



AMERICAN BENEFITS
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NEWS RELEASE

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Council President James A. Klein's memo to members: policy priorities will need to overcome partisan conflict

WASHINGTON, D.C. — American Benefits Council President James A. Klein sent the following memo to more than 6,800 individuals from our 394 member companies, representing the entire spectrum of the private employee benefits community.

Editors, reporters and producers seeking additional post-election insights from Klein should contact Jason Hammersla, Council senior director of communications, at jhammersla@abcstaff.org to arrange an interview.

To: American Benefits Council Members
From: Jim Klein
Re: Election Reflection

A great deal has already been said and much more will be in the days and weeks ahead. But in the interest of saying something new, I want to share with you a few political and policy observations that I think have gotten little or no attention.

POLITICAL OBSERVATIONS

- We have heard for months that Donald Trump's path to 270 electoral votes was much more challenging than Secretary Hillary Clinton's. However, the reason for that was not simply ongoing polling. It was also the historical base of each party. In every presidential election between 1992 and 2012, there were 18 states (plus the District of Columbia) that voted for the Democrat – representing 242 electoral votes. By contrast, there were 13 states that voted for the Republican each time,

representing just 102 electoral votes. Clinton started out with a base that put her within easy striking distance.

- We have heard for months that the Democrats needed to pick up just five seats (four, if Clinton won) to gain the majority in the Senate. What has been less frequently noted is that mathematically the Democrats were in an excellent position to do so. The Republicans were defending 24 seats and the Democrats were defending only 10 seats. Seen another way, the Democrats had nearly 2.5 times as many opportunities to pick up a seat from the Republicans than the other way around. The fact that Republicans have lost only two seats is remarkable.
- Republicans and Democrats alike thought that Trump's high unpopularity ratings would be a drag on so-called "down-ticket" races. Trump supporters will note that rather than being a drag, his coattails substantially mitigated Republican losses in both the House and Senate. And they will cite that as a reason that Republican members of Congress need to fall into line to support him. By contrast, Trump's critics will assert that so many voters expected Clinton to win, that they were more inclined to vote for Republican Senate and House candidates as a buffer against a Clinton administration given her high unpopularity. Undoubtedly there is an element of truth in both points of view.
- Typically, following a presidential election the losing party performs a *post mortem* – with some members of the party saying that they should have moved (right or left) to shore up their base. Others argue that they should have moved to the center to gain support from independents. This is a first time I recall where the *winning* party will engage in serious soul-searching. Is the Republican party still largely a party of business interests and social conservatives? How many of the millions of people who voted for Trump don't consider themselves Republicans but, rather, were attracted by his message – and, therefore, does the party, at its peril, assume it has the support of these individuals?
- There is a critical distinction between being the majority party in Congress and "controlling" Congress. Just ask *former* Speaker John Boehner. These past two years, despite the largest Republican majority in the House since the 1920s, the GOP leadership had an extremely challenging time moving its agenda. Presumably, that problem is somewhat lessened because no longer will the point of contention for the rank-and-file GOP members be their leadership's willingness to forge some compromises with a Democratic president. In the Senate, for most matters, a 60 vote "supermajority" is needed to overcome a filibuster delay tactic on the part of the minority party. The Republicans will not have 60 Senate seats and Senate Democrats will be in no mood to compromise.

With a Republican in the White House, Senate Democrats will now be the principal voice of the "loyal opposition" and they will seek every opportunity to thwart the president and the Republican-led Congress.

- I would not be at all surprised if Speaker of the House Paul Ryan (R-WI) decides not to seek to retain the speakership. Distancing himself from Donald Trump gave cover to those House GOP members who wanted to do the same. In doing so, he also angered many members of his caucus and re-election is no sure thing. He only very reluctantly accepted the Speakership last year. While right now there is no obvious successor – which could mean he will seek to retain the job– he might prefer to reclaim the chairmanship of the Ways & Means Committee in order to shepherd through Congress comprehensive tax reform, which remains his top policy priority.
- Congress will obviously have a large say in shaping policy issues. This is especially the case given that Trump has not offered specificity in many policy areas. But, our Constitution vests the president with a great deal more authority on matters of foreign policy and national security. The president could find himself devoting much more time to foreign and security affairs than he had planned. The structure of our government system gives him a freer hand to do so there than in the domestic policy realm.
- Trump's victory speech and Clinton's concession speech both struck the right tone. Both were gracious and humble. It gives reason for faith in our incredible democratic system and our traditions – much needed after such a divisive election. But, at the risk of being a contrarian, one aspect of Trump's comments struck me as worth watching. In traditional fashion, he opened his remarks by paying tribute to his opponent, saying that the country "owes her a major debt of gratitude for her service to our country." During the campaign he continually remarked that she had accomplished nothing in 30 years of public life and he promised to appoint a special prosecutor to help send her to prison. In the eyes of his supporters – many of whom chanted "lock her up" last night even as their candidate was heading to victory – will Trump be viewed as the same kind of politician that he so successfully ran against (i.e. a person who says one thing on the campaign trail and another upon taking office)? While much of the country wants him to change his tone, not everyone will be pleased if he does.

EMPLOYEE BENEFITS POLICY OBSERVATIONS

- President-elect Trump could issue Executive Orders to set the early agenda of his presidency and will likely rescind many Executive Orders signed by President

Obama— perhaps on his first day in office. Any that have a connection to benefits (e.g. the overtime rule) are likely to be included. It is common that when the White House changes hands from one party to another, the incoming administration seeks to impose a moratorium on regulations that have not yet gone into effect. Even for those that are already in effect, the new administration may decide to hold off on active enforcement until they have reviewed them. This could then lead to new agency regulatory rule-making to revise or completely repeal the rules. There are a plethora of such things in the benefits arena (e.g. the fiduciary rule affecting retirement plans which does not go into effect until April 2017, many Affordable Care Act (ACA) rules (though most are now final), the paid sick leave rule for federal contractors, etc.). Of course, for many plan sponsors, plan design and operational changes have already been made and it may be more trouble than it is worth to reverse those decisions.

- Repeal of the ACA is a GOP priority. Clearly, most Senate Democrats would try to block such a move. As noted above, in general a supermajority of 60 votes is needed to overcome a filibuster and achieve anything controversial, and the Republicans don't have that many seats. A notable exception to the 60-vote rule is to use the budget reconciliation process. Budget bills cannot be filibustered, so a simple majority is sufficient. Indeed, the Democratically-controlled Senate used that process to help enact the ACA. There is every reason to believe a GOP-led Congress would use a budget measure as the vehicle for repeal, knowing that the Republican President would sign it. It is important to remember that Congress must first pass a budget resolution that contains a reconciliation instruction in order to utilize the budget reconciliation process.
- There are complications to the budget reconciliation strategy. Provisions that do *not* have revenue implications may be struck from a budget reconciliation bill. In effect, this means that the most likely ACA-repeal provisions that could be added to a budget bill are those related to the individual and employer mandates, the premium tax subsidies, and various taxes (including the so-called "Cadillac Tax" on high-cost employer-sponsored coverage. Non-revenue measures such as those related to repealing insurance market reforms, age rating, etc. are not likely to survive being added to a budget bill.
- There are at least two other complications. First, Republicans have effectively used against President Obama the promise that "if you like the coverage you have, you can keep it." With millions of Americans now getting coverage under the ACA, they will need to proceed with caution on repeal so as not to be accused of taking coverage away from those Americans who have coverage in the exchanges. Second, the GOP is not likely to "repeal" unless they have a concrete proposal to "replace" and Republicans have not reached an agreement

on what that should be. In any case, even Republicans dedicated to ACA repeal recognize the need for a reasonable transition period to a new system.

- For a number of years, I have felt that the good news on health policy is that we are having a national discussion about it. The bad news is that with regard to most aspects of health policy, it is terribly partisan. The scenario on retirement policy is the converse. The good news is that there are a number of retirement policy ideas that enjoy bipartisan support. The bad news is that there is no national retirement income policy against which to measure whether lawmakers are advancing or impeding a coherent vision. In the coming days, weeks and months we'll be addressing in much greater detail the retirement policy areas where there may be agreement and disagreement. One observation is that past positions strongly suggest that Republicans are more likely than Democrats to hasten the long-running transition from defined benefit to defined contribution plans.
 - Next year is likely to see a renewed effort to enact comprehensive tax reform. With employer-sponsored health and retirement benefits being the two largest tax expenditures in the federal budget, employee benefits will certainly be in the crosshairs. Ryan and the House GOP Health Care task force report issued in June echo a long-standing Republican position to limit the tax excludability of employer sponsored health benefits. Likewise, the comprehensive tax reform proposal developed two years ago by former Ways & Means Committee Chairman Dave Camp (R-MI) called for a number of specific proposals that would curtail retirement income savings in defined contribution plans. Those will get a fresh look as possible starting points for the retirement provisions of whatever tax reform initiative Congress and president seek to undertake.
 - Republicans have generally been strong defenders of ERISA preemption. But they are also oriented toward states' rights. We are likely to see both the executive and legislative branches inclined to give states more authority and to be the "laboratories of innovation."
 - It bears keeping in mind that not *all* of these things can be addressed quickly. It will take time for the new administration to gear up and fill key cabinet and other political positions. This will further shift some power to Congress to take the lead on some matters. There will be a battle over a Supreme Court nominee. We are in for tough partisan conflict. Initiatives will need to be prioritized.
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For more information or election analysis, or to arrange an interview with Klein, contact Jason Hammersla, Council senior director of communications, at jhammersla@abcstaff.org or by phone at 202-289-6700 (office) or (202) 422-4652 (cell).

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The American Benefits Council is the national trade association for companies concerned about federal legislation and regulations affecting all aspects of the employee benefits system. The Council's members represent the entire spectrum of the private employee benefits community and either sponsor directly or administer retirement and health plans covering more than 100 million Americans.