Updates
November 15, 2024
The New Administration’s Impact on Retailers

With a new administration reshaping the political landscape, retailers are preparing for policy shifts that may greatly influence their operations.

In this Update, we explore the potential changes and challenges on the horizon, examining key areas like antitrust, tariffs and trade, privacy, advertising and consumer protection, intellectual property, and labor. Our team offers an initial analysis to help retailers navigate this evolving environment and plan strategically for the future.

Antitrust

Antitrust in the second Trump administration will present a new set of challenges and opportunities for retail companies. It is difficult to predict the precise contours of antitrust policy over the next four years, but one thing is certain—Lina Khan and Jonathan Kanter’s tenure as America’s top antitrust enforcers has come to an end. With their exit, many of their progressive policy aims will likely leave, as well. The antitrust agencies’ focus on labor and data markets, attempts to revitalize federal Robinson-Patman Act enforcement, adversarial relationship with artificial intelligence (AI) developments, and general assumption that big is bad should end as this administration does. Other policy developments of the last four years—such as the 2023 Merger Guidelines and the rule against noncompete clauses—are likely to be rolled back.

The second Trump administration, however, is not shaping up to be an entirely pro-business affair. Early reports suggest the lead antitrust enforcers at both agencies may come from the Republican Party’s populist wing that is more skeptical of big business than the Republicans of the last 40 years. This potential shift to an “America First” antitrust policy will present its own unique set of challenges. As was a common theme in President-elect Donald Trump’s first administration, there will likely be certain companies that face a constant uphill battle with the agencies due to the administration’s opinions. Finding yourself in that group may all but guarantee antitrust investigations. Furthermore, we may see a shift from more "traditional" antitrust analysis to something more populist, and companies should proactively think about how they can leverage this shift to their advantage, such as by emphasizing their American manufacturing presence in agency interactions.

Tariffs and Trade

Trade and tariff policies under the incoming Trump administration are likely to resemble President-elect Trump's approach during his first term—in which he pursued trade actions based on rarely used statutory authorities and unconventional executive orders—but now with a more aggressive approach. Increased tariffs on imports will be the immediate focal point, targeting China but also most, if not all, other major U.S. trading partners. We are likely to see aggressive executive actions on tariffs within the first 100 days of the new administration. President-elect Trump will also push for further disengagement from multilateral trade institutions like the World Trade Organization. Former U.S. Trade Representative Robert Lighthizer, a fierce advocate of increased tariffs and a trade law expert, will be a key voice in President-elect Trump's execution of trade and tariff policy in the new administration. Tariffs on China will be inextricably intertwined with broader U.S.-China security concerns, and we can expect strong support for President-elect Trump's China tariff plans from Secretary of State designate Marco Rubio, a longtime China hawk.

It remains to be seen whether President-elect Trump's tariff approach will be guided by specific U.S. industry sector concerns, such as semiconductors and electric vehicle technologies, which have been a priority of the Biden administration, or will instead be more broad-based. We can also expect significant legal actions challenging President-elect Trump's executive orders as outside his Congressionally delegated authority. The Supreme Court of the United States has not ruled on this subject in the tariff context for many decades; lower court rulings in President-elect Trump's first term generally upheld the president's tariff actions.

Privacy

Once inaugurated, President-elect Trump will have authority to designate a new chair of the Federal Trade Commission (FTC), which is the most consequential agency for regulating privacy at the federal level. We anticipate President-elect Trump will appoint one of the agency's current Republican commissioners, Melissa Holyoak or Andrew Ferguson, on at least an acting basis. In the new Trump administration, we also expect the FTC will be less likely to advance novel or expansive interpretations of the FTC's authority in enforcement actions or rules involving privacy, data security, or AI. We also expect the FTC to abandon the broad "commercial surveillance" rulemaking it initiated two years ago and be more open to tailored remedies in consent orders. At the same time, the FTC was active on privacy during the first Trump administration and should be expected to be active again, particularly on issues related to children and teen privacy, health privacy, and data security.

With the change in Senate control, Senator Ted Cruz is poised to take over leadership of the Senate Commerce Committee. In this role, Senator Cruz will play a major role in shaping the conversation on a federal privacy bill. Senator Cruz was a vocal opponent of the proposed American Privacy Rights Act of 2024 but has indicated support for a federal law that looks more like Texas' state privacy law. While it remains to be seen what a Cruz privacy bill would look like and whether enough Senate Democrats would support such a bill, retailers will need to continue to contend with a patchwork of state privacy laws.

Advertising and Consumer Protection

As noted above, a change in the White House will almost certainly lead to a new chair at the FTC, which would alter the FTC's priorities on enforcement and rulemaking in certain areas of marketing and consumer protection.

Recent FTC actions—such as the FTC's Negative Option Rule addressing recurring subscription programs—have been adopted along party lines, with opposing commissioners offering strong dissents. These contentious actions could prove tempting targets for amendments or lighter enforcement, especially in areas that align with political goals of deregulation. For example, the FTC's proposed Rule on Unfair or Deceptive Fees may be revamped significantly, if not scrapped altogether. The change in Congress could also lead to a reversal of some prior FTC rules through the Congressional Review Act. Even so, some FTC issues cross party lines, so brands will need to watch closely to see how big of a shift there will be.

And the story may not be the same at the state level. California and other states focused on stricter consumer protection laws have already passed tougher laws governing recurring subscriptions, junk fees, privacy, and many areas affecting advertising practices that go beyond federal requirements. Some of these states also allow for private rights of action and class actions based on violations of these laws, meaning brands need to consider risks posed by regulatory enforcement and the plaintiffs' bar. As states expand legislative and regulatory activity in areas affecting advertising, brands operating at a national level should consider how best to balance compliance and risk in an increasingly complicated patchwork of state law requirements.

Intellectual Property

The Trump administration will likely adopt a more pro-patent stance that elevates the rights of patent owners. While no patent-related promises were made during the campaign, the new administration is expected to follow the trends of President-elect Trump's first term, where he appointed U.S. Patent and Trademark Office (USPTO) Director Andrei Iancu, who generally made it harder to invalidate existing patents and more difficult for the government to interfere with a patent holder's rights. To continue this pro-patent objective, the new administration is likely to appoint someone with a similar approach as former-Director Iancu, as well as support current bills in Congress that could prevent concurrent validity challenges in multiple venues and create a standing requirement for proceedings before the Patent Trial and Appeal Board (PTAB). The new administration will also likely explore measures to penalize foreign infringers of U.S. patents—especially Chinese manufacturers—to diminish the competitive edge of foreign companies importing goods to the United States.

The incoming administration could affect the trademark and copyright landscape in several ways. First, their "America First" approach will likely result in continued efforts to secure enhanced and expeditious international trademark enforcement/counterfeit measures (including stricter import controls)—with particular focus on China. Domestically, the Trump administration is likely to renew prior legislative efforts (SHOP SAFE Act) to combat counterfeiting and piracy with a focus on online platforms to implement more stringent anticounterfeiting and antipiracy measures involving goods that implicate health and safety. As AI continues its rapid advances, the new administration will need to grapple with appropriate regulations. Favoring a pro-innovation approach, the Trump administration could take a more hands-off approach to regulation, which could ease licensing requirements for AI developers, potentially allowing developers to train models on copyrighted materials without compensating the copyright holder. Lastly, since the five-year term of current Commissioner for Trademarks David S. Gooder is due to end early next year, the incoming Secretary of Commerce will need to appoint a new commissioner for trademarks, thereby affecting the shape of the USPTO leadership. And it is yet to be seen what affect, if any, the newly formed Department of Government Efficiency (DOGE), which is to be co-led by Elon Musk and Vivek Ramaswamy, might have on the USPTO and Copyright Office.

Labor

Although President-elect Trump's campaign strategy was more friendly to organized labor than has traditionally been the case with Republican candidates, it is reasonable to expect the Trump National Labor Relations Board to reverse most of the union-friendly changes that occurred during the Biden administration. Previously, the

Trump board reversed fast-tracked union elections and reinstated rules making it easier for employees to decertify union representation. We anticipate similar rulings, and perhaps a loosening of recent restrictions on employer communications during organizing campaigns.

There is a pending change to overtime eligibility that will result in many more employees being eligible. The change is scheduled to go into effect January 1, 2025—before President-elect Trump takes office. It is also possible implementation will be delayed by court action, which would enable President-elect Trump to limit or block implementation entirely.

President-elect Trump has historically opposed increases to federal minimum wage, and the U.S. Equal Employment Opportunity Commission's efforts to require pay data reports from employers. He has supported immigration reform and discussed large-scale deportation efforts, which might greatly affect workforce availability. On the positive side, he has supported initiatives to eliminate taxation of tipped wages and to make it simpler to classify individuals as independent contractors. We expect him to stay firm on these points.

To learn more about the anticipated labor changes under a new administration, please register for our Fall 2024 Virtual Labor & Employment Law Program on Wednesday, November 20, 2024.

Authors

Explore more in

Antitrust & Unfair Competition International Trade Privacy & Security Intellectual Property Law Labor & Employment Retail & Consumer Products Advertising, Marketing & Promotions

Related insights

Update

Two Tools for Trump To Dismantle Biden-Era Rules: the Regulatory Freeze and the Congressional Review Act

Update

The FY 2025 National Defense Authorization Act: What's New for Defense Contractors