

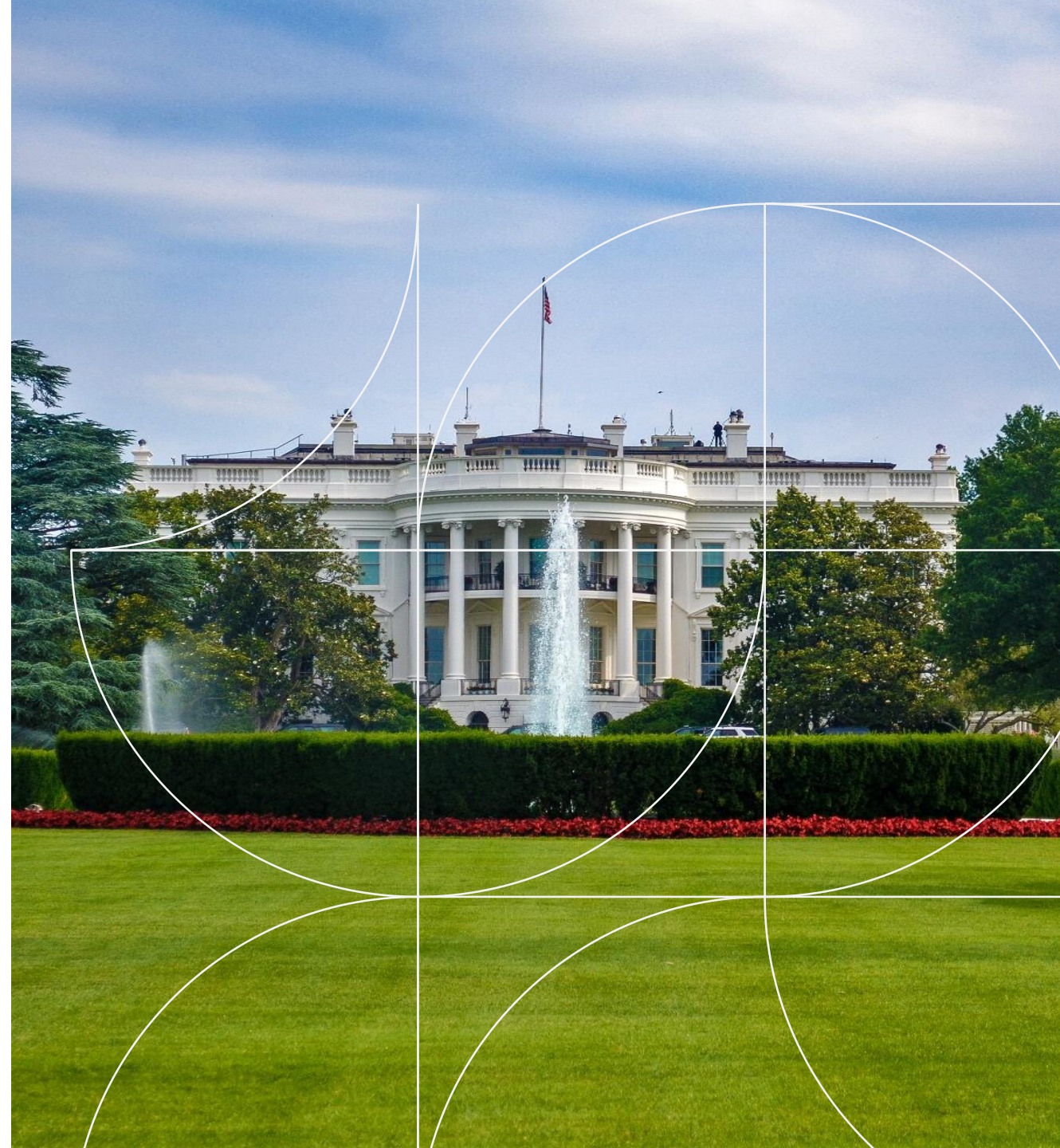


2020 US Election: What to Expect in Labor & Employment from the Biden-Harris Administration

Friday, December 4, 2020

Seyfarth Shaw LLP

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Speakers



Laura Maechtlen
SAN FRANCISCO



Leon Rodriguez
WASHINGTON, DC



Brian Stolzenbach
CHICAGO



Camille Olson
CHICAGO



Lawrence Lorber
WASHINGTON, DC



Scott Mallery
SACRAMENTO



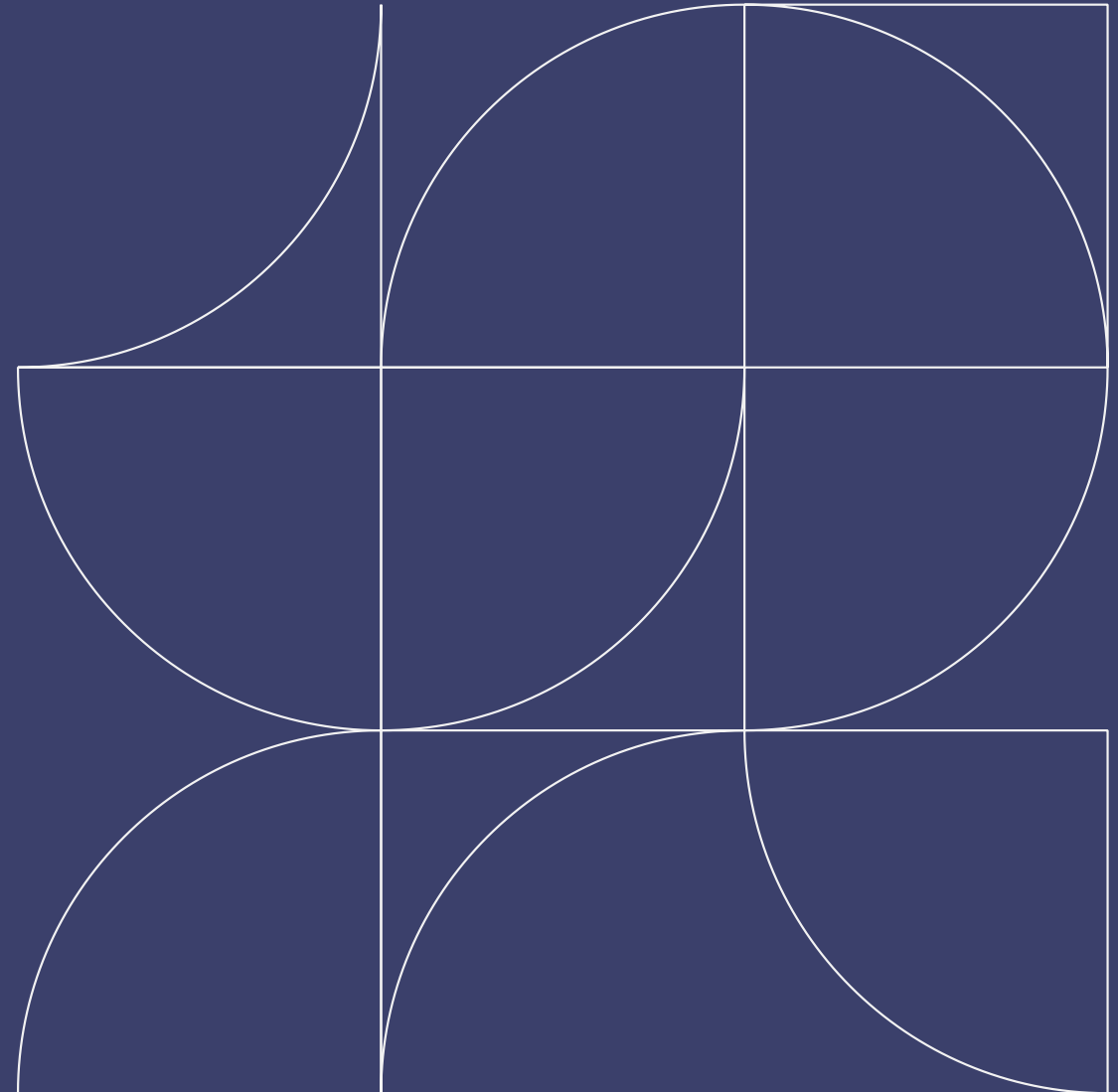
Scott Hecker
WASHINGTON, DC

Agenda

- 01** Personnel is Policy
- 02** EEO / EEOC / OFCCP
- 03** National Labor Relations Board/Labor Management-Issues
- 04** OSHA and Wage and Hour Division Enforcement
- 05** FLSA
- 06** Affordable Care Act
- 07** Immigration

Personnel is Policy

- **Transition teams**
- **Anticipated appointments**



Department of Labor

The Department of Labor team will also review the Equal Employment Opportunity Commission, the Federal Mine Safety and Health Review Commission, the Pension Benefit Guaranty Corporation, the Federal Labor Relations Authority, the National Mediation Board, the Federal Mediation and Conciliation Services, the Railroad Retirement Board, and the National Labor Relations Board.



Chris Lu, Team Lead	FiscalNote	Volunteer
Jennifer Abruzzo	Communications Workers of America	Volunteer
Esmeralda Aguilar	Sherman Dunn, P.C.	Volunteer
Mary Beech	Northeastern University	Volunteer
David Bennett	National Energy Management Institute Committee	Volunteer
Patricia Bory	University of Maryland, College Park	Volunteer
Dora Chen	Service Employees International Union	Volunteer
Jessica Chu	Amalgamated Transit Union International	Volunteer
Erika Dinkel-Smith	Biden for President	Transition – PT Fund, Inc.
Michele Evermore	National Employment Law Project	Volunteer
Jocelyn Frye	Center for American Progress	Volunteer
Tanya Goldman	Center for Law and Social Policy	Volunteer

Viv Graubard	New America	Volunteer
Deborah Greenfield	Self-employed	Volunteer
Seth Harris	Self-employed	Volunteer
Micheal Hazard	United Association	Volunteer
Nadia Marin-Molina	National Day Laborer Organizing Network (NDLON)	Volunteer
Patricia Moscoso	State of California	Volunteer
Seema Nanda	Self-employed	Volunteer
Raj Nayak	Self-employed	Volunteer
Shaun O'Brien	American Federation of State, County and Municipal Employees	Volunteer
Josh Orton	United States Senate, Office of Senator Bernie Sanders	Transition – PT Fund, Inc.
Doug Parker	State of California, Department of Industrial Relations	Volunteer
Lynn Rhinehart	Self-employed	Volunteer
Ann Rosenthal	Self-employed	Volunteer

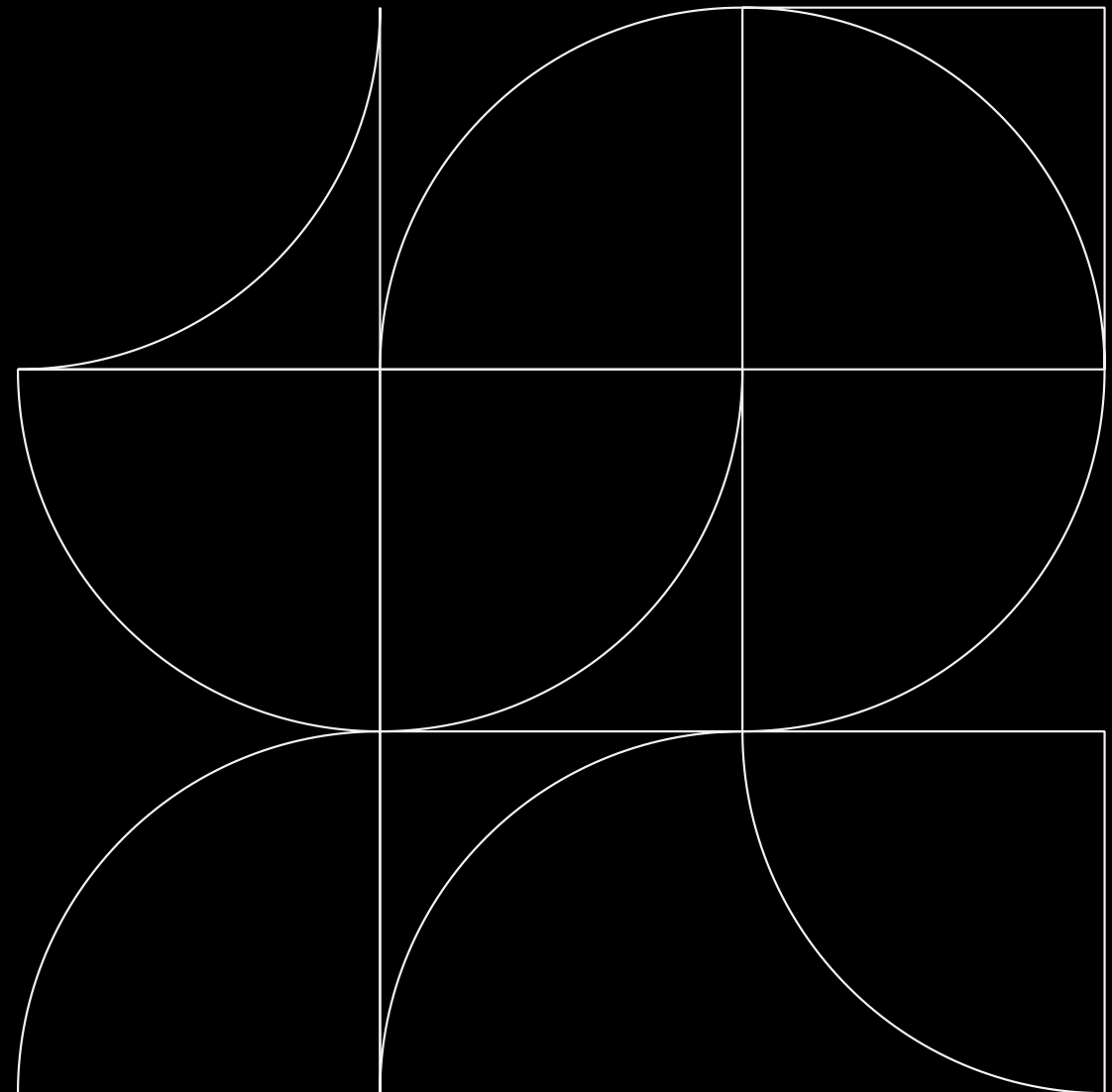
Lynn Rhinehart	Self-employed	Volunteer
Ann Rosenthal	Self-employed	Volunteer
Robin Runge	The Solidarity Center	Volunteer
Eric Seleznow	Jobs for the Future, Inc.	Volunteer
Patricia Smith	National Employment Law Project	Volunteer
Jenny Yang	Urban Institute	Volunteer

Possible DOL Secretary Nominees (Politico, November 7)

- Rep. Andy Levin (D-Mich.)
- Julie Su - California Labor Secretary a former union organizer who also has Labor Department experience
- “Other possibilities”
 - Tom Perez,
 - Bill Springs, AFL-CIO Chief
 - Bernie Sanders
 - Other possibilities for



EEO
EEOC
OFCCP



What to Expect

- Increase in Religious Discrimination Enforcement Cases
 - EEOC Guidance
 - OFCCP Guidance
 - *Archdiocese of Brooklyn v. Cuomo*
- Legislation
 - POWADA (Protect Older Workers Against Discrimination Act)
 - PWFA (Pregnant Workers Fairness Act)
 - Equality Act
 - PFA (Paycheck Fairness Act)
- Focus on Compensation
 - Definition of Discrimination- Oracle Case Settled
 - Component 2 - State Initiatives-
- Use of Procurement to deliver L & E initiatives



What's Next at the EEOC FY 2020-2021



Janet Dhillon
Chair (R)

Term Expires
July 2022



Charlotte A. Burrows
Commissioner (D)

Term Expires
July 2023



Keith E. Sonderling
Vice Chair (R)

Term Expires
July 2024



Andrea R. Lucas
Commissioner (R)

Term Expires
July 2025



Jocelyn Samuels
Commissioner (D)

Term Expires
July 2021

Status of EEOC Guidance Proposals



- Conciliation
 - Religious Discrimination
 - Harassment
 - Wellness
 - Compensation
-
- Immediate and longer term litigation emphasis

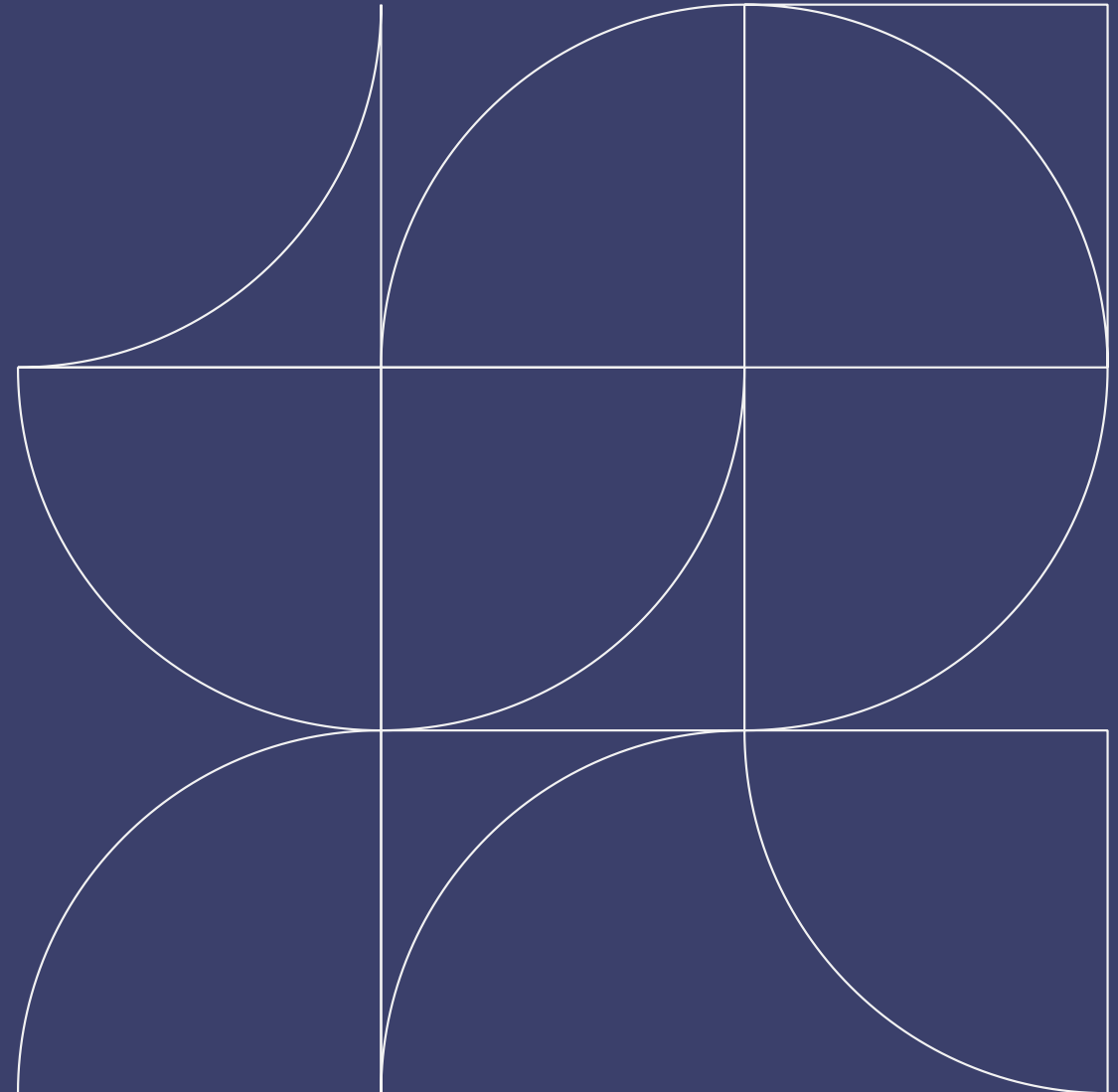
OFCCP



- New Director
- New Secretary
- Shift in emphasis and audit strategy
- Status of Diversity EO
- MOU
 - Role of OFCCP
 - EEOC
 - DOJ

National Labor Relations Board

Labor Management Issues



National Labor Relations Board: New Appointees

Two New Board Members

- Open seat (term expiring August 2023)
- Member Emanuel's term expiring **August 2021**

New General Counsel

- Peter Robb's term expiring **November 2021**

NLRB: Reversal of Key Decisions by Trump Board

Non-Union Employers*

- Strict scrutiny of workplace policies
- Right to use email for union activity
- Leeway for offensive statements
- Return to micro-units in organizing

Unionized Employers

- Requirement to bargain over discipline and discharge after union election
- Increased hostility to defense that union has no right to bargain over changes
- No inherent ability to stop dues check-off upon contract expiration

** would apply to unionized employers, too*

Legislation and Rulemaking

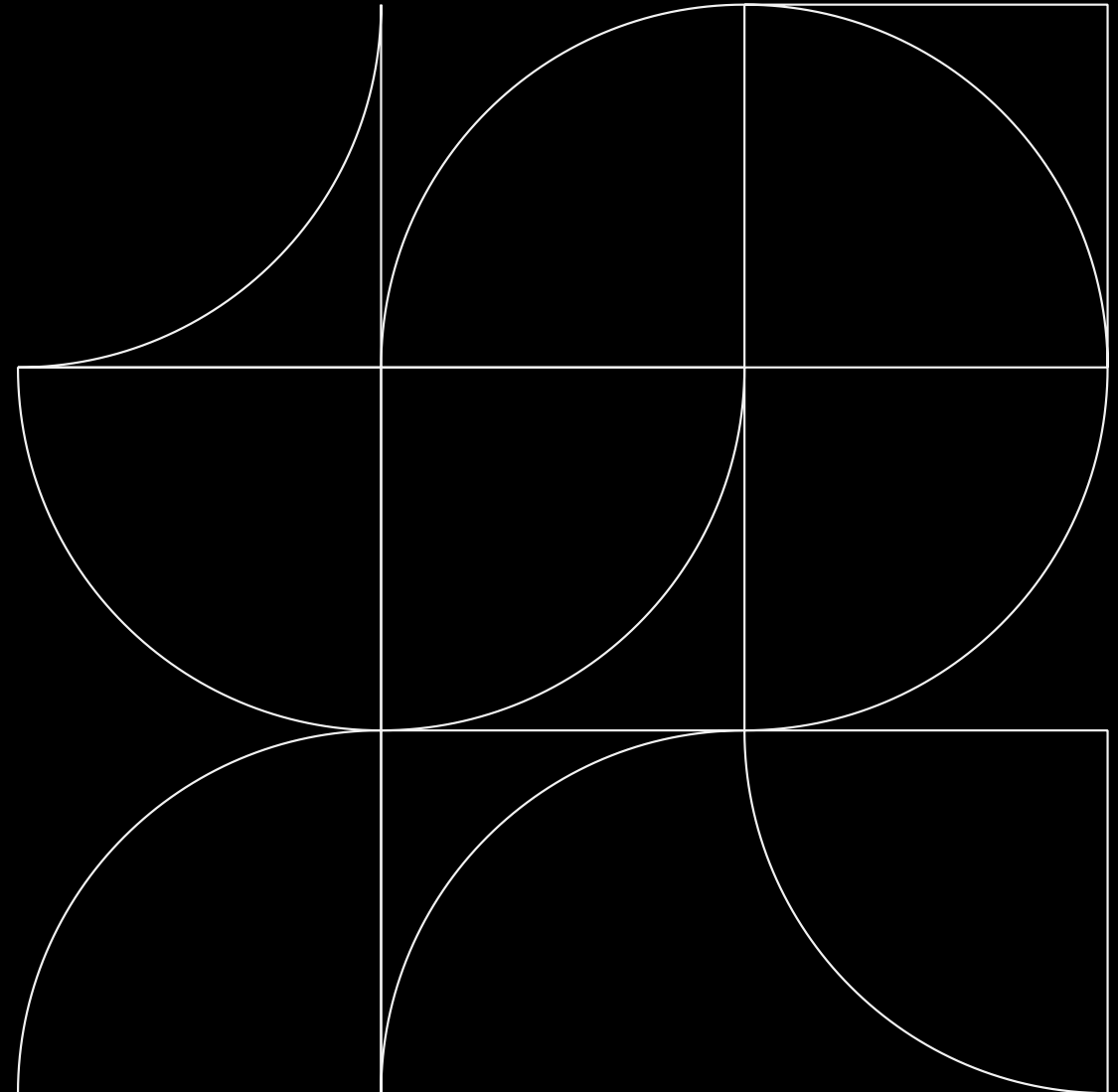
Legislative Priorities

- Multiemployer Pension Fund Reform
- PRO Act

Possible Rulemaking Priorities

- Joint Employer
- Quickie Elections

OSHA and Wage and Hour Division Enforcement



OSHA

- No Assistant Secretary Throughout Trump Administration
 - Director of Enforcement also Empty for an Extended Period
- COVID-19 Emergency Standard
- Increased Recordkeeping / Records Used in Enforcement
- More Egregious Cases
- Policy
 - General Duty Clause
 - Heat Stress
 - Workplace Violence

“Every OSHA press release achieves as much compliance as 210 inspections.”

Dr. David Michaels, Former OSHA Assistant Secretary
October 23, 2020 Tweet

WHD

- New SES's with Regional Voices
- Data-Driven Initiatives and Strategic Enforcement Will Remain
 - Relaxed Case Selection Criteria?
- Publicity

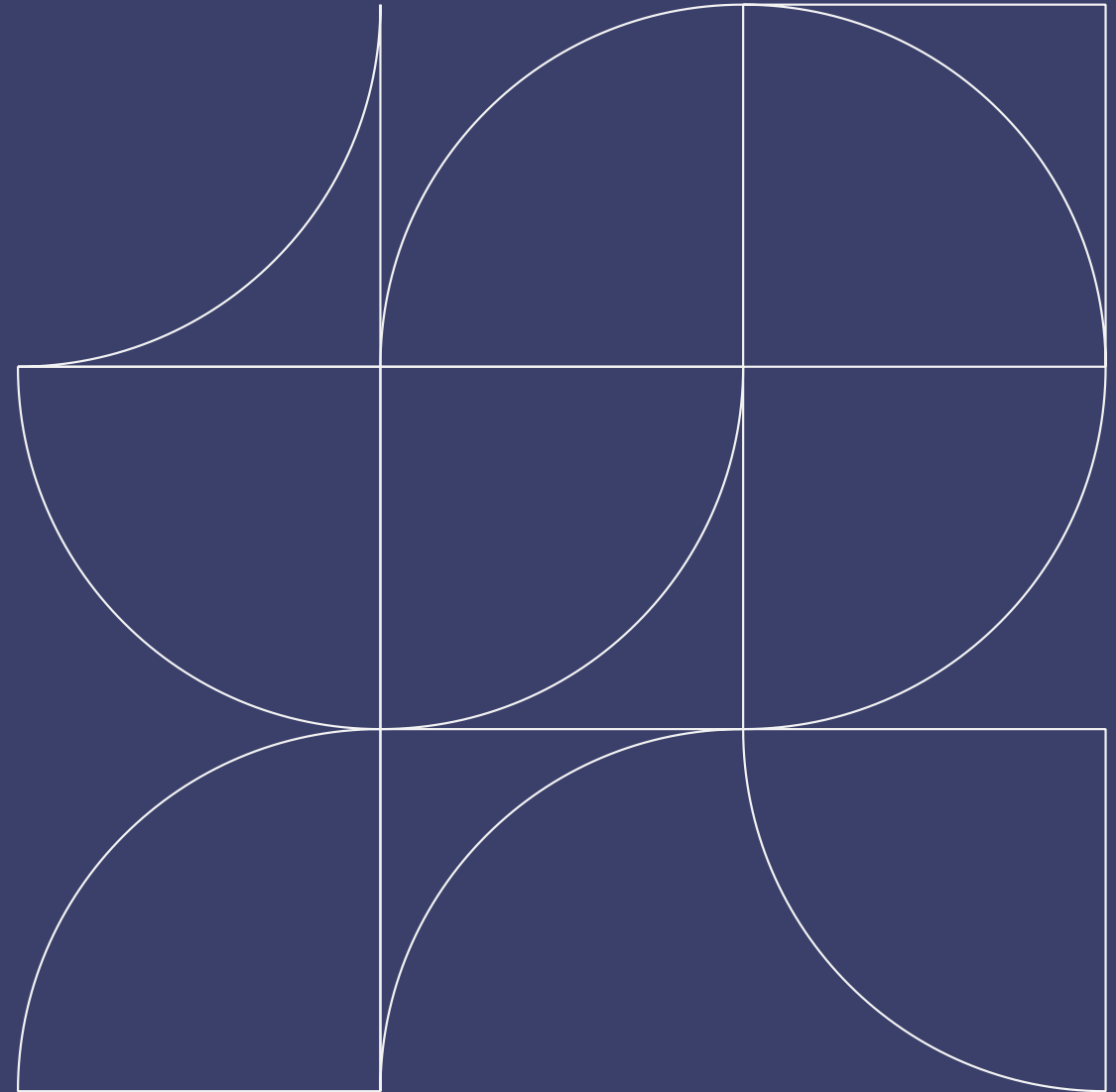
“[E]nforcement procedures must send the consistent message that persistent, egregious, and workplace-wide infractions of the law will be met with significant consequences.”

Dr. David Weil, Former WHD Administrator
Improving Working Conditions Through Strategic Enforcement

Bad Actors Beware

- Under **Trump**:
 - Business-friendly, **compliance assistance**.
 - Use data; numbers-driven **case selection**.
 - Limit press** releases “shaming” employers.
- Under **Biden**:
 - More “bad actors,” **increased enforcement**.
 - Use data; freer, region-driven **targeting**.
 - Publicity as deterrence**.

FLSA



Potential Secretary of Labor Candidates



Marty Walsh

Mayor of
Boston



Julie Su

Secretary of
the California
Labor and
Workforce
Development
Agency



**Sen. Bernie
Sanders**

Vermont
Independent
Senator



Rep. Andy Levin

Michigan
Democratic
Congressman



Sharon Block

Director of
Labor and
Worklife Program
at Harvard Law
School



Seth Harris

Former Deputy
Labor Secretary

The Continued Viability of 3 Key Trump Administration Rules

Independent Contractor NPRM

- Two core factors -- **control** and **opportunity for profit or loss** -- and three secondary factors
- Comment Period Ended October 26, 2020
- Final Rule forthcoming
- Impact on Gig Economy and State Enforcement Actions

Joint Employer Regulation

- New interpretation is **right to control** test
- Enjoined by S.D.N.Y. because departs from **economic dependence**
- What will other courts do?

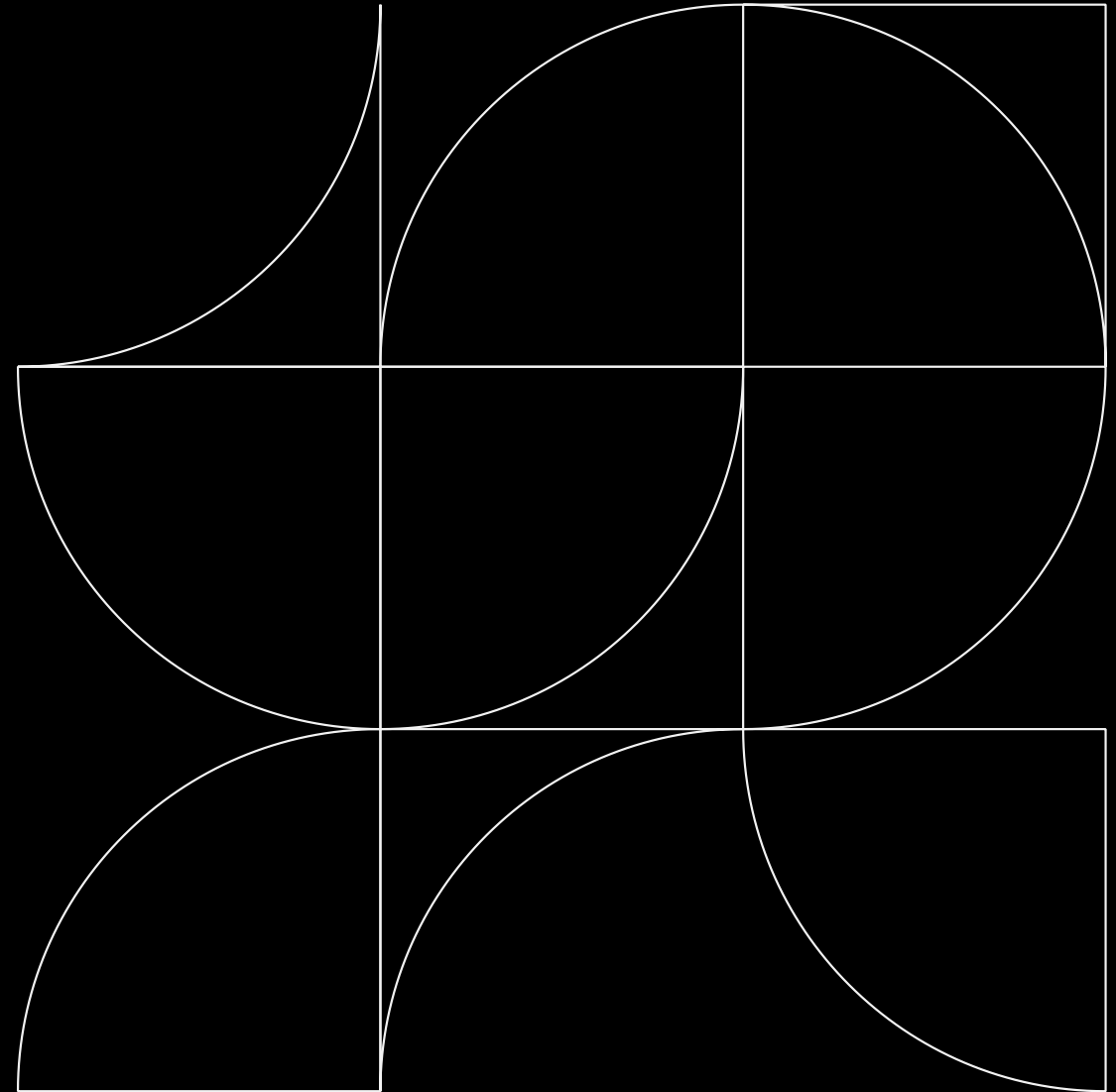
Salary Thresholds for Exempt Status

- Increase in minimum salary from \$23,660 to **\$35,668**
 - But not \$47,476 and no annual increase
- No change to duties test
- Legislative rule not challenged in courts

Biden Administration Priorities

- Federal minimum wage increase
- Broadened definition of joint employer
- Broadened definition of independent contractor
- Increased enforcement and regulatory action by DOL

Affordable Care Act



What Changes Might A Biden Administration Shepard?

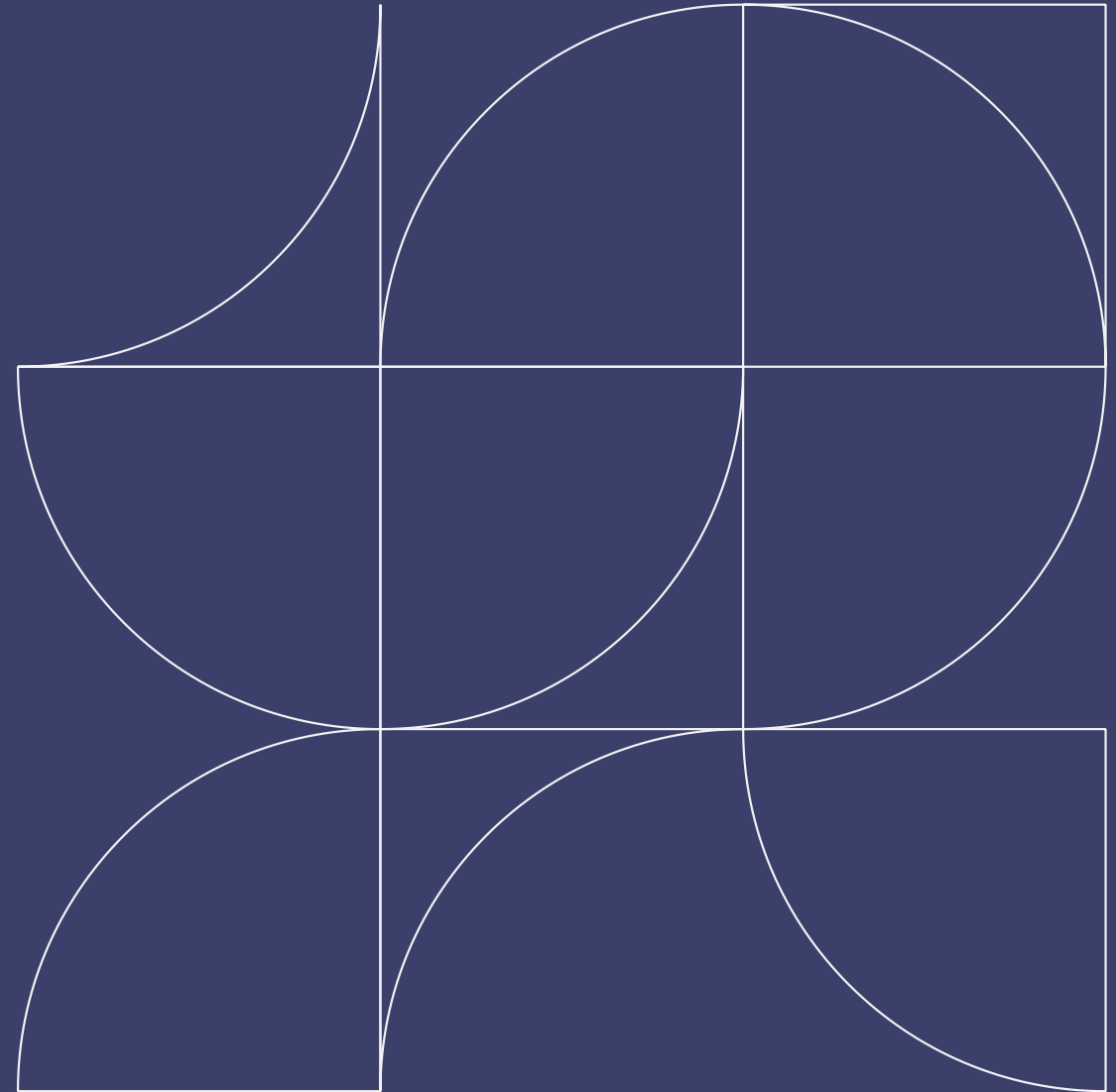
“Even with a Republican Senate, there are things that would be implemented under a Biden administration that would expand on or at least make the Affordable Care Act a little more effective in how it's been running.”

Marianne Udow-Phillips, Director of the Center for Health and Research Transformation at the University of Michigan.

Legislative v. Executive Options

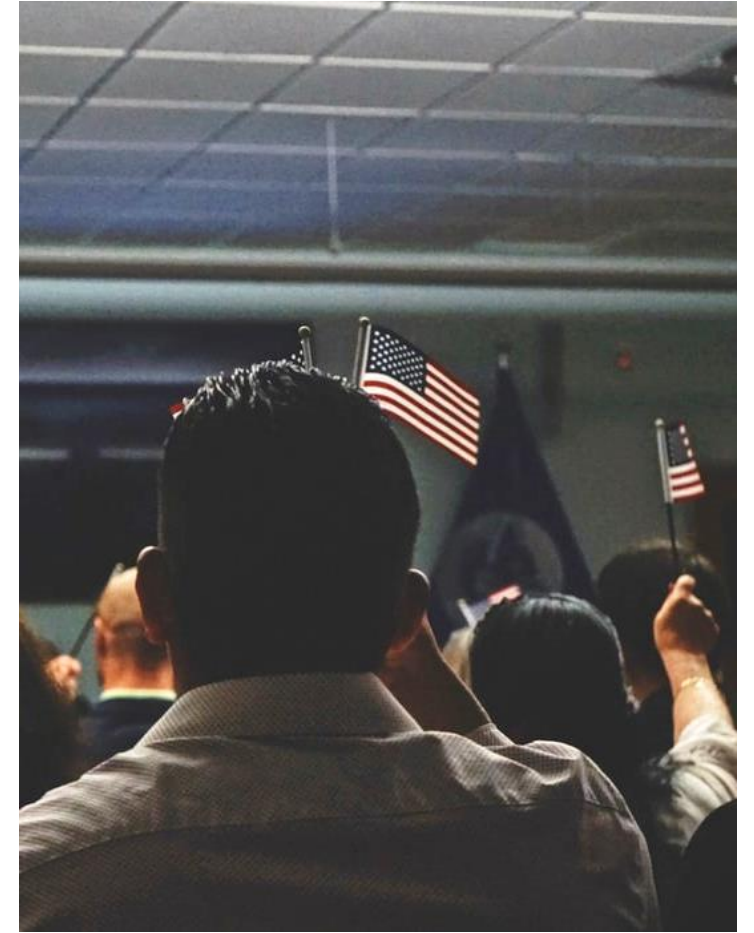
- The future of the ACA hinges on Georgia
- If the Senate stays red, what can be accomplished through EO?
- If the Senate turns blue, expect legislation designed to increase coverage.
- Biggest Potential Policy Changes:
 - Section 1332 waiver guidance
 - Increase subsidies and tax credits through elimination of the so-called “family glitch”
 - Additional funding for for navigators, marketing, outreach, and state-based reinsurance or subsidy programs.
 - Public option similar to Medicare for all ages
 - Reinstating individual mandate penalty

Immigration



Immigration

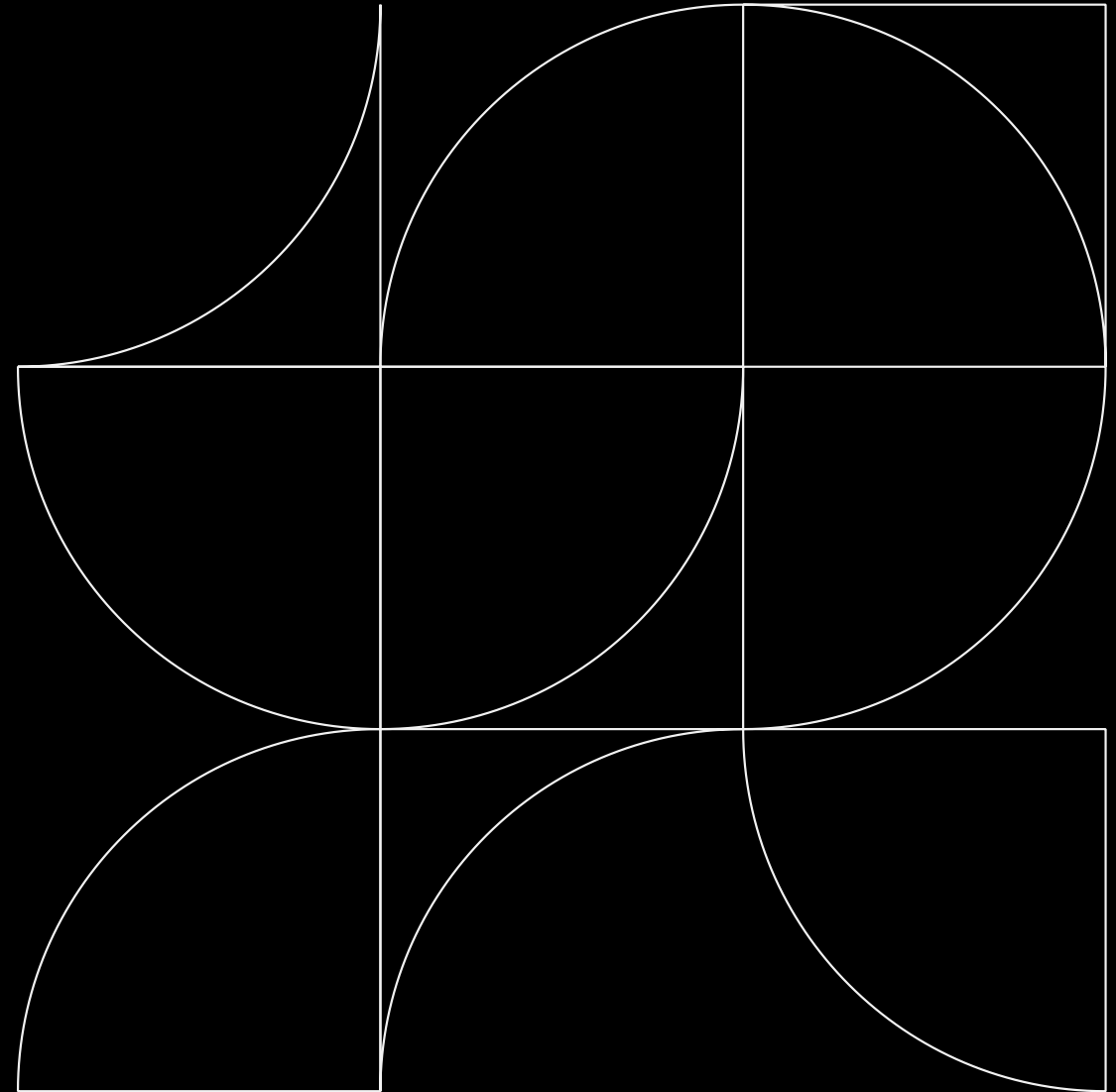
- What will happen to?
 - Travel restrictions
 - Recently proposed Regulations
 - Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media
 - Strengthening the H-1B Classification
 - Modification of Registration Requirement for Petitioners Seeking To File Cap- Subject H-1B Petitions
 - Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States
 - Other Guidance and Adjudication Practices



Expected Biden-Harris Administration Priorities

- DACA Restoration
- Refugee and Asylum reform
- Border Security/Central America migration
- Where will business immigration fit?

Questions?





Upcoming Webinars:

2020 US Election: How Will Immigration Change under the Biden-Harris Administration?

Monday, December 7

<https://www.seyfarth.com/news-insights/2020-us-election-how-will-immigration-change-under-the-biden-harris-administration.html>

2020: The Year that Was – And What's Next?

Tuesday, December 8

<https://www.seyfarth.com/news-insights/2020-the-year-that-was-and-whats-next.html>



Additional Resources :

2020 US Election Trend

<https://www.seyfarth.com/trends/2020-us-election.html>

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COVID-19 Resource Center

<https://www.seyfarth.com/covid-19-resource-center.html>

Thank You

