LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

CURRENT EVENTS MONTHLY NEWSLETTER

April 2016

INSIDER BRIEFING

With an eye to the Congressional Review Act clock, the Department of Labor (DOL) recently released long-awaited and controversial final regulations and readied others for imminent release. The Congressional Review Act (CRA) gives Congress the authority to overturn regulations by passing a resolution of disapproval. Such resolutions, however, are subject to a presidential veto. The CRA has been successfully employed only one time, nullifying a Clinton Administration ergonomics rule after the White House and Congress came under Republican control. The Obama Administration is rushing to issue some of its most contentious regulations before a mid-May deadline for retaining veto power over any CRA resolution that passes Congress. For final regulations issued after that deadline, it would fall to the next president to decide whether to veto or approve any such congressional resolution.

Hoping to run out the clock on a potential CRA challenge before the next president is sworn-in, on March 24, the DOL issued its final rule on persuader activity under the Labor-Management Reporting and Disclosure Act. The final rule requires employers to file public reports with the DOL when they use consultants, including attorneys, to provide labor relations advice and services that have the purpose of persuading employees regarding union organizing or collective bargaining. The final rule and its narrowing of the "advice" exemption is a radical departure from

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ON THE MOVE

States and localities continue to pick up the legislative slack left by a dysfunctional U.S. Congress. In March 2016, more than 90 labor- and employment-related state bills and ordinances were introduced, and over 40 were signed into law. However, while local governments have been relatively effective at moving legislation, some state legislatures have reined in such legislative ambition. Several measures aimed at preventing local governments from enacting measures that would provide a level of benefits greater than that provided under state or federal law advanced in March. These measures covered minimum wage, fair scheduling laws, discrimination protections, and other employment benefits. The following discusses these and other notable bills that gained traction last month.

Minimum Wage

Attempts to temper minimum wage increases at the

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the previous standard under which such reports were required only when a consultant providing advice had direct contact with employees. The final persuader rule comes almost five years after the DOL issued its proposed rule in 2011, but its implementation has been a long-standing goal of organized labor. The battle over the persuader rule now moves to the courts and Congress, where opponents of the rule are looking to appropriations legislation to block it. See this month's *In Focus* article for more information on the persuader rule.

On the same day the persuader rule was issued, the DOL's Occupational Safety and Health Administration (OSHA) released a final rule amending its existing standards for occupational exposure to respirable crystalline silica. The final silica rule sets a new permissible exposure limit (PEL) of 50 micrograms of respirable crystalline silica per cubic meter of air (50 µg/m3) as an 8-hour time-weighted average in all industries covered by the rule. The new limit is roughly 50% of the previous PEL for general industry, and roughly 20% of the previous PEL for construction and shipyards. It includes other provisions, such as requirements for exposure assessment, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. OSHA, in fact, issued two separate standards—one for general industry and maritime, and the other for construction – which, according to the agency, was "in order to tailor requirements to the circumstances found in these sectors."

The 600-page rule was met with intense criticism from a number of industry groups, contending it is neither technologically nor economically feasible. Both legal and legislative challenges to the silica rule are expected.

While most of the attention on OSHA rulemaking has been focused on the silica rule, the agency also recently issued two final rules on whistleblower protections. On March 16, OSHA published an interim final rule governing the employee whistleblower or retaliation protection provisions of Section 31307 of the Moving Ahead for Progress in the 21st Century (MAP-21) Act. On March 17, OSHA published a final rule governing the whistleblower provisions of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA). This final rule responds to comments on a 2014 interim final rule. The interim and final rules establish the procedures and timeframes for the handling of retaliation complaints under MAP-21 and CFPA, respectively.

In March, the DOL's Wage and Hour Division took one step closer to issuing its final white collar overtime exemption rule. On March 14, the agency sent the final rule to the White House Office of Management and Budget (OMB). OMB clearance is the last step in the rulemaking process before publication of a final rule in the *Federal Register*, and typically takes between 30 and 90 days. With the CRA clock in mind, release of the final overtime rule in mid-May seems likely. The CRA also requires a 60-day period before the rule could become effective, meaning that employers would have to be in compliance in mid-July of this year. The content of the final rule DOL sent to the White House for review, or what will emerge from the OMB review process, are not known. Whether the salary threshold in the final regulations deviates from that in the proposal or whether the final rule will also include changes to the duties test remains to be seen.

As employers anxiously await the release of the final overtime rule, Republican members of Congress have introduced legislation to block it. The Protecting Workplace Advancement and Opportunity Act, introduced in the Senate by Sen. Tim Scott (R-SC) and in the House by Rep. Tim Walberg (R-MI), would require the Secretary of Labor to nullify the proposal and conduct an economic analysis to determine its impact on certain employers before implementation. The findings in the bill echo many of the complaints raised by the employer community against the proposed rule, such as the contention that the DOL did not consider the potential impact of the proposal

on workplace flexibility and that the agency lacks the authority to increase the salary threshold on an annual or other basis without conducting notice-and-comment rulemaking with respect to each change. While the bill—even if it were to pass Congress—would face a certain presidential veto, it does serve to reinforce the concerns many employers have with the rule.

Another subject of legislation in March was the Equal Employment Opportunity Commission's (EEOC) proposed changes to the EEO-1 report to collect pay data. The EEOC's proposal would require employers with 100 or more employees to report data of their employees' W-2 pay and hours worked in broad pay bands and job categories, by gender, race and ethnicity. On March 16, during a public meeting held by the EEOC, a number of representatives of the employer community voiced their concerns with the proposal. Among the concerns raised were that the EEOC significantly underestimated the burden of the EEO-1 revisions, that the data would not be a reliable indicator of pay discrimination, and that the EEOC proposal fails to protect the confidentiality of the information. The same day as the EEOC public meeting, Senator Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced the EEOC Reform Act. According to Senator Alexander's press release, the bill "would require the EEOC to calculate the cost of imposing its own rule on the federal government so that the EEOC better understands the burden the rule adds to private employers."

Comments on the proposed revisions were due April 1. Pursuant to the Paperwork Reduction Act, the OMB must approve the EEOC's request to revise the EEO-1.

In other notable EEOC developments, the Commission filed its first lawsuits challenging sexual orientation discrimination as sex discrimination under Title VII of the Civil Rights Act of 1964. In the press release announcing the suits, EEOC General Counsel David Lopez stated: "[w]ith the filing of these two suits, EEOC is continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation." Lopez added, "[w]hile some federal courts have begun to recognize this right under Title VII, it is critical that all courts do so." The lawsuits were significant in that they represent the EEOC's efforts to push the envelope of statutory authority under Title VII as federal legislation to create discrimination protections for employees on the basis of sexual orientation or gender identity remains stalled in Congress.

With respect to developments at the National Labor Relations Board (NLRB), General Counsel Richard Griffin issued a memorandum listing issues that regional directors, officers-in-charge and resident officers must submit to the board's Division of Advice. Pursuant to Memorandum GC 16-01, new mandatory issues include "the employment status of workers in the on-demand economy," whether misclassifying employees as independent contractors constitutes an unfair labor practice, whether a union-management bargaining impasse over a single issue demonstrates an overall impasse in negotiations because the disputed issue is critical to one or both of the parties, and cases involving whether an employer's "English-

Quotes of the Month

"The reporting requirements put into place by the revised rules are minimal."

— Michael Hayes, Director of the DOL's Office of Labor-Management Standards, on the final persuader rule

"This rule will chill employer free speech and make it harder for small business owners to navigate a host of complex labor rules."

— House Education and the Workforce Committee Chairman John Kline (R-MN) and Health, Employment, Labor, and Pensions Subcommittee Chairman Phil Roe (R-TN) on the same rule

only" policy violates Section 8(a)(1). Griffin also issued a memorandum on agency case handling and operations, responding to questions submitted to him during an annual American Bar Association meeting.

Another U.S. Circuit Court of Appeals has weighed in on the validity of the appointment of Lafe Solomon as the former acting general counsel of the NLRB. In *Hooks v. Kitsap Tenant Support Services Inc.,* the Ninth Circuit held that Solomon's appointment was invalid under the Federal Vacancies Reform Act, which resulted in the dismissal of an NLRB suit over allegedly unfair firings by a home health aide company. Earlier, the D.C. Circuit similarly held that Solomon's acting role was invalid.

On March 23, Congressman Bradley Byrne (R-AL), a member of the House Education and the Workforce Committee and a former labor and employment attorney, led 72 House Republicans in sending a letter to the House Appropriations Committee asking that four major labor decisions and regulations be rolled back. The letter deals with four controversial labor issues, and asks that they be addressed in the appropriations legislation. The four issues are: the DOL's persuader rule, the NLRB's ambush election rule, the NLRB's new joint employer standard, and the Board's *Specialty Healthcare* decision on micro bargaining units. While including one or more of the labor policy riders in a final funding bill will no doubt prove difficult, the battle lines have already been drawn and foretell of an upcoming battle on Capitol Hill and with the White House.

Congressional efforts to block the Administration's labor and employment agenda will continue to play out over the remainder of the year. Yet, it may well fall to the courts to determine whether the regulations survive, a determination that may ultimately rest with the Supreme Court. Accordingly, the next Justice to occupy the ninth seat on the Court could determine the fate of such challenges to administrative action.

A month after Justice Scalia's death, President Obama appointed Merrick B. Garland to fill the High Court vacancy. Judge Garland currently is Chief Judge for the U.S. Court of Appeals for the D.C. Circuit. President Clinton nominated Garland to the D.C. Circuit Court in 1995. His nomination, however, stalled because Senate Republicans did not believe that the vacant seat should be filled by anyone. In 1997, President Clinton again nominated Garland for the D.C. Circuit; this time, he was confirmed by the Senate by a vote of 76-23.

Judge Garland's record on labor and employment issues is not well established. However, his views on administrative deference are more recognized and suggest he would likely uphold administrative rules. For example, in *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257 (D.C. Cir. 2014), Judge Garland voted to uphold a rule promulgated by the Department of Labor's Office of Federal Contract Compliance Programs under Section 503 of the Rehabilitation Act, which requires government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. If Judge Garland's nomination is voted upon by the Senate and confirmed—whenever that may be—he could represent the deciding vote on challenges to rulemaking by the Obama Administration or other labor and employment matters.

The Supreme Court's recent 4-4 split in *Friedrichs v. California Teachers Association* was a clear example of how Justice Scalia's death has changed the makeup of the Court. Based on oral arguments held prior to Justice Scalia's death, he was expected to be the deciding fifth vote to overturn *Abood v. Detroit Board of Education*. In *Abood,* the Court upheld as constitutional agency shop clauses for public sector employees. Instead, the Court's deadlock allows the Ninth Circuit decision permitting the imposition of public sector union agency fees for non-union members to stand. With the presidential and congressional elections only seven months away, the workplace policy agenda in the agencies, in Congress, and in the courts lies in the balance.

– By Ilyse Schuman and Michael J. Lotito

local level have not slowed efforts to boost the minimum wage floor around the country.

Fifteen dollars per hour is the new popular target wage, replacing last year's $10.10 minimum wage goal. A week after a California ballot initiative was certified that would allow voters to decide whether to increase the state's minimum wage to $15 per hour by the year 2021, the state legislature passed SB 3, which will raise the minimum wage to $15 by the year 2022. Governor Jerry Brown signed the bill into law on April 4. SB 3 will impose the first increase on January 1, 2017 to $10.50 per hour for employers with at least 26 employees. Smaller employers would have an additional year to implement the step increases to the eventual $15-per-hour floor. This legislative alternative was part of a deal reached by union members and the state legislature's Democratic members.

Workers in Pasadena, California, meanwhile, will see their wages increase starting in July. Employers with at least 26 employees will have to pay them at least $10.50 per hour starting on July 1, 2016, not less than $12 starting on July 1, 2017, and not less than $13.25 starting on July 1, 2018. Smaller employers will have an additional year to provide the first step increase.

On the East Coast, New York's budget has created a convoluted minimum wage system that will provide varying minimum wage increases by region. In New York City, for example, the minimum wage will increase to $15 per hour by the end of 2018. Other jurisdictions will see more modest raises over longer periods of time.

Similarly, on March 2, Oregon's governor signed into law a three-tiered geographic approach to the minimum wage.

Meanwhile, Washington, DC's mayor has indicated she would support city council efforts to raise the city's minimum wage to $15 per hour by the year 2020.

Bills to raise the minimum wage were introduced in at least four other states in March.

Idaho, however, was in the opposite camp. Idaho lawmakers enacted HB 463 in March, which prohibits localities from establishing a minimum wage higher than the state or federal amount. Although both chambers passed a similar measure in Virginia (HB 1371), the governor vetoed it on March 25.

Equal Pay

Both legislative chambers in New Jersey passed a bill (SB 992) that would make significant pay-related changes if enacted. The bill would restart the statute of limitations for filing a state wage claim each time an employee is affected by the original discriminatory pay-related action, essentially applying the terms of the federal Lilly Ledbetter Fair Pay Act to state claims. More significant, the bill would mandate equal pay for "substantially similar work." It is uncertain whether Governor Chris Christie will sign this measure, as he has vetoed similar legislation in the past.

Maryland's House and Senate cleared related bills (HB 1003 and SB 481), which would ban employers from providing certain less favorable employment opportunities based on sex or gender identity.

Equal pay bills were killed in Colorado, Louisiana, Nebraska, and Tennessee.

Discrimination

In a move that has generated nationwide attention, North Carolina's legislature held a special session to approve HB 2—which was quickly signed into law—prohibiting localities from enacting laws or regulations that provide benefits greater than those established under federal or state law. Notably, the Public Facilities Privacy and Security Act supersedes and preempts existing local laws that sought to "impose any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce." This move was likely in reaction to changes to Charlotte, North Carolina ordinances set to take effect April 1 that would have provided discrimination protections to individuals on the basis of sexual orientation and gender identity at certain public establishments. HB 2 also prevents individuals

from bringing certain discrimination claims in state court. The Act has already been challenged, and the state's attorney general has said his office would not defend the new law in court.

On the flip side, New York's lower chamber approved AB 4558, which would extend discrimination protections to individuals based on their gender identity or expression.

Pregnancy Accommodation

Providing pregnant or nursing employees with certain reasonable workplace accommodations continues to be a popular state legislative topic. Utah enacted SB 59, and Washington's legislative chambers passed SB 6149, both of which make it an unlawful employment practice to refuse to provide reasonable accommodations for an employee related to pregnancy, childbirth, breastfeeding, or related conditions, unless doing so would create an undue hardship. Iowa's Senate passed a similar bill (SB 2252) in March.

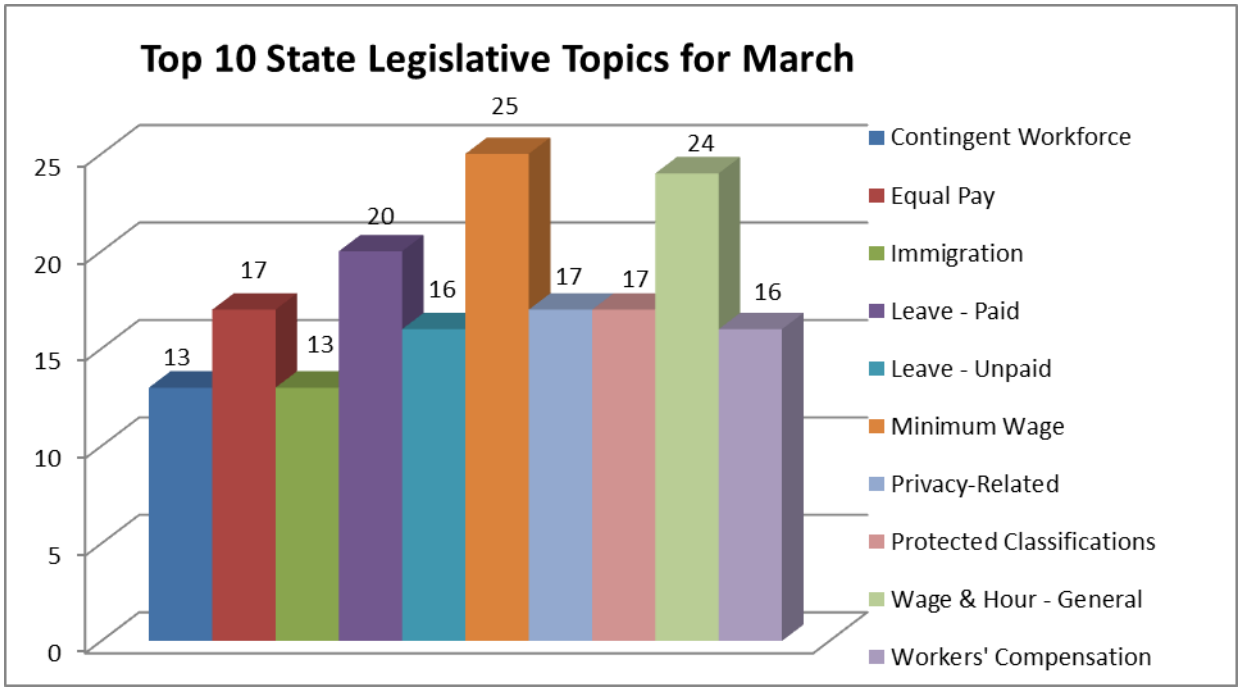
Scheduling

Indiana enacted SB 20, which prevents a local government from establishing, mandating, or otherwise requiring employers to provide employees with "an attendance, scheduling, or leave policy."

Arizona's House and Senate, and Kansas's House, cleared HB 2191 and HB 2576, respectively, each of which seeks to prohibit cities, towns, and counties from requiring an employer to alter or adjust employee scheduling unless required by state or federal law.

Bills introduced in Maryland and Rhode Island that would have *required* certain employers to provide advance notice of worker schedules died in March.

Meanwhile, New Hampshire's Senate passed legislation (SB 416) that would require employers to consider an employee's request for a flexible work schedule.



This chart shows the most popular state bill and ordinance topics considered in March 2016.

Paid Sick Leave

Vermont became the fifth state to require private-sector employers to provide their employees with paid sick leave. Under HB 187, starting January 1, 2017, employees in Vermont will be entitled to accrue and use at least 24 hours (or three days) of earned sick time in a 12-month period. Starting January 1, 2019, employees can accrue and use at least 40 hours (or five days) of earned sick time in a 12-month period.

The city of Plainfield, New Jersey will also require employers to provide their employees with paid sick leave. The city council passed an ordinance that will allow employees to earn one hour of paid sick time for every 30 hours worked, up to five sick days per year if they work for an employer with 10 or more employees, and up to three paid sick days if they work for a smaller employer.

Meanwhile, a New Jersey bill (SB 799) that would impose statewide paid sick leave requirements cleared a Senate committee. A similar Maryland bill (HB 580) that would allow employees in establishments with more than 15 employees to accrue up to seven days of sick leave per year passed a House committee.

Similar paid sick leave bills were introduced in Louisiana, Kentucky, and Rhode Island in March. A paid sick leave bill died, however, in Nebraska.

Paid Family Leave

San Francisco is considering an ordinance that would require employers with 20 or more employees to pay a portion of the difference between the benefits an employee receives under the California Paid Family Leave program and the employee's full salary. Employees entitled to receive funds under the Paid Leave program can take up to six weeks of leave to bond with a newborn baby, newly adopted child, or new foster child, and receive 55% wage replacement, funded by payroll contributions. The city's ordinance, which would require employees to pay up to the remaining 45% wage replacement benefits, will be considered in April.

The New York budget that will provide the aforementioned minimum wage increases also includes provisions allowing workers to qualify for payroll-funded family leave starting in 2018. According to preliminary reports, eligible employees will be able to receive a 50% statewide average weekly wage benefit for 12 weeks, rising to 67% by the year 2021.

Franchise Industry & Joint Employment

In the wake of the NLRB's *Browning-Ferris* decision, several states last month moved forward with legislation that seeks to blunt the decision's impact. For example, Indiana enacted HB 1218, amending the state's business code to stipulate that a franchisor is not an employer or co-employer of a franchisee or a franchisee's employees unless the franchisor agrees, in writing, to assume the role of an employer or co-employer. Wisconsin's governor signed SB 422 into law, which also clarifies a franchisor's role with respect to a franchisee's employees. Nearby Michigan enacted a series of bills specifying that under various state employment statutes, "(e)xcept as specifically provided in the franchise agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages." Utah enacted similar legislation (HB 116) excluding franchisors as the employer of the franchisee or its employees.

Georgia's House and Senate cleared the Protecting Georgia Small Businesses Act (SB 277), which clarifies that "[n]otwithstanding any order issued by the federal government or any agreement entered into with the federal government by a franchisor or a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose." A similar measure in Virginia (HB 18) is awaiting the governor's signature or veto, while Kentucky's upper chamber and Oklahoma's lower chamber cleared related bills (SB 198, HB 3164, respectively).

Gig Economy

Following on the heels of Seattle's ordinance that would allow independent contractors in the on-demand economy to organize and bargain collectively, California Assemblywoman Lorena Gonzalez has introduced the California 1099 Self-Organizing Act, which would create a similar framework for such workers to unionize. Even if this measure were to advance, however, it would most likely be preempted by the NLRA.

In March, there were additional legislative efforts to clarify that certain gig workers are independent contractors. Both Arizona's and Oklahoma's State Houses passed bills containing language stipulating that "qualified marketplace contractors" are independent contractors under state law. A qualified marketplace contractor is defined as a "person or organization, including an individual, corporation, limited liability company, partnership, sole proprietor or other entity, that enters into an agreement with a qualified marketplace platform to use the qualified marketplace platform's digital platform to provide services to third-party individuals or entities seeking those services." The "qualified marketplace platform" means an "organization . . . or any other entity, that operates a digital platform that facilitates the provision of services by qualified marketplace contractors to third-party individuals or entities seeking those services." Such language appears to target workers involved in online commerce—i.e., those who use another entity's digital platform to find clients.

Non-Compete Agreements

While only a few non-compete bills have moved in recent months, Utah's governor signed the Post-Employment Restrictions Act (HB 251) into law in March. This measure prevents employers from requiring employees to sign non-compete agreements lasting more than one year. Specifically, the law states: "[i]n addition to any requirements imposed under common law, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this section is void."

The same month, Maryland's House approved a bill (HB 1440) that would bar non-compete or conflict-of-interest provisions in a contract entered between an employer and an employee who earns equal or less than $15 per hour, or $31,200 annually.

Background Checks

Austin, Texas is the latest jurisdiction—and the first city in the Lone Star State—to implement a ban-the-box law. Austin's Fair Chance Hiring Ordinance will prohibit most employers from inquiring about or considering an applicant's criminal history until after making a conditional offer of employment. The ordinance also prevents employers from taking adverse actions against individuals because of their criminal history unless the employer has a "good faith belief that the individual is unsuitable for the job based on an individualized assessment conducted by the employer."

Meanwhile, Tennessee enacted an "anti" ban-the-box law. SB 2103 prevents localities from prohibiting a private employer from requesting *any information* on an application for employment or during hiring.

Social Media Policies

West Virginia is the latest state to prohibit employers from requiring, requesting, or coercing applicants or employees to provide access to their personal accounts. HB 4364 was signed into law on March 15, while Hawaii's House cleared similar legislation (HB 1739). Related bills were introduced in Minnesota and New York in March.

What's Next?

As we enter Q2, employers can anticipate increasing tension between state lawmakers in opposing camps. One camp will continue to try to pass worker protection laws that have stalled at the federal level, while the other camp will keep pumping the brakes on these efforts.

– By Ilyse Schuman and Tessa Gelbman

GLOBAL REPORT

The following is a roundup of labor and employment news from around the globe:

Asia/Pacific

Congressional opposition to the proposed Trans-Pacific Partnership ("TPP") Agreement is increasing. On March 23, 19 members of New York's congressional delegation sent a letter to President Obama voicing their concerns over the TPP's impact on U.S. workers and the economy. Specifically, the lawmakers took issue with the TPP's possible blow to U.S. manufacturing jobs, and claimed that the agreement has "no effective measures to address currency manipulation." The day before, the same number of Senators sent a separate letter to U.S. Trade Representative Michael Froman, expressing skepticism that Malaysia, Vietnam, and Brunei could implement the required labor reforms as part of the TPP. Congress has yet to act on the TPP, but some have speculated that it might consider the measure during the post-election lame duck session.

South Korea. Amendments to the Labor Standards Act applicable to pregnant workers took effect March 25, 2016 for all employers. The amendments allow pregnant employees to request shorter work hours (up to two hours per day) during the early and late stages of their pregnancies. Pregnant employees who work fewer than eight hours per day are not permitted to request a reduction in hours that would allow them to work fewer than six hours per day.

Central America

Costa Rica. Significant changes to Costa Rica's labor and employment laws take effect on July 25, 2017. The country's Labor Procedure Reform ("*Reforma Procesal Laboral*" or "RPL") revises nearly half of Costa Rica's Labor Code, which has not been substantially amended since its enactment in 1943. Among other changes, the RPL adds unionization status and economic conditions as protected categories, makes it easier for employees to initiate a strike, and changes the procedures for litigating an employment dispute.

Europe

European Union – Data Privacy

In a move that could bolster approval of the new U.S.-E.U. data protection framework known as the "Privacy Shield," President Obama signed the Judicial Redress Act into law. This measure allows foreign citizens in European countries to sue the United States for unlawful disclosure of personal information obtained in connection with international law enforcement efforts. Previously, only U.S. citizens had the right to sue the federal government for such privacy violations. Approval of the Privacy Shield is contingent upon several preconditions, including the adoption of such a law providing European citizens with judicial redress if their personal information is disclosed.

European Union – Tax Transparency

In other EU news, to increase tax transparency, the European Commission announced new rules that will require multinational companies operating throughout the EU and subject to UK parliamentary scrutiny to report tax-related financial information. According to an EU press release, the new rules will require multinational entities to provide annually tax-related information for each tax jurisdiction in which they do business. This information will include revenue, pre-tax profit or loss, income tax paid and accrued, and number of employees, among other data. Each parent company will provide the tax information to its "country of establishment" in Europe, while EU-based subsidiaries must request such information from their parent companies.

Ireland. A bill granting fathers paid paternity leave is advancing. The provision of two weeks' paid leave will be included in the Family Leave Bill—expected to be introduced in September—and allow new fathers to receive the same leave amount per week (€230) as provided to new mothers. The leave benefit was agreed to in Ireland's budget. According to the *Irish Times*, the paid leave could be taken within 26 weeks of the child's birth.

United Kingdom – Visa Fees

The government has published information on new visa fees and immigration and nationality applications made from outside and within the UK. Tables indicting the various types of visas and applications and their corresponding rates—effective March 18, 2016—can be accessed here.

United Kingdom – Unfair Dismissal/Redundancy Rates

Employees subject to unfair dismissal or layoffs will be entitled to additional compensation starting April 6, 2016. The government published its annual increases to statutory redundancy pay and the amount an employee is entitled to receive as an unjust dismissal award. The amount of redundancy pay will increase from £475 to £479 per week, or from £14,250 to £14,370 total. The maximum amount a tribunal could award an employee in an unjust dismissal action will also rise from £78,335 to £78,962.

Global

According to a new International Labour Organization (ILO) report—*Women at Work: Trends 2016*—the gender gap remains a global issue. The report evaluated employment statistics in 178 countries. Among other findings, the report noted the gender gap has closed by only .6% since 1995. Moreover, the gender wage gap is estimated to be 23%. The study notes that if this trend continues, it will take 70 years to remedy this discrepancy. The 138-report outlines several policy suggestions.

North America

Canada. Ontario lawmakers have enacted a new sexual harassment law. The Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015 (Bill 132) amends various statutes regarding sexual violence, sexual harassment, domestic violence and related matters. Notably, the law amends various sections of Ontario's health and safety statute (the Occupational Health and Safety Act) and creates new obligations for employers regarding the prevention, training, investigation and resolution of workplace harassment claims. This law takes effect on September 8, 2016.

United States – Imports. President Obama recently signed into law a trade enforcement bill that included a provision to close an import loophole under the Tariff Act of 1930. Although the Tariff Act generally prohibited the importation of goods manufactured in whole or in part from forced labor, the law included a "consumptive demand exception" that applied when demand for certain goods could not be met by U.S. production. Section 910 of the Trade Facilitation and Trade Enforcement Act of 2015 eliminates this exception.

South America

Peru. The U.S. Department of Labor has issued a report highlighting its concerns about Peru's handling of labor rights in the country's non-traditional export sectors, including the textile, apparel, and agricultural industries. Notably, the report found that employees working under Decree Law 22342, which allows employers to employ workers indefinitely on consecutive short-term contracts, tend to not have their contracts renewed if they exercise their rights to freely associate. Issued under the labor chapter of the United States-Peru Trade Promotion Agreement, the report responds to a claim filed with the DOL's Bureau of International Labor Affairs by the International Labor Rights Forum, Perú Equidad and seven Peruvian workers' organizations, that the Peruvian government has failed to enforce its labor laws effectively, and that Peru's law governing employment contracts for non-traditional exports is incompatible with freedom of association. The report makes additional findings and recommendations.

– By Michael Lotito and Tessa Gelbman

IN FOCUS

First Challenge to the Persuader Rule

On March 30, 2016, Littler filed the first lawsuit in the nation to challenge the new "persuader" rule published by the U.S. Department of Labor. The new rule is titled "Labor-Management Reporting and Disclosure Act; Interpretation of the Advice Exemption," 81 Fed. Reg. 15924 (Mar. 24, 2016) (the "Rule"), and is currently scheduled to take effect on April 25, 2016.[1] Littler has sued to block the Rule in the U.S. District Court for the Eastern District of Arkansas, on behalf of a coalition of the following local and national organizations: Associated Builders and Contractors, Inc. and its Arkansas Chapter; Arkansas Chamber of Commerce/Associated Industries of Arkansas, the Arkansas Hospitality Association, the Coalition for a Democratic Workplace, the National Association of Manufacturers, and the law firm of Cross, Gunter, Witherspoon & Galchus, P.C. *See ABC v. Perez*, No. 16-cv-169 (E.D. Ark.).

Absent injunctive relief, the challenged Rule will cause a radical change in the well-settled application of Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or the "Act"), 29 USC § 433(c), which states: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer." The Rule would effectively repeal the statutory advice exemption by sweeping aside more than 50 years of consistent, judicially approved enforcement of the LMRDA's reporting requirements applicable to millions of employers represented by the Plaintiffs, both in Arkansas and nationally, and their advisors, including trade associations, lawyers, and other consultants who are also represented by the Plaintiffs in this lawsuit.

The Rule eliminates the previously well-accepted distinction between non-reportable "advice" and reportable "persuader" activity described in the DOL's 1962 LMRDA Interpretive Manual and reaffirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F.2d 616 (D.C. Cir. 1989). Since 1962, the DOL has consistently held that non-reportable advice includes any communication that is "submitted orally or in written form to the employer for his use, [where] the employer is free to accept or reject the oral or written material submitted to him." 81 Fed. Reg. at 15924. But the new Rule for the first time declares that reporting will be required of all communications to employers from advisors whose object is to "indirectly persuade" employees regarding their right to organize and bargain collectively, and that "an employer's ability to 'accept or reject' materials provided, or other actions undertaken, by a consultant, . . . no longer shields indirect persuader

[1] It is unclear what provisions of the Rule actually take effect on April 25, 2016. The Rule further states that it "will be applicable to arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016." 81 Fed. Reg. at 15924.

activities from disclosure." *Id.* at 15926.

The lawsuit contends that the DOL's new Rule usurps Congress's legislative power and violates the plain language of the LMRDA, as well as the legislative history and settled judicial interpretation of the advice exemption. In particular, the Rule is flatly inconsistent with the broad application of the advice exemption mandated by the Eighth Circuit in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974 (8th Cir. 1985) (a case filed more than 30 years ago in Arkansas). The Rule creates a series of confusing and inconsistent new reporting requirements that prevent employers and their advisors from knowing whether they are in compliance. The DOL has also violated the Supreme Court's standards for justifying a drastic departure from years of settled enforcement policy.

According to the suit, the new Rule irreparably harms the First Amendment rights of employer members of the Plaintiff associations and their advisors (which include additional members of the Plaintiff associations and the associations themselves), both by coercing speech in the form of the newly required public reports and by chilling lawful speech and membership rights of the employers and their advisors on labor relations issues, which would now have to be publicly reported for the first time in the LMRDA's history.

In addition, by requiring attorneys and their employer clients to file detailed reports regarding the advice arrangements that exist between them and regarding the nature of the advice provided, the Rule irreparably and impermissibly compels disclosure of confidential information and intrudes into confidential attorney-client communications. The Rule thereby forces lawyers to breach their ethical obligations to preserve client confidences under Rule 1.6 of the Arkansas Rules of Professional Conduct (and similar ethical rules in every other state), and violates LMRDA Section 204, which protects privileged communications, including work product.

The suit further contends that the Rule's new test for distinguishing between reportable persuader activity and non-reportable advice is so vague and confusing that it violates the Due Process Clause of the Fifth Amendment by failing to provide fair warning to employers and their advisors as to what activities will trigger criminal liability, thereby causing further irreparable harm. Finally, the Rule fails to adequately address the burdensome impact of its requirements on millions of small business employers and their advisors, in violation of the Regulatory Flexibility Act. 5 U.S.C. § 611. In each of these aspects, the Rule violates the Administrative Procedure Act. 5 U.S.C. § 706.

The Plaintiffs are seeking preliminary injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure to prevent the new Rule from going into effect on its scheduled effective date of April 25, 2016. The DOL has not yet responded to the suit but under the Federal Rules is required to respond by April 18, after which the court may order an expedited hearing. Two other lawsuits have also been filed by business associations and law firms in other parts of the country. A decision is expected by the federal court sometime during the spring of 2016.

– By Maury Baskin (lead counsel in the litigation)

OUTLOOK

APRIL

Comments Due on Proposed Changes to EEO-1 Reporting Forms
Friday, April 1, 2016
The Employment Opportunity Commission is seeking to amend Employer Information Report (EEO-1) data collection to require employers with 100 or more employees (both private industry and federal contractors) to submit information on their employees' pay and hours worked. Read more»

Extended Comment Period Closes for Proposed Rule on Federal Contractor Paid Sick Leave
Tuesday, April 12, 2016
The DOL is extending its comment period for accepting public input on its proposed rule to implement the executive order requiring certain federal contractors to provide their employees with up to seven days of paid sick leave. The close of the comment period has been moved from March 28 to April 12, 2016. Read more»

Comments Due on OSHA's Solicitation of Information Governing Whistleblower Complaint Process
Monday, April 18, 2016
The Occupational Safety and Health Administration is seeking comments on proposed changes to how the agency will handle retaliation complaints filed with the agency under various whistleblower protection statutes and procedural regulations. Proposed changes include revisions to the form employees use to submit retaliation complaints to OSHA, including electronic submission. Another proposed change would direct employees to other agencies that could provide redress if the employees' claims are not governed by OSHA. Read more»

PBGC Final Rule on Annual Financial and Actuarial Information Reporting Takes Effect
Friday, April 22, 2016
The Pension Benefit Guaranty Corporation (PBGC) has issued a final rule governing its financial and actuarial information reporting requirements. The final rule "modifies the reporting waiver under the current regulation tied to aggregate plan underfunding of $15 million or less to be based on non-stabilized interest rates"; "adds new reporting waivers for smaller plans and for plans that must file solely on the basis of either a statutory lien resulting from missed contributions over $1 million or outstanding minimum funding waivers exceeding the same amount"; and provides alternative methods of compliance for reporting certain actuarial information. Read more»

Final "Persuader" Rule Takes Effect
Monday, April 25, 2016
The Office of Labor-Management Standards of the Department of Labor has issued its so-called "persuader rule" that revises Form LM-20 Agreement and Activities Report and the Form LM-10 Employer Report to revise its interpretation of the advice exemption in section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA) to increase the scope of reportable activities. The final rule requires employers and their labor relations consultants to report activities undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining. Read more»

OSHA Final Rule Updating Standards Based on National Consensus Standards for Eye and Face Protection Takes Effect

Monday, April 25, 2016

The Occupational Safety and Health Administration has issued a final rule updating the references in OSHA's eye and face standards to reflect the most recent edition of the ANSI/International Safety Equipment Association (ISEA) eye and face protection standard. It removes the oldest-referenced edition of the same ANSI standard. The final rule also amends other provisions of the construction eye and face protection standard to bring them into alignment with OSHA's general industry and maritime standards. Read more»

Meeting of the Advisory Committee on Construction Safety and Health

Monday, April 25-Tuesday, April 26, 2016

OSHA's Advisory Committee on Construction Safety and Health (ACCSH) will hold a special meeting April 25-26, 2016, in Washington, DC, to draft a construction version of OSHA's planned Safety and Health Program Management Guidelines. Read more»

Meeting of the Whistleblower Protection Advisory Committee

Tuesday, April 26, 2016

The Occupational Safety and Health Administration's Whistleblower Protection Advisory Committee (WPAC) will hold a public meeting in Washington, DC on Tuesday, April 26 from 9:00 a.m. to 4:00 p.m. ET. Read more»

Comments Due on Proposed Rule Governing Nondiscrimination Relief for Closed Defined Benefit Pension Plans

Thursday, April 28, 2016

The IRS has issued a proposed rule that modifies the nondiscrimination requirements applicable to certain retirement plans that provide additional benefits to a grandfathered group of employees, following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposal makes other changes to the nondiscrimination rules that are not limited to these plans. These regulations would affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified retirement plans. Read more»

MAY

Extended Comment Period Ends for Input on Future OSHA Guidance for Determining Chemical Health Hazards

Monday, May 2, 2016

The Occupational Safety and Health Administration plans to issue new guidance on how to apply the Weight of Evidence approach when dealing with complex scientific studies. To this end, OSHA is accepting comments on its Guidance on Data Evaluation for Weight of Evidence Determination, which is intended to help employers consider all available information when classifying hazardous chemicals. The comment period has been extended from March 31 to May 2. Read more»

The 2016 Executive Employer® Conference

Wednesday, May 4 – Friday, May 6, 2016

Littler's Executive Employer® Conference is a multi-day event that covers the most significant employment law developments and trends impacting the workplace. The conference is designed specifically for in-house counsel, human resources executives and employee relations professionals. Read more»

Final Rule on Benefit and Payment Parameters Under the Affordable Care Act Takes Effect

Monday, May 9, 2016

The U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), has issued a final rule implementing several provisions of the Affordable Care Act. The rule establishes payment parameters and provisions related to the risk adjustment, reinsurance, and risk corridors programs; cost-sharing parameters and cost-sharing reductions; and user fees for federally-facilitated Exchanges. The final rule also provides additional changes to the annual open enrollment period for the individual market for the 2017 and 2018 benefit years; essential health benefits; cost sharing; qualified health plans; the Small Business Health Options Program; third-party payments to qualified health plans; the definitions of large employer and small employer; fair health insurance premiums; the medical loss ratio program; eligibility and enrollment; exemptions and appeals; and other related topics under the ACA. Read more»

Final DHS Rule on STEM OPT Program Takes Effect

Tuesday, May 10, 2016

The Department of Homeland Security (DHS) is amending its F-1 nonimmigrant student visa regulations on optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. The final rule allows F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months (STEM OPT extension), requires employers to implement formal training, and adds wage and other protections for STEM OPT students and U.S. workers, among other changes. Read more»

Comments Period Ends on OSHA Interim Final Rule Governing Whistleblower Procedures under MAP-21

Monday, May 16, 2016

OSHA has issued an interim rule and request for comments regulations to implement the retaliation/whistleblower provisions of section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21 or the Act). The rule establishes procedures and time frames for the handling of retaliation complaints under MAP-21, including procedures and time frames for employee complaints, investigations, and appeals. Comments on this rule are due by May 16, 2016. Read more»

IRS Public Hearing on Proposed Changes to the Nondiscrimination Requirements Applicable to Certain Retirement Plans

Thursday, May 19, 2016

The IRS will hold a public hearing to discuss proposed changes to the nondiscrimination requirements applicable to certain retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposed change would affect participants in, beneficiaries of, employers maintaining, and administrators of, tax-qualified retirement plans. The public hearing is scheduled for May 19, 2016 at 10:00 a.m. ET in Washington, DC. Read more»

JUNE

OSHA Final Rule on Occupational Exposure to Respirable Crystalline Silica Takes Effect
Thursday, June 23, 2016
The Occupational Safety and Health Administration is amending its existing standards for occupational exposure to respirable crystalline silica. This final rule establishes a new permissible exposure limit of 50 micrograms of respirable crystalline silica per cubic meter of air (50 µg/m3) as an 8-hour time-weighted average in all industries covered by the rule. The final rule also includes requirements for exposure assessment, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. OSHA is issuing two separate standards – one for general industry and maritime, and the other for construction – in order to tailor requirements to the circumstances found in these sectors. Read more»

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