NSBA
National Small Business Association®

BOARD OF TRUSTEES MEETING
Dec. 4, 2020

What to Expect: Lame-Duck Session

The Senate returned to Capitol Hill the week of Nov. 9 to begin the post-election lame duck legislative session and the House resumed on Nov. 16, but the outlook for speedy passage of legislation to address the continuing economic and health impacts of the coronavirus pandemic remains dim as leaders in the two chambers continue to disagree over the size and scope of a relief package.

Congress has a long to-do list after punting several items until the end of the year, including funding the government and trying to get a fifth coronavirus deal. NSBA continues to work with our trade association allies for passage of a new relief measure that includes liability protection, protects the business tax credits included in the CARES bill, and restarts and/or expands the PPP.

Meanwhile, House and Senate leaders appear united on passing a government funding bill for fiscal year 2021 during the lame duck work period but have said nothing publicly about whether they intend to act on the more than two dozen temporary tax “extenders” provisions that are scheduled to expire at the end of this year.

Further, the House and Senate aim to quickly negotiate and pass a compromise National Defense Authorization Act in the coming weeks.

Yet, the Senate and House are out of session until Nov. 30, making the window for the upper chamber to deal with legislative packages just a little tight.

Pandemic Recovery Package

The post-election lame duck legislative session wrapped up its second week without any apparent signs of progress by congressional leaders on a deal to provide another round of coronavirus relief.

The day after the presidential and congressional elections, Senate Majority Leader Mitch McConnell (R-Ky.), said that he wants Congress to complete work on a relief bill before the end of the year. But what such a deal might look like – and whether it can come together in the next few weeks – is unclear.

Since the summer, House Speaker Nancy Pelosi (D-Calif.) and Treasury Secretary Steven Mnuchin have been negotiating the contours of a potential package worth nearly $2 trillion, but Majority Leader McConnell had said the estimated $519 billion aid package Republicans introduced in September is sufficient. Speaker Pelosi's public position, and that of President-elect Joe Biden, has been that negotiators should agree to the roughly $2.4 trillion package the House passed on Oct. 1.

Unfortunately, Speaker Pelosi and Sec. Mnuchin have been unable to reach consensus on issues such as funding for state and local governments; liability protections to shield businesses, schools, and health care facilities from virus-related lawsuits; funds for a national tracking, testing, and tracing program; funding for schools and child care; expansions of the earned income tax credit and the child tax credit; and an extension of the federal supplement to state-level unemployment benefits.

Further complicating matters is the gulf between congressional Democrats and Republicans over the scope and cost of another potential stimulus package. Shortly before the elections, Pelosi called for $2.4 trillion in stimulus relief – the cost of the slimmed-down version of the Heroes Act that the House approved in October – and Mnuchin reportedly was willing to offer up to $1.9 trillion. Leader McConnell and other Senate Republican leaders, however, have indicated that their members would be reluctant to accept a package in the range that Speaker Pelosi and Sec. Mnuchin are considering, noting that most want a narrow more targeted measure.

At this time, neither Leader McConnell nor Speaker Pelosi appeared ready to cede ground to the other. On Nov. 9, McConnell pointed to a better-than-expected unemployment report and promising developments in the quest for a coronavirus vaccine as signals that Congress should pursue a relatively narrow relief measure. He reiterated that assessment in comments on Nov. 12, as well.

The proposals McConnell brought to the Senate floor in September and October, which were informally estimated to cost roughly $500 billion, were blocked by Senate Democrats. As of now, McConnell has not indicated when or if he plans to release a new proposal.

Speaker Pelosi, for her part, said at a press conference with Senate Minority Leader Charles Schumer (D-N.Y.), on November 12 that her position on a recovery bill remains unchanged, particularly in the wake of reports showing coronavirus infection levels rising throughout much of the country. Both Speaker Pelosi and Minority Leader Schumer agree that the Heroes Act should be the starting point for further negotiations with Republicans.

Paycheck Protection Program Renewal

Among the many priorities left to be accomplished this Congress, none is more important to NSBA than renewing the Paycheck Protection Program (PPP).
Congress created the PPP as part of the $2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act. The legislation authorized Treasury to use the SBA's 7(a) small business lending program to fund forgivable loans of up to $10 million per borrower that qualifying businesses could spend to cover payroll, mortgage interest, rent, and utilities. PPP borrowers can qualify to have the loans forgiven if the proceeds are used to pay certain eligible costs.

The PPP funded more than 5.2 million loans for a total of $525 billion; but, the program stopped accepting applications on Aug. 8 with almost $134 billion of congressionally approved funds remaining unspent. Allowing certain small businesses to access those funds is among several PPP proposals that have been discussed between Congress and the White House, but nothing has been passed, as no agreement has yet been achieved on a comprehensive COVID-19–related stimulus bill.

PPP 2 is an unofficial name referring to a more targeted small business assistance program that has been discussed among congressional leaders and White House officials for months. While new funding to help small businesses deal with COVID-19 pandemic-related business disruptions has bipartisan support, disagreement between Democrats and Republicans on other aspects of a new stimulus bill has so far prevented a deal from being reached.

Since talks are still stalled, many lawmakers have come forward calling for action. Senate Committee on Small Business and Entrepreneurship Chairman Senator Marco Rubio (R-Fl.) issued this statement, and the chairman has been working to engage leadership and bipartisan taskforce on how to help small businesses before Congress adjourns before end of the year. He believes, the alternative is there will be no further help for small-business owners until next spring.

Senator Rob Portman (R-Ohio) is also trying to put together a bipartisan proposal for a narrow COVID-19 aid bill in the lame-duck session that focuses on areas of common ground, such as funding for vaccine relief and development, small businesses and unemployment insurance.

Senator Portman is focused on renewing an extra 13 weeks of unemployment benefits available to jobless workers whose regular state benefits, which typically last 26 weeks, have run out. That provision, as well as a new pandemic unemployment program providing benefits for freelancers and gig workers, was enacted in the $2 trillion March relief law but expires Dec. 31. He also cited the importance of another round of Paycheck Protection Program loans for small businesses, which expired in August. If eligible businesses spend the money mostly on payroll expenses, they qualify for loan forgiveness. "Obviously the PPP is really important to small businesses. Some of those businesses are being shut down by government edict again. We need to help them," Portman said.

NSBA continues to work with our allies on Capitol Hill to call for immediate legislation that recognizes the below small to no-cost solutions to help small businesses stay open this holiday season, including to:

- Allow the hardest hit small businesses to take a second draw on the Paycheck Protection Program (PPP), as suggested in the Continuing Small Business Recovery and Paycheck Protection Program Act and Prioritized Paycheck Protection Program (P4) Act.
- Allow less stringent standards for the second round—and commensurate funding to include businesses that demonstrate a 20-30 percent reductions in gross revenues to participate in this second wave of funding, making it much more effective across the diverse sectors and the various sizes who continue to need the help.
- Expedite PPP loan forgiveness, particularly for the smallest and hardest hit businesses, pass S. 4117/H.R. 7777, The Paycheck Protection Small Business Forgiveness Act. Allow the PPP loan forgiveness spent in FY 2020 apply to FY2020, regardless of when forgiveness is granted.
- Allow full tax deductibility for PPP recipients, thereby eliminating the unexpected and substantial tax increase many business owners now face.
- Eliminate caps and increase funding for the Economic Injury Disaster Loan Program.
- Ensure tax-exempt organizations such as 501(c)6 trade organizations, chambers of commerce and destination marketing organizations (501(c)6 and quasi-governmental structures have PPP access.
- Optimize the Small Business Administration 7(a) loan program by providing increased federal loan guarantees and maximum loan sizes, as well as reduced fees, all of which

were critical programmatic changes that accelerated economic recovery after the Great Recession.

- Increase funding for Community Development Financial Institutions, which promote economic revitalization in distressed communities.
- Costs associated with Personal Protection Equipment (PPE), technology and cloud based services, and business physically damaged during COVID-19 should be forgiven under PPP.

Unless Congress provides additional relief soon, business failures in the next several months will skyrocket as it will be impossible for additional measures to come online until well into early 2021.

a) Deductibility of Expenses

Earlier this year, the Internal Revenue Service (IRS) ruled that otherwise-tax-deductible expenses that are paid with a forgiven Paycheck Protection Program (PPP) loan will not be deductible. This ruling is in direct conflict with the statute, which clearly said PPP loans would not be taxable. NSBA and our trade association colleagues have been working with allies in the House and Senate to pass legislation that would reaffirm statutory intent and reverse the IRS ruling. We have also communicated with the Small Business Administration (SBA) and the Department of Treasury urging that the IRS ruling be rescinded, but with no success – Secretary Steven Mnuchin has been truly "dug-in" on this issue.

NSBA is still actively lobbying for Congressional action on this and hope Congress will pass a COVID-19 bill in the lame-duck session that includes Sen. John Cornyn (R-Texas) bill (S. 3612), which would reverse the IRS ruling.

In the interim, however, Treasury and the IRS appear to be moving in the wrong direction on this. On Nov. 19, Treasury and the IRS released guidance clarifying the tax treatment of expenses where a PPP loan has not been forgiven by the end of the year the loan was received.

According to the guidance, since businesses are not taxed on the proceeds of a forgiven PPP loan, the expenses are not deductible. This results in neither a tax benefit nor tax harm since the taxpayer has not paid anything out of pocket.

If a business reasonably believes that a PPP loan will be forgiven in the future, expenses related to the loan are not deductible, whether the business has filed for forgiveness or not. Therefore, [we] encourage businesses to file for forgiveness as soon as possible.

In the case where a PPP loan was expected to be forgiven, and it is not, businesses will be able to deduct those expenses.

According to Sec. Mnuchin, the guidance is intended to provide taxpayers with greater clarity and flexibility while ensuring that all small businesses receiving PPP loans are treated fairly.

Click here to view the revenue ruling.
Click here to view the revenue procedure.

Omnibus Spending package

One lame duck priority that Majority Leader McConnell and Speaker Pelosi appear to agree on is the need to move an omnibus appropriations package to fund the government for fiscal year 2021, which began on October 1, rather than rely on another continuing resolution (CR) that would temporarily extend funding at the levels in effect for fiscal year 2020.

The current CR keeping the government's doors open took effect on October 1 and is set to expire on December 11. Allowing the CR to lapse without having a new stopgap or long-term funding agreement in place would result in a partial shutdown of government operations.

On Nov. 10, the Senate Appropriations Committee released text for all 12 spending bills needed to fund government agencies for this fiscal year, setting the stage for negotiations with the House, which approved its spending measures over the summer. Due to the time constraints, Senate leaders are expected to bypass committee mark-ups and floor votes on the Appropriations Committee bills and quickly begin talks with the House. Both chambers will vote on an omnibus package once negotiators resolve the differences in their respective proposals.
Links to the text, explanatory statements, and highlights are available on the committee website.

On Nov. 9, Senate Appropriations Committee Chairman Richard Shelby (R-Ala.), said that he believes the two chambers would be able to reconcile their differences and approve an omnibus spending package in the coming work period. All sides agree they do not want another government shutdown.

An omnibus spending bill could serve as a legislative vehicle for a coronavirus stimulus package if Democrats and Republicans are able to strike a deal. However, Sen. Shelby expressed doubts about that prospect. Yet, he did suggest that any pandemic-related provisions that made their way into an omnibus appropriations bill would have to be "mainly targeted at small business" and "some people [who] are hurting."

Neither Pelosi nor Senate Minority Leader Schumer have indicated that congressional Democrats would be willing to accept a limited relief package as part of an appropriations agreement.

Meanwhile, the Trump administration appears ready to accept a $1.4 trillion, full-year omnibus appropriations bill rather than a simple short-term government funding extension. For President Trump, an omnibus might be his last chance to squeeze in a few budget priorities before he leaves office.

a) Tax Extenders

Lawmakers could also use a government funding bill to move extensions of a slew of temporary tax deductions, credits, and incentives that are scheduled to sunset on December 31; however, congressional leaders so far have said nothing publicly about plans to address tax extenders provisions during the lame duck session.

Among the more notable extenders that will expire at the end of this year without congressional intervention are:

- Renewable energy and energy-efficiency provisions, such as credits for certain nonbusiness energy property (section 25C) and the construction of new energy-efficient homes (section 45L), the deduction for energy-efficient commercial building improvements (section 179D), and the beginning of construction date for renewable power facilities eligible to claim the electricity production credit or investment credit in lieu of the production credit (sections 45 and 48(a)(5));
- The controlled foreign corporation lookthrough rule under section 954(c)(6);
- Cost recovery provisions, such as three-year depreciation for certain race horses (section 168(e)(3)(A)(i)), seven-year depreciation for motorsports entertainment complexes (sections 168(i)(15) and (e)(3)(C)(ii)), and expensing for qualified film and live theatrical productions (section 181);
- Economic development incentives, such as the work opportunity tax credit (section 51(c)(4)), and the new markets tax credit (section 45D(f));
- Reduced excise taxes on craft beer, wine, and distilled spirits, and the reduced record-keeping requirements for taxpayers subject to those excise taxes (sections 263A(f)(4), 5001, 5041, 5051, 5212, 5414, and 5555);
- The employer credit for paid family and medical leave under section 45S; and
- Incentives for individuals, such as the above-the-line deduction for tuition and fees (section 222), the itemized deduction for mortgage insurance premiums (section 163(h)(3)), the exclusion from gross income of up to $2 million of discharged qualified principal residence indebtedness (section 108(a)(1)(e)), and the reduced percentage-of-adjusted-gross-income threshold for claiming the itemized deduction for medical expenses (section 213(f)).

If lawmakers do not pass an extenders bill before the end of the year, they could extend these provisions retroactively when the 117th Congress convenes in 2021. It is worth noting, though, that a retroactive fix would be much more difficult, if not impossible, in the case of excise taxes (such as those imposed on craft beverages).

The pending sunset of a number of temporary tax provisions in this year's Coronavirus Aid, Relief, and Economic Security Act (CARES Act) also could add complexity to any extenders discussions that take place during the lame duck session.

FY21 National Defense Authorization Act

On Nov. 18, the House appointed its slate of negotiators to craft a compromise version of the National Defense Authorization Act. In all, 53 Democrats and 30 Republicans were named from the Armed Services Committee and 17 other panels. The House also voted by unanimous consent to form a conference committee with the Senate.

Earlier in the day, House and Senate negotiators held their first official session, known as the "pass the gavel" meeting, where lawmakers discussed their priorities for the defense bill behind closed doors.

President Trump — who is refusing to concede his loss to former Vice President Joe Biden and who upended the Pentagon by ousting Defense Secretary Mark Esper — has lawmakers concerned about the commander in chief's national security whims going unchecked over the next two months.

Now lawmakers must iron out their competing versions of the annual NDAA, which President Trump has threatened to veto over provisions that would renames bases that honor Confederate leaders. Both House and Senate versions (H.R. 6385/S. 4049) of the NDAA would do that, but over varying time frames.

The White House also opposes a bevy of other provisions, detailed in a formal veto threat against the House-passed NDAA. That includes bipartisan efforts to constrain his plans to remove thousands of U.S. troops from Germany and precipitously withdraw forces from Afghanistan and limit the president's emergency powers to redirect some Pentagon money to a border wall.

If President Trump follows through and vetoes the bill, congressional leaders will be faced with a vote to override the president in the final days of 2020 and will have little margin in time and votes to do so. President Trump has vetoed eight bills during his term and Congress has yet to muster enough bipartisan support to reach the two-thirds majority needed to overturn any of them.

The House and Senate passed their versions of the NDAA in July with veto-proof majorities, defying Trump's threats. But neither chamber can afford to lose many votes. Conservative Republicans who supported the bill over the summer will have to stay the course and defy Trump. It is also unclear if progressive Democrats who opposed the bill in both chambers would reverse course and help overturn a Trump veto.

A Trump veto is not necessarily a foregone conclusion if lawmakers and the administration can strike a deal on renaming bases and other issues that allows all parties to claim a legislative victory.

a) Beneficial Ownership Amendment

In recent years, the Senate NDAA has attracted numerous, often controversial, and sometimes non-germane floor amendments, though few receive floor time. This year was no different, and NSBA was concerned about the potential inclusion of a new small business mandate that would impact businesses with 20 or fewer employees. Ultimately, the amendment (S. Amdt. 2198) — Anti-Money Laundering Act of 2020 –was not offered by Senators Mike Crapo (R-Idaho) and Sherrod Brown (D-Ohio) in the Senate version of the NDAA.

While NSBA's efforts to prevent the Crapo/Brown beneficial ownership amendment from advancing in the Senate resulted positively, we were less successful in the House. Rep. Carolyn Maloney (D-N.Y.) filed her Corporate Transparency Act of 2019 as an amendment to House NDAA. On July 20, Rep. Maloney's Corporate Transparency Act amendment passed in the En-Bloc number 1 package to H.R. 6395, (NDAA). The amendment can be found here.

The inclusion of this amendment is devastating news to the millions of small-business owners who will be faced with an additional $5.7 billion in regulatory paperwork. Throughout the process, NSBA and our coalition partners urged lawmakers to oppose the Corporate Transparency Act amendment, highlighting that it will impose burdensome, duplicative reporting burdens on the smallest businesses in the U.S. and it threatens the privacy of law-abiding, legitimate small-business owners.

The Corporate Transparency Act would require small businesses with 20 or fewer employees to complete and submit annual paperwork which includes the personally identifiable information of each business owner to the Treasury Department's Financial Crimes Enforcement Network (FinCEN) upon the creation of the business and periodically for the life of the business. Failure to comply would be a federal crime with civil penalties up $500 per day to $10,000 and criminal penalties of up to three years in prison.

Millions of small businesses would be required to provide personal ownership information to FinCEN on an annual basis. The Treasury Department would be required to retain the information for the life of the business plus five years. Furthermore, the legislation grants broad access to the information to federal, state, local, or tribal law enforcement agencies without having to obtain a subpoena.

On Nov. 19, House Financial Services Committee Chairwoman Maxine Waters (D-Calif.) stated in a press release, "In particular, I appreciate that the Committees agreed to include legislation introduced by Representative Carolyn Maloney to finally end anonymous shell companies, legislation by Representative Emanuel Cleaver to prevent money laundering and other financial crimes around the globe, and language similar to a bill by Representative Ben McAdams to enhance the Securities and Exchange Commission's tools to recover the ill-gotten gains of bad actors."

Apparently, House Financial Services Committee Chairman Patrick McHenry (R-N.C.) – in exchange for his sign-off/support – was able to extract some marginal improvements including new government reporting and slightly more secure access to the FinCEN database, but the fundamental structure of a new small business reporting burden with threats of significant penalties remains (civil penalties up to $10,000 and criminal penalties up to 3 years in prison). Rep. McHenry was limited in what he could negotiate because the other three principle were stacked against him.

NSBA is disappointed that the House passed this amendment with minimal debate by attaching a non-germane amendment to the must-pass NDAA. Since the Senate Crapo/Brown amendment was not included in the Senate version of the NDAA, it means that the Corporate Transparency Act has now gone to Conference with no Senate counterpart. NSBA remains opposed to the legislation and opposes inclusion of the amendment in the unrelated NDAA. Along with our coalition partners, we will be lobbying conferees to exclude the controversial provision from the NDAA.

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<u>What to Expect: Biden Administration (117th Congress)</u>

The results of the 2020 national elections are (mostly) in. Former vice president Joseph Biden is now President-elect Joseph Biden and is moving forward with the transition process, even though it is not clear how much cooperation from the Trump Administration the transition process will receive, give that President Trump has refused to concede.

Democrats have managed to hold the House, but they will be working with the slimmest House majority in years. Based on results for 2020 House races, Democrats will control at least 222 seats in the next Congress, Republicans will control at least 205 seats, and 8 contests remain undecided. That will leave Democrats with a smaller majority in the 117th Congress (they currently have 232 seats) and will leave Speaker Nancy Pelosi (D-Calif.) with little room for error as she works to secure the votes for critical legislation.

Control of the Senate is still unknown at this time, though Republicans enjoy a 50–48 majority as we await two runoff elections in Georgia scheduled for January 5, 2021. If Democrats win both of those races, they will seize control of the upper chamber, as the vice president (who under the Constitution of the U.S. also serves as president of the Senate) can provide a tie-breaking vote in the event of a 50–50 deadlock. Any other outcome in Georgia will tilt the Senate balance in favor of Senator Mitch McConnell (R-Ky.) and the Republicans.

While the results of the congressional elections may put a damper on a robust Democratic legislative reform agenda, president-elect Biden still has an incredibly ambitious legislation agenda. He wants to pass a new round of COVID-19 relief, rework the nation’s health care law, make significant tax law changes, and we will likely see a dramatic shift to the federal labor and employment policy landscape.

COVID-19 Relief

One of the first actions of Biden’s transition was the announcement of a COVID-19 advisory board to, as he said in his victory speech, "…help take the Biden-Harris COVID plan and convert it into an action blueprint that will start on January 20, 2021."

When Pfizer announced that its vaccine candidate appears to be working, at least in preliminary evidence from tests in people, Biden released a statement calling the news "excellent" but warned that widespread vaccination is many months away and that "Americans will have to rely on masking, distancing, contact tracing, hand washing, and other measures to keep themselves safe well into next year."

Biden will be taking office with the coronavirus blazing through the country—new records of cases and deaths are becoming routine, and more than 237,500 Americans have already died from COVID-19. Thus, among, his top issues, the pandemic—which will still be with us for quite some time, will likely dominate the next presidential term.

Biden has remarked often that he would "listen to science" in his approach to stopping the pandemic, whereas Trump has repeatedly contradicted his own top health officials. Biden has pledged to put the federal government in charge of a nationally coordinated COVID-19 response, once he has the presidential reigns in January, and to use the Defense Production Act to ramp up production of masks, face shields, and other personal protective equipment.

While Trump has deferred to the states to come up with and implement testing strategies, Biden wants to establish a Pandemic Testing Board that would coordinate a nationwide response. Among other goals the board would increase drive-by testing twofold and push for the creation of at-home tests and instant tests.

Similar to Trump, Biden has pledged to guarantee free coronavirus testing regardless of a person's insurance status. He also has said he would subsidize health insurance coverage for people who are relying on COBRA health insurance because of a job-loss during the COVID-19 emergency.

Contact tracing has also been left to the states until now, though few states have enough contact tracers to help keep the spread of the virus at bay. Biden would like to create a U.S. Public Health Jobs Corps to mobilize 100,000 contact tracers. Similar ideas have been floated already by Democrats in Congress, although — again — whether such a plan could be passed into law depends in part on which party controls the Senate.

Although, the Trump administration has invested around $12 billion in the development of potential vaccines to fight COVID-19, negotiations between the White House and Congress over a new COVID-19 relief bill that would include money to distribute those vaccines along with other stimulus measures, have stalled. There does seem to be bipartisan support for this funding, but it is unclear if a new relief bill can happen before inauguration day. Biden will likely push hard for this and other vaccine-related funding—his platform calls for an investment of $25 billion in vaccine manufacturing and distribution.

Health Care

President-elect Biden's healthcare priorities in the first term are likely to meet stiff opposition if the Republicans hold the Senate. With the likelihood of a slim margin in the Senate, Democrats will not be able to pursue some of Biden's key healthcare agenda items like a public option for the Affordable Care Act (ACA). Regardless of the outcome, health care will be a top priority in the Biden administration, with many changes likely to be driven through executive orders and regulatory action.

a) Affordable Care Act

On Nov. 10, the U.S. Supreme Court heard arguments in a case challenging the Affordable Care Act's (ACA's) constitutionality, with a decision expected by June 2021. Based on the questions and comments by U.S. Supreme Court Justices during oral arguments in *Texas v. California*, it appeared that a solid majority of the court was likely to uphold the ACA, perhaps striking down the "individual mandate" coverage requirement but leaving the rest of the law in place. However, until a decision is rendered, the exact scope of the court's ruling remains speculative.

Assuming the ACA does survive the latest Supreme Court challenge, Biden has said he wants to "build on" the law. For example, he wants to address complaints that ACA premiums are unaffordable — the current law only provides federal premium subsidies for households that make up to 400 percent of the federal poverty level. Biden's plan would expand these subsidies to include people who make more money than that. He would also reverse some of the ways the Trump administration has tried to undercut the exchanges; Biden says he would restore funding for ACA consumer outreach and for help with ACA sign-ups.

The most significant change he would like to make to the ACA is creating a Medicare-like program that would be a "public option" — a health insurance program administered by the federal government, just as Medicare is, but available to people of any age — that could compete against private insurance plans in the marketplace. This idea was part of the original ACA but did not make it into the final law.

According to supporters, a Medicare-like public option would likely be substantially less expensive than current private insurance plans because of the leverage the government would have to drive down the prices of doctor visits and hospital care.

One example of how this works is in payment rates for doctors and other providers. Medicare pays hospitals about half of what private insurance companies pay, so a Medicare-like public option at Medicare prices would be much less expensive than private insurance plans and the government-sponsored insurance plan also wouldn't have a profit margin like private insurers have, which would also help lower premiums

However, the public option is one of many health care ideas Biden campaigned on that are likely dead in the water if Republicans keep control of the Senate.

b) Medicare & Medicaid

When it comes to Medicare and Medicaid, the federal health programs that together provide coverage to 115 million people, Biden has signaled he wants to expand eligibility for these programs.

For Medicare, the federal program for people over 65, and certain younger people with disabilities, Biden has said he would like to allow people to enroll as early as age 60 and make dental, vision and hearing coverage standard issue in traditional Medicare. Currently, most Medicare beneficiaries have to buy a supplemental policy to add on those benefits. In a divided Congress, these changes to Medicare that would cost taxpayers more money aren't likely to make it into law.

In terms of Medicaid, the state-run program for low-income adults, children, pregnant women and people with disabilities, he may rely on executive orders and regulations to make changes to the program jointly funded by states and the federal government.

The Trump administration has been creative in how it encouraged states to change the program, such as allowing for eligibility and enrollment restrictions, restricting benefits, increasing co-pays, increasing or requiring premiums, and implementing work reporting requirements.

There is no reason why the Biden administration could not do the same, although to very different policy ends. More progressive or liberal states might ask the federal government to be able to use Medicaid funding for housing costs, for instance.

Further, Biden has also talked about Medicaid expansion, a key part of the ACA that expanded coverage to more than 12 million people. Only about a dozen states have declined to adopt expansion of the program. Biden campaigned on the idea that the new public option could help fill the need for low-income people who don't qualify for Medicaid in those states that haven't expanded eligibility. If the public option can't get through Congress, though, it is unclear how the Biden administration might address this issue.

Biden may also move to reverse the executive actions Trump took to limit health care options for immigrants, which is another one of the areas where Biden could do a lot administratively without Congress. That may include reversing the "public charge" rule, which aimed to deny green cards to some immigrants who use food stamps or other public benefits. On Nov. 2, a federal judge blocked enforcement of Trump's public charge rule. Biden has also said he wants to expand ACA coverage to DACA recipients, and allow undocumented immigrants to purchase plans in the ACA marketplaces, although without federal subsidies.

c) Drug & Health Care Costs

This is the area in health policy where Biden's policies might be most similar President Trump's. Both of them have said they want to end surprise medical billing and bring down prescription drug prices, and they even agree on some ideas about how to do that.

A key way in which Biden differs from Trump in his favored way to lower drug prices is Biden's support for allowing the federal government to negotiate drug prices on behalf of Medicare beneficiaries. This was an important part of the drug pricing law the House passed in 2019, but was a nonstarter for the Senate led by Sen. Mitch McConnell (R-Ky.). If Republicans maintain control of the Senate, this is very unlikely to get through Congress.

There is the potential for bipartisan agreement on other measures to bring down drug costs, and to help remedy the problem of sky-high medical bills—particularly surprise medical billing measure being dealt with in the new administration.

The practice of surprise billing — when, for example, a patient goes to an in-network hospital but is treated by out-of-network providers who then bill the patient directly — is a particular problem that Congress has tried to address. Out-of-network surgical assistants (health care providers the patient never met) have become an increasing problem in this regard, policy analysts say, and surprise "hospital facility fees" are another problem. According to some, surprise bills and skimpy, or high deductible-insurance plans have forced many Americans into medical bankruptcy.

Trump pushed hard on Congress to deal with surprise billing from out-of-network health care providers, and lawmakers got close last December, but ultimately failed to come to an agreement about how to get it done. Biden has also said he would like to end the practice, but hasn't explained which approach he would support.

Overall, for some of the incoming president's larger priorities, such as lowering the Medicare age to 60 and lowering the income thresholds to qualify for tax credits to lower the cost of ACA exchange plans, experts say he will likely have to rely on executive orders and regulations. However, there are some areas in which Biden could find common ground with Republicans in the Senate, chiefly on drug prices. There are members in the Senate who really want to do something on drug prices and are frustrated efforts did not go anywhere.

Tax Reform

President-elect Joe Biden would like to make significant changes to the tax code, but a potentially divided Congress, could stymie the incoming president's tax goals.

Under a Biden administration and if the Democrats assume control of both the House and the Senate, taxpayers are likely to see increases to the corporate tax rate and to the top tax rate for individuals. However, should the Republicans retain control of the Senate, it would be difficult to effect any tax rate changes and most provisions in the Tax Cuts and Jobs Act (TCJA) (as passed during the Trump administration) would continue until they generally expire after 2025.

President-elect Biden has indicated that he would like to see the reduction or elimination of the tax cuts made by the TCJA. He believes that the tax system should be changed to ensure that large corporations and high-net-worth individuals pay their "fair share" of taxes. For individuals, President-elect Biden has proposed increasing the top income tax rates and expanding the Social Security tax base, as well as curtailing or eliminating various incentives that are currently available to high income taxpayers. If these plans are implemented, roughly $4 trillion would be raised over the next 10 years, as reflected in estimates obtainable through the Tax Policy Center and the Tax Foundation. The additional tax revenue would be used to pay for spending initiatives to improve the nation's infrastructure, developing alternative energy sources and building up the U.S. manufacturing sector.

To be successful in implementing proposed changes, the timing of any future tax increases will be balanced against the need to keep the economy strong and resilient at a time when the country is trying to address the economic slump that was brought about by the coronavirus pandemic.

a) Individual Income Tax Rates

Current law provides for a progressive income tax rate system, which means that tax rates increase as taxable income increases. Under the seven-bracket system, tax rates for ordinary income start at 10 percent and increase to 37 percent for taxable income of $622,050 for individuals filing joint income tax returns in 2020, and $518,400 for individuals filing as single taxpayers. Under President-elect Biden's plan, the TCJA tax cuts likely would be repealed and the top federal income tax rate of 39.6 percent would be reinstated.

b) Capital Gains and Qualified Dividend Income

Under current law, individuals are subject to progressive income tax rates on capital gains and qualified dividend income. The long-term capital gains rates are 0 percent, 15 percent or 20 percent, depending on a taxpayer's ordinary income tax bracket. Moreover, a net investment income tax (enacted during the Obama administration) is imposed on high income taxpayers at a rate of 3.8 percent, which brings the total maximum tax rate on long-term capital gains up to 23.8 percent.

Under President-elect Biden's tax plan, the tax rate on capital gains would increase to 39.6 percent for taxpayers with taxable income of $1 million or more, plus the 3.8 percent net investment income tax. As a result, taxpayers whose taxable income exceeds $1 million would be subject to an effective tax rate of 43.4 percent.

c) Business Income from Pass Through Entities (Partnerships, S Corporations and Sole Proprietorships)

Under current tax law, many businesses qualify for a qualified business income deduction of up to 20 percent, which can lower the effective tax rate on the business income of individuals from a high of 37 percent to as low as 29.6 percent for qualifying businesses.

President-elect Biden would phase out the tax benefits associated with the qualified business income deduction for individuals making more than $400,000 a year, thus effectively raising the business income tax rate from 29.6 percent to 39.6 percent.

d) Corporate Tax

The Tax Cuts and Jobs Act (TCJA) reduced the corporate income tax rate to a flat 21 percent rate from a progressive rate of up to 35 percent before 2018 and abolished the corporate alternative minimum tax.

President-elect Biden would raise the corporate tax rate from 21 percent to 28 percent, a middle ground between the top rate of 35 percent under the Obama administration and the current 21 percent rate. He also would put in place a new form of corporate alternative minimum tax that essentially would require corporations to pay the greater of their regular corporate income tax or a new 15 percent minimum tax on worldwide book income.

e) Payroll Taxes

A 6.2 percent Social Security tax and a 1.45 percent Medicare tax currently are imposed on both the employer and the employee. While the wage base for the Medicare tax is unlimited, there is a cap on the Social Security tax base equal to the first $137,700 of employee wages (increasing to $142,800 for 2021).

In addition to the Medicare tax rate, which totals 2.9 percent for the employer and the employee, an additional 0.9 percent Medicare tax is levied on employees with wage and self-employment income above the same thresholds that are applicable in the case of the net investment income tax ($250,000 or more for joint returns or a surviving spouse, $125,000 or more for a married taxpayer filing a separate return and $200,000 in all other cases). This effectively increases the collective employer/employee rate or self-employed rate to 3.8 percent (1.45% twice + 0.9%), which would raise the Social Security and Medicare tax rate for self-employed individuals to 16.2 percent (12.4% + 3.8%).

President-elect Biden has indicated that he would remove the cap on the wage base for the Social Security tax for high earners, defined as those making more than $400,000. These changes to the Social Security and Medicare taxes would apply to employees and self-employed individuals that have sole proprietorships or are partners in a partnership.

It is uncertain whether wages between $142,800 and $400,000 would be subject to the additional income tax, or whether there would be a so-called "donut hole" before the higher rate kicks in for individuals with taxable earnings in excess of $400,000. This would raise the overall income tax rate on some businesses to as high as 55.8 percent (39.6% + 16.2%) before taking into account state income taxes.

f) Estate Tax

The estate tax rate currently is subject to a progressive rate scale up to 40 percent. The estate tax is imposed upon the death of a taxpayer after an exemption allowance of up to $10 million per taxpayer, as indexed for inflation (currently $11,580,000 per taxpayer ($23,160,000 per married couple for 2020)). In addition, beneficiaries are entitled to a step-up in the tax basis of all inherited assets based on the date of death valuation or the alternative valuation date.

President-elect Biden would reduce the exemption amount to pre-Obama levels of $3.5 million per taxpayer, while increasing the top estate tax rate to 45 percent. He has also suggested eliminating the regime that allows for a step-up in tax basis on the date of death or alternative valuation date.

g) Investments into Distressed Areas

The TCJA introduced significant incentives for investments in qualified opportunity zones (QOZs). These rules allow taxpayers to defer recognition of capital gains where the proceeds are reinvested in a property directly or a QOZ fund property within 180 days.

The capital gains deferral exists until the earlier of the time the QOZ property is sold or December 31, 2026. In addition to the deferral, there is a 10 percent tax reduction if the fund is held for five or more years, a 15 percent reduction in tax if the property is held for seven or more years, and if the investment is held for 10 or more years, the appreciation of the QOZ fund investment (not the original gain but the post-acquisition gain) qualifies for a step-up in tax basis, essentially excluding the appreciation from gross income.

In addition to QOZs, a new markets tax credit is available to investors that inject capital into community development entities. The credits are progressive and vest with each year of expenditures and can equal up to 39 percent of the cost of the new markets tax credit project.

President-elect Biden has indicated that he would like to continue both programs and may be willing to expand and make the new markets tax credit program permanent.

h) Manufacturing and Business Incentives

Tax incentives currently are available for low-income housing, reducing fossil fuels and using alternative energy, as well as employer incentives for hiring individuals that qualify for the work opportunity tax credit and for hiring individuals with disabilities. Tax credits also are available to employers for providing child-care facilities on their premises so that working parents can continue working.

President-elect Biden supports these programs but would like to add a tax credit for manufacturing goods in the U.S. He also has proposed imposing a tax penalty on corporations that ship jobs overseas in order to sell products back to the United States.

Labor and Employment

President-elect Biden has pledged to support many policy initiative organized labor has proposed over the past two decades. Yet, many of these initiatives threaten to negatively impact small businesses, the self-employed, and the economy. The 180-degree turn in regulatory employment policy priorities that will likely result will undoubtedly create uncertainty for employers, which are already dealing with a pandemic and an unstable economy.

President-elect Joe Biden has promised to reinstate Obama-era labor policies at the U.S. Department of Labor (DOL) and National Labor Relations Board (NLRB) despite the fact that many of these policies were rejected on a bipartisan basis, widely criticized by the regulated community as unworkable, and rejected by federal courts.

Biden has also promised to enact new regulations aimed at increasing union density, imposing federal control over the workplace, and increasing penalties and federal enforcement. In nearly every policy area of his campaign platform, from his infrastructure proposal to the "Environmental Justice" plan to the "Build Back Better" program on COVID-19 recovery, Biden has pledged that all new policies and/or federal projects will be geared towards the creation of "good-paying, union jobs." Additionally, Biden has promised to specifically target enforcement against the misclassification of workers as "independent contractors," including through the creation of a federal and state multi-jurisdictional enforcement initiative focused on the misuse of independent contractors across tax, labor, anti-discrimination, and wage and hour laws. Biden's campaign platform specifically notes, "Biden will fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort."

Many of the policy proposals advocated by the president-elect can be implemented via executive order or regulatory or sub-regulatory action, paving the way for the Biden administration to push through the changes immediately upon taking over the White House.

That said, most administrative actions do not happen or take effect instantaneously, and the Biden administration will face challenges in implementing policy through independent agencies such as the NLRB, which will likely remain in Republican control at least until August 28, 2021, the day after Member William Emanuel's (R) term expires. Additionally, the NLRB's General Counsel, who largely controls the Board's litigation positions and what cases to bring before the Board, will continue to be held by Republican Peter Robb through August of 2021.

a) Executive Orders

The quickest and easiest way for newly sworn-in President Joe Biden to initiate policy changes will be by rescinding certain executive orders issued by then former president Donald Trump and issuing his own executive orders. Revoking myriad Trump executive actions relating to immigration will top the list, including those relating to refugees and asylees, certain COVID-19–related travel restrictions, and the ban on certain nonimmigrant visas. In turn, Biden is likely to reinstitute the Deferred Action for Childhood Arrivals (DACA) program, as well as the temporary protected status of certain eligible nationals.

In the employment law space, Biden is expected to revoke President Trump's Executive Order on Combating Race and Sex Stereotyping, which is opposed by civil rights groups and members of the business community. It is very possible Biden may follow this action with a proactive requirement on federal contractors to require diversity and inclusion or implicit bias training and programs. Additionally, Biden may also attempt to resuscitate a version of former president Barack Obama's Fair Pay and Safe Workplaces Executive Order.

Biden may create a cabinet-level working group to promote collective bargaining, likely through an executive order or executive memorandum. In the first one hundred days of the Biden administration, the working group could develop a plan to dramatically increase union density as well as identify areas where the government could waive preemption of the National Labor Relations Act (NLRA) to allow cities and states to find innovative ways to increase union density. The working group could also provide insight into ways to expand sectoral bargaining, in which "all competitors in an industry are engaged in collective bargaining" with one or more unions. Both a waiver of preemption and sectoral bargaining would likely require legislation.

He may direct the Department of Labor (DOL) to partner with the NLRB, Equal Employment Opportunity Commission, Internal Revenue Service, Department of Justice, and state agencies to work together on enforcement to stop misclassification of workers as independent contractors rather than traditional employees.

There is a possibility, Biden will restore and build on the Obama administration's Fair Pay and Safe Workplaces Executive Order, which conditioned federal contracts on the company's record of compliance with federal, state, and local labor and employment laws. Opponents of the Executive Order said it defined compliance too broadly, allowing for consideration of allegations that had not been fully adjudicated. Opponents also noted that existing government contract requirements already have mechanisms in place for the debarment of "bad actors." The Obama administration did not have the opportunity to fully implement the Executive Order, and the Trump administration formally revoked it in 2017. Portions of the implementing regulations were revoked by Congressional Review Act (CRA).

Another EO, may require all federal contractors to sign agreements pledging "neutrality" during a union organizing drive. Any such agreement, which would require employers to relinquish rights under the NLRA and the First Amendment, would be susceptible to a legal challenge. It could also direct federal agencies to bargain with employee unions over non-mandatory subjects of bargaining.

b) National Labor Relations Board

Republicans will maintain a majority at the National Labor Relations Board (NLRB) at least into the summer of 2021, though Democratic member Lauren McFerran will assuredly be named chair in early 2021. She could look to slow down the issuance of case decisions, and especially rulemakings, until reinforcements arrive. Of course, if Republicans retain a majority in the Senate, Majority Leader Mitch McConnell (R-Ky.) will have a say in who gets confirmed to the Board and when.

Once Democrats gain a majority on the Board, we can expect they will seek to roll back current Board policies and return to policies that favor unions. Assuming that Congress fails to enact the PRO Act, a Board with Democrats in the majority may attempt to enact the legislation administratively, where possible.

The NLRB could limit use of "captive audience" meetings where employees are required to listen to employer presentations on the union seeking to represent the employees, promises the union may have made, or structural changes that would occur as a result of union representation. This is often the only source employees have for information about the union other than what the union itself has provided. The Board is limited in what it can do with respect to this issue as the NLRA and First Amendment protect employer speech.

The NLRB can reinstate the Obama-era "ambush elections" rule, which shortened the time frame between the date a union petitions the NLRB to hold a representation election at a specific workplace and the NLRB holding of that election. Employers opposed the rules, arguing the short time frames robbed them of their due process rights, interfered with their ability to communicate with employees, and did not allow the NLRB to fully settle critical matters before the election, such as the scope of the bargaining unit, supervisory status, and other matters impacting voter eligibility. The Trump-era NLRB has issued various regulations to reverse or mitigate aspects of the rule. We can expect a Biden-appointed Board will move to reverse the Trump-era actions.

A Biden NLRB will likely reinstate the Obama-era NLRB policy permitting the creation of micro-unions, or bargaining units that fracture the workforce into smaller entities in order to avoid and disenfranchise workers who do not support unionization. This was implemented via the NLRB's Specialty Healthcare decision in 2011. The Trump-era NLRB reversed this decision with its 2017 PCC Structurals decision. While the original Specialty Healthcare standard survived various challenges across federal courts of appeals, the courts significantly cabined aspects of the standard. As a result, the Board may be hard pressed to move forward with another standard as aggressive as Specialty Healthcare.

Under the NLRB, we may see the reestablishment of the Browning-Ferris Industries (BFI) joint-employer standard. The joint-employer standard is used to determine when two or more companies are jointly responsible for the terms and conditions of employment over the same group of employees. These terms and conditions include, but are not limited to, having the ability to hire, fire, discipline, supervise, or direct employees. Joint employers are responsible for bargaining with any union representing the joint employees and are mutually liable for any NLRA violations either entity commits against those employees. Under the BFI standard, nearly every contractual relationship could potentially trigger joint-employer status, from the franchise model to relationships between contractors and subcontractors and suppliers and vendors, needlessly exposing vastly more businesses to unwarranted joint-employer liability. Prior litigation around the BFI standard may impact the extent to which the Board can move forward.

c) Department of Labor

The process of taking over functions at the Department of Labor (DOL) has already begun. Biden announced his "agency review teams" to begin evaluating agency operations in anticipation of the shift in executive power in January 2021. The labor review team (overseeing the DOL, the National Labor Relations Board, and the EEOC, among other agencies) includes many familiar faces from the Obama administration. Individuals such as Jenny Yang (former EEOC chair), Seth Harris (former DOL deputy secretary and acting secretary of labor), and Patricia Smith (former DOL solicitor) will likely join others from organized labor, academia, and progressive think tanks in beginning the initial overhaul of the DOL. This group will likely influence the selection of Biden's DOL nominees and may even be candidates themselves.

Expect the DOL of the Biden administration to be aggressive from the start, in terms of both regulatory actions and enforcement proceedings. Clawing back some of the initiatives of the DOL of the Trump administration will, of course, be a priority. But beyond that, expect this DOL to go on the offensive with an agenda that is even more progressive than that of the Obama administration's DOL.

We can expect to see the Biden DOL to reinstate the Obama-era persuader rule, which requires employers to disclose expenditures on labor relations matters and effectively and drastically limits small employers' ability to obtain legal counsel during union organizing drives or collective bargaining. The rule was opposed by the American Bar Association, among others, and struck down in 2016 by a federal court in Texas, which issued a permanent injunction against the rule. A federal court in Minnesota also issued a decision calling into question whether the rule could survive in court. The Trump administration formally rescinded the rule in 2018.

Occupational Safety and Health Administration: The ongoing COVID-19 pandemic has thrust OSHA into the spotlight, and workplace safety will likely be the priority of the Biden DOL. First and foremost, this likely means quickly putting forward a nominee to be assistant secretary of labor for occupational safety and health. Additionally, expect OSHA to begin developing a COVID-19–specific emergency temporary standard right away. Enforcement is likely to tick up, too, especially with regard to COVID-19–related complaints.

Wage and Hour Division: In addition to an aggressive enforcement strategy, the Wage and Hour Division (WHD) of the DOL will undoubtedly pursue a robust regulatory agenda that could potentially be described as "repeal and replace." The agenda will likely include the following initiatives:

- Joint Employer: The Trump DOL's joint-employer regulation under the Fair Labor Standards Act has been enjoined by a federal court. Whatever the legal status of the regulation, a Biden DOL is expected to "repeal and replace" the rule with a broader and more amorphous joint-employer standard.
- Independent Contractor: Similarly, if the Trump administration finalizes an independent contractor regulation, it will quickly be targeted for reversal. Senate Democrats may try to repeal it by using the Congressional Review Act (though they are unlikely to have the votes and doing so would severely limit Democrats' ability to promulgate their own version of an independent contractor regulation). If Congress does not act, the incoming administration will rescind the regulation via rulemaking. The Biden DOL may then proceed to issue its own version of an independent contractor standard, but the controversy surrounding AB 5 in California may give them pause.
- Overtime: A federal court ruling in late 2016 blocked the enactment of the Obama administration's overtime rule. Although the Trump DOL finalized its own overtime rule in September 2019 that increased the salary basis threshold, the level probably will not satisfy a Biden DOL, which most likely will want it to be at $47,000 or higher and may also look to make changes to the duties test.
- Opinion Letters: Opinion letters offer a way for stakeholders to seek assistance from the DOL when confronted with difficult questions as to the application of federal wage and hour law. In 2010, the Obama administration ended the opinion letter process in favor of sweeping Administrator's Interpretations. The opinion letter program was reinstated in the current administration, but may be jettisoned in a Biden DOL.

- PAID Program: A Biden WHD can be expected to do away with the Payroll Audit Independent Determination (PAID) program that encourages employers to self-report wage and hour violations.

d) Legislative Action

Though their majority will be slim, House Democrats will likely reintroduce and seek to advance multiple employment-related bills in 2021. In response, Republicans and the business community will try to peel off a number of Democrats to spoil any potential floor votes.

Paid Leave: The political debate surrounding federal paid family/sick leave legislation has evolved dramatically over the last several years. While Democrats have long supported such legislation, Republicans have only recently started to come on board with the concept (though they still have concerns about cost, scope, the need for preemption, etc.). Three recent developments have pushed the debate forward: (1) the increasing patchwork of state and local paid leave law requirements, (2) the new paid family leave benefit for federal government employees beginning in 2021, and (3) the paid family and sick leave provisions of the Families First Coronavirus Response Act (FFCRA) that provided a glimpse of a national requirement. Legislation in 2021 will remain a challenge, but the parties are inching—perhaps incrementally—closer.

Multiemployer Pension Fix: It is getting harder and harder for legislators to keep kicking the can down the road with respect to the multiemployer pension crisis. Accordingly, there is some bipartisanship on this matter in that there is recognition by both parties of the problem. Some combination of premium increases and loans is the compromise position. There could be some action on this issue during the lame-duck session of Congress following the elections, but it could also slip to 2021.

Paycheck Fairness Act: Among other provisions, the Paycheck Fairness Act would amend the Equal Pay Act of 1963 by replacing the "factor other than sex" defense with a "bona fide factor" defense that must be "job-related" and "consistent with business necessity"; would provide for uncapped compensatory and punitive damages; would require the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) to develop mechanisms for the collection of employee compensation data from employers; and would enact prohibitions on the use of, or inquiry into, applicants' pay history.

Raising the Minimum Wage: The House passed the Raise the Wage Act in 2019. The bill would gradually increase the federal minimum wage over a six-year period to $15 per hour. The bill also indexes the minimum wage to inflation and would phase out the separate minimum wage for tipped employees. While a long shot—especially if the COVID-19 pandemic continues and the economy remains on shaky grounds—it is possible that Senate Republicans would be willing to cut a deal if the terms and legislative package were right.

e) Equal Employment Opportunity Commission

Recent appointments to the Equal Employment Opportunity Commission (EEOC) will give the Commission a Republican majority through at least mid-2022. Further, Republican-appointed general counsel, Sharon Fast Gustafson, will remain in office until 2023. But as with his likely selection of an NLRB chair, Biden can be expected to name a Democratic commissioner (likely Charlotte Burrows) as the chair. In this scenario, Burrows will control the agenda, meaning that the EEOC will try to finalize a conciliation regulation prior to January 20, 2021. Further, the odd dynamic of having a chair who is in the minority will undoubtedly influence, and likely delay, the Commission's position on a pending National Academy of Sciences analysis of EEO-1 pay and hours worked data, as well as the development of a rule on employer-sponsored wellness programs.

Of course, in Democratic hands, the Commission can be expected to explore ways to collect compensation data from employers. Additionally, a Commission with Democrats in the majority could revoke a September 2020 opinion letter clarifying EEOC's interpretation and enforcement of "pattern or practice" litigation under § 707(a) of Title VII of the Civil Rights Act of 1964. The letter confirms that when pursuing § 707 pattern-or-practice cases, the EEOC must follow the same administrative prerequisites as when pursuing § 706 cases on behalf of individual employees, such as the requirement of an underlying charge of discrimination and engaging in conciliation.

f) Immigration

Chances are that a Biden presidency will be friendlier to business immigration needs than the current administration, but this does not mean that there will not be any challenges for employers that supplement their work forces with high-skilled foreign labor. B

During his campaign, Biden has said he will work with Congress to first reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages. He has said he will support expanding the number of high-skilled visas and eliminating the limits on employment-based visas by country, which create unacceptably long backlogs. Thus, employers should not expect all scrutiny of the high-skilled nonimmigrant visa programs to disappear with the Biden administration. That being said, expect a Biden administration to:

- restore DACA and TPS programs;
- reaffirm the rule allowing employment authorization for certain H-4 spouses of H-1B nonimmigrants;
- rescind (or not defend) the U.S. Department of Homeland Security's rule on strengthening the H-1B Nonimmigrant Visa Classification Program and accompanying DOL wage rule;
- rescind the Inadmissibility on Public Charge Grounds final rule;
- evaluate and possibly rescind current travel bans, although the COVID-19 travel bans may take time to rescind as the situation evolves;
- rescind the proposed "duration of status" rule for nonimmigrant academic students, exchange visitors, and representatives of foreign information media; and
- rescind the proposed rule on the collection and use of biometric data in the enforcement and administration of immigration laws.

President-elect Joe Biden is set to take the country in a different political direction unless President Trump's legal challenging of the election process is found valid. If Democrats manage to win both the House and the Senate, we can expect a much more ambitious policy agenda from Biden, such as a large stimulus package and tax increases on corporations. However, if Republicans win one of two key Senate runoff races in Georgia, they will maintain control of the Senate and will likely cause President-elect Biden to make changes through regulatory avenues.