



# What We Know Now: Benefits and the 2020 Election

November 12, 2020

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# Health Benefits



# Today's Presenters



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# Agenda

**Election Update**

**U.S. Supreme Court ACA Case**

**Legislative and Regulatory Update**

**Gender Identity and Sexual Orientation**

**Transparency Rules**

**Mental Health Coverage and Health Plan Audits**

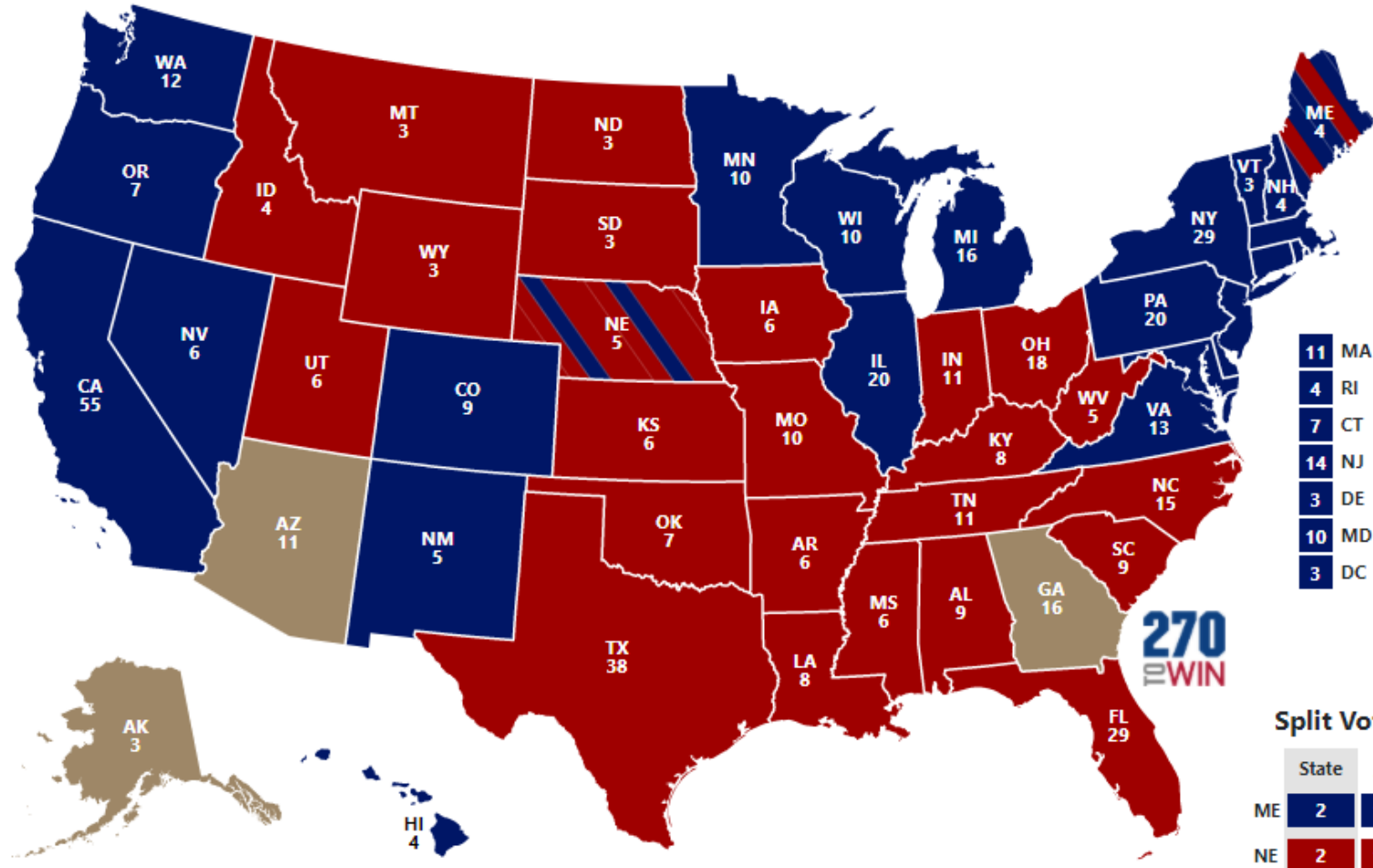
**Pandemic Response**





# Election Update

# Election Update



11	MA
4	RI
7	CT
14	NJ
3	DE
10	MD
3	DC

**Split Votes**

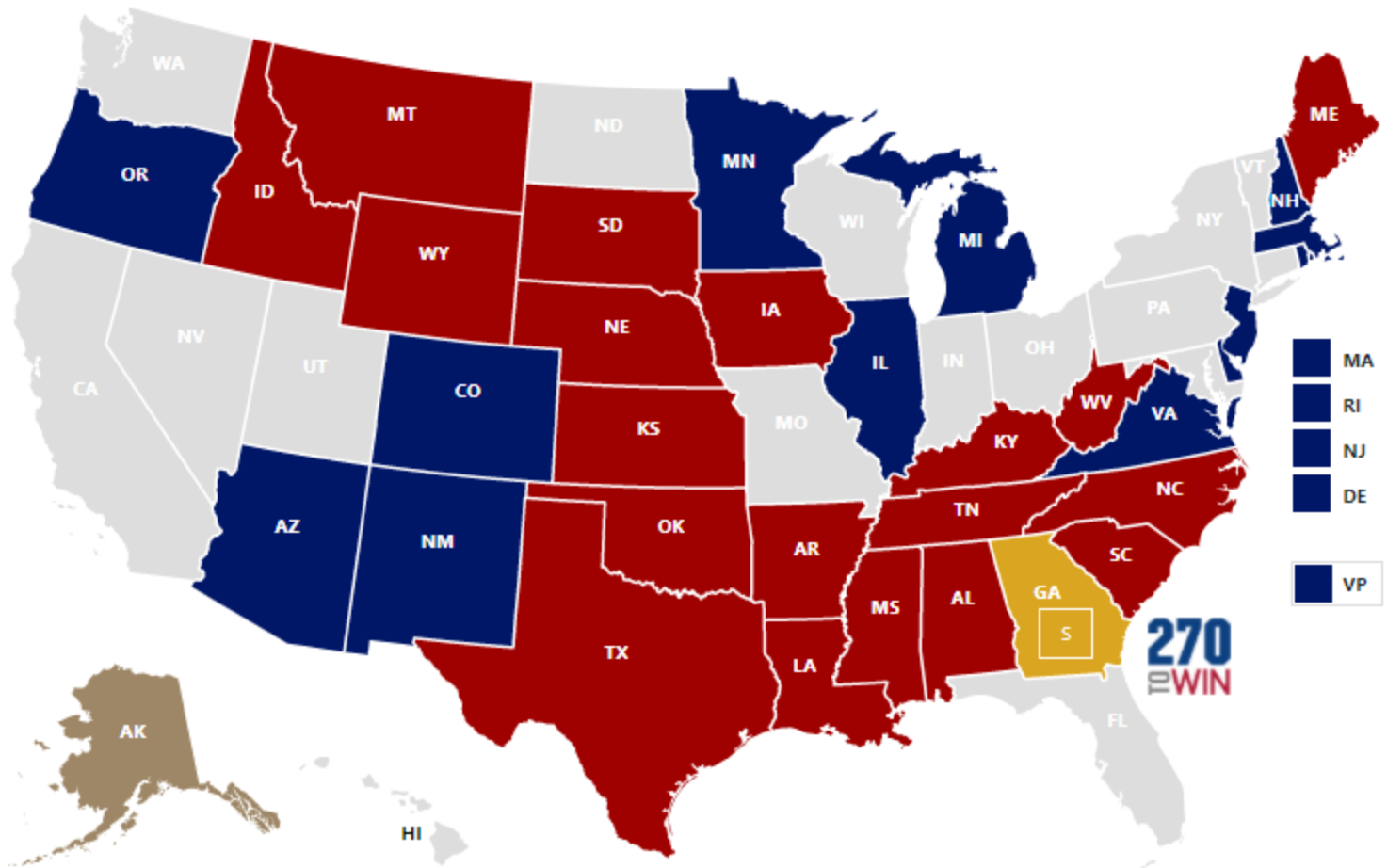
State	District		
	1	2	3
ME	1	1	?
NE	1	1	1

\* Source: <https://www.270towin.com>

# Election Update

Democrats 48

49 Republicans



## United States Senate Battle for Control

	Dem	Rep
<b>Current</b>	47	53
<b>No Election</b>	35	30
<b>Decided</b>	13	19
<b>Total (Live)</b>	48	49
<b>Remaining</b>	3	
Safe	0	0
Likely	0	0
Leaning	0	1
Toss-up	0	
Runoff	2	
<b>Forecast</b>	48	50

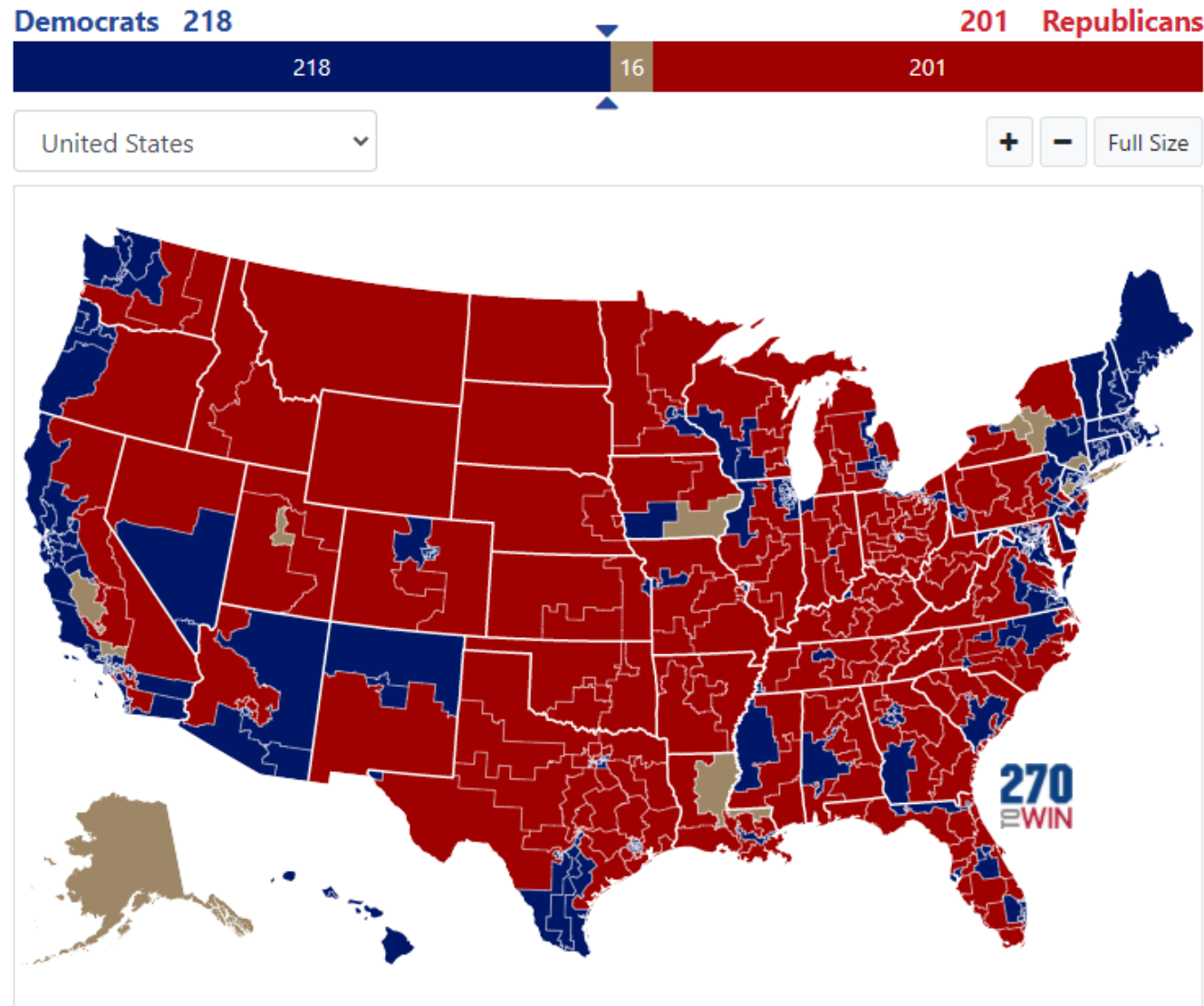
<b>Vice President</b>	1
<b>Total</b>	49 50

*Vice President breaks ties. Senate control goes to party with a total of 51 or more.*

\* Source: <https://www.270towin.com>



# Election Update



## United States House Battle for Control

	■	■
<b>Current*</b>	233	201
<b>No Election</b>	0	0
<b>Decided</b>	218	201
<b>Total (Live)</b>	218	201
<b>Remaining</b>	16	
Safe	2	1
Likely	1	0
Leaning	4	3
Toss-up	5	
<b>Forecast</b>	225	205

House control goes to party with a total of 218 or more.

\*Excludes one retiring Libertarian. Five vacancies counted as party of prior incumbent.



# U.S. Supreme Court ACA Case

# U.S. Supreme Court ACA Case

- *California v Texas* No 19-840 (U.S.)
- Fifth Circuit Court of Appeals found the individual mandate, with tax penalty of “zero”, could no longer be justified as an exercise of Congressional taxing power
- Remands to district court to take a “fine-tooth comb” through the ACA to determine what is and is not severable from individual mandate
- USSC granted petitions for *certiorari* March 2, 2020; heard oral argument on November 10, 2020





# Main Issues in California v Texas

1. Do the individual plaintiffs or the States have standing to bring the case to court in the first place?
2. Is the individual mandate (with its tax penalty reduced to zero) still constitutional?
3. If the individual mandate is unconstitutional, can it be “severed” from the rest of the ACA, leaving the rest of the ACA (or most of it) intact?

# What Happened During Oral Argument

- Lots of questions from the Justices about standing
- On the merits, it is unclear how the final votes will tally on constitutionality of the amended mandate
- Two conservative Justices (Chief Justice Roberts and Justice Kavanaugh) phrased questions that appear to support severability

# Supreme Court Outcomes

## Uphold the ACA in Full

Group health plan mandates, Employer Shared Responsibility Penalty and reporting, PCORI, Exchanges and Medicaid expansion remain intact

## Overtake the ACA

Would result in significant restructuring of health care system, individual insurance, Medicare innovations

## Sever the Individual Mandate

Severing the mandate would have no impact, but if other parts of the ACA are invalidated consequences could be severe





# Legislative and Regulatory Update

# Legislative Update

- Congress needs to finish appropriations bills for next fiscal year by September 30
  - Congress passed a bipartisan continuing resolution (CR) funding the government through December 11, 2020
- COVID-19 Stimulus package #4



# Biden Proposals to Expand Coverage

- Public Option
- Eliminate the 400% FPL cap on subsidy eligibility and lower the affordability percentage from 9.5% (indexed) to 8.5%
- Peg the subsidy to the Gold (80%) plan
- Change the “firewall” to permit employees to choose a subsidized Exchange plan even if they have access to employer-sponsored coverage—details unknown
- Medicare eligibility at age 60

With a divided Senate, legislative action may not be possible

# Legislative Initiatives

- Surprise Billing
- Prescription Drug Prices
- Tax Reform
- Paid Leave and Support for Caregivers



# Regulatory Initiatives

- Rollback Trump Administration rules
- Expand ACA exchanges with open enrollment, marketing outreach
- Civil rights initiatives
- Prescription drugs

In many cases, a new rule will have to be proposed with public comment



# Gender Identity and Sexual Orientation





# USSC Decision in *Bostock v. Clayton County* and Section 1557

Supreme Court ruled that federal protections against workplace sex discrimination under Title VII of the Civil Rights Act of 1964 extend to discrimination based on gender identity and sexual orientation

- The 6-3 decision in *Bostock v. Clayton City, GA* was handed down on June 15, 2020
- Plan sponsors should reexamine exclusions for gender dysphoria treatment and sex stereotyping



# USSC Decision in *Bostock v. Clayton County* and Section 1557

- Section 1557 final regulation subject to several legal challenges
- Final rule eliminates notice and tagline requirements effective August 18, 2020
- Still requires language assistance programs, accommodations for those with a disability, and website accessibility



# Transparency Rules



# Transparency Final Rule

Effective for plan years beginning on or after January 1, 2022

**Plan must post on the internet machine-readable files updated monthly that include:**

- An in-network rate machine-readable file
  - If underlying fee schedule rates used to calculate cost-sharing, those must be disclosed
- An out-of-network allowed amount machine-readable file
- A prescription drug machine-readable file





# Transparency Final Rule

- Effective for plan years beginning on or after January 1, 2023, with respect to 500 items and services listed in rule
- Effective for plan years beginning on or after January 1, 2024 for all covered items and services

## **Internet-based self-service tool**

- Real time tool a participant can use to search for cost-sharing information that is accurate at the time of request

# Transparency Final Rule

## Required Cost-Sharing Information

- Estimate of participant's cost-sharing liability
- Accumulated amounts
- In-network rate, reflected as a dollar amount
- Out-of-network allowed amount
- If bundled rate, list of included items and services
- Notice of applicable prerequisites
- Notice (model available)





# Transparency Final Rule

Not applicable to grandfathered plans, account-based plans (including Health Reimbursement Arrangements), excepted benefits, short-term, limited-duration insurance, or retiree-only plans



# Transparency Final Rule

Insured group health plans may require insurer to comply

Self-insured group health plans may enter into written agreement for compliance with service provider, but plan retains compliance responsibility



# Transparency Final Rule

## Good faith rule

- Plans that act in good faith and with reasonable diligence are not out of compliance if:
  - An error or omission is made in a disclosure, provided it is corrected as soon as practicable
  - Its internet website is temporarily inaccessible, provided the information is available as soon as practicable
  - If plan needs to obtain information from another entity to comply, will not be out of compliance unless plan knows or reasonably should have known that the information is incomplete or inaccurate





# Mental Health Coverage and Health Plan Audits



# What's at Stake

**\$6 Trillion** is the projected annual global cost of mental health disorders in 2030 — **more than the combined cost of diabetes and cancer.**

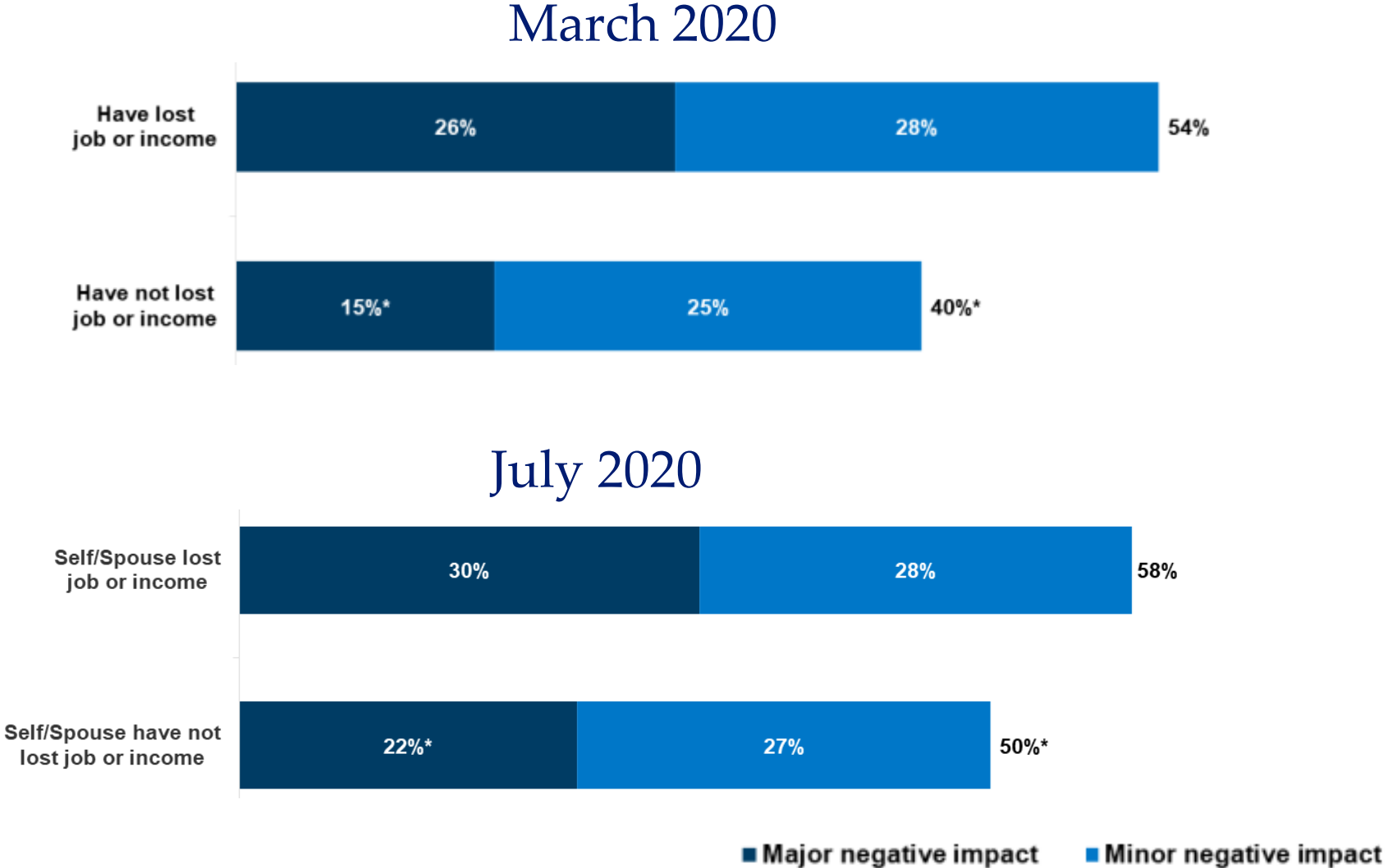
## **Key impacts include:**

- Higher health care costs associated with increased utilization and poor medication adherence
- Impact on workforce morale and productivity
- Lost earnings
- Higher costs associated with premature death and disability

# COVID-19 Affects Us All, But in Different Ways

**Percent of adults who say worry and stress related to the Coronavirus has had a negative impact on their mental health, based on job or income loss**

**The trend demonstrates that the problem is increasing as the pandemic lingers.**



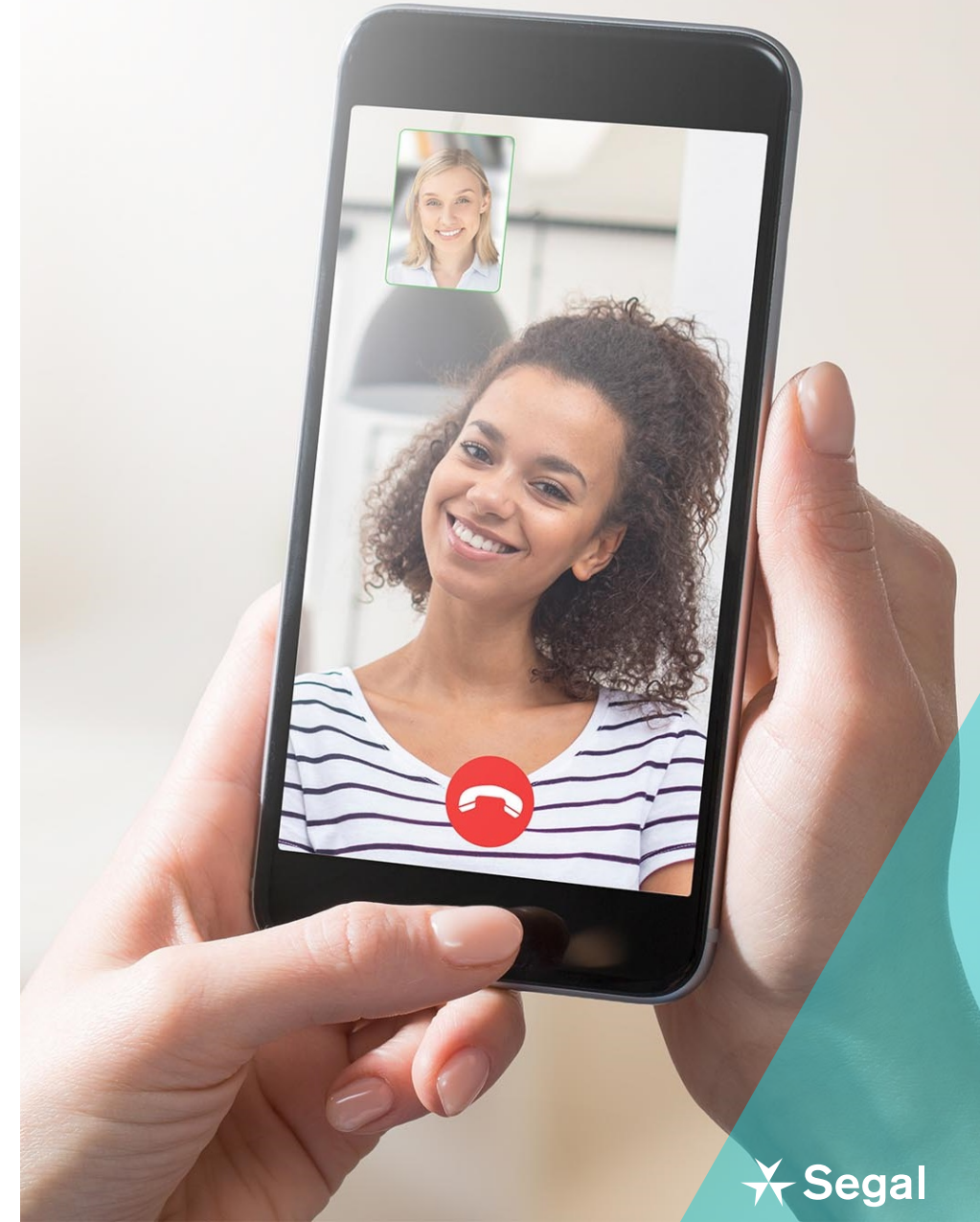
\* Notes: Indicates a statistically significant difference between those who have lost job or income and those who have not lost job or income at the p<0.05 level. Source: KFF Health Tracking Poll conducted March 25 – 30 and July 14-19, 2020.



# Tele-Behavioral Health

## The impact of COVID-19 has catapulted this growth

- Stand Alone or within the Health Plan
- Employee Assistance Program (EAP) visits; behavioral health visit to licensed psychiatrists, psychologists, counselors, and social workers; various kinds of therapies including psychotherapy, cognitive behavioral therapy, dialectical behavioral therapy can all go virtual
- Regular cost sharing may be applied to telehealth treatments (except for visits that result in the ordering of a COVID-19 test).
- Temporary regulatory flexibilities are in place



# Federal Implementation Guidance

- DOL published an updated 2020 MHPAEA Self-Compliance Tool <https://www.dol.gov/agencies/ebsa/at-a-glance>
- New additions to the tool signal increased expectations for plan sponsors:
  - Revised and additional examples, particularly related to application of MHPAEA’s nonquantitative treatment limitation (NQTL) rules and in response the 21st Century Cures Act
  - Best practices for establishing an internal compliance program
  - Additional “warning signs” — plan terms that do not on their own signify a MHPAEA violation, but raise a red flag that a treatment limitation may be impermissible

# Updated Federal Parity Tool

## **Creating a Compliance Program should include:**

- Training and education of claims reviewers
- Retention of all documents that support plan activities
- Internal monitoring and compliance reviews, including audits of samples of adverse benefit determinations
- Prompt response and corrective action if noncompliance is detected, which may include retroactive relief and notices to affected participants and beneficiaries

# Health Plan Audits

## **Both DOL and HHS continue active programs to audit group health plans**

- Multiemployer and large self-funded and fully-insured plans are targets of DOL audits
- Nonfederal governmental plans are the focus of HHS audits





# Health Plan Audits

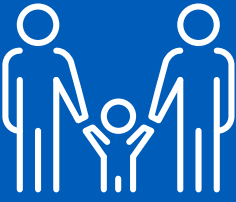
## Focus includes:

- Grandfathered status
- Mental Health Parity and Addiction Equity Act (MHPAEA)
- Affordable Care Act (ACA) group market requirements
- HIPAA/ACA Wellness Program Rules





# Pandemic Response





# Pandemic Response

- The Families First Coronavirus Response Act (PL 116-127) passed on March 18 and provides:
  - paid leave
  - tax credits
  - expanded unemployment and nutrition assistance
  - free testing
- CARES Act (PL 116-136) passed on March 27 and enacted additional requirements applicable to group health plans



# CARES Act

*Interim Final Rule released 10/29/20*

- Non-grandfathered group health plans must cover COVID-19 vaccine(s) without cost sharing within 15 business days of recommendation from ACIP/CDC
  - Same deadline for covering other COVID-19 preventive services recommended by USPSTF
- Vaccines and other services must be covered in- and out-of-network during Public Health Emergency
- Plan must reimburse out-of-network providers a “reasonable amount”
  - Determined in comparison to prevailing market rates
  - Medicare rate would be reasonable



# Families First and CARES Acts

## *COVID-19 Testing and Visits*

Effective March 18, 2020 through the end of the Public Health Emergency (Currently January 21, 2021) group health plans and insurers must cover without cost sharing:

- COVID-19 diagnostic tests and serologic tests;
- Test administration;
- Visit (office, urgent, ER, telehealth) that results in ordering of or administration of test; and
- Items and services provided during that visit to the extent they relate to the evaluation or furnishing the test





# Families First and CARES Acts

*FAQs Released 6/23/20*

Group health plans (and insurers) are not required to cover tests for employment purposes or public health surveillance

- The requirement to cover COVID-19 tests without cost sharing applies only to tests intended for individualized diagnosis or treatment of COVID-19 or another medical condition, as determined by an attending health care provider





# Families First and CARES Acts

## *COVID-19 Tests*

- If plan (or insurer) has a negotiated rate with a diagnostic test provider that rate would apply
- If plan (or insurer) does not have a negotiated rate with the provider
  - The plan (or insurer) must reimburse the provider the cash price for such service
  - The cash price rule applies to the laboratory analysis of the specimen, not the visit to evaluate the need for the test or the collection of the specimen

# For More Information



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Compliance News | November 5, 2020

## Final Transparency Rule for Group Health Plans and Insurers

The Departments of Health and Human Services (HHS), Treasury, and Labor have issued a final rule that will require group health plans and insurers to:

- Disclose cost-sharing information to plan participants
- Publicly disclose negotiated rates for in-network providers and allowed amounts for out-of-network providers.



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This rule, known as the "transparency rule," is based on the ACA's group health plan mandate framework regulating insurers and group health plans. The agencies state that the transparency rule will provide greater information to

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Articles | May 27, 2020

## Telebehavioral Health Care Makes Sense Now More Than Ever

Using telemedicine is a prudent response to the COVID-19 public health emergency. Virtual visits can minimize the spread of the coronavirus while facilitating access to healthcare services.

As recommended by the Centers for Disease Control and Prevention, plan sponsors are expanding telemedicine benefits. Plan sponsors should also consider telebehavioral health care



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<https://www.cdc.gov/od/oc/pubs/topics/telehealth.html>


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Compliance News | November 4, 2020

## Guidance on Covering COVID-19 Preventive Services and Tests

A new interim final rule from the Departments of Treasury, Labor, and Health and Human Services (HHS) includes two important provisions that affect group health plans:

- One provision, applicable only to non-grandfathered plans under the ACA, sets out accelerated coverage requirements for COVID-19 preventive services, including vaccines, under the CARES Act.
- The other provision implements a separate CARES Act requirement establishing a reimbursement formula for paying out-of-network providers for COVID-19 tests.



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# Thank You

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# Retirement Plans

# Today's Presenters



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**Julia Zuckerman**  
VP, Senior Consultant,  
Compliance - Retirement

# Agenda

**Election Update**

**What to Expect Between Now and the Inauguration**

**What to Expect in the First 100 Days**

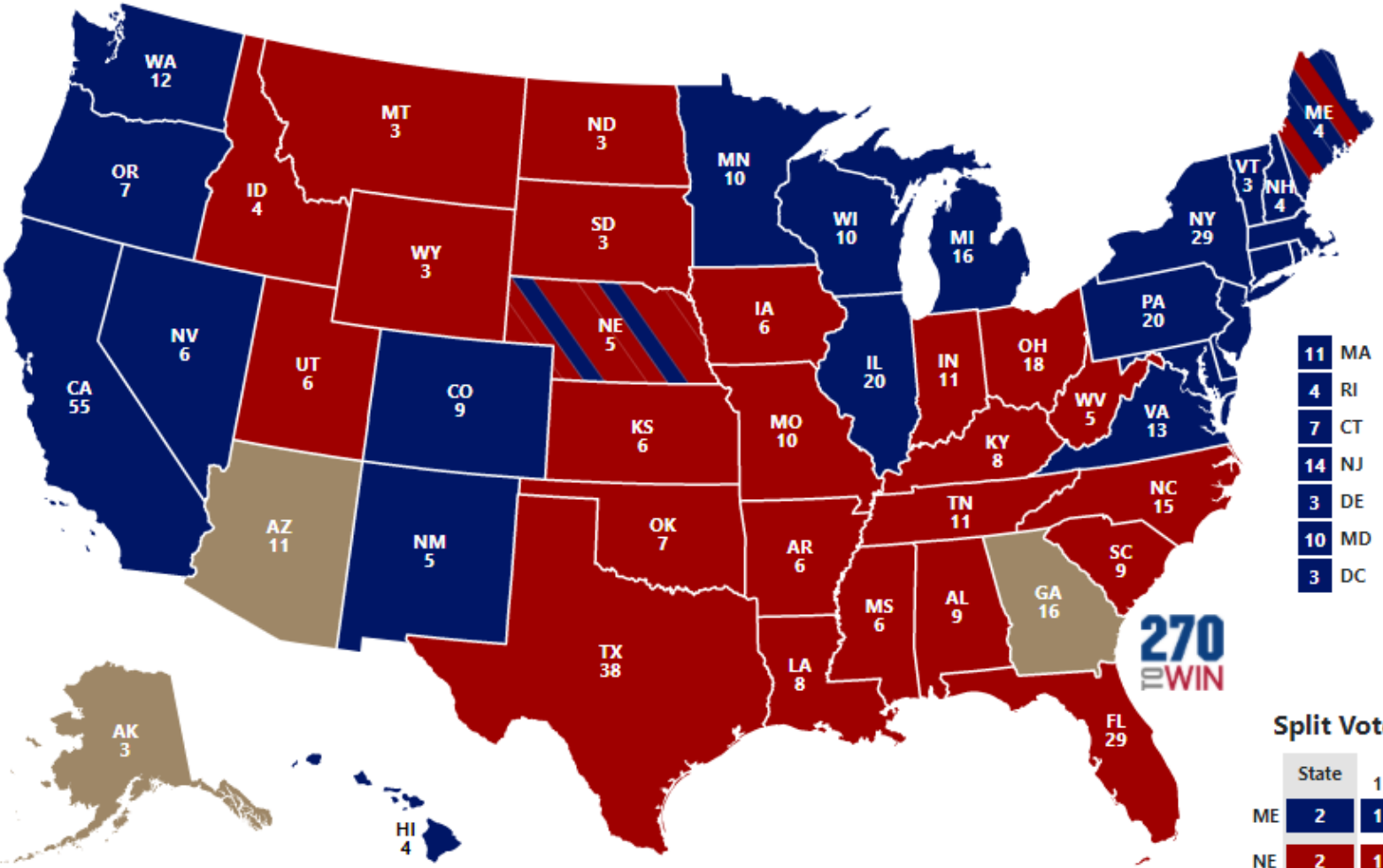
**What Else is on the Horizon**



# Election Update



# Presidential Election

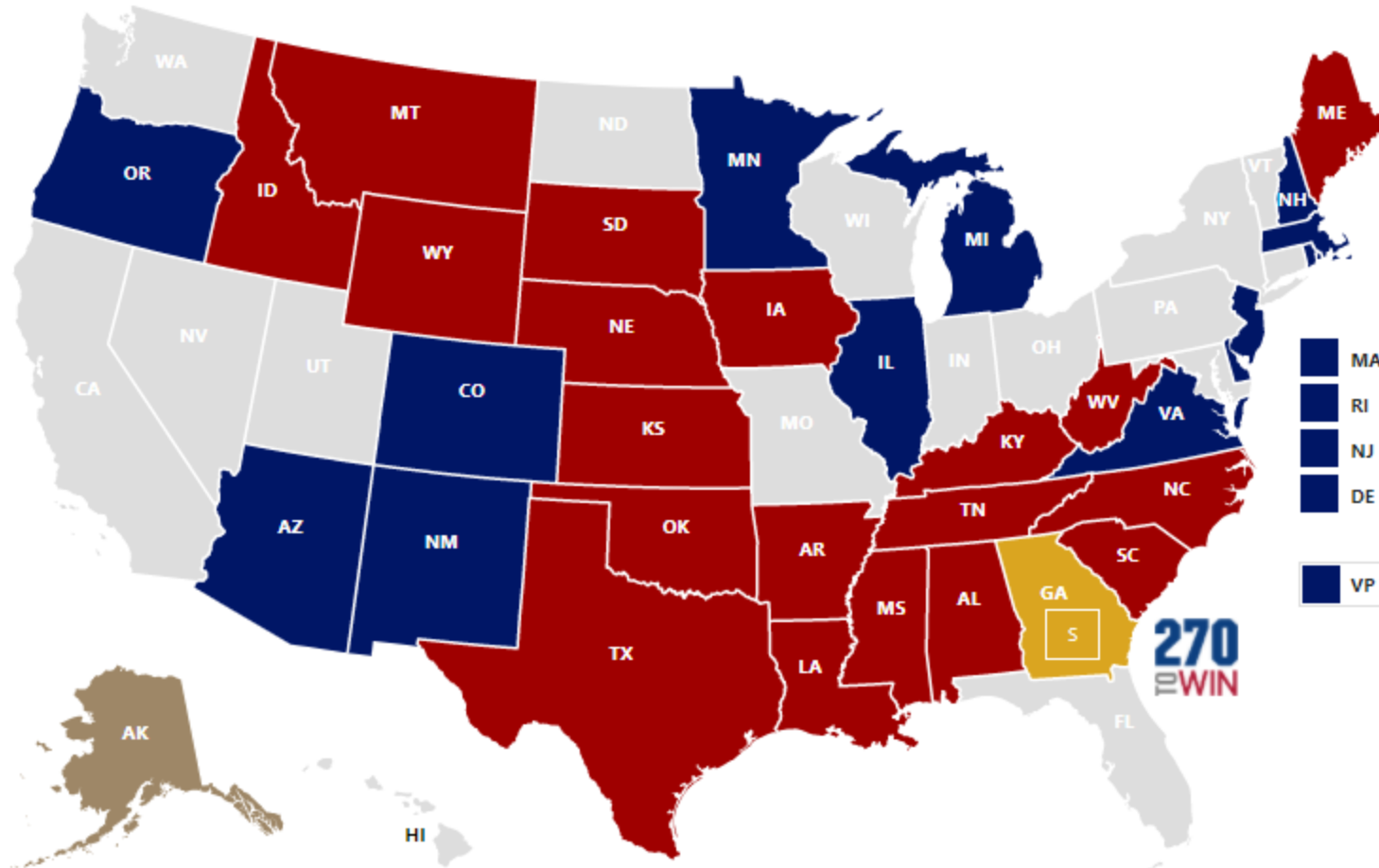


\* Source: <https://www.270towin.com>

# United States Senate

Democrats 48

49 Republicans



## United States Senate

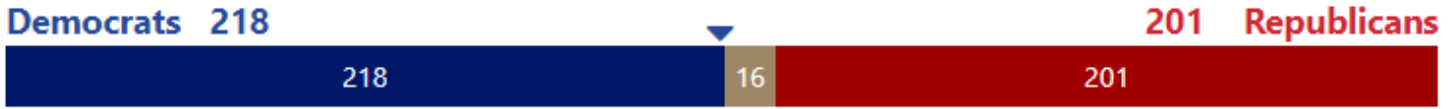
Battle for Control

	Dem	Rep
<b>Current</b>	47	53
<b>No Election</b>	35	30
<b>Decided</b>	13	19
<b>Total (Live)</b>	48	49
<b>Remaining</b>	3	
Safe	0	0
Likely	0	0
Leaning	0	1
Toss-up	0	
Runoff	2	
<b>Forecast</b>	48	50
<b>Vice President</b>	1	
<b>Total</b>	49	50

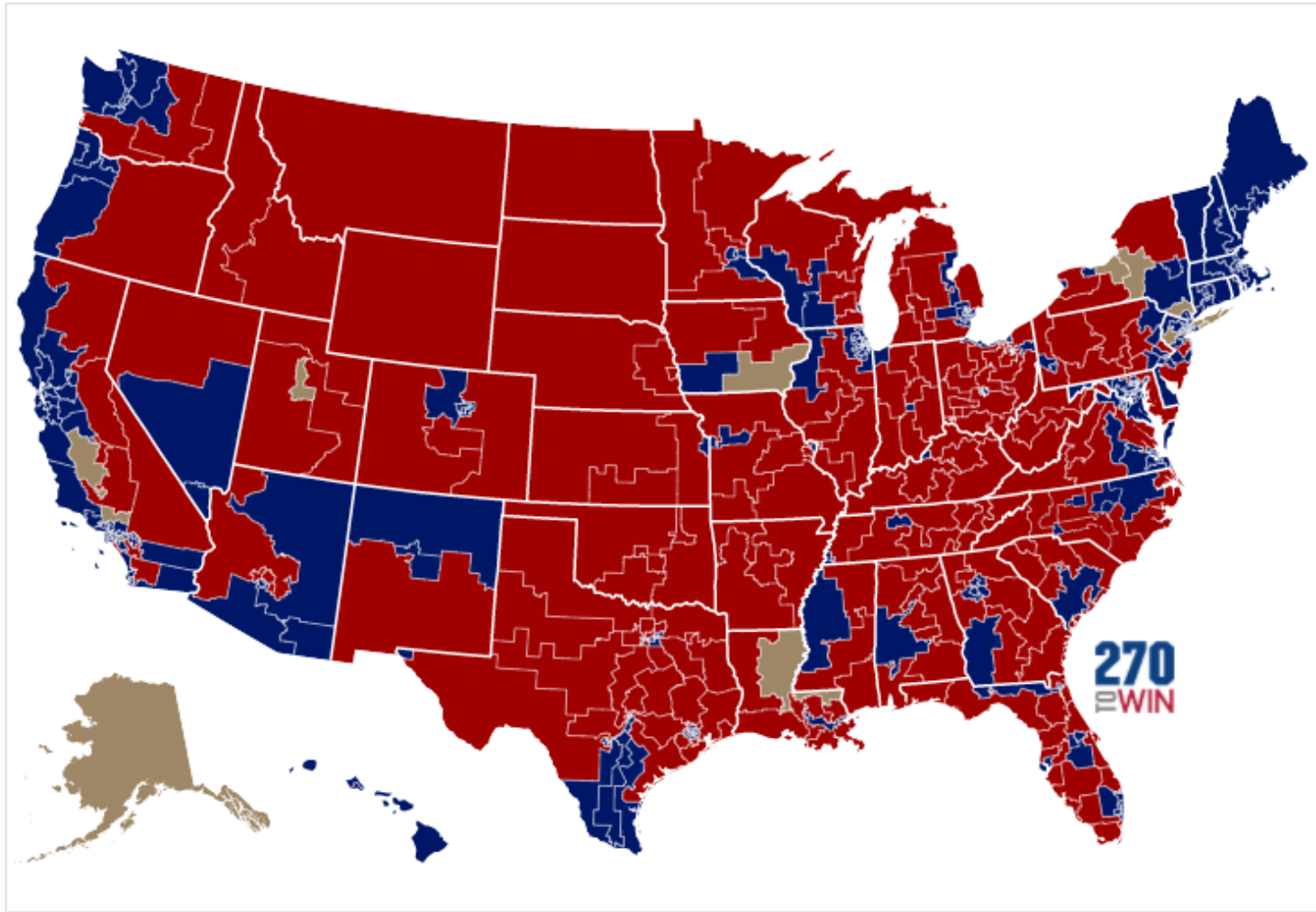
*Vice President breaks ties. Senate control goes to party with a total of 51 or more.*

\* Source: <https://www.270towin.com>

# United States House



United States + - Full Size



## United States House Battle for Control

	D	R
<b>Current*</b>	233	201
<b>No Election</b>	0	0
<b>Decided</b>	218	201
<b>Total (Live)</b>	218	201
<b>Remaining</b>	16	
Safe	2	1
Likely	1	0
Leaning	4	3
Toss-up	5	

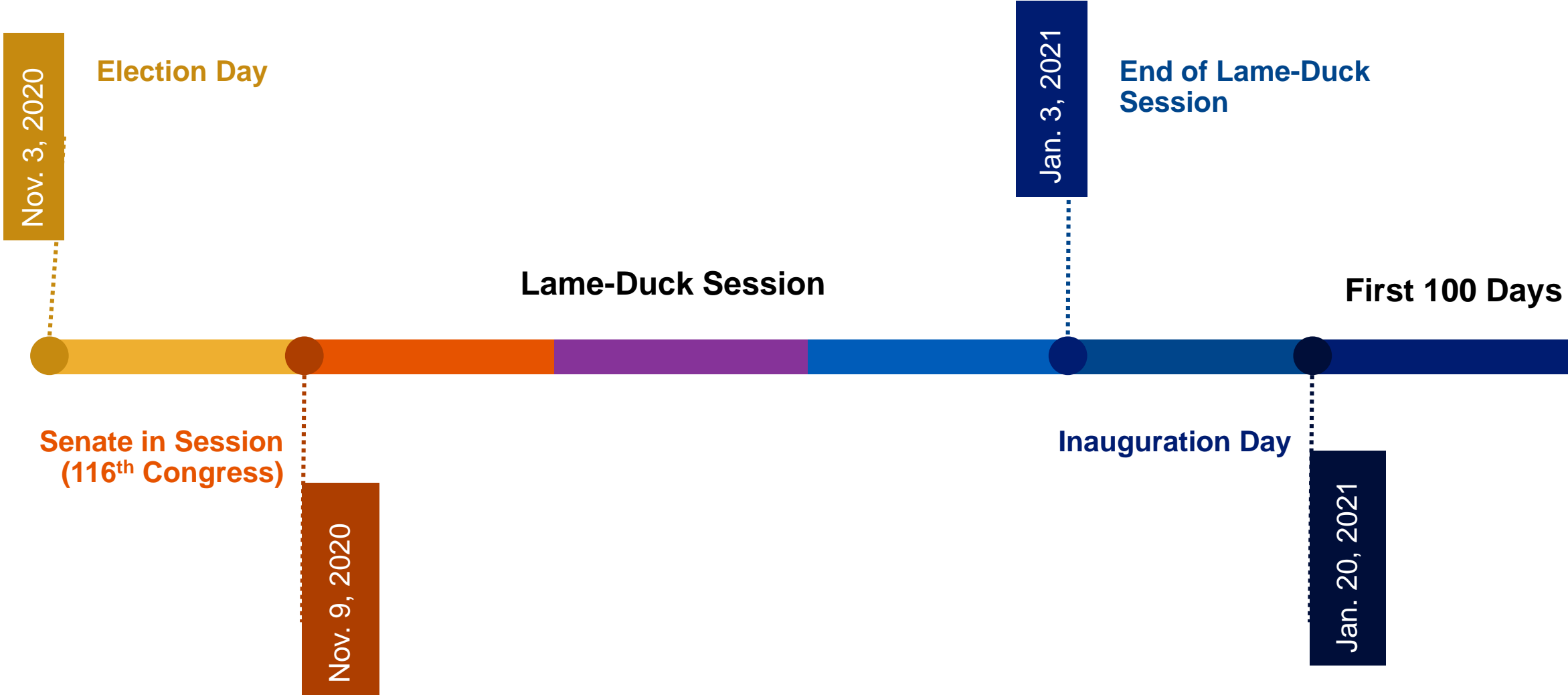
**Forecast**      225    205

*House control goes to party with a total of 218 or more.*

*\*Excludes one retiring Libertarian. Five vacancies counted as party of prior incumbent.*

\* Source: <https://www.270towin.com>

# Timeline







# What to Expect Between Now and the Inauguration

# President Elect, Agencies, Congress

<b>President Elect</b>	<b>Agencies</b>	<b>Congress</b>
<ul style="list-style-type: none"><li>• Announced Transition Team</li><li>• Prepare Executive Orders for post-Inauguration</li></ul>	<ul style="list-style-type: none"><li>• Continue to work on finalizing Trump Administration regulations (proxy voting, definition of investment fiduciary, etc.)</li></ul>	<ul style="list-style-type: none"><li>• 116<sup>th</sup> Congress still in Session until January 3</li><li>• GA Senate seats TBD</li><li>• Continuing Resolution needed to fund government</li><li>• Possible Stimulus Bill<ul style="list-style-type: none"><li>– May include funding relief for single employer plans, relief for public plans and multiemployer relief and reform</li></ul></li><li>• Possible “SECURE 2.0”</li></ul>

# President Elect

- Transition Team assembled
  - Agency review teams in holding pattern
- Preparation of Executive Orders
  - Orders to be issued immediately after the inauguration
- Planning for first 100 days
  - Priority policy items (likely not including retirement items)



# Agencies

- Agencies still working under Trump Administration leadership
- Will be working to finalize all Trump Administration guidance that is still in the works





# Congress

- 116th Congress still in session
- GA Senate election results not known until January 2021
  - No one knows what the final composition of Congress will be
  - Both sides might be more willing to compromise because they don't know how much power they'll have in the next Congress
- Continuing Resolution (CR) to fund government expires December 11, 2020
  - Congress has to return to pass a new CR to keep government open
  - Big question is will it pass anything else?
    - High on the list is a stimulus bill
    - Other possibility Secure Act 2.0

# Congress

## House COVID-19/Stimulus bill

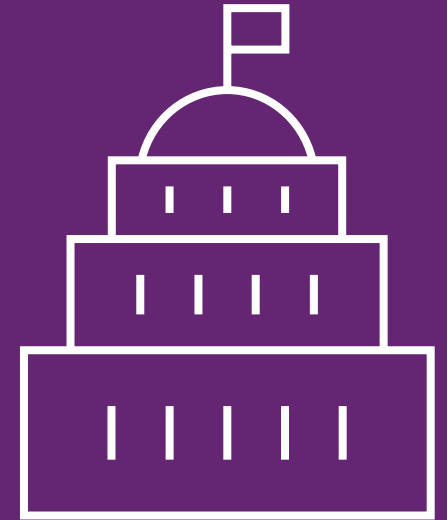
- On the table for Democrats is the revised Heroes Act passed by the House on October 1, 2020
  - Democratic bill that provides broad economic relief for businesses and individuals, assistance to state and local governments
- Currently also includes
  - Single-employer DB plan funding relief
  - Multiemployer DB plan funding relief
  - Relief for public sector DB plans (in the form of broad economic relief)
  - Other targeted retirement plan provisions



# Congress

## Senate COVID-19/Stimulus bill

- On the table for Republicans is the HEALS Act, proposed by the Senate Finance Committee July 26, 2020
  - Republican bill that provides more limited relief than House bill
- Currently also includes other targeted retirement plan provisions
- Does not include single employer or multiemployer funding relief



# Congress

- Democrat multiemployer funding relief
  - A federally-funded rescue proposal for distressed plans
    - Provides a special plan partition program
    - PBGC takes over and pays a portion of the distressed plan's liabilities
  - Relief also includes new type of pension plan
    - Called Composite plan
    - Intended to help keep current employers in plans and attract new employers to system
- Republican Grassley Alexander White Paper (Nov. 2019)
  - Includes plan partitioning, funding reform, higher premiums for plans, and a new premium on participants and the unions.





# Congress

## Single-employer funding relief

### Heroes Act

- Funding interest rate
- Amortization of shortfalls



# Congress

## Public plans

- Funding for state and local governments currently part of House COVID-19 stimulus bill not earmarked for any specific purpose
- Senate version has no general funding to state and local governments

# Congress

## Secure Act 2.0

- Official name: “Securing a Strong Retirement Act of 2020”
- Introduced October 27, 2020
- *More likely to be passed in the new Congress*
- Key provisions follow in the next section





# What to Expect in the First 100 Days



# President, Agencies, Congress

<b>President</b>	<b>Agencies</b>	<b>Congress</b>
<ul style="list-style-type: none"><li>• COVID-19 and other critical issues requiring Presidential attention</li></ul>	<ul style="list-style-type: none"><li>• Biden DOL personnel will address Trump guidance</li></ul>	<ul style="list-style-type: none"><li>• “SECURE 2.0” if not passed in the Lame Duck</li></ul>

# President and Agencies

- President
  - Retirement issues take backseat to COVID-19
- Agencies
  - Addressing Trump administration regulations
    - Definition of investment fiduciary
    - ESG investing
    - Proxy voting
    - Private equity DOL Advisory Opinion
    - Lifetime income illustration requirements
    - Electronic disclosure regulations

# Congress

## SSRA (Secure 2.0)

- Securing a Strong Retirement Act of 2020 (SSRA) (bipartisan, bicameral)
- Recently Proposed Version of SECURE 2.0 Includes Grab-Bag of Proposals
- Allowance for matching contributions for student loan payments
- Changes to required minimum distr. rules: incl. age 75 required beginning date
- Required auto-enrollment for new 401(k) and 403(b) plans
- Changes to long-term, part-time worker participation rule to include more workers
- Performance benchmarks for asset allocation funds Investments with a mix of asset classes, e.g., target date funds, could be benchmarked against appropriate blend of broad-based security market indices

# Congress

## SSRA (Secure 2.0)(cont'd)

- Higher catch-up contribution limits
- Sanctioning of small financial incentives to employees who contribute to a 401(k) or 403(b) plan
- Elimination of certain notices for unenrolled participants
- Safe-harbor for corrections of employee deferral election failures
- Changes to IRS correction rules
- Creation of retirement savings “lost and found” register
- Paper benefit statement requirements



# Congress

## SSRA (Secure 2.0) (cont'd)

### 403(b) Plans and Governmental Plans

- Enhancement of 403(b) plans
  - SSRA would allow 403(b) custodial accounts to invest in collective investment trusts. A parallel change would be made under the securities laws
- Multiple employer 403(b) plans
  - The SECURE Act expanded rules for 401(a) plan MEPs. The SSRA would expand the rule to 403(b) plans
- Governmental pension plans
  - SSRA would allow public safety agency plan to include firefighters and out-of-hospital emergency medical providers and still remain a government plan
- 457(b) First Day of the Month requirement

# Other Public Plan Issues





# What Else is on the Horizon

# What Else is on the Horizon?

## President

- Biden campaign website and Democratic platform agenda items:
  - Equalizing 401(k) tax benefits
  - Protecting public and private pension plans
  - Preventing the cut back of benefits already earned
  - Universal access to auto-enrolled retirement savings plans
  - Ability to save through state, local and federal plans

## Agencies

- Develop and implement Biden polices regarding retirement plan issues

## Congress

- Additional bipartisan, bicameral retirement legislation (i.e. SECURE Act 3.0)



# For More Information



The image displays three browser screenshots of the Segal website's 'Consulting Insights' section. Each screenshot shows a different article with its title, date, and a brief description. The first article, dated November 4, 2020, is titled 'Election 2020: Presidential Race, Senate Control Uncertain' and includes an image of the US Capitol. The second article, dated August 10, 2020, is titled 'CARES Act Relief for Single-Employer DB Plans Explained' and includes an image of two people in a meeting. The third article, dated March 4, 2020, is titled 'What Plan Sponsors May Need to Change for SECURE Act' and includes an image of a man and a woman in a kitchen. Each article has a 'Download Now' button at the bottom right.

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# Thank You

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