Alert

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COZEN O'CONNOR

An Election Agenda for Management if Biden Becomes President

Although the election will be the buzz in every workplace for at least the rest of this week, the prospect of a Biden administration has prompted companies and executives to begin planning for significant changes affecting a host of executive employment issues. There are many steps that can be taken now in anticipation of a likely increase in individual and corporate tax rates, and changes to capital gains tax, taxation of retirement savings, estate tax, and payroll taxes offer opportunities for significant savings for actions taken or changes to be implemented before December 31. To that end, executives may approach the board or compensation committee requesting accelerated payment of 2020 bonuses or incentive compensation, payouts of previously deferred compensation, institution of additional deferral options in 2021, and other changes to company retirement, equity, and compensation arrangements.

The continued pressure for transparency, disclosure requirements, and influence exerted by shareholders as well as the potential public perception of executives promoting their self-interest during a pandemic, may drive compensation committees to be more hesitant about taking action to address these issues. Biden's tax proposal could incent executives to exercise options and/or sell company stock held in excess of share ownership requirements to take advantage of the current tax rate on long-term capital gains, thereby affecting the level of executive ownership of company stock and potentially creating investor concerns. Thorough analysis, thoughtful consideration, and documentation of decisions to incentivize and retain management teams is essential at a time when their dedication and performance is more important than ever.

Wealth and estate planning may also require pre-year-end action such as utilizing gift and estate tax exemptions or conversion of a traditional IRA to a Roth IRA. A conversion of one's traditional IRA is a taxable event resulting in the individual paying ordinary income taxes on the IRA in 2020. However, an individual will not need to pay income taxes on future distributions at higher tax rates. Prior to 2020, deductions on cash donations to public charities were limited to 60 percent of an individual's adjusted gross income. The CARES Act removed this limitation so individuals can receive a 100 percent deduction for gifts to public charities in 2020.

Anticipated government initiatives in other areas, dependent in part on which party controls the Senate, could upend current arrangements ranging from non-compete agreements to new diversity and inclusion initiatives. A Biden administration is likely to quickly pass a host of policy initiatives that would significantly benefit organized labor and impose additional mandates on employers. Several of these proposals are likely to have a direct impact on corporate executives including holding corporate executives personally liable for interfering with union organizing efforts. Biden's commitment to diversity and inclusion initiatives includes a mandate that employers publicize the diversity composition of both their senior leadership and overall workforce. Such publicity is expected to create additional pressure on employers to restructure the way that they chose senior leadership.

Except for states such as California, which bans the practice, most senior level executives are covered by noncompetition agreements. Biden proposed limiting non-compete agreements to those that are necessary to protect trade secrets. While Republican retention of control in the Senate could cripple Biden's legislative agenda, there is much that a new administration can accomplish through regulatory measures and enforcement proceedings. Environmental, climate change, and worker safety programs may become the likely flashpoints, especially in companies that do business with the federal government.

Our team has written an expanded analysis of this issues which was published by Law360 and can be viewed here.

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