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:

DO YOU AGREE THERE IS A SHIFT TO SELLERS' MARKET? – The hospitality industry trade press is awash in predictions of a shift from a so-called buyers' market to a sellers' market. But with the current uncertainties in the business climate, will association and corporate buyers support such a shift? *It may be too early to call the tune on this trend. Economic gloom is pervasive, the Obama administration is beset with crises, Congress is a war zone, another combative election cycle is upon us and stifling compromise, businesses are reluctant to hire, indecision is rampant. More than ever, associations must sell their value to their members and prospects. Sellers' market? What do you think? Proceed warily.*

GOOD NEWS OR BAD NEWS? – Is it good or bad news to read U.S. households have reduced their outstanding debt load by approximately $1 trillion since 4th quarter 2008? It's good news in that lower debt loads mean American consumers can return to their free-spending ways which means more demand, and more demand means factories have to turn out more goods and even hire more workers. But it is bad news if American consumers get into credit problems again. *Good microeconomics, reducing household debt loads, may be bad macroeconomics, i.e., not spending and supporting those making and selling goods and services. During wartime it used to be patriotic to scrimp. Now is it more patriotic to spend in wartime? That is a hard sell to many of us who were raised to avoid debt and before the advent of today's credit cards.*

WHAT IF ASSOCIATIONS WERE RUN LIKE THE GOVERNMENT? – Congress is so pleased with itself for coming to an agreement to not shut down the government September 30, instead kicking that can down the road through November 18. Of course we can anticipate that will lead to more shutdown threats and political posturing come mid-November, especially when tied to the doings of the so-called supercommittee. *If an association were run this way, the members would (1) resign; or (2) vote those doing it out of power; or (3) sue them for misfeasance or malfeasance. Watch how Congress operates – avoiding difficult decisions, unrealistic finances, personal rancor, disregarding results – and run your association completely the opposite.*

GOOD READING … See you in November

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NEW "NEW" D.C. NONPROFIT CORPORATION ACT, EFFECTIVE JANUARY 1, 2012 – The District of Columbia recently enacted a totally revised (and very lengthy) nonprofit corporation act which will become effective January 1, 2012. Every nonprofit organization, industry trade association, professional society and foundation incorporated in D.C., whether under the so-called "Old Act" (i.e., incorporated pre-1962), or under the so-called "New Act" (i.e., the D.C. Nonprofit Corporation Act effective 1962), will need to review its articles of incorporation, bylaws, and operating and governance policies and practices to have confidence the organization is in compliance with the new "new" D.C. Nonprofit Corporation Act and able to take full advantage of the new benefits as well as meet the new obligations of the new statute. The new statute is much more detailed than the current D.C. Nonprofit Corporation Act, with new procedures for internal governance, including provisions allowing a "superbody" of delegates chosen by members to elect the Board of Directors, and new record-keeping requirements, new provisions regarding directors' fiduciary duties and officers' and directors' indemnification, and new provisions regarding officer positions. Overall, the new Act appears to be an improvement over the 1962 Act. Among other things, under the new statute "Old Act" nonprofit corporations will be required to file a statement with D.C. corporate authorities within two years of January 1, 2012, referencing various corporate information but may not become subject to the governance provisions of the new statute. "New Act" nonprofit corporations will want to act appropriately to file "elections of coverage" under the new statute. "Old Act" nonprofit corporations incorporated in D.C. but not now conducting business in D.C. will not need to follow the new reporting requirements and maintain a D.C. registered agent. *We will be happy to help you navigate your way through the new "new" D.C. Nonprofit Corporation Act and help your organization chart its course for the most appropriate and beneficial route for its members and leadership to follow.*

SOCIAL ENTERPRISES TAKE A NEW FORM – In recent years, nine states including Illinois have amended their Limited Liability Company and partnership laws to provide for a special form of social enterprise – the Low-Profit Limited Liability Company or L3C – designed to secure private sector as well as foundation investment. In a recent presentation by the Chicago Chapter of Association of Fundraising Professionals, it was noted that 65 L3C entities have been established in Illinois as of June 2011. Several charitable and educational organizations in Illinois have formed specialized Social Enterprises to pursue a variety of community improvement efforts, including major employment initiatives for vulnerable populations. In Illinois, such enterprises file as regular corporate or partnership taxpayers with the IRS, and send a copy to the charitable oversight bureau of the Illinois Attorney General's office. *One can expect to see more such well-organized and well-capitalized community and social enterprises, given cutbacks in many public human service agency budgets, and the growth of social networking business ventures which seek community partners to reach customers in underinvested communities.*

UNIVERSITY WON'T APPEAL DECISION ON E-MAIL SUBPOENA – *H&H Report Update* – Northwestern University has decided not to appeal a judge's decision that allowed the Cook County State's Attorney to subpoena over 500 e-mails written to and from journalism students, their professor and an assistant relating to a murder case. The students were investigating the conviction of Anthony McKinney for the murder of a security guard in 1978. After the investigation, the Center on Wrongful Convictions at the Northwestern School of Law filed a petition seeking to have McKinney's conviction overturned, and that petition is still awaiting a hearing. In the meantime, the State's Attorney served subpoenas, demanding the e-mails, hundreds of pages of student interviews with witnesses, and student memos as well as student grades and the syllabus

for the course. Northwestern fought the subpoenas at first, but now has acquiesced, and earlier this year accused the professor of making false and misleading statements to the university regarding the course, and placed him on leave from teaching. *The professor in this case has questioned whether, "[I]f the subpoena virus takes hold here, it may spread uncontrolled," and the State's Attorney's Office has admittedly subpoenaed materials in a second murder investigation conducted by the university's journalism students. Other schools should be aware that this sort of thing may happen to them and their students. But then, this is Chicago. What happens here may happen nowhere else, but don't count on it.*

REGULATORY LAW DEVELOPMENTS

NLRB VIEWS ON SOCIAL MEDIA AS PROTECTED ACTIVITY ARE EVOLVING – The views of the National Labor Relations Board regarding the use of social media by employees are evolving, as seen in a flurry of decisions and orders coming down since the widely publicized February 2011 decision in which the NLRB charged a Connecticut company with infringing the rights of an employee to engage in "protected activity" under the National Labor Relations Act ("NLRA") when she was terminated for derogatory remarks made on her Facebook page after hours about her supervisor. The worker was ultimately reinstated and the company was required to restate its position on employees' use of social media about their jobs and employer. Since last February there have been similar decisions around the country mostly upholding employees' use of social media sites, including Facebook and Twitter, to comment (grouse?) about their working conditions, their employers, and so on. But not all such activity is protected. The NLRB seems to be heading toward a policy that protects comments in social media related to an employee's situation at work, but does not protect comments unrelated to the workplace or conditions there which an employer finds unacceptable. *The NLRB has a Division of Advice responsible for issuing opinions on difficult or novel labor issues. Social media disputes are currently regarded as falling in that category. If it is difficult for NLRB enforcers, how about companies trying to figure out where the line is the company should not cross?*

TAX LAW DEVELOPMENTS

NOT THE HEADLINE THE IRS WANTS TO SEE RIGHT NOW – The Internal Revenue Service cannot always pick and choose the timing of headlines it would prefer not to see, so the blaring news recently that 1,470 millionaires had not paid any income taxes in 2009 came at a particularly bad time given current economic upheavals. Some millionaires escaped income tax due to legal deductions, tax-free income from municipal bonds, charitable contributions, and other exemptions, also called loopholes if they don't apply to your situation. *Wasn't the dreaded Alternative Minimum Tax or AMT imposed by Congress a number of years ago supposed to put an end to this? Back to the drawing board….*

NOT QUITE WHAT MOST ILLINOIS TAXPAYERS PROBABLY HAVE IN MIND – A recent item in an online report from the Republican Senate Leader in Illinois noted the following use of taxpayer refund dollars. An Illinois taxpayer has the option of designating one of ten listed charities to receive some or all of a refund owed the taxpayer who overpays his/her state income tax. The taxpayer simply checks a box on the return form and says how much should go to the selected charity. The senator's report says the Quinn administration is "borrowing" those taxpayer refund dollars to pay state bills. The Quinn administration says not to worry, the borrowed money will be repaid. *Not to worry? Repay? Illinois has the second worst credit rating of any state, trailing only California, and routinely is six months late or more in paying creditors including not-for-profits. If this gets out, taxpayers may be more inclined to seek a full refund and have the option of making a contribution by check directly.*

EMPLOYMENT LAW DEVELOPMENTS

COURT ENTERS BASIC ADEA LAW DECISION – A federal court in Chicago entered summary judgment on behalf of the nonprofit U.S. Soccer Federation ("USSF"), the governing body for soccer in this country, rejecting an age discrimination complaint filed by a soccer referee against the USSF. The referee alleged the USSF did not assign him to work Major Soccer League games because of his age. The court quickly disposed of his complaint, finding by his own admission that he was an independent contractor, and consequently the Age Discrimination in Employment Act ("ADEA") did not apply to him. Furthermore, the court looked at the five-factor test used in federal courts to distinguish between employees and independent contractors and found they also established that he was an independent contractor, not an employee. The court noted he could accept or reject assignments, he had authority to make game decisions, he could work a variety of different leagues, he only received expenses for USSF-sponsored games and not other games he refereed, and he had specialized training and skills. *First and foremost, the ADEA protects employees, not independent contractors. Keep that in mind whenever you encounter an age discrimination claim. Check employment status first.*

BEWARE OF THOSE AFTER-HOURS PHONE CALLS WITH STAFF – A Minnesota court recently ruled against a former supervisor who sued Wal-Mart for discrimination based on her termination for talking on the phone with an employee for some 90 minutes after work hours. Their conversation covered work-related and personal matters. The employee was not paid for the time she spent on the phone with the supervisor. The supervisor's store manager learned about the call, insisted the worker be compensated for her "off the clock" time, and terminated the supervisor for breaking a Wal-Mart policy prohibiting work "off the clock." The supervisor who had previously filed race discrimination claims sued. An appellate court not only dismissed her claim but praised the company for adhering to the requirements of the Fair Labor Standards Act ("FLSA"). *While there was obviously more to this story, association executives and supervisors should keep in mind that work-related phone calls, and even e-mail and text messages, after working hours to nonexempt staff may be regarded as work for FLSA compensation requirements. You might not think so but employees and courts might see it differently.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

COUNT ON IT – HIGHER FARES AND FEWER FLIGHTS – With airlines looking at higher fuel prices and other costs, and just maybe fewer flyers in this down economy, airlines are responding by decreasing their flight schedules. Fewer flights mean greater load factors, fewer empty seats, lower costs, an opportunity to increase fares, and maybe even profitable operations. *But it also means if your flight is delayed or cancelled, you have fewer options to change flights or make alternative flight arrangements. With the increase in cancellations this year due to weather and to the new tarmac rules, flying is all too often anything but routine. And the holidays will soon be upon us.*

MEETING PLANNERS CAN RELATE – The Justice Department was widely reported to be holding meetings and conferences with outlandish expenses, most notably $16 muffins at a breakfast. If nothing else in the article resonated, that allegation did. The story was based on an auditor's review of certain Justice Department expenses. Whatever else turned up in the audit, that particular one turned out to be the per-person charge for a package of fruit, baked goods, beverages and service including gratuity. *Anyone familiar with meal charges at D.C. hotels – and many other venues – would recognize that was pretty much the norm. Most meeting attendees, and the public and apparently government auditors and reporters, have little concept of what hotels and other meeting sites charge for food and beverages at receptions and meals. Ask any meeting planner.*

RELEASE UPHELD IN PARTICIPANT'S PERSONAL INJURY LAWSUIT – An Illinois appellate court has upheld summary judgment in favor of bicycle race organizers, sponsors, various individuals and a medical facility sued by a participating cyclist injured in a collision with a nonparticipant during a practice run. The cyclist alleged the defendants in charge of the race had said the race course would be closed to nonparticipants, and alleged their negligence in not preventing a nonparticipant, a minor on a bike, on the race course which used public streets as the cause of the accident and his injuries. The defendants relied on a written release the cyclist had signed assuming all risks and waiving any claims against them arising out of the event. It specifically mentioned collisions as a potential hazard. The trial and appellate courts had no problem finding the release trumped the cyclist's claim that the collision was not foreseeable. *Event planners should always consider whether requiring participants to execute a release is appropriate considering the nature of the event and the risk of potential liability for the event managers and sponsors. We can help you craft a release appropriate to your circumstances.*

Intellectual Property & Computer Law Developments

NO CLASS ACTION FOR GOOGLE TRADEMARK PLAINTIFFS – In a substantial legal victory for Google, a federal trial court in Texas has refused to certify a trademark infringement case pending against Google as a class action. As others have alleged in similar lawsuits, the plaintiffs claimed that Google was infringing their marks by presenting users with competitive offerings in response to searches for the plaintiffs' services. However, the plaintiffs in this case requested that the court certify the case as a class action, which would permit any party injured by Google's AdWords service to be included in the litigation. The court rejected this approach and held that the facts and circumstances unique to the comparison between various trademarks meant that there was insufficient commonality between the members of the class the plaintiffs had urged the court to certify. *While the court's ruling did not impact the viability of the plaintiffs' infringement claim, it is a major victory for Google as it would appear that any trademark owners that wish to take issue with Google's AdWords program must face off with the search giant directly . . . a daunting and expensive proposition.*

Other Issues, Trends & Developments

ONE MORE THING ABOUT THE FED LOWERING LONG-TERM INTEREST RATES – With the focus on the Federal Reserve Board's effort on September 21, 2011 to lower long-term interest rates, something that might be overlooked in association circles is that if the Fed is successful in keeping interest rates down, this should also mean that the expected returns on conservatively invested association reserve funds are also likely to decline. Many associations limit their investments to federal funding instruments and other investments such as money-market funds regarded as ultra-safe, avoiding equities. But the returns on federal funds are at historic lows and money-market funds are in the same low rate of return boat. *With revenues depressed by member losses and fewer attending industry functions, associations are being squeezed just as their members are. This might be cause to review investment policies for reserve funds to determine if they are realistic in today's investment climate or at least call for income budget revisions.*

WHY EMPLOYERS ARE CONFUSED ABOUT WHISTLEBLOWING RULES – Accounting firm Selden Fox offers one explanation why so many employers, employees and their legal advisors may find the federal rules on whistleblowing such a confusing thicket, citing some 21 different federal laws with their own definitions and processes. *Ouch! And remember the Sarbanes-Oxley Act ("SOX") extends whistleblowing rules to not-for-profit entities. Get knowledgeable advice regarding the procedures you need in place on whistleblowing issues.*

USEFUL HARVARD BUSINESS SCHOOL ADVICE FOR NEW (AND OLD) BOSSES – An article from the Harvard Business School contained some useful nuggets of information for new CEOs, but experienced CEOs and executives should pay attention too. Too much time spent giving orders may make you a decision bottleneck. If you are in too many meetings trying to "run" the company, maybe you are focusing on the wrong things, spending too much time being tactical instead of strategic. Do you know where you really stand with your board of directors? Are you focused on the same goals? And if it is just about the latest quarterly earnings, you may have a different problem entirely. *There is more of the same, but these pointers should resonate in the for-profit and not-for-profit arenas for CEOs and boards.*

ATA AND MEMBERS OPPOSED TO PROPOSED INCREASES IN ADD-ON FEES – The Obama administration has proposed a $100 per-takeoff fee on commercial, cargo and corporate flights and increases of $2.50 per passenger per leg in the security fee charged passengers on commercial flights. The Air Transport Association ("ATA") representing the nation's major airlines and some of its individual member companies are understandably and vocally opposed. They claim they are already overtaxed and barely scraping by financially, and hinting broadly they may have to further reduce services to smaller, less profitable or unprofitable cities. *Airlines collectively have gone through another cycle of bankruptcies, mergers, and in recent years losses or skimpy profits depending in large part on fuel costs they cannot control. But in revenue-hungry D.C. those arguments may not prevail. It is one more piece of the increasingly confused air travel outlook. One way or another, air travel costs for associations and their members will likely increase. Budget accordingly.*

H & H DEVELOPMENTS

In October…

John Peterson gave a presentation on Business, Legal and Regulatory Developments to a national manufacturers association.

Samuel J. Erkonen gave a presentation on association law to an association forum in Chicago. He will also be speaking about hospitality law to students at Roosevelt University.

Gerald Panaro gave a presentation on the Fair Labor Standards Act to an annual conference sponsored by a major nonprofit human resources organization at the Gaylord National Hotel in National Harbor, Maryland (right outside Washington DC).

Naomi R. Angel gave a presentation entitled "The AMC Advantage – Added Value & Efficiency" to a major society for physical asset management at its board meeting in Greensboro, NC

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