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:

JUDGE RULES MOBILE MAP-CHECKING WHILE DRIVING IS ILLEGAL – A trial court judge in Fresno, CA rejected a driver's defense under California's law banning wireless and cellular device use while driving a vehicle. The driver argued the law bans phone calls and texting, but he was using his cell phone's map service, therefore the law did not apply. The judge disagreed, basically saying distracted driving due to phone use applies to all such activities. *As more drivers rely on their smartphones' map capabilities for directions, this issue seems likely to recur. Reading maps on a phone can be as distracting as reading a text message, and as deadly.*

U.S. SUPREME COURT AGREES TO HEAR IMPORTANT CONTRACT ISSUE – The U.S. Supreme Court has agreed to hear an appeal of a federal appellate court decision upholding contracting parties' choice of venue in a contractual dispute. As often happens, a party to a contractual dispute wants to change the previously agreed choice of venue for litigating the dispute. So the issue before the Supreme Court is how much discretion lower courts should have to designate an alternative venue or what the burden of proof should be among multiple parties seeking to uphold or overturn a previously agreed venue. *Remember that parties negotiate venue provisions because they think it confers an advantage or disadvantage if a contract ends up in litigation or arbitration. Whose "home court"? Just about all your contracts have a choice of venue provision, often coupled with a choice of law provision, so you will want to be aware of the outcome of this decision.*

SURPRISE, SURPRISE? NOT REALLY – *H&H Report Update* – It does not come as a surprise that the U.S. Postal Service has backed down in the face of Congressional opposition to USPS plans to eliminate Saturday mail deliveries except packages, starting in August, in order to reduce its badly out of whack operating deficits. Many in Congress objected. *Let's look at how all this works. The USPS is supposed to operate at a profit and under its own management. But Congress pretty much tells it to not cut any services, communities tell it not to close their post offices, and its unions tell it not to cut any jobs. Just how is the USPS supposed to operate at a profit with those restrictions? Stand by for another postal rates increase.*

GOOD READING … See you in May 2013

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"SLOPPY, MISTAKEN OR UNFAIR" TERMINATIONS NOT ILLEGAL – A federal appellate court in Chicago recently dismissed charges filed against the American Red Cross by a worker who was fired for misconduct from the nonprofit's Rockford, Illinois office after other employees complained, among other things, that she had instructed another employee to falsify records, given out blank certifications for Red Cross courses, and told people that "the Red Cross was out to get minorities." The discharged worker denied making that last statement and sued the Red Cross, saying that, rather than being fired for misconduct, she had actually been terminated because of her race and in retaliation for a complaint she had previously filed against the nonprofit with the Equal Employment Opportunity Commission. But the appellate court found there was insufficient evidence that the reasons for discharge offered by the Red Cross were a "pretext," that is, a "lie" or a "phony reason" for termination, since it appeared the Red Cross honestly believed the charges made against the plaintiff by other employees were true, and that her firing had nothing to do with her previous EEOC complaint but only with her misconduct. The court further opined that, at most, the plaintiff had demonstrated that the Red Cross investigation of charges against her by other employees was "sloppy, and perhaps it was also mistaken or even unfair." But the court said that federal employment law "does not forbid sloppy, mistaken or unfair terminations; it forbids discriminatory or retaliatory terminations." *Interestingly, the appeals court hinted, in a footnote to its opinion, that the plaintiff might have been able to claim that the Red Cross unlawfully retaliated against her for telling others that "the Red Cross was out to get minorities," and making similar statements about alleged racism at the Red Cross, except for the fact that she denied ever having made such statements. "Needless to say," the court noted, the plaintiff "cannot win a suit based on factual events that she insists never happened." That's one more point of law to keep in mind.*

IT'S BEEN A LONG TIME COMING – The National Football League, a nonprofit, believe it or not, has preliminarily agreed to settle a lawsuit filed in 2009 on behalf of retired players whose names and images were used without the former players' consent by the NFL. The settlement pot is initially $42 million. It will be used to fund a common trust fund to help retired players with medical expenses, housing and career transitions. The settlement also provides for a licensing agency for retired players to ensure that they are compensated going forward if the NFL uses their names and images for promotional purposes. The settlement covers players who are currently retired, but future retirees will have the licensing agency to work out their deals with the NFL or sponsors. An additional $8 million will compensate the players' attorneys and help set up the licensing agency. *This seems pretty basic: if you want to use my name or image, negotiate with me. But the NFL has strongly resisted. A lot of former players, especially those who played before the salary structure exploded upward in the past decade, are in need, with medical expenses and other bills mounting. This fund, to be administered by former players, can help those players. There will be more hearings on the settlement with opportunities for players to comment to the court on the settlement. The goal is to finalize the settlement about the time the 2013-2014 season begins. Perhaps the NCAA, which is also being sued by former college athletes whose names and images are being used by the NCAA without their consent for marketing and promotion, might want to take a look at the NFL settlement to end that litigation. The NCAA faces substantial exposure on that lawsuit, among a number of others.*

Intellectual Property & Computer Law Developments

BOOKS SOLD ABROAD MAY BE IMPORTED WITHOUT PUBLISHER'S OKAY – The U.S. Supreme Court has decided 6-3 that copyrighted works manufactured and sold with the copyright owner's permission in foreign countries may be resold in the U.S. without that permission. The case involved copyrighted textbooks that John Wiley & Sons, Inc. had authorized an affiliate to manufacture and sell abroad, at cut-rate prices, which were purchased there by the relatives of an American graduate student and shipped to him in the U.S., where he resold them on eBay at a profit. Trying to protect the U.S. market for its copyrighted works, which Wiley sold in the U.S. at higher prices than the prices charged for the copies of somewhat lesser quality that it sold abroad, Wiley had stated in each book sold overseas that they were not to be distributed in the U.S. But the Supreme Court held that Wiley's permission was not required for the importation of the works manufactured and first sold abroad with Wiley's authorization. *This decision does not apply to the importation of works copied or sold abroad without the permission of the copyright owner. But the Court apparently realized that its decision would not be popular with publishers – including nonprofit publishers – as it invited Congress to change the U.S. Copyright Act to specifically prevent resale in the U.S. of copyrighted works manufactured and first sold legally overseas, except when such importation has been authorized by the copyright holder. If your association publishes materials for sale outside the United States, keep this decision in mind.*

Employment Law Developments

BEWARE OF DISABILITY ACT CLAIMS IN THIS LEGAL ENVIRONMENT – When Congress revised and expanded the scope of disability claims under the Americans With Disabilities Act ("ADA") in 2008, the focus for regulators, judges and juries changed from whether the employee claiming a disability was truly disabled to what sort of accommodation had been considered and offered by the employer. More claims were anticipated – and, not at all surprising, have been filed, successfully passed the summary judgment barrier that used to defeat many disability claims, and resulted in more and higher judgments and settlements. Some statistics illustrate these trends, such as a 33% increase in disability claims filed with the Equal Employment Opportunity Commission between 2008 and 2012, and settlements for anxiety and back pain more than doubling in cost to employers. *What this means for employers is that any disability claim must be carefully considered, and accommodations must be considered, or the risk of a costly EEOC investigation or lawsuit will greatly increase. The underlying standard is what constitutes an unreasonable burden for the employer. As one example, adhering to an employer's fixed time limits for medical leave or requiring an employee to be able to return to full-time work without limitations, may run afoul of an employer's obligation to consider "reasonable" accommodations. What is reasonable or an undue burden is too often in the eyes of the beholder, and once a disability claim is filed, the employer may not be the deciding beholder. So get good legal and medical advice before deciding one way or another. It's a changed legal and regulatory environment out there.*

COURT RULES UNION CANNOT KEEP COMPANY'S FINANCIAL DATA – A federal appellate court in New York has overruled a National Labor Relations Board decision that a company must provide its confidential financial data to a union during contract negotiations. The employer told the union it was not in business to sustain losses and it had to reduce its labor costs to remain viable. The union demanded audited financial data from the employer to show its inability to meet the union's demands. The company produced an unaudited 19-page financial statement but would not permit the union to copy it or take the statement, although the union could read it and take notes. The union appealed to the National Labor Relations Board, which ruled

the company had committed an unfair labor practice by not providing the financial statement to the union. Not so, said the federal appellate court. The company is obliged to provide financial information to the union if it declares it cannot afford the union's demands, but it need not do so if it tells the union it is unwilling to meet the union's demands. *Unable versus unwilling – that's the distinction that mattered to the court. Words matter in contract negotiations, so use them carefully. Another key ruling was that providing the financial data to the union, even though the union was not allowed to keep the data, satisfied the company's disclosure obligation. There were numerous contentions raised by the company and NLRB in this court decision, and your member companies with union contracts should keep this decision in mind.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

ANOTHER TAX INCREASE PROPOSAL, ANOTHER OBJECTION – The trade association for U.S. airlines, Airlines for America or A4A for short, has come out in opposition to a tax increase proposed in the House Republicans' budget, a doubling of the security tax paid by airline passengers from $2.50 to $5.00. A4A claims air travel is already more heavily taxed than cigarettes or alcohol, citing an example of taxes meant to discourage consumption as well as raise revenues. Instead of higher taxes, A4A thinks the government should focus on increased operating efficiencies for the Transportation Security Administration. *Some interesting facets to this proposal: With governments from the federal level on down looking to fees and other service charges to help fund operations, this proposed fee increase is less a surprise than many. The increased fee is also in President Obama's draft budget for FY 2014. Will an added $2.50 reduce air travel? Not likely. But to have House Republicans proposing a tax increase, however minimal, even if it is called a fee, shows some sign that House members recognize that government operations require funding. Who better to charge than those who directly benefit from services provided? And, as we see next, more add-on fees that are much higher than the TSA tax, but flow to the airlines, are okay with them.*

AIRLINES ARE TINKERING WITH THEIR OFFERINGS AND FEES – Hard on the heels of the American-U.S. Air agreement to merge as American tries to emerge from bankruptcy, come announcements of other efforts to tweak offerings to the flying public. United, which merged with Continental after bankruptcy, is offering to deliver passengers' checked bags to their homes, offices or hotels, within 40 miles, for a fee of $30 for the first bag, $40 for two bags, and $50 for up to eight bags. That is on top of the fees to check bags before boarding, and is similar to an offering by American last year. American is experimenting with a revised boarding system, letting those without carry-on bags board after the first class and elite passengers but before the general boarding process begins. Southwest is offering to move passengers up in its boarding process for an additional fee of $40 per flight, similar to a program previously offered by American, and some airlines are offering an expedited passage through security lines for an added fee. Samoa Airline is now charging passengers by the kilo, including their luggage, an approach not expected to be adopted elsewhere. *What all these offerings have in common is additional fees, which the airlines insist are necessary if they are to earn any profits. Competitive fares, they claim, are too low for them to operate at a profit. Spirit Airlines may be the most proficient airline at adding fees beyond the initial fare, and manages to operate profitably. Will it be the poster child for the future of domestic air travel? Plan and budget accordingly.*

JUST HOW MUCH WILL SEQUESTRATION AFFECT AIR TRAVEL HERE? – The Federal Aviation Administration has announced that, to reduced funding caused by the budget sequestration process, the FAA has to lay off or reduce the work hours of many federal air controllers. The first step was to remove FAA air controllers at 149 smaller airports, a move now delayed until June 15. But the bigger impact for the nation's airlines and their flyers is likely to be a reduction in controllers available to man air control towers at New York's three major airports, Chicago's O'Hare Airport, and other major airports for starters. As one example, O'Hare may shut down its newly built north tower, which permits a substantial increase in landings and takeoffs per hour in good and bad weather. While the airlines are saying they do not intend to reduce their regularly scheduled flights due to sequestration, and are encouraging the FAA to make budget cuts in other spending before controllers, all bets are off. *One comparison to fewer flight controllers is the schedule havoc when severe weather affects the major airports, especially in New York, Chicago, Atlanta or Dallas, and flight delays or cancellations cascade across the country. Anticipate fewer flights available, delays, cancellations and backups, including international flights facing restrictions due to reductions in Customs and Border Protection staffing and elimination of overtime. International entry lines will be much longer. German officials are already protesting long lines leading to two-hour processing waits here. It could be a long summer. Plan accordingly.*

REGULATORY LAW DEVELOPMENTS

NLRB WILL APPEAL THE RECESS APPOINTMENTS DECISION – *H&H Report Update* – The National Labor Relations Board has announced it will take a direct appeal to the U.S. Supreme Court of the decision by a District of Columbia federal appellate three-judge panel that declared the recess appointments of three members of the NLRB was a violation of the U.S. Constitution because the appointments bypassed the U.S. Senate's advise and consent power. The underlying issue is what constitutes a "recess" when the Senate is not sitting. The appellate court for the first time declared that a recess is limited to breaks between annual sessions of the Senate, and the short breaks over holidays, during the campaign seasons, and similar breaks do not constitute a constitutional recess. The appellate decision not only throws into uncertainty all the decisions by the NLRB commissioners since the three members were appointed by President Obama in January, 2012, but also makes all the other recess appointments by the President to other executive and administrative positions subject to challenge. *Recess appointments are not new. Every president has made such appointments to get around the Senate's refusal to take action on presidential nominations, whether by secret or not-so-secret holds, filibusters, or refusals to conduct hearings on nominees. The NLRB has decided to bypass an appeal to the D.C. appellate court sitting en banc that is, all the judges of the appellate court, and go directly to the Supreme Court lest the uncertainty drag on into 2014 or beyond. The NLRB has until April 25, 2013 to file its appeal. The Supreme Court may or may not accept the appeal, and in any event is unlikely to act until its next term, beginning in October 2013. As Stan Laurel often said to Oliver Hardy, "This is another fine mess you've got us into."*

TAX LAW DEVELOPMENTS

CORRECT 403(b) PROBLEMS THIS YEAR TO PAY REDUCED IRS FEES – The Internal Revenue Service has published a Voluntary Correction Submission Kit to help employers with 403(b) retirement plans restore tax-favored treatment for their plans that was lost because they failed to adopt a written plan meeting all requirements then imposed by federal tax law and the IRS by December 31, 2009. Adopting the required written plan and making a Voluntary Correction Program submission to the IRS can restore tax-favored treatment to the plan so that the plan participants can continue to build up retirement

savings on a tax-deferred basis. Additionally, if an employer makes the submission by December 31, 2013, it can claim a 50% discount on correction fees due to the IRS. *Nonprofits exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, along with public schools, are generally the only employers eligible to sponsor a 403(b) plan. A church plan is not subject to the written plan requirement with the 2009 deadline unless it includes retirement income accounts.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

BEFORE THEY CAN TAX IT, THE MARKET HAS TO PRICE IT – The "it" is marijuana, eyed by some tax authorities and proponents of legalization of marijuana as a potential sales tax bonanza. While Colorado and Washington struggle with the rules governing the production, sale and limitations on newly legalized marijuana for recreational use (not just for medical purposes and aside from the minor issue of its continuing illegality under federal law), the whole issue of how to tax it at the retail level is open to conjecture. What sales tax should be applied, the same sales tax that is charged on other products, a higher or additional "sin" tax of the sort many state and municipal governments apply to liquor, wine and beer, or something different? What quantity should be used? Per ounce, per gram, something else? How will "legal" marijuana be priced in comparison with the current illegal stuff? Will there be price wars if the bad guys react to new competition? Will they muscle in on the newly legal providers? *Perhaps we should be grateful Colorado and Washington State are assuming the burdens of being the national laboratories for these and numerous other issues yet to be resolved, or even much debated. The great tax bonanza envisioned by tax authorities, regulators, pundits and others may be a while in coming. One thing seems to be clear: before the state and local governments can tax it, the market will have to price it, and exactly how that will occur is still being worked out by the tax authorities, regulators, legislators, and legal (and maybe the not so legal) providers, with Uncle Sam looming in the background.*

H & H DEVELOPMENTS

In April . . .

Jonathan Howe co-presented "It's Your Day in Court: Common Contract Disputes on Trial" which explored disputes from both sides of the courtroom for an event for association executives in San Francisco, CA. He also presented "Changing Contracts for Changing Times" for Destination Midwest, in Detroit, Michigan, sponsored by *Meetings & Events* (a publication in which he has been "The Law & The Planner" author for many years), and *Successful Meetings*, both publications well known to the meeting professional industry.) **Barbara Dunn** presented a session on overcoming common obstacles in negotiating hotel contracts to a group of attorneys in Chicago and social media legal issues program to a trade association group in Orlando. She also presented a webinar on drafting a social media policy for a group of meeting professionals. **John Peterson** made a presentation on legal developments of interest to two trade associations. **Layton Olson** facilitated a webinar on Broadband Planning and Big Data with Northwestern University, linked to the national conference of American Planning Association in Chicago.

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Contributors to this issue…
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