

What To Expect From State AGs As Federal Control Changes

By **Nicholas Gess, Martha Stolley and Diana Cortes** (November 14, 2024, 4:07 PM EST)

With the election of Donald Trump as the 47th president, we anticipate increased activism by Democratic state attorneys general in the form of legal challenges to his administration and the exercise of independent state authority in investigations and enforcement.

Further, in states where there is overall Democratic control of the appropriations process, legislatures likely will provide funding for these activities and — at least as for investigations and litigation — plaintiffs lawyers likely will redouble their efforts to represent states on a contingent fee basis.

State attorneys general are either elected, appointed by their governor, or, in the case of Maine and Tennessee, selected by their legislature or state supreme court.

They are generally their state's chief legal officer and, in most cases, also its chief law enforcement officer. In that position, they exercise significant authority with the stroke of a pen.

With Trump's election and the U.S. Senate's change of control from Democratic to Republican, the Republican Party will have control of at least the executive branch and the appointments process for Trump's own administration, as well as the federal judiciary.

As the attorneys general of the party out of federal executive power have done since at least the Reagan administration in the early 1980s, Democratic attorneys general can be expected to challenge the federal administration's actions and, if the past is prologue, have some success.

For instance, Republican attorneys general successfully challenged rules and litigation positions taken by the incumbent Biden administration and thereby tempered many of the administration's capabilities. Examples include lawsuits seeking to: (1) block most federal student loan forgiveness, (2) require the administration to continue the so-called "remain in Mexico" immigration policy, and (3) block administration rules requiring COVID-19 vaccinations for certain healthcare workers.

State attorneys general are able to bring actions on behalf of their citizens — *parens patriae* — and are



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often granted special solicitude by the federal courts when determining standing to bring a lawsuit.

Similarly, many states have powerful statutory enforcement authority and sophisticated state courts with the capacity to manage large-scale litigation.

Accordingly, even if federal avenues are foreclosed, roughly equivalent state remedies are available. However, this does shift the cost of affirmative litigation to the states.

We expect that, in states where budgetary constraints limit such affirmative activities and alternate funding cannot be found — e.g., through the National Association of Attorneys General — the attorneys general may contract with outside counsel to oversee the litigation on a contingent fee basis.

Because attorneys general exercise independent authority, the partisan split among states is not particularly relevant. More importantly, of the 50 states, only five have divided executive power.

In the remaining 45, there are so-called triplexes — i.e., one party controls the governorship, the attorney general and the secretary of state.

The five states that are not triplexes include Kansas, Kentucky, Nevada, Pennsylvania and Vermont.

Subject to official certification processes, the outcomes of the races for attorney general are as follows.

Indiana

Incumbent Todd Rokita, a Republican and former member of the U.S. House of Representatives, won a second term. He defeated Democrat Destiny Scott Wells, a former service member and Indianapolis municipal official.

Rokita's stated priorities include combating alleged federal overreach and fraud, and an anti-abortion agenda.

Maine

The Maine attorney general is selected by the Maine Legislature. Democrat Aaron Frey, a private practitioner and former member of the Maine House of Representatives, is currently serving his third two-year term.

Whether Frey, another Democrat or a Republican is selected is dependent on party control of the two houses of the state Legislature, and they will select an attorney general when they first convene in December. Control and margins in the Legislature's two houses remain uncalled.

In the past, Frey's focus has been on supporting access to reproductive rights, reaching comprehensive settlements of opioid litigation, and other consumer protection matters.

Missouri

Incumbent Andrew Bailey, a Republican, defeated Democratic challenger Elad Gross to win his first full term. Bailey is the former chief counsel to the state's governor, and had been appointed to fill the vacancy created when his predecessor was elected to the U.S. Senate.

His priorities include combating alleged federal overreach and working with law enforcement.

Montana

Incumbent Austin Knudsen, a Republican and former speaker of the Montana House of Representatives, was elected to a second term, defeating Democratic challenger Ben Alke, a private practitioner.

Knudsen has devoted much of his time to finding resources for state and local law enforcement, and combating alleged federal overreach.

New Hampshire

The New Hampshire attorney general is appointed by the governor and confirmed by the state's executive council. Republican John Formella serves by appointment of outgoing Gov. Chris Sununu for a four-year term, expiring in March 2025.

Whether he or someone else is appointed by incoming Republican Gov. Kelly Ayotte remains to be seen. Formella previously served as chief counsel to the governor.

Formella has focused on election integrity and the active use of his criminal authority. In December, he will take over as president of the National Association of Attorneys General.

North Carolina

Rep. Jeff Jackson, a Democrat and a sitting member of the U.S. House of Representatives, defeated Republican Rep. Dan Bishop, also a member of Congress, to fill the open seat created when Democratic incumbent Josh Stein was elected governor.

Jackson's priorities include fighting fraud against seniors and veterans, combating the fentanyl epidemic, and prosecuting fraud against state government.

Oregon

Speaker of the Oregon House of Representatives Dan Rayfield, a Democrat, was elected attorney general to fill the open seat created by the retirement of three-term Attorney General Ellen Rosenblum, also a Democrat. He defeated Republican Will Lathrop, a former local Oregon prosecutor.

Rayfield's priorities include supporting reproductive rights, and combating substance abuse and gun violence.

Pennsylvania

Republican Dave Sunday, a local prosecutor and military veteran, won the open seat created by Democratic incumbent Michelle Henry's decision not to seek the elected position. She had been appointed to fill the 2022 vacancy created when former Attorney General Josh Shapiro, a Democrat, was elected governor.

Sunday defeated State Auditor Eugene DePasquale. Sunday's priorities include anti-violence

initiatives, combating the opioid epidemic and other drug addiction, and working to stop internet crimes against children and fraud against the elderly.

Utah

Derek Brown, chair of the Utah Republican Party, was elected to fill the open seat created by Republican incumbent Sean Reyes' decision not to seek reelection.

Brown has practiced at several large law firms, served as a law clerk on the U.S. Court of Appeals for the Third Circuit, and served as a member of the senior staff of Sen. Mike Lee, R-Utah. He defeated Democrat Rudy Bautista, an attorney in private practice.

Brown's priorities include preserving the boundaries of authority between the state and federal governments, protecting Utah lands and energy, and litigating against pharmaceutical companies.

Vermont

Democratic incumbent Attorney General Charity Clark was elected to a second two-year term. Clark had previously served in senior positions in the Vermont attorney general's office and was a policy adviser to then-Gov. Howard Dean. She defeated Republican challenger Ture Nelson, an investigator for the Federal Motor Carrier Safety Administration and an administrator for a municipal official in Vermont.

Clark's priorities include championing data privacy, protecting reproductive rights and addressing domestic violence.

Washington

Democrat Nick Brown was elected to fill the open seat created when Democratic incumbent Bob Ferguson was elected governor. Brown previously served as the U.S. Attorney for the Western District of Washington and as chief counsel to Gov. Jay Inslee. He defeated Republican Pete Serrano, an attorney for the U.S. Department of Energy and the mayor of Pasco, Washington.

Brown has focused on preventing gun violence, combating substance abuse and addressing hate crimes.

West Virginia

State Auditor John McCuskey, a Republican, was elected attorney general to fill the open seat created by Republican incumbent Patrick Morrissey's election to governor. McCuskey defeated private practitioner Teresa Toriseva, a Democrat.

McCuskey's priorities include fighting for government transparency and accountability, and fighting against climate rules and abortion access.

Takeaways: Contradictory Enforcement Likely Leads to Unintended Business Risk and Liability

Democratic governors and attorneys general in states where there is Democratic control of the legislature are already proposing to strengthen and fund state laws on many social issues, including reproductive rights.

Those efforts will likely also include funding and enhanced authority for the enforcement of consumer protection, competition, labor, environmental and civil rights laws to accommodate the anticipated pendulum swing of the new federal administration taking a deregulatory approach.

California, Illinois, New York and Washington are all so-called trifecta states, where the governor, legislature, and attorney general belong to the same party, and the governor of each of those states has already announced plans to seek legislative authorizations and funding to accomplish this hardening of state authority.

Additionally, as Republican attorneys general have done during the Biden administration, these same state officials will likely attack allegedly infringing rules or other lack of enforcement.

By way of example, at the request of a group of Republican attorneys general, the U.S. District Court for the Eastern District of Texas, in *Texas v. U.S. Department of Homeland Security* on Nov. 7, **enjoined** the Biden administration's rule permitting certain undocumented spouses and stepchildren of U.S. citizens to remain in the country while applying for permanent residency. The court found that Congress had not authorized the president's action.

At the same time, Republican attorneys general, who have expended a great deal of effort over the past nearly four years going after the rules and policies of the Biden administration, will now have the resources and federal support to continue their efforts to investigate and possibly prosecute business social policy issues that fall within the rubric of diversity, equity, and inclusion and environmental, social, and governance frameworks.

Examples include enforcement around state reproductive rights; energy and climate change; and investment policies based on environmental or social considerations.

They also will likely use their resources to prosecute, under the guise of civil rights, business policies relating to race, gender and other related considerations.

The risk to businesses, especially those with operations in multiple jurisdictions, is that the devolution of investigative and enforcement authority to the states creates an even greater patchwork than exists today. What is permitted in one state may be prohibited elsewhere.

Because even the most local businesses depend on an interstate, if not international, stream of commerce, situations may arise in which a business cannot comply with all of the laws, policies and enforcement mandates it faces from different states. The resulting confusion and lack of clarity creates unintended risk and liability.

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