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Key Legislative Developments Affecting Your Human Resources

Election 2020: what's at stake

One week remains until Election Day. The candidates are making their final pushes as early voting is already underway in many states. While the latest polls give Joe Biden an edge over Donald Trump, registered voters appear divided over who they think will win in November. Factoring in the role of the electoral college, the outcome of this presidential race in a year like no other is anything but certain.

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Authors

Nancy Vary, JD

Laurie S. DuChateau, JD

In this issue: [Presidency](#) | [Senate](#) | [House](#) | [Setting agenda for 2021](#) | [DOL](#) | [NLRB](#) | [EEOC](#) | [PBGC](#) | [IRS](#) | [In closing](#)

Background

Arguably one of the most contentious election cycles in recent history — at both the presidential and congressional levels — is drawing to a close. Voters will soon decide whether divided government will continue, with the president from one political party and the majority in the Senate and/or the House of Representatives from another, or one party will rule.

While the nation would normally learn the outcome on Election Day, there may be some delay in tallying the vote this year. Amid ongoing COVID concerns over in-person voting, an unprecedented surge in mail-in voting is forecast and an upsurge in challenges to the validity of mail and other ballots is expected. With races in some districts that had been considered “safe” becoming more competitive, an uptick in automatic recounts or recounts by demand is likely, particularly in close contests.

In 2000, the presidential election went undecided for six weeks pending a review of butterfly ballots and “hanging chads.” Ultimately, the Supreme Court had to intervene. In the current political climate, a repeat is not out of the question as federal and state courts are already dealing with hundreds of lawsuits swirling around the election process, changes in voting rules, and expanded voting options. As in 2000, it's possible that the winner of the election may not be known until days or weeks after Election Day.

Buck comment. This election cycle, the Supreme Court has already been involved. In a 4-4 ruling on October 19, the Court let stand a lower court [decision](#) extending the deadline for receipt

of absentee and mail-in ballots in a key battleground state. That allows Pennsylvania officials to count ballots received as late as 5:00 pm on November 6, even those lacking a postmark or bearing an illegible postmark.

Presidency

In 2016, Donald Trump won the Electoral College with 304 votes — 34 more than the 270 electoral votes needed — but lost the popular vote due to narrow victories in states such as Michigan, Wisconsin, Pennsylvania, and Florida. Whether he can capture enough electoral votes to ensure re-election in 2020 remains to be seen.

Next month's election is expected to largely be a referendum on the president's first term. While the economy typically plays a key role in shaping the electorate's views, the president's handling of the pandemic may be pivotal in this cycle. Though the latest polls give Joe Biden an edge, registered voters appear divided over who they think will win in November. As the candidates make their final push, the outcome of this race is anything but certain.

Senate

Currently, Republicans hold a slim majority in the Senate with 53 Senators as compared to the Democrats' 47. For these purposes, Democratic seats include the two independents who caucus with them — Angus King, I-Maine, and Bernie Sanders, I-Vt. Of the 35 Senate seats up for election in the 2020 cycle (including a special election in Arizona), 23 are Republican and 12 are Democratic.

Democrats need a net gain of four seats to take control of the Senate in 2021. Alternatively, they could seize control by winning a net three seats plus the presidency. If both parties hold 50 seats, control of the Senate will be decided by which party holds the vice presidency — a possibility in this cycle.

Since many of the races are not competitive, control of the Senate is expected to depend on a minority of contests. Among those targeted by the Democrats are Republican seats in states that are shifting demographically, such as Colorado and Arizona. Conversely, Republicans are looking to pick up Democratic seats in states Trump won in 2016, in particular Michigan and Alabama.

With 51 votes needed to pass legislation, a shift in the composition of the Senate would alter the body's legislative priorities. Because Senate approval is needed to pass any federal law and to confirm presidential nominees to federal courts and senior jobs, it is critical for Republicans to hold the chamber and for Democrats to flip it. Should Biden win and the Democrats regain control of the Senate and hold the House, they would have free rein to push forward the Democratic agenda. Should Trump win and Republicans hold the Senate and regain control of the House, they would have full authority to push forward the president's "America First" agenda. Any other outcome would allow divided government to continue.

House

The Democrats flipped the House in 2018. They currently hold a majority of its 435 seats with 232 Representatives against the Republicans' 198 seats. In addition, there is one Libertarian (Justin Amash, L-Mich.) and four vacant seats. The House seats are all up for re-election in 2020.

To retake the House, Republicans would need to hold their current seats and flip 18 Democratic seats. Conversely, Democrats could lose as many as 14 seats and maintain control. Recent polls suggest that House Republicans could pick up a handful of seats mostly in conservative districts Democrats won in 2018, but probably not enough to take back the majority. As suburban districts in particular trend more competitive, Democrats may even be able to expand their majority and continue to set the legislative priorities of the House.

Setting the agenda for 2021

The president establishes national public policy through executive orders, proclamations, directives, political appointees and other means, and sets the agenda for the executive branch. To carry out that agenda, the president appoints Cabinet members to head 15 executive departments, the heads of more than 50 independent federal commissions and agencies, federal judges, ambassadors, and other federal officers. Who controls the DOL and government agencies such as the NLRB, EEOC, PBGC and IRS can have a significant impact on implementing the White House's agenda.

One of the hallmarks of the Trump administration has been its commitment to deregulation and cutting bureaucratic red tape. But as President Trump's first term winds down, executive and other agencies are pushing to finalize regulations to enact policies and effect changes that likely would not be shared by a Biden administration. If outgoing, the current administration could protect these so-called "midnight" regulations by establishing an effective date prior to the end of its term. While executive orders can be undone with the stroke of a pen, it's more complicated to undo agency rulemaking.

A new president with a different policy agenda could impose a moratorium on issuing new regulations or require departments and agencies to suspend or postpone the effective dates of those that have not yet taken effect. Proposed regulations that have not been finalized could be withdrawn, but final rules would have to be eliminated or changed through the rulemaking process. While that process is underway, a new administration may adopt a policy of non-enforcement.

Buck comment. While unlikely, a Democratic Congress could use its general legislative powers under the rarely used Congressional Review Act to overturn midnight rules. More likely, it would look to affect agency rulemaking and regulations through regular legislation or adding provisions to appropriations bills that prohibit the use of funds for implementing or enforcing rules that have already been finalized.

DOL

The Department of Labor oversees federal programs addressing key workplace issues such as health and retirement benefits, minimum wage and overtime pay, employment discrimination, job training, safe working conditions, and unemployment insurance. Offices within the Department of Labor include, among others, the Employee Benefits Security Administration (EBSA), the Wage and Hour Division (WHD), the Pension Benefit Guaranty Corporation (PBGC), the Office of Federal Contract Compliance Programs (OFCCP), and the Occupational Safety & Health Administration (OSHA).

Trump-appointee Eugene Scalia has served as the Secretary of Labor since September 2019. Appointees to executive branch positions, including the current secretary, usually serve at the pleasure of the president and step down when an administration changes unless asked to stay on. Given Secretary Scalia's background as a former management-side attorney and the employer-friendly policies promoted by this DOL, we would not expect a Biden administration to ask. Rather, we would expect it to take steps to install a new secretary and set a new union-friendly policy agenda as expeditiously as possible.

NLRB

The National Labor Relations Board (NLRB) is an independent government agency responsible for enforcing federal labor law in relation to collective bargaining and unfair labor practices. It is governed by a five-person board, all of whom are appointed by the president. Board members are appointed to five-year terms, with the term of one member expiring each year.

The Board currently has four members — three Republicans and one Democrat — and one vacancy. The next member's term to expire is William Emanuel's (a Republican seat), ending on August 27, 2021. The Trump Board has reversed a number of pro-labor decisions issued by the Obama Board, and embraced far more employer-friendly positions. A Biden administration would look to reverse course but would experience some delay due to the composition of the Board. Regardless of who occupies the White House, the Board will continue to have a Republican majority until late 2021. For that reason, the election will not have an immediate effect on Board policy — but may thereafter.

EEOC

Like the NLRB, the Equal Employment Opportunity Commission (EEOC) is an independent government agency governed by a presidentially appointed five-person Commission. Created by Title VII of the Civil Rights Act of 1964, the EEOC is charged with enforcing federal anti-discrimination laws in the workplace.

The EEOC chair, a presidential designee, is responsible for the administration and implementation of policy and sets the Commission's priorities while the vice chair and the other Commissioners participate equally in the development and approval of Commission policies, issue charges of discrimination where appropriate, and authorize the filing of suits.

The terms of the current chair and vice chair, Trump-appointees Janet Dhillon and Keith Sonderling, are slated to expire in July 2022 and July 2024 respectively. A third Trump appointee, Andrea Lucas, was recently confirmed for a term ending in July 2025. Charlotte Burrows, representing a Democratic seat, was confirmed for a second term ending in 2023. Jocelyn Samuels, representing a second Democratic seat, was confirmed earlier this year for a term expiring in July 2021.

If administrations change, the new president would be able to designate Democratic members to serve as chair and vice chair. However, barring their resignations, the current chair and vice chair would remain as Commissioners, and the EEOC would continue to have a 3-2 Republican edge into at least the second year of the new administration when Chair Dhillon's term expires.

PBGC

The PBGC is a federal agency created by the Employee Retirement Income Security Act of 1974 (ERISA) to protect pension benefits in private-sector defined benefit plans. PBGC's insurance program pays pension benefits for plans terminating without sufficient funding up to the limits set by law. Program funding comes from premiums paid by companies whose plans the PBGC protects, investments, assets of pension plans the PBGC takes over as trustee, and recoveries from the companies formerly responsible for the plans.

PBGC is headed by a director appointed by the president. In April 2019, Trump-appointee Gordon Hartogensis was confirmed as director of the PBGC for a term of five years or until 2024. This position can be replaced at anytime by the president with Senate approval. Because the director of the PBGC reports to a board of directors consisting of the Secretaries of Labor, Commerce and Treasury, with the Secretary of Labor as chairman, changes in the Cabinet could influence agency policy. Who occupies the White House will dictate whether the PBGC will remain Republican-led for several more years.

IRS

Appointed by President Trump, Charles P. Rettig currently serves as the head of the Internal Revenue Service. His nomination to be IRS commissioner was confirmed by the Senate in 2018, for a term expiring November 12, 2022. As commissioner, he is responsible for administering the tax system. Similar to the PBGC Director, the commissioner can be replaced at the will of the president with Senate confirmation.

On the campaign trail, Joe Biden has promised that, if elected, he would repeal the 2017 Tax Cuts and Jobs Act on his first day in office. Of course, reversing the so-called Trump tax cuts depends on Democrats controlling both the House and Senate and passing tax legislation. While Senate Democrats initially suggested they would move quickly to repeal, tax legislation is likely to take a back seat to COVID-related initiatives. Should the tax laws change, the IRS would be responsible for implementing and administering the changes and work with the Treasury Department to issue regulations and other guidance for taxpayers.

In closing

Just one week remains until Election Day. Whether Americans will opt for divided government or one-party rule is uncertain. Given the current political climate and the number of lawsuits already swirling around the 2020 election process, it's entirely possible that election results may not be known until days or even weeks after November 3.

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