

# Post-Election Issues for HR/Benefit Professionals

November 22, 2016

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# AGENDA

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- **What happened?**
- **U.S. Supreme Court**
- **ACA**
- **FLSA overtime rules**
- **Minimum Wage**
- **Equal pay**
- **Taxes**
- **Paid leave**
- **Other Benefit Issues**

# WHAT HAPPENED?

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**In the wake of the 2016 U.S. Presidential election the following occurred:**

- 1. Donald Trump (R) elected President**
- 2. Republican party retained control of Senate with a 52-48 margin**
- 3. Republican party retained control of the House with a 238-193 margin**
- 4. First time Republican party has controlled all three since 2003-2006 (prior to that, briefly in 2001-02, and 1953-54, 1928)**

# WHAT HAPPENED?

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**What does this mean?**

**Depending on your political affiliation-**

# WHAT HAPPENED?

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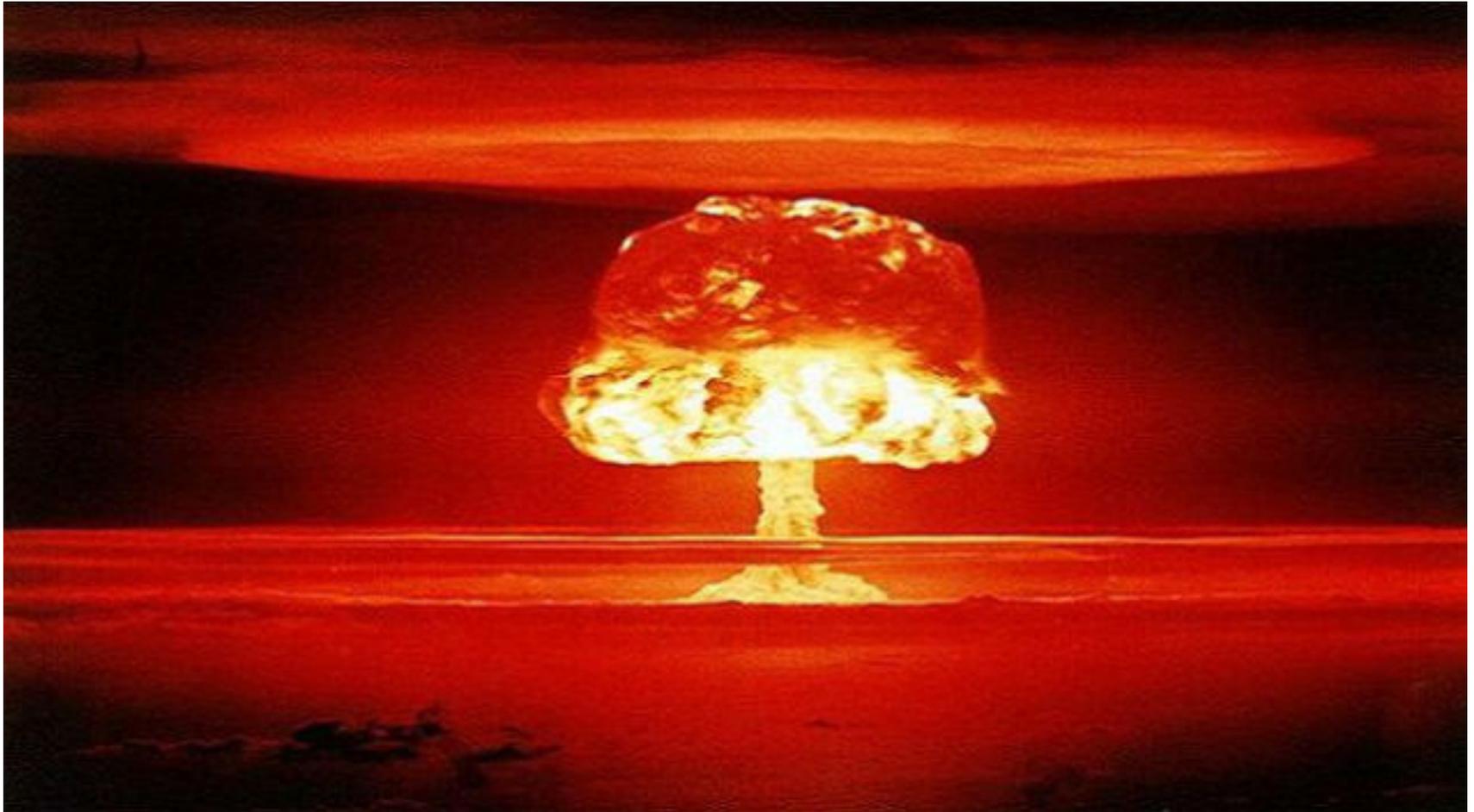
Either this



# WHAT HAPPENED?

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Or this



# WHAT HAPPENED?

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**Republicans are in much the same position as the Democrats in 2010.**

- **They control the government, but lack a super majority in the Senate and are thus susceptible to filibusters.**

**The Republicans can:**

- **Issue/rescind Executive Orders**
- **Enact legislation, subject to filibuster**
- **Appoint leaders of regulatory agencies**
- **IRS, DOL, HHS, etc.**
- **Appoint judges to federal courts and the U.S. Supreme Court**

## WHAT HAPPENED?

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**Much is unknown about the actual changes and policies the Trump administration will pursue.**

- **Candidate Trump vs. President Trump**
- **Some walk-backs already seen on campaign issues**
- **Changes are coming, but not necessarily right away**

## WHAT HAPPENED?

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Even when changes are made it may take time to see an effect.

Why?

- “It’s like turning an aircraft carrier”



- It takes a Nimitz-class aircraft carrier 3-5 miles to complete a 180-degree turn.

\*<https://www.youtube.com/watch?v=d4KnCqcTEOU> (Good stuff starts at 1:44)

# U.S. SUPREME COURT

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## Potential to replace numerous members of SCOTUS

- 2 justices 80 or older (Bader Ginsburg, Kennedy)
- 1 justice approaching 80 (Breyer)
- Lone moderate and 2 liberal justices could be replaced with more conservative appointees.
- Senate rule changes enacted by Democrats now prevents filibusters on Presidential appointees.

# U.S. SUPREME COURT

## Current Court Composition

Justice	Date of Birth	Appointed By	Sworn in
Vacant (Antonin Scalia)	3/11/1936 Died 2/13/2016 Age: 79 yr 11 mo	Ronald Reagan	9/26/1986 Served: 29 yr 4 mo
Anthony Kennedy	7/23/1936 Age: 80 yr 3 mo	Ronald Reagan	2/18/1988 Served: 28 yr 8 mo
Clarence Thomas	6/23/1948 Age: 68 yr 4 mo	George H. W. Bush	10/23/1991 Served: 25 yr 0 mo
Ruth Bader Ginsburg	3/15/1933 Age: 83 yr 8 mo	Bill Clinton	8/19/1993 Served: 23 yr 2 mo
Stephen Breyer	8/15/1938 Age: 78 yr 3 mo	Bill Clinton	8/3/1994 Served: 22 yr 3 mo
John G. Roberts	1/27/1955 Age: 61 yr 9 mo	George W. Bush	9/29/2005 Served: 11 yr 1 mo
Samuel A. Alito, Jr.	4/1/1950 Age: 66 yr 7 mo	George W. Bush	1/31/2006 Served: 10 yr 9 mo
Sonia Sotomayor	6/25/1954 Age: 62 yr 4 mo	Barack Obama	8/8/2009 Served: 7 yr 3 mo
Elena Kagan	4/28/1960 Age: 56 yr 6 mo	Barack Obama	8/7/2010 Served: 6 yr 3 mo

## Repeal or replace?

- Candidate Trump campaigned on the promise of repealing the ACA immediately after taking office.
- President-elect Trump has already walked back on that, suggesting instead that he was willing to keep portions of the law.
- Repeal via “Reconciliation” possible, fairly straight forward.

**Due to lack of super majority (60 votes) in the Senate and the threat of a potential filibuster, Republicans may try to use “Reconciliation” strategy that only needs a simple majority.**

**•Very specific requirements to use Reconciliation. According to the “Byrd Rule”, cannot use Reconciliation:**

**•if it does not produce a change in outlays or revenues;**

**•if it produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;**

**•if it is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;**

**•if it produces a change in outlays or revenues which is merely incidental to the non-budgetary components of the provision;**

**•if it would increase the deficit for a fiscal year beyond those covered by the reconciliation measure;  
and**

**•if it recommends changes in Social Security.**

# ACA

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**Another repeal option is to attempt to eliminate the filibuster. Senate Democrats eliminated the filibuster for Presidential appointments earlier.**

**Reconciliation was used to pass the ACA originally.**

**If repealed, strong possibility of 18-24 month phase out of ACA features that are popular with voters in hopes of winning additional seats in 2018 needed to establish super majority.**

**Republicans need 8 additional seats; 21 in play in 2018. This includes traditionally “Blue” states that went “Red” in 2016: Michigan, Wisconsin, Pennsylvania, etc.**

# ACA

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**Much of the Republican strategy is expected to focus on supporting the 2018 midterm elections and the goal of capturing a super majority in Congress.**

**Paul Ryan’s “A Better Way” proposal is expected to be a guide for the administration.**

- **For people without access to employer coverage, Medicare, or Medicaid, offers a refundable tax credit to help buy health insurance in the individual market.**
- **Expand the use of health savings accounts.**
- **Preserve employer-based insurance, but caps the open-ended tax break on employer-based premiums.**
- **Allow sales across state lines.**
- **Allow small businesses and individuals to band together through new pooling mechanisms.**
- **Back wellness programs.**
- **Medical liability reform.**

## What stays, what goes?

### ACA feature likely to remain:

- Elimination of Pre-Existing Conditions
- Potential for 2-tiered system:
  1. Continuous coverage, no Pre-Ex
  2. Break in coverage, subject to Pre-Ex
- Supported by insurance industry to combat adverse selection/death spiral

# ACA

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## What stays, what goes?

### ACA feature likely to remain:

- Ban on Rescissions
- Guaranteed Issue
- Guaranteed Renewal

## What stays, what goes?

### ACA feature likely to remain:

- Elimination of Lifetime Dollar Limits (Annual Dollar Limits might return)
- Coverage to Age 26
- Coverage of Clinical Trials
- Elimination of Prior Auth for OB/GYN, Pediatric Svcs, Out-of-Network ER Care
- Increased Wellness Incentives

## What stays, what goes?

ACA features likely to go/change:

- Employer Mandate (“Play or Pay”)
- Reporting (possibly not right away)
- Individual Mandate
- Cadillac Tax

## What stays, what goes?

### ACA features likely to go/change:

- Federal Operation of Exchanges/MarketPlaces(reinstate state high risk pools?)
- Medicaid Expansion (replace with block grants?)
- Advanced Premium Tax Credits
- Other ACA Taxes (Medicare Surtax, Medical Device Tax, Health Insurer Tax)
- OTC Ban, Dollar Cap for FSAs
- Effect on IRS Guidance (Cash in lieu of benefits, etc.)

# ACA

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## ACA Items on the fence:

- **Medical Loss Ratio/Limits on Carrier Profits (trade off for MarketPlace?)**
- **Annual Dollar Limits**
- **Preventive Care without Cost Sharing (Staying but changing?)**
- **Section 1557 non-discrimination rules**

# ACA

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## How quickly might this happen?

- **Expect to see the suspension of ACA reporting**
- **IRS just announced in Notice 2016-70 the extension of “good faith reporting” for 2016 filings and also extended the individual statement deadline from January 31, 2017 to March 2, 2017**
- **Conservative position is to carry through with 2016 1095-C filings**
- **Likely waiver of Play or Pay penalties for 2016 (IRS is already months behind)**
- **The ACA “is the law until it isn’t”; it’s in effect until repealed/replaced**

# FLSA OVERTIME RULES

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## FLSA Overtime Rules

- New rules set to go into effect 12/1/2016
- Legacy item for Obama administration
- 21-state legal challenge pending, injunction ruling set for 11/22/2016
- If injunction is granted, changes can be prevented
- If injunction is not granted, new overtime rules will go into effect 12/1/2016
- Automatic updates set for 2020 can be prevented

# FLSA OVERTIME RULES

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## FLSA Overtime Rules

- **Even if rolled back, businesses that have already complied will find it difficult, if not impossible, to undo changes**
- **Hard to take back raises (“Horse is already out of the barn”)**
- **Administrative changes could include phased-in increases to Salary Test**
- **FLSA has built-in small business exception already- only applies to businesses with annual revenues of \$500,000 or more**

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# FLSA OVERTIME RULES

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## Potential FLSA strategies:

- Do nothing in hopes that new rules are repealed- puts employer at risk for regulatory action and employee suits.
- Conservative approach is to comply fully by 12/1/2016.
- Because the FLSA rules center on who gets overtime and who does not, non-exempt employees can still be paid a salary, they just are eligible for overtime.
- Non-exempt employees can be paid by the hour, day, week, or by the piece.
- Employees who are currently salaried exempt who don't meet the new salary test amount of \$47,476 can be designated as salaried, non-exempt. If the Trump administration rolls back the rules, the employees could be redesignated without having to flip between hourly and salaried status.

# MINIMUM WAGE

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## Battle over minimum wage

- Many Democrats have advocated for a national minimum wage of \$15/hour.
- Trump has stated in the past that is in favor of/would not object to raising the minimum wage to \$10/hour. Federal minimum wage is currently \$7.25/hr
- The Congressional Budget Office (CBO) estimated in 2014 that raising the minimum wage to \$10.10 and indexing it to inflation would increase the wages of 16.5 million workers in 2016, while raising it to \$9.00 without indexing would affect 7.6 million.

# MINIMUM WAGE

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## Battle over minimum wage

- 30 states already have state minimum wage rates higher than federal
- 14 states with minimum wage rates the same as the federal
- 5 States with no minimum wage law (federal minimum wage rate applies)
- 2 States with minimum wage rates lower than the federal (federal minimum wage rate applies)
- May result in increased efforts at the local level to raise state or city minimum wages, such as in Seattle.
- Question over timing- all at once or phased-in in stages?

## **EQUAL PAY**

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**Candidate Trump stated during campaign multiple times that women and men will make the same amount of money for the same job performance, but that he believed legislating equal pay is a mistake.**

- While Trump's daughter made equal pay a major issue during her speech at the RNC this year, there are limited specifics available on pay equality.**
- Efforts to delay or alter the new EEO-1 pay reporting requirements are expected.**

# TAXES

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Taxes were discussed by Trump during the campaign, but specifics have not been forthcoming as of yet.

•According to Trump's Great Again website:

“A Trump Administration tax plan can be summarized as lower, simpler, fairer, and pro-growth”.

\*<https://www.greatagain.gov/policy/tax-reformeconomic-vision.html>

## PAID LEAVE

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**Paid sick leave is a hot topic nationally. Seven states have adopted paid sick leave laws (AZ, CA, CT, MA, OR, VT, WA), in addition to over 20 localities.**

- **Trump proposal floated for six weeks of paid maternity leave though the unemployment insurance the organizations are already required to carry.**
- **If your organization already offers a paid maternity leave, this plan would not apply to you.**
- **Childcare plan includes incentives for businesses to offer on-site child care, certain tax deductions for childcare costs and the establishment and expansion of Dependent Care Savings Accounts.**
- **Obama executive order requiring federal contractors to offer 7 days of sick leave might be rescinded, but once in place employers would find it difficult to walk back.**

## OTHER BENEFIT ISSUES

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### **Increased flexibility for FSA, HSAs**

- **Eliminate cap on medical FSA contributions**
- **Restore ability to use FSA, HSA monies for OTCs**
- **Increase contribution limits for HSAs**
- **Broader participation in HSAs- persons on Medicare or on Tricare could contribute**
- **Restore stand-alone Health Reimbursement Arrangements**
- **Broaden use to HSA monies to permit paying insurance premiums**
- **If Cadillac Tax is not repealed, FSA and HSA contributions wouldn't count towards Tax**

# QUESTIONS

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