Association TRENDS

2013 Legal Review

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Stand up for your members – if you have 'standing'

Many associations are called on to initiate litigation to pursue their members' interests. As with all litigants, an association may bring a lawsuit in court only if it has "standing" – the association must demonstrate that it has suffered injury in fact, that the injury is fairly traceable to the defendant, and that the injury will likely be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State Inc., 454 U.S. 464, 471-472 (1982). An association may sue on its own behalf if it has suffered an injury, or the association may, under certain circumstances, sue in a representational capacity on behalf of its members.

The U.S. Supreme Court has held that an association has standing to sue on behalf of its members only if the following conditions are met: (1) the association's members would otherwise have standing in their own right, (2) the interest the association is seeking to protect is germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

A recent case from Missouri, Association of Independent Gas Station Owners v. Quiktrip Corp., No. 4:11CV2083 (E.D. Mo. July 20, 2012), demonstrated that meeting this standard is often a challenge for associations. The plaintiff trade association, which represented independent retail gas stations, filed suit on behalf of its members against QuikTrip, a retail gas station operator that allegedly violated the antitrust laws in its effort to dominate the St. Louis market for the distribution of gasoline. The court dismissed the association's complaint for lack of either individual or representational standing.

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Legal Issues of the Past Year

It's not easy being green

On Oct. 1, the Federal Trade Commission issued revised Guides for the Use of Environmental Marketing Claims ("Green Guides"), 16 C.F.R. Part 260, designed for the laudable goal of preventing unsubstantiated "green-washing" claims. Unfortunately, the Guides have a number of harsh implications for trade associations that maintain environmental certification programs. A presumption permeates the Guides that an association cannot be independent in developing and administering a certification program. For example, a trade association seal may trigger the FTC's Endorsement Regulations, which requires disclosure of the connection between the company and association (e.g. "the seal is issued by an industry organization of which the company is a member"). Moreover, if the name of the association does not disclose or describe its industry affiliation, a statement must be included that the certifier is an industry trade association, lest there be an implication of "independence."

Nonprofits' role in political campaigns – indirect payments reaffirmed

The Citizens United Supreme Court case resulted in a presidential rebuke some years ago in the State of the Union address and a justice's public nod of disapproval. It held that direct corporate contributions to political campaigns could be regulated, but that indirect political expenditures for political communications could not be banned. Several cases followed that precedent in 2012.

The court overturned a Montana statute (and Montana Supreme Court decision) that prohibited direct corporate contributions, in spite of a finding by the legislature that the statute was needed to overcome political corruption. American Tradition Partnership v. W. Tradition Partnership 132 S. Ct. 2490 (2012). It summarily found the situation to be directly controlled by Citizens United.

In Minnesota Citizens Concerned for Life v. Swanson, the 8th Circuit upheld a state law ban on direct contributions, but overturned requirements for the maintenance of separate funds, record-keeping and other provisions. These were essentially equivalent to requirements for PACs that were found to be inappropriate for indirect contributions in Supreme Court precedents.

For the time being, corporate associations can continue to make indirect payments in support of candidates, but not direct payments to candidates or their political committees.

Stay out of the lobby if you want to advise

As part of its effort to limit the role of "special interests," the Obama administration has banned registered lobbyists from serving on federal advisory committees such as the Industry Trade Advisory Committees, which advise on international trade matters. A federal district court in Washington in September rebuffed a constitutional challenge by displaced ITAC members, who alleged violation of equal protection and the First Amendment right to petition the government. Autor v. Blank. The court found that service on the committees was not a valuable government benefit and that the disparate treatment was not based on the protected speech, i.e. the content of the speech, who their clients were or any positions that they took. The court found that there was a rational basis to a legitimate purpose of avoiding undue influence of paid lobbyists.

New York attorney general wants to know who is funding nonprofit political communications

On Dec. 11, the New York attorney general's office proposed rules that would require nonprofit organizations doing business in New

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Volunteering for trouble or trouble with volunteers?

A guide to the liability risks for nonprofits and their volunteers

Volunteers often constitute an essential portion of the "workforce" of nonprofit organizations. Volunteers can play an essential role in providing important charitable services and constitute a vital link to an organization's constituency and the public – enhancing or harming a nonprofit's image and functioning. The use of volunteers, however, entails risk – both from and to volunteers.

A concern for the nonprofit: Is the nonprofit volunteer really an employee?

Nonprofits, like all employers, are subject to an ever-expanding array of employment statutes. Antidiscrimination statutes exist at the federal, state and local levels, barring discrimination based upon a wide range of protected characteristics from race and religion to gender identity and expression. However, as a general rule, courts have held that such statutes apply only to individuals in an employment relationship and do not apply to volunteers.

The question becomes, then, whether a volunteer may actually be an employee. It is fairly clear that the individual's perception that volunteering is prestigious or professionally advantageous to him or her does not create an employment relationship, but the line between employee and volunteer becomes less clear when something of value is provided to the volunteer. Where there is evidence of compensation, courts often will look at the "economic realities" of the relationship, including the degree of control over the activities of the volunteer. Reimbursing a volunteer for volunteer-related expenses generally should not convert a volunteer into an employee.

However, when the financial benefits provided to a volunteer extend beyond the simple reimbursement of expenses, there is an increasing risk that the individual could be considered an employee. For example, some nonprofits make volunteers who are exposed to personal risk eligible for a range of benefits such as a disability pension, survivors' benefits for dependents, and other benefits. Some courts have found that such benefits could reflect the existence of an employment relationship. Thus, the urge to provide volunteers with stipends or other financial benefits, while admirable, could expose the nonprofit to significant additional risk in the form of employment litigation.

In the area of federal and state antidiscrimination laws, there is a significant benefit to an individual being considered a volunteer because the nonprofit usually will not be liable under these laws. In contrast, under workers' compensation laws, there can be a significant downside to an individual not being considered an employee because the nonprofit does not get the benefit of the limited liability afforded to the nonprofit for injuries sustained by the volunteer. This is not to say an injured volunteer would have an automatic or meritorious claim against the nonprofit for which she or he is volunteering – the volunteer would have to prove all the elements of his or her claim, subject to all defenses, including, in some states, a limitation on liability and/or partial charitable immunity. The possibility of a suit for negligence suggests that nonprofits should take steps to assure that their volunteers are not subjected to dangerous conditions, including through a lack of appropriate training.

This risk of potential claims (whether employment- or injury-based) is enhanced by the fact that many nonprofits do not adequately train or take typical employment-related steps with volunteers – such as providing sexual harassment training or providing a policy on reporting sexual harassment.

Because volunteers in most situations will not be considered employees, the risk of liability for an employment law claim by a volunteer is low. However, the potential for personal injury and other claims still exists, and the reputational harm to an organization from lawsuits is potentially very high. The risk can be mitigated to a large extent by recognizing that volunteers are potentially exposed to the same risks as employees and that the steps taken to protect employees should be taken to protect volunteers, consistent with their exposure to risks.

Do the nonprofit and its volunteer need to worry about getting sued for volunteer activities?

In order to prevent the fear of being sued from discouraging volunteerism, the federal government and many states have enacted legislation designed to protect volunteers from certain types of liability, such as from honest mistakes or ordinary negligence. For example, Congress passed the federal Volunteer Protection Act in 1997. The law provides that a "volunteer" of a nonprofit organization generally will not be liable from harm caused if (1) the volunteer was acting within the scope of the volunteer's responsibilities; (2) the volunteer was licensed properly, certified or authorized by the state in which the harm occurred (where such authorization is required); (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the volunteer; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft or other vehicle for which the owner or operator is required to possess an operator's license or maintain insurance. Note that to qualify as a volunteer, the person cannot receive more than $500 in annual compensation.

Many states have additional protections, such as coverage for use of motor vehicles – it is important for each organization to understand the law in the jurisdictions where it has volunteers.

What should the nonprofit do?

Nonprofits should consider the following simple steps to help minimize the potential liability from and to volunteers:

- **Establish criteria for volunteers and exercise reasonable care in the selection of volunteers.** Obtain complete information to enable identification of a "risky" volunteer. This consideration is especially important if the volunteer will work with vulnerable individuals such as children.
- **Provide training and guidance to volunteers** similar to an employee performing the same duties.
- **Ensure that volunteers understand that they are volunteers,** that they are not eligible for employee benefits, and that their status as a volunteer is not a step toward obtaining employment with the organization.
- **Establish a volunteer handbook** that provides volunteers with clear channels for reporting and resolving any problems (including harassment).
- **Develop rules for supervising and monitoring volunteers.**
- **Develop criteria for discontinuing volunteers** who demonstrate unfitness.
- **Understand the scope of exemption from liability for volunteers** and take the steps necessary to maximize that protection.
- **Examine the organization's insurance policies** to ensure that they provide sufficiently broad coverage for actions taken by volunteers.

Read full article by Ron Taylor at www.Venable.com

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York to disclose their spending on a wide range of activities, including those unrelated to New York elections or candidates. The rules also would require groups that spend more than $10,000 to identify donors giving $100 or more.

Under the proposed rules, nonprofit, tax-exempt organizations registered—or required to be registered—under New York's law must include in their annual financial report the amount and percentage of total expenses spent on all "election related expenditures" during the reporting period. The term "election related expenditures" is defined so broadly that it would require organizations to track and report on spending nationwide, and could sweep up grassroots lobbying and other issue advocacy. In addition, a group making public communications in New York during the six months prior to a state or local election may have to publicly disclose all of its individual donors.

FTC decision imminent in pipe case

Associations are closely watching an FTC antitrust proceeding against McWane Inc., alleging unfair methods of competition in the ductile iron pipe fittings ("DIPF") industry. According to the FTC, "McWane invited...[its competitors] to collude with it beginning in early 2008, when it communicated to...[its competitors] a plan to raise and fix prices for imported DIPF. The FTC alleges that...[they] accepted McWane's invitation to collude and, to further the conspiracy, each raised its prices for imported DIPF in January 2008 and again in June 2008. Between June 2008 and January 2009, according to the FTC, the three firms exchanged information documenting the volume of their monthly sales through a trade association called the Ductile Iron Fittings Research Association, and each company used this information to monitor whether the other co-conspirators were adhering to the terms of their collusive arrangement."

Two particular aspects are of interest to the association community. First, the FTC alleges that an association statistics program reporting volume of sales facilitated the price fixing conspiracy. This highlights the fact that a statistics report that on its face appears appropriate can be used for improper purposes. Second the FTC reiterates its long-held position that an invitation to collude is, in and of itself, a violation of Section 5 of the FTC Act, regardless of whether the invitation ripens into an agreement.

'Play or Pay' hits associations

In September, the Internal Revenue Service issued guidance on the employer-sponsored health coverage mandate (often called the "play or pay rules" under the Affordable Care Act). Beginning in 2014, a nonprofit employer that has 50 or more full-time equivalent employees (defined as 30 hours a week), could be subject to substantial fines. The penalties are triggered if:

- A nonprofit employer fails to offer all of its "full-time employees" the opportunity to enroll in an employer-sponsored health plan; or (2) the employer-sponsored health plan offered to full-time employees is "unaffordable" or fails to provide "minimum value;" AND
- Any employee impacted by such failure purchases individual health insurance coverage through a state-based or federally facilitated exchange and qualifies for a subsidy.

Nonprofit employers who fail to provide coverage to their full-time employees are subject to a penalty of $2,000 per year (assessed on a monthly basis) multiplied by their total full-time employee count. Note this applies even if just one employee is not offered the insurance and goes to an exchange. $3,000 in penalties are assessed if the "unaffordable plan" or less than "minimum value" features are present. These fines are assessed only with respect to employees that do not meet the standards based on their household income.

Although the provisions do not become operative until 2014, it is important to begin planning now. Nonprofit employers should evaluate which employees are eligible for coverage under existing plans, track the hours of any excluded employees, monitor the income of low-paid full-time employees in relationship to plan premiums, and, once further guidance is issued, confirm their plan offers adequate coverage.

The Tax Man cometh

The nonprofit community girded for trouble as numerous proposals were floated for reducing the charitable income tax deduction. This was rationalized by many as closing loopholes and introducing equity into the system. Others simply pointed to the need for additional revenues. A range of approaches have been suggested, including limiting deductions for higher income individuals to 28 percent, replacing the deduction with a credit for donations, allowing non-itemizers to deduct for contributions and setting a floor above 2 percent of adjusted gross income, and various other credit schemes. Whatever the end result, the outcome would be less ability to shelter income from taxation.

In May, the House Ways and Means Committee conducted extensive hearings on the rationale for many 501(c) exemptions and the interaction of the community with the IRS. On Feb. 12, it again focused on nonprofits, this time looking at the charitable deduction. The session featured testimony from more than 40 witnesses and lasted about seven hours. Witness after witness implored the committee not to institute any additional caps on the charitable contribution deduction that impeded fundraising.

And cometh again – IRS plans for 2013

Earlier this year the IRS announced its plans for Exempt Organizations examination focus. Once again Form 990 compliance will feature some of the usual suspects:

1. Compensation. The IRS will focus on those that reported amounts of compensation for all officers, directors, trustees and other key employees that is inconsistent with the amount reported by other organizations with similar amounts of gross receipts.

2. Political activities. The IRS has developed internal indicators for noncompliance with political activity restrictions. About 300 cases involving unlawful political campaign intervention by tax-exempt organizations were identified and the IRS likely will send these cases to a committee to determine the necessity of more in-depth examination.

3, Unrelated business income. The IRS plans to examine a sample of organizations that specifically reported substantial gross unrelated business income in the past three tax years and did not report any income tax due during those years. Last year, the IRS completed compliance checks of more than 400 organizations reporting unrelated business income that did not file a Form 990-T, leading to more than $260,000 in tax payments.

4. Charitable spending initiative. The IRS uses data from Forms 990 to examine the sources and uses of funds by charities and the relationship between spending and charitable work. The IRS first selected a group of about 170 smaller organizations for examination, and these examinations led to revocation of exempt status in some cases, as well as assessing tax on unrelated business income and adjusting employment tax returns. In 2013, the IRS plans to change its focus to medium and large organizations, particularly those that report a high amount of fundraising income but much lower fundraising expenses.

Read the full article by Matt Journy at www.Venable.com.

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First, the association lacked individual standing because it did not operate retail gas stations and therefore was not injured by the defendant's alleged predatory pricing. Second, the court held that the association could not satisfy the second and third Hunt factors for representational standing. According to the court, the association failed to present evidence showing that the lawsuit was germane to the association's purpose. Finally, with respect to the third Hunt factor, the court found that the association's claim required the participation of individual members because the complaint alleged that members suffered varying degrees of injury. Compare to Natl Office Mach. Dealers Assn v. Monroe, the Calculator Co., 484 F. Supp. 1306 (N.D. Ill. 1980) (finding the challenged conduct to be "equally applicable and equally detrimental" to all of the association's members).

A Feb. 26 Supreme Court decision, Clapper v. Amnesty International, further clarified the murky area of claims based on impending or future harm. The plaintiffs in Clapper were a group of nonprofit organizations and others who alleged that their work requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with people outside the U.S. They challenged the constitutionality of the Foreign Intelligence Surveillance Act of 1978, which allows the attorney general and the director of national intelligence, with the approval of the Foreign Intelligence Surveillance Court, to authorize the surveillance of non-U.S. persons located outside the U.S. In a 5-4 decision by Justice Samuel A. Alito Jr., the high court held that plaintiffs must demonstrate harm that is "certainly impending," not speculative, to satisfy the injury-in-fact requirement of standing. The court also held that plaintiffs may not "manufacture" standing "by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."

These cases accentuate the high hurdle that associations often face in establishing their right to litigate. They also underscore some useful points when deciding to move forward with litigation. First, determine whether the litigation is in the best interests of the association, notwithstanding member pressure. Are there less aggressive ways to resolve the problem? For instance, a legislative solution might be available. In some cases, federal and state regulators can be convinced to do the heavy lifting against a putative defendant.

Also review the association's articles of incorporation, bylaws, internal policies and procedures, federal tax exemption recognition application and annual IRS Forms 990, and other organizational documents to determine if the litigation falls within the organization's mission and purposes. The association should document, whether through meeting minutes or otherwise, any decision to pursue litigation, including how such pursuit will further the association's mission and purposes.

Following Association of Independent Gas Owners, make sure to draft the complaint carefully to tie the association's mission and purposes to the lawsuit. In Association of Independent Gas Owners, the association very well may have filed suit to protect members from a legitimate competitive threat. Decide if direct or representational standing is alleged and plead the requisite information.

Finally, before pulling the trigger, make sure that your association's house is in order and that filing the complaint will not expose your association or its members to counterclaims, such as product disparagement, defamation, trade libel, or other unfair trade and antitrust allegations. Offense is not always the best defense!

Read the full article by Andrew Bigart and Jeff Tenenbaum at www.Venable.com.