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:

THE DAILY HEADLINES SURE SEEM TO POINT THAT WAY — "Data Security Expert: There Is No More Privacy" was the claim in a recent headline in a *Wall Street Journal* article. And this security computer-security expert is a Russian who has become very wealthy providing security services and helping with investigation for government agencies in Russia, the U.S. and elsewhere, as well as serving private clients. He warns hacking mobile phones is likely to be the next big target area now that computers are so thoroughly compromised. *With the Eric Snowden disclosures of NSA and investigative agency access to telephone, email and other electronic communications, the Private Bradley Manning disclosures, and numerous reports that international travelers' computers and electronic devices may be seized for investigation and copying of contents when returning to the U.S., we should not be surprised with the Russian expert's conclusion. Treat each of your electronic communications accordingly.*

THERE'S SOMETHIING WRONG ABOUT THIS INEQUALITY — As seen in a number of news accounts recently: "1% of the most highly compensated persons in the country are taking down 19.3% of compensation." Another indication of how inequality is increasing in this nation is reflected in the incomes of the top 1% growing by over 30% while the incomes of the next 99% grew by less than a half of 1% between 2009 and 2012. *If these reports are correct, there is something terribly wrong about how our economy is functioning. What recovery?*

LET THE SUN SHINE IN — What a difference some sunshine can bring. It seems there was a tradition at the University of Alabama for white sororities to bar qualified black young women from membership, 50 years after then Governor George Wallace stood in the doorway to bar black students from entering the university. Even when the sorority students said the black applicants were qualified, alumnae and chapter advisors could order that they be rejected. The student newspaper on campus exposed this practice and the story went viral. A week later, the university declared the practice unacceptable and illegal. Even the university president has now weighed in and said the university will not tolerate such discrimination. *Time Magazine summarized it this way: a century of discrimination and a week of bad publicity. Nothing like some sunshine on a not very well hidden practice to bring it to a quick end. But let's see what happens next before assuming the practice has ended.*

GOOD READING … See you in October 2013

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NONPROFIT EMPLOYEES IN EGYPT SENTENCED — *H&H Report Update* — An Egyptian court has sentenced 43 nongovernmental organization (nonprofit) employees to pay fines and, in some cases, serve prison terms for receiving unregistered foreign funding. Most of the defendants were convicted in absentia, as they had left the country. But one American, Robert Becker, who remained in Egypt for the trial, was sentenced to a two-year prison term. Other defendants received five-year sentences or one-year suspended sentences, and all 43 employees were fined 1,000 Egyptian pounds (about $143). In addition, the Egyptian offices of five nonprofits, including four based in the U.S., were ordered closed. *All of the defendants were said to be using foreign money to influence Egyptian politics (i.e., promoting democracy). But the court's decision seems to be popular with both the current military government and the Muslim Brotherhood opposition. Foreign nonprofit employees should be on the alert. Their good intentions won't always protect them from harm abroad.*

NEW YORK PASSES NONPROFIT REVITALIZATION ACT AMENDMENTS — The New York legislature has passed a package of amendments to bring its statute governing nonprofit entities into the 21st century. One of the significant developments is explicit authorization to use electronic means such as facsimile, email and other electronic delivery systems for notices, waivers, proxies, voting, records, minutes and other writings. However, voting to approve actions taken outside a meeting still requires unanimous consent, absent a permission in the entity's certificate of incorporation. Skype and other telephonic communications in which all the parties can hear one another are expressly authorized for meetings. Certified audit requirements are changed for entities registered to solicit and collect charitable contributions, and will be phased in over a period of years based on revenues received. Other notable changes include New York asserting personal jurisdiction over any person who is a director, officer, key employee or agent of a New York nonprofit entity; a provision that no employee of a New York nonprofit corporation may serve as chairman of the corporation or in any similar position, and this includes the CEO however his/her title reads; and adoption of a conflict of interest policy. *There are numerous additional provisions to be aware of, but keep this caveat in mind: the governor has to approve it and has time to amend the legislation, and the Nonprofit Revitalization Act of 2013 is not scheduled to go into effect until July 1, 2014. New York lags only the District of Columbia and Illinois as the corporate home for associations. If these statutory amendments apply to your entity, you are well advised to be aware of them and to follow their enactment into law over the next nine-plus months.*

U.S. LOOSENS IRAN SANCTIONS TO FACILITATE NFP ACTIVITIES — The U.S. Treasury Department has announced that it is relaxing sanctions on Iran in order to facilitate the humanitarian activities of nonprofits in that country, as well as cooperative sports activities involving the two countries. Nonprofits focusing on disaster relief, promotion of human rights, and similar activities will no longer need special permission from the Department in order to enter Iran. *Some speculate that relations between the U.S. and Iran may significantly improve because of a recent change in the Iranian regime. Nonprofits are among the first beneficiaries of some relaxation in U.S. law concerning relations with Iran, which we applaud. Whether there will be broader improvement in U.S.-Iranian relations, particularly coming from the Iranian side, is yet to be seen.*

CHURCH PROGRAM NOT ENTITLED TO IMMUNITY FROM SUIT AS "SCHOOL" — An Illinois appellate court has ruled that a church program called the Calvary Kids Club, which provides "teachings and activities for children" on Wednesday evenings, did not entitle the church to immunity from suit as a "school" under the Illinois School Code. The plaintiff was a child who fell and broke both her arms during a relay race on church property as part of the program. Through her father, she sued the church, and the church claimed immunity from suit for mere negligence under the School Code, which generally makes schools and school personnel liable only for their "willful and wanton conduct." A trial court found the church had such statutory immunity, but the appellate court reversed, ruling that, while a church or other nonprofit could operate a "school" under the School Code, including one that offered religious instruction, the church program in this particular case was not that kind of a school. Key to the court's ruling was its determination that, in order to

qualify as a "school" for purposes of the immunity afforded by the School Code, a program would have to be part of an organized "system" of instruction. But the program in this case, according to the appellate court, was not part of such a system, even if it provided some element of instruction, but rather a "club" – which, in fact, is what it called itself - run by volunteers and "more akin to a scouting organization that a school." *Take note, all nonprofits sponsoring instructional programs in Illinois. You had better be careful what you call your programs, have at least one employee involved in their operation, and be as "organized" and "systematic" about it as possible if you want to claim School Code immunity from suit.*

Intellectual Property & Computer Law Developments

FEDERAL COURT REJECTS FIRST AMENDMENT DEFENSE — A federal appellate court in California has rejected a First Amendment defense to a class action lawsuit filed by a former college quarterback (and eight other former college athletes) who claim the National Collegiate Athletic Association and its licensee, Electronic Arts ("EA"), a video game producer, are wrongfully using his (and the other) players' likenesses in EA's popular video game series, "NCAA Football" and a separate basketball series, without their consent or compensating them in any way. The series strive to replicate as accurately as possible the colleges, players, uniforms. statistics, etc., of the players' actual college performances in developing avatars who can be manipulated by game buyers in simulated games. The former athletes allege the games violate their rights of publicity. The NCAA and EA argued the games are expressive works protected by the First Amendment. The court analyzed the conflicting rights under the California Supreme Court's 2001 "transformative use" five-part test, and concluded 2-1 that EA's use did not qualify for First Amendment protection as a matter of law because EA literally created the players in the very settings in which they achieved renown and portrayed them as exactly as it could. The court cited a similar outcome by another federal appellate court in New Jersey earlier this year against EA in a lawsuit filed by another former college quarterback. *EA immediately asked for and received ninety days to appeal the California appellate decision to the U.S. Supreme Court. These decisions have potentially severe consequences for the NCAA and EA. The NCAA generates a lot of revenue from licensing college athletes' likenesses while they are in college, and heretofore even after they have left school. Now that revenue stream may be significantly curtailed, and the NCAA and EA could be subject to very substantial damages by the many former athletes portrayed by EA. Of further note are the NCAA rules expressly forbidding college athletes to make money from endorsements, signing autographs or otherwise trading commercially on their athletic renown at the risk of losing their eligibility to play, but the NCAA has no such qualms about its benefiting by using players' and member schools' likenesses in generating millions of dollars in revenues. And the NCAA requires collegiate athletes to sign waivers allowing the NCAA to utilize their likenesses without paying them a dime. Incidentally, there were numerous amicus curiae in this lawsuit including the NFL, NBA, NHL and Major League Baseball Players Associations and Major League Soccer Players Union, as well as movie, TV and print media entities. This will be interesting to follow.*

Employment Law Developments

EMPLOYERS AND EMPLOYEES SHOULD BE AWARE OF THIS TREND — Some employers are already embracing a shift from providing their employees (and in some cases retirees) with health care benefits. With the advent of Obamacare and introduction of new state and private insurance exchanges on October 1, 2013, employers are looking hard at switching to providing employees a fixed amount of money each month and telling them to go to the new exchanges and select their own coverages. One benefit to employers is being able to budget more precisely what their medical costs will be, and not having to respond to medical plan providers' changes in premiums or benefits. A benefit or a downside to the switch for employees is the amounts

they are given may not cover the medical benefits they formerly had or do not address future premium increases, but also allowing employees to tailor their coverages to their individual circumstances, such as accepting higher deductibles for lower premiums. *How will this work out in the long run? It is too soon to know. But some employers are already implementing such changes, e.g., IBM for more than 100,000 retirees recently, Detroit's financial czar has proposed it for retirees there, and other employers are likely to follow suit. Anticipate hearing and reading a lot more about this after October 1.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

TSA TO EXPAND PRECHECK TO MIDWAY, 50 MORE AIRPORTS — *H&H Report Update* —- The Transportation Security Administration has announced it will expand its PreCheck program to Midway Airport in Chicago and 50 other airports by year-end, bringing the total to 100 U.S. airports. O'Hare is one of the major airports already approved for and using the PreCheck program which speeds trusted travelers through airport security lines, permitting them to keep their shoes on, wear a jacket, not requiring them to pull out their computers from briefcases, and they go through much shorter and faster security lines. *We have previously recommended applying for GOES ("Global Online Enrollment System") status for association staff and members who travel frequently. It speeds you through those airports where the program is currently available and if your airline is one of the implementing airlines. The $85 fee for five years is small compared to the cost of missing one flight due to a long security line backup.*

REGULATORY LAW DEVELOPMENTS

EEOC IS REPEATEDLY SLAMMED FOR SUE-FIRST APPROACH — The Equal Employment Opportunity Commission is finding out what it feels like to be taken to task by several federal trial and appellate courts, and required to pay defendants' legal fees, for what courts have characterized as the EEOC's "sue first, ask questions later" approach in a number of recent lawsuits brought by the EEOC against corporate defendants for alleged wrongdoing in the use of criminal history and credit checks and for pregnancy discrimination. One trial court said federal law requires the EEOC to thoroughly investigate claims and to explore settlement with defendants before litigation is commenced, and the EEOC failed on both counts. Other courts have said much the same in a variety of lawsuits. The courts have also found the EEOC's use of statistical evidence and expert testimony to support its legal theories to be unreliable and failing to support the EEOC's burden of proof in a number of lawsuits. *Employers take note. You should not cave whenever an employee asks the EEOC to investigate and sue to enforce the employee's or group of employees' claims. The employee(s) and EEOC have the burden of proof in such lawsuits.*

NEW SECRETARY OF LABOR LIKELY TO CONTINUE HARDNOSED APPROACH — It already appears that new Secretary of Labor Thomas E. Perez will continue the hardnosed enforcement of wage and hours laws as his predecessor Hilda Solis, if his speech when he was sworn in to office on September 4 is any indication. He touted recent investigations of worker misclassification fraud and recoveries of back wages by the Wage and Hour Division, and called for a increase in the minimum wage and fixing our broken immigration system. *Based on his record as Maryland Labor Secretary and Justice Department lawyer, Perez will be every bit as pro-labor as Solis. Your members will have cause for concern on some forthcoming regulations.*

NONPROFIT CAN SUE IRS FOR FAVORING RELIGION — A federal district court in Wisconsin has refused to dismiss a suit against the Internal Revenue Service for allegedly refusing to enforce political campaign prohibitions against churches and religious organizations while enforcing them against other nonprofits. The plaintiff Freedom from Religion Foundation is exempt from federal income tax under §501(c)(3) of the Internal Revenue Code, as are churches and religious organizations, and all §501(c)(3) entities are subject to the same federal laws prohibiting them from participating in or intervening in political campaigns on behalf of, or in opposition to, a candidate for public office. But the plaintiff claims the IRS has an unconstitutionally discriminatory policy of not enforcing that prohibition against churches and religious organizations, while preventing other §501(c)(3) organizations from participating in elections. Now, the district court has ruled against the IRS on a motion to dismiss the suit on the ground that the Foundation has no standing to bring it. According to the court, the Foundation has standing to sue because, even though it never sought to engage in political intervention and could not legally do so, the Foundation is alleging the threat of "injury in fact" necessary to establish standing to sue simply by contending that the IRS is denying it equal treatment under the law. *The ruling by the court will still require the Foundation to prove that the IRS has, in fact, engaged in the allegedly unconstitutional conduct. But the ability of the Foundation to survive a motion to dismiss on standing grounds is noteworthy because such motions usually succeed in disposing of suits against the government for allegedly granting a benefit to one group while legally denying it to another.*

IRS ISSUES PRIORITY GUIDANCE PLAN — The Internal Revenue Service has issued its 2013-2014 Priority Guidance Plan, which sets out those projects that the IRS expects to give priority to in the coming year relating to publication of tax compliance guidance. In the exempt organizations area, the Plan includes (1) developing guidance under §501(c)(4) of the Internal Revenue Code as to measurement of an organization's primary activity and whether it is operated primarily for the promotion of social welfare, including guidance concerning political campaign interventions; (2) additional guidance on requirements for exempt §509(a)(3) supporting organizations; and (3) final regulations under §4944 on program-related investments. *The Plan shows the enormous amount of work that the IRS expects itself to do annually (never mind what we expect it to do) when you consider that there are 324 policy guidance "priorities" listed in the Plan. These are the things the IRS places a "priority" on doing in addition to other somewhat significant tasks such as collecting taxes. We are glad to see such a published Plan, of course, government transparency being a plus as a general rule. But with 324 policy guidance "priorities," it sounds like someone needs to prioritize among the priorities.*

IRS SHOULD INCREASE BEFORE AND AFTER AUDITS — The Internal Revenue Service should increase audits of those taxpayers who are determined to have underreported their income in a given year by looking at those taxpayers' returns filed in years before and after the return which resulted in an assessment, says the IRS Inspector General for Tax Administration. The basis for the recommendation is simple: if the taxpayer underreported income in one year by a significant amount, the taxpayer probably did it more than once so check earlier and later returns to see if they also underreported income. The recommendation is based on sampling of returns from audits by the IRS's Small Business/Self-Employed Division which demonstrated such underreporting in a significant percentage of earlier and later returns. *The IRS needs to do more with fewer resources to catch underreporting so it makes sense to look at those underreporting and see if they are repeat offenders. More than likely they are, and easier to find than someone new. "Where there's smoke there's fire," someone said a long time ago.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

NONPROFITS COULD LEARN FROM THIS EXPERIENCE — Recently an article by Peter Orszag and John Bridgeland appeared in *The Atlantic*. The authors had served in the Obama and Bush (41) administrations in the budgeting process, and their conclusions were not startling but all too indicative of the legislative and budgeting process at federal, state and local government levels. Their basic conclusion was that government programs are very seldom evaluated to determine if they are effective, and legislators often actually resist even permitting, much less using such evaluations. The results are all too common: ineffective, duplicative and very expensive programs that are funded indefinitely with no evidence they work. One example cited was some 339 different federal programs aimed at disadvantaged youth, many overlapping, not coordinated, no analysis of their effectiveness, and some $223.5 billion expended annually. *Nonprofits can learn from such dismal examples. Rigorously evaluate whether your programs are achieving their purposes. If they are not, either correct their deficiencies or eliminate the program. Too often we have seen association boards add programs without adding resources in the budget or personnel or eliminating lower priority programs. In a recent story in TIME Magazine on economic development, Bill Gates had this to say about measuring outcomes. "All the good business leaders I know are maniacal about measuring things…. Measurement is a big part of mobilizing for impact. You set a goal, and then you use data to make sure you're making progress toward it. This is crucial in business…." If it is crucial in business, why not in government, and for associations which are, after all, businesses?*

H & H DEVELOPMENTS

In September. . .

Jonathan Howe presented "Watch Out For The Boiler Plate — It Could Cost You ," as a webinar for meeting professionals on arbitration and dispute resolution.

John Peterson made presentations on Legal and Regulatory Developments and Trends at semiannual meetings of two national trade associations.

C. Michael Deese participated on a panel addressing the issue of "Insurance Defense: Selection of Legal counsel through Legal Expense Audit" at the ASAE Annual Association Law Symposium in Washington, DC.

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