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Pay Equity, Sexual Harassment Continue to Drive State Bills

BY MICHAEL J. LOTITO

While the surge of state-level legislation introduced in the first quarter of 2018 has waned, some significant labor and employment bills are advancing through their legislative chambers. In March, over 300 labor and employment bills were actively considered at the state and local levels, but only about a quarter of these measures were new. More than 30 bills and ordinances were enacted last month, some of which will require employers operating in multiple jurisdictions to take a second look at their workplace policies and practices. This month's State of the States will examine the notable bills that did make it to the finish line, and highlight those getting close.

Pay Equity

Nearly 20 bills promoting equal pay, wage transparency, and salary history inquiry restrictions were actively considered last month. Washington State enacted significant amendments to its equal pay statute, and New Jersey will likely soon follow.

On March 21, 2018, Washington Governor Jay Inslee signed the Equal Pay Opportunity Act (H.B. 1506) into law. This measure makes some noteworthy changes to the state's equal pay statute. Among other revisions, the new amendments prevent pay differentials based on gender between those "similarly employed," meanings those who work in jobs that require similar skill, effort, and responsibility, and are performed under similar working conditions.

The amendments also prohibit employers from imposing pay secrecy policies or retaliating against employees who file complaints, discuss wages, or seek advancement opportunities.

New Jersey's governor is expected to stick to his campaign promise to promote equal pay by signing a new equal pay bill cleared by the state legislature.[1] The bill expands pay equity protections for New Jersey employees by, among other things, providing that employees are entitled to an equal rate of pay (and benefits) for "substantially similar" work. Determining what constitutes "substantially similar" work will include evaluation of a number of factors.

Meanwhile, in Massachusetts, the state attorney general published an Overview and Frequently Asked Questions

1 *See* Jedd Mendelson, *New Jersey Governor Expected to Sign Expansive Equal Pay Bill*, Littler ASAP (Mar. 28, 2018).

regarding the amendment to the Massachusetts Equal Pay Act, which is set to take effect on July 1, 2018.[2] This guidance answers many outstanding questions about the new law, and confirms the importance of an employer self-evaluation, explaining how doing so can help protect a company from liability.

Other state-level bills are still pending, and would impose varying pay-related requirements. A newly introduced bill (SB 2638) in Rhode Island, for example, would require an employer of 100 or more employees to annually report information regarding compensation and hours worked for employees by gender, race, ethnicity, and job category to the Department of Labor and Training. Bills limiting salary history inquiries cleared at least one committee or legislative chamber last month in Connecticut, Illinois, Hawaii, Louisiana, and Maryland.

By contrast, Michigan and Wisconsin enacted or advanced bills to expressly preempt salary history restrictions.

Michigan's new law prohibits local governments from regulating the information—including salary history—employers can request from prospective employees during the interview process.[3] The new law amends the 2015 Local Government Labor Regulatory Limitation Act, which imposes a similar restriction on local governments regarding the information employers can request on an employment application.

Wisconsin is expected to soon follow, as its legislature passed AB 748, which is a broad preemption bill that includes a provision stipulating that no local ordinance may prohibit "an employer from soliciting information regarding the salary history of prospective employees."[4]

Sexual Harassment

Legislative attempts to address sexual harassment are still going strong. In March, Washington State enacted a package of bills that are likely in response to the #MeToo and TIME'S UP movements. Although several states have proposed similar measures, Washington is the first state to sign its bills into law.

One bill, SB 5996, prohibits an employer from requiring an employee, as a condition of employment, to sign a nondisclosure agreement or other document that prevents the employee from disclosing sexual harassment or sexual assault. Along the same lines, under a separate enacted bill, SB 6313, an employment contract or agreement would be considered against public policy and therefore unenforceable if it requires the employee to waive the right to publicly pursue a state or federal discrimination claim, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

Finally, SB 6471 calls for the creation of a stakeholder work group, which will be tasked with developing model policies for the prevention of workplace sexual harassment. This work group is directed to include, "to the extent practicable," representatives from the business community, unions, the agricultural industry, human resources professionals, and advocates for survivors of sexual assault. Model polices should be drafted by January 1, 2019; the department of labor and industries must post those model policies shortly thereafter.

Nearly a dozen other jurisdictions considered or advanced similar bills targeting sexual harassment in March. Some, like Washington's, would prohibit nondisclosure and mandatory arbitration agreements involving harassment claims. Others would require increased harassment training. Expect this issue to gain traction in additional states in the months to come.

Gig Economy

A couple of new state laws seek to clarify that certain gig economy workers are independent contractors and not employees of the marketplace platform they use to connect with clients or customers. Both Indiana and Kentucky enacted such laws in March.

Both clarify the employment relationship between entities that provide internet- or smartphone-based service applications (the "marketplace platform") and the actual providers of the requested services ("marketplace

2 *See* Michael Mankes and Stephen Melnick, *Massachusetts Attorney General Publishes Long-Anticipated Guidance on the Revised Pay Equity Law*, Littler Insight (Mar. 5, 2018).

3 *See* Jaclyn Giffen and Bill Vincent, *Michigan Expands its Preemption Law to Cover Interview Limitations*, Littler ASAP (Mar. 29, 2018).

4 *See* Adam Tuzzo and Jon Levine, *Still "Open for Business" – New Wisconsin Legislation to Preempt Most Local Employment Ordinances*, Littler ASAP (Mar. 27, 2018).

contractors"). The service providers will be presumed independent contractors under certain conditions, including the existence of a written agreement stipulating the existence of an independent contractor relationship between the platform and contractor. The platform must not unilaterally prescribe specific hours for the contractor to accept service requests; prohibit the contractor from using any other online tools provided by another platform; or restrict the contractor from engaging in another occupation, among other conditions.

The same month, Utah enacted the Service Marketplace Platforms Act, which establishes a presumption that a building service contractor who affiliates with a service marketplace platform is an independent contractor, not an employee. The law defines a "building service" as any of the following services if the charge for the service is $3,000 or less: (a) cleaning or janitorial; (b) furniture delivery, assembly, moving, or installation; (c) landscaping; (d) home repair; or (e) any similar service.

Legislation clarifying marketplace contractors are to be treated as independent contractors under state and local laws have cleared Georgia's lower legislative chamber and Colorado's senate.

By contrast, a marketplace contractor bill died in the Tennessee legislature.

Other types of bills targeting independent contractors / freelance workers were popular in March. New Jersey introduced a bill analogous to New York City's Freelance Isn't Free Act.[5] Among other protections, this bill would require that freelance workers be paid according to agreed-upon work terms. This contract would need to be in writing, detail how compensation is earned, calculated and owed, and kept on file by the client for at least six years. The client would be required to provide a copy of this agreement to the commissioner of labor upon request. Failure to do so would give rise to a presumption in favor of the freelancer.

With respect to state independent contractor analysis, Hawaii's house has approved a bill that would create three categories and 12 factors for the Department of Labor and Industrial Relations to apply to determine independent contractor status.

Background Checks

Washington State was again at the legislative forefront in March, enacting the latest state-wide ban-the-box law. The new law prevents an employer from including any question on an application for employment or otherwise inquiring about an applicant's criminal history until after the employer initially determines that the applicant is otherwise qualified for the position. Applicants would be considered "otherwise qualified" if they meet the basic criteria for the position as set out in the advertisement or job description.

To the South, San Francisco is poised to amend its Fair Chance Act to better align it with the new state-wide ban-the-box requirements that took effect on January 1, 2018.[6]

Relatedly, a bill (HB 2311) that has passed Arizona's upper and lower chambers would provide that an employer is not liable for hiring an employee or contracting with an independent contractor who has previously been convicted of a criminal offense.

Regarding an applicant's credit history, New Jersey's senate approved a bill (SB 545) that would ban employers from requiring a credit check on a job applicant or current employee unless required to do so by law, or if they reasonably believe that an employee has engaged in a specific activity that is financial in nature and constitutes a violation of law. The bill further prohibits an employer from discriminating on the basis of credit report information. The bill would not, however, prevent an employer from performing a credit inquiry or taking an employment action if credit history is a bona fide occupational qualification of a particular position or employment classification.

Protected Time Off

As a federal paid leave mandate remains unlikely, states continue to pick up the slack.

New Jersey's assembly cleared a bill (AB 1827) that would require employers to allow their employees to accrue one hour of paid sick leave for every 30 hours worked. At least 13 municipalities in the Garden State have already enacted ordinances mandating similar requirements. Efforts to enact a state-wide bill are gaining steam.

To the West, Hawaii's house approved a bill (HB 1727) that would require employers to provide up to 40 hours of paid

5 *See* María Cáceres-Boneau and David M. Wirtz, *New York City to Pass Protections for Freelance Workers*, Littler ASAP (Nov. 7, 2016).

6 *See* Rod M. Fliegel and Allen P. Lohse, *San Francisco is Likely to Amend its Ban-the-Box Law*, Littler ASAP (Mar. 29, 2018).

sick leave per year to employees to be used to care for themselves or a family member who is ill or needs medical care. It is uncertain whether this bill will advance.

Some states have floated the idea of providing a tax credit as an incentive for employers to offer some form of paid leave. Utah's house and senate approved a bill (HB 278) that would create such a tax credit for employers that offer their employees paid family and medical leave.

Meanwhile, Minneapolis, Minnesota adopted an ordinance that clarifies its paid sick leave rules to provide that an employer is only required to allow an employee to use sick and safe time that is accrued when the employee is scheduled to perform work within the geographic boundaries of the city.

Wage & Hour

Bills seeking to amend state and local minimum wage and overtime practices continue to be popular. More than a dozen wage-related bills were considered in March alone. For more information on the bills, ordinances, and ballot initiatives that advanced, see the latest edition of WPI Wage Watch.[7]

What's Next?

The Indiana legislature has already adjourned its regular 2018 session. At least nine more states are expected to adjourn their regular sessions by the end of April. State lawmakers will actively consider pending bills in the second quarter of 2018, as most states will adjourn before the summer months. We will continue to monitor any significant labor and employment developments.

7 Libby Henninger, Sebastian Chilco, and Corinn Jackson, *WPI Wage Watch: Minimum Wage & Overtime Updates (March Edition)* WPI Reports (Mar. 30, 2018).