

Labor and Employment Developments – 2016 in Review

This *FYI Roundup* recaps workplace issues that were front and center for employers during the past year. Employees gained new benefits as lawmakers and voters expanded state and local leave laws. Caregivers and freelance workers secured new employment protections, as employers faced additional restrictions on their hiring and screening practices. A \$15 minimum wage became a reality for workers in two states, as the EEOC finalized new EEO-1 reporting requirements for equal pay data. Federal courts put the DOL's final overtime rule on hold, and blocked key provisions of its new "persuader" rule from taking effect. Federal contractors geared up for a higher minimum wage, paid sick leave, new paycheck transparency requirements, and increased protections against workplace sex discrimination. The IRS addressed identity theft protection and transit benefits. The Supreme Court took on class-wide liability under the FLSA, and left public union fees in place. The DOL took a broader view on who is an employer, and the NLRB said graduate students are employees and can unionize. All in all, a busy year.

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Ever-Growing Patchwork of State and Local Leave Laws

Voters Approve Paid Sick Leave Initiatives

On November 8, voters in Arizona and Washington passed ballot initiatives that mandate a new employee benefit — paid sick leave. Employers in Arizona will be required to begin providing paid leave on July 1, 2017, and Washington employers will have to start on January 1, 2018. (See our [November 18, 2016](#) *For Your Information*.)

NYC Prescribes Changes for Sick Time Rules

New York City's Earned Sick Time Act requires private-sector employers to provide a minimum amount of job-protected sick time to full- and part-time employees who work in the city. Amendments to the Earned Sick Time Rules took effect on March 4, altering the regulatory landscape in a number of significant ways. (See our *For Your Information* from [March 18, 2016](#).)



New York Adopts Paid Family Leave

On April 4, New York enacted the nation's most comprehensive paid family leave law, providing covered employees with up to 12 weeks of paid leave annually. Paid family leave benefits will be phased in over three years, starting in 2018. Wholly funded by employee contributions, benefits will be paid through the state's existing temporary disability insurance program. (See our [April 26, 2016 For Your Information.](#))

San Francisco Adopts Fully Paid Parental Leave

On April 21, San Francisco became the first city in the nation to mandate fully paid parental leave for baby bonding, requiring employers to supplement compensation new parents receive under California's Paid Family Leave program starting in 2017. (See our [May 9, 2016 For Your Information.](#))

Bill to Expand California Family Leave Vetoed

On September 30, Governor Jerry Brown vetoed a bill that would have required public and private employers with 20 or more employees within a 75-mile radius in California to provide workers with up to six weeks of job-protected baby-bonding leave. While this bill did not become law, businesses are likely to see further efforts to expand employee leave entitlements as more millennials become parents. (See our [October 11, 2016 For Your Information.](#))

Cities Continue to Expand Employment Protections

NYC Extends Employment Protections to Caregivers

On January 5, 2016, NYC Mayor Bill de Blasio signed into law a bill prohibiting employment discrimination based on an individual's actual or perceived status as a caregiver, effective May 4, 2016. (See our [January 22, 2016 For Your Information.](#))

Philadelphia Expands Ban-the-Box Restrictions as NYC Considers Changes

Both Philadelphia and New York City have so-called "ban-the-box" or "fair chance" laws that curb the use of criminal history and background checks for employment purposes. Amendments to Philadelphia's law took effect March 14, placing new constraints on employers' hiring and screening practices as New York weighed additional restrictions on background screening under its law. (See our [April 8, 2016 For Your Information.](#))



NYC Passes Wage Protections for Gig Workers

On October 27, the NYC Council unanimously passed a bill aimed at protecting freelancers against wage theft, which the mayor is expected to sign into law. The first-of-its-kind measure will require a written contract for freelance work valued at \$800 or more, itemizing the services to be provided, their value, and payment terms. (See our [November 3, 2016 For Your Information.](#))

A Failure to Persuade

Texas Court Permanently Blocks DOL Persuader Rule

On June 28, a Texas District Court preliminarily enjoined the DOL from implementing and enforcing its new "persuader" rule on July 1. The rule would have required employers and their labor relations advisors to disclose publicly agreements and arrangements that had long been exempt from reporting under the Labor-Management Reporting and Disclosure Act. (See our [June 29, 2016 FYI Alert.](#)) On November 15, the court concluded that the rule is unlawful and permanently blocked enforcement. (See our [November 17, 2016 FYI Alert.](#))

Working Overtime on Overtime

DOL Unveils Final Overtime Rule — At Last

In June 2015, the DOL proposed the expansion of overtime eligibility to millions of workers by more than doubling the minimum salary threshold for the so-called “white-collar” exemptions. On March 14, the DOL submitted a final rule to the Office of Management and Budget for regulatory review. (See our [March 16, 2016 FYI Alert](#).) On May 18, the DOL unveiled the final overtime rule that will have nationwide implications for millions of employees and employers alike. (See our [May 18, 2016 FYI Alert](#).)

21 States and Business Groups Succeed in Temporarily Blocking Final Overtime Rule

On September 20, 21 states and a more than 55-member business coalition filed legal challenges aimed at preventing or delaying implementation of the new overtime rule. (See our [September 21, 2016 FYI Alert](#).) On October 12, the states filed an emergency motion asking a Texas federal court to issue a nationwide preliminary injunction blocking the DOL’s final overtime rule from taking effect on December 1. Two days later, the business coalition moved for expedited summary judgment on its lawsuit, asking the court to vacate the overtime rule immediately. (See our [October 20, 2016 For Your Information](#).) On November 22, the court judge issued a temporary injunction, preventing the controversial overtime rule from taking effect on December 1. (See our [November 23, 2016 FYI Alert](#).)



DOL Appeals Overtime Ruling, and 5th Circuit Agrees to Expedite

On December 1, the DOL filed a notice of appeal from the federal court order that prevented the rule from taking effect on December 1. (See our [December 2, 2016 FYI Alert](#).) The following day, it asked the 5th Circuit to expedite the appeal. On December 7, the court agreed and ordered oral argument to be scheduled as expeditiously as possible after January 31, 2017. (See our [December 9, 2016 FYI Alert](#).)

Wage Rates Rise ...

Voters Hike State Minimum Wage Rates

Proponents of higher minimum wage rates scored multiple victories at the ballot box as voters in four states — Arizona, Colorado, Maine and Washington — approved initiatives that will gradually increase their pay floors, affecting an estimated 2 million workers. Employers will face the first of these wage increases on January 1, 2017. In addition, South Dakota rejected a lower minimum wage for non-tipped employees under 18 years old. (See our [November 9, 2016 FYI Alert](#).)

California to Increase Salary Threshold for Computer Professional Exemption

California exempts certain computer professionals from its overtime pay requirements if they are compensated at or above a level set by the state and satisfy a stringent job duties test. Effective January 1, 2017, computer professionals will have to earn a salary of \$88,318.55 annually or an hourly wage of \$42.39 to qualify for the California exemption. (See our [October 14, 2016 For Your Information](#).)

CA and NY Adopt \$15 Minimum Wage

On April 4, California became the first state to enact a minimum wage of \$15 per hour, to be phased in by 2022. In a budget deal signed into law that same day, New York also raised its minimum wage to \$15 per hour, but with regional variations on both the timing and amount of staged increases. (See our [April 27, 2016 For Your Information](#).)

As Focus on FLSA Continues

DOL Takes “As Broad As Possible” View of Joint Employment Under FLSA

On January 20, the DOL issued guidance on when businesses should be classified as joint employers for purposes of the Fair Labor Standards Act (FLSA). The Administrator’s Interpretation, which takes a broad view of who is an employer, has profound implications for businesses that share employees or rely on subcontracting, outsourcing and staffing agencies. (See our [February 11, 2016 For Your Information](#).)

Paid Meal Break No Substitute for Overtime Pay

Federal law does not require employers to provide meal periods, or to compensate employees for meal breaks as long as they are completely relieved of work duties during the breaks. In a case of first impression, the Third Circuit Court of Appeals ruled that an employer cannot use voluntarily provided paid meal periods to offset compensable overtime worked. (See our [October 28, 2016 For Your Information](#).)

High Court OKs Law of Averages for FLSA Claims

Where the employer failed to keep adequate time records, pork processing plant workers relied on employee testimony, videotapes and an industrial relations expert’s study to support class claims to recover overtime pay. On March 22, the Supreme Court upheld a \$5.8 million judgment for the workers, ruling that they could rely on a representative or statistical sample to establish class-wide liability under the FLSA. (See our [April 1, 2016 For Your Information](#).)

DOL Updates FLSA and EPPA Posters

A number of federal employment laws mandate workplace postings to inform employees of their statutory rights. The DOL recently released a new FLSA minimum wage poster, and an updated poster under the Employee Polygraph Protection Act. Employers should replace any outdated postings in their workplaces and electronic copies on any intranet or on-line application sites to ensure compliance. (See our [August 30, 2016 For Your Information](#).)



Wage Gaps Targeted

Massachusetts Enacts Expansive Equal Pay Law

On August 1, Massachusetts Governor Charlie Baker signed into law one of the most far-reaching equal pay laws in the country. The Act to Establish Pay Equity, which will take effect on July 1, 2018, is intended to expand significantly the commonwealth’s Equal Pay Act by increasing wage transparency and closing the wage gap between men and women. (See our [August 3, 2016 FYI Alert](#).)

California Moves to Level the Paying Field

On September 30, California Governor Jerry Brown signed into law two bills aimed at narrowing wage gaps, effective January 1, 2017. One bill prohibits the use of prior salary to justify a wage disparity between employees performing similar work. The other prohibits employers from paying employees less than their co-workers because of their race or ethnicity. (See our [October 7, 2016](#) *For Your Information*.)

EEOC to Require Equal Pay Data Reporting by Employers

On February 1, the EEOC proposed a dramatic expansion of the data reporting requirements for the Employer Information Report EEO-1 that employers file annually with the agency. The proposal added employee pay and hours worked data to the employment information and workforce profiles that must already be submitted. (See our *FYI* from [February 26, 2016](#).) On July 14, the EEOC revised its proposal to move the due date of the first expanded EEO-1 filing, revise the workforce snapshot period, and change the reporting period for the pay data and hours worked to the entire calendar year. (See our [July 19, 2016](#) *For Your Information*.) On September 29, the EEOC finalized the revised EEO-1 report requiring employers with 100 or more employees to provide summary pay and total hours worked data in their annual filings. The expanded data collection will start with the 2017 filing, due on March 31, 2018. (See our [October 6, 2016](#) *For Your Information*.)

Tax Breaks for Identity Theft Protection and Expanded Transit Benefits

IRS Expands Tax Relief for Identity Protection Services

In August 2015, the IRS announced that the value of credit monitoring and other identity protection services provided to data breach victims by the organization that experienced the breach (including employers and their service providers) is neither taxable nor reportable on information returns such as Forms W-2 or 1099-MISC. On December 30, the IRS announced it would extend the same tax treatment to services provided to employees or other individuals where there has been no data breach. (See our [January 13, 2016](#) *For Your Information*.)

IRS Guidance on Retroactive Increase to 2015 Transit Benefits

In January, the IRS issued guidance on the retroactive increase of the 2015 monthly limit on excludable transit benefits from \$130 to \$250. The guidance addressed employer questions on the retroactive increase, established a special administrative procedure to alleviate reporting burdens for certain employers, and instructed employers on Form W-2 adjustments. (See our [January 12, 2016](#) *FYI Alert*.)

San Francisco Bay Area Commuter Benefits Program Made Permanent

On September 22, Governor Jerry Brown signed into law a bill that continues a regional pilot program aimed at encouraging employees in the Bay Area to use commute alternatives to driving alone on a permanent basis. The program, launched in 2014, requires employers with 50 or more employees in the Bay Area to offer certain commuter benefits to their employees. (See our [September 30, 2016](#) *For Your Information*.)

NYC Amends Mass Transit Benefit Rules

Federal law allows — but does not require — employers to offer employees the opportunity to purchase qualified transportation fringe benefits with pretax dollars. Starting in 2016, NYC law requires businesses to offer pretax commuter benefits to their “full-time” employees who work in the city. The NYC Department of Consumer



Affairs amended its rules to clarify recordkeeping requirements, enforcement provisions, and penalties effective September 7. (See our [August 23, 2016](#) *For Your Information*.)

DOL, EEOC Ratchet Up Employer Penalties

DOL Hikes FLSA and Other Employer Penalties

The DOL announced a significant increase in the civil monetary penalties for violating federal minimum wage, overtime, posting and safety requirements. The increases apply to penalties assessed after August 1 for FLSA, FMLA, and OSHA violations that occurred after November 2, 2015. (See our [July 14, 2016](#) *For Your Information*.)

EEOC Boosts Penalties for Posting Violations

The EEOC announced that the current monetary penalties for notice-posting violations under Title VII, the ADA, and GINA would more than double on July 5. (See our [June 20, 2016](#) *For Your Information*.)

Federal Contractors Gear Up for New Rules

DOL Finalizes Paid Sick Leave Rules for Federal Contractors

On February 25, the DOL published proposed regulations to implement President Obama's 2015 executive order requiring certain government contractors to provide covered employees with up to seven days of paid sick leave annually. (See our *FYI* from [March 17, 2016](#).) On September 30, the DOL issued final regulations establishing paid sick leave for federal contractors. The regulations require certain contractors to provide covered employees with up to 56 hours of paid sick leave annually, including paid leave for family care, under contracts solicited on or after January 1, 2017. (See our [September 30, 2016](#) *For Your Information*.)

DOL Increases Minimum Wage for Federal Contractors

The DOL announced that federal contractors will have to pay workers performing on or in connection with covered contracts at least \$10.20 per hour and covered tipped employees a cash wage of at least \$6.80 per hour, beginning January 1, 2017. (See our [September 23, 2016](#) *For Your Information*.)

“Blacklisting” Rule Issued — Then Key Provisions Blocked

On August 25, the FAR Council and the DOL issued the Fair Pay and Safe Workplaces final rule and guidance for federal agencies in implementing the a 2014 executive order — the so-called “blacklisting” order — that requires prospective federal contractors and their subcontractors to disclose past labor law violations during the federal procurement process, imposes new paycheck transparency requirements, and restricts the use of mandatory arbitration agreements. (See our [September 28, 2016](#) *For Your Information*.) Hours before the rule was to take effect on October 25, 2016, a Texas district court put key provisions, including the violation disclosure requirements, on hold. The nationwide preliminary injunction remains in place, blocking their implementation, pending a final resolution of the case or further court order. (See our [October 27, 2016](#) *FYI Alert*.)

OFCCP Expands Sex Discrimination Guidance

The OFCCP updated its sex discrimination guidelines for federal contractors and subcontractors that have been in place since 1970. New regulations increased protections against workplace sex discrimination and imposed additional obligations on employers, effective August 15, 2016. (See our [August 5, 2016](#) *For Your Information*.)

New Challenges for Higher Education

Higher Education to Face Overtime Challenges

If it takes effect, the DOL's final overtime rule would have profound implications for most employers — including higher education institutions. Whether operated for profit or not for profit, colleges and universities would face many of the same overtime pay requirements and compliance challenges as most other employers, but special rules would apply to some of their employees. (See our [June 30, 2016 For Your Information](#).)



NLRB Says Grad Students Can Unionize

In a closely watched case with potentially broad ramifications for higher education, the NLRB ruled that student assistants at Columbia University are statutory employees and have the right to organize. In a 3-1 decision, the board reversed its long-standing rule that graduate teaching and research assistants at private colleges and universities were not employees since their relationship with the institutions was primarily academic rather than economic. (See our [August 25, 2016 FYI Alert](#).)

“Fair Share” Union Fees Left Intact

High Court Tie Leaves Public Union Fees in Place

A deadlocked Supreme Court left standing an earlier ruling by the 9th Circuit that allows public-sector unions to require nonunion employees to pay “agency” or “fair share” union fees as long as they do not include portions for political activities. Although the ruling set no precedent, it left intact the ability of public employee unions to collect fees from nonmembers in California. (See our [March 30, 2016 FYI Alert](#).)

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