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## Employer Sponsors of Health Benefits Part 3: Possible 2020 Election Scenarios

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Scenario	Party Controlling White House		Party Controlling Senate		Party Controlling House of Representatives	
	Republican	Democrat	Republican	Democrat	Republican	Democrat
<b>A</b>	X		X			X
<b>B</b>	X		X		X	
<b>C</b>	X			X	X	
<b>D</b>	X			X		X
<b>E</b>		X	X			X
<b>F</b>		X	X		X	
<b>G</b>		X		X	X	
<b>H</b>		X		X		X

In Part 2, we looked at how the Trump Administration’s executive actions between now and the 2020 election could shape the direction of employer-sponsored health benefits. But let’s now consider eight potential outcomes of the 2020 Presidential election and how they could impact employer-sponsored healthcare. As you refer to the grid above, you will note Scenario A represents the status quo. Earlier in this series we reviewed those dynamics.

- A:** Status Quo-White House (WH) issues healthcare-related Executive Orders (EOs) and directs release of DOL/HHS/Treasury regulations. Senate does not act on House Democrat bills not supported by White House. House Democrats and states with Democratic Attorneys General (AGs) raise court challenges to EOs & regulations.
- B:** GOP takes back control of the House. Laws enacted to bolster HSAs/HRAs/AHPs, reform Medicare/Medicaid Rx purchasing and provider payments and give states more flexibility to reform healthcare. Democrats in Congress and states with Democratic AGs challenge these laws in court.
- C:** Democrat-controlled Senate does not act on House GOP bills. White House issues EOs/regs that are challenged by Democrats.

- D:** Democrats in Congress pass bills that are vetoed by the White House. Congress likely fails to override the vetoes. White House issues EOs/regs, but face court challenges from Democrats.
- E:** Democrats capture the White House. GOP Senate does not act on House Democrat bills. White House issues EOs/regs but face court challenges from GOP Senate and states with GOP AGs.
- F:** White House vetoes legislation passed by GOP. Congress likely fails to override vetoes. White House issues EOs/regs but face court challenges from GOP.
- G:** Democrat-controlled Senate does not act on House GOP bills. White House issues EOs/regs that are challenged by the GOP.
- H:** Democrats enact bills to phase out employer-sponsored health benefits in favor of a Medicare-for-All system. GOP files court challenges where the outcome depends on the post-2020 make-up of SCOTUS.

**Wild Card:** Current makeup of the US Supreme Court (SCOTUS) gives White House a narrow advantage, but does Chief Justice Roberts evolve into a swing vote? Does President Trump have the opportunity to appoint another Justice? If yes, is that confirmation process concluded by November 2020? These answers will have

a bearing on appeals of any health benefit-related cases heard by SCOTUS in 2019, 2020, and beyond.

Scenario B assumes a best case scenario for the GOP, where President Trump is re-elected, and the GOP regains control of the House. In this case, you could expect to see more measures passed that promote state experimentation (e.g., via CMS waivers to expand access and control costs while upholding quality of care), HSA and HRA expansion, prescription drug payment reform, and AHPs. However, you could also anticipate these laws to be challenged in the courts.

Scenarios C and D illustrate two more examples of divided government where a Trump Administration resorts to EOs and regulations that would be challenged in the courts.

Scenario H is the best case for Democrats, where they recapture the White House and Senate. As a result, you could expect the Democrats to lay the groundwork to implement a Medicare-for-All system. Employer-sponsored health benefits would be transformed into a supplemental coverage form. The supplements would probably be similar to the Medicare Supplements purchased today by post-65 retirees, and not unlike what many Canadian employers do in wrapping their plans around Canada's version of Medicare.

Scenarios E, F, and G feature a Democrat President working with a divided Congress. For instance, in Scenario E, a Republican Senate will not act on bills passed by the Democrat-controlled House. This leads to the President and the Administration issuing EOs and regulations respectively that will likely be challenged in court. This is where the makeup of SCOTUS will play a crucial part in the outcome of those challenges. The divided government in Scenario G is similar to E, except in G the House is in GOP hands.

Scenario F is the reverse of Scenario D where the President and Administration are faced with both the Senate and House controlled by the GOP and as a

result, they initiate change through regulation instead of legislation, but those executive actions will be challenged in the courts.

So what is the key takeaway for employers? Regardless of what political party wins in 2020, the healthcare debate will remain contentious. Any EOs, regulations, or laws originating from one party will be challenged by the other to the fullest extent possible. Many of these challenges could take years to work themselves through the appeals process and some could wind up with SCOTUS.

## Conclusion

Although employers need to assume gridlock will continue, they will also need to pay close attention to all future healthcare-related EOs, regulations, and laws. Depending on the content and scope of those directives, employers must be ready to quickly adapt their benefits strategies accordingly. Employers will also want to monitor the strength and vitality of the individual health insurance marketplace in order to execute appropriate changes in how they might deliver future health benefits.

Through all this gridlock, changes will come. It seems inevitable, and, hopefully, they will be for the better. We should all be reminded what John F. Kennedy said about this, "Change is the law of life. And those who look only to the past or present are certain to miss the future."

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