



Legislatures Pick up the Pace

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State and local lawmakers introduced over 250 new labor and employment bills in February, and considered hundreds of others in various stages of the legislative lifecycle. Many topics covered by these measures are familiar, including paid leave, criminal history, predictive scheduling, and minimum wage. Although it is still too early in the legislative session to see significant movement on most bills, some noticeable trends are forming.

The #MeToo movement has had a lasting impact, inspiring several bills that seek to ban nondisclosure agreements involving sexual harassment claims and to mandate harassment training. A few of these bills have advanced through at least one legislative chamber. At the same time, more than 100 state bills have already died in committee, the majority of which were in Mississippi and Virginia.

The following provides a brief overview of recent legislative developments at the state and local level.

Nondisclosure Agreements

The newest legislative trend is the introduction of bills that would prevent employers from requiring various forms of nondisclosure agreements related to sexual harassment. In Washington State, a few bills that would restrict such agreements have advanced.

One bill (SB 5996), which has cleared both legislative chambers, would prevent employers from requiring employees, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at a work-related event, or involving company personnel. Notably, the bill would not prohibit settlement agreements alleging sexual harassment that contain confidentiality provisions.

Another bill (SB 6471) that has been sent to the governor would create a stakeholder work group to develop model policies and best practices for preventing sexual harassment. The state Human Rights Commission would have to adopt and post these model policies on its website.

Other bills related to sexual harassment also advanced in Washington. SB 6068 would stipulate that in any civil action related to sexual harassment or assault, “a nondisclosure policy or agreement that purports to limit the ability of any person to produce evidence regarding past instances of sexual harassment or assault by a party to the civil action” would not impact discovery or witness testimony.

STATE OF THE STATES

In the same vein, Washington's senate passed SB 6313, which would render any agreement or employment contract void as against public policy if it requires employees to waive their rights to pursue a cause of action under state or federal anti-discrimination law, or if it requires a dispute resolution process that is confidential.

A handful of other states introduced bills in February that also seek to prohibit agreements banning the disclosure of details related to sexual harassment allegations, or would require employees to waive future claims related to harassment. At least three such bills were introduced in Tennessee. Other bills made their February debut in Kansas, Kentucky, Maryland, Missouri, New Jersey, and West Virginia.

Salary History

Limiting an employer's ability to inquire about an applicant's salary has become a popular legislative approach to target the wage gap between men and women. The theory is that an unfairly set salary level should not have to follow the employee from job to job. In February, Vermont's lower legislative chamber passed HB 294, which would prohibit employers from requiring an applicant to disclose his or her salary and benefit history and from seeking an applicant's salary history without authorization. The bill would not prevent an employer from inquiring about a prospective employee's salary expectations or requirements. This measure is currently in a senate committee. If enacted, it would take effect on July 1, 2018.

Similar bills were also introduced last month in Arizona, Connecticut, Hawaii, Illinois, Kentucky, Minnesota, Rhode Island, and South Carolina.

Wage Transparency / Equal Pay

Another common legislative method to promote equal wages is to prevent employers from banning salary discussion in the workplace. A house committee in Oklahoma has approved a bill (HB 1530) that would, among other provisions, make it unlawful for an employer to fire or otherwise discriminate against employees who inquire about or discuss their own pay or the pay of another employee. Two other Oklahoma bills (HB 2534, SB 1527) introduced in February also contains these restrictions, as does a new bill (HB 4440) introduced in

West Virginia's lower chamber.

In California, lawmakers have introduced a pay-transparency-related bill similar to one that was vetoed last year. The new bill (SB 1284) would require employers with 100 or more employees in the Golden State to begin collecting and providing to the Secretary of State pay data information. Specifically, covered employers would be required to report, among other information, the number of employees by race, ethnicity, and sex in each of ten specific job categories, as well as pay information for each employee. It is too early to tell whether this bill will make it past the finish line this year.

A handful of other bills introduced in Alabama, Connecticut, Illinois, Kentucky, Missouri, Oklahoma, Rhode Island, Washington, and Wyoming would either create new or expand existing equal pay obligations. Versions of a Washington bill (HB 1506), for example, have cleared both chambers. The measure that has advanced through the state senate would update the state's existing state equal pay act to address income disparities, employer discrimination, and retaliation practices. The bill would make it unlawful to pay different wages based on gender between those *similarly* employed. The bill defines those "similarly employed" as those who "work for the same employer, the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative of whether employees are similarly employed." An employer would be able to pay different compensation based on a bona fide seniority system, merit system, training, or education levels, or other listed factors. An employer could not, however, use an employee's salary history to defend pay differentials.

Protected Time Off

In the wee hours of February 16, 2018, the city council of Austin, Texas approved an ordinance that will require all private employers in the city to allow their employees to accrue paid sick leave.¹ The mayor signed this ordinance ten days later. Whether the Texas Legislature will respond with a bill to preempt local laws such as Austin's is up in the air.

In Minneapolis, Minnesota, a committee has approved proposed changes to the city's paid sick leave ordinance. Specifically, these amendments clarify that an employer

¹ See Steve McCown and Kim Miers, [Does Anything Good Happen After Midnight? Austin, Texas Adopts Paid Sick Leave](#), Littler ASAP (Feb. 16, 2018).

is only required to allow an employee to use sick and safe time that is accrued when the employee is scheduled to perform work within the geographic boundaries of the city.

Meanwhile, a few states (e.g., Connecticut, Illinois, and Utah) considered bills in February that would provide a tax credit to employers that provide their employees with paid family and medical leave.

Another method for offering some form of paid time off is the creation of a state-run family and medical leave insurance program funded by payroll contributions.

Newly introduced bills to create this type of system were introduced in Connecticut, Hawaii, Oklahoma, and Oregon.

Several other states would either create new leave entitlements or expand existing paid leave requirements. We will continue to monitor those bills and report on any measures that advance significantly.

Background Checks

Restricting an employer's ability to ask about and/or use an applicant's criminal history in making employment decisions continues to be a popular legislative area. On February 1, 2018, Kansas City, Missouri enacted a local ban-the-box ordinance.² The new law, which applies to employers in the city with six or more employees, prevents employers from inquiring about an applicant's criminal history until after an initial interview and after it has been determined that the individual is otherwise qualified for the position. The inquiry may then be made of all applicants who are "within the final selection pool of candidates."

In Washington, a ban-the-box bill has cleared the house and a senate committee. Similar to the ordinance enacted in Kansas City, the Washington legislation (HB 1298) would prevent inquiries on an employment application, or orally, regarding an applicant's criminal record until after the employer initially determines that the applicant is otherwise qualified for the position. Similar bills were introduced in Kentucky, Illinois, and Pennsylvania in February.

Some newly introduced bills in California would amend existing ban-the-box provisions. Other bills would provide a tax credit for hiring applicants with criminal records. One such bill (HB 175) cleared Mississippi's lower chamber last month.

Relatedly, bills to limit an employer's use of an applicant's *credit* history also remain strong, if not as frequent. One bill (HB 1619) cleared Oklahoma's lower legislative chamber, while a separate bill (SB 2304) was introduced in Massachusetts.

Independent Contractors

A bill (HB 789) that has cleared Georgia's house would help clarify worker status for many gig economy employers in the state. The measure would stipulate that a "marketplace contractor" is to be treated as an independent contractor of a "marketplace platform," and not as an employee, for all purposes under state and local laws, rules, regulations, ordinances, and resolutions, except for purposes of workers' compensation. As defined in the bill, a "marketplace contractor" enters into an agreement with a marketplace platform to use the platform's digital network to receive connections to customers seeking services, and offers or provides services to these customers for compensation. A "marketplace platform" uses "a digital network to connect customers to a marketplace contractor for the purpose of providing services to customers for compensation, and accepts service requests from customers only through such platform's digital network and does not accept service requests in person at physical retail locations, by telephone, or by facsimile."

Other bills were introduced (in Hawaii and New Jersey, for instance) to clarify existing statutes or to establish new tests for determining who is an independent contractor, but none have advanced significantly so far.

A separate type of bill that has cleared Arizona's house would shield employers from liability for a contractor's criminal history.

Predictive Scheduling

States continue to press for so-called "predictive" or "fair" scheduling laws that require certain employers to provide employees with advance notice of their schedules and changes to those schedules. New proposed legislation was recently introduced in Hawaii, Illinois, and Vermont.

Hawaii's bill (SB 2288), which has cleared a senate committee, would require employers to provide employees with ten days' advance notice of their schedules, and

2 See William J. Simmons, Uzo N. Nwonwu, and Jason N.W. Plowman, [Kansas City, Missouri, Enacts "Ban-the-Box-Plus" Ordinance](#), Littler ASAP (Feb. 6, 2018).

impose penalties for noncompliance. Illinois's measure (HB 5046) would create the Fair Scheduling Act, requiring employers to provide work schedules to employees at least 72 hours before the start of their first shift, and require "reporting pay" if the shift is canceled or reduced within 72 hours of the work shift.

Finally, Vermont's bill (HB 812) would require the provision of two weeks' advance notice of work schedules, as well as give part-time employees the right of first refusal to take on extra hours before an employer can hire additional employees.

Preemption / Anti-Preemption

Kansas City's and Austin's new ordinances are just the latest examples of municipalities implementing labor and employment laws where similar measures have not moved at the state level. The steady increase in local law changes has given rise to state bills that seek to preempt them. A broad preemption bill (SB 458) that has cleared West Virginia's senate would prevent local governments from adopting, enforcing, or administering any ordinance, regulation, local policy, or local resolution governing private-sector background checks, minimum wages, fringe benefits, labor relations, paid or unpaid leave, or scheduling. A similar Mississippi bill (HB 1241), however,

recently died in committee.

Some preemption bills are more specific. One introduced in Arizona, for example, would preempt health insurance-related legislation. Another introduced in Illinois would preempt local attempts to regulate labor relations. Yet another introduced in Oklahoma contains a provision that would preempt local attempts to raise the minimum wage.

On the flip side, some "anti-preemption" bills (e.g., Kansas HB 2647, Oklahoma HB 1634), seek to either repeal existing preemption law or expressly allow localities to enact local minimum wages (e.g., Kentucky HB 393).

For more information on minimum wage and overtime legislative and regulatory updates, see the latest edition of WPI's Wage Watch.³

What's Next?

State legislatures are expected to continue introducing new legislation at a rapid pace through the end of March and into the second quarter of the year. Then state lawmakers will start winnowing down the pile, and actively consider their legislative priorities. We will continue to monitor notable state and local bills, and report on those that seem to be gaining traction. Stay tuned.

3 Libby Henninger, Sebastian Chilco, and Corinn Jackson, *WPI Wage Watch: Minimum Wage & Overtime Updates (February Edition)*, WPI Report (Mar. 1, 2018).

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