

Election Compliance Briefing: A Post-Election Employee Benefits Forecast

*By Daniel Kuperstein, Senior Vice President, Compliance, Corporate Synergies
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As Election Day turned into Election Week and Americans watched officials tally an unprecedented number of mail-in ballots, Corporate Synergies' Senior Vice President of Compliance Dan Kuperstein shared some context with an [election compliance briefing](#).

While the results haven't been finalized, it appears that former Vice President Joseph Biden will be the next U.S. President. Amid that backdrop, Kuperstein explained what we might expect from a Biden administration, the final chapter of a lame-duck Trump administration and that the biggest potential benefits shakeup may have nothing to do with the election at all.

Here are the topics we're watching:

COVID-19 Relief Packages

"COVID-19 relief is a bipartisan focus," said Kuperstein. "We know Joe Biden's team is interested in providing relief to employers and workers, but we might not have to wait that long."

Congress appears to be prepared to work together to pass additional COVID-19 relief after leaders highlighted stimulus checks and expanded unemployment benefits as central goals.

A Federal Response to COVID-19

Kuperstein expects a stronger federal response to COVID-19 from a Biden administration. A more uniform, national policy approach could relieve some of [HR's biggest headaches](#).

"There is some merit to state-by-state COVID relief, as each state's needs are different," Kuperstein said. "But, especially in places like New

York City and Philadelphia where a mid-size employer might have workers in multiple states, the current patchwork approach is just too much to manage for most HR and Benefits Teams."

Such a national, uniform approach would reduce regulation and could be very helpful for those managing policies like [paid leave](#), open enrollment and COBRA eligibility.

The Affordable Care Act Reaches the Supreme Court

Oral argument in the Supreme Court case challenging the Affordable Care Act's (ACA) constitutionality were held on Nov. 10. This ruling has the potential to create the biggest disruption for employee benefits, though Kuperstein doesn't expect any surprises.

"It's likely the ACA's Individual Mandate will be found unconstitutional, but we're prepared for that," said Kuperstein. The Individual Mandate, which forced Americans to choose a commercial or state-offered healthcare plan, was effectively eliminated by the 2017 Tax Cuts and Jobs Act. Yet the ACA continued to perform as expected, prompting speculation that the Individual Mandate isn't a necessary stabilizer.

"Plan prices have held relatively steady under the ACA, even without the Individual Mandate, so there seems to be room to stabilize it without overturning it completely," said Kuperstein. "But that relies on the court's ruling about the Individual Mandate's severability."

“Severability” refers to the ability to split or sever the Individual Mandate from the rest of the ACA if the Individual Mandate is held to be unconstitutional. One argument is that certain portions of the ACA may be so entwined with the Individual Mandate, that if the Individual Mandate were to be invalidated, those other portions would also have to be invalidated as well.

Kuperstein sees three possible outcomes from the Supreme Court decision (expected by June of 2021), with the third being most likely:

If the Individual Mandate is severable, just that section can be overturned without impacting the other provisions of the law, such as those impacting employer-sponsored healthcare plans or coverage protections for pre-existing conditions.

If the Individual Mandate is inseverable, the entire ACA will be overturned. In this very unlikely scenario, the court would likely offer a transition period for health plans to adjust before coverages are eliminated. This would cause massive structural changes to the health insurance marketplace, prompting insurers, healthcare providers, actuaries, brokers and consultants, and other entities in the marketplace to create contingency plans.

Most likely, we will see a combination. “Certain parts, or individual pieces, of the ACA that are

closely connected to the Individual Mandate (such as Exchange coverage rules, pre-existing condition rules and rules on guaranteed issue) may be stricken, but the impact on those individual pieces will likely be decided by a lower court,” said Kuperstein. “This makes the most sense when we look at where we are now: The ACA working without the Individual Mandate. We can easily survive like that.”

Based on comments from the Supreme Court judges during oral argument, it appears likely that the ACA will survive the challenge to its constitutionality, but the Individual Mandate is likely to be severed from the rest of the law. However, there is no guarantee that the judges will vote based on their comments during oral argument.

This case is unlikely to be decided before March or April of 2021, and any next steps on changes to the ACA will require [bipartisan efforts](#).

“This is where Biden’s established working relationship with Senate Majority Leader Mitch McConnell will be central,” said Kuperstein, citing decades of work between the two lawmakers.

“But, right now it looks like we are going to be very, very busy no matter how you look at it.” ■

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