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# state of the STATES

Monthly Newsletter | December 2017

## Lawmakers Trade Jostling Bills for Jingle Bells

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With the holidays in full swing, state legislators across the country are enjoying a bit of a lull. December traditionally marks the calm before the storm, as most legislatures are out of session and will reconvene in January.

Nonetheless, a few states—such as Florida and Michigan—introduced or advanced bills in November. New York City saw major developments in both its paid sick leave and predictive scheduling ordinances. Along with those topics, salary history and right-to-work measures garnered attention. This month's State of the States reviews these types of bills and other noteworthy developments. creation, and out of sync with the 21st century workforce.

### Salary History

Albany County, New York became the latest jurisdiction to adopt a law limiting salary history inquiries. The new ordinance (Local Law P), which was signed by the county executive, amends the county's human rights law. Under Local Law P, employers may not: (1) screen applicants based on prior wages or other compensation; (2) ask applicants for minimum or maximum salary criteria; (3) demand that candidates disclose salary history information; or (4) seek salary history information from current or former employers. Employers may confirm prior salary with current or former employers only if the candidate has authorized such disclosure in writing, after receiving an offer of employment.

Meanwhile, the Illinois Senate failed to muster sufficient votes to override Governor Rauner's veto of a similar salary history bill (HB 2462). The defunct bill would have made it illegal to screen applicants based on their wage history or to require that applicants' prior wages satisfy any minimum or maximum criteria. It blocked employers from requesting that an applicant disclose his or her prior wages or salary as a condition of being interviewed or hired. With some exceptions, the law also would have prohibited employers from asking any current or former employer of a candidate about that individual's pay history.

Illinois employers should stay tuned, however. While HB 2462 ultimately failed, a new bill (HB 4163) has already been introduced that would achieve the same end.

The Florida legislature is also considering a salary history ban, which has now moved to committee. The bill, HB 393, states that employers "may not provide a less favorable

employment opportunity to an employee based on the employee's sex" or pay the employee at a lesser rate "for substantially similar work." The proposal, moreover, specifically permits class actions and the recovery of both liquidated damages and civil penalties. It includes wage transparency provisions as well as a salary history inquiry ban. HB 393 would not prevent an employee from voluntarily disclosing prior wage history. A second, related bill (HB 594) is also under review.

## Predictive Scheduling

Both the State of New York and New York City are moving forward with predictive scheduling regulations. The New York City Fair Workweek Law took effect on November 26, 2017, and it substantially restricts retail and fast food employers' ability to craft schedules for their employees.[1] In preparation for that effective date, the New York City Department of Consumer Affairs promulgated rules that expand on the Fair Workweek Law.[2] The regulations are fairly comprehensive and, among other things, impose specific notice and recordkeeping requirements.

As that story unfolds in New York City, the State of New York proposed its own predictive scheduling regulations for certain industries.[3] The regulations would revise the Minimum Wage Order for Miscellaneous Industries and Occupations to limit the scheduling of on-call shifts and to require employers to pay employees for cancelled shifts and newly-added shifts. This sweeping amendment would affect employers in the retail, financial services, healthcare, and construction industries, for example. If the proposed regulations become effective, New York would become the second state in the country to implement statewide predictive scheduling rules.

A Massachusetts bill (SB 2208) that would implement predictive scheduling has moved to committee. If enacted, this bill would require employers to post employee schedules seven days in advance, to pay one hour of predictability pay if a shift changes, and to allow employees to decline shifts in various circumstances.

1 *See* Eli Freedberg et al., *New York City Enacts Laws Limiting Employers' Flexibility To Staff Employees*, Littler Insight (June 2, 2017).
2 Eli Freedberg & Christine Hogan, *The DCA Has Issued Proposed Rules for the New York City Fair Workweek's Predictive Scheduling Laws*, Littler Insight (Oct. 25, 2017).
3 Eli Freedberg, *New York State Jumps on the Predictive Scheduling Bandwagon and Issues Proposed Scheduling Rules*, Littler Insight (Nov. 14, 2017).

## Protected Leave

New York City Mayor Bill de Blasio recently approved revisions to the city's paid sick leave law, extending its protections to "safe time."[4] The amendments, which become operative on May 5, 2018, expand the list of covered reasons for which paid sick leave can be used to include "when the employee or a family member has been the victim of a family offense matter, sexual offense, stalking, or human trafficking."[5] As a result, many existing provisions have been updated to address safe time use, including documentation, confidentiality, and notice to employees. The law also broadens the types of family members for whom paid sick and safe leave can be used.

Along the same lines, the Michigan legislature is evaluating a package of five bills aimed at protecting employees who are victims of domestic violence. This package includes a requirement that employers offering sick leave to employees also allow victims of sexual assault, domestic violence, or stalking to use that protected time to get help or receive services. The bills would also permit survivors to qualify for unemployment compensation if they lose their jobs for reasons related to the abusive situation.

To the south, the City of Austin, Texas is exploring the possibility of a paid sick leave ordinance. The Austin City Council passed a resolution directing staff to gather feedback from the community concerning a paid sick leave requirement for private employers. Public comments were submitted throughout November and will be presented at a December 5, 2017 city council session.

On a regulatory front, Oregon and the City of Tacoma, Washington, introduced proposed rules to update and further implement their respective paid sick leave laws. Comments concerning the Oregon proposal may be submitted through December 22, 2017.[6] The Tacoma amendments[7] are intended to align the city's code with the State of Washington's more generous paid sick leave statute, which takes effect January 1, 2018.[8]

4 Jill Lowell & Sebastian Chilco, *New York City Expands Types of Leave Covered by Paid Sick Leave Law*, Littler ASAP (Nov. 8, 2017).
5 The text of the amendments and other information can be found here.
6 The proposed Oregon sick leave regulations are available here.
7 See *City of Tacoma, Wash., Tacoma's Paid Sick Leave will Change in 2018*.
8 See Pamela Selgado et al., *New Minimum Wage and Paid Sick Leave Laws for Washington Employers*, Littler Insight (Dec. 22, 2016) (summarizing Washington state paid sick leave law).

## Right-to-Work

Advocates for right-to-work laws received mixed results in November. In Illinois, the legislature was unable to override Governor Rauner's veto of a bill that would have prohibited localities from adopting their own right-to-work ordinances. The state senate supported the bill but the override failed by one vote in the house, marking a victory for the Republican governor.

Right-to-work proponents in neighboring Missouri suffered a setback, however. Governor Greitens signed a right-to-work bill earlier this year—but a coalition of unions successfully petitioned to have voters decide whether Missouri will become the 28th right-to-work state. The secretary of state certified that the petition received sufficient signatures to place the question on the ballot in 2018.

## Discrimination & Harassment

New Hampshire introduced a bill (HB 1319) that would amend existing law to ban discrimination based on gender identity.

The legislature in Guam is considering a similar proposal (Bill 164-34). Senators recently held a public hearing on the bill, which would redefine the term "sex" in Guam's civil rights code to include gender identity and gender expression.

The Washington Supreme Court issued a significant ruling in November, in *Zhu v. North Central Education Services District – ESD 171*.[9] There, the court addressed whether Washington state law prohibits retaliation against applicants by prospective employers. The plaintiff sought employment from an educational service district after previously working as a math teacher in a particular school district. The service district rejected his application, allegedly because he had sued his prior employer for race discrimination. The plaintiff sued in federal court, claiming retaliatory discrimination. The federal district court allowed the theory, and the plaintiff prevailed at trial. The court then granted defendant's request to certify the question to the state high court. The Washington Supreme Court agreed with the plaintiff and the district court, concluding that state law authorizes claims for retaliatory discrimination against prospective (and not just current) employers.

9 No. 94209-9, 2017 Wash. LEXIS 1058 (Nov. 9, 2017).

## Trade Secrets & Noncompetition Agreements

Massachusetts lawmakers are again contemplating measures to rein in employer use of noncompetition agreements. The Labor and Workforce Development Committee reviewed several bills restricting noncompetes and otherwise addressing the protection of trade secrets. One proposal, for example, would limit the duration of a noncompete to one year, with exceptions. That bill would also prohibit an employer from requiring certain types of workers to sign noncompetes (*i.e.*, interns or temporary contractors) and from enforcing such agreements against workers who lose their jobs due to downsizing.

## Wage & Hour

Wage and hour issues in general remain hot-button topics. 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.[10]

10 *See* Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates (November Edition)*, WPI Report (Nov. 30, 2017).