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:

JUST THE START? — Verizon has concluded it's too expensive to reinstall landline infrastructure in some areas in New Jersey that were destroyed by Hurricane Sandy, so it does not intend to do so. *We better get used to it. Some countries have skipped landlines in recent years because they were simply too expensive to install and went on to more technically advanced telephone systems. As more of us go to cell phones, why pay for two systems? Verizon and AT&T will probably feel the same. But any such change is not without its casualties, including the labor force that does the installation work, the materials for the landline installations, all the ancillary interests, the people who will lose such service against their will. And when cell phone circuits are knocked out by storms or overwhelmed by too many users trying to call, what then? Progress comes at a price that is not always obvious.*

WILL MORE EMPLOYERS FOLLOW THIS ROUTE? — A recent news article reported retail food chain Trader Joe's will cancel its health insurance for part-time employees working 18 to 30 hours a week, and instead give them a $500 lump-sum amount in January 2014 to purchase their own Obamacare health coverage on the federal and state insurance exchanges. The payment plus the Obamacare subsidies and tax credits are intended to provide the part-time employees with roughly the same coverage Trader Joe's has provided in the past at about the same cost to them, while reducing costs to Trader Joe's. *You have to wonder how many employers will take this route. Trader Joe's at least provided health care benefits to part-time workers. With the Obamacare standard that a full-time employee is anyone who works a 30-hour week and mandatory healthcare coverage is required for employers with 50 or more employees, two trends may emerge: keep part-time employees under 30 hours a week and stay below 50 employees. Neither trend will ease the unemployment and underemployment problems here.*

GOOD READING … See you in December 2013

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NOT-FOR-PROFIT LAW DEVELOPMENTS

DOES YOUR ASSOCIATION ALLOW ELECTRONIC VOTING? — Many associations have adopted or would like to adopt electronic voting as part of their routine practices, but what if the state where they are incorporated has not amended its Not-For-Profit Corporation Act to allow electronic voting? Don't stop your search there. The (federal) Electronic Signatures in Global and National Commerce Act ("E-SIGN") was specifically intended to permit electronic writings take the place of written documents with specified exceptions. E-SIGN left it up to the states to enact legislation implementing electronic documentation in place of written documents, and specifically assigned to states the responsibility for determining what constituted the necessary safeguards to ensure authenticity of the parties' signatures on such documents as contracts sent electronically. This in turn led to adoption of a model statute which was used by nearly all the states to implement their own electronic signatures and records statutes. With minor variations, the statutes say electronic records and documents can be substituted by willing parties in place of written documents, and lay out the process for authenticating signatures. Another point to keep in mind: Both parties have to accept electronic documents. It is not involuntary. *So even though your association does not have electronic voting in its bylaws, or is incorporated in a state which does not have electronic voting in its NFP Act, check to see if your state has adopted an electronic records and signatures act, and that should be sufficient to allow electronic voting rather than written or mail ballots.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

GOOGLE'S BIG COPYRIGHT WIN — *H&H Report Update* **—** A federal district court judge in New York City has dismissed a copyright infringement claim by the Authors Guild against Google after eight years of contentious litigation. The Authors Guild claimed Google's digital scanning of some 20 million books from libraries all over the world without authors' permission infringed authors' copyrights. The purpose of the scanning is to make the books searchable by author, title and subject matter, with small snippets of a book's contents available. If a person wants to buy a scanned book, Google directs the buyer to Amazon or Barnes & Noble's websites. Google does not sell books. The judge ruled the scanning project was a fair use under federal copyright law, making the search information widely available, expanding the market for authors' books, and Google was not profiting from the search project. *The battle may not be over. The Authors Guild has announced it will appeal the judge's ruling. Associations that have published books may find their books swept up in the Google project, and might generate a sale or two.*

EMPLOYMENT LAW DEVELOPMENTS

WILL LITIGATION LEAD TO FEWER INTERNSHIPS? — *H&H Report Update* **—** The recent spate of lawsuits by unpaid interns seeking compensation for current or previous internships is leading to speculation in employment circles that internships may become an endangered species, with employers deciding that the federal rules governing internships are too vague, and the risk of litigation too great to deal with the uncertainties resulting from several highly publicized lawsuits in which interns have sued for compensation. Interns have claimed they were employees entitled to at least minimum wage compensation for performing useful work rather than obtaining training of a type complying with federal rules governing interns. One company that was sued has announced it will end its internship program. *The company's announcement is not a surprise, but it will be unhappy news for many students and workers seeking opportunities for training, networking, entries to fields or opportunities to impress prospective employers. The federal rules for internships are fairly rigid, and it appears some employers did use unpaid interns to perform useful work in place of a paid employee, but a drying up of intern opportunities may be a high price to pay if intern opportunities are eliminated by many employers.*

WITH THE NEW MEDICAL MARIJUANA LAWS, KNOW THE TERRITORY — From Colorado and Washington passing laws permitting recreational use of marijuana to the steadily expanding number of states which have passed medical marijuana laws, including Illinois most recently, employers are faced with new challenges in determining just what they can do to enforce drug-free workplaces without becoming entangled in lawsuits filed by employees who claim their employers are violating the medical marijuana laws, or acting against (new) public policy, or failing to accommodate an employee's medical situation. There are some basics to keep in mind. Employers can enforce drug-free workplaces. They can discipline workers who bring marijuana to the workplace, or who are impaired while on the job. Targeting an employee's use of recreational marijuana (CO and WA) or medical marijuana in the 20 or so states that permit it for health reasons while off the job is trickier for employers because the various state laws vary in significant ways, and that means litigation decisions are all over the place. *An employer must know the statutory and case law in the employer's state, and that is evolving. There are also differences between federal and state court decisions in some states, depending on the plaintiff's theory of injury. One wild card is whether the interpretation of a claim involves federal law which prohibits marijuana as a criminal offense versus state law permitting its use for medical purposes. Now, more than ever, "ya' gotta know the territory" in your state. Before taking action on a medical marijuana situation, get good advice.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

ANOTHER REASON WHY WE DON'T LIKE TO FLY — A recent headline in the *Wall Street Journal* read "The Incredible Shrinking Plane Seat," and the story described how the airlines continue to shrink plane seats, at least in the economy section where most of us fly. Soon 17-inch seats will be the norm, down from 18. The room between seats fore and aft is also shrinking. The intent is to cram more seats into the same size cabin, and squeeze (no pun intended) more revenue from each flight. *An inch may not sound like much but you will notice it when it's gone. The article said the original jet plane seats way back in Boeing 707 days were 17 inches, and were based on the hip size of a U.S. Air Force pilot. Well, another well documented trend in the past 50-plus years is that we are bigger and heavier, and we are probably not as fit as Air Force pilots then or now. If you are uncomfortable about being squeezed sideways as well as front to back, let your airline know what you think about that – or suffer in silence.*

GET USED TO THE TERM "OPMD" — "OPMD" is the abbreviation for Other Power-Driven Mobility Devices, or such vehicles as Segways™ and golf carts in addition to the more customary wheelchairs and scooters. Why care about it? Because it may come to an office facility where you work, or mall where you shop, and for meeting planners, venues which you want to rent to others or to planners inquiring about facilities' policies for such devices at their trade shows or meetings and conferences. The basic issue is what is required of facility owners, and those wanting to use facilities, when faced with demands for accommodation by those who say they need to use such devices. *Facility owners and meeting planners should be aware the U.S. Department of Justice has issued guidelines addressing the use of OPMDs but they provide little practical direction, and there are few litigation decisions so far, and they have mixed results. The guideline, last updated in March 2011, defines OPMD as "any mobility device powered by batteries, fuel or other engines, whether or not designed primarily for locomotion." Just one more ADA issue out there that may never come up, but you never know. Better to be aware of it.*

WHY AIRLINES ARE CUTTING BACK ON LONGEST FLIGHTS — Some airlines are cutting back on their longest (e.g., 19-hour) nonstop flights despite planes that can do it. Why? High fuel costs. The longer a flight, the more fuel required and fewer passengers. *And that means less profitability. So be prepared for more layovers when flying those really long flights.*

TAX LAW DEVELOPMENTS

ILLINOIS HIGH COURT STRIKES DOWN "AMAZON TAX" — *H&H Report Update* – The Illinois Supreme Court has upheld last year's decision by a lower state court that out-of-state retailers could not be required to collect the Illinois use tax on Internet purchases. A state law passed in 2011 created what was termed the "Amazon tax" by many, as it was an attempt to force large out-of state retailers to collect and remit the tax if they had marketing affiliates in Illinois generating more than $10,000 in business during a tax year, even on sales to consumers not residing in Illinois, as long as the Illinois marketing affiliate had a link on its website that connected Internet users to the out-of-state retailer. The Illinois Supreme Court has now ruled that the tax is preempted by the Internet Tax Freedom Act ("ITFA"), a federal statute prohibiting discriminatory state and local taxes on electronic commerce. But the federal law is scheduled to expire next year unless it is reenacted, and one Illinois Justice contended the Court should have ruled on the question of whether the tax also violated the Commerce Clause of the U.S. Constitution, anticipating the state would try to collect the tax after the ITFA expired. The Court specifically refused to rule on that question. *The ultimate legal responsibility for paying Illinois use tax on out-of-state purchases falls on purchasers located in the state, including Illinois-based nonprofits. But Illinois has pursued out-of-state sellers to collect its use tax after finding direct state collection of the tax from Illinois purchasers to be difficult and impractical. Also be aware that other states' courts have ruled differently on this tax issue.*

IRS ANNOUNCES 2014 PENSION PLAN LIMITATIONS — The Internal Revenue Service recently announced cost-of-living adjustments affecting dollar limitations for pension plans and other retirement-related items for tax year 2014. Some pension limitations will remain unchanged from 2013, such as those applicable to 401(k) plans and IRAs, because changes in the Consumer Price Index did not meet statutory thresholds for adjustment. But others will change. The FICA wage base for Social Security will increase from $113,700 to $117,000, a 2.9% increase. Contributions to 401(k), 403(b) and most 457 elective deferrals remain at $17,500, and catch-up contributions to such plans (for those age 50 and over) remain at $5,500. SIMPLE plan employee deferrals remain at $12,000 and SIMPLE catch-up contributions remain at $2,500. There were minor adjustment to the adjusted gross income maximums before deductible contributions to an IRA are phased out for singles, heads of households and married couples. *For more detailed information, see IR-2013-86 dated October 31, 2013 at www.irs.gov. Start your 2014 tax planning now.*

THIS SURVEY RESULT CONTAINS NO SURPRISES — Accounting firm McGladrey's report that a survey of online retailers concluded large online retailers were less likely to think proposed federal legislation requiring retailers to collect sales taxes on their online sales would have a negative impact on profitability than smaller online retailers. The proposed legislation would exempt retailers with less than $1 million online sales from such collection duties. *"Smaller" was defined as $10 to $50 million. No surprises in this result. In fact many of the larger online retailers are pushing for such collections as a competitive advantage against their smaller competitors.*

SEND NO UNSOLICITED FAXES WITH "INCIDENTAL" COMMERCIALS — A federal appellate court in Chicago has held an attorney's unsolicited faxes including business advice in the form of a newsletter, but also calling attention to the availability of the attorney's services, violated the (federal) Telephone Consumer Protection Act's prohibitions on unsolicited faxes with commercial messages. The attorney argued that any commercial message in the thousands of faxes he sent was 'incidental" to the business advice he provided, which occupied about 75% of each fax, and he contended that the Federal Communications Commission had adopted a rule implementing the Act that said such "incidental" ads were not illegal. But the appellate court said that there was no "incidental" exception to the TCPA's prohibitions on sending unsolicited faxes because, even though the FCC had the authority to issue regulations implementing the statute, anything the FCC might have said about "incidental" faxes was not a part of any duly promulgated regulation. Instead, it was, perhaps, a declaration of the FCC's enforcement plans, which the U.S. Supreme Court had said should be ignored by the courts, like any legislative history "untethered" to either the TCPA or duly adopted regulations. *We have warned before about sending unsolicited faxes. Violations of the TCPA are so dangerous because attorneys are filing class action lawsuits against those sending unsolicited faxes. This case involved such a class action suit, which may result in the defendant having to pay over $4 million in damages. Readers ought to send no unsolicited faxes with a commercial message, "incidental" or otherwise, except to those with whom they have an "established business relationship," taking advantage of an exception to the TCPA's prohibitions that is recognized in the law. But even then, recipients must be told in the faxes how they can stop receiving future messages, which the attorney in this case didn't do.*

NEW TELEMARKETING AND SOLICITATION REGS TAKE EFFECT — New telemarketing and telephone solicitation regulations issued by the Federal Communications Commission took effect October 16. The Federal Trade Commission has also been involved in regulating telemarketing and telephone solicitations, and the FTC and FCC have taken turns issuing rules on the subject. The FCC's new rules that just took effect are significant in that they prohibit making of any telephone calls using an automatic telephone dialing system or an artificial or prerecorded voice to any wireless phone, with certain exceptions, one of which is calls made by or on behalf of a tax-exempt nonprofit organization and with the prior express consent of the called party. The new regulations also prohibit making telephone calls to any residential line using an artificial or prerecorded voice, again with certain exceptions including all calls that are not made for a commercial purpose, are made with the prior express written consent of the called party, or are made by or on behalf of a tax-exempt nonprofit. Importantly, these new regulations do not include an exception for calls made to one who has an established business relationship with the caller (unlike other federal regulations, such as those on unsolicited faxes, for example). *These are just some of the rules with regard to telemarketing and telephone solicitation. Anyone engaged in such activity should get legal advice concerning all applicable laws.*

OSHA'S MOST FREQUENTLY CITED STANDARDS — The Occupational Safety and Health Administration has announced its ten most frequently cited standards during FY 2013 (October 1, 2012 to September 30, 2013). Fall protection-construction (29 CFR 1926.501) leads the list with more than 8,000 cites, followed by the hazard communication standard (29 CFR 1910.1200) cited more than 6,000 times. The list includes scaffolding, respiratory protection, powered industrial tools, hazardous energy and powered industrial truck standards among others most often cited. *Associations may want to direct their members' attention to the OSHA site, Frequently Cited OSHA Standards, where they can find the overall list, and drill down to generate a report of the of the most frequently cited federal or state OSHA standards by a company's SIC code and number of employees.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

SOME TIPS FOR MORE PROTECTIVE PASSWORDS — We often see advice to change our passwords from time to time, and suggestions on what makes for better passwords. But how many of us follow such advice? Consider this more such advice. Passwords should be eight or more characters. A combination of letters and numbers is better than just letters. Insert some caps and lower case combinations. *One simple technique is to use a sequence of words from a song or saying that resonates with you, and take the first or second letters of the saying as your password, e.g., "I pledge allegiance to the flag of the United States" becomes "Ipa2tfotUS." Easy to remember, upper and lower case, and at least one number used. Don't forget the other advice to change your passwords from time to time. And beware of leaving a list of all your passwords where they can be easily discovered. Protecting your personal and business confidential information should be worth the occasional inconvenience and effort involved.*

MISSION IMPOSSIBLE? — Senator Tom Coburn (Rep.-OK) has undertaken a really difficult challenge, and the odds of pulling it off in football-crazed America are daunting. He had the temerity to introduce legislation ending the National Football League's tax-exempt status as a §501(c)(6) "business league," on the basis that the NFL does not broadly promote football but is instead focused solely on its own NFL brand and that of its 32 member teams. His proposed legislation would end tax-exempt status for any professional league with revenues over $10 million. This would take in not only the NFL but most of the other professional leagues including the National Basketball Association , the National Hockey League, the Professional Golfers Association, the Ladies Professional Golf Association, the United States Tennis Association, and other less well known leagues such as the National Hot Rodders Association and the Professional Rodeo Cowboys Association. But the NFL is the primary target. *What? Challenge the NFL? Subject it to a corporate income tax of 35%? Horrors! You can bet the $15 billion paid by ESPN just for the rights to televise Monday Night Football will buy a lot of lawyering and lobbying to blitz Senator Coburn's bill and put him in a penalty box*.

H & H DEVELOPMENTS

In November . . .

Jonathan Howe did a webinar for meeting professionals entitled, "When Negotiating, Don't Be A Turkey" and a second webinar for Meetings & Conventions on contracts and risk management entitled, "Do You Need a Lawyer For That?" **John Peterson** did a webinar on the topics of antitrust, product liability and non-disclosure agreements for a national association and made a presentation on legal and regulatory developments and trends to an international association. **Sam Erkonen** gave a presentation in Boston at a meeting for financial and insurance conference planners. **C. Michael Deese** co-presented an educational session entitled "Association Management Company Best Practices" to a group of AMC owners on November 14 in Oak Brook, Illinois. The session was co-sponsored by the Philadelphia Convention and Visitors Bureau and The AMC Institute. The session will be repeated in Washington, DC on December 5.

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