

The New Normal: Your 2022 Washington Update



Private Club Consultants

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Private Club Consultants

- PCC was created to provide in-depth legal/operational answers for America's top clubs
- We help club leaders:
 - Resolve legal issues, including those from staff, members and guests
 - Modernize club bylaws, rules and other governance documents
 - Protect their private and tax-exempt status, and
 - Implement new legislative and regulatory mandates
- We are “Your Trusted Source for Answers”



Our Roadmap



COVID - What's Next

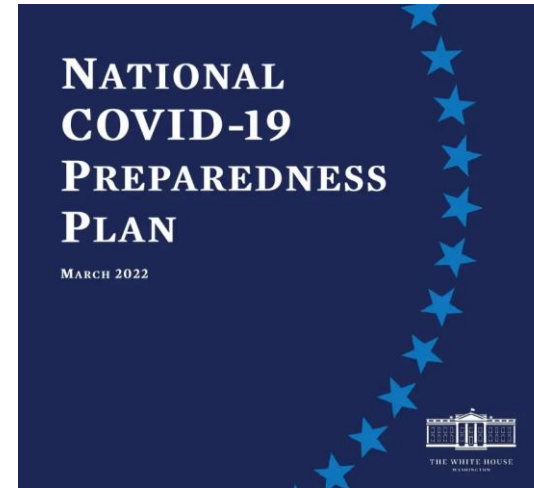
What to do about Mary Jane

What to Expect from Washington

The Midterm Elections



COVID - What's Next



The New White House COVID Plan

- Four-point plan issued three weeks ago
 - Protect against and treat virus
 - Continue free testing and provide antiviral pills for those who pop positive
 - Prepare for new variants
 - Expand data collection and sequencing capabilities to respond earlier to new threats
 - Prevent economic and educational shutdowns
 - Clear policy to avoid shutdowns at all costs, which means new OSHA *guidance* to protect workers
 - Lead the effort to vaccinate the world
 - Increase funding to get shots in arms everywhere
 - BUT...funding for this was nixed in the just passed/signed FY22 spending bill
- No mention of further mask requirements or employer mandates
 - Left to states/private employers – new CDC guidance lifts mask requirements for most
 - All state mask mandates end by 3/25 and TSA's ends 4/18 – just extended



Minimizing Your Club's COVID Liability

- OSHA still has requirements we must follow
 - General Duty Clause -29 USC 654(a)
 - An employer shall furnish each worker employment and a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm
 - Thousands of complaints have been filed (federal and state)
- Four steps to limit liability from OSHA
 - Adhere to your COVID preparedness and response plan
 - Maintain basic infection prevention measures
 - Remind workers to keep healthy and stay home if sick
 - Keep workplace controls in place like providing PPE and improving ventilation



Minimizing Your Club's COVID Liability

- Club liability was reduced with the proposed OSHA Rule
 - Compliance with the federal government's workplace safety agency would have been hard to attack
- Now, club liability could ramp up again
 - Especially with member-facing employees who aren't vaccinated or tested
- How to protect the club if someone gets sick
 - Require vaccinations for employees and members, but there will be some issues
 - Implement your own vax status and testing requirements
- For negligence, "standard of care" is key – breach it and it's easier to claim causation
 - Comply with local and state health dept. and CDC guidelines to help avoid negligence
 - What would a reasonably prudent person do under similar circumstances
 - Juries will decide if you need to mandate the shot, testing or at least ask status
 - The world is evolving on what a "reasonably prudent person would do"



What to do about Mary Jane



State of Play

- State marijuana laws have changed
 - Those 21+ may have 1 oz. or less for use at home and it can't be sold to any other person
 - 18 states – AK, AZ, CA, CO, CT, IL, ME, MA, MI, MT, NV, NJ, NM, NY, OR, VT, VA and WA (DC, too) – permit recreational use of it
 - DE, OK, MD, OH, PA and RI could do so in 2022
 - So, nearly half of the states could have laws that allow small amounts of pot for personal use soon
 - 37 states permit medical use of it
- Federal marijuana laws have NOT changed
 - Possession, use and sale of it is still illegal
 - Sen. Maj. Leader Schumer (D-NY) wants to change that through the Cannabis Administration and Opportunity Act
 - Decriminalizes it and expunges records, and it taxes and regulates sale and use
 - Schumer hopes to introduce it in April and some Rs are showing interest in it



To Test or Not To Test

- Testing simply for presence of pot may not be the best practice any longer
 - Depending on your state, firing an employee who tests positive could be illegal
 - NY – can’t discriminate against an employee who uses during off-duty hours
 - You may discipline if he is impaired at work
 - NJ – can’t take “adverse action” based on an employee testing positive alone
 - You must have a reasonable suspicion for testing and he must be impaired
 - CT – clubs may only discipline if an employee is impaired, using or in possession at work
 - MA, NV, and VT – club must provide reasonable accommodation for those who use b/c of a disability (truly private and tax-exempt clubs could be exempt from this)
- Testing before hiring could pose additional problems, too
 - You likely can’t reject a candidate because he tested positive
 - Will you lose too many qualified candidates?
 - Do you care what he does on the weekend if he shows up sober on Monday?



Impairment is Key Now

- Testing based only on employee impairment will minimize legal liability
 - Have a reasonable suspicion for the test and document it (watch medical use issues)
 - Does he exhibit altered time perspectives, have attention span issues, have balance difficulties, or have distance perception problems?
 - Use a Workplace Impairment Recognition Expert (WIRE) or Drug Recognition Expert (DRE)
 - Have clear, written policies regarding when you'll test – after accidents for workers' comp. purposes
 - Define impairment in your written policies – unable to perform work adequately b/c of being high
- Testing for pot isn't like for alcohol
 - THC stays in the blood long after impairment wears off
 - Weekend users – 1-2 days after; heavy users – up to a month after
 - There is no test that can help identify impairment – like a BAC test
 - Until such a test is created, clubs need to learn to recognize impairment before testing
 - Especially in states that have legalized it....

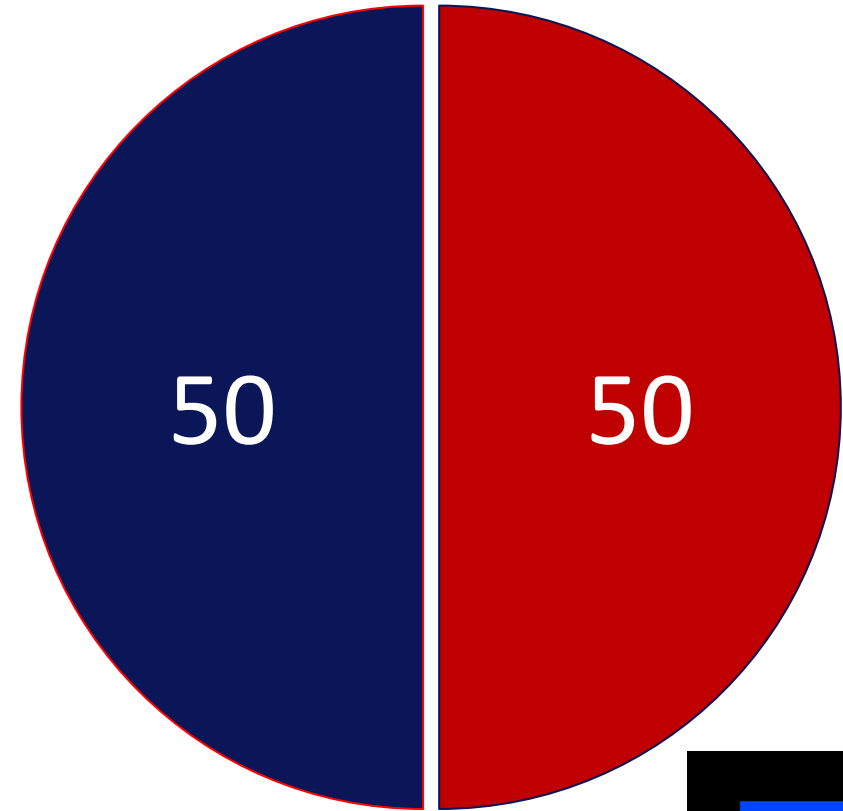


What to Expect from Washington



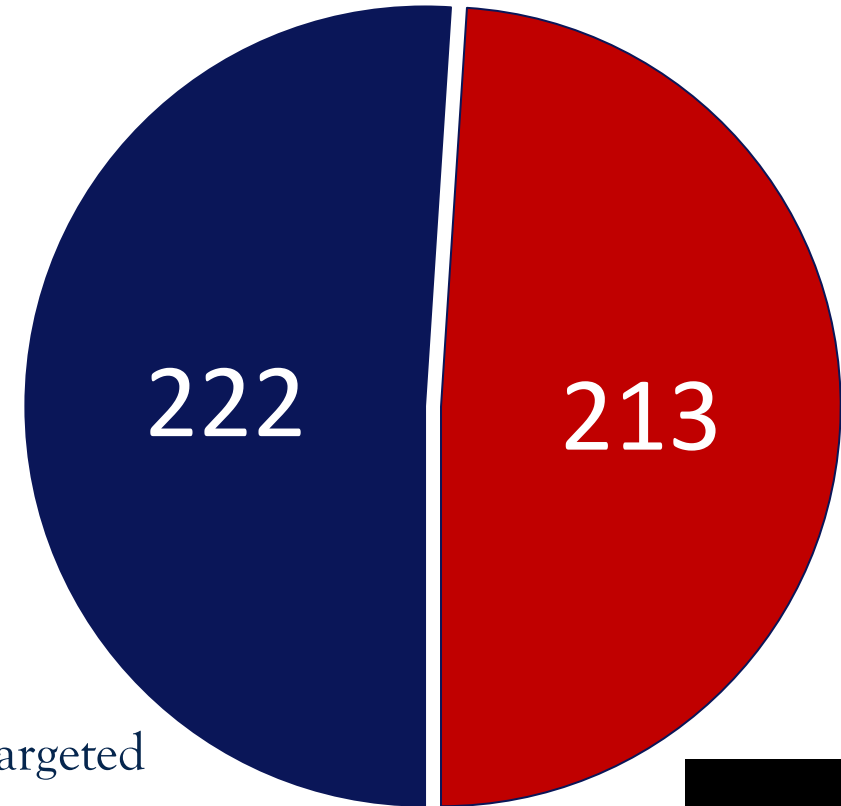
Senate Balance of Power

- Democrats have control – sort of
 - Can't move anything without 60 votes
- Midterm Elections
 - 21 Rs up vs. 14 Ds
 - 5 R races to watch
 - Two are in states Biden won
 - 4 D races watch – all in states Biden won
 - Since WWII, Pres.'s party loses an average of 4 seats



House of Representatives Balance of Power

- Democrats have control – sort of
 - Razor thin margin
 - Real pressure on the Speaker to be more progressive
 - Takes 218 to pass anything, so can't lose more than 4
 - Pelosi's last year – she'll retire after the election
- Midterm Elections
 - Rs just need 5 to retake control - redistricting will be key
 - FL, MT, NC pick up 1 seat and TX picks up 2
 - CA, IL, MI, NY (89 short) & PA lose 1 seat – 3 NY Rs targeted
 - More Ds have retired than in 2010 (when they lost 63 seats)
 - Since WWII, Pres.'s party loses an average of 26 seats



Legislative Action

- Most of Biden's bills won't get through Congress – especially in an election year
 - The Speaker has a numbers problem and Senate Ds can't meet the 60 vote threshold
 - No major healthcare, immigration, labor (PRO Act), or employment law (min. wage) bills will pass
- The next reconciliation bill – “Building a Better America”
 - Sen. Manchin wants changes to the tax code (it's “weighted unfairly”) and reduced drug costs
 - Top rate goes up, 3% surcharge on income over \$10M and caps/limits on deductions
 - Cap. gains could be taxed at 28% or the individual's rate for those making over \$1M
 - Income above \$400K will be subject to the 3.8% Medicare surcharge tax
 - Some swing district House Ds are concerned tax hikes could kill the recovery
 - Full SALT deduction is a silent problem, too
 - Maj. Leader Schumer wants it but House progressives don't (Schumer might be losing)
 - This new \$ is to be spent on inflation/deficit reduction and whatever else Ds can agree



Regulatory Action

- When you can't legislate, you regulate – Biden using regulatory agencies
 - DOL
 - Tipped Employee Classification Rule – permits managers/supervisors to keep a tip only if it's based on service he or she “directly and solely” provides, and clarifies they cannot be part of a tip pool
 - Tipped Employee Work Rule – requires clubs to pay full min. wage if tipped workers do non-tipped duties for more than 20% of hrs./week or more than 30 minutes straight
 - Club can pay tip credit wage if workers do non-tipped duties for less than 30 mins., but that work must directly support tip-producing work (folding napkins or filling salt & pepper shakers)
 - Changes coming to the Overtime Exemption Rule's min. salary threshold - \$35,308 going up?
 - Independent Contractor Rule – copies Calif.'s ABC Test (3 clubs in NJ sued by caddies)
 - DHS – 20,000 more H-2B visa workers for FY22, but unions will want something....
 - EPA – will reinstate Obama's WOTUS Rule (already pulled the old rule)
 - NLRB (full D majority now) – will help unions with card check, micro-unions and IC misclassification



The Midterm Elections



NY, NJ and CT Races

■ Senate

- NY – Sen. Majority Leader Chuck Schumer (D) is projected to win without issue
- NJ – No Senate race this year
- CT – Sen. Richard Blumenthal (D) is projected to win without issue

■ House of Representatives

- NY loses one seat – 19 Ds and 8 Rs now
 - Reps. Reed (R-23rd), Katko (R-24th) and Zeldin (1st) are not running – Zeldin is running for Gov.
 - Reps. Rice (D-4th) and Suozzi (D-3rd) are not running – Suozzi is running for Gov.
- NJ has no changes in the number of its House seats – 10 Ds and 2Rs now
 - Rep. Sires (D-8th) is not running
- CT has no changes in the number of its House seats – 5 Ds and 0 Rs now
 - All incumbents are running for re-election



U.S. Senate

- Majority will be determined by 9 races
 - MO (T won): OPEN – AG or fmr. Gov. or 2 Reps. (R) v. fmr. St. Rep./Sen. or fmr. Marine (D)
 - NC (T won): OPEN – fmr. Gov. or Rep. (R) vs. fmr. St. Sup. Ct. Chief Justice Beasley (D)
 - OH (T won): OPEN – fmr. Treasurer or fmr. GOP Chair or investment banker (R) v. Rep. Ryan (D)
 - PA (B won): OPEN – fmr. hedge fund exec. or celebrity/TV Dr. (R) v. Lt. Gov. or Rep. (D)
 - WI (B won): Sen. Johnson (R) v. Lt. Gov., Treasurer or NBA executive (D)
- Democrat-held seats to watch
 - AZ (B won): Sen. Kelly (D) v. investment fund operator or businessman or AG (R)
 - GA (B won): Sen. Warnock (D) v. Walker (R)
 - NV (B won): Sen. Cortez Masto (D) v. fmr. AG Laxalt (R)
 - NH (B won): Sen. Hassan (D) v. St. Senate Pres. Morse (R)
- Primaries will be the key – only 17% of voters voted in TX primary



U.S. House of Representatives

- Democrats need some luck to keep their majority
 - Lost 31 to retirement (Rs lost 27 to retirement in 2020)
 - Redistricting will impact the result
 - Neither side will have money issues
- House races to watch (only 30–35 races will be competitive)
 - IA 2: Rep. Miller-Meeks (R) – flipped the seat but won by <1% (6 votes!)
 - NJ 7: Rep. Malinowski (D) – won by 1.2% (5,300 votes)
 - VA 7: Rep. Spanberger (D) – won by 1.8% (8,300 votes)
 - AZ 1: Rep. O’Halloran (D) – won by 3% (11,800)
 - ME 2: Rep. Golden (D) – won by 6% (22,700)
 - CO 8: New District that is a toss-up
- Primaries will be the key – only 17% of voters voted in TX primary



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Your Trusted Source for Answers

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