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:

MORE NEW WORDS — We are all familiar with the term hypochondriacs, persons who are excessively worried about or preoccupied with their health. But with such persons searching the Internet for more information on real and imagined illnesses, two new terms are coming into the lexicon: "Dr. Google" and "cyberchondriacs," people who search the Internet to find new illnesses and diseases to worry about. *They are assisted, no doubt, by all the ads for drugs, devices and treatments available. Harken back to that Big Band era classic song associated with Benny Goodman, "Don't Be That Way!"*

KEEP THIS IN MIND FOR YOUR CONTRACTS — One of those points to keep in mind when drafting a contract is a general rule of construction that provides a contract of indefinite length is terminable at will by either party. What do we mean by a contract of indefinite length, you may ask. It is a contract without a termination deadline, whether a date or passage of time, or some occurrence, to end it. An Illinois court looking at a contract which could only be terminated by the mutual agreement of the parties recently said that basically amounted to a perpetual contract against Illinois public policy, and consequently could be terminated by either party at any time without the consent of the other party. *That's a general contracting rule to keep in mind when negotiating how to amend or end a contract. Check the law in your state to see if it follows this rule of contract construction.*

ANOTHER OF THOSE TRENDS WE TEND TO OVERLOOK — United Airlines, aka United Continental Holdings, has announced it will outsource such jobs as ticket agents, baggage handlers and customer service to vendors at 12 more airports. This follows similar outsourcing at six other airports last year. United is embracing a trend well underway at other airlines including American, Delta and Alaska Air Group. The vendors pay lower wages and typically do not provide benefits to their workers. *This results in lower costs to United and the others, but further erodes the near-minimum wage paid these workers, and further hollows out that middle class we claim as our national model. United has also recently changed its mileage awards to reflect dollars and not miles, another airline industry trend. There is a cost to always striving for lower costs. Now if I could only find my missing bag or a customer representative.*

GOOD READING … See you in August 2014

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NOT-FOR-PROFIT LAW DEVELOPMENTS

CALIFORNIA REQUIRES NEW NONPROFIT CONTRIBUTOR REPORTING — The State of California has enacted new legislation that, among other things, requires "multipurpose organizations," including state ballot measure committees and state candidate committees, to report the names of their top ten contributors on the Internet, and, if requested, to the Secretary of State. This came about after some well-funded nonprofits actively attempted to influence the outcome of ballot measure voting and elections in ways that some state officials, clearly, didn't like. *This legislation may eventually be struck down as unconstitutional by a court. In the meantime, it certainly represents a significant expansion of government regulation directed at nonprofits in California. Will other states follow suit?*

INDIA REPORTEDLY TAKES ACTION AGAINST NONPROFITS — The Boston Globe reports that the government of India has instructed the Reserve Bank of India to hold all foreign contributions to India-based charities until they are "cleared" by the Home Ministry. This occurred while the National Investigative Bureau was preparing an internal government report in which foreign-funded charities like Greenpeace and Amnesty International were accused of costing India up to 3% of its gross domestic product by encouraging public opposition to nuclear and coal-fired power plants, uranium mines, genetically-modified crops and electronic waste. *It can happen, and it has happened, everywhere, including the United States, to left-leaning organizations like the ones allegedly targeted in India and to conservative Tea Party types. When government officials don't like an organization's message, they may use and abuse their authority to curtail the organization's activities. And all of us are hurt whenever that happens to anybody, because what happens to someone else today can happen to you tomorrow.*

COURT ORDERS ACCOMMODATIONS FOR BLIND CHIROPRACTIC STUDENT — The Iowa Supreme Court has ordered a leading chiropractic college to provide accommodations to a blind student so that he can complete his degree. Specifically, the college was ordered to allow the student a sighted assistant to perform functions such as reading X-rays. The court rejected the college's argument that eyesight is a requirement for the profession. *Nonprofits must remember that federal law requires them to make reasonable accommodations for disabled persons who want to participate in their programs. Failing to do so can have expensive consequences. In this case, besides being ordered to provide accommodations, the college was required to pay the student $100,000 in damages and legal fees. So, must a future employer also provide such an accommodation? Any consequences to that?*

MEETINGS & TRAVEL LAW DEVELOPMENTS

TSA'S FEE WENT UP ON JULY 21st — The Transportation Security Administration's "September 11" fee increased on July 21st to $5.60 for a one-way flight, up from the current $2.50 for a nonstop flight or $5.00 maximum one-way for a flight that has a stopover of less than four hours. The definition of a stopover will become four hours for a domestic flight and 12 hours or more for an international flight. The fee varies on flights with multiple legs ("multiple enplanements" in TSA jargon) and international flights. The fee does not go directly to TSA, and TSA claims it does not cover TSA expenses completely. The fee instead goes into general government revenues which are used for TSA and other government activities. *This increase was previously approved by Congress last December as part of the big spending and tax deal. It is one of the fees that the airlines want to show separately in air fares and the government (and most passengers) want shown as part of the overall ticket price. Whether the fee is bundled or unbundled for ticketing purposes, it is basically doubling on a nonstop domestic flight.*

FEDERAL JUDGE RULES NO-FLY RULE UNCONSTITUTIONAL — A federal judge in Oregon has ruled the federal no-fly list used to bar persons from flying to or within the U.S. is unconstitutional, at least as it applies to 13 people who challenged the rule after they were barred from flying to or within the U.S. on commercial flights. The judge said they were not told why they were barred and they were without any meaningful way to challenge the restriction, a denial of due process. She ordered Homeland Security to come up with a better system allowing persons to know why there are barred from flights and a process for challenging such denials. *Typically those barred are not told why, or given any practical way to find out why or challenge the restriction. The no-fly list is reputed to have as many as 20,000 persons on it, including 500 U.S. citizens. It will be interesting to see what happens next. Will Homeland Security appeal the ruling? Will others challenge their being on the list, citing this decision as a precedent? Stay tuned. This is not over by any means.*

CALIFORNIA SUPREME COURT SAYS NO ON DEFIBRILLATORS — *H&H Report Update* **—** The California Supreme Court concluded that a large retail store (Target) was not required to provide defibrillators with trained store employees in its retail outlets, as demanded in a lawsuit filed by the mother and brother of a woman who had suffered a heart attack and died in a Target store before emergency responders could arrive and attempt to save her life. The plaintiffs claimed Target should have known that some of its customers were likely to have seizures in Target stores, and defibrillators could save persons having seizures, therefore Target had a *common law duty* to provide defibrillators. The court said customers could have such seizures in any sort of retail establishment, not just large stores, the burden on Target was substantial and went well beyond the cost of defibrillators since there would have to be sufficient trained personnel to operate them at all times, and California statutes regulating the testing and maintenance of defibrillators in places where they are mandated impose significant burdens. "Similarly, the relative size of a retail business's premises, the number of patrons the business serves, or the amount of its owner's resources — factors which plaintiffs urge this court to rely on to limit the reach of a decision in their favor — do not lend themselves to the formulation of a workable common law rule that would provide adequate guidance to businesses." *Recall that we originally asked whether meeting planners should require the venues for their events, such as hotels, conference centers, convention halls, etc., to have defibrillators (or at least inquire regarding their availability). Many states by statute may require at least some of these venues to provide defibrillators. This decision may provide some comfort to planners who do not impose such a requirement on their venues or make such inquiries. But be aware that if you do require a defibrillator for your events, a judge or jury might very well expect the provider to comply with the maintenance, testing and trained staff standards applicable to those establishments required by statute to provide defibrillators.*

EMPLOYMENT LAW DEVELOPMENTS

AMERICORPS PARTICIPANT IS NOT A COMPANY EMPLOYEE — The National Labor Relations Board has a Division of Advice which is an arm of the NLRB's General Counsel's Office. The division offers advice to Regional NLRB offices on questions of law, including whether charges should proceed or be dismissed. Earlier this year the Division opined that the NLRB Regional office did not have jurisdiction over an AmeriCorps volunteer at a nonprofit company in Tucson, AZ, Arts for All, because by law AmeriCorps volunteers are not employees, even though they may work extended hours and receive a stipend from the entity accepting their services. The stipend is underwritten by AmeriCorps. The advice given was not to proceed on the volunteer's charge. *The governing statute is the National and Community Trust Act of 1993. The participant had alleged certain safety shortcomings at the company which would normally be protected activity if by an employee. If you ever use an AmeriCorps volunteer, as many nonprofits do, remember the person is not your employee.*

Intellectual Property Law Developments

IS IT REALLY A TRADE SECRET? — Many employers routinely require mid to upper level employees to sign noncompetition agreements, and those can create a variety of problems for the employer and employee. Is it enforceable under the laws of the state of employment? Some states such as California are anti-noncompete agreements. Is it enforceable as drafted? Some states "blue-pencil" overly restrictive noncompetes, striking or revising certain provisions while others throw out such agreements in their entirety. But in one area, state laws seem relatively uniform: if an underlying purpose of the noncompete is to protect the employer's trade secrets, there had better be trade secrets to protect. Information readily available from public sources such as business directories, trade association lists, Yellow Pages and electronic equivalents, information already known to competitors or to employees from prior work, information not maintained or treated as confidential, all of these undermine an employer's claim that its information is confidential and should be regarded as trade secrets entitled to protection, regardless of a noncompete agreement's broad language. *In fact, the broader the claim the more vulnerable it may be to a challenge that it is not a trade secret at all. Keep that in mind when deciding the real goal of requiring a noncompete agreement. What is it you are trying to protect, and why? And draft any such agreement within the parameters of trade secret and noncompete statutory and common law of your state.*

Regulatory Developments

DO AS I SAY, NOT AS I DO — The Equal Employment Opportunity Commission has been on a toot of late about employee severance agreements, and declaring provisions that state an employee agrees not to sue the employer in return for a monetary benefit to be discriminatory and unenforceable. A commentator recently pointed out the EEOC's own mediation agreement used to initially address charges by an employee against an employer contains a provision in which the "charging party" agrees not to institute a lawsuit. When questioned about that, the EEOC said its provision is "non-negotiable." *Of course not. So, do as I say, not as I do. But be aware of recent EEOC pronouncements and rulings on covenants not to sue and not to disparage in severance agreements, which appear to override earlier EEOC pronouncements, and which are likely to be challenged in court. Meanwhile, review your standard severance agreements to see if they need to be changed.*

SO NOW WHAT HAPPENS? — The U.S. Supreme Court has finally issued its long-awaited opinion on the President's recess appointments authority which was challenged in a lawsuit by a company appealing a National Labor Relations Board decision by a 3-2 majority including three commissioners appointed by President Obama during a three-day Senate recess. The issue for the Court was what constituted a "recess" under the U.S. Constitution during which the President may make personnel appointments that would otherwise require the Senate to "advise and consent" to the appointments. The Court ruled 9-0 the President did not have authority to make recess appointments during a recess of three days while the Senate was ostensibly meeting and able to do business, but four of the nine justices only concurred in the judgment, arguing the majority had substantially undermined the D.C. Circuit Court's more correct interpretation of the constitutional provision at issue on two major and controlling points. The Senate had been conducting *pro forma* sessions in which a Senator gavels the Senate into business and then promptly adjourns for the day, at least partially if not only to prevent such appointments. *Well after*

the NLRB decision which was appealed, the Senate finally confirmed all five NLRB commissioners who have been issuing decisions ever since. But up in the air now are more than 400 NLRB decisions issued while there were only two commissioners approved by the Senate. Even if the NLRB with a 3-2 Democrat commissioners edge is likely to confirm most if not all of the decisions previously made by its contested 3-2 majority, the process could take quite awhile and slow down new decisions by the NLRB, as happened in 2010 under somewhat similar circumstances. More important, the Supreme Court's decision imposes new limits on President's recess appointing powers going forward, another club a divided Senate can use to delay and deny future Presidents' choices for cabinet officers, senior executive and administrative branch appointees, and judges.

TAX LAW DEVELOPMENTS

EASEMENT SALE HAS NO ADVERSE TAX CONSEQUENCES FOR SOCIAL CLUB — The Internal Revenue Service, in a recent Private Letter Ruling, advised that a social and recreational club exempted from federal income tax under §501(c)(7) of the Internal Revenue Code would not jeopardize its exempt status or realize taxable income as a result of its selling a conservation easement to a city and using the proceeds to make capital improvements to the club's golf course property. Key to the IRS ruling was the fact that that the easement pertained to the club's golf course and surrounding wetlands and shrubs, which were used for the club's exempt social and recreational purposes, the sale was not part of an ongoing plan to develop and sell real estate, and proceeds from the sale were to be used on capital projects within three years from the closing of the sale of the easement. *Though clubs engaging in the sale of real estate are generally not considered to be operating for §501(c)(7) purposes, this sale was found to be incidental to the club's exempt purposes, all of the facts and circumstances being taken into account, and not a departure from the club's exempt purposes, even if it resulted in a profit.*

GOVERNMENT MUST PAY FOR DISCLOSING NONPROFIT'S DONORS — A court has ordered the federal government to pay $50,000 to a conservative group whose donor information, culled from its confidential 2008 tax return, was published by a political opponent. The payment was ordered in a consent judgment after the government was sued by the National Organization for Marriage ("NOM"), which opposes same-sex marriage, because its tax return information was published on the website of Human Rights Campaign ("HRC"), which supports gay rights. The IRS refuses to comment on the disclosure, but the NOM says it will not stop trying to find out how its tax return information ended up with the HRC. *This judgment, to which the government consented in order to settle the lawsuit, is certainly ammunition for those who believe that the current congressional investigation of the IRS is more than just a politically motivated stunt. As the saying goes, "Where there's smoke, there's fire," and there's so much smoke around the IRS these days, it almost seems like the British are burning Washington again.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WE DON'T RECOMMEND THAT YOU TRY THIS — After more than a year of congressional prodding, hearings, subpoenas, partial document and email disclosures and the former Director of the Internal Revenue Service Exempt Organization Unit taking the Fifth Amendment in declining to testify about alleged targeting of certain organizations' applications for exempt status, the IRS has announced that it is unable to provide Ms. Lois Lerner's emails for the relevant two-year period because her personal computer crashed and none of her incoming or outgoing emails could be recovered. Even worse, the computers of half a dozen other IRS employees in the unit also crashed and their contents cannot be recovered.

As you can imagine, the chairman of the House Ways and Means Committee and chairman of the House Investigations Committee are howling in indignation about a convenient cover-up and failure to report this a year ago. Whatever the outcome of this political theater in D.C., we don't recommend that you claim your computer crashed or a dog ate your homework if you hear from the IRS, Congress or some other regulator or litigant.

MICROSOFT'S REFUSAL TO DEAL WITH SOFTWARE COMPETITOR UPHELD — The U.S. Supreme Court denied certiorari in an appeal by Novell against Microsoft, thus affirming federal appellate and trial courts' decisions rejecting a monopolization claim by Novell, a software developer delayed in developing its own applications for use with Microsoft's Windows 95 operating system. The basic rule is that a monopolist almost never is obliged to assist others to use the monopolist's goods or services. *There have been very few decisions to the contrary since a Supreme Court decision in 1985 finding a duty to cooperate in a lawsuit driven by unusual facts, which is often cited but very seldom followed.*

H & H DEVELOPMENTS

In July . . .

Samuel Erkonen gave presentations to the U.S. Chamber of Commerce Institutes in Athens, Georgia covering a general survey of not-for-profit law as well as risk management.

Terry Hutton reported on legal trends and developments at an international trade association meeting in California.

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Contributors to this issue…

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