LITTLER WORKPLACE POLICY INSTITUTE

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Monthly Newsletter | June 2017

Crunch Time in the Statehouses Before Summer Break

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At this point in the year, many state lawmakers are wrapping up their efforts before summer, when many legislatures are in recess. Legislatures in roughly half the states have already concluded their sessions. Approximately 18 more state legislatures will adjourn by the end of June. As the active sessions wind down, there is little time left for legislators to propose new measures or advance bills still under consideration.

As a result, only about 50 new employment-related bills were proposed during the month of May. New York saw the most new proposals, with about nine, while Maine, Pennsylvania, New Jersey, Massachusetts, and Puerto Rico introduced about five bills apiece. Meanwhile, more than 30 bills died, either in the legislature or on a governor's desk. So far, roughly 10% of the more than 240 employment-related bills pending at the state or city level have become law. This month's State of the States features some notable trends in the bills that have been enacted or seriously evaluated.

Preemption and Predictive Scheduling

Preemption bills—which seek to preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries—received mixed reviews in May. Minnesota Governor Dayton indicated he would veto a preemption measure (HB 600) that passed both houses, and similar language was reportedly removed from the budget. Accordingly, the paid sick leave and minimum wage ordinances enacted in St. Paul and Minneapolis are expected to take effect as planned.

On the other hand, Missouri's legislature approved a preemption bill (HB 1194), which prohibits any political subdivision from requiring an employer to provide a minimum wage or employment benefit exceeding the requirements set by state law. "Employment benefit" is defined broadly under this bill to include not only health and similar benefits, but also sick leave and attendance policies. The bill passed both houses and awaits the likely signature of Governor Greitens.[1] Assuming the law takes

effect, it will nullify minimum wage raises passed in St. Louis and Kansas City, likely spurring legal challenges.

Georgia passed a preemption law (HB 243), which targets "predictive scheduling" ordinances that might seek to entitle employees to additional pay based on schedule changes. This new law, effective July 1, 2017, builds on Georgia's existing preemption law.

New York City, meanwhile, adopted a package of ordinances impacting retail and fast food establishments. With respect to retail establishments, these measures ban "on call" scheduling, generally prohibiting retail employers from cancelling, changing, or adding work shifts within 72 hours of the start of an employer's previously-scheduled shift. Other "Fair Workweek" ordinances affecting fast food employers will similarly impact an employer's ability to modify employee schedules and impose severe penalties for last-minute schedule changes. Mayor de Blasio signed the laws on May 30, 2017. They become operative in November.

Pay Equity and Related Measures

Bills addressing equal pay continue to dominate headlines, with quite a few gaining steam. An Oregon bill (HB 2005) was signed into law on June 1.[2] The law builds upon the state's existing equal pay law by expanding coverage to additional protected categories, imposing restrictions on salary history inquiries, increasing existing remedies available to employees, and providing a safe harbor for employers that have voluntarily assessed their pay practices to identify and eliminate discriminatory pay practices.

In California, Assembly Bill 168 would prohibit an employer from seeking salary history information about an applicant for employment. It would also require an employer, upon reasonable request, to provide the pay scale to an applicant for employment. This measure has passed the assembly and is before a senate committee. The Golden State's assembly also passed AB 1209, which would require large employers (those with 250 or more employees) to collect and publish online specified information on gender pay differentials and submit the information to the Secretary of State.

Similar bills have progressed through at least one chamber in Delaware (HB 1) and New Jersey (AB 3480), and both chambers in Illinois (HB 2462). The Delaware and New Jersey bills preclude an employer from asking about prior salary and from requiring that prior salary be used to qualify or disqualify an applicant for the job. New York City, for its part, adopted an ordinance (Int. 1253-A) that prohibits employers from inquiring about a prospective employee's salary history or relying on that salary history when setting compensation for the applicant.[3] The ordinance, which will take effect by the end of October, provides for some exceptions, such as when an applicant voluntarily discloses prior salary information.

Several states continue to weigh wage transparency bills, which protect employees who choose to disclose and discuss their wages. Two proposals containing such provisions have reached the governor's desk in Nevada (AB 276 and SB 397). A Colorado measure (HB 1269) that has also passed both houses would extend wage transparency protections to all employees, including those exempt from coverage under the National Labor Relations Act. The Illinois proposal mentioned above (HB 2462) also enhances existing wage transparency protections by making it illegal to require an employee to waive the right to discuss wages.

A pending Washington bill (HB 1506), which has cleared both legislative chambers, includes a wage transparency provision along with broader equal pay measures. That bill bans pay disparities based on gender and also prohibits employers from discriminating in career tracking. Specifically, it grants employees certain remedies if they receive "less favorable employment opportunities" because of gender. Under that measure, employers could be liable for failing to provide information about promotions or for limiting career opportunities based on gender.

Paid Sick and Safe Time

Paid sick leave remains a hot topic in the statehouses, and the growing patchwork of such laws compounds the headache for employers.

An Illinois measure (HB 2771), which has passed both houses, would permit employees to accrue paid time off (one hour for each 40 hours worked) in order to care for their physical or mental needs, to tend to the needs of a family member, to attend medical appointments, to care for children when school or daycare are closed due to an emergency, or to address domestic or sexual violence situations. Meanwhile, in Arizona, the Industrial Commission has issued proposed rules to implement its sick leave and minimum wage law. The Arizona law takes effect July 1, 2017, although the regulations, if adopted, would not become final until the fall.[4]

In Maine, a bill (LD 1159) that would require employers of 50 or more employees to provide employees with one hour of paid sick leave for every 30 hours worked has cleared a house committee.

Other paid leave proposals have suffered setbacks. Governor Hogan of Maryland, for example, recently vetoed a bill (HB 1) that would have granted paid sick leave to employees working for employers with 15 or more workers. The legislature passed the measure with enough votes to surpass a veto, however, thus setting up a potential override battle in the next session. Similarly, Nevada's governor vetoed a bill (SB 196) that would have required an employer to provide employees with one hour of paid sick leave for every 30 hours worked.

Also in May, a Pennsylvania Commonwealth Court invalidated the City of Pittsburgh's sick leave ordinance. The ordinance would have allowed employees to earn one hour of paid sick leave per 35 hours worked. Employer groups successfully challenged the ordinance, although the City intends to appeal the ruling.[5]

"Kin Care" Leave

A few family leave proposals made headway in the last few weeks, primarily involving "kin care." Governor Abbott of Texas signed a bill (HB 88) that expands the definition of "child" to include foster children for purposes of an employer's sick leave policy. Thus, if an employee is permitted to take personal leave to care for a biological or adoptive child, the same right must be extended to foster parents. The new law takes effect September 1, 2017.

Georgia enacted a more generous kin care law (SB 201), effective July 1, 2017. The law, signed by Governor Deal, applies to employers with more than 25 employees and covers employees working at least 30 hours per week. Under the new law, employers that offer paid sick leave to employees—or choose to do so in the future—must allow employees to use their paid sick leave to care for their children, spouse, parents, grandparents, grandchildren or any person identified as a dependent on the employee's most recent tax return.[6]

Pregnancy and Lactation Accommodation

A handful of states are considering expansion of their nondiscrimination laws to expressly protect employees who are pregnant or who have conditions related to pregnancy. Vermont enacted one such law (HB 136) in May. The Vermont law takes effect on January 1, 2018 and makes it an unlawful employment practice to deny reasonable accommodation for an employee's pregnancy-related condition, unless an accommodation would impose an undue hardship.

A Nevada proposal (SB 253) has cleared both chambers and awaits the governor's decision. The bill mandates that employers with 15 or more employees must afford the same treatment to employees and applicants who are affected by pregnancy, childbirth or related conditions as they would to other individuals. It applies to all aspects of employment and requires employers to provide reasonable accommodations, upon request, for pregnancy, childbirth or related conditions, including gestational diabetes, lactation, and post-partum depression.

A pregnancy accommodation bill is also pending in Connecticut (HB 6668), where it has passed the house and a senate committee. The measure would obligate employers to offer reasonable accommodations but at the same time prohibit them from forcing an employee or applicant to accept an accommodation she does not want. It would further prohibit employers from limiting, segregating, or classifying an employee in such a manner that she would be deprived of opportunities because of her pregnancy.

Immediately to the north, Massachusetts has entertained several pregnancy accommodation bills. Most have fizzled, but one measure (HB 3680) has cleared the house. The bill, which is under review by a senate committee, would require reasonable accommodation

for employees who are pregnant, who have a condition related to pregnancy, or who are nursing. The bill defines "reasonable accommodation" to include, among other things, more frequent or longer breaks, time off to recover from childbirth, light duty, job restructuring, and modified work schedules.

Discrimination Claims

Missouri is poised to enact a measure that will make sweeping changes to its discrimination and whistleblowing laws. The amendments would more closely align Missouri law governing discrimination claims with federal precedent. For example, the existing causation standard in Missouri imposes liability if discrimination was a "contributing factor" to an adverse decision, but the bill would instead require proof of bias as a "motivating factor." The bill (SB 43) has been delivered to the governor for consideration.[7]

Social Media

Vermont recently joined the majority of states by enacting a statute (HB 462) that protects the privacy of an employee's or applicant's social media accounts. Under the new law, which takes effect on January 1, 2018, employers may not request or coerce employees or applicants to disclose a user name, password, or other means of authentication, or to turn over an unlocked electronic device, in order to access an individual's social media account. The law further bans requiring an employee or applicant: (1) to access an account in the employer's presence; (2) to add the employer to the individual's contacts; or (3) to change the privacy settings to allow increased third-party access. Retaliation is also prohibited. As with similar laws in other jurisdictions, various exceptions apply—including, for example, for employer-provided devices or during certain types of investigations.

Joint Employment

Bills intended to clarify the nature of the joint employer relationship continue to advance. This trend seeks to legislatively defeat court decisions and agency interpretations that in recent years have expanded the concept of joint employment and thereby increased employer risk.

In May, North Carolina enacted such a law (SB 131), which explicitly states that "[n]either a franchisee nor a franchisee's employer shall be deemed to be an employer of the franchisor for any purposes." This law becomes operative at the end of August.

Alabama's governor also signed into law a nearly identical bill (HB 390). The Alabama version provides that a franchisee, an employee of a franchisee, or an independent contractor working for a franchisee may not be considered employees of the franchisor. Meanwhile, a different type of proposal is progressing in New Hampshire (SB 89). That bill would establish that a franchisor may be deemed an employer or co-employer only if it agrees in writing to assume that role.

Minimum Wage

Minimum wage issues continue to garner attention in states and localities from coast to coast. Readers interested in more detail on this topic 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 during this final legislative push. Stay tuned for future reports on interesting developments that unfold before summer recesses begin.

1 Harry Wellford, Jr., *Missouri Legislature Approves Minimum Wage Preemption Bill*, Littler ASAP (May 15, 2017).

2 *See* Cody Emily Schvaneveldt, *Oregon Enacts New Equal Pay Law that Includes Salary History Inquiry Restrictions*, Littler ASAP (June 1, 2017).

3 *See* María Cáceres-Boneau, Jean Schmidt, and David M. Wirtz, *New York City Set to Ban Inquiries About Salary History*, Littler ASAP (Apr. 14, 2017).

4 *See, e.g.*, Neil Alexander & Lindsay Schafer, *New Arizona Law Provides Minimum Wage Increases and Paid Sick Time*, Littler Insight (Nov. 15, 2016). In addition, the proposed regulations are available at *http://apps.azsos.gov/public_services/register/2017/18/contents.pdf*. The comment period closes June 5, 2017.

5 Mark Phillis, *Pittsburgh's Paid Sick Days Ordinance is Confirmed to Be Invalid*, Littler ASAP (May 18, 2017).

6 Shella Neba & Blaze Douglas, *Georgia Enacts Kin Care Law*, Littler ASAP (May 15, 2017).

7 Curtis R. Summers, *One Step Remains in Correcting the Missouri Human Rights Act*, Littler ASAP (May 10, 2017).

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