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WEBSITE “BROWSEWRAP” AGREEMENT UNENFORCEABLE — A California Court of Appeal has ruled that the ProFlowers.com website’s terms of use are unenforceable as to a consumer who alleged that he was misled in connection with a purchase. The consumer purchased a Mother’s Day floral arrangement listed as a “completed assembled product”, but what he received was a kit in a box that required assembly. The consumer sued the website’s proprietor claiming violations of consumer protection laws. In rejecting the website owner’s claim that the consumer was bound by the terms and conditions linked to by each page during the checkout process, the court sided with the consumer, who alleged he was not aware of the terms and conditions and had not agreed to be bound by them. The court found the mere offering of the terms and conditions insufficient to shield the company from claims. In doing so, the court differentiated passive “browsewrap,” not requiring affirmative consumer agreements to purchase, from “clickwrap” agreements, which require users to affirmatively represent that they have read and agree to be bound by a website’s terms and conditions. *This ruling should be eye opening for all associations, many of which operate under the assumption that they are sufficiently insulated from website related claims as long as their site contains a link to various legal disclaimers. Courts view website-related disclaimers and limitations of liability the same way as the paper and ink variety in that it is not enough to merely make them available. For such terms and conditions to successfully limit liability, the party invoking them must show that they have actually been agreed to. For this reason, higher stakes online transactions often require a user to take some affirmative action such as checking a box or clicking “I agree” to document assent to the terms in question. Note, however, that even that approach may be insufficient if users can indicate such assent without having to review the terms and conditions at issue.*

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.*

GOOD READING ... See you in June

NOT-FOR-PROFIT LAW DEVELOPMENTS

ENEMIES OF FREE SPEECH LOSE ONE, TEMPORARILY — A federal judge has issued a temporary injunction prohibiting a Cook County, Illinois school board from barring the criticism of officials by name at board meetings. The judge found a board policy banning criticism – but not praise – of school officials at meetings is likely a content-based restriction on speech in violation of the First Amendment to the U.S. Constitution. However, the board will have a chance to present further arguments in favor of its policy before the judge issues a permanent injunction. *First Amendment considerations don't have as much force at the meetings of private organizations not involved with governmental activities. But nonprofits must be careful in trying to muzzle dissent at their board meetings, as they sometimes try to do. If someone who is not on the board, or even a board member, is obstructing a board meeting in such a way as to prevent the board from deliberating and acting, security can be called upon to throw them out. But some nonprofit officers and directors seem to think that they ought to have a right to stifle directors, or even throw them off a board, if they disagree with or just refuse to affirmatively support, the positions and actions of officers or the board majority. They have no such right, and dissenting directors, on the contrary, have a legal right (and sometimes a duty) to dissent from actions with which they disagree, privately or even publicly. If they don't, they may face legal liability for improper organization actions with which they have "gone along." Furthermore, many state and federal laws protect whistleblowers and other dissenters. For example, if a dissenting director has been elected to a board position by an organization's members, some state laws prevent removal of that director from the board except through a vote by the membership, which, in some states, must be a two-thirds or other supermajority vote.*

2015 IRS DATA BOOK RELEASED — The Internal Revenue Service has released its 2015 Data Book, containing statistics on exemption applications by nonprofit organizations, among other things. The IRS approved 95,372 applications for recognition of exempt status last year, denying 67. The vast majority of applications received were for recognition of exempt status under Section 501(c)(3) of the Internal Revenue Code, coming from charities, as well as educational, religious and scientific organizations. Of those, 86,915 were approved and 57 denied. *We'll remember these statistics the next time we feel like complaining about how long it takes the Service to act on the applications we file.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

Part of an article printed in the April 2016 issue was inadvertently omitted in the distribution process. The entire article appears immediately below.

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.*

SUPREME COURT REFUSES CHALLENGE TO GOOGLE ONLINE LIBRARY — *H&H Report Update* — The Supreme Court of the United States has refused to consider an appeal by authors from a lower court decision upholding Google's right to digitize millions of books in an online library. The authors claimed copyright infringement. But the U.S. Court of Appeals for the Second Circuit held that Google

had made fair use of the authors' works, since individuals searching the library would only be provided with "snippets" amounting to no more than 16% of any copyrighted work, online. Users of the library would then have to purchase the entire work if they were interested, and that would produce revenue for the copyright owners. Therefore, the Second Circuit found that Google's library would not threaten any significant harm to the authors' copyrights. *The Court of Appeals decision, which will now stand, may have created a 16% safe harbor for all who wish to use portions of a copyrighted work. Nonprofits are major publishers of copyrighted works, and many of their works are, no doubt, in the Google library.*

REGULATORY LAW DEVELOPMENTS

BANKS, PRESSURED BY GOVERNMENT, CLOSE CHARITY ACCOUNTS — *The Wall Street Journal* has reported that banks in the U.S. and Europe are increasingly closing the accounts of legitimate charities without cause or explanation in response to pressure from government regulators seeking to prevent money laundering, financing of terrorism and violation of government sanctions against certain countries. Financial transfers by charities are also being delayed or blocked by government in other ways. *Though regulation of financial transactions has long been an effective weapon for law enforcement, the crackdown has hindered the efforts of humanitarian organizations to deliver aid to needy individuals, particularly in Syria, Turkey and Lebanon.*

CELL PHONE USERS CLEARED TO SUE FOR POLITICAL/COMMERCIAL CALLS — A federal judge has cleared a class of cell phone users to sue three companies in the leisure industry, as well as other companies that made recorded calls to cell phones for the purported purpose of conducting political surveys, but then transferred call recipients to the leisure industry defendants. All defendants are charged with violating the federal Telephone Consumer Protection Act for failing to obtain permission from the call recipients before allowing the calls to be placed. Recipients of the calls were offered "free" cruises if they participated in the political surveys, but informed they would have to pay taxes, port fees and gratuities. Those who agreed to take a cruise were then offered an "upgraded package" that required them to tour a timeshare facility. Regulations implementing the Act provide that nonprofit organizations and others making calls for a noncommercial purpose need not obtain permission from call recipients before making recorded calls to a landline phone. But the judge ruled that those regulations do not apply to recorded calls made to cell phones, even if the calls placed in this case could be called "noncommercial". *Those who make recorded calls to cell phones must first obtain permission from the owners, and this case shows that applies regardless of whether the calls are for a commercial purpose.*

MISSOURI POLITICAL DISCLOSURE LAW ADVANCES — Lawmakers in Missouri are moving to enforce new regulations on political donations and spending in the name of transparency. New legislation would require all organizations exempted from federal income tax under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code to disclose political contributions and expenditures if anyone who makes spending decisions for the group is a candidate for public office, a candidate's spouse or "has a contract or is employed by a candidate." The architect of the new legislation is a state senator running for state Attorney General against a university professor who may need financial contributions to be competitive politically. *This law is just one of many state-level initiatives throughout the U.S. that are designed to require disclosure of political contributions by nonprofits.*

TAX LAW DEVELOPMENTS

PROPOSAL WOULD TAX YALE'S ENDOWMENT — Trying to close a \$220 million budget deficit, Democrats in Hartford, Connecticut have proposed a tax of around 7% on the income realized annually by Yale University's endowment fund. Yale's endowment earned \$2.6 billion last year. But there may be a legal challenge in the offing for the Yale tax proponents, since Yale's charter from Connecticut, dating back to 1818, purportedly shields it from all taxation. *One would be tempted to say that the Yale tax plan sets an awful precedent, if it weren't for the fact that the Supreme Court of the United States, only a year after Yale received its "charter" from Connecticut, ruled university charters are protected from impairment only a year after Yale received its charter from Connecticut. That rather celebrated case set the precedent, and we wish more lawmakers would read up on such things before wasting their time coming up with new tax measures that are doomed to be struck down by the courts.*

ACA ALSO AFFECTS SMALLER EMPLOYERS — *H&H Report Update* — The federal Affordable Care Act ("Obamacare") makes employers with 50 or more full-time or full-time equivalent employees subject to tax and information reporting responsibilities, which we have previously discussed. But the Internal Revenue Service is advising smaller employers that the ACA also affects them. Under the ACA, employers with fewer such workers can purchase health insurance coverage for their employees through the Small Business Health Options Program ("the SHOP Marketplace"). Meanwhile, employers with fewer than 25 such workers with average annual wages of less than \$50,000 may be eligible for the small business health care tax credit if they cover at least 50% of such employees' premium costs and, generally, if they purchase coverage through the Marketplace. On the negative side, employers providing self-insured health coverage for workers must file annual information returns with the IRS, reporting information about the employees they cover, regardless of the employer's size. *Thanks to the IRS for providing this "health care tax tip." Who says the service provides no service?*

EMPLOYMENT LAW DEVELOPMENTS

WHISTLEBLOWER AWARDED MILLIONS IN SUIT AGAINST SCHOOL — The Illinois Appellate Court has ruled that Chicago State University must pay a former attorney employee \$2 million in punitive damages and \$480,000 in back pay for firing and smearing the worker. He informed on some questionable contract practices by the University and refused to cooperate with school officials in stonewalling a Freedom of Information Act request. The Appellate Court affirmed a lower court ruling that the University violated the State Officials and Employees Ethics Act by manufacturing reasons for firing him and filing a baseless complaint against him with the Illinois Attorney Registration and Disciplinary Commission. *Government employees have greater protections than others when it comes to whistleblowing, but any employer that sought to imitate the University's actions in this case could wind up with major legal problems. Wrongful termination was bad enough, but punitive damages were also awarded and back pay was doubled under the Act largely because of the school's efforts to punish the whistleblower through the filing of the trumped up ethics complaint "clearly calculated to professionally bury" the former employee. Such vindictive conduct is never a good option for an employer, even if an employee has done something worthy of dismissal.*

MINIMUM WAGE CONTINUES RISE ACROSS U.S. — California and New York recently became the first states to mandate a \$15 per hour statewide minimum wage, though the minimum will be phased in over the next few years in both states. Seven cities in Washington State and California have also passed laws or held referenda setting local minimum wages at \$15 per hour. *The march toward higher minimum wage requirements continues across the country. Many states raise their minimum wage automatically in accord with increases in the cost of living. The federal minimum wage is \$7.25 per hour, and reports indicate that many workers, particularly in retailing and the leisure and hospitality industries, are paid at or below that amount.*

INADEQUATE AND FRAUDULENT FMLA NOTICE KILLS RETALIATION CLAIM — The U.S. Court of Appeals for the Seventh Circuit in Chicago has held that a worker’s comment to a subordinate that he intended to “scam” his employer by taking “medical leave” was not only evidence of fraudulent intent, but also insufficient notice to the employer concerning a need for leave under the federal Family and Medical Leave Act. The employer in this case demoted the worker after finding out about the comment, and the employee (incredibly) sued the employer, alleging that he had been retaliated against for engaging in a protected activity under the Act, namely, giving notice of a need for FMLA leave. Not so, said the Court of Appeals. The worker was engaging in a fraud, not a protected activity. And even ignoring his fraudulent intent, he had failed to provide a proper notice of his need for medical leave, since his statement to the subordinate, even if it had been given to someone higher up in the chain of command, failed to give the employer sufficient information regarding the leave, duration of the leave and his health condition justifying the leave, as required by the Act. *When planning to commit a fraud, bragging about your intentions is never a good idea. But finding out the requirements for a proper FMLA notice before giving one certainly is.*

DONNING AND REMOVING WORK GEAR COUNTS TOWARD OVERTIME — More than 40 hours of work per week entitles an employee to time and a half overtime pay under the federal Fair Labor Standards Act and some state laws. But what is “work” that counts toward overtime? A recent court case involved workers in a pork processing plant who were required by their employer to wear protective gear on the job. Their employer wouldn’t count the time that the workers spent donning and removing the gear toward the 40-hour limit. But the Supreme Court of the United States has affirmed a lower court award of \$2.9 million in unpaid wages to the employees based on the conclusion that putting the gear on and taking it off was “work.” *Interestingly, the employer sought to avoid paying the employees for overtime because the employees took different amounts of time to don and remove the gear, and no evidence was presented by the employees as to the exact amount of time each one of them took to do that. The employees, however, presented a statistical average time study done by an industrial relations expert, and the Supreme Court ruled that such a study could be used to infer the number of hours a particular employee or class of employees has worked, though the case was sent back to a lower court for further consideration as how the total award should be disbursed among the individual employees.*

EMPLOYEE INJURED WORKING AT HOME ALLOWED COMPENSATION — An employee injured while working at home can be entitled to worker’s compensation. That’s the lesson from a case where a policeman was allowed to collect compensation when he injured his back while securing his 40-pound duty bag at his personal residence between shifts. The evidence in the case was held to indicate that the policeman was injured while performing actions directly related to the job-related task of maintaining the safekeeping of his equipment, which his employer allowed him to store at home even though he could also have used a locker at the police station. *Employers who don’t want their workers to collect compensation in similar circumstances should consider instituting policies that expressly prohibit employees from taking work-related equipment home.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

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 Starwood. 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

FBI'S FIGHT WITH APPLE HIGHLIGHTS PRIVACY ISSUES — The Federal Bureau of Investigation and Apple Inc. recently fought battles over iPhone privacy in the courts and on Capitol Hill, as the FBI sought to force Apple to help unlock security protections on its iPhone so that the government could better collect information on criminals. Ultimately, the FBI backed away from court actions in California and New York, saying it didn't need Apple's assistance to unlock phones that belonged to San Bernardino terrorist Syed Rizwan Farook and certain drug dealers. But reports indicate the federal government has repeatedly sought court orders in at least seven states requiring Apple and Alphabet Inc.'s Google to help federal agents unlock cell phones. The government has been citing a 1789 law called the All Writs Act to obtain cell phone information from Apple and Google since at least as early as 2008, with great success until Apple recently began resisting such efforts. A fight in Washington may take center stage now, as lawmakers consider proposed new legislation that would penalize companies not complying with court orders to help authorities crack encrypted devices. *Nonprofits are often the target of subpoenas by government and private litigants hoping to obtain the considerable information they collect for various purposes. Failure to comply can result in court orders to do so and penalties even under existing law. Consequently, while the government wants to characterize its dispute with Apple as involving obstruction of specific criminal investigations, Apple may be right in saying that it could create a "dangerous precedent" sacrificing the right of privacy under the U.S. Constitution to other considerations, and impacting the ability of Americans to carve out a little space for themselves, free from the scrutiny of others.*

H & H DEVELOPMENTS

Naomi Angel presented a session entitled, "GPS Navigation Through the Maze of Hotel Contracts." Held at the National Education Conference of Society of Government Meeting Planners in San Diego, this session addressed how to successfully negotiate contracts to get what is needed for a group event.

Gerard (Jerry) Panaro co-presented "How HR Compliance Impacts Association Health" at the ASAE 2016 Finance, HR & Business Operations Conference in Washington D.C.

Jonathan Howe presented two sessions for the MPI Wisconsin Chapter held at the Blue Harbor Resort in Sheboygan, WI: "To Risk Or Not To Risk – That Is The Question" (discussing how to have a better understanding of what causes liability and those areas that cannot be controlled versus those meeting professionals need to control) and "What's Up, Doc? — Market Negotiations and Contracts" (dealing with the need to pay attention to the boilerplate* and explore the clauses not to include as well as those that need to be included in contracts).

*n., adj. slang for provisions in a contract, form or legal pleading which are apparently routine and often preprinted. The term comes from an old method of printing.

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