

# 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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**START WORRYING** — Wells Fargo reports the baby boomer generation (those born between 1946 and 1964) are retiring at the rate of 10,000 per day. Over the next 25 years, those projected to draw Social Security and other retirement benefits will grow by almost 37 million but the working age population (ages 20-64) is projected to grow by nearly 21 million. *So where will the contributions come from to pay anticipated Social Security and Medicare benefits? Increases in the retirement age or FICA rates, elimination of the wage ceiling, income tax increases or more funds from more deficit spending, or even means testing to reduce wealthier retirees eligible to collect? The so-called third rail of politics has not gone away. We all had better start saving more.*

**SAME OLD WARNING** — Some things don't seem to change much. A crisis arises, people are in need, charitable solicitations quickly follow, and almost sure to follow them are warnings from the Internal Revenue Service, the Better Business Bureau and others to beware of fraudulent appeals. *We are already seeing the solicitations and the warnings in connection with the Ebola outbreak. Be very wary of any solicitation from someone you may never have heard of or from before.*

**BUT IS IT WORTH IT?** — The federal Job Corps is coming in for some overdue scrutiny. It costs the taxpayers about \$1.7 billion per year, making it the most expensive job training program at the Department of Labor. It costs about \$45,000 per year per attendee. About 60% do not complete their training, and nearly half who do are unable to find work in the fields in which they were trained. Still the program dating back to 1965 is popular with Congress and not likely to be cut or changed. *Shades of Lyndon Johnson and the Great Society. Some vestiges of it remain. The Job Corps illustrates another inside-the-Beltway reality. It is one of some 45 or so job training programs created by Congress. They are seldom done away with, scrutinized carefully, or tested for effectiveness. Guess who pays.*

**HERE'S AN UNEXPECTED HEADLINE** — "NSA Offers Year-End Tax Tips For Individuals" — What is the NSA doing offering tax tips? Is the NSA that far into our daily business? It turns out this NSA is the National Society of Accountants, not that other one. *Admit it. You were surprised too. It's also in D.C. So many abbreviations...*

GOOD READING ... See you in December 2014

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**CIAC AND THE BATTLE AGAINST FRAUDULENT CERTIFICATION MARKS** — Fake and fraudulent certifications are all too common these days, whether unauthorized copies of legitimate certification marks or phony marks. A little-known organization was formed in 2008 to combat such practices, the Certification Industry Against Counterfeiting. Its membership is primarily Canadian, U.S. and European, and it has links to Interpol. Its purpose is to combat counterfeit certifications worldwide. *Many products sold in international trade bear counterfeit certification marks and the fakes can be very difficult to distinguish from the real thing. Associations are well advised to police their own certification marks very carefully. Their reputations are on the line. Good intentions will not be enough. Become acquainted with the CIAC and its efforts.*

## EMPLOYMENT LAW DEVELOPMENTS

**NEW PROTECTIONS FOR PREGNANT EMPLOYEES TAKE EFFECT** — Amendments to the Illinois Human Rights Act taking effect in January 2015 provide new protections to pregnant employees. The amendments require all employers, regardless of size, to provide reasonable accommodations to employees for pregnancy and related medical conditions, as well as job-protected unpaid leaves of absence for pregnant workers. However, the Act lists many possible “reasonable accommodations” (including light duty and job restructuring) and makes it unlawful for an employer to require that an employee accept any accommodation or take any leave that the employee hasn’t requested, putting the burden on the employee to make an appropriate request. Also, employers are only required to provide accommodations to the extent they will allow the pregnant employee to perform the “essential functions” of her job and do not impose an “undue hardship” on the employer. New notices of employee rights under the Act, developed by the Illinois Department of Human Rights, must be posted by all Illinois employers, as well as included in any employee handbook an employer provides. *These new requirements are in addition to those provided under federal law, and they apply regardless of whether an employer discriminates by treating pregnancy differently than other temporary disabilities. Illinois employers and employees alike will want to familiarize themselves with the new requirements, and, more than ever, Illinois employers will want to create and distribute worker job descriptions that include “essential” job functions.*

**WILL OTHER STATES FOLLOW MICHIGAN ON THIS ISSUE?** — A Michigan appellate court has upheld rulings by three state trial courts that termination for medical marijuana use did not constitute a basis for denial of unemployment compensation to the terminated workers. There was not a claim the workers were impaired or using marijuana at work, simply that they failed drug tests due to their use of medical marijuana which is authorized by the Michigan Medical Marijuana Act (“MMMA”). The MMMA includes a provision saying use of medical marijuana by a qualifying patient shall not be subject to a civil penalty. Denial of unemployment compensation was construed as a penalty. *So an employer is not required to accommodate a worker’s use of medical marijuana and may terminate the worker for failing a drug test, but the worker may not be penalized by loss of unemployment compensation for activity permitted by Michigan law. State supreme courts in other states have upheld terminations of workers for medical marijuana use (and Colorado’s court recently heard argument on the issue) so it will be interesting to see if other states follow suit on the unemployment compensation issue.*

**A WAIVER IS A WAIVER IS A WAIVER** — A federal appellate court in Atlanta, GA affirmed summary judgment for the defendant employer Hartford Fire Insurance Company on a worker’s claim that Hartford had interfered with her Family Medical Leave Act (“FMLA”) rights and then retaliated against her for exercising those rights. Hartford defended on the basis that in return for 13 weeks’ severance pay the employee had

signed a waiver of all claims including FMLA claims against Hartford. The employee sought to avoid the waiver by arguing she gave up past claims, and this was a prospective claim she had not yet filed. The trial and appellate courts did not buy that theory because all the events the employee cited occurred before she executed the waiver. *Prospective claims may not be waived but this was not a prospective claim, said the court. The court also rejected her argument that her waiver was not “knowing,” saying she had been in the insurance industry for 21 years, had 21 days to review the severance agreement and it urged her to get legal advice.*

## INTELLECTUAL PROPERTY LAW DEVELOPMENTS

**“IT’S ELEMENTARY, MR. WATSON”** — How often do associations and other entities enter into business transactions in which the negotiations include a promise by each party to maintain the confidentiality of information shared between the parties during the negotiations or even during their ongoing business relationship? This elementary practice was the subject of a recent federal trial court’s summary judgment decision, affirmed on appeal in Chicago, in favor of a defendant accused of misusing confidential information obtained during a business negotiation and brief business relationship before the relationship was terminated by the defendant company. The plaintiff revealed design information and samples of a product which the defendant produced for the plaintiff before striking out on its own and producing a competing product. The plaintiff, relying on the parties’ standard agreement language not to use the other party’s confidential information, sued for fraud, breach of contract and trade secret misappropriation. But the trial and appellate courts said the plaintiff company did not take reasonable steps to maintain the confidentiality of any information it revealed to the defendant, therefore it was not confidential. The information was not marked confidential; it was not kept under lock and key or other security; those to whom it was revealed were not required to sign confidentiality agreements. *The moral of the story is that it is not enough to have a confidentiality agreement in place. When push comes to shove, courts will look at what the parties actually did to treat the information as confidential. We see lots of contracts with the right wording about confidentiality of information shared, but little that is actually done to live up to the wording. Thus, it’s likely ineffective. Pretty elementary.*

## REGULATORY DEVELOPMENTS

**FTC STAFF SAYS NPIA EXEMPTION APPLIES TO DRUG PROGRAM** — The staff of the Federal Trade Commission issued an opinion letter stating a prescription drug program for the benefit of a group of nonprofit schools, colleges and universities appears to come within the Non-Profit Institutions Act (“NPIA”). The NPIA provides an exemption for some nonprofit entities from the strictures of the Robinson-Patman Act, a seldom-cited federal statute which addresses price discrimination between competing customers. The opinion letter says the proposed program will only benefit nonprofit entities eligible for the NPIA exemption; their purchases are for their own use; and the program appears to be structured so that no ineligible for-profit entity will benefit. *Once a potent tool against illegal price discrimination for federal regulators and plaintiffs’ antitrust attorneys, we seldom encounter regulatory or plaintiff citations to the Robinson-Patman Act or the even more obscure federal statute, the Non-Profit Institutions Act. But they still are on the books and should be kept in mind for some situations.*

**FTC PROVIDES AN ANTITRUST LAW PRIMER** — The Federal Trade Commission has provided an antitrust law primer on its website which is a very useful summary of federal antitrust law that associations might want to download, print out and have available as reminders for staff members, officers and directors and members. The primer is basic and in plain English, not loaded with legalese. The primer is divided into segments, with subdivisions going into more detail. Of particular interest to associations are the segments on Dealings With Competitors, Dealings in the Supply Chain, Spotlight on Trade Associations, and Other Agreements Among Competitors, all topics of direct import to association staff, member volunteers and their attorneys. *Check it out at [www.ftc.gov/tips-advice/competition-guidance-guide-antitrust-laws/](http://www.ftc.gov/tips-advice/competition-guidance-guide-antitrust-laws/).*

**FOUNDATION ALLOWED A FOREIGN SUBSIDIARY** — The Internal Revenue Service, in response to a request by a foundation formed to support foreign-born orphan children, has ruled the foundation can establish a controlled subsidiary in a foreign country for its exempt purposes, and can send some of the contributions it receives to that subsidiary, without adversely affecting its tax-exempt status. In addition, the IRS ruled that tax deductions claimed by donors to the foundation would not be disallowed because foundation money was being transferred to the subsidiary. *Key to the IRS ruling was the control and oversight that the U.S. foundation exercised over the subsidiary; the subsidiary and all of its funds were irrevocably dedicated to the foundation's charitable purposes; and the absence of any restrictions on the complete discretion of the foundation's board to determine the extent of the subsidiary's funding by the foundation.*

**LOW INCOME HOUSING CORPORATION DENIED EXEMPTION** — The Internal Revenue Service has ruled that a nonprofit corporation providing low income housing on a cooperative basis was not entitled to a federal income tax exemption. The residents served by the nonprofit were also, by virtue of their residency at its property, members and directors of the corporation. Consequently, the IRS concluded that the nonprofit operated for the private benefit of individuals who were in control of its operations, and the IRS denied exempt status on that basis. *Apparently, if the residents had not been given the right to vote and control how the corporation was run, so that the corporation was controlled by other people, who might not have had low incomes qualifying them to live there, the exemption would have been granted. Strange, but we guess there is such a thing as a nonprofit giving too many benefits to its targeted recipients if those benefits involve control over their living conditions!*

**TEA PARTY LAWSUITS DISMISSED** — *H&H Report Update* — A federal district court in the District of Columbia has dismissed lawsuits filed by several Tea Party-type organizations against the United States and Internal Revenue Service officials alleging constitutional and statutory violations in targeting nonprofits with conservative-sounding names for special scrutiny in IRS reviews of applications for recognition of tax-exempt status. While the court found that some of the allegations in the complaints filed by the Tea Party groups did not properly state a claim upon which relief could be granted, the court also dismissed the complaints because tax-exempt status had ultimately been recognized by the IRS for some of the plaintiffs, making their cases “moot” (not a live controversy). In addition, the court noted that the IRS had publicly announced that the conduct complained of by the organizations had been suspended, and since the IRS implemented changes in the exemption application review process to eliminate the practices complained of, the court was satisfied the IRS conduct in question would not recur. *Former-President Reagan said about the former Soviet Union, “Trust, but verify.” Apparently, we are supposed to join this court in trusting the IRS on appropriate scrutiny of exemption applications, but the ability to “verify” is questionable when so many IRS review procedures are kept secret, email messages seem to disappear at convenient times, and government officials take the Fifth Amendment rather than testify to Congress about controversial IRS actions.*

**SOME YEAR-END TAX TIPS FROM THE IRS** — The Internal Revenue Service offers some year-end tax tips to avoid nasty surprises when filing 2014 income tax returns. Adjust your withholding payments up or down by filing a revised W-4 to avoid over and underpayments. The self-employed should review their 2014 income and see if their estimated tax payments are still in the ballpark to avoid penalties. Any changes such as marriage, divorce, birth of a child or death of a family member may require changes in withholding or a W-4 filing. *Adjust before December 31, 2014 to avoid tax penalties or other unpleasant news such as an audit.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**HOW DO YOU LIKE AA'S NEW FREQUENT FLIER PROGRAM?** — American Airlines has announced some changes to its frequent flier program resulting from its merger with US Air. American will combine the mileage totals for fliers with dual accounts and elite-qualifying miles. American will keep its three classes of elite fliers which differs from US Air's four elite classes. American will not shift to the revenue-based frequent flier approach to which United, Delta and some other airlines have shifted, at least not at this juncture. *Airlines' frequent flier programs are in flux as airlines try to make them work better for their best-paying customers without losing their budget-minded fliers. The shift to revenue-based programs is one such trend. United just raised some of its revenue requirements for elite status in addition to flight miles. It's getting ever more complicated to figure out each program's requirements.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**SOME TRENDS MAKE YOU WONDER** — If Internet Use Disorder (“IUD”) is deemed a disability, will employers be expected, even required, to accommodate an employee claiming excessive Internet use is an addiction? Does the Americans With Disabilities Act go that far? Is every addiction the American Psychiatric Association comes up with, and IUD is a recent addition to the APA's manual, going to push the bounds of workplace accommodation farther out? These questions are not completely hypothetical. There is a reported case of an employee seeking treatment for his alcoholism as well as his use of his Google Glass device about 18 hours a day. *IUD is a very general term for a lot of different activities so it is difficult to anticipate what sort of Internet-related behaviors an employer might have to address in the workplace. While this example was not a workplace accommodation case, the potential for an employee seeking some sort of accommodation for this sort of disorder cannot be ruled out. How an employer could accommodate such a disorder while expecting the employee to carry out his job responsibilities will take some creativity to avoid an undue burden.*

**SOME GOOD NEWS AND NOT-SO-GOOD NEWS** — *H&H Report Update* — Word is out that major credit card issuers Visa and MasterCard will have microchips (the so-called chip & pin device) replacing the current magnetic stripe technology, which is found on most U.S. credit cards, by the end of 2015. Chip & pin technology uses the Europay MasterCard Visa (or EMV) smartcard standard that is used elsewhere in the world, and is considered less vulnerable to hacking. It is anticipated that about 70% of credit cards and 40% of debit cards will be issued with chip & pin microchips. *But even these cards are still vulnerable to hacking, so some security industry experts recommend encrypting payments. Another drawback is the new cards will be issued with chip & signature rather than chip & pin requirements. Signatures are widely ignored; having to insert a PIN number provides more protection. Watch out for efforts to shift liability for fraudulent transactions to consumers if they do not use the chip & pin cards after they are made available. First came issuer resistance to changing to such cards; next will be an effort to penalize those who do not promptly shift. Sigh....*

**IT'S PHISHING SEASON — AND WE ARE THE FISH** — Internet security experts are reminding us that the holiday shopping period is the prime phishing season, and we are the fish expected to take the bait. Two of the most common forms of bait are messages disguised to appear as if they are legitimate messages from Amazon or eBay where many of us shop. Think your way through such fake receipts and delete them without opening them. Other common fake messages this time of year appear to be confirmations from airlines or hotels because so many are traveling. *This is no time to be careless or curious. Did you order something you forgot about? No, you didn't. These fake messages can search for your account data or take control of your computer. Don't cooperate! Delete, delete, delete. Do not open fake messages.*

## H & H DEVELOPMENTS

### In October . . .

Our firm was recognized as one of the 2015 Chicago's Top Ranked Law Firms™ by Martindale-Hubbell's Preeminent Attorneys rating system.

### In November . . .

**Jonathan Howe** presented “Contract Law and Events” to a meeting of executive directors at the meeting of an association of orthopedic surgeons. As part of a series of articles addressing contract disputes, he also presented a webinar for meetings and conventions professionals entitled, “Resolving Problems Out of Court .”

**Samuel Erkonen** presented “Managing Risk in the World of Social Media” for the Chicago Bar Association Trade and Professionals Association Committee. He also presented “Ethics & Risk Management: How the General Rules Apply to Nobody in Particular” for a CMP Summit.

**Naomi Angel** presented an Antitrust Overview to a Train the Trainers session for a certification program of an association of manufacturers.

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### Contributors to this issue...

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