

5 Ways Trump's Election Could Change Employee Benefits

By **Kellie Mejdrich**

Law360 (November 8, 2024, 8:08 PM EST) -- Donald Trump's election to a second term as president has attorneys preparing for potentially significant changes to tax, investment and health policy that could directly affect the administration of employee benefit plans.

Attorneys say that the upcoming expiration of numerous federal tax provisions at the end of 2025, including income tax credits on workers' healthcare premiums, combined with the prospect of unified government control raises the likelihood of a major tax deal, potentially next year.

The second Trump administration will also result in regulatory rollbacks aiming to reverse policies issued under President Joe Biden regarding retirement advice, retirement plan investment selection and healthcare protections for gender-affirming care under the Affordable Care Act, attorneys say.

Brigen Winters, a principal at Groom Law Group who advises on employee benefits issues and is chair of the firm's policy practice group, said that in the days after the election, he's been focused on "a lot of things," including potential changes to agency rules and, most importantly, tax policy.

"That is going to be the biggest issue — the 2025 expiring tax provisions— and what that means for employee benefits and retirement health benefits specifically," Winters said.

Here are five issues that benefits attorneys will be monitoring for changes once Trump is inaugurated.

Tax Cuts Could Affect Benefits Credits

Attorneys widely expect Trump and Republicans in Congress to push for major changes to tax policy, and there are several expiring tax provisions — including an individual health premium tax credit from the ACA — that could factor into future negotiations.

Another massive driver for a deal next year is that many tax provisions under the Tax Cuts and Jobs Act — legislation negotiated by Trump in 2017 along with a Republican-controlled House and Senate — expire at the end of 2025, setting up the potential for the GOP to extend major tax cuts. The ACA-era premium tax credits were also expanded under the American Rescue Plan Act, which Biden signed into law in 2021.

Winters, at Groom Law, said he's keeping an eye on what happens with the expiring tax provisions from the 2017 tax overhaul as well as the health premium tax credit because "there will be, I think, a lot of consideration of whether and how to extend those."

Winters pointed out that some conservative think tanks, including the Paragon Health Institute, have advocated for capping the federal income and payroll tax exclusion on health insurance premiums. That idea was also backed by the Republican Study Committee, a conservative House Republican caucus, in its fiscal year 2025 budget proposal.

"I think a lot of employers and health plans and insurers will be watching and opposing any move to do that, perhaps as a revenue raiser, as part of extending the expiring tax provisions," Winters said.

Tia Martarella, of counsel at Jackson Lewis PC and an employer-side attorney, said she's also watching for any movement on federal tax legislation, including with regard to 401(k) plan policy, given recent movement on retirement plan policy under the 2022 Secure 2.0 legislation. The first Secure Act was passed in 2019 under Trump. Both legislative efforts were aimed at expanding workers' access to defined-contribution 401(k) plans.

"I think we can look forward to seeing some more 401(k)-related tax provisions," Martarella said, adding that she is looking to see if "anything similar comes along," like Secure 2.0.

End to Fiduciary Rule

Texas federal courts have already halted Biden's regulatory package expanding the definition of an investment

advice fiduciary under the Employee Retirement Income Security Act, and the incoming Trump administration is likely to drop an appeal of those decisions, attorneys say.

On Nov. 4, the Fifth Circuit granted a joint motion to consolidate the U.S. Department of Labor's appeals of **two Texas court orders** from July enjoining enforcement of the regulations, which included a final rule and three sets of changes to ERISA-prohibited transaction exemptions. The DOL appealed the two court decisions in which the judges enjoined the rule, **finalized in April**, as beyond the DOL's authority under ERISA and set the regulations aside using the Administrative Procedure Act.

Andrew Oringer, partner and general counsel at The Wagner Law Group, said the incoming Trump administration's likely withdrawal of a fiduciary rule appeal would amount to a "surreal repeat of what we saw with the amended fiduciary rule" that Trump backed away from in his first administration. He referred to the first Trump administration ultimately dropping a regulatory effort finalized by President Barack Obama's administration in 2016 that also attempted to expand the definition of an ERISA investment advice fiduciary.

A legal challenge to that rule ended up on appeal at the Fifth Circuit, and the appellate court ultimately **struck the rule down** in 2018.

"If that is not appealed, then the rule is dead, and that is exactly what happened the last time," Oringer said. "It is *deja vu*, all over again."

ESG Rule Repeal

The incoming Trump administration vowed during the campaign to reverse the Biden administration's **2022 final rule** that allowed but did not require employee retirement plan advisers to consider environmental, social and governance factors in their investment choices.

In a February 2023 campaign video, Trump vowed to repeal Biden's ESG rule and pointed to his rule from 2020 "banning Wall Street and employers from pouring your 401(k)s, pensions and retirement accounts into so-called ESG, or environmental social and governance, investments for political reasons." Biden's rule largely shifted away from Trump's approach on ESG, and attorneys say it's likely Trump will move the direction back to what his first administration advanced.

It's not clear if Trump would follow Project 2025, a right-wing policy blueprint by conservative think tank The Heritage Foundation, but the group that backed his election included in its 180-day plan of action for the start of Trump's second administration a proposal to reverse Biden's ESG rule. The group said in its plan document that it also wants the DOL to "prohibit investing in ERISA plans on the basis of any factors that are unrelated to investor risks and returns," suggesting a desire for new rules.

Winters said he's watching out for regulations on ESG and expects "the ping pong match will continue" on the rule.

Oringer, at Wagner Law, said he's watching out for multiple possibilities in how Trump handles the ESG rule itself, including "that the Trump administration simply goes to repeal the new Biden reg without replacing it."

Regardless of how the administration moves forward, Oringer pointed out that the two administrations had vastly different views of ESG and the shift in power will likely have a downstream effect on considering ESG.

"I think you're going to get a real chilling effect on the taking into account of ESG, even if there's no regulatory activity," Oringer said.

Preventive Care Policy Shifts

Attorneys are also keeping an eye out for policy changes related to preventive care and public health, in part because individuals who are reportedly close to Trump and on the shortlist for a role in his administration have criticized core agencies and standard-setting bodies involved in the federal government's current approach.

Attorneys are watching for moves by conservative Texas lawyer Jonathan Mitchell, who **represented Trump** in February before the U.S. Supreme Court in a successful challenge to Colorado's attempt to bar the former president from the ballot.

Mitchell also **argued before the Fifth Circuit** in March on behalf of two Christian-owned Texas businesses — Braidwood Management and Kelley Orthodontics — that challenged the federal government's mandate under the ACA requiring employer-provided health plans to cover preventive services, including HIV preexposure prophylaxis, or PrEP.

Richard Hughes IV, a healthcare attorney and partner at Epstein Becker Green, said he's keeping an eye on whether Mitchell joins the administration.

"I think that what is going to be really interesting is the fact that Braidwood has been argued by Jonathan Mitchell, who is very likely to play a role in this administration ... if not as solicitor general," he said.

Hughes said it's "very likely" that the federal government could change its position in the Braidwood case, which the businesses petitioned to the Supreme Court in October. A response from the federal government is due Nov. 29.


Hughes also pointed out that another potential impact on public health comes from the possibility that Trump could give control of federal public health agencies to Robert F. Kennedy Jr., the third-party former presidential candidate and public vaccine skeptic. During the campaign, Trump said of Kennedy: "I'm going to let him go wild on health."

Hughes said he's watching to see what type of role Kennedy takes up in the administration.

"He believes that we need less of a focus on infectious disease and more of a focus on chronic disease," Hughes said. "You know, it's a bit inconsistent with the way we think about public health."

Rollback of Trans Healthcare Protections

Benefits attorneys also expect Trump will change healthcare regulations imposed under Biden that extended protections in nondiscrimination language under Section 1557 of the ACA to prohibit employer group health plans and third-party service providers from denying healthcare based on gender identity discrimination.

Biden's final rule and interpretation, which was **unveiled April 26**, revived protections that were rescinded during Trump's first administration and clarified that the ACA's prohibition against discrimination based on sex includes sexual orientation and LGBTQ+ patients. The rule and interpretation followed the U.S. Supreme Court's 2020 decision in **Bostock v. Clayton County** , which held that Title VII protects against gender identity discrimination in employment.

The rule also drastically expanded application of Section 1557 to third-party service providers for employer group health plans. Those rules were enjoined by **Mississippi and Texas federal courts** this summer.

Trump already removed those protections once **in 2020**, rolling back Obama-era regulations from 2016 that had also advanced the interpretation that the ACA's Section 1557 protected against gender identity discrimination.

Repeal of the rules is likely to come swiftly in Trump's second administration, given that Trump ran off of a campaign that was broadly hostile to government support of healthcare for transgender people.

Even as the rules change, the Supreme Court is expected to **hear arguments this fall** on the question of to what extent the U.S. Constitution protects access to transgender people's healthcare in an appeal from the Biden administration.

Martarella, at Jackson Lewis, said the nondiscrimination in healthcare rule's "beleaguered" history is likely to continue under Trump's second term: "They've just turned over so many times."

"Because of the history of these regulations and how they keep getting overturned and put back in place and changed and modified, even though we have final regulations ... it's sort of like we're all waiting on the edge of a cliff to see if they're going to get repealed again or shot down again," Martarella said.

--Editing by Abbie Sarfo.

Correction: A previous version of this story misquoted Winters. The error has been corrected.