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ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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DO NOT TAKE YOUR PAYROLL SERVICE FOR GRANTED — A recent article in the *Wall Street Journal* should give associations and their member companies that use payroll services to handle their employees' pay and to withhold and pay their FICA tax payments one more potential problem to consider. The article said payroll services have mushroomed in recent years beyond the major service providers such as Paychex and ADP to many smaller, more local operations and some of them have folded without warning, leaving their clients on the hook with the Internal Revenue Service for employers' and employees' share of FICA tax payments that were never paid to the IRS. *Whether due to theft, fraud or simply unsuccessful business practices of their payroll services, employers remain liable for the unpaid FICA taxes, not to mention interest and penalties. And being a civil claimant against a payroll service that has failed due to criminal activities or unsuccessful business practices doesn't offer much promise of recovery either. Pay close and continuing attention to your payroll service. Require it to provide you with a record of tax payments on your behalf. Check with the IRS from time to time to ensure payments are being made on your behalf. In other words, trust but verify.*

NSC REPORTS CELL PHONE DISTRACTED DRIVING UNDER-REPORTED — The National Safety Council ("NSC") recently reported distracted driving due to cell phone use is an increasing factor in traffic accidents, but it is vastly under-reported for a variety of reasons, including states having different reporting standards, crashes that are not included in federal data collected by the National Highway Traffic Safety Administration, lack of witnesses, and driver reluctance to admit they were using a cell phone when in an accident, among other factors. Driving fatalities increased in 2012, the first such increase in seven years. *The NSC estimates about 25% of vehicle crashes involve cell phone use. What do you tell your staff about cell phone use while driving on association business? What do you tell yourself? Is any call or text while driving worth an accident or worse?*

GOOD READING ... See you in June 2013

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DONOR-RECIPIENT TIT FOR TAT — This could get interesting. An unhappy donor and law center alumnus sued Georgetown University Law Center in federal court in Dallas, Texas, demanding it return his gift of \$7.5 million after the university declined to name its law center fitness and health center (gym) after the donor as promised. After his initial gift of \$5 million in 2000, the law center continued to solicit him and used his name on the project as part of its project promotion. But then he ran afoul of Securities and Exchange Commission civil charges of insider trading, and was found guilty by a jury and fined \$1 million. The law center held off on naming the gym after him, but he pledged another \$11 million in 2003, and has since paid \$2.5 million. The gym was never named after him, so now he wants all of his money back. Georgetown responded by countersuing the unhappy donor, saying not only would it keep his money, but demanding he make good on the remainder of his \$11 million pledge. *The factual allegations of this donor-recipient lawsuit distinguish it from other such disputes. Supposedly after the donor, a wealthy entrepreneur-businessman who describes himself as having a big ego, was informed the law center gym would not be named after him, or at least not until things quieted down, he was induced to make a much larger pledge which he fulfilled in part, according to Georgetown. But the donor's version differs from Georgetown's version about what would happen after the initial notoriety died down. Well, disputed facts make for good lawsuits, but perhaps the lesson for donors and recipients is to be clear, specific and comprehensive on all terms in writing regarding contributions, especially when major dollars and big egos are involved.*

COURT ISSUES MIXED RULING ON CHURCH FUNERAL PROTESTS — *H&H Report Update* — A federal appellate court in St. Louis has issued a mixed ruling on Missouri laws restricting protests at funerals, concluding that a law prohibiting protests within 300 feet of funerals did not violate the First Amendment rights of protesters, as long as it was not applied to funeral processions on town streets, but striking down another law that prohibited protests “in front of or about any location at which a funeral is held.” The vagueness of the second law led to its rejection. The decision arose from actions by the Westboro Baptist Church, which pickets funerals of military personnel, contending that the deaths of service members are God’s punishment for the acceptance of homosexuality in the U.S. Its actions are hugely unpopular around the country. *This decision was in line with another appellate ruling upholding the 300-foot distance from funerals. The Westboro church has made several additional legal arguments against the “300-foot” law that were not finally dealt with by this appellate court. Further proceedings on those claims in a lower court, and perhaps appeals of the appellate rulings, may follow.*

CALIFORNIA BILL TARGETS YOUTH GROUPS’ TAX EXEMPTIONS — *H&H Report Update* — California Senate Bill 323 seeks to repeal the exemption from state taxation of any youth organization that discriminates on the grounds of “... gender identity, race, sex, sexual orientation, nationality, religion or religious affiliation.” The bill specifically enumerates Little League, Boy Scouts and Cub Scouts, Girl Scouts and Campfires, Inc., YMCA and YWCA, numerous soccer groups and Pop Warner football, and numerous other youth-oriented organizations in addition to the broader language of “any youth organization.” The bill has cleared two committees and is up for a third reading. *How this will play out remains to be seen. Most commentators seem to believe the bill is aimed at the Boy Scouts. The Boy Scouts of America top leadership is currently debating the termination of the national ban on gay scouts and gay leaders and leaving it a local scouting group decision. The California Senate and House of Representatives have overwhelming Democrat control and Governor Brown is a Democrat. But those opposed and some commentators are pointing out that the U.S. Supreme Court has previously ruled that private organizations have the right to determine their own membership qualifications. If the bill is passed into law, once again the Boy Scouts may be headed to the courts.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

A SUPREME COURT DECISION IN WHICH WE MAY ALL HAVE A STAKE — The U.S. Supreme Court recently heard oral arguments in a case in which we may all have a stake sooner or later, namely whether patent law should permit patenting of human genes. The Association for Molecular Pathology and the American Civil Liberties Union have sued a biotechnology firm that has patented two human genes, and thus is the only company producing tests on those genes to detect mutations, mutations that may increase a person's risk of cancer. Other companies will need a license to use the patents or be barred from using the genes to create their own cancer tests. The issue before the Court, once past the emotional claims, is whether genes are a product of nature, thus not subject to patent. *The underlying issue is broader, because this issue delves into genetics, economics, ethics, and biotechnology going well beyond this company and patents on these two genes, to a much broader range of potential patents. For example, someone in the UK patented a virus forwarded for study from Saudi Arabia as part of an effort to understand a potentially very dangerous source of a potential pandemic. But without patent protection, will researchers and biotechnology companies invest the hundreds of millions of dollars to identify and defeat gene defects and potential sources of pandemics? In the not too distant future, it may be your genes being tested.*

EMPLOYMENT LAW DEVELOPMENTS

DO EMPLOYERS DISCRIMINATE AGAINST THE LONG-TERM UNEMPLOYED? — Do employers really discriminate against those out of work for longer periods, say six months or more? That was the focus of a study for the Boston Federal Reserve Bank by two economists. They found that the Beveridge Curve, which depicts graphically the relationship between unemployment rates and the job vacancies rate (and named for a British economist dating back to the 1960s), works normally across job categories, workers' ages, levels of education and skills, showing the relationship to be pretty steady. More job vacancies lead to lower unemployment; fewer vacancies and the unemployment rate does not decline and may well go up. If that is not the case, the problem may be structural unemployment. And that appears to be what is happening for those unemployed for more than six months. Employers simply don't seem interested in even considering the longer-term unemployed. Applications are simply ignored or rejected. The odds of finding employment after six months are much tougher, despite vacancies. *Therein lies a major problem. Structural unemployment does not respond to ordinary stimulus packages, more job training, and the usual incentives. It may be a form of discrimination, but so far it is not a form of discrimination prohibited by federal or state laws. So far....*

MEETINGS & TRAVEL LAW DEVELOPMENTS

TSA PRECHECK PASSENGERS TO GET A NOTICE ON BOARDING PASSES — United and some other airlines will start putting the TSA PreCheck logo on mobile and paper boarding passes. This helps to ensure passengers know their PreCheck status is recognized by participating airlines, at least at the 40 U.S. airports where PreCheck is currently offered. *For those interested in reducing the time, stress and inconvenience of typical TSA security checks at U.S. airports, qualifying for TSA Pre✓™ Participation (also called Pre-Check) status is worth the time and effort to qualify. Qualifying passengers can keep their shoes and belts on, keep computers in their briefcases, do not have to put their 3-1-1 liquids in a quart bag on display, and go through a much shorter security line. TSA and participating airlines can show you how to apply.*

REGULATORY LAW DEVELOPMENTS

FTC ADDS HELPFUL VIDEO TO ITS IDENTITY THEFT RESOURCES — The Federal Trade Commission has added a helpful video to its identity theft resource library. The video, captioned “Helping Victims Of Identity Theft,” is intended to help the public generally, but especially victims of ID theft to recognize identity theft when it happens, how to report it and to whom, and how to repair the damage it can cause. Identity theft is the FTC’s leading cause of consumer complaints, with over a million complaints received annually. *Go to the FTC’s website. www.ftc.gov, and look for this video and other FTC resources including the “Guide For Assisting Identity Theft Victims” and “Taking Charge: What To Do If Your Identity Is Stolen.” The information is informative before or after your identity is compromised. It happens to so many of us daily. As we have reported elsewhere, the IRS is also involved in taking steps to combat identity theft aimed at taxpayers.*

FTC’S NOVEL APPROACH TO BEST TECHNOLOGICAL SUPPORT — The Federal Trade Commission is looking for help on ways to address robocalls, those automated telephone calls by mass marketers that can be so annoying. So the FTC reached out for technical support, issuing a challenge to the gamers industry to come up with new and better ways to block illegal sales calls to landlines (old technology) and cell phones (newer technology). Over 700 responses were received and have been reviewed by three judges, two technically savvy FTC staff executives and a technical publication editor, using the following three criteria: Does it work? [50%] Is it easy to use? [25%] Can it be rolled out? [25%] This is pretty far out for a federal regulatory agency, but an interesting idea. *Other organizations are trying for solutions by going public and submitting questions or challenges (“group sourcing”) and garnering useful and not so useful responses — and the price is right! The FTC is offering a top money prize of \$50,000 and a separate non-cash Technology Achievement Award. The FTC is expected to announce the winners in early April. Maybe your group has a vexing problem to solve.*

TAX LAW DEVELOPMENTS

FEWER EXEMPT NONPROFITS IN 2012 — The Internal Revenue Service has published its annual Data Book for 2012, containing statistics about exempt organizations in the United States, among other things. The publication shows the number of exempt organizations in the U.S. recognized by the IRS decreased from 1,494,882 in 2011 to 1,484,818 in 2012. The Book also shows that almost three-fourths of the applications to the IRS for recognition of exempt status in 2012 came from Section 501(c)(3) organizations (including charitable, educational, scientific, and religious groups), which, along with war veterans organizations and exempt organizations created by act of Congress, are growing in number. All other classes of exempt organizations in the U.S., including trade associations and professional societies, went down in number from 2011 to 2012. *These numbers may show how important the deductibility of charitable contributions is for nonprofits, as such deductibility is available for payments to those organizations exempt under Section 501(c)(3) of the Internal Revenue Code and not other exempt nonprofits. But the Obama Administration each year, and some years more than once, proposes reducing the value of such deductions to upper income taxpayers, which would likely reduce the number of nonprofits in the U.S. even further and faster, while having a very negative impact on the ability of nonprofits to achieve their purposes for the public benefit. Another possible contributor to the overall decline may be the loss of exempt status for those entities that did not file Form 990-N with the IRS despite all the warnings in recent years that the IRS was revoking exemptions for entities which had not filed as required.*

TENNESSEE STATE BOARD TAXES CHURCH GYM AND BOOKSTORE — The Tennessee State Board of Equalization, which determines property tax exemptions for nonprofits in Tennessee, has ruled a Nashville mega church’s gym is 50% subject to local property taxes, and its bookstore is not exempt from property taxes. The board concluded the gym and bookstore were not directly related to the religious purposes of the mega church, relying on a variety of factors such as their being open to the public at large, not just people affiliated with the church; fees charged were competitive with for-profit entities; and the facilities were professionally managed. *One can argue with the rationale of the board, as the church did and continues to do, saying the facilities were directly related to its religious activities, but expect to see more such rulings as local and state governments look for tax revenues, and that often means paring back property and other tax exemptions. Other local governments continue to push “PILOT” – payments in lieu of taxes – programs at schools, colleges, churches and other exempt organizations. And why is the gym in this tax case 50% exempt?*

WILL ONLINE SALES FINALLY BE TAXED ACROSS THE BOARD? — It is beginning to look that way, as states’ needs for revenues are obvious to everyone; the New York Court of Appeals (New York’s highest court) upholds taxation of online sales in New York, turning down appeals by Amazon and Overstock.com; and legislation captioned the Marketplace Fairness Act of 2013 has passed the Senate with some bipartisan support. It faces tougher sledding in the House of Representatives. The federal bill is intended to avoid some of the pitfalls of earlier bills, including providing a small retailer exception of \$1,000,000, double the size of the exception in a 2011 bill which did not pass congressional muster. *Some states such as Illinois are already making an effort to collect use taxes on online purchases delivered to Illinois buyers by online sellers. Illinois, for example, requires Illinois taxpayers to report their online purchases on which they did not pay sales taxes or alternatively being assessed an estimated \$60 tax for each \$100,000 of reported income. One way or another, online sales will be taxed in the not too distant future. Bet on it.*

COLLEGES AND UNIVERSITIES GET FAILING GRADES FROM IRS — The Internal Revenue Service has released its final report on a Colleges and Universities Compliance Project, which involved sending questionnaires to 400 randomly selected schools and selecting 34 of them for examination based on their responses. Examination highlights included: (1) increases to unrelated business taxable income for 90% of the schools examined, totaling about \$90 million; (2) employment tax increases and penalties assessments of over \$7 million; (3) assessment of more than \$200,000 in taxes and penalties with regard to retirement plan issues; and (4) identification of some serious issues with regard to documenting the reasonableness of compensation paid to officers, directors, trustees and other employees. *The IRS report concluded that issues presented with regard to both unrelated business income and compensation “may well be present elsewhere across the tax-exempt sector.” Consequently, the IRS plans to look at them “more broadly.” In other words, the study of these schools has caused the IRS to believe that “there’s gold in them thar nonprofits!” Therefore, increased IRS scrutiny of all nonprofits is in the offing, subject, of course, to resources and priorities following the budget sequester.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

TSA MAY PRIVATIZE ITS BACKGROUND CHECKS PROCESS FOR PRECHECK — The Transportation Security Administration is considering whether or not to privatize the background checks process for applicants to TSA’s PreCheck program, which enables airline passengers to go through an expedited and less intrusive, less stressful security check line at the 40 U.S. airports where PreCheck is in operation. For now TSA is gathering information from businesses in the security field but may proceed

formal request for proposals. *One concern that has been expressed is putting a lot of detailed personal information in the hands of a private company. The PreCheck application asks for a lot of personal information, but when you consider how much personal information is already available through Facebook, LinkedIn, Google, credit card companies, banks, and the health care industry, and your tax preparers, one more company with access to personal data seems less of a leap.*

USPS SAYS NO OPTION EXCEPT TO RAISE RATES — *H&H Report Update* — A spokesman for the U.S. Postal Service commented with Congress closing the door on eliminating Saturday mail deliveries and fighting post office branch closings, the unions opposing layoffs, the USPS sees no way to meet its expenses except to raise rates again. *This will induce mailers to seek alternative delivery systems, thereby cutting postal revenues. It's a no-win solution. Various studies of other suggested solutions we previously reported are still ignored.*

H & H DEVELOPMENTS

In May . . .

Jonathan T. Howe presented two webinars for meeting professionals entitled “Sequestration... A Nasty Word and What It Means to the Meeting Industry,” and “Speakers and Entertainers and Other Things That Go Bang In The Night.” He presented a session to the Springtime Expo of a major association executives meeting in Washington, D.C. entitled “The Art of Writing and Revising Contracts in an Improving Market.” He also traveled to the State of Washington where he gave two sessions, “The Art of Writing and Revising Contracts in an Improving Market” and “Developments Affecting Not for Profits – The Good, The Bad, and The Ugly.” **Barbara F. Dunn** presented a session on “Legal Considerations in the Digital Age” for meeting professionals at a national destination management conference in Chicago. She presented a contracts workshop for association executives in Boston, and she also presented board orientations for two nonprofit organizations. **Samuel J. Erkonen** presented sessions to two national school principal associations at Lake Tahoe, California. He will also be presenting a session to a gathering of meeting professionals in Nassau, Bahamas, and then a meeting of the U.S Chamber of Commerce in Madison, Wisconsin. Following these sessions he will travel to Park City, Utah to present to a financial and insurance conference for planners. **Naomi R. Angel** will be presenting two programs for government meeting professionals at a national education conference in Orlando May 23-24: “Legal Issues Affecting Social Media Platforms” and “A Contract’s GPS: Navigating Contract Legal Issues in the Government Arena.” **Nathan J. Breen** presented a session on identity theft at a trade association’s annual educational conference. **Gerard P. Panaro** did a webinar for an independent schools business officers association on the topic of volunteers’ and schools’ liability if a volunteer is injured or injures a third party.

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