

# THE HOWE & HUTTON REPORT

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**CHURCH-AFFILIATED ORGANIZATION PLANS NOT IMMUNE FROM ERISA** — The U.S. Court of Appeals for the Seventh Circuit in Chicago has held that pension plans established by organizations affiliated with a church are subject to government regulation under the federal Employee Retirement Income Security Act (ERISA). The ruling came in a suit involving a plan for the employees of Advocate Health Care Network, which is affiliated with two churches. The court noted that the Act contains a "church plan" exemption that Congress intended "to prevent excessive government entanglement with religion." But the court held that the exemption applies only to plans created by a church or other house of worship, not plans established by a church-affiliated organization. *The Chicago court is the second federal appeals court to consider whether ERISA applies to plans created by church-affiliated organizations. The Third Circuit Court of Appeals came to a similar conclusion previously.*

**U.S. RESTRICTIONS ON TRAVEL TO CUBA EASED** — As part of President Obama's announced policy to "engage and empower the Cuban people," the Department of the Treasury's Office of Foreign Assets Control has issued final regulations intended to ease U.S. restrictions on Americans traveling to Cuba. Among other things, the new regulations facilitate "individual people-to-people educational travel," defined as Americans traveling to Cuba to engage, while there, in a "full-time schedule of educational exchange activities that are intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities...." The predominant portion of the activities engaged in by the traveler must not be with "certain Government of Cuba or Cuban Communist Party officials," and travelers must keep a record of their activities while in Cuba. *Nonprofits with interest in pursuing educational activities in Cuba may find easing of U.S. regulations on their Cuban activities helpful. But that aspect of the new regulations authorizing "individual" travel without the sponsorship of any recognized organization might not be a great thing for nonprofits that currently sponsor foreign educational travel by Americans. Americans wishing to take advantage of the new regulations should also remember that they only ease U.S. restrictions on travel. Travelers might still want to gain sponsorship for their travel from some nonprofit, especially if Cuban officials decide that the purpose of their travel really is to "promote the Cuban people's independence from Cuban authorities." In that case, it might be helpful for the traveler to gain some nonprofit's assistance to avoid a one-way trip to a Cuban prison.*

GOOD READING ... See you in May

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**CHARITIES UNDER FIRE FOR SPENDING** — Nonprofits are always under fire for what some regard as excessive spending unrelated to their mission, with criticism coming from Congress and the media, as well as their own current and former employees and other constituents. One of the more recent examples is an article in the *New York Times* about a veterans organization accused of flying workers around the country for minor meetings, putting them up in \$500-per-night hotel rooms, using 40% of donations received for overhead, and spending hundreds of thousands of dollars a year on public relations and lobbying. *Much of the public relations and lobbying went to deflecting criticism of the organization's overhead spending and preventing enactment of legislation that would restrict such expenditures. So, to some extent, there may have been a vicious circle going on. The criticism of some organizations also should not eclipse the fine work being done by nonprofits in many endeavors that benefit the public.*

**CONFESSION TO LEADER OF BIBLE STUDY GROUP HELD PRIVILEGED** — The Illinois Appellate Court has held that the leader of a Bible-study group could not be forced to testify at a criminal trial about an alleged confession made to him by a member of his group. The court noted that an Illinois statute providing for a clergy-penitent privilege from testifying applied to confessions made to a “practitioner of any religious denomination, accredited by the religious body to which he or she belongs,” and not just confessions made to a clergyman, as is true in some other states. In this case, a member of the Bible-study group told the leader of the group that he had slashed the tires of a car in his ex-wife’s driveway, and both the leader and the group member successfully invoked the clergy-penitent privilege from testifying. The Appellate Court deemed the leader a “practitioner” under the statute, though he was not a clergyman, because his church elders authorized him to lead the group, provide religious counseling to group members, and even baptize them. *A second issue decided in the case was whether the group leader waived the privilege by discussing his counseling of the tire-slasher with several other church members while seeking guidance on how to deal with the confession, one of those members being a policeman. The Appellate Court held there was no waiver by the confessing group member, who hadn’t told anyone but the group leader about his actions. That was enough to preserve the privilege.*

**FIXES COMING FOR ACA CO-OPS** — More than half of the nonprofit cooperatives set up under the Affordable Care Act (Obamacare) have now closed their doors, leaving insureds scrambling for replacement coverage while the federal government is stuck with \$1.17 billion in unpaid loans made to those co-ops. The government says it is looking for ways to recoup loans in some cases, and fixes are in the offing for the remaining cooperatives. Responding to complaints from co-op officials that laws restrict their ability to obtain capital and private investment (including, one imagines, those laws that go along with nonprofit status), the Obama Administration has plans to help them attract funding or merger partners. Another proposal is to change the risk-adjustment formula that distributes money from plans with healthier and younger enrollees to plans with sicker and older customers, who, some say, were attracted by overly aggressive pricing that drove up co-op losses. *Changes in the ACA are proposed even by Democrats like Hillary Clinton, while some Republicans want to repeal the ACA in its entirety and replace it, perhaps, with an alternative arrangement.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**TRADEMARK PROTECTION IN FOREIGN COUNTRIES CAN BE HARD** — Nonprofits with valuable trademarks often learn that protecting their rights in such marks can be difficult outside their home countries. Trademark protection is largely based on local law in every country, and protection for foreign owners may be nonexistent for practical purposes in some countries, even if the local law says protection is available. *Registering important marks in target market countries can be helpful. But preventing infringement in a foreign country will often mean filing a lawsuit in that country at great expense and with a*

questionable likelihood of success. So, nonprofits should consider that carefully when evaluating possible overseas activities.

## REGULATORY LAW DEVELOPMENTS

**APPLE LOSES ANTITRUST CASE** — Nonprofit volunteers and staff who tire of hearing their legal counsel warn about the potential adverse consequences of antitrust violations might take a look at the recent conclusion of an antitrust suit against Apple Inc. The Supreme Court of the U.S. has declined to overturn a lower court ruling that Apple must pay \$400 million in damages to consumers and \$50 million in legal fees for government and private plaintiffs who charged Apple with orchestrating a conspiracy among publishers to fix e-book prices in 2010. Other conspiring publishers have settled cases against them for \$170 million. *Antitrust cases can be costly, even when you win, considering legal costs and the bad publicity that usually results from them. If Apple isn't immune from the legal consequences of price-fixing, that should be a warning to other would-be antitrust violators.*

**RAILROADS SAY THEY WON'T MEET SAFETY COMPLIANCE BY 2018** — *H&H Report Update* — Many of the nation's railroads, having obtained an extension of time until 2018 to comply with new federal safety requirements, now say they will miss that deadline as well. The federal government originally set a deadline at the end of 2015 for installation of safety technology called positive train control, relying on GPS, wireless radio and computers, on all tracks carrying passenger traffic or trains used to haul liquids capable of emitting toxic gas. But the deadline was extended to 2018 after railroads said they couldn't comply with the original deadline, and now, three of the nation's largest freight carriers and four commuter railroads, including Metra in Illinois, have said they won't be able to comply in 2018 either. *Railroad warnings that they couldn't meet the 2015 deadline raised fears of enormous commuter railroad shutdowns in parts of the country, as some of those railroads said they would not operate in violation of the law because of the large fines that would be imposed on them and concerns for liability in the event an accident occurred. Many railroads say they will comply with the new safety requirements by 2018. But concerns about noncompliance by other railroads still exist for commuters, other passengers and companies shipping freight by rail.*

## TAX LAW DEVELOPMENTS

**IRS WARNS OF PAYROLL AND HR PHISHING SCHEME** — The Internal Revenue Service has issued an alert advising payroll and human resource professionals to beware of an emerging email scheme that involves purported messages from company executives requesting personal information on employees. The idea behind the scheme is to get payroll and human resources offices to email payroll data, including Form W-2s with Social Security numbers and other personal information, to cybercriminals; and such "phishing" has already claimed a number of victims. *Company payroll departments need to be wary of this relatively new danger, which involves a variation on an older scheme that used purported emails from the IRS and tax software companies to collect personal information during tax season. Confirming the identity of people requesting personal information is essential.*

**NEW FORM 990-N REPORTING REQUIRED** — The Internal Revenue Service is making life slightly more difficult for smaller nonprofits that file Form 990-N annual reports with the Service. They now must complete a one-time registration for that privilege and utilize a new submission process on the Service's website at [www.irs.gov](http://www.irs.gov). *The IRS advises that there may be some temporary problems with the new submission process, but the Service says it has put in place systems "to prevent organizations from being penalized" if their filing due dates occur before all of the glitches in the new submission process are ironed out. Glitches? Think initial Affordable Care Act website insurance purchases.*

**NEW LAW MAKES IRA CHARITABLE ROLLOVER PROVISION PERMANENT** — Last year’s federal Protecting Americans From Tax Hikes Act made permanent a provision of a law first passed in 2006, excluding from income taxation up to \$100,000 per year distributed to eligible nonprofits from certain donor taxpayer IRAs. Congress had been extending this exclusion periodically to prevent its expiration, sometimes after taxpayers made otherwise taxable required minimum distributions from their IRAs without knowing for certain if the distributions would be taxed. *Taxpayer confusion and uncertainty over whether they would be taxed on such distributions is now eliminated, provided the requirements for the exclusion are met. The taxpayer must be at least 70 ½ years old, the recipient organization must be one described in Internal Revenue Code Section 170(b)(1)(A) (typically being public charities), the distribution must come directly from the IRA (not the taxpayer), the distribution must be an “outright gift,” and the distribution must otherwise have been taxable.*

**APPEALS COURT SLAMS IRS FOR OBSTRUCTION IN TARGETING SUIT** — The U.S. Court of Appeals for the Sixth Circuit has upheld a lower court order that the IRS turn over documents to representatives of conservative groups suing the Service for allegedly targeting them because of their political opinions. The IRS has admitted that it delayed considering applications for recognition of exempt status from conservative organizations. In this suit, a federal district court has twice ordered the IRS to produce for inspection spreadsheets it created on the targeted groups, and the Service has delayed compliance for almost a year. Now, noting that charges of an executive agency targeting citizens for their political views are “among the most serious allegations a federal court can address,” the Court of Appeals has ruled that the Service must stop its “continuous resistance” to the lower court’s order. *The IRS may appeal to the Supreme Court in its efforts to prevent discovery of its internal documents relating to the decision to “slow-roll” exemption applications filed by conservative groups. So, the last chapter in this story may be unwritten at this time.*

**ZONING VIOLATION DOESN’T MEAN LOSS OF PROPERTY TAX EXEMPTION** — Your nonprofit has violated a zoning ordinance. Does that mean it will forfeit any right to a property tax exemption? The Town of Ramapo, New York thought so and sought to remove the exemption previously afforded to a nonprofit provider of residential housing for low-income families because the Town believed the nonprofit had established more residences on one property than its zoning permitted. But a New York appellate court has held that not all violations of law should cost a nonprofit its property tax exemption, and a zoning violation should not automatically disqualify a nonprofit for an exemption if the nonprofit would otherwise be entitled to it based on its use of the property. *Of course, a nonprofit must still comply with local zoning laws or face more conventional punishments for failing to do so, such as fines from the local government.*

**HEAVY LIFTING REQUIREMENT DOOMED ADA CLAIM** — The U.S. Court of Appeals for the Seventh Circuit in Chicago has affirmed a lower court’s dismissal of a U.S. Equal Employment Opportunity Commission suit against a seller of auto parts for alleged disability discrimination in discharging a worker who was permanently restricted from heavy lifting. The Court of Appeals found that heavy lifting was a fundamental duty of the worker’s position, rather than a marginal function, and the employer, which had previously given the worker accommodations for health issues, was not required to accommodate her permanent work restriction. *The employer in this case was able to establish the fundamental duties of the worker through testimony from former parts sales managers. But it’s easier for employers to avoid similar problems under the Americans with Disabilities Act if they have written job descriptions, agreed to by each employee, clearly setting out their essential functions.*

**JUDGE RULES FOR WORKERS IN INDEPENDENT CONTRACTOR DISPUTE** — A federal judge in Chicago has ruled that workers who delivered food for three Asian restaurants, all sharing the same owner, were not independent contractors, contrary to the owner’s claim, but employees entitled to a minimum wage and overtime. The fact that the drivers had signed agreements declaring themselves to be independent contractors was held to be of no consequence, as the court said the nature of a working relationship was determined by its “economic realities” and not the parties’ description of the relationship. In this case, the judge found that the workers were employees because they were “dependent upon the business to which they render service.” That dependency was demonstrated by the control the restaurants exercised over the drivers’ work and the requirement that they sometimes perform chores such as running personal errands for the owner and his family in addition to delivering food. *The federal government believes that many workers are wrongly classified as independent contractors instead of employees. Are there any in your workplace?*

**4-4 SUPREME COURT VOTE GIVES UNIONS A WIN** — Taking advantage of Justice Antonin Scalia’s death and a resulting 4-4 vote from the Supreme Court, unions representing government employees have won the right to collect dues from workers who choose not to join them. The Supreme Court, with its split vote, left intact a decision by a lower court rejecting a challenge to such dues collections. *Until Justice Scalia is replaced, every 4-4 split vote on the Supreme Court will result in the sustaining of whatever lower court decision is under review. Before his death, Justice Scalia had made it clear that he was going to vote against the unions in this case, which would have caused the lower court ruling to be overturned by a 5-4 vote.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**LAWSUIT TRIGGERS IN-FLIGHT WI-FI RETHINK** — A lawsuit filed against Chicago-based in-flight Wi-Fi provider Gogo by American Airlines earlier this year, which has since been settled, has ignited discussion in the airline industry as to the quality of in-flight Wi-Fi service and the pricing for it, both of which are reported to be varying wildly across the marketplace. American sued to get out of a contract with Gogo or renegotiate it, but the suit was dropped when Gogo agreed to install faster satellite service on American’s fleet of planes. *Airlines are experimenting with different pricing models for the service, with some offering it free, at least to preferred customers, and some charging as much as \$40 for it.*

**MARRIOTT MAKES NEW BID FOR STARWOOD** — *H&H Report Update* - Responding to a \$13.2 billion bid from China’s Anbang Insurance Group, Marriott International Inc. offered a sweetened \$13.6 billion deal to buy Starwood Hotels & Resorts Worldwide Inc and create the world’s largest hotel chain, with more than a million rooms and 30 brands. Game over? No, because Anbang almost immediately increased its bid to \$15 billion and then, only a couple of days later, withdrew it. The new Marriott offer significantly increased the cash portion of a previous offer it made for Starwood, reducing the portion represented by Marriott stock. Anbang has acquired a number of other U.S. hotel properties recently, including the historic Waldorf Astoria in Manhattan. But it’s apparently backing away from this opportunity. *Does Marriott then win this bidding war? Starwood has reportedly been fielding inquiries from companies worldwide, and this may not be the last of the Starwood sale saga.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**VERIZON FINED IN “SUPERCOOKIE” CASE** — The Federal Trade Commission has fined Verizon Communications Inc. \$1.35 million for not telling its consumers about the company’s use of “supercookies” and getting customer consent for that use. Cookies track consumer use of the Internet, and supercookies have earned that name because Internet users can’t delete them from their computers. This case marked the first time the FTC has fined anyone for using supercookies, and it was Verizon’s failure to notify consumers and obtain their consent that prompted the FTC to act, not the supercookies themselves. *Telecom companies like Verizon are subject to tighter government restrictions than most companies or nonprofits. But getting informed consent before collecting information from members, customers and other constituents online is the safest practice. The almost unrelenting invasion of our privacy, at home and elsewhere, by government agencies, companies, politicians, charities and others – of which the use of cookies to track our Internet usage is only a small part – will almost certainly result in more protective laws and decisions like this one.*

**JURY AWARDS ERIN ANDREWS \$55 MILLION IN MARRIOTT SUIT** — A jury recently awarded \$55 million to Fox Sports reporter Erin Andrews in her suit against a stalker, the Nashville Marriott and its owners. She claimed successfully that the hotel was negligent in allowing the stalker, Michael David Barrett, to book a room next to hers when she was working for ESPN and secretly film a video of her in the nude, which he then posted online. Barrett will be responsible for 51% of the damage amount, while the hotel and its owner are responsible for the remaining 49%. *Even if nude photos of you might not be worth \$55 million, you have a right to privacy in your hotel room, and, as this case shows, hotels owe a duty to take reasonable steps to protect it.*

## H & H DEVELOPMENTS

**Howe & Hutton is pleased to announce that we have two new faces in the Chicago Office.**

**Christina Pannos** joins Howe & Hutton as an Attorney of Counsel. She completed her undergraduate studies at Northwestern University and graduated from DePaul Law School, where she teaches a legal drafting course as an adjunct professor. She has extensive experience in art law with a Masters Degree in Art Business from Sotheby’s Institute in London.

**Deborah Guth** joins us as our new Firm Administrator. Debbie has extensive experience handling the day-to-day operations of law firms. She has her BA from Columbia College in Chicago and is currently a Board member of Homer Township Chamber of Commerce, and member of the Association of Legal Administrators-Greater Chicago Chapter.

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