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What To Expect From Federal Agency Leadership Changes

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One of the hallmarks of any new presidential administration is a widespread change in personnel at all levels of the government. But how this shift in leadership is accomplished varies depending on the agency and the position, with many operating as business as usual. And how a company should prepare for that shift also depends on the circumstances.

Department of the Treasury and the Internal Revenue Service

For the U.S. Department of the Treasury and the Internal Revenue Service, the top positions, including the commissioner of the IRS and the chief counsel of the IRS, are politically appointed. However, most of the personnel within the IRS and the IRS's Office of Chief Counsel do not change when an administration changes.

Taxpayers should expect that ongoing audits and investigations will continue without skipping a beat. The IRS Chief Counsel Michael Desmond has commented publicly that guidance resulting from the Tax Cuts and Jobs Act will continue to be rolled out, with a goal to be done by the end of the year. So, in that respect, it is business as usual at the IRS.

Legislatively, we can expect some activity with tax impacts in the new year. We should see additional COVID-19 relief, which will likely have tax components and will lead to additional tax guidance being issued by the IRS and Treasury.

Many taxpayers who received Paycheck Protection Program loans are hoping that the next round of relief legislation will address the deductibility of associated expenses and are planning to hold off filing their 2020 federal income tax returns. They plan to wait to see if Congress will act to force the IRS and Treasury to change the position currently being taken, namely that these expenses are not deductible in cases where the loan was forgiven.

While President-elect Joe Biden had indicated that he wanted to increase the corporate tax rate from 21% to 28%, given the Republican control of the U.S. Senate, it is unlikely that those changes will come to fruition, at least not in the near term. However, many taxpayers had begun transactions to address these possible changes and are continuing to move forward regardless of whether the rate will go up in 2021 or not.

Department of Justice

Within the U.S. Department of Justice, there are essentially two groups of government appointees: a group of high-level officials in Main Justice that sit in Washington, D.C., and then a group of appointed U.S. attorneys in the field. In Main Justice, significant changes are expected come January, when the landing team from the Biden administration comes in with an acting attorney general.

At the same time there are 93 U.S. attorneys across the country. While the 50 or so remaining Obama-appointed U.S. attorneys were all fired on the same day under the then-incoming Trump administration, the Biden administration is expected to be more measured, allowing existing U.S. attorneys to stay in their roles until their replacements are all named and confirmed, which will provide a bit of continuity to the department.

Coming into a new Democratic administration, there is every reason to expect that those selected to lead the DOJ will push for investigations to continue at the same or an accelerated pace, and for department leaders to support the DOJ's work in parallel with other enforcement and regulatory bodies — both domestic and foreign — in order to remain at the forefront of pursuing sophisticated financial and corruption offenses with international impact.

Moreover, given the impact that the pandemic has had on businesses, there is likely to be enhanced scrutiny by the U.S. Securities and Exchange Commission and the DOJ on industries that have been hit hard in this environment, such as retail, hospitality and airlines, to name a few.

In the past, a stressed economic environment like this one has lent itself to problems in reporting, as well as business behaviors that pique the interest of securities fraud enforcers who will be eager to question accounting practices and accuracy in market statements. It's important for companies to be extra vigilant in their reporting practices.

Department of Labor

At noon on Jan. 20, political appointees at the U.S. Department of Labor who haven't already departed the building, will leave. But, like the IRS, the bulk of the DOL workforce is made up of thousands of career staff, including senior career officials who will stay and maintain continuity.

No great big policy changes will happen out of the gate, because it will take time to confirm a new secretary, solicitor of labor and assistant secretaries who set the tone and priorities of the agencies. Political appointees, however, may start making some decisions as acting officials that won't require a Senate confirmation.

What this means for employers is that the whiplash they felt from the pace of new guidance coming from the agency during the Trump administration will continue. But changes to any regulations will take longer.

In addition to the potential regulatory changes and policy shifts that come with a presidential transition, employers will need to continue to be flexible to navigate COVID-19-related workplace change. DOL and Centers for Disease Control and Prevention recommendations will likely continue to evolve, and employers will continue to face the challenges of complying with a patchwork of federal and state wage and hour laws, new state and local COVID-19 sick leave laws, changes to workers' compensation laws, and more.

These are challenges that the Biden administration will not really be able to impact, at least in the short term.

EEOC

There will be a significant difference at the U.S. Equal Employment Opportunity Commission because there will be a new chair, probably as early as Jan. 21. Unlike cabinet officials, the president can choose a current commissioner to become the chair without any additional confirmation by the Senate. The commission will still have a Republican majority, but that doesn't translate into Republican control of the EEOC.

This simply means that any regulation or guidance that was finalized by the EEOC before Jan. 20 will likely not be overturned or modified. But no new initiative, regulation or guidance will move forward unless it's on the agenda of the Democratic chair and then circulated for a vote.

NLRB

On the National Labor Relations Board side, the NLRB chairman serves as the head of the agency, but many of the chairman's administrative responsibilities are shared with the NLRB general counsel, Among NLRB members, the chairman still only has a single vote. This means case-related issues and rulemaking remain subject to whatever is supported by a majority of board members.

It is likely that, in the first few days of the Biden administration, Lauren McFerran, the only current Democratic board member, will be designated chair — or chairman — of the agency. McFerran is very experienced, having already served one complete earlier term at the NLRB — from Dec. 17, 2014 to Dec. 16, 2019 — and she previously served as chief labor counsel to the Senate Committee on Health, Education, Labor and Pensions.

However, the majority of the board's members are likely to be Republicans at least through Aug. 27, 2021 — the end of board member William Emanuel's term — and possibly through Dec. 26, 2022 — the end of current Chairman John Ring's term. Current NLRB General Counsel Peter Robb's term does not end until November 2021. Therefore, significant policy changes at the NLRB may not occur until two or three years into the new administration.

Before any of these personnel changes are officially made, many agencies will be working very hard to get as much finalized as possible before January 20. In most agencies, there are options to reconsider and even pull back regulations and guidance, with the level of flexibility depending on the type of regulatory or subregulatory action, but most of that will take time.

In a year where most companies have had to pivot and stay flexible amid COVID-19, this level of uncertainty might not be as disruptive as in other years. While change is always challenging because it creates uncertainty for businesses, President-elect Biden has pledged his administration will build unity, so that may bode well for an easier transition.

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