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Associations and the Law

April 30, 2019

American Bar Association
321 North Clark Street
Chicago, IL 60654

Schedule and Session Descriptions

9:10 – 9:45 a.m.
Keynote: Developing A New Membership Model for the American Bar Association
Keynote Speaker: Jack Rives, American Bar Association

Today is a time of profound and transformative change for professional associations, as many examine new ways to attract and retain members, especially younger professionals. ABA Executive Director Jack Rives will highlight some of the historic innovations his organization is advancing, including the launch of a new membership model on May 1 that will provide more tangible benefits to its members, tailored to their professional interests. Mr. Rives will also focus on some of the marketing initiatives the ABA will deploy to promote the new model and demonstrate its value to a new generation of attorneys.

Learning Objectives:

- Examine some of the significant membership and fiscal challenges facing associations
- View some steps associations might consider to reverse negative trends and promote future growth
- Review some marketing techniques to refresh a long-standing association's value proposition, both to retain current members and acquire new ones

9:45-10:30 a.m.
Privacy and Data Protection – The GDPR and the Rising Global Tide of New Laws
Presented by Raz Miutescu, Whiteford Taylor Preston, LLP

Data and technology are no longer the domains of Internet or e-commerce companies. Every organization is a data and technology organization. As custodians of data, organizations must be mindful of and comply with domestic and foreign laws governing individuals' rights to privacy, mandating the protection of personal data, and requiring physical, administrative, and technical safeguards to assure adequate security of data. Keeping up with the changing legal landscape in the United States is difficult. Keeping up with the increasingly complex global privacy and data security environment is even more difficult. The European Economic Area, Switzerland, Canada, Brazil, Japan, and other countries, have all adopted stricter privacy laws that have either already taken effect recently or will take effect soon. Some of these laws may affect nonprofits and other associations in the U.S. if they process data of individuals located abroad. The compliance requirements can be overwhelming. Taking a practical and methodical approach towards compliance, and not being discouraged, is key.

Learning Objectives:

- Identify a roadmap towards building a fundamental privacy and data security program;
- Understand the importance of further refining and adapting the program to meet specific domestic and foreign regulatory requirements, such as the GDPR; and
- Proactively embrace the concept of "failing well" in the face of likely inevitable failures in compliance

10:30–10:45 a.m.
Break

10:45–11:15 a.m.
Associations and Social Media: Navigating the Legal Risks
Presented by Sue Carlson, Chicago Law Partners, LLC

Whether through a forum, blog, Facebook page or YouTube video, today's associations must employ social media if they wish to communicate with their members and other important constituencies quickly and cost-effectively. While social media engagement has many benefits, it also raises legal risks. This session will address potential liability associated with social media activities, including copyright and trademark, defamation, privacy, and antitrust; and it will review Web site disclaimers, terms of use, and social media policies for association staff, volunteers, and members designed to minimize such liability.

Learning Objectives:

- The sources of potential liability associated with social media activities
- Ways in which to mitigate/avoid liability by using disclaimers, access agreements, etc.
- The benefits, and essential terms, of a social media policy

11:15-11:45 a.m.
Contractual Relations: The Courtship of Negotiation
Presented by Caitlin Podbielski, Vedder Price

Successful relationships begin with successful negotiations. Using commonly negotiated contract terms, this session will explore effective (and ineffective) strategies for reaching a meeting of the minds. Topics will include drafting and communication techniques, with a particular focus on performance accountability, risk allocation, and termination concepts.

Learning Objectives:

- Breakup with the Boilerplate – Reexamine commonly used (or misused) boilerplate provisions;
- Redefine Boundaries – Think creatively about risk allocation; and
- Plan for the Divorce – Understand the value of a thoughtful termination clause

11:45-12:15 p.m.
Current Legal Issues In Hotel Contracts and Negotiations
Presented by Jon Howe, Howe & Hutton, Ltd.

This session will address the ongoing dynamic changes occurring in hotel contracts as a result of the increasing market demands by owners and the economy. New wrinkles as well as dynamic changes in contracts are an ongoing concern. Privacy laws as well as contracts being used to shift liability from the hotel to the organization present new hazards. Emphasis in this session will be on the "what to watch fors."

Learning Objectives:

- Have a better appreciation of the market demands and economy in limiting the amount of flexibility in hotel contract negotiations;
- Learn about new and old clauses that are appearing in contracts that could be detrimental to your organization;
- Have an understanding of the new dynamics in the industry leading to negotiating points.

12:15–1:15 p.m.
Networking Lunch

1:15-1:45 p.m.
Certification and Accreditation: Managing Association Legal Risks
Presented by George Constantine, Venable LLP

Association that engage in credentialing activities must manage risks on antitrust and other legal fronts. Recent developments in the courts show a heightened focus on matters related to associations in this arena.

Learning Objectives:

- Following internal processes to lessen the risk of legal liability in credentialing
- Balancing due process obligations while maintaining a robust and effective accreditation program
- Identifying and avoiding antitrust risks with standard-setting

1:45-2:30 p.m.
Identifying and Navigating Conflict of Interests in Associations
Presented by Julie B. Kulovits, North American Spine Society

This session will address conflict of interests for the attorney representing a corporation (either on an in-house or outside generalist basis). This session will dive into some common conflict of interest scenarios that may arise, identify the applicable authority, and discuss practically how to deal with these sensitive situations.

Learning Objectives:

- Identify how to spot, navigate, and understand the relevant authority regarding conflicts of interests with the association's employees
- Identify how to spot, navigate, and understand the relevant authority regarding conflicts of interests with entities affiliated with the association
- Identify how to spot, navigate, and understand the relevant authority regarding conflicts of interest between reporting structure and fiduciary duties to the board of directors (if in conflict)

2:30-3:00 p.m.
™ ® ©…Oh my! A Practical Look at Trademark and Copyright Issues in the Not-For-Profit World
Presented by Kimberly Pendo, Chicago Law Partners, LLC

Understanding how best to protect and use intellectual property is increasingly difficult in the age of open access, Creative Commons, social media, YouTube, Instagram, Facebook, and other social media platforms. This session will explore the difference between copyright and trademark law, what to trademark (and when), using photographs found on the internet, and the importance of speaker agreements and photo releases.

Learning Objectives:

- Copyright and trademark issues important to an association's everyday business
- The intersection between copyright law, privacy & photographs
- The importance of speaker agreements and photo releases

3:00–3:15 p.m.
Break

3:15-4:00 p.m.
Key Employment Issues for Non-Profits
Presented by Thomas E. Deer, Ogletree Deakins

Litigation risks and compliance headaches continue to bedevil non-profits. From laws that have been on the books for years such as the Fair Labor Standards Act, to emerging issues such as the "Me Too" movement, to new state and local laws covering non-profits, complying with the law, and avoiding litigation, has never been harder.

Learning Objectives:

- Gain confidence that your payroll practices are compliant with federal and Illinois state law
- Learn how to respond if your organization is faced with a "Me Too" complaint
- Be updated on the recent changes to Illinois and federal law as they impact non-profits

4:00-4:45 p.m.
Hot Tax Topics
Presented by Paula Goedert, Barnes & Thornburg LLP and Jim Quaid, Ostrow Reisin Berk & Abrams, Ltd.

This session will provide an overview of new developments in tax issues, including royalties, benefits, and IRS audit issues.

Learning Objectives:

- Improve Form 990 reporting
- Restructure common contracts to minimize taxes
- Protect the non-profit by better preparation for IRS audits

4:45–5:30 p.m.
Networking Wrap-Up Session

Today's speakers will lead table top discussions on topical legal issues of special interest to associations.

Speakers

Jack L. Rives is the Executive Director and Chief Operating Officer of the American Bar Association. He oversees a staff of more than 900 and a consolidated budget of over $200 million, and he ensures the effective development and direct implementation of the Association's strategic goals. He has responsibility for the programs and policy activities adopted by the ABA's governing and policy-making bodies, the Board of Governors and House of Delegates. He is responsible for membership and non-dues revenues programs, and for budgets that reflect the right priorities and appropriate cost-cutting initiatives. Jack helps to assure the ABA's position as the voice of the legal profession and as the world's premier professional association for lawyers, with more than 400,000 members.

Following graduation from law school, Jack began a 33-year career in the United States Air Force as a military attorney, or judge advocate (JAG). He served as The Judge Advocate General of the United States Air Force, the senior U.S. Air Force attorney, and he was the first military attorney to attain the three-star rank of lieutenant general. Jack led some 2,600 active duty, reserve component, and civilian lawyers. Among his many military awards and decorations are the Distinguished Service Medal with oak leaf cluster and the Defense Superior Service Medal.

Susan Feingold Carlson is a founding Member of Chicago Law Partners, LLC. Her practice is focused on counseling trade and professional associations, certifying boards, educational foundations and other nonprofit organizations on all aspects of their corporate governance and operations, including antitrust, contract, tax, credentialing, intellectual property, healthcare, publishing, liability, chapter and affiliate relations, meeting and convention, and membership matters.

George Constantine is the leader of Venable's associations practice and co-Chair of the firm's Regulatory Group. George concentrates his practice on providing legal counseling to non-profit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities.

Tom Deer is a shareholder in the Chicago office of Ogletree Deakins. Tom has a national practice advising clients on all aspects of workplace law and defending clients in litigation across the United States. Tom's clients range from Fortune 500 client to local, privately held businesses. Tom is an honors graduate of both Yale University and the Indiana University Mauer School of Law. Tom has been recognized in Best Lawyers every year since at least 2006.

Paula Cozzi Goedert chairs the Associations and Foundations practice group at Barnes & Thornburg LLP in Chicago. Her practice focuses on the representation of associations and charities.

Jonathan T. Howe, Esq. of Howe & Hutton, Ltd. is general counsel for several organizations in the hospitality industry and serves as special advisor to the American Bar Association Standing Committee on Meetings & Travel. He was named Hospitality Industry Attorney of the Year by the Academy of Hospitality Industry Attorneys. Howe is well known for his prolific writing in the field as well as in association management. He serves as General Counsel to the U.S. Chamber of Commerce Association Committee of 100, among many others, and is a past chair of the ASAE Legal Section Council. He is an ASAE Fellow.

Julie Kulovits is the General Counsel for the North American Spine Society, a multidisciplinary medical association. Prior to that she worked in private practice for The Collins Law Firm, P.C. where she handled a variety of corporate and non-profit matters.

Jed R. Mandel is a founding Member of Chicago Law Partners, LLC. Jed has extensive experience representing not-for-profit organizations and is a frequent lecturer and author on association-related topics. Jed is the General Counsel for the Association Forum of Chicagoland and has received its Associate Member of the Year Award for his contributions to the Chicago association community, and its John C. Thiel Distinguished Service Award.

Raz Miutescu is a technology and information governance attorney with Whiteford, Taylor & Preston. His practice focuses on privacy; data security; information technology transactions; licensing; and data management, including data broker transactions, cloud services, and distributed ledgers/blockchain technology matters.

Kimberly Pendo, a founding Member of Chicago Law Partners, LLC, counsels not-for-profit organizations on all aspects of their business and operations. As general counsel to a wide range of organizations, Kimberly advises her clients on corporate organization and governance issues, trademark and other intellectual property questions, licensing and publishing agreements, certification and credentialing, hotel and meetings, antitrust matters, mergers & acquisitions, grants, tax issues, contract negotiations and a variety of other issues affecting her clients' day-to-day business.

Caitlin Podbielski is a member of the Health Care and Professional Associations group at Vedder Price. She regularly counsels a variety of tax-exempt organizations, including organizations exempt under Section 501(c)(3), (c)(4), (c)(6) and (c)(7) of the Internal Revenue Code, on a variety of issues ranging from governance matters and exempt status compliance, state and federal privacy and disclosure law obligations, vendor and third party contracting and relationship management, with a particular focus on clinical data registry networks.

Jim Quaid is Chair of the Not-for-Profit Group for ORBA in Chicago. He provides auditing, accounting and tax services for non-profit organizations.

Session Slides

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Privacy and Data Protection: The GDPR and the Rising Global Tide of New Laws

Razvan E. Miutescu
Whiteford, Taylor & Preston

April 30, 2019

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Overview: Privacy & Data Security

- *Privacy* is about an individual's right (applies to members, staff, certificants, registrants, and your mailing list)
- *Data Security* is about three types of safeguards to protect information:
  - Physical
  - Administrative
  - Technical
- Global shift towards stronger privacy rights (i.e., fundamental or human rights in EU, India, etc.)
- Increased value of data requires stronger data security

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The starting point …

- **Transparency** - what data is collected, from whom, how is it processed, and for what purposes → Data Map (internal) + Privacy Policy (external)
- **Safeguards** – *physical* (access controls), *technical* (IT systems), and *administrative* (policies + procedures + training)
  - WISP + Incident Response Plan
  - IT Systems Use Policy
  - Data Retention Policy
- **Service Providers** – onboarding (due diligence) + trust but verify!
- **Other Third Parties** – data sharing agreements
- **Fail Well** – data breach preparedness: *pre-breach* → *breach handling* → *remediation + notification*

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The deeper dive …

- **Specific security standards** – PCI-DSS for taking an event registrant's cardholder information
- **Local with a global footprint:**
  - GDPR (EEA)
  - e-Privacy Regulation (EEA)
  - PIPEDA (Canada, except Alberta, BC, Quebec)
  - Japan, Brazil, Switzerland … the rest of the world
- **Extraterritorial application of foreign laws** – the French member attending your association's event in the UK
- **How much should I worry?** – it depends

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Example 1: GDPR

- **Charter of Fundamental Rights of the European Union**

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

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GDPR – What is Covered?

Personal Data (Art. 2)

"***any information relating to an identified or identifiable natural person*** *('**data subject**'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a* **name**, *an* **identification number**, ***location data***, *an* ***online identifier*** *or to one or more factors specific to the* ***physical, physiological, genetic, mental, economic, cultural or social identity of that natural person***."

"Special Categories" of Personal Data (Art. 9)

any personal data "*revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.*"

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GDPR – Who Must Comply?

Two categories of organizations subject to the GDPR:

(1) have an establishment in the EU, or

(2) do not have an establishment in the EU, but their data ***processing activities relate to*** (i) **offering of goods or services to individuals in the EU** or (ii) **monitoring the behavior of individuals** as far as their behavior takes place within the EU

Two roles with different obligations under the GDPR:

- Controller: alone or jointly with others, **determines the purposes and means of the processing of personal data**
- Processor: processes data **on behalf of the controller**.

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GDPR – Checklist?

- ✓ Does your organization have **members or certificants in the EEA**?
- ✓ Does your organization **host in the EEA events,** conferences, educational or training programs, seminars, meetings, or administer exams?
- ✓ Does your organization **host in the United States** the list of events above that are **attended by individuals from the EEA**?
- ✓ Does your organization have **employees, independent contractors, volunteers, or vendors** in the EEA?
- ✓ Does your organization have a **website with a version in a language spoken in EEA** countries (in addition to English)?
- ✓ Does your organization have an affiliate or subsidiary or other **physical presence** in the EEA?

Threshold Question: targeting individuals in the EEA?

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GDPR – Lawful Grounds!

Article 6 of the GDPR identifies limited **lawful grounds** on which the personal data may be processed.

(a) **consent** of the data subject;

(b) processing is necessary for the **performance of a contract** with the data subject or to take steps to enter into a contract;

(c) processing is necessary for **compliance with a legal obligation**;

(d) processing is necessary to **protect the vital interests of a person**;

(e) processing is necessary for the **performance of a task carried out in the public interest** or in the exercise of official authority vested in the controller; and

(f) necessary for the purposes of **legitimate interests pursued by the controller or a third party**, ***except where such interests are overridden by the interests, rights or freedoms of the data subject***.

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GDPR – Rights of the Data Subject

- to **be informed** of the processing of the data;
- to **have access** to the data;
- to **rectify** the data;
- to **erasure** of the data;
- to **restrict processing** of the data;
- to **port** the data;
- to **object to the processing** of the data; and
- **several rights in connection with automated decision making** and profiling concerning that individual.

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GDPR – Enforcement

European Commission:
http://ec.europa.eu/justice/smedataprotect/index_en.htm

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Example 2: ePrivacy Regulation?

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (**Regulation on Privacy and Electronic Communications**)

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QUESTIONS?

Razvan E. Miutescu
Whiteford Taylor & Preston, LLP
rmiutescu@wtplaw.com
410.347.8744

Please Note: These slides are not intended to be a substitute for legal advice. Always seek experienced legal counsel to address risks based on your organization's own unique circumstances.

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15-minute break
Next session begins at 10:45 am

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Associations and Social Media: Navigating the Legal Risks

April 30, 2019

Susan Feingold Carlson, Esq.
Chicago Law Partners, LLC

Association Forum
10 South Riverside Plaza, Suite 800 Chicago, Illinois 60606 P 312.924.7000

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What is Social Media?

- Online resources for sharing content among users
- Media using Web-based technologies that enable interactive, rather than one-directional, communication among individual and organizational users
- Social networking platforms that host photos, videos, and other user-generated content
- Examples:
  - Website forums, blogs, discussion groups
  - Facebook, Twitter, YouTube, LinkedIn, and other platforms

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Social Media for Associations

- Association-based social media
- Other association-related social media activities
- Social media activities of association employees

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Costs and Benefits

- Benefits:
  - Cost-effective means of communicating "instantly" with members and other important constituencies
  - Few technical knowledge barriers
- Potential Costs:
  - Damage to the association's brand and reputation
  - Lack of control over content
  - Legal implications

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Learning Objectives

- Sources of potential liability associated with social media activities
- Ways to mitigate/avoid liability through disclaimers, access agreements, etc.
- Benefits, and essential terms, of a social media policy

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Sources of Potential Liability

- Copyright and Trademark Infringement
- Defamation
- Invasion of Privacy
- Antitrust

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Question

An association uploads a segment from a local news program featuring an interview with the association president. Has the association committed a copyright violation?

___ No, the segment is in the "public domain" because the news outlet published it on its Website

___ Yes, unless the association has obtained permission from the news outlet

___ No, the association's uploading is "fair use"

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Copyright and Trademarks

- Copyright protects original expression of an idea in tangible form, not ideas or facts
  - Rights exist upon creation
  - Use without authorization is infringement, except in limited circumstances
- A trademark is any word, name, symbol, design, device or combination that identifies the source of a specific product and distinguishes it from others in the marketplace
  - A service mark identifies and distinguishes the source of services rather than tangible products
  - As a general rule, one should not use another's trademark or service mark without permission

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Copyright Basics

- Works of authorship include literary works; musical works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and Website designs and content
- Copyright protection exists without notice or registration
- Publication on the Web is not "in the public domain"
- "Fair use" allows for the use of a copyrighted work without the permission of author, but the permitted use is narrow and the standard is vague and subjective

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Defamation

- Defamation constitutes the act of harming another through a false statement communicated orally or in writing to a third party
- "Publisher" of a defamatory statement is held to the same standard of liability as the original author
- "Distributor" of a defamatory statement is held responsible if he/she repeats a defamatory statement with knowledge, or reason to know, of its falsity

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Invasion of Privacy

- Stored Communications Act, 18 U.S.C. § 2701 et seq. ("SCA"), regulates:
  - Electronic communications, including emails and social media posts
  - In electronic storage
  - Transmitted using an electronic communications service
  - That are not public
- With certain exceptions, SCA limits ability of Internet service providers to reveal user content to government and non-government entities
- States also are developing laws and regulations to protect information on social media

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Antitrust

- Sherman Act makes unlawful any contracts, combinations or conspiracies in unreasonable restraint of trade
- Because associations, by their nature, consist of groups of competitors joined together for a common business purpose, they are particularly vulnerable to government and private antitrust claims
- Virtually every state has enacted antitrust laws similar to the Sherman Act
- Antitrust laws prohibit competitors from sharing financial information for the purpose or effect of raising, fixing, or stabilizing prices and from engaging in group boycotts

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Question

State and federal antitrust laws do not apply to an association's "private" Website forums, blogs, or discussion groups, i.e., those that are limited to association members.

___ TRUE

___ FALSE

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Mitigating/Avoiding Potential Liability

- Compliance with Legal Protections
- Website Disclaimers
- Terms of Use/Access Agreements
- Social Media Policies

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Digital Millennium Copyright Act of 1998

- Limits the liability of Internet service providers for copyright infringement
- Can limit associations' liability for links and user-generated content
- Protection is contingent on association meeting several requirements, including registration of a copyright agent and posting of notice and takedown procedures
- Can also protect unauthorized uses of association copyrighted material

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Communications Decency Act of 1996

- Section 230 protects providers from liability for "any action voluntarily taken in good faith" to restrict access to objectionable material
- Provider not treated as a publisher of information
- Provider may select, edit or remove user content, but protection may not apply if significant changes are made that contribute to the meaning of the content
- Protection does not apply to content posted by individuals acting on association's behalf

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Website Disclaimers

- Vary depending on site/page content
- Examples:
  - Views expressed are those of individual contributors, not those of the association
  - Not intended to replace judgment in individual circumstances
  - Standards may vary from one jurisdiction to another
  - Association makes no guarantees, representations, or warranties regarding the accuracy or sufficiency of the information provided and assumes no liability therefor
  - Association disclaims approval or endorsement of products or services referenced on the site/page
- Limitations with respect to enforcement

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Terms of Use/Access Agreements

- Post terms of use on association Websites
- Require access agreements for interactive sites sponsored by association (*e.g.*, blogs, chat rooms, virtual trade shows)
- Require users (*e.g.*, members, meeting attendees) to accept terms by using a click-through agreement
- For terms or agreement, include:
  - Assertion of ownership of site contents
  - Right to modify terms from time to time
  - Limitation of liability and disclaimer
  - Privacy Policy, either incorporated into terms or as a stand-alone policy

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Terms of Use/Access Agreements

- For agreements, also include rules addressing (at a minimum):
  - No anticompetitive, defamatory, or otherwise offensive statements
  - No breach of confidentiality or individual rights of privacy
  - No advertising or selling goods or services
  - Right to monitor and remove posts not in association's "best interests"
  - DMCA notification procedures

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Social Media Policies

- Set forth standards of conduct, including the importance of maintaining confidentiality, accuracy, privacy, and professionalism
- Establish limits regarding individuals' authority to post on association site
- Require association representatives to explain their connection to the association and clearly distinguish association positions from personal opinions
- Include standards for both volunteers and employees

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Essential Policy Terms

- No uploading or downloading of unauthorized copyrighted material or trademarks
- No anticompetitive, defamatory, or otherwise offensive statements
- No posting of messages advertising or selling good or services
- No expectation of confidentiality
- Common sense and courtesy in postings
- Deleting a post does not necessarily erase it, even if it is no longer visible on the screen
- Association may freely use content posted by users
- Association disclaims liability for posts of individual contributors
- Association has the right to monitor and remove postings "not in its best interests"
- DMCA notification procedures

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Questions

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Contact Information

Susan Feingold Carlson, Esq.
Chicago Law Partners, LLC
333 North Wacker Drive, Suite 810
Chicago, IL 60606
scarlson@clpchicago.com
(312) 929-1956

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Contractual Relations: The Courtship of Negotiation

Presented by:
Caitlin C. Podbielski, Esq.
Vedder Price P.C.

Association Forum
10 South Riverside Plaza, Suite 800 Chicago, Illinois 60606 P 312.924.7000

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Course Overview

- The negotiation “love story”
- “DTR”
- Perspective on the proposal

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Creating Your Profile

- What is the Relationship Goal?
- What are your goals?
- Going Back to You Ex?

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Choosing the Right "App"

- RFP
- Interview
- Stakeholders
- "Friend of a Friend"

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Found "the One?"- Swipe Right!!!

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"DTR" – Defining the Relationship

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Breakup with the Boilerplate: Confidentiality Clauses

- What is "Confidential Information"
- How long is it "Confidential"?
- Obligations to Return or Destroy

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Breakup with the Boilerplate: Putting "Equity" in Equitable Relief

- "May" versus "will"
- Scope of applicability
- Defining the relief
- Limitation of waiver

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Breakup with the Boilerplate: Preserving "Equity" in Equitable Relief

*An impending or existing violation of any provision of this **Agreement** by either Party **or its representatives** or affiliates **may** cause the other Party irreparable injury for which it may have no adequate remedy at law. Accordingly, such Party **will** be entitled to seek injunctive relief **prohibiting such violation without the necessity of posting a bond**, in addition to any other rights and remedies available to it at law or in equity.*

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Redefine Boundaries:

Mutuality in Attorney's Fees Provisions

- Parties' relative size
- Parties' underlying relationship and likelihood of lawsuit
- Excluding "necessary" suits

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Redefine Boundaries:

Mutuality in Attorney's Fees Provisions

"If any legal action or other proceeding is commenced to enforce or interpret any provision of, or otherwise relating to, this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees and costs."

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Redefine Boundaries:

Tailoring Indemnification Clauses

- Identify the relevant risks
- Exclude irrelevant risks
- Consider party-specific clauses

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Build in the Prenup

- Notice Periods
- Transition Obligations
- Effect of Termination on Payment Obligations

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Perspective on the Proposal

- Avoid "losing yourself" in the relationship
- Keep the entire relationship in perspective
- Refer to your "checklist"

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Questions?

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Current Legal Issues In Hotel Contracts and Negotiations

Presented by

Jonathan T. Howe, JD, FASAE

April 30, 2019

Chicago, Illinois

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Introduction/Overview

The Market

- Today
- Tomorrow
- Supply/Demand Issues

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Introduction/Overview

Dysfunction In the Industry

- Labor – At All Levels
- M&A
- Branding/Who's a What
- Commissions/Rebates

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Negotiation

- Past
- Today
- Empowerment
- The Word “No!”

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Purpose of the Contract

- Change from Road Map
- To Defensive Tool

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Clauses to Watch Out For

- A&C Words
- Force Majuere
- Liquidated Damages
- Prevailing Parties
- ADR

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Clauses to Watch Out For

- Privacy
- Responsibility for Attendees

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Clauses to Watch Out For

- Boiler Plate
  - Parties
  - Notices
- Riders/Amendments

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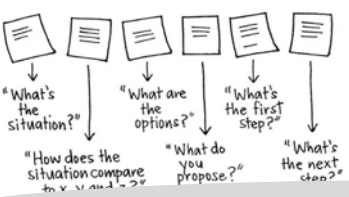

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Jonathan T. Howe, JD, FASAE
President
Howe & Hutton, Ltd.
125 South Wacker Drive
Suite 2310
Chicago, Illinois 60606-3191
Phone: 312-263-3001
Email: jth@howehutton.com
Website: www.howehutton.com

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JONATHAN T. HOWE, ESQ. is the President/Senior Partner of Howe & Hutton, Ltd., a law firm with offices in Chicago and Washington, D.C. He has written hundreds of articles, papers and books, and has spoken to organizations all over the world on all manner of legal issues. He received his Bachelor of Arts degree majoring in diplomatic history and international political science with honors from Northwestern University and his Juris Doctorate from Duke University where he was first in his graduating class.

He serves as general counsel for Meeting Professionals International and the International Live Events Association, among others. He also is general counsel for the prestigious Association Committee of 100 sponsored by the U.S. Chamber of Commerce. He is a founder, past President and board member of the Academy of Hospitality Industry Attorneys and was named the Hospitality Industry Attorney of the Year for 2008. He is the legal editor for MEETINGS & CONVENTIONS and THE MEETING PROFESSIONAL magazines.

He is the special advisor to the American Bar Association Standing Committee on Meetings and Travel.

He is the recipient of the prestigious Meeting Professionals International Industry Award for his service to and advancement of the meetings industry. The Chicago Area Chapter of MPI awarded Jon its Industry Award for his dedicated and significant contribution to the meetings industry. On its 15th anniversary of publishing, he was named in MEETING NEWS as one of 15 leaders who have made the difference in the meetings industry. The Association Forum of Greater Chicagoland selected Jon as its Associate Member of the Year. He is a Fellow of the American Society of Association Executives. The Hospitality Sales and Marketing Association International honored Jon as the recipient of its HSMAI Foundation PaceSetters Award for vision and cutting edge accomplishments that have inspired countless others to think "outside the box." He was the first non member to receive the Religious Conference management Association President's Award for his contribution to the meetings and conventions industry.

He is one of the few lawyers in the United States to have argued before the United States Supreme Court. Email: jth@howehutton.com; Website: www.howehutton.com [10E2170]

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Lunch Break
Next session begins at 1:15 pm

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Certification and Accreditation: Managing Association Legal Risks

George E. Constantine, III
Partner
Venable LLP

April 30, 2019

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Today's Discussion

- Introduction
- Legal Background
  - Due Process
  - Antitrust
  - Intellectual Property
  - Tax
  - ADA
  - Tort Liability
- Conclusion/Questions

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Introduction

- About 1/3 of associations offer accreditation or certification (ASAE Benchmarking Study)
- Growing reliance on non-dues revenue—highest priority in 2018 was growing non-dues revenue (McKinley)

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Introduction

- Certification can help grow profession
- Accreditation may stave off government regulation
- Note recent state efforts to limit reliance on certification

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Legal Issues—Due Process

- Two key aspects:
  - Setting or agreeing on a standard to apply
  - Establishing a process for determining whether an individual, entity, facility, product qualifies

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Legal Issues—Due Process

- Standards must be reasonable, fairly arrived at, and the program must have pro-competitive results
- State-by-state; usually common law
- Common elements of due process
  - Notice (not only of facts that form basis of decision, but also of procedures to be applied)
  - Fair hearing
  - Reasonable, consistent sanctions
  - Appeals?

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Legal Issues—Antitrust

- Antitrust and associations brief overview
  - Sherman Act Section 1
  - Per se and Rule of Reason
  - Agreements can be presumed

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Legal Issues—Antitrust

- Certification and Accreditation
  - Note SDOAA protection for standard-setting bodies
  - Refusal to grant certification or accreditation could present antitrust risks

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Legal Issues—Antitrust

- Two kinds of standard setting (with different issues)
  - **Health, Safety, Competence**—industry members set standards that might be adopted by state or local governments
  - **Compatibility**—industry members set standards that allow diverse products to work together

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Legal Issues—Antitrust

Health, Safety, Competence Standards

- Industry gets together as experts to figure out best practices for health or safety or related reasons
- Example: fire safety for building materials by the NFPA
- If accepted by the market or by lawmakers, these standards reduce the number of options available in the market

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Legal Issues—Antitrust

Health, Safety, Competence Standards

- *Allied Tube*—Packing the meeting with steel conduit manufacturers, meaning PVC excluded
- Highlights importance of procedural fairness in standard-setting process; need to monitor participation among committees

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Legal Issues—Antitrust

Accreditation and Certification Program Risks

- Programs can determine whether products comply with a standard or whether professionals have sufficient ability, education and experience.
- Not certifying a product or a professional can create competitive harm
- Courts look at the process of how a certification program is implemented to ascertain whether they help customers or are a way to harm rivals

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Legal Issues—Antitrust

Accreditation and Certification Program Risks

- Who are the decision-makers – competitors or customers or a mix
- Are the criteria objective and related to the function being certified
- Were the criteria applied consistently and without discrimination
- Were the association's procedures followed

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Legal Issues—Antitrust

Accreditation and Certification Program Risks

- Note recent dispute involving American Osteopathic Association—risks to member-only restrictions for certifiying bodies
- Note ANSI, NCCA restrictions on "undue influence" from membership side

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Legal Issues—Intellectual Property

Copyright/Trade Secrets

- Registration approaches—note option to maintain confidentiality in questions
- Agreements with participants
- Protecting standards adopted by governmental actors

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Legal Issues—Intellectual Property

Trademark

- "Certification Mark" may not always be the best approach
- Digital badging considerations

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Legal Issues—Intellectual Property

Trademark

- "Certification Mark" may not always be the best approach
- Digital badging considerations

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Legal Issues—Taxation

- Certification activities generally more common for 501(c)(6) organizations; IRS has taken the position that regardless of the educational nature of a certification program, it is substantially focused on individual professional advancement
- Some limited exceptions (e.g., relieving burdens of government)
- Accreditation programs which accredit in the arts, health care, and education fields may qualify under 501(c)(3)

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Legal Issues—ADA

- Issue arises most frequently in certification programs that involve certification of individuals
- Must offer examinations and courses in a place and manner accessible to persons with disabilities
- May involve extensions of time, etc.
- Cannot force individual with the disability to bear the cost of an accommodation

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Legal Issues—ADA

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Legal Issues—Tort Liability

- Risk arises particularly in accreditation arena—when a third party relies on accreditation and uses a product or service and is subsequently harmed
- Still, relatively limited risk and can be managed with strong standard-setting, common-sense marketing language, indemnification provisions
- Defamation can be at issue when removal of a certification is being considered; confidentiality is key

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Conclusion/Questions

George E. Constantine, Esq. | Venable LLP
t 202.344.4790 **| f** 202.344.8300 **| m** 443.618.2995
600 Massachusetts Avenue, NW, Washington, DC 20001

GEConstantine@Venable.com | www.Venable.com

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Identifying and Navigating Conflicts of Interest in Associations

Julie Kulovits

General Counsel, North American Spine Society

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Road Map

- COI issues when dealing with **Employees**
- COI Issues when dealing with **Affiliated Entities**
- "Conflicts" with your **Reporting Chain of Command**

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Focusing on the Basics

- Each scenario generally involves four questions:
  - (1) Who is (or was) my client?
  - (2) Are my words/actions going to create another client?
  - (3) If so, will these two clients have a conflict of interest?
  - (4) What do I need to do?

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Relevant Authority

- **Who is my Client?**
  - Rule 1.13 (a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- **Are my words/actions going to create another client?**
  - Can be implied – not defined in rules, but substantive law
  - Question of fact

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Relevant Authority

- **Do I have a conflict of Interest?**
- ABA Model Rule 1.7 (**concurrent** COIs) …a lawyer shall not represent a client if…:
  - (1) the representation of one client will be **directly adverse** to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be **materially limited** by the **lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**
  - Exception – Written Informed Consent
- ABA Model Rule 1.9 (COI with **past client**)…A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the **same or a substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client
  - Exception – Written Informed Consent

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Relevant Authority

- **What do I need to do?**
- ABA Model Rule 4.3 – Dealing with unrepresented persons
  - Don't imply that you are disinterested
  - Duty to make reasonable efforts to correct incorrect assumptions about your role
  - If there is a reasonable possibility of being in conflict, do not give the unrepresented person advice, other than the advice to secure counsel.
- ABA Model Rule 1.13(f) (and cmts. 10,11): If interests are adverse, advise:
  - You cannot represent the person
  - The person may wish to obtain independent representation
  - Discussions may not be privileged
- ABA Model Rule 1.0 (b), (e): Written Informed Consent – adequate information about the material risks of and reasonably available alternatives

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Conflicts of Interest and **Personal Legal Question**

- Employee approaches association's attorney and asks a personal legal question (e.g. parking ticket, dispute with a contractor, divorce question).

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Conflicts of Interest and **Personal Legal Question**

- Educate staff on your professional obligations
- Know what to answer/what to pass on (competency and conflicts of interest)
- Keep a list of good referral sources: county bar associations, www.illinoislegalaid.org
- Be friendly and approachable, but at a necessary distance

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Conflicts of Interest and **Work-focused Legal Question**

- Employee was terminated and has questions about [severance agreement], [confidentiality obligations], [non-compete agreement]

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Conflicts of Interest and **Work-focused Legal Question**

- Conflict Exists – association/employee are on opposite sides of transaction
- Duty to Inform Exists – ABA Model Rules 4.3 and 1.13 (f), (cmts. 10 and 11)
- Create a buffer; document, as necessary

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Conflicts of Interest and **Internal Investigations**

- An employee brings allegations of potential misuse of association funds to your attention; you conduct a formal internal investigation and interview several employees, including the employee suspected of the theft. During the interview, the employee suspected of misconduct asks you what you think he should do to make it right.

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Conflicts of Interest and **Internal Investigations**

- Goal: To clarify you represent entity alone (i.e. no individual representations) and to protect the organization's privilege
- All employees: Provide *Upjohn* warning (aka Corporate Miranda warning). Three elements:
  - Counsel represents the corporation and not the employee;
  - Communications between the employee and counsel will be privileged (if individual is within the privilege);
  - However, this privilege belongs to the corporation and the corporation alone can decide to exercise it or waive it.
- Subject employee: Rule 4.3, and Rule 1.13 (comments 10 and 11)

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Conflicts of Interest and **Intentionally Represented Employees**

- Association has been sued, and as part of that lawsuit, the opposing party wants to depose several of your employees.

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Conflicts of Interests and **Intentionally Represented Employees**

- Employees are not automatically represented persons.
- Before representing an employee, consider the following:
  - Is this a limited scope representation? Must be reasonable and undertaken with informed consent. *See* Rule 1.2(c).
  - Does a conflict exist? Can I represent both the employer and employee?
  - If there are no conflicts now, could a conflict arise in the future? Should I obtain a prospective waiver regarding future conflicts (with election on which representation will continue)?
  - Disclose limitations on joint representation – both clients (i.e. boss) are entitled to confidential information that is material to the representation

  See NY Bar Opinion 2016-2

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Conflicts of Interest and **Representation Adverse to an Affiliated Entities**

- Rule 1.7, comment 34: "A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."
- To determine if you are going to be deemed to represent an affiliate for conflict purposes:
  - Do the circumstances show you represent both (operational commonality and financial interdependence are considered)?
  - Is there an understanding between lawyer and the organizational client that lawyer will avoid representation adverse to client's affiliates (retainer agreement stipulation)?
  - Is the lawyer's obligations to the organizational client likely to materially limit the lawyer's representation to other client?

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Conflicts of Interest and **Representation of an Affiliated Entities**

- Generally no conflict where parent and wholly-owned subsidiary are both solvent with interests aligned.

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Conflicts of Interest and **Affiliated Entities – "Group Projects"**

- Your association wants to work on a collaborative project with representatives from some other associations in your field. The board member from your association that is spearheading this effort tells his counterparts that you are available to help the group with any legal issues related to the project.

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Conflicts of Interests and **Affiliated Entities – "Group Projects"**

- Can represent a "group assignment" that is a collaboration with your association and others, if there is a very carefully worded retainer agreement that considers:
  - Limited scope of the representation. *See* Rule 1.2(c)
  - Do conflicts exist or might they exist?
  - Can they be waived?
  - Material information will be shared among joint clients.
- Safer to avoid this joint representation

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Conflicts of Interest and **Reporting Chain of Command**

- Rule 1.13, Comment 3: "When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province…"

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Conflicts of Interest and **Reporting Chain of Command**

- If lawyer knows someone on behalf of the organization:
  - acted illegally or in violation of legal obligations to the organization, and
  - **Likely** to result in **substantial injury** to the organization
- Lawyer needs to act as is "reasonably necessary in the best interest of the organization," including reporting up the chain of command
- ABA Model Rule 1.13, Comment 3: "A lawyer cannot ignore the obvious."

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Conflicts of Interest and **Reporting Chain of Command**

- If the highest authority fails to address the situation, then if it is:
  - clearly a violation of law, and
  - **reasonably certain** to result in **substantial injury** to the organization
- Lawyer may reveal information relating to the representation, but only to the extent reasonably necessary to prevent substantial injury to the organization.

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Associations and the Law

Trademark and Copyright Issues in the Not-for-Profit World

April 30, 2019

Kimberly A. Pendo

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Illinois Right of Publicity Act: What is it?

- The Illinois Right of Publicity Act recognizes an individual's right to control the use of one's "identity" for "commercial purposes"
- "Identity" includes any attributes by which that person can be identified, including name, signature, photograph, image, likeness, and voice
- "Commercial purpose" means use (1) in connection with the sale of products, merchandise, goods, or services, (2) to advertise or promote products, merchandise, goods, or services, and (3) to fundraise
- Comparable requirements apply in numerous other states

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Illinois Right of Publicity Act: What does it do?

- The Illinois Right of Publicity Act limits a person's or an entity's use of an individual's identity for commercial purposes
- Violators may be liable for (1) actual damages, profits from unauthorized use, both or $1,000 – whichever amount is greater, (2) punitive damages, and (3) attorneys' fees, costs, and expenses
- Injunctive relief may also be imposed to stop the offending use

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Illinois Right to Publicity Act: What can I do?

- Questions about the Act typically arise when an association wants to take photos or videos of conference attendees and use them in online (or other) materials to promote future events
- You can do that … as long as you get written consent
- Written consent should be worded broadly enough to cover any anticipated method of recording and using the attendee's identity
- Written consent should be obtained prior to the recording

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Intellectual Property: What is it?

- Copyright
- Trademark

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Copyright

- Copyright protects the original expression of an idea in tangible form
  - Books, photographs, music, art, blog posts, articles, etc.
- Copyright is a "bundle of rights"
  - Right to reproduce, prepare derivative works, distribute copies by sale or otherwise, perform, display, and renew copyright
- Infringement is use of another's work without permission (except in a few limited circumstances)
- Copyright is different from trademark
  - Trademark protects any word, name, symbol, device or combination used to identify source of goods or services (*e.g.*, brand names, logos, acronyms, slogans)

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Derivative Works

- A derivative work is a new work based on pre-existing material
- Only a copyright owner has the right to create derivative works
  - Others need permission (*i.e.*, a license)
  - For example, using a photo as basis for artwork requires obtaining photographer's permission
- If an existing work is used as the basis for a new work, the new work must be sufficiently "transformative" in order to avoid infringement

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Trademarks

- A trademark is any word, name, symbol, design, device or combination that identifies the source of a specific product or service and distinguishes it from others in the marketplace
- Typically a name, word, phrase, logo, symbol, design, image, or a combination of elements
- May be non-conventional, such as marks based on color, smell, or sound

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Trademark owner: Microsoft
Generic name: Slide show presentation program

LOUBOUTIN YSL

BAND-AID®

Trademark owner: Johnson & Johnson
Generic name: Adhesive bandage

Trademark owner: 3M
Generic name: Sticky note

Google

Trademark owner: Google Inc.
Generic name: Internet search engine

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Obtaining Permission to Use Intellectual Property

- Permission must be obtained in writing and can be in the form of a complete transfer of all rights (ownership) or a partial transfer of rights (license)
- Key elements of written permission:
  - Representation that the creator owns and has not used someone else's materials without permission
  - Defining the term/scope of the permission
    - Perpetual or for a limited time
    - Exclusive vs. non-exclusive
    - Multiple or single use
    - When and how it can be used (*e.g.*, website, social media, other formats)

Circumstances Requiring Permission to Use Intellectual Property

- Using a photograph
- Using a quote
- Using a trademark, brand name or a "play" on a trademark/brand name
- Playing music at any event
- Incorporating or using original artwork, clip art, designs
- Reproducing articles and other written materials
- Reproducing speeches

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Photographs

- Must obtain permission from the photographer (copyright)
  - Limited exception for "news" reporting
  - Use of stock photos
- Must also obtain permission from the subject(s) (right to privacy/publicity)
- When taking pictures at an event:
  - Obtain subjects' permission individually
  - Or, include appropriate "permission" language on all event/program registration materials
- When holding a photo session:
  - Require subject to sign a "Photo/Video Authorization and Release Agreement"

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Articles & Speeches

- Obtain permission from authors
- For speakers/presenters, obtain rights to record and replay session and reproduce handouts in all formats and media
- For all, obtain representations as to ownership, no prior publication, non-libelous
- Special issues for volunteers, including committee members
  - They own the copyright in what they create
  - Associations must obtain written permission

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When Permission to Use Intellectual Property May Not Be Necessary

- Fair Use
- "Works for Hire"
- Government Works
- Public Domain

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Fair Use

- Allows limited copying of others' material based on facts and circumstances:
  - Nature of the work
  - How much was copied
  - Purpose of the copying
  - Effect on the market for the original
- No "educational" or other exception for not-for-profit organizations

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Examples: Fair Use

- **Fair use.** A biographer of Richard Wright quoted from six unpublished letters and ten unpublished journal entries by Wright.
  - **Important factors:** No more than 1% of Wright's unpublished letters were copied and the purpose was informational.
- **Fair use.** The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match in their biography.
  - **Important factors:** A small portion of film was taken and the purpose was informational.
- **Fair use.** A search engine's practice of creating small reproductions ("thumbnails") of images and placing them on its own website (known as "inlining") did not undermine the potential market for the sale or licensing of those images.
  - **Important factors:** The thumbnails were much smaller and of much poorer quality than the original photos and served to help the public access the images by indexing them.

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Examples: Not Fair Use

- **Not fair use.** The Nation magazine published excerpts from ex-President Gerald Ford's unpublished memoirs. The publication in The Nation was made several weeks prior to the date Mr. Ford's book was to be serialized in another magazine.
  - **Important factor:** The Nation's copying seriously damaged the marketability of Mr. Ford's serialization rights.
- **Not fair use.** A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read those letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see those letters was in their paraphrased form in the biography. Salinger successfully sued to prevent publication.
  - **Important factors:** The letters were unpublished and were the "backbone" of the biography – so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been taken more as a means of capitalizing on the interest of Salinger than in providing a critical study of the author.

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"Work for Hire"

- "Work for Hire" (WFH) is a statutorily defined term (17 U.S.C. § 101)
  - Federal copyright law establishes ownership of materials in certain situations
- A WFH is:
  - A work prepared by an employee within the scope of his or her employment
  - Some limited types of works for which all parties agree in writing to the WFH designation ***and*** meet the statutory requirements (*i.e.*, contribution is: part of the collective work, movie or other audiovisual work, a translation, an instructional text, a test, an atlas, etc.).
- It is an exception to the general rule that the person who actually creates a work is the legally recognized author of that work.
- If a work is "made for hire", the employer – not the employee or contractor – is considered the legal author.

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Government Works

- Works of the U.S. government are not subject to copyright protection
- "Work of the U.S. government" is work prepared by an officer or employee of the federal government as part of the person's official duties

Public Domain

- Works in the public domain are previously published materials for which the copyright has expired
  - Term of copyright is life of author plus 70 years
  - Term of copyright for a Work for Hire is the shorter of 95 years from first publication or 120 years from creation
- Be certain that a work is in the public domain before using it without permission
  - Finding something on the internet does not mean it's "in the public domain"
  - Older works can obtain new copyright life (*e.g.*, a new recording of a Mozart symphony)

Intellectual Property: What can I do?

- Reduce the risk of violating someone else's intellectual property rights by considering – in advance – what materials you want to use, for what purposes, and who owns those materials
- More often than not, the best practice is to obtain the appropriate permission
- Risks for Violations:
  - Possible exposure for damages
  - Treble damages for willful infringement
  - Potential liability for attorneys' fees
  - Time, money and energy responding to a lawsuit

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15-minute break
Next session begins at 3:15 pm

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Non-Profit Issues for Illinois Employers

Thomas E. Deer

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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Agenda

- Compensation
- Leave & Benefits
- Illinois Biometric Information Privacy Act
- Recent Changes in Illinois Law
- Impact of #MeToo on Non-Profits and Fundraising

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Compensation · *Lifting Up Illinois Working Families Act*

- The Lifting Up Illinois Working Families Act amends the Illinois Minimum Wage Law (IMWL) to raise state minimum wages in various stages.

- The IMWL applies to all "employers," even non-profits:
  - "Employer" includes any individual, partnership, association, corporation, limited liability company, business trust, governmental or quasi-governmental body, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employer, for which one or more persons are gainfully employed on some day within a calendar year.

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Compensation · *Lifting Up Illinois Working Families Act*

	Before Jan. 1, 2020	*Starting Jan. 1, 2020*
Minimum Wage	• 18 years or older: ➢ $8.25/hour; ➢ $7.75/hour for first 90 days (untipped employees) • Under 18 years: ➢ $7.75/hour	• Employees 18 years or older OR employees under 18 years who have worked more than 650 hours for the employer during any calendar year: ➢ January 1, 2020: $9.25/hour ➢ July 1, 2020: $10.00/hour ➢ Thereafter, an increase of $1.00/hour every January 1, until it reaches $15.00/hour on January 1, 2015 • Employees under 18 years of age who have not worked more than 650 hours in a calendar year: ➢ January 1, 2020: $8.00/hour ➢ January 1, 2021: $8.50/hour ➢ January 1, 2022: $9.25/hour ➢ January 1, 2023: $10.50/hour ➢ January 1, 2024: $12.00/hour ➢ January 1, 2025: $13.00/hour

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Compensation · *Lifting Up Illinois Working Families Act*

	Before Jan. 1, 2020	*Starting Jan. 1, 2020*
Penalties	• Failure to keep payroll records: ➢ No penalty • Underpayment ➢ Unpaid amount + (2% of underpayment x number of months unpaid) • Other penalty for failure to properly pay minimum wage and/or overtime • 20% of total underpayment (if employer's conduct is willful, repeated, or reckless)	• Failure to keep payroll records: ➢ $100/employee, to accrue each day the violation continues • Underpayment ➢ Unpaid amount + (5% of underpayment x number of months unpaid) • Other penalty for failure to properly pay minimum wage and/or overtime • 20% of total underpayment (if employer's conduct is willful, repeated, or reckless); and • $1,500 penalty

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Compensation · *Fair Labor Standards Act*

General Rule **(FLSA and Illinois Minimum Wage Law)**

- All covered employees must be paid minimum wage and overtime (for hours worked over 40 in a workweek) unless properly classified as exempt.

Exemptions

- Minimum Salary
- Primary Duties

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Compensation · *Fair Labor Standards Act*

	Current	***DOL Proposal***
Non-Exempt Employees (Salary Threshold)	• Overtime Eligibility: ➢ $23,660 ($455/week) • Total annual compensation for highly compensated employees: ➢ $100,000	• Overtime Eligibility: ➢ $35,308 ($679/week) • Total annual compensation for highly compensated employees: ➢ $147,414
Exempt Employees ("Duties Test")	• Executive • Administrative • Professional • Computer Employee • Outside Sales • Highly Compensation Employee	No change.

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Compensation · *Does the FLSA Apply to Non-Profits?*

Enterprise Coverage

- Focus is on interstate commence.
- Non-Profits: not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in an annual gross volume of sales made or business done of at least $500,000.
  - Exception: "Named Enterprises" (e.g. hospitals, schools, government agencies, business providing medical or nursing care for residents) are covered by the FLSA regardless of their non-profit status or total of annual sales/business done
- Test
  - Does the non-profit perform interstate activities for a business purpose? If so, does the revenue from that activity reach $500,000?
  - Example (from DOL)
    - A non-profit animal shelter provides free veterinary care, adoption services and shelter (charitable activities) AND veterinary care for a fee to customers (commercial activities)
    - If revenue generated from the commercial activities is at least $500,000 → FLSA applies
  - Other examples: fee for services, gift shop, space rentals, museum receipts

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Compensation · *Does the FLSA Apply to Non-Profits?*

Individual Coverage

- Employees of non-profits not covered by FLSA may still be entitled to FLSA protection if:
  - The employee is individually engaged in interstate commerce;
  - The employee is individually engaged in the production of goods for interstate commerce; or
  - The employee is individually engaged in any closely-related process or occupation directly essential to such production.
- Example (from DOL)
  - Employee regularly makes/receives interstate telephone calls, emails, mail; ships materials to another state; handles cross-state credit card transactions; transports persons or property across state lines; often orders office products for the organization from other states.
  - EXCEPTION: if employee performs these actions on isolated occasions (i.e. spends an insubstantial amount of time performing individually covered work), the FLSA will not apply.

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Compensation · *Does the FLSA Apply to Non-Profits?*

Interns and Volunteers

- FLSA will not cover a volunteer if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation.
- FLSA will not cover interns who volunteer in commercial activities run by a non-profit organization (i.e. – gift shop).
- Paid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide.

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Compensation · *Does the FLSA Apply to Your Non-Profit?*

QUESTION 1: Does Enterprise Coverage Apply?

a) Is the organization a "named enterprise?"
   - If YES – the FLSA applies
   - If NO – go to Question 1(B)

b) Does the organization have earned income via interstate commerce with gross revenues over $500,000/year?
   - If YES – the FLSA applies
   - If NO – go to Question 2

QUESTION 2: Does Individual Coverage Apply to Any Employees?

a) If YES – the FLSA applies
b) If NO – the FLSA does not apply

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Compensation · *FLSA & Non-Profits* · ***Take Action***

1) **Does the FLSA apply to your non-profit and/or your employees?**
   - Enterprise coverage – at least $500,000 in interstate commerce
   - Individual coverage
2) **If so, do any exemptions apply to your employees?**
   - Minimum salary
   - Job duties
3) **If not, what can you to do?**
   - Raise salaries
   - Restructure positions – separate interstate/intrastate and exempt/non-exempt duties
   - Limit and regulate overtime
4) **How?**
   - Evaluate financial impact for salary increases or reclassification
   - Consider impact on operations and culture
   - Train employees and supervisors on tracking and managing work flow and overtime

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Compensation · *Illinois Equal Pay Act (IEPA) Updates*

- **IEPA applies to all "employers," even non-profits**
  - "Employer" means an individual, partnership, corporation, association, business, trust, person, or entity for whom employees are gainfully employed in Illinois and includes the State of Illinois, any state officer, department, or agency, any unit of local government, and any school district.
- **African-American Employees**
  - Before January 1, 2019, the IEPA prohibited unequal pay between male and female employees.
  - Starting January 1, 2019, the IEPA expressly prohibits employers from paying African-American employees who are performing "the same or substantially similar work" less than non-African-American employees.

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Compensation · *Illinois Equal Pay Act (IEPA) Updates*

- **HB-834 – Proposed Amendment to IEPA**
  - Salary History Ban
    - Prohibits employers from seeking the salary information of any applicant from *any* current or former employer.
    - Prevents employers from requiring that an applicant's prior wage or salary "satisfy minimum or maximum criteria; or to request or require such wage or salary history as a consideration of being considered for employment."
    - Exception: this ban does not apply if the applicant's salary is publicly available or subject to FOIA requests.
  - Equal Pay
    - Requires employers pay equally for work that requires "substantially similar" skill, effort, and responsibility

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Compensation · *Illinois Equal Pay Act (IEPA) Updates*

- **HB-834 – Proposed Amendment to IEPA (continued)**
  - Employer's Affirmative Defenses for Differences in Pay:
    - Cannot be based on or derived from a differential in compensation based on sex or another protected characteristic,
    - Must be job-related and consistent with business necessity, and
    - Must account for the entire differential in pay.
  - Pay Transparency
    - Prohibits employers from requiring employees to sign any contract or waiver of their rights to discuss "wages, salary, benefits, or other compensation." sign any contract or waiver of these rights.
  - Status – passed the Illinois House on March 13, 2019, pending before the Assignments Committee of the Illinois State Senate

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Leave & Benefits · *Leave Ordinances*

	City of Chicago	Cook County
Effective Date	July 1, 2017	July 1, 2017
Covered Employers	Employers that maintain a business facility within the City of Chicago	Employers with at least one covered employee and who have at least one place of business in Cook County, unless the location where the employee(s) works has opted out of the Ordinance
Covered Employees	Employees who work at least 80 hours in a 120-day period + 2 hours in Chicago in any 2-week period	Employees who work at least 80 hours in a 120-day period + 2 hours in Cook County in any 2-week period
Period	12 months	12 months

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Leave & Benefits · *Leave Ordinances*

	City of Chicago	Cook County
Potential Accrual of Hours Per Year	60 (at least 20 must be FMLA hours)	40 (unless FMLA is carried over and used, then an additional 20 hours may be added for a total of 60 hours)
Accrual Rate	1 hour for every 40 hours worked in Chicago	1 hour for every 40 hours worked in Cook County (excluding time worked in a municipality that has opted out)
Waiting Period for New Employees	No later than 180 calendar days after start date	No later than 180 calendar days after start date

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Leave & Benefits · *Leave Ordinances*

	City of Chicago	*Cook County*
Notice Requirements	Employer may require up to 7 days' notice if the need for leave is foreseeable	Employer may require up to 7 days' notice if the need for leave is foreseeable
Documentation	May request verification after more than three consecutive work days of absence	May request verification after more than three consecutive work days of absence
Recordkeeping	5 years	3 years

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Leave & Benefits · Leave Ordinances · *Municipalities That Opted Out of Cook County PSL Ordinance*

Alsip	Calumet Park	Glenview	La Grange Park	Northlake	Roselle	Western Springs
Arlington Heights	Chicago Heights	Glenwood	Lansing	Oak Forest	Rosemont	Wheeling
Barrington	Chicago Ridge	Golf	Lemont	Oak Lawn	Sauk Village	Willow Springs
Bartlett	Country Club Hills	Hanover Park	Lincolnwood	Orland Hills	Schaumburg	Wilmette
Bedford Park	Crestwood	Harvey	Lynwood	Orland Park	Schiller Park	Worth
Bellwood	Deer Park	Harwood Heights	Lyons	Palatine	South Barrington	
Bensenville	Des Plaines	Hazel Crest	Markham	Palos Heights	South Chicago Heights	
Berkeley	East Dundee	Hickory Hills	Matteson	Palos Hills	South Holland	
Blue Island	East Hazel Crest	Hillside	Maywood	Palos Park	Steger	
Bridgeview	Elgin	Hinsdale	Melrose Park	Park Forest	Stickney	
Broadview	Elk Grove	Hodgkins	Merrionette Park	Park Ridge	Stone Park	
Brookfield	Elmwood Park	Hoffman Estates	Midlothian	Posen	Streamwood	
Buffalo Grove	Evergreen Park	Hometown	Morton Grove	Prospect Heights	Summit	
Burbank	Flossmoor	Homewood	Mount Prospect	Richton Park	Thornton	
Burnham	Forest Park	Indian Head Park	Niles	River Forest	Tinley Park	
Burr Ridge	Forest View	Inverness	Norridge	River Grove	Westchester	
Calumet City	Franklin Park	Justice	North Riverside	Riverside		
		La Grange	Northbrook	Rolling Meadows		

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Leave & Benefits · *Expense Reimbursement* · ***Illinois Wage Payment Collection Act***

- Applies to all "employers," even non-profits:
  - "Employer" shall include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.
- Employers must reimburse employees for all:
  - Necessary expenditures or losses;
  - Incurred within the employee's scope of employment; and
  - Directly related to services performed for the employer.

820 ILCS 115/9.5 (effective Jan. 1, 2019)

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Leave & Benefits · Expense Reimbursement · ***Illinois Wage Payment Collection Act***

- Necessary expenditures:
  - Reasonable expenditures or losses required of the employee in the discharge of employment duties that inure to the primary benefit of the employer.
- Requirements:
  - The employer must have "authorized or required" the employee to incur the expense;
  - The expense request + appropriate documentation, must be submitted within 30 calendar days—unless a longer period is provided for under the employer's expense reimbursement policy; and
  - The employee must provide a signed, written statement in lieu of a receipt when supporting documentation has been lost or does not exist.
- Exceptions:
  - No reimbursement for losses due to employee's own negligence, normal wear, or losses due to theft (unless employer's negligence caused the theft).
  - A less than 100% reimbursement policy is permitted if:
    - There is some reimbursement; and
    - The reimbursement is more than "de minimus"

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Illinois Biometric Information Privacy Act (BIPA)

- Applies to all "private entities" – does not apply to State or local government agencies.
- **2008** – Illinois is the first state to regulate a private entity's collection, use, storage, transmission, and destruction of "biometric identifiers" and "biometric information."
  - Retina or iris scans;
  - Fingerprints;
  - Voiceprints;
  - Hand or facial geometry scans; and
  - "Any information . . . based on an individual's biometric identifier used to identify an individual."
- **2015** – consumer class actions begin
- **2017** – employer class actions begin

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Illinois Biometric Information Privacy Act (BIPA)

- **740 ILCS 14/15**
  - Prohibits a private entity from collecting a person's or consumer's "biometric identifiers" or "biometric information" unless the entity first:
    - Informs the person or consumer of the "specific purpose and length of term" for which the information is being collected, stored and used;
    - Obtains the person's or consumer's written release or consent; and
    - Develops and provides the person or consumer a written policy that establishes a retention schedule and guidelines for timely destruction of biometric data in compliance with BIPA.
- **740 ILCS 14/20**
  - Any person "aggrieved" by a violation of BIPA may recover:
    - For negligent violations of BIPA - $1,000 or actual damages (whichever is greater);
    - For intentional or reckless violations of BIPA - $5,000 or actual damages (whichever is greater);
    - Reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
    - Other relief, including an injunction.

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Recent Changes in Illinois Law · *ISERRA*

Illinois Service Member Employment and Reemployment Rights Act (ISERRA)

- Applies to all "employers," even non-profits.
  - "Employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities.
- Modeled after the federal USERRA.
- Streamlines the various job-related protections afforded to Illinois service members.
- Military service includes:
  - Service in a federally recognized auxiliary of the United States Armed Forces when performing official duties in support of military or civilian authorities as the result of an emergency;
  - Service covered by the Illinois State Guard Act; and
  - A period during which service members are absent from employment for medical or dental treatment related to a condition, illness, or injury sustained or aggravated during a period of active service.

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Recent Changes in Illinois Law · *ISERRA*

- **Protections**
  - A service member who is absent on military leave must be credited with the average of his or her efficiency or performance ratings or evaluations received over the three years preceding the leave, but in no case can the average rating be less than the rating that the employee received for the last rating period preceding his or her leave.
- **Enforcement and Damages**
  - ISERRA provides for a private right of action to individual employee claimants as well as enforcement authority by the Illinois attorney general.
  - ISERRA expressly negates any statute of limitations for individuals or the attorney general to bring suit.
  - Actual damages + attorneys' fees + up to $50,000 in punitive damages.

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Recent Changes in Illinois Law

- ***Illinois Nursing Mothers in the Workplace Act***
  - Applies to any individual or entity with more than 5 employees, including non-profits.
- ***Amendments to the Illinois Human Rights Act***
  - For sexual harassment, disability and pregnancy discrimination:
    - Any person employing one or more employees.
  - For all other violations:
    - Any person employing 15 or more employees during 20 or more calendar weeks within the calendar year of, or preceding, the alleged violation.

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Recent Changes in Illinois Law · *Illinois Nursing Mothers in the Workplace Act*

	Before August 21, 2018	***After August 21, 2018***
Breaks	"Must" if possible run concurrently with other employer-provided breaks	"May" coincide with other break times. Employers must also provide reasonable break time "each time the employee has the need to express milk."
Temporal Period	None	Up to one year after child's birth.
Compensation	Expressing milk must take place during unpaid breaks.	Employers shall not reduce compensation for the time used for the purpose of expressing milk. Employers must now pay employees for any additional breaks taken for this purpose.
Avoiding the Act's Requirements	If providing break time would "unduly disrupt the employer's operations."	If providing break time is an "undue hardship": additional breaks would be prohibitively expensive or disruptive given the employer's size, financial resources, and operation.

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Recent Changes in Illinois Law · *Illinois Human Rights Act (IHRA)*

	Before	*Now*
Time to File Charge with the IDHR	180 days	300 days (mirrors EEOC)
Investigation	After the Charge is filed, the Illinois Department of Human Rights (IDHR) assigns the charge to an investigator who conducts a factual investigation.	Complainants can now opt out of the investigation process and proceed directly to state court by: • Submitting a written request to opt out within 60 days after receiving notice from the IDHR of his or her right to opt out; and • The IDHR has 10 business days thereafter to issue a notice of right to sue, allowing the complainant to file suit in state court.

Posting Requirements

Employers must post the new notice provided by the IDHR, which includes specific information about employees' rights to be free from sexual harassment. Employers must also include the same content covered in the notice in their employee handbooks.

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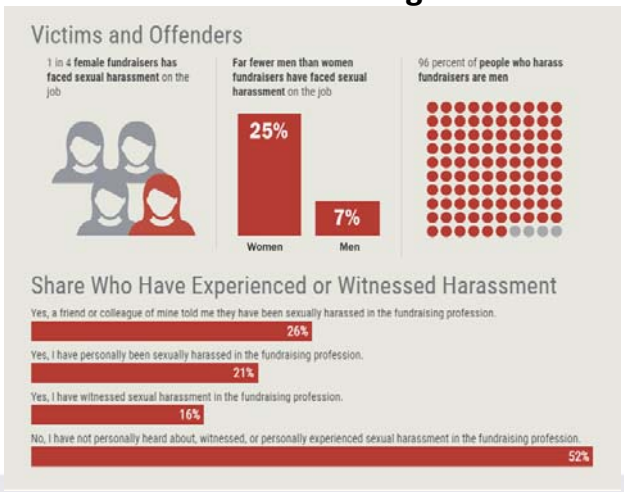
Impact of #MeToo on Non-Profits and Fundraising



April 2018: *Chronicle of Philanthropy* and the Association of Fundraising Professionals

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Impact of #MeToo on Non-Profits and Fundraising

- **Gender-Based Disparity**
  - Fundraisers – 70% women
  - Donors – 96% male CEOs, 80% male C-Suite
- **Power Dynamics**
  - Donor vs. Fundraiser

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Impact of #MeToo on Non-Profits and Fundraising

- Advocacy
- Unrestricted donations
- Overhead rejection
- Strong leadership

"We don't value donor dollars more than we value your personal safety or dignity."
-Beth Ann Locke (Simon Fraser University)

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Qualified Transportation Fringes

- As part of the 2017 Tax Cuts and Jobs Act, Congress made changes to the treatment of various qualified transportation fringe benefits that employers provide to employees, specifically transit and parking benefits.
- These changes, which went into effect as of January 1, 2018, affect many tax-exempt organizations who may now be subject to Unrelated Business Taxable Income (UBTI).
- Any organization that provides parking to its employees, whether by paying a third party or by providing employees with parking on its own, may be impacted by this new rule.

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Qualified Transportation Fringes

- Many of the details surrounding the calculations of UBTI were unclear.
- In December 2018, the IRS issued Notice 2018-99 that provided interim guidance on determining the amount of nondeductible parking expenses relating to qualified transportation fringes (QTF).
- The interim guidance can be relied on until future regulations are issued.

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Qualified Transportation Fringes

- Expenses paid or incurred for qualified transportation fringes (as defined in section 132(f)) and any parking facility used in connection with qualified parking (as defined in Section 132(f)(5)(C)) are not tax deductible under section 274(a)(4).
- These expenses will be treated as increases in UBTI for tax-exempt organizations under section 512(a)(7).

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Qualified Transportation Fringes

- QTFs include: transportation in a commuter highway vehicle for travel between an employee's residence and place of employment, transit passes, and qualified parking.
  - Bicycle commuting reimbursements are not included
- Commuter highway vehicle (van pools) means any highway vehicle with seating capacity of at least six adults (not including the driver) and at least 80% of the mileage is used to transport employees in connection with travel between their residences and their place of employment.
- Transit passes means any pass, token, fare-card, voucher, or similar item entitling the person to transportation (or transportation at a reduced price) if such transportation is on a mass transit facility, or provided by any person in the business of transporting persons for compensation or hire if such transportation is provided in a vehicle meeting the requirements of a commuter highway vehicle.
- Qualified parking means parking provided to an employee on or near the employer's business premises or on or near a location from which the employee commutes to work.
  - It does not include any parking on or near property used by the employee for residential purposes

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Qualified Transportation Fringes

- Parking facility means any indoor or outdoor garage or other structure, as well as parking lots and other areas, where employees may park on or near the employer's business premises or on or near a location from which the employee commutes to work.
  - Includes parking garages or lots owned or leased by the employer
- Parking expenses include: repairs, maintenance, utilities, insurance, property taxes, interest, snow removal, leaf removal, trash removal, cleaning, landscaping, parking lot attendant, security, and rent or lease payments or a portion of rent or lease payments if parking is not broken out separately.
  - Depreciation expense is not included
  - Use the actual cost of operations, not the value or amount charged to employees or the general public
  - Expenses paid for items not located on or in the parking facility, including items related to property next to the parking facility, are not included
  - If an organization has a lease for which parking is not separately stated, an allocation must be done to calculate the portion of the lease payments allocated to parking

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Qualified Transportation Fringes

- This new provision only applies to commuting between an employee's personal residence and their place of employment.
- It does not apply to transportation for work-related purposes.
- Generally, the entire amount paid to a third party for employee parking, amounts paid (or reimbursed) for transit passes, and amounts paid for pre-tax parking/transit benefits are considered UBTI.
- Amounts paid that exceed $260 (2018) and $265 (2019) per employee per month must be treated as compensation to the employee and reported on Form W-2.
  - These amounts are not included in UBTI

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Qualified Transportation Fringes

- If the organization owns or leases a parking facility used to, at least in part, provide parking for its employees, the amount of parking expenses allocable to employees that must be included in UBTI may be calculated using any reasonable method.
- In Notice 2018-99, the IRS outlined a four-step process that it deems to be a reasonable method.
- Step 1 – Calculate the disallowance for reserved employee spots.
  - Whether by signage or a separate facility or portion of a facility segregated by a barrier to entry or other limited access
  - Determine the percentage of reserved employee spots in relation to total parking spots and multiply that percentage by the total parking expenses
  - The resulting amount is included in UBTI
  - Note, employers had until March 31, 2019 to change the signage or access in order to reduce or eliminate the number of reserved employee parking spots, a provision that was retroactively applied to January 1, 2018

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- Step 2 – Determine the primary use of the remaining spots.
  - Identify the remaining parking spots to determine whether the primary use is for the general public
  - The determination should be done during normal business hours on a typical day
  - Empty, non-reserved parking spots are treated as being provided to the general public
  - General public includes: customers, clients, visitors, patients, students, and congregants
  - Primary use is more than 50% of actual or estimated use
  - If the primary use of the remaining spots is for the general public, then the remaining total parking expenses are excluded from UBTI
  - If less than 50% of the remaining spots are used for the general public, then move to Step 3

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Qualified Transportation Fringes

- Step 3 – Calculate the allowance for reserved nonemployee spots.
  - Such as spots reserved for visitors and customers
  - Determine the percentage of reserved nonemployee spots in relation to the remaining total parking spots and multiply that percentage by the remaining total parking expenses
  - The resulting amount is excluded from UBTI
- Step 4 – Determine employee use of the remaining parking spots and allocate expenses accordingly.
  - Identify the number of employee spots based on actual or estimated usage, which may be based on the number of spots, number of employees, hours of use, or other measures
  - Allocate the remaining parking expenses to the remaining parking spots used by employees
  - The resulting amount is included in UBTI

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Qualified Transportation Fringes

- Tax-exempt organizations have three options:
  - Continue to provide the fringe benefit tax-free to its employees and pay the associated federal and state tax,
  - Treat the benefit to employees as taxable compensation, or
  - Discontinue the benefit
- UBTI is reported on Form 990-T, which is due four and one-half months after the organization's year-end.
- $1,000 income exclusion
- Federal tax at 21% plus Illinois state tax at 9.5%
- Estimated tax should be paid in quarterly installments

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Qualified Transportation Fringes

- There is a possible exception for expenses paid for transportation and commuting benefits if the benefits are provided for "ensuring the safety of the employee."
- Stay tuned to future legislation that may provide prospective or retroactive relief.
- Examples

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Questions?

Jim Quaid

jquaid@orba.com

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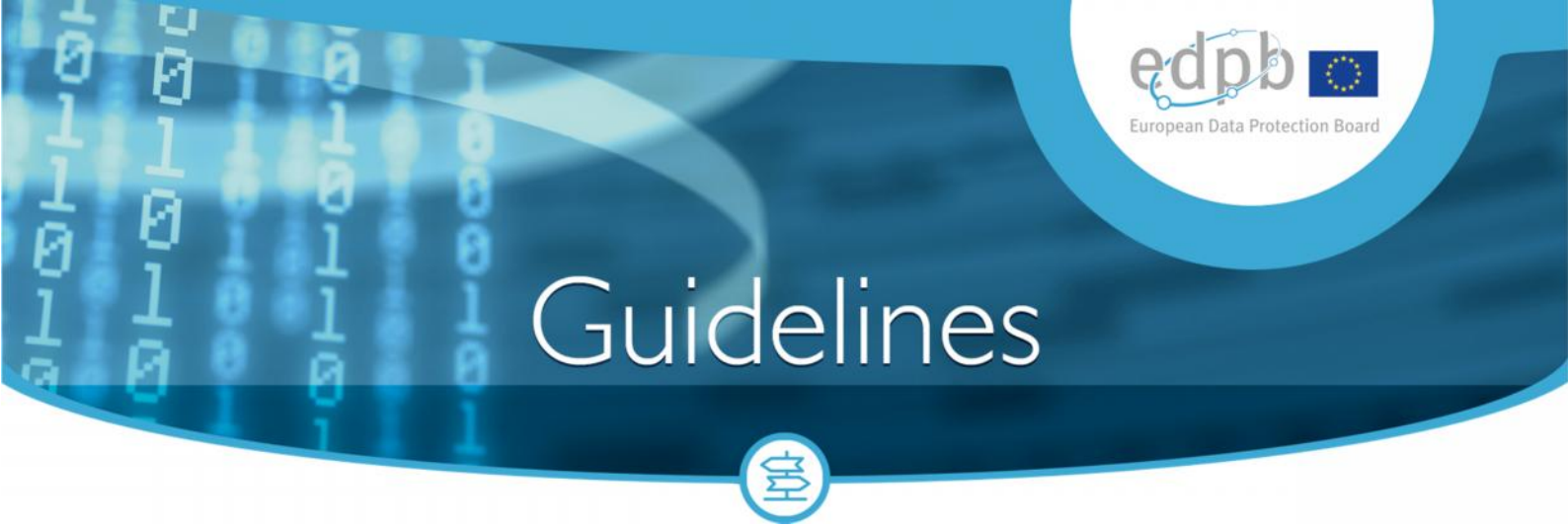
Up Next: Wrap-Up Session

Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) - Version for public consultation



Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) - Version for public consultation

Adopted on 16 November 2018

Contents

The European Data Protection Board

Having regard to Article 70 (1)(e) of the Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

HAS ADOPTED THE FOLLOWING GUIDELINES:

INTRODUCTION

The territorial scope of General Data Protection Regulation[1] (the GDPR) is determined by Article 3 of the Regulation and represents a significant evolution of the EU data protection law compared to the framework defined by Directive 95/46/EC[2]. In part, the GDPR confirms choices made by the EU legislator and the Court of Justice of the European Union (CJEU) in the context of Directive 95/46/EC. However, important new elements have been introduced. Most importantly, the main objective of Article 4 of the Directive was to define which Member State's national law is applicable, whereas Article 3 of the GDPR defines the territorial scope of a directly applicable text. Moreover, while Article 4 of the Directive made reference to the 'use of equipment' in the Union's territory as a basis for bringing controllers who were "not established on Community territory" within the scope of EU data protection law, such a reference does not appear in Article 3 of the GDPR.

Article 3 of the GDPR reflects the legislator's intention to ensure comprehensive protection of EU data subjects' rights and to establish, in terms of data protection requirement, a level playing field for companies active on the EU markets, in a context of worldwide data flows.

Article 3 of the GDPR defines the territorial scope of the Regulation on the basis of two main criteria: the "establishment" criterion, as per Article 3(1), and the "targeting" criterion as per Article 3(2). Where one of these two criteria is met, the relevant provisions of the GDPR will apply to the processing of personal data by the controller or processor concerned. In addition, Article 3(3) confirms the application of the GDPR to the processing where Member State law applies by virtue of public international law.

Through a common interpretation by data protection authorities in the EU, these guidelines seek to ensure a consistent application of the GDPR when assessing whether particular processing by a controller or a processor falls within the scope of the new EU legal framework. In these guidelines, the EDPB sets out and clarifies the criteria for determining the application of the territorial scope of the GDPR. Such a common interpretation is also essential for controllers and processors, both within and outside the EU, so that they may assess whether they need to comply with the GDPR.

As controllers or processors not established in the EU but engaging in processing activities falling within Article 3(2) are required to designate a representative in the Union, these guidelines will also provide

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

clarification on the process for the designation of this representative under Article 27 and its responsibilities and obligations.

As a general principle, the EDPB asserts that where the processing of personal data falls within the territorial scope of the GDPR, all provisions of the Regulation apply to such processing. These guidelines will however specify the various scenarios that may arise, depending on the type of processing activities, the entity carrying out these processing activities or the location of such entities, and will detail the provisions applicable to each situation. It is therefore essential that controllers and processors, especially those offering goods and services at international level, do undertake a careful and *in concreto* assessment of their processing activities, in order to determine whether the related processing of personal data falls under the scope of the GDPR.

1 APPLICATION OF THE ESTABLISHMENT CRITERION - ART 3(1)

Article 3(1) of the GDPR provides that the *"Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not*."

Article 3(1) GDPR makes reference not only to an establishment of a controller, but also to an establishment of a processor. As a result, the processing of personal data by a processor may also be subject to EU law by virtue of the processor having an establishment located within the EU.

The following sections clarify the application of the establishment criterion, first by considering the definition of an 'establishment' in the EU within the meaning of EU data protection law, second by looking at what is meant by 'processing in the context of the activities of an establishment in the Union', and lastly by confirming that the GDPR will apply regardless of whether the processing carried out in the context of the activities of this establishment takes place in the Union or not.

Article 3(1) ensures that the GDPR applies to the processing by a controller or processor carried out in the context of the activities of an establishment of that controller or processor in the Union, regardless of the actual place of the processing. The EDPB therefore recommends a threefold approach in determining whether or not the processing of personal data falls within the scope of the GDPR pursuant to Article 3(1).

a) Consideration 1: "An establishment in the Union"

Before considering what is meant by "an establishment in the Union" it is first necessary to identify who is the controller or processor for a given processing activity. According to the definition in Article 4(7) of the GDPR, controller" means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data". A processor, according to Article 4(8) of the GDPR, is "a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller". As established by relevant CJEU case law and previous WP29 guidance[3], the determination of whether an entity is a controller or processor for the purposes of EU data protection law is a key element in the assessment of the application of the GDPR to the personal data processing in question.

[3] WP169 - Opinion 1/2010 on the concepts of "controller" and "processor", adopted on 16th February 2010.

While the notion of "main establishment" is defined in Article 4(16), the GDPR does not provide a definition of "establishment" for the purpose of Article 3[4]. However, Recital 22[5] clarifies that an "*[e]stablishment implies the effective and real exercise of activities through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect*."

This wording is identical to that found in Recital 19 of Directive 95/46/EC, to which reference has been made in several CJEU rulings broadening the interpretation of the term "establishment", departing from a formalistic approach whereby undertakings are established solely in the place where they are registered[6]. Indeed, the CJEU ruled that the notion of establishment extends to any real and effective activity — even a minimal one — exercised through stable arrangements[7]. In order to determine whether an entity based outside the Union has an establishment in a Member State, both the degree of stability of the arrangements and the effective exercise of activities in that Member State must be considered in the light of the specific nature of the economic activities and the provision of services concerned. This is particularly true for undertakings offering services exclusively over the Internet[8]. The threshold for "stable arrangement[9]" can actually be quite low when the centre of activities of a controller concerns the provision of services online. As a result, in some circumstances, the presence of one single employee or agent of the non-EU entity may be sufficient to constitute a stable arrangement if that employee or agent acts with a sufficient degree of stability.

The fact that the non-EU entity responsible for the data processing does not have a branch or subsidiary in a Member State does not preclude it from having an establishment there within the meaning of EU data protection law. Although the notion of establishment is broad, it is not without limits. It is not possible to conclude that the non-EU entity has an establishment in the Union merely because the undertaking's website is accessible in the Union[10].

Example 1: A car manufacturing company with headquarters in the US has a fully-owned branch and office located in Brussels overseeing all its operations in Europe, including marketing and advertisement.

The Belgian branch can be considered to be a stable arrangement, which exercises real and effective activities in light of the nature of the economic activity carried out by the car manufacturing company. As such, the Belgian branch could therefore be considered as an establishment in the Union, within the meaning of the GDPR.

[4] The definition of "main establishment" is mainly relevant for the purpose of determining the competence of the supervisory authorities concerned according to Article 56 GDPR. See the WP29 Guidelines for identifying a controller or processor's lead supervisory authority (16/EN WP 244).

[5] Recital 22 of the GDPR: *"Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place within the Union. Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect."*

[6] See in particular *Google Spain SL, Google Inc. v AEPD, Mario Costeja González (C-131/12), Weltimmo v NAIH (C-230/14), Verein für Konsumenteninformation v Amazon EU (C-191/15) and Wirtschaftsakademie Schleswig-Holstein (C-210/16)*.

[7] Weltimmo, paragraph 31.

[8] Weltimmo, paragraph 29.

[9] Weltimmo, paragraph 31.

[10] CJEU, Verein für Konsumenteninformation v. Amazon EU Sarl, Case C 191/15, 28 July 2016, paragraph 76 (hereafter "Verein für Konsumenteninformation").

Once it is concluded that a controller or processor is established in the EU, an *in concreto* analysis should then follow to determine whether the processing is carried out in the context of the activities of this establishment, in order to determine whether Article 3(1) applies. If a controller or processor established outside the Union exercises "a real and effective activity - even a minimal one" - through "stable arrangements", regardless of its legal form (e.g. subsidiary, branch, office…), in the territory of a Member State, this controller or processor can be considered to have an establishment in that Member State[11]. It is therefore important to consider whether the processing of personal data takes place "in the context of the activities of" such an establishment as highlighted in Recital 22.

b) Consideration 2: Processing of personal data carried out "in the context of the activities of" an establishment

Article 3(1) confirms that it is not necessary that the processing in question is carried out "by" the relevant EU establishment itself; the controller or processor will be subject to obligations under the GDPR whenever the processing is carried out "in the context of the activities" of its relevant establishment. The EDPB recommends that determining whether an entity based in the EU is to be considered as an establishment of the controller or processor for the purposes of Article 3(1) is made on a case-by-case basis and based on an analysis *in concreto*. Each scenario must be assessed on its own merits, taking into account the specific facts of the case.

The EDPB considers that, for the purpose of Article 3(1), the meaning of "*processing in the context of the activities of an establishment of a controller or processor" is* to be understood in light of the relevant case law. On the one hand, with a view to fulfilling the objective of ensuring effective and complete protection, the meaning of "in the context of the activities of an establishment" cannot be interpreted restrictively[12]. On the other hand, the existence of an establishment within the meaning of the GDPR should not be interpreted too broadly to conclude that the existence of any presence in the EU with even the remotest links to the data processing activities of a non-EU entity will be sufficient to bring this processing within the scope of EU data protection law. Some commercial activity led by a non-EU entity within a Member State may indeed be so far removed from the processing of personal data by this entity that the existence of the commercial activity in the EU would not be sufficient to bring that data processing within the scope of EU data protection law[13].

i) *Relationship between a data controller or processor outside the Union and a local establishment in the Union*

The activities of a local establishment in a Member state and the data processing activities of a data controller or processor established outside the EU may be inextricably linked, and thereby may trigger the applicability of EU law, even if that local establishment is not actually taking any role in the data processing itself[14]. If a case by case analysis on the facts shows that

[11] See in particular para 29 of the Weltimmo judgment, which emphasizes a flexible definition of the concept of 'establishment' and clarifies that 'the degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned.'

[12] Weltimmo, paragraph 25 and Google Spain, paragraph 53.

[13] WP 179 update - Update of Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain, 16th December 2015

[14] CJEU, Google Spain, Case C 131/12

there is an inextricable link between the activities of an EU establishment and the processing of data carried out by a non-EU controller, EU law will apply to that processing by the non-EU entity, whether or not the EU establishment plays a role in that processing of data[15].

ii) Revenue raising in the Union

Revenue-raising in the EU by a local establishment, to the extent that such activities can be considered as "inextricably linked" to the processing of personal data taking place outside the EU and individuals in the EU, may be indicative of processing by a non-EU controller or processor being carried out "in the context of the activities of the EU establishment", and may be sufficient to result in the application of EU law to such processing[16].

The EDPB recommends that non-EU organisations undertake an assessment of their processing activities, first by determining whether personal data are being processed, and secondly by identifying potential links between the activity for which the data is being processed and the activities of any presence of the organisation in the Union. If such a link is identified, the nature of this link will be key in determining whether the GDPR applies to the processing in question, and must be assessed against the elements listed above.

Example 2: An e-commerce website operated by a company based in China, whereas the data processing activities of which are exclusively carried out in China, has established a European office in Berlin in order to lead and implement commercial prospection and marketing campaigns towards EU markets.

In this case, it can be considered that the activities of the European office in Berlin are inextricably linked to the processing of personal data carried out by the Chinese e-commerce website, insofar as the commercial prospection and marketing campaign towards EU markets notably serve to make the service offered by the e-commerce website profitable. The processing of personal data by the Chinese company can therefore be considered as carried out in the context of the activities of the European office, as an establishment in the Union, and therefore be subject to the provisions of the GDPR as per its Article 3(1).

Example 3: A hotel and resort chain in South Africa offers package deals through its website, available in English, German, French and Spanish. The company does not have any office, representation or stable arrangement in the EU.

In this case, in the absence of any representation or stable arrangement of the hotel and resort chain within the territory of the Union, it appears that no entity linked to this data controller in South Africa can qualify as an establishment in the EU within the meaning of the GDPR. Therefore the processing at stake cannot be subject to the provisions of the GDPR, as per Article 3(1).

[15] WP 179 update - Update of Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain, 16th December 2015

[16] This may potentially be the case, for example, for any foreign operator with a sales office or some other presence in the EU, even if that office has no role in the actual data processing, in particular where the processing takes place in the context of the sales activity in the EU and the activities of the establishment are aimed at the inhabitants of the Member States in which the establishment is located (WP179 update).

However, it must be analysed *in concreto* whether the processing carried out by this data controller established outside the EU can be subject to the GDPR, as per Article 3(2).

c) Consideration 3: application of the GDPR to the establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not

As per Article 3(1), the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union triggers the application of the GDPR and the related obligations for the data controller or processor concerned.

The text of the GDPR specifies that the Regulation applies to processing in the context of the activities of an establishment in the EU "*regardless of whether the processing takes place in the Union or not*". It is the presence, through an establishment, of a data controller or processor in the EU and the fact that a processing takes place in the context of the activities of this establishment that trigger the application of the GDPR to its processing activities. The place of processing is therefore not relevant in determining whether or not the processing, carried out in the context of the activities of an EU establishment, falls within the scope of the GDPR.

Example 4: A French company has developed a car-sharing application exclusively addressed to customers in Morocco, Algeria and Tunisia. The service is only available in those three countries but all personal data processing activities are carried out by the data controller in France.

While the collection of personal data takes place in non-EU countries, the subsequent processing of personal data in this case is carried out in the context of the activities of an establishment of a data controller in the Union. Therefore, even though processing relates to personal data of data subjects who are not in the Union, the provisions of the GDPR will apply to the processing carried out by the French company, as per Article 3(1).

Example 5: A pharmaceutical company with headquarters in Stockholm has located all its personal data processing activities with regards to its clinical trial data in its branch based in Singapore. According to the company structure, the branch is not a legally distinct entity and the Stockholm headquarter determines the purpose and means of the data processing carried out on its behalf by its branch based in Singapore.

In this case, while the processing activities are taking place in Singapore, that processing is carried out in the context of the activities of the pharmaceutical company in Stockholm i.e. of a data controller established in the Union. The provisions of the GDPR therefore apply to such processing, as per Article 3(1).

In determining the territorial scope of the GDPR, geographical location will be important under Article 3(1) with regard to the place of establishment of:

- the controller or processor itself (is it established inside or outside the Union?);
- any business presence of a non-EU controller or processor (does it have an establishment in the Union?)

However, geographical location is not important for the purposes of Article 3(1) with regard to the place in which processing is carried out, or with regard to the location of the data subjects in question.

The text of Article 3(1) does not restrict the application of the GDPR to the processing of personal data of individuals who are in the Union. The EDPB therefore considers that any personal data processing in the context of the activities of an establishment of a controller or processor in the Union would fall under the scope of the GDPR, regardless of the location or the nationality of the data subject whose personal data are being processed. This approach is supported by Recital 14 of the GDPR which states that "*[t]he protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data.*"

d) Application of the establishment criterion to controller and processor

As far as processing activities falling under the scope of Article 3(1) are concerned, the EDPB considers that such provisions apply to controllers and processors whose processing activities are carried out in the context of the activities of their establishment in the EU. While acknowledging that the requirements for establishing the relationship between a controller and a processor[17] does not vary depending on the geographical location of the establishment of a controller or processor, the EDPB takes the view that when it comes to the identification of the different obligations triggered by the applicability of the GDPR, the processing by each entity must be considered separately.

The GDPR envisages different and dedicated provisions or obligations applying to data controllers and processors, and as such, should a data controller or processor be subject to the GDPR as per Article 3(1), the related obligations would apply to them respectively and separately. In this context, the EDPB notably deems that a processor in the EU should not be considered to be an establishment of a data controller within the meaning of Article 3(1) merely by virtue of its status as processor. The existence of a relationship between a controller and a processor does not necessarily trigger the application of the GDPR to both, should one of these two entities not be established in the Union.

An organisation processing personal data on behalf of, and on instructions from, another organisation (the client company) will be acting as processor for the client company (the controller). Where a processor is established in the Union, it will be required to comply with the obligations imposed on processors by the GDPR (the 'GDPR processor obligations'). If the controller instructing the processor is also located in the Union, that controller will be required to comply with the obligations imposed on controllers by the GDPR (the 'GDPR controller obligations').

i) Processing by a controller in the EU using a processor not subject to the GDPR

Where a controller subject to GDPR chooses to use a processor located outside the Union and not subject to the GDPR, it will be necessary for the controller to ensure by contract or other legal act that the processor processes the data in accordance with the GDPR. Article 28(3) provides that the processing by a processor shall be governed by a contract or other legal act. The controller will therefore need to ensure that it puts in place a contract with the processor addressing all the requirements set out in Article 28(3). In addition, it is likely that, in order to ensure that it has complied

[17] In accordance with Article 28, the EDPB recalls that processing activities by a processor on behalf of a controller shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller, and that controllers shall only use processors providing sufficient guarantees to implement appropriate measures in such manner that processing will meet the requirement of the GDPR and ensure the protection of data subjects' rights.

with its obligations under Article 28(1) – to use only a processor providing sufficient guarantees to implement measures in such a manner that processing will meet the requirements of the Regulation and protect the rights of data subjects – the controller may need to consider imposing, by contract, the obligations placed by the GDPR on processors subject to it. That is to say, the controller would have ensure that the processor not subject to the GDPR complies will the obligations, governed by a contract or other legal act under Union or Member State law, referred to Article 28(3).

The processor not subject to the GDPR will therefore become indirectly subject to some obligations imposed by controllers subject to the GDPR by virtue of contractual arrangements under Article 28. Moreover, provisions of Chapter V of the GDPR may apply.

Example 6: A Finnish research institute conducts research regarding the Sami people. The institute launches a project that only concerns Sami people in Russia. For this project the institute uses a processor based in Canada.

While the GDPR would not formally apply directly to the Canadian processor, the Finnish controller has a duty to only use processors that provide sufficient guarantees to implement appropriate measures in such manner that processing will meet the requirement of the GDPR and ensure the protection of data subjects' rights. The Finnish controller needs to enter into a data processing agreement with the Canadian processor, and the processor's duties will be stipulated in that legal act.

ii) *Processing in the context of the activities of an establishment of a processor in the Union*

Whilst case law provides us with a clear understanding of the effect of processing being carried out in the context of the activities of an EU establishment of the controller, the effect of processing being carried out in the context of the activities of an EU establishment of a processor is less clear.

The EDPB emphasises that it is important to consider the establishment of the controller and processor separately.

The first question is whether the controller itself has an establishment in the Union, and is processing in the context of the activities of that establishment. Assuming the controller is not considered to be processing in the context of its own establishment in the Union, that controller will not be subject to GDPR controller obligations by virtue of Article 3(1) (although it may still be caught by Article 3(2)). Unless other factors are at play, the processor's EU establishment will not be considered to be an establishment in respect of the controller.

The separate question then arises of whether the processor is processing in the context of an establishment in the Union. If so, the processor will be subject to GDPR processor obligations. However, this does not cause the non-EU controller to become subject to the GDPR controller obligations. That is to say, a "non-EU" controller (as described above) will not become subject to the GDPR simply because it chooses to use a processor in the Union.

By instructing a processor in the Union, the controller not subject to GDPR is not carrying out processing "in the context of the activities of the processor in the Union". The processing is carried out in the context of the controller's own activities; the processor is merely providing a processing service[18]

[18] The offering of a processing service in this context cannot be considered either as an offer of a service to data subjects in the Union.

which is not “inextricably linked” to the activities of the controller. As stated above, in the case of a data processor established in the Union and carrying out processing on behalf of a data controller established outside the Union and not subject to the GDPR as per Article 3(2), the EDPB considers that the processing activities of the data controller would not be deemed as falling under the territorial scope of the GDPR merely because it is processed on its behalf by a processor established in the Union. However, even though the data controller is not established in the Union and is not subject to the provisions of the GDPR as per Article 3(2), the data processor, as it is established in the Union, will be subject to the relevant provisions of the GDPR as per Article 3(1).

Example 7: A processor established in Spain has entered in a contract with a Mexican retail company, the data controller, for the processing of its clients’ personal data. The Mexican company offers and directs its services exclusively to the Mexican market and its processing concerns exclusively data subjects located outside the Union.

In this case, the Mexican retail company does not target persons on the territory of the Union through the offering of goods or services, nor it does monitor the behaviour of person on the territory of the Union. The processing by the data controller, established outside the Union, is therefore not subject to the GDPR as per Article 3(2).

While the provisions of the GDPR does not apply to the data controller, the data processor, as a processor established in Spain, will be required to comply with the processor obligations imposed by the regulation for any processing carried out in the context of its activities.

When it comes to a data processor carrying out processing on behalf of a data controller established outside the Union and which does not fall under the territorial scope of the GDPR as per Article 3(2), the processor will be subject to the following relevant GDPR provisions directly applicable to data processors:

- The obligations imposed on processors under Article 28 (2), (3), (4), (5) and (6), on the duty to enter into a data processing agreement, with the exception of those relating to the assistance to the data controller in complying with its (the controller’s) own obligations under the GDPR.
- The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law, as per Article 29 and Article 32(4).
- Where applicable, the processor shall maintain a record of all categories of processing carried out on behalf of a controller, as per Article 30(2).
- Where applicable, the processor shall, upon request, cooperate with the supervisory authority in the performance of its tasks, as per Article 31.
- The processor shall implement technical and organisational measures to ensure a level of security appropriate to the risk, as per Article 32.
- The processor shall notify the controller without undue delay after becoming aware of a personal data breach, as per Article 33.
- Where applicable, the processor shall designate a data protection officer as per Articles 37 and 38.
- The provisions on transfers of personal data to third countries or international organisations, as per Chapter V.

In addition, since such processing would be carried out in the context of the activities of an establishment of a processor in the Union, the EDPB recalls that the processor will have to ensure its processing remains lawful with regards to other obligations under EU or national law. Article 28(3) also

specifies that "*the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.*"

In line with the positions taken previously by the Article 29 Working Party, the EDPB takes the view that the Union territory cannot be used as a "data haven", for instance when a processing activity entails inadmissible ethical issues[19], and that certain legal obligations beyond the application of EU data protection law, in particular European and national rules with regard to public order, will in any case have to be respected by any data processor established in the Union, regardless of the location of the data controller. This consideration also takes into account the fact that by implementing EU law, provisions resulting from the GDPR and related national laws, are subject to the Charter of Fundamental Rights of the Union. However, this does not impose additional obligations on controllers outside the Union not falling under the territorial scope of the GDPR as per Article 3(2).

2 APPLICATION OF THE TARGETING CRITERION – ART 3(2)

The absence of an establishment in the Union does not necessarily mean that a data controller or processor established in a third country would be excluded from the scope of the GDPR, since Article 3(2) sets out the circumstances in which the GDPR applies to a controller or processor not established in the Union, depending on their processing activities.

In this context, the EDPB confirms that in the absence of an establishment in the Union, a controller or processor cannot benefit from the one-stop shop mechanism provided for in Article 56 of the GDPR. Indeed, the GDPR's cooperation and consistency mechanism only applies to controllers and processors with an establishment, or establishments, within the European Union[20].

While the present guidelines aims at clarifying the territorial scope of the GDPR, the EDPB also wish to stress that controllers and processors will also need to take into account other applicable texts, such as for instance EU or Member States' sectorial legislation and national laws. Several provisions of the GDPR indeed allow Member States to introduce additional conditions and to define a specific data protection framework at national level in certain areas or in relation to specific processing situations. Controllers and processors must therefore ensure that they are aware of, and comply with, these additional conditions and frameworks which may vary from one Member State to the other. Such variations in the data protection provisions applicable in each Member State are particularly notable in relation to the provisions of Article 8 (providing that the age at which children may give valid consent in relation to the processing of their data by information society services may vary between 13 and 16), of Article 9 (in relation to the processing of special categories of data), Article 23 (restrictions) or concerning the provisions contained in Chapter IX of the GDPR (freedom of expression and information; public access to official documents; national identification number; employment context; processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes; secrecy; churches and religious associations).

Article 3(2) of the GDPR provides that *"this Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union."*

[19] WP169 - Opinion 1/2010 on the concepts of "controller" and "processor", adopted on 16th February 2010
[20] WP244, 13th December 2016, Guidelines for identifying a controller or processor's lead supervisory authority.

The application of the "targeting criterion" towards data subjects who are in the Union, as per Article 3(2), can be triggered by two distinct and alternative types of activities carried out by a controller or processor not established in the Union. In addition to being applicable only to a controller or processor not established in the Union, the targeting criteria largely focus on what the "processing activities" are "related to", which is to be considered on a case-by-case basis.

In assessing the conditions for the application of the criteria, the EDPB therefore recommends a twofold approach, in order to determine first that the processing relates to personal data of data subjects who are in the Union, and second whether it relates to the offering of goods or services or to the monitoring of data subjects' behaviour in the Union.

a) Consideration 1: Data subjects in the Union

The wording of Article 3(2) refers to "*personal data of data subjects who are in the Union*". The application of the targeting criteria is therefore not limited by the citizenship, residence or other type of legal status of the data subject whose personal data are being processed. Recital 14 confirms this interpretation and states that *"[t]he protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data".*

This provision of the GDPR reflects EU primary law which also lays down a broad scope for the protection of personal data, not limited to EU citizens, with Article 8 of the Charter of Fundamental Rights providing that the right to the protection of personal data is not limited but is for "everyone"[21].

While the location of the data subject in the territory of the Union is a determining factor for the application of the targeting criterion as per Article 3(2), the EDPB considers that the nationality or legal status of a data subject who is in the Union cannot limit or restrict the territorial scope of the Regulation.

The requirement that the data subject be located in the Union must be assessed at the moment when the relevant trigger activity takes place, i.e. at the moment of offering of goods or services or the moment when the behaviour is being monitored, regardless of the duration of the offer made or monitoring undertaken.

Example 8: A start-up established in the USA, without any business presence or establishment in the EU, provides a city-mapping application for tourists. The application processes personal data concerning the location of customers using the app (the data subjects) once they start using the application in the city they visit, in order to offer targeted advertisement for places to visits, restaurant, bars and hotels. The application is available for tourists while they visit New York, San Francisco, Toronto, London, Paris and Rome.

The US start-up, via its city mapping application, is offering services to individuals in the Union (specifically in London, Paris and Rome). The processing of the EU-located data subjects' personal data in connection with the offering of the service falls within the scope of the GDPR as per Article 3(2).

[21] Charter of Fundamental Right of the European Union, Article 8(1), « Everyone has the right to the protection of personal data concerning him or her".

The EDPB also wishes to underline that the fact of processing personal data of an individual in the Union alone is not sufficient to trigger the application of the GDPR to processing activities of a controller or processor not established in the Union. The element of "targeting" individuals in the EU, either by offering goods or services to them or by monitoring their behaviour (as further clarified below), must always be present in addition.

Example 9: A U.S. citizen is travelling through Europe during his holidays. While in Europe, he downloads and uses a news app that is offered by a U.S. company. The app is exclusively directed at the U.S. market. The collection of the U.S. tourist's personal data via the app by the U.S. company is not subject to the GDPR.

Moreover, it should be noted that the processing of personal data of EU citizens or residents that takes place in a third country does not trigger the application of the GDPR, as long as the processing is not related to a specific offer directed at individuals in the EU or to a monitoring of their behaviour in the Union.

Example 10: A bank in Taiwan has customers that are residing in Taiwan but hold German citizenship. The bank is active only in Taiwan; its activities are not directed at the EU market. The bank's processing of the personal data of its German customers is not subject to the GDPR.

Example 11: The Canadian immigration authority processes personal data of EU citizens when entering the Canadian territory for the purpose of examining their visa application. This processing is not subject to the GDPR.

b) Consideration 2a: offering of goods or services, irrespective of whether a payment of the data subject is required, to data subjects in the Union

The first activity triggering the application of Article 3(2) is the "offering of goods or services", a concept which has been further addressed by EU law and case law, which should be taken into account when applying the targeting criterion. The offering of services also includes the offering of information society services, defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 as "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*".

Article 3(2)(a) specifies that the targeting criterion concerning the offering of goods or services applies irrespective of whether a payment by the data subject is required. Whether the activity of a controller or processor not established in the Union is to be considered as an offer of a good or a service is not therefore dependent whether payment is made in exchange for the goods or services provided[22].

Another key element to be assessed in determining whether the Article 3(2)(a) targeting criterion can be met is whether the offer of goods or services is directed at a person in the Union, or in other words,

[22] See, in particular, CJEU, C-352/85, Bond van Adverteerders and Others vs. The Netherlands State, 26 April 1988, par. 16), and CJEU, C-109/92, Wirth [1993] Racc. I-6447, par. 15

whether the conduct on the part of the controller or processor demonstrates its intention to offer goods or a services to a data subject located in the Union. Recital 23 of the GDPR indeed clarifies that "*in order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union.*"

The recital further specifies that "*whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union."*

Processing activities which are "related" to the activity which triggered application of Article 3(2) also fall within the territorial scope of the GDPR. The EDPB considers that there needs to be a connection between the processing activity and the offering of good or service, but both direct and indirect connections are relevant and to be taken into account.

The elements listed in Recital 23 echo and are in line with the CJEU case law based on Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and in particular its Article 15(1)(c). In *Pammer v Reederei Karl Schlüter GmbH & Co and Hotel Alpenhof v Heller* (Joined cases C-585/08 and C-144/09), the Court was asked to clarify what it means to "direct activity" within the meaning of Article 15(1)(c) of Regulation 44/2001 (*Brussels I*). The Court held that, in order to determine whether a trader can be considered to be "directing" its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Brussels I, the trader must have manifested its intention to establish commercial relations with such consumers. In this context, the Court considered evidence able to demonstrate that the trader was envisaging doing business with consumers domiciled in a Member State.

While the notion of "directing an activity" differs from the "offering of goods or services", the EDPB deems this case law in in *Pammer v Reederei Karl Schlüter GmbH & Co and Hotel Alpenhof v Heller (Joined cases C-585/08 and C-144/09)*[23] might be of assistance when considering whether goods or services are offered to a data subject in the Union. When taking into account the specific facts of the case, the following factors could therefore *inter alia* be taken into consideration, possibly in combination with one another:

- The EU or at least one Member State is designated by name with reference to the good or service offered;
- The data controller or processor pays a search engine operator for an internet referencing service in order to facilitate access to its site by consumers in the Union; or the controller or processor has launched marketing and advertisement campaigns directed at an EU country audience
- The international nature of the activity at issue, such as certain tourist activities;
- The mention of dedicated addresses or phone numbers to be reached from an EU country;

[23] It is all the more relevant that, under Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in absence of choice of law, this criterion of "directing activity" to the country of the consumer's habitual residence is taken into account to designate the law of the consumer's habitual residence as the law applicable to the contract.

- The use of a top-level domain name other than that of the third country in which the controller or processor is established, for example ".de", or the use of neutral top-level domain names such as ".eu";
- The description of travel instructions from one or more other EU Member States to the place where the service is provided;
- The mention of an international clientele composed of customers domiciled in various EU Member States, in particular by presentation of accounts written by such customers;
- The use of a language or a currency other than that generally used in the trader's country, especially a language or currency of one or more EU Member states;
- The data controller offers the delivery of goods in EU Member States.

As already mentioned, several of the elements listed above, if taken alone may not amount to a clear indication of the intention of a data controller to offer goods or services to data subjects in the Union, however, they should each be taken into account in any *in concreto* analysis in order to determine whether the combination of factors relating to the data controller's commercial activities can together be considered as an offer of goods or services directed at data subjects in the Union.

It is however important to recall that Recital 23 confirms that the mere accessibility of the controller's, processor's or an intermediary's website in the Union, the mention on the website of its e-mail or geographical address, or of its telephone number without an international code, does not, of itself, provide sufficient evidence to demonstrate the controller or processor's intention to offer goods or a services to a data subject located in the Union.

Example 12: A website, based and managed in Turkey, offers services for the creation, edition, printing and shipping of personalised family photo albums. The website is available in English, French, Dutch and German and payments can be made in Euros or Sterling. The website indicates that photo albums can only be delivered by post mail in the UK, France, Benelux countries and Germany.

In this case, it is clear that the creation, editing and printing of personalised family photo albums constitute a service within the meaning of EU law. The fact that the website is available in four languages of the EU and that photo albums can be delivered by post in six EU Member States demonstrates that there is an intention on the part of the Turkish website to offer its services to individuals in the Union.

As a consequence, it is clear that the processing carried out by the Turkish website, as a data controller, relates to the offering of a service to data subjects in the Union and is therefore subject to the obligations and provisions of the GDPR, as per its Article 3(2)(a).

In accordance with Article 27, the data controller will have to designate a representative in the Union.

Example 13: A private company based in Monaco processes personal data of its employees for the purposes of salary payment. A large number of the company's employees are French and Italian residents.

In this case, while the processing carried out by the company relates to data subjects in France and Italy, it does not takes place in the context of an offer of goods or services. Indeed human resources management, including salary payment by a third-country company cannot be considered as an offer

of service within the meaning of Art 3(2)a. The processing at stake does not relate to the offer of goods or services to data subjects in the Union (nor to the monitoring of behaviour) and, as a consequence, is not subject to the provisions of the GDPR, as per Article 3.

This assessment is without prejudice to the applicable law of the third country concerned.

Example 14: A Swiss University in Zurich is launching its Master degree selection process, by making available an online platform where candidates can upload their CV and cover letter, together with their contact details. The selection process is open to any student with a sufficient level of German and English and holding a Bachelor degree. The University does not specifically advertise to students in EU Universities, and only takes payment in Swiss currency.

As there is no distinction or specification for students from the Union in the application and selection process for this Master degree, it cannot be established that the Swiss University has the intention to target students from a particular EU member states. The sufficient level of German and English is a general requirement that applies to any applicant whether a Swiss resident, a person in the Union or a student from a third country. Without other factors to indicate the specific targeting of students in EU member states, it therefore cannot be established that the processing in question relates to the offer of an education service to data subject in the Union, and such processing will therefore not be subject to the GDPR provisions.

The Swiss University also offers summer courses in international relations and specifically advertise this offer in German and Austrian universities in order to maximise the courses' attendance. In this case, there is a clear intention from the Swiss University to offer such service to data subjects who are in the Union, and the GDPR will apply to the related processing activities.

c) Consideration 2b: monitoring of data subjects' behaviour

The second type of activity triggering the application of Article 3(2) is the monitoring of data subject behaviour as far as their behaviour takes place within the Union.

Recital 24 clarifies that "*[t]he processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union.*"

For Article 3(2)(b) to trigger the application of the GDPR, the behaviour monitored must first relate to a data subject in the Union and, as a cumulative criterion, the monitored behaviour must take place within the territory of the Union.

The nature of the processing activity which can be considered as behavioural monitoring is further specified in Recital 24 which states that *"in order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes*." While Recital 24 exclusively relates to the monitoring of a behaviour through the tracking of a person on the internet, the EDPB considers that tracking through other types of network or technology involving personal data

processing should also be taken into account in determining whether a processing activity amounts to a behavioural monitoring, for example through wearable and other smart devices.

As opposed to the provision of Article 3(2)(a), neither Article 3(2)(b) nor Recital 24 introduce a necessary degree of "intention to target" on the part of the data controller or processor to determine whether the monitoring activity would trigger the application of the GDPR to the processing activities. However, the use of the word "monitoring" implies that the controller has a specific purpose in mind for the collection and subsequent reuse of the relevant data about an individual's behaviour within the EU. The EDPB does not consider that any online collection or analysis of personal data of individuals in the EU would automatically count as "monitoring". It will be necessary to consider the controller's purpose for processing the data and, in particular, any subsequent behavioural analysis or profiling techniques involving that data. The EDPB takes into account the wording of Recital 24, which indicates that to determine whether processing involves monitoring of a data subject behaviour, the tracking of natural persons on the Internet, including the potential subsequent use of profiling techniques, is a key consideration.

The application of Article 3(2)(b) where a data controller or processor monitors the behaviour of data subjects who are in the Union could therefore encompass a broad range of monitoring activities, including in particular:

- Behavioural advertisement
- Geo-localisation activities, in particular for marketing purposes
- Online tracking through the use of cookies or other tracking techniques such as fingerprinting
- Personalised diet and health analytics services online
- CCTV
- Market surveys and other behavioural studies based on individual profiles
- Monitoring or regular reporting on an individual's health status

Example 15: A marketing company established in the US provides advice on retail layout to a shopping centre in France, based on an analysis of customers' movements throughout the centre collected through Wi-Fi tracking.

The analysis of a customers' movements within the centre through Wi-Fi tracking will amount to the monitoring of individuals' behaviour. In this case, the data subjects' behaviour takes place in the Union since the shopping centre is located in France. The marketing company, as a data controller, is therefore subject to the GDPR in respect of the processing of this data for this purpose as per its Article 3(2)(b).

In accordance with Article 27, the data controller will have to designate a representative in the Union.

Example 16: An app developer established in Canada with no establishment in the Union monitors the behaviour of data subject in the Union and is therefore subject to the GDPR, as per Article 3(2)b. The developer uses a processor established in the US for the app optimisation and maintenance purposes**.**

In relation to this processing, the Canadian controller has the duty to only use appropriate processors and to ensure that its obligations under the GDPR are reflected in the contract or legal act governing the relation with its processor in the US, pursuant to Article 28.

3 PROCESSING IN A PLACE WHERE MEMBER STATE LAW APPLIES BY VIRTUE OF PUBLIC INTERNATIONAL LAW

Article 3(3) provides that "*[t]his Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law*". This provision is expanded upon in Recital 25 which states that "*[w]here Member State law applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post.*"

The definitions and status of diplomatic missions and consular posts are laid down in international law, respectively in the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

The EDPB considers that the GDPR applies to personal data processing carried out by EU Member States' embassies and consulates, insofar as such processing falls within the material scope of the GDPR, as defined in its Article 2. A Member State's diplomatic or consular post, as a data controller or processor, would then be subject to all relevant provisions of the GDPR, including when it comes to the rights of the data subject, the general obligations related to controller and processor and the transfers of personal data to third countries or international organisations.

Example 17: The Dutch consulate in Kingston, Jamaica, opens an online application process for the recruitment of local staff in order to support its administration.

While the Dutch consulate in Kingston, Jamaica, is not established in the Union, the fact that it is a consular post of an EU country where Member State law applies by virtue of public international law renders the GDPR applicable to its processing of personal data, as per Article 3(3).

Example 18: A German cruise ship travelling in international waters is processing data of the guests on board for the purpose of tailoring the in-cruise entertainment offer.

While the ship is located outside the Union, in international waters, the fact that it is German-registered cruise ship means that by virtue of public international law the GDPR shall be applicable to its processing of personal data, as per Article 3(3).

4 REPRESENTATIVE OF CONTROLLERS OR PROCESSORS NOT ESTABLISHED IN THE UNION

Data controllers or processors subject to the GDPR as per its Article 3(2) are under the obligation to designate a representative in the Union. A controller or processor not established in the Union but subject to the GDPR failing to designate a representative in the Union would therefore be in breach of the Regulation.

This provision is not entirely new since Directive 95/46/EC already provided for a similar obligation. Under the Directive, this provision concerned controllers not established on Community territory that, for purposes of processing personal data, made use of equipment, automated or otherwise, situated on the territory of a Member State. The GDPR imposes an obligation to designate a representative in

the Union to any controller or processor falling under the scope of Article 3(2), unless they meet the exemption criteria as per Article 27(2). In order to facilitate the application of this specific provision, the EDPB deems it necessary to provide further guidance on the designation process, establishment obligations and responsibilities of the representative in the Union as per Article 27.

It is worth noting that a controller or processor not established in the Union who has designated in writing a representative in the Union, in accordance with article 27 of the GDPR, does not fall within the scope of article 3(1), meaning that the presence of the representative within the Union does not constitute an "establishment" of a controller or processor by virtue of article 3(1).

a) Designation of a representative

Recital 80 clarifies that "*[t]he representative should be explicitly designated by a written mandate of the controller or of the processor to act on its behalf with regard to its obligations under this Regulation. The designation of such a representative does not affect the responsibility or liability of the controller or of the processor under this Regulation. Such a representative should perform its tasks according to the mandate received from the controller or processor, including cooperating with the competent supervisory authorities with regard to any action taken to ensure compliance with this Regulation."*

The written mandate referred to in Recital 80 shall therefore govern the relations and obligations between the representative in the Union and the data controller or processor established outside the Union, while not affecting the responsibility or liability of the controller or processor. The representative in the Union may be a natural or a legal person established in the Union able to represent a data controller or processor established outside the Union with regard to their respective obligations under the GDPR.

In practice, the function of representative in the Union can be exercised based on a service contract concluded with an individual or an organisation, and can therefore be assumed by a wide range of commercial and non-commercial entities, such as law firms, consultancies, private companies, etc… provided that such entities are established in the Union. One representative can also act on behalf of several non-EU controllers and processors.

When the function of representative is assumed by a company or any other type of organisation, it is recommended that a single individual be assigned as a lead contact and person "in charge" for each controller or processor represented. It would generally also be useful to specify these points in the service contract.

The EDPB does not consider the function of representative in the Union as compatible with the role of an external data protection officer ("DPO") which would be established in the Union. Article 38(3) establishes some basic guarantees to help ensure that DPOs are able to perform their tasks with a sufficient degree of autonomy within their organisation. In particular, controllers or processors are required to ensure that the DPO "*does not receive any instructions regarding the exercise of [his or her] tasks*". Recital 97 adds that DPOs, "*whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner*"[24]. Such requirement for a sufficient degree of autonomy and independence of a data protection officer does not appear to be compatible with the function of representative in the Union, which subject to a mandate by a controller

[24] WP29 Guidelines on Data Protection Officers ('DPOs'), WP 243 rev.01

or processor and will be acting on its behalf and therefore under its direct instruction[25]. Furthermore, and to complement this interpretation, the EDPB recalls the position already taken by the WP29 stressing that "*a conflict of interests may also arise for example if an external DPO is asked to represent the controller or processor before the Courts in cases involving data protection issues*". Given the possible conflict of obligation and interests in cases of enforcement proceedings, the EDPB does not consider the function of a data controller representative in the Union as compatible with the role of data processor for that same data controller.

While the GDPR does not foresee any obligation to data controller or the representative itself to notify the designation of the latter to a supervisory authority, the EDPB recalls that, in accordance with Articles 13(1)a and 14(1)a, as part of their information obligations, controllers shall provide data subjects information as to the identity of their representative in the Union. This information shall for example be included in the privacy notice or upfront information provided to data subjects at the moment of data collection. A controller not established in the Union but falling under Article 3(2) and failing to inform data subjects who are in the Union of the identity of its representative would be in breach of its transparency obligations as per the GDPR. Such information should furthermore be easily accessible to supervisory authorities in order to facilitate the establishment of a contact for cooperation needs.

Example 19: The website referred to in example 12, based and managed in Turkey, offers services for the creation, edition, printing and shipping of personalised family photo albums. The website is available in English, French, Dutch and German and payments can be made in Euros or Sterling. The website indicates that photo albums can only be delivered by post mail in the UK, France, Benelux countries and Germany. This website being subject to the GDPR, as per its Article 3(2)(a), the data controller must designate a representative in the Union.

The representative must be established in one of the Member States where the service offered is available, in this case either in the UK, France, Belgium, Netherlands, Luxembourg or Germany. The name and contact details of the data controller must be part of the information made available online to data subjects once they start using the service by creating their photo album. It must also appear in the website general privacy notice.

b) Exemptions from the designation obligation[26]

While the application of Article 3(2) triggers the obligation to designate a representative in the Union for controllers or processors established outside the Union, Article 27(2) foresees derogation from the mandatory designation of a representative in the Union, in two distinct cases:

- processing is "occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10", and such processing "is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing". While the GDPR does not define what constitutes large-scale processing, the WP29 has previously recommended in its guidelines WP243 on data

[25] An external DPO also acting as representative in the Union could for example be in a situation where he is instructed to communicate to a data subject a decision or measure taken by the controller or processor which he or she had deemed uncompliant with the provisions of the GDPR and advised against.

[26] Part of the criteria and interpretation laid down in WP243 (Data Protection Officer) can be used as a basis for the exemptions to the designation obligation.

protection officers (DPOs) that the following factors, in particular, be considered when determining whether the processing is carried out on a large scale: the number of data subjects concerned - either as a specific number or as a proportion of the relevant population; the volume of data and/or the range of different data items being processed; the duration, or permanence, of the data processing activity; the geographical extent of the processing activity[27].

Or

- processing is carried out "by a public authority or body".

c) Establishment in one of the Member States where the data subjects whose personal data are processed are

Article 27(3) foresees that "the representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are". In cases where a significant proportion of data subjects whose personal data are processed are located in one particular Member State, the EDPB recommends, as a good practice, that the representative is established in that same Member State. However, the representative must remain easily accessible for data subjects in Member States where it is not established and where the services or goods are being offered or where the behaviour is being monitored.

The EDPB confirms that the criterion for the establishment of the representative in the Union is the location of data subjects whose personal data are being processed. The place of processing, even by a processor established in another Member State, is here not a relevant factor for determining the location of the establishment of the representative.

Example 20: An Indian pharmaceutical company, with neither business presence nor establishment in the Union and subject to the GDPR as per Article 3(2), sponsors clinical trials carried out by investigators (hospitals) in Belgium, Luxembourg and the Netherlands. The majority of patients participating to the clinical trials are situated in Belgium.

The Indian pharmaceutical company, as a data controller, shall designate a representative in the Union established in one of the three Member States where patients, as data subjects, are participating to the clinical trial (Belgium, Luxembourg or the Netherlands). Since most patients are Belgian residents, it is recommended that the representative is established in Belgium. Should this be the case, the representative in Belgium should however be easily accessible to data subjects and supervisory authorities in the Netherlands and Luxembourg.

In this specific case, the representative in the Union could be the legal representative of the sponsor in the Union, as per Article 74 of Regulation (EU) 536/2014 on clinical trials, provided it is established in one of the three Member States, and that both functions are governed by and exercised in compliance with each legal framework.

[27] Article 29 Working Party guidelines on data protections officers (DPOs), adopted on 13th December 2016, as last revised on 5th April 2017, WP 243 rev.01.

d) Obligations and responsibilities of the representative

The representative in the Union acts on behalf of the controller or processor it represents with regards to the controller or processor's obligations under the GDPR. This implies notably the obligations relating to the exercise of data subject rights, and in this regard and as already stated, the identity and contact details of the representative must be provided to data subjects in accordance with articles 13 and 14. While not itself responsible for complying with data subject rights, the legal representative must facilitate the communication between data subjects and the controller or processor represented, in order to make the exercise of data subjects' rights are effective.

As per Article 30, the controller or processor's representative shall in particular maintain a record of processing activities under the responsibility of the controller or processor. The EDPB considers that the maintenance of this record is a joint obligation and that the controller or processor not established in the Union must provide to its representative with all accurate and updated information so that the record can be maintained and made available by the representative.

As clarified by recital 80, the representative should also perform its tasks according to the mandate received from the controller or processor, including cooperating with the competent supervisory authorities with regard to any action taken to ensure compliance with this Regulation. In practice, this means that a supervisory authority would contact the representative in connection with any matter relating to the compliance obligations of a controller or processor established outside the Union, and the representative shall be able to facilitate any informational or procedural exchange between a requesting supervisory authority and a controller or processor established outside the Union.

With the help of a team if necessary, the representative in the Union must therefore be in a position to efficiently communicate with data subjects and cooperate with the supervisory authorities concerned. This means that this communication must take place in the language or languages used by the supervisory authorities and the data subjects concerned. The availability of a representative is therefore essential in order to ensure that data subjects and supervisory authorities will be able to establish contact easily with the non-EU controller or processor.

In line with Recital 80 and Article 27(5), the designation of a representative in the Union does not affect the responsibility and liability of the controller or of the processor under the GDPR and shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves.

It should however be noted that the concept of the representative was introduced precisely with the aim of ensuring enforcement of the GDPR against controllers or processors that fall under Article 3(2) of the GDPR. To this end, it was the intention to enable enforcers to initiate enforcement action against a representative in the same way as against controllers or processors. This includes the possibility to impose administrative fines and penalties, and to hold representatives liable.

For the European Data Protection Board

The Chair

(Andrea Jelinek)

2019 Associations and the Law
Current Tax Topics

Paula Cozzi Goedert
Barnes & Thornburg LLP
pgoedert@btlaw.com

2019 ASSOCIATIONS AND THE LAW

CURRENT TAX TOPICS

Paula Cozzi Goedert
Barnes & Thornburg LLP
pgoedert@btlaw.com

1. Important Ruling on Exemptions on Re-filing for Tax Status

A. Revenue Procedure 2018-15 provides long awaited relief for tax-exempt organizations undergoing structure changes.

B. In the past, tax-exempt organizations were required to re-apply for tax-exempt status each time the structure changes. This meant that tax-exempt organizations were forced to choose between re-filing, which causes unwanted attention, and living with an undesirable structure.

C. Effective January 1, 2018, the corporate restructuring of a domestic business entity that is:

- classified as a corporation under Reg. §301.7701-2(b)(1) or (2), and
- recognized as exempt under Code Sec. 501(a) as an organization described in Code Section 501(c), will not be required to file a new application for exemption from tax for the surviving organization so long as the surviving entity is carrying out the same purpose as the exempt organization had been when it engaged in the restructuring. In addition, the organization must be in good standing with the state in which it is incorporated or formed (if an unincorporated association), and must continue to satisfy the organizational test described in Reg. §1.501(c)-1(b).

D. Excepted from these updated procedures are corporate restructurings in which the resulting organization is a disregarded entity, limited liability company, partnership, or foreign business entity, or the surviving entity obtains a new employer identification number. Any such surviving entity that desires exempt status under Code §501(a) must apply for exempt status.

2. New IRS Position on Royalties

A. The Internal Revenue Code exempts royalties from Federal income tax when received by a tax-exempt organization.

B. Section 512(b)(2) provides:

> There shall be excluded [from UBI] all royalties (including overriding royalties) whether measured by production or by gross or taxable income from the property, and all deductions directly connected with such income.

C. In Rev. Rul. 81-178, a 501(c)(5) organization of professional athletes received proceeds from licensing the use of the organization's “trademarks, trade names, service marks, copyrights, and members' names, photographs, likenesses, and facsimile signatures in connection with the distribution, sale, advertising, and promotion of merchandise or services.”

- The organization had the right to approve the "quality or style of the licensed products and services."
- The licensees, which were commercial organizations, agreed to refrain from any activities that would affect adversely the organization or its members, or the value of the licensed products or services.
- The licensees paid the organization either a percentage of gross sales or a flat sum.

D. The IRS takes the position that, notwithstanding Rev. Rul. 81-178, "royalty" for purposes of section 512(b)(2) has a different and narrower meaning than for other provisions of the Code because of the different policies underlying the rules for tax-exempt organizations.

E. The IRS has, over the years, sought to narrow the definition of royalties which are eligible for tax-exempt status.

F. In Disabled American Veterans v. United States, 227 Ct. Cl. 474, the exempt organization engaged in the rental of its mailing list, but, the organization itself performed all of the list management and list fulfillment functions. On the question of whether the list rental payments were royalties, the court of Claims concluded that the list rentals "[were] the product of extensive business activity by DAV and [did] not fit within the types of `passive' income set forth in section 512(b)."

G. A Technical Advice Memorandum, published on September 14, 2018 clarified, when a tax-exempt organization receives only subscription income from a publisher, and the publisher retains all advertising income, no portion of the subscription income need be re-characterized as taxable advertising income.

3. Independent Contractor or Employee?

A. IRS Authority On Independent Contractor Status

The IRS has focused for the last decade on the status of individuals as employees or independent contractors. This is a focus which has been highlighted in yearly announcements of top issues to be reviewed during an IRS audit. From our firm's experience, we find that field auditors are indeed focusing on any individual names listed on 1099s and reviewing the facts and circumstances to determine whether those individuals should be treated as employees.

In the past, the IRS focused on 20 factors which might indicate employee or independent contractor status. This focus has shifted to control by the payor over the actions of the individual. The fundamental question is who retains the right to determine the means and method by which a task is accomplished.

Other factors retain relevance. For example, the ability to require an individual to undertake a task is a sign that the individual is an employee. The association's obligation to pay any required assistants is a sign of employee status. The ability of the individual to make more or less money, based on the individual's control of expenses, is a factor which indicates contractor status.

Another factor of importance to the Internal Revenue Service is whether the individual's services are an integral part of the association. For this reason, we recommend that Editors not be included as such in the governance structure of the association to preserve independent contractor status. They are outside service providers: they should not be part of the internal management.

The payment of expenses of the independent contractor by the association tends to indicate that the individual is actually an employee. If this is the only factor working against the characterization as an independent contractor, it should be not be fatal. The more types of expenses paid, however, the more likely it is that the individual will be treated as an employee. For example, paying for home office expenses is a factor which may make the IRS consider the individual to be an employee.

B. The Contract

A good contract confirming the factors discussed in this article will help confirm to the IRS on audit that your independent contractor is actually an independent contractor and not an employee and will also be useful in preventing assessments by state authorities.

The contract should be labeled as an independent contractor agreement. Provisions such as the following should be included:

- The independent contractor acknowledges and agrees that he or she is an independent contractor.
- The independent contractor retains the right to determine the means and method by which the services are rendered.
- The association retains control only over the result to be accomplished**.**
- Any assistants which the independent contractor requires will be paid solely by the independent contractor and will not be considered contractors or employees of the association for any purpose.
- The association will have no obligation or liability to independent contractor or any other party for worker's compensation, federal and state payroll taxes, unemployment taxes, minimum wages, social security assessments or similar taxes, benefits or liabilities.
- The independent contractor is not eligible to participate in any benefits available to employees of the association.

- The independent contractor shall also have no authority to bind the association to any contract or agreement.

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Qualified Transportation Fringes - Examples of Parking Expense Allocations

Qualified Transportation Fringes – Examples of Parking Expense Allocations

Example 1
Association A pays X Corp, a third party who owns a parking garage across the street from A, $100 per month for each of A's 10 employees to park in X's garage.

The entire $12,000 ($100 * 10 employees * 12 months) is included in UBTI.

Example 2
Assume the same facts in Example 1, except A pays X Corp $300 per month for each of A's 10 employees or $36,000 per year ($300 * 10 employees * 12 months).

Of this amount, $31,200 ($260 * 10 employees * 12 months) is included in UBTI and $4,800 (($300 - $260) * 10 employees * 12 months) is treated as compensation and reported as wages.

Example 3
Association B owns a parking lot adjacent to its office building. B incurs $10,000 of parking expenses. B's parking lot has 500 spots that are used by employees and customers. There are no reserved employee spots. There are usually 50 employees that park in the lot during normal business hours on a typical business day. There are usually 300 parking spots that are empty during normal business hours on a typical business day.

Step 1 – Because there are no reserved employee spots, there is no amount to allocate for reserved employee spots.

Step 2 – The primary use of the lot is to provide parking to the general public because 90% (450/500) of the lot is used by the public. Therefore, none of the $10,000 is included in UBTI.

Example 4
Association C owns a parking lot adjacent to its office building. C incurs $10,000 of parking expenses. Cs parking lot has 500 spots that are used by employees and visitors. There are no reserved employee spots. There are usually 400 employees that park in the lot during normal business hours on a typical day. C has 25 spots reserved for visitors.

Step 1 – Because there are no reserved employee spots, there is no amount to allocate for reserved employee spots.

Step 2 – The primary use of the lot is not to provide parking to the general public because 80% (400/500) of the lot is used by employees.

Step 3 – 5% (25/500) of the lot is reserved for visitors so $500 (5% * $10,000) is excluded from UBTI.

Step 4 – C must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical day and allocate that percentage to the remaining $9,500 ($10,000 - $500) of parking expenses.

Example 5

Association D owns a parking lot adjacent to its office building. D incurs $10,000 of parking expenses. D's parking lot has 500 spots that are used by employees and visitors. There are 50 spots reserved for management. There are usually 400 employees that park in the lot during normal business hours on a typical day. D has 10 spots reserved for visitors.

Step 1 – Because D has 50 spots reserved for management, $1,000 (50/500 * $10,000) is included in UBTI.

Step 2 – The primary use of the remainder of the lot is not to provide parking to the general public because 89% (400/450) of the remaining parking spots are used by employees.

Step 3 – 2% (10/450) of the remainder of the lot is reserved for visitors so $200 (2% * $10,000) is excluded from UBTI.

Step 4 – D must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical day and allocate that percentage to the remaining $8,800 ($10,000 - $1,000 - $200) of parking expenses.

Example 6

Association E owns a parking garage adjacent to its office building. E incurs $10,000 of parking expenses. E's parking lot has 1,000 spots that are used by employees and visitors. One floor of the parking garage is segregated by an electronic barrier and can be entered only with an access card provided by E to its employees. That floor contains 100 spots. The other floors of the parking garage are not used by employees for parking.

Step 1 - Because E has 100 spots reserved for employees, $1,000 (100/1,000 * $10,000) is included in UBTI.

Step 2 – The primary use of the lot is to provide parking to the general public because 100% (900/900) of the remaining parking spots are used by the public. Therefore, only the $1,000 determined at Step 1 is included in UBTI.

Example 7

Association F leases a parking lot adjacent to its office building. F incurs $10,000 of parking expenses. F's leased lot has 100 spots that are used by employees and clients. F usually has 60 employees parking in the leased lot during normal business hours on a typical business day.

Step 1 - Because there are no reserved employee spots, there is no amount to allocate for reserved employee spots.

Step 2 - The primary use of the lot is not to provide parking to the general public because 60% (60/100) of the parking spots are used by employees.

Step 3 – Because there are no reserved nonemployee spots, there is no amount to allocate for reserved nonemployee spots.

Step 4 - F must reasonably determine the employee use of the parking spots during normal business hours on a typical day. Because 60% of the parking spots are used by F's employees, F reasonably determines that $6,000 (60% * $10,000) of parking expenses is included in UBTI.