LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

Current Events Monthly Newsletter | October 2016

INSIDER BRIEFING

With little more than a month left until Election Day, Congress passed a stopgap funding bill after resolving fights over Zika funding and aid for Flint, Michigan, allowing members of Congress to return to the campaign trail. Passage of the continuing resolution will fund the federal government until December 9, 2016. Although the continuing resolution averts a government shutdown prior to the election, it punts a long-term appropriations bill – and debate over policy riders to block controversial labor and employment administrative actions – until after voters go to the polls. The fate of those riders remains uncertain and, no doubt, dependent on the outcome of the election and which party will gain an upper hand in the negotiations.

Overtime Rule

Even though Members of Congress were anxious to return to the campaign trail, there were some notable workplace policy developments on Capitol Hill during September. On September 28, the House passed the Regulatory Relief for Small Businesses, Schools, and Nonprofits Act (H.R. 6094), legislation introduced by Rep. Tim Walberg (R-MI), Chairman of the Subcommittee on Workforce Protections, to require a six-month delay in the effective date of the Department of Labor's (DOL) overtime rule. In a statement upon House passage of the bill, Rep. Walberg said, "the department needs to abandon this flawed rule and pursue the balanced approach we've been fighting for from the start." The rule, which is scheduled to become effective on December 1, 2016, doubles the salary threshold for overtime eligibility to $47,476 per year and requires automatic adjustments every three years. Five Democrats joined 241 Republicans in support of the measure. ▸▸

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The day after House passage of the legislation, Senators Lamar Alexander (R-TN), Susan Collins (R-ME), James Lankford (R-OK), Tim Scott (R-SC), and Jeff Flake (R-AZ) introduced legislation similar to a bill introduced by Democratic Rep. Kurt Schrader of Oregon to change the overtime rule's implementation timeline. The Senate Overtime Reform and Review Act (S. 3464) would stretch out over five years the administration's increase in the salary threshold for overtime pay. The bill would also prevent automatic increases to the overtime threshold, and require an independent government watchdog study of the rule after the first year of implementation. If the rule is found to negatively impact American workers and our economy, non-profits—including colleges and universities—along with state and local governments

and many Medicaid- and Medicare-eligible facilities such as nursing homes or facilities serving individuals with disabilities, would be exempt from any further increases under the rule. Senate Labor Committee Chairman Alexander called the Senate bill "a moderate, bipartisan approach that should be able to pass both Houses before December." Even if the Senate or House overtime bills were to pass both Houses of Congress, however, they would face a certain Presidential veto.

Multiemployer Pension Plans

During September, lawmakers also focused on how to address the funding challenges facing the multiemployer pension system. On September 9, Rep. John Kline (R-MN), Chairman of the House Committee on Education and the Workforce, unveiled a discussion draft of a proposal to modernize the nation's multiemployer pension system. The Pension Benefit Guaranty Corporation (PBGC) multiemployer insurance program, which is funded through premiums paid by multiemployer plans, faces a multi-billion dollar deficit and is expected to run out of money in less than 10 years. The proposal would authorize multiemployer composite plans, which would combine aspects of both defined benefit and defined contribution retirement plans. According to a summary of the proposal, composite plans would be professionally managed, and benefits would be provided in the form of annuities. The trustees managing the composite plan would set benefit levels based on incoming contributions and conservative funding requirements. Unlike a traditional defined benefit plan, retirement benefits offered through a composite plan would not be eligible for the PBGC insurance guarantee.

On September 22, the House Subcommittee on Health, Employment, Labor, and Pensions, chaired by Rep. Phil Roe (R-TN), held a hearing to receive public feedback on this discussion draft. In concluding the hearing, Rep. Roe called the proposal "a draft meant to spur a conversation...I hope we can continue what we started by advancing further reforms and modernizing the system for today's workers and future generations." The task of finding common ground to address the multiemployer pension system is not likely to be easy.

Midnight Regulations

As the Administration continues its dash to roll out final regulations in the remaining months and days of President Obama's term, congressional Republicans were taking aim at last-minute rulemaking efforts. ▸▸

On September 14, the House Judiciary Committee approved H.R. 5982, the "Midnight Rules Relief Act." The legislation, introduced by House Judiciary Committee Chairman Bob Goodlatte (R-VA); Courts, Intellectual Property, and the Internet Subcommittee Chairman Darrell Issa (R-CA); and House Rules Committee Chairman Pete Sessions (R-TX), "creates a rapid-response method for Congress to act when an outgoing presidential administration attempts to impose major regulations without the transparency and scrutiny expected in normal regulatory implementation," as explained in the sponsors' press release. The bill specifically amends the Congressional Review Act (CRA) to allow CRA resolutions that disapprove of multiple midnight rules to be passed by the incoming Congress, allowing Congress to better scrutinize and stop midnight rules "that are truly problematic—such as those that defy the message sent by the voters or those that have been poorly designed in the haste of the midnight rule period."

Paid Sick Leave

The Administration shows no sign of slowing its race to complete its workplace policy regulatory agenda before the next one takes over. On September 29, the DOL issued its final rule requiring certain government contractors to provide paid sick leave to their employees. The final rule implements Executive Order 13706, signed by President Obama on Sept. 7, 2015.

The Executive Order requires certain employers that contract with the federal government to provide their employees with up to seven days of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking. The requirement applies to the following contracts: (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA); (2) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA); (3) concessions contracts, including any concessions contracts excluded from the SCA by the DOL's regulations at 29 CFR 4.133(b); and (4) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

QUOTE of the MONTH

> "The next step is a federal earned sick time law such as the Healthy Families Act, and I am confident that it is a question of when, not if. I'm proud to be part of an administration that's getting us closer to that day."
>
> – Secretary of Labor Thomas Perez upon announcement of the final rule implementing paid sick leave for federal contractors

Furthermore, any subcontract of a covered contract that falls into one of these four categories is subject to the paid sick leave requirements. The requirement applies to new contracts and replacements for expiring contracts that result from solicitations issued on or after January 1, 2017. It covers any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or Fair Labor Standards Act (FLSA), including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions.

Under the final paid sick leave rule, employees accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. Contractors may limit the amount of paid sick leave employees may accrue to 56 hours each year and must permit employees to carry over accrued, unused paid sick leave from one year to the next. The final rule also allows contractors to limit the amount of paid sick leave employees have accrued to 56 hours at any point in time. Under the final rule, contractors must allow employees to use paid sick leave in increments as small as one hour (with a narrow exception for employees whose work makes it physically impossible to leave or return to the job during a shift).

Release of the final paid sick leave rule marks yet another workplace policy regulatory change directed at federal contractors in the absence of ▸▸

INSIDER BRIEFING (continued)

broader legislative change. Coming on the heels of the "Fair Pay and Safe Workplaces" final rule, the Administration has significantly altered the labor and employment law landscape for federal contractors and made doing business with the federal government more challenging.

EEO-1 Reports

Like paid sick leave, equal pay has featured prominently on the White House's "Middle Class Economics" agenda. On the same day the DOL issued the final paid sick leave rule, the Equal Employment Opportunity Commission (EEOC) announced approval of revisions to the EEO-1 report. The controversial new report will require covered employers to provide pay data about their employees. See this month's *In Focus* article for more information about the revised EEO-1 report.

Paid leave and equal pay have become key election issues in the race for the White House and control of Congress. Depending on the outcome of the presidential and congressional elections, and of state elections across the country, legislative and regulatory changes on these and other workplace policy issues may become even more likely.

ON THE MOVE

Given the particularly contentious nature of this election cycle and partisan bickering, passage of major federal labor and employment bills before the year is out is highly unlikely. States and major cities, however, continue to advance bills, ordinances, and ballot initiatives that will significantly impact the workplace in those jurisdictions. The following touches on some of the more noteworthy measures that made headway in September 2016.

Minimum Wage

The patchwork of minimum wage laws around the country continues to frustrate multi-state employers. In September, several localities—particularly those in California—either instituted a new minimum wage or made progress toward that end. The month began with the adoption of an ordinance in Berkeley, California, which not only institutes new paid sick leave requirements, but also raises the minimum wage, in increments, to $15.00 per hour by October 1, 2018.

Both Pasadena's and San Leandro's City Councils approved minimum wage-related ordinances. Pasadena's ordinance amends a previously adopted minimum wage ordinance to clarify how to determine "large" versus "small" employers, and to require that employers post notices of the minimum wage ordinance. Under the ordinance, all workers employed by the business—not just those who work in the city—will be factored into the employer size equation. Smaller employers have more time to comply with the yearly increases.

The City of San Leandro adopted an ordinance that will increase the minimum wage to $15 per hour by the year 2020. The first step increase to $12.00 per hour is set to take effect on July 1, 2017.

On September 26, the City Council of Palo Alto, California, voted to raise the city's minimum wage to $15.00 per hour by the year 2019. A competing proposal would have expedited that increase by the year 2018. A second reading of this ordinance is expected in the upcoming weeks.

In non-California minimum wage news, Linn County, Iowa approved a more modest minimum wage ordinance that will increase the minimum ▸▸

wage to $8.25 per hour on January 1, 2017, to $9.25 per hour on January 1, 2018, and to $10.25 per hour on January 1, 2019. Not to be outdone, the Polk County, Iowa, board of supervisors has given its preliminary approval for a minimum wage increase to $10.75 by 2019. This measure must undergo additional readings before final adoption. Meanwhile, Wapello County, Iowa, similarly approved a series of minimum wage increases, in steps, to $10.10 per hour by January 1, 2019.

In May 2017, voters in Cleveland, Ohio will get to decide whether to increase that city's minimum wage. In September, a ballot measure was approved for a May 2, 2017 special election. The proposal would increase the minimum wage rate in the City to $15.00 per hour by the year 2021.

Finally, a number of states that automatically adjust their minimum wage have announced their new rates for 2017. Washington's minimum wage will increase $.06 to $9.53 per hour, effective January 1, 2017. Both Montana's and Ohio's minimum wages will rise to $8.15 per hour in 2017.

Fair Scheduling

Nearly two years ago, San Francisco enacted its Retail Workers Bill of Rights, which, among other provisions, requires employers to provide covered retail workers with at least two weeks' notice of their work schedules, and, if the employer changes or cancels an employee's previously-scheduled shift, the employer must provide the affected employee with a specified amount of "predictability pay." On September 19, the Seattle City Council followed in San Francisco's footsteps by unanimously passing the Secure Scheduling Ordinance (SSO). The SSO also mandates that large retail and food service employers provide two weeks' advance notice to employees of their schedules and compensate employees for changes to their scheduled hours. The SSO will take effect on July 1, 2017. The terms and requirements of the SSO are extensive and complex, so employers covered by this Ordinance are advised to start preparing now.

Employers in the "other" Washington – the District of Columbia – can breathe a sigh of relief, at least for now. After facing increased pressure from the District's business community, the DC City Council agreed to table their own "fair scheduling" bill, which would have required large retailers to provide employees with advance notice of their schedules, and give part-time employees the right of first refusal to work more hours before the employer could hire additional part-timers.

Meanwhile, New York City Mayor Bill De Blasio announced that a similar bill applicable to NYC fast-food workers is in the pipeline.

Paid Leave

As with the minimum wage, efforts to compel private employers in various states and cities to provide their workers with paid time off continue to complicate the lives of multi-jurisdiction employers.

As noted, the new Berkeley, California ordinance contains paid sick leave obligations, requiring employers to provide employees with one hour of paid sick leave for every 30 hours worked.

Saint Paul, Minnesota joined its Twin City of Minneapolis in enacting a paid leave ordinance. Under the ordinance, covered employers must allow employees who work in Saint Paul to accrue one hour of sick and safe time for every 30 hours worked, up to 48 hours of sick and safe time each year. Minneapolis, meanwhile, made tweaks to its ordinance, bringing it more in line with St. Paul's requirements concerning frontloading, payment of employees when on leave, tracking accrual of available paid sick time, and recording required information.

Meanwhile, San Francisco amended its Paid Parental Leave Ordinance (PPLO), which requires private employers to provide supplemental compensation to employees who use California paid family leave (PFL) benefits for new-child bonding. The amendments both respond to changes the California Legislature made to the PFL benefits program and attempt to clarify an employer's PPLO supplemental compensation obligations.

The same day, Morristown, New Jersey became the Garden State's 13th municipality to require private employers to provide paid sick time to employees. ▸▸

ON THE MOVE (continued)

Like most of the other paid leave ordinances in New Jersey, Morristown's allows employees to accrue up to 40 hours of paid sick time per year, to be used in connection with either their own medical condition or to care for a family member.

A much-debated sick leave ballot initiative for voters in Albuquerque, New Mexico, however, will not likely be an option on November 8. A district court judge refused to order the proposal, which would have required all employers to allow their employees to earn paid time off, to appear on the general election ballot. The City Charter requires the text of the entire measure to be printed on the ballot, while the general election ballot only allows for a summary to appear. Opponents of the paid leave proposal seized upon this technicality to push the matter off for another day.

Salary History

Although the DC City Council decided against pursuing a fair scheduling bill, it may soon consider a new bill that would amend the City's Wage Transparency Act of 2014 to prevent employers from screening applicants based on their salary history. The measure would prevent the employer from requesting the applicant's wage history from prior employers, unless the employer has made an offer of employment with compensation and seeks the prior salary information solely to confirm information about the prospective employee's wage history, and the employee has provided written consent for the employer to do so.

Both of New Jersey's legislative chambers introduced bills (AB 4119, SB 2536) that would institute similar prohibitions on requesting an applicant's salary history. A member of Philadelphia's city council has announced plans to introduce an ordinance that would likewise bar employers from asking about an applicant's previous salary.

Meanwhile, California's governor signed AB 1676, a measure specifying that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception to the state's equal pay law.

In other wage-related news, the New York State Department of Labor adopted a final regulation setting the conditions by which employers in New York State can pay wages by direct deposit or by debit card. The new and stringent requirements serve as a disincentive to paying employees in this manner.

Criminal History

While the recent legislative flurry focused on salary history inquiries, jurisdictions are still introducing measures seeking to curb an employer's ability to ask about an applicant's *criminal* history until later in the hiring process. In September, a Los Angeles City Councilmember introduced an ordinance that would prevent most employers in the city from making criminal history inquires until after a condition offer of employment has been made.

At the state level, California's governor signed AB 1843 into law, which prohibits an employer from asking an applicant to disclose any information regarding juvenile court actions or detentions.

Forum Selection

A new California law will have a significant impact on employment agreements. The bill, SB 1241, prohibits employment contracts entered into or modified after January 1, 2017, from requiring, as a condition of employment, that the employee agree to litigate a claim outside of California for claims arising within the state. In addition, according to the bill's summary, it will be unlawful to include provisions in contracts that "deprive the employee of the substantive protection of California law with respect to a controversy arising in California. The bill would make any provision of a contract that violates these prohibitions voidable, upon request of the employee, and would require a dispute over a voided provision to be adjudicated in California under California law."

Mandatory Retirement Plans

California joined the handful of states with laws requiring employers that do not offer their employees a retirement plan to allow their employees to ▸▸

enroll, via automatic payroll deduction, in a state-sponsored program. Under the California Secure Choice Retirement Savings Program, an automatic 3% minimum deduction will be made through the employee's payroll into his or her IRA, which will be managed by a state investment board. Employees may opt out of the program or change their contribution levels at any time.

Anti-Discrimination

The Massachusetts Commission Against Discrimination issued new Gender Identity Guidance, replacing an earlier advisory on transgender law. The guidance explains the anti-discrimination protections afforded to individuals based on their gender identity in employment and places of public accommodation, among other areas. The new guidance takes into consideration Senate Bill 2407: *An Act relative to transgender anti-discrimination*, signed into law on July 6, 2016, and effective October 1, 2016.

What's Next

In a little over a month's time, voters across the nation will not only vote for the future President of the United States, but also for members of their local legislatures. The November election could therefore play a large role in determining which bills advance at the state and local levels.

IN FOCUS

Revised EEO-1 Report: Challenges and Risks for Employers

On January 29, 2016, President Obama marked the seventh anniversary of the Lilly Ledbetter Fair Pay Act by announcing a number of steps the Administration was taking to advance equal pay. Among these steps was a proposal by the Equal Employment Opportunity Commission (EEOC) to require employers to provide information on employee compensation as part of their EEO-1 reporting. The White House fact sheet described revisions to the EEO-1 report as "stemming from a

recommendation of the President's Equal Pay Task Force and a Presidential Memorandum issued in April 2014" and was intended to "help focus public enforcement of our equal pay laws and provide better insight into discriminatory pay practices across industries and occupations." Nine months later, on September 29, the EEOC announced that the revised 2017 EEO-1 reports, due in March 2018, will require employers to disclose pay data information.

The new form will require employers with 100 or more employees to report the total number of full- and part-time employees by demographic categories in each of 12 pay bands listed for each EEO-1 job category based on W-2 wages. Employers will also have to report the number of hours worked that year by all the employees included in in each pay band. For employees who are non-exempt from the Fair Labor Standards Act (FLSA) minimum wage and overtime requirements, employers will identify the actual numbers of hours worked. However, the FLSA does not require employers to record the number of hours worked by exempt employees. With respect to such exempt employees, employers have a choice of either reporting 20 hours per week for each part-time employee and 40 hours per week for each full-time employee, or they may report actual number of hours worked by exempt employees, full- or part-time.

In a press release touting the final EEO-1 revisions, EEOC Chair Jenny R. Yang echoed President ▸▸

IN FOCUS (continued)

Obama's January announcement, saying, "[c]ollecting pay data is a significant step forward in addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal antidiscrimination laws." Secretary of Labor Thomas E. Perez similarly noted that "[c]ollecting data is a critical step in delivering on the promise of equal pay. Better data will not only help enforcement agencies do their work, but it helps employers to evaluate their own pay practices to prevent pay discrimination in their workplaces."

As a predicate to changing the EEO-1 report, the EEOC sought and was granted approval for the revisions by the White House Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA). In the nine-month interval between announcement of the original proposal and approval of the marginally revised proposal, many in the employer community raised serious concerns about the reliability and cost of the changes. In both rounds of public comments – first to the EEOC's original proposal and then to the EEOC's revised proposal submitted to OMB, commenters challenged whether the revised EEO-1 would achieve its intended objective of advancing equal pay by identifying discriminatory pay practices.

To the contrary, a number of commenters from the employer community contended that the broad, aggregated pay data would not paint an accurate and complete picture of employee compensation. In its comment letter, Littler's Workplace Policy Institute (WPI) took issue with reporting and measuring by the EEO-1 job categories. As explained in the comment letter:

> Compensation data at this level are not useful for the Commission to identify discriminatory pay practices. The EEO-1 job categories are too broad. The expected range of compensation within any EEO-1 category is vast. Variation would naturally derive from legitimate, non-discriminatory elements. Using data that likely includes such legitimate variation would result in too many false positives or "Type I" errors.

Another problem with basing compensation data on W-2 wages is that such information is not an accurate or sufficiently complete measure of employee compensation. In other words, W-2 wages may include compensation not related to the current year, or compensation that is difficult to value, such as income related to incentive compensation.

Moreover, there are a large number of factors that determine an employee's compensation. Many of these factors cannot be measured by the information contained in W-2s, such as an individual's educational attainment, previous work experience, performance on the job, and seniority, to posit only a few examples.

Finally, WPI, and other commenters, faulted the EEOC's revised proposal for failing to address concerns regarding the security of data submitted as part of the EEO-1 reporting process despite the PRA requirement that agencies wishing to collect information "implement and enforce applicable policies, procedures, standards, and guidelines on privacy, confidentiality, security, disclosure and sharing of information collected."

Given these significant concerns regarding confidentiality and the reliability and utility of the ▸▸

pay data collected, it is disappointing that OMB approved the EEOC's proposal without making any changes. This is particularly true since the PRA requires an evaluation of the burden imposed by the collection in light of its utility. The EEOC's revised burden estimate, although higher than its original estimate, is widely seen as having substantially underestimated the true costs of implementation. Putting aside any "disagreement over how reliable the data collected will be, the revised proposal makes it very clear that the Commission has no reasonable estimate of how much collecting and reporting this data will cost employers, nor does the EEOC have any concrete idea how it will utilize the data in a meaningful way once it is reported.

Reaction to the EEO-1 changes by congressional Republicans was swift and harsh. Upon release of the new EEO-1 report and DOL paid sick leave rule, Rep. John Kline (R-MN), Chairman of the House Committee on Education and the Workforce, and Rep. Tim Walberg (R-MI), Chairman of the Subcommittee on Workforce Protections, responded:

> From the Department of Labor to the EEOC, working families and small businesses are being hit in all directions. The American people are looking for opportunity and prosperity, and these new rules will make it harder to find both.

A trio of Republican Senators had earlier sent a letter to OMB expressing their "serious concerns" with the EEOC's EEO-1 proposal. Although legislation has been introduced to forestall implementation of the new EEO-1 report, it faces certain White House opposition.

The new EEO-1 report is unlikely to be the last word in efforts to advance equal pay both in Washington and at the state level. Equal Pay has been gaining traction on the campaign trail, and Hillary Clinton has made the promotion of equal pay a key feature of her platform. Should she win in November, her Administration is expected to continue, if not accelerate, the Obama Administration's efforts.

For example, the Paycheck Fairness Act—which would expand damages available under the Equal Pay Act (EPA) and weaken an employer's ability to raise the "factor other than sex" affirmative defense in a wage discrimination case—has stalled in recent years. A new Congress, however, could be more receptive to promoting such an equal pay measure.

While new federal equal pay legislation is still speculative, the challenge of implementing the changes to the EEO-1 is real and immediate.

GLOBAL REPORT

The following is roundup of international labor and employment news:

Europe

United Kingdom – Bereavement Leave

On October 28, 2016, a bill that would provide grieving parents with two weeks' paid bereavement leave will undergo a second Parliamentary reading. The Parental Bereavement Leave (Statutory Entitlement) would amend the Employment Rights Act of 1996 to give parents who have suffered the loss of a child a statutory right to the paid leave. The bill's sponsor noted that parents are statutorily entitled to paid time off for stillbirth, but not for the death of a child. The bill seeks to rectify this disparity.

United Kingdom – Pregnancy Discrimination

The UK's Women and Equalities Committee has published a new report on pregnancy and maternity discrimination. The report discusses the prevalence of such discrimination in the workplace and makes several recommendations. Among other suggested courses of action, the Committee calls for ▸▸

GLOBAL REPORT (continued)

legislation requiring employers to undertake individual risk assessments when informed an employee is pregnant, has given birth in the past six months or is breastfeeding. In addition, the Committee recommends that the right to paid time off for prenatal appointments, and other maternity-related benefits, be extended to casual and part-time workers.

North America

Canada – Gender Diversity Reporting

The Alberta Securities Commission (ASC) issued a proposal that would require non-venture issuers (companies with their securities listed or quoted on the Toronto or other stock exchanges) to report on the representation of women on their boards of directors and in executive officer positions. Specifically, the proposal would require covered corporations to report the following information when filing their *Corporate Governance Disclosure* (Form 58-101F1): (a) whether the issuer has adopted a policy for the identification and nomination of women directors, and if so, the policy's objectives and key provisions; (b) whether the issuer's board or nominating committee considers the level of representation of women on the board in identifying and nominating board candidates; (c) whether the

issuer considers the level of representation of women in executive officer positions in the appointment of executive officers; (d) whether the issuer has adopted any targets (numbers or percentages) regarding women on the issuer's board or in executive officer positions of the issuer, and if so, what those targets are; (e) the number and proportion (in percentage terms) of directors on the issuer's board who are women; (f) the number and proportion (in percentage terms) of executive officers of the issuer who are women; and (g) whether the issuer has any term limits or other mechanisms of board renewal in place for its board of directors. Comments on this proposal are due by October 14, 2016.

Canada – Harassment

On September 8, 2016, the new workplace harassment rules mandated by Ontario's Occupational Health and Safety Act (OHSA) took effect. To help employers comply with the new anti-harassment obligations, the Ministry of Labour has issued a Code of Practice. This non-binding document contains four parts: Part I: Workplace Harassment Policy; Part II: Workplace Harassment Program; Part III: Employer's Duties Concerning Workplace Harassment; and Part IV: Providing Information and Instruction on a Workplace Harassment Policy and Program. The Code of Practice also contains a sample workplace harassment policy and investigation checklist. The Ministry of Labour notes that an employer's compliance with the practices in the Code of Practice is one way to meets its workplace harassment obligations under OHSA, and that an employer may adhere to one or all of its parts. However, if an employer opts to follow a particular section, it "must adhere with all of the Practice outlined under that Part to be deemed in compliance with the related workplace harassment provision."

Canada – Hazardous Chemicals

The U.S. Occupational Safety and Health Administration (OSHA) and Health Canada have developed a collaborative 2016-2017 Workplace Chemicals Work Plan. The purpose of the work plan "is to ensure that current and future requirements for classifying and communicating the hazards of workplace chemicals will be acceptable in the United States and Canada without reducing worker safety." ▸▸

Mexico – Cooperation Agreements to Prevent Discrimination

Several U.S. Equal Employment Opportunity Commission local offices signed cooperation agreements with the Mexican Consulate to provide information, guidance, and access to resources to prevent workplace discrimination based on immigration status. EEOC offices in Denver, Colorado; Memphis, Tennessee; Houston, Texas; Richmond, Virginia; and Seattle, Washington signed memorandums of understanding to help combat discrimination. Similarly, the U.S. Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices and the Ministry for Foreign Affairs of the United Mexican States entered into an agreement to protect Mexican workers in the United States "from employment discrimination in hiring, firing and recruiting or referring for a fee, based on their citizenship, immigration status, and national origin; unfair documentary practices; and retaliation."

South America

Brazil – Transmission of Employment-Related Data

Brazil's eSocial Steering Committee has postponed the implementation of the eSocial digital bookkeeping program. eSocial is Brazil's federal government project to unify the transmission of employment-related data to several government agencies. The far-reaching program, which will impose several new recordkeeping and reporting burdens on employers, was slated to begin in September 2016; the new deadline is scheduled for January 1, 2018.

Global

The U.S. Department of Labor has renewed partnership agreements with embassy officials representing Ecuador, Guatemala, Honduras, Peru and the Philippines. According to the DOL's press release, under these agreements, the agency's Occupational Safety and Health Administration and Wage and Hour Division "will continue their ongoing collaboration with consulates in providing information to workers about U.S. labor laws, including workers under H-2A and H-2B visas."

OUTLOOK CALENDAR

OCTOBER 2016

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

Thursday, October 6, 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 "blacklisting" EO requires prospective and existing contractors on covered contracts to disclose administrative determinations, arbitral awards, and civil judgments finding or violations of 14 enumerated labor laws and state law equivalents. The DOL Guidance explains what violations must be reported and which ones will have the biggest impact on agency responsibility determinations. read more

OUTLOOK CALENDAR (continued)

OCTOBER 2016 (continued)

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 2016

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

Comments Due on GSA Proposed Rule Governing Construction Contract Administration

Tuesday, November 8, 2016

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

Comments Due on PBGC Proposed Rule Governing Missing Plan Participants

Monday, November 21, 2016

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

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

Tuesday, November 29, 2016

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

OUTLOOK CALENDAR (continued)

DECEMBER 2016

Final DOL White Collar Exemption Overtime Rule Takes Effect

Thursday, December 1, 2016

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

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

Monday, December 5, 2016

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

JANUARY 2016

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

Sunday, January 1, 2017

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

EEOC Final Wellness Rule under GINA Becomes Applicable

Sunday, January 1, 2017

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

OUTLOOK CALENDAR (continued)

JANUARY 2016 (continued)

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

New Minimum Wage Rate Increase for Federal Contractors Takes Effect

Sunday, January 1, 2017

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

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

Sunday, January 1, 2017

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