

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Election Day is Tomorrow: Finish Line in Sight

Last week, lawmakers on both sides of the aisle remained focused on the November 8 presidential and congressional elections. And — with the country wondering the outcome — this edition of *Legislate* is dedicated to that topic.

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Election Outcome

In theory, later this week, we will finally learn the outcome of one of the most anticipated — and certainly contentious — presidential and congressional elections in US history. That election will tell us whether there will continue to be a divided government, with the president from one political party and the majority in the Senate and/or the House of Representatives from another.

It's unlikely that we will see anything rising to the level of *Bush v. Gore* — the now infamous 2000 presidential election that went undecided for six weeks pending a review of ballots with “hanging chads” and which required intervention by the Supreme Court. Yet, there may be some delay before the nation knows the outcome of tomorrow's elections. Indeed, mail ballots (some of which can be counted so long as they are postmarked by Election Day) and provisional ballots (those that are cast subject to confirmation of an individual's eligibility to vote) may cause delays before the final tallies are counted. And, should the count in one or more elections be close, there may be further delays if ballots are subject to a recount. Depending upon the jurisdiction, recounts can occur either automatically or if the validity of the result is challenged.

What If ...

Although the outcomes are unknown, there are a limited number of them. A few scenarios are outlined below.

Democrats or Republicans Sweep Elections

While unlikely, the Democrats or the Republicans could sweep the elections, with the president being from the same political party as the party that wins the majority of seats in both the Senate and the House. If it were to happen, however, the level of confidence in predicting what's to come would rise exponentially. For example, if the Democrats

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We will consider both the short- and longer-term outlooks for what to expect after the new president and Congress are sworn in.

sweep the elections, we could predict with a high degree of certainty that the Affordable Care Act (ACA) would not be repealed and that the Cadillac tax (the 40% excise tax on “high cost” health plans) would be modified, if not repealed. Likewise, if the Republicans sweep, we could safely forecast that the ACA would be repealed, and any replacement law would include popular ACA-like insurance market reforms, such as the prohibition on annual and lifetime coverage limits for essential benefits and the prohibition on eligibility and coverage exclusions for pre-existing conditions.

Divided Government

The elections will more likely produce another divided government, both between the executive and legislative branches and within the Congress. A divided government often makes passing legislation challenging, taking more time and requiring more compromises by both sides of the aisle; and in some cases (as political commentators have noted in recent years), creating legislative stalemates. This makes predicting upcoming laws more difficult for businesses trying to plan for the future.

There are six possible divided government outcomes of this election, which are noted in the table below. (As discussed in the [next section](#), one additional, quite odd result could occur should there be a tie in the electoral vote.)

President	Senate Majority	House Majority
Clinton (D)	Democrats	Republicans
Clinton (D)	Republicans	Democrats
Clinton (D)	Republicans	Republicans
Trump (R)	Democrats	Republicans
Trump (R)	Republicans	Democrats
Trump (R)	Democrats	Democrats

Among the possibilities of a divided government, it is unlikely (but not impossible) that the House will be controlled by the Democratic Party in 2017 and 2018 (the 115th Congress). This is because the Democrats would have to pick up over 30 House seats in tomorrow’s elections — a tall order. On the other hand, because the Democrats would need to pick up only five seats to win the majority in the Senate, the majority may flip from the currently Republican-controlled to a Democrat-controlled Senate. Thus, if control is split between the parties, it would most likely be with the Republicans winning the majority of House seats and the Democrats winning the majority of the Senate seats.

If the Democrats win a majority of seats in the Senate this election cycle — absent any special facts and circumstance — the Democrats will hold the majority for two years. However, the Democrats will have another tough fight to win two years later in the 2018 Senate races, when they have several seats up for re-election. (The House seats are all up for re-election in 2018).

The chart below provides some insight about how the government may be structured over the next four years, based on two possible outcomes from tomorrow’s elections.

2017 – 2020 President	2017 – 2018 Senate Majority	2017 – 2018 House Majority	2019 – 2020 Outlook
Clinton (D)	Democrats	Republicans	The divided government would likely continue in 2019 and 2020, with a Democrat-controlled executive branch and a Republican-controlled Congress. The upshot of this scenario is that Hillary Clinton likely would have only the first two years of her presidency to accomplish her goals.
Trump (R)	Democrats	Republicans	The divided government would likely end with a completely Republican-controlled government for 2019 and 2020. The upshot of this scenario is that Donald Trump likely would have to wait until the third and fourth year of his presidency to accomplish his goals.

Electoral College: The 270 Challenge

A president is not elected in accordance with the outcome of the popular vote — the vote that counts each person’s ballot. The outcome of the 538 votes, which are cast in accordance with the Electoral College, determines who wins the election. As such, a presidential candidate can win the popular vote and lose the election (as in *Bush v. Gore*, where Gore won the popular vote but ultimately lost the election).

To be elected president, a candidate usually needs to capture at least 270 electoral votes. However, if no candidate succeeds in winning 270 electoral votes — which may happen when there are three or more candidates, or when the 538 electoral votes are split equally between two candidates — additional rules apply to determine who wins the presidency.

In the event no candidate receives 270 electoral votes — including if there is a 269 to 269 tie vote — the newly elected House chooses the president and the newly elected Senate chooses the vice president. However, as these rules are not straightforward, a few additional details are outlined below:

- **House Vote:** In electing the president, each member of the House does not have one vote. Rather, all the House representatives in a particular state have a single vote. And, should the House vote end in a tie (25 to 25), then the vice president-elect (chosen by the Senate as described below) shall act as the president until the House resolves the deadlock. And, should the Senate vote end in a tie (50 to 50) and there is no elected vice president to serve as the president, then the speaker of the House shall act as the president.
- **Senate Vote:** In electing the vice president, each senator (other than those from the District of Columbia) has one vote.

For the 2016 presidential election, it is possible that no candidate will capture 270 electoral votes. If this does occur, there could be some odd outcomes: Mr. Trump could win the presidency and have Sen. Tim Kaine (D-VA), Mrs. Clinton’s running mate, as his vice president; or Mrs. Clinton could win the presidency and have Gov. Mike Pence (R-IN), Mr. Trump’s running mate, as her vice president.

Electoral College

To learn more about the Electoral College, the process by which electors cast votes in the presidential election, please see the [National Archives and Records Administration website](#).

Lame-Duck Session

The House and Senate will remain on recess this week, with lawmakers returning next week for the lame-duck session. The most pressing order of business for both chambers will be to restart discussions to pass funding legislation to avert a government shutdown after December 9. In all likelihood, any such legislation will be in the form of a continuing resolution, not an omnibus funding bill for the remainder of the 2017 fiscal year (which began on October 1, 2016 and ends on September 30, 2017). In any event, we can predict that the lame-duck session will be a challenging period for the lawmakers.

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