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:

THE LATEST FROM THE IRS – A month ago the Internal Revenue Service was touting its "where's my refund" tracking tool for taxpayers to check on when they should expect their tax refunds as one of its services to taxpayers. Now the IRS is asking taxpayers to cut way back on their use of that tool as the IRS is burdened by too many taxpayers utilizing the service. *In the memorable words of Steve McQueen in The Magnificent Seven, "It seemed like a good idea at the time."*

THIS OUGHT TO GET INTERESTING! – *H&H Report Update –* The National Labor Relations Board has announced it plans to appeal directly to the U.S. Supreme Court to overturn a January 2013 decision by a three-judge panel of the District of Columbia federal appellate court that struck down as unconstitutional recess appointments of three commissioners to the NLRB. Recess appointments are commonly used by presidents to get around senators' filibusters or refusals to even consider a president's nominees to positions including the federal judiciary, cabinet and executive and administrative positions requiring the senate to advise and consent to the nominees. The NLRB will skip an appeal to the full DC appellate court sitting *en banc* which can affirm or reverse a three-judge panel's decision. The NLRB has until April 25 to file its appeal. *The appeal has all sorts of immediate and long-term ramifications. More than 90 cases pending before the NLRB include challenges to the NLRB's authority because of the appellate decision. Most recently the NLRB overturned fifty years of precedents that after a collective bargaining agreement expires, a company is no longer obliged to collect and forward dues from workers' pay to their union. The NLRB just announced that obligation continues during negotiations or until negotiations reach an impasse. President Obama's other recess appointments are also under a cloud until this constitutional issue is resolved. Lots riding on the outcome!*

GOOD READING … See you in April 2013

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FEDERAL COURT RULES UNPAID VOLUNTEERS MAY BE EMPLOYEES – A federal judge in Chicago has ruled two volunteers providing services to the Antioch (IL) Rescue Squad, a not-for-profit organization, and Metro Paramedic Services, Inc., may be employees of the two entities for purposes of their lawsuit under Title VII and the Illinois Human Rights Act even though as volunteers they are not compensated for their services. The defendants moved to dismiss the lawsuit, arguing the two volunteers were not employees under Illinois law. Illinois law defines an employee as an individual performing services for remuneration within this state for an employer. Title VII imposes liability only on employers. However, the judge relied on common law principles of agency in finding an employment relationship, citing such factors as control of the work, location of the work, whether the work is part of the hiring party's routine business, the hired party's discretion over when and how long to work, duration of the relationship between the parties, remuneration, benefits and tax treatment of the hired party. The judge said remuneration was only one of the factors of an employment relationship and did not of itself determine whether an employment relationship existed. The judge noted that in all respects other than compensation, the two volunteers appeared to be in a typical workplace and subject to the same control of an employer as paid employees. *This decision may be an important precedent whether or not the two volunteers are successful in their lawsuit. The defense motion to dismiss was based on the allegations of the volunteers' complaint, which are taken as true for purposes of whether or not they have stated a claim under law. Next comes the hard work of obtaining evidence sufficient to require a trial. But the precedent that an unpaid volunteer may be regarded as an employee for federal or state discrimination claims should be kept in mind by not-for-profit directors, executives, and their legal advisors. Federal courts in other states have required remuneration as a necessary component of an employment relationship so this decision is breaking new ground, at least in Illinois.*

NONPROFIT'S FUNDS DIVERTED FOR OBAMA VICTORY PARTY – A former Director of the District of Columbia Homeland Security and Emergency Agency, Millicent West, is pleading guilty to criminal charges for diverting $110,000 from a nonprofit so that she could help fund a 2009 celebration of President Obama's first inauguration. She prepared false grant documents to obtain the money from the nonprofit, which she previously led, and then, compounding her misdeeds, she filed inaccurate tax returns by failing to report the money to the Internal Revenue Service. She was also involved with another D.C. politician and nonprofit leader who had diverted funds from his foundation for personal high jinks and is now doing time in jail. *Cheers for the IRS, which apparently doesn't care whose victory party was being funded with unreported income. Bigger crooks than this one have made their worst mistakes when they failed to report ill-gotten gains to the IRS and got caught. Remember Al Capone?*

NONPROFIT AND COACHES BILKED BY "INVESTMENT ADVISORS" – A former Treasurer of a nonprofit "booster club" created to benefit University of Houston athletics, Brian Bjork, has pleaded guilty to fraudulently procuring $1.4 million from clients for whom he provided investment advice, including the nonprofit booster club. He was also reportedly an associate of David Salinas, another University of Houston booster and Ponzi scheme operator, who committed suicide after it was discovered that he had swindled numerous college coaches around the country, and many others, out of money they had entrusted to him for investment. *Don't want to "invest" in someone's criminal enterprise? Be careful when you search for advice on handling your money. And remember, if it sounds too good to be true, it probably is.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

WHO SAW THIS COMING? – *H&H Report Update* **–** No one has accused Amazon of being slow to recognize opportunities, but one of its latest initiatives has aroused concern, controversy and active opposition. Readers will recall ICANN opening up gTLD categories, generic Top Level Domain appellations, beyond the original .com, .gov, .net, .edu, and so on in order to benefit Internet users and expand uses of non-Latin and non-English scripts. Interested parties could purchase such generic TLDs, and require others to obtain their permission to use the newly created gTLDs, thus creating a money stream or preventing competitors from registering items using the gTLD. Amazon has quietly applied to acquire such gTLDs as .book, .read, and .author, in addition to .kindle and .fire based on existing Amazon trademarks. That has others protesting, including Barnes & Noble, the Association of American Publishers, and the Authors Guild, protesting the impact on competition. *Amazon seemingly agrees, based on its application statement that .book will be a single entity registry with all domains registered to Amazon for Amazon's business goals. So what will ICANN do with this hot potato. Stay tuned.*

EMPLOYMENT LAW DEVELOPMENTS

WILL CONGRESS APPROVE A MINIMUM WAGE OF $10.10 PER HOUR? – Senate Democrats led by Tom Harkins (D. Iowa), who says he is retiring in 2014, are pushing another bill through the Senate in addition to the mandatory paid sick days bill reported last month, this time to increase the federal minimum wage from the current $7.25/hour to $10.10/hour by 2015. This is a dollar per hour more than President Obama proposed in his recent State of the Union address to Congress. President Obama is also calling for the minimum wage to be linked to the federal cost of living index to avoid having to come back to Congress to push through future increases in the minimum wage. *Will the Republican-controlled House go along? It seems unlikely in current circumstances. The current federal minimum wage of $7.25 works out to about $15,080 for a 40-hour week annually. The proposed minimum wage would be $21,008 annually. Most state minimum wage rates fall between the current and proposed federal rates, so keep that in mind when determining if you would be affected by an increase to $10.10 with or without indexing.*

MARIJUANA USE AN EMERGING EMPLOYMENT CONUNDRUM? – You are the CEO of a nonprofit in Colorado or Washington, and your head of HR reports your preferred candidate for a significant position has tested positive for marijuana. Do you reject the person for that reason, or terminate an employee who tests positive for marijuana, if your employment policy specifically says illegal drug use will result in termination? But marijuana use is now legal under state law in Colorado and Washington while it remains illegal under federal law. This is almost certain to end up in federal or state courts if employers refuse to hire or if they terminate marijuana users. This is already an issue in states which permit the use of marijuana for medical purposes, with mixed results for employers and employees. *Before making an employment decision, know your state's law on the subject, both statutory and case law, get good legal advice on employment and liability issues, and see if your employment insurance addresses the issue. This is an unsettled area of the law, therefore unpredictable, and public sentiment is also unsettled. Proceed warily, especially in states where medical marijuana or marijuana use is permitted.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

WILL TSA CHANGE ITS POSITION ON CARRY-ON ITEMS AGAIN? – The Transportation Security Administration has announced that effective April 25, 2013 airline passengers will be able to carry small pocket knives (including small knives on corkscrews illustrated in a TSA prohibited items list), ski poles, lacrosse and hockey sticks, billiard cues, and not more than two golf clubs in their carry-on luggage on planes. TSA said it wants to focus on more dangerous items, and the revised rule will be more in line with International Civil Aviation Organization ("ICAO") standards. That announcement has created an uproar among groups representing flight attendants, air marshals and pilots protesting the proposed change in TSA policy, and demanding the change be rescinded. Some airlines have also voiced opposition to the change of policy. *So the TSA change of policy may not be a done deal after all. But the current uproar may lead to a more transparent debate on what the TSA's primary mission should be, deterring terrorism or that plus controlling unruly passengers. Association executives, staff and their members, who pass through a lot of TSA security lines, should pay attention to how this plays out.*

HOT AIR BALLOON CRASH IN EGYPT ILLUSTRATES A PLANNER'S DILEMMA – The hot air balloon crash in Luxor, Egypt that killed 18 tourists illustrates a meeting planner's dilemma, a popular sort of event that people enjoy but one that on rare occasions can be deadly. An Egyptian security official said a fire started which spread to the balloon's gas canister causing it to explode, and the balloon crashed from an altitude of roughly a thousand feet. So what to do? First thought: don't offer this option as a meeting event. Too risky if ***anything*** goes wrong, including an unpredictable increase in the wind speed about the time of landing. Second, if meeting attendees want to go on a hot air balloon ride, suggest they ask the hotel or meeting facility to arrange it for the individuals wishing to go. Stay out of the planning process to avoid potential liability. Third, carry insurance. *Every day thousands of tourists go on balloon rides, have a great time, and nothing goes wrong. But just often enough something does go wrong and death or severe injury results. That's why those providing balloon rides require that everyone sign disclaimers saying they understand there are risks, and absolve the balloon ride provider of any liability. Meeting planners should probably avoid this sort of unnecessary risk.*

REGULATORY LAW DEVELOPMENTS

FTC OFFERS PUBLIC COMMENT PERIOD ON UPDATED FOIA FEES – The Federal Trade Commission has asked for comments on proposed revisions to its Freedom of Information Act fee schedule. The revised fees address such matters as waivers for fees less than $25, revisions for microfiche and photocopying fees, increases for certification services and priority mail, new fees for information provided on DVDs, CDs and videotapes, and other fee topics. The FTC has also published a final rule making its FOIA process more transparent. *The comment period runs through March 29, 2013. For more detailed information, see the FTC's press release dated February 21, 2013, available at www.FTC.gov.*

IDENTITY THEFT TOPS FTC COMPLAINT LIST FOR 13TH YEAR IN A ROW – The Federal Trade Commission reports complaints of identity theft topped the categories of complaints to the FTC for the 13th year in a row, increasing to 369,132, or 18% of all the complaints received by the FTC in 2012. Just under half were related to tax or wage-related fraud. Complaints involving debt collection practices ranked second with 199,721 complaints. The other top categories were complaints about banks and lenders, shop at home and catalog sales, and prizes, sweepstakes and lotteries. *Interestingly credit cards and*

telephone and mobile services ranked at the bottom of the major complaint categories at 51,550 and 76,783, respectively, behind internet services, impostor scams and auto-related complaint. The IRS is devoting more resources to tax-related identity theft issues which are a major headache for the IRS and victimized taxpayers.

TAX LAW DEVELOPMENTS

SOME ILLINOIS GOVERNMENT UNITS MUST REFUND PROPERTY TAXES – *H&H Report Update* – The status of property tax exemptions for nonprofit hospitals may be a little clearer now that a new formula for calculating the amount of charity care required for an exemption has been adopted by the Illinois Department of Revenue, as described in a previous report. However, some local government units, including school districts, will now be required to refund millions of tax dollars collected over the past five years from nonprofit hospitals with an exempt status that appeared lost under earlier Department rulings, but now seems safe under the Department's new guidelines for charity care. The DuPage County Treasurer, for example, expects to make nearly $2.25 million in refund payments to one hospital. *It is important to remember that Illinois nonprofit hospitals weren't the only ones that had problems planning for the future because of government waffling over how much charity care, if any, should be provided by such hospitals in order to justify their tax exemptions, as well as the all-important definition of what constitutes charity care. Local government units had to have their crystal balls out too, wondering how the issue would finally be resolved. Now some of them are scrambling for funds to replace taxes they wrongly thought they could collect from nonprofit hospitals in their jurisdictions.*

IRS ANNOUNCES SOME REVISIONS TO FORMS 990 AND 990Z FOR 2012 – The Internal Revenue Service recently released revised forms 990 and 990-EZ for 2012 filings this year, including a number of significant changes. Several changes are designed to provide organizations more flexibility in preparing financial reports from multiple entities or ventures within standard books and records, rather than filing additional schedules or forms. Changes include clarification of information on management companies, on average hours per week for the filing and related organization, reporting of functional expenses when they become a substantial percentage, and clarifications that "grants" definition no longer includes "program-related investments," and that "professional fundraising services" includes consultation and application preparation. *Now is a good time to review this year's 990 or 990 EZ filing by related organizations, including the involvement of shared services, such as accounting services, and how financial figures from one organization will show up on the 990 of the other. See details at* ***http://www.irs.gov/pub/irs-tege/2012_Form 990_Significant Changes.pdf.***

IRS MODIFIES EMPLOYMENT TAX SETTLEMENT PROGRAM – The Internal Revenue Service has announced changes in its Voluntary Classification Settlement Program, which allows employers, including nonprofits, to reclassify employees they have been wrongly treating as independent contractors and make a limited employment tax payment for pay periods during which the workers have been improperly classified. Previously, this program was unavailable to employers currently under audit by the IRS for any reason, but it will now be available unless an employer is being audited for employment tax purposes. Also, program participants will no longer be subject to a six-year statute of limitations on adverse IRS actions relating to employment, rather than the normal three-year limitation applying to collection of payroll taxes, and, until June 30, employers will not be considered ineligible for the program if they have failed to file required tax forms for the workers to be reclassified during the past three years. *The program has proven very popular with employers. Any nonprofit that has doubts about its previous classification of workers as independent contractors should consider applying for program participation.*

SEQUESTER BITES NONPROFITS – One of the provisions of the federal sequester legislation that took effect March 1 is a limitation on the refundable portion of the Small Business Health Care Tax Credit, for which nonprofits as well as businesses are eligible. Until September 30, or until there is intervening congressional action to the contrary, the refundable portion of the credit will be reduced by 8.7%. *Everyone is going to be affected by the sequester in big ways and small, just as they will likely be impacted by any other serious effort to reduce federal budget deficits that may be undertaken in Washington.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

TOO MANY ELEMENTARY TEACHERS, TOO FEW SCIENCE AND MATH – News reports that too many elementary school teachers and too few math, science and special education teachers are being turned out for available jobs do not seem to deter education undergraduates or the college programs that produce them, a classic demand vs. supply imbalance. The colleges argue they produce for a national market, and do not coordinate with demand in the states where they are located. But with twice as many new entrants for elementary education as job openings, why do education undergraduates ignore the job imbalance instead of flocking to math, science and special education specialties where there are shortages? *One possibility may be the extra training and credits required to teach math, science and special education. Another may be old stereotypes about women in math and science fields. But undergraduates racking up loans to finance their education may want to consider where prospective job openings are – and are not. Their college advisors could and should provide some useful guidance about this.*

H & H DEVELOPMENTS

In March . . .

Jonathan Howe presented a webinar entitled, "Dissecting a Contract" offered by a meetings trade publication. **John Peterson** will be giving a presentation on legal trends and developments of interest to the annual meeting of a trade association. **Barbara Dunn** presented "Meetings and the Law: Must Knows for the Digital Age" at a national conference of meeting and event professionals in Washington, DC. She also presented "Top Ten Legal Mistakes and How To Avoid Them" to a Houston-based group of meeting professionals. **Sam Erkonen** presented a session on legal issues affecting emerging technologies entitled, "BYOD and Mobile Device Management Policies" in French Lick, Indiana for a mid-America educational conference for meeting professionals. He also presented "Legal Issues Affecting Emerging Technologies" and "Test Your Legal IQ" (a quiz on contracts), for the Michigan chapter of an international organization for meeting professionals in Bay City Michigan.

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