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Trump/Biden positions on healthcare, retirement, and labor and employment

2020 has been a year like no other. COVID-19 continues to weigh heavily on Americans affected by the virus as well as the millions who are out of work amidst a struggling economy. These two issues, combined with a highly engaged electorate, provide the backdrop for what looks to be an historic election. This edition of *Legislate* will put the election in context as well as provide a glimpse into the presidential candidates' healthcare, retirement, and labor and employment positions.

Election day is tomorrow

We are just a day away from one of the most contentious and arguably most important elections in U.S. history, the final outcome of which may not be known on November 3, as millions of voters cast their ballots through mail-in voting.

Early voting and a close election

This year early voting has surged. As of Saturday, October 31, over 90 million voters had already cast their ballots either through in-person early voting or by mail, according to the U.S. Elections Project. These early figures now represent over half of the 140,114,502 ballots cast in 2016 and almost certainly will mean record voter turnout in this election.

Post-election webinar

Join us on November 12 for ***What's next for benefits***, a discussion of the potential changes to employee benefits and labor and employment policies.

With rules regarding when ballots must be postmarked and received varying from state to state, it isn't difficult to see how the outcome of the election may not be known on election day or potentially for days or weeks later. For example, a recent Supreme Court ruling permits Pennsylvania, a key battleground state, to extend the deadline for receipt of absentee and mail-in ballots to allow those received by 5:00 pm on November 6 to be counted.

Automatic recounts and contested results may also factor into delaying the outcome.

Path to 270

The presidential election is unique because, unlike other elections where candidates are elected by popular vote, the president and vice president are elected by state and electorates through the Electoral College process. The Electoral College votes, not the popular votes (each individual's ballot), determine who will be the next president of the United States. As such, a candidate can win the popular vote, as happened in the 2016 election with then candidate Hillary Clinton, and lose the election. A candidate must receive 270 of the 538 Electoral College votes to win.

As described in our October 26 issue of *Legislate*, Donald Trump won the Electoral College surpassing the 270 threshold by 34 votes. This year it will be critical for the winner to claim victory in several key states such as Pennsylvania, Florida, Michigan, and Ohio — as evidenced by the number of stops the candidates have made in these states in the remaining days of the campaign.

Candidates' HR and employment positions

The winner, when that is ultimately determined, will have the opportunity to push forth their agenda in the four years ahead. Certainly, the ability to do so is dependent on the outcome of the House and Senate races as well, but the next president's positions on issues of importance to Americans, such as the security of their retirement, the availability and quality of healthcare, and employment issues like the minimum wage and paid leave, are on the ballot.

President Donald J. Trump and former Vice President Joseph R. Biden Jr. have diverging viewpoints on many fronts, but here we compare their positions on healthcare, retirement, and labor and employment.

For additional background on the election, see our **October 26** issue of *Legislate*: Election 2020: What's at stake.

Healthcare

The most significant difference between the Biden and Trump healthcare positions is that a Biden administration would build on the current Affordable Care Act (ACA), while a Trump administration seeks to invalidate the ACA by the Supreme Court and replace it with a new healthcare program.

Biden administration

If implemented, the Biden healthcare plan could potentially affect employer-provided health coverage in several ways.

It could provide employees with alternatives to employer coverage by:

- Providing a public health insurance option similar to Medicare. The public option would be available to individuals, including those eligible for employer coverage. This program would reduce costs for patients by using Medicare payment rates or negotiating lower prices from hospitals and other providers and would cover primary care without cost-sharing. Lower provider payments could increase cost shifting from providers to employer plans. The public option would be offered at no premium cost to individuals living in states that did not expand Medicaid if they would qualify for it in other states.
- Lowering the Medicare eligibility age from 65 to 60. This could obviate the need for retiree coverage and would likely reduce the number of older workers electing to continue employer coverage through COBRA.
- Making premium tax credits to subsidize the cost of marketplace coverage available to a larger number of individuals and increasing the amount of those credits. This would be achieved by eliminating the 400% income cap on premium tax credit eligibility, providing tax credits so that the cost of coverage would not exceed 8.5% of household income, and setting credit levels based on the cost of the marketplace gold plan, rather than the less expensive silver plan.

The expansion of premium tax credits could potentially increase employer exposure to the ACA employer shared responsibility assessment. Under the ACA, an employer may be subject to a shared responsibility assessment for each full-time employee who enrolls in marketplace coverage and qualifies for a premium tax credit because the premium that the employee must pay for self-only, employer-offered coverage is “unaffordable.” Because the affordability percentage used for shared responsibility purposes is tied to the percentage used for premium tax credit eligibility, the reduction of the affordability percentage from 9.78% in 2020 to 8.5% could mean that currently affordable employer coverage may become unaffordable and thus some full-time employees would become eligible for premium tax credits. For that reason, employers would have to reassess their employee contribution strategies.

The Biden plan also includes various actions to lower the cost of prescription drugs, including:

- Allowing the government to use its leverage to directly negotiate lower Medicare prescription prices with drug companies; these prices would then be available to group health plans
- Limiting launch prices for specialized biotech drugs with little or no competition by establishing an independent review board to assess their value and recommend a reasonable price based on the average price in other countries
- Imposing penalties on drug companies that increase prices above the inflation rate
- Allowing the purchase of drugs from other countries
- Eliminating tax breaks on drug advertising spending

Trump administration

If the Supreme Court invalidates the entire ACA, group health plans would not be subject to the various benefit mandates and could again impose annual and lifetime dollar limits on benefits, pre-existing condition limitations, etc. The administration has not proposed a specific plan to replace the ACA or to "protect" individuals with pre-existing conditions.

If the court upholds the ACA, the Trump administration would likely continue its efforts to dismantle the law and offer health coverage alternatives through executive orders and regulatory actions. For example, during its first term, the Trump administration expanded the use of short-term health plans and authorized association health plans and individual coverage health reimbursement accounts to provide coverage. Additional activity through executive orders can be expected in a second term, especially if Congress remains split or in Democratic control. To address medical costs, price transparency requirements will apply to hospital services starting January 1, 2021 (unless stopped by the courts), and final regulations on price transparency for health plans were recently released.

It is not clear to what extent the Trump administration's efforts to reduce prescription drug prices would impact group health plans. The administration does not support government negotiation of drug prices and would limit drug price increases to inflation only for Medicare Part B drugs. The administration does support allowing the importation of drugs from Canada and a payment model under which Medicare would not pay more for costly Part B or Part D prescription drugs or biologics than any other nation (i.e. a "most-favored nation" price). Trump's administration would also require that individuals enrolled in Medicare Part D directly receive any rebates from drug companies.

Retirement

Sometimes taking a back seat to healthcare reform, retirement policy, including increased savings and access to retirement vehicles along with social security reform, remains an important issue in this campaign. If control of the White House and Congress is secured by a single party, we could see significant changes to retirement policy as the president's agenda would likely be ushered into law without significant objection. If divided government continues, retirement policy changes may be less dramatic. However, as evidenced by the recently proposed SECURE Act 2.0, Securing a Strong Retirement Act of 2020, there is bipartisan support for retirement reform.

Retirement policy

Although President Trump's second term agenda does not include a detailed retirement platform, he has indicated support for tax policy changes that include capital gains and middle-class income tax cuts. An indicator of the president's stance on retirement is evidenced by the Setting Every Community Up for Retirement Enhancement (SECURE) Act, enacted during his first term with Republican and Democratic support. The SECURE Act encourages savings and accessibility while providing administrative simplification and incentives for small employers to offer retirement plans. These themes are reinforced in the proposed SECURE Act 2.0, and we would expect a second Trump administration to provide further support for these provisions.

Mr. Biden has issued a more detailed tax proposal as posted on his campaign's website. The most significant change for retirement plans would involve how employee contributions are taxed as this aspect of his plan would give lower- and middle-income workers a bigger tax break. The intent is to bolster savings and equalize saving incentives. *The Biden Plan for Older Americans* suggests that two-thirds of the current tax benefits are realized by 20% of the wealthiest earners. In response, Mr. Biden proposes that the existing tax deduction available for retirement contributions would be eliminated and replaced with tax credits. This would apply to most retirement programs such as 401(k) plans and individual retirement accounts (IRAs). Though the amount of tax credit has not been established some experts have suggested it would be 26%.

To put this proposed change in context, the federal income tax system is progressive, meaning that the value of a tax deduction increases as the taxpayer's tax rate goes up. Conversely, a lower-income taxpayer will see less value in a tax deduction. The Biden campaign seeks to equalize this disparate impact by employing a tax credit, which will provide a greater tax benefit to lower-income workers. Whether the tax credit will be refundable (that is, the taxpayer would get the credit back even if no tax is due or the taxes owed are less than the credit) remains to be seen.

Another Biden proposal involves automatic enrollment in a 401(k) plan to aid in retirement savings. According to the *Biden Plan for Older Americans* as posted, "almost all workers without a pension or 401(k)-type plan will have access to an "automatic 401(k)."" It is unclear if this would involve an employer mandate, establishment of a national savings plan program, or something else. This idea is also part of the proposed CARES Act 2.0, suggesting bipartisan interest in automatic enrollment as a way to support and encourage saving for retirement.

Social security

Social security is another area where both candidates have indicated policy changes. President Trump and Mr. Biden each have expressed interest in protecting retirees, but how this is accomplished varies between the candidates. President Trump indicated he would protect social security and Medicare. Exact details have not yet been released.

Candidate Biden suggests a "donut hole" approach to shoring up social security. He would impose an additional social security payroll tax on those earning over $400,000. Thus, payroll tax would be collected on earnings up to the indexed taxable wage base, then an additional 12.4% payroll tax would be imposed on wages over $400,000, split equally between employers and employees. This change appears to be in response to Mr. Biden's promise to preserve and strengthen social security.

Labor and employment

Republicans renewed the president's "America First" agenda, rolling over their 2016 platform to 2020 rather than adopting a new platform this cycle. Thus, a second Trump term would be expected to continue the pro-growth tax policies, deregulation, and business-friendly labor and employment agenda of the first term.

The 2020 Democratic Party platform proposes a new economic contract that “raises wages and restores workers’ rights to organize, join a union, and collectively bargain,” guarantees equal pay for women, and promises paid family leave for all.

Fundamental differences between the Trump and Biden positions on several key workplace issues are highlighted below.

Labor

Among other things, the Trump administration’s labor agenda includes increasing the transparency of union trust funds and executive compensation of union leaders, eliminating forced funding of political candidates through union dues and other mandatory contributions, and supporting right-to-work laws.

In sharp contrast, Mr. Biden has pledged to be the “strongest labor president you’ve ever had” and supports bills to eliminate right-to-work laws, strengthen organizing capabilities, encourage and incentivize unionization and collective bargaining, and extend additional protections to union workers. A Biden administration would prioritize passing the Pro Act (Protecting the Right to Organize Act of 2019) — a bill that would make sweeping changes to federal labor laws. Among other things, it would amend the National Labor Relations Act (NLRA) to revise the definition of “employee” and “supervisor,” prohibit permanent strike replacements, ban captive audience meetings, enhance employer penalties for engaging in unfair labor practices and other labor law violations, and make executives personally liable for unfair labor practices. Whether a Biden administration would be able to make such changes would heavily depend on the majorities in both chambers of Congress.

The NLRB

Over time, the National Labor Relations Board (NLRB) has tended to shift between pro-labor and pro-management decisions, depending on which party holds the White House. During the Obama-Biden administration, the NLRB’s pro-labor decisions and initiatives broadened the reach and protections of federal labor law in relation to collective bargaining and unfair labor practices. In many cases, the Obama Board overturned longstanding precedent affecting both union and non-union workplaces.

Embracing a more business-friendly outlook, the Trump Board has reversed a number of those decisions and reinstated prior precedent. The Board would continue to have a pro-management majority if the president is re-elected. By contrast, a Biden administration would look to establish a pro-labor majority that would overturn many Trump-era decisions and broaden protections of the laws governing unions and the workplace. Along with those mentioned above, its stated labor priorities would include:

- Reimplementing quickie election rules
- Abolishing secret ballot elections
- Resurrecting “card check” organizing
- Requiring federal contractors to maintain neutrality during the course of union organizing

- Reversing recent business-friendly Board decisions on issues such as work rules (*Boeing*) and employee discipline (*General Motors*)
- Extending the right to organize and bargain collectively to independent contractors
- Codifying the *Browning Ferris* joint employer standard
- Reinstating and codifying into law the Obama administration's "persuader rule"

Employment

As with the labor issues discussed above, the Trump administration would have very different positions than a Biden administration on many important issues affecting employers and employees alike. Among those are the fundamental workplace policy differences on minimum wage, worker classification, paid leave, and arbitration agreements highlighted below.

Minimum wage

Notably, the Republican agenda leaves minimum wage as an issue to be handled at the state and local level. The president previously indicated some support for an increase in the federal minimum wage but has not committed to an amount.

By contrast, Mr. Biden supports a $15 federal minimum wage, indexing the minimum wage to the median hourly wage, eliminating the tipped minimum wage, and increasing the salary threshold to qualify as an exempt employee under the FLSA. Further, his platform says that gig and platform workers deserve minimum wage and overtime pay — rights currently reserved under the FLSA for employees.

Worker classification

President Trump supports the DOL's expanded definition of "independent contractor," which is now being finalized, that would simplify worker classification and use an economic realities test to determine employee vs. independent contractor status under federal wage law. Notably, the NLRB returned to its long-standing, independent-contractor standard last year and reaffirmed its adherence to the traditional common-law test to determine employee status.

Mr. Biden's platform would extend to gig and platform workers wage and workplace protections that are typically reserved for employees, including minimum wage and overtime pay. The Biden plan calls for the establishment of a federal standard modeled on California's ABC test to distinguish employees from independent contractors for all labor, employment, and tax laws. That test presumes workers are employees unless the employer can establish otherwise.

Paid family leave

President Trump signed the Federal Employee Paid Leave Act, allowing most federal employees the right to take up to 12 weeks of paid parental leave for the adoption, birth, or foster care placement of a child. He supports legislation that would allow new parents to collect their own future child tax credits early and receive smaller credits later. The administration would likely continue to pursue these efforts in a second term.

Mr. Biden's agenda includes a national paid family and medical leave program providing up to 12 weeks of paid leave for all workers to care for newborns, newly adopted or fostered children, their own or family member's serious health conditions or injured military service members or to deal with "qualifying exigencies arising from the deployment" of a family member. It also supports requiring employers to provide up to seven days of paid sick, family, and safe leave. It's possible that Mr. Biden may seek to create those programs by resurrecting legislation such as the Family and Medical Insurance Leave (FAMILY) Act and the Healthy Families Act.

With respect to COVID-related relief, Mr. Biden supported the leave provisions of the Families First Coronavirus Response Act, which President Trump signed into law earlier this year.

Arbitration agreements

President Trump supports pre-dispute arbitration agreements and previously indicated that he would veto the Forced Arbitration Injustice Repeal (FAIR) Act, passed by the House last month on a party-line vote. The bill would prohibit pre-dispute arbitration agreements of employment disputes as well as agreements and practices that interfere with the right of workers to participate in a joint, class, or collective action related to an employment dispute.

Mr. Biden takes a more employee-friendly position, opposing agreements that require employees to arbitrate workplace disputes. Among other things, this position would favor legislation to prohibit employers from requiring individual arbitration as a condition of employment.

In closing

While the results of the election may not be known when America wakes up on November 4, what is clear is that we have an engaged electorate and candidates with very different positions on a variety of issues important to our country.

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