

May 2016

INSIDER BRIEFING

With the number of legislative days left on the congressional calendar before the November elections dwindling and control of the White House and Congress at stake, April was a busy month for federal workplace policy developments. Both the Administration and Congress accelerated their efforts to advance the labor, employment, and benefits agenda and messaging in advance of the upcoming elections.

The Department of Labor (DOL) continued its march toward completing its regulatory agenda by issuing its long-awaited fiduciary rule on April 6. The rule, which amends the definition of "fiduciary" to address conflicts-of-interest in retirement investment advice, was touted by the White House and the DOL as a key feature of the "Middle Class Economics" agenda. (See the month's [In Focus](#) article for a detailed discussion of the fiduciary rule).

More than five years in the making, the fiduciary rule is the latest in a string of high-profile final rules—including the final "persuader" and silica regulations—the DOL has issued in recent weeks to beat potential Congressional Review Act (CRA) challenges in Congress. Under the CRA, Congress may pass a resolution of disapproval to prevent, with the full force of the law, a federal agency from implementing a rule or issuing a substantially similar rule without congressional authorization. However, such a

Continued on [page 2](#)

ON THE MOVE

The flurry of new bill introductions that marked the beginning of 2016 slowed dramatically in April, with only about 50 new labor- and employment-related bills and ordinances making their debut at the state and local levels during this period. About an equal number of measures were vetoed or died in committee in April. Much of the legislative activity at the start of 2016's second quarter centered on the hundreds of bills that have been pending for months, and in some instances, for more than a year. At least 28 measures were enacted or adopted by states or localities in April 2016, while another 22 cleared both legislative chambers. State lawmakers continue to focus on topics that have languished at the federal level: minimum wage, paid leave, wage theft, fair scheduling, background checks, and social media password protection. These and other trending topics are discussed below.

Continued on [page 6](#)

TABLE OF CONTENTS

Insider Briefing	1
On the Move	1
Global Report	10
In Focus	12
Outlook	15

INSIDER BRIEFING, CONTINUED

resolution is subject to Presidential approval. Therefore, agencies likely have a mid-May deadline in mind to finalize controversial rules, as doing so would give President Obama sufficient time to veto any resolution of disapproval.

Congressional Republicans and employer groups have responded with their own efforts to block the DOL regulations in Congress and in court. On April 15, Rep. Bradley Byrne (R-AL), a member of the House Committee on Education and the Workforce, introduced a resolution (H.J. Res. 87) under the CRA to block the labor consultant "persuader" rule. Rep. Byrne criticized the rule, which eliminates the previously well-accepted distinction between non-reportable "advice" and reportable "persuader" activity under the Labor-Management Reporting and Disclosure Act (LMRDA), for making it more difficult for employers to communicate with employees and undermining the right of workers to make informed decisions in union elections. Anyone with such reporting obligations must submit two separate reports to the DOL's Office of Labor-Management Standards (OLMS): (1) a Form LM-20, which must be submitted to the OLMS within 30 days of the consultant's agreeing to provide reportable persuader activity, and (2) a Form LM-21, which must be submitted to the OLMS within 90 days after the completion of the consultant's fiscal year. In a [press release](#) issued upon introduction of the resolution, Rep. Byrne stated the rule "would restrict privacy, upend the attorney-client relationship, and limit employee access to information during an organizing campaign."

On April 27, Rep. Phil Roe (R-TN), Chairman of the House Subcommittee on Health, Employment, Labor and Pensions Committee, echoed this criticism during a [hearing](#) on the persuader rule. In his opening statement, Chairman Roe stated: "there are far-reaching consequences for this dramatic change in long-standing labor policy." Chairman Roe characterized the rule as "an attack on the fundamental right of employers to seek legal counsel," and claimed it chilled employer free speech. Bill

Robinson, former President of the American Bar Association, discussed this concern in more detail during his testimony. As President of the ABA, he wrote to the DOL in 2011 expressing "serious concerns" with the rule. In his statement at the hearing, he described the rule's "destructive impact upon the confidential relationship between attorneys and their clients that is so essential to the American system of justice" and addressed the rule's "attack on client attorney confidentiality in labor relations matters."

The hearing served to highlight the problems with the persuader rule and energize congressional efforts to block the rule through the CRA and the appropriations process. Even if Congress were to pass a resolution disapproving of the persuader rule, President Obama would almost certainly veto it. The appropriations process, therefore, might be the most viable means to try to block the persuader rule legislatively. Meanwhile, multiple lawsuits to block the persuader rule are pending.

At the same time, the OLMS announced a special enforcement strategy with respect to the Form LM-21—Receipts and Disbursements Report—which requires the consultant engaging in persuader activity to report the names and addresses of all employers for whom the consultant provided labor relations advice or services and all receipts and disbursements from those employers in connection with those services. The DOL's fall 2015 Semi-Annual Regulatory Agenda announced that the OLMS intends to pursue a rulemaking to revise Form LM-21. The OLMS announced that "in light of changes to the LM-20 and potential changes in Form LM-21 reporting obligations that may be proposed in the upcoming rulemaking," filers of Form LM-20 who must also file a Form LM-21 will not be required to complete two parts of the LM-21. Specifically, the OLMS will not take enforcement action based upon a failure to complete Part B (Statement of Receipts), which ordinarily requires the filer to report all receipts from employers in connection with labor relations advice or services regardless of the purpose of the advice or services.

INSIDER BRIEFING, CONTINUED

Nor will they be required to complete Part C (Statement of Disbursements), which ordinarily requires the filer to report all disbursements made by the reporting organization in connection with labor relations advice or services rendered to the employers listed in Part B. The Department had been criticized for its bifurcated rulemaking process and proceeding with the persuader rule before completion of the related LM-21 rulemaking.

The DOL's Occupational Safety and Health Administration (OSHA) final rule amending its existing standards for occupational exposure to respirable crystalline silica also came under attack in Congress and the courts in April. The final silica rule, which was issued on March 24, sets a new permissible exposure limit (PEL) that is roughly 50% of the previous PEL for general industry, and roughly 20% of the previous PEL for construction and shipyards.

Quote of the Month

"In my left hand here, I hold a Webster's dictionary, which defines every word in the English language, and it only has a few more pages than this 1,000-page rule that defines one word . . . 'fiduciary.'"

—Rep. Phil Roe (R-TN) speaking on the House floor in favor of the joint resolution disapproving of the DOL's fiduciary rule

On April 19, the House Subcommittee on Workforce Protections held a hearing examining the silica rule. Subcommittee Chairman Tim Walberg (R-WI) opened the hearing by framing the question before the committee as "whether the workplace rules and regulations coming out of Washington serve the best interests of employees and their employers. Are they practical, responsible, and fair? Are they created with transparency and enforced effectively?" Chairman Walberg [noted](#) that OSHA's "first priority should have been enforcing existing standards." As Congress weighs in on the silica rule, employer organizations have filed multiple lawsuits challenging the rule.

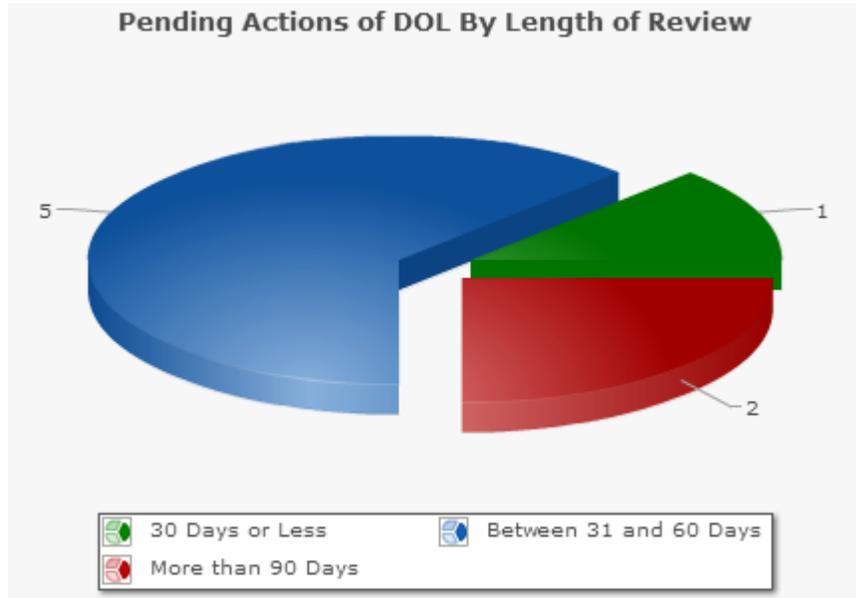
The DOL's recent finalization of the persuader, silica and fiduciary rules is by no means the end of the story on important workplace policy rulemaking during the remainder of President Obama's term. Other key regulatory initiatives await finalization in the coming months. Topping the list is the DOL's overtime regulations. The Wage and Hour Division's final rule to revise the white collar overtime exemptions has been under review at the White House Office of Management and Budget (OMB) since March 14, triggering a review process that normally lasts 30–90 days. As part of the review process, a number of stakeholders, including employer groups, have met with OMB to discuss the rule. Although the OMB meetings present an opportunity for employers to express their concerns with the rule, OMB usually discloses very little about the content of the final rule in return. However, according to press reports, the Department will lower the salary threshold for overtime coverage from \$50,440 in the proposed rule to \$47,000. The current salary threshold is \$23,660. Even the reportedly revised threshold would almost double the current level. What remains unknown is whether the final rule will include changes to the duties test or an automatic indexing feature. Regardless, raising the threshold alone would have a significant impact on a multitude of employers across the country.

INSIDER BRIEFING, CONTINUED

A rulemaking that government contractors and subcontractors are anxiously watching is the final regulation to implement the "Fair Pay and Safe Workplaces" Executive Order. Under a proposed rule and guidance issued by the Federal Acquisition Regulatory (FAR) Council and the DOL, the scope of contractors' obligations to report "violations" of 14 enumerated federal labor laws would be sweeping, encompassing any finding that had yet to be deemed final and subject to judicial review. Reports on such "violations" would, in turn, be used in making contracting decisions. Government contractors have strongly opposed the so-called blacklisting rule as proposed. A final rule has not yet been sent to OMB for its review, nor has a proposed rule been issued defining state law equivalents to the enumerated federal labor laws.

Congressional opponents of the blacklisting rule have turned to the National Defense Authorization Act

(NDAA) legislation as a vehicle to limit the rule's application. In a vote of 34-28, the House Armed Services Committee adopted an amendment to the NDAA offered by Rep. John Kline (R-MN). The amendment would prohibit the blacklisting executive order, the proposed rule to implement it, and the DOL guidance, from applying to the Department of Defense and the National Nuclear Security Administration. If the language were to become law, the Secretary of Defense and the Administrator for Nuclear Security would not be permitted to issue, or be required to comply with, any policy, guidance, or rules to carry out this executive order, or to otherwise implement any provision of the executive order or its implementing regulations. In a [statement](#) issued after the committee approved the amendment, Rep. Kline stated, "[t]he best way to ensure fair pay and safe workplaces is to enforce current rules, not add another layer of bureaucracy onto a procurement process already plagued by delays and inefficiencies."



Source: U.S. Office of Information and Regulatory Affairs, Office of Management and Budget
<http://www.reginfo.gov/public/>

INSIDER BRIEFING, CONTINUED

Full House consideration of the NDAA version is next, where efforts to try to remove the language from the bill are likely. The Senate Armed Services Committee is set to consider its version of the NDAA the week of May 9.

As equal pay measures proliferate at the state level, federal equal pay legislation remains stalled in Congress, but certainly remains an important issue in the upcoming elections. With control of the Senate in the November elections at stake, events marking Equal Pay Day on April 12th took on added significance. Senators Patty Murray (D-WA) and Deb Fischer (R-NE) attempted to force passage of two competing pay-related bills by unanimous consent. Both efforts failed. Senator Murray tried to seek approval for the Paycheck Fairness Act, which would expand damages under the Equal Pay Act (EPA) to include potentially unlimited compensatory and punitive awards for wage discrimination and weaken an employer's ability to raise the "factor other than sex" affirmative defense in a wage discrimination case. Senator Fischer's bill, the Workplace Advancement Act, would amend the Fair Labor Standards Act by making it unlawful to discharge or in any other manner retaliate against employees because they inquired about, discuss, or disclose comparative compensation information for the purpose of determining whether the employer is compensating them in a manner that provides equal pay for equal work. The bill would not protect wage disclosures by employees who, as part of their job functions, have access to other employees' wage information.

The Equal Employment Opportunity Commission (EEOC) has embarked on its own initiative to promote equal pay in the absence of federal legislation by proposing recent changes to the EEO-1 report to include information on pay data. The proposal has been criticized as burdensome as well as having the potential to generate inaccurate and misleading information about pay discrimination. Congressional

Republicans have been scrutinizing the EEOC's actions this term. On April 12, the Senate Appropriations Committee advanced legislation targeting the EEOC. One measure would direct the EEOC to focus on reducing its "massive" backlog of more than 76,000 workplace discrimination complaints, while the other would give the public an opportunity to weigh in on any new guidance proposed by the agency. The language was included in the in the Committee-approved Fiscal Year 2017 Commerce, Justice, Science, and Related Agencies Appropriations Bill. On adoption of his amendment, Senator Lamar Alexander (R-TN) [stated](#), "[f]ocusing on the backlog will force the agency to focus on its core mission of protecting American workers. Giving the public at least 30 days to comment on any new guidance will help ensure that the agency's guidance are not implemented without giving the public an opportunity to have a say."

Finally, proving that bipartisan legislation can still occur in Congress, both chambers recently passed a significant intellectual property bill. On April 27, the House passed by an overwhelming margin the Defend Trade Secrets Act (S. 1890). The Senate approved the same bill on April 4. The legislation amends the Economic Espionage Act to create a private civil cause of action for trade secret misappropriation. President Obama is expected to sign the bill into law shortly.

April certainly was an active month in Washington with respect to workplace policy developments. As the election nears and the clock runs out on the Obama Administration, employers can expect even more congressional and Administrative activity in the months ahead.

– By Ilyse Schuman and Michael J. Lotito

ON THE MOVE, CONTINUED

Family Leave

On April 21, 2016, San Francisco [adopted an ordinance](#) that will require private employers to fund family bonding leave. Under the ordinance, employers with 20 or more employees, at least one of whom must work in San Francisco, will have to provide "supplemental compensation" to covered employees who take leave under California's paid family leave law to bond with a newborn or newly adopted child, or to place a child up for adoption or foster care. The ordinance is operative on January 1, 2017, but when the employer must offer supplemental compensation depends on the employer's size.

Similarly, on April 4, 2016, New York approved a budget that provides for a [paid family leave](#) program funded through payroll deductions. Starting on January 1, 2018, eligible employees can receive up to eight weeks of paid family leave per year. The leave will incrementally increase until 2021, when eligible employees can receive up to 12 weeks of paid leave. The payment amounts employees can receive during this leave will start at 50% of their average weekly wage, capped at 50% of New York's average weekly wage, and eventually rise to 67% of their average weekly wage, capped at 67% of the state's average weekly wage. Employees become eligible for this program after working for the employer for six months.

Paid Sick Leave

Workers in Los Angeles, California could soon be able to accrue up to six paid sick days per year, three more days than is allowed under state law. On April 19, the council voted 12-1 to direct the City Attorney to draft an ordinance incorporating the paid sick leave requirements. The council will then consider and vote on this ordinance, likely within the coming weeks.

Meanwhile, a paid sick leave bill that cleared the Maryland Assembly did not make it past "go" in the Senate.

Equal Pay

Both of Maryland's legislative chambers approved SB 481, which prohibits an employer from wage discrimination based on sex or gender identity. Specifically, the bill would prevent employers from offering less favorable employment opportunities to employees or applicants based on these factors.

Louisiana's State Senate approved an equal pay bill (SB 254) that requires that employees be paid equally for work that is the same or equal in kind and quality. The measure would apply to employers with at least 50 employees in Louisiana. The amended measure that cleared the Senate would allow only full-time employees to seek redress under the bill, and imposes a three-year cap on back pay awards.

Wage Transparency

Bills preventing employers from retaliating against employees who discuss their compensation have gained more traction than equal pay bills in recent months. April was no exception. In Oklahoma, the House approved HB 2929, which prohibits employers from firing or otherwise discriminating against employees who inquire about, discuss, or disclose their or other employees' wages with co-workers. Similar legislation (HB 314) was introduced in Delaware in early April.

Wage Theft

In other wage-related news, Oregon enacted SB 1587, which modifies the information employers must include in their employees' itemized wage statements. Each pay period, employees must receive statements that list, among other information, the date of payment and dates worked; the worker's rate of pay and how that pay is calculated (by the hour, shift, weekly, commission, salary, etc.); deductions; and allowances if claimed as part of the minimum wage. Employees must maintain these wage records for at least three years and provide them to employees upon request.

ON THE MOVE, CONTINUED

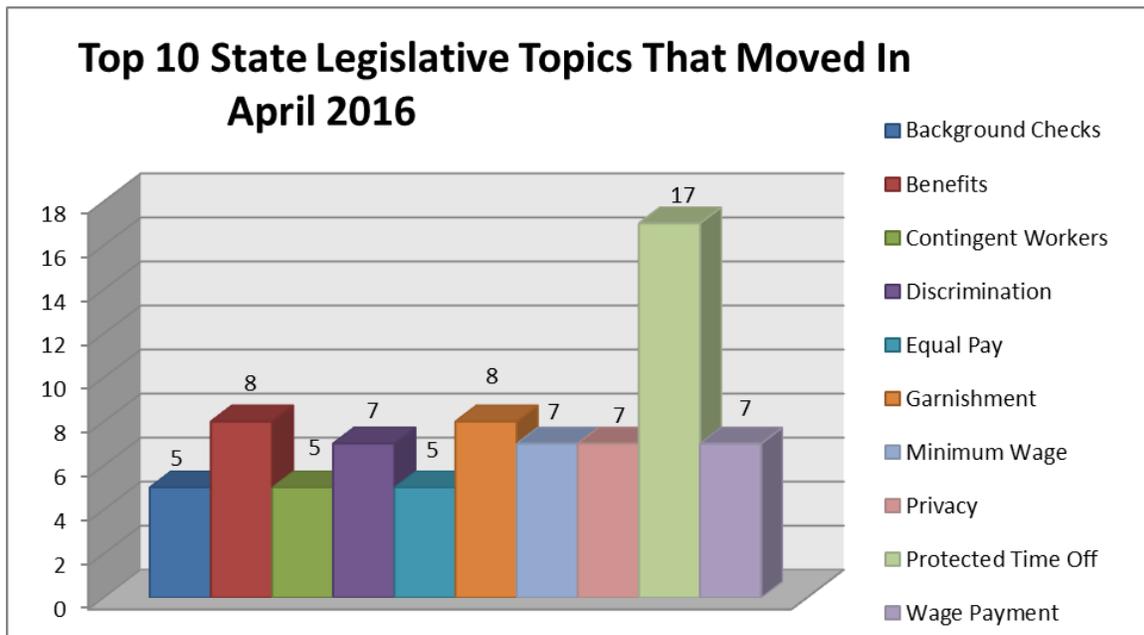
Rhode Island's Senate approved SB 2475, which provides employees with additional means of collecting wages from nonpaying employers, and increases penalties for noncompliance. The bill would allow individuals to file a civil action for injunctive relief and monetary damages, which could amount to twice unpaid wages plus fees and expenses. An employer could also face revocation of its business license for noncompliance. Another measure that passed the Senate and was sent to a House committee (SB 2235) would allow claimants to secure liens against their employers for the amount of unpaid wages.

In California, a Senate committee advanced SB 1342, which would expressly permit county and city officials to issue subpoenas to investigate allegations of wage theft. In Colorado, the House approved HB 1347, which would make an employee's wage complaints public.

Minimum Wage

During the first week of April, New York passed a series of complicated [minimum wage increases](#) as part of its fiscal year 2016-2017 budget. The first increase will take effect on December 31, 2016, and increase yearly until 2021. Much like Oregon's new region-based minimum wage increases, New York's minimum wage increases will differ by geographic area. By the beginning of 2022, most regions are slated to have a \$15.00 minimum wage.

On the opposite coast, California enacted SB 3 on April 4. This law increases the state-wide minimum wage for employers with at least 26 employees to \$10.50 on January 1, 2017; \$11:00 on January 1, 2018; \$12.00 on January 1, 2019; \$13.00 on January 1, 2020; \$14.00 on January 1, 2021; and \$15.00 on



This chart indicates the most popular topics addressed by state legislation in April 2016.

ON THE MOVE, CONTINUED

January 1, 2022. Smaller employers will have an additional year to implement each incremental increase.

In other Golden State news, the city council for Sunnyvale, California, voted to raise the city's minimum wage, in stages, to \$15.00 per hour by the year 2018. The first wage boost to \$11.00 an hour would take effect on July 1, 2016. The city's current wage floor is \$10.30 per hour.

Voters in Berkeley, California, will have at least one chance in November to decide whether to raise the minimum wage to \$15.00 per hour. The Berkeley City Council will draft a ballot resolution to implement a \$15.00 minimum wage by 2019. A separate initiative to appear on the ballot would impose this minimum by October 2017.

Fair Scheduling

While several states have introduced so-called "fair scheduling" bills in recent months, none have sufficiently advanced. However, many worker centers or "union front organizations" are taking up this cause, much like they did for the "Fight for 15" movement to increase the minimum wage. Many of these fair scheduling laws would require certain retail employers to provide their employees with advance notice of their schedules, and pay their employees a percentage of lost income if their hours are reduced or eliminated close to the scheduled start time. While these bills have an uphill battle, several state attorneys general have taken notice. On April 13, attorneys general from eight states and the District of Columbia sent letters to 15 large retailers requesting information about their on-call policies. Last year, New York's attorney general took similar action. These fishing expeditions indicate the topic might not fade away as quickly as many employers had hoped.

Regarding fair scheduling legislation, in April, bills pending in California (SB 878) and New Jersey (AB

1117) advanced through at least one legislative committee.

Preemption of Local Laws

Another trend in recent months is the rise of bills expressly prohibiting cities and municipalities from requiring private employers to provide a benefit or minimum wage greater than that set by state or federal law. In April, Arizona's Legislature cleared a measure (HB 2579) prohibiting cities, towns or other political subdivisions in the state from regulating employee benefits, including leave.

Background Checks

Limiting an employer's ability to ask about an applicant's criminal history until a later point in the hiring process remains a hot legislative topic. Vermont's upper and lower chambers approved HB 261, which prohibits requiring the disclosure of an individual's criminal history information on an initial employment application. Vermont could therefore be the next jurisdiction to "ban the box."

In Connecticut, a bill (HB 5237) that would bar criminal history inquiries until after an employer makes a conditional offer of employment has cleared the State House and a Senate committee. A ban-the-box bill (HB 1388) that would prevent criminal history inquiries on employment applications cleared Colorado's lower chamber on April 27.

In related background check news, the California Assembly passed a bill (AB 1843) that would prohibit employer inquiries into a job applicant's juvenile court or detention record.

Immigration

Using the federal E-Verify employment verification program will become mandatory for Tennessee employers with 50 or more employees. Under a Tennessee law enacted in 2011, employers with six

ON THE MOVE, CONTINUED

or more employees had to verify that their workers were authorized to work in the United States either through E-Verify or by requesting certain residency and work authorization documents from the individuals. Under the new law (SB 1965), covered private employers must use the E-Verify program for employees hired after January 1, 2017. The law also imposes a \$500 per day penalty for noncompliance.

LGBT Discrimination

Likely in response to the public outcry over North Carolina's controversial [Public Facilities Law](#) (HB 2), Louisiana Governor John Bel Edwards (D) signed an executive order on April 13 providing protections to state employees and contractors against discrimination on the basis of sexual orientation or gender identity.

Meanwhile, the U.S. Court of Appeals for the Fourth Circuit held in *G.G. v. Gloucester County School Board* that prohibiting a transgender student who identifies as male from using the boys' restroom violated Title IX. The court noted that discrimination on the basis of gender identity constitutes discrimination on the basis of sex. Because North Carolina is within the Fourth Circuit's jurisdiction, the ruling could have implications for at least portions of North Carolina's new law.

San Francisco's City Council approved an ordinance that would require businesses and places of public accommodation to designate single-user toilet facilities that are available to the public or employees as all-gender accessible to persons of any gender identity. A similar bill introduced in the California State Assembly (AB 1732) cleared a committee.

Social Media

Nebraska became the latest state to enact a law restricting an employer's access to applicants' or employees' social media passwords or accounts. The Workplace Privacy Act (LB 821) prevents employers from requiring, requesting, or coercing applicants or employees to disclose their usernames or passwords

to their personal accounts. The bill also prevents an employer from "shoulder surfing," or requiring the employees to log in to their accounts in the employer's presence. In addition, the employee or applicant could not be compelled to add the employer or others to their list of contacts associated with a personal account. Like similar laws enacted in other states, Nebraska's law includes certain exceptions, including permitting access to employer-provided devices, and allowing employers to conduct certain investigations.

Both of Hawaii's legislative chambers approved similar legislation (HB 1739), while Illinois's House approved its own social media privacy protection bill (HB 4999).

Drug Testing

Pennsylvania has decriminalized the medical use of marijuana. The Pennsylvania Medical Marijuana Act (SB 3) includes employment-specific provisions. While employers are prohibited from discriminating against employees who are certified users of medical marijuana, they do not have to make accommodations for marijuana use. Employers are not restricted in their ability to discipline employees for being under the influence in the workplace if their conduct falls below the standard of care normally accepted for their job. The law includes several safety-related provisions.

What's Next?

Half of the state legislatures are now in recess. Over the next couple of months, those jurisdictions still in session will continue to sift through pending items. We will continue to report on those labor and employment bills that make the final cut.

– *By Ilyse Schuman and Tessa Gelbman*



GLOBAL REPORT

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

Asia/Pacific

Singapore. Starting on April 1, 2016, employers in Singapore must provide more detailed information on employee pay slips and key employment terms to employees covered under the country's Employment Act. According to a [statement](#) issued by Singapore's Ministry of Manpower, the more detailed pay information enables employees to better understand how their salary is calculated, and reduces misunderstandings and disputes in the workplace. Other revisions to the Employment Act create a framework for addressing less severe breaches of the law, which will be subject to administrative penalties.

Europe

European Union – Trade Secrets Directive

The EU Parliament has approved a new trade secrets directive. The directive creates an EU-wide definition of "trade secret" to mean "information which is secret, has commercial value because it is secret, and has been subject to reasonable steps to keep it secret." According to a [press release](#) on the parliamentary vote, the directive "would oblige EU member states to ensure that victims of misuse of trade secrets are able to defend their rights in court and to seek compensation. The agreed text also lays down rules to protect confidential information during legal proceedings." Under the [terms of the directive](#), claims regarding the theft or misuse of trade secrets will fail if the trade secret was acquired, used or disclosed: (a) to exercise the right to freedom of expression and information as set out in the EU Charter of Fundamental Rights, including respect for freedom and pluralism of the media; (b) to reveal misconduct, wrongdoing or illegal activity, provided that the respondent acted to protect the general public interest (such as public safety, consumer protection, public health or environmental protection); (c) to protect a legitimate interest, recognized by European Union or national law; or (d) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions

under EU or national law, provided that such disclosure was necessary for that exercise.

European Union – Privacy Shield

Last fall, the European Union Court of Justice invalidated the Safe Harbor Framework that had allowed U.S. companies to comply with the EU's restrictions on transferring personal data from the EU to the United States. In response, in February 2016, the European Commission and the U.S. Commerce Department announced the creation of a replacement framework, known as the "Privacy Shield." On April 13, 2016, however, the Article 29 Working Party, the EU's main data protection regulatory body, issued a [report](#) explaining its reasons for not supporting the Privacy Shield in its current form. While the Working Party "welcome[d] the significant improvements brought by the Privacy Shield," it emphasized that problems with it remain. Notably, "some key data protection principles as outlined in European law are not reflected in the draft adequacy decision and the annexes, or have been inadequately substituted by alternative notions." The report identifies areas for improvement, and "urges the Commission to resolve these concerns, identify appropriate solutions and provide the requested clarifications in order to improve the draft adequacy decision and ensure the protection offered by the Privacy Shield is indeed essentially equivalent to that of the EU."

United Kingdom. The United Kingdom's Equality and Human Rights Commission (EHRC) has published [guidance](#) for improving diversity on corporate boards specifically, and throughout an organization. The guidance, which discusses six steps for hiring and maintaining diversity at the executive and non-executive levels, is targeted to corporations and executive search firms. The EHRC is akin to the U.S. Equal Employment Opportunity Commission, and is charged with implementing the UK's Equality Act and providing authoritative guidance on equality and human rights law.

Global

The Corporate Human Rights Benchmark [published information](#) on a pilot program to create a publicly-

GLOBAL REPORT, CONTINUED

available, comparative, year-on-year “snapshot” of the human rights performance of the largest 500 companies in the world. The intent of the program is to make individual company “scores” available so shareholders, the media and the public can create market pressures to enhance corporate human rights performance. While the ultimate aim of the Benchmark is to rank the top 500 globally-listed companies, the Pilot Benchmark scheduled for publication in November 2016 will rank the top 100 companies across three industries: agricultural products, apparel and extractives. The Pilot Benchmark will assess certain risks in each industry. The labor-related risks to be assessed in the Pilot Benchmark are: child labor, forced labor, freedom of association and collective bargaining, health and safety, and working hours, although not every risk will be assessed in each industry.

North America

Canada

Intellectual Property. Canada's Competition Bureau has published revised [Intellectual Property Enforcement Guidelines](#) to explain how the Bureau will balance the need for competition and protections for intellectual property rights. The Bureau is an independent law enforcement agency charged with investigating anti-competitive practices and promoting compliance with the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act. The updated Guidelines summarize IP and competition law, describe the Bureau's approach to enforcing these laws and present various scenarios to illustrate how the Bureau would apply the law to a variety of business conduct involving IP.

Miscarriage as Disability. In [Mou v. MHPM Project Leaders](#), 2016 HRTO 327 (CanLII), the Human Rights Tribunal of Ontario held that a miscarriage can constitute a disability within the meaning of the Human Rights Code (Code). The former employee alleged she experienced “a series of events” in the first half of 2013 that “profoundly affected her health and well-being,” including a slip-and-fall accident, a

miscarriage and the death of her mother-in-law. The employer argued, among other things, that the miscarriage did not constitute a disability. The Tribunal disagreed: “. . . the applicant's miscarriage is a disability. I acknowledge that a miscarriage may be covered under the ground of sex or as an intersection of sex and disability. It also is not a common ailment, and it is certainly not transitory. It is clear from the applicant's testimony that she continues to experience significant emotional distress from the miscarriage even today.”

Workplace Safety and Employment Standards Inspections. The Ontario Ministry of Labour published an [updated schedule](#) of workplace safety and employment standards inspections, referred to as inspection “blitzes.” These safety inspections check for employer compliance with the Occupational Health and Safety Act and the Employment Standards Act, 2000. Inspectors conduct these blitzes by industry sector, and focus on the hazards and employment law violations common to that sector.

South America

Colombia. The Office of the U.S. Trade Representative and the U.S. Department of Labor issued a [status report](#) on the Columbian Action Plan related to Labor Rights—five years after the plan was implemented. According to the report, progress has been made in several areas, including “a decline in fake worker cooperatives that undermine workers' rights, a reduction in violence against labor unionists, and a doubling of the number of labor inspectors in Colombia's Ministry of Labor.” As for issues that remain, the report claims the country still faces subcontracting abuse and illegal labor cooperatives. To combat these issues, President Santos and Minister of Labor Garzon issued a Presidential Decree “to help inspectors investigate and apply potentially very significant fines to employers that use such other forms of subcontracting to violate labor rights.”

– By Michael Lotito and Tessa Gelbman



IN FOCUS

The Final Fiduciary Rule

On April 6, 2016, the Department of Labor issued its final rule governing conflicts-of-interest in retirement investment advice. The final rule changes the definition of who is deemed a "fiduciary" of an employee benefit plan under ERISA by virtue of giving investment advice to the plan and its participants and beneficiaries. The rule similarly amends the Internal Revenue Code (Code) regarding Individual Retirement Accounts (IRAs). Advisors deemed to be fiduciaries under the revised definition will be held to a higher standard in ensuring the advice rendered is in the best interest of the retirement investor. Such fiduciary investment advisors are prohibited from receiving compensation in connection with rendering the investment advice unless a prohibited transaction exemption applies. The regulatory package includes related changes to ERISA's prohibited transaction exemption, namely the creation of a new Best Interest Contract Exemption (BICE).

The fiduciary rule has taken on much more significance and controversy than a mere change to an ERISA definition. After a rulemaking process that began in 2010, the final regulatory package was touted by the White House and DOL as a key component of the "Middle Class Economics" agenda. Contending that "these conflicts of interest in retirement advice cost America's families an estimated \$17 billion a year," the White House states that the DOL's reforms to the definition of "fiduciary investment advice" and related exemptions "will save affected middle-class families tens of thousands of dollars in retirement savings over a lifetime of saving and level the playing field for the many financial advisers who are already doing right by their clients." According to the White House [statement](#), finalization of the rule "is another critical step in the President's ambitious effort to put in place the strongest consumer protections in American history, while fighting back efforts by Wall Street and their allies to hinder the progress we have made." These issues have already played on the Presidential primary

campaign trail and continue to reverberate in the race for the White House and congressional elections.

Under the 1974 ERISA statute and the Code, a person is a fiduciary to a plan or IRA to the extent the person engages in specified plan activities, including rendering "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan . . . [.]". The 1975 regulations set forth a five-part test for determining when advice constitutes "fiduciary" investment advice: an adviser must (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA.

Since promulgation of the 1975 regulations, the retirement plan landscape has changed dramatically. As the DOL noted in the preamble to the final rule, "[p]erhaps the greatest change is the fact that individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions."

The proliferation of participant-directed 401(k) plans and rollovers to IRAs served as the impetus for the DOL's issuing its original proposal in 2010. That 2010 proposal was widely criticized by both sides of the aisle, prompting the DOL to go back to the drawing board with a new proposal in 2015. The DOL described its revised approach as a "principle-

IN FOCUS, CONTINUED

based" approach that "aligns the adviser's interests with those of the plan participant or IRA owner, while leaving the individual adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business."

Under the final rule, fiduciary investment advice is defined as a "recommendation" to a plan, plan fiduciary, plan participant and beneficiary, and IRA owner for a fee or other compensation, direct or indirect, on the advisability of buying, holding, selling or exchanging securities or other investment property. The threshold question is whether the communication is deemed to be a "recommendation." A "recommendation" means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The more individually tailored the communication is to a specific advice recipient or recipients about a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation.

The regulations sets forth certain communications not deemed to be "recommendations" and, therefore, do not confer fiduciary status on the advisor. Educational information and materials that do not fall within the definition of fiduciary investment advice include: plan information, general financial, investment, and retirement information, asset allocation models, and interactive investment materials. Service providers that offer a "platform" or selection of investment alternatives are not deemed to make "recommendations" if the plan fiduciary is independent of the person who markets or provides the investment alternatives. The platform provider must disclose in writing to the plan fiduciary that they are not providing impartial investment advice or giving advice in a fiduciary capacity.

The final rule also excludes certain counterparty transactions with independent fiduciaries from the definition of fiduciary investment advice.

Communications in arm's-length transactions with certain plan fiduciaries who are licensed financial professionals (broker-dealers, registered investment advisers, banks, insurance companies, etc.) or with plan fiduciaries who have at least \$50 million under management, are not considered "recommendations." The final rule lowered the threshold from \$100 million to \$50 million. However, such parties should have a high degree of financial sophistication and may often engage in arm's-length transactions in which neither party has an expectation of reliance on the counterparty's recommendations. Therefore, even with the lower threshold, relatively few plan fiduciaries are likely to have the requisite "financial sophistication" needed to qualify for the exemption.

A cornerstone of the DOL's regulatory package is the creation of the new BICE prohibited transaction exemption. As a condition of receiving compensation otherwise prohibited, the BICE exemption requires financial institutions and advisors to acknowledge their fiduciary status in writing. The financial institution and advisors must adhere to standards of fiduciary conduct and fair dealing. These "Impartial Conduct Standards" regarding their advice require that the compensation be reasonable. In addition, the financial institution must also have policies and procedures designed to mitigate harmful impacts of conflicts of interest and must disclose basic information about their conflicts of interest and the cost of their advice. Unlike the proposed rule, the BICE exemption does not require financial institutions to enter a separate enforceable contract regarding ERISA plans. The DOL explains that such a separate contract is unnecessary as ERISA investors can directly enforce their rights to proper fiduciary conduct under ERISA sections 502(a)(2) and (3). The final BICE exemption creates streamlined conditions for so-called "Level Fee Fiduciaries." A Level Fee is a fee or compensation provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather

IN FOCUS, CONTINUED

than a commission or other transaction-based fee. The streamlined procedures for level fee fiduciaries do not require the financial institution to establish practices and procedures designed to ensure adherence to the impartial conduct standards or disclosure requirements. Given the relative ease and certainty of such level fee arrangements, many expect the use of level fee arrangements to increase.

The final fiduciary rule becomes applicable on April 10, 2017. Phased-in compliance with the BICE exemption also begins on that date, with full compliance required by January 1, 2018.

The White House and the DOL championed the changes made to the final rule in response to public comments and stakeholder input in formulating the final rule. Besides soliciting public input on its 2010 proposal, the DOL conducted a comment period lasting over five months following the issuance of the proposed fiduciary rule in April 2015. The DOL also received extensive feedback during four days of public hearings, over 3,000 comment letters (and over 300,000 petitions), and conducted more than 100 meetings with stakeholders. Although the DOL made changes to the proposed rule, the final version still seems to track the basic approach of the proposed rule in key respects.

The changes made to the final rule did little to assuage the concerns of congressional critics. Congress wasted no time in blasting the final rule. On April 28, the House passed a joint resolution of disapproval of the final fiduciary rule under the Congressional Review Act (CRA). H.J. Res 88 passed 234-183 along strict party lines, with all Republicans voting in its favor. House Education and the Workforce Committee Chairman John Kline (R-MN) and Health, Employment, Labor, and Pensions Subcommittee Chairman Phil Roe (R-TN) issued a [statement](#) following the resolution's passage. "We have taken an important step in protecting access to affordable retirement advice and helping more Americans retire with financial security and peace of

mind," said Chairman Roe. Chairman Kline said, "[t]he department's fatally flawed rule will restrict access to affordable retirement advice and make it harder for small businesses to help their workers save for the years ahead."

A similar effort is underway in the Senate. On April 18, Senators Johnny Isakson (R-GA), Lamar Alexander (R-TN), and Mike Enzi (R-WY) introduced their own resolution to stop implementation the fiduciary rule, [warning](#) the rule "will have devastating effects on retirement planning by hardworking families and small businesses." If passed, the resolution of disapproval would allow Congress to stop the DOL from implementing what the sponsors of the resolution call "this harmful rule, which will deny retirement advice to low- and middle-income savers, which is what happened when a similar change was adopted in the United Kingdom."

A resolution of disapproval needs only a simple majority to pass and cannot be filibustered or amended, if approved within 60 days of the rule's issuance. However, the resolution of disapproval must also be signed by the President. Congress can overturn a veto with a two-thirds vote in both the Senate and the House. Therefore, even if this resolution to block the fiduciary rule is passed, President Obama is certain to veto it, and Congress would likely lack the requisite two-thirds majority to reverse course. Nevertheless, critical debate over the rule in Congress and potentially the courts is likely to continue for some time. Meanwhile, plan sponsor preparations for applying the new rule should not be delayed.

– By Ilyse Schuman and Melissa Kurtzman

OUTLOOK

MAY

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

Monday, May 2, 2016

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

The 2016 Executive Employer® Conference

Wednesday, May 4 – Friday, May 6, 2016

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

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

Monday, May 9, 2016

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

Final DHS Rule on STEM OPT Program Takes Effect

Tuesday, May 10, 2016

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

Comments Period Ends on OSHA Interim Final Rule Governing Whistleblower Procedures under MAP-21
Monday, May 16, 2016

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

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

Thursday, May 19, 2016

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

Comment Period Ends for IRS's Call for Input on New Compliance Questions in Form 5500

Tuesday, May 31, 2016

The IRS added new compliance questions to the 2015 IRS Form 5500/5500-SF, which is the annual report filed by retirement plans with the Department of Labor and the IRS. The IRS has invited comments on several of the new questions. In its request for comments, the IRS has also proposed to modify some of the questions from their original form, or delete them entirely. [Read more»](#)

JUNE

Final EBSA Fiduciary Rule Takes Effect

Tuesday, June 7, 2016

The DOL's Employee Benefits Security Administration (EBSA) issued a final rule defining who is a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a "fiduciary" of a plan (including an individual retirement account (IRA)) under the Internal Revenue Code of 1986. The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships. Although the rule becomes effective on June 7, 2016, it has an applicability date of April 10, 2017. [Read more»](#)

OSHA Final Rule on Occupational Exposure to Respirable Crystalline Silica Takes Effect

Thursday, June 23, 2016

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

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»](#)

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