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Surf's Up – Could Be Dangerous

A LAYOFF'S LONG-TERM IMPACT – A University of Wisconsin study reported in *Business Week* states that employees who are laid off for any period of time are less likely to participate in charitable organizations, community affairs or other nonprofit activities before or even after regaining employment. The study went on to say that instead, after gaining employment, they focused their attention on professional and political groups, apparently believing they would do more to promote their careers. *That may be good news and bad news for nonprofit organizations. Business and professional groups offering training or useful information might benefit, but other nonprofit organizations may find fewer volunteers.*

GAO SAYS CHARITIES NOT ABLE TO HANDLE A MAJOR DISASTER – The Government Accountability Office says the nation's major charities cannot fully respond to a major disaster such as a hurricane or epidemic. The Red Cross, Salvation Army, Catholic Charities and Southern Baptist Convention lack the financial resources, trained personnel, shelter, feeding and other resources to address a disaster on the scale of Hurricane Katrina. The Red Cross, which is mandated by federal law to provide care in an emergency, is currently seeking \$150 million in government funding to help victims of Hurricanes Ike and Gustav. *Charities should not be expected to be the sole or even the first providers of help. Isn't that a government function? Are governments ready and able?*

WHAT GOVERNOR PALIN CAN TEACH US ABOUT E-MAIL HACKERS – The widely-publicized hacking of Governor Palin's e-mail account demonstrates how easy it is to break into a work computer also used for private e-mail messages. The hacker posted that it took about 45 minutes to break into Palin's e-mail using information such as her date of birth, zip code and other information acquired through Google searches, then was able to obtain her password and took control of her account. *This could happen to any of us. When setting up password reminders, take caution to select those that are not public record or easily discernable by potential hackers.*

**GOOD READING... See you in October
HOWE & HUTTON, LTD.**

Howe & Hutton, Ltd.:

20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685

Washington Office:

1901 Pennsylvania Avenue, NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • Fax: 202/466-5829

St. Louis Office:

1421 Buckhurst Ct. • Ballwin, MO 63021 • 636/256-3351 • Fax: 636/256-3727

E-Mail: hh@howehutton.com

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NOT-FOR-PROFIT LAW DEVELOPMENTS

SHOULD MINISTERS BE ALLOWED TO ENDORSE CANDIDATES IN CHURCH?

– A group of religious leaders in the Midwest is challenging actions by the Alliance Defense Fund (“ADF”) to encourage other ministers to endorse or oppose political candidates from the pulpit. The ADF is looking for ministers to challenge a restriction going back to 1954 which prohibits pastors from endorsing candidates, leading to the potential risk of their churches losing their federal tax exemption. The ministers challenging the ADF claim endorsements from the pulpit violate the constitutional separation of church and state. *Endorsing candidates from the pulpit appears to be a fairly blatant violation of the constitutional separation of church and state as the law is currently interpreted for §501(c)(3) organizations. The irony is that the group of ministers challenging the ADF efforts is largely from one church body that endorsed the Democratic candidate for president at the church’s convention in 2007. So is the real issue for those arguing against the ADF effort about separation of church and state or that they disagree with the ADF’s political stand? The Internal Revenue Service could be busy responding to such challenges in the next few months.*

WILL APA ENFORCE ITS BAN ON MEMBERS? – The American Psychological Association (“APA”) has voted to ban its members from taking part in interrogations of prisoners held at Guantanamo Bay, Cuba or other military prisoner facilities. The ban reverses a 2005 position permitting such participation for purposes of national security. Will the ban become part of the APA Code of Ethics to add enforcement teeth to the ban? *Associations and professional associations often promulgate codes of good practices or ethics, but enforcing such codes by censuring or expelling members is frequently a problem. Many such codes are imprecise and cumbersome in practice and subject to challenge when used.*

IL LAW CLARIFIED ON ASSOCIATION LITIGATING IN PLACE OF ITS MEMBERS

– An Illinois not-for-profit group opposed a zoning change proposed by a developer. The trial court dismissed the association’s lawsuit, saying the association lacked standing to bring the lawsuit. An Illinois appellate court reversed, relying on an earlier decision by the Illinois Supreme Court setting forth three criteria for an association litigating on behalf of its members and on several federal decisions on the point. The Illinois Supreme Court’s three requirements for associational standing are: the association’s members would have standing in their own right; the association was trying to protect an interest germane to the association’s purposes; and a third court-developed requirement, the claim and relief sought do not require the participation of individual members in the lawsuit. The third requirement is for administrative convenience and efficiency and is not an element of the controversy, but it is often used to prevent an association from litigating on behalf of its members. In this case, the trial court found individual members’ participation would be necessary in fighting the zoning change. The appellate court interpreted the Illinois Supreme Court precedent and various federal court precedents to mean that so long as the nature of the claim and relief sought did not make individual participation of *each* member necessary, the association could proceed. Other courts have said that if participation by members was not a significant aspect of the association’s claim, the association could continue. *What this means is that an association’s standing to litigate on behalf of its members is fact-driven. Courts should look at what will be necessary to establish the association’s claim, i.e., how significant members’ participation will be in the litigation. At least in this instance, the appellate court determined the association’s claim could not be dismissed without additional fact-finding on that point so the case could proceed until it was determined just how significant the members’ participation would be. Keep this in mind anytime an association is asked to litigate on behalf of its members.*

REGULATORY LAW DEVELOPMENTS

JUSTICE DEPARTMENT AND FTC DISAGREE ON ANTITRUST ENFORCEMENT

– The United States Department of Justice Antitrust Division (“DOJ”) recently released a 215-page report describing the DOJ’s approach to combating anticompetitive business practices. Among other things, the DOJ reports that some business practices considered anticompetitive actually help competition, including exclusive-dealing practices and some tying practices and should be judged for their practical effects and not dismissed out of hand as anticompetitive. The report immediately ran into objections from three of the four commissioners on the Federal Trade Commission who declared they thought the report would radically weaken enforcement against big companies’ anticompetitive practices. *This report is coming out just a few months before a change of administrations, and the next attorney general and senior DOJ appointees will have their own views on antitrust enforcement. Whether this is a very short-term outlook or something likely to set the enforcement tone for the next administration is unclear for now.*

EMPLOYMENT LAW DEVELOPMENTS

NO REASONABLE EXPECTATION OF PRIVACY ON OFFICE COMPUTERS – An employee responsible for selection of computers and maintaining his employer’s company invoicing, order entries and bank records used his computer expertise to surreptitiously increase his salary from \$40,000 to \$125,000, and to ultimately steal over \$665,000 from his employer. Access to this information was hidden from his employer and protected by passwords. When caught, he claimed an expectation of privacy involving his use of the company computers on the grounds that his entries were password-protected. The court said he should not have an expectation of privacy because these were company computers connected to the company’s computer network system, and the employee’s privacy claim was an effort to hide his criminal activities. *Employers have to be very careful about placing that much financial control in one employee without anyone else having access to or overseeing the records, including banking and payroll records. Employers should also have written policies saying that their computers are property of the employer and subject to inspection at any time.*

SHOULD EMPLOYERS BE REQUIRED TO PROVIDE PAID SICK DAYS? – The Family Medical and Leave Act requires employers with 50 or more employees to provide employees with up to 12 weeks’ unpaid leave a year for personal sickness or to take care of a family member who may be sick or disabled. Smaller employers are not required to provide such unpaid leave. Legislation is pending in Congress to mandate *paid* sick leave for employees, but it is currently stalled. The action is shifting to the states where paid sick leave is a hot topic. There are pros and cons to requiring paid sick leave and associations are weighing in on the topic, including the Small Business and Entrepreneur Council with 70,000 members which opposes mandating paid sick leave. The National Partnership for Women and Families is in favor of mandating paid sick leave. Senator Obama is on record favoring such a mandate and Senator McCain is opposed. *Associations are usually pretty generous with providing paid sick leave even though it is not mandated by federal or state law in most instances, particularly for small employers which most associations are. So it often comes down to what is practical and affordable for associations. But just in case, check your state, and in some instances local, e.g., D.C. or San Francisco, laws that may be on point.*

D.C. COURT OF APPEALS REVERSES A DENIAL OF EMPLOYMENT BENEFITS –

The D.C. Court of Appeals (District of Columbia court and not a federal court) has reversed a ruling by the D.C. Department of Employment Services which denied benefits to a claimant because the court said the employer did not produce enough evidence to prove the claimant was fired for “gross misconduct.” The employer said the claimant was fired for letting her cousin use her employee discount card that was restricted to employees and immediate family members. The appellate court said there was no record the employer had ever given the claimant written notice of the reason for termination and she said she was never given such an explanation verbally or in writing. There was also no evidence as to what the employer’s written requirements were for employees. The denial of unemployment benefits to employees discharged for misconduct requires deliberate or willful violation of the employer’s rules or disregarding the standards of behavior which the employer has a right to expect of its employees. The Department of Employment Services must find that the existence of the employer’s rule is well known to the employee, the rule is reasonable, and the rule is consistently enforced by the employer. Even though the Department of Employment Services found that the employer failed to establish the rules in its employee handbook are consistently enforced, it still denied the claimant benefits. But the employer failed to make its case, at least as far as the Court of Appeals was concerned. The Department of Employment Services also went off the track by denying benefits even though one of its three criteria for such a denial was not met. *Employers are frequently unhappily surprised when denials of unemployment benefits for misconduct are either overturned or not awarded in the first place because what employers regard as misconduct fails to meet statutory or regulatory requirements.*

ARBITRATION PROVISION UPHELD EVEN IF EMPLOYEE CAN’T READ ENGLISH –

A federal court of appeals has reversed a trial court’s ruling that dismissed a contractual arbitration provision written in English because the employee did not speak English and an interpreter did not read the arbitration provision to him. The court of appeals said the employee had an opportunity to have the provision explained to him and had the opportunity to take the document home and have it interpreted as he had done on other occasions, something he could have done before he accepted this contract written in English. One judge of the three-judge panel dissented and agreed with the trial court. *The decision comes down in some way to that old maxim, read and understand what you sign before you sign. Whether you read it or not, or understand it or not, it can be enforced against you. Another lesson to take away is that the appellate court was influenced by the employer having provided an interpreter to the employee who went over most of points of the contract with him before the employee signed the contract, including the arbitration provision.*

MEETING & TRAVEL LAW DEVELOPMENTS

NO SURPRISE – BAGGAGE FEES CREATE OVERHEAD BIN STUFFING – People are reasonably predictable, including air travelers. If you put a fee on checking luggage (now up to \$50 for a second checked bag), they are more likely to bring their bags onboard and try to fit them into the limited space provided by overhead bins. Couple this with more crowded flights and smaller regional jets flown by airlines where they can in order to save money and you have baggage chaos. The results are unhappy passengers, unhappy crew trying to resolve disputes, and delays at the gate while baggage that won’t fit in overhead bins must be hand-checked at the gate. *This was all predictable, but airlines are so desperate for money they apparently are willing to accept the adverse consequences of flight delays and unhappy passengers. Think again about scheduling teleconferences and video conferences to cut down on association member and staff travel.*

TAX LAW DEVELOPMENTS

IRS RELEASES REVISED FORM 990-EZ INSTRUCTIONS FOR 2008 – The Internal Revenue Service (“IRS”) has released revised instructions for its new Form 990-EZ for tax year 2008. While Form 990-EZ, the short form return of organizations exempt from income tax, is mostly unchanged, it has been updated to include certain schedules from the new Form 990 which will be first used in 2008 tax returns. Among other things, filing thresholds for Form 990-EZ have been significantly increased for 2008 and future years. *Associations should go to the www.irs.gov website under “Charities and Non-Profits” and look up Form 990-EZ, Background Paper and Revised Instructions, for further information.*

IRS OFFERS DISASTER PREPARATION SUGGESTIONS – In anticipation of hurricanes and other natural disasters, the Internal Revenue Service has offered a number of recommendations that individuals and business should consider to lessen the stresses that such disasters bring. Individuals with computer access should consider maintaining their personal financial records in a secure electronic format as primary or back-up records, which are accessible after a disaster strikes when paper records might not be accessible or even recoverable. The IRS recommends (and your insurance provider will agree) that you document your valuables, including photographs or video plus any supporting records. Update emergency plans and your insurance. *This is all very basic but too often neglected by individuals and businesses. What is backed up, what is not? Why not? It’s a lot easier to do before a disaster hits than after as those flooded in Iowa, or dealing with hurricanes in Texas and Louisiana, or rain-fed floods in the Midwest will attest.*

IRS QUIETLY ELIMINATES ADVANCE RULINGS FOR §501(c)(3) – The Internal Revenue Service has quietly eliminated the Advance Ruling Process for §501(c)(3) organizations. Under the new regulations issued September 9, 2008, new organizations will be classified as publicly supported charities if they can show the IRS that the organization can reasonably expect to be publicly supported (as opposed to a private foundation) when it applies for tax-exempt status. This substantially changes the burden for a new organization which previously had to declare that it expected to be publicly supported, and after five years file Form 8734 showing the IRS that it had in fact achieved sufficient public support to retain its exempt status as a publicly supported entity. From now on, such organizations will file a Schedule A with their Form 990 (the new 2008 version and beyond) showing the public support actually received during the preceding five years. *The big change is that an entity will retain its publicly supported status for the five years regardless of the public support it receives during that period. Before an entity unable to demonstrate sufficient public support would revert to private foundation status and face stricter rules. This should be a substantial benefit to start-up organizations.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

IT AIN'T OVER TILL IT'S OVER – TIFFANY APPEALS eBAY DECISION – *H&H Report Update:* Tiffany & Company has appealed the federal district court ruling dismissing its trademark violation claim against eBay. The trial court ruled that eBay had promptly taken action against sellers of counterfeit Tiffany goods when Tiffany gave notice of such sales to eBay. eBay cites its Verified Rights Owners (“VeRO”) program to help companies look for sellers of counterfeit goods. Users of the VeRO program are supposed to notify eBay when they find such violations. Then eBay will take down that seller’s auction site. Tiffany says it should be eBay’s responsibility to police sales on the eBay site, not companies such as Tiffany. *Left unsaid by Tiffany is how eBay is supposed to identify the myriad of real versus counterfeit merchandise moving across eBay auctions daily. But the appeal, now pending in a federal appellate court in New York, should clarify which party has primary responsibility for policing sales activities on Internet sites, something associations should be interested as sellers and buyers.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

SURF’S UP – COULD BE DANGEROUS – A new entertainment option from Chrysler for video systems in cars may present unanticipated hazards. Chrysler is coming out with Wi-Fi Internet connectivity which Chrysler says is intended for use in the rear seat for entertainment purposes and not for use by drivers or passengers in the front seat. Well, guess what? With drivers already using hand-held cell phones, checking e-mail and text-messaging using cell phones and other such devices, why would Chrysler expect them not to take advantage of Wi-Fi and Internet connectivity? *As we have stated before, it should not be necessary for laws and ordinances banning text-messaging while driving, but in practice such laws are necessary. Is this one more example of Internet connectivity trumping common sense? Apparently so, given the ineffectiveness of states’ and municipalities’ bans on the use of hand-held cell phones while driving. Associations should have policies banning such hand-held cell phone use and text-messaging while their staff members are driving because of potential liability.*

H & H DEVELOPMENTS

In September:

Jonathan T. Howe will repeat as Chairman of ASAE’s Chicago Law Symposium in 2009, following a successful 2008 Symposium. He also was a featured speaker on “Intellectual Property and the Internet” and “Becoming a Business of Your Own: Steps for Success” at a hospitality industry meeting in D.C., and on Internet legal issues at a Caribbean promotion board meeting.

Barbara F. Dunn gave a presentation on the best practices for managing association contracts to a national association of lawyers.

Samuel J. Erkonen spoke about liability issues with a state-wide association executive association.

Contributors to this issue...

**Jonathan T. Howe, Terrence Hutton,
Gerard P. Panaro, Nathan J. Breen, Joshua W. Peterson**

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