THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

FEBRUARY 2014 VOLUME 2014 ISSUE 2

THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

DO YOU FIND IMPLEMENTATION DELAYS IN OBAMACARE CONFUSING? — The Obama administration has just delayed for an additional year to 2016 the previously delayed requirement that employers of 50 to 99 employees shall provide health care insurance meeting specific standards, and employers of 100 or more employees need not provide health care insurance until 2015, but will be required to cover only 70% of their workers in 2015 and then 95% in 2016. The Patient Protection and Affordable Care Act of 2010 ("PPACA" or "ObamaCare") originally mandated such coverages commencing in 2014. Meanwhile the mandates and penalties applying to individuals continue to apply in 2014. *With the PPACA's exemptions, delayed mandates, noncomplying insurance policy cancellations effective January 1, 2014, followed by reinstatement exhortations to insurers and state insurance departments, and these latest additional delays in compliance dates, you have to ask what is the constitutional authority of the Obama Administration to simply rewrite provisions of this statute? Somehow that question never seems to be asked by the media, and businesses are only too happy for any delays in implementing the PPACA. Is it simply midterm election politics? As usual, associations are found on both (or even more) sides of PPACA issues.*

BE FAMILIAR WITH THIS TERM AND PRACTICE — Employees are well advised to be familiar with this term and practice — "remote wiping." Remote wiping is the capability of an employer to erase all data from an employee's smartphone if it is connected to the employer's IT network. The problem for the current or former employee is that the remote wiping erases everything on the employee's phone so it is not just the employer's messages and information that is erased but all of the employee's personal information. This could include phone records, addresses, photographs, music, apps, you name it. This practice is typically related to a termination or resignation situation, and can occur without warning or recovery. *So you are well advised to back up personal information on your phone from time to time, but especially in anticipation of a resignation or termination situation. This might be something to anticipate and negotiate about before it happens.*

GOOD READING … See you in March 2014

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Not-For-Profit Law Developments

NONPROFIT EXEC MUST PAY $2 MILLION JUDGMENT — In a recent decision, an Illinois appellate court upheld the forced dissolution of a nonprofit that operated a nursing home as well as a $2 million judgment against its Executive Director. The court found the nonprofit failed to make required annual reports to the Illinois Attorney General for years. In addition, the Executive Director, who had caused the sale of the home's real estate, failed to report the sale to the Attorney General and wrote herself a $2 million check from the organization's assets, allegedly in repayment of loans she had made to the nonprofit, which had not been previously reported to the Attorney General and were inadequately substantiated. Besides the $2 million judgment, the appellate court ruled the Executive Director must pay the Attorney General's attorney's fees and court costs in bringing this case. The court also ruled the nursing home's remaining assets must be distributed to other Illinois bona fide charities. *Readers should note the importance of making required annual reports to the authorities, including the Illinois Attorney General under the Illinois charitable trusts and solicitations laws. If all this Executive Director must do is pay over the $2 million she received from the nonprofit and pay attorney's fees and costs of this action, she may be getting off lucky. The IRS can impose tax penalties, and people can even* go to jail for such conduct.

IS IT CHARITABLE FUNDRAISING OR PLAIN OLD GAMBLING? — That's a question many Michigan legislators are asking of late when looking at the current state of charity gambling games in Michigan. Little more than a decade ago, charities received about half of charity poker revenues; now it's less than ten percent, while gross revenues have climbed from $7.9 million to $197 million. And even those numbers are a few years out of date, so the current gross amounts are higher. With some legislators wanting no limits on gambling parlors' operations for ostensibly charitable fundraising, even when run 365 days a year, and others finding this really smacks more of plain old unregulated gambling, and even some frauds on charities, the Michigan Gaming Control Board has proposed some rule changes, trying to appease both sides. The Board has proposed new rules expanding charity gambling from dedicated poker parlors to other places, including churches, schools, and community centers; limiting gaming at such sites to four nights a week; and reducing the number of charitable representatives required to be present to two, among new requirements. Charities are to be limited to sixteen such events per year. The proposed rules are subject to further legislative review before becoming final. *When you learn only ten percent or less of revenues go to the charities in whose names these gambling activities are conducted, you have to wonder, the same as when you learn about mail and telephone solicitations which produce ten percent or less of revenues raised for the charities and ninety or more percent for the professional fundraisers. But many charities insist they need such fundraising.*

Intellectual Property & Computer Law Developments

SUPREME COURT TO DECIDE LACHES DEFENSE AGAINST INFRINGEMENT CLAIM — The U.S. Supreme Court will decide if a defendant may invoke a *laches* defense against a copyright infringement claim brought within the Copyright Act's three-year statute of limitations. The theory of *laches* is an equitable defense based on unwarranted delay in asserting rights ("sitting on your rights") to the prejudice of the party against whom a claim is asserted. The facts of the appeal before the Supreme Court are complicated, but it involves an infringement claim only for the last three years as provided by the Copyright Act's three-year limitations period. The defendant argues the plaintiff threatened to sue for nearly 20 years, therefore she had sat on her rights to the detriment of the defendant. The trial and appellate courts ruled in favor of the defendant. The Supreme Court decision should resolve a split among federal appellate courts on the issue. *Moral of the story, don't sit on your rights if you think you have a valid infringement claim. The same appellate court in San Francisco also recently ruled in another lawsuit that failure to bring an infringement claim within three years barred the claim. You snooze, you lose.*

ILLINOIS SUPREME COURT DECLINES TO REVIEW FIFIELD DECISION — *H&H Report Update* — The Illinois Supreme Court declined to review a June, 2013 Illinois appellate court decision which formalized a two -year minimum employment period for upholding a restrictive noncompetition covenant. The appellate court had ruled that if new or continued employment was the only consideration for the employee being required to sign a noncompete agreement, the employment had to last at least two years for the agreement to be enforceable. *The Illinois Supreme Court's decision not to review Fifield makes it even more persuasive as a precedent for other Illinois courts. Employers and employees, and their attorneys, should be familiar with the Fifield decision which is much more comprehensive than the one brief point addressed here. Those in other states may find Fifield a useful precedent when addressing their own noncompete agreements.*

HERE'S A SELDOM REPORTED EMPLOYMENT ISSUE — With all the furor over President Obama's declaration that by executive order he will raise the minimum wage to be paid on federal contracts going forward to $10.10 per hour, the *Chicago Tribune* recently did a story on a seldom reported issue, the carve-out from paying even minimum wages for employees of "sheltered workshops," which are specifically exempted by Section 14(c) of the Fair Labor Standards Act, dating back to the late 1930s. The provision permits sheltered workshops to pay employees on a sliding scale based on how productive a disabled worker is compared to a worker who is not considered disabled. In practice, this may result in pennies per hour, not even fewer dollars than the minimum wage, many on contracts with the government. Who decides how productive the disabled worker is? Not the U.S. Department of Labor, which is responsible for overseeing the program. It requires employers to obtain and annually or biennially renew certificates authorizing payment of Special Minimum Wages, ascertain prevailing wages paid nondisabled workers for comparable work in their areas, measure disabled workers' productivity versus nondisabled workers' productivity, and then calculate disabled workers' Special Minimum Wages. *Numerous nonprofit groups are calling for repeal of Section 14(c) of the FLSA and underlying rules, saying it is unfair to disabled workers, while others assert there are no programs that would replace such programs, providing some sort of paid employment and, but, at first blush, cents per hour is not much of a wage for any kind of productive work.*

THIS UNION RECOGNITION PETITION COULD GET VERY INTERESTING — A group of football players at Northwestern University (with organizing help by the United Steelworkers union) in Evanston, IL has filed a petition with the National Labor Relations Board to be recognized as a labor union, specifically the National College Players Association, presenting all sorts of labor law questions and issues for their university and for the National Collegiate Athletic Association, which oversees and regulates college athletics. The NCAA immediately responded that college athletes, i.e., "student-athletes," are not employees of their universities, therefore union status is simply unavailable to them, and that union status would undermine the purpose of college, which is education. The players' spokesman, senior quarterback Kain Colter (who has used up his eligibility) says the typical athletic scholarship does not cover a player's expenses beyond room, board and tuition; notes the players want better protection on sports-related medical issues during and after college; and basically says that players want a say in their working conditions. The players are not seeking compensation in the form of wages, at least not at this juncture. *A host of issues come to mind. While the NCAA talks about student-athletes and education, players see overt commercialism, crowded stadiums holding 100,000 frenzied fans paying $100 a ticket or more, coaches being paid multimillion dollar salaries, the NCAA raking in huge dollars from football bowl championship games and the NCAA's college basketball "March Madness" tournament, frenzied recruiting of athletes, scholarships being cancelled when athletes are injured and cannot play or play as well as before, and players unable to hold jobs due to the heavy demands on their time. So, are scholarships compensation paid to athletes, thereby making them employees? What about college athletes who are not on scholarship? Are they also employees? How does this apply to nonrevenue sports, which generate little or no revenue compared to big-time football and basketball programs?*

How about Title IX which requires women's teams to be treated the same as men's teams in terms of scholarships and other benefits? There are few precedents to guide the NLRB, and its decision is likely to be appealed by one side or the other. Stand by. This is just the opening salvo in a protracted battle.

MEETINGS & TRAVEL LAW DEVELOPMENTS

WILL THE FTC TAKE REGULATORY ACTION AGAINST "RESORT FEES"? — The Federal Trade Commission has looked into resort fees and whether they are an unfair trade practice. So far, the FTC emphasis seems to be limited to disclosure, ensuring that resort fees are clearly disclosed to travelers at the time of reservation, not as an add-on at checkout. Travelers are pretty consistent about their dislike for so-called resort fees, charges appended for use of exercise or pool facilities, in-room water bottles, wireless access, beach chairs, newspapers, and the like. One beef has to do with not using the amenities covered by the fee. Another is charging for services that most travelers believe should be included in the price of the room. *So will the FTC take regulatory action to ban resort fees? Don't bet the farm on it. The FTC will not comment publicly, but it seems likely the FTC will at least continue to push for up-front disclosure of any such fees. Many association meeting contracts address resort fees, often striving to have them waived. Caveat emptor.*

TAX LAW DEVELOPMENTS

IRS SCRUTINIZES OFFICER'S EXPERIENCE IN REVOKING EXEMPTION — In a recent private letter ruling, the Internal Revenue Service revoked the tax-exempt status of a nonprofit formed to accept, hold and enforce conservation easements and to convince owners of hunting land to make conservation easement donations. The IRS found that the organization did not operate for charitable purposes, but, instead, served to help its president, a CPA, obtain charitable deductions for his clients on their tax returns. One interesting aspect of this case is the scrutiny the IRS gave to the president's qualifications to run this nonprofit, something the IRS asks about on exemption applications but rarely places much emphasis on in making its rulings. The IRS said the president didn't have the knowledge, training or experience to make educated decisions about whether a conservation easement would serve a conservation purpose. But the IRS also said it was "disturbing" that the nonprofit engaged in only minimal record keeping in view of the president's accounting background. *Apparently, the president knew too little about conservation and too much about accounting to be running the organization the way he was! If the IRS's approach in this case is going to be followed regularly in the future, nonprofits should pay greater attention to the need for their officers and directors to have demonstrated expertise for leadership positions in their organizations.*

PUBLIC EDUCATION AND ADVOCACY SUPPORT PROPERTY TAX EXEMPTION — A New York court has granted a property tax exemption to a nonprofit, rejecting an argument by local tax authorities that the entity could not be considered exclusively "educational," as required for the exemption, because its primary focus was on encouraging legislative and policy changes. The court said that the New York Department of Finance had acted arbitrarily or irrationally in denying a property tax exemption to the nonprofit, noting that the organization had already received recognition of tax-exempt status from "the Federal, State and City authorities," and that similar nonprofits had been granted a property tax exemption under a more liberal interpretation of "education" than the Department had applied in this case. *This nonprofit was perhaps fortunate in finding a court that recognized a "liberal interpretation" of "education" and gave deference to prior determinations of exempt status made by the Internal Revenue Service and other government entities. Getting public education and advocacy recognized as*

supporting an "educational" tax exemption isn't always easy, and many state and local governments, in determining who should receive tax exemptions, are intentionally more restrictive than others, or than the IRS when granting property tax exemptions.

REGULATORY LAW DEVELOPMENTS

WHAT A TANGLED WEB WE WEAVE — The confluence producing the Ohio River at Pittsburgh has nothing on the confluence of the Internal Revenue Service's proposed regulations governing §501(c)(4) organizations to prevent overt political activities by them, with the IRS comment period set to close February 27 with over 23,000 comments already filed; the House Ways and Means Committee vote on February 11 to block any new rules by the IRS that the Republican committee members see as targeting conservative groups; and the developing trend for lobbying to shift in some fashion from registered lobbyists to using nonprofit groups (so-called "soft lobbying") to present positions which are funded by undisclosed sources. One recent example of how this trend works is seen in the attacks by the Sugar Association on behalf of the domestic sugar industry and the Corn Refiners Association on behalf of the corn syrup industry, each side claiming the other's scientific studies and quality or health claims are bad science or bogus on other grounds. The two associations are not registered lobbyists, and do not have to disclose who is funding their campaigns, which already exceed $1 million between them. *The Ways and Means Committee's bill will not see the light of day in the Democrat-controlled Senate; the IRS is asking if its proposed limits on political activities of §501(c)(4) organizations should be extended to §501(c)(5) and §501(c)(6) organizations, and the IRS has to wade through the tens of thousands of comments already on file, while the soft lobbying trend plus PACs and so-called SuperPACs seem likely to grow. Will all this soft lobbying by associations come to be seen as suspect when the funding behind it is not disclosed?*

FOUNDATION TRANSACTIONS WITH FOR-PROFIT DRAW A.G. SCRUTINY — A foundation has entered into an agreement settling charges brought by the New York Attorney General's office that the nonprofit misused charitable assets to benefit its for-profit affiliate in violation of state law. The affiliate allegedly used the foundation to develop educational materials that the affiliate intended to sell commercially. Now, under the terms of the settlement, the foundation has agreed to pay $7.7 million to the State of New York, most of which is intended to be used for recruiting and retaining high-quality kindergarten through 12th grade teachers, but part of which pays the expenses of the Attorney General's office for pursuing this matter. In addition, the foundation has agreed to adopt certain program changes and governance reforms to ensure that charitable assets of the foundation are not improperly used for the private benefit of the affiliate. That includes adding at least three independent directors to the foundation board, who will have to approve all transactions with the affiliate before they proceed, finding that they are fair, reasonable and in the best interests of the foundation. *Transactions between nonprofits and for-profit affiliates often draw special IRS attention, as well as an occasional state investigation. Organizations should review such transactions carefully with experienced nonprofit legal counsel.*

USPS TRIES A NEW SERVICE — *H&H Report Update* **—** The U.S. Postal Service is having a second go at an experimental same-day pickup and delivery service for packages, using only five carriers for now in New York City. The USPS previously tried a very small-scale, experimental, same-day package delivery service in San Francisco in 2013, which flopped. *Never say die. Will it work? Can it work? The letter carriers' union is casting a wary eye on the experiment. These carriers work unpopular hours and on weekends. This is in addition to the Sunday delivery service USPS previously started to serve Amazon and other online retailers. That seems to be working. The USPS needs some new services to address its declining first class revenues and mounting deficits.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

CHOICE OF FORUM CLAUSE IS NOT JUST CONTRACT BOILERPLATE — The U.S. Supreme Court issued a decision in December 2013 that executives (and their attorneys) should keep in mind when drafting or reviewing contracts. The Court ruled that choice of forum selections in parties' contracts will ordinarily take precedence over a plaintiff's choice of forum when bringing a lawsuit. Absent such a contractual commitment by the parties, a plaintiff's choice of forum (i.e., where the lawsuit is filed and will be conducted) would ordinarily prevail. *Why does this matter? Most parties and their attorneys want to litigate in their home courts, perhaps for reasons of convenience or reduction of expenses, or because they think the judges or juries in a particular jurisdiction are particularly favorable to plaintiffs, or the law is favorable there. So forum selection is one of those "boilerplate" provisions that parties should negotiate, to obtain an advantage or avoid a disadvantage, as the case may be.*

AN INTRIGUING CAPTION — This caption caught our eye: "How Much Profit Does a Nonprofit Need?" The author goes on to explain investment targets, strategic goals, various formulas, etc., but the underlying point is not always obvious to a nonprofit's various constituents and audiences. Nonprofits need to make a profit to remain viable. *Nonprofit is not the same as unprofitable. The first is an organizational status and tax concept, the second an accounting concept. You can be nonprofit for decades, but too many unprofitable years and you are out of business, unless, of course, you can get someone else to pay your bills.*

H & H DEVELOPMENTS

In February . . .

Jonathan T. Howe presented the M&C February 2014 Webcast: Avoiding Common Contract Disputes for CMP Credit [B. Project Management, 1 hour].

C. Michael Deese will be participating on an AMC Consultant Panel on February 27 and also presenting a session on Legal Issues for AMCs and their Association Clients on February 28 at the upcoming annual meeting of The AMC Institute in Tempe, Arizona.

Naomi R. Angel presented a session for the Annual Education Conference at MPI-NCC in San Francisco on Advanced Negotiations for Planners and Suppliers.

Samuel J. Erkonen recently gave two presentation to regional groups of HelmsBriscoe representatives in Charlotte and Atlanta on hospitality contracts and industry trends.

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Contributors to this issue…
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