PRESIDENT TRUMP SIGNS EXECUTIVE ORDER INTO THE FEDERAL REGULATORY PROCESS: SIGNIFICANT CHANGES FOR NONPROFITS

By John F. Cooney and Jordan R. Bailey

On Jan. 30, 2017, President Trump issued an Executive Order, "Reducing Regulation and Controlling Regulatory Costs," which if properly implemented may herald the most significant changes in the federal regulatory process since 1981, when President Reagan instituted formal White House Regulatory Review of rules issued by federal executive departments and agencies.

At this stage, analysis of the likely practical effects of this presidential initiative is difficult, because the order contains little more than broad outlines of three new principles that covered federal agencies are to follow: (1) a "two-for-one" rule requiring elimination of two existing regulations for each new rule issued; (2) a regulatory cap, imposed on an agency-by-agency basis, on the costs that may be imposed in rules issued during fiscal year 2017, which may constitute a de facto moratorium on issuance of many major rules; and (3) in the most potentially significant step, the creation of a regulatory budget on an agency-by-agency basis, that would allow centralized White House control over the total incremental costs that a rulemaking agency may impose on nonprofit organizations and others.

The authority to devise implementation criteria and to make important substantive decisions to carry out these three principles is delegated to the director of the federal Office of Management and Budget, acting in consultation with the White House staff. If the order is developed and implemented carefully, it could be the first step in a significant modification of the federal regulatory process to focus on its total costs to the economy, to complement the current emphasis on the net benefits of individual rules after subtracting their costs.

IMPLICATIONS FOR RETROSPECTIVE REVIEW

For several years, some regulatory experts have called for agencies to engage in retrospective review of regulations. Federal agencies subject to the White House Regulatory Review process typically have conducted ex ante analyses of the projected costs and benefits of rules they propose to issue, but have not gone back after the fact to conduct an ex post review of the actual costs of their rules. In a "retrospective review," agencies are required to analyze existing regulations for effectiveness and revise or eliminate rules or aspects of rules that proved more costly than expected. Indeed, President Obama issued an executive order in 2011 that encouraged agencies to engage in retrospective reviews, but this directive generated relatively few results.

The new order does not formally require that agencies engage in retrospective review. But the creation of a regulatory budget is likely to create incentives for agencies to build into their new rules data collection and analytical techniques that they could use after the fact in a retrospective review to determine if a rule has been implemented at a lower cost than projected originally, or to identify rules that have cost more than expected and thus may be candidates for possible revision or repeal. Agencies may conclude that the value of generating cap space under the regulatory budget by reducing regulatory costs makes it in their institutional self-interest to place greater emphasis on retrospective reviews in their rulemaking processes.

CONCLUSION

The new order lacks many details about how its requirements will be implemented. The actual process by which the Trump administration will seek to limit regulatory costs is very much a work in progress. The order does, however, direct the director of OMB to provide guidance to the agencies on the implementation of its provisions. This guidance will specifically address, among other issues, the standardization of the measurement and estimation of regulatory cost, the definition of new or offsetting regulations, and what constitute emergencies and other circumstances that might justify individual waivers of the requirements of the order.

We will continue to monitor this issue as the White House releases more details about the implementation of the order and as the OMB director issues implementing guidance.

NEW COPYRIGHT OFFICE SAFE HARBOR RULE EXPOSES NONPROFITS TO NEW LIABILITY RISKS

By Justin E. Pierce, Joshua J. Kaufman, Claire M. Wheeler and Taylor G. Sachs

Many nonprofit organizations operate websites or other electronic communication forums that allow member-generated content to be posted in one form or another (uploads, comments, posts, contents, etc.). Often the nonprofit owner of the website has no idea what is being posted by its users and can be held liable for copyright infringement caused by user-generated content unless appropriate protective measures are followed under the federal Digital Millennium Copyright Act. As a result, most nonprofits have established an appropriate policy for removing copyright-infringing content from their websites. Compliance is required in order to be protected by the safe harbor under the DMCA, which limits the web host's liability.

A recently promulgated rule from the U.S. Copyright Office, however, may drastically affect copyright liability for nonprofits and other online service providers. The new rule changes how online service providers, such as nonprofits, designate registered agents with the U.S. Copyright Office and updates the steps service providers must follow to remain in compliance under the DMCA. Any nonprofit that operates a website can be classified as an online service provider under the statute.

THE NEW RULE

Under the finalized rule, all new nonprofits can register only with the new online system, and all previously registered nonprofits must re-register online by Dec. 31, 2017. The U.S. Copyright Office will charge a $6 fee for designation renewals, reduced from $105. To register a designated agent using the new online system, service providers must first create an online account with the U.S. Copyright Office. In addition, to remain under the protections of the safe harbor, the new rule requires all service providers to submit the following information:

1. The nonprofit's legal name and street address. Just as in the previous system, the new rule does not allow a service provider to list a P.O. box as a street address.

2. All names under which the nonprofit is conducting business. These should include commonly used names and names the public might use to search for the provider's agent.

3. Up-to-date contact information and mailing address for the designated agent. Under the new rule, an agent's address can be filed as a P.O. box, and an agent's name can be filed as an individual or a department title or third-party entity.

IMPLICATIONS

The most dramatic change from the current paper-based directory is the rule's new requirement that all online service providers renew designations every three years, even if the information is the same. Since renewal is not required under the current regulation, many nonprofits and other organizations may fail to re-register and unknowingly lose protections under the DMCA safe harbor. This minor change exposes nonprofits to a significant risk of copyright liability for simply forgetting to update an online form every few years. And, unfortunately, this new liability risk will likely have a more considerable impact on the smaller organizations that lose protective status based on new technicalities.

The rule, which has been criticized for its risk of inadvertent loss of safe harbor protections, will likely face multiple challenges in court. However, it is still incumbent upon every nonprofit operating a website or other electronic communication forum that accepts user-generated content of any kind to update its DMCA agent's designations.

NONPROFIT HR PROFESSIONALS: NEW JOINT DOJ/FTC GUIDANCE ON ANTITRUST RISKS

By Andrew E. Bigart, Jennifer G. Prozinski and Jeffrey S. Tenenbaum

The U.S. Department of Justice and Federal Trade Commission recently issued joint guidance for human resource professionals on the antitrust risks of certain types of noncompete and nonsolicitation agreements and the exchange of hiring-related information. The guidance serves as a reminder to nonprofit HR professionals to carefully review the use and content of noncompete and nonsolicitation provisions in employment contracts, joint ventures, and other agreements.

Although the DOJ and FTC recognize that these types of agreements and provisions are often procompetitive, the guidance emphasizes that employers – including nonprofits – that agree not to compete to hire or retain employees are likely in violation of the antitrust laws. Given these risks, it is critical for nonprofit HR professionals to take steps to ensure that interactions with other employers do not result in unlawful agreements.

BEST PRACTICES FOR MINIMIZING POTENTIAL ANTITRUST RISK

In the guidance, the FTC and DOJ suggest that HR professionals implement safeguards to prevent inappropriate discussions or agreements with other employers. Although the guidance does not provide specific safeguards, the implementation of the following will go a long way toward minimizing potential antitrust risk in your nonprofit organization:

- HR professionals and others engaged in hiring and compensation decisions should receive training on the antitrust laws. As helpful background, the DOJ and FTC have published a quick reference card that sets forth a list of red flags for HR professionals to look out for in their day-to-day work.
- Do not share information with other employers regarding the terms and conditions of employment unless the information exchange is part of a carefully structured program monitored by antitrust counsel. Terms and conditions of employment include, but are not limited to, compensation and employee benefits (such as, for example, paid parking). Similarly, hiring policies should not be exchanged with other employers.
- A nonsolicitation provision is permissible where it is reasonably related to, and necessary for, a subcontract or teaming agreement. The DOJ and FTC have advised that any such provisions should be limited as follows:
  - Identify with specificity the agreement to which the non-solicitation provision is related.
  - Narrowly tailor the non-solicitation provision to only those employees who are anticipated to be involved in the project relating to the agreement.
  - Include a specific termination date or event.
- Any noncompete agreement should be narrowly designed to further a legitimate business interest, such as ensuring that the purchaser is able to put the assets purchased to productive use or the service provider is able to protect its investment in building its products and services. The noncompete should be tied to a particular economic activity or line of business, and limited in duration and geographic scope; avoid overly broad noncompetes that prohibit competition outside the scope of the transaction.
- Determine whether the noncompete or nonsolicitation provision involves a profession or set of skills that is scarce in the market. Federal and state antitrust enforcers may be more aggressive in cases where there is a limited supply of replacement workers (e.g., physicians) or where the restrictions are not otherwise in the public interest.
- Consult legal counsel if it is determined a violation may already have occurred.

ENHANCING CHARITY FUNDRAISING TRANSPARENCY AND LEGAL COMPLIANCE

By Anita K. Drummond, Eric S. Berman, Atitaya C. Rok and Jeffrey S. Tenenbaum

Public charities – including related foundations of associations – are always pushing to meet their fundraising goals. But whether a charity is using traditional or innovative fundraising tools (or both), transparency and legal compliance should be the hallmarks of any solicitation campaign.

Charitable fundraising must comply with both charitable solicitation and consumer protection laws. If a charity has not laid out a structured approach to fundraising compliance, it risks attracting scrutiny from state and federal regulators, who are increasingly collaborating on enforcement, as discussed at Venable's Nov. 10, 2016 program. There is no time like the present: now is the time to plan for compliance, not at year-end.

Transparency in solicitations. A strong multi-state and Federal Trade Commission collaboration continues to emerge – the FTC and the National Association of State Charities Officials have announced plans to cohost a conference next March with a focus on "how consumers evaluate and respond to various charitable solicitation practices and the role for consumer protection." While this conference will undoubtedly provide useful guidance to the industry in the near future, charities can take steps today to enhance the transparency of their solicitations.

Regulatory compliance. Regulators commonly advise donors to research any charity to which they are considering donating, and advise charities to perform due diligence on fundraisers with whom they may contract. Checking off the list of all applicable registration and reporting requirements goes a long way toward protecting a charity's fundraising efforts.

Donor intent. Well-functioning charities understand that donor relations are their lifeblood, and take special care to honor a donor's intent. Unfortunately, sometimes donors' intended use of their contribution becomes disconnected from the charity's actual application of the donated funds. While donors are often the party most likely to complain about the perceived misuse of their contribution, state attorneys general and the FTC are broadly empowered to protect consumers' interests. Most state attorneys general are specifically authorized to protect charitable assets.

Contractor management. Charities must be vigilant when contracting with other parties for fundraising services, such as professional fundraising firms, online "crowdfunding" platforms, and companies that act as commercial coventurers by promoting the message that the sale of goods and services will benefit a charity or a charitable purpose. By controlling these activities, the charity is protecting itself, its mission and its donors. Old and new forms of solicitations need equal attention.

The FTC and NASCO emphasized in their announcement of the March 2017 conference that "Americans contribute a lot of their hard-earned money to charity – more than $373 billion in 2015, which averaged about $1,100 per adult and more than $2,100 per household." Now, more than ever, charities – including their leadership – need to embrace key practices to bring themselves into full compliance with the federal and state laws and regulations governing charitable fundraising.

FEDERAL APPEALS COURT RULES IN FAVOR OF PROFESSIONAL CERTIFICATION BOARD

The implications for all associations

By Andrew E. Bigart and Jeffrey S. Tenenbaum

An October 2016 decision from the federal appeals court for the DC Circuit highlights some of the legal challenges for trade and professional associations that sponsor certification and accreditation programs, as well as enforceable codes of ethics for their members, certificants and accreditants, and even association membership requirements generally (collectively, "certification programs"). In *Camarda v. Certified Financial Planner Board of Standards Inc.*, No. 15-7080 (filed on Oct. 4, 2016), the plaintiffs – two certified financial planners – filed breach of contract and implied duty of good faith claims against the Certified Financial Planner Board of Standards Inc. (the "board"), a nonprofit, tax-exempt organization that certifies financial planners. Although the court granted summary judgment to the board, the case is an example of the risks faced by associations that sponsor certification programs. In many cases, the costs, burdens and distractions of mounting a defense against litigation can overwhelm an association. As discussed below, however, there are steps that an association can take to minimize these legal risks.

Developing standards. Any certification standards adopted by an association should be clear and unambiguous, reasonable, fair and objectively grounded. These standards should be no more stringent or rigid than necessary to ensure the minimum competency or quality of certified members. Specific commercial or economic considerations should play no role in an association's development of the standards. This applies to certification and accreditation standards, as well as to association membership criteria and member codes of ethics.

Availability of certification. Certification programs should be open to association members and nonmembers on the same terms and conditions. The association should widely publicize the availability of the certification program and permit application by all who choose to apply. The fees for certification should be reasonable, but higher fees may be charged to nonmembers for certification to account for any association membership dues or assessments that contribute to funding the program.

Update standards. Periodically review and update all certification, accreditation, and membership standards to ensure they are current and reflect new legal, technological and other developments. Provide appropriate opportunities for industry notice, comment whenever standards are modified, and carefully consider such comments in the revision process. In addition, document any and all complaints or concerns about the standards and revise the standards accordingly, if appropriate.

Due process. Due process should be built into the program. This requires associations to provide notice of a potential adverse decision to a current or prospective certificant, accreditant, or member, an opportunity for the affected individual/entity to respond and defend himself/herself/itself, and an opportunity to appeal any adverse decision. While nothing prevents a certification program from publicizing the names of, and information about, those who are certified, accredited or members of the association, care should be taken to avoid any explicit or implicit disparagement of those who are not certified, accredited or association members (the underlying issue in *Camarda*). As a general best practice, an association should maintain strict confidentiality of all adverse allegations, complaints, actions and proceedings that arise in connection with the certification, accreditation, code of ethics or membership program. While it is acceptable, for instance, for a certifying association to verify that an individual or entity is not currently certified, no further details should be provided.

Insurance. Maintain sufficient insurance to cover the liability risks of the program. Some association directors and officers liability insurance (D&O) policies provide coverage for certain claims arising from certification, accreditation, and enforceable code of ethics programs as part of the basic policy, although there sometimes are coverage sublimits. Other D&O policies will not cover such programs without an endorsement to the policy. Importantly, D&O policies do not cover bodily injury or property damage claims arising from these programs, nor do they cover breach of contract claims (one of the claims alleged in *Camarda*). Specialized stand-alone insurance policies are available and sometimes necessary to insure against these risks. Adequate insurance should be a prerequisite for the operation of any association certification or accreditation program or enforceable member code of ethics.

FEDERAL JUDGE TOSSES UNPAID INTERN CLAIMS: 4 TAKEAWAYS – AND GOOD NEWS – FOR NONPROFIT EMPLOYERS WITH INTERNSHIP PROGRAMS

By Nicholas M. Reiter and Jeffrey S. Tenenbaum

The legal requirements for unpaid internships have been in a state of flux the past several years. In *Glatt v. Fox Searchlight Pictures Inc.*, unpaid interns sought minimum wage and overtime pay based on allegations that they qualified as employees under federal and New York State wage-and-hour laws. In 2013, the federal District Court in *Glatt* ruled in favor of the unpaid interns, finding that they should have been classified as employees and, therefore, were entitled to minimum wage and overtime pay. That holding was soon reversed, however. In 2015, the Second Circuit Court of Appeals vacated the District Court's *Glatt* decision and established a different test for evaluating the legality of unpaid internships.

Federal courts in the Second Circuit are now tasked with applying the new *Glatt* standard. On Aug. 24, 2016, U.S. District Judge J. Paul Oetken of the Southern District of York dismissed an unpaid intern lawsuit against the Hearst Corp., using the new *Glatt* test.

By way of background, *Glatt* replaced the U.S. Department of Labor's six-factor test for unpaid internships with a more employer-friendly "primary beneficiary" test. Under the new test in *Glatt*, courts consider nonexhaustive factors when deciding whether an individual is properly classified as an unpaid intern (as opposed to a paid employee).

In addition, DOL generally permits unpaid internships for individuals who volunteer at "charitable" nonprofit organizations (a more limited subset of all nonprofits), provided that the individual meets the first factor above regarding the individual's understanding that he or she will not receive compensation. That being said, based on DOL enforcement practices, there have been some questions about whether there truly is a "charitable" nonprofit exception to the basic rules in this area, despite what the written DOL guidance provides. Finally, DOL has stated that it is reviewing the need for additional guidance about unpaid internships at nonprofit organizations.

With that as background, below are four takeaways for nonprofit employers with unpaid internship programs.

1. Require academic credit from the intern's educational institution. Nonprofits should consider requiring that unpaid interns submit proof from their educational institutions that they are at least preliminarily eligible to receive academic credit for participation in the internship program, if that is indeed the case. In any event, even if an individual is ineligible for academic credit, nonprofits should remember that no single *Glatt* factor is necessarily determinative.

2. Design educational sessions for the interns. Nonprofits should consider conducting educational sessions for their interns during the internship program. A nonprofit employer should ensure that the educational sessions teach its interns about the practical realities of working in the nonprofit's field.

3. Monitor the frequency of menial tasks performed by interns. While menial tasks are not altogether prohibited, nonprofits should ensure that the majority of an intern's time is not spent on "drudge work." Nonmenial tasks for interns may include substantive tasks that paid employees would otherwise perform, or, alternatively, a nonprofit may assign an intern to shadow a paid employee. Both tasks typically support the legality of an unpaid internship program because both tasks provide interns with an educational benefit.

4. Beware of lengthy intern relationships. Nonprofits should manage the length of participation in their internship programs. To minimize the risk of an unpaid intern suit for minimum wage and overtime pay, it is always recommended that nonprofits consult with experienced legal counsel about the nature of their internship program.

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