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state of the STATES

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State Legislatures and Governors Turn Up the Heat

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As the dog days of summer settle in, most statehouses have closed up shop. Legislatures in approximately 12 states remain in regular session, however, with a couple more active in special session. Roughly 200 labor and employment bills were considered in June, although only around 40 new bills were introduced. New Jersey introduced the most measures, with about 15, with Pennsylvania taking second place with 10 bills.

As in prior months, June saw significant activity in certain areas of concern, particularly involving leave benefits and pay equity. This month's State of the States focuses on these two areas, as well as several other trends that continue to dominate headlines.

New and/or Expanded Leave Requirements

At the end of June, the Washington legislature joined a handful of other states by passing a paid family and medical leave measure (SG 5975), which Governor Inslee signed on July 5. Under the bill, employers and employees will pay a percentage (0.4 percent) of an individual's wages into the state insurance program. Employers will contribute 63% of that sum while employees pay the other 37%. Employers with fewer than 50 employees will be exempt from such contributions. The program provides up to 12 weeks of paid family leave after the birth or placement of a child or for an employee to care for a family member with a serious health condition, as well as 12 weeks for an employee's own serious health condition, up to a maximum of 18 weeks per year. Depending on an employee's wages and the applicable cap, employees may receive up to 90% of their wages while on leave.

A New Jersey bill (AB 4927), now before New Jersey Governor Chris Christie, would significantly increase temporary wage replacement benefits available to employees taking family leave under the New Jersey Family Leave Act. The bill would double the length of time that benefits are available, up to 12 weeks, and would raise the amount of benefits. It would extend the time for which employees may receive intermittent benefits (up to 84 days) and permit employees to receive intermittent benefits during "baby bonding" leave. AB 4927 also would entitle employees eligible for leave under the Security and Financial Empowerment Act, which may be used to attend to a variety of matters related to an act of domestic violence or sexual assault, to receive benefits while on leave.

A pending California bill (SB 63) would obligate employers to allow up to 12 weeks of paid parental leave to eligible employees if the employer has more than 20 workers within a 75-mile radius. Existing law covers only employers with 50 or more employees. In addition, the proposal extends protections for health care coverage and job security. A proposed Pennsylvania paid parental leave measure (HB 1634) would require employers with at least 4 employees to provide 12 weeks of paid leave to an eligible employee to care for a child, during the time period spanning from the beginning of a pregnancy to one year after the birth or adoption of the child.

Rhode Island's legislative chambers have approved slightly different bills providing for paid time off. The State Senate has approved a bill (SB 290) that would require all employers to provide their employees with one hour of paid sick and safe leave for every 30 hours worked, up to a maximum of 40 hours per year. The House approved a version that would allow employees in businesses with 18 or more employees to earn three days of paid sick time in 2018, four days in 2019, and five days in 2020. Smaller employers would be required to provide unpaid leave. The bills must be reconciled before a final version can be sent to Governor Gina Raimondo.

Oregon (SB 299), meanwhile, has amended its sick and safe time law so that employers may limit the number of hours that employees may accrue to 40 hours per year.

In October, voters in Albuquerque, New Mexico may be considering a paid sick leave initiative of their own. The Healthy Workforce Ordinance, a citizen initiative, should be on the ballot pending resolution of an ongoing battle over the form of the ordinance included on the ballot. Mayor Richard Berry recently vetoed a City Council plan to print a summary of the ordinance in regular-size font on the ballot, as well as the actual ordinance even if that seven-page text appeared in a smaller font. The City Council can attempt an override of that veto, but only if it holds a special session in July.

Also at the local level, Cook County, Illinois published final rules to implement its earned sick leave ordinance, which took effect on July 1, 2017. [1] The ordinance and regulations cover employees who work at least two hours in Cook County in any two-week period, allowing them to accrue one hour of paid sick time for every 40 hours worked. Among other things, employers must also post notice advising employees of their rights under the ordinance.

Finally, Nevada recently enacted a law (SB 361) requiring employers to provide 160 hours of leave, per year, to employees who are victims of domestic violence, or whose household family members have been victims.[2] Employers must also consider reasonable accommodations for protected employees, including transfers, modified schedules, and new work phone numbers. Further, the act imposes certain record-keeping and workplace notice requirements. These new requirements go into effect January 1, 2018.

Pregnancy and/or Lactation Accommodation

Legislation passed or under consideration in several states involves enhanced protections for employees who are pregnant or breastfeeding. Nevada enacted two such bills this summer. First, under AB 113, as of July 1, 2017, all employers must provide reasonable unpaid break time for covered employees to express breast milk as needed. With certain exceptions, an employer also must provide a place to express milk, other than a bathroom, that is reasonably free from dirt or pollution, protected from the view of others, and free from intrusion. Second, the Pregnant Workers' Fairness Act (PWFA) (SB 253) obligates employers to provide reasonable accommodations to employees and applicants for pregnancy, childbirth, or a related condition, including lactation, gestational diabetes, preeclampsia, and post-partum depression.[3] The PWFA also requires employers to provide three distinct notices: to new employees, upon learning that an employee is pregnant, and by conspicuous posting in the workplace.

A new bill passed in the Connecticut legislature (HB 6668), like the PWFA, would make it an unlawful employment practice for employers to refuse to provide reasonable accommodations to a pregnant employee or applicant. HB 6668 would also prohibit an employer: (1) from segregating or classifying an employee in such a way that would deprive her of employment opportunities due to her pregnancy; (2) from engaging in retaliation; and (3) from forcing an individual to accept an unnecessary accommodation. HB 6668 awaits the signature or veto of Governor Dannel Malloy.

Similar bills also have been introduced in Massachusetts (SB 2093/HB 3680) and Pennsylvania (HB 1583).

Equal Pay Measures[4]

Oregon enacted a comprehensive equal pay law in June (HB 2005) prohibiting discrepancies in compensation

based on any protected characteristic—such as race, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. HB 2005 also restricts salary history inquiries, expands existing remedies, and provides a safe harbor for employers that voluntarily assess their pay practices to identify and eliminate discriminatory pay practices. The bulk of the new provisions become operative on January 1, 2019.[5]

Nevada has amended its fair employment practices statute (AB 276), effective June 3, 2017, to make it unlawful for a covered employer, agency, or labor organization to discriminate against a person for inquiring about, discussing, or voluntarily disclosing information about his or her own wages or the wages of another individual. This prohibition applies to any employer that employs 15 or more employees for each working day in each of 20 or more calendar weeks in the same or the preceding calendar year as when the unlawful employment practice occurred.

Colorado also expanded its wage transparency law (HB 1269). As of August 9, 2017, the protections of existing law will extend to all employers, including those exempt from the National Labor Relations Act, which had previously been excepted from the wage transparency provisions.

Two additional wage transparency bills received serious consideration in June. A Maine proposal (LD 1259) cleared both houses before Governor Paul LePage vetoed it at the close of the session. A California bill, known as the Gender Pay Gap Transparency Act (AB 1209), has gained traction. This bill would require large employers (250 or more employees) to provide the Secretary of State information relating to "gender pay differentials." Specifically, a large employer would be required to identify the difference between the mean and medial salary of male exempt employees and female exempt employees, by each job classification or title. Similar information would be required for male and female board members. AB 1209 has passed the California State Assembly and moved on to the State Senate for committee review.

Meanwhile, salary history bills across the country are making a splash. Delaware became the latest state to pass a law limiting employer inquiries into salary history. The new statute (H.S. 1) makes it unlawful for an employer to screen applicants based on their compensation histories, including by requiring that an applicant's prior compensation satisfy minimum or maximum criteria for the job. The law, which takes effect in December, also prohibits an employer from seeking the compensation history of an applicant from the applicant or a current or former employer, except under narrow circumstances.[6]

Illinois and New Jersey both advanced salary history bills in June. The Illinois bill (HB 2462), currently on Governor Bruce Rauner's desk, would prohibit an employer from screening job applicants based on their wage or salary history and from requiring that an applicant's prior wages satisfy minimum or maximum criteria. HB 2642 would also prohibit employers from requesting or requiring, as a condition of being interviewed or as a condition of continuing to be considered for an offer of employment, that an applicant disclose prior wages or salary. Governor Christie is similarly weighing a measure (AB 3480/S 2536) that would prohibit screening job applicants based on wage or salary history. It remains unclear whether these governors, both Republican, will veto the pending legislation in light of potential opposition from the business community.

Finally, the San Francisco Board of Supervisors approved a salary history measure (Ordinance 170450) on June 27, 2017. This measure would ban employers, including city contractors and subcontractors, from asking about current or past salary or considering salary information in determining whether to hire an applicant or what salary to offer. The ordinance would also prohibit employers from disclosing a current or former employee's salary history without that employee's authorization, unless the salary history is publicly available. This ordinance must pass a second reading on July 11, 2017 to move forward. If enacted, the new requirements would take effect July 1, 2018.

Background Checks

California's State Assembly and a Senate Committee have cleared a bill (AB 1008) that would limit an employer's ability to make hiring decisions based on the applicant's conviction record. AB 1008 would make it unlawful for an employer to inquire into a candidate's criminal history, or to inquire about or consider a candidate's conviction history until after making a conditional offer. Moreover, the proposal would require the employer to make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job, and to consider certain topics when making that assessment.

Pennsylvania is advancing a different type of bill aimed at encouraging the employment of individuals with criminal histories. Pennsylvania's State Senate has approved a bill (SB 529) that would provide immunity to employers that employ individuals with an expunged criminal history from liability in a civil action based on damages suffered as a result of criminal or other unlawful conduct by the employee.

The New York Senate passed a bill (SB 5348) restricting the hiring of level-three sex offenders. The measure, now under consideration in the State Assembly, provides that employers may not permit or cause any such offender to work at a location within 500 feet of a nursery, school, or licensed day care facility.

Predictive Scheduling & Preemption

Oregon's House and Senate passed a bill (SB 828) that would require large employers in specified industries to provide new employees with estimated work schedules. Employers would have to provide current employees with seven days' advance notice of their work schedules and to compensate employees for employer-requested changes to those schedules. Employees would be entitled to at least 10 hours of rest between shifts and to identify any scheduling concerns for their availability. Oregon Governor Kate Brown has reportedly expressed a willingness to sign this legislation following legal review.

Emeryville, California's similar Fair Workweek Ordinance took effect on July 1, 2017. Covered employers must offer additional work hours to current part-time employees before hiring new employees and must also provide two weeks' advance notice of work schedules. Employees are entitled to at least 11 hours of rest between shifts and to request a flexible working arrangement. Emeryville recently promulgated draft regulations implementing the ordinance. The proposed regulations are intended to clarify how employers can comply, including how they should calculate coverage and determine when predictability pay is or is not required.[7]

On the flip side, Georgia enacted a preemption bill, effective July 1, 2017, that specifically bans local governments from enacting ordinances that mandate additional pay based on employee schedule changes.

Additional preemption proposals are pending in Michigan (SB 353), New York (SB 3297), and Pennsylvania (SB 128). The New York bill has passed the State Senate and would prohibit municipalities from requiring employers to provide wage and employment information about any individual to any local agency, except during the course of specified investigations. The Pennsylvania bill focuses on leave time and would preclude any municipality from adopting an ordinance requiring employers to provide any paid or unpaid vacation or other leave time not otherwise required by state or federal law.

Discrimination

In addition to the pending salary history bill, the Illinois legislature also sent an antidiscrimination bill to Governor Rauner (SB 1697). The bill makes it a violation of the Illinois Human Rights Act for an employer to impose any term or condition that requires a person to violate or forgo a sincerely held practice of his or her religion, as a condition of initial or continued employment. Under the bill, protected religious practices expressly include "the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion." Restrictions may be permissible to maintain safety and food sanitation, as well as in the event that accommodation imposes undue hardship on the employer.

On June 2, 2017, California proposed new regulations on national origin discrimination.[8] The proposal includes a broad definition of "national origin," which extends protections to employees married to or associated with a person of a national origin group or who belong to religious or social organizations associated with such a group. If adopted, the regulations would make it unlawful for an employer to enforce an English-only policy unless certain criteria are satisfied. The regulations include additional language restrictions, as well as guidelines on immigration-related practices. For example, the regulations specify that all protections apply to undocumented workers and applicants and that no discovery will be permitted into an individual's immigration status during the liability phase of any proceedings. The proposal also generally bans the use of height or weight requirements.

California also recently amended its sex discrimination regulations to specifically address and protect transgender employees.[9] For example, the law specifically requires California employers to grant employees access to the restroom that corresponds with their gender identity or expression, without proof of any medical procedure or similar documentation. Employers with

single-occupancy facilities must use gender-neutral signage. Employers must take feasible measures as needed to ensure the privacy of all employees, such as staggered schedules for showering. The new regulations also preclude employers from requiring employees to dress in a manner that that is inconsistent with their gender identity or expression, absent business necessity.

The regulations legally obligate employers to respect the names, genders, and pronouns preferred by employees for identification purposes. Moreover, employers may not require individuals to provide documentation of sex, gender, gender identity, or gender expression as a condition of employment. Finally, the law makes clear that discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning is unlawful.

A handful of other states introduced bills expanding protections for various classifications of workers. Measures advancing in California (AB 569) and New York (AB 566), for example, would prohibit employers from taking adverse action against an employee based on that individual's (or his or her dependent's) reproductive health care decisions. A Pennsylvania bill (SB 793) introduced in June would ban employment discrimination against individuals based on their status as currently or previously unemployed. Proposals are also under consideration in Michigan (HB 4689), Pennsylvania (HB 1410), and Wisconsin (SB 328), that would prohibit discrimination on the basis of sexual orientation, gender identity, and/or gender expression. For its part, Rhode Island is exploring a bill (HB 6328) that would permit the imposition of personal liability on employees that directly or indirectly commit unlawful employment practices, aid in such illegal conduct, or obstruct compliance with the law.

At the local level, the City of Philadelphia enacted a new ordinance that immediately gave the Philadelphia Commission on Human Relations (PCHR) the power to shut down a business for a period of time if the entity severely or repeatedly violates antidiscrimination laws. This measure adds teeth to the City's Fair Practice Ordinance, which outlaws discrimination on the basis of "race, ethnicity, color, sex (including pregnancy, childbirth, or a related medical condition), sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, familial status, genetic information, or domestic or sexual violence victim status."[10] The PCHR is expected to issue regulations regarding this enforcement mechanism.

Finally, on June 30, 2017, Missouri Governor Eric Greitens signed into law some significant changes to the Missouri Human Rights Act (MHRA).[11] The new law (Senate Bill 43) makes several amendments to the state's law on employment discrimination, harassment, and retaliation. Missouri's law in these areas is now more in line with federal anti-discrimination law and other states' anti-discrimination statutes.

Minimum Wage

Minimum wage and overtime exemption issues remain hot topics at the state and local levels. Readers interested in more detail on these subjects are encouraged to consult WPI Wage Watch, a Littler feature focusing exclusively on breaking minimum wage developments.[12]

What's Next?

We will continue to monitor the state houses as the remaining legislative sessions progress and will report on any further noteworthy developments.

1 Darren Mungerson & Stephanie L. Mills-Gallan, *Cook County, Illinois Publishes Final Rules for Sick Leave Ordinance: Employers, Are You Ready?*, Littler ASAP (June 7, 2017).

2 Rick Roskelley, Nevada Mandates Employer Provided Leave and Accommodations for Victims of Domestic Violence, Littler Insight (June 30, 2017).

3 Rick Roskelley, Nevada Expands Protections for Pregnant Workers, Littler ASAP (June 6, 2017).

4 For a more detailed discussion of pay equity developments thus far this year, *see Mid-Year Roundup: Equal Pay and Related Bills Command Attention in 2017*, WPI Report (July 5, 2017).

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

6 Joon Hwang, *Delaware Enacts Law to Address Gender Pay Gap By Prohibiting Employers from Requesting Compensation History of Job Applicants*, Littler ASAP (June 19, 2017).

7 EMERYVILLE, CAL., MUN. CODE §§ 5-39.01 *et seq*. For more information on the Emeryville ordinance, and to access the proposed regulations, visit http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance. Comments may be submitted through July 31, 2017.

8 The proposed regulations are available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/Text-Regulations-Regarding-National-Origin-Discrimination.pdf. Comments may be submitted through July 17, 2017.

9 *See, e.g.,* Marko Mrkonich, Bruce Millman & Bruce Sarchet, *July Is the New January: Beware of Employment Regulations About to Take Effect*, WPI Report (June 27, 2017) (summarizing numerous laws taking effect in July 2017). The transgender regulations are available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf.

10 PHILA., PA., CODE § 9-1103.

11 Curtis R. Summers, *Big Changes in Missouri: A New and Improved Missouri Human Rights Act Becomes Law*, Littler ASAP (July 6, 2017).

12 Libby Henninger, Sebastian Chilco & Corinn Jackson, *Wage Watch: Minimum Wage & Overtime Updates (June Edition)*, WPI Report (June 30, 2017).