

❖ Ten Steps to Reducing Liability at Your Aquatic Facility

10. **Ensure that flow meters, pressure and vacuum gauges are intact and properly installed.** Replace gaskets or o-rings on pump strainers each year to ensure that lids seal tightly. Likewise, replace rubber parts on chemical feed equipment each year and inspect plastic parts for degradation due to chemical contact. Clean vent covers in chemical storage rooms and equipment areas. Ensure that air exchange rates meet standards for the types of chemicals that you have on hand and that chemical storage room air is NOT vented into the pool area.

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❖ The Siren Call of “Private Club” Exemptions to Federal Employment Discrimination Statutes

By Steven M. Gutierrez and Brad Williams

Many managers (and human resources employees) of private membership clubs mistakenly believe that “private club” exemptions to various federal employment discrimination statutes permit them to be less punctilious in safeguarding against illegal discrimination in their workforce or in adopting and enforcing strong antidiscrimination policies. Such managers and employees are not only wholly mistaken, but they make such assumptions at their clubs’ significant peril.

While it is true that both Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act (“ADA”) provide exemptions from these acts’ employment discrimination protections for employees of “bona fide private membership club[s],” such exemptions are far less substantial than first meets the eye.

Applicability of the Title VII and ADA Exemptions

Upon their face, the “private club” exemptions to Title VII and the ADA only apply to organizations that are tax exempt under section 501(c) of the Internal Revenue Code. Moreover, under applicable Internal Revenue Service regulations interpreting section 501(c)(7) – the section most likely to be invoked by private membership clubs – this exemption is unavailable to clubs that engage in “business” or whose profits inure to private shareholders.

Assuming that a private club is exempt under section 501(c), it must next show that it is a “bona fide private membership club” as defined by relevant government agencies, or courts.

For instance, the Equal Employment Opportunity Commission (“EEOC”) suggests in its compliance manual that a private club may only qualify as a “bona fide private membership club[s]” if it: (1) is a club in the ordinary sense of the word; (2) is private; and (3) imposes meaningful conditions of limited employment. The EEOC also provides multiple criteria for assessing whether a club is “private” but, unhelpfully notes that none of these criteria is “determinative.”

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In construing such broad (and non-determinative) criteria, the EEOC suggests in illustrative examples that a golf club in which (1) non-members may use the facilities without a sponsoring member paying a fee, (2) applicants for membership need only know one current member and (3) all applicants for membership have been admitted, is not sufficiently private or selective to qualify as a “bona fide private membership club.” By contrast, the EEOC suggests in a separate illustrative example that a golf club in which: (1) non-members may use the facilities only at a member’s request and in his or her presence; and (2) applicants for membership must be 25 years old, have an undergraduate degree and be sponsored by at least five current members, is sufficiently private and selective to qualify under both statutes’ exemptions.

Courts have been equally restrictive in deciding which clubs qualify as “bona fide private membership club[s],” applying such varied criteria as: (1) membership selectivity; (2) membership control; (3) history of the club; (4) the use of facilities by non-members; (5) the club’s purpose; (6) whether the club advertises for members; and (7) whether the club is non-profit. In applying these (and other) criteria, courts have found clubs to be non-exempt under Title VII or the ADA where: (1) they permit guests to have essentially the same privileges as members; (2) their membership criteria are not very selective; and (3) their marketing materials suggest that club facilities are open to the public at large.

In short, both the EEOC and many courts apply restrictive standards in determining which clubs qualify as “bona fide private membership club[s],” and the effect of applying such standards to particular clubs is not always easy to predict in advance.

Other Federal, State and Local Protections

Irrespective of whether the Title VII and ADA exemptions apply, managers of private membership clubs must be aware that other federal, state, and municipal laws may provide employees with identical (or more extensive) protections than those provided under Title VII or the ADA.

For instance, courts are in disagreement as to whether Section 1981 – a federal statute analogous to Title VII but pertaining only to racial discrimination – contains an implicit “bona fide private membership club” exemption. Courts have reached inconsistent holdings upon this question, but the Supreme Court arguably signaled in a 2008 decision (relating to retaliation claims under this statute) that the Court intends to read Section 1981’s protections for employees very broadly.

Similarly, both state and municipal antidiscrimination statutes may provide protections for private club employees that Title VII and the ADA do not, and many such state or municipal statutes contain no comparable “private club” exemptions. Moreover, even state statutes permitting private clubs to restrict their membership under certain circumstances are narrowly construed by courts, excluding clubs that, for instance: (1) host catered non-member events, allow non-members to use recreational facilities upon purchase of golf and tennis instructions and permit non-members to purchase goods from the club’s pro golf and tennis shops (New York); and (2) allow non-members to use club facilities during sponsored events, charge fees to non-members for using club facilities and profit from non-members’ purchases at golf and pro tennis shops (California).

In sum, both state and municipal statutes provide a panoply of protections (and interpretive possibilities for courts) that may greatly curtail any potential exemptions available to private clubs under Title VII and the ADA.



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Conclusion

In conclusion, managers of private membership clubs must be vigilant in ensuring that their clubs follow the highest standards of anti-discriminatory employment practices, not only because such practices are fair, but because they are essential to guarding against very real litigation threats that any contrary approach could yield.

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