



Post-2024 Election Outlook: Preparing for Changes in Immigration (and Employment) Law

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Presented by:

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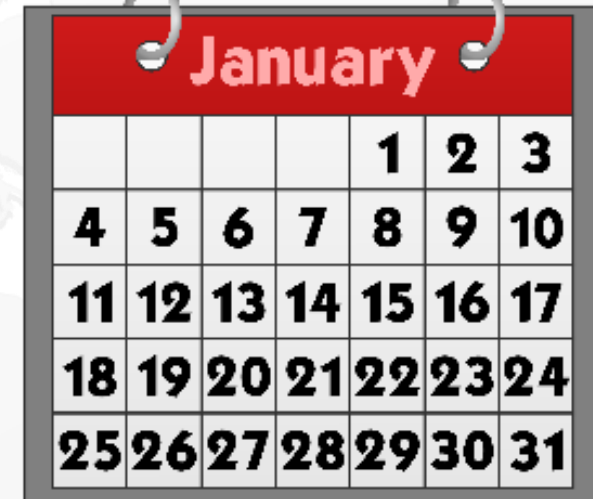
Atlanta
Austin
Berlin
Birmingham
Boston
Buffalo
Charleston
Charlotte
Chicago
Cleveland
Columbia
Columbus
Dallas
Denver
Detroit (Metro)
Fresno
Greenville
Houston
Indianapolis
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montréal
Morristown
Munich
Nashville
New Orleans
New York
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
Salt Lake City
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Washington, D.C.

Ogletree
Deakins

Congress – Lame Duck

Clock is ticking:

- Government funding (December 20, 2024)
- Military funding
- Disaster relief
- Farm bill
- Healthcare program extenders
- Political appointments



Regulations (Remainder of 2024)

- NLRB case “flurry”
- Most labor/employment regulations have been finalized
- Immigration regulations?

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IN FOCUS
July 9, 2024

The Congressional Review Act: The Lookback Mechanism and Presidential Transitions

The Congressional Review Act (CRA, 5 U.S.C. §§801-808) is a tool that Congress can use to overturn federal regulations. Enacted in 1996, the CRA requires that agencies submit covered rules to Congress and the Government Accountability Office (GAO) before they may take effect. Congress then has a limited period of time to use special fast-track procedures to consider legislation overturning those rules. If a joint resolution of disapproval is enacted, it has the effect of overturning the rule—either by preventing it from taking effect at all. If the rule had already gone into effect, it is to be treated as though it was never in effect. Furthermore, the agency is prohibited from reissuing the rule in “substantially the same form” unless Congress provides additional statutory authorization.

The CRA also has a feature that is sometimes referred to as its “lookback mechanism.” The lookback mechanism provides Congress with additional time to review rules that were submitted toward the end of the previous session. This feature is most relevant as the end or potential end of a President’s Administration approaches, because a new Congress and new President might be able to more easily overturn rules issued by the outgoing Administration.

This In Focus describes why the lookback mechanism is most relevant during a presidential transition, describes how the lookback date is calculated, and makes a general estimate about when the lookback date might fall in 2024 under certain assumptions.

Relevance of the CRA in Presidential Transitions

Like regular legislation, a CRA joint resolution of disapproval requires passage in both chambers of Congress and signature by the President to become law. Obtaining the President’s support to overturn a rule issued by his own Administration is an unlikely prospect, however, and creates a practical challenge for using the CRA: Most of the time, when presented with a joint resolution of disapproval, a President can be expected to veto it. Congress could attempt to override a presidential veto, but that requires a

issued near the end of the previous Administration—sometimes referred to as “midnight rules”—are eligible for review under the CRA. If Congress were to consider a joint resolution of disapproval to overturn a rule issued by the prior Administration, a new President may be more willing to sign the joint resolution into law. (For more information on midnight rulemaking, see CRS Insight IN11539, *Presidential Transitions: Midnight Rulemaking*.)

The vast majority of the instances in which the CRA was used to overturn rules took place during such a period. Of the 20 rules that have been overturned by the CRA, 18 were issued by prior, outgoing Administrations.

CRA Time Periods for Review

Under the CRA, before a final rule can take effect, an agency must submit that rule to both houses of Congress. After a rule is received in both chambers and published in the *Federal Register*, the CRA establishes specific time periods during which Congress can introduce and act on a joint resolution that, if enacted, would disapprove the rule. Specifically, the CRA creates:

- an “introduction” period, which lasts for 60 calendar days (excluding days on which either house has adjourned pursuant to a concurrent resolution), during which joint resolutions disapproving the rule can be introduced in either chamber;
- a “discharge” period, which lasts for 20 calendar days after which a petition signed by 30 Senators can be filed to discharge a Senate committee from the further consideration of a CRA joint resolution of disapproval; and
- a “Senate action” period, which lasts for 60 days of Senate session, during which a disapproval resolution can be considered in the Senate under “fast track” parliamentary procedures that permit a simple majority to call up and reach a final vote on the joint resolution without a cloture process.

White House 2025



J.D. Vance

Traditional Labor

- Picket Line Presence; Union household.
- Sectoral bargaining: one-size-fits-all, European style bargaining.
- Vance voted to *rescind* the NLRB's joint employer regulation and voted *against* the confirmation of Gwynne A. Wilcox to the NLRB

Anti-Trust/Non-competes. “Khanservative”

Workplace Safety. Railway Safety Act which would institute new railroad safety protocols (such as notice requirements, and two-person crew requirements) following the 2023 freight train derailment in East Palestine, OH.

Diversity, Equity, Inclusion.

- Co-sponsor of the Dismantle DEI Act of 2024, which would prohibit federal agencies from contracting with companies that operate DEI programs.



Trump Administration – Potential Executive Orders

- Border security / deportation
 - *“There is much President Trump can do through executive action to provide immediate relief. He can secure the border by ending catch and release, reinstating Remain in Mexico and stopping the current flagrant abuses of the asylum and parole programs.”* Steve Scalise, Dear Colleague Letter (Nov. 6, 2024)
- “Protecting the Nation from Foreign Terrorist Entry into the United States”
- Buy American, Hire American
 - Agencies directed to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid” employees.
- DACA/TPS

Trump Administration – Potential Executive Orders

- ~~“Good Jobs” Executive Order~~
- Anti-DEI
- Regulatory reform
- Energy independence
- Nondisplacement of Qualified Workers
- Federal employee “union time”
- Schedule F

Trump Administration – Immigration Personnel

- Kristi Noem, Governor South Dakota – DHS
- Marco Rubio – State Department
- Brian Homan - “Immigration Czar”
 - 20+ years at ICE;
 - WaPo 2016: ““Thomas Homan deports people. And he’s really good at it.”
 - Obama → “exceptional performance over an extended period of time.”
- Stephen Miller – Deputy Chief of Staff (immigration and DEI)

Nothing is guaranteed – particularly in the Senate

Sec. of Labor Lori Chavez-DeRemer (Nominee)

- Republican Representative, Oregon (2023-2025)
- Mayor, Happy Valley, Oregon (2011-2019)
- The Protecting the Right to Organize Act (PRO Act)
- Public Service Freedom to Negotiate Act



Trump Administration - Nominations

- Recess Appointments
 - *Noel Canning v. NLRB* (2014)
 - “In sum, we conclude that the phrase “the recess” applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. **And a recess lasting less than 10 days is presumptively too short as well.”**

(Slip Opinion)

OCTOBER TERM, 2013

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* NOEL
CANNING *ET AL.*

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 12–1281. Argued January 13, 2014—Decided June 26, 2014

Respondent Noel Canning, a Pepsi-Cola distributor, asked the D. C. Circuit to set aside an order of the National Labor Relations Board, claiming that the Board lacked a quorum because three of the five Board members had been invalidly appointed. The nominations of the three members in question were pending in the Senate when it passed a December 17, 2011, resolution providing for a series of “*pro forma* session[s],” with “no business . . . transacted,” every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923. Invoking the Recess Appointments Clause—which gives the President the power “to fill up all Vacancies that may happen during the Recess of the Senate,” Art. II, §2, cl. 3—the President appointed the three members in question between the January 3 and January 6 *pro forma* sessions. Noel Canning argued primarily that the appointments were invalid because the 3-day adjournment between those two sessions was not long enough to trigger the Recess Appointments Clause. The D. C. Circuit agreed that the appointments fell outside the scope of the Clause, but on different grounds. It held that the phrase “the recess,” as used in the Clause, does not include intra-session recesses, and that the phrase “vacancies that may happen during the recess” applies only to vacancies that first come into existence during a recess.

Held:

1. The Recess Appointments Clause empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length. Pp. 5–33.
 - (a) Two background considerations are relevant to the questions here. First, the Recess Appointments Clause is a subsidiary method



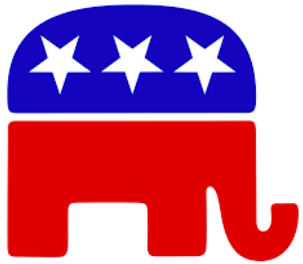
“Each of these nominees needs to come before the Senate and go through the process and be vetted.”

119th Congress (2025-2027)



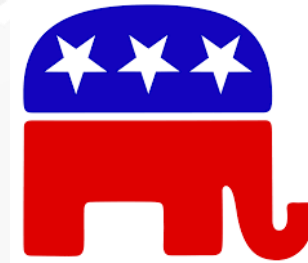
U.S. Senate

53 - 47



U.S. House of Representatives

220 - 215



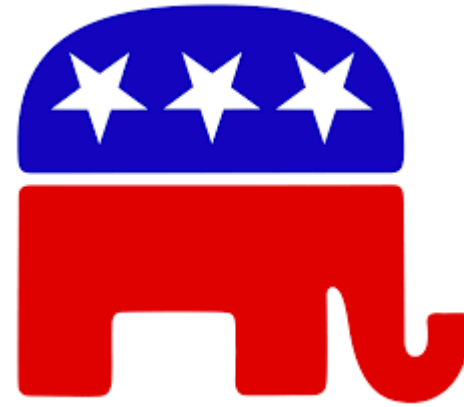
119th Congress

- Republican priorities: ***Taxes, Energy, Border***



119th Congress – Labor/Employment Issues

- DEI
- Child labor?
- Portable benefits?
- Employee Rights Act?
- Paid leave?
- DEI/ESG investigations
 - Letters to CEOs
- *Won't see: PRO Act, Warehouse Worker Protection Act, arbitration limitations, etc.*





“Whole of Government” Approach to Promoting Unionization

- Task Force on Worker Organizing and Empowerment
- Interagency cooperation (NLRB/OSHA, NLRB/FTC, DOL/FTC, DOL/EEOC)
- FTC (noncompetes, gig workers, worker classification)
- NLRB
- DOL
 - Overtime
 - Independent Contractor
 - Davis-Bacon
 - OSHA (walkaround reg, injury/illness reporting)
- CMS, CFPB, DOE, EPA
- Pension funds neutrality
- “Good Jobs” Executive Order



Political Appointments

National Labor Relations Board

- McFerran confirmation = Democratic majority through August 2026.
- December 11, 2024: Senate **rejects nomination**, 49-50
- Republican takeover on the way
- Avoids Constitutional fight (for now)



CHAIR
Lauren McFerran
(December 16, 2024)

National Labor Relations Board

- Case Flurry
- ~~Joint Employer Standard~~
- Ambush elections return
- Card check organizing (*Cemex*)
- Handbook rules (*Stericycle*)
- Confidentiality & non-disparagement (*McLaren*)
- Non-compete agreements under attack!
- Broadening the scope of protected concerted activity
- Expanded remedies
- Employer Speech!
- NLRB structure unconstitutional?



Department of Labor

- Independent contractor
- ~~Overtime~~



DATE	STANDARD SALARY LEVEL	HIGHLY COMPENSATED EMPLOYEE TOTAL ANNUAL COMPENSATION THRESHOLD
Before July 1, 2024	\$684 per week (equivalent to \$35,568 per year)	\$107,432 per year, including at least \$684 per week paid on a salary or fee basis.
July 1, 2024	\$844 per week (equivalent to \$43,888 per year)	\$132,964 per year, including at least \$844 per week paid on a salary or fee basis.
January 1, 2025	\$1,128 per week (equivalent to \$58,656 per year)	\$151,164 per year, including at least \$1,128 per week paid on a salary or fee basis.
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

Department of Labor - OSHA

- Assistant Secretary?
- Walkaround regulation
- Heat proposal



Department of Labor

- OFCCP
 - Combine with EEOC?
 - Religious carve-out
 - More transparency?
 - DEI “attack dog”?
- Return of joint employer and independent contractor rules?
- Compliance assistance
 - Opinion letters
 - PAID (Payroll Audit Independent Determination) Program?

Department of Labor – EBSA; HHS

- Association Health Plans
- 1557 (gender affirming care mandate)
- Mental health parity
- Environmental, Social and Governance (ESG) investing
- Fiduciary rule - re-written or eliminated

Equal Employment Opportunity Commission

- General Counsel Karla Gilbride?
- Lucas: a chair without votes
- ~~Pay data reporting~~
- DEI?
- Religious accommodation
- PWFA
- Sexual harassment guidance?



Commissioner
Andrea Lucas (R)

FTC and Noncompete Agreements

- FTC Noncompete Regulation: guaranteed reversal? Maybe not.
 - Vance: *“I look at Lina Kahn as one of the few people in the Biden administration that I actually think is doing a pretty good job and that sort of sets me apart from most of my Republican colleagues.”*
 - Bachman, Justin. *“JD Vance’s regulatory romance with the Biden FTC.”* LEGALDIVE (August 5, 2024)
- Republican voices opposing non-competes (e.g., Gaetz and Rubio)

U.S. Supreme Court *Loper Bright* Decision

- No more deference to agency interpretations
- Intended to rein in federal agency rulemaking and force Congress to be more specific
- Federal circuit patchwork?
- Trump administration still likely to pursue aggressive rulemaking

Trump Employment Based Immigration

- Scaling back, limiting, restrictions on:
 - DACA
 - TPS
 - Optional Practical Training for STEM graduates
 - National Interest Waivers

Trump Employment Based Immigration

- H-1B Wage Rule
- More RFEs
- Elimination of H-4 EAD
- Travel = abandonment of advance parole application for H-1B, L-1
- Resuscitate memoranda that were rescinded, regs that were overturned or not completed



- No premium processing for H-1B
- I-9 Audits; workplace raids
- No deference for prior approvals
- Scrutiny of H-1B third party site location
- More immediate and outright denials
- No more “B in lieu of H”

Trump Employment Based Immigration

- In addition to notice-and-comment regulations, use of personnel decisions, guidance, memos, changes to Foreign Affairs Manual, etc., to slow down process and issue denials
- State Department
 - Stricter processes at U.S. consulates
- USCIS
 - From service provider to enforcement agency

Thank you!

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