LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

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IN FOCUS

The Gig Economy: Recent Developments in this Evolving Workforce Sector

Almost a year ago, the U.S. Department of Labor (DOL) held a symposium on the "Future of Work" to explore how the nature of work continues to evolve as our economy undergoes tremendous change and innovation. In the wake of the December 10, 2015 symposium, Secretary of Labor Thomas Perez further described how innovation in the Silicon Valley and the tech-driven expansion of the "gig" or "on-demand" economy are raising important questions for workplace policy. While Secretary Perez labeled this "an exciting, entrepreneurial development that is tapping into powerful consumer demand while giving workers flexibility and enabling them to monetize existing assets," he also said, "[a]t the same time, the on-demand economy raises important questions about how to continue upholding time-honored labor standards and how to promote economic security for American workers in a changing labor market."

Economic innovation is driving changes over established notions of the workplace and workforce. Policymakers in Washington and across the country are grappling with whether and how labor and employment laws constructed long before these technological advances were even imagined—and long before the distinctions between "employee" and "independent contractor" were defined—apply to the ever-evolving 21st century workforce.

When Secretary Perez announced at the beginning of this year that the DOL's Bureau of Labor Statistics (BLS) was working with the Census Bureau to reinstitute a revised Contingent Worker Supplement (CWS) to the Current Population Survey, he said this data was intended to give the Department "reliable, credible insight into what's going on across a range of work arrangements." ▸▸

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According to Secretary Perez, the information gathered as part of the May 2017 Current Population Survey will help the DOL "do something that's essential to smart policymaking and smart business: understanding the past and the present so that we can prepare for the future."

To this end, on September 30, 2016, the BLS published in the Federal Register a request for comments on its proposal to add four new questions to capture new types of work that have emerged since the last findings of the CWS. In light of how data from the CWS is to be used to formulate policy, the survey takes on much more importance than a mere information collection request may suggest. If the survey generates an inaccurate or incomplete picture of the true size and nature of the

gig economy, any resulting regulatory or legislative changes would themselves be misguided. A lack of understanding of the gig economy by regulators and lawmakers threatens to impede innovation as well as worker flexibility and opportunity. Seen through this lens, the BLS request for comments on its proposed revisions to the CSW to gather information about the "on-demand" economy is indeed both substantive and significant.

Defining the Nature and Scope of the Gig Economy

In its proposed information collection request, the BLS acknowledges that since the CWS was discontinued in 2005, "there have been no reliable and comparable statistics to show how the number and characteristics of these workers have changed over time." Thus, the BLS itself recognizes what other commentators have noted – that the gig economy does not "fit neatly into official labor statistics."[1] Indeed, the task is complicated by differing terminology about what this expanding sector of the economy is called, what it encompasses, and the composition of its workforce.

The McKinsey Global Institute's (MGI) recent report on the gig economy uses the terms "independent work" and "independent workers," which are characterized by three defining features: (1) a high degree of autonomy; (2) payment by task, assignment, or sales; and (3) a short-term relationship between worker and client. MGI's definition includes individuals who provide labor services as well as those who sell goods or rent assets. Digital platforms are transforming independent work. Yet, according to MGI's report, only 4 percent of the working-age population has used digital platforms to generate income. While these digital platforms have grown rapidly, only 15 percent of the independent workers have used them to earn income.

Online platforms represent only a narrow slice of the gig economy currently. The BLS survey, however, limits its questions to individuals who obtain customers or online tasks through mobile apps. Seeking to quantify the size of the independent or gig workforce by capturing data only from digital platforms will significantly underestimate the true size and scope of the gig economy. Policy decisions that flow from drawing the size and scope of the gig economy too narrowly may yield changes that stifle innovation and limit worker opportunity.

It is important to note that the term "independent workers" as used in the MGI report does not include so-called "fissured" workers, who have been the ▸▸

1 McKinsey Global Institute, Independent work: *Choice, necessity, and the gig economy* (Oct. 2016).

focus of Wage and Hour Administrator David Weil's enforcement efforts to combat the alleged misclassification of employees as independent contractors. While the binary nature of our current labor law classification as employee versus independent contractor may not have kept pace with the reality of the evolving modern workforce, it is important for policymakers not to conflate the so-called fissured workforce with that of the gig economy.

Highlighting the shortcomings of existing government data, the MGI report concludes that such data significantly undercounts those who engage in independent work to supplement their income. According to the report, 20 to 30 percent of the working-age population in the U.S. and the European Union (EU) engage in independent work. This amounts to 54 million to 68 million independent workers. Of that number, 46 percent use independent work as their primary income, while 54 percent turn to independent work for supplemental income.

Furthermore, the MGI survey found that 10 to 15 percent of the working-age population engages in independent work for supplemental, rather than their primary, income. The report asserts that 72 percent of independent workers, both supplemental and primary earners, engage in independent work by choice. By contrast, 28 percent engage in independent work by necessity, whether as a primary or secondary source of income. Of those 54 percent of independent workers who turn to independent work for supplemental income in the United States, the MGI survey found that 40 percent were "casual earners" – those who do so by choice. While some "casual earners" have traditional jobs, others are students, retirees and caregivers. Only 14 percent of independent workers for whom such work generates supplemental income are defined in the report to be "financially strapped" and would prefer not to have to do side jobs to make ends meet. The BLS survey asks whether work obtained through "electronic matching platforms" is a source of secondary earnings. However, the question fails to capture whether the independent work was primary or supplemental, by choice or by necessity.

At the crux of much of the discourse surrounding the gig economy are concerns about whether workers in this sector have access to benefits. Such distinctions between primary or secondary income and choice versus necessity may indeed prove very important when considering policy options to extend the safety net of benefits to workers in the gig economy. Legislative or regulatory changes based on an incomplete or inaccurate understanding of the gig economy workforce are likely to undermine this objective.

Other recent studies have sought to fill the gap in data on the size and scope of the gig economy or, more narrowly, the online platform economy. A February 2016 report by the J.P. Morgan Chase Institute examines whether the platform economy helps individuals mitigate income volatility in their financial lives or whether it is a source of volatility in its own right.

The J.P Morgan Chase report defines the online platform economy as economic activities involving online intermediaries that are marked by four characteristics: (1) they provide an online platform that connects workers or sellers directly to customers; (2) they allow people to work when they want; (3) they pay on a "piece-rate" basis for a single task or good; and (4) they intermediate or facilitate payment for the good or service. In September 2015, one percent of adults actively earned income from the Online Platform Economy. However, this monthly participation rate increased ten-fold over the three-year period starting in October 2012, and, cumulatively, more than four percent of adults received income from the platform economy over the three years. The report also examined the characteristics of the participants in the online platform economy, finding that participants in both the labor and capital online platforms are significantly younger than the general population. Otherwise, labor platform participants and capital platform participants have quite different profiles.

Notably, the report found that in the months when individuals were actively participating, platform earnings represented a sizable but still secondary ▸▸

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source of income. Furthermore, the study found that reliance on labor platforms has remained stable over time in terms of both the fraction of months in which participants are active and the fraction of total income earned on platforms in active months. As of September 2015, labor platform income represented more than 75 percent of total income for 25 percent of active participants. In September 2015, just 25 percent of active participants relied on capital platforms for more than 25 percent of their income, including 17 percent of active participants who earned 75 percent or more of their total income from capital platforms. Earnings from labor platforms helped mitigate volatility in labor income, but earnings from capital platforms did not.

The J.P Morgan Chase study concludes that many questions raised about the platform economy are best understood within the context of income volatility and the broader labor market. The authors of the report conclude that the data it presents "provide an essential, data-driven foundation for policymakers debating proposals for new labor laws, such as the creation of a new class of workers, portable benefits for independent contractors, and eligibility for social safety net programs like unemployment insurance."

The J.P. Morgan Chase study affirms that understanding the nature and scope of the gig economy cannot be viewed in isolation from the broader labor market and economic landscape. Nor should it be viewed as a static one. The Aspen Institute and the Brookings Institute are also among the growing list of organizations examining the nature and scope of the gig economy. As the size of this important economic sector grows, so too has the attention on its workplace policy implications. Therefore, a more clear and comprehensive understanding of its nature and scope becomes even more important.

Federal Activity

The BLS request for comments on revisions to the CWS comes as other regulatory agencies as

well as lawmakers in Washington are focusing on the gig economy and its workplace policy implications. Among Members of Congress, Senator Mark Warner (D-VA) has been at the forefront of addressing the "opportunities and challenges of the 'sharing economy.'" Indeed, in September 2015, Senator Warner called upon the Departments of Labor, Treasury and Commerce to generate better information about the on-demand economy. Senator Warner explains: The changing employee-employer dynamic of the "gig economy" poses both opportunities and challenges for the American worker, allowing freedom and flexibility of hours. But many of these on-demand jobs do not provide traditional safety net protections for workers: unemployment insurance, workers' compensation for injuries, or pension and retirement planning.

Senator Warner has expressed his commitment to "putting forward practical solutions to keep up with this fundamental shift in the economy and to make the on-demand economy work better for more people."

Lawmakers on the other side of the Capitol are also interested in the gig economy. Last May, U.S. Representatives Eric Swalwell (D-CA) and Darrell Issa (R-CA) announced the formation of the bipartisan Sharing Economy Caucus, which will bring attention to this booming sector and its impact on our society and economy. ▸▸

Other lawmakers are also looking at the labor law implications of the gig economy, some from different perspectives. In July, 2016, Rep. David Schweikert (R-AZ) introduced H.R. 5918, which seeks to prohibit individuals operating in the peer-to-peer economy from being considered employees subject to the requirements and restrictions of the Fair Labor Standards Act of 1938, the Family Medical Leave Act of 1993, and the National Labor Relations Act if they: (1) are permitted to determine the hours during which they offer services to users; (2) are subject to a quality-of-service evaluation of the services they furnish through a user-based rating system; (3) furnish any service user with an electronic description of the transaction and the amount paid for it; and (4) use their own tools or assets to furnish those services. The bill defines "peer-to-peer economy" as the business of facilitating transactions between a user seeking a service and an individual furnishing the service using an online platform or software application running on a mobile device. Although the bill has not advanced and is not expected to this Congress, its introduction demonstrates that lawmakers in Congress are taking note of this issue.

The BLS is not the only federal agency to delve into the issue of worker assessment. Elsewhere at the DOL, the Department's Wage and Hour Division (WHD) has made combating the classification of employees as independent contractors a priority. On July 15, 2015, the WHD division released an Administrator's Interpretation on the application of the FLSA in the identification of employees who are misclassified as independent contractors. The Interpretation concludes that "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA." The DOL's attention on independent contractor misclassification may place some gig economy companies in the spotlight.

The application of the myriad labor and employment laws in determining appropriate worker classification extends beyond just wage and hour law. The National Labor Relations Board (NLRB) has had a couple of notable developments with respect to independent contractor misclassification generally, and the gig economy specifically. In August 2016, the NLRB's Office of the General Counsel issued a legal advice memorandum on a pending case, *Pacific 9 Transportation*, explaining that an employer's misclassification of its driver employees as independent contractors is in itself a violation of Section 8(a)(1) of the National Labor Relations Act.

Meanwhile, the Chicago regional office of the NLRB filed a complaint against an on-demand delivery service in early October alleging labor violations against its drivers. The case highlights the complexity of the labor and employment law issues surrounding the classification of participants in the gig economy – and the political forces that are likely at play in the quest to increase union organizing.

The Equal Employment Opportunity Commission (EEOC) also appears poised to weigh in on the application of federal nondiscrimination laws as it relates to the gig economy. The EEOC's updated Strategic Enforcement Plan for FY 2017-2021 reaffirms its commitment to six overarching substantive priorities, while also focusing on several specific, burgeoning areas of law. Of particular interest, the EEOC intends to emphasize "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." What precisely the EEOC will do to emphasize issues related to, among others, the on-demand economy remains to be seen. One could expect the Commission, like the NLRB, to seek to extend the application of laws under its jurisdiction broadly to encompass as many workers as possible.

In addition to the DOL, NLRB and EEOC, the Internal Revenue Service (IRS) is among the federal agencies beginning to address the sharing economy. The IRS has launched a new web page designed to help taxpayers involved in the sharing economy quickly locate the resources they need to help them meet their tax obligations. Although the IRS has not put forth specific proposals with respect to the ▸▸

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sharing economy, the classification of on-demand workers as independent contractors oremployees has important tax, revenue and benefit considerations for the federal government as well as for states and localities.

State and Local Issues

Eligibility for unemployment insurance and workers' compensation vary from state to state and are dependent on the classification of workers as employees instead of independent contractors. Some state regulators have begun to weigh in on their application to participants in the gig economy. States that have considered whether on-demand workers are covered by unemployment insurance have reached different conclusions. At the local level, last year Seattle passed an ordinance that seeks to provide a collective bargaining framework for on-demand drivers. Such state and local efforts may well proliferate as the gig economy continues to grow in size and importance.

By contrast, Arizona enacted a law aimed at clarifying that certain on-demand workers are indeed independent contractors. HB 2652, enacted in May 2016, establishes a new category of workers, Qualified Marketplace Contractors ("QMCs"), who are to be deemed independent contractors under state and local laws if certain criteria are met. The law defines a QMC as a person or entity that contracts to use a digital platform to provide services to third parties. The law defines a Qualified Marketplace Platform ("QMP") as an entity that operates a website or smartphone app that facilitates a QMC providing a service to a third party and accepts these service requests only through its website or smartphone application (not in person, over the telephone, etc.). Similar measures were introduced in Alabama and Oklahoma this year, but only Arizona's took hold.

What's Next?

What the regulators and lawmakers in Washington do to address the gig economy and labor and employment laws that are increasingly out of sync with the modern workforce remains to be seen.

Will the U.S. follow the path that the EU seems to be on in developing a more uniform approach to regulating the gig economy? If, as Secretary Perez suggested, "understanding the past and present" is essential to understanding the future, a data-driven understanding of the gig economy and its participants in the context of the broader economy and labor market is the foundation upon which "smart policymaking" must be based. As the BLS attempts to fill in the data gap in government statistics on the gig economy and its participants, a survey that paints an incomplete or inaccurate picture of this sector of the economy will make the gap even wider and the task of smart policymaking even more difficult.

The Workplace Policy Institute will continue to be engaged in this issue – with stakeholders as well as with policymakers.

INSIDER BRIEFING

The course of workplace policy over the next four years will be decided in the next few days. With the race for the White House and control of Congress finally nearing its conclusion, attention is already turning to what labor and employment policy would look like under a new Clinton or Trump Administration and a new Congress. However, the month leading up to the November 8 election was itself notable and included some significant workplace policy developments. ▸▸

Blacklisting Update

Federal government contractors facing the looming implementation of the Fair Pay and Safe Workplaces Executive Order can cheer a Texas federal district court's decision to grant a preliminary injunction halting some of its more onerous provisions from taking effect. The injunction, requested by the Associated Builders and Contractors of Southeast Texas, the Associated Builders and Contractors national organization, and the National Association of Security Companies, represented by Littler Shareholder Maury Baskin, will temporarily block implementation and enforcement of the Order's disclosure and disqualification requirements and its prohibition on certain pre-dispute arbitration agreements.

The plaintiffs argued that the disclosure requirements were unlawful because the President, Federal Regulatory Acquisition (FAR) Council, and the Department of Labor of Labor (DOL) exceeded their statutory and congressional authority by issuing the Order, its implementing rule, and implementing guidance, respectively. They also argued that the rule and its accompanying DOL guidance are preempted by, or otherwise violate, the plain language of the 14 federal labor and employment laws that trigger reporting. Furthermore, the lawsuit argued that conformity with the rule by contractors would cause compelled speech in violation of the First Amendment of the Constitution, that the final rule violates the Due Process Clause by disqualifying contractors based on labor law violations that are not final and have not been subject to adjudication or a hearing, and that the rule is arbitrary and capricious because it upends significant amounts of established labor and employment law without offering a compelling reason. Although further legal proceedings are expected, the preliminary injunction was indeed a significant win for government contractors.

Notably, while the disclosure and arbitration provisions were enjoined, the paycheck transparency provision was not. The paycheck transparency provision, which requires contractors and subcontractors to include information regarding overtime pay and exempt status with each paycheck and to provide certain notices to independent contractors, is still scheduled to go into effect in connection with solicitations or contract amendments made on or after January 1, 2017.

EEOC Activity

Congress was not in session as lawmakers hit the campaign trail. However, all was not quiet with the federal agencies during October. The Equal Employment Opportunity Commission (EEOC) was particularly active, holding a public hearing and issuing an updated strategic enforcement plan.

On October 13, the EEOC held a public hearing to examine the implications of employers' use of Big Data. "Big Data has the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions," said Chair Jenny R. Yang. "At the same time, it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."

Commissioner Victoria A. Lipnic, who helped organize the meeting, said, "[i]t can be a challenge to determine whether, when, and how laws may apply in our increasingly technology-driven workplaces. But [at the core of our responsibilities is]: Ensuring that our understanding of today's workplaces and our interpretation and administration of the law, are as current and fully-informed as possible." Accordingly, Lipnic added, "it's for that reason that holding meetings like [this one] is so crucial to our work."

Among the group of Big Data experts testifying was Littler Shareholder Marko Mrkonich. He testified, "it is already clear that Big Data, used correctly, can be a powerful tool to eliminate overt and implicit bias from an employee selection process, and a misplaced, rigid adherence to outdated legal tests and standards cannot prevent this progress from taking place." Mrkonich concluded that the "challenge for the legal system is to permit those engaged in the ▸▸

INSIDER BRIEFING (continued)

responsible development of Big Data methodologies in the employment sector to move forward and explore their possibilities without interference from guidelines and standards based on assumptions that no longer apply or that become obsolete the next year."

As the use of Big Data continues to evolve and expand, Littler's Workplace Policy Institute will continue to engage with policy makers on this important issue to help meet this challenge.

A few days later on October 17, the EEOC released its updated Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021. The updated SEP continues to prioritize the areas identified in its previous SEP, with some modifications. Those areas include: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (3) addressing selected emerging and developing issues; (4) ensuring equal pay protections for all workers; (5) preserving access to the legal system; and (6) preventing systemic harassment. Notably, the EEOC has added as a priority "issues related to complex employment relationships in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." With this, the EEOC conveys its intent to focus on the so-called "gig economy" as it relates to equal employment opportunity laws, further evidence of the growing attention of policymakers on this sector of the economy. (See this month's *In Focus* for a discussion of the gig economy).

Wellness Programs

Employers seeking clarity with respect to their wellness program face new uncertainty in the wake a lawsuit filed by the AARP against the EEOC over its wellness rules. In May, the EEOC issued final rules addressing the use of financial incentives in wellness programs under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The EEOC sought to achieve a balance between privacy interests and promotion of wellness programs by affirming the use of financial incentives up to a certain limit and under certain conditions. Although not consistent with regulations issued by the Department of Labor pursuant to provisions in the Affordable Care Act, the EEOC final rules did at least provide some clarity for employers. The AARP now seeks to block the wellness rules and thus prevent the use of financial inducements in connection with such programs. The EEOC rules are scheduled to take effect on January 1, 2017.

Hiring Guidance

The Department of Justice (DOJ) and the Federal Trade Commission issued guidance about the application of anti-trust laws to HR professionals and others involved in hiring and compensation decisions. This development could have far-reaching implications for HR professionals and their job responsibilities. In announcing the guidance, the DOJ explains, "labor competition is a type of competition that our antitrust laws protect. The guidance issued today will help HR professionals learn about antitrust law so that they can conform to it and report potential violations."

Notable Departures

The results of next week's elections will no doubt have significant implications for labor and employment policy in the upcoming years. But even before the next Administration takes over and a President is sworn in, there are still unfinished items on the Obama Administration's agenda. Officials in the current Administration have announced or are expected to announce that they are stepping down, notably OFCCP Director Patricia Shiu, WHD Administrator David Weil, and EEOC General Counsel David Lopez. Under their tenure, workplace policy has changed dramatically. Depending on the outcome of the election, additional significant changes could lie ahead.

ON THE MOVE

Although new laws at the state and local levels have slowed a bit in the lead-up to the November elections, the measures that did advance in October mirror the areas that are expected to remerge at the federal level in 2017. Bills and ordinances increasing the minimum wage, expanding paid leave, and imposing fair scheduling requirements on employers all made headway last month.

Minimum Wage

While voters in at least four states and two cities will determine on November 8 whether to raise their jurisdiction's minimum wage, a handful of other state and local minimum wages are already set to increase in the coming months.

A few states have recently announced their yearly minimum wage increases. Alaska's minimum wage will increase to $9.80 per hour starting January 1, 2017. Florida's minimum wage will increase to $8.10 per hour for non-tipped employees and $5.08 per hour for tipped employees effective January 1, 2017. South Dakota's minimum wage will follow a scheduled increase to $8.65 per hour on January 1, 2017 for non-tipped employees and to $4.325 per hour on January 1, 2017 for tipped employees.

At the local level, Santa Clara, California announced its 2017 wage increase to $11.10 per hour on January 1, 2017, while the City of Cupertino, California adopted Ordinance No. 16-2151, which will increase the city's minimum wage to $12 per hour on January 1, 2017, to $13.50 on January 1, 2018, and to $15.00 on January 1, 2019.

At the county level, workers in Polk County, Iowa will also see a wage increase to a minimum of $8.75 per hour starting April 1, 2017; $9.75 per hour on January 1, 2018; and $10.75 per hour on January 1, 2019.

Controversy is brewing in Cook County, Illinois, where the County Board of Commissioners recently approved an ordinance that will raise the minimum wage, in increments, to $13.00 per hour by 2020. The first step increase is slated to take effect on

July 1, 2017. However, there are rumblings from some Cook County suburbs about possibly opting out of the new increases, and questions remain about whether raising the minimum wage is within the county's legal authority in the first instance. Therefore, whether Cook County's minimum wage will indeed reach its intended goal over the next three years is unclear.

Meanwhile, the New York State Department of Labor has proposed amendments to its minimum wage orders, which would significantly increase the salary requirements for exempt employees. The changes are not yet in final form.

While the focus has been on minimum wage increases, opponents of such patchwork laws and ordinances continue to assert challenges to these laws. In October, the Kentucky Supreme Court struck down the Louisville and Jefferson County Metro Government's minimum wage ordinance, which would have raised the area's minimum wage floor to $9 per hour by July 2017. The court found that the ordinance, which raised the local minimum wage higher than the state's, violated state law. This decision could impact the Lexington and Fayette Urban County Government's minimum wage as well. ▸▸

ON THE MOVE (continued)

Paid Sick Leave

In other Cook County, Illinois news, the jurisdiction approved the first county-wide paid sick leave ordinance in the Midwest. Ordinance No. 16-4229, which is very similar to Chicago's paid leave law, requires employers to provide employees with one hour of paid sick time for every 40 hours worked, with a cap of 40 hours in a 12-month period. The ordinance takes effect on July 1, 2017, and will apply to employees who work 80 hours for an employer within any 120-day period.

Montgomery County, Maryland adopted a bill that expands the reasons an employee can make use of that county's earned sick leave law. Bill 32-16 permits an employee to use accrued sick and safe leave for the birth of a child or the placement of the child with the employee for adoption or foster care, or to care for a newborn, newly adopted, or newly placed child within one year of birth, adoption, or placement.

In a related vein, Oregon has issued additional proposed regulations to clarify the state's sick leave law. According to the notice of proposed rulemaking, the proposal would add definitions for "employee" and "employer"; clarify employer obligations if applying the undue hardship provision of the law; clarify the "rate of pay"; update the provisions regarding joint employment; and explain the provisions regarding the restoration of sick time.

These rules would update and clarify final rules published in 2015.

On the flip side, the Minnesota Chamber of Commerce is challenging Minneapolis' new sick leave ordinance on the grounds that it conflicts with state law.

Fair Scheduling

Retail and fast food businesses in Emeryville, California are the next employers subject to so-called "fair scheduling" requirements. The City Council approved the Fair Workweek Employment Standards Ordinance, which will require covered employers to provide each employee with at least two weeks' notice of their work schedules. With certain exceptions, the ordinance applies to retail businesses with 56 or more employees globally, and fast-food businesses with 56 or more employees globally and 20 or more employees in Emeryville. The law takes effect July 1, 2017. In addition, before hiring new employees, covered employers would have to first offer additional hours to existing part-time employees.

Emeryville joins Seattle and San Francisco as the only jurisdictions so far to pass a secure scheduling law. Similar measures have been introduced in other states and at the federal level, but have failed to advance.

The City of San Jose, California is poised to be the next jurisdiction to implement the hiring right-of-first-refusal portion of Emeryville's ordinance. On November 8, residents will vote on a ballot initiative that would require employers to offer additional work hours to existing qualified part-time employees before hiring new staff.

Form of Payment

Pennsylvania's governor is expected to sign a bill (SB 1265) governing an employer's use of paycards. The employee's receipt of wages by paycard would be voluntary. An employer could not make the payment of wages, salary, commissions or other compensation via payroll card a condition of employment or a condition for receiving any other benefits. Before obtaining the employee's authorization for receiving wages via payroll ▸▸

card, the employer would have to provide the employee with a clear and conspicuous notice, in writing or electronically, that lists all of the employee's wage payment options; the terms and conditions of the payroll card account option, including the fees that may be deducted from the employee's payroll card account by the card issuer; notice that third parties may assess fees in addition to the fees assessed by the card issuer; and the methods available to the employee for accessing wages without fees.

Wage Theft

New York City is attempting to be the first jurisdiction in the country to provide wage protections for freelance workers. The measure (Int 1017-2015, Version C), which the New York City Council unanimously approved on October 26, 2016, would provide freelance workers with the right to a written contract for services valued at $800 or more and the right to be paid within a specified timeframe. The measure sets forth employer penalties for noncompliance, including statutory damages, double damages, injunctive relief and attorney's fees. The bill, dubbed the "Freelance Isn't Free Act," is the latest effort to confer independent contractors with additional employment rights. If signed into law, the measure would take effect 180 days later.

QUOTE of the MONTH

"We're redoubling our efforts to help identify and deter anticompetitive conduct in hiring and employment practices that harm workers, such as agreements among competitors not to recruit each others' employees or agreements to fix wages. These are serious violations and the division will act if it uncovers evidence of unlawful conduct in the employment context."

– DOJ Acting Assistant Attorney General Renata B. Hesse

Salary History

In August, Massachusetts became the first state to prohibit employers from screening job applicants based on their wages, requesting or requiring an applicant to disclose prior wages or salary history, or seeking the prospective employee's salary history from a current or former employee without first making an offer of employment with a pay proposal, and obtaining the applicant's consent. Last month, a similar measure died in New Jersey (AB 4119), although it is expected that other states will follow Massachusetts' lead when their legislative sessions re-convene in January.

What's Next?

The focus now turns to November 8, when a number of labor and employment-related measures will be subject to voter approval. These include at least nine marijuana-related, seven minimum wage-related, and two right-to-work ballot initiatives, among others. Next month's On The Move will discuss the measures that lived to see the light of day, as well as what's in store at the state and local level through the remaining days of 2016.

GLOBAL REPORT

The following is a roundup of international labor and employment news:

Asia/Pacific

Australia – Data Breach Notifications

A bill under consideration in Australia would create a revised nationwide data security breach notification law. Introduced on October 19, the Privacy Amendment (Notifiable Data Breaches) Bill 2016 would amend the Privacy Act 1988 to require companies to notify individuals if a data breach occurs. An "eligible data breach" occurs if there is unauthorized access to, unauthorized disclosure of, or loss of, personal information held by an entity, and the access, disclosure or loss is likely to result in serious harm to any of the individuals to whom the information relates. A company would have to provide notice of the breach if it has reasonable grounds to believe that an eligible data breach has happened, or is directed to do so by the Australian Information Commissioner. The draft bill contains several exceptions and specific notification obligations. Although the measure's fate is far from certain, there appears to be enough bipartisan support for this measure to allow it to advance.

Europe

European Union – Big Data

The use of big data in employment was the main topic of discussion during a recent U.S. Equal Employment Opportunity Commission meeting. Concern over big data's use and implications, however, is a global issue. During a joint conference on big data in Brussels, EU Commissioner for Competition Margrethe Vestager called for increased data pooling to promote competition, so long as privacy protections are instituted. In closing remarks, European Data Protection Supervisor Giovanni Buttarelli claimed, "[m]ore and more data is being collected, without your knowledge, and the data is feeding algorithms which put you in categories which you cannot challenge. And the question is therefore: who should deal with these problems?"

Many conference participants called for cooperation among regulators to ensure online privacy is maintained. Participants also discussed the call for the establishment of a Digital Clearing House to promote more coherent enforcement of EU rules, which was outlined in a recent EDPS Opinion on coherent enforcement of fundamental rights in the age of big data.

European Union – Gig Economy

A draft opinion on the European collaborative economy and online platforms calls for clearer rules and a "holistic approach" in dealing with this emerging employment sector. The European Committee of the Regions (CoR) draft opinion notes the "prevalence of US businesses in the collaborative economy," and emphasizes that "introducing clear, harmonized EU-level rules would give European start-ups the chance to grow and be more competitive on the world stage." Among other recommendations, the draft opinion calls for "early action" to regulate the collaborative economy so the EU need not contend with "ex-post harmonisation of 28 national frameworks and countless local and regional regulations." The European Committee is expected to discuss and adopt the draft opinion during a December plenary session.

United Kingdom – Management Guidance & Gender Pay Gap Reporting

The Advisory, Conciliation and Arbitration Service (ACAS), an independent entity that provides employment-related information, advice, training, conciliation and other services to both employers and employees, has issued guidance that aims to help employers handle potentially life-threatening conditions at work, including cancer, HIV and multiple sclerosis. ACAS also issued a more general guidance for management—Managing people—which includes sections on understanding the role of a manager; leading and communicating; handling day-to-day tasks; and handling less frequent and/or longer-term tasks such as performance management, staff appraisals, and flexible working requests.

Finally, ACAS is asking managers and HR professionals to complete a survey as it drafts future guidance on gender pay gap reporting. Gender pay reporting, which is expected to take effect in April 2017, was instituted by new regulations under the Equality Act 2010. Under these regulations, employers in Great Britain with 250 or more employees will be required to "calculate their gender pay gap, gender bonus gap, the proportion of men and women receiving a bonus and the proportion of men and women working at each pay quartile" within the company.

United Kingdom – Pregnancy Discrimination

Earlier this year, the White House asked employers to participate in an "Equal Pay Pledge." Employers in the UK are similarly being asked to participate in a "Working Forward Pledge" to support working mothers. According to a press release on the new pledge, its purpose is to "show employers how to attract, develop and retain women at work" and to "encourage businesses in their supply chains to sign up to the coalition and pledge to make their workplaces the best they can be for pregnant women and new mothers."

North America

Canada – Disability Law

The Government of Canada announced it will consult with the public on planned accessibility legislation until February 2017. According to the consultation objectives, the government "is committed to developing new planned accessibility legislation to promote equality of opportunity and increase the inclusion and participation of Canadians who have disabilities or functional limitations." Items addressed include physical and architectural barriers—including accessing information or using technology; beliefs and misconceptions about disabilities; and "outdated policies and practices that do not take into account the varying abilities and disabilities that people may have." The government will consider public comments in drafting future legislation.

Mexico—Labor Law

The Senate of the Republic of Mexico recently passed a measure to amend several Labor Justice provisions of the Mexican Constitution. These changes would affect employment dispute hearings and union representation. If ultimately enacted, newly created tribunals and specialized authorities will adjudicate labor disputes and regulate collective bargaining, union registration, and employee representation verification.

OUTLOOK CALENDAR

NOVEMBER 2016

Comments Due on GSA Proposed Rule Governing Construction Contract Administration

Tuesday, November 8, 2016

The General Services Administration (GSA) has issued a proposed rule amending the General Services Administration Acquisition Regulation (GSAR) coverage on construction contracts, including provisions and clauses for solicitations and resultant contracts. The purpose of the proposal is to clarify, update, and incorporate existing construction contract administration procedures. read more

Meeting of the ERISA Advisory Council

Wednesday, November 9 – Thursday, November 10, 2016

The Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) will hold an open meeting from November 9-10, 2016. On November 9 and the morning of November 10, the Advisory Council members will finalize the recommendations they will present to the Secretary of Labor. At the November 10 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations. The issues up for discussion include: (1) Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation and (2) Cybersecurity Considerations for Benefit Plans. read more

OSHA to Hold Informal Discussion on Hazard Communication Rulemaking

Wednesday, November 16, 2016

On Wednesday, November 16, 2016, the Occupational Safety and Health Administration (OSHA) will conduct a public meeting to informally discuss potential updates to the Hazard Communication Standard. The purpose of this meeting is to invite stakeholders to identify topics or issues they would like OSHA to consider in the rulemaking. read more

Comments Due on PBGC Proposed Rule Governing Missing Plan Participants

Monday, November 21, 2016

The Pension Benefit Guaranty Corporation (PBGC) administers a program to assist participants and beneficiaries in terminated single-employer defined benefit pension plans receive benefits held for them. The PBGC is proposing to extend this program to multiemployer plans covered by title IV of ERISA, to certain defined benefit plans that are not covered by title IV, and most defined contribution plans. read more

Comments Due on DOL's Proposal to Reinstate the Contingent Worker Supplement

Tuesday, November 29, 2016

Earlier this year the Bureau of Labor Statistics (BLS) announced plans to reinstate the Contingent Worker Supplement (CWS) to the Current Population Survey (CPS) to better capture members of the gig economy. The BLS is now soliciting comments on this proposal. Comments are due November 29. read more

OUTLOOK CALENDAR (continued)

DECEMBER 2016

Enforcement Date Extended for Portions of OSHA Tracking of Workplace Injuries and Illnesses Rule

Thursday, December 1, 2016

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulations to clarify the rights of employees and their representatives to access the injury and illness records. The portions of the final rule that (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibit employers from retaliating against employees for reporting work-related injuries or illnesses, will start being enforced as of December 1, 2016 (extended twice from August 10, 2016 and November 1, 2016). The remaining sections of the rule take effect on January 1, 2017. read more

Final DOL White Collar Exemption Overtime Rule Takes Effect

Thursday, December 1, 2016

The DOL's final rule raises the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from the Fair Labor Standards Act's overtime exemptions. The final rule sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region ($913 per week; $47,476 annually for a full-year worker); sets the total annual compensation requirement for highly compensated employees subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption. The rule also amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. read more

Comments Due on Proposed Revisions to Annual Information Return/Reports – Period Extended

Monday, December 5, 2016

The DOL's Employee Benefits Security Administration has issued a proposed rule to change the Form 5500 Annual Return/Report forms, including the Form 5500, Annual Return/Report of Employee Benefit Plan (Form 5500 Annual Return/Report), and the Form 5500–SF, Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500-SF). The annual returns/reports are filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). The comment period, which was initially scheduled to conclude on October 4, 2016, has been extended until December 5, 2016. read more

Comments Due on OSHA's Standards Improvement Project-Phase IV

Monday, December 5, 2016

Pursuant to Executive Order 13563, Improving Regulations and Regulatory Review, the Occupational Safety and Health Administration (OSHA) is proposing to revise or remove regulations deemed outdated, duplicative, unnecessary, and inconsistent. To that end, under OSHA's Standards Improvement Project-Phase IV (SIP-IV), the agency is considering changes to certain construction standards. Comments on this proposal are due by December 5. read more

OUTLOOK CALENDAR (continued)

DECEMBER 2016 (continued)

Comments Due on OSHA's Proposed Amendments to its Respiratory Protection Standard

Tuesday, December 6, 2016

The Occupational Safety and Health Administration is proposing to add two modified PortaCount® quantitative fit-testing protocols to its Respiratory Protection Standard. The proposed protocols would apply to employers in general industry, shipyard employment, and the construction industry. read more

New USCIS Immigration Fees Schedule Takes Effect

Friday, December 23, 2016

The Department of Homeland Security (DHS) is adjusting the fee schedule for immigration and naturalization benefit requests processed by U.S. Citizenship and Immigration Services (USCIS). Among other changes, fees will increase by a weighted average of 21%. The fee related to processing the Employment Based Immigrant Visa, Fifth Preference (EB-5) Annual Certification of Regional Center, Form I-924A, will increase to $3,035. Applications or petitions mailed, postmarked, or otherwise filed on or after December 23, 2016, must include the new fee. read more

JANUARY 2016

Final OSHA Rule Governing Tracking of Workplace Injuries and Illnesses Takes Effect

Sunday, January 1, 2017

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The reporting requirements take effect on January 1, 2017. read more

EEOC Final Wellness Rule under GINA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer-sponsored wellness programs. This rule addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. read more

EEOC Final Wellness Rule under ADA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to all wellness programs that include disability-related inquiries and/or medical examinations whether they are offered only to employees enrolled in an employer-sponsored group health plan, offered to all employees regardless of whether they are enrolled in such a plan, or offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. read more

OUTLOOK CALENDAR (continued)

JANUARY 2016 (continued)

New Minimum Wage Rate Increase for Federal Contractors Takes Effect

Sunday, January 1, 2017

The minimum wage rate that must be paid to federal contractors under Executive Order 13658 will increase on January 1, 2017. The minimum wage rate that generally must be paid to workers performing work on or in connection with covered contracts will increase to $10.20 per hour. The required minimum cash wage that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to $6.80 per hour. read more

Final Rule Providing Paid Sick Leave Benefits for Federal Contractor Employees Becomes Applicable

Sunday, January 1, 2017

The DOL's Wage and Hour Division issued a final rule to implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, signed by President Barack Obama on September 7, 2015. Executive Order 13706 (E.O.) requires certain federal contractors to provide their employees with up to 7 days (56 hours) of paid sick leave annually, including paid leave allowing for family care. The final rule defines terms, describes the categories of contracts and employees the E.O. covers and excludes from coverage, sets forth requirements and restrictions governing the accrual and use of paid sick leave, and prohibits interference with or discrimination for the exercise of rights under the E.O. While the rule took effect on November 29, 2016, compliance will begin January 1, 2017. read more

Paycheck Transparency Provisions of Fair Pay and Safe Workplaces Executive Order Take Effect

Sunday, January 1, 2017

Although a federal court enjoined the implementation of several key provisions of the Fair Pay and Safe Workplaces Executive Order and its regulations, the portion of the so-called "blacklisting" rule that requires federal contractors to include information regarding overtime pay and exempt status with each paycheck and to provide certain notices to independent contractors, have not been enjoined and are still scheduled to go into effect in connection with solicitations or contract amendments made on or after January 1, 2017. read more

Rule Governing Excepted Benefits, Lifetime and Annual Limits, and Short-Term, Limited-Duration Insurance Becomes Applicable

Sunday, January 1, 2017

The IRS, HHS, and EBSA have issued final regulations regarding the definition of short-term, limited-duration insurance for purposes of the exclusion from the definition of individual health insurance coverage, and standards for travel insurance and supplemental health insurance coverage to be considered excepted benefits. These final regulations apply to group health plans and health insurance issuers beginning on the first day of the first plan year (or, in the individual market, the first day of the first policy year) beginning on or after January 1, 2017. read more

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