

Insider

2020 presidential candidates' employee benefit and other workforce proposals

By Precious Abraham and Ann Marie Breheny

The results of the 2020 presidential and congressional elections will carry important implications for employer-provided benefit, compensation and other workforce programs. Proposals from the two major party presidential candidates, President Donald Trump and former Vice President Joe Biden, address health care, taxes and other issues that will affect workplace benefits and programs; their approaches to these issues could shape benefit and compensation policy over the next four years.

ACA: A continuing focus of the health care agenda

More than a decade after its enactment, the Affordable Care Act (ACA) remains a central focus of the health care agenda. In 2016, President Trump campaigned on repealing the ACA, and Congress attempted repeal during his first year in office. After the repeal attempt failed, President Trump and his administration took steps to amend and reinterpret the law, issuing rules to expand the availability of plans that are exempt from some ACA requirements, expand state flexibility and make other changes. President Trump also signed legislative changes to the ACA, including a tax reform law that repealed the individual mandate penalty and sparked new litigation seeking to nullify the law. During his campaign for a second term, President Trump has said he would protect individuals with preexisting conditions but has not issued specific proposals.

Mr. Biden was vice president when the ACA was enacted and continues to support the law. He proposes to expand the law's premium tax credits. Households with income over 400% of the federal poverty level could receive premium tax credits, and households receiving the credits would not pay more than 8.5% of household income toward their premiums (under current law, the limit is 9.78% in 2020). In addition, the credits would be based on the cost of gold plan coverage rather than the less generous silver plan coverage

In This Issue

- 1 2020 presidential candidates' employee benefit and other workforce proposals
- 4 IRS issues guidance on Social Security payroll tax holiday
- 5 SEC issues final rule that may prompt 10-K human capital disclosures

under the current benchmark. In addition, Mr. Biden proposes to establish a public option, which could be purchased by any enrollee through the ACA marketplaces and would be available without premiums to qualifying low-income households in states that have not expanded coverage.

Health care beyond the ACA

The candidates have issued proposals addressing prescription drug costs, surprise medical bills, cost and quality transparency, and other health care issues.

Prescription drug costs

Both candidates support policies intended to reduce the cost of prescription drugs. During his term, President Trump and his administration issued a policy blueprint, executive orders and regulations targeting prescription drug costs. The policy blueprint, called American Patients First, outlined steps the administration could take to lower prescription drug costs, such as improved competition, better negotiation and incentives for lower list prices. President Trump signed executive orders addressing importation of prescription drugs from other countries, the use of international pricing (sometimes referred to as "most favored nation" pricing) for Medicare and other prescription drug issues. The administration issued a regulation requiring that pharmaceutical advertisements disclose a drug's price; however, it was struck down by a federal court. The administration also issued guidance to implement

international reference pricing for certain Medicare drugs, which has not yet been published, and to permit limited importation of prescription drugs.

Mr. Biden has also issued proposals addressing prescription drug costs. He would permit the secretary of Health and Human Services to negotiate Medicare drug prices directly with the pharmaceutical manufacturers. In addition, he would allow the importation of prescription drugs as long as the secretary of Health and Human Services certifies that the drugs are safe. Launch prices for new drugs that lack market competition would be limited, using a process under which an independent review board would determine a reasonable price for the drug. As a condition of participating in Medicare, drug price increases generally would be limited to the rate of general inflation. Mr. Biden would also support the development of generic drugs and eliminate the tax deduction for prescription drug advertising.

Surprise medical billing and other issues

Both candidates support solutions to surprise medical billing. President Trump issued principles intended to guide surprise billing legislation. According to the principles, 1) patients should not incur out-of-network charges for emergency care, 2) patients should receive a notice informing them about the network status of providers and an estimate of their expected out-of-pocket costs before they receive scheduled medical care, 3) patients should not receive balance or surprise bills from providers they do not choose, and 4) surprise billing legislation should not increase federal health expenditures. In addition, the administration prohibited surprise medical bills as a condition of COVID-19 provider relief. Mr. Biden proposes that providers would be prohibited from balance billing in cases when patients cannot choose their providers.



Both candidates support solutions to surprise medical billing.

President Trump has supported price and quality transparency. Under an executive order he signed, the administration issued regulations aimed at improving transparency. One regulation proposes that health plans give participants personalized cost-sharing estimates for scheduled care and post rates they have negotiated for in-network providers along with the amounts they allow for out-of-network providers. Another regulation requires transparency in prices negotiated between health insurers and hospitals. The administration also issued guidance expanding health savings accounts and health reimbursement accounts.

Mr. Biden has suggested allowing individuals to opt into Medicare at age 60. He has said he would ensure enforcement of state and federal mental health parity requirements and use the government's antitrust authority to address industry consolidation.

Retirement savings

During President Trump's term, important retirement legislation was signed into law, and other retirement policy changes were authorized through administrative and regulatory action. The Setting Every Community Up for Retirement Enhancement (SECURE) Act enacted a range of provisions aimed at increasing retirement savings, expanding retirement plan sponsorship and easing some administrative burdens for plan sponsors, among others. President Trump also signed the Coronavirus Aid, Relief, and Economic Security Act, which included retirement provisions aimed at assisting plan sponsors and participants who experienced financial difficulty as a result of the COVID-19 public health emergency. In addition, he issued an executive order on retirement security that directed regulators to address multiple employer plans, electronic disclosure and mortality assumptions for lump sum distributions, which were subsequently implemented through regulations and guidance. In several budget proposals, President Trump proposed raising the cap on Pension Benefit Guaranty Corporation variable rate premiums for single-employer pension plans as well as establishing a variable rate premium for multiemployer pension plans and an exit premium for employers that leave multiemployer pension plans.

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In his retirement savings proposals, Mr. Biden proposes to “equalize” defined contribution tax incentives and broaden access to retirement savings. Mr. Biden’s campaign documentation does not offer details about how this would be accomplished, but it could involve replacing the current tax exclusion with tax deductions or credits or capping the exclusion. In addition, he proposes “automatic 401(k) plans” under which employees who do not have access to pension or retirement savings benefits through their employment would have access to payroll-deduction retirement savings vehicles. He also proposes providing tax incentives to encourage small businesses to sponsor retirement savings programs and enroll their employees, providing benefits for unpaid caregivers to save for retirement, and granting survivors of domestic and sexual violence access to their retirement savings.

Paid leave, overtime and other workforce policies

Both candidates have expressed support for some paid leave policies. In annual budget submissions, President Trump has included proposals to provide six weeks of paid leave following the birth or adoption of a child. He also signed the Families First Coronavirus Response Act, under which some employers must provide emergency paid sick leave and paid public health emergency leave. Mr. Biden supports both paid sick leave and paid family and medical leave. He supports paid sick leave based on the Healthy Families Act, legislation that would provide one hour of paid sick leave for each 30 hours worked, up to 56 hours of paid sick leave per year. On paid family leave, Mr. Biden supports the FAMILY Act, which would establish a program to provide partially paid family and medical leave funded by employer and employee payroll taxes. In addition, Mr. Biden proposes a childcare tax credit of up to \$8,000 (\$16,000 for two or more children) to cover up to 50% of eligible expenses. The full credit would be available to families making up to \$125,000 and would phase out for families with income between \$125,000 and \$400,000.

Mr. Biden supports expanding the overtime protections. Overtime rules issued under former President Obama would have expanded eligibility to those with wages up to \$913 per week (from \$455 per week) and made other changes, but those rules were blocked by a federal court. To replace those rules, the Trump administration issued overtime rules that generally provide overtime eligibility to workers with wages up to \$684 per week. Mr. Biden could seek to expand eligibility for overtime compensation and has pledged stronger enforcement of the overtime rules.



The campaigns have markedly different approaches to the corporate and individual tax rates and payroll taxes.

In addition to expanding overtime, Mr. Biden supports increasing the federal minimum wage to \$15 per hour and proposes a broad definition of the word “employee” as well as tough enforcement against worker misclassification. Mr. Biden supports the Paycheck Fairness Act, which would limit an employer’s ability to use “bona fide factors other than sex” to defend against claims of gender-based wage discrimination and prevent employers from prohibiting employee discussions about salary, among other changes.

Tax proposals

The campaigns have markedly different approaches to the corporate and individual tax rates and payroll taxes.

President Trump signed the Tax Cuts and Jobs Act (TCJA) and supports additional tax cuts. Among other provisions, the TCJA restructured tax brackets for individuals and families, lowering the top tax rate to 37% and the corporate tax rate to 21%. The individual tax provisions in the act expire in 2025; President Trump would seek to extend these provisions during a second term. President Trump also said he would seek additional tax cuts during a second term.

In August 2020, President Trump issued a memorandum allowing the deferral of payroll taxes that would otherwise be paid during the time period of September to December 2020. The deferred taxes would have to be repaid before May 2021, but President Trump has said he would prefer that the taxes be forgiven and would seek to end payroll taxes during a second term.

Mr. Biden proposes repealing some provisions of the TCJA. For example, he proposes to reinstate the 39.6% top tax rate for individuals and families. For corporations, he would increase the tax rate to 28% and establish a minimum rate of 15%. In addition, he has proposed taxing long-term capital gains at ordinary income rates for taxpayers with income exceeding \$1 million. Mr. Biden supports imposing payroll taxes on income exceeding \$400,000. In addition, the FAMILY Act, which he supports as a vehicle for paid family leave, would include new, additional payroll taxes.

No clear outlook for changes following November elections

Election victory alone will not guarantee that campaign proposals or promises become public policy; the outcome of the congressional elections will play an important role in the legislative outlook for 2021 and 2022. Other issues, such as trade, education and energy, will also be on the agenda.

Legislative procedures will also affect the legislative outlook after the elections. If the elections result in a split outcome, where one political party wins the White House and another controls one or both chambers of Congress, legislation would be difficult to enact. If the election outcome results in a one-party sweep, where the same political party controls

the White House, House and Senate, the legislative path may be easier; however, obstacles would remain because current Senate rules generally require a 60-vote majority to enact most legislation. A one-party sweep in November could prompt lawmakers to eliminate or reform these rules so that it is easier to enact legislation with a simple 51-vote majority, but such a change could face its own challenges.

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IRS issues guidance on Social Security payroll tax holiday

By Gary Chase and Steve Seelig

On August 28, the IRS issued **Notice 2020-65** providing guidance for employers on how to implement **President Trump's Presidential Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster**.

The memorandum provides a Social Security payroll tax holiday from September 1 to December 31, 2020, for employees whose wages or compensation for any biweekly pay period generally is less than \$4,000, calculated on a pre-tax basis.

The notice clarifies that employers will measure whether the \$4,000 threshold is met on a "pay period-by-pay period basis" and that wages for this calculation do not include any amounts excluded from wages or compensation such as 401(k) deferrals, or other before-tax employee benefit items. Employers must withhold and pay the taxes deferred until December 31 between January 1, 2021, and April 30, 2021, to avoid interest and penalties in addition to the tax. If necessary, employers may make arrangements to otherwise collect the total taxes due from employees.

The notice does not explicitly state that the Social Security payroll tax holiday is discretionary; however, on September 3, the IRS confirmed that the Social Security payroll tax holiday can be implemented at an employer's discretion. This confirmation came from an IRS spokesperson during the IRS's monthly payroll industry teleconference in response to questions regarding how employers would implement the tax holiday.



The IRS confirmed that the Social Security payroll tax holiday can be implemented at an employer's discretion.

Employers may be reluctant to provide this tax holiday to employees for several reasons, including the time and expense of significantly updating payroll systems. In addition, the need to make up the forgone taxes would cause employers to either pay the taxes owed on behalf of their employees (which would be considered taxable income) or withhold the previously foregone Social Security taxes from other wages or compensation paid during the first four months of 2021.

Doubling the amount of Social Security tax withheld from employees' paychecks during those four months could outweigh any benefits received from the tax holiday. Employers also need to be aware that they would be responsible for taxes they are unable to collect, including for employees who have terminated employment.

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SEC issues final rule that may prompt 10-K human capital disclosures

By Bill Kalten and Steve Seelig

The Securities and Exchange Commission (SEC) has issued a **final rule** making extensive changes to the periodic disclosure requirements for Form 10-Q quarterly and Form 10-K annual reports and registration statements. The amendments are intended to “modernize” the description of business, legal proceedings and risk factor disclosures public companies are required make under Regulation S-K. While the changes reflect a move to a “principles-based” approach tailored to each individual company rather than a mandated set of disclosures, the final rule also requires a company to disclose, when material to an understanding of the business, a description of its 1) human capital resources, and 2) any human capital measures or objectives that are a focus of managing the business.

The SEC changes are not limited to human capital resources disclosures in Form 10-K and other filings; they also require companies to rethink how they will describe their business as a whole, broaden the regulatory compliance discussion beyond environmental laws, heighten the discussion of legal proceedings and hone the disclosure of risk factors.

The new disclosure rules take effect 30 days from the date they are published in the Federal Register. So for calendar-year companies, the rules will apply to the 2020 10-K disclosure and could possibly apply to the third-quarter 10-Q disclosure.

Human capital disclosure

Under the final rule, companies are not required to focus on any particular aspect of human resources and must decide for themselves which elements are material to them and would require disclosure. The rule also does not mandate specific disclosures regarding climate change or diversity unless material. This is consistent with the other changes made that, generally, require companies to assess whether an issue meets the standard of being “material to an understanding of the business.”

Similar to the rules for Compensation Discussion and Analysis, the determination of whether and how to assess the need for disclosure is principles-based, as noted in the preamble:



Companies...must decide for themselves which elements are material to them and would require disclosure.

[A] principles based approach affords registrants the flexibility to tailor their disclosures to their unique circumstances, including by providing disclosure in accordance with some or all of the components of any current or future standard or framework that facilitates human capital resource disclosure that is material to an understanding of the registrant’s business taken as a whole.

This language recognizes that many companies already measure their human capital resources under an evolving array of standards or frameworks from the Global Reporting Initiative, the International Integrated Reporting Council and the Sustainability Accounting Standards Board, to name just a few. The rules imply that companies will determine that a human capital disclosure is required, albeit tailored to the unique business, workforce, and facts and circumstances.

The regulation itself is not a directive that any particular human capital disclosure is required and makes reference only to very limited, “non-exclusive” examples of what might be disclosed, including *the number of employees* as well as measures or objectives that address the *development, attraction and retention of personnel*. The economic analysis section of the preamble suggests that companies would also consider disclosing “other human capital characteristics, including *education, experience, and training*, that have positive effects on firm performance.”

During the open meeting where the regulations were approved, SEC staff noted that many companies have already begun offering human capital-related discussions in their 2020 quarterly 10-Q filings about COVID-19’s impact on their human resources. These disclosures were in response to the SEC encouraging companies, back in April, to detail those impacts and to craft forward-looking statements that forecast future impacts.

Going forward

Publicly listed companies and their human capital professionals should consider the following questions before the new disclosure rules take effect:

- What is the principal objective behind these disclosures?
- How would the disclosed information benefit shareholders, ecosystem partners and broader stakeholders?
- What are the appropriate methods for measuring the value of human capital for a company?
- What existing methods are in place for measuring the value of human capital?
- Are these methods set forth as corporate objectives, either for the HR function, a segment of the business or the business as a whole?
- How will materiality of human capital metrics be assessed?
- What, if any, overlaps are expected with a company's sustainability reporting?
- To the extent human capital issues are not measured, does this indicate they are not material and would not need to be disclosed?
- These changes focus on disclosure for many different facets of the organization. Who is heading the effort and how will the process work?
- What part of your organization will make the determination of whether the need to disclose human capital issues meets the materiality standard?

- What might the disclosure look like if the company has not quantified the impact of human capital but intends to measure it for next year?
- How might a company describe in its current disclosure that it believes a human capital measure is material but that it has not yet compiled the data sufficient for it to be disclosed?
- To what extent might a company take the position an issue is material for one year's disclosure but then omit references to it in later years?
- How would the company's employees assess the prominence and materiality of different human capital measures?

Companies will need to consider the manner in which they will measure the impact, costs and value of their human capital in order to determine materiality. It is expected that these disclosures will vary widely among companies that are on different paths toward measuring human capital and that, over time, more human capital metrics will become part of their 10-k descriptions of the business.

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