



State Legislatures are Back in Business

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The majority of state legislatures are back in session, wasting no time considering new labor and employment measures. More than 600 state and local bills governing workplace issues were introduced or actively evaluated in January. Nine states reviewed at least 20 bills each. Lawmakers in Hawaii, Mississippi, Missouri, New Jersey, and Virginia led the pack, with each state considering more than 40 labor and employment measures.

Many bill topics are familiar. As we saw throughout 2017, a host of new bills seek to mandate paid leave, establish a family and medical leave insurance program, or expand the number of protected categories in state discrimination statutes.

But there are some noteworthy trends. As predicted, the #MeToo movement has sparked legislation in several states that would bar nondisclosure agreements in sexual harassment cases.¹ The focus on sex-based inequalities in the workplace has also resulted in renewed attention to pay equity issues. Finally, the Department of Justice's

revised stance on state legalized marijuana laws has spurred a number of new proposals at the state level, both for and against marijuana's legality. This month's State of the States provides a brief overview of these and other legislative themes that have emerged thus far this year.

Equal Pay

At least 17 states—from Hawaii to New Jersey—introduced proposals aimed at narrowing the pay gap between male and female workers. These bills take different approaches. Roughly eight states are considering bills that would strengthen existing pay equity statutes. Along with those options, six states (Hawaii, Illinois, Nebraska, Oklahoma, Tennessee, and Virginia) are weighing stand-alone wage transparency bills, which would prohibit employers from requiring workers to refrain from discussing their wages with colleagues. In Mississippi, however, several measures that would have created a new equal pay law have already died in committee.

¹ Ilyse Schuman and Betsy Cammarata, [Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?](#), Littler Insight (Jan. 9, 2018).

In addition, the trend toward banning salary history inquiries continues to spread. Legislators in at least 11 jurisdictions, including Arizona and Rhode Island, have introduced salary history bills, which make it illegal for employers to ask applicants about their wage history during some portion (if not all) of the hiring process. These types of laws remain popular, with salary history bans taking effect recently or later this year in California, Delaware, Massachusetts, New York City, and Puerto Rico.

Sexual Harassment, Nondisclosure, and Arbitration Issues

In the wake of #MeToo, lawmakers are searching for new ways to complement antidiscrimination laws and help eliminate harassment. State legislatures are coming at this problem from numerous angles.

So far this year, legislators have focused primarily on nondisclosure agreements (NDAs) as a possible avenue for reform. When used as part of a settlement package, an NDA may require that the employee keep confidential all negotiations and the terms of the agreement. The last few weeks have seen a spate of bills that would curtail the use of NDAs in the resolution of harassment claims. Measures have been filed in Arizona, California, Florida, Indiana, New Jersey, New York, Pennsylvania, Vermont, Virginia, and Washington.

State lawmakers are also entertaining restrictions on the use of arbitration agreements, which often require employees to resolve employment disputes through arbitration rather than in court. Bills on that topic are percolating in a handful of jurisdictions, including South Carolina, Vermont, New Jersey, Washington, and Virginia.

A few states are exploring mandatory training as a means of raising awareness and curbing sexual harassment. Virginia and Arizona, for example, are reviewing bills that would require employers to provide new hires with anti-harassment training. Under a New York assembly bill, the state Department of Labor would create harassment prevention materials for employer use, including training protocols and model policies.

Protected Time Off

On January 12, 2018, the Maryland legislature overrode Governor Larry Hogan's prior veto to enact the Healthy Working Families Act.² The new law requires all employers with 15 or more employees to provide paid sick and safe leave; smaller employers must grant unpaid leave. Leave may be used for the employee's own care, or for the covered needs of a family member. Although the act is scheduled to take effect on February 11, 2018, legislation is in the works to delay implementation or potentially amend the statute. The Maryland labor agency has indicated that it does not plan to issue enforcement guidance until the legislative session concludes in April, so that any regulations can reflect potential amendments.

Sick leave bills are pending in at least six other states, including Indiana, Nebraska, and South Dakota. Another handful of states are evaluating proposals that would require employers to provide paid family and medical leave or would create a family and medical leave insurance system funded by employee and/or employer contributions collected by paycheck deduction.

In January, two states—Colorado and Mississippi—introduced measures that would grant employees protected time for voting, although the Mississippi bill has already died. School activities leave bills were also filed in five states, such as Missouri and Wisconsin. Other assorted leave-related bills under review would designate protected time off for maternity leave (Kentucky), emergency responders (Vermont), and employees failing to report to work due to a state of emergency or evacuation order (New Jersey and Florida).

Discrimination: Protected Classifications

At least a dozen states are contemplating bills that would expand coverage under their current antidiscrimination laws. Most of these proposals (as seen in Arizona, Indiana, and Florida) would prohibit discrimination on the basis of sexual orientation, gender identity, and/or gender expression. Additionally, veteran status would be explicitly protected under four particular proposals. Bills in Hawaii and Missouri would prohibit employers in those

² See Libby Henninger, Eunju Park & Steven Kaplan, [Maryland Becomes the Latest State to Require Paid Sick and Safe Leave](#), Littler Insight (Jan. 17, 2018).

states from discriminating against workers based on their reproductive health decisions.

Drug Usage and Testing

As of February 1, 2018, Maine is the first jurisdiction in the nation to protect workers from adverse employment action based on their use of marijuana and marijuana products—as long as the use occurs away from the workplace.³ Employers still may prohibit the use and possession of marijuana products at work and may discipline employees who attend work under the influence of marijuana. Maine employers with workplace drug-testing policies implemented under state law may need to assess compliance strategies in light of these developments.

The legislature in nearby Vermont enacted its own marijuana legalization law on January 22, 2018. The new provisions, which take effect on July 1, 2018, eliminate civil and criminal penalties associated with possession and cultivation of limited amounts of marijuana. Employers are not obligated by the new law to allow or accommodate the use, possession, sale or growing of marijuana in the workplace. Employers also retain the right to maintain and enforce policies restricting such use and to discipline employees who are under the influence.

Several other jurisdictions introduced bills that would legalize recreational marijuana use (such as Missouri and New Jersey) or further criminalize it (such as Florida). Lawmakers in at least six states, including Georgia and Indiana, proposed measures that would create job protections for medical marijuana users.

Predictive Scheduling

So-called “fair,” “secure,” or “predictive” scheduling ordinances continue to make headlines.⁴ Generally speaking, these laws require employers to provide advance notice (often up to 14 days) to certain types of employees (hourly, retail, etc.) of their schedules and to provide additional compensation if the employer initiates a change to that

schedule. Oregon became the first state to adopt such a law, joining several California cities as well as Seattle and New York City. Predictive scheduling measures recently were introduced in Arizona, Hawaii, New Hampshire, New Jersey, Virginia, and Wisconsin.

The New York City fair scheduling regulations took effect in November 2017 and have already been substantially amended. The city council enacted a bill ([Int. 1399-2016](#)) that authorizes covered employees to take two temporary schedule changes each year for “personal events.”⁵ Employers must accommodate schedule changes, for example, for an employee to tend to a caregiving emergency, certain legal proceedings, or any event that would qualify for the use of leave time under the city’s sick or safe time act. Employers are also prohibited from retaliating against covered workers who request schedule changes. This amendment becomes effective on July 18, 2018.

Preemption

Preemption statutes preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries. These laws are increasingly popular, particularly among conservative state legislatures seeking to rein in more progressive cities and counties located within their borders, which might otherwise be willing to adopt ordinances on a variety of employment topics (e.g., minimum wage and paid sick leave).

A Wisconsin bill (SB 634), for example, would ban local governments from adopting or enforcing ordinances concerning: (1) employment discrimination; (2) wage claims and collections; (3) employee hours, overtime, and scheduling; (4) employee benefits; and (5) an employer’s right to seek salary history information from job applicants. Various types of preemption measures are pending in Arizona, New Jersey, and Oklahoma.

3 Melinda Caterine, Dale Deitchler, Nancy Delogu & Jeff Dilger, [Maine Employers Must Ignore Off-Work Marijuana Use, Cease Testing Applicants](#), Littler ASAP (Jan. 30, 2018).

4 See, e.g., Deidra Nguyen, [Who Could Have Predicted? Fair Scheduling Requirements Pose Compliance Challenges for Retail, Restaurant and Other Employers](#), Littler Insight (Sept. 18, 2017).

5 See Neta Levanon and Eli Freedberg, [The New York City Council Continues To Pass Laws Granting Employees The Power To Dictate Their Schedules](#), Littler Insight (Jan. 30, 2018).

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On the other hand, some states (indeed, some of the same states) are considering anti-preemption measures, which would guarantee a locality's right to adopt its own regulations on certain employment matters. To that end, the Missouri house has introduced a bill (HB 1395) that would repeal preemption provisions that currently prevent municipalities from establishing a minimum wage higher than the state level or other employment benefits, such as sick leave or vacation time.

Wage and Hour

Wage and hour issues in general remain hot-button topics. 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.⁶

⁶ See Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates (January Edition)*, WPI Report (Jan. 31, 2018).

Conclusion

At this point in the year, state legislative proposals really run the gamut. In addition to the items discussed above, for example, at least seven states are weighing “ban-the-box” laws. Eight states are evaluating regulations about accessibility to weapons in or near the workplace. There are measures under review addressing health benefits, noncompete agreements, the mandatory implanting of devices on an employee's body, social media policies, required immunizations, and smoking in the workplace.

Most of these bills will never see the finish line, and it is difficult to predict which bills will succeed. For now, we will continue to monitor the measures that advance and will report back next month on any notable trends.

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