veterans finishing their enlistments are over 21, the minimum age for drivers; used to extensive time away, long hours, and hard work; disciplined and trainable in a new field. *Would it make sense for companies looking for drivers to recruit veterans looking for civilian jobs and vice versa? Starting pay is said to be in the $38,000-$40,000 range. Something to mention at association meetings or conventions? Just asking.*

H & H DEVELOPMENTS

In July …

Jonathan Howe presented "The Lawyer Is Here" for meeting professionals attending an educational familiarization program relative to bringing business groups to the Bahamas. The session was held at the British Colonial in Nassau. He presented "Protect the Integrity of Your Business with Iron-Clad Contracts" to a national association of caterers at their annual meeting in New Orleans, LA.

Naomi Angel presented a program in Huntsville, AL to an engineering society. Topic: "Understanding the Fair Use Doctrine, a limitation and exception under copyright law."

Samuel Erkonen presented "Risk Management and a General Survey Of Not For Profit Law" for the U.S. Chamber of Commerce in Los Angeles.

Gerard Panaro gave a talk to a council of engineers and scientific executives in Louisville, KY on the latest developments in employment law, including new EEOC and DOJ guidance on use of arrest and conviction records and treatment of persons with HIV under the Americans With Disabilities Act. In addition, he also co-presented a webinar on workplace violence for bankers and security experts.

Contributors to this issue…

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