

Federal Action – and Inaction

10.09.18 | Linda J. Rosenthal, JD



Before the end of September, the U.S. House of Representatives had already recessed until after the November 6th election. The Senate will also recess for a certain amount of time in October and until November 7th. There are lots of unfinished pending and proposed federal legislative items that will languish until at least the lame-duck session; that is, November and December. Depending on the outcome, it's unclear whether any substantive legislative work will get done until January 3, 2019, when the new Congress will be sworn in.

Of course, while Congress slow-walks many items, the federal administrative agencies are charging ahead on all fronts to make U-turns on as many pre-2017 policies as possible.

Johnson Amendment Threat Averted – For Now

Because of almost constant gridlock in Congress, federal appropriations and spending bills are repeatedly delayed and the nation lurches from one temporary fix to another.

For many Republican members, a wish-list item is the elimination or neutralization of the Johnson Amendment; that is, the section 501(c)(3) total ban on political campaign activities. There have been ongoing proposals and arguments for attacking it directly or indirectly, in whole or in part. (A partial ban might eliminate the Johnson Amendment for churches and religious organizations only, for instance.)

One of the methods of indirect attack is attaching an (unrelated) rider to appropriations or spending legislation. When Congress returned after Labor Day from its August recess, it took up the Financial Services and General Government appropriations bill for fiscal year 2019, beginning October 1, 2018. The House of Representatives attached a rider to section 112 which would “effectively block the IRS from enforcing the Johnson Amendment when ‘churches’ violate it in even the most egregious ways, such as diverting charitable assets to influence partisan political campaigns.” The Senate did not include this rider language in its version of the appropriations bill. The House recessed until after

the November 6th election without having resolved the differences by a House-Senate conference committee.

This latest official threat to the Johnson Amendment has been averted – for at least several weeks or perhaps longer. However, in recent months, “the Vice President, in particular, has been alerting those attending campaign-style rallies that the Administration will not enforce the Johnson Amendment against churches that violate the federal law. A prominent evangelical preacher, during a White House meeting, encouraged other pastors to urge their parishioners to ‘vote red’ in the upcoming elections.”

Federal “Public Charge” Regulation

A new administrative regulation issued on September 22, 2018, by the Department of Homeland Security has raised serious concerns among nonprofit social services organizations that assist the immigrant community.

The draconian new rule called the “public charge” regulation is a harsher version of an earlier draft regulation issued in February 2018. It requires immigration officials to “give greater weight to applicants’ medical history, income levels, and dependency on public assistance in determining whether to grant lawful immigration status.” (The earlier draft proposed that DHS be allowed to “reject immigrants’ green cards if they used certain public benefits for which they were eligible.”

This harsh new policy is expected to harm low-income immigrants who desperately need financial assistance benefits like SNAP or housing aid; they may be reluctant to apply for aid knowing that it will lessen their eligibility for green cards. Over 1,100 nonprofit organizations drafted and signed a letter of strong opposition to the “public charge” regulation because it “puts money ahead of family, and threatens to worsen hunger, poverty, and unmet health and housing needs.”

These agencies argue that the effect of this regulation is to impose “unfunded mandates on charitable nonprofits and foundations to essentially subsidize federal responsibilities to fund and provide support for these [immigrant] residents in their communities.”

In accordance with law and standard practice in connection with the issuance of proposed regulations, there is a public comment period for 60 days after the September 22nd publication of the notice of the regulation in the Federal Register.

Federal Guidance on Paid Leave Credit

In last December’s Tax Cuts and Jobs Act, Congress included a new tax credit for employers that offer certain types of paid family and medical leave.

This type of tax benefit is consistent with good public policy; namely, to strongly encourage employers to offer this type of leave to employees. But in late September 2018, the IRS issued official guidance on this aspect of the TCJA. Instead of applying this credit expansively, the federal tax agency has asserted that this tax credit is *not* available to 501(c)(3) organizations. This rule applies even if the organization must pay unrelated business income tax on which the credit may be applied.

The stated reason is that the tax credit arises from wages under the Federal Unemployment Tax Act (FUTA), but 501(c)(3)s are not subject to FUTA.

Conclusion

There is no such thing anymore as a slow news day. With all of the major issues and controversies erupting, it's easy to lose track of the more mundane, lower-profile, actions taken by the federal government that can have a significant effect on the nonprofit community.