THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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IN THIS ISSUE:

NEW LAW CONTAINS PROVISIONS AFFECTING NON-PROFITS – Late last year, Congress passed, and the President signed, the Protecting Americans from Tax Hikes Act, which contains numerous provisions of special interest to nonprofits. Among other things, it establishes a mandatory registration process for all organizations claiming exemption from tax under Section 501(c)(4) of the Internal Revenue Code, and it permits all nonprofits to seek judicial review of IRS revocation or denial of tax-exempt status, as well as an IRS failure to act on an exemption application. It also excludes contributions to Section 501(c)(4), (c)(5) and (c)(6) entities from the federal gift tax, extends certain tax breaks intended to encourage charitable giving, and makes permanent a provision that payments of rent, royalties, annuities or interest made by controlled subsidiaries to parent exempt organizations at arm's length will not be subject to unrelated business taxation as long as they are made for a fair market value return. *Organizations claiming exemption under Section 501(c)(4) should be mindful of the new registration process. However, as provided for in the Act, the IRS has already issued a notice that it will be developing regulations to implement the registration process, and the due date for submitting registrations has been extended beyond due dates specified in the Act. Registrations need not be made now until 60 days from the day those still-to-be-finalized regulations are issued or such later date as may be specified in the regulations.*

CLASS ACTION AGAINST IRS CERTIFIED TO PROCEED – *H&H Report Update* - A federal judge has certified a class action suit filed against the Internal Revenue Service by more than 200 conservative nonprofit groups whose applications for recognition of tax-exempt status were allegedly given slower than normal processing by the IRS between 2010 and 2013 because of their political views. The slowdown has been admitted by the Service. Also involved in this case, though, is an allegation that the IRS failed to protect the confidentiality of the organizations' tax information. The judge, a Bill Clinton appointee, dismissed parts of the suit, but allowed key portions to proceed to discovery and trial, saying, "My impression is that the government probably did something wrong in this case." Whether the government faces liability will be determined at trial. However, the judge also criticized the government for trying to delay the litigation, hoping that it will "last as long as it possibly can, so that by the time there is a result, nobody is going to care…." *The judge is wrong. We're going to care.*

GOOD READING … See you in March

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COURT RULES HOSPITAL TAX EXEMPTION STATUTE UNCONSTITUTIONAL – The Appellate Court of Illinois for the Fourth District has ruled that a state statute providing property tax exemptions for hospitals on the basis of charitable use is unconstitutional as violating a provision of the Illinois Constitution allowing the General Assembly to exempt from taxation "property used exclusively for…charitable purposes." The Appellate Court noted that the statute in question, the product of a length dispute in the General Assembly and the courts over hospital tax exemptions, would improperly allow exemptions based on a comparison of the charitable care that a hospital provides in a given year with the hospital's estimated property tax liability for the year. And that would allow the hospital to "pay its own way" with charitable care (either provided by the hospital or by others, like community clinics, at the hospital's expense) while doing any amount of other things that are not charitable at all, in effect "buying an exemption," which no taxpayer should be allowed to do, according to the Appellate Court. Thus, the Appellate Court said, the exemption statute does not comply with the Illinois Constitution's requirement, both because it settles for "something less than exclusive use of the property for charitable purposes" and because it allows a hospital to use its proceeds to pay for charitable care performed somewhere other than on the hospital premises and then use that care to justify its own property tax exemption. *The trouble with the court's ruling is that it is subject to appeal, and, as this court admitted, Illinois courts, for over 100 years, have previously ruled that "exclusively," as used in this provision of the Illinois Constitution and earlier constitutions, means something more like "primarily." That even includes the Illinois Supreme Court, to which an appeal could be taken in this case. We'll keep an eye out for that appeal.*

STANDARD MILEAGE RATES GOING DOWN, EXCEPT FOR CHARITY – The Internal Revenue Service has announced that the standard mileage rates taxpayers can use in deducting costs for automobile use in 2016 are going down, except for the mileage rate for service to charitable organizations. That rate remains the same as for 2015, 14 cents per mile driven. The rate for business miles driven will decrease to 54 cents per mile from 57.5 cents per mile in 2015, while the rate for medical or moving purposes driving will decrease to 19 cents per mile from 23 cents in 2015. In the same announcement, the Service also warns that taxpayers cannot use the business standard mileage rate for a vehicle if they have claimed accelerated depreciation on it. *Using standard rates is only one option for those claiming deductions for vehicle use. The alternative is to claim deductions for the taxpayer's actual costs of using a vehicle.*

NEW YORK NONPROFIT CONTRACTED STATE WORKERS WANT EMPLOYEE WAGE – Nonprofit workers serving as independent contractors for the State of New York are pushing for the same minimum wage that applies to state employees, which may be $15 per hour, since Governor Andrew Cuomo has proposed such a minimum wage for all state workers. Nonprofit representatives have said that they will need government subsidies to pay their employees at that level. The State of New York has hired roughly 40,000 to 50,000 workers at 2,500 nonprofits, about half of whom make less than the proposed $15 an hour minimum, serving, among other things, as social service caseworkers and teachers. *As previously reported here, the $15 per hour minimum wage is gaining ground. We think nonprofits that provide workers for state jobs as independent contractors should be able to pay them at the same level as government employees would receive for doing the same work, whatever level that is. If they need government subsidies to do that, fine. Why should governments be able to avoid the consequences of their own minimum wage laws by contracting employee work out to nonprofits?*

NONPROFITS EFFECTIVE IN GETTING OUT THE VOTE – A recent study of voting turn-out in the 2014 midterm election in nine states found that nonpartisan efforts by nonprofits to encourage voter registration and voting were highly effective in getting people to the polls, especially among groups of voters often characterized as having a low propensity to vote, namely, young, lower-income and nonwhite groups. Nonprofits achieving the highest success rate in motivating people to vote had a motivated staff, set goals and started early, focused on collecting pledge to vote cards from those already registered, and made sure their staff members and volunteers were voting as well. *Even 501(c)(3) organizations prohibited by laws from partisan political campaigning can engage in nonpartisan get out the vote efforts, and nonprofits have historically played a major role in that activity.*

NONPROFIT FIGHTS CITY HALL OVER AD POSTING ORDINANCE – A nonprofit publisher has sued the City of Chicago after police gave it a ticket for violation of an ordinance that prohibits posting "commercial" ads on lampposts, fire hydrants, telephone poles, traffic lights and other surfaces. The nonprofit claims it doesn't know how a poster for one of the films the nonprofit streams free on its website was found on a lamppost. But since the ordinance presumes whoever's goods or services have been advertised is the guilty party, the nonprofit received a $350.00 ticket, and it is now claiming that the ordinance violates freedom of speech under the First Amendment to the U.S. Constitution. *That argument aside, maybe the ordinance against posting "commercial" ads shouldn't have been applied on its own terms to a poster for a nonprofit's free film. But the constitutional issue is also a very important one. We'll follow this case and see how it's resolved.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

IS YOURS THE NEXT STRANGE TRADEMARK TO BE REGISTERED? - If a trademark is used with your organization's activities, but you think it's too strange to be registered, better consider some of the oddball marks that *have* been registered. There is, for example, the word "dirty," which the U.S. Patent and Trademark Office has protected for flavor-infused soft drinks, prompting litigation between two beverage companies in Utah, where "dirty soda" is in demand by, among others, some alcohol and coffee avoiding Mormons. Then there is "Left Nut Brewing Company," recently allowed for registration despite a contention that the mark is too vulgar for such government protection, since the U.S. Trademark Trial and Appeal Board found that only one of several possible derivations for the mark was vulgar. *Just don't let your mark, however strange, offend a special interest group enough that they cause serious trouble. Ask the Washington Redskins football team about that one.*

REGULATORY LAW DEVELOPMENTS

ALABAMA SUES FEDS FOR INFORMATION ON RESETTLED REFUGEES – *H&H Report Update* - Alabama has become the second state to sue the federal government over resettlement of Syrian refugees, which is largely being coordinated by nonprofits under contract with the federal government. Texas filed suit earlier, and that case is still pending. Both Texas and Alabama claim that the federal government hasn't followed a provision of federal law requiring that states be consulted about resettlement of refugees in their jurisdictions. The states are saying that they want to be provided with the entire federal government file on refugees – including medical information and the basis to support Medicaid eligibility – before resettlement takes place. The Obama Administration has argued that "consulting" doesn't include giving the states person-specific information on individual refugees before they are resettled. *Further proceedings will be held in these two cases, and probably others, as states try to assert what they believe are their rights, even under the wording of federal law.*

TAX LAW DEVELOPMENTS

IRS WARNS OF PHISHING SCAM – The Internal Revenue Service has warned of a phishing scam that may come through your email in the guise of a request from the Service for updating of IRS e-services information. The Service advises that it never initiates contact with taxpayers by email, text messages or social media to request personal or financial information *Don't fall for this scam. Never click on strange email or links purporting to come from the IRS. If they want something from you, they will always send you a letter, and their idea of using advanced technology for response is (I kid you not) a fax.*

CADILLAC TAX ON EMPLOYER HEALTH PLANS DELAYED – Legislation has been signed by the President that will delay the effective date of the so-called Cadillac tax on employer health plans from 2018 to 2020. The tax, which is payable annually and non-deductible, is a 40% excise tax on the cost of employee health insurance coverage exceeding $10,200 for individuals and $27,500 for families, with those amounts to be adjusted for inflation plus factors such as age, gender, high risk professions and retirement. For self-insured plans, the tax is payable by either the employer or the plan administrator. For fully insured plans, the tax is payable by the insurer. But if an employee is enrolled for a combination of fully insured and self-insured benefits, the providers of benefits must pay their share of the tax in proportion to the benefits they provide. *This tax was included in Obama's Affordable Care Act to help pay for other portions of the Act and to discourage high-cost plans. However, many in Congress dislike it, and Presidential candidate Hillary Clinton wants*

EMPLOYMENT LAW DEVELOPMENTS

COURT UPHOLDS BROAD CHURCH PLAN ERISA EXEMPTION – The U.S. District Court for the District of Colorado has held that Catholic Health Initiatives ("CHI"), a health care organization associated with the Roman Catholic Church, is exempt from requirements of the federal Employee Retirement Income Security Act under the "church plan" exemption contained in the Act. The court so ruled even though CHI does not provide places of public worship and covers employees of more than one Catholic-affiliated entity, finding also that CHI's eligibility for the exemption did not depend on whether it was "controlled" by the Church. Finally, the court rejected an argument by a group of former CHI employees that the statutory "church plan" exemption violates the First Amendment of the U.S. Constitution by legislating with respect to an establishment of religion, as the court found the exemption does not have the purpose of advancing or inhibiting religion and does not cause the government to be excessively entangled in religion, but, rather, seeks to prevent such entanglement. *Other federal courts have opted for a stricter definition of "church plan" that might have excluded CHI. A Supreme Court ruling on the subject may be in the offing because of the conflict in the lower courts.*

EMPLOYEE HANDBOOK AND JOB DESCRIPTION CAN ESTABLISH EMPLOYEE RIGHTS - A recent case before the federal district court in Chicago demonstrates that employers must be very careful in their wording of employee handbooks and job descriptions. The case involved a former police officer who sued the village for which she had worked, claiming that she was unlawfully discharged after she suffered a back injury. Many of the charges filed against the village will require further proceedings to resolve. But of particular interest is the district court's finding that the former officer was not precluded from charging that the village failed to comply with the federal Americans With Disabilities Act ("ADA"), the Illinois Human Rights Act ("IHRA") and the federal Family and Medical Leave Act in failing to consider returning her to light duty work after her injury. The village argued that the ADA and IHRA were not violated because the former officer could not perform the essential functions of her job after the injury, while the FMLA could not have been violated because she took FMLA leave, she could not perform her previous job after that leave had ended, and the Act contains no right to a transfer to other suitable work after leave expires. However, the court found that

the officer might be able to show that she could perform the essential duties of her job after her injury because, even though she could not lift more than 20 pounds, her previous job description said nothing about lifting, and, while she was restricted from walking, the job description indicated that only 20% of her job involved walking, as opposed to sitting and standing. Further, the court noted that the village's employee handbook stated that a worker would be transferred to "alternative suitable work, if available" after FMLA leave was exhausted, and the court held that the village was bound to that promise under the FMLA, even though its return from leave program, as stated in the handbook, was more generous than the specific requirement of the FMLA that the former officer be returned to her previous job after leave ended, if she could perform it. *Nonprofit employers should review their employee job descriptions and handbooks. As this case shows, the specific language they contain could be key in defending against future lawsuits.*

NEW YEAR BRINGS MAJOR ILLINOIS UNEMPLOYMENT COMP CHANGES – Significant changes in Illinois unemployment compensation law have taken effect, mitigating employer liability. While employers could previously avoid liability for recently terminated employees if they were willfully and deliberately violating the employer's policies, that "willful and deliberate" standard is no longer a part of the law. Now, employers can terminate without liability for unemployment compensation if the employee was guilty of any of the following:

1. Falsifying an employment application
2. Failing to maintain a license, registration or certification reasonably required by the employer or by law
3. Knowing, repeated violations of reasonable attendance policies following a written warning, unless the attendance failures were out of the employee's control or occurred despite the employee's reasonable efforts to avoid them
4. Damaging the employer's property or endangering the safety of the employee or co-workers through "grossly negligent" conduct (defined as actions by an employee who is or should be aware of a substantial risk that harm may result from his actions, if the conduct substantially deviates from the care a reasonable person would exercise in the situation)
5. Refusing to obey the employer's reasonable and lawful instructions, unless due to the employee's lack of ability, skills or training or the instruction would result in an unsafe act
6. Consuming alcohol, illegal or non-prescribed drugs, or other impairing substances in violation of the employer's policies and on the employer's premises during working hours, or reporting to work under the influence of any of the above substances in violation of the employer's policies (unless the employer requires the employee to work during off-hours or hours not on call after the employee has informed the employer that he is "under the influence").

MEETINGS & TRAVEL LAW DEVELOPMENTS

POLICE DEMAND HOTEL GUEST INFORMATION UNLAWFULLY – Travelers should be aware that hotels are frequently required to provide guest information to law enforcement personnel in violation of constitutional privacy protections, as guaranteed by the U.S. Supreme Court in a case decided last year. The Court in *City of Los Angeles v. Patel* ruled that a city ordinance requiring hotels to provide police with guest information on demand, or face criminal sanctions, was unconstitutional in allowing such "searches" without a warrant or subpoena issued by a neutral decision-maker such as a magistrate. Yet, even after that decision, it is reported that law enforcement personnel, without a warrant or subpoena, are frequently demanding that hotels give them copies of hotel registries, security camera footage, information about whether someone specific has checked in or out, and guest identifying information, occupancy patterns, and payment data. Some officers have even demanded that they be allowed to search guest rooms, again without a warrant or subpoena, and hotels rarely resist any of these demands. *Hotels are placed in a bad situation by such official conduct.. They don't want to antagonize law officers, especially when they may not see compliance as hurting them, as*

opposed to their guests. But hotels should be aware that complying with unconstitutional demands from law enforcement can subject a hotel to an invasion of privacy suit by affected guests. For the hotel, it may be a no-win situation. And it is particularly unfair because law enforcement personnel can have a magistrate issue a warrant or subpoena in the field with relative ease if there are any grounds for it, thus providing a hotel that complied with search demands a defense against any resulting guest lawsuit.

OTHER ISSUES, TRENDS & DEVELOPMENTS

COURT INTERPRETS AMBIGUOUS POLICY AGAINST INSURER – The U.S. Court of Appeals for the Seventh Circuit recently ruled against an insurance company trying to avoid coverage for an "additional insured" under a liability insurance policy that was deemed ambiguous by the court. The policy had been issued to Painters USA, and one of its employees was injured in an accident while working on the premises of another company, Vita Food Products, precipitating a suit against Vita on behalf of the worker and his wife. Vita argued that Painters had made Vita an "additional insured" on the policy, but the insurer denied coverage because no certificate of insurance had been issued to Vita until after the accident. However, the Seventh Circuit found that the policy was ambiguous as to whether the certificate had to be issued before an accident or only before a claim could be filed by the additional insured (as in this case), and the court ruled that the ambiguous policy language had to be interpreted against the insurance company. *Nonprofits are often "additional insureds" on policies, or they make others "additional insureds" on their policies, as is frequently demanded, for example, by the owners of facilities where a nonprofit's events are held. This court's ruling is typical in concluding that an ambiguous contract must be interpreted against whoever drafted it, something readers should keep in mind whenever they enter into contractual arrangements.*

H & H DEVELOPMENTS

Jonathan Howe presented, "What's Up Doc?" Market, Negotiations, Contracts to a leading company in the meeting planning industry.

Michael Deese served as a co-presenter in an Accreditation Workshop. He also served as the moderator of a session panel on Succession Planning for association management company owners, at The AMC Institute's annual meeting held in February in Anaheim, California.

Naomi Angel gave a report on current trends and legal developments to professional society's Board of Directors meetings in Washington, D.C.

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