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state of the STATES

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Legislative Proposals Are Taking Root

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As April showers turn into May flowers, measures proposed earlier this year in the state legislatures begin to take root. Significantly fewer generally applicable labor and employment bills were introduced in April, around 60 overall, with Michigan tallying the most new bills with 16 proposals. (By contrast, in March, four states introduced at least 20 bills each.)

But those bills that remain pending are being actively considered, with increasing numbers reaching the governor's desk. Arkansas (with seven) and West Virginia (with five) enacted the most employment-related bills this month, on a variety of topics, including drug testing, joint employment, and weapons in the workplace. This month's State of the States highlights some of the prominent trends demonstrated by the bills that are advancing across the nation.

Preemption

We continue to see progress with preemption bills, which seek to preclude localities from enacting ordinances that impose additional obligations on employers operating within their boundaries. South Carolina enacted a bill (SB 218) that prohibits any political subdivision from requiring employers to grant any employee benefit beyond wages, including "paid days off for holidays, paid sick leave, paid vacation leave, paid personal necessity leave, retirement benefits, and profit-sharing benefits." A similarly broad bill awaits the governor's signature in Minnesota (HB 600) and expressly prevents localities from enacting or administering any sick leave, scheduling, or minimum wage laws.

A more narrowly-tailored preemption law took effect in Tennessee (SB 262), depriving local governments of the ability to adopt any regulation that imposes new scheduling requirements. Similarly, a Georgia law (HB 243) that would preempt any requirement that employers compensate employees for schedule changes has cleared both houses. A similar Missouri bill (HB 1048) has also gained ground. Meanwhile, a new Arkansas law (HB 1737) focuses on remedies and prohibits the duplication of awards for damages over the statutory limit allowed by any other state or federal law.

On the flip side, Seattle presses on with its secure scheduling ordinance.[1] In April, Seattle adopted final regulations interpreting and implementing the new law, which mandates that large retail and food service employers provide two weeks' advance notice to employees of their schedules, and compensate

employees for alterations to their scheduled hours. Among other things, it also requires covered employers to offer additional hours to current employees before hiring new outside applicants to fill any needs. This new law takes effect on July 1, 2017.

Background Checks

Measures relating to background checks also have attracted a great deal of attention in the state legislatures, in one form or another. Arkansas enacted a law (HB 2000) stating that any employer that obtains any background check information must provide a copy of the report (for example, a credit report) to the employee upon request. Bills regulating the use of credit reports in employment decisions are also pending in Ohio, New York, and Texas.

Several other proposals specifically address the use of criminal history information by employers. A new West Virginia law (SB 76) grants employers civil immunity for hiring convicted felons or persons in reduced misdemeanor status. A similar "safe harbor" provision has passed both chambers in Montana (SB 325).

A Colorado "ban-the-box" measure (HB 1305) that has passed the House would prohibit employers from advertising, or including in an application, that a person with a criminal history may not apply for a position. It would also ban inquiries into an applicant's criminal history on an initial application. For its part, Texas is considering a preemption bill (HB 577) that would preclude localities from adopting their own "ban-the-box" ordinances.

State-Run Retirement Plans

Although President Trump signed a resolution of disapproval (H.J. Res. 67) that rescinds the Department of Labor rule designed to promote the creation of state-run retirement plans for private-sector use, Oregon has moved forward with its law that will require employers that do not offer retirement plans to enroll employees in the state plan. On April 18, 2017, the state issued final regulations, including employer guidelines, to implement its plan.[2] The plan will begin with a pilot stage for certain workers in July.[3]

The New York City Council recently introduced a similar bill (Int. No. 1574). If enacted, the proposal "would establish an individual retirement account . . . program for private-sector workers at businesses with 10 or more employees located in New York City that do not already offer retirement savings plans." As with the Oregon law, enrollment for employees would be automatic, although individuals could opt out.[4] Retirement-related measures also are pending in Minnesota, North Carolina, and Rhode Island.

Protected Time Off

Bills addressing leave time, both paid and unpaid, remain popular. The District of Columbia's Universal Paid Leave Act took effect in April, after surviving the congressional review period.[5] The statute grants covered employees eight weeks of paid parental leave, six weeks of paid family leave, and two weeks of paid personal medical leave. The substantive requirements of this law do not take effect until March 1, 2019.

Hawaii is entertaining two leave-related bills. The first proposal (HB 213) would expand the existing family and medical leave law to permit an employee to take time off to care for a sibling and to provide for bereavement leave. The second, a sick leave bill (HB 4), has cleared both chambers and would require employers to grant employees one hour of paid sick leave for every 40 hours worked.

Washington has issued proposed regulations on its minimum wage and paid sick leave law.[6] Cook County, Illinois has also published draft interpretive and procedural rules concerning its Earned Sick Leave Ordinance.[7] Sick leave bills have been introduced (and in several cases, are advancing) in Illinois, North Carolina, Nevada, and Texas.

A Georgia "kin care" bill represents a variation on the theme. This proposal (SB 201), which has reached the governor, would permit employees to use their sick leave, if any, for the care of immediate family members.

Equal Pay

As we track equal pay measures across the country, we see a trio of approaches making headway—bills focusing on: (1) pay equity; (2) wage transparency; and/or (3) salary history.

Pay equity bills are advancing in Connecticut (HB 5591), New York (AB 4696), and Illinois (HB 2462). By way of example, the New York bill would mandate equal pay for work in equivalent jobs, as well as prohibit employers from disciplining or discriminating against employees who discuss their wages. The Illinois proposal, which has passed the House, would require equal pay for substantially similar work, protect employees who discuss their wages, and preclude employers from screening applicants based on salary history.

The Delaware House has approved a salary history bill (HB 1) making it illegal to screen applicants based on their compensation histories or to ask the candidate,

or his or her current or former employer, about the individual's salary history. New York City is poised to enact a similar bill (Int. No. 1253), which Mayor de Blasio is expected to sign shortly.[8] Some variation of a salary history proposal is under consideration in Michigan, New York, Rhode Island, Wisconsin, Texas, California, and Washington.

Philadelphia, on the other hand, has agreed to temporarily stay the enforcement of its law that prevents employers from asking about an applicant's salary history. The Philadelphia Wage Equity Ordinance, which was to take effect on May 23, 2017, is now in a holding pattern pending the outcome of a legal challenge.[9]

For its part, Colorado is advancing a wage transparency bill (HB 1269), which has passed both houses. That bill would extend the existing wage transparency protections to all employees, even those who are exempt from coverage under the National Labor Relations Act (*i.e.*, supervisors). Louisiana, Pennsylvania, and Nevada are also weighing wage transparency measures.

Labor

Efforts to curtail union influence continue to gain traction at the state level. Earlier this year, Missouri and Kentucky became right-to-work states. In April, both Iowa (SF 438) and Wisconsin (SB 3) passed legislation eliminating project labor agreement (PLA) requirements for government-funded projects. A similar measure (SB 182) in Missouri is on its way to the governor's desk. PLAs typically require governments to award public construction projects to contract bidders that use unionized workers or pay union wages. More than 20 states now ban PLAs for state and local projects.

In West Virginia, a new law (SB 222) disqualifies individuals from unemployment benefits if they left or lost their job as the result of a strike.

Discrimination & Accommodation

A noticeable trend in antidiscrimination bills is their increasing focus on conditions associated with pregnancy. Currently, for example, three states are evaluating measures that would protect employees from discrimination and/or require employers to provide reasonable accommodation to employees affected by pregnancy, childbirth, or a related condition. A Vermont proposal (HB 136) has passed both chambers, while bills pending in South Carolina (HB 3865) and Nevada (SB 253) have passed one house.

Meanwhile, a Missouri bill (SB 43) seeks to raise the burden of proof for state-law claims of workplace discrimination. This proposal, which has passed the senate, would amend the current burden of proof to match the federal burden of proof and abrogate all state precedent to the contrary.

Social Media

About half the states have laws regulating employer access to employee social media accounts. This past month, Arkansas amended its social media statute (HB 2216), while Vermont (HB 462) is advancing such a law. The Vermont proposal, which has passed both houses, includes many provisions common to these types of laws. For example, it prohibits employers from requiring that an applicant or employee divulge a username or password for a social media account, access an account in the employer's presence, add anyone (including the employer) to his or her contacts, or otherwise alter security settings so as to enable broader access to the account by third parties.

Joint Employment

Bills intended to clarify the nature of the joint employer relationship continue to progress. The last couple of 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.

Arkansas is the latest state (and the sixth this year) to pass a bill (SB 695) providing that a franchisor is not the employer of a franchisee or the franchisee's employees. A similar proposal is now before the governor in North Carolina (SB 131), having passed both houses. An Alabama measure (HB 390) is also showing promise.

Data Breach Security

Nearly all states impose certain duties on employers in the event of a data security breach. Employers typically are obligated to notify employees if their personal information is compromised, along with the state's attorney general and/or credit reporting agencies. New Mexico recently became the 48th state to enact a data security breach law. In addition, Virginia amended its statute to address the recent explosion of W-2 phishing scams, while Tennessee revised its law to clarify that it does not apply to properly encrypted information.[10]

Drug Testing & Medical Marijuana

West Virginia tackled two drug-related issues this month, passing both a medical marijuana law and a drug-testing statute. The West Virginia Medical Cannabis Act (SB 386) (WVMCA) legalizes the use of medical cannabis for patients suffering from serious medical conditions, including, but not limited to, cancer, Parkinson's disease,

multiple sclerosis, and terminal illnesses. The WVMCA addresses several employment-related dilemmas. It permits employers to restrict the duties of employee-patients; for example, an employer can prohibit an individual from performing a task that poses a threat to public health or safety while under the influence of medical marijuana. The WVMCA also protects employee-patients from discrimination, as it makes it unlawful for an employer to discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against an individual because of his or her status as a certified patient. That being said, employers need not accommodate the use of medical marijuana at the workplace.[11]

The West Virginia Safer Workplace Act (HB 2857) authorizes employers to require mandatory drug and alcohol testing of both applicants and current employees under certain circumstances. Employers that choose to institute a testing program policy must adopt written policies, which must be disclosed to applicants and employees.

Minimum Wage

Minimum wage issues continue to dominate headlines. Readers interested in more detail on this topic are encouraged to consult *WPI Wage Watch*, a Littler feature focusing exclusively on breaking minimum wage developments coast-to-coast.[12]

In Other News . . .

In news you'll wish you could forget: the Illinois House has approved a bedbug notification bill. Under the bill (HB 369), employees would become obligated to inform their immediate supervisors if they observe bedbugs in the workplace. Notice duties would run both ways, however. If a certified pest control professional finds the presence of bedbugs at a workplace, the employer must notify employees of the infestation, ideally by e-mail.

What's Next?

Many state legislatures recess for the summer, but they will continue to consider and process pending bills over the next couple of months. We will continue to monitor these bills and report on any that come to fruition.

1. *See, e.g.,* Doug Smith, *Seattle City Council Approves Secure Scheduling Ordinance*, Littler Insight (Sept. 20, 2016).
2. The final rules are available at http://www.oregon.gov/treasury/ORSP/Documents/170418%20ORSP%20Final%20Rules%20-%20Approved%20by%20Board%20180417.pdf.
3. *See, e.g.,* Nancy L. Ober & Sean D. Brown, *Mandatory Payroll Deduction Savings Programs Are on the Rise*, Littler Insight (Nov. 7, 2016).
4. Details about the New York City bill are available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3029960&GUID=D100EE1E-A377-4FCE-BA19-36EA2E17112A&Options=&Search=.
5. Libby Henninger & Eunju Park, *District of Columbia Enacts the Universal Paid Leave Act*, Littler Insight (Apr. 24, 2017).
6. *See, e.g.,* Pamela Salgado, Breanne Martell & Vanessa Lee, *New Minimum Wage and Paid Sick Leave Laws for Washington Employers*, Littler Insight (Dec. 22, 2014). The public comment period has closed, but the proposed Washington regulations are available at https://s3-us-west-1.amazonaws.com/ehq-production-us-california/64333b2b4ff449112b8724ac8f2482fc0550fb01/documents/attachments/000/000/339/original/I-1433_Draft_Proposed_Rules_-_Pre-CR102.pdf?1491606888.
7. Larry D. Robertson, *Cook County, Illinois Becomes First in the Midwest to Mandate Countywide Paid Sick Leave*, Littler Insight (Oct. 18, 2016). Details about the ordinance, as well as access to the proposed regulations, are available at https://www.cookcountyil.gov/service/earned-sick-leave-ordinance-0. Public comments may be submitted through May 8, 2017.
8. María Cáceres-Boneau, Jean Schmidt & David M. Wirtz, *New York City Set to Ban Inquiries About Salary History*, Littler ASAP (Apr. 14, 2017).
9. Martha Keon, *The City of Philadelphia Has Agreed to Stay the Enforcement of the Philadelphia Wage Equity Ordinance Pending Resolution of Court Challenge*, Littler ASAP (Apr. 20, 2017).
10. Philip L. Gordon & Joon Hwang, *Security Breach Notification Becomes More Complex for Employers*, Littler Insight (Apr. 24, 2017).
11. *See* W. VA. CODE §§ 16A-5-10, 16A-15-4.
12. Libby Henninger, Sebastian Chilco & Corinn Jackson, *WPI Wage Watch: Minimum Wage & Overtime Updates (April Edition)*, WPI Report (Apr. 28, 2017).