



## Lawmakers Keep Their Focus on Equal Pay Measures

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As the holiday season approaches, legislative activity at the state level is starting to slow down. The California General Assembly closed out its term, for example, giving employers a breather until January. Illinois' regular session has also concluded, although its ongoing veto override session may yet bring about new labor and employment regulations. Municipal legislators are keeping employers on their toes, no matter the season.

As in prior months, proposals concerning equal pay remain popular. Protected time off (e.g., family or paid sick and safe leave) also garnered much of lawmakers' attention. This month's State of the States reviews these types of bills and other noteworthy developments.

### Salary History & Equal Pay

We begin with one of 2017's hottest trends: bans on salary history inquiries. California enacted a statewide prohibition, while several other states and localities are entertaining similar measures.

The California law ([AB 168](#)) will apply to all employers, including state and local governments, and will take effect on January 1, 2018.<sup>1</sup> It prohibits employers from relying on an applicant's prior salary history "as a factor in determining whether to offer employment . . . or what salary to offer an applicant." Moreover, an employer cannot—orally or in writing, directly or indirectly—seek this type of information about an applicant from the individual or from current or former employers. Employers may review publicly available information. In addition, salary history may be discussed if an applicant "voluntarily and without prompting" discloses his or her past salary to a potential employer.

Governor Bruce Rauner vetoed a similar bill in Illinois, but that measure has been resuscitated in the veto override session. If enacted, this measure ([HB 2462](#)) would bolster equal pay provisions and prohibit salary history inquiries. Specifically, HB 2462 would make it illegal to screen applicants based on their wage history or to require that applicants' prior wages satisfy any minimum or maximum

# STATE OF THE STATES

criteria. The bill would prevent employers from requesting that an applicant disclose his or her prior wages or salary as a condition of being interviewed or hired. With some exceptions, the law also would prohibit employers from asking any current or former employer of a candidate about that individual's pay history. The Illinois house voted to override Governor Rauner's veto, sending it to the senate in early November for reconsideration. Based on initial voting for the bill earlier this year, the override could succeed.<sup>2</sup>

The Albany County, New York legislature unanimously adopted a salary history ordinance, Local Law P, which will take effect in November—unless vetoed by the county executive. Under the measure, employers may not: (1) screen applicants based on prior wages or other compensation; (2) ask applicants for minimum or maximum salary criteria; (3) demand that candidates disclose salary history information; or (4) seek salary history information from current or former employers. Employers may confirm prior salary with current or former employers only if the candidate has authorized such disclosure in writing, after receiving an offer of employment.

Florida introduced two related bills (HB 393, SB 594) that would strengthen the current equal pay law and impose salary history restrictions. [HB 393](#), for example, states that employers “may not provide a less favorable employment opportunity to an employee based on the employee's sex or pay the employee” at a lesser rate “for substantially similar work.” The proposal, moreover, specifically permits class actions and the recovery of both liquidated damages and civil penalties. It includes wage transparency provisions as well as a salary history inquiry ban. HB 393 would not prevent an employee from voluntarily disclosing prior wage history.

Philadelphia adopted a salary history ban in January 2017. Although implementation of that ordinance is currently on hold pending the outcome of a legal challenge, the Philadelphia Commission on Human Relations has adopted regulations interpreting the law.<sup>3</sup> The regulations address a variety of topics, including the scope of the ordinance's coverage (*i.e.*, limited to positions physically located in the City of Brotherly Love), applicability of the law to current employees seeking new positions with the same employer, voluntary disclosures, and permissible inquiries.

Two additional pay equity developments in California merit mention. Governor Jerry Brown approved AB 46, which extends the coverage of the equal pay statute (Cal. Lab. Code § 1197.5) to all employers, both public and private. The law also stipulates that Labor Code § 1199.5, which imposes penalties and damages, applies only to private employers.

On the other hand, Governor Brown vetoed the Gender Pay Gap Transparency Act (AB 1209), which would have required large employers (with 500 or more employees in the state) to begin collecting and providing the Secretary of State with information relating to “gender pay differentials.” Under AB 1209, a large employer would have been 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. Despite the bill's support in the legislature, Governor Brown returned the bill without his signature over concerns that the proposal was ambiguous and would not gather data that would meaningfully contribute to the state's efforts to ensure equal pay.<sup>4</sup>

Unlike these other jurisdictions, Michigan does not appear interested in jumping on the salary history bandwagon. Indeed, the state senate advanced a bill (SB 353) that would prevent localities from adopting or enforcing laws that would regulate salary history and criminal background checks. This proposal is currently under review by a house committee.

## Protected Time Off

In addition to pay equity measures, a number of bills related to protected time off were passed or introduced in October. Washington, D.C., for example, is considering amendments to its universal paid leave law—which has not even taken full effect yet. The District of Columbia Council passed the leave law last year, and its substantive provisions are scheduled to become operative in March 2019.<sup>5</sup> The Council is actively considering amendments to the funding scheme, however, to ease the burden on employers. Rather than fund the benefits through a .62% tax increase on D.C. businesses, as initially planned, the Council is exploring alternatives, such as a public insurance program funded by contributions from both employers and employees.

In California, Governor Brown signed the New Parent Leave Act (SB 63) into law on October 12, 2017, requiring

# STATE OF THE STATES

certain employers to provide employees with 12 weeks of unpaid, job-protected parental bonding leave.<sup>6</sup> This new requirement takes effect on January 1, 2018 and applies to private and public employers that directly employ 20 to 49 employees within 75 miles of each other.

The City of Emeryville, California updated its sick leave ordinance, enhancing its enforcement mechanisms. The ordinance now specifies the amounts of fines to be collected by the city for violations, including a fine of \$1,000 per employee, for any employer that engages in retaliation. Fines of \$500 are available for more technical violations, such as failure to post notices or maintain payroll records.

Up the coast from Emeryville, Washington State is developing regulations on its new sick leave law. That law, which takes effect January 1, 2018, applies to all employers (regardless of size) and entitles employees to accrue one hour of sick leave per 40 hours worked.<sup>7</sup> The Washington Department of Labor & Industries is currently accepting comments on the proposed rules concerning its enforcement of the law. Public comments are due November 17, 2017.<sup>8</sup>

Arizona published final rules interpreting its new paid sick time law.<sup>9</sup> These comprehensive administrative regulations include definitions, front-loading and carry-over provisions, and posting and recordkeeping requirements.

In neighboring New Mexico, however, Albuquerque voters rejected a ballot initiative that would have obligated employers to provide paid sick leave.<sup>10</sup>

Meanwhile, both New York City and the State of Illinois may expand protected time off to workers who are affected by domestic violence or sexual abuse. The New York City Council passed a bill (Int. 1313-2016) that would broaden the existing Earned Sick Time Act to offer “safe time” to victims of “family offense matters,” which is defined to include offenses such as disorderly conduct, harassment, sexual abuse, stalking, and human trafficking. Safe time could be used to obtain services from a domestic violence or rape crisis center, to participate in safety planning or relocation, to meet with an attorney or social service provider, to enroll children in a new school, or for other actions necessary to maintain or restore the health and safety of the employee or his or her family member. This proposed ordinance passed unanimously and awaits action by Mayor Bill de Blasio.

An Illinois proposal (SB 2242) would amend the Employee Sick Leave Act to enable individuals to use their personal sick leave benefits for time taken off under the state’s Victims’ Economic Security and Safety Act (VESSA).<sup>11</sup> VESSA currently allows an employee to take unpaid leave if the employee, or the employee’s family or household member, is a victim of domestic or sexual violence.

## Discrimination & Harassment

Express legal protections for transgender citizens continue to gain momentum across the country. In October, Morgantown became the 11th municipality in West Virginia to pass a local ordinance securing the rights of lesbian, gay, bisexual, and transgender people.

North Carolina Governor Roy Cooper issued an executive order (NC EO 24) prohibiting discrimination in the administration on the basis of several characteristics, including sexual orientation, gender identity, and gender expression. NC EO 24 also requires certain state contractors to extend non-discrimination protections to their workers and ensures that North Carolina provides all individuals with equal access to state services. Governor Cooper also took steps to resolve lingering litigation over the ability of transgender individuals to use public restrooms in the state. Pursuant to a consent decree, transgender people cannot be prevented from the use of public facilities within the control of the executive branch in accordance with their gender identity.

For its part, Florida introduced a bill (HB 347) that would add sexual orientation and gender identity to the list of protected classes under the state’s civil rights act.

In California, Governor Brown signed a new law (SB 396) altering state anti-harassment training requirements.<sup>12</sup> Under SB 396, employers with 50 or more employees—that is, employers already required to provide sexual harassment training—must include training addressing harassment based on gender identity, gender expression, and sexual orientation. Such training must be conducted by educators with knowledge and expertise in these topics and must include practical examples. In addition, employers with five or more employees must prominently post a workplace notice, to be developed by the state Department of Fair Employment and Housing, regarding transgender rights.

On another note, the Golden State also took steps to enhance employment protections for veterans. AB

1710 expanded protections for military personnel by prohibiting discrimination in all “terms, conditions, or privileges” of employment.

## Background Check Restrictions

Two states amended their ban-the-box restrictions in October. Turning first to California, Governor Brown signed AB 1008, which will add a section to the California Fair Employment and Housing Act (FEHA) containing new state-wide restrictions on an employer’s ability to make pre-hire and personnel decisions based on an individual’s criminal history, including a significant and far-reaching “ban-the-box” component.<sup>13</sup> AB 1008 generally prohibits employers with five or more employees from: (1) including on applications questions seeking an applicant’s conviction history; (2) inquiring into conviction history before a conditional offer of employment is made; and (3) considering or distributing certain types of criminal history information while conducting a background check. This new law also prescribes steps that must be taken if an employer intends to deny employment solely or partly because of conviction history.

Rhode Island, on the other hand, slightly relaxed its ban-the-box regulations. The amendment to the regulations (SB 1029), which took effect October 5, 2017, permits an employer to include on an application a question about whether an applicant has ever been convicted of any offense that a federal or state law or regulation makes a mandatory or presumptive disqualification.

Florida (HB 433) and Michigan (HB 5067) have also proposed restrictions on questions about, or the use of, criminal history information in hiring.

## Immigration

While many employers anticipate further changes to federal law governing immigration, they should not lose sight of related activity at the local level.

California recently enacted a new law (AB 450) imposing requirements for public and private employers regarding immigration worksite enforcement actions by Immigration and Customs Enforcement (ICE).<sup>14</sup> Unless otherwise required by federal law, AB 450 prohibits employers from voluntarily consenting to ICE access to worksites and employee records in certain circumstances. Specifically, an employer cannot agree to an ICE agent: (a) entering any nonpublic areas of a worksite if the agent does not have a warrant; and/or (b) accessing, reviewing, or obtaining the employer’s employee records without a subpoena or warrant, with the exception of I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection has been provided to the employer. AB 450 also requires employers to provide certain notices to current employees about ICE inspection of employment records and expressly prohibits employers from re-verifying a current employee’s employment eligibility when not otherwise required by federal law. AB 450 takes effect on January 1, 2018.

## Wage & 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.

- 1 Bruce Sarchet, [New California Law Prohibits Salary History Inquiries](#), Littler ASAP (Oct. 13, 2017).
- 2 Darren Mungerson & Betsy Cammarata, [Will Illinois Ban Salary History Inquiries? Hang on for a Bumpy Override!](#), Littler ASAP (Oct. 30, 2017).
- 3 Martha Keon & William J. Simmons, [Philadelphia Adopts Regulations Clarifying the Still-Stayed Ordinance Banning Salary History Inquiries](#), Littler ASAP (Oct. 24, 2017); see also Martha Keon, [The City of Philadelphia Has Agreed To Stay The Enforcement of The Philadelphia Wage Equity Ordinance Pending Resolution of Court Challenge](#), Littler ASAP (Apr. 20, 2017); Martha Keon & Denise Maher, [The Philadelphia Wage Equity Bill Will Ban Employers From Asking Prospective Employees About Their Past Wages and Fringe Benefits](#), Littler Insight (Dec. 14, 2016).
- 4 See Bruce Sarchet, Corinn Jackson & Betsy Cammarata, [Return of the Living Dead: Could Unsuccessful California Bills Haunt Employers in 2018?](#), Littler Insight (Oct. 23, 2017).
- 5 S. Libby Henninger & Eunju Park, [District of Columbia Passes Expansive Paid Leave Law](#), Littler Insight (Dec. 22, 2016). D.C. Mayor Muriel Bowser did not veto the paid leave ordinance but allowed it to become law without her signature.
- 6 Alexis Sohrakoff, [California Will Require Small Businesses to Provide 12 Weeks of Unpaid, Protected Leave for Baby Bonding Purposes](#), Littler ASAP (Oct. 13, 2017).
- 7 See Pamela Salgado, Breanne Martell & Vanessa Lee, [New Minimum Wage and Paid Sick Leave Laws for Washington Employers](#), Littler Insight (Dec. 22, 2016).
- 8 The proposed Washington regulations and other information about this initiative are available [here](#).

# STATE OF THE STATES

- 9 The final Arizona rules are available [here](#), beginning at page 12. See also Steve Biddle & Sarah Watt, *10 Employer Considerations in Light of Arizona's New Paid Sick Time Law*, Littler ASAP (July 14, 2017).
- 10 See, e.g., Dan McKay, *Voters Reject ABQ Sick Leave Ordinance*, Albuquerque J., Oct. 4, 2017.
- 11 820 ILCS 180/1 et seq.
- 12 See Bruce Sarchet, Corinn Jackson & Betsy Cammarata, *With Governor Brown's Signature, California Employers Face a Gauntlet of New Laws*, Littler Insight (Oct. 16, 2017).
- 13 Rod Fliegel & Allen Lohse, *California Statewide Ban-the-Box Law Signed By Governor*, Littler Insight (Oct. 16, 2017).
- 14 Gayle Gonda, Michelle White & Jorge Lopez, *New Law Governs Immigrant Worksite Enforcement Actions in California*, Littler ASAP (Oct. 19, 2017).
- 15 See Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates (October Edition)*, WPI Report (Oct. 31, 2017).

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