51 WAYS TO LEGALLY PROTECT YOUR GOLF COURSE

Property Rights and Potential Dispute Areas with Property Owners
Operational Issues
Property Restrictions and Regulatory Requirements
Human Resources
Contracts, Licenses and Permits
Membership and Access to Facility Issues
Private Club Concerns
51 Ways to Legally Protect Your Golf Course

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The presentation of this material does not necessarily represent an endorsement by the NGCOA. We strongly recommend consultation with legal counsel before materially relying on the information presented here.

Published by:
National Golf Course Owners Association
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Property Rights and Potential Dispute Areas with Property Owners
POA/HOA Access to Club
Provided by Matt Martin, Addison Law Firm

In any residential golf community, a vibrant and financially stable golf/country club is vital to the overall success of the community. Golf participation rates span a large spectrum, but generally speaking, golf members alone are oftentimes not sufficient to make a successful club. Many developers have elected to require all owners in a community to maintain a certain baseline membership. The goal with this plan is increased dues and related revenues from increased use, not initiation fees or deposits. Therefore, there is usually no initiation fee or deposit for this level of membership. If this type of required membership is utilized, be sure that your counsel has confirmed that it complies with state law as it is a problem in some states.

The scope of the amenities in the club must be considered when defining the scope of this type of membership. More and more clubs provide a host of amenities in addition to golf, including dining, swimming, tennis, kid’s areas and fitness centers. Depending on the desired dues structure and the extent of the amenities, the baseline membership might provide access to limited amenities (such as clubhouse dining and swimming, which is basically the traditional social membership) or it might provide access to all amenities except golf. If the baseline is limited, then there is usually an intermediate membership that provides access to the other amenities, such as the fitness center. In addition, the membership might provide limited availability for golf, upon payment of all required fees and dues. Alternatively, the limited golf option could be set forth in a separate category of membership. For example, a limited golf membership might provide access to the golf course during the weekdays only or after certain times on the weekends. The goal is to get people to use the facilities and increase revenues. Golf course owners are much better off trying to juggle a crowded tee sheet rather than trying to fill an empty one.

The development covenants, conditions and restrictions (CC&Rs) should clearly state that the baseline membership is required for all lot owners (and owners of other product types, such as condominiums, if applicable). This membership should automatically transfer to future purchasers. The club should have the right to enforce such payment of required club dues and charges by placing a lien on the property (and foreclosing, if required), just as with other homeowners’ association (HOA) fees and charges.

The CC&Rs should also be clear that, while all owners have access to the club amenities set forth in the baseline membership documentation; this does not create any sort of ownership or control of the HOA over the club. In addition, the roles and responsibilities of the club and the HOA must be clearly defined. This includes maintenance of common areas, operation and use of non-club improvements (such as guard gates) and a variety of other issues. Access to non-club improvements is also critical if the developer has elected to have the HOA own certain improvements, such as the swimming pool. The documents must clearly state whether club members that are not homeowners have access to such improvements.

Using a mandatory baseline membership can be a good tool for creating a financially stable club and community. Purchasers are increasingly sophisticated and they understand this importance as well. Developers and club owners must be very careful to clearly work through the issues described here as well as a variety of others when utilizing these mandatory memberships.
Covenants, Conditions and Restrictions (CC&Rs) are one of the key legal documents in any residential golf community. This issue primarily arises in the development of residential golf communities. As such, this issue is best addressed at the beginning of the development process. However, if your golf course is in a community where the CC&Rs can still be amended by the developer and the CC&Rs do not address the items briefly discussed here, it would be in the best interest of the golf course and the development to amend the CC&Rs as described here. One of the best things to remember when preparing CC&Rs is to as if the golf course and the development property owners are distinct, even if at the time, they are the same or related entities. This helps in determining in what is really needed for each aspect of the community.

In considering whether the golf course should be included in the CC&Rs, the answer should be absolutely yes as to items that benefit the golf course and a maybe as to items that burden or restrict the golf course. What does this mean?

With respect to items that benefit the golf course, these are primarily easements. In the CC&Rs, there should be a golf course easement permitting a variety of activities related to the operation of the golf course, including the overspray of fertilizers and pesticides in connection with the normal operation of the course and in compliance with law, the creation of noise in connection with the operation of the course, including mowing and maintenance, the over flight of golf balls, as well as the collection of golf balls and other activities, such as lighting for practice areas. If the golf course does not own all of the roads needed to access the golf course and related structures, the CC&Rs should include a specific easement over all such roads for the golf course owner and its agents and employees. This easement should also cover cart paths and irrigation lines that cross roads or other development property not in the golf course. A waiver and release should also be included that covers errant golf shots. Basically, this puts owners of houses adjacent to the golf course on notice that errant shots may land in their yard or on their property and releases the golf course owner and its employees, agents, etc. from any liability arising from such errant golf shots. These are baseline items that should be included in any CC&Rs for the benefit of the golf course. From there, other items can be added, such as fencing restrictions to maintain a uniform and quality look and a variety of other matters specific to the development.

With respect to items that burden the golf course, this is where golf course owners get real concerned, and the main concern lies with a homeowners’ association having control over the golf course. We generally find it preferable to exclude the golf course from all of the CC&Rs except for the golf course easements described above and perhaps certain other specific sections, such as fees and voting rights. With respect to fees, if the golf course pays fees or dues to the Association, the amounts should be very easily calculated. For example, the golf course might pay dues to the association equal to a specific number of lots. Voting rights, if possible, should be commensurate with the fees/dues paid.
Another key area is architectural control. From a golf course owner’s perspective, the golf course and all structures thereon should generally be excluded from this process.

Finally, and importantly, the CC&Rs should state that no portions of the CC&Rs that affect the golf course may be amended without the written consent of the golf course owner. This is obviously a very brief summary of a critical area. Experienced counsel should be utilized whenever preparing or amending CC&Rs as they are vital to both the golf course and the overall community.
Errant Golf Balls - Off Premises Liability
Provided by Matt Martin, Addison Law Firm

Who is responsible when an errant golf shot causes damage or injury to person or property adjacent to the course? The usual potential parties are the golfer, the club owner, the club operator, the adjacent homeowner, the golf course architect, the golf course builder, the residential developer and the homebuilder. Any one or multiple of these parties can be responsible for errant golf balls.

For the purposes of this summary, we will only focus on the liabilities as between the club owner or operator and adjacent homeowners. But, do not forget the other parties listed above. The club should bring them into the equation if at all possible.

Generally, the club owner or operator is only liable if the existence of the course and errant shots creates a nuisance or if the club owner or operator breached its duty to protect adjacent properties and persons from unreasonably dangerous conditions on the course. The key to determining liability is understanding the facts. You have to know the facts before you can determine if a nuisance or an unreasonably dangerous condition exists. While an occasional errant ball generally does not create liability, numerous balls, especially if they routinely have enough force to cause damage or injury will be considered a nuisance or dangerous condition.

If you do have an errant golf ball problem on your course, you do need to take corrective measures to substantially reduce or eliminate the problem. If you do not take action and an errant golf ball causes injury or damage, the club will most likely be held liable. This does not mean that you have to respond to every request from every homeowner. It is very important that you understand the nature of the problem. A ball survey to determine the number of balls leaving the course is a very effective means to quantify the problem. You also need to know if any defenses apply. The most typical defenses are discussed in the next paragraph.

There are some defenses in favor of the club. First, is the theory of assumption of the risk. Homeowners moving to a house adjacent to a golf course assume the normal risks of living next to the course. These risks include a reasonable number of errant golf shots entering their property and an expectation of a reasonable amount of damage. Again this gets back to a fact issue as to what is reasonable. Certainly one ball per year is reasonable and one hundred balls a day is not. Somewhere in between, in the gray area, is the answer and it will change based on factors such as the amount and frequency of damage and the presence of children.

In addition to the assumption of risk defense, you may also find that subdivisions created in the late 1970s and later contain releases of the golf clubs from errant golf ball damage and injury. These releases are generally effective, unless the injury or damage was so severe that the homeowner could not have reasonably believed that was a potential at the time the home was purchased.
Rights to Use Private Streets and Access through Guard Gates
Provided by Timothy J. Clow, Addison Law Firm

Many private clubs are located in guard gated communities throughout the United States. Does your club have the legal right for your members and guests to have unfettered access to your club through the gate?

Typically, when a community is being developed, the developer created covenants, conditions and restrictions (CC&Rs) that are recorded against properties in the community in order to establish control mechanisms for operating the various aspects of the community. One of those aspects is the establishment of a homeowners association which is empowered to own, operate and maintain the common area aspects of the community, i.e. roads, common areas, entry features and the guard gate. While the developer is continuing to develop the community, and still controls the homeowners association, there are normally not any problems associated with a club’s members and guests having access to the club because the developer owns both the club and the residential components of the community. The potential problem arises after the developer has turned over control of the homeowners association to the homeowners and/or has turned over the club to its members or sold it to a third party. At that point, the mutual goals of the developer of establishing a successful club and building out the community have now been separated between the club and the homeowners. Additionally, the expenses of the club and the homeowners association are no longer being subsidized by the developer and each must now stand on its own when operating its business. When money becomes an issue, conflicts will arise between the club and the homeowners association.

If the developer has not granted access to the club and its members and guests through the gates of the community in the CC&Rs, it is quite possible that the homeowners association can attempt to block free access through the gates by guests or non-resident members of the club. This is typically done to force the club to help pay certain costs associated with the entry features and operation and maintenance of the gate either through “voluntary” contributions to the expenses of the homeowners association if the club is not currently paying dues as a member of the homeowners association or by charging guests and members an access fee. In a large community with many non-resident members and guests, these fees can be substantial.

Another issue that may arise deals with the long-term maintenance of any private roads in the community that must be maintained by the homeowners association. If the club does not pay dues to the homeowners association or contribute to its maintenance budget, the homeowners association may attempt to argue that the club is responsible for paying a portion of the maintenance of the roads, i.e. repair, resurfacing, snow removal, etc., since the club’s members and guests may use the road much more than a typical homeowner. In some cases, the homeowners association may actually count the number of cars coming through the gate to prove that the club usage is excessive compared to other members of the community.

To avoid this problem and the guard gate access issue, make sure the club has been granted absolutely free access through the guard gates and over the roadways. If this has not been done in the CC&Rs, make sure that the developer grants an access or ingress/egress easement to the club through a separate instrument if the roads are to be non-public roads.
Golf courses are unique in that they are an “island” surrounded by third-party owners with different interests and concerns. One of the concerns that tie the parties together is the need for consistent landscape and maintenance standards for the golf course and the surrounding property. The parties normally involved in landscape issues and maintenance standards are the Golf Course Owner, Property Owner’s Association (POA), community developer, and individual lot owners. The Golf Course Owner requires a consistent, well-maintained and appealing view from the golf course and contains certain protective restrictions on the adjacent boundary property.

The POA has similar requirements as it is established pursuant to the Covenants, Conditions and Restrictions (CC&Rs) and therefore is usually the party to maintain and enforce the design, maintenance and improvements for the community. As long as the POA is generally controlled by the developer the landscape and maintenance standards for the community, as well as for the golf course, is one of the essential elements for successful lot sales. Therefore, the developer will be involved until a predetermined level of build-out is reached. Finally, the individual lot owner is concerned about his individual view of the golf course and the full utilization for his personal use of his individual lot. Lot owners in general desire to construct improvements, pools, etc. as close to the golf course boundary, as possible, or plant their own individual landscape preferences, rose gardens, etc., which dictates the requirement for uniform landscape and maintenance standards.

Golf Course Owners in new developments typically work with the developer to establish numerous protective provisions in the CC&Rs including but not limited to golf play easements, overspray and noise disclaimers, membership notification, liability disclaimers, and landscape, maintenance and fencing requirements for houses on the perimeter of the golf course. In addition, the Golf Course Owner will need view disclaimers including the right to alter or plant trees and other landscaping that may block or restrict a view corridor. Moreover, consistent and uniform fencing that is approved for the design criteria of the community is critical to the appearance of the adjacent property from the golfer’s view as they play their round of golf. In existing Community Developments, the Golf Course Owner should work with the POA to establish clear and uniform guidelines for the landscaping and fencing around the golf course.

If there is a reason or a requirement to impose landscape or maintenance standards on the golf course, then the document should be very carefully negotiated and drafted as it will become, in many instances, a “covenant running with the land” during the period the landscape and maintenance standards are in force. When initially negotiating the covenants, the Golf Course Owner should request that the POA assess an annual fee on all residents to be applied toward golf course maintenance as all residents and the community benefit from a well-maintained golf course.
The enforcement of landscape and maintenance standards is a critical issue. The POA and/or developer, until turnover, should be the first party to enforce the landscape, maintenance and fencing requirements as to individual property owners. The Golf Course Owner should have the contract right under its CC&Rs or by written agreement with the POA to enforce the obligation if the POA does not timely do so. In the case of an emergency condition, the Golf Course Owner should have the right to immediately proceed with the action to correct the deficiency and bill directly the lot owner. The costs incurred by the Golf Course Owner to correct a deficiency, after notice and time to cure to the lot owner, should be a lien imposed by the POA under the CC&Rs on their individual lot. If the Golf Course Owner does agree to landscape and maintenance standards on the golf course, the right to enforce should lie only with the Developer or the POA and not with the individual homeowners. Additionally, their remedies should be limited to “self help” remedies. Landscape and maintenance standards and enforcement provisions are very complex and should be clearly considered and drafted as they have a lasting impact on the golf course operation.
Landscape and Maintenance Standards and Enforcement, Part II
Provided by Ed Smilow, Golf Course Law

With so many golf courses today being part of the overall scheme in community development, legal issues have arisen regarding the respective rights of homeowners, the home owner associations (HOA) and the owner/operator of the golf course. Too often disputes are settled in a court of law where the difficulties of owning and operating a golf course are not always appreciated.

A case on point concerned Upland Hills Country Club in San Bernardino County, California. Two HOAs representing condominium residents who overlooked the golf course claimed an easement to a “pleasant view” over the public golf course. The claim arose from language in the declaration of rights stating that the homeowners had to pay golf club assessments even if they didn’t play golf because the owners generally benefit from living next to a golf course. Justifying payment of the assessment, the declaration states: “It is acknowledged that the owner derives a benefit from upkeep, maintenance and the success of the golf course. The views of each condominium across the greens, lakes and other amenities, as well as the open space and reduction in density in population, materially add to the quality of life of the homeowners.” The homeowners were also granted a non-exclusive easement for the use and enjoyment of the golf course. From this language, the homeowners claimed that in exchange for their assessment the easement included a “pleasant view” requiring that the golf course be maintained in a pristine condition.

The trial court agreed with the homeowners. In the mandatory injunction which it issued, the court ordered that the golf course owner:

1. Have and continue to have an operational irrigation system covering all turfgrass.

2. Plant, regularly fertilize, and regularly mow and maintain, in a weed-free condition, all turfgrass throughout the entire golf course.

3. Regularly fertilize and regularly trim, cut and maintain in a weed-free condition all shrubs, planters, flower beds and landscaped areas.

4. Remove all dead or dying trees as necessary to maintain visual aesthetics.

5. Properly prune all trees to remove all growth on trunks, dead limbs, and otherwise trim to allow sunlight filtration to turfgrass under and adjacent to the trees.

6. Maintain and chemically treat as appropriate all lakes and ponds in a full and clean condition, free of noxious weeds and growth.

7. Maintain and repair all irrigation so as to prevent standing water or mud areas.

The court retained its jurisdiction to determine whether the golf course was meeting its obligation and assumed power to oversee golf course maintenance.
The appellate court must have correctly surmised that the trial judge was a frustrated greens committeeeman of days of yore, when it overturned the order. In its opinion the court of appeals correctly found that the easement did not guarantee homeowners any type of view at all. The rationale for the assessment was not a grant of rights. The easement was limited to physical use and enjoyment of the course and not to any particular type of view. The court concluded that the homeowners had no right to dictate how the course was to be maintained.

There are two lessons to be learned from this case. First, it is very important to spell out in writing exactly what the rights of the parties are and are not when dealing with HOAs. Second, never let a case like this get before a judge who thinks he can run a golf course. Even if the ruling is overturned on appeal, the lawyers will wind up owning the course from the fees they earn.
Since most golf and country clubs are located in residential communities, there are times when ingress/egress rights are requested through or across club property. Do you know how to protect the club when granting such requests?

First and foremost, a club needs to determine what type of ingress and egress is needed by the party requesting it and decide the best avenue for granting the request. There are numerous vehicles that can be used to grant ingress and egress and the type a club will ultimately want to use depends on the circumstances.

If an adjacent landowner is needing ingress and egress across a portion of the club property in order to access his property for construction purposes, then the ingress and egress rights granted by the club will normally be temporary in nature and contain specific limitations and conditions upon which the ingress and egress has been granted. The limitations will typically deal with the width and location of the area being impacted, the length of time during which the area may be used, which may include the hours of the day during which it may be used, the type of ingress and egress which is permitted and any restoration obligation which is imposed on the grantee of the ingress and egress rights. Additionally, the club may want to impose requirements on the grantee to obtain insurance which names the club as an additional insured and protects it from claims due to the grantee’s use of the area subject to the ingress and egress. Furthermore, the club may want to request that the grantee indemnify the club from any and all claims which might arise in connection with the grantee's use of the club property.

If the easement is to provide permanent access, then the club needs to first be comfortable with the proposed location of the easement. The easement should also be limited to serve the specific purpose of the request. For example, if the easement is to provide a secondary fire access to a subdivision, then the easement needs to be limited to that purpose. The easement should also address responsibility for maintenance and repair of the easement area and the costs associated with such as well as all of the liability matters discussed above with regard to temporary easements.

Finally, all easements regardless of the purpose should contain provision obligating the benefited party to repair any damage done to the club following work on the easement. In golf course turf areas, it is a good idea to specify that the areas will be restored with sod of the same type of grass disturbed. One last item to consider is that the granting of an easement will almost always require the prior approval of the club’s lender. It is important to get the lender’s consent in writing before granting the easement.
Ingress/Egress Easements - Part II
Provided by Ed Smilow, Golf Course Law

There are three basic types of easements known in law. The first is the kind where the owner of the land deeds to another the right to use the property for a particular limited use. If described with particularity there is usually little or no contest as to the scope of the easement. The person or entity that holds the easement has the duty to maintain it, and failing to do so, the owner may either go to court to force the easement holder to maintain it, or he may maintain it himself and charge the easement holder the cost of maintenance.

The second type of easement is that which occurs by necessity. It is recognized by law because to do otherwise would be inequitable and cause the easement holder undue hardship. The typical case is where a person’s property is landlocked and there is no other way of egress or ingress but to travel across another’s land.

The third type, which is a trap for the unwary, is an easement by prescription where there is no grant and it is not necessary. It is a mere taking of the easement by adverse use, open and notoriously over time which in some states may be as short a time as five years and in others as long as 40.

All three types are common at golf courses as the following cases illustrate.

At a course in San Diego, California, the local power company held an easement by deed to run its power lines through the golf course. To maintain the easement it was required to cut trees which interfered with its lines. The power company hired a local contractor to fulfill this obligation. The principals met and confirmed that nine trees had to be removed. Subsequently, the contractor, under the watchful eye of the golf course superintendent removed 269 trees. The golf course owner sued the power company to recover the irreparable damage and diminished aesthetics of his golf course. A jury returned a verdict in his favor in an amount in excess of one million dollars. On appeal, the verdict was overturned on the basis that the superintendent failed to act to mitigate, or minimize the damages, because he failed to take any steps to stop the contractor from cutting down the trees.

In a case in the posh Bel Air, California, a country club was given the right to bombard its abutting landowners with golf balls under the notion of a prescriptive easement. The court reasoned that since golfers had been openly and notoriously hitting golf balls into neighboring houses for the requisite period of time, the golfers earned the right to continue to do so. The court didn’t address whether or not the golfers had the right to go on to the neighbors land to get their balls back. However, the law recognizes the right to go onto another’s land to retrieve personal property so long as to do so does not cause a breach of the peace. One wonders just how peace loving the neighbors are knowing that not only do they have to suffer from the artillery bombardment but now they are subject to infantry infiltration as well.
Mandatory Club Membership
Provided by Jack Wilson, Gordon & Rees LLP

Mandatory membership is increasingly becoming more attractive to developers as the costs of building and operating a club escalate and club participation becomes less certain due to increasing entertainment choices available to property owners. Mandatory membership is seen as a fair way to allocate the cost of increasing development property values among all of those who benefit and also guarantees a minimum income to the club to insure its continued existence which maintains those property values. In many instances, without mandatory membership, a club could not sustain quality levels or its existence and property values would suffer.

However, because mandatory membership can be a troublesome concept for prospective purchasers, often deed restrictions for the development provide for property owner involvement in club operations to deter concerns over lack of control over costs. Those provisions, if not properly drafted, can be perceived to mislead prospective purchasers and lead to limitations on the clubs which prevent its future viability.

Equally important is the fact that mandatory memberships may place the club in an undesirable legal status under applicable law which may subject the club to mandatory member control, limitations on operations, or government registration, reporting or oversight. Some states’ laws make mandatory memberships impractical or impossible.

Many mandatory memberships include property lien and foreclosure rights for nonpayment of dues. Those enforcement rights often lead to a member perception that the club must seek approval for dues increases, account for the funds collected and use those funds only for certain costs. In some states, lien and foreclosure rights may require the club to account to the property owners, subject the club to property owner control or limit the club in the amount it can charge or the use of the funds collected.

Prior to the implementation of mandatory memberships or when acquiring a club with a mandatory membership program, it is imperative that a complete review of existing deed restrictions, member agreements and applicable law be completed to prevent undesired consequences. The failure to be properly informed can lead to very significant legal consequences and costs.
Operational Issues
Premises Liability - Accidents & Slips and Falls
Provided by Jack Wilson, Gordon & Rees LLP

We often hear about catastrophic results for business owners when someone has been injured on their premises. Often premises’ owners find themselves responsible for injuries even though those injuries were actually caused by the carelessness of the injured party simply because the condition which injured the person was present and located on the premises. There can be many conditions at a club which create opportunities for injury. Some examples of these conditions are: spills, slippery surfaces, cracks, hard to see steps, poor lighting conditions, malfunctioning doors, low hanging objects, hot surfaces, and sharp objects, protruding objects, damaged carts, blind corners and lack of warning signs.

Vital steps toward minimizing premises liability are both training employees to constantly be looking for any potential conditions that can cause injury and training them on how to immediately deal with dangerous conditions they observe. A simple example would be to instruct employees to immediately wipe a beverage spill when observed. In addition, make the reporting of such conditions important. Employees need to see that a reported condition is addressed timely. Employers need to reward employees who demonstrate awareness and timely reporting. Promoting a successful awareness program both among members and employees creates pride in accomplishment and encourages compliance.

Clubs must also set the example by conducting regular inspections of the premises which lead to correction of dangerous conditions discovered. More importantly, a proper inspection program reduces the chances that a dangerous condition goes unnoticed long enough so that an injury caused by the condition results in the club being responsible for punitive damages for gross negligence. Those are the types of cases often heard about within the industry in which astronomical sums of money are awarded.

When an injury does occur, it is important that employees be trained in how to deal with the event and how to properly report. Very frequently, the greatest challenge faced by a premises owner is overcoming statements made by an employee to an injured party based on inaccurate facts. These statements are typically made in an effort to show sympathy with the injured party or because the employee has a misperception as to the existence of or reasons for a condition. Employees should be trained to seek aid for the injury if appropriate, sympathize only about the injury and not the cause, comfort the injured and listen. Likewise, employees should not make statements or ask questions which reflect an attempt to avoid responsibility.

A well-designed reporting system is a must in dealing with injuries. Always have an on-duty point person to whom events are referred to insure that the proper information is obtained and improper responses or statements are avoided. Also, make sure the managers are provided forms to aid in the reporting process and are well trained as to the procedures and requirements of the club’s insurance company in dealing with claims and injuries. If a club can successfully implement procedures and guidelines which incorporate these basic policies, that club will reduce its exposure for premises injuries.
Errant Golf Balls - On-Property Liability
Provided by Matt Martin, Addison Law Firm

A frequent question is whether a club owner/operator is responsible if a golfer is hit by an errant shot while on the golf course. The answer is very dependent on the facts of each particular circumstance. In order for the owner/operator to have responsibility, the liability must exist under a recognized legal theory. Therefore, it is important to know the legal theories under which liability can be found and also the potential defenses.

The most probable theory of law to be applicable is general premises liability. In short, property owners or their operating agents have the following duties to the persons who use their property: (i) duty to protect from dangerous conditions on the property which are not obvious, (ii) the duty to not allow an unreasonably dangerous condition to exist on the property and (iii) the duty to take action to minimize the above two items.

All three of the above really work together and in most cases all three have to be evaluated together to understand the potential for liability. The best way to understand this is to discuss prior instances where liability was found so that you can understand the rationale used by the courts.

For example, liability was found where a club had a green too close to a tee for an adjacent hole. In that case, there had been a large tree protecting the green from errant shots off the tee. But, the tree died and was not replaced. A golfer on the green was struck by an errant tee shot. The court found liability because (i) there was an unreasonably dangerous condition on the course - i.e. the green was too close to the tee and (ii) the club failed to take protective measures to shield the green from the tee shots. Probably the most determinative factors were that (i) the club knew of the existence of the condition and that the tree was protecting the green and (ii) the club did not provide any replacement protective measure such as a new tree or screening to protect the green.

In another case, a golfer was hit by his own ball which bounced back after hitting a railroad track that crossed a fairway. The court held that (i) there was a dangerous condition which was not obvious - i.e. the railroad track, (ii) such condition was unreasonably dangerous and (iii) the club did not do anything to protect the golfers from the condition. In that case, the court reasoned that some protective measure was needed to either protect or warn the golfers. Since the club had taken no action it was held liable.

What about defenses to errant golf ball claims? The most effective defense is that all golfers assume some measure of risk when playing golf. It is well known in real life and in the courts that golf balls are hard and that not all golf shots go where they are intended. Golfers assume the risk that one of these errant shots will hit them. So, why does the assumption of the risk defense not apply to all circumstances? It is only effective if risk was reasonable for the golfer to have expected. Golfers can reasonable expect that errant shots will exist on the course. What they may not reasonably expect is that there is a tee box way too close to a green or that there is an area (i.e., adjacent to a range) which is constantly pounded by errant golf balls.
The practical effect of all of this is that club owners/operators need to understand if any unreasonably dangerous conditions exist. If they do exist, then protective measures need to be taken to help minimize the risks. While generally there should not be liability for wayward shots, the liability can exist when the dangerous condition is known and nothing is done to limit or eliminate it.
Golf Car Accidents
Provided by Ed Smilow, Golf Course Law

The number of reported golf car accidents continues to grow with the number in the thousands annually. Many of the injuries are to children riding as passengers. Since the cars are manufactured to limit their speed, most states do not classify golf cars as motor vehicles. Nonetheless, in at least one state they have been recognized as dangerous instrumentalities requiring a heightened duty of care for the golf course owner in allowing them to be used.

A majority of the accidents are caused by driver error, either through inadvertence or a lack of training. Most persons assume that a golf car is easily operated. However, the perils of uneven terrain, wet grass and sharp turns are often underappreciated. A lack of experience with speed, braking and a safe turning radius can lead to passengers being thrown from cars, cars flipping over and collisions with persons and obstructions. Many fatalities have been reported. The potential for serious injury should not be underestimated.

The potential for injury is exacerbated by alcohol use. The consumption of alcohol by golfers is not only expected but often encouraged by sales from on-course beverage carts. How then should the golf course owner approach the use of golf cars so as to limit potential liability?

Education of the driver and passengers remain the key. The golf car owner manuals stress the need to provide adequate warnings to the end user. An adequate warning is a conspicuous one where it is most likely and easily seen. The warnings not only include operation instructions. They include specific statements about slowing when encountering slopes, wet conditions and when operating the vehicle near pedestrians and other cars. Passengers are warned to keep their feet in the car when the car is moving and to stay seated while the car is in motion. Drivers are encouraged to place the parking brake on whenever the car is stopped.

The owner’s manuals and car warnings state that a golf car should not be operated while under the influence of alcohol or drugs. This appears disingenuous as the provider of the car is also the provider of the alcohol. Use of alcohol while driving a golf car is an issue that needs to be addressed. Course employees need to be well educated in their role in enforcing alcohol rules. The dangers have to be emphasized with the driver.

To limit liability, not only to the driver but also to those who the driver injures, reasonable steps must be taken to assure that before the driver gets behind the wheel he or she has been adequately warned and trained. Many courses require that the driver sign an agreement acknowledging the rules of operation and assuming liability. This alone may not be enough. Claims are made by persons who do not sign the agreement like a passenger or pedestrian. Manufacturers encourage the posting of operational instructions and warning signs at the place where the cars are dispensed. Some member of the course personnel should be trained and available to instruct drivers and to go over the warnings prior to use. On course personnel should be encouraged to monitor driving as deterrence to potential abuse. And in order to be protected from the common allegation of defective
maintenance, per the manufacturer’s instructions, each car should be tested and inspected daily to make sure they are in proper working order. Documentation must be kept to offer proof that tests have been performed with the results noted.

Just like automobile accidents, golf car accidents are bound to happen. Without seat belts, safety gear, lights or even a horn, a golf car traveling at 14 miles per hour can be extremely dangerous. Because golf course owners are aware of potentially hazardous golf course conditions and the likelihood of injury in operation of golf cars, reasonable steps must be made and the problems addressed through driver education in order to avoid potential liability.
Lightning Strikes
Provided by Matt Martin, Addison Law Firm

What kind of liability does a club have for a golfer struck by lightning on its course?

A lightning strike in the legal world is viewed as an "Act of God." Acts of God are all events which result purely from the forces of nature and which cannot be reasonably prevented. Generally, there is no liability for Acts of God, and particularly lightning strikes. The rationale is two pronged. First, obviously, lightning cannot be prevented. Second, it is not reasonable to require a club to protect golfers from lightning. The risk of lightning is usually so remote (about the same odds of winning most state lotteries) and the danger so readily apparent, there is no duty to protect or warn golfers.

Although there is generally no liability for lightning strikes, a club may have exposure in several situations. There can be liability if the injury would not have occurred "but for" some additional cause. In other words, a club may find liability in the following manner. A person is struck by lightning. The club was negligent and the injury would not have occurred without the club’s negligence.

Let us look at a few examples of how a club’s negligence can create liability for a lightning strike.

**Faulty Protective Devices** - A club may have liability if a faulty protective device helped cause the injury. For example, lightning jumping off an improperly installed or maintained lightning rod and striking a golfer could give rise to liability. The theory here is that the injury would not have occurred without the club’s failure to install or maintain a reasonably safe lightning rod.

**Numerous Lightning Strikes** - A club may also breach its duty if it has a history of unusually frequent lightning strikes and it fails to have an adequate warning system or protective devices such as shelters or lightning rods. The lack of such items may prove to be a breach of both the duty to maintain safe premises and the duty to warn, especially if the course is subject to frequent sudden storms.

**Negligent Operation or Misrepresentations about Warning Systems** - A club might increase its duty if it creates a false sense of security by misrepresentations to golfers about lightning safety. For example, a club may create a false assumption that golfers are safe from lightning unless the club notifies them otherwise. This is a dangerous situation. If the club fails to operate the warning/detection device properly or if it fails to notify golfers, it may be subject to liability.

Above all, a club cannot make or allow a representation that all is safe until the horn sounds. Lightning is just too unpredictable to make such assurances. In fact, clubs should make it very clear that no system can guarantee protection from lightning. Golfers must first rely on the most obvious warning device - their eyes and ears - and take cover when they see lightning or hear thunder.
Alcohol Liability
Provided by Ed Smilow, Golf Course Law

In most states, it is not the dispensing of alcohol which is a negligent act, it is the consumption of the alcohol. Thus, the owner of a golf course is generally not liable for injuries caused by or to a person who consumes alcohol from the mere fact of having provided the drink.

Nonetheless, serving alcohol to an obviously intoxicated person will not only give rise to potential liability but may cost one his liquor license. Without the use of a breathalyzer, it is frequently asked how is one to tell whether a person is intoxicated.

Legally, the key phrase is “obviously intoxicated.” This is to be distinguished from under the influence. Scientifically, a person will be influenced from one drink of alcohol. Sam Snead, a man who rarely drank, relates the story of taking a sip of beer on a hot day to celebrate his apparent victory in a golf tournament. Upon learning that Tommy Bolt had tied him, Sam says that sip of beer made him wobble up to the first tee in the play-off and nearly slice his tee shot out of bounds. Though he may have appeared to all as perfectly sober having consumed no more than a sip of beer, the beer nonetheless had an influence upon him.

To be “obviously” intoxicated, there must be an appearance of intoxication. A customer is obviously intoxicated when an average person can plainly observe that the patron is intoxicated. The usual signs are staggering, alcoholic breath, dilated pupils of the eyes, slurred speech, poor muscular coordination, and things of that nature.

However, caution must be used because some of these signs are also symptoms of physical disabilities or reactions to prescription medicine. Discriminating against such persons is against the law. Discretion is always the better part of valor so personnel must be trained to not only recognize the symptoms but to deal with the customers fairly.

Another troubling issue concerns minors and alcohol. The age of majority differs from state to state. Furnishing alcohol to a minor is a crime which may result in a stiff fine and/or imprisonment. If the minor winds up in an accident, there is potential liability in the provider unless it can be shown that the provider acted as a reasonable and prudent person.

The common practice today is to demand documentary evidence of the age and identity of any person prior to the sale whenever there is the slightest doubt of the age of the prospective patron. Proof that a licensee was shown as bona fide identification of the age and identity of the person, and in good faith relied on the evidence, establishes a defense. You have the right to refuse service to any person whose majority is questionable.
Suitable evidence for a defense is an identification card issued by a governmental agency that has a current description and a picture of the person presenting it which reasonably describes the person as to date of birth, weight, height, sex and color of eyes and hair. No defense will exist if the card has obviously been altered or has expired. There are only three defenses to the charge of selling alcohol to a minor: (1) There was no sale or serving of alcoholic beverage; (2) the person sold or served is in fact of legal age; and (3) bona fide documentary evidence of majority and identity was provided prior to service. The minor may be arrested for purchasing, consuming or possessing alcoholic beverages, as well as attempting to make the purchase.

The law differs in each locality as to who may serve liquor. In some states, under age employees may serve alcohol in an area primarily designed and used for the sale of food for consumption on the premises as an incidental part of their overall duties. However, these minors cannot act as bartenders. There are usually restrictions that state no minor can be employed during business hours on the portion of any premises which is primarily designed and used for the sale of alcoholic beverages for consumption on the premises. There are exceptions, usually related to the extent of supervision.

As in all business decisions, it is best to check the local laws relating to alcohol and then strictly apply and enforce the rules in your establishment. “Sober” and “Safe” should be your by-words.
Most states have specific legislation addressing the liability of business establishments who serve alcohol. They are generally known as Dram Shop Acts. These laws impose liability on a Golf Club for injuries or death of others caused by the actions of the person consuming the alcoholic beverages. Any time your Golf Club serves alcoholic beverages; there is the potential for dram shop liability. Generally, the server of alcoholic beverages becomes liable when providing those beverages to a person who was intoxicated when served or who becomes intoxicated because of the alcoholic beverages served to him or her and then that person injures or kills another person while intoxicated. Some states require that the person be visibly intoxicated before there is any liability.

Although not necessarily limited to automobile accidents, most of these cases seem to involve driving after the intoxicated person has left the Club. In addition to liability to innocent third parties, some states have expanded their statutes to include recovery for the injuries or death of the intoxicated person himself.

Clubs and their staff can also be liable for the injuries or deaths caused by an intoxicated person under a negligence theory. This theory is primarily applicable to recovery for the intoxicated person’s injuries. Under the negligence theory, the courts look to state laws preventing sale of alcohol to an intoxicated person or to underage drinkers. A violation of such laws is deemed negligence in and of itself. If thereafter the intoxicated person is injured or killed, the Club could be liable.

In addition to liability under a dram shop act or a general negligence theory, a Club may be liable as a social host. Social host’s liability arises when a Club has a party for its employees. Social host liability is not as prevalent as dram shop liability. Some states do not recognize social host liability, while others limit it to specific situations. Some states limit the liability to social hosts who serve an intoxicated person or a minor. Others add the limitation that the injuries must be in connection with an automobile accident.

Although social host liability is not as far reaching as liability for serving alcoholic beverages to members or their guests, it should not be taken lightly. Social host liability is based on the same underlying principles. If social host liability applies, the extent of the potential exposure may be the same as with commercial service.

One last point to consider is liability insurance policies. Many insurance companies have deleted coverage for alcohol related liability suits, especially for commercial servers. However, most do offer such coverage for an additional premium.
In most areas of the United States, the use of treated wastewater effluent has become a viable alternative source of irrigation water for golf course operations. It is the reuse or recycling of a naturally occurring asset, albeit one which requires special treatment and handling. The regulation of wastewater reuse is generally controlled at the state level and can vary from state to state primarily due to the particular issues and conditions that exist in that area.

Wastewater treatment generally consists of two separate and distinct steps: (1) treatment of the wastewater; and (2) disposal of the treated wastewater. In each aspect there are multiple options to choose from, although in each particular instance, the true options are usually limited to only a few. Treatment options are measured by the level of treatment, or how pure the treated wastewater is required to be. Disposal is generally determined by (a) whether the method of disposal is also being considered as a part of the treatment and (b) the ability of the recipient of the treated wastewater to assimilate the volume to be discharged.

The first of these disposal issues is often associated with land-based disposal such as spray irrigation, drip irrigation or subsurface beds. Often the method of treatment of the wastewater includes the use of the soil after land application to provide additional pollutant removal. As a result, the application of the wastewater is considered a part of the treatment process and is subject to regulation as such. Where the application to the golf course has treatment implications, the permitting of the process will require testing to establish the ability of the soils to provide the required results without adverse consequences to groundwater conditions, such as mounding of groundwater or the increase of substances such as nitrates in the ground water under and leaving the site. In well-drained soils in coastal regions and desert areas the potential for problems is less than in regions with less sandy soils. Many states will require additional mechanical treatment, such as sand filtering, to eliminate the treatment aspect, especially when the wastewater is being disposed of in a land application that involves public contact, such as golf course irrigation.

The second issue in the use of treated wastewater is the ability of the disposal facility to handle the volume of water that is generated by the treatment plant. Understandably, unless the outflow from the treatment plant is being discharged to a receiving stream or river, there must be a satisfactory method of land applying it that assures the disposal of the volume generated. That again raises the issues of required application rates and the ability of the soils to accept that much water without an adverse affect on ground water conditions. It also raises the questions of weather conditions, since precipitation and cold both affect the ability to apply treated wastewater. Storage must be provided to account for such conditions, and the amount of water accepted by a course for disposal must be adjusted for the anticipated average number of unsuitable days.
Given this background, it is important for a course to understand its role in the wastewater treatment process. In many instances, the golf course is a dual use of ground that is also designed to be the wastewater disposal area for the community or municipality. The availability of suitable ground will determine the required application levels. In these situations the amount of wastewater to be applied each day can actually exceed the amount normally desired for normal golf course use and considerations of playability from over application of water must be considered. While many studies exist on the minimum amount of water needed for good turf conditions, there is little available on maximum water applications that can be implemented while still maintaining acceptable playability. That question needs to be answered before committing to dispose of a fixed allocation to wastewater.

Where the wastewater to be acquired is less than the needs of the golf operation, the concerns of forced over irrigation are avoided. Generally, however states treat the wastewater that is received by the course, and not yet applied, as still being a part of the treatment process and require its storage to be segregated from other sources of irrigation water at the golf facility. Usually a separate pond is required. If full treatment has not been provided before it is piped to the course for disposal, it may also require segregation of irrigation lines so that the wastewater is only applied on the portions of the course where appropriate soil conditions exist to complete the renovation process.

The cost of disposal of the wastewater stream from a treatment plant that is not approved for stream discharge is a significant cost for the treatment plant operator, especially in developing and metropolitan areas. The cost of ground is usually a major component of that disposal cost. This means that land uses, such as golf courses, that need water and have their own economic viability can benefit from the need to find cost effective ways to dispose of the constantly occurring stream of treated wastewater. The questions to be answered before signing on to the use of treated wastewater, other than the cost of the water (or in some instances the payment to be received for accepting the water), are: (1) to what level is the water treated; (2) is my land application of the water part of the treatment process (hopefully not); (3) what amount do I need and can I limit my obligation to that amount; (4) what special handling and storage requirements will apply; (5) are there any mandatory application requirements; and, (6) how does it get to me and who pays for the conveyance system? Each of these need to be answered in the context of the regulatory program for your state, county or municipality.
Property Restrictions and Regulatory Requirements
Land Use Restrictions, Government Regulations and Third-Party Regulations
Provided by John Snyder, Saul Ewing, LLP

From the mid 1920s with the first United States Supreme Court case upholding the power of local government to regulate land use and development, the breadth of regulation has continually expanded. Simple restrictions governing the type of land use by zone have grown into regulations on the operations of those uses. Restrictions on the standards and specifications for land use improvements have grown into regulations on woodlands, flood plains, riparian buffers, high-water table soils, view sheds and a myriad of other considerations. Zoning and subdivision ordinances have grown from pamphlet size to more than 100 pages each, with ancillary ordinances covering specialized topics, like storm water management.

The power to regulate land uses and the implementation on development is primarily a state function. There are some issues like pollutant discharges and wetlands that are federally regulated, as well, based upon their impacts on interstate commerce and our system of federally protected waterways. But in general the power to regulate in the area of land use lies with the states. They have, in turn, passed it on, through state enabling legislation, to counties and/or local municipalities. Many states regulate and administer at the county level, with some minimal authority in local towns or cities. Others, like Pennsylvania with thousands of local municipalities, pass the authority on to the local level. But even in the states with the greatest amount of local control, there are a growing number of state environmental regulatory agencies, with regulations and policies that overlap the local or county controls, often in an inconsistent manner.

Over time governmental restrictions on land use have evolved from a defined set of standards, setting the parameters for permitted land uses, to a growing trend of regulating by special permits. Courts have upheld, and state enabling legislation has authorized, regulatory schemes whereby a land owner proposing a specific use, that is allowed in that zone, must go through a hearing process to determine the suitability of the property for the use and the impacts that would arise there from, with the administrative body having the power to impose conditions on the grant of permission to implement the use. Standards for the imposition of conditions are usually condensed to the word “reasonable” and then compounded by the reluctance of the courts to become “super zoning boards.” Add the power of political persuasion of even the smallest group of local residents on local elected officials, and the formula for over regulation is in place, especially in jurisdictions that administer at the local elected official level and not at the level of county administrative departments.
Issues on approval are generally local fact dependent. Water usage, and its effects on local water supplies and quality; environmental encroachments into wetlands, woodlands and even habitat of endangered species; storm water management, including issues of quality resulting from turf management practices; noise and buffering issues relating to the location and hours of operation of the maintenance facilities; encroachments on the land of neighbors and safety issues relating thereto; and, traffic are generally the hot topic issues. They flow through the enacted regulations and the hearing and review process, often finding their way into specific conditions imposed on the permits for the construction and operation of the facility.

Some of the more restrictive requirements arise from the expanding area of land use regulation. Examples that severely limit the ability to construct a facility without unreasonable large land acquisition requirements include the following: local ordinances requiring undisturbed wetland or riparian buffers (sometimes as wide as 300 feet) in which activities such as tree removal, and sometimes even grading, are prohibited; prohibition of grading in areas of high water table (seasonal groundwater within, in some instances even, 18 inches of the surface); limitations on the disturbance of slopes in excess of 15 to 20 percent; and, limitations on the removal of tree masses, wooded areas or individual trees of a certain minimum size. Additional state and federal regulations have limited the amount and location of wetland disturbance and crossings, mandated recharge systems for storm water management and established extensive buffers around habitats of endangered species, usually prohibiting activities such as mowing and intended to prevent human entry into those areas. All of these require an extensive and comprehensive due diligence effort on the part of any prospective course owner before buying ground for a new course or taking on ownership of an existing course where any renovation or redesign effort could be faced with such regulations or requirements.

However, understanding the breadth of the regulations and ordinance requirements alone is not always sufficient in the present land use regulatory climate. If your permits will be subject to a review process in which “reasonable” conditions can be imposed, you also need to understand the lay of the land both politically and with regard to the issues that your neighbors deem most important. Where is your noise generating maintenance facility going to be located? Does your layout put neighboring properties in the potential line of fire from amateur John Dalys, the ones that can hit the ball a mile, but, unlike John, can’t quite control where it is going? Are your local neighbors on wells and, if so are you going to sink your own wells for irrigation, and what are you doing to prevent your nitrates from polluting their wells? It even can get as petty as whether your players will be walking too close to the back yards of your neighbors (an issue that was the topic of a successful nuisance action brought by a neighbor of one Pennsylvania golf course). All of these are issues that can lead to the imposition of design or operational conditions to, or restrictions on, your permits and approvals. And all are topics on which courts have upheld the reasonableness of such conditions.

From the standpoint of nuisances and noise, many municipalities, especially in suburban and urban areas, have noise ordinances restricting the operation of machinery and equipment during night and early morning hours. Most have been drafted with the construction industry in mind and do not exempt the course preparation activities of golf course owners and operators. As such they can lead to negotiated conditions on the timing, scope and location of early morning activities.
All this leads to the final consideration, the alternative that is sometimes the lesser of the evils, the creation of private restrictions. It is often easier and less risky to work with neighboring property owners and civic groups to create a satisfactory set of restrictions on your design and operation than to leave it to elected officials or governmental administrators to fashion conditions that create the protections that they perceive the neighbors to need and/or want. There is generally more opportunity for give-and-take in such private discussions and the chance to reduce excessive governmental interference in private issues. It also provides insight to, and information on, the issues you will face if you do not reach a private resolution.

Local regulation of land use issues even with regard to a "community friendly" use like a golf facility is constantly expanding. State and federal regulation of environmental matters overlay additional, and often inconsistent, restrictions and requirements. When placed in the fishbowl of neighbor and watchdog group involvement, they create a formidable gauntlet of permitting and approvals for any project, whether you are starting new or upgrading your facilities or changing your operational procedures. It all comes down to doing the home work of understanding the regulations and restrictions that will apply and the due diligence of understanding, through careful investigation, the local environment in which the decisions on your project will be considered.
Water Quality Checklist for Golf Course Developers and Managers
Provided by Wayne Rosenbaum, Foley & Lardner LLP

Golf is one of the most popular sports in America today for both men and women. It provides recreation, exercise, business opportunities, and a chance to get outdoors and enjoy nature for more than nine million people every year. The growth of the golf industry coupled with attendant residential development and redevelopment has resulted in increased environmental pressures on water quality, which in turn has led to the placement of additional social and regulatory obligations on the industry.

As stewards of the land, golf course developers and managers recognize their social obligations to protect and enhance water resources. In addition, federal, state, and local environmental and land use regulatory agencies continue to impose additional regulatory obligations on developers and managers requiring them to design and operate the facilities under their control in a manner that protects and enhances water quality.

This section provides a checklist for use by developers and managers to aid in meeting their social and regulatory water quality obligations during the pre-development, construction and operational phases of their courses. Specific regulations may vary based upon jurisdictional requirements and site-specific conditions. Therefore, the reader should use this article as an awareness tool and a basis for discussion with legal counsel and environmental consultants when considering activities that may have an effect on water quality.

Pre-Construction
During the site selection and design phase, course developers need to consider the water quality impacts of their projects on existing hydrological conditions. Early consideration of these issues is likely to save time, money, and potentially expensive regulatory enforcement actions by both public agencies and private citizens.

Developers should obtain a detailed hydrological analysis of both on-site and off-site conditions. Developers should pay particular attention to the location and condition of surface waters. The regulation of surface water by state, federal, and local agencies continues to increase nationally.

Pursuant to Section 404 of the Clean Water Act, the Army Corps of Engineers regulates the filling of any water of the United States. Waters of the United States currently include not only navigable waters and blue line streams but also any waters tributary thereto. Impacts to these waters such as the construction of bridges or the canalizing of surface flows may require federal permits. Obtaining these permits can be costly and result in project delays. In addition, the federal agency may require costly mitigation. Early consultation with environmental experts and legal counsel can help the developer identify the locations and probable classification of existing surface waters and assist in project designs that minimize impacts. The strategic relocation of a cart path to avoid an Army Corps permit could result in significant savings in time and money.
Regulation of surface waters is also within the purview of state and local agencies. In order to obtain a permit from the Army Corps, a Clean Water Act Section 401 Water Quality Certification will be required from the state. Section 401 Water Quality Certifications allow state regulators to review the project and verify that the project meets any state requirements, which may be more expansive and more restrictive than the federal requirements. Again, early consultation with water quality experts and state regulatory agencies can help avoid costly redesign, mitigation expenses, or project delays.

Finally, recent revisions to municipal storm water permits in many jurisdictions require that the local land use agencies consider water quality impacts arising from the proposed development both during and after construction. Because the local jurisdictions are now held accountable for the quality of the water discharging from the project, many jurisdictions have begun to impose additional best-management practices on projects above and beyond those required either by the federal government or the state. Once again, early consultation can avoid long and costly delays in the plan check process.

Construction
The development or redevelopment of a golf course frequently involves the disturbance of large areas during the grading process. During a storm event, these exposed areas have the potential to contribute large silt and sediment loads to surface waters both on and off the project site. In order to minimize these impacts, federal, state, and local agencies have required developers to obtain coverage under a construction storm water permit. In recent years, the requirements of these permits have become more stringent.

Although not required by the federal government, many states, such as California, now require the sampling of storm water discharges during the construction phase for a variety of pollutants including silt and sediment. Some of the most recent permits include requirements which strictly limit the amount of land which may be exposed at any one time and require the capture and chemical treatment of storm water prior to discharge. The most recent proposed permits have included design requirements that would control post construction downstream erosion by limiting both the velocity and duration of post construction storm water discharges to mimic the pre-construction condition.

Because of the additional liabilities attendant to these new requirements, developers need to be aware of the specific requirements applicable to them during the pre-planning phase. By understanding their obligations, developers can appropriately budget for the additional costs associated with these new requirements. Further, by understanding their specific obligations, developers can include appropriate language in their construction contracts to assure that the contractors are aware of these new obligations and will indemnify the developer for their actions.

Careful compliance with construction storm water permit obligations is critical for one additional reason. The developer’s obligation to comply with the provisions of the permit arises out of Section 401 of the Clean Water Act. As such, compliance with the permit is subject to enforcement by any citizen. It is not unheard of for individuals or environmental groups who did not fully support the project during its initial planning and permitting stages to use the citizen suit provisions of the Clean Water Act as a tool to ensure strict compliance with permit requirements. Remedies available to citizens
under Section 505 of the Clean Water Act include payment of penalties to the federal government ($34,500 per day per violation), injunctive relief (stop the project), and award of attorneys fees.

Operations
Environmental groups and regulatory agencies have focused on several pollutants of concern generated through the operation of golf courses. These include green waste, nutrients and pesticides, and bacteria. In order to address these concerns golf courses are now subject to additional local, state, and federal regulation.

State and federal agencies have attempted to address these concerns through the imposition of industrial storm water permits for maintenance activities associated with golf courses. Recent revisions to the federal requirements for the general industrial storm water permit now require that golf course operators obtain coverage under the industrial storm water permit for all equipment facilities and maintenance activities that could cause or contribute to an exceedance of a water quality objective. Many state and local enforcement agencies interpret this requirement to include maintenance operations, cleaning operations and storage operations where storm water could be exposed to potential pollutants such as green waste, oil and grease, stored fertilizers and pesticides.

Operators need to carefully inventory their facilities and audit their operations to determine exposure potentials. Where potential exposures exist, coverage under the permit is required and best management practices deployed to minimize the impacts to surface waters.

In order to minimize the impacts of these obligations, operators should carefully review the maintenance and storage design features of the course at the design phase with a view towards minimizing storm water contact. Additionally, operators will need to develop and budget for ongoing training programs for maintenance staff to ensure that those individuals engaged in maintenance and storage operations understand the reason for, and the operation of, the adopted best management practices as part of the operator’s storm water pollution prevention plan.

The discharge of reclaimed water into surface waters has become a recognized water quality problem. Regulatory agencies have identified irrigation overspray and the overtopping of reclaimed water features as major sources of fecal coli form. Operators need to develop and implement operational and maintenance plans to address these contingencies.

Finally, the improper application of fertilizers and pesticides can contribute significant pollutant loads to surface waters. In order to meet their obligations to protect surface waters, many local jurisdictions are imposing new requirements on golf course operations, which generally include the development and implementation of a fertilizer and pesticide management plans. Operators need to be aware of these potential obligations and to include the development and operating costs of these plans in their budgets.
Conclusions
Golf course developers and operators play an important role in society by providing recreational activities to millions of citizens and as stewards of the land. As land use intensifies in urban and suburban areas across the country, regulatory agencies and citizens have begun to scrutinize more carefully the design, construction and operation of golf courses related to their impacts on water quality. Early planning and ongoing water quality management have become important factors in the successful design and operation of golf courses. Proactive consultation with environmental experts and legal counsel can help assure that golf course developers and managers remain good stewards of the land and comply with their regulatory obligations while continuing to provide important recreational opportunities.
Considering buying or operating a club built as part of a residential development? One of the first things you need to do is to obtain and properly analyze all of the deed restrictions relating to the club property and the development in which the club is located.

Developers build clubs to ensure that lot values are maximized. Invariably, the costs of early operations of the club are considered a cost of the development infrastructure and are subsidized for some period of time. Most developments also include provisions within the deed restrictions relating to the club and its use which often limit its membership or golf course access to create “exclusivity” to enhance property values. These actions create continuing expectations among members.

As a club or development matures, circumstances often require changes at the club. Members often sue to prevent change they do not favor. To avoid a costly legal battle, developers often enter into “consent judgments” or “consent decrees” in which concessions are made concerning the future operation of the club. Those consent judgments or decrees often create hurdles to the future viability of the club.

Those who acquire development clubs often become embroiled in disputes with the members because of differences in how the restrictions, consent judgments or decrees are interpreted because they are poorly written, confusing or misunderstood. Those disputes usually arise when changes are made by the subsequent owner which the members believe are unfavorable. Typically these disputes are stimulated by increases in course usage through group or outside play, creation of limited play memberships, dues or fee increases, changes to private cart access or modification of membership transfer rights or fees.

Before you begin development or purchase a development golf facility or before you make significant changes, it is imperative that a thorough review of the “legal” obligations associated with the club property be performed by a qualified person. That review may wind up saving you thousands of dollars in legal fees as well as help you make changes while preserving harmony with your members.
Interstate Land Sales Full Disclosure Act
Provided by John Theirl, Esquire; Brown McCarroll, LLP

The Interstate Land Sales Full Disclosure Act (15 U.S.C.A. §§ 1701 et seq.) is intended to protect consumers from fraud and abuse in the sale of or lease of land. It was originally enacted by Congress in 1968 and became effective in 1969. Except in the case of a transaction which is exempt from the registration requirements of the Act, the Act requires land developers to register with the U.S. Department of Housing and Urban Development (HUD). The Act is administered by HUD.

If registration with HUD is required under the Act, the developer will be required to file a Statement of Record with HUD and to deliver to each prospective purchaser a Property Report. Each prospective purchaser is required to sign a receipt acknowledging that they received a copy of the Property Report from the developer. The Statement of Record filed with HUD is available for inspection by the public. If registration is required under the Act, and the developer fails to register, as a general rule, any contracts entered into by prospective purchasers are voidable at the election of the purchaser.

The type of information included within the Statement of Record generally includes, but is not limited to, the following:

- A copy of the formation documents of the developer, such as articles of incorporation and bylaws.

- A financial statement of the developer.

- Information about the land, including title policies and copies of deeds and mortgages.

- Information about local ordinances and regulations.

- Information about facilities available in the area such as schools, hospitals and transportation systems.

- Information about the availability of utilities.

- Supporting documents such as maps, plats and suppliers of utilities and services.
The type of information within the Property Report, which must be delivered to prospective purchasers, generally includes, but is not limited to, the following:

- Distances to nearby communities over paved and unpaved roads.

- Status of mortgages or liens on the property.

- Whether contract payments are placed in escrow.

- Availability and location of recreational amenities.

- Available utilities including, sewer, water, electricity, telephone and natural gas.

- Timetable for completion of all improvements and amenities.

- Security, if any, insuring the completion of proposed improvements.

- Number of lots included within the subdivision.

- Soil and climate conditions.

- Type of title the purchaser will receive.

A subdivision may qualify for an exemption from the registration requirements of the Act. If the developer has fewer than 25 lots that are part of a common promotional plan, the developer is generally exempt from the provisions of the Act. If the offering of lots by a developer has 100 or more lots, the offering may be subject to registration with HUD unless an exemption is available. A developer who violates the Act may be subject to a fine and a term in jail.

Once a registration under the Act becomes effective, the developer is required to submit to HUD an annual report within thirty (30) days of the anniversary of the effective date of the filing. In addition to the annual report, the developer is required to file an amendment to any of the registration documents to the extent that there is a change in any material fact.

Even if a developer complies with the registration requirements of the state in which the property is located, the developer will generally also have to comply with the registration requirements of the Act. There are a few states, including Arizona and California, that are certified by HUD and HUD may accept the registration statements for such states.

This article may not to be relied upon as a legal opinion or legal advice nor is it intended to be a complete discussion or overview of the provisions of the Act or the Act’s applicability to any given factual situation.
Accessibility and Clubs
Provided by Jack Wilson, Gordon & Rees LLP

The Americans with Disabilities Act (ADA) is expanding its reach into golf facilities through new pending rules related to golf courses. Much has been written about these new rules and their impact upon course construction and play. However, while these new rules have been generally well received, often overlooked are existing accessibility standards already covering many club amenities. Every golf facility owner, operator and developer should be fully conversant with these existing accessibility laws as well as the new golf course rules and understand myths that surround accessibility laws.

There is a common myth that “clubs are exempt” from the ADA or equivalent state standards. The fact is that only non-profit organizations which are member controlled where membership is highly selective but non-discriminatory fall within this exemption. Even then, if non-member access is granted to amenities at those clubs, then those amenities are subject to the standards.

Another common myth is that golf clubs have generally been exempt until the recent golf course standards take effect. The fact is that many of the amenities have long been subject to the requirements of the ADA. For example, lodging facilities, clubhouses, dining and bar facilities and their related parking areas are subject to the ADA standards.

For facilities constructed after the effective date of the ADA those facilities generally must meet ADA standards. For facilities constructed prior to the ADA effective date, modifications to meet the standards must be made if “readily achievable” as defined by the ADA. Renovations can also trigger new construction standards. Another commonly overlooked fact is that many states have regulations which require advance submission and approval of construction plans for new construction and renovations to assure compliance with accessibility standards.

Therefore, it is vitally important that existing facilities be examined and modified for compliance with the ADA (or equivalent state accessibility law) and that planning for new facilities or renovations occur with an awareness of the applicable standards and approval processes. Failing to do so not only invites costly legal action, but more importantly, discourages growth of a desirable market segment.
Water bodies and wetlands on golf courses are often subject to federal and state regulation. The Clean Water Act requires a permit to discharge, dredge or fill material into waters of the United States. Federal permitting authority is vested in the United States Army Corps of Engineers under § 404 of the CWA (33 U.S.C. § 1344). Corps regulations define "waters of the United States" to include navigable, tidal and interstate waters as well as lakes, streams, tributaries and adjacent wetlands, the use or destruction of which could affect interstate or foreign commerce. (33 CFR § 328).

Federal jurisdiction over non-navigable waters and wetlands has been the subject of considerable dispute. In a 2001 decision, the Supreme Court held that federal jurisdiction does not extend to isolated wetlands. (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S.159). In February, 2006, the Supreme Court heard oral argument in two cases in which the Corps asserted jurisdiction over wetlands based on their hydrological connection to navigable waters. A decision was expected in the first half of 2006. There is a distinct possibility that the scope of federal authority will be sharply curtailed as a result of these cases unless Congress responds with new legislation. Congress will be powerless to act to the extent the Court rules that the Clean Water Act exceeds federal authority under the Commerce Clause of the Constitution.

The fundamental Corps regulations pertaining to permits for activities affecting waters of the United States are in 33 CFR § 323. Relatively small projects affecting less than one-half acre or 300 linear feet of stream bed can be authorized under the Corps’ Nationwide Permit Program described in 33 CFR § 330.

Nationwide permits are tied to specific types of projects. Two of the nationwide permits explicitly address golf courses. NWP 39, generally applicable to residential, commercial and institutional developments, covers golf courses that are an integral part of residential developments. NWP 42 applies to recreational facilities and small support facilities and covers construction and expansion of golf courses that do not substantially deviate from natural landscape contours and are designed to minimize adverse effects to waters and riparian areas through the use of such practices as integrated pest management, adequate storm water management facilities, vegetative buffers, and reduced fertilizer use. Both NWP 39 and 42 require pre-construction notification for all projects causing the loss of 1/10th acre of non-tidal waters. NWP 39 also requires notice of the loss of any open waters below the ordinary high-water mark. Compensatory mitigation is required at a one-to-one ratio in the form of restoration, creation, enhancement or preservation of wetlands to compensate for the unavoidable adverse impact remaining after appropriate and practicable avoidance and minimization has been achieved. Mitigation is required under NWP 39 for all projects, even those below the pre-construction notification levels.

Other NWP provisions may affect golf course activities such as utility line installation, stream crossings and storm water management. Course owners/operators should review all provisions carefully to avoid violations and potentially serious penalties.

Many states regulate water bodies and wetlands. With the potential shrinkage of federal authority, states may increase their level of oversight.

Wetlands and Golf Courses
Provided by Carl B. Everett, Saul Ewing LLP

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Human Resources
There are two primary ways in which employers hire individuals - by contract and at-will. One of the main distinctions between an at-will employee and a contractual employee is whether the duration of employment has been set. Typically (not always), contractual employees will have a temporal term set forth in their employment agreements. Some contracted periods of employment may be very short, some may be a year or two in length, and some may be for life. Individuals employed on an at-will basis, on the other hand, will have no such defined term of employment.

Many employers desperately want to preserve the at-will employment relationship with their employees. Before we venture too much further in this discussion, we should define the concept that we are discussing. Although it may vary from state to state, the at-will employment relationship is generally described as “an employment relationship that can be terminated for any reason or no reason by either party as long as such termination is not discriminatory.” Many states add to that definition “and do not violate public policy.” In other words, the at-will employment doctrine contemplates employment freedom, both for the employee and the employer - there is nothing, other than anti-discrimination laws and, in some states, public policy, from preventing either party from terminating the employment relationship. This allows either party to cut its ties with the other whenever it so chooses.

Yet many employers will inadvertently abrogate the at-will employment relationship with careless language in offer letters, verbal offers, or even employee handbooks. For instance, an employer who mails an offer letter that indicates “during your first year of employment . . .” without any other language that specifically preserves the at-will employment doctrine risks establishing an employment contract one year in length. Similarly, an oral offer that indicates that the employee is “being hired for the season,” without anything else, runs the risk that the employer has entered into an employment relationship with the specified term of the season. In either of these two scenarios, the employer has entered into an employment relationship that has a specified term - also known as an employment contract.¹

Some may be scratching their heads and wondering, “So? What is the problem with having a term of employment? Can’t I just fire the person anyway?” Well, the answer to that last question is, yes, an employer can go ahead and fire someone who has an employment contract for a specific term, but not without consequences. If someone has a specified duration of employment - for example one year - and the employer terminates that employment prior to the full year transpiring, then the employer will owe the employee for the remaining term of employment. This analysis will be different in a written contractual setting where there is contractual language that governs how and when a contract of employment can be terminated. But, remember, for purposes of this discussion, we are focused on non-written contracts where an employer may or may not have created an employment relationship for a specific duration.

¹ There are certain jurisdictions that have held even in the at-will employment setting, the employer and employee have entered into an employment contract. The holdings find that the employment relationship itself establishes a contractual relationship and the fact that such relationship is at-will only means that there is no term of duration to the contract. For purposes of this discussion, we are focused on whether an employment relationship for a specified duration of time has been created.
The key for employer flexibility is to maintain the at-will doctrine. As such, employers should always include language that the relationship is at-will and not for a defined period of time. Employers should also be careful about speaking in terms of time duration when it comes to employment relationships. Saying that an employee is expected to be available from 7 a.m. through 5 p.m. on Saturday and Sunday is fine, the employer simply wants to avoid any kind of indication that the employee has a guaranteed job for a season, a year, or whatever the timeframe may be.

Employers in certain states must also be very careful as to what they include in such workplace documents as the employee handbook. Some states, New Jersey for instance, have interpreted handbooks that do not contain clear at-will disclaimers as giving rise to employment relationships that are not at-will. In Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257 (N.J. 1985), the New Jersey Supreme Court was faced with whether language in an employee manual stating that an employee would only be discharged for cause gave rise to a contractual bind between the employer and the employee thus altering the at-will employment relationship. The employee at issue was hired without a written employment agreement and it was the employer’s intent to hire the employee as an at-will employee. The personnel manual very clearly indicated that an employee could only be fired for cause. The Court found that, without a disclaimer in the personnel manual that the employment relationships would be at-will, the termination provisions contained therein created a contract pursuant to which the employee could only be terminated for cause. As such, the employer had lost the at-will relationship with this employee. Although the language from the manual did not create a contract with a specified time of duration, it did abrogate the at-will relationship by requiring the employer to establish cause prior to effecting a termination of any of its employees.

As one can see, the handbook argument set forth in Woolley can carry over to offers of employment. As discussed previously, an employer may inadvertently create a contractual relationship of a specified term (or under specified conditions) that prohibits the employer from terminating the employment when it wants.

Employers who want to maintain as much freedom as they can with respect to their workforces should be very careful with respect to documents that are given to employees either through conveying offers of employment, through the handbook, or through other non-written communications. Of course, there are situations in which an employer will want to give an employee the comfort of knowing that they are employed for a specified period of time. In such situations, an employment contract that sets forth a specific timeframe may be appropriate. That said, most employers want to maintain their workforce freedom and flexibility by maintaining the at-will relationship with its employees. Employers who want to maintain such at-will relationships are advised to have at-will language contained in their offer letters as well as their handbooks.
Employment Agreements
Provided by Scott Callen, Foley & Lardner LLP

Employment agreements are used to protect business interests and avoid legal disputes. Employers are advised to consider entering into employment agreements for higher level managers or individuals with specialized skills. Employment agreements terms include:

**Termination** - Terms such as "with or without cause" allow employers to retain broad discretion over termination of employment decisions.

**Unfair Competition ("Non-Competition Agreements")** - Expressly prohibiting former employees from soliciting customers and divulging confidential business secrets is a prudent legal and business tactic. State laws vary on the legal protections afforded to employers so legal counsel should be contacted before implementing and interpreting such provisions.

**Assignment** - Employers can preserve the enforceability of employment agreements when an employee transfers to a new employer or there is a business entity or ownership change with the existing employer. Assignment terms make sure the agreement remains enforceable despite employment status changes.

**Automatic Renewal** - Employers can avoid disputes regarding an employee's terms and conditions of employment upon the expiration of the initial employment agreement. For instance, if the initial employment agreement runs for five years and the employee remains employed after five years, the agreement can be automatically renewed for another five years.

**Alternative Dispute Resolution** - Employers may elect alternative dispute resolution to avoid/reduce litigation costs, excessive jury verdicts, and negative publicity. Alternative dispute resolution allows employers to resolve legal disputes through mediation or arbitration (i.e., alternative dispute resolution forums) before federal/state court lawsuits are initiated.

Because employment agreement terms may restrict at-will employment legal freedoms and result in legal disputes (e.g., breach of contract), employers are advised to review such agreements with legal counsel. Legal counsel will also assist with maximizing the legal protections permitted under the employer’s local and state laws.
Independent Contractors
Provided by Scott Callen, Foley & Lardner LLP

Legal Requirements - Independent Contractors vs. Employees

Independent contractors are self-employed and typically contract to perform specific job assignments because of a unique skill. Importantly, independent contractors are treated differently than employees under most employment laws and are excluded from certain legal protections. For example, independent contractors are not covered by federal wage and hour laws relating to minimum wage and overtime. Employers do not provide worker’s compensation and unemployment insurance to independent contractors under most state laws.

Substantial fines and legal damages are levied when employers fail to properly classify independent contractors and employees. For example, if an employee is wrongfully classified as an independent contractor and does not receive overtime, the employer may be liable for years of wage and hour violations.

Employer “control” is a common legal standard for distinguishing employees from independent contractors. The employer’s independent contractor designation on company documents does not dictate the legal classification. The more an employer exercises control over the independent contractor, the greater the chance the independent contractor will be deemed an employee. Legal factors distinguishing employees and independent contractors include whether:

- The contractor’s relationship with the employer is temporary.
- The contractor invests in facilities and equipment.
- The contractor shares or assumes the risks and rewards of profit and loss.
- The contractor operates as an independent business organization and operation.
- The employer exercises limited control over the contractor’s work.
- The contractor exercises independent initiative, judgment, or foresight in performing the work.
- The contractor utilizes special skills in performing the work.
- The contractor staffs the project with its own assistants.
- The contractor is free to work for others or works solely for the employer.
- The contractor is not required to work a schedule mandated by the employer.
Example: Bushwood hires Spackler to rebuild the putting greens after an explosion on the golf course. Spackler signs an independent contractor agreement to complete the project in two weeks. Spackler is free to set his own working conditions so he works on the project from 2 a.m. until 4 a.m. every night because he has insomnia and is handling another golf course development project at a different country club during the day. Spackler uses his own equipment and has a company called "Gopher, LLC." Spackler is an independent contractor.

Example: Spackler signs an independent contractor agreement to rebuild the greens and to maintain the course throughout the year. He is required to work during standard business hours, use the company time clock, and has one five-minute break period. Spackler is not allowed to work for any other employer and he uses only the equipment provided by Bushwood. Spackler signs the employee handbook and he was told by human resources that he is eligible for health care benefits if he works 100 hours a week. Spackler is considered an employee despite the independent contractor designation.

Avoiding Improper Independent Contractor Classification
Do not rely on an oral agreement. Execute and strictly implement written agreements to clarify the relationship with the independent contractor.

Do not put independent contractors on your payroll - pay by invoice.

Do not offer independent contractors health and other benefit plans.

Do not put independent contractors on a set schedule each day (if possible).

Do not treat independent contractors the same as employees with respect to discipline - such as supervisors “writing-up” independent contractors.

Do not place limits on other projects the independent contractor can perform while working for your company.

Do not cover contractors under your workers’ compensation insurance or pay unemployment insurance premiums or taxes associated with employee status.

Consult with legal counsel when classifying independent contractors and implementing contractor agreements.
Governing Laws
Federal and state laws regulate wage and hour compliance. The Fair Labor Standards Act (FLSA) is the federal law establishing payment of minimum wage, overtime and various other wage and hour compliance laws. Many states have also established wage and hour laws, including payment of minimum wage and overtime. Wage and hour compliance is the root of many employment lawsuits, including class actions, so employers should carefully review and audit such practices on an annual basis.

Minimum Wage
The FLSA requires generally that all covered employees receive the current minimum each hour worked in a workweek unless specifically exempted by law. Few minimum wage exceptions exist, but some relate to training employees and volunteers. Congress continues to consider increases to the minimum wage so employers are advised to stay abreast of legal developments.

Employers must comply with the minimum wage laws within their respective state(s) of operations. State laws are increasingly establishing the amount of minimum wage above federal requirements, and employers are required to comply with their applicable state law requirements.

Compensation for Hours Worked
Employers are required to pay minimum wage and overtime only for "hours worked" (i.e., compensable working time), which the FLSA legal standard delineates as "suffered or permitted to work." This means employers are obligated to pay employees for work requested or permitted. Although there are numerous debatable "hours worked" situations, employers should be particularly cautious about failing to pay for "hours worked" in the following contexts:

- Overtime work performed after a shift ended and there is no policy prohibiting overtime or requiring express authorization.
- Work performed away from the business (e.g., home) if the employer knows or has reason to believe that the work is being performed.
- Travel time requested or required by the company (e.g., company training events).
- "On-Call" time.
- Rest and meal periods of brief duration.
- Pre-work activities (e.g., preparing equipment and putting on work clothing, etc.).
- Post-work activities (e.g., cleaning or removing work clothing or equipment, etc.).
**Example:** Spackler, an hourly employee, works 50 hours the week of the club championship to prepare the putting greens. Bushwood believes Spackler should have completed this task in five hours and Spackler did not have express authorization to work 10 hours of overtime. There is no policy prohibiting overtime without express authorization from supervisors. Bushwood decides not to pay Spackler for the overtime hours. Bushwood violated the FLSA (and possibly state laws) by failing to pay Spackler the overtime.

**Example:** Bushwood requires Spackler, an hourly employee, to attend a training seminar related to gopher destruction of golf courses. It takes Spackler 20 hours to attend the training seminar including travel time. Bushwood must pay Spackler for the 20 hours because it is considered “hours worked.”

**Overtime**
The FLSA requires that all covered employees receive one and one half times their regular hourly rate of pay for all hours worked in excess of 40 hours in a workweek *unless specifically exempted from this requirement by law*. Overtime violations can result in thousands to millions of dollars in back pay, double damages, and attorney’s fees. Many employers unlawfully fail to pay overtime because of a common misconception that employees paid a “salary” are not eligible for overtime. Employees not paid on an hourly basis (such as a salary or commissions) may qualify for an overtime exemption, but only if certain compensation thresholds and legal standards are satisfied. The FLSA requires a minimum salary of $455.00 per week ($23,660.00 annual salary) for certain “white collar” job exemptions.

Additionally, the employee’s job duties must qualify as overtime exempt. Employees performing management, upper level administrative, or certain sales duties may qualify for overtime exemption(s). Employees possessing specialized training, skills, or education may also qualify for overtime exemptions (e.g., computer personnel). These employees may be eligible under “white collar” exemptions provided for executive, professional or administrative job functions or other sales related exemptions.

It is recommended that trained human resource managers or legal counsel assist with applying overtime exemptions because of the significant legal damages associated with violations and the ill-defined nature of federal and state law overtime regulations.
Worker’s Compensation
Provided by Scott Callen, Foley & Lardner LLP

Governing Laws
State laws require employers to provide worker’s compensation insurance to employees for work-related injuries. Worker’s compensation insurance covers lost wages and medical expenses associated with the work injury. In exchange for providing worker’s compensation insurance, employers have legal immunity from legal claims related to the injury.

Example: Spackler cuts off a finger while mowing the putting greens for his employer, Bushwood Country Club. Spackler has an injury covered by worker’s compensation insurance and Bushwood has legal immunity for personal injury claims.

Avoiding Worker’s Compensation Claims & Litigation
Worker’s compensation insurance is costly and alleged work-place injuries are the cause of many legal disputes. Proactive and legally sound employer measures may reduce premiums, claims and litigation.

Implementing safety policies and procedures are recommended for all work-related activities. These policies should extend to work activities that are outside of the place of employment, including home offices and business related travel. An employee does not need to be physically working at the employer’s location to be covered by worker’s compensation insurance.

Documentation practices should be implemented to reduce claims and defend against non-meritorious claims. Legal disputes commonly arise over whether the injury is work-related, the severity of the injury, and entitlement to lost wages. Documentation preserves contemporaneous evidence of the nature of the injury and statements made by the employee and employer.

Employers should consult with their worker’s compensation insurance provider or legal counsel about premium discounts and claim denial measures. Many states offer premium discounts for employer sponsored drug testing programs and implementation of drug testing policies. Employees testing positive for drugs or alcohol shortly after sustaining a work-injury may be denied worker’s compensation benefits.

Worker’s compensation insurance providers and legal counsel should also be contacted about implementing light duty programs because such programs can reduce an injured employee’s lost wages. State laws may specify light duty requirements. Federal and state laws relating to job accommodations and discrimination also must be considered when offering light duty programs.

Employers should exercise utmost caution to avoid worker’s compensation retaliation claims. Even if the employee does not have a legitimate worker’s compensation claim, employers are prohibited from taking adverse employment action in retaliation for filing a worker’s compensation claim.
Discrimination
Provided by Scott Callen, Foley & Lardner LLP

Governing Laws
Federal laws prohibit employment discrimination on the basis of several protected characteristics including race, sex, color, national origin, religion, age, disability, and pregnancy. Federal laws must also be reviewed when taking adverse action against employees or applicants for off-duty conduct (e.g., bankruptcy filings, credit scores, etc.).

State and local government laws prohibit employment discrimination, but usually cover more protected characteristics than federal laws including (but not limited to) marital status, genetic testing, medical conditions, off-duty conduct (e.g., smoking) and sexual orientation. Employment discrimination claims represent a very high percentage of lawsuits filed in the United States so employers should carefully scrutinize all employment practices to avoid discrimination violations.

Discriminatory Employment Actions
Employment discrimination is prohibited in connection with any terms and conditions of employment. Any discriminatory conduct which directly or indirectly impacts the terms and conditions of employment may form a legal violation. Absent very limited legal exceptions, employers cannot discriminate in hiring, promotion, terminations, layoffs, employment tests, compensation, benefits, training, transfers, work assignments, accommodations, or any other conditions of employment.

Intentional and unintentional employment discrimination is legally actionable. Discrimination claims are frequently based on discriminatory comments or comparisons between employees of different protected characteristics. In addition, statistics or unbalanced demographics may prove employment discrimination violations.

Example: Employee A (age 55) has evidence showing that Employee B (age 25) are both in the same job position and received the same performance ratings, but Employee B was awarded the only pay raise. Employee A may have a valid age discrimination claim.

Example: An employer hires mostly males for management jobs and mostly females for lower paying administrative jobs. Statistics will likely be used to show gender discrimination.

Avoiding Discrimination Actions
Federal/state laws require employers to prove a legitimate business reason for any differences in the treatment of employees with protected characteristics. Legitimate business reasons may be subjective or objective, but objective reasons are more legally defensible. For example, an employer may fire a female employee because she is subjectively perceived to have an “attitude problem,” but the employer may be found liable for employment discrimination if the jury does not believe the applicant has an “attitude problem.” Examples of objective business reasons supporting employment decisions may include excessive tardiness, failure to meet sales objectives, seniority, superior training, or past employment evaluations.
Sound documentation practices should be implemented to avoid and defend employment discrimination claims. Juries and judges tend to believe the alleged discrimination victim if no documentation exists to substantiate the employer’s legitimate business reasons. For example, if the employer is terminating an employee for excessive tardiness, there should be a record of numerous late arrivals. Without such documentation, juries may believe the employer concocted the excessive tardiness rationale as a pretext to engage in employment discrimination.

Employers should also implement anti-discrimination policies. Otherwise, juries may believe the employer is condoning workplace discrimination. The policies should address all forms of discrimination prohibited by federal/state/local laws and should provide an employee complaint procedure. Complaint procedures allow employers to remedy employment discrimination before such alleged violations result in lawsuits. Moreover, employees failing to complain of employment discrimination prior to filing lawsuits may be found to lack credibility.
Sexual Harassment
Provided by Scott Callen, Foley & Lardner LLP

Governing Laws
Sexual harassment is prohibited by federal and most state employment laws as a form of gender discrimination. Harassment claims are pervasive and can result in bad publicity and significant legal damages.

Defining Sexual Harassment
Sexual harassment is defined as *unwelcome* sexual conduct where submission or exposure to the conduct is made either explicitly or implicitly a term or condition of the individual’s employment. Sexual harassment is *unwelcome* where the employee does not solicit or invite the conduct that is deemed undesirable and offensive by the employee. Male and female employees can be victims of sexual harassment.

Types of Sexual Harassment
"Quid pro quo" harassment occurs when submission to or rejection of sexual conduct is used as a basis for employment decisions affecting the individual. The victim is usually asked by a supervisor to submit to sexual conduct in exchange for favorable employment action (e.g., hiring, promotion or raise) or the supervisor takes unfavorable action (e.g., demotion, discharge or assignment of undesirable job duties) against an employee who refuses to acquiesce in sexual conduct. For example, an employee who rejects her supervisor’s requests for sexual favors and receives a poor performance review from the supervisor a few months later may have a quid pro quo harassment claim if the employee can show the review was motivated by retaliation rather than actual performance.

"Hostile work environment" harassment exists where there is unwelcome sexual conduct that unreasonably interferes with an individual’s job performance or creates an intimidating, hostile or offensive working environment. A hostile work environment claim is legally actionable even if it does not result in tangible or economic job consequences. Conduct which can give rise to a hostile work environment claim can include: (a) requests for sexual favors; (b) sexual comments or jokes; (c) unwanted physical contact; and (d) display of sexually oriented materials.

Example: Spackler hangs naked pictures of his favorite female club members on his office walls. A female employee complains that the pictures are offensive, even though it is believed the employee is having an affair with numerous club members of Bushwood. No employee had complained about the pictures in the previous 10 years. Bushwood management decides Spackler does not need to remove the pictures because the employee should not be offended based on her rumored “off duty” conduct. Bushwood may be liable for hostile environment sexual harassment.

In addition, conduct which is not sexual in nature can also give rise to a hostile work environment claim in certain circumstances. Offensive or intimidating conduct directed at an individual because of his or her gender constitutes sexual harassment. A typical claim of this nature might include a charge that an employer ignored male employees’ attempts to drive out or belittle females by intimidating them or sabotaging their work.
Severity of Harassment
To prevail in a hostile work environment claim, the alleged victim must show the conduct was sufficiently severe and pervasive to alter the conditions of employment. Therefore, a single sexual comment is not likely to form the basis of a valid sexual harassment claim. However, severity and pervasiveness are not viewed in isolation. Consequently, a single, especially severe incident of harassment may be sufficient to constitute a violation, particularly when the harassment is physical. Similarly, relatively minor incidents may constitute unlawful sexual harassment if they are repeated with such regularity that the totality of the conduct is severe enough to alter the employee’s conditions of employment.

Preventing Harassment Complaints
Employers are required by federal/state laws to take proactive workplace measures to prevent harassment. Harassment policies and handbook provisions must be disseminated and readily available to all employees. Employers should retain a copy of the employee’s receipt of any such policies.

State laws may require harassment avoidance training so check with your employment counselor appropriate state agency. Most federal laws do not expressly require harassment training, but failure to conduct training exposes employers to lawsuits and higher damages (e.g., punitive damages).

Responding to Harassment Complaints
Federal/state laws require employers to promptly respond and take corrective measures to stop harassment. Any harassment complaint must trigger an immediate and thorough investigation. Investigations should be conducted by human resources or upper management employees who can make unbiased findings.

Questions that may be relevant to harassment investigation include:

- What type of conduct was involved?
- Was it verbal or physical or both?
- How often did the conduct occur?
- Over what period of time?
- Any witnesses?
- How many people participated in the harassment?
- Was the harassment directed at members of one gender?
- Was a particular individual singled out for harassment?
- Was the alleged victim harassed by only her co-workers, or did supervisors also participate in the harassment?
• Was the harassment patently hostile and offensive, or was the conduct relatively innocuous?

• Were there any prior complaints?

The investigation findings must be carefully and fairly reviewed to effectuate the appropriate corrective action. Additional harassment training may be appropriate where there is weak or no evidence substantiating the harassment complaint. Termination of employment or suspension may be appropriate if the investigation findings substantiate the harassment complaint. Employers should avoid, if possible, transferring the alleged victim from his/her position of employment in order to avoid future complaints.

This response may result in a retaliation complaint from the victim. Documenting the investigation is crucial to defending the employer’s harassment complaint response. Trained human resource managers or legal counsel should assist with drafting and reviewing the investigation findings because the documentation will likely serve as evidence should litigation arise.
Contracts, Licenses and Permits
Liquor Sales and Service
Provided by Deborah G. Means, Addison Law Firm

Whether you are a Club Manager, a supervisor for food and beverages, a hostess or a waitress, knowing the important service parameters of the liquor license for your establishment is key to limiting liability and avoiding liquor license violations. All service personnel need to be well-trained and policies implemented to make sure that all sellers and servers of alcoholic beverages follow the policies consistently. Do you know the answer to certain basic service questions and does your staff? If you’re not sure, keep reading....

Knowledge of permitted serving hours and rules regarding servers are both important. Most vary between weekdays and weekends and several jurisdictions require additional permits to allow service beyond midnight. Even if your location routinely closes prior to midnight, make sure any special permits needed are obtained for such once-a-year celebrations like New Year’s, Halloween or St. Patrick’s Day. The age of alcoholic beverage servers varies from jurisdiction to jurisdiction, as does the training requirements for each server. Knowing who can legally serve drinks and enforcing policies to limit service to only those individuals is extremely important.

Special drink pricing, whether for events such as March Madness, Monday Night Football gatherings, Mother’s Day brunch or weekly happy hour is generally very tightly regulated. Does your license and your jurisdiction permit two-for-one drinks? How about all-you-can-drink private party functions or 25 cent beers? Many private clubs (and their members) regularly feature Sunday brunch with free champagne. If you don’t know how to account for those sales or whether the glasses of champagne are limited to one or two per person, contact the licensing authorities and ask. This is a case where it is not better to ask forgiveness than permission.

Another tricky area involves the ability to have alcoholic beverages belonging to others brought onto your licensed premises. Does your permit allow you to hold wine tasting functions where vendors bring products for sampling? Can you ever accept donated product for charity or other events? Can the ladies golf association create cute table decorations for their monthly luncheon using a bottle of red wine as a centerpiece? Generally, the rule is that a licensed premise cannot ever have alcoholic beverages on-site which were not purchased under the permit which covers the property. There are some exceptions, but they are few and far between and very, very specific, so the only way to insure that no laws are broken is to have any such events approved, in advance, by licensing authorities.

Additional service issues and questions concern the required training level for servers, any regulations of complimentary drinks, how to account for theft and spillage, how to transfer bar inventory for use in the kitchen, permitting casino nights or other gambling activities on a licensed premises, the use of cash bars for private functions and allowing minors (accompanied by guardians) to possess alcoholic beverages. All are regulated to a certain degree and controlled by statute or rule. Educating yourself and your staff before the regulatory agent pays you a "routine" visit is critically important and a worthwhile investment of time, money and energy; one you should make today.
Water Permitting
Provided by Matt Martin, Addison Law Firm

With the ever increasing demands put on our natural water resources, the importance of understanding the rights to and the limitations of a club’s irrigation source have become paramount. In many states the use of water in streams, rivers or lakes (this is known as surface water) and the use of water pulled underground from a well (this is known as ground water) has become increasingly regulated and the use is often conditioned on having necessary permits or water rights.

Generally, the right to surface water is obtained through having ”riparian rights” or a permit to utilize the water. The legal concept of riparian rights has developed over many years and generally allows a land owner adjacent to a stream, river or lake to utilize such a body of water for irrigation purposes. In many states, however, the bodies of water over time have been either fully spoken for (this is commonly referred to as appropriation) or the states have enacted a regulatory structure of permitting to replace riparian rights.

Ground water is treated somewhat differently from surface water. But, it too is becoming increasingly more regulated. Most states require that a permit be obtained to withdraw ground water. In certain parts of the country, the stress caused by over pumping of wells has led to policies or legislation designed to ease the impact. In the southern coastal states the primary concern is ground subsidence (or sinking) caused by pumping and the invasion of salt water into fresh water aquifers. In the drier western states the regulations focus on conservation to limit the effect of well pumping on aquifer levels. Additionally, in many states there is a strong trend toward requiring golf courses to utilize reclaimed wastewater for irrigation.

Many of the water permits issued will have an expiration date. It is imperative that the golf course owner know and understand the ramifications of the duration of the permit. It is also important to know and understand if changing public policy and stress on water resources will affect the availability of permit renewals.

What this all means is that a golf course owner needs to make sure it has sufficiently answered two questions. First, have all required permits for the irrigation source been obtained? Second, is there legislation or public policy which is requiring golf course owners to move away from surface or ground water irrigation to alternate sources such as reclaimed water? Owners must look at irrigation water sources long term and be prepared to respond to the changing landscape of water availability.
Automatic Renewal Provisions
Provided by Matt Martin, Addison Law Firm

There are numerous types of services for which a club may enter into a contract, many of which may include services that may continue after an initial term. Examples of these contracts may include linen contracts, postage meter lease agreements, copy machine leases, etc. These types of contracts or agreements often contain automatic renewal provisions. Obviously the person or company providing a service to a club would like to continue to provide that service after the contract term has expired; therefore, an automatic renewal seems like the best way to continue providing such service. However, an automatic renewal provision can often time put a club at a disadvantage. For this reason, clubs should read such provisions carefully, especially if the nature of the contract or agreement is such that it lends itself to being renewed.

Automatic renewal provisions come in various forms that can each automatically renew a contract for an additional, extended term without action on the part of the club. For example, an automatic contract renewal provision might read, “This agreement shall automatically renew for a like term unless the club gives written notice to the vendor prior to the expiration date of the initial term stating that the club does not wish to renew the agreement.” This type of provision allows the agreement to continue for an additional time period unless notice to the contrary is served upon the other party prior to expiration of the original agreement term. The additional time period is usually identical to the initial term; however, it can sometimes be a shorter length of time. This type of provision burdens the club in two ways. It requires the club to remember the expiration date of the contract, and it also requires that the club give written notice of cancellation or termination prior to that date. Although this example puts the burden on the club, it is actually the least burdensome type of automatic renewal provision you may see.

Other renewal provisions go a step further and require that a club give notice that it does not want to renew the contract at least so many days prior to the expiration of the initial term. An example of this type of provision may read, “This contract shall automatically renew for an additional like term unless the club gives written notice to the vendor that it does not wish to renew the contract at least sixty (60) days prior to the expiration date of the contract.” This type of renewal provision requires that the club remember the expiration date of the contract and provide written notice two (2) months before the contract expires that it does not want to renew the agreement, otherwise, the club will be bound to an additional term of service. If subject to this type of renewal provision, a club finds itself unable to terminate the contract during the last two (2) months of the initial term. As you can see, this type of provision is more burdensome than that discussed above; however, it provides a little more breathing room than the next example.
Other types of automatic renewal provision leave clubs with a very short timeframe in which to terminate a contract. Such a provision might read, "This agreement shall automatically renew for an additional like term unless the club gives written notice to the vendor that it does not wish to renew the contract no more than ninety (90) days or no less than thirty (30) days prior to the expiration date of the initial term." This type of provision requires that the club not only remember the expiration date, but it also only gives the club only two (2) months in which it must provide notice of its desire to terminate the agreement. This is more restrictive because if the club were to remember four (4) months prior to the expiration term that it needed to provide notice, that would be too soon, and the club would be required to wait at least another month before it could provide such notice to the vendor, at which point, the club could forget and then find itself not remembering again until just a few days prior to the expiration date at which point it would be too late. Clubs should avoid entering into contracts with these types of provisions as it opens the door for potentially unwanted renewal terms.

Because automatic renewal provisions do not normally provide any benefit to clubs and are inserted really to benefit the vendor, these provisions should be deleted from all contracts if possible before execution. These types of provisions can often times be negotiated out of the written agreement; however, if a vendor is completely unwilling to enter into a contract without an automatic renewal provision, and if a club finds it absolutely necessary to enter into the agreement, the club should, at a minimum, attempt to include the least invasive provision possible. A good rule of thumb is for a club to always attempt to negotiate for a shorter amount of time required for notice prior to the expiration date. Also, a simple calendar or reminder system should be put into effect so that a club will know when the expiration of an initial term is approaching. Enough notice should be provided so that a club can make a determination as to whether it wishes to renew the contract of its own volition or whether it wishes to shop the market for a new service provider and/or a better deal. Even if a club wishes to renew the service contract, it may be able to negotiate with the vendor for the removal of the automatic renewal provisions, therefore, removing the burden of perpetual renewals.
Membership and Access to Facility Issues
Tee Time Agreements with Hotels and other Third Parties
Provided by Matt Martin, Addison Law Firm

One of the most complex agreements that a Golf Course Owner can enter into involving the operation of their golf course is an agreement concerning the reservation, allocation and utilization of tee times, commonly referred to as "Tee Time Agreements." The agreements are entered into for the mutual benefit of both parties whereby the third party, for example, a Hotel, Resort or Developer has access to the golf course and the Golf Course Owner has increased rounds directed to their golf course. For a major Hotel facility, certain guaranteed access rights to the golf course for group bookings and their individual guests is essential to the profitability of the Hotel. Due to the requirement in many cases that the obligation of the Tee Time Agreement be a covenant that "runs with the land" and is binding on all subsequent owners, the Tee Time Agreement is a very critical agreement to be drafted and negotiated with all issues considered.

The issues to be addressed in the Tee Time Agreement are numerous and vary based on the size of the Club Complex, the Hotel and other Third Party requirements, for example, whether there are multiple locations, fractional owners, private members and other users. Some of the Golf Course Owner’s major issues are the following: (i) the Tee Time Reservation procedure and allotment procedures, of which there are various mechanisms used, including a percentage of Total Tee Times reserved for a certain period of time, i.e., 72 hours and then released, (ii) additional reservation rights for group bookings, (iii) division of priority peak demand tee times, (iv) the amount of the minimum guaranteed green fee income, (v) collection procedures, (vi) cancellation and deposit requirements for group bookings, (vii) the right or obligation to provide food and beverage to players and tournament participants, (viii) reallocation of unused tee times, (ix) the sale of golf club products, (x) booking procedures through Hotel software, (xi) calculation of rate of golf tees and charges, (xii) staging area for the golf carts from the Hotel, (xiii) term of agreement, (xiv) termination rights, and (xv) other issues related to construction and development of Hotel and Club.

In return, the third party, for example, the Hotel requesting access to the golf course for their guests, customers and others will have the following issues to be resolved, namely, (i) guaranteed access to the golf course and driving range, (ii) establishment of pricing and fee standards and increases, (iii) nondiscriminatory rules, regulations and policies, (iv) golf course operating hours, (v) golf course maintenance standards, (vi) construction obligations, (vii) no disturbance from the lenders, (viii) food and beverage standards, (ix) booking and cancellation policies, (x) indemnification, (xi) enforcement rights, and (xii) other issues related to the Hotel project or Club.

The issues involved in the Tee Time Agreement are each critical to the success of the Golf Course Owner and the Hotel or Third Party and the Tee Time Agreement must be carefully discussed, drafted and negotiated to create a "win/win" situation for both parties or it can be a crippling burden for a party and the property involved.
Private Club Concerns
IRC 501(c)(7) Status for Golf Clubs
Provided by Marshall Paul, Saul Ewing LLP

Typically, member-owned golf clubs seek to be classified as social clubs under Section 501(c)(7) of the Internal Revenue Code (IRC) so that dues, membership fees and the like will not be taxable.

A club will qualify for 501(c)(7) status if (i) it is "organized for pleasure, recreation, and other nonprofitable purposes;" (ii) substantially all of its activities are for those purposes; and (iii) no part of its net earnings inures to the benefit of any member.

Ordinarily, a member-owned golf club has no problem meeting the threshold requirements of this test if it has an established membership of individuals who have joined the club for the purpose of personal contacts and fellowship, as required by the Internal Revenue Service (IRS).

However, beyond this threshold test, the essence of what the IRS requires is that the bulk of the club's revenues come from members on account of the social or recreational activities offered by the club. While non-members may use a club's facilities, a member-owned club that derives too much of its revenue from non-member sources may jeopardize its Section 501(c)(7) status because the IRS may view the club as engaging in business. Examples of non-member revenues include revenues from investments, revenues from non-member golf outings and revenues from regularly-conducted non-member tournaments.

To help clubs avoid violating this test, safe-harbor guidelines permit a club to receive as much as 15 percent of its gross receipts from the use of the club's facilities or services by the general public and a total of 35 percent of its gross receipts (including the 15 percent from use of the club by the general public) from sources outside of its membership. Thus, 15 percent of a club's gross receipts could consist of revenues from use of the club by the public, and 20 percent of the club's gross receipts could consist of investment income without jeopardizing the club's 501(c)(7) status. Gross receipts, for this purpose, do not include initiation fees or capital assessments.

In addition, "unusual amounts of income," such as receipts from the sale of a part of the club's facilities or from non-member tournaments that are not conducted on a regular basis, may be excluded from consideration in determining whether the club has received too much non-member income.

Because the IRS will generally look at all of the facts and circumstances in order to determine whether the club is used for exempt purposes, failure of a club to come within the safe harbor guidelines does not necessarily mean that the club will lose its IRC 501(c)(7) status. Thus, under appropriate circumstances, a club could fail to come within the safe harbor but still qualify as a 501(c)(7) organization.
If a club qualifies as a Section 501(c)(7) organization, then, as indicated above, its income from dues and membership fees is not taxable. In addition, proceeds from the sale of land are not taxable if the proceeds are used for relocation of the club or to make other similar improvements. However, income which is not related to normal operations of the club, such as income from investments and non-member functions, is taxed as unrelated business income.

In all cases, a tax-exempt club must maintain detailed records showing the use of the club by nonmembers, so that income which is not exempt can be determined.

In examining a club’s qualification as a 501(c)(7) organization, the IRS also may look at the club’s membership. For example, subject to certain exceptions, a club may lose its 501(c)(7) status if the club’s governing documents or written policy statements provide for discrimination. In addition, while corporations may be members of a club, a club’s membership may not be made up entirely of corporations.

In order to obtain 501(c)(7) status, a club must file an application on Form 1024j with the IRS.
A private club may be owned and operated by a residential real estate developer, by a third-party club owner/operator, or as a member-owned equity club. The general features of equity vs. non-equity ownership are discussed below.

With an equity club, the club real estate and facilities are generally owned by a nonprofit corporation that is controlled by the equity club members. Each equity member must pay a membership contribution in order to become a member, and is subject to assessments for operating deficits and capital improvements. Equity members have voting rights which may vary by category. For example, full privilege members have greater voting rights than limited privilege or social members. Equity clubs are governed by a board of directors elected by the voting membership. Usually, only equity members are eligible to serve as a director or officer of the club. The board administers club policies and determines the amounts of the dues, fees and assessments payable by members. The board may employ a general manager to oversee day-to-day operations, or may handle those functions directly. Other management alternatives are for the board to engage a professional club management company to operate the club for a stated management fee (a flat fee and/or percentage of gross revenue), or to lease the club facilities to a management company in exchange for receiving a fixed rental amount.

An equity club may seek to obtain tax-exempt status as a 501(c)(7) private club. Clubs with 501(c)(7) status must not permit any income to inure to the benefit of their members. In addition, 501(c)(7) clubs must limit non-member income to avoid revocation of their tax exemption. Equity clubs that are not tax-exempt under 501(c)(7) may elect to operate as a private or semi-private facility.

A feature of equity clubs that is often emphasized is the right of the equity members to receive a refund of their “equity” on resignation. Such refund rights vary tremendously with some clubs providing a refund in an amount equal to all membership contributions and assessments paid by the member during the term of the membership, while other equity clubs provide very limited or no refund rights. Equity clubs also typically provide for distributions to equity members upon the dissolution of the club and sale of its assets. Such provisions do not constitute inurement to the members under IRS regulations, and thus do not jeopardize the club’s 501(c)(7) tax-exempt status.

As a result of member control, a member-owned equity club assumes the characteristics of its membership. The club experience and lifestyle is often enhanced by the heightened interest and participation of member-owners, and the greater continuity in the membership which can be found in a member-owned club. On the downside, members are subject to assessment and clubs are often governed by board members inexperienced in club management.
Clubs owned and operated by residential real estate developers or third-party club owners/operators are considered non-equity clubs. Individuals are generally required to pay either a membership deposit or a nonrefundable initiation fee in order to become members, and are not subject to assessments for operating deficits and capital improvements. The owner of a non-equity club is responsible for all operating deficits. Non-equity club members do not have voting rights, except for very limited voting rights occasionally provided such as the right to approve an assessment for capital improvements. The club owner is responsible for setting all club policies and the amounts of the dues, fees and charges paid by members.

Non-equity clubs may operate as private, semi-private or public facilities. Upon their resignation, members of non-equity clubs may have a right to receive a refund of all or a portion of the initiation fee or membership deposit they paid to join the club. Such refund amounts paid are sometimes mistakenly referred to as “equity.” Benefits of non-equity clubs generally include operating under professional management and freedom from assessments.
Often to the ultimate detriment of their members, founders of member-owned clubs very rarely think about the consequences of a sale of the club.

It is not unusual for a club to sell its property and liquidate, particularly in an era such as this, where buildable land is scarce in many metropolitan areas. A course which doesn’t have historical significance or which has a weak membership may be very attractive to developers and be sold.

If the club doesn’t have a structure in place that fairly allocates the liquidation proceeds among members, the consequence can be costly and time-consuming litigation. The best time to create such a structure is when a club is organized, long before any kind of disparity arises among the club’s members.

Absent a contrary arrangement, members are presumed to share equally in distributions of sales or liquidation proceeds. This would not present a problem if members all acquired their interests at fair-market value. However, this is rarely the case. Typically, members acquire their interests at different times and for different amounts, and those amounts do not usually correspond to the fair-market value of the club’s equity in its assets.

Many clubs attempt to remedy this by establishing a class of equity memberships and a class of non-equity memberships. If properly drafted, this should make it clear that non-equity members do not share in liquidation or sales proceeds. However, it does not avoid the problems which may result from having equity members buy in at different times for less than fair-market value.

Other clubs provide that original equity members are entitled to the return of their full initiation fees, while equity members admitted later receive nothing or only a portion of their initiation back. This, if drafted properly so that it applies to sales or liquidations, may eliminate the disparity to some degree, but it does not solve the problem.

How might a club address this issue if it wishes to properly deal with it?

Obviously, a club could require new members to buy in at full fair-market value. However, for most clubs, this would be impractical because the cost of paying for an equal share of the club’s fully appreciated equity would make the acquisition of a membership prohibitively expensive for too many people.

Another alternative would be to provide that original members fully share in sales proceeds but that new members share in proceeds only above the value of the club’s equity on the date they became members. This would require periodic valuations of the club’s equity, but there is no reason why the valuation could not be made by the board at its sole discretion.

A third approach might be for a club to provide that new members vest in sales or
liquidation proceeds over time. For example, a new member might vest in sales proceeds at the rate of 10 percent per year. This would avoid the problem of having someone buy in for a nominal amount in one year and then fully share in sales proceeds that are realized a short time later. While this would not necessarily establish economic parity as far as the members’ contributions are concerned, it at least adds a perception that new members have earned their right to share ratably in sales or liquidation proceeds.

Finally, a fourth alternative would be to provide that, for the purpose of determining the amount to which a member is entitled in the event of a sale or liquidation, interest would be deemed to accrue on the member’s capital contribution each year. Sales or liquidation proceeds would be distributable in proportion to the members’ respective capital contributions plus accrued interest.

These are only a few examples of the way that founders might avoid the prospect of having to deal with this increasingly troublesome problem. The key is to create at the outset an arrangement that members over time always will consider equitable.
Discrimination
Provided by Van Tengberg, Foley Lardner LLP

All states and jurisdictions have some form of anti-discrimination laws. These anti-discrimination laws apply generally to business establishments. The laws typically provide that a business establishment may not discriminate on the basis of sex, race, color, religion, ancestry, natural origin, disability, sexual preference or medical condition. Many private clubs take the position that they do not constitute a business establishment and are not bound by the anti-discrimination laws. However, the courts and the legislative bodies have taken a broader view of what constitutes a business establishment and look at a variety of factors, including whether the club receives a portion of its revenue from non-members on a regular basis, whether the revenue derived from the non-members results in lower dues to members, whether the club allows non-members to utilize banquet rooms and other club facilities for weddings, bar mitzvahs, etc., and whether members are reimbursed by their employers for business use of the club facilities to entertain clients and/or perspective clients. Given this criteria, most private clubs will constitute a business establishment and are subject to the anti-discrimination laws.

Assuming a private club does constitute a business establishment, there are three primary areas where the anti-discrimination laws impact private clubs, namely spousal privileges, preferred tee times and clubhouse amenities. Each of these areas is analyzed below.

Spousal Privileges
One of the most troublesome issues facing private clubs is defining the persons who will be entitled to exercise the rights and privileges under a membership. Most private clubs grant the member, the member’s spouse and qualifying children the right to utilize the club facilities under the membership. Clubs have traditionally deferred to applicable state law to define a spouse. By deferring to state law, most clubs view themselves as gender neutral and therefore minimize challenges by same sex couples as well as unmarried opposite sex couples. Other clubs adopted a “significant other” policy and allow an unmarried member to designate one individual residing in such member’s home as a significant other. However, a recent California Supreme Court decision, Koebeke v. Bernardo Heights Country Club, has dramatically changed the landscape. In Koebeke, the California Supreme Court ruled that Bernardo Heights Country Club must provide registered domestic partners with all the same rights, privileges and benefits that married couples enjoy. The holding in the Koebeke case only extends to registered domestic partners under California’s Domestic Partner Act, but does not extend to unregistered domestic partners. This case has tremendous significance in both the club context, as well as other business establishments. Although only time will tell, it is certainly probable that many other states and jurisdictions will follow the holdings in the Koebeke case and clubs will need to modify their bylaws to extend spousal privileges to not only legal spouses, but to registered domestic partners as well.
Preferred Tee Times
Historically, clubs have generally set aside certain time periods for certain groups including, men’s day, ladies’ day, seniors’ day, etc. Traditionally, Saturday and Sunday mornings were reserved for men only and one day of the week was reserved for women only. However, with more and more women joining the workforce, denying women the right to play golf during peak times on Saturdays and Sundays no longer became acceptable. On the other side of the equation, clubs have a legitimate need to regulate tee times to ensure equitable use of the club facilities. In order to address this problem, many clubs have adopted policies and procedures which are gender neutral and which allow the club to regulate usage of the club facilities. One popular method is to eliminate the concept of men’s day, ladies’ day and other gender restrictive time slots. The club instead designates certain time periods for the “member” only and other time periods for “spouse/significant other” only, and leaves it to the member and his/her spouse/significant other to decide who will be the member and who will be the spouse/significant other. For example, peak times such as Saturday and Sunday mornings before noon may be reserved for members only and neither spouses/significant others nor guests will be permitted to play during such time periods. By adopting this gender neutral policy, the clubs placed a burden on the member and his or her spouse/significant other to make the determination.

Clubhouse Amenities
Many clubhouses have gender designated rooms such as a “Men’s Grill”, “Ladies’ Card room,” etc. Some of these rooms are adjacent to the locker room facilities and, in some cases, are only accessible through the locker room. A few cases have wound their way through the court system concerning this issue. One of the most significant holdings is a case out of Louisiana which held that gender restrictive areas of the clubhouse (other than the locker rooms) were discriminatory and these areas must be open to all individuals, regardless of their sex. The courts have not addressed the question as to whether “separate but equal” facilities will be deemed to be non-discriminatory. Given the holding of the courts in the cases that have been decided on this issue, it is doubtful that any court will view “separate but equal” as acceptable. In response to these decisions, many clubs are eliminating the gender restrictions, installing additional access doors to allow entry other than through locker rooms and renaming the rooms to non-gender designations.
Public Accommodations Laws
Provided by Matt Martin, Addison Law Firm

What are public accommodations laws? They refer to the laws which prevent discrimination in public businesses. They have their basis in federal, state and local laws.

At the federal level, there is the Civil Rights Act of 1964. The Civil Rights Act precludes discrimination on the basis of race, color, religion or national origin in "places of public accommodation." The one interesting thing to note is that gender is not a protected category at the federal level. In addition to the Civil Rights Act, most of the states have enacted their own "public accommodations laws." Currently, there are only eleven states without public accommodations laws. Generally, the states’ laws mirror the federal laws but add gender as a prohibited basis for discrimination. Finally, many cities have enacted their own "public accommodations laws." These generally deal with gender preference issues and same-sex significant others.

The net result of all of these laws is that it is generally illegal to discriminate on the basis of race, color, religion, national origin or gender in most states and on the basis of gender preference in certain cities.

In addition to the general public accommodations laws, some states have enacted similar laws specific to clubs and memberships. For example, Connecticut and New Jersey both have laws which provide for both spouses under a membership equal rights and prohibit men’s or ladies’ only designated tee times.

It is important to know that the public accommodations laws only apply to places of public accommodation. Generally, places of public accommodation are businesses that are open to the general public. There is an exemption for private clubs which exists under the freedom of association rights protected by the First Amendment of the U.S. Constitution. Unfortunately, however, only a very few private golf or country clubs qualify as private clubs for First Amendment Protection.

The determinative factors are generally (i) the size of the club, (ii) the selectivity of membership, (iii) the privateness of the club (i.e. extent of non-member usage), (iv) whether the club has a profit motive, and (v) the purpose of the club. While there are no hard and fast rules, the following will generally eliminate a club’s First Amendment protection: (i) membership size in excess of 400, (ii) ownership of the club by a for profit entity, (iii) a lack of a true membership selection and screening process by the membership of the club and (iv) allowing more than de minimis non-member usage.
Private clubs that have tax-exempt status under IRS 501(c)(7) are subject to tax on their unrelated business income. The legislative purpose for taxing unrelated business income is to prevent the unfair competition that exists when exempt organizations carry on commercial activities in competition with nonexempt entities without the same tax burden.

For private 501(c)(7) social, golf or country clubs, unrelated business income is generally defined as "non-member" income. The IRS uses a rather circular definition of non-member income: "Non-member income is any income that is not member income." Member income has been identified as dues, fees, charges and similar amounts paid by members of a club as consideration for the club providing goods, facilities, or services to the members, and the spouses, dependents and guests of such members, in furtherance of the exempt purposes of the club. Thus, non-member income generally includes all other income, including investment income.

For private clubs to retain their 501(c)(7) tax-exempt status, the club must not receive investment and other non-member income exceeding 35 percent of the club’s gross receipts. Gross receipts include receipts from the club’s normal and usual activities, including charges, admissions, membership fees, dues, assessments, investment income (dividends, rents, etc.), and normal recurring capital gains on investments, but excluding initiation fees and capital contributions.

In addition to the 35 percent limit, no more than 15 percent of the club’s gross receipts may be from the use of its facilities or services by non-members. If this percentage is exceeded, a facts and circumstances test is applied to determine if the club’s tax-exempt status should be revoked. Certain nonrecurring income, such as the proceeds from the sale of a clubhouse or other club facility, is not included in calculating the 15 or 35 percent limitations. Income received from members of other clubs using a club under a reciprocal agreement is non-member income and is subject to the 15 percent limit, as well as UBI tax.

The IRS requires private 501(c)(7) clubs to maintain detailed records on the extent of non-member use. The IRS has established certain situations where, for audit purposes, a host-guest relationship will be assumed:

- if payment for the event or activity is made directly to the club by a member or the member’s employer;
- And, (i) with a group of eight or fewer individuals using the club’s facilities, at least one is a member; or (ii) with a larger group using the club’s facilities, 75 percent or more of the group are club members.
In all other situations, a host-guest relationship must be supported by the club’s records. Therefore, it is advised that a private club maintain adequate records that substantiate that there was, in fact, (a) a member in a group of eight or fewer or that 75 percent of a larger group was members, and that (b) payment to the club was made directly by members or their employers. The club need not inquire about reimbursement where payment to the club is made directly by the member.

The information that should be obtained in all situations involving groups of more than eight (even if a member pays the club directly) includes the date of the event, the total number of attendees and the number of non-members in the party, total event charges, and the charges attributable to and paid by non-members. In addition, the club should obtain a statement signed by the member indicating whether the member has been or will be reimbursed for such non-member use and, if so, the amount of the reimbursement and the amount of the payment attributable to the non-member use. If the member will be reimbursed by his or her employer, or the employer makes direct payments to the club, the statement should also include the name of the member’s employer, the non-members’ names and businesses or other relationship to the member, and the business, personal, or social purpose of the member served by the non-member use. If a large number of non-members are involved and they are readily identifiable as a particular class of individuals, the class rather than the individual names of the non-members may be recorded. If a non-member, other than the employer of the member, makes payment to the club or reimburses the member for the cost of the event, the statement should include donor’s name and an explanation of the relationship between the donor and the member with sufficient information to substantiate the gratuitous nature of the payment or reimbursement.