



## A Busy December Signals a Wild 2018 for Employers

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Despite the holiday break in most statehouses and city halls, legislators were quite productive in December. More than 40 employment-related bills were introduced or advanced last month, across nearly 20 states and municipalities.

As we turn the calendar, we can expect a significant increase in this pace. By the end of January, at least 40 state legislatures will reconvene, and they will generate a flurry of new bills. We should be able to identify definite legislative trends by the end of the first quarter.

The spate of sexual harassment allegations seen in 2017 presumably will carry over into the new year. One potential trend worth watching in 2018 may be a proliferation of bills concerning the use of nondisclosure agreements (NDAs) for discrimination claims. Opponents argue that these types of provisions prevent victims from going public with their accusations. States are beginning to consider measures that would restrict the use of NDAs in the discrimination context. A New Jersey bill (AB 5287),

for example, would render such provisions unenforceable as contrary to public policy. The recently-enacted [Tax Cuts and Jobs Act](#) also addresses this issue. The new tax law eliminates the deduction for payments related to the settlement of a sexual harassment or abuse claim, if the settlement is subject to an NDA. Additional proposals affecting NDAs could gain traction as an increasing number of harassment complaints come to light.

While we wait to see what 2018 brings, this month's State of the States reviews December highlights from state and local legislatures. Much of this attention focused on topics that remained hot throughout last year, such as protected leave time and background checks.

### **Paid Sick Leave**

Prince George's County, Maryland recently enacted a paid sick and safe time law, which is scheduled to take effect around May 24, 2018.<sup>1</sup> The law applies to employers with 15 or more workers in the county and entitles workers to accrue one hour of leave time per

<sup>1</sup> Elizabeth A. Lalik and Sebastian Chilco, [Prince George's County, Maryland Enacts Paid "Safe" Time Law](#), Littler Insight (Dec. 19, 2017).

30 hours worked, up to 40 hours per year. Employees can use leave for themselves or to care for or assist a family member, which includes a child, grandchild, grandparent, parent, sibling, or spouse.

The City of Tacoma, Washington formally amended its paid sick leave law and interpretive regulations. The final rules<sup>2</sup> 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.<sup>3</sup>

On December 15, 2017, Seattle similarly updated its municipal code, including its paid sick and safe time law as well as its secure scheduling ordinance.<sup>4</sup> These amendments clarify certain issues; for example, the ordinance now specifies that employers cannot require employees to find replacements to cover their shifts. The amendments also generally broaden the Seattle ordinance to conform to the new statewide leave law.

The Pennsylvania Supreme Court, meanwhile, has agreed to hear a challenge to the City of Pittsburgh's paid sick leave law. Lower courts invalidated the ordinance, finding that the city lacked the authority to enact a law imposing such obligations on private employers.

Voters in Albuquerque, New Mexico narrowly rejected a paid sick leave measure in October 2017—but the debate is far from over. The Albuquerque city council has introduced an ordinance that would require employers with 50 or more employees in the city to offer paid sick leave beginning January 1, 2019.<sup>5</sup> Employees could earn one hour of leave for every 40 hours worked and could use leave for sick and safe time purposes, including the care of a child or spouse.

## Other Protected Time Off

Massachusetts voters may have the opportunity to endorse a paid leave law directly, at the polls. Several ballot questions have been proposed, including initiatives to raise the minimum wage to \$15 per hour

and to implement a paid family and medical leave. These questions have garnered enough support to require the legislature to consider them. If the legislature fails to act, proponents can gather additional signatures and present the questions to the voters in November.<sup>6</sup>

Wisconsin lawmakers are examining a proposal (AB 772) that would limit the scope of the state's family and medical leave law. The bill, currently before the labor committee, provides that the state family and medical leave law would not apply to employers that: (1) are required to comply with the federal version; or (2) elect to provide leave consistent with the federal law to employees who are not eligible for leave. The bill does not prohibit employees from exercising their rights to leave under the state law to care for family members.

State legislatures are also weighing other types of protected leave time. The South Carolina house is reviewing a proposal (HB 4442) that would entitle workers to paid school activities leave. Under this bill, employers with school-aged children (K-12) must permit workers to take leave of up to eight hours per year to attend school conferences, activities, or meetings. Additional paid leave would be provided to employees with special expertise who volunteer to discuss their profession or teach about the relevant subject matter.

Both chambers of the New Jersey legislature have approved a measure (AB 2294) that would expand civil rights protections for breastfeeding employees. It outlaws discrimination against such workers and requires employers to provide reasonable accommodations to breastfeeding employees, including reasonable break times and suitable, private spaces for lactation.

## Employee Scheduling

So-called "fair," "secure," or "predictive" scheduling ordinances continue to make headlines, as the concept spreads to major jurisdictions across the country.<sup>7</sup> Oregon became the first state to adopt such a law, joining several

<sup>2</sup> See City of Tacoma, Wash., [Tacoma's Paid Sick Leave will Change in 2018](#). The Tacoma amended rules are available [here](#).

<sup>3</sup> 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).

<sup>4</sup> The Seattle amendments are available [here](#).

<sup>5</sup> The proposed Albuquerque ordinance is available [here](#).

<sup>6</sup> Links to the proposed ballot questions are available [here](#).

<sup>7</sup> See, e.g., Deidra Nguyen, [Who Could Have Predicted? Fair Scheduling Requirements Pose Compliance Challenges for Retail, Restaurant and Other Employers](#), Littler Insight (Sept. 18, 2017).

California cities as well as New York City and Seattle.

Adding to the mix, the New York State Department of Labor recently proposed its own predictive scheduling regulations, which would affect employers statewide that are covered by the Miscellaneous Industries and Occupations wage order.<sup>8</sup>

The New York City fair scheduling regulations took effect in November 2017, but the City Council is already working on a significant addition. The council passed a bill in December (Int. 1399-2016) that would authorize employees to take two temporary schedule changes each year for “personal events.” Employers would be obligated to accommodate schedule changes, for example, for an employee to tend to a caregiving emergency, certain legal proceedings, or any event that would qualify for the use of leave time under the city’s sick or safe time act. If Mayor de Blasio signs the bill, employers would be prohibited from retaliating against covered workers who request schedule changes.

As noted earlier, Seattle also updated its secure scheduling ordinance to clarify employer coverage. The revision stresses that all employees who work for compensation must be included when determining the size of an employer, including employees working outside Seattle’s city boundaries, temporary employees, and employees retained through a staffing agency.

## Preemption

Preemption bills, which seek to preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries, were quite popular in 2017. At least three states (Georgia, Indiana, and Missouri) enacted or amended preemption laws last year.

Wisconsin may be next in line. Lawmakers there have introduced a measure (SB 634) that would ban local governments from adopting or enforcing ordinances concerning employment matters. Prohibited regulatory topics would include: (1) employment discrimination; (2) wage claims and collections; (3) employee hours, overtime, and scheduling; (4) employee benefits; and (5) an employer’s right to seek salary history information from job applicants. SB 634 is currently under committee review.

## Wage Theft

Both New Jersey and Michigan have advanced wage theft bills, aimed at bolstering existing wage and hour laws. The New Jersey proposal (AB 5072) has passed both houses and would strengthen enforcement remedies and procedures. The bill would impose a \$500 fine on employers found guilty of a first wage payment violation (and a \$1,000 fine for subsequent offenses), plus a penalty of 20% of wages owed for any offense, payable to the state. Employees would be entitled to recover unpaid wages plus liquidated damages totaling 200% of that sum, along with costs of the action. AB 5072 also prohibits retaliation.

For its part, the Michigan senate introduced no fewer than six measures enhancing penalties for employer wage violations. SB 718, for example, raises the stakes for an employer that repeatedly fails to pay wages as required; second or subsequent violations would be deemed felonies under the bill, resulting in a fine of not more than \$10,000 for each violation or imprisonment for up to two years, or both. SB 720 would increase the penalty payable to aggrieved employees from 10% to 100% annually of the wages and benefits due. Flagrant or repeated violations of certain provisions would also require payment of exemplary damages to the employee (three times the amount of the wages and benefits due the employee). Both Michigan bills have been referred to committee.

## Background Checks

As 2017 wound down, state and local legislators did not lose interest in regulations limiting the employer use of background checks. New Jersey amended its ban-the-box law (SB 3306), to specifically prohibit employers from asking applicants about any expunged criminal records in the hiring process. This amendment took effect on December 20, 2017 and prohibits oral, written, or online inquiries into this information.

The Spokane, Washington city council expanded its ban-the-box requirements, which will apply to private employers later this year. Mayor Condon neither approved, nor vetoed the law, clearing the way for it to take effect in July of 2018. The ordinance makes it unlawful for employers

<sup>8</sup> Eli Freedberg, [New York State Jumps on the Predictive Scheduling Bandwagon and Issues Proposed Scheduling Rules](#), Littler Insight (Nov. 14, 2017).

to ask candidates about criminal history prior to an interview. The city will not impose penalties for violations of the new ordinance until 2019, giving employers some leeway as they adjust their hiring practices.

New York City issued final regulations interpreting its Stop Credit Discrimination in Employment Act (SCDEA), which restricts an employer's reliance on an individual's credit history when making employment decisions. The rules define key terms and violations, clarify the scope of SCDEA, and explain that exemptions to coverage under the law are to be construed narrowly.

## Drug Testing & Usage

The Maine house has introduced a bill (LD 1719, HP 1199) regulating the legalization of recreational marijuana in the state, which was authorized by voter initiative in November of 2016. Section 112 of the proposal addresses employment practices and specifically states that employers are not obligated to allow or accommodate the use, possession, transportation, sale, or cultivation of marijuana in the workplace. If enacted, employers will retain the right to enact and enforce workplace policies restricting drug use and discipline employees who attempt to work while under the influence of marijuana. The measure is currently under review by the Committee on Marijuana Legalization Implementation, and a public hearing is set for January 5, 2018.

A bill (HB 424) pending before committee in the Ohio House would protect the rights of certain employees who have not passed a drug screening.<sup>9</sup> Under the proposal, an individual is not considered to have failed a drug test if he or she obtained the controlled substance in question "pursuant to a prescription issued by a licensed health professional." The measure also addresses related issues affecting unemployment compensation benefits determinations.

## Immigration / Work Authorization

In Florida, a ballot initiative, if approved, would require all employers in the state to participate in the federal E-Verify work authorization program.<sup>10</sup> A panel of the Florida Constitution Revision Commission recently came out in support of a mandatory E-Verify proposal, which has drawn vocal criticism from the state's agricultural community. Under current law, state agencies and public contractors must participate in E-Verify, but this step is optional for private businesses.

## 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.<sup>11</sup>

<sup>9</sup> Information about Ohio HB 424 is available [here](#).

<sup>10</sup> E-Verify is an electronic program employers may use to submit new-hire information to the Department of Homeland Security (DHS) and the Social Security Administration (SSA). The program attempts to match each employee's information, taken from an I-9, with data held by the DHS and the SSA to confirm the employee's identity and work eligibility. While E-Verify is voluntary under federal law, some employers must participate under state law. As it has in prior years, the U.S. Congress is considering a bill that would mandate E-Verify for employers nationwide.

<sup>11</sup> See Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates* (December Edition), WPI Report (Dec. 29, 2017).

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