

September 2016

INSIDER BRIEFING

August is typically a slow month in Washington. When Congress is out of session, there is an exodus from the hot and humid Capital. However, with only a few months left in the Obama Administration, August was anything but slow from a workplace policy perspective. The Department of Labor (DOL), National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC) released regulations and subregulatory directives that could have profound implications for employers. As the highly charged presidential and congressional elections approach, members of Congress and stakeholders in the employer community weighed in on the final administrative push to effectuate its workplace policy agenda before the next president and Congress are sworn into office.

Fair Pay and Safe Workplaces Executive Order

On August 24, 2016, the Department of Defense, General Services Administration, the National Aeronautics and Space Administration (FAR Council) and the DOL released the final rule and guidance, respectively, implementing the Fair Pay and Safe Workplaces Executive Order (EO). The so-called "blacklisting rule" has been the subject of much concern, controversy and confusion since the EO was issued two years ago. Despite numerous and strenuous objections to the proposed rule and guidance raised by government contractors, the final

Continued on [page 2](#)

ON THE MOVE

With Labor Day approaching, lawmakers at the local, state, and federal levels will continue to push bills, ordinances, and ballot initiatives governing the workplace. While August is ordinarily a sleepy legislative period, at least eight city labor and employment-related ordinances were adopted, seven state bills enacted, and six local ballot initiatives certified for the November election. Another handful of bills cleared both legislative chambers. Measures considered last month include those related to equal pay, paid time off, minimum wage, non-compete agreements, and fair scheduling. The following discusses some of these measures that moved in August.

Minimum Wage

In 2016 it became more common for localities to advocate for a \$15.00-per-hour minimum wage. A recent endorsement for such a raise occurred in San

Continued on [page 5](#)

TABLE OF CONTENTS

Insider Briefing	1
On the Move	1
Global Report	8
In Focus	10
Outlook	12

INSIDER BRIEFING, CONTINUED

product mirrors the proposal in its most fundamental and problematic aspects. Namely, the final DOL guidance retains a broad definition of "administrative merits determination" that would mandate contractor and subcontractor reporting of notices or findings – *whether final or subject to appeal or further review* – issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the 14 enumerated labor laws set forth in the EO. The EO requires contractors and subcontractors on covered federal contracts to disclose "administrative determinations, arbitral awards, and civil judgments" (referred to in the rule as "labor law decisions") finding "violations" of their enumerated labor laws and state law equivalents. Contracting officers, in consultation with agency labor compliance advisors (ALCAs), will consider the decisions, including any mitigating factors and remedial measures, as part of the contracting officer's decision to award or extend a contract.

The DOL cited Littler's Workplace Policy Institute comment objecting to characterizing an NLRB Regional Director's complaint as "being based on investigatory findings without judicial or quasi-judicial safeguards." Despite this objection, the DOL retained the definition of administrative merits determinations largely as proposed.

The EO's disclosure requirements will be phased in for solicitations valued at \$50 million or more issued on or after October 25, 2016. The threshold will be reduced to \$500,000 beginning on April 25, 2017. In addition, subcontractors will disclose labor law decisions directly to the DOL instead of the contractor, as initially proposed. Disclosure of state-law equivalent decisions will wait until a future date based on future rulemaking. Despite these positive changes for contractors, the final rule and guidance present significant risks and challenges to contractors.

Congressional Republicans were quick to condemn the final rule. House Education and the Workforce Committee Chairman John Kline (R-MN), along with Workforce Protections Subcommittee Chairman Tim Walberg (R-MI) and Health, Employment, Labor, and

Pensions Subcommittee Chairman Phil Roe (R-TN), issued a [statement](#) in response to the administration's final blacklisting regulation and guidance, saying: "[t]his redundant, unnecessary, and unworkable regulatory scheme isn't about protecting the rights of workers. It's about growing government and promoting a culture of union favoritism."

No doubt with an eye to legislative and legal challenges to the blacklisting rule, the FAR Council and DOL went to great lengths to try to explain their dismissal of contractors' objections. That the agencies largely ignored these concerns sets up a battle in court and in Congress. House and Senate-passed versions of the National Defense Authorization Act (NDAA) would exclude or limit the application of the blacklisting rule for Department of Defense contractors. With the final rule now issued and compliance obligations imminent, the stakes for a legislative fix or lawsuit to block the rule have become that much higher. Littler's WPI, in conjunction with its Government Contractors Industry Group and Whistleblowing and Corporate Ethics Practice Group, are engaged in voicing the concerns of the contractor community in what could be a significant game change for doing business with the federal government.

Implementation of the Fair Pay and Safe Workplaces EO has been a priority for the White House, and will likely be strongly defended during the NDAA conference report negotiations.

Retirement Savings Programs

Another White House priority has been expanding the availability of retirement plans for workers who do not have access to a retirement plan through their employer. At a White House Conference on the Aging on July 13, 2015, President Obama [stated](#): "[w]e've got to make it easier for people to save for retirement . . . So I've called on the Department of Labor and Tom Perez to propose a set of rules by the end of the year to provide a clear path forward for states to create retirement savings programs."

On August 25, 2016, the DOL unveiled a final rule offering a path forward for states looking to create

INSIDER BRIEFING, CONTINUED

their own retirement savings plans. Specifically, the rule provides that a state retirement savings program is not an ERISA plan and hence unlikely to be preempted by ERISA if the program: (1) is established and administered by the state; (2) provides for a limited employer role; and (3) is voluntary for employees. The President's Budget Request has repeatedly proposed to automatically enroll workers in an Individual Retirement Account (IRA) if they do not have access to a workplace plan. Eight states have passed laws to create state-administered retirement savings programs for private-sector workers, and the final rule is intended to encourage more to do so by reducing the risk that the state laws would be invalidated based on ERISA preemption.

To qualify under the final rule, a state program must be established and administered by the state, and provide for a limited employer role. Participation in the program must be required under state law for employers, but voluntary for employees. One significant concern for employers is that states could impose this requirement on employers that already offer retirement plans, yet employ individuals who are not eligible to participate in those plans.

On the same day it published its final rule on state retirement savings plans, the DOL issued a proposed rule that would enable some larger cities to create retirement savings plans. Under the proposed rule, a

city could create its own retirement savings program provided: (1) it has the authority under state law; (2) its population is equal to or greater than the population of the least populous state; and (3) the state does not have its own retirement savings program. As more states and localities adopt these private retirement mandates, a host of questions and challenges for employers, particularly multi-state employers, are sure to emerge. Such regulations and mandates may form the basis of broader policy changes.

EEOC Enforcement Guidance on Retaliation

On August 29, the EEOC issued its long-anticipated final [Enforcement Guidance on Retaliation and Related Issues](#), to replace its 1998 Compliance Manual section on retaliation. The Commission also issued an accompanying [question-and-answer publication](#) summarizing the guidance, and a [small business fact sheet](#).

According to a press release announcing the final guidance, EEOC Chair Jenny R. Yang said:

retaliation is asserted in nearly 45 percent of all charges we receive and is the most frequently alleged basis of discrimination . . . The examples and promising practices included in the guidance are aimed at assisting all employers reduce the likelihood of retaliation. The public input provided during the development of this guidance was valuable to the Commission in producing a document to help employers prevent retaliation and to help employees understand their rights.

The EEOC published its proposed guidance on January 21, 2016.

In its comment letter on the proposal, Littler's WPI stated:

The proposed guidelines . . . misguide

Quote of the Month

"These regulations will bury federal contractors and subcontractors under mountains of paperwork and then prevent some from getting work for a labor violation they didn't commit."

— Senate Labor Committee Chairman Lamar Alexander (R-TN) in reaction to the new "blacklisting" rule

INSIDER BRIEFING, CONTINUED

EEOC personnel on the definition of "protected activity" and the standard for "causal connection," by defining these terms in a manner that contradicts federal law. To ensure that its personnel (or anyone else) who will rely on these guidelines as a roadmap to EEO retaliation laws, the Commission must revise the proposed guidelines to ensure that they are accurate and comport with the letter and spirit of the law.

Further analysis of the final retaliation guidance will be forthcoming. Yet, it appears that the final guidance does not fully remedy this disconnect.

EEOC Proposed Revisions to the EEO-1 Report

Meanwhile, the EEOC's proposed revisions to the EEO-1 report to include pay data is under review for approval by the White House Office of Management and Budget (OMB). The EEOC's revised proposal submitted to OMB was very close to the original proposal, which was strongly criticized by many in the employer community for being overly burdensome and failing to yield accurate, useful data about pay discrimination. Senators Lamar Alexander (R-TN), Pat Roberts (R-KS) and Johnny Isakson (R-GA) asked OMB to disapprove the revised proposal in a letter dated August 16, 2016. In the [letter](#), the Senators stated that the EEOC "did not meet the Paperwork Reduction Act's two goals: to minimize paperwork and reporting burdens and to ensure the maximum possible utility of the data collected."

NLRB Activity

The NLRB continues its march towards overturning precedent issued by the George W. Bush-era Board. The 2004 decision in *Brown University* held that graduate students are not employees under the National Labor Relations Act (NLRA). On August 23, the Board issued a decision reversing *Brown* and holding instead that graduate and undergraduate student assistants at Columbia University are employees who have the right to unionize. In the *Columbia* decision, the Board majority rejected the

conclusion in the *Brown* case that graduate assistants cannot be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university." With implications beyond universities, the Board opined that the definition of employee under the NLRA is broad. The *Columbia* decision also reflects the Board's preference for collective bargaining in an academic setting. In his dissent, Member Phillip Miscimarra stated: "I do not believe our statute contemplates that it should be governed by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other." The majority's preference for collective bargaining is not surprising, but its application in the academic setting is certainly striking.

Gig Economy

Policymakers are increasingly focused on the "gig economy." The Internal Revenue Service (IRS) recently launched a new sharing economy [resource center](#). The IRS resource center notes that "although this is a developing area of the economy, there are tax implications for the companies that provide the services and the individuals who perform the services." The IRS is providing additional information to assist individuals and tax professionals with the tax issues and questions related to this emerging area—and one that is likely to continue to grow and evolve.

Conclusion

When Congress returns to Washington after the August recess, time will be short – and likely contentious – before adjourning again until after the November elections. Congress has a lengthy to-do list, with a continuing resolution to keep the government funded until at least after the election at the top of the list. The fate of a final omnibus appropriations bill, and policy riders to block regulatory actions, will likely have to wait until after the elections. Meanwhile, the pace of administrative action to enact dramatic workplace policy changes shows no signs of abating.

– By Ilyse Schuman and Michael J. Lotito

ON THE MOVE, CONTINUED

Mateo, California, where the City Council on August 15 voted to increase the citywide minimum wage, in increments, to \$15.00 by 2019. The first increase—to \$12.00 per hour—is slated to begin on January 1, 2017.

Elsewhere in the Golden State, Berkeley's city council voted unanimously to similarly raise the City's minimum wage to \$15.00 per hour over the next two years. On October 1, 2016, the hourly minimum wage will increase to \$12.53; on October 1, 2017, it will rise to \$13.75; and on October 1, 2018, it will hit the target \$15.00 hourly mark.

Other cities may see a rise in their hourly pay rates. The Polk County, Iowa Task Force recently recommended raising the jurisdiction's minimum wage to \$10.75 by 2019, although youth workers would be excluded from this increase. The Polk County Board of Supervisors is expected to review these recommendations and draft a proposed ordinance to implement the increase in September.

In contrast, movement towards a higher minimum wage in some cities hit a snag. The Cleveland, Ohio City Council rejected a proposed \$15.00 minimum wage, although proponents of a wage increase will likely attempt to certify the issue as a ballot initiative. Similarly, on August 31, the Minnesota Supreme Court rejected an attempt to increase Minneapolis' minimum wage to \$15.00 per hour by way of a charter amendment. Further east, Baltimore, Maryland's city council sent a \$15.00-per-hour minimum wage proposal back to committee, a week after tentatively approving this bill. It is anticipated the labor committee will once again take up this measure in the fall. Meanwhile, New Jersey Governor Chris Christie vetoed a bill that would have raised the state's minimum wage to \$15.00 per hour over the next five years.

Another route to raising the minimum wage is through ballot initiatives. In August, advocates for an increase to Colorado's minimum wage announced they had enough signatures to place the \$12.00-per-hour initiative on the November ballot.

An effort in Arizona to raise that state's hourly rate to \$12.00 per hour by 2020 via ballot initiative weathered a recent challenge. On August 19, a Maricopa County Superior Court Judge dismissed a lawsuit to remove the voter initiative from the ballot, claiming the lawsuit was filed too late.

Time is running out to certify this issue for the November 8 ballot, but additional efforts are expected over the coming weeks.

Other Ballot Initiatives

Efforts to place other controversial issues before voters on November 8 continue. While raising the minimum wage and legalizing certain uses of marijuana seem to be the most popular employment ballot initiatives, the electorate will get to decide other matters. For example, under Seattle Initiative 124, the Seattle Hotel Employees Health and Safety Initiative, voters will decide whether Seattle hotel industry employers will face new and significant health and safety, healthcare, and hiring requirements. This initiative would, among other things, require hotel employers to institute protections regarding sexual assault and harassment, take steps to prevent on-the-job injury, offset the cost of health insurance, and retain workers if a change in ownership occurs.



ON THE MOVE, CONTINUED

Fair Scheduling

Cleveland Ohio Ordinance No. 925-16 would amend the City Charter to create a Part-Time Workers' Bill of Rights. Specifically, the changes would require employers to: (1) provide employees with advance notice of their schedules; (2) pay part-time workers the same starting hourly rate as provided to full-time employees; (3) provide part-time workers with proportional benefits given to full-time workers; and (4) give part-time workers the right of first refusal for full-time work before hiring additional part-time employees.

While not a ballot initiative, Emeryville, California's Fair Workweek / Employee Scheduling Ordinance would also impose on employers similar "fair scheduling" requirements. City lawmakers are still considering the terms and scope of this measure. Seattle, Washington's city council is also mulling over its own "predictive scheduling" bill. Bill No. 118765 would apply to employers in the retail and restaurant industries.

Paid Leave

Whether in legislative or ballot initiative form, efforts to increase an employer's obligation to provide paid leave for various reasons show no sign of abating. On August 31, Berkeley, California's city council approved an ordinance allowing employees to earn an hour of sick leave for every 30 hours worked, subject to a 48-hour accrual cap for small employers, and a 72-cap for larger employers. The Albuquerque, New Mexico City Council voted in favor of a similar measure for the November ballot.

Illinois Governor Bruce Rauner signed a Family Caregivers Bill (HB 6162) into law. This measure allows workers to use their sick leave benefits for other leave purposes, including to care for a sick family member. Under the bill, employees can use their personal sick leave benefits for absences due to an illness, injury, or medical appointment for their children, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent,

on the same terms the employees can use sick leave benefits for their own illness or injury.

Meanwhile, St. Paul, Minnesota is on the cusp of adopting its own paid sick leave ordinance. St. Paul's measure would require employers to allow employees to accrue one hour of sick and safe time for every 30 hours worked, and to accrue up to 80 hours of earned sick and safe time. This ordinance must pass a fourth reading, which is scheduled for September 7.

Finally, new amendments to San Diego's Earned Sick Leave and Minimum Wage Ordinance take effect on September 2. [The changes](#) create an administrative enforcement system for receiving and resolving complaints, and impose additional obligations on employers that might necessitate policy review/revision.

With respect to *unpaid* leave, the California Legislature has approved a bill creating the California Family Rights Act (S.B. 654), which would require employers with 20 or more employees to allow their employees to take up to six weeks of leave to bond with a new child or care for a sick family member.

Equal Pay

On August 1, Montana's governor signed an executive order to promote wage transparency for employers that do business with the state. [Executive Order No. 12-2016](#) directs the state's Department of Administration to incorporate into the state procurement process "criteria to incentivize contractors to engage in best practices to promote wage transparency." Such best practices include posting salary ranges in employment listings, certifying that the contractor will not ask about wage history in employee interviews, and certifying that the contractor will not retaliate or discriminate against employees who discuss or disclose their wages in the workplace.

Similarly, New York City Public Advocate Letitia James unveiled legislation that would bar employers from inquiring about an applicant's salary history.

ON THE MOVE, CONTINUED

According to James, this practice exacerbates the wage gap between men and women. The introduction of this measure comes just weeks after Massachusetts Governor Charlie Baker [signed](#) an Act to Establish Pay Equity, exposing employers in the Commonwealth to one of the most expansive equal pay laws in the nation.

California's Assembly and Senate approved bills that would prohibit employers from paying employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work (SB 1063), and clarify that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception to the equal pay law (AB 1676).

Non-Discrimination

On the governor's desk in California is a bill (AB 1890) that would require businesses that contract with the state to maintain a nondiscrimination program and submit periodic reports showing compliance with that program.

The City Council of Wilkes-Barre, Pennsylvania approved an ordinance that expands the City's anti-discrimination protections to cover lesbian, gay, bisexual and transgender individuals. The ordinance will undergo additional readings in September.

Retirement

At the federal level, new final and proposed rules seek to encourage states to create retirement savings arrangements for private-sector employees. Along these lines, California's Legislature approved SB 1234, a bill that would create such a state-run retirement plan. If enacted, the bill would create the California Secure Choice Retirement Plan, and cover workers whose employers do not offer retirement packages. Lawmakers in Michigan introduced a bill that would achieve a similar end (HB 5776).

Gig Economy

A federal judge in Washington has rejected the U.S. Chamber of Commerce's challenge to Seattle's ordinance permitting on-demand drivers to unionize because of the organization's lack of standing to sue. While disappointing to gig economy employers, the lawsuit was dismissed without prejudice, meaning another challenge could be brought when the ordinance takes effect. Opponents of the ordinance have claimed that it violates and is preempted by federal anti-trust and labor laws.

Non-Compete

On August 19, Illinois enacted the Illinois Freedom to Work Act (SB 3163). This law prevents employers from requiring low-wage employees to sign covenants not to compete. The law defines a low-wage worker as one who makes \$13.00 per hour or the applicable minimum wage, whichever is greater.

What's Next?

California has wrapped up its legislative session, so any new labor and employment laws from that state will be finalized soon. As has been the case in recent months, however, the greatest chance of legislative movement may occur at the local level, as proponents for raising the minimum wage or imposing other obligations on employers gather the requisite number of signatures to certify initiatives for the November 8 ballot. There is still time for surprises.

– By Ilyse Schuman and Tessa Gelbman

GLOBAL REPORT

The following is roundup of international labor and employment news:

Asia/Pacific

India. A measure seeking to extend India's maternity leave benefit from 12 to 26 weeks [cleared](#) the country's upper house of Parliament (Rajya Sabha or Council of States). On August 11, 2016, the members passed by voice vote the maternity Benefit (Amendment) Bill, 2016, which would apply to all employers with 10 or more employees.

Japan. The government of Japan is recommending a 3 percent (¥24) [raise in the country's minimum wage](#), to ¥822 per hour. The increase to the hourly wage floor will be part of an economic stimulus package.

Philippines. A Philippine lawmaker [filed a bill](#) that would extend paid paternity leave from 7 to 30 days. On August 1, Senator Francis "Kiko" Pangilinan filed draft legislation to amend Republic Act 8187, or the Paternity Leave Act of 1996. The terms of this bill cover all married male employees in both the public and private sectors. Covered employees would be entitled to paid leave for all births. The current paid benefit is provided for the first four deliveries only.

Singapore. Singapore's Ministry of Manpower (MOM) has [updated](#) its Employment Pass (EP) salary criteria. Starting January 1, 2017, employers must pay foreign professional workers at least \$3,600 per month (up from \$3,300). According to the MOM, the increased EP qualifying salary level is to "to keep pace with rising local wages, maintain the quality of our foreign workforce and enhance their complementarity to the local workforce."

Vietnam. Vietnam's National Wage Council (NWC) has set a [7.3 percent increase](#) in the minimum wage for 2017. Pending final government approval, the new minimum wages will be set at VND3.75 million, VND3.1 million, VND2.7 million and VND2.4 million for Zones 1, 2, 3 and 4, respectively.

Europe

Ireland – Posted Workers

Regulations to implement the EU Directive governing

"posted workers" (those employed in one EU Member State but temporarily assigned to work in another) were adopted in Ireland on July 27, 2016. According to a [press release](#), these regulations "strengthen the enforcement of employment rights for posted workers and ensure that foreign service providers respect labour standards applicable in Ireland." Some of these [measures include](#) a new requirement that foreign service providers notify the Workplace Relations Commission (WRC) when posting workers to Ireland, and new subcontracting liability in the construction sector to ensure posted workers are adequately paid under the law. Specifically, the regulations provide that if a posted worker is not paid the statutory rate, the next contractor up in the supply chain will be liable for the amount owed.

Ireland – Workplace Inspections

Ireland's Workplace Relations Commission (WRC) issued guidance on how workplace inspections to achieve compliance with employment laws will be carried out under the Workplace Relations Act 2015. The [WRC Guide to Inspections](#) provides information on the timing and location of inspections, how employers can prepare for them, and what happens during the inspections. The guide includes an employer recordkeeping compliance checklist.

United Kingdom – Holiday Pay

The UK's Advisory, Conciliation and Arbitration Service (Acas), which provides information and advice to employers and employees on laws affecting the workplace, has released an updated [guide](#) governing the calculation of holiday pay.

United Kingdom – Gender Pay Gap Reporting

The UK's Government Equalities Office issued a [new consultation](#) on mandatory gender pay gap reporting for public sector employers. The consultation paper explains how the government will implement mandatory gender pay gap reporting "for large public sector bodies in England and certain public authorities operating across Great Britain in relation to non-devolved functions." The consultation seeks input on how covered employers will be affected by the proposed regulations. The comment period closes on September 30, 2016.

GLOBAL REPORT, CONTINUED

North America

Canada – Alberta

The general minimum wage in Alberta [will increase](#) by \$1.00 to \$12.20 per hour on October 1, 2016, and the liquor server rate will be abolished. The following year, the rate will increase again to \$13.60 per hour; on October 1, 2018, the rate will rise to \$15.00 per hour.

Canada – British Columbia

The Province of British Columbia passed Bill 27, Human Rights Code Amendment Act, 2016, adding “gender identity or expression” to the anti-discrimination code's protected categories. According to a [press release](#), prior to the enactment of Bill 27, the province's Human Rights Tribunal and the courts interpreted the protected grounds of “sex” to cover transgender individuals. The changes to the code make this protection more explicit.

Canada – Ontario

Ontario's Ministry of Labour issued the [Changing Workplaces Review Special Advisors' Interim Report](#), an independent review commissioned by the Ontario Government to solicit input on possible changes to the Employment Standards Act, 2000 (ESA) and the Labour Relations Act, 1995 (LRA). The Report focuses on “changes in the workplace as an integrated problem in both the unionized and the non-unionized workplaces.” The Report contains the following five chapters: [Chapter 1 \(Introduction\)](#), [Chapter 2 \(Guiding Principles, Values and Objectives\)](#), [Chapter 3 \(Changing Pressures and Trends\)](#), [Chapter 4 \(Labour Relations\)](#) and [Chapter 5 \(Employment Standards\)](#). Each chapter outlines employee and employer concerns, and asks for suggestions to address them. Notably, Chapter 3 includes a discussion of the “fissured workplace,” and cites U.S. Wage and Hour Administrator David Weil, a vocal critic of contracting and outsourcing. In addition, the Report's chapter on Labour Relations includes a section on related and joint employers, a favored topic for the U.S. National Labor Relations Board and Department of Labor. The Report lays out several

options to address how to determine whether entities are joint employers, and seeks public input on those suggestions. These options include: (1) maintaining the status quo; (2) adding a provision to the law stating that the Ontario Labour Relations Board may declare that two or more employers are “joint employers” and specify the criteria that should be applied; (3) enacting specific joint employer provisions to the law to create a “rebuttable presumption that an entity directly benefitting from a worker's labour (the client business) is the employer of that worker,” and creating “a model for certification that applies specifically to franchisors and franchisees.”

Chapter 5 addresses the gig or sharing economy. According to the Report, there are misclassification concerns for workers in this sector. Among the questions for feedback are whether the ESA's definition of “employee” should “[i]nclude a dependent contractor provision . . .” and “consider making clear that regulations could be passed, if necessary, to exempt particular dependent contractors from a regulation or to create a different standard that would apply to some dependent contractors.”

Parties wishing to provide input on these and other matters discussed in the Report can find more information about doing so [here](#).

South America

Venezuela. Venezuela's Ministry of Labor [has established](#) a forced labor program, which will require public and private sector employers to supply their workers as “temporary loans” to State-owned companies to boost the country's economic development in essential industries, such as agriculture. Under the program and the presidential decree, known as the “State of Economic Emergency Decree No. 2,323,” employers must loan workers who either are physically fit or have the professional skills to perform the activities in demand by the requesting State-owned company. The program took effect on July 22, 2016, and can be applied for a 60-day period, which may be renewed indefinitely. This mandatory work program will have significant implications for both the workforce and private sector employers.



IN FOCUS

The Push for Paid Sick Leave

On August 9, 2016, the U.S. Department of Labor's Women's Bureau [announced](#) it awarded \$1.1 million in grants to research and analyze how paid leave programs can be developed and implemented across the country. The announcement was notable because it reinforced the Administration's commitment to paid leave mandates for workers, even absent federal legislation. The grant announcement came as a final rule imposing paid leave requirements on certain government contractors under Executive Order 13706 is under review by the White House Office of Management and Budget. Release of the final rule is slated for September. The announcement was also notable because it recognized that many states and localities are not waiting on Congress to act, and will further fuel those efforts.

In announcing the grants, Secretary of Labor Thomas Perez said:

Too many Americans are forced to choose between the job they need and the family they love. While Congress refuses to take action to make paid leave the law of the land, we have seen tremendous leadership at the state and local levels to expand access to these programs . . . The grants we are announcing today will help innovative state and local officials design paid-leave policies that work for their citizens. These important grants build on our work to make sure that people have the tools to be responsible employees and good caregivers.

The grantees include states, cities and counties across the country that are exploring different models for paid family and medical leave programs. For example, Pennsylvania's Department of Labor and Industry will receive \$250,000 to conduct (a) a cost-benefit analysis for different paid family leave models; (b) a statistical analysis to determine populations that

would benefit from them; (c) a feasibility study of state administrative infrastructure for a paid family leave program; and (d) an education, outreach and marketing analysis for implementation purposes.

Hawaii's Department of Human Services will receive \$240,000 to conduct an economic analysis feasibility study to determine ways Hawaii could potentially implement a paid family leave program. The funds would also be used to conduct polling and create focus groups to gather perspectives that will inform messaging, help design educational materials, and gather insight for policy development.

The Indiana Commission for Women will receive \$202,500 to conduct cost-benefit modeling for several locally developed paid family and medical leave program proposals.

The City of Madison, Wisconsin will receive \$155,317 to research the fiscal and operational impacts of providing a paid leave policy for all permanent city government employees.

The city and county of Denver, Colorado will receive \$126,091 to conduct statistical analysis and financing, eligibility, and benefit modeling to explore and develop a paid family and medical leave program or other benefit options.

The Franklin County, Ohio Board of Commissioners will receive \$126,091 to evaluate the cost and economic impact of paid leave programs on individuals and employers. The funds will also be used to provide an analysis of how these programs would be implemented.

Employers with operations in these states, cities and counties could eventually face new paid leave obligations.

The recent DOL paid leave grant was in addition to the more than \$2 million the DOL awarded in 2014 and 2015 to support paid leave studies. This comes as an increasing number of states, cities and

IN FOCUS, CONTINUED

counties have passed or are considering legislation to mandate paid sick leave for employees. The list of states with adopted paid sick leave mandates includes: Connecticut, California, Massachusetts, Oregon, and Vermont. Legislation to mandate paid leave is pending in five other states, although none are likely to move this year. The growing number of cities with paid sick leave requirements includes, among others, the District of Columbia, Los Angeles, San Diego, San Francisco, Seattle, New York City, Minneapolis, Philadelphia, Chicago, and 12 cities in New Jersey. This number may expand further with ordinances or ballot initiatives proposed in Cook County, Illinois; St. Paul, Minnesota; Morristown, New Jersey; and Albuquerque, New Mexico.

To make matters even more challenging for employers, multiple state and local laws are not uniform. They differ in their requirements regarding paid leave, its use, and how it can be accrued and carried over. For multi-state, multi-locality employers, designing a company-wide compliant leave policy is not easy. For government contractors covered by Executive Order 13706, the task is even more complex. Employer obligations may become even more significant and complex if the pending state and local mandates are enacted following the November elections.

Hillary Clinton and the 2016 Democratic Party Platform call for a mandatory seven days of paid sick leave for employees, as do the stalled Healthy Families Act legislation and the paid leave executive order. Indeed, Clinton has made paid family and medical leave a [prominent component](#) of her campaign.

Clinton's plan for paid family and medical leave would guarantee employees up to 12 weeks of paid family and medical leave to care for a new child or a seriously ill family member, and up to 12 weeks of medical leave to recover from their own serious illness or injury. The plan would provide workers with at least two-thirds of their current wages, up to a ceiling, while on leave. As described on her campaign

website, the paid leave would be funded by "making the wealthy pay their fair share—not by increasing taxes on working families."

The fate of this proposal depends on who will control Congress and occupy the White House. Republicans in Congress may feel increasing pressure to take action on paid leave. Federal legislative alternatives to mandatory paid leave could gain more traction, such as a voluntary model under which participating employers that provide leave programs that meet certain requirements would not have to comply with differing state and local mandates.

Nonetheless, state and local efforts to enact or expand paid leave mandates are likely to continue. As more localities push for paid leave and wage and hour mandates – such as minimum wage increases or scheduling requirements – more states may try to enact legislation preventing local action. Several states already have laws prohibiting local governments from enacting leave laws applicable to private employers that exceed state or federal requirements. Among these states are: Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oregon, Oklahoma, Tennessee and Wisconsin.

While most of the political focus has been on the federal-level elections, the outcome of the upcoming state elections may add to this list. Republican control of the governorship and state legislatures will likely increase the prospects for additional states to enact such preemption legislation. While predictions about the outcome of the presidential, congressional and state elections remain speculative, pollsters would be on firm ground to predict that the paid leave obligations for employers around the country will become more numerous and complex.

– *By Ilyse Schuman and Michael J. Lotito*

OUTLOOK

SEPTEMBER

IRS Rule Regarding Definition of Terms Relating to Marital Status Takes Effect

Friday, September 2, 2016

The IRS has issued a final rule to reflect changes in the law made by the U.S. Supreme Court decisions in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), and *Windsor v. United States*, 570 U.S. ___, 133 S. Ct. 2675 (2013), and Revenue Ruling 2013-17 (2013-38 IRB 201), all of which redefined the terms in the Internal Revenue Code describing the marital status of taxpayers for federal tax purposes. [Read more»](#)

Comments Due on IRS Proposed Rule Governing Premium Tax Credit under the Affordable Care Act

Tuesday, September 6, 2016

The IRS has issued proposed regulations relating to the health insurance premium tax credit and the individual shared responsibility provisions under the Affordable Care Act. Although employers are not directly affected by rules governing the premium tax credit, these proposed regulations may indirectly affect employers through the employer shared responsibility provisions and the related information reporting provisions. [Read more»](#)

EEOC to Hold Executive Leadership Training

Monday, September 19 - Tuesday, September 20, 2016

The U.S. Equal Employment Opportunity Commission (EEOC) will hold its Executive Leadership Training Conference (ELC) from Sept. 19-20 in Washington, DC. This year's theme is: Leadership Through Times of Transition: Flexibility Meets Precision. According to the EEOC's press release, "[l]eaders who are flexible and able to adapt to change are successful during any presidential transition process and change of administration. The ELC training provides participants with skills to successfully navigate change and prepare for the new incoming presidential administration in January 2017." [Read more»](#)

Comments Due on Potential Alternative Coverage for Contraceptive Services

Tuesday, September 20, 2016

The DOL's Employee Benefits Security Administration has issued a request for information on whether there are alternative ways for eligible organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still adhering to the Affordable Care Act's mandate. [Read more»](#)

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

Tuesday, September 27, 2016

The Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) will hold an open meeting to discuss reports/recommendations for the Secretary of Labor regarding (1) cybersecurity considerations for benefit plans and (2) participant plan transfers and account consolidation for the advancement of lifetime plan participation. The meeting will be held via teleconference, but the public may attend in person at the DOL's Washington, DC headquarters. [Read more»](#)

Comments Due on DOL Proposal Governing Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

Thursday, September 29, 2016

The DOL is proposing to amend a regulation that describes how states may design and operate payroll deduction savings programs, using automatic enrollment, for private-sector employees without causing the states or private-sector employers to establish employee pension benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). The proposed amendments would expand the current regulation beyond states to cover programs of qualified state political subdivisions that otherwise comply with the current regulation. This rule would affect individuals and employers subject to such programs. [Read more»](#)

Comments Due on CFTC Proposal to Amend its Whistleblower Awards Process

Thursday, September 29, 2016

The Commodity Futures Trading Commission (CFTC) has issued a proposed rule to amend its process for reviewing whistleblower claims and to exercise greater authority to administer and enforce the whistleblower program. The changes better align the CFTC's program with that of the SEC. [Read more»](#)

OCTOBER

Comments Due on Proposed Revisions to Annual Information Return/Reports

Tuesday, October 4, 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). [Read more»](#)

Comments Due on Proposed Amendments to ERISA Annual Reporting and Disclosure

Tuesday, October 4, 2016

The DOL's Employee Benefits Security Administration has issued a proposal to amend DOL regulations relating to annual reporting requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed amendments would conform the DOL's reporting regulations to proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan. [Read more»](#)

Comments Due for HHS Proposed Rule Setting ACA Benefit and Payment Parameters for 2018

Friday, October 7, 2016

The U.S. Department of Health and Human Services has issued a proposed rule setting forth the payment parameters and provisions related to the Affordable Care Act's risk adjustment program; cost-sharing parameters and cost-sharing reductions; and user fees for federally-facilitated Exchanges and state-based Exchanges on the federal platform. The proposal also provides additional guidance relating to standardized options; qualified health plans; consumer assistance tools; network adequacy; the Small Business Health Options Program; stand-alone dental plans; fair health insurance premiums; guaranteed renewability; the medical loss ratio program; eligibility and enrollment; appeals; and other related topics. [Read more»](#)

DOJ Final Rule Amending its ADA Regulations Takes Effect

Tuesday, October 11, 2016

The U.S. Department of Justice (DOJ) has issued a final rule amending its Americans with Disabilities Act (ADA) regulations to incorporate the statutory changes made by the ADA Amendments Act of 2008, which took effect on January 1, 2009. The final rule adds new sections to its Title II and Title III ADA regulations to set forth the proper meaning and interpretation of the definition of “disability” and to make related changes required by the ADA Amendments Act in other sections of the regulations. [Read more»](#)

Final Rule Implementing the Fair Pay and Safe Workplaces Executive Order Takes Effect

Tuesday, October 25, 2016

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration (FAR Council) released the final rule implementing the Fair Pay and Safe Workplaces Executive Order (EO). The so-called “blacklisting” EO requires prospective and existing contractors on covered contracts to disclose administrative determinations, arbitral awards, and civil judgments (referred to collectively in the rule as “labor law decisions”) finding or (sometimes even just alleging) violations of 14 enumerated labor laws and state law equivalents. Although the rule formally takes effect on October 25, 2016, certain provisions will be phased in over time. [Read more»](#)

DOL Guidance on Fair Pay and Safe Workplaces Executive Order Rule Takes Effect

Tuesday, October 25, 2016

The DOL issued final guidance on key provisions of the final rule implementing the Fair Pay and Safe Workplaces Executive Order, issued on July 31, 2014. The so-called “blacklisting” EO requires prospective and existing contractors on covered contracts to disclose administrative determinations, arbitral awards, and civil judgments (referred to collectively in the rule as “labor law decisions”) finding or (sometimes even just alleging) violations of 14 enumerated labor laws and state law equivalents. [Read more»](#)

DOL Final Rule Governing Savings Arrangements Established by States for Non-Governmental Employees Takes Effect

Monday, October 31, 2016

The DOL has issued a final rule creating a safe harbor from ERISA coverage for state payroll deduction savings programs with automatic enrollment. The rule provides guidance for designing programs to reduce the risk of ERISA preemption of the relevant state laws. This document also provides guidance to private-sector employers that may be covered by such state laws. This rule affects individuals and employers subject to such state laws. [Read more»](#)

NOVEMBER

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

Tuesday, November 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 November 1, 2016 (extended from August 10, 2016). The remaining sections of the rule take effect on January 1, 2017. [Read more»](#)

DECEMBER

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»](#)

JANUARY

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»](#)

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