LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

CURRENT EVENTS MONTHLY NEWSLETTER

March 2016

INSIDER BRIEFING

On February 9, 2016, President Obama unveiled his budget for funding the federal government for FY 2017. Subject to congressional approval, the final budget that emerges from a Republican-controlled Congress will no doubt differ significantly from the President's request. Nonetheless, the President's last budget document reveals where his Administration would like to focus its resources during the President's final year in office.

Although aspirational, the Department of Labor's (DOL) budget sends a strong signal to employers that they can expect aggressive enforcement and frenzied regulatory activity in the year ahead. The Department has requested $12.8 billion dollars in discretionary funding for FY 2017, a $600 million increase from the FY 2016 enacted level. According to the DOL's Budget in Brief, the Department's "worker protection agencies build a shared prosperity for a stronger America by leveling the playing field, so that employers who follow the rules are not at a competitive disadvantage when compared to those who cut corners to the detriment of their workers." Toward this end, during this Administration's final year the DOL will continue to pursue a combination of strategies to "strengthen worker protection laws and their enforcement."

The DOL's budget provides $277 million for the Wage and Hour Division (WHD) to enforce laws that

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ON THE MOVE

As Congress remained predictably stagnant, state and local legislatures were active in February 2016. Legislative bodies in 40 states, plus the District of Columbia and Puerto Rico, introduced over 270 labor- and employment-related bills and ordinances during this period. While this number is a drop from the over 400 such measures introduced in the first month of 2016, lawmakers began actively considering pending bills at the state and local levels. At least 490 bills were acted upon in some fashion, even if just referred to committee. Approximately 27 bills cleared a state's lower chamber; 25 passed the state senate; 23 moved through both chambers; and 12 bills or ordinances were enacted or adopted. On the flip side, 72 labor and employment bills were killed or died in committee in February, the majority of which were axed in Mississippi (34) and Virginia (25). The following highlights some of the more notable measures considered in February.

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establish the minimum standards for wages and working conditions in many of the workplaces in the United States, "particularly in industries where workers are most at risk." The budget request for the WHD includes an increase of almost $50 million and additional personnel to "continue positive momentum towards building a stronger and more effective enforcement program." These additional resources would be dedicated to directed investigations that are "strategically selected and executed" to solve the most important compliance challenges, including protecting workers in industries that employ business models that are at high risk of wage and hour violations." The targeted attack on so-called "fissured industries" has been a priority for Wage and Hour Administrator Dr. David Weil since he assumed office. Under his leadership, the WHD has issued guidance in the form of Administrator's Interpretations on Independent Contractors and Joint Employment. The DOL's budget request explains that the additional resources will be used to "crack[] down on the illegal misclassification of some employees as independent contractors." With or without additional funding, this will continue to be an enforcement priority for the remainder of 2016.

The WHD's budget justification confirms it will "be focused on carrying through and implementing additional regulatory initiatives." Although the agency references the revisions to the FLSA's white collar overtime exemption regulations, it offers no further information on the final rule's release date or content. Meanwhile, over 100 House members, including two Democrats, sent a letter to Secretary of Labor Thomas Perez asking him to reconsider issuing the overtime regulations. The letter states: "As written, this one-size-fits-all rule would adversely impact all affected employers, especially small businesses." The letter is critical of the proposal for not clearly explaining the DOL's plan regarding the future of the duties test. This unanswered question leaves many employers very concerned and uncertain about the shape the final rule will take.

The WHD's budget justification also stated the Division intended to issue a proposed rule to establish the ability of employees of federal contractors to earn seven days of paid sick leave per year, implementing Executive Order 13706. On February 25, the proposed rule was published in the *Federal Register*. The proposal identifies the types of contracts and employees the executive order covers and excludes from coverage, provides requirements and restrictions regarding the accrual and use of paid sick leave, prohibits interference with or discrimination against employees who exercise their rights under the executive order, imposes violations for associated recordkeeping requirements, and includes a prohibition against waiver of rights. Covered contracts include procurement contracts for services or construction covered by the Davis-Bacon Act (DBA), contracts for services covered by the Service Contract Act (SCA), contracts for concessions, and contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Notably, some key definitions used in the paid sick leave proposed rule differ from those under the federal Family and Medical Leave Act (FMLA). The DOL notes its proposed definition of "child" is "deliberately broader" than the definition of "son or daughter" in the FMLA, which includes only minor children or adult children "incapable of self-care because of a mental or physical disability." Under the proposed rule, employees may take paid sick leave to care for a non-nuclear family member who does not necessarily have a biological or legal relationship to the employee, including a "close friend." Addressing the interaction of the paid leave mandate with existing leave policies, the proposal explains that a contractor's existing paid time off policy (if provided in addition to the fulfillment of the SCA or DBA obligations, if applicable) will satisfy the requirements of the executive order and the rule only if various conditions are met. These requirements and broad definitions suggest that compliance challenges for contractors lie ahead. Comments on the proposed rule are due March 28; a final rule is expected by September 30, 2016.

Funding for the Occupational Safety and Health Administration (OSHA) falls under the rubric of "Protecting Wages, Workplace Safety, and Retirement Security." The DOL's budget request includes additional funding for increased enforcement of workplace safety and whistleblower protection laws. Specifically, the budget provides $595 million for OSHA, including additional funding to improve safety and security at chemical facilities and to heighten response procedures when major incidents at these sites occur. The budget requests $143 million for compliance assistance activities, an increase of $6 million over 2016. The budget also requests a $4 million increase to bolster OSHA's ability to enforce the over 20 whistleblower protection laws under its jurisdiction. OSHA's budget justification also creates a roadmap for regulatory activity for the remainder of FYs 2016 and 2017. For the remainder of this fiscal year, OSHA will prioritize finalizing the controversial crystalline silica rule, and will move to finalize its recordkeeping modernization rule. In FY 2017, OSHA expects to publish final rules on beryllium and revised respirator fit test methods. Additionally, the agency will issue notices of proposed rulemaking on infectious diseases, emergency preparedness and response, and an update to the hazard communication standard to accommodate the latest revisions of the Globally Harmonized System of Chemical Hazard Communication.

Quote of the Month

"I am also now utterly confused as to what the purpose of the proposed DOL rule is then ..."

—Email from Matthew Kozora, SEC, to Keith Bergstresser, DOL, on July 31, 2012, regarding the DOL's fiduciary rule, according to Report issued on Feb. 24, 2016, by the Minority Staff of the Senate Committee on Homeland Security and Governmental Affairs

The Employee Benefits Security Administration (EBSA), the agency charged with protecting an estimated 681,000 private retirement plans, 2.3 million health plans and a similar number of other employee welfare plans, would receive $205.8 million in the budget. The increase of more than $24 million from FY 2016 funding would be used for enforcement program modernization and enforcement targeting and analysis. The budget request also includes $100 million in mandatory funding for demonstrations conducted by nonprofits and states to design, implement, and evaluate new and innovative approaches for providing more portable retirement and other employer-provided benefit coverage. The goal of these demonstrations is to develop and test models that are portable across employers and can accommodate intermittent contributions or contributions from multiple employers for an individual worker. The focus on the portable benefits has increased with the rise of the "on-demand" or "gig economy."

One of the most controversial uses of EBSA funding has been the promulgation of its so-called "fiduciary rule" governing conflict-of-interest for retirement plan investment advice. Following unsuccessful efforts to cut off funding for the fiduciary rule in the FY 2016 omnibus appropriations bill, the agency is on the verge of issuing its final rule. While the White House Office of Management and Budget (OMB) reviews the final rule prior to its release, members of Congress continue to voice their opposition to the fiduciary rule. On February 2, the House Committee on Education and the Workforce approved two bills that would effectively kill the DOL proposal by requiring an affirmative vote by Congress before the DOL could issue a final rule. According to a Committee press release, the bills, the Affordable Retirement Advice

Protection Act (H.R. 4293), introduced by Rep. Phil Roe (R-TN), and the Strengthening Access to Valuable Education and Retirement Support Act (H.R. 4294), introduced by Rep. Peter Roskam (R-IL), "will raise investment advice standards for the retirement industry to ensure financial advisors act in the best interests of their clients, while also ensuring low- and middle-income Americans have access to quality, affordable financial advice to help plan for retirement." The fiduciary rule will likely remain a congressional target as the DOL commits to its finalization.

The Office of Federal Contract Compliance Programs (OFCCP) would receive $105.4 million under its budget request, representing an increase of more than $8 million. In FY 2017, one of the OFCCP's top enforcement priorities will continue to include identifying and addressing: "systemic pay discrimination" based on race and gender. As part of President Obama's National Equal Pay Task Force, the OFCCP's budget describes the agency as "building a robust enforcement strategy for investigating and resolving pay discrimination by federal contractors." To build on these prior efforts, in FY 2017, the OFCCP will continue to focus on systemic compensation cases where agency reviews can have the greatest impact. The agency expects 30-40% of its caseload to address pay discrimination in FY 2017. As part of its focus on pay equity, the OFCCP's budget request cites the Equal Employment Opportunity Commission's recent proposal to amend the EEO-1 report to require certain private employers, including federal contractors with 100 or more employees, to provide summary pay data by gender, race, and ethnicity, which would be shared with the OFCCP.

The DOL's Office of Labor-Management Standards (OLMS) administers and enforces most provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The FY 2017 request for OLMS is $45.7 million, an increase of $4.6 million. One of the OLMS's key performance metrics as outlined in its budget justification is the number of "persuader" reports filed by employers and labor consultants under the LMRDA, a number that would likely significantly increase under the agency's proposed persuader rule. The persuader advice exemption rule, a final version of which was sent to the OMB in December, seeks to broaden the scope of an employer's reporting obligations under the LMRDA by substantially narrowing the "advice exemption" in Section 203(c) of the LMRDA. If the final rule follows the proposal, employers would need to disclose any agreements with third parties for advice or services that "directly or indirectly" could persuade employees regarding their right to join a union. In December, a group of 90 trade associations representing millions of employers sent a letter to the OMB asking that the rulemaking be returned to the DOL and consolidated with a separate proposal. On February 5, 2016, a group of 13 state attorneys general sent a letter to the OMB opposing the OLMS's proposed rule. The letter expresses the concern of the signatories that "this new rule would undermine long-standing protections for confidential attorney-client communications and would place undue burdens on small businesses within our states."

The DOL's budget request laid out the Administration's vision for further transforming workplace policy, building on the actions of the previous seven years. The significance of the DOL's budget request extends beyond the numbers themselves to disclose what workplace policy priorities the current leadership will try to advance before the next Administration takes over. The DOL remains focused on protecting wages, workplace safety, and retirement security. Through enforcement, rulemaking and sub-regulatory activities, the DOL is intent on completing as dramatic a transformation as possible. Meanwhile, the Republican-controlled Congress has begun crafting its own budget proposal. Thus, the battle lines over potential policy riders to stop the Administration's efforts are already taking shape. What emerges at the end of the year remains to be seen.

The National Labor Relations Board (NLRB) requested $274.7 million for FY 2017, an increase of

$471 million. In its justification, the NLRB asked for additional resources for casehandling, administrative and operational support to efficiently and effectively process comprehensive and complex cases, which the general public brings to the agency "based upon external factors outside of our control." Among the factors the NLRB cites as justifying increased funding include its "ongoing nationwide efforts to improve the wages and working conditions of workers in the retail and fast food industries; the increased prevalence and evolving tools and usage by employees of technology and social media in and outside of the workplace to discuss terms and conditions of employment with one another, and the related handbook provisions and workplace rules, generated therefrom; and expanded use of mandatory arbitration clauses in employment matters."

The EEOC's 2017 budget request is $376.7 million, which represents an increase of $12 million above the enacted FY 2016 appropriation. The EEOC's budget justification submitted to Congress sets forth the following priorities for FY 2017: (1) expanding its impact through strategic law enforcement; (2) strengthening partnerships across the government and with stakeholder communities; (3) leveraging technology and streamline operations; and (4) transforming the workplace to promote inclusion, collaboration, and innovation.

Shortly after submitting its budget request, the EEOC released litigation and enforcement statistics for FY 2015. The statistics released on February 11, 2016, show that the number of charges filed with the EEOC is once again rising. 89,385 charges were filed with the agency, up slightly from the 88,778 charges filed the previous year. The year-end data shows that retaliation again was the most frequently filed charge of discrimination (39,757 charges), making up 45% of all private sector charges filed with EEOC. Disability discrimination claims reached a record high this past year. 26,968 such claims were filed, representing 30.2% of total charges. The agency filed 142 merits lawsuits last year, up from 133 the previous year. The majority of the lawsuits filed alleged violations of Title VII of the Civil Rights Act of 1964, followed by suits under the Americans with Disabilities Act (ADA). This included 100 individual lawsuits and 42 lawsuits involving multiple victims of discriminatory policies, of which 16 were systemic. Legal staff resolved 155 lawsuits alleging discrimination.

The unexpected death of Supreme Court Justice Antonin Scalia sent shockwaves through Washington and the rest of the country and set up a contentious fight over the nomination and confirmation of his replacement. Election-year dynamics have solidified the battle lines drawn by the Republican-controlled Senate and the President. With Justice Scalia's passing, the consistently conservative bloc on the Court is reduced to three; several 5-4 decisions in which conservatives were expected to prevail suddenly become 4-4 ties. Because it is expected there will be a sustained period before the next justice is appointed, the outcome of important labor and employment cases before the Court is now uncertain. Indeed, public sector unions facing an expected loss in *Friedrichs v. California Teachers Association* are now unlikely to have the Court overturn the *Abood v. Detroit Board of Education* decision. In *Abood*, the Court held that non-union public employees could be compelled to pay for union expenses related to collective bargaining. Without Justice Scalia's deciding vote, the validity of such "agency shop" arrangements in *Abood* will likely stand. The outcomes of other labor and employment-related cases in which oral argument was heard but no opinions were issued, or in which oral arguments have not yet been heard, are now cast into doubt.

Looking beyond the remainder of the current Supreme Court term, the stakes in the battle for the White House and control of the Senate have become even higher. The next Supreme Court Justice may well be the deciding vote in future important labor and employment decisions. Much about the future landscape of workplace policy in the courts, in Congress and in the Administration remains in flux.

– By Ilyse Schuman and Michael J. Lotito

Minimum Wage

The drive to increase the minimum wage shows no signs of abating. During the first month of 2016, over 25 state and local bills seeking to raise the minimum wage were introduced. While in February this trend continued in many jurisdictions, a handful of state lawmakers have pushed back on this effort. At least five bills considered in February aim to prevent localities from enacting ordinances raising the minimum wage or providing benefits greater than those provided under state or federal law.

Notably, the Alabama legislature expedited passage of the Alabama Minimum Wage and Right-to-Work Act (AB 174), which prevents local governmental entities from requiring minimum leaves, wages, or other benefits for employees that exceed those provided under state or federal law. The rush to ready this bill for the governor's signature was in response to the city council of Birmingham's approval of an ordinance to raise the minimum wage for workers within city limits to $10.10 per hour. Because Alabama's governor signed AB 174 on February 25, just hours after both chambers voted in its favor, the Birmingham ordinance did not take effect. Alabama does not have its own minimum wage, but rather follows the federal standard at $7.25 per hour.

Idaho's lower chamber, both houses of Virginia's legislature, and a New Mexico House Committee similarly approved measures that would prevent localities from imposing minimum wages greater than that provided under state or federal law. In the same vein, Colorado's governor vetoed a measure that would have expressly *allowed* localities to raise the local minimum wage. Missouri's governor, in contrast, vetoed legislation restricting localities from raising minimum wages.

About the same number of bills to raise the wage floor at the state level was introduced in February as introduced in January. Some efforts advanced. Both chambers in Oregon's Legislature approved a measure to increase the state's minimum wage using a tiered approach in three separate geographic regions. Depending on the region, the minimum wage will increase to either $9.50 or $9.75 starting July 1, 2016, and be raised, in increments, to either $12:50, $13.50, or $14.75 by the year 2022. Meanwhile, a proposed ballot initiative that would have raised Nevada's minimum wage in steps to $13 per hour has been withdrawn.

In West Virginia, the State Legislature overrode the governor's veto of a measure to repeal the state's prevailing wage requirements for construction workers on public works projects.

Equal Pay

At least 18 bills seeking to strengthen state equal pay laws were introduced last month. While three have already died in committee, bills in Massachusetts (SB 2119) and New Jersey (SB 992) have been cleared by their state's upper chamber. The Massachusetts bill would prevent employers from paying different wages to employees of different genders for "comparable" work. New Jersey's bill would, among other things, reset the statute of limitations for filing an equal pay claim each time an individual is affected by the initial discriminatory compensation decision. In essence, the law would apply the Lilly Ledbetter Fair Pay Act provisions to state law claims.

A measure (HB 1646) passed by Washington's House would update the state's Equal Pay Act to address income disparities, employer discrimination, and retaliation practices. The bill would entitle employees to relief if they receive less favorable employment opportunities because of being discriminated against on account of gender. The bill defines "less favorable employment opportunities" as "assigning or directing the employee into a less favorable career track or position based on gender." Factors to be considered in making this assessment include, but are not limited to, "failing to use reasonable means to provide the employee information about advancement in their career tracks or positions, including but not limited to posting information on internal and external web sites,

in employee common areas, or at the employer's human resource office."

Hawaii is also considering legislation (HB 1909; SB 2313) that would establish a "comparable work" equal pay benchmark similar to that enacted under California law. These companion bills have cleared committees in their respective chambers.

Wage Theft

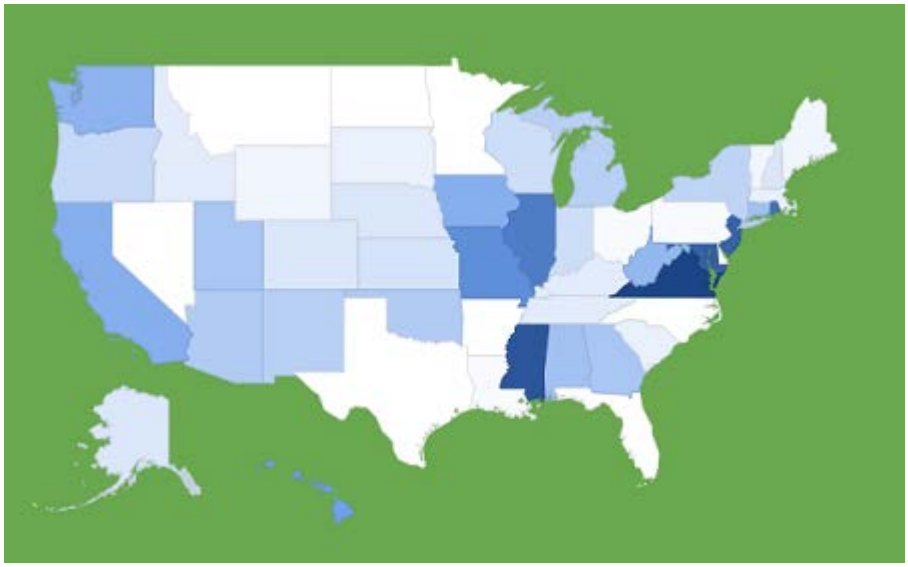
Cincinnati, Ohio approved an ordinance to address so-called "wage theft." This measure prevents an employer found to have violated wage payment laws from doing business with the city. Time will tell whether other cities follow Cincinnati's lead. At the state level, Rhode Island introduced bills (HB 7628, SB 2475) targeting an employer's unlawful nonpayment of wages.

Franchise Industry

Recent federal agency focus on whether franchisors should be deemed joint employers with their franchisees for liability purposes has spurred many states to introduce laws to delineate who is the "employer" under state law. In Michigan, a series of bills (HB 5070-73) were enacted in February stipulating a franchisee is considered the sole employer of workers "for whom the franchisee provides a benefit plan or pays wages." Similar bills were enacted in Wisconsin (SB 422) and cleared both chambers in Indiana (HB 1218) and Virginia (HB 18). Georgia's Senate has passed a bill (SB 277) that would also clarify "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose." While these bills would not likely preempt federal law, they do signify states are doing as much as they can within their purview to protect franchisors from additional joint employer liability.

Labor Relations

The backlash against an increasingly active National Labor Relations Board might be the impetus for the uptick in right-to-work legislation. In February, West Virginia became the 26th right-to-work state. Lawmakers overrode the governor's veto of the



This map shows legislative activity by state for February 2016. The darker the state, the more bills or ordinances were considered.

Workplace Freedom Act, a measure that eliminates language allowing employment agreements to require membership in a labor organization as a condition of employment.

In neighboring Virginia, lawmakers approved a ballot initiative that will let voters decide on November 8 whether to prohibit "any agreement or combination between an employer and a labor union or labor organization whereby nonmembers of the union or organization are denied the right to work for the employer, membership to the union or organization is made a condition of employment or continuation of employment by such employer, or the union or organization acquires an employment monopoly in any such enterprise."

Colorado's State Senate passed a bill (SB 70) that would achieve the same end.

In Kentucky, however, a federal judge held in February that the National Labor Relations Act preempted a Hardin County, Kentucky right-to-work ordinance that banned requiring the payment of union fees.

Fair Scheduling Laws

A number of states are attempting to follow San Francisco's lead by introducing bills that would require employers to provide employees with advance notice of their work schedules, and impose penalties for noncompliance. Such measures were introduced in Maryland (HB 1175; SB 664), New Jersey (SB 1397), and Rhode Island (HB 7515 & 7634). A California statewide bill (AB 357), however, was defeated.

"Gig Economy"

Whether workers in the so-called "gig economy" are employees or independent contractors is an evolving question. A bill (SB 20) that cleared Indiana's House and Senate in February seems to address this issue. The legislation creates an independent contractor test under state law that specifically alludes to workers involved in online commerce. For determining who is an independent contractor, SB 20 clarifies that a "qualified marketplace contractor" means one who "enters into an agreement with a qualified marketplace platform to use the qualified marketplace platform's digital application or digital platform to provide services to an individual or entity that seeks to obtain the services." A "qualified marketplace platform" is defined as one who "operates a digital application or digital platform that facilitates the provision of services by a qualified marketplace contractor to an individual or entity that seeks to obtain the services." The bill then sets forth a test for assessing when such a "qualified market contractor" should be classified as an independent contractor under state law. Because amendments were made to the measure, the two houses must reconcile the differences before moving forward. Similar bills died in Mississippi's legislature, while others are pending in Arizona and Nebraska.

Pregnancy Accommodation

Bills requiring employers to provide employees with reasonable accommodations for pregnancy or pregnancy-related conditions continue to advance. Such bills moved through both chambers in Utah (SB 59), at least one chamber in Washington State (HB 2307-House; SB 6149 - Senate), and were introduced in Georgia, Iowa, and Oklahoma.

Sick leave

Entitling employees to accrue paid sick time continues to be popular at the state level. Vermont is on track to become the fifth state to enact a paid sick leave law applicable to private employers. House Bill 187 cleared both state houses in February, and the governor has indicated he intends to sign it into law. This measure would require employers to initially

provide employees with at least three days (24 hours) of paid sick leave per year, an amount that would increase to five days (40 hours) by the year 2019. At least five other bills that would require the provision of paid sick leave were introduced in February.

Discrimination

States continue to introduce bills to expand protected classifications under state anti-discrimination law. In February alone, at least 14 such measures were introduced, half of which would add protections for discrimination on the basis of sexual orientation or gender identity.

Meanwhile, California's Department of Fair Employment and Housing posted new guidance to assist employers with transgender employees in complying with the Fair Employment and Housing Act. The guidance, issued in the form of frequently asked questions, explains the types of questions an employer may ask an employee or job applicant, whether employers may still implement dress codes and grooming standards, and what an employer's obligations are regarding restrooms, showers, and locker rooms. The guidance provides steps an employee can take to seek redress for potential violations.

Background Checks

Limiting an employer's ability to use criminal or credit histories in making employment decisions remains a popular legislative topic at the state level. Measures limiting criminal history inquiries cleared the Indiana Senate (SB 267) and Washington's House (HB 1553) in February. Ten bills limiting criminal history inquiries and three bills limiting credit history information were introduced in February alone. Several similar bills are still pending.

What's Ahead?

Over the next few months, state legislatures will weed through pending bills while introducing new ones. We will continue to monitor these measures and determine new labor and employment trends at the state and local levels.

– By Ilyse Schuman and Tessa Gelbman

GLOBAL REPORT

The following is a roundup of labor and employment news from around the globe:

Asia/Pacific

Australia. Keeping up with employment changes spurred by the so-called gig economy is an international issue. Australia's New South Wales (NSW) Government recently issued a position paper on the collaborative or "sharing economy" generated by the rise in online commerce. The report defines the collaborative economy as "an economy built on distributed networks of connected individuals and communities versus centralised institutions, transforming how we can produce, consume, finance, and learn." The stated purpose of the paper is to provide greater understanding of the collaborative economy within NSW's jurisdiction, and to target areas for growth and development within this economic sector. The report analyzes several industries within the collaborative economy, including transportation; accommodation services; financial services; the goods and redistribution market; services and labor hire; and education, and discusses sectors that may see future growth.

New Zealand. An omnibus employment bill is advancing. On February 12, 2016, the Employment Standards Legislation Bill (53-2) was reported back from the Transport and Industrial Relations Committee. This measure seeks to amend various New Zealand employment laws and standards. Among other substantive changes, the measure would expand eligibility for parental leave, increase an employer's recordkeeping obligations over employees' hours worked and amount paid, create a new regime to address serious minimum wage violations, and impose certain limitations on the use of zero-hour contracts (contracts that do not guarantee hours, but include provisions requiring employees to be available when needed). With respect to the use of zero-hour contracts, the bill would prohibit "availability" provisions unless the employer includes "genuine reasons" for including them.

Europe

European Union. On February 2, 2016, the U.S. Department of Commerce and the European Commission announced they had agreed to a new cross-border data transfer framework. Multinational employers had been eagerly awaiting the arrival of a new framework—called the "Privacy Shield"—following the uncertainty caused by the European Court of Justice's October 2015 decision that invalidated the existing U.S.-EU safe harbor. The following day, the EU's main data protection agency—the Article 29 Working Party—issued its own statement regarding the new Privacy Shield, essentially reserving judgment pending further review. On February 29, the European Commission released its decision on the adequacy of the Privacy Shield.

United Kingdom

Pay Transparency. The UK government has published its response to a request for input on the new pay transparency measures for large employers. Starting in April 2017, private employers with 250 or more employees in the UK will be required to track gender pay gap information, and report the data collection by April 2018. The government issued its request for comments ("Consultation on Closing the Gender Pay") last summer. The government's response explains the parameters of the reporting obligations, who must report on gender pay disparities, when the regulations take effect, and how often such reports must be provided, among other details. The government is also seeking input on draft regulations to implement the pay transparency requirements. These regulations are slated to take effect in October 2016.

Workplace Trends Report. The UK's Acas (Advisory, Conciliation and Arbitration Service), the entity that provides free and unbiased employment law-related advice to both employers and employees in the UK, has issued a report on workplace trends for 2016. Among other notable UK employment trends for this year, the continuing use of zero-hour contracts (contracts with no set minimum hours), movement on the proposed Trade Union Bill, outsourcing, pressure to increase the minimum wage, and efforts to combat workplace bullying made the list.

Psychoactive Substances Act. As employers in the

United States struggle to reconcile legalized marijuana and workplace drug testing laws and policies, the UK has approached the problem differently through the recently enacted Psychoactive Substances Act. This measure prohibits the production, distribution, sale and supply of so-called "legal highs"—i.e., those produced by legally purchasable psychoactive substances that are not covered under existing drug laws. To assist employers with combatting legal highs, the Acas has issued guidance on this topic.

National Minimum Wage Enforcement. The UK's Her Majesty's Revenue and Customs ("HM Revenue & Customs" or "HMRC"), the enforcement agency responsible for tax collection, has issued a fact sheet that provides guidance to employers on their obligations to pay their workers at least the national minimum wage (NMW), and how the agency will conduct checks to ensure compliance. The fact sheet includes information on the NMW itself, the role of the HMRC in conducting employment wage checks, the investigation process, the assessment of penalties, and how an employer can appeal an adverse finding.

North America

Canada

Protecting Employees' Tips Act. Efforts to curtail so-called "wage theft" are not limited to the United States. Lawmakers in Ontario have approved the Protecting Employees' Tips Act, 2015 ("Bill 12"), a measure that amends the Employment Standards Act, 2000, to prevent employers from improperly withholding or reducing an employee's earned tips. Under the terms of Bill 12, which takes effect on June 10, 2016, an employer "shall not withhold tips or other gratuities from an employee, make a deduction from an employee's tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorized to do so…." The bill includes allowances for tip pooling and makes other noted exceptions.

Workplace Safety Report. The results from a series of Ontario industrial workplace inspections conducted from September 14 to October 23, 2015, to check for material handling hazards were released in February. Ministry of Labour inspectors engaged in the "enforcement blitz" to ensure employer compliance with the country's Occupational Health and Safety Act (OHSA) and accompanying regulations as part of the "Safe At Work" Ontario enforcement initiative. The blitz involved 1,224 visits to 1,014 workplaces, and resulted in a total of 4,393 citation orders, including 107 stop work orders. Orders were most often issued for instances in which the employer failed to ensure lifting devices were examined properly and operating within their load capacity; equipment, materials, and protective devices were maintained in good condition; and materials were transported, placed, or stored in a manner to prevent tipping hazards.

South America

Venezuela. On February 17, 2016, the President of Venezuela announced an increase in the country's minimum wage and meal break benefit. On March 1, 2016, the monthly minimum wage will increase by 20%. This increase will impact social benefits based on the minimum wage, including the child care benefit and social security. The meal break benefit will now equal 2.5 tax units per day, or 442.50 bolivars.

Global

The International Organization for Standardization (ISO), an independent, non-governmental international organization that develops and publishes non-binding international standards, has moved forward with ISO 45001, a standard governing occupational safety and health. According to a news release issued February 12, 2016, the safety standard, which has been in development for several years and has involved the input from more than 70 countries, has advanced to the Draft International Standard (DIS) stage. Following a vote and comment period by the ISO national member bodies, the standard will be issued as a Final Draft International Standard (FDIS), and if approved, as an International Standard by late 2016 / early 2017.

– By Michael Lotito and Tessa Gelbman

IN FOCUS

Political Speech and Activity in the Workplace

The 2016 election cycle began long before the first votes of the Presidential primary season were cast in Dixville Notch, New Hampshire. It will not end until November 8th when voters across the country head to the polls to determine the next occupants of the White House and various governors' mansions, as well as control of the U.S. Congress and state legislatures. In the interim, the heated debate on the campaign trail will no doubt make its way from town halls to dinner tables and to workplaces. This can lead to tensions and disagreements in the office, the lunch room, and the shop floor. With the political stakes so high, candidates, political parties, and independent committees are encouraging voters to contribute, volunteer and become engaged. How should employers respond when politics spills over to the workplace?

Some employers may seek to minimize political discussions at work. Others may themselves try to interject politics into the workplace. Regardless of whether an employee may engage in political activity in the workplace, employees may have rights to conduct political activities outside of work, and to take time off from work, where needed, to vote in an election. Employers must be cognizant of federal and state laws protecting their employees with respect to political speech and activity. First of all, it is a federal crime to interfere with an individual's ability to vote for federal candidates, or to coerce that individual to cast a ballot in a specific way.[1] Similarly, it is unlawful to bribe or offer an "expenditure" to an individual in exchange for voting a certain way.[2] However, much of the other relevant law varies by state. While several areas of the relevant law are discussed below, employers are urged to consult counsel about specific state laws applicable to them.

Section 7 of the NLRA

Section 7 of the National Labor Relations Act, which applies to both unionized and non-unionized employees, provides: "[e]mployees shall have the right … to engage in … concerted activities for the purpose of … mutual aid or protection." In *Eastex, Inc. v. NLRB*, the U.S. Supreme Court interpreted this provision to mean that employees may organize as a group to "improve their lot" outside of the employer-employee relationship. Essentially, employees may engage in protected political advocacy so long as it relates to labor or working conditions; this can mean contacting legislators, testifying before agencies, or, more relevantly for election season, joining protests and demonstrations. Employers are generally barred from retaliating against employees who participate in these types of political activities outside the workplace, so long as the means used are not themselves prohibited.

In 2008 guidance, the then-General Counsel of the NLRB laid out a framework for analyzing unfair labor practice charges involving discipline of employees who engage in political advocacy. While the nexus is not always clear between the political advocacy and the benefit to workers, the General Counsel's guidance includes the example of an employee attending a demonstration in favor of immigration reform as being protected by Section 7. According to the General Counsel, because employment verification legislation could be deemed to chill even legal hiring activity, the demonstration sufficiently relates to the employees' "mutual aid or protection."[3]

Restrictions on Employer Solicitations for Political Contributions

There are limits on what employers can do to raise money for political candidates from their employees. For instance, improper solicitations of a corporation's "restricted class"—its non-unionized managers, officers, and executives—may generate

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[1] 18 U.S.C. § 594.
[2] 18 U.S.C. § 597.
[3] R. Meisburg, *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, Memorandum GC 08-10 at p.12 (July 22, 2008).

a labor union's right to solicit its own members in ways that would otherwise be prohibited. Some companies may seek to create "separate segregated funds"—more commonly known as Political Action Committees (PACs). However, contributions to those PACs from employees must be entirely voluntary under federal law,[4] meaning employers may not condition employment or any change in employment status on those contributions. Furthermore, employers are prohibited from reimbursing their employees for contributions made to the company's PAC.

Employers' Rights to Restrict Political Activities in the Workplace

A number of employers try to minimize political discussions in the workplace given their often heated and contentious nature. Generally, private employers have wide latitude to limit or prohibit political discussions in the workplace, simply because there is no First Amendment right or statutory regime at play in most circumstances. Similarly, many employers adopt policies that preclude employees from initiating political conversations with clients or vendors. While a complete prohibition on political speech may seem draconian, advising employees that political discussions should be limited generally appears reasonable. Moreover, because companies generally have a property interest in their resources, some employers may prohibit employees from using company property (like computers, printers, and office supplies) for political activities. They often also restrict employees from using the employer's telephones for political fundraising, or making campaign calls to potential voters. However, it is important for employers to have written, formal policies regarding such usage, even if it is encompassed in a broader limitation on the personal use of employer resources.

Employers' Rights to Introduce Political Speech in the Workplace

Executives, officers, and managers generally have the right to engage in political activity in the workplace. In some states, however, that activity is limited where it could be construed as intimidation or coercion on the part of the employer with respect to the employees' free choices in voting. For instance, California makes it a violation for an employer to "coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[5] The line between an employer's free expression under the First Amendment and coercion is often blurred, particularly where the employer's own financial fortunes are mentioned. In the context of 29 U.S.C. § 158(a)(1), which prohibits employers from using threats or coercion against employees considering unionization, courts have tried to draw a fine line between an employer's mere predictions of negative consequences for the business, and outright threats to employees. The former are protected by the First Amendment, while the latter are not. While the same distinction likely carries analogous force in the political speech context, courts can be unpredictable in defining the contours of permissible employer statements.

Moreover, because political communications are often broadcast to a number of employees, they present a unique problem in employment litigation. Employees may allege, in addition to their other claims, that they felt coerced by corporate officials with respect to voting or political contributions. Thus, even where an employer may have a strong defense to a race- or gender-based claim, a

[4] 2 U.S.C. § 441b(b)(3)(A).
[5] Cal. Labor Code § 1102.

secondary claim for impermissible political coercion can add negotiating power to a plaintiff's settlement demands. Thus, in many cases, even when an employer's political speech may be legal, it is generally advisable to avoid political activity in the workplace.

Leaves of Absence for Employees to Vote

There is no federal law requiring time off to vote in an election. However, the majority of states require employers to provide their employees with time off. Employers in these states may not take adverse employment action against employees who take time off to vote, although some states require employees to provide advance notice to be eligible for protected leave. The state laws vary as to how much time off must be provided, the circumstances under which time off must be provided, whether time off must be paid and how much notice must be given by the employee. For instance, in California, employees who will not otherwise be able to vote may take up to two hours of paid leave to do so. Regardless of whether any employees take such leave, employers must post notices advising employees of their rights within 10 days of a given election, and keep those notices posted until Election Day

States that do not require time off for voters include: Connecticut, Delaware, District of Columbia, Florida, Idaho, Indiana, Louisiana, Maine, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Virginia and Washington.

In the states that do require time off for voting, the requirement often depends on the hours polls are open, as well as the employee's work schedule. Thus, for many employees who are able to vote before or after their work shifts—often defined as between one to three hours while polls are open—these laws have little effect.

While the general election is still eight months away, the questions and challenges employers face with respect to political speech and activity in the workplace has already begun. As the election nears, these questions are sure to multiply.

– By Ilyse Schuman and Michael J. Lotito

OUTLOOK

MARCH

Comments Due on Proposed IRS Rule Governing Suspension of Benefits Limitation Applicable to Certain Multi-Employer Pension Plans

Tuesday, March 15, 2016

The Multiemployer Pension Reform Act of 2014 (MPRA) governs multiemployer defined benefit pension plans that are in critical and declining status. Under MPRA, the sponsor of such a plan is permitted to reduce the pension benefits payable to plan participants and beneficiaries if certain conditions and limitations are satisfied. One specific limitation governs the application of a suspension of benefits under any plan that includes benefits directly attributable to a participant's service with any employer that has withdrawn from the plan in a complete withdrawal, paid its full withdrawal liability, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries equal to any benefits for such participants and beneficiaries reduced as a result of the financial status of the plan. The IRS has issued a proposed rule providing guidance on this specific limitation. Read more»

EEOC to Hold Public Meeting on Proposed Changes to EEO-1

Wednesday, March 16, 2016

The Equal Employment Opportunity Commission will hold a public hearing to gather information and hear public comment on its proposed revision of the Employer Information Report (EEO-1). The meeting will begin at 9:30 ET at the EEOC's Washington, DC headquarters. Read more»

180th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans

Wednesday, March 16, 2016

The Advisory Council on Employee Welfare and Pension Benefit Plans ("ERISA Advisory Council") will hold a public meeting from 9:00 a.m. to 3:30 p.m. ET at the U.S. Department of Labor headquarters on March 16. At this meeting the ERISA Advisory Council will set its agenda for 2016. Read more»

Deadline to File Briefs in NLRB Case *King Soopers, Inc.*

Friday, March 18, 2016

The National Labor Relations Board is asking interested parties for briefs in the case *King Soopers, Inc.* (27-CA-129598). Comments should address whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees. Read more»

Deadline to File Briefs in NLRB Case *United States Postal Service*

Friday, March 18, 2016

The National Labor Relations Board is asking interested parties for briefs in the case *United States Postal Service* (07-CA-142926). Questions raised in that case include whether the Board may continue to permit administrative law judges to issue a "consent order" incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel. Read more»

OSHA to Hold Rescheduled Hearing on Occupational Exposure to Beryllium

Monday, March 21, 2016

OSHA is rescheduling the informal public hearing on its proposed rule "Occupational Exposure to Beryllium and Beryllium Compounds." The public hearing will now begin on Monday, March 21, 2016 at 2:00 p.m. ET. Read more»

Comments Due on Proposed Federal Contractor Rule Implementing Small Business Jobs Act of 2010
Monday, March 21, 2016
The DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the Small Business Jobs Act of 2010. This statute requires contractors to notify the contracting officer in writing if the contractor pays a reduced price to a small business subcontractor, or if the contractor's payment to a small business contractor is more than 90 days past due. Read more»

Comments Due on DOT Proposed Rule Governing Motor Carrier Safety
Monday, March 21, 2016
The Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) has issued a proposed rule amending the Federal Motor Carrier Safety Regulations (FMCSRs) to revise the current methodology for issuance of a safety fitness determination (SFD) for motor carriers. Read more»

Comments Due on FAR Council Proposed Confidentiality Rule
Tuesday, March 22, 2016
The DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the Consolidated and Further Continuing Appropriations Act, 2015, that prohibits the use of funds, appropriated or otherwise made available, for a contract with an entity that requires employees or subcontractors to sign an internal confidentiality agreement that restricts such employees or subcontractors from lawfully reporting waste, fraud, or abuse to a designated government representative authorized to receive such information. Read more»

IRS to Hold Public Hearing on Proposed Rule under the Multiemployer Pension Reform Act of 2014
Tuesday, March 22, 2016
The IRS has issued a proposed rule providing guidance on a specific limit of the application of a suspension of benefits under the Multiemployer Pension Reform Act of 2014. The proposal is expected to impact active, retired, and deferred vested participants and beneficiaries under any such multiemployer plan in critical and declining status as well as employers contributing to, and sponsors and administrators of, those plans. The agency plans to hold a public hearing on this proposal on March 22 in Washington, DC. Read more»

Comments Due on Proposed Rule Implementing the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act
Monday, March 28, 2016
The U.S. Department of Labor is proposing to issue nondiscrimination and equal opportunity regulations replacing its regulation that implemented Section 188 of the Workforce Innovation and Opportunity Act (WIOA). WIOA supersedes the Workforce Investment Act of 1998 (WIA) as the Department's primary mechanism for providing financial assistance for a comprehensive system of job training and placement services for adults and eligible youth. The proposed rule would update the nondiscrimination and equal opportunity regulation consistent with current law and address its application to current workforce development and workplace practices and issues. Read more»

Comments Due on Proposed Rule Governing Federal Contractor Paid Sick Leave
Monday, March 28, 2016
The U.S. Department of Labor has issued a proposed rule to implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, signed by President Barack Obama on September 7, 2015, which requires certain parties that contract with the federal government to provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care. Read more»

Comment Period Ends for Input on Future OSHA Guidance for Determining Chemical Health Hazards
Thursday, March 31, 2016
The Occupational Safety and Health Administration plans to issue new guidance on how to apply the Weight of Evidence approach when dealing with complex scientific studies. To this end, OSHA is accepting comments on its Guidance on Data Evaluation for Weight of Evidence Determination, which is intended to help employers consider all available information when classifying hazardous chemicals. Read more»

APRIL

Comments Due on Proposed Changes to EEO-1 Reporting Forms
Friday, April 1, 2016
The Employment Opportunity Commission is seeking to amend Employer Information Report (EEO-1) data collection to require employers with 100 or more employees (both private industry and federal contractors) to submit information on their employees' pay and hours worked. Read more»

Comments Due on OSHA's Solicitation of Information Governing Whistleblower Complaint Process
Monday, April 18, 2016
The Occupational Safety and Health Administration is seeking comments on proposed changes on how the agency will handle retaliation complaints filed with the agency under various whistleblower protection statutes and procedural regulations. Proposed changes include revisions to the form employees use to submit retaliation complaints to OSHA, including electronic submission. Another proposed change would direct employees to other agencies that could provide redress if the employees' claims are not governed by OSHA. Read more»

Comments Due on Proposed Rule Governing Nondiscrimination Relief for Closed Defined Benefit Pension Plans
Thursday, April 28, 2016
The IRS has issued a proposed rule that modifies the nondiscrimination requirements applicable to certain retirement plans that provide additional benefits to a grandfathered group of employees, following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposal makes other changes to the nondiscrimination rules that are not limited to these plans. These regulations would affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified retirement plans. Read more»

MAY

The 2016 Executive Employer® Conference
Wednesday, May 4 – Friday, May 6, 2016
Littler's Executive Employer® Conference is a multi-day event that covers the most significant employment law developments and trends impacting the workplace. The conference is designed specifically for in-house counsel, human resources executives and employee relations professionals. Read more»

Final Rule on Benefit and Payment Parameters Under the Affordable Care Act Takes Effect

Monday, May 9, 2016

The U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), has issued a final rule implementing several provisions of the Affordable Care Act. The rule establishes payment parameters and provisions related to the risk adjustment, reinsurance, and risk corridors programs; cost-sharing parameters and cost-sharing reductions; and user fees for federally-facilitated Exchanges. The final rule also provides additional changes to the annual open enrollment period for the individual market for the 2017 and 2018 benefit years; essential health benefits; cost sharing; qualified health plans; the Small Business Health Options Program; third-party payments to qualified health plans; the definitions of large employer and small employer; fair health insurance premiums; the medical loss ratio program; eligibility and enrollment; exemptions and appeals; and other related topics under the ACA. Read more»

IRS Public Hearing on Proposed Changes to the Nondiscrimination Requirements Applicable to Certain Retirement Plans

Thursday, May 19, 2016

The IRS will hold a public hearing to discuss proposed changes to the nondiscrimination requirements applicable to certain retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposed change would affect participants in, beneficiaries of, employers maintaining, and administrators of, tax-qualified retirement plans. The public hearing is scheduled for May 19, 2016 at 10:00 a.m. ET in Washington, DC. Read more»

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