Navigating the Swamp: Your 2019 Washington Update

Brad D. Steele, J.D.
Founder, Private Club Consultants
Today’s Roadmap

- Balance of Power
- Legislative Issues
- Regulatory Issues
- 2020 Elections
House of Representatives

- Balance of power
  - 235 Democrats – 198 Republicans
    - Ds can only lose 17 votes and still pass bills
  - Two vacancies
    - Rep. Sean Duffy (R-Wis.) resigned
    - Rep. Chris Collins (R-N.Y.) resigned
  - No Rs from N.E., NYC or Orange County
  - The VP’s older brother won a seat in IN
  - A former HHS Sec. won a seat in FL
- Ds hold 13 Districts Pres. won by 6%+
  - Rs need 18 to win back majority
Senate

- Balance of power
  - 53 Republicans – 47 Democrats
    - With filibuster, real majority number is 60
  - In 2020, 22 Rs up for re-election & 12 Ds
  - Two Rs running in states Trump lost
    - He won in the other 20
    - AZ, GA (2) and NC could be turning purple
    - KS and TN are open R seats
  - One D running in a state Trump won
    - The other 11 should have no issues (NH?)
    - NM is an open D seat
  - Rs can only lose 4 seats and still maintain the majority
Legislative Issues
Government Funding

- Here we go again
  - House passed 10 of 12 funding bills
  - Senate waited until the topline budget number for FY20 was set – so no funding bills passed
  - Topline budget number was agreed to along with a no “poison pill” mandate for the 12 spending bills...

- What is a “Poison Pill”?
  - Senate work on Labor/HHS/Education bill held up because of abortion rider by Ds
    - This covers H-2B visas....
  - Senate work on DHS bill held up because of border wall rider by Rs

- FY20 starts with a Continuing Resolution through 11/21
  - Last year, 35 day shutdown – déjà vu??
H-2B Visa Program

- The program allows foreign workers in for seasonal work when Americans aren’t available
  - 66,000 cap
  - That number increased by 15,000 in FY17 & FY18 and 30,000 in FY19
    - The visa recipients must have been here at least 1 out of the last 3 years

- Clubs have had a hard time getting these workers because of the cap limits
  - DOL Sec. has said the process needs to be better and DHS Sec. wants Congress to set a new cap

- Rep. Andy Harris (R-Md.) and Sen. Thom Tillis (R-N.C.) proposed new legislation
  - Increases the cap to 132,000
  - Quarterly distribution with proportional issuance if too many requested in a quarter
  - DOL must review cap number every two years
  - E-Verify use mandated for all new hires and must reverify those hired from 10/1/12
  - Higher fees and greater penalties for violators
Regulatory Issues
DOL’s Overtime Rule

- New federal minimum weekly salary threshold likely set at $684 ($35,568/year)
  - May pay $616/week if at least $3,557 (10%) is paid in annual nondiscretionary bonuses or commissions
  - Those who don’t fall under the WCs but earn at least $107,432/year will be exempt if they earn $684/week
  - Rule likely starting January 2020, but there will be litigation filed to stop it

- There will be no change to the “duties test” for the WCEs
  - Clubs must be certain to correctly classify an employee as exempt from overtime pay
    - He must be paid a salary, earn at least the min. weekly salary and fit into one of the WCEs
  - To fit into one of the WCEs, he must satisfy the duties test of that exemption:
    - **Executive** – manage a dept., supervise two FTers, and have a say in hire/fire
    - **Administrative** – perform office work (no manual labor) related to the management of club and exercise discretion on matters of significance
    - **Professional** – perform work that requires advanced knowledge earned from specialized academic training; or artistic or creative endeavors; or teaching in an **academic institution**
The National Labor Relations Board is less anti-business/anti-club
  Five-member board comprised of three from the President’s party and two from the opposition party
  Created to resolve disputes between labor and management and oversee union elections
  Overturned the Micro-Union decision
  Bargaining units must be made up of all employees with an overwhelming community of interests
  Overturned the Joint Employer decision...then reinstated it
  Reinstated the “indirect control” test because of an issue with a member of the NLRB
  A new Joint Employer Rule has been proposed requiring “direct and immediate control” over employees
  DOL has proposed its own rule that should be out at the end of fall
  Board will review of the Ambush Election Rule and likely return to reasonable election timetables
  The new NLRB has focused on returning the board to what it should be – a neutral arbiter
  It is applying the National Labor Relations Act with balance and fairness now
New WOTUS Rule clarifies “protected water” under CWA – old rule repealed 9/19

- Traditional Navigable Water – used in interstate/foreign commerce as well as territorial seas/tidal waters
- Tributary Water – rivers, streams, brooks, creeks
  - Naturally occurring water that contributes perennial (year-round) or intermittent (continuously during certain times of a typical year) flow to a TNW
- Lakes and Ponds – contribute perennial or intermittent flow to a TNW or are flooded by TNW/Tributary water in a typical year
- Adjacent Wetlands must be adjacent (touch one point or side) or have direct hydrological surface connection (through flooding or perennial or intermittent flow) to other protected water
  - Wetlands separated from other water AND lack direct hydrological surface connection aren’t covered
  - Groundwater, ephemeral water, artificial lakes/ponds, & waste treatment systems are excluded

New rule establishes what is and isn’t protected water – finalized by end of year

- Expect lawsuits to slow these changes
Employee/IC Classification

- Misclassification means a FLSA violation – failure to pay min. wage and OT
  - Fed. courts can still use the Economic Realities Test to determine if a worker is an IC or employee
  - 3 federal cases against clubs – Streamsong (’16), Peachtree GC (’18), Garden City Men’s Club (pending)
  - House Ed. and Labor subcommittee held a hearing on misclassification in September

- CA Sup. Ct. issued new “ABC” test for ICs and Gov. signed law codifying it – starts 1/20
  - Worker must be free from the control and direction of the club in the performance of the work
  - Worker must perform work outside of the usual course of the club’s business, and
  - Worker must be engaged in an independently established trade, occupation or business

- NJ follows “ABC” test; Gov.’s Misclassification Task Force recommendations 7/19
  - Personal liability for GM/COOs and their Boards for misclassifying workers
  - Higher penalties - $5K/worker for 1st offense and $10K/worker for 2nd
  - New workplace poster on “Misclassification of Workers”
  - Clubs required to pay for state’s investigation costs into misclassification claims
Employee/IC Classification

- Best Practices to help ensure they are ICs
  - Clubs should not:
    - Have ICs attend staff mtgs, ask for time off, do separate work at club or wear the club’s logo
    - Set ICs’ prices, schedule them or pair them with members
  - Three options for ICs
    - Have members hire their ICs themselves – club is completely out of it
      - Educate members on their responsibilities – CaddieNow App
    - Engage third party entities to do the job – valet, fitness company, massage company, CaddieMaster
    - Reclassify ICs as employees – could provide best protection
      - Club has complete control over their training, work, discipline and pay – ambassadors of the club
      - Members expect club to provide service & will pay for it – caddie fee vs. cart fee, fitness class fee
      - They can still be tipped employees – so they can still receive cash

- DOL Sec. Scalia now looking at creating a rule

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2020 Elections
Democrats

- Presidential Race down to 3 with Iowa caucuses less than 4 months away
  - Former Vice President Joe Biden (Del.) – 30% with $21M raised in 2nd Q
    - Proposed a Financial Transaction Tax on sales of stocks/bonds
  - Sen. Elizabeth Warren (Mass.) – 20% with $19M raised in 2nd Q
    - Proposed a wealth tax of 2% over $50M to 3% over $1B
  - Sen Bernie Sanders (Vt.) – 16% with $18M raised in 2nd Q
    - Proposed a wealth tax of 1% over $32M to 8% over $10B
- Watch for Sens. Harris, Klobuchar, and Booker as likely VP candidates

- Senate Democrats need to flip 5 seats (4 if they win WH) to gain majority
  - Ala. – Sen. Jones not likely to win re-election (Trump won by 28%)
  - No other D in trouble and map is turning more purple

- House Democrats seem poised to maintain their majority
  - Impeachment backlash?
  - No mass retirements on the horizon and freshman are strong in their fundraising
Republicans

- The President
  - Favorable/unfavorable – 43%/56% but $54M (MAGA) and $51M (RNC)
  - 3 states he won to break the “Blue Wall” – Pa., Mich., & Wis. (46) – are trending blue
  - Impeachment/economic slowdown impact? – manufacturing jobs growing but < first 2 years of term

- The Senate Republican majority rests in 5 states
  - Colo. – Sen. Gardner vs. a popular ex-gov./former pres. candidate (Trump lost)
  - Maine – Sen. Collins lost support (with ton of $$ against her) b/c of Kavanaugh vote (Trump split)
  - Ariz. – Sen. McSally lost in ’18 and then appointed vs. former astronaut/husband of former Rep. Gabby Giffords (Trump won by 3.5%)
  - N.C. – Sen. Tillis’ 1st re-election race follows defeat of the R gov. (Trump won by 3.5%)
  - Ga. – Sen. Perdue’s 1st re-election race follows a 1.4% victory by the R gov. AND Sen. Isakson’s seat will be open – likely run-off for control of Senate on 1/5/21 (Trump won by 5%)

- House Republicans need to flip 18 seats to gain majority
  - Lost 17 to retirement (6 from Texas)
  - Many R suburban seats lost in ‘18 and those who remain fear the worst
Questions
Private Club Consultants
Your Trusted Source For Answers

PCC
Brad D. Steele, J.D.
Founder
Cell/Text: 703.395.5463
steele@privateclubconsultants.net