LITTLER WORKPLACE POLICY INSTITUTE

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State of the States — Legislative Action Heats Up

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As we turn the calendar to April, state legislatures are starting to hit their stride. Bills introduced earlier this year continue to advance, with more than 400 labor and employment-related measures remaining under consideration across the nation. New York, Missouri, Rhode Island, and Texas have the most pending bills, with at least 20 apiece.

Now that we are heading into the second quarter of the year, we are starting to see an uptick in the number of bills that actually make it to the finish line. Five joint-employer bills were enacted in March, for example. We are also seeing a surge in preemption bills, which are designed to clip localities' wings. This month's State of the States focuses on a few of these developing trends.

Preemption Bills

As mentioned, numerous states are considering preemption laws, which would preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries. These jurisdictions hope to follow the trail blazed by states like Ohio, Iowa, Alabama, Arkansas, Georgia, Tennessee, Pennsylvania, and Rhode Island, which have already done so. At least one version of a preemption bill is percolating in about a dozen states, including Minnesota, Missouri, Oregon, Georgia, Iowa, West Virginia, and South Carolina.

These bills cover a wide range of topics. Some bills take aim at specific targets and expressly prohibit ordinances that affect, for example, employee benefits (such as paid sick leave) or minimum wage. A new measure (H.B. 142) enacted in North Carolina prohibits local municipalities from passing an anti-discrimination ordinance through December 1, 2020. A measure that passed the New Mexico house and senate (HB 442) would prevent localities from implementing predictive scheduling measures. An Indiana proposal (SB 312), which has passed both the house and senate chambers, would prevent municipalities from enacting "ban-the-box" ordinances. A more controversial Texas "bathroom bill" (SB 6) would ban political subdivisions from adopting or enforcing any ordinance or order that concerns the designation of a private entity's bathroom or changing facility.

Other measures are broader in nature. The new Arkansas law (SB 668) generally prohibits political subdivisions from establishing any employer obligation that exceeds the requirements of federal or state law. The Iowa governor signed a similar bill (HF 295) on

March 30, 2017. Interestingly, the Iowa law will apply retroactively and thereby voids minimum wage increases that already took place in four counties. (It is unclear whether those localities will challenge the preemption law.) A Pennsylvania proposal (HB 861) would prevent municipalities from regulating "employer policies or practices," a term that covers, but is not limited to, subjects such as wages, benefits, "the workplace," employment relationships, and leave time. No matter the scope of the proposals, employers can expect the trend of preemption (and relatedly, anti-preemption) bills to continue.

Equal Pay

Equal pay remains a popular topic at the statehouses. In early March, Puerto Rico adopted a comprehensive equal pay act, prohibiting pay discrimination based on sex as well as certain inquiries and practices during the recruitment process.[1] The Oregon house also has approved a bill (HB 2005), which now goes to the senate, making it unlawful to use any protected status—including gender, race, sexual orientation and other classifications—to discriminate in compensation.

The proposals under consideration across the country attempt to ensure pay equity in various ways. A common approach is legislation that prevents an employer from asking applicants about their salary history. The Oregon bill includes such a provision, as do measures pending in Maryland, Illinois, and New York.

Other bills ban employers from preventing workers from discussing their salaries. Such a bill has cleared the house in Washington, for example. That bill (HB 1506) not only would outlaw discrimination in pay on the basis of gender but would prohibit employers from punishing employees who share salary information with coworkers. In all, about 10 states are considering some sort of equal pay bill.

Background Checks

"Ban-the-box" bills—which restrict the use of an individual's criminal history when making employment decisions—are also making headway. New Mexico (SB 78) is considering such a ban, and two measures are advancing in Washington (SB 5312, HB 1298). The New Mexico proposal and Washington SB 5312 would preclude employers from asking about an applicant's conviction(s) on an initial employment application. The Washington house bill would go further, however, banning application inquiries as well as any criminal background check until the employer has determined that the applicant is otherwise qualified for the job.

Relatedly, Massachusetts, Pennsylvania, Connecticut, New Mexico, and Arkansas are considering bills regulating the use of credit checks in employment decisions.

Joint Employment

In the past month, several states have enacted laws to clarify that a franchisor is not the employer of a franchisee or the franchisee's employees. The last few years have seen an increase in these types of bills, in response to legal decisions and agency interpretations that have expanded the concept of joint employment. These new laws, most of which take effect by August, can be found in Arizona (HB 2322), Kentucky (SB 151), North Dakota (HB 1139), South Dakota (SB 137), and Wyoming (SB 94).

Additional bills addressing joint employment relationships are advancing, and have passed at least one chamber or committee, in Alabama (HB 390), Arkansas (SB 695), New Hampshire (SB 89), and North Carolina (SB 131).

Fair Scheduling

In recent years, a couple of cities have passed "secure," "fair," or "predictive" scheduling ordinances.[2] These laws require employers to provide their employees with advance notice of their schedules and, in some instances, to compensate employees for last-minute changes to those schedules.

Seattle enacted a secure scheduling ordinance last year and recently issued its proposed rules to implement the law.[3] The rules add definitions and provide additional guidance on how employers may comply with the ordinance, which becomes effective on July 1, 2017.

Earlier in March, the New York City Council's Committee on Civil Service and Labor held hearings on a series of predictive scheduling bills. The six bills under consideration could significantly affect the scheduling of employees, particularly those in the fast-food industry. With respect to such workers, for example, the bills would ban "clopening" (when an employee closes an establishment and then opens up as his or her next shift), require 14-day advance notice of employee schedules, and require employers to offer available shifts to current employees at the relevant location before hiring more workers.

Meanwhile, Massachusetts (HB 3144), North Carolina (HB 366), and Oregon (HB 3028) also have introduced bills that would impose varying requirements regarding fair scheduling.

Protected Time Off

At the moment, there are approximately 45 bills pending across the states that would protect employee leave time. These proposals contemplate protected time off for a variety of purposes, such as for bone marrow or blood donation, for victims of domestic violence, or for military service. Most measures, however, address paid or unpaid family medical leave, or paid sick leave.

A California bill (SB 63) is progressing, for example, that would provide up to 12 weeks of job-protected, unpaid leave for new parents who work for employers with 20 to 49 employees. (A similar provision for "baby bonding leave" is already in place for larger employers.) Pennsylvania lawmakers are floating three unpaid family and medical leave proposals, while paid proposals are under review in Massachusetts, Minnesota, Missouri, New Jersey, and Connecticut.

While we cannot predict how many will come to fruition, quite a few paid sick leave bills were introduced or advanced in March. "Kin care" measures progressed in New Mexico (HB 86) and Georgia (SB 201); these bills would require employers to provide employees, who have accrued paid sick leave, the opportunity to use that sick leave for family caregiving. A Hawaii bill (HB 4, SB 638), which has passed the house, grants employees the right to accrue a minimum of one hour of paid sick leave for every 40 hours worked. Under that bill, leave may be used for an employee's mental or physical care, for the care of a family member, or due to the closure of the employee's workplace (or the employee's child's school or childcare facility) due to a public health emergency. And although a Maryland bill (HB 1, SB 230) is increasingly likely to be approved by both houses, it faces an expected veto by the governor.

Employers with operations in Los Angeles should be aware that the City of Los Angeles Office of Wage Standards (OWS) recently revised its rules implementing the Minimum Wage Ordinance as well as its "frequently asked questions." These amendments clarify several issues for employers concerning the city's mandatory paid sick leave requirements.[4]

Minimum Wage

Finally, minimum wage issues continue to dominate headlines, from heavily-populated states to small towns in rural areas. More than a dozen states have some type of wage rate proposal in the works. One interesting wage bill, headed to the Colorado governor's desk (HB 17-1021), would enable the public to access information about employer wage violations. Under prior law, information provided by an employer to the state labor department during the course of a wage investigation was treated as a trade secret. The pending bill provides that "any notice of citation or notice of assessment issued to an employer for violation of a wage law . . . after all remedies have been exhausted" will be deemed a public record and must be released upon request under the Colorado Open Records Act.

Readers interested in more detail on such topics should consult *WPI Wage Watch*, a Littler feature focusing exclusively on breaking minimum wage developments coast-to-coast.[5]

1. José Dávila Caballero and Mariela Rexach, Puerto Rico Adopts Local Equal Pay Act, Littler ASAP (Mar. 9, 2017).
2. *See, e.g.,* Doug Smith, Seattle City Council Approves Secure Scheduling Ordinance, Littler Insight (Sept. 20, 2016); Michael Brewer, et al., San Francisco Ordinance Imposes New Burdens on 'Formula' Retail Employers, Littler Insight (Dec. 9, 2014).
3. The Seattle draft rules are available at https://seattle.legistar.com/LegislationDetail.aspx?ID=2981757&GUID=DD848015-3DEF-459E-9435-531F8DD01A4D&Options=Advanced&Search=.
4. Maria R. Harrington and Sebastian Chilco, City of Los Angeles Updates Paid Sick Leave Rules and FAQs, Littler ASAP (Mar. 27, 2017).
5. Libby Henninger, Sebastian Chilco and Corinn Jackson, WPI Wage Watch: Minimum Wage & Overtime Updates *(March Edition)*, WPI Report (Mar. 30, 2017).

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