THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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IN THIS ISSUE:

CALIFORNIA SUPREME COURT TAKES A PASS ON CELL PHONE EXPENSES — *H&H Report Update* — The California Supreme Court declined to grant review of an appellate court decision in August 2014 directing employers to reimburse employees for mandatory use of personal cell phones for business purposes, even if an employee's phone plan had unlimited minutes and the employee incurred no additional expenses for using a personal phone for business purposes at times. *In addition to the questionable logic of its decision, the appellate court ignored the accounting problems created by each employee having a different plan and different phone with numerous service providers which can change frequently. Ah, the joy of being oblivious to all that minutiae. California nonprofits take note; this applies to you too.*

HERE'S AN INTERESTING TWIST ON DISTRACTED DRIVING — It seems a driver was ticketed in Georgia by a local policeman for driving while eating a McDonald's double quarter-pounder with cheese. The issue is whether that led to distracted driving by the driver, something a prosecutor will have to determine before proceeding to trial on the ticket. *As you can imagine, this has led to national attention, and lots of commentary. The late night comedians should have a field day with it. Our personal experience is that distracted driving due to cell phone use and texting is more obvious than food and beverage consumption. The matter was set for hearing in early February.*

"EXPERT" TESTIMONY CAN'T BE BASED ON "COMMON SENSE" — Individuals associated with nonprofits are often called to testify as expert witnesses in court proceedings. But a recent case out of Delaware reaffirmed what court decisions and rules have said for years; expert witness testimony must be "scientific, technical, and/or specialized" and not just "common sense" observations. Otherwise, that testimony will be excluded from evidence. So declared a Superior Court concluding that "expert" testimony regarding the likely cause of a scuff mark on the rear of a car provided no assistance to the jury beyond what the jury could have reasoned out, because the jury was as competent as the expert to form an opinion about it. *It makes you wonder why common sense seem so be so uncommon, as seen in many a court decision. Or as Sir Arthur Conan Doyle is reputed to have said, "There is nothing more deceptive than an obvious fact."*

GOOD READING … See you in March

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NOT-FOR-PROFIT LAW DEVELOPMENTS

QUARTER HORSE ASSOCIATION NOT A CLONE OF AMERICAN NEEDLE — *H&H Report Update* — A federal appellate court in New Orleans distinguished the U.S. Supreme Court's 2010 opinion in *American Needle v. NFL* in overturning an antitrust verdict against the American Quarter Horse Association ("AQHA") for banning cloned horses from its registry, shows and races. In *American Needle*, each of the NFL league members had agreed to and profited from the challenged licensing arrangement for NFL teams' merchandise. Here the appellate court found that AQHA and its members have interests not limited to profit, but rather the association sets breed standards, in essence "creating" and preserving the product – the quarter horse breed, among other activities. Without ruling on whether AQHA was legally capable of conspiring with its committee members, the appellate court assumed the answer is yes and then examined the trial evidence. The appellate court found no direct evidence of a conspiracy among AQHA committee members acting to advance their own economic interests, controlling decision-making, or conspiring with AQHA to exclude cloned horses. The court said that reasonable jurors "[C]ould not draw any inference of conspiracy from the evidence presented, because it neither tends to exclude the possibility of independent action nor does it suggest the existence of any conspiracy at all." *Jurors in fact had previously found an anticompetitive conspiracy, but did not award damages. The trial judge had entered an injunction against the AQHA's ban on cloned horses which is now overturned. Other animal breed associations will also be relieved the trial court decision was reversed. The appellate court's opinion examined the AQHA's board election process, committee structure and functions, and how policy decisions were made with significant member input in finding no basis for a conspiracy. The opinion is a very useful guide to help associations avoid antitrust liability in board election processes, committee structures, association rule-making processes, and related activities. We can help you.*

REGULATORY LAW DEVELOPMENTS

EEOC ATTACKS EMPLOYER SEPARATION AGREEMENTS — The Equal Employment Opportunity Commission recently filed suit against a private college, alleging, among other things, that a separation agreement it had negotiated with a resigning employee denied her rights under the Age Discrimination in Employment Act and interfered with the EEOC's ability to investigate charges of discrimination. The EEOC suit targeted a provision in the agreement that required the former employee to refrain from filing a complaint or grievance with any governmental or regulatory agency. The agreement also prohibited the former employee from disparaging the college, and the college had gotten into a dispute with the former employee over the latter provision because of certain emails she had sent. The college sought a return of money it had paid the former employee to sign the separation agreement. She then filed charges of discrimination with the EEOC, and the college filed a state court action against her for breach of the agreement's non-disparagement provision. Now, a federal district court judge in Colorado has dismissed, on procedural grounds, the EEOC's charges against the college based on the separation agreement, though the judge did allow the EEOC's case against the college to proceed to trial to determine whether the college had illegally retaliated against the former employee for her EEOC complaint by filing the state court suit for breach of contract. *What do we learn from this case? We did not learn whether a separation agreement violates federal law if it includes a provision against filing complaints or grievances with federal agencies, because the judge didn't reach the merits of that claim, dismissing it on procedural grounds. But we know the EEOC has a bee in its bonnet of late over this type of provision, and, if an employer doesn't want to court an EEOC action, it should perhaps remove such provisions from its separation agreements (or, at least, include language that says the prohibition doesn't apply to charges filed with the EEOC). Also, we learned that employers had better be careful about filing suits against former*

employees after those employees have filed a complaint with the EEOC, for fear that some court may find that an employer's lawsuit was filed, even partly, to retaliate for an employee's complaint to the EEOC. Retaliation claims are fast becoming the predominant discrimination-related claim.

JURY UPHOLDS WORKER'S REFUSAL TO SUBMIT TO HAND SCANNING — A jury in Clarksburg, WV awarded $150,000 in compensatory damages to a worker who claimed he was forced to retire early because he refused to submit on religious grounds to biometric hand scanning for time and attendance tracking. The jury said the employer refused to accommodate his religious belief that hand scanning was related to the "Mark of the Beast and Antichrist" discussed in the Bible. The Equal Employment Opportunity Commission sued the employer on his behalf, and plans to seek a permanent injunction against the employer's alleged religious discrimination. The judge in the case will also decide on back pay and front pay in addition to the $150,000. *The employer had countered with information that the biblical reference was only to a mark on the forehead and right hand, and the employee's left hand could be scanned. Not too surprising, the employer announced it will appeal. But the lesson here appears to be that employers must balance the risk of not accommodating a religious belief with the costs of litigation and damages, especially when a federal agency such as the EEOC weighs in.*

TAX LAW DEVELOPMENTS

SILICON VALLEY ANTITRUST SUIT MAY SETTLE — Four Silicon Valley companies sued by a group of workers for allegedly violating the antitrust laws by agreeing not to hire each other's employees have proposed a new settlement offer to a federal district court judge who rejected a previous offer as too low after one of the named plaintiffs objected to it. Apple, Google, Intel and Adobe Systems made a new offer that the attorney for the employee who objected to the previous settlement has indicated he will accept. Reportedly, it could involve a joint payment of $415 million, topping the rejected offer of $324.5 million. *This case is a reminder that fixing a market for employees is just as illegal as fixing prices for products and services*.

FREEDOM FROM RELIGION FOUNDATION LOSES AGAIN — *H&H Report Update* **—** Reversing one of its own previous decisions, a federal district court in Wisconsin has dismissed a suit filed by nonprofits Freedom From Religion Foundation and Triangle FFRF challenging an exemption from annual federal income tax reporting requirements afforded to churches and affiliated religious organizations. The district court concluded that the Foundation and Triangle had no standing to challenge the exemption under the Establishment Clause and the Equal Protection Clause of the U.S. Constitution because they had not sought and been denied a similar exemption, and further, they had admitted they had no interest in obtaining one. *The district court decision comes on the heels of a ruling by the federal appellate court in Chicago that, for the same reasons, found no basis for a lawsuit.*

NEW ILLINOIS LAW PROTECTS JOB APPLICANTS WITH CRIMINAL RECORDS — *H&H Report Update* — We have been reporting on "ban the box" laws. The Illinois version is the Illinois Job Opportunities for Qualified Applicants Act, effective January 1, 2015. It generally forbids employers with 15 or more employees to ask job applicants about their criminal records or history, or consider such things, until an applicant "[H]as been determined qualified for the position and notified that the applicant has been selected for an interview or, if there is no interview, until after a conditional offer of employment has been made to the applicant." Thousands of dollars in civil penalties may be assessed violators by the Illinois Department of Labor, with the amount depending on the number of violations and the length of noncompliance by an employer. *The intention of the new law is to require that employers give job applicants a chance to explain criminal records after they have been found qualified for a job, rather than relying on "check the box" provisions to disqualify applicants as soon as they admit to having a criminal record on job applications. Employers are still permitted to deny employment eventually, after compliance with the new law, because of criminal convictions or because prospective workers have lied about them. On the other hand, a flat legal prohibition on asking about arrests also remains in effect. This sort of "ban the box" legislation is one of the most widespread trends in employment legislation at state and local levels in the past few years. Be sure to check your state and local laws in this regard.*

EMPLOYEE PARTICIPATION IN FINDING AN ACCOMMODATION REQUIRED — A federal appellate court in Boston has ruled against the Equal Employment Opportunity Commission's claim that a company violated the Americans with Disabilities Act, finding that a worker who quit her job, allegedly because of the company's failure to accommodate her diabetes, should have been more cooperative in working with the company to find a "reasonable accommodation" for her condition. The worker had requested only daytime work after a restructuring of the company's staffing system had resulted in her being given more inconsistent work hours, including a night shift followed by an early day shift. The company had refused that request but had offered to discuss alternatives, following which she walked out of a meeting with her supervisor, slammed the door, resigned, and refused to have any further contact with anyone representing that company, though her former employer later called her in an attempt to get her to reconsider her resignation and engage in further discussions regarding an accommodation. *As the appellate court noted, the ADA requires an "interactive process" between a disabled employee and an employer in an attempt to find a reasonable accommodation for a disability. In this case, the appellate court found the former employee's failure to cooperate was the primary reason that interactive process broke down, in view of the former employer's concrete and documented efforts to continue a dialog with her concerning reasonable accommodations. Employers dealing with disabled workers should take note and should ensure that they engage in such efforts when trying to reach reasonable accommodations, and document any such efforts.*

ILLINOIS MANDATES PAYROLL DEDUCTION PLANS — The new Illinois Secure Choice Savings Program Act, signed into law January 4, 2015, requires employers with 25 or more employees and not already offering a qualified retirement plan, to automatically enroll employees for payroll deduction contributions of 3% of pay to a state-controlled Roth IRA program unless employees opt out or opt for a different contribution percentage. Employers aren't required to contribute, and employers in business fewer than two years are exempt. The Act contemplates a 24-month start-up period before the program becomes effective. Employers failing to comply with the new law face a penalty of $250 per employee for each year an employee is not enrolled in the program, and $500 per employee each year after the employer has been caught and the first penalty has been assessed. The Act may not be a done deal as it is subject to U.S. Department of Labor scrutiny for compliance with ERISA, and a lot of details must be fleshed out before the Act becomes effective in 2017. We *believe this is the first such state retirement program enacted. Similar legislation has been introduced in other states, and the federal government is also reported to have expressed an interest in such a program.*

However, an opt-out law of this sort may be doomed to failure if it is intended to increase retirement savings. There's no doubt people aren't saving enough for retirement, but the chief reason may be that too many workers haven't enough money to live on today, much less to put away for tomorrow.

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

CAN LINKEDIN CONNECTIONS BE TRADE SECRETS? — An ongoing court battle in California tests a cellular accessories company's theory that a former employee who started a competing business unlawfully took its trade secrets by retaining business LinkedIn contact information after leaving the company. That issue, thus far, is undecided. The former employee argues, among other things, that the contact information couldn't be considered a trade secret because LinkedIn knows about it and shares it with others, and because the company never advised its employees that LinkedIn contacts were proprietary or confidential. The former employee faces other charges that he emailed himself a company customer information file, contact information for company purchasing agents, information on customer billing preferences, and company pricing information and sales strategies. *Trade secrets are protected by the law only if they are maintained as secret. Employers should generally make an effort to label trade secret information as such and warn employees not to disclose it to anyone or use it for their own purposes. But it will be interesting to see how trade secret law is applied to LinkedIn contacts in this case, as it certainly seems like a novel application. Some companies push their employees to join LinkedIn and would seem to have an even more uphill battle to claim the contact information was a company trade secret.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

SOMETIMES IT PAYS TO COMPLAIN — *H&H Report Update* **—** Last month we reported Marriott and the American Hospitality and Lodging Association ("AHLA") were pushing the Federal Communications Commission to approve the use of equipment allowing hospitality facilities to block Wi-Fi access by customers if the facilities believe they detect hacking or other unauthorized activities. Customers quickly recalled Marriott had recently been socked with a $600,000 fine and an order requiring Marriott to not block customers' own cell phones and computer devices circumventing access to Marriott facilities' Wi-Fi networks (at considerable daily expense) after a customer complained to the FCC about such blocking at Marriott's Gaylord Opryland. Marriott quickly found itself on the receiving end of heated criticism for the end-around to the FCC with the AHLA to avoid the no-blocking order. Marriott tried to calm things down to no avail by saying it would not block access in common areas and guest rooms. It quietly retreated. *But Marriott left itself some wiggle room, saying it will continue to look for ways to "… clarify security measures…." So don't assume the hospitality industry will not continue to find ways to impose limits on customer use of their devices in the interests of what Marriott called " appropriate market solutions…."*

UNITED FREQUENT FLYER LOSES SUIT OVER MILEAGE RESTRUCTURING — A United Airlines "Million Miler" recently lost an attempt to hold United liable for his loss of mileage after the airline merged with Continental and restructured its frequent flyer program. A federal appellate court in Chicago affirmed a district court decision dismissing his claim that he had been granted benefits for life after flying on the airline for 13 years. According to the court, United had precluded his breach of contract claim by reserving the right to modify its frequent flyer program "unilaterally and without notice." Further, the court ruled that, while the airline may have made certain promises to Million Milers that were "misleading" and "perhaps even fraudulent," the federal Airline Deregulation Act of 1978 required them to channel this sort of grievance to the U. S. Department of Transportation and not the courts. *Not so friendly, these skies. All frequent flyer programs are subject to change, and the airlines are doing so more and more of late. Note the trend to airline awards based on dollars for a ticket instead of miles.*

CHIPPING AWAY AT THE ACA — Republicans in the U.S. House of Representatives continue to pass measures that would limit the reach of the Affordable Care Act (Obamacare). The House recently adopted bills that would excuse employers from counting emergency service volunteers receiving reasonable benefits and expense reimbursements, as well as veterans covered under TRICARE (Defense Department health plan) or comparable insurance, in computing the employee threshold at which mandated employer provision of health insurance coverage for workers kicks in (currently 100 full-time employees, but scheduled to drop to 50 in 2016). Also proposed is a bill that would increase from 30 to 40 the number of hours employees must work per week to be considered "full-time" under the Act. *All of these measures would have to be approved by the Senate to become law and could face a Presidential veto after that.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

UNINCORPORATED MEDICAL STAFF CAN SUE PRIVATE HOSPITAL — The Minnesota Supreme Court has ruled the unincorporated medical staff of a private hospital could sue the hospital for breach of contract after the hospital board repealed and replaced the medical staff bylaws. In so deciding, the court found the unincorporated status of the staff did not prevent it from bringing suit on two bases: first, the Minnesota legislature had overridden a common law rule preventing the filing of suits by unincorporated entities; and second, a statutory act now permitted such suits by two or more people associating and acting under a common name, which the court found was the case with the medical staff. Further, the court concluded that the medical staff bylaws were an enforceable contract between the staff and the hospital. The court remanded the case to a lower court for further consideration of whether the hospital board's repeal and replacement of the staff bylaws constituted a violation of that contract. *Both the Minnesota Supreme Court's ruling on the legal rights of an unincorporated medical staff and its decision about the enforceable nature of medical staff bylaws as against a hospital are important for nonprofit hospitals and their staffs, and neither was a foregone conclusion, since two lower courts and two members of the Minnesota Supreme Court itself reached a different result in this case.*

H & H DEVELOPMENTS

In February…

Naomi Angel presented "Marketing Your Meetings and Events With Social Media: It's All Good … Or Is It?" at a Northern California annual conference and expo for meeting professionals in Moscone West, San Francisco.

Jonathan Howe presented "Solid Contracts, Fewer Clauses," a webinar for meeting professionals. He also co-presented "What Association and Business Executives Need to Know Now" in Orlando relating to the Affordable Care Act. He attended EMERGE 2015, a conference for management associations at the Birmingham Jefferson Convention Center and presented "Contingency Planning," "Road Maps to Successful Meetings: Contracts, Legal Liabilities and Negotiations," Obtaining Maximum Value through Effective Negotiations," and "The Lawyer Is In."

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