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state of the STATES

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The holiday weekend marked the end of summer fun, but state legislatures across the country remained hard at work in August. Roughly nine statehouses are in active session. In other jurisdictions, such as Florida and Ohio, lawmakers are pre-filing bills for consideration in the next term.

On the whole, predictive scheduling and protected time off remain very hot topics. Several antidiscrimination bills also made headway in August. This month's State of the States reviews these and other noteworthy developments.

Discrimination

Governor Bruce Rauner signed a bill (SB 1697) amending the Illinois Human Right Act, which applies to employers with 15 or more employees. The amendment, effective immediately, makes it unlawful for an employer to impose conditions that would require an employee to violate or forgo a sincerely held religious practice. Religious practices protected by the statute include "the wearing of any attire, clothing, or facial hair" as required by the individual's religion. Employers must make *bona fide* efforts to accommodate employee religious practices and observances and must do so unless they can demonstrate undue hardship to the business.

In New Jersey, Governor Chris Christie approved an amendment to the state's antidiscrimination law (SB 726), extending full protection to members of the U.S. military. The law prohibits discrimination against individuals because of "liability for service in the Armed Forces of the United States," in employment, housing, and public accommodations.

A bill (SB 66) introduced in Florida's senate would add sexual orientation and gender identity as impermissible grounds for discrimination in employment, housing, certain private clubs, and public accommodations, including food service establishments. Relatedly, in Ohio, legislators introduced a bill (SB 174) that would expand the state's equal pay protections to ban wage discrimination based on sexual orientation or gender identity.

Employment Screening

Several states are taking a hard look at laws restricting an employer's ability to use certain information when screening potential employees. For example, a handful of measures (in Florida, Maine, Pennsylvania, and Wisconsin) were introduced concerning criminal history background checks. Generally speaking, these bills prohibit employers from inquiring into or relying on a candidate's criminal history when making hiring decisions, at least until an interview takes place or a conditional offer is made. Wisconsin's bill would clarify that a crime that has been expunged from an employee or applicant's criminal record cannot be considered a conviction for employment purposes.

Meanwhile, a salary history bill collapsed at the finish line in Illinois. The proposal (HB 2462) would have prevented employers from asking applicants about their compensation history and from seeking that information from a current or former employer, with certain exceptions. Governor Rauner vetoed the bill, although its proponents have vowed to seek an override in the November session. The measure was fairly popular in the legislature, and the voting in both chambers suggests that an override is a real possibility.

A similar bill has been introduced in Texas (HB 391) as part of a broader equal pay and minimum wage measure. The proposal would permit employers to confirm prior wage history with the candidate's written authorization, after a conditional offer has been made. Given the conservative majority in the Texas legislature, however, the bill is unlikely to get very far.

Employee Classification

In August, North Carolina Governor Roy Cooper signed the Employee Fair Classification Act (SB 407) into law. The law creates an Employee Classification Section within the state Industrial Commission, which will investigate allegations that employers have misclassified workers as independent contractors. The new section will also assist state agencies in recouping back taxes wages, penalties, or other sums owed as a result of any misclassification. Among other provisions, the law imposes an additional workplace posting requirement.

A bill in Michigan addresses a different issue related to employee classification. The measure (HB 4878) specifies that an intern for a private employer is *not* an employee as long as seven criteria are met. These criteria include, for example, that the intern works no more than 30 hours per week, does not displace regular employees, and understands that he or she is not entitled to wages for time participating in the internship.

Predictive Scheduling

Beginning with San Francisco in 2014, several municipalities have enacted laws aimed at providing more scheduling predictability to hourly workers. With Governor Kate Brown's signature on August 8, 2017, Oregon became the latest jurisdiction (and first state) to join these ranks.[1] The Oregon law generally applies to employers with 500 or more employees operating in the retail, hospitality, and food services industries. Covered employers must provide new hires with a written, good-faith estimate of their likely schedules, as well as advance notice of their actual schedules (initially seven days, then increasing to 14 days in July 2020). Employees also are entitled to a minimum of 10 hours of rest between shifts, and premium pay may apply if this rest period is not respected. Most of the law's provisions take effect on July 1, 2018.

New York lawmakers recently introduced their own predictive scheduling bill (SB 6854), which seeks to guarantee a worker's ability to rest. The measure would prohibit the scheduling of an employee to work the first 10 hours following the end of the previous calendar day's work shift or on-call shift, or the first 10 hours following the end of a work shift or on-call shift that spanned two calendar days. Employees can agree to take shifts that do not provide the entire mandated rest period, but they must be paid one and one-half times the regular rate of pay for all hours worked within that rest period.

Protected Time Off

Paid leave continues to generate a great deal of interest at the state and local levels. New York will be implementing a paid family leave benefits program beginning January 1,

1 Matt Scherer, *New Oregon Law Imposes Scheduling and Working Hours Obligations on Employers*, Littler ASAP (Aug. 14, 2017).

2018. State agencies have issued interpretive regulations concerning how the program will work[2] as well as its tax ramifications. The recently released tax guidance clarified certain lingering questions and explained, for example, that premiums must be deducted from an employee's after-tax wages.[3]

Emeryville, California also promulgated rules in August concerning its paid sick leave law, which took effect more than two years ago.[4] The regulations cover a variety of topics, including calculation of a business's size to determine coverage, the accrual rate for leave earned by exempt employees, and the use of leave for "safe time" purposes. The new rules further address employer workplace posting, recordkeeping, and written policy requirements.

Paid leave measures are pending in other jurisdictions as well, including Pennsylvania and Maine. Pennsylvania lawmakers have reintroduced a bill (SB 862) that would establish paid parental leave of at least 12 weeks in connection with the birth, adoption, or placement of a child. Leave would be available for employees working more than 20 hours a week for employers with four or more employees in the commonwealth.

The bill in Maine (LD 1587), currently in committee, would create a paid family medical leave program. Under that measure, employers would deduct contributions from employee paychecks and submit those sums to the Department of Labor, Bureau of Unemployment Compensation. Employees would be eligible for benefits if they work for an employer with 15 or more employees, although smaller employers could elect to participate. Self-employed individuals could also enter the program if they satisfy certain conditions.

In addition to the parental leave measure, the Pennsylvania legislature is considering a voting leave bill (HB 1703). The proposal would require state employers to recognize Election Day (meaning a general or primary election) as a legal holiday, while schools and counties could choose to do so. A private employer would be obligated to provide "no less than two hours of unpaid leave to its employees for the purpose of voting." The majority of states already have enacted some sort of voting leave law.[5]

Right-to-Work

Missouri was set to become a right-to-work state on August 28, 2017. The right-to-work law (SB 19) has been stayed, however, due to various labor-led initiatives.[6] Article III, Section 52 of the Missouri Constitution allows the public to petition for a referendum to put key issues before Missouri voters. The AFL-CIO has submitted a petition, and supporting signatures, seeking to place this issue on the ballot in November 2018. If the signatures are verified, voters will face the question next autumn. Regardless of that outcome, the union is also working towards a potential constitutional amendment, which would be put to vote in the 2020 general election.

Data Breach Security

Delaware significantly amended its data security breach notification statute (HB 180), effective April 14, 2018. The amendment expands the type of personal information covered by the statute, to include data such as an individual's passport number, medical history, health insurance policy number, tax identification number, and unique biometric data. In the event of a breach, affected individuals must be notified within 60 days, except in certain circumstances. If more than 500 people are affected, the state attorney also must be notified. The law additionally requires any entity conducting business in the state, that "owns, licenses, or maintains personal information," to "implement and maintain reasonable procedures and practices to prevent the unauthorized acquisition, use, modification, disclosure, or destruction

2 Stephen Fuchs & Jill Lowell, *New York Issues Final Paid Family Leave Law Regulations*, Littler Insight (Aug. 9, 2017).
3 Stephen Fuchs & Tom Cryan, *New York State Issues Guidance on Tax Treatment of Paid Family Leave Contributions and Benefits*, Littler ASAP (Aug. 29, 2017).
4 Adam Fiss & Sebastian Chilco, *Emeryville, California Adopts Rules Implementing Its Minimum Wage, Paid Sick Leave, and Hospitality Service Charge Ordinance*, Littler ASAP (Aug. 11, 2017).
5 *See*, e.g., Ilyse Schuman & William E. Trachman, *When Can An Employee Take Leave To Vote?*, Littler Insight (Oct. 11, 2016).
6 Stephen D. Smith & Adama K. Wiltshire, "*A Little Bad Grammar Will Not Annul" – Missouri Unions Move Ahead with Referendum Petition to Revoke Right-to-Work*, Littler ASAP (Aug. 7, 2017).

of personal information collected or maintained in the regular course of business."

Wage & Hour

Oregon enacted a law in August regulating overtime compensation and hour limits in the manufacturing sector.[7] The amendment requires most employers in the manufacturing sector to pay employees the greater of daily or weekly overtime if an employee works more than 10 hours in a single day and more than 40 hours total in the course of a single workweek. The law also sets a firm 55-hour weekly limit for most covered employees.

Wage and hour issues in general remain hot-button issues. 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.[8]

7 Matt Scherer, *Oregon Enacts New Law Impacting Overtime and Maximum Hour Limits for Manufacturers*, Littler ASAP (Aug. 18, 2017).
8 Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage and Overtime Updates (August Edition)*, WPI Report (Aug. 30, 2017).