LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

CURRENT EVENTS MONTHLY NEWSLETTER

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INSIDER BRIEFING

In the weeks leading up to the Memorial Day holiday, the Department of Labor's (DOL) activities confirmed that the remaining months of the Obama Administration would be a regulatory sprint to the finish line. As employers across the country prepare for implementation of several significant rules the DOL finalized in May, they also must brace themselves for additional regulations that are still forthcoming. According the DOL's spring regulatory agenda, the Department's rulemaking race to complete its workplace policy agenda before the next president is sworn in is far from over. (See this month's *In Focus* article for more information on the regulatory agenda). Meanwhile, congressional efforts to block the Administration's agenda continue, setting up a likely showdown with the White House over its labor and employment priorities.

On May 18th, the DOL's Wage and Hour Division released the long-awaited final rule updating the Fair Labor Standards Act (FLSA) white collar exemption regulations. Publication of the final rule came a week after Littler Principal Tammy McCutchen testified before the Senate Committee on Small Business and Entrepreneurship about how the proposed changes will disproportionately and negatively impact small businesses and nonprofit entities.

The final rule increases the minimum salary threshold for FLSA white collar exemptions from $455 per

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ON THE MOVE

A snapshot of the state and local bills that advanced in May highlights the struggle for multistate employers. Businesses with operations in multiple jurisdictions will once again have to review their pay policies and handbooks to make sure they comply with new equal pay requirements, minimum wage increases, paid leave mandates, and ban-the-box restrictions. Many legislative efforts to increase employer obligations related to pregnancy accommodation, social media privacy protection, and non-compete agreements also made headway last month, so additional changes could be on the horizon. The following outlines some of the key employment law trends taking root at the local level.

Paid Leave

Amid chants of "the people, united, will never be defeated!", the Minneapolis City Council voted 13-0 on May 27 in favor of a paid sick and safe leave

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week, which equates to $23,660 per year, to $913 per week, or $47,476 per year. Although the final threshold is lower than the proposal's $50,440 annualized level, it nonetheless represents a dramatic increase. Moreover, the final rule includes an indexing feature that provides for periodic increases in the salary level without additional notice and comment rulemaking. Specifically, the salary level will be automatically increased every three years, beginning January 1, 2020. The minimum salary level will be indexed to the 40th percentile of salaries for full-time workers in the lowest wage census region, currently the south region.

The final rule also includes an increase in the total annual compensation level for highly compensated employees (HCE) from $100,000 to $134,004. This level will be indexed to the 90th percentile of salaries for national full-time salary workers. However, the final rule does allow employers to include nondiscretionary bonuses and other incentive payments, including commissions, paid on at least a quarterly basis, for up to 10% of the minimum salary level. The new rule becomes effective on December 1, 2016. Notably, although the DOL solicited comments on potential changes to the "duties tests" for the white collar exemptions, the Department did not pursue any such changes. Explaining its rationale for not adopting any changes to the duties test, the DOL stated it "believes that the standard salary level adopted in this Final Rule coupled with automatic updating in the future will adequately address the problems and concerns that motivated the questions posed in the NPRM about the standard duties test."

The White House and Department of Labor announced the release of the final rule to great fanfare. Seen as a cornerstone of the President's "Middle Class Economics" agenda, finalization of the overtime rule was a priority for the Administration. However, beyond being a legacy for President Obama and Secretary of Labor Thomas Perez, the overtime rule will no doubt be a hot topic on the campaign trail before the November election.

The battle lines for the overtime rule are already being drawn in Congress, with control of the Senate and House at stake. Republican criticism of the final rule on Capitol Hill was swift. Chairman of the House Education and Workforce Committee John Kline (R-MN) and Workforce Protections Subcommittee Chairman Tim Walberg (R-MI) described the

regulation as an "extreme and partisan rule that will hurt the very individuals they claim it will help" and that they "plan to explore all options to protect families and students from this fundamentally flawed rule." Chairman of the Senate House, Education, Labor and Pensions Committee Lamar Alexander (R-TN) issued a statement announcing that "he will soon introduce a Congressional Review Act resolution to block the rule."

The overtime rule will not be the only regulation under attack in Congress. On May 24th, the Senate passed a resolution introduced by U.S. Senator Johnny Isakson (R-GA) to block the DOL's recently finalized rule to revise the definition of fiduciary investment advice for retirement plans. The resolution of disapproval under the Congressional Review Act (CRA) passed the Senate by a vote of 56-41. Senator Isakson, along with Senators Lamar Alexander and Mike Enzi (R-WY), filed the resolution to overturn the fiduciary rule. The Senate-passed measure, H.J.Res.88, previously cleared the U.S. House of Representatives on April 28, 2016. Under the CRA, the House and Senate vote on a joint resolution of disapproval to stop, with the full force of law, a federal agency from implementing a rule or regulation or issuing a substantially similar regulation without congressional authorization. A resolution of disapproval needs only a simple majority to pass and cannot be filibustered or amended. However, the resolution of disapproval must also be signed by the President, or Congress can overturn the President's veto with a two-thirds vote in both the Senate and the House. The President is expected to veto the resolution, and Congress will be unable to muster the votes needed for an override. However, congressional Republicans" pursuit of the resolution of disapproval is nonetheless seen as important from a messaging standpoint.

Congressional Republicans are turning to the CRA to try to block other controversial DOL regulations as well. On May 18th, the House Committee on Education and the Workforce approved a resolution (H. J. Res. 87) under the CRA to block the DOL's "persuader" rule. According to the Committee's press release, the persuader rule "will undermine the ability of employers to communicate with employees and deprive workers of the information they need to make fully-informed decisions in union elections."

The resolution was introduced by Rep. Bradley Byrne (R-AL) and passed the committee by a vote of 22 to 13. The rule drastically restricts the long-standing "advice" exemption under the Labor-Management Reporting and Disclosure Act and seriously interferes with the confidential attorney-client relationship. The congressional challenge to the persuader rule comes as litigation to block the rule in court is still pending.

The Occupational Safety and Health Administration (OSHA) finalized another of its regulatory priorities last month. On May 11th, the agency issued a final rule requiring certain employers to electronically submit injury and illness data that they are already required to record on their OSHA Injury and Illness forms. According to OSHA's press release, "[b]ehavioral economics tells us that making injury information publicly available will 'nudge' employers to focus on safety."

OSHA contends that the analysis of this data will enable it "to use its enforcement and compliance assistance resources more efficiently" and that "some of the data will also be posted to the OSHA website." Establishments with 250 or more employees in industries covered by the recordkeeping regulation must submit information from their 2016 Form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2. Establishments with 20-249 employees in certain high-risk industries must submit information from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

The new OSHA rule also prohibits employers from discouraging workers from reporting an injury or illness. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. These anti-retaliation provisions become effective on August 10, 2016.

The CRA is not the only vehicle to which opponents of recent workplace regulations are turning. The annual appropriations process through which Congress funds the federal government is shaping up to be a battleground over controversial labor and employment regulations. As the appropriations legislative process plays out during the final year of the Obama Administration, congressional Republicans are expected to try to attach riders to funding bills blocking recent rulemaking and other administrative policy changes. The persuader, overtime and fiduciary rules may well be in that mix. Yet, what emerges in the final appropriations bills remains very much uncertain.

The Equal Employment Opportunity Commission's (EEOC) proposed changes to the EEO-1 report to include pay data was the target of an amendment to the House Commerce-State-Justice Appropriations legislation. The House Appropriations Committee adopted an amendment offered to the bill that would block the EEOC from collecting the new information. Specifically, the amendment offered by Rep. Andy Harris (R-MD) would prohibit the EEOC from using funds for the "collection of information" as set forth in the notice the EEOC published on February 1, 2016, or for any final "collection of information" related to such notice.

The proposed changes to the EEO-1 report come as the topic of equal pay continues to resonate in Congress and on the campaign trail. Rep. Lynn Jenkins (R-KS) introduced a wage transparency bill to amend the FLSA to "strengthen equal pay

Quote of the Month

"One of the most concerning requirements calls for public posting of injury and illness records online without corresponding context. This regulatory scheme designed to shame employers will do little, if anything, to advance the cause of worker safety. What it will do is make it easier for big labor to organize, and for trial lawyers to bring frivolous lawsuits."

—Rep. Tim Walberg (R-MI), Chairman of the Subcommittee on Workforce Protections, on OSHA's new injury and illness reporting rule

requirements." The Workplace Advancement Act (H.R. 5237) would "permit employees to discuss compensation with other employees for the sake of ensuring they are receiving equal compensation for equal work." The fate of this bill this election year is uncertain.

Another controversial rulemaking to implement the Fair Pay and Safe Workplaces Executive Order has been targeted in the House and Senate versions of the National Defense Authorization Act (NDAA). The so-called "blacklisting" rule would require federal contractors to report on "violations" of labor and employment laws, and such reports would be used in the procurement decision process. The final blacklisting rule is currently under review by the White House Office of Management and Budget. The House-passed and Senate Committee versions of the NDAA legislation would exempt or limit the application of the blacklisting rule to defense contractors. After the expected passage in the Senate, the NDAA legislation now moves to the conference committee where House and Senate negotiators and the White House will battle over inclusion of the blacklisting rule restriction in the final bill.

In May, the EEOC finalized two rules dealing with the treatment of wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Employers utilizing wellness programs to try to improve the health of their workforce and control healthcare costs have been cautiously awaiting the EEOC final rules to reconcile apparent conflicts between the EEOC's stance on wellness programs and provisions in the Affordable Care Act (ACA). The ACA and its implementing regulations promote the use of wellness programs by, among other things, increasing the incentive levels that can be offered for health-contingent wellness programs. In contrast, the EEOC has taken aim at employers utilizing such programs. The EEOC final wellness rules do provide a measure of clarity for employers about the use of incentives for employees and spouses. However, important differences between the EEOC regulations and those under the ACA remain, which could still prove quite problematic for employers.

The wellness provisions in the ACA were one of the few areas of bipartisan agreement in the sweeping healthcare reform bill. Lawmakers opposing the ACA have repeatedly tried to repeal the law in Congress. House Republicans have also turned to the courts to attack a key provision of the legislation – funding for cost-sharing subsidies to reduce the out-of-pocket costs of health care plans purchased through the ACA Exchanges. U.S. District Court Judge Rosemary M. Collyer has ruled that the Administration has improperly funded the subsidy program. If the decision is upheld, the cost of ACA health insurance would become more expensive for many, and could destabilize the Exchanges. On several occasions, the U.S. Supreme Court has narrowly ruled in favor of preserving the ACA. If the recent House lawsuit winds its way to the Supreme Court, who fills the Court's vacancy could impact the ACA's fate.

As the election nears, the battle in Congress and the courts over the Obama Administration's regulatory and legislative legacy will no doubt intensify.

– By Ilyse Schuman and Michael J. Lotito

ordinance. Mayor Betsy Hodges swiftly signed it into law on May 31. This measure will require employers with six or more employees to provide one hour of paid sick and safe leave for every 30 hours worked, up to a maximum of 48 hours per year. Smaller employers can provide unpaid leave. Although this ordinance will not take effect until July 1, 2017, its provisions are expansive and complex, so employers are advised to start planning for these changes now.

On the flip side, a bill in New Jersey that would have imposed state-wide paid sick leave requirements was pulled before a Senate vote. A dozen cities and counties in the Garden State, however, do mandate some form of paid sick leave.

Clarifying Employment

Since the National Labor Relations Board's decision in *Browning-Ferris*, in which the Board held that an entity's "indirect control" over another entity's employees may be enough to establish a joint employer relationship under the National Labor Relations Act, the backlash at the state level has been swift. This decision has particularly troubled the franchise industry, as franchisors are being charged with unfair labor practices allegedly committed by their franchisees. Several legislatures are trying to get ahead of this issue. In May, both Georgia and Oklahoma enacted laws (SB 277, SB 1496, respectively) clarifying that a franchisor is not the employer of the franchisee or the franchisee's employees. Both measures are relatively short, and are no shield to a federal charge of joint employment. Their enactment, however, indicates mounting hostility to the NLRB's position on this topic.

While the Georgia and Oklahoma bills focus on defining the employer, other bills seek to clarify who is an employee. Many employee and labor advocates would prefer to confer employment rights to a greater sector of the workforce, including independent contractors in the so-called sharing or "gig" economy.

In response, a handful of states have enacted laws that emphasize workers who use digital platforms to find work or clients are indeed working as independent contractors, not employees of those digital platforms. Arizona, for instance, recently enacted HB 2652, which defines a "qualified marketplace contractor" as any person or 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. A "qualified marketplace platform" is defined as an entity that both: (a) operates a digital website or digital smartphone application that facilitates the provision of services by qualified marketplace contractors to individuals or entities seeking such services; and (b) accepts service requests from the public only through its digital website or digital smartphone application, and does not accept service requests by telephone, by facsimile or in person at physical retail locations. In essence, Arizona's measure is an attempt to better delineate employees from independent contractors under state law.

Equal Pay

Maryland adopted significant changes to its equal pay statute. The Equal Pay for Equal Work bill (SB 481/HB 1003) expands the state's existing law to prohibit wage discrimination based on not only sex, but also gender identity. Under the amendments, an employer cannot provide less favorable employment opportunities, in addition to disparate wages, to employees based on sex or gender identity. Less favorable employment opportunities include assigning or directing the employee to a less favorable career track and failing to inform employees about career advancement opportunities. In addition, the law includes wage transparency provisions, preventing employers from placing restrictions on employee inquiries, discussions, or disclosures regarding their compensation.

Pregnancy Accommodation

Pregnancy accommodation continues to be a hot topic at the state and local levels. In time for Mother's Day, the New York City Commission on Human Rights published new guidance regarding the NYC Human Rights Law's pregnancy discrimination protections. The guidance defines what constitutes a violation under this law, discusses when an employer must offer employees a reasonable accommodation for pregnancy or pregnancy-related conditions, and what types of accommodations would be deemed reasonable. The guidance also explains under what conditions an employer may deny a request for pregnancy-related accommodation. New York City's reasonable accommodation law is relatively expansive, covering employees undergoing fertility treatment and those who have had abortions, miscarriages, or are breastfeeding.

West Virginia issued its regulations governing the state's Pregnant Workers' Fairness Act, which specifically excludes the accommodation requirement for abortion-related conditions. Out West, Colorado's governor recently signed into law HB 1438, a measure that makes it an unfair employment practice for an employer to fail to provide reasonable accommodations for a job applicant or employee for conditions related to pregnancy or childbirth, so long as doing so does not impose an undue hardship on the business. This law requires employers to engage in a "timely, interactive, good faith process" to provide reasonable accommodations to pregnant workers.

Social Media

Both legislative chambers in Hawaii and Illinois passed bills that would limit an employer's access to an applicant's or employee's social media accounts. Illinois's bill (HB 4999) amends the state's Right to Privacy in the Workplace Act by making it unlawful for an employer to request or require an employee or applicant to authenticate or access a personal online account in the presence of the employer, or to request or require that an employee or applicant invite the employer to join a group affiliated with any personal online account, or join an online account the employer established. The bill also clarifies that when an employer pays for or provides additional features to an employee's personal online account and the employee uses only those features for business purposes, the rest of the account is to be considered a personal online account with the associated privacy protections.

Hawaii's bill (HB 1739) would generally prevent employers from requiring, requesting, or coercing employees or potential employees to provide access to their personal accounts, with certain exceptions.

At least 25 states have some form of social media privacy protection law in place. Although they are similar, the subtle differences continue to pose a challenge for multistate employers.

Minimum Wage Measures Appear to Abate

Although the minimum wage fervor slowed in May, some notable bills advanced. In New Jersey, the Democratic-controlled Assembly passed a bill that would raise the state's minimum wage to $15 over the next five years. Its fate is less certain in the Senate.

The District of Columbia Council will soon consider a measure that will increase the city's minimum wage to $15 an hour by the year 2020. A council committee has already voted in its favor.

Three separate bills to raise the minimum wage were introduced in North Carolina, one of which would put it to the voters on November 8, 2016 to decide whether to raise the hourly minimum to $9.00 an hour, with automatic cost-of-living adjustments.

Ban-the-Box

Vermont and Connecticut are the latest states to restrict an employer's use of an applicant's criminal history in making hiring decisions. Vermont's law (HB 261) prohibits most employers from requesting criminal history information on an employment application, and adds a new section to the state statutory provisions on “unlawful employment

practices."

Nearby Connecticut recently followed in Vermont's footsteps when on June 1, the governor signed into law HB 5237. This measure similarly prevents most employers from requiring applicants to disclose any criminal history on an employment application.

Working its way through the Pennsylvania legislature is a bill (SB 1197) that would limit access to criminal history information once 10 years have passed since the most recent conviction.

Advancing through two Massachusetts legislative committees is a measure (SB 2271) that would place restrictions on the use of an individual's credit report in hiring. Expect this trend to continue.

Non-Compete

A Massachusetts House Committee cleared a bill (H 4323) that would place limits on the use of non-compete agreements. The measure would prevent most non-competes from lasting over 12 months from the date of separation. In addition, non-compete agreements would be unenforceable against enrolled college or graduate students, individuals age 18 and younger, employees classified as nonexempt under the Fair Labor Standards Act, and employees terminated without cause or laid off.

Similarly, the Illinois House and Senate passed a bill (SB 3163) that would prevent employers from entering into covenants not to compete with any low-wage employee. The bill defines a "low-wage employee" as one who earns the applicable federal, state, or local minimum wage, or $13.00 per hour, whichever is greater.

Anti-Locality Laws

In reaction to the surge in local employment laws, several "anti-locality" bills have made headway. A new Arizona law (HB 2579) amends the state's existing statute that prohibits local governments from enacting ordinances that regulate local minimum wage or employee benefits by clarifying that nonwage compensation is covered by this restriction. Nonwage compensation includes fringe benefits, welfare benefits, child or adult care plans, sick pay, vacation pay, severance pay, commissions, bonuses, and retirement plan or pension contributions. Arizona enacted a related measure (HB 2191) that would prevent cities, towns, and counties from requiring an employer to alter or adjust employee scheduling unless required by state or federal law.

What's Next?

As summer approaches, only about a third of state legislatures remain in session. The states that are still active will use the upcoming months to push final bills to the finish line. We will continue to monitor 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

Australia. The Australian Government's Productivity Commission has released an extensive draft report outlining the state of the country's intellectual property system and making recommendations for improvement. The Commission is an independent research and advisory body charged with addressing a range of economic, social, and environmental issues. The over 600-page document details the country's intellectual property protections and their effect on investment, competition, trade, innovation, and consumer welfare, and provides recommendations and requests for comment. According to the report, "[t]he global economy and technology are changing and there have been increases in the scope and duration of intellectual property protection. The Australian Government seeks to ensure that the appropriate balance exists between incentives for innovation and investment and the interests of both individuals and businesses, including small businesses, in accessing ideas and products." Comments on the draft report are due June 3, 2016. The Commission plans to hold hearings on the report throughout the month.

Hong Kong. Hong Kong's Equal Opportunities Commission (EOC) issued several recommendations to revise the country's anti- Sex Discrimination Ordinance, Family Status Discrimination Ordinance, Race Discrimination Ordinance, and Disability Discrimination Ordinance. The EOC notes this process, which began in 2013, is the first time the Commission has comprehensively reviewed all of Hong Kong's existing anti-discrimination legislation. The EOC's submission to the government contains 73 separate recommendations. The EOC also issued responses to comments it solicited from the public.

Europe

Ireland. Promoting pay transparency as a means of ensuring men and women earn equal pay is not a concept unique to the United States. In May, Irish Prime Minister Enda Kenny published the government's goals for the upcoming months. Among planning initiatives are steps to address the gender pay gap. Section 13 of the Programme for a Partnership Government sets forth the government's objectives in this area, including requiring companies with 50 or more employees to complete a wage survey, and increasing women's representation on state boards to 40%. The government also seeks to increase the minimum wage to €10.50 per hour by 2021.

United Kingdom – Trade Union Bill

Labor law overhaul legislation received Royal Assent in May, enacting the Trade Union Bill into law. Now referred to as the Trade Union Act of 2016, this measure imposes several restrictions on the right to strike ("industrial action"). Among other changes, the law requires a voter turnout of at least half of eligible workers for any industrial action to be valid. If a strike vote is called in an "essential public services" sector (e.g., health, education, emergency services), at least 40% of eligible voters must vote in its favor. The law requires unions to provide employers with greater advance notice of any strike action (14 days instead of 7). The law will also set a six-month time limit on an industrial action, which can be increased to nine months if both the employer and union agree to the longer period. In addition, union fees for political purposes will not be automatically deducted from an employee's pay after a 12-month transition period; members must actively opt in.

United Kingdom – Immigration Act

The UK enacted the Immigration Act (2016) in May. Among other changes, the new law increases the penalties for hiring illegal workers. Notably, an employer that has "reasonable cause" to believe it is hiring an individual not authorized to work in the county can be found guilty of a criminal offense, facing up to five years in prison. The law also includes provisions governing language fluency for public sector workers, labor abuse controls, and fees for sponsoring certain workers outside of the European Economic Area.

United Kingdom – Human Rights Guidance

The UK's Equality and Human Rights Commission issued new guidance to assist company boards with identifying, mitigating, and reporting on the human rights impacts of their organization's activities. This five-step guide also advises boards on how they can adhere to the UN Guiding Principles on Business and Human Rights, the global non-binding standard that provides direction on how employers should conduct their operations to respect internationally-recognized human rights.

European Union – Data Protection

On May 4, 2016, the EU General Data Protection Regulation published long-awaited data protection regulations in the Official Journal of the European Union. These regulations, which harmonize existing data protection frameworks in the EU, will apply to EU member states on May 25, 2018. According to the European Commission Directorate-General for Justice and Consumers, the new regulation "is an essential step to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market. A single law will also do away with the current fragmentation and costly administrative burdens, leading to savings for businesses of around €2.3 billion a year."

European Union – Trade Secrets Directive

On May 27, 2017, the Council of the European Union adopted a directive governing trade secret and confidential information protections for EU companies. The rules include whistleblower protections and means of civil redress for trade secrets violations. After the directive is published in the Official Journal of the EU and it comes into force, member states will have a maximum of two years to incorporate the new provisions into their country's law.

France & Germany. The rise of "big data" and its implications for employers is an international issue. On May 10, 2016, France and Germany published a joint report on Competition Law and Data, which examines possible competition issues arising from the possession and use of big data. The report seeks to identify the key issues and parameters to consider "when assessing the interplay between data, market power and competition law." The report defines "big data" and how it is collected and used; outlines the theories of harm usually associated with data collection and exploitation in digital markets; and identifies how to assess the relevance and credibility of these theories of harm.

Sweden. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) issued draft arbitration rules for 2017, and draft rules for expedited arbitration. The draft rules include a section on summary procedures for international commercial arbitration.

North America

Canada. While the U.S. Department of Justice and North Carolina fight over the legality of the state's so-called "bathroom" law, Canada's administration introduced Bill C-16, legislation that extends anti-discrimination and human rights law to transgender individuals. The measure would amend the Canadian Human Rights Act and the Criminal Code to include the terms "gender identity" and "gender expression."

Mexico. Mexican President Enrique Peña Nieto recently presented to the Mexican Senate a bill proposing to amend several sections of the Mexican Constitution. These proposed changes would represent a significant reform to the Federal Labor Law (FLL). Among other changes, the law would make conciliation proceedings mandatory, require employers to ensure employees know of any collective bargaining agreement in place, and revise the union certification process.

South America

Venezuela. On April 29, 2016, Venezuelan President Nicolás Maduro announced a 30% increase in the monthly minimum wage, effective May 1, 2016. President Maduro also announced an increase in the meal benefit, which will now be three and a half tax units per day.

IN FOCUS

2016 Spring Regulatory Agenda

The federal agencies' recent release of several long-awaited labor and employment regulations may lead some employers to conclude that there is nothing left on the Administration's plate in the final months of President Obama's second term. A review of the agencies' 2016 spring regulatory agenda indicates otherwise. On May 18th, the federal agencies published a semi-annual list of regulatory actions they plan to take within the next six months. While more attention may be focused on the November elections and who will be the next occupant of the White House, the current Administration plans to use this time period to finalize what remains of its workplace regulatory agenda. Because the regulatory agenda spans a six-month timeframe, this is the last complete regulatory agenda this Administration will produce.

The Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and the Federal Acquisition Regulatory (FAR) Council each plan to finalize some important regulations in the months ahead. This forthcoming rulemaking activity follows sweeping regulatory changes already completed that will have a dramatic impact on workplaces across the county. Taken together, if the agencies adhere to the agenda's schedule, the transformation of labor and employment policy during the last eight years will be profound, and—depending what happens in November—perhaps lasting.

For federal government contractors, the regulatory agenda is particularly noteworthy. Government contractors have been on the receiving end of several labor and employment-related executive orders. Final rules implementing the executive orders are expected during the remaining months of the current Administration.

Topping the list of concerns for many contractors is the expected finalization of the Fair Pay and Safe Workplaces Executive Order 13673. The so-called "blacklisting" executive order would require employers bidding on federal contracts for goods and services, including construction, valued at more than $500,000 to disclose "violations" of 14 enumerated federal labor laws and their state law equivalents over the past three years. Such violations would then be considered in the contracting decision, and, if they indicate a "lack of integrity or business ethics," would cause the contractor to be disqualified. In May 2015, the FAR Council and DOL published a proposed rule and guidance defining reportable violations, which include administrative merits determinations, civil judgments, and arbitral awards or decisions. The proposal broadly defined "administrative merits determinations" to include non-final agency findings not subject to judicial review. This means an agency finding that is not even final or has not been reviewed by a court could serve as a basis for denying a contract award. The FAR Council is expected to issue the final rule, which is under review by the White House Office of Management and Budget, in August.

Given the blacklisting rule's potentially detrimental impact on contractors and the procurement process, legislative efforts are underway to narrow its scope. Both the Senate and House versions of the National Defense Authorization Act (NDAA) included language targeting the blacklisting rule as it applies to defense contractors. On May 18th, the House passed 277-147 the NDAA (H.R. 4909) with a provision stating:

> The provisions of Executive Order 13673 and any implementing rules or regulations shall not apply to the acquisition, contracting, contract administration, source selection, or any other activities of the Department of Defense or the National Nuclear Security Administration. The Secretary of Defense and the Administrator for Nuclear Security may not issue, or be required to comply with, any policy, guidance, or rules to carry out such executive order or otherwise implement any provision of such executive order or any related implementation rules or regulations.

The version under consideration on the Senate floor

(S. 2943) includes language stating that the Secretary of Defense will apply the blacklisting executive order only to contractors or subcontractors that have been suspended or debarred because of federal labor law violations covered by Executive Order 13673. Given White House opposition to language restricting application of the blacklisting rule, whether the House or Senate language remains in the final legislation remains to be seen.

When federal paid sick leave legislation (the Healthy Families Act) stalled in Congress, President Obama issued another executive order in September 2015 applying some of the pending bill's requirements to certain government contractors. Executive Order 13706 mandates that employees of covered contractors and subcontractors, in performing the contract or any subcontract, shall earn not less than one hour of paid sick leave for every 30 hours worked per year. The executive order directed the DOL to issue a final rule implementing the paid sick leave requirement by September 2016. Under this directive, the DOL's regulatory agenda specifies that it will release a final rule on schedule. For covered contractors and subcontractors, the paid leave executive order and ensuing regulations add to the challenging complexity of complying with an increasing number of state and local leave mandates.

Government contractors are also eyeing additional rulemaking from the Office of Federal Contract Compliance Programs (OFCCP). According to the regulatory agenda, the OFCCP was scheduled to issue final regulations amending the agency's sex discrimination guidelines in May 2016. Clearly that deadline has slipped, as is often the case with regulatory agenda timelines. The OFCCP explains the rationale for updating the guidelines:

> The guidance in part 60-20 is more than 30 years old, and warrants changes that align OFCCP's requirements with current law and better address the realities of today's workplaces. OFCCP published a Notice of Proposed Rulemaking on January 30, 2015 (80 FR 5245), to create sex discrimination regulations that reflect the current state of the law in this area.

The final rule has been under review by the OMB since October 29, 2015, a process that typically takes between 30 to 60 days. The extended review time does not indicate what form the final rule will take, but suggests that it is being closely scrutinized.

The OFCCP plans to issue a proposed rule to revise construction contractors' affirmative action requirements by August 2016. The OFCCP contends that "[r]ecent data show that disparities in the representation of women and racial minorities persist in on-site construction occupations in the construction industry." The agency plans to issue a notice of proposed rulemaking that would remove "outdated" regulatory provisions and propose a "new method for establishing affirmative action goals," among other revisions to the affirmative action requirements, that "reflect the realities of the labor market and employment practices in the construction industry today." Whether the OFCCP can finalize a proposal before that next Administration takes over is uncertain.

The DOL is working on 22 proposed rules—an ambitious agenda for an Administration with only seven months left in office. Among the other proposed rules under development is an Office of Labor Management Standards (OLMS) proposal to revise the Consultant Form LM-21, Receipts and Disbursements Report. Form LM-21 requires the consultants deemed to be "persuaders" under the recently issued final persuader rule to report the names and addresses of all employers for whom they provided labor relations advice or service "regardless of the purpose of the advice or service," and all receipts and disbursements from those employers for those services. The agency has been harshly criticized for issuing the final persuader rule before the LM-21 reporting requirements have been finalized, or even proposed. According to the regulatory agenda, the OLMS will issue this proposed rule in September 2016, leaving little time for a public notice-and-comment period and formulation of the final rule.

Earlier in development are 24 rules the DOL categorizes as at the "pre-rule" stage. For these

items, a proposed rule is not expected to be issued in the next six months, but is nonetheless under active consideration. Given the approaching end date for this Administration, these pre-rule items will more likely serve as a foundation for further action by succeeding administrations.

A Request for Information (RFI) establishes a record for proceeding with formal proposed rulemaking, and invites public comment to inform the process. One such RFI that remains on the agenda is the Wage and Hour Division's planned solicitation of public comment on how an overtime-eligible employee's use of electronic devices outside of regularly scheduled work hours affects employment. According to the agenda, the Division plans to issue an RFI in July 2016 "to gather information about employees' use of electronic devices to perform work outside of regularly scheduled work hours and away from the workplace, as well as information regarding 'last minute' scheduling practices being utilized by some employers that are made possible in large part by employees' use of these devices." The description of this item in the agenda is cryptic. However, some see this as the precursor to a rule addressing whether such use constitutes compensable work time. The concern is that the Wage and Hour Division would indeed view this as compensable work time, thus limiting the flexibility such common devices afford non-exempt employees in the 21st century workplace.

The Occupational Safety and Health Administration (OSHA) has been, and will continue to be, a prolific rulemaking agency. OSHA lists 32 items on its latest regulatory agenda at the final rule, proposed rule, or pre-rule stage. By October 2016, OSHA plans to complete its review of the bloodborne pathogens standard and issue its findings. OSHA undertook the review to consider "the continued need for the rule; whether the rule overlaps, duplicates, or conflicts with other Federal, State or local regulations; and the degree to which technology, economic conditions, or other factors may have changed since the rule was evaluated."

With workplace violence an increasing concern, OSHA will issue an RFI in November to gather information on preventing workplace violence in healthcare settings. In addition, since 2009, OSHA has been considering rulemaking to develop a combustible dust standard for general industry. OSHA announced that it intends to use information gathered, including from an upcoming Small Business Regulatory Enforcement Fairness Act (SBREFA) panel slated for October 2016, to develop a comprehensive standard that addresses combustible dust hazards.

In August 2015, OSHA issued a proposed rule on occupational exposure to beryllium. OSHA's next action within the next six months does not include issuing a final rule on such exposure, but plans to analyze comments by the end of June.

Finally, OSHA has been developing a rule on infectious diseases since 2010, when it issued an RFI on the topic. No doubt spurred by recent disease-related health scares, including those related to Ebola and the Zika virus, the agency plans to issue a proposed rule on the occupational exposure to infectious diseases in March 2017. This target date is striking because it extends beyond the end of the current Administration.

The DOL will likely leave numerous other regulatory activities incomplete when the next Administration takes over. Items on DOL's long-term agenda, such as the proposal to add a musculoskeletal disorders column to OSHA's injury and illness log, and the Wage and Hour Division's "right to know" regulations under the Fair Labor Standards Act, are effectively dead. Depending on who wins the White House, the Department under the next Secretary of Labor will opt to either scrap or complete the rulemakings initiated but not finalized during President Obama's years in office. Even before Inauguration Day 2017, legislative and legal challenges to the labor and employment regulations that have been finalized may dictate the fate of this Administration's labor and employment regulatory legacy.

– By Ilyse Schuman and Michael J. Lotito

OUTLOOK

JUNE

Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans
Tuesday, June 7 — Thursday, June 9, 2016
The Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) will hold a meeting June 7-9, 2016 at the U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210 in C5320 Room 6. The purpose of the open meeting is for Advisory Council members to hear testimony from invited witnesses and to receive an update from the Employee Benefits Security Administration (EBSA). The Advisory Council will study the following topics: (1) cybersecurity considerations for benefit plans and (2) participant plan transfers and account consolidation for the advancement of lifetime plan participation. Read more»

House Committee Hearing on the DOL's New Overtime Rule
Thursday, June 9, 2016
The House Committee on Education and the Workforce will hold a hearing: The Administration's Overtime Rule and Its Consequences for Workers, Students, Nonprofits, and Small Businesses, on June 9. The hearing will begin at 10:00 a.m. in room 2175 of the Rayburn House Office Building in Washington, DC. Read more»

Meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH) Work Group
Tuesday, June 14, 2016
The National Advisory Committee on Occupational Safety and Health (NACOSH) Injury and Illness Prevention Program Work Group will meet to discuss workplace safety and health issues regarding contractors at multi-employer worksites, including workplace protections and best practices as part of injury and illness prevention programs. There will also be a discussion on efforts to promote the occupational safety and health profession. Read more»

OSHA Meeting to Prepare for the 31st session of the UN Sub-Committee of Experts on the Globally Harmonized System of Classification and Labeling of Chemicals
Tuesday, June 14, 2016
The Occupational Safety and Health Commission (OSHA) will conduct a public meeting to discuss proposals in preparation for the 31st session of the United Nations Sub-Committee of Experts on the Globally Harmonized System of Classification and Labeling of Chemicals (UNSCEGHS) to be held July 5 to July 8, 2016 in Geneva, Switzerland. Read more»

Meeting of the NACOSH
Wednesday, June 15, 2016
The National Advisory Committee on Occupational Safety and Health (NACOSH) will hold a meeting open to the public to discuss, among other topics, updates on OSHA's major regulatory activities. Read more»

Final Rule Requiring Safeguards for Contractor Information Systems Takes Effect
Wednesday, June 15, 2016
The DoD, GSA, and NASA issued a final rule amending the Federal Acquisition Regulation (FAR) to add a new subpart and contract clause for the basic safeguarding of contractor information systems that process, store or transmit federal contract information. Read more»

Comments Due on PBGC Proposed Late Payment Penalty Rule
Monday, June 27, 2016
The Pension Benefit Guaranty Corporation (PBGC) is proposing to reduce penalty rates for late payment of annual (flat- and variable rate) premiums for all plans, and create a new automatic waiver of 80 percent of the higher penalty rate for plans that demonstrate good compliance. The agency is soliciting comments on this proposed rule. Read more»

JULY

Comments Due on EEOC's Proposed National Origin Discrimination Enforcement Guidance
Friday, July 1, 2016
The U.S. Equal Employment Opportunity Commission has issued draft enforcement guidance addressing national origin discrimination under Title VII of the Civil Rights Act of 1964. The EEOC's enforcement guidance sets forth official agency policy and explains how the laws and regulations apply to specific workplace situations. The EEOC is soliciting public input on this guidance. Read more»

EEOC's Adjusted Penalty for Violation of Notice Posting Requirements Takes Effect
Tuesday, July 5, 2016
The Equal Employment Opportunity has issued a final rule adjusting for inflation the civil monetary penalty for violations of the notice-posting requirements in Title VII of the Civil Rights act of 1964, the Americans with Disabilities Act, and the Genetic Information Non-Discrimination Act. According to the rule, failure to comply with the notice-posting requirement is punishable by a fine of not more than $525 for each separate offense. Read more»

HHS Final Rule Governing Non-Discrimination in Health Plans –Effective Date
Monday, July 18, 2016
The U.S. Department of Health and Human Services (HHS) has issued a final rule implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities. The final rule clarifies and codifies existing nondiscrimination requirements and sets forth new standards to implement Section 1557, particularly with respect to the prohibition of discrimination on the basis of sex in health programs other than those provided by educational institutions and the prohibition of various forms of discrimination in health programs administered by the HHS and entities established under Title I of the ACA. Read more»

Comments Due on Proposed Rule Governing Incentive-Based Compensation Arrangements
Friday, July 22, 2016
Various federal agencies charged with implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) are seeking comment on a joint proposed rule to implement section 956 of the Dodd-Frank Act. Section 956 generally requires that the agencies jointly issue regulations or guidelines: (1) prohibiting incentive-based payment arrangements that the agencies determine encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and (2) requiring those financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate federal regulator. Read more»

AUGUST

PBGC Interim Final Rule Governing Adjustment of Civil Penalties Takes Effect
Monday, August 1, 2016
The Pension Benefit Guaranty Corporation is amending its regulations to adjust the penalties provided for in sections 4071 and 4302 of the Employee Retirement Income Security Act of 1974. In essence, plan sponsors that fail to provide required notices and other information required by ERISA will face steeper fines. The maximum amount for noncompliance with the Section 4071 requirements will increase from $1,100 per day to $2,063 per day. The penalties assessed under Section 4302 will increase from $110 to $275 per day. Read more»

Comments Due on IRS Proposed Rule Governing Certified Professional Employer Organizations
Thursday, August 4, 2016
The IRS has proposed regulations relating to certified professional employer organizations (CPEOs). The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 requires the IRS to establish a voluntary certification program for professional employer organizations. The proposed regulations also propose to adopt, by cross-reference, the text of temporary regulations published the same day in the Federal Register, which relate to the requirements for applying for, receiving, and maintaining certification as a CPEO. These proposed regulations will affect persons who apply to be treated as CPEOs and who are certified by the IRS as meeting the applicable requirements. In certain instances, the proposed regulations will also affect the federal employment tax liabilities and other obligations of customers of the CPEO. Read more»

Comments Due on PBGC Proposed Rule Governing Mergers and Transfers Between Multiemployer Plans
Monday, August 8, 2016
The Pension Benefit Guaranty Corporation has issued a proposed rule to amends its regulations governing mergers and transfers between multiemployer plans to implement section 121 of the Multiemployer Pension Reform Act of 2014. The proposed rule would also reorganize and update the existing regulation. Read more»

Portions of OSHA Tracking of Workplace Injuries and Illnesses Rule Take Effect
Wednesday, August 10, 2016
OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The portions of the final rule that (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibit employers from retaliating against employees for reporting work-related injuries or illnesses take effect on August 10, 2016. The remaining sections of the rule take effect on January 1, 2017. Read more»

DECEMBER

Final DOL White Collar Exemption Overtime Rule Takes Effect
Thursday, December 1, 2016
The DOL's final rule raises the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from the Fair Labor Standards Act's overtime exemptions. The final rule sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region ($913 per week; $47,476 annually for a full-year worker); sets the total annual compensation requirement for highly compensated employees subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption. The rule also amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. Read more»

JANUARY

Final OSHA Rule Governing Tracking of Workplace Injuries and Illnesses Takes Effect
Sunday January 1, 2017
OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The reporting requirements take effect on January 1, 2017. Read more»

EEOC Final Wellness Rule under GINA Becomes Applicable
Sunday, January 1, 2017
The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer-sponsored wellness programs. This rule addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. Read more»

EEOC Final Wellness Rule under ADA Becomes Applicable
Sunday, January 1, 2017
The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to all wellness programs that include disability-related inquiries and/or medical examinations whether they are offered only to employees enrolled in an employer-sponsored group health plan, offered to all employees regardless of whether they are enrolled in such a plan, or offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. Read more»

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Littler's Workplace Policy Institute® (WPI™) was created to be an effective resource for the employer community to engage in legislative and regulatory developments that impact their workplaces and business strategies. The WPI relies upon attorneys from across Littler's practice groups to capture—in one specialized institute—the firm's existing education, counseling and advocacy services and to apply them to the most anticipated workplace policy changes at the federal, state and local levels. For more information, please contact the WPI co-chairs Michael Lotito at mlotito@littler.com or Ilyse Schuman at ischuman@littler.com.