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Government Matters: 2015 Update

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NCA’S MISSION

““To defend, protect and advance the interests and well-being of private social and recreational clubs”

As the trade association for the private club industry, NCA is based in Washington, DC to do two things:

• Be involved in the political world, and
• Shape the policies that come from it

Simply put, we make sure the private club industry’s voice is heard

• On Capitol Hill,
• In the agencies,
• In the statehouses, and
• In the courthouses
TODAY’S ROADMAP

- Balance of Power
- Legislative Issues
- Regulatory Issues

BALANCE OF POWER
THE HOUSE OF REPRESENTATIVES

- Balance of power:
  - 245 Republicans – 188 Democrats
  - There are two vacancies:
    - Mississippi’s 1st District – Special Election set for June 2
    - Illinois’ 18th District – Special Election set for September 10
  - 245 seats are the most for Republicans since 1947
  - The last election gave Republicans a 26 seat majority
    - Rs flipped 15 seats, including those in Maine, N.H., N.Y., Ill., and NV
    - Ds flipped an open seat in Calif. and a seat in Neb. and Fla.

THE SENATE

- Balance of power:
  - 54 Republicans – 46 Democrats (with 2 Independents)
  - Nine seat pick up for Republicans
  - Republican gains in 2014:
    - They flipped open seats in Iowa, Mont., S.D., and W. Va.
    - They beat incumbents in Ark., Alaska, Colo., La. and N. C.
  - Democrats flipped no seats in 2014, but...
    - In 2016, Rs will have 24 seats up and Ds will only have 10 seats up
  - Sen. Mitch McConnell (R-Ky.) is Majority Leader
    - This means a more pro-growth, pro-club U.S. Senate
    - However, Democrats will still be able to filibuster any controversial bill
      because Republicans do not have 60 votes to stop them
LEGISLATIVE ISSUES

DO YOU FALL UNDER THE ACA?

- Seasonal workers and the 50 threshold
  - Seasonal Worker – one who performs services on a seasonal basis where the work is exclusively performed at certain seasons/periods of the year and which may not be continuous or carried on throughout the year
  - You may use a reasonable, good faith interpretation of this definition
  - You must count your seasonal workers to determine if you fall under the law, but there is an exception
    - Seasonal workers can be removed from the count if they push the club over the 50 threshold for 4 months or less
    - If they push the club over 50 for more than 4 months, they must be counted
  - The four calendar months (or 120 days) do not have to be consecutive
DO YOU FALL UNDER THE ACA?

- In this example, the club averages 52 full-time/full-time equivalents with 5 months of seasonal workers.
- If the club had less seasonal workers, or less months worked by seasonal workers, it would be under the 50 threshold.

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DO YOU HAVE TO OFFER INSURANCE?

- Is he full-time?
- If, based on facts and circumstances at his start date, he is reasonably expected to work full-time, then you must offer ins. or risk being fined.
- What is “reasonably expected” to work full-time?
  - Factors that must be considered:
    - What were the hours of the person he is replacing
    - What are the hours of those working in comparable positions
    - What were the hours advertised in the job description
DO YOU HAVE TO OFFER INSURANCE?

- Rules for *new seasonal employees*
  - A “seasonal employee” is one who is hired into a position for which the customary annual period of employment is 6 months or less
  - If the season is 6 months or less, then he will not be full-time
  - The law is really for year-round full-timers, not seasonal full-timers
  - If he is employed > 6 months, he is not a seasonal employee
  - If he is expected to work more than 30 hours/week, then he will have to be classified as full-time and offered insurance

IS HE A “NEW” EMPLOYEE?

- Who is a *new* employee
  - Only “new” if he hasn’t worked for you for 13 consecutive weeks
  - If it’s less than 13 weeks, he’s only “new” if:
    - He has been gone longer than he was previously employed
    - He has to be gone a minimum of four weeks
  - Don’t forget this rule when rehiring your seasonal employees
  - If he is not “new,” then he is a continuing employees for the look-back measurement period
    - The time he was away is counted as zero (0) hours of service for the look-back measurement period
    - The IRS may change this by averaging his hours while he was working and use that for the time he was away...
**WHAT PLAN MUST YOU OFFER?**

- The plan must meet the MEC, MV & Affordability requirements
  - MEC – offer a plan that covers all EHB
  - MV – offer a plan with an actuarial value of at least 60% coverage
  - Affordable – offer a self-only plan that costs no more than 9.5% of:
    - The employee’s W-2 wages for the year – Box 1, or
    - His lowest monthly hourly rate x 130 hours or his monthly wage; or
    - 1/12 of FPL for a single individual

- By offering a valid plan, employees can’t get a tax credit from the Exchange
- By offering an invalid plan, any employee who meets the income test for a tax credit will cause the club to be fined - $3,000/year
- By not offering insurance at all, one employee will likely meet the income test and cause the club to be fined - $2,000/FTer/year

**PENDING ACA AMENDMENT BILLS**

- The Save American Workers Act (SAW Act)
  - Bipartisan bill filed in the House and Senate
    - House sponsors: Reps. Todd Young (R-Ind.) and Dan Lipinski (D-Ill.)
    - Senate sponsors: Sens. Susan Collins (R-Maine) and Joe Donnelly (D-Ind.)
  - Would change definition of “full-time” from 30 hours/week back to 40 hours/week
  - The AFL-CIO, Teamsters and Food Workers’ Union wrote that the current law will “destroy the foundation of the 40 hour work week”
  - Passed the House last year 248-179 – with 18 Democrats
    - Then-Senate Majority Leader Harry Reid (D-Nev.) wouldn’t allow a vote in Senate
  - Passed the House in early January 252-171 – with 12 Democrats
  - Senate will take it up soon
    - HELP Committee held a hearing on the bill in January
    - Finance Committee is next
PENDING ACA AMENDMENT BILLS

- The Simplifying Technical Aspects Regarding Seasonality Act (STARS Act)
  - Bipartisan bill introduced in the House by Reps. Jim Renacci (R-Ohio) and Kurt Schrader (D-Ore.) on 2/12/15
  - Senate version will be introduced by Sen. Kelly Ayotte (R-N.H.)
  - Creates one label – seasonal employee – for ACA purposes
    - A seasonal employee is one who is employed in a position for which the customary annual employment is not more than 6 months
    - Establishes that a “seasonal employee” is not to be counted when determining whether your club hits the 50 threshold
    - No more worrying about workers being on property for 4 months or less
    - Clarifies that a “seasonal employee” is not a full-time employee
      - You do not have to offer insurance regardless of the number of hours they work

OTHER ACA AMENDMENT BILLS

- House and Senate leaders are considering two other bills
  - A repeal of the 2018 Cadillac tax
    - The 40% excise tax on high cost policies is passed through to clubs
    - Rep. Joe Courtney (D-Conn.) introduced the House bill 4/28/15
      - $10,200 threshold for self-only & $27,500 threshold for family plans
  - A repeal of the 2.3% medical device tax
    - The tax is passed through to clubs in the form of higher premiums
    - In 2015, 21 Democratic Senators voted to remove this tax
      - Unfortunately, the vote was non-binding
  - A repeal of the new fee on all health insurance policies sold
    - The so-called Health Insurance Tax (HIT) is also passed through to clubs in the form of a 2%-4% premium hike ($350-$500 per policy)
    - Reps. Charles Boustany (R-La.) and Kyrsten Sinema (D-Ariz.) introduced a bill to repeal the HIT on 2/12/15
      - It has over 218 bipartisan co-sponsors – the magic number!
    - A bipartisan Senate bill to repeal it has 35 total co-sponsors
REGULATORY ISSUES

EPA’S WOTUS RULE

- The Rule alters the Clean Water Act – effective end of July
- Redefines “waters of the United States” (WOTUS)
- Water falls under the CWA if it significantly affects the chemical, physical or biological integrity of traditional navigable waters, interstate waters or territorial seas:
  - “Tributaries” are now covered if they have:
    - A bed, banks, an ordinary high water mark and a flow that goes, directly or indirectly, to protected waters (perennial, intermittent and ephemeral streams, too)
  - “Adjacent Waters” are now covered if they:
    - Border, are contiguous to or are neighboring protected waters
    - Some ponds, creeks, etc. will be under EPA control with new permits needed before using chemicals and fertilizers
- Exclusions for irrigation and artificial ponds, groundwater, puddles and storm water control features, but “dry land” requirement
- The Regulatory Integrity Protection Act passed House 5/12/15
  - If it does not pass the Senate, litigation will be filed to stop the final rule
DOL'S OVERTIME RULES

New rules will alter who is exempt from overtime pay

- They will modify the minimum salary requirements for exemption
  - The current $455/week ($23,660/yr.) will increase – maybe to $961/per week ($50,000/yr.)

- They will modify the current “executive” exemption, which requires:
  1. The employee’s primary duty must be managing the club or a distinct department of the club;
  2. He must customarily and regularly direct the work of at least two full-time employees; and
  3. He must have authority to hire or fire or his perspective on personnel matters must be given particular weight

- The changes will mandate
  - More supervision of even more employees, and
  - More direct control of those employees

- “Administrative” and “Professional” exemptions will be altered, too
- The new rules are in the last stages of review....

NLRB'S AMBUSH ELECTION RULE

- Allows union elections within 15 days of a petition being filed – effect 4/14 (209 petitions filed in first 24 days)
- Limits workers’ ability to receive information about union and its costs
  - In 1959, then-Sen. Kennedy said a 30-day period before an election was a necessary “safeguard against rushing employees into an election where they are unfamiliar with the issues.”
  - Since the rule took effect, the average election time is less than 25 days
- It limits a club’s ability to prepare for a union election battle
- It promotes union “stealth campaigns”
- A Joint Resolution of Disapproval was filed in the House and Senate
  - Senate and House passed it and the Pres. vetoed it
- Workforce Democracy and Fairness Act filed in House and Senate
  - No election any sooner than 35 days after petition
- We have one lawsuit pending and one on appeal
- The rule impedes employees’ rights to get full information about the union and it tramples employers’ free speech and due process rights
NLRB CASE LAW

- **Purple Communications**
  - NLRB ruled that employee union organizers are entitled to have access to company email systems during off-hours
  - Overturns a 2007 decision that allowed employers to limit the use of company email systems for business purposes only

- **Specialty Healthcare**
  - NLRB ruled that unions are entitled to select smaller subsets of larger employee groups to organize
  - Burden is on employers to prove that the excluded employees “share an overwhelming community of interest” with the smaller subset

- **Lancaster Symphony Orchestra**
  - NLRB ruled musicians were employees (not independent contractors) and could vote on forming a union
  - Since orchestra set work hours, pay schedules, dress code and standards for behavior, they were “employees” – like caddies?

DOL’S PERSUADER RULE

- DOL issued a proposed rule that will severely impact a club’s ability to get legal advice during a union organizing campaign
- If a club hires a lawyer to help with almost any aspect of a union campaign, it must file complicated disclosure reports with DOL
- The lawyers must also file reports disclosing all clients seeking labor advice and the fees charged
  - Many law firms will pull back from this type of work
  - Without lawyers, most clubs will be unable to effectively give their side of the story

- DOL Secretary Thomas Perez says rule will be out by December
  - Labor unions want this rule issued – only 11% of workers belong to unions (lowest since 1983) and only 7% of the private sector workforce is union
ACA REGULATIONS

- Clubs with 50 or more FTs/FTEs must file a new IRS info. return
- You must file a Sec. 6056 return for each full-time employee you have – Form 1094-C
- Clubs must also furnish an “employee statement” to each full-timer – Form 1095-C
- Form 1094-C will include things like:
  - A certification indicating whether the club offered ins. to full-timers, by calendar month
  - The number of full-timers you have each calendar month
  - For each full-timer, the months during the year ins. was available
  - For each full-timer, the monthly cost for the lowest priced plan
- Clubs will also provide info. through “indicator codes”
- Filings are due yearly starting 2/28/16 (3/31 electronically) with IRS and 1/31/16 with your full-timers

ACA REGULATIONS

- Waiting periods before offering health insurance
- Clubs with 200 or less full-time employees
  - You may have up to a 90 day waiting period for new full-time employees before coverage can become effective
  - 90 days is a solid number – count weekends and holidays
  - Applies to all clubs regardless of size
  - New variable hour employees who are later deemed full-time will have the Initial Measurement Period as their waiting period
- Clubs with more than 200 full-time employees
  - You must automatically enroll new full-timers in the insurance plan
  - New variable hour employees who are later deemed full-time will have the Initial Measurement Period as their waiting period
  - This “auto enrollment” requirement is delayed until regulations are issued
ACA REGULATIONS

- All health insurance plans must be “nondiscriminatory”
- Applies to all clubs regardless of size – § 105(h) IRC
- Clubs are required to offer the same benefits, waiting periods, contributions and type of coverage to all classes of employees regardless of their compensation
- Failure to meet this requirement can result in a fine of $100/day for each employee the plan discriminates against
  - There is a cap of the lesser of $500,000 or 10% of the price of the plan
- This requirement has been delayed until regulations are issued
  - We are working with the IRS to minimize the impact of this rule
  - Since the Employer Mandate requires employers to offer all FTers ins., why does the IRS care what we give our senior staff?
  - Probably another year before the regulations are issued

THE NATIONAL CLUB ASSOCIATION
YOUR VOICE IN WASHINGTON, D.C. – JOIN TODAY!