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:

SAD COMMENTARY BUT MORE OF THE SAME – The *Daily Herald Business Ledger* recently summarized the State of Illinois pension mess in a sentence: "Illinois has set aside only 45 percent of what it needs to meet public-worker pension obligations, the worst of any U.S. state." The legislature's response, it seems, year after year is to promise more but not fund the promise. *What is really strange is that other than the occasional newspaper editorial or speech by an opposition legislator and occasionally even the governor, nothing changes. The legislature goes on doling out the goodies to public employees who take an increasing share of the budget, and we just grumble a bit and go along with it. Associations and their employees in Illinois have a lot at stake in this 'kicking the can down the highway' scenario. Another state income tax increase to fund the pension liability, anyone? That worked so well a year ago.*

PRIVACY – SURELY YOU JEST! – A criminal suspect in New York City learned the hard way that Facebook privacy is limited despite what Facebook may promise. The suspect thought his statements to Facebook "friends" were private. To his dismay, however, a "friend" disclosed his statements to federal investigators. A federal judge rejected the suspect's motion to suppress the statements, stating that whatever he may have thought his privacy limitation on Facebook would protect, once he went public on Facebook to "friends," they were not bound and could disclose his statements to anyone. *And one did! The moral of the story is that once you post something on Facebook or other social media, the likelihood of it remaining confidential or limited only to those you permit is at risk, as many a sexting teen has discovered. A secret is known to one person; if more than one it is a shared confidence, and subject to disclosure.*

ANOTHER "DUH" MOMENT – The Aerospace Industries Association and other air traffic groups recently commented that the automatic 10% federal budget cuts across the board, which are supposed to kick in January 1, 2013 as part of the "fiscal cliff" package if Congress cannot come up with a compromise on the so-called "Bush tax cuts," will hurt air traffic. *Precisely! That was the idea of enacting the fiscal cliff – to force Congress to compromise. Maybe after the election and before January 1…. Maybe….*

GOOD READING … See you in October

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BENEFIT CORPORATION ACT SIGNED INTO LAW IN ILLINOIS – Governor Quinn on August 2 signed into law the so-called "B Corporation Act" authorizing businesses to adopt public benefit standards subject to private-sector self-regulation. Peer-reviewed standards include environmental stewardship, community engagement, public accountability and employee treatment. Several environmental enterprises led the way to create this formal designation in order to communicate with consumers and maintain founders' business practices in relation to mergers and acquisitions. *Illinois has become the ninth state to create this classification of business. In recent years Illinois has also authorized nonprofit enterprises to secure investment by private investors while operating as low-profit limited liability companies committed to charitable purposes, and subject to public oversight. The forms of nonprofit entities are diversifying. If you need further information on options, we are here to assist you.*

FEC WON'T ACT ON CHARGE OF EMPLOYEE POLITICAL COERCION – The Federal Election Commission ("FEC") recently decided not to take any action on behalf of two individuals who charged that they were coerced into engaging in political activity by their former employer, a nonprofit union local in Hawaii. The employees said the union had decided to support a Democratic candidate in a 2010 special election for a seat in the U.S. House of Representatives and had also encouraged employees to support that candidate on their own time, firing the two complainants after they refused. When the FEC considered charges that this employer conduct violated the Federal Election Campaign Act, the FEC's eight members split 4-4 on whether to take any action against the union, and, since five members must support any action the FEC takes, the union escaped punishment for alleged employee coercion in connection with a federal election. Interestingly, four Democrats on the FEC voted to take further action in the case, while four Republican members sided with the union. *What does this case tell nonprofits about their involvement in elections? Maybe nothing, since the four FEC members who voted for the union gave no reasons for their votes, and they may have thought the alleged conduct wasn't prohibited by the Act or that there was insufficient proof the union had actually engaged in the alleged conduct. In any event, we think nonprofit employers should play it safe and let their employees make their own decisions about political involvement.*

HOSPITALS COMPETE FOR STATE AID IN MASSACHUSETTS – Massachusetts has come up with an innovative way to fund aid to nonprofit hospitals: tax some hospitals, including nonprofits, to pay for aid to others, then make eligible recipients compete for funding in presentations to a special commission charged with divvying up available money. Three Harvard-affiliated hospital systems will pay a one-time $60 million tax into a kitty that will go to help needy nonprofit hospitals invest in technology, control costs and better coordinate patient care. The hospitals subject to the tax were apparently chosen because, of the population of for-profit and nonprofit facilities in the state, they were judged to be best capable of paying it. The tax revenues, though, will have to be divided among numerous eligible and needy nonprofit hospitals who will have to make their case for funding to the commission, and the money may not be sufficient to aid all eligible nonprofits. "It's a jump ball," one commentator said. *If a nonprofit hospital is run efficiently in Massachusetts and requires no state aid, it seems to risk being specifically compelled by the state to finance other hospitals that may be less efficient in using technology, controlling costs and coordinating patient care. What a concept! And what an incentive to operate efficiently! And talk about selective taxation. Is this a lawsuit waiting to happen?*

Intellectual Property & Computer Law Developments

AICPA HAS PUBLISHED AN UPDATED NONPROFIT ACCOUNTING GUIDE – The American Institute of CPAs has published an updated accounting guide for nonprofits. It is available in paperback and electronic book format and by online subscription at various member and nonmember prices ranging from $77 to $106. It is intended to provide guidance on common accounting and auditing issues of nonprofits. The new version provides information on such recent topics as risk assessments, contributions, fair value measures, and other topics in addition to the materials previously covered. *This might be a helpful publication to have on hand to determine routine and sometimes not-so-routine accounting questions*.

Employment Law Developments

HARD TIMES AND SITUATIONS BREED LABOR LAW CLAIMS – It should not come as a surprise that labor law claims go up during a protracted recession with high unemployment numbers. According to the Administrative Office for the U.S. Courts, wage-and-hour cases for the 12-month period ending March 31, 2012 were at a 20-year high. Why so many wage-and-hour claims? First, the definitions of work classifications under the Fair Labor Standards Act date largely to a bygone era of white collar and blue collar wage classifications in an industrial age which do not reflect today's information-based workplace. Ambiguities abound. Second, once an employee is laid off, the employer's leverage is greatly reduced. The employee has less to lose by filing a lawsuit or a complaint with the Equal Employment Opportunity Commission or an equivalent state agency. Job misclassifications are rampant, with employees designated as exempt to avoid paying them overtime even as they are asked to do the work of workers previously laid off. Another tactic is to label employees as independent contractors to avoid overtime and benefits obligations. *Associations need to look at their job classifications carefully. Is that "manager" really a manager, or primarily doing routine work and managing no other employees? Is that contractor really independent when viewed through the lens of a regulator? Both federal and state regulators are focusing on misclassification issues, and whether a misclassification was done intentionally or due to error, the consequences can be expensive.*

PAY REDUCTION FOR GUARANTEED RETIREMENT BENEFIT – A recent survey conducted by Bank of America Merrill Lynch concluded that 80% of the employees who responded to the survey would agree to a pay reduction of 5% if that resulted in a guaranteed retirement benefit. As many as 40% would take a 10% pay cut for a guaranteed retirement benefit. *Of course, the problem is few things in life are guaranteed, especially in the financial world. Even defined benefit plans, which are fast disappearing in the private sector, rely on the financial health of the plans, backed in part by (federal) Pension Benefit Guaranty Corporation assurances, but employees whose companies filed for bankruptcy can attest to the fragility of their guaranteed retirement benefits. Those employees might consider taking that 5% or 10% and invest it themselves in insurance annuities or money market plans or government securities – but again, nothing is guaranteed on the outcome, especially when inflation is factored in.*

MAY EMPLOYER DISCRIMINATE AGAINST ILLEGAL IMMIGRANT? – It is well known an employer may not discriminate against a worker based on national origin, but what about someone in this country illegally? A federal appellate court in Chicago ruled it was not illegal for an employer to terminate an employee who was associating with (married to) a man from Mexico who was in this country illegally. It is not a violation of Title VII – in some respects – to discriminate against a person in this country illegally. *It was her husband's illegal status, not his Mexican nationality, as the court saw it, that led to her termination. But Title VII may apply in other respects so get good advice.*

EMPLOYERS AND EMPLOYEES OFTEN UNCLEAR ON "FREE SPEECH" – Just how far can employers go in curtailing employees' "free speech" rights on the job? Well, it all depends. Employers have to be wary of curtailing employee speech, including statements on social media outside the workplace as well as speech on the job, which might be characterized as speech related to job conditions, collective bargaining and other speech protected under the Fair labor Standards Act, a category of protected speech which federal regulators have expanded under National Labor Relations Board interpretations since 2009, and speech alleging discriminatory policies, for example protected by civil rights laws, or safety and other issues protected under other federal laws. But employers may impose limits on employees' speech deemed disrespectful of others, or pushing their own political or religious views on other employees, or bullying or sexist remarks, or speech which interferes with the employer's business operations. *In general, employers need to tread carefully here, and get good legal advice, particularly in areas that might be construed as interfering with employees' rights under federal law. And don't forget state laws may also apply. But employees need to recognize that "free speech" on many topics ends at the employer's door. "Can they do that?" Yes, they can.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

NEW VISA REQUIREMENTS FOR TRAVEL TO CHINA – China introduced new visa requirements effective July 1, 2012. Travelers to China for business, tourism, study or work will need to provide more documents in order to obtain the required visa. A business visa will require a letter of invitation or a letter of confirmation of invitation by a local government, company, corporation or institution. A tourist visa will require a letter of invitation meeting specified requirements by a tourist authority, or by an individual, company or other entity; or a photocopy of an airline ticket and hotel reservation. *If your members travel to China, you might want to give them a heads-up on the new requirements, and advise them to allow more time to obtain a visa. For more information, see www.chinaconsulatechicago.org.*

REGULATORY LAW DEVELOPMENTS

GOT YOUR MEDICAL LOSS RATIO REFUND? – The Patient Protection and Affordable Care Act of 2010 now requires health insurance issuers to publicly report, in various categories, how they spend premium dollars they have collected. In addition, if insurers spend less than an established percentage of premiums for claims payments, as opposed to administrative fees, expenses and profits (called the "medical loss ratio" and set at 85% for large group policies, 80% for small groups and individuals), they are supposed to rebate excess premiums to policy holders, beginning with excess premiums collected in 2011, which were required to be rebated by August 1, 2012. Insurers must advise policyholders (including employers and employees) as to whether or not they are entitled to a rebate. *Want to check on your insurer's medical loss ratio for 2011? Insurer ratios, organized by state, are posted on the Internet at http://companyprofiles.healthcare.gov.*

DOES THE ADA APPLY TO INTERNET BUSINESS ACTIVITIES? – Courts that have considered this question have come up with different answers. A federal district court in Massachusetts recently held the (federal) Americans with Disabilities Act ("ADA") does require that goods and services provided over the Internet be equally accessible to the disabled in accordance with the ADA. But other federal courts have disagreed, finding that the public accommodations required to be accessible to the disabled under the ADA involve only actual physical bricks-and-mortar places, not Internet websites, and the federal courts of appeal that have addressed the issue to date seem to be about evenly divided on the issue. With the split in the courts over this question, the U.S. Justice Department is planning to issue a notice of proposed rulemaking on the subject in December. *Do nonprofits have to redesign websites to provide*

closed-captioning for the deaf on all Internet-supplied videos, as well as alternative access to online content for the blind and other disabled individuals who have a hard time using a mouse or keyboard? The Justice Department may provide the definitive answers, or the U.S. Supreme Court may have to weigh in. We will follow up when more is known.

TAX LAW DEVELOPMENTS

NO DEDUCTION FOR ALLOWING FIRE DEPARTMENT USE OF HOUSE – The U.S. Tax Court has upheld a decision by the Internal Revenue Service to deny a federal charitable contribution tax deduction to property owners for letting a local fire department conduct training exercises at their house. The exercises involved destroying the house by fire, which would save the owners money, since they had recently acquired the property with the intention of demolishing the existing house and constructing a new one. But the IRS balked at granting them a tax deduction for their charitable "gift" to the fire department, and the Tax Court agreed with the IRS on the grounds that simply allowing someone else to use property, while retaining all other property rights, could never qualify the owners for a tax deduction, regardless of what value the use might have and regardless of the owners' charitable intentions or lack thereof. *Current federal law greatly restricts deductions for granting a partial interest in real property, and the Tax Court rejected the notion that the owners in this case had granted even a partial interest to the department, rather than just a license to enter and destroy the house. On the other hand, the Tax Court did reverse the IRS's decision to impose penalties on the property owners for negligence and substantial understatement of income tax, as the Tax Court noted the previous "uncertain state of the law" regarding the type of transaction in which the taxpayers engaged. We should all be so lucky in dealing with the IRS.*

IRS DENIES EXEMPTION FOR MARIJUANA DISTRIBUTORS – A corporation formed to distribute marijuana intended for medical use has been denied a federal income tax exemption by the Internal Revenue Service. The nonprofit was based in California, which has passed a state law allowing the cultivation of marijuana for use by seriously ill individuals upon a physician's recommendation. Though the nonprofit claimed it was organized and operated as a public benefit corporation and as a "clinic devoted to the care and nurturing of persons in medical distress for various reasons," the IRS basically said that, whatever California might think about the distribution of marijuana, *federal* law recognized no health benefits in marijuana and prohibited manufacture, distribution, possession, or dispensing of it. That made the primary activity of the corporation illegal, as far as the IRS was concerned, and required denial of any federal income tax exemption. *This illustrates a different side of the ongoing conflict between federal laws banning the use, distribution, or sale of marijuana, and increasingly widespread public tolerance and state and local acceptance of limited use of marijuana for medicinal purposes. We guess the corporation's hope for an exemption was a true "pipe dream."*

"ONLINE MINISTRY" NOT EXEMPT – The Internal Revenue Service has denied a federal income tax exemption for a nonprofit calling itself an "online ministry." The organization said it provided "free spiritual services" through an Internet website, including "sermon preparation, outlines, and spiritual illustrations; Bible study, prayer group, and leadership training materials; membership, statement of faith, and other church-building materials; articles and fictional reading materials." But the IRS said the organization had a substantial nonexempt purpose which disqualified it for an exemption, because it largely produced, promoted and sold books and other materials that had been written by the group's founder and other authors, who retained copyrights in all of the materials and received a share of the proceeds from all sales. Since this activity conferred a substantial private benefit on the group's founder, the IRS said it did not have to determine whether the proceeds from sale of the books and other materials were reasonable or excessive. *This is an example of how much weight the IRS is currently placing on the need for exempt organizations to avoid providing any substantial private benefit to founders and other "insiders."*

OTHER ISSUES, TRENDS & DEVELOPMENTS

A REASONABLE BUSINESS RISK? – Corporate executives are often admonished not to risk the outcome of their businesses on the results of jury deliberations, particularly with unschooled jurors deciding claims in highly technical and arcane areas of the law such as conflicting patent claims. Yet Apple and Samsung ignored all efforts by the federal trial judge in San Jose, CA to get them to settle their complex patent litigation despite hundreds of millions of dollars at stake, injunctive relief, legal fees, and uncertain outcomes for all concerned. *The lawsuit was sent to jurors who occasionally were seen to be less than attentive to the tedious complexities of conflicting patent claims during the trial, and made to stand from time to time so they would not fall asleep while listening to more than 100 pages of jury instructions ranging from the standard boilerplate to specific pieces of evidence. Reasonable risk? Someone had to win or lose big-time! Of course the appeals could take years – and more fees and opportunities to settle.* Apple won big; Samsung lost big, $1 billion, and that may be trebled by the judge hearing the case.

ANOTHER RULING UNDERMINES PRIVACY ON THE INTERNET – A recent court ruling that permitted New York prosecutors to have access to the Twitter account of one of the Occupy Wall Street protesters should give us all pause. The New York state court judge allowed prosecutors access to the protester's account to not only reveal his messages for three months, but additional account information which will reveal his whereabouts when he posted a message and other information. This followed the protester's arrest for disorderly conduct in connection with a march across a bridge into Manhattan, disrupting traffic and garnering national news media attention. But what is most dangerous about the judge's ruling is that the prosecutors are ***not*** required to obtain a subpoena for a search warrant which requires a finding by a judge that the prosecutors have probable cause to pierce the individual's (or a company's) privacy. No probable cause need be shown. Twitter resisted the prosecutors' demand for the protester's records and was summarily ordered to produce them by the judge. *So what, you might ask. Protesters should be subject to having their privacy invaded. Well, this is not just about protesters using Twitter. This sort of ruling allows invasions of Facebook, LinkedIn, email and other online accounts. You may never even know who is scrutinizing your postings or why. Ever since 9-11, privacy invasions by federal, state and local authorities have become the norm. George Orwell's "Brave New World," anyone?*

H & H DEVELOPMENTS

In September … **Jonathan Howe** presented, " Your Not So Silent Partner – Overcoming Government's Impact on Meetings and Events Act" and "Legal Issues Roundtable – Some Leading Issues and Best Practices" in Washington, D.C. **Barbara Dunn** co-presented "It's Your Day in Court: Common Contract Disputes on Trial" with a colleague as they examined seven case studies to explore both the planner and supplier issues related to contracts. **Samuel Erkonen** presented "The Lawyer is here" for an educational familiarization program for meeting planners in Nassau. **John Peterson** reported on "Legal Trends and Development of Interest" to a manufacturing association. **Gerard Panaro** presented a session at an international association annual seminar on workplace violence in Philadelphia. PA. Toward the end of the month **Jonathan Howe** will present "The Art of Negotiating And Contracting In An Improving Market" at DESTINATION HAWAII at the Wailea Beach Marriott in Maui, Hawaii.

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Contributors to this issue…

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