



Top 10 Things Employers Need To Know About Midterm Election Results

Insights

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As many predicted, Democrats recaptured the House for the first time in eight years in yesterday's midterm elections, while Republicans retained and strengthened their grip on the Senate. That will lead to a dynamic in Washington, D.C. that the Trump administration has yet to face: a fractured legislature and a tug-of-war at the federal level. What does this development mean for employers? Here are the top 10 things to expect in the labor and employment law arena given the results in yesterday's historic elections.

1. Worker-Friendly Bills Expected To Pass The House...Then Stall In The Senate

Eager to repay the support they received that vaulted them into power, employers can expect to see a slew of worker-friendly measures introduced and passed in the House. It would not be surprising to see newly installed members of Congress swiftly pass a series of bills aimed directly at employers. Among them, you might see a repeal of the *Epic Systems case* that cleared the use of class waivers, a full-scale prohibition on mandatory arbitration agreements, measures to limit right-to-work laws, a passage of card-check provisions to streamline union organizing, a return of the expansive persuader rule, the expansion of the worker-friendly ABC test for determining independent contractor status, and a boosting of the federal minimum wage towards \$15 per hour.

However, most of these actions would be largely symbolic and would amount to nothing in the end. The Republican party continues to control the Senate, and in fact expanded their slim margin of power in yesterday's election. There is almost no scenario imaginable where any of these measures would clear the Senate hurdle, although a more moderate increase to the federal minimum wage might not be out of the question.

2. House Members Could Throw Their Weight Around

This isn't to say that the new Democratic House would be completely powerless, however. Indeed, many congressional candidates ran on a platform to provide a check on the Republican leadership in the White House and Congress, and they will look to fulfill their campaign pledges once in office. By using their power to seek additional information, hold hearings, and levy more control over executive activity, the new House could provide sufficient oversight over several federal agencies—namely the U.S. Department of Labor (USDOL) and the National Labor Relations Board (NLRB)—to slow down their agenda.

Expect to see the USDOL's effort to provide a more balanced overtime rule and the NLRB's move to return the joint employment rule to a more measured level both caught up in the political turmoil that will descend on the nation's capital.

3. New House Leadership Could Turn Attention To Labor And Employment Matters

Chatter among those in the know would seem to indicate that Congressman Bobby Scott (D-Virginia) will be the new Chair of the Committee on Education and the Workforce. He currently serves as the minority Ranking Member, and many believe his tenure on the committee will lead his fellow Democrats on the committee to install him into the top position once the new Congress is sworn in this coming January. He is widely regarded as a progressive member of the House and would probably bring his philosophy to matters of federal labor and employment law.

4. Paid Sick Leave Might Be Top House Priority

Of all of the measures expected to be pushed by the new House, it seems fairly likely that paid sick leave will be on the top of the agenda when it comes to realistic goals. After all, many Republican members of Congress have indicated support for such a law, and even President Trump has provided words of support for some form of paid sick leave. The devil is in the details, however, and it remains to be seen what form of paid sick leave would be agreed upon by the Senate and the president.

Some Republicans have floated the concept of a voluntary paid sick leave program, or one that is borne by employees themselves through a reduction in Social Security or other benefits, which has not been well received by Democratic leadership. Employers should monitor this development to see if House and Senate members can work out a bipartisan solution that would be amenable to all and to President Trump.

5. Immigration Will Also Be A Priority For New House

Perhaps the most hot-button issue of the day, immigration will continue to be a matter of significant attention and interest when the new Congress is sworn in this January. Now that Democrats are about to control the House, they will almost certainly seek to curb some of the more controversial positions taken by the White House. You can expect to see greater oversight attempted over the administration's aggressive immigration agenda, but it is an open question as to whether they will be able to have a significant impact.

6. House Could Get Bugged Down By Anti-Trump Activity

Another possibility that could emerge in the coming months is that of complete gridlock and contentious wrangling between the House, the Senate, and the White House as new House members get swept up in anti-Trump sentiment. Some candidates campaigned on a platform that led them to promise impeachment proceedings, subpoena requests, oversight hearings, and any other mechanism available to them to throw a monkey wrench into the Trump administration's activity. Such actions could eat up valuable time and resources and distract the new House leadership from accomplishing their legislative and policy goals, including labor and employment initiatives.

7. Senate Could Streamline Consent And Approval Activity

While the House has been flipped, the Senate remains red, and this could free up senators to move forward to approve appointments that have been held up in political limbo while the fate of the midterm elections remained uncertain. Expect to see action at the USDOL and the Equal Employment Opportunity Commission (EEOC) in short order to add key leadership personnel.

8. Expect Stability At The Labor Department

Although news reports in the last several months have hinted at major shakeups at several federal agencies soon after the midterms were concluded—including at the Departments of Justice, Homeland Security, Defense, and Interior, to name a few—there has been nary a word about the fate of USDOL Secretary Alexander Acosta. By all accounts, President Trump has been pleased with Acosta's no-drama personality and the relatively smooth operations at the Labor Department, so most expect Acosta to survive what could be a mass exodus.

9. Another Attack On The ACA Awaits Its Final Fate

While the Republican-controlled Congress could not kill the Affordable Care Act (ACA) in 2017 or 2018, its fate could still hang in the balance in the coming months and years. A legal challenge filed by current House members seeking to strike down the entire law has been pending in a Texas federal court for several months. Many expect that the judge on the case has been waiting until the midterm elections were concluded before issuing his ruling so as to not introduce a political element into the proceedings. But now that the elections are behind us, a decision may soon be forthcoming.

If the law is struck down, you can expect an immediate appeal to the 5th Circuit Court of Appeals—and a probable stay in the proceedings delaying any sort of immediate revocation of the law—and then yet another round at the U.S. Supreme Court.

10. Future Elections May Never Look The Same

Finally, employers and others may see an entirely new kind of election season in 2019 and beyond given a recent monumental ruling from the Supreme Court. The recent decision in *Janus v. AFSCME* struck down the ability of public sector entities to automatically collect fees from non-union members. Now that non-union employees are no longer obligated to finance union efforts to support anti-employer legislation and progressive candidates, you can expect to see a potentially devastating impact on the finances of public sector unions—and the worker-friendly causes they generally support at all levels of government across the nation.

This could lead to a new kind of election season where unions play a less pivotal role in the outcomes of local and federal elections. Stay tuned to next year's elections and the blockbuster 2020 elections that are just a short 24 months away to see what kind of impact *Janus* has on the national landscape.

Conclusion

A divided Congress that is unable to pass significant employment legislation—whether it be pro-employer or pro-worker—means that we are likely to continue to see the drive for legislative changes pursued at the state, or even local, government level. You will likely continue to see a hodgepodge of local labor policies that vary from jurisdiction to jurisdiction, which can pose compliance challenges if you operate across large areas or multiple regions.

For questions on how the midterm elections might impact your business, contact your Fisher Phillips attorney or any member of our [Government Solutions Practice Group](#).

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