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Statehouses Continue to Release Summer Blockbusters

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Despite recent publicity surrounding bills pending in the U.S. Congress, state legislatures have not lost their focus. More than 30 states have concluded their legislative sessions, and another half-dozen are in recess. But the roughly 12 active states remain busy, considering and enacting a variety of labor and employment bills.

As in prior months, paid leave measures took center stage in July. Pay equity bills are stealing the show in California, however, while preemption laws continued to gain ground. This month's State of the States highlights several of these marquee developments.

Paid Leave

The State of Washington passed a paid family and medical leave bill, signed by Governor Jay Inslee on July 5, 2017. The law, which takes effect in 2020, provides covered workers with up to 12 weeks of paid time off for use related to the birth or adoption of a child or to care for the serious medical condition of either the employee or a family member. Moreover, employees may take up to 16 weeks of leave per year if needed for both purposes, and an additional 2 weeks is available for serious health conditions related to a pregnancy. The law creates a leave insurance program to collect contributions, from both larger employers (37%) and employees (64%), and to pay out benefits. Depending on an employee's wages and the applicable cap, employees may receive up to 90% of their wages while on leave.

A bill was also introduced in Washington (SB 5983) that would allow an employee to opt out of the fledgling paid family and medical leave provisions. It would remove employer and employee responsibility for leave insurance contributions for those declining to participate.

Last month, New York issued final regulations concerning that state's paid family leave benefits program, which kicks in on January 1, 2018. The rules include numerous definitions and explain various administrative issues, including how the leave program phases in over four years, interacts with other leave laws, and collects contributions. The regulations also address penalties

for violations, obligations for self-insured employers, notice and posting duties, and mandatory arbitration for resolving disputes.

Hawaii, meanwhile, amended its family and medical leave statute to permit employees to use paid time off to care for a sibling.

In New Jersey, however, Governor Chris Christie issued a conditional veto blocking a measure (AB 4327) that would have significantly increased temporary wage replacement benefits available to employees taking leave under the New Jersey Family Leave Act. Among other things, that bill would double the length of time that benefits are available, up to 12 weeks, and would raise the amount of benefits. The legislature could attempt to override Gov. Christie's veto, if sufficient support materializes.

Relatedly, a couple of jurisdictions made progress in July with paid sick leave legislation. In New Mexico, the City Council of Albuquerque passed Resolution No. 17-214, agreeing to submit to voters the question of whether the City of Albuquerque should enact a sick leave ordinance. The ballot measure would require employers to offer paid sick time, accruing at a rate of one hour per 30 hours worked. The amount of time that could be used per year by an employee would depend on the employer's size, and unused time would carry over to the following year. If approved through the October 3, 2017 election, the ordinance would take effect no later than January 1, 2019. Litigation is pending concerning the ballot language to be presented to voters.

Oregon amended its Paid Sick Time Law, which took effect last year. The changes, effective July 1, 2017, authorize employers to limit the number of hours that employees may accrue to 40 hours per year. The amendments explain how piece rate and commissioned employees must receive payment for sick time used and also clarify that certain persons associated with employers need not be included in the employee count for determining coverage.[1]

Pay Equity

Pay equity measures continue to take hold, particularly in the Golden State. San Francisco, for example, adopted a salary history ordinance, which becomes operative on July 1, 2018.[2] The law prohibits inquiries into a candidate's salary history, such as an application, and prevents an employer (including private employers as well as the city itself) from considering salary history when deciding whether to hire a candidate and how much to pay him or her. The ordinance, moreover, makes it illegal for San Francisco employers to release salary history information about a current or former employee to any prospective employer, without written authorization from the individual. It also protects candidates from retaliation.

On July 31, 2017, the San Diego City Council passed a more comprehensive equal pay bill that would apply to city contractors, for contracts awarded or extended on or after January 1, 2018. The ordinance would require city contractors and consultants to certify that they pay their employees equally regardless of ethnicity or sex and to notify employees of that policy in writing. It exempts contractors with 12 or fewer full-time employees, as well as employers with public works contracts valued at less than $500,000. The mayor of San Diego has spoken favorably of the legislation.

A state-wide bill in California (AB 1209) continues to advance and would require large employers (250 or more employees) to collect and publish online information relating to "gender pay differentials." Specifically, a covered employer would be required to identify the difference between the mean and median salary of male exempt employees and female exempt employees, by each job classification or title. Similar information would be required for male and female board members. AB 1209 has passed the California house as well as a senate committee.

On the opposite coast, however, a different story played out. Maine's legislature passed a bill that included both wage transparency and salary history provisions (LD 1259). Governor Paul LePage vetoed the bill at the close of the session, and the legislature failed to override his veto.

On July 31, 2017, Governor Christie likewise vetoed a bill (AB 3480) in New Jersey, which would have outlawed screening applicants based on their wage or salary history and inquiring into such history.

Background Checks

Although Kentucky's legislature is not scheduled to reconvene until January 2018, a state lawmaker has already pre-filed a "ban-the-box" bill for consideration. The bill, entitled the Ban the Box – Criminal Record Employment Discrimination Act, has been submitted repeatedly in the past and will be up for consideration

again in the next term. If passed, the law would restrict employers from requiring candidates to disclose prior criminal history as part of an initial job application and from considering such history in employment decisions. Earlier this year, Kentucky Governor Matthew Bevin issued an executive order (EO 2017-64) removing questions about convictions and criminal history from applications for executive branch employment and prohibiting agencies from asking about such history until an applicant has been contacted to interview.

While a ban-the-box ordinance took effect in New York City in 2015, the city only recently promulgated final regulations interpreting the law. The ordinance imposes affirmative obligations on covered employers and employment agencies regarding when they may conduct criminal background checks on applicants, and what process must be followed before making an adverse decision on the basis of an applicant's criminal history. The comprehensive regulations, which take effect August 5, 2017, expand on and clarify the ordinance's requirements.[3]

Joint Employment

In July, New Hampshire became the latest state—and at least the ninth this year—to enact a statute specifying that a franchisor is not the employer of its franchisees or its franchisees' employees. The law, which took immediate effect, explains that a franchisor may be deemed an employer or co-employer only if it agrees in writing to assume that role. Such laws have been very popular in recent years because of growing confusion about when employers may be held liable as joint employers under federal law.

On a related note, a bipartisan bill was introduced last week in the U.S. House (HR 3441) that would perhaps alleviate that confusion and clarify the nature of the joint employer relationship.[4] The bill, now headed to committee, would limit the meaning of "employer" under the National Labor Relations Act and the Fair Labor Standards Act to include only an entity that "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment."

Preemption

Preemption bills, which seek to preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries, remain a hot topic at statehouses. Georgia amended its preemption law, effective July 1, 2017, to prohibit any municipality from requiring employers to offer additional pay based on scheduling changes.

Missouri enacted a preemption law that prohibits political subdivisions from requiring a minimum wage or any other employment benefit in excess of state requirements. The new law applies retroactively, thereby nullifying a minimum wage increase in St. Louis that had taken effect a few months earlier.

By contrast, a New York preemption bill (AB 2523) died in July. That proposal would have deprived municipal corporations of the authority to enact any local regulation requiring an employer to provide employment and wage information concerning an employee or contractor to any local agency.

Pregnancy Accommodation

Two neighboring states passed pregnancy accommodation laws in July. A Connecticut bill, signed into law by Governor Dannel Malloy, becomes operative on October 1, 2017.5 Among other things, the law requires employers to offer reasonable accommodations to pregnant employees or applicants. It also prohibits an employer: (1) from segregating or classifying an employee in such a way that would deprive her of employment opportunities due to her pregnancy; (2) from engaging in retaliation; and (3) from forcing an individual to accept an unnecessary accommodation.

Massachusetts quickly followed suit. On July 27, 2017, Governor Charlie Baker approved the Massachusetts Pregnant Workers Fairness Act, effective April 1, 2018.[6] This statute similarly imposes a duty on employers to engage in an interactive process and reasonably accommodate pregnant employees. It also requires employers to accommodate employees with a need to express breast milk and to provide employees with written notices of these protections.

Discrimination

Connecticut amended certain antidiscrimination and leave laws to include protections for veterans. Under the amendments, which take effect October 1, 2017, covered employers may not discriminate against any individual on the basis of his or her status as a veteran. Additionally, employees who are members of the U.S. National Guard or the guard unit of any other state are entitled to leave

for military duty, to the same extent such leave is already offered to members of the Connecticut National Guard.

West Virginia took similar steps to protect employees active in the state wing of the Civil Air Patrol, the civilian auxiliary of the U.S. Air Force. A new statute, which took effect on July 1, 2017, makes it unlawful for employers to discriminate against employees because of their membership in the Civil Air Patrol. The law also requires employers to provide workers with unpaid leave for training purposes (up to 10 days per year) or to respond to an emergency mission (up to 30 days per year). Employees returning from such leave have rights to job reinstatement and previously-accrued benefits.

California and Michigan, meanwhile, are exploring options to enhance protections for workers facing discrimination on the basis of their gender identity or sexual orientation. A bill in California (SB 396) cleared the state senate and an assembly committee and would require covered employers (i.e., those with 50 or more employees) to include training about harassment based on gender identity, gender expression, and sexual orientation as a component of the mandatory training for supervisors.

The Michigan Civil Rights Commission (MCRC) has agreed to evaluate and issue interpretative guidance on the question of whether the state-law prohibition against sex discrimination also bans discrimination based on gender identity or sexual orientation. While approximately half of the states explicitly protect workers from these types of discrimination, Michigan is not among them. Should the MCRC conclude that state law protects against discrimination based on gender identity or sexual orientation, the agency could then investigate and resolve alleged violations as it does with other discrimination claims. Federal courts are divided on this question in the Title VII context, increasing the odds that the U.S. Supreme Court may take up the issue.[7]

Minimum Wage

Minimum wage and overtime exemption issues continue to generate a lot of buzz at the state and local levels. Readers interested in more detail on these subjects are encouraged to consult *WPI Wage Watch*, a Littler feature focusing exclusively on breaking minimum wage developments.[8]

What's Next?

We will continue to monitor the state houses as the remaining legislative sessions progress and will report on any further noteworthy developments.

1 Adam Brauner, *Oregon Clarifies Paid Sick Leave Law*, Littler ASAP (July 13, 2017).

2 Bruce Sarchet & Corinn Jackson, *Another San Francisco Treat: Mayor Lee Signs Salary History Ban*, Littler ASAP (July 20, 2017).June 30, 2017).

3 Stephen A. Fuchs, *Final Regulations Clarifying and Expanding New York City "Ban the Box" Law Take Effect on August 5, 2017*, Littler Insight (July 31, 2017).

4 Michael J. Lotito & Ilyse Schuman, *House Introduces Bipartisan Bill Designed to Ease Joint Employer Uncertainty,* Littler ASAP (July 27, 2017); *see also* Michael J. Lotito & Ilyse Schuman, *House Hearing Explores Legislative Remedy to Joint Employer Confusion*, Littler Insight (July 13, 2017).

5 Patricia E. Reilly & Matthew K. Curtin, *New Connecticut Law Enhances Protections for Pregnant Employees*, Littler ASAP (July 12, 2017).

6 Christopher B. Kaczmarek & Shannon M. Berube, *Massachusetts Expands Employers' Obligation to Accommodate Pregnant Employees,* Littler ASAP (July 27, 2017).

7 *See* Kevin Kraham & Emily Haigh, *Seventh Circuit Holds Title VII Protections Extend to Sexual Orientation Discrimination*, Littler ASAP (Apr. 6, 2017); *see also* Emily Haigh & Kevin Kraham, *Is Sexual Orientation Protected Under Title VII? The DOJ Weighs In,* Littler ASAP (July 31, 2017) (discussing the filing of an amicus brief by the Department of Justice, in which the department changed its interpretation from the prior administration and, contrary to the EEOC, argues that Title VII does not reach sexual orientation).

8 Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates (July Edition),* WPI Report (July 31, 2017).