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State Legislatures Saw a Flurry of Activity in February

BY ILYSE SCHUMAN AND MICHAEL J. LOTITO

Statehouses across the country continue to propose legislation at a frenzied pace. In February, as in January, more than 500 bills concerning labor and employment issues were either introduced or addressed in some fashion. New York and Tennessee saw the most legislative action, followed by Texas, Illinois, and Oklahoma.

The topics of these bills run the gamut, but there are some notable trends. If we compare this year's activity to last year's, we notice an increase in bills (and in movement on such bills) that seek to explain what constitutes joint employment in the franchise context. We are also seeing the debate heat up between "preemption" and "anti-preemption" measures, which, respectively, either prohibit cities and counties from imposing requirements on employers that are stricter than existing mandates or permit them to do so. Another developing trend is found in localized efforts to prevent employers from asking about an applicant's salary or criminal history. This month's State of the States highlights some of these noteworthy trends.

Joint Employment

As mentioned, several states are advancing bills that would clarify that a franchisor is not the employer of the franchisee or the franchisee's employees. Such laws have become more numerous in recent years, largely in response to legal decisions and agency interpretations that have expanded the concept of joint employment. This type of law has already been enacted in Georgia, Indiana, Louisiana, Michigan, Oklahoma, Tennessee, Texas, Utah, and Wisconsin.

Pending bills on this subject recently made headway in a dozen states: Arizona, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, South Carolina, South Dakota, Virginia, Washington, and Wyoming. The Virginia proposal (HB 1394), for example, cleared both legislative chambers in February and provides that "neither a franchisee

nor any employee of the franchisee is an employee of the franchisee's franchisor for any purpose to which the amended section of the Code of Virginia applies." In South Dakota, a similar bill (SB 137) that passed the state house and senate clarifies,"[n]otwithstanding any other provisions of law or any voluntary agreement between the United States Department of Labor and a franchisor, a franchisee or an employee of a franchisee is not considered an employee of the franchisor."

Background Checks and Salary History Inquiries

States and municipalities also remain interested in curbing employers' use of certain background checks or other preemployment inquiries in hiring decisions. On February 15, 2016, Washington, D.C. joined the growing list of jurisdictions that prohibit, with limited exceptions, employers' use of or obtaining credit information about an applicant or employee for employment purposes.[1]

Numerous measures also have been introduced, or are advancing, that would restrict the use of credit or criminal history information during the hiring process. A New York proposal would prevent employers from inquiring about any criminal convictions of a prospective employee until after making a conditional offer of employment. Meanwhile, New Mexico is advancing a "ban-the-box" bill that would preclude employers from asking about convictions on initial employment applications.

Additional protections, moreover, will be implemented shortly in California. The California Fair Employment and Housing Council recently approved new regulations discussing the numerous ways in which employers can face liability when using a candidate's or current employee's criminal history in hiring and other employment decisions. Those regulations should take effect on July 1, 2017.[2]

And as we reported last month, various states are considering laws that would prohibit employers from asking job applicants about their salary history. These bans are intended to narrow the gender wage gap by preventing employers from setting pay based in whole or in part on an applicant's wages and benefits at a prior job. In February, such bills were introduced or sent to committee for consideration in several states, including Georgia, Illinois, Montana, New York, Oregon, Texas, and Vermont.

Wage Transparency

Similar to the proposals banning salary history inquiries, several states are evaluating measures designed to increase wage transparency in the workplace. Generally speaking, these laws would make it unlawful for employers to prevent employees from disclosing or discussing their salaries with other employees. Wage transparency bills have advanced through at least one committee in Pennsylvania and Washington. Legislation also has been introduced in Georgia, Iowa, Oklahoma, Arizona, Kentucky, Tennessee, and Montana.

Minimum Wage

Minimum wage proposals continue to command attention in state legislatures across the country. More than 40 bills are pending in more than 20 states. Readers interested in more detail on this topic should consult WPI Wage Watch, a Littler feature focusing exclusively on breaking minimum wage developments coast-to-coast.[3]

Preemption and Anti-Preemption Bills

As mentioned earlier, some states are considering preemption bills to stanch the flow of local laws imposing more rigorous obligations on employers than otherwise required by federal or state authorities. These bills vary in what types of ordinances they would preempt, e.g., minimum wage, scheduling laws, paid leave, etc. The Indiana Senate, for example, passed a preemption bill (SB 312), which states, "a political subdivision may not prohibit an employer from obtaining or using criminal history information during the hiring process to the extent allowed by federal or state law, rules, or regulations." One pending proposal out of Tennessee would prevent localities from imposing

weapons restrictions. Approximately eight other states are currently contemplating some sort of preemption measure, including Florida, Iowa, Kansas, New Mexico, Georgia, Minnesota, Utah, and West Virginia.

On the other hand, anti-preemption bills are also cropping up and would specifically permit localities to address such issues. A Texas anti-preemption bill is currently in committee, and proposals were introduced in February in four other states (Kentucky, New York, Ohio, and Oklahoma).

Discrimination

A handful of states and cities are considering amending their fair employment practices laws to protect employees from discrimination based on sexual orientation or gender identity. About 20 states and more than 200 cities and counties in the U.S. already do so, and Jacksonville, Florida joined their ranks on February 14, 2017.

Similar bills have not fared as well in other jurisdictions, however. Proposals in Missouri, North Dakota and Wyoming fell flat, for example. Bills remain pending in several other states, but their fate is unclear, particularly where under consideration in more conservative state legislatures.

Somewhat relatedly, Arkansas enacted a law that prevents individuals from suing their employers for hate crimes under the Arkansas Civil Rights Act. The new law, effective June 7, 2017, applies to civil actions seeking damages arising out of the employer-employee relationship or based on an incident that occurred in the workplace.

Right-to-Work

Right-to-work advocates had reason to celebrate in February, as Missouri became the 28th state to enact such a law.[4] A similar bill in Colorado passed the state senate, and bills remain pending in a couple of other jurisdictions. Moreover, a federal right-to-work proposal has been introduced (HR 785) and referred to committee.

That being said, right-to-work bills failed to garner sufficient support in three states in February. Proposed legislation died in New Hampshire, despite anticipated support. The Maryland and New Mexico legislators also abandoned fledgling right-to-work bills.

Paid Leave and Protected Time Off

Paid leave and protected time off continue to be hot-button issues at the state and local levels, particularly in the absence of developments at the federal level. Washington, D.C. recently finalized an expansive paid leave law, which provides eight weeks of paid parental leave, six weeks of paid family leave, and two weeks of paid personal medical leave to eligible employees.[5]

Several other paid sick leave bills were introduced or progressed in February. Generally, these proposals enable employees to accrue paid sick time based on the number of hours worked (i.e., 1 hour for every 40 hours worked) and sometimes based on the size of the employer. Bills are under consideration in Georgia, Hawaii, Illinois, Maryland, Nevada, Oklahoma, Rhode Island, and South Carolina.

A slew of other bills have been proposed that would provide and protect time off (paid or unpaid) for employees to utilize for other reasons, such as upon the birth or adoption of a child or to care for a seriously ill family member. More than a dozen such proposals were introduced or sent to committee in February.

Meanwhile, a more specific Colorado bill concerning school activities leave passed the house chamber. This measure would require employers with at least 50 employees to allow an employee to take up to 18 hours of unpaid leave in an academic year for the purpose of attending his or her child's academic activities. If enacted, this bill would revive a Colorado law that expired in 2015, although there is no guarantee that it will be approved by the state wsenate as it moves forward.

Data Security

Several states are either revisiting their data security laws or are assessing whether to implement such regulations. These laws may require entities, including

employers, to properly secure and dispose of personal identifying information contained in their records (i.e., first and last name, credit card number, driver's license number, etc.). One such bill is pending in New Mexico and would require businesses to properly dispose of such information (by shredding, erasing, or rendering the data unreadable) when no longer needed for business purposes.

Some data security laws place a further duty on employers. In the event of a data security breach, these measures require an employer to timely notify: (1) all individuals who may have been affected; and/or (2) government agencies. The New Mexico proposal includes such a provision, for example. Two companion bills in Virginia, which are awaiting the governor's decision, would amend the existing data security law to require employers to also notify the Department of Taxation after discovery of a security breach of payroll information.

Next Steps

Employers should remain cognizant of these ongoing developments, particularly those with operations in multiple jurisdictions. We will continue to follow the progress of all significant labor and employment bills and will continue to report on state-level developments as the year unfolds.

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1 Jennifer L. Mora & Ethan Balsam, *District of Columbia Mayor Signs Law Restricting Employers from Using Credit Information in Employment Decisions*, Littler Insight (Feb. 16, 2017).

2 Jennifer L. Mora, *California Employers Are Subject to New Requirements When Using Criminal History Information*, Littler Insight (Feb. 21, 2017).

3 Libby Henninger et al., *WPI Wage Watch: Minimum Wage & Overtime Updates* (February Edition), Litter Insight (Feb. 28, 2017).

4 Stephen Smith, *Missouri is Now a Right-to-Work State*, Littler ASAP (Feb. 6, 2017).

5 Libby Henninger & Eunju Park, *District of Columbia Passes Expansive Paid Leave Law*, Littler Insight (Dec. 22, 2016). The leave entitlements for private employees take effect July 2, 2010, and collection of the employer payroll tax funding the program begins on July 1, 2019.