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Labor and Employment Developments 2017 – A Mid-Year Recap

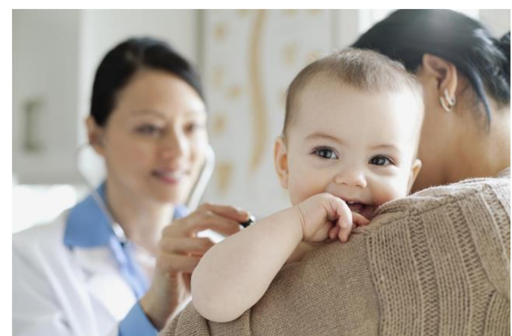
This *FYI Roundup* recaps workplace issues that were front and center during the first half of 2017. Washington became the fifth state to approve paid family leave, as New York prepared to phase in the new benefit starting in 2018. Oregon enacted new equal pay protections. A legal challenge sidelined Philadelphia's wage equity law as restrictions on background screening ramped up on both coasts. Massachusetts employers learned they may have to accommodate employee medical marijuana use, while New York City extended new employment protections to freelancers, retail and fast food workers. The DOL withdrew guidance on independent contracting and joint employment, and revived its practice of issuing opinion letters. A federal court blocked the new "persuader" rule from taking effect.

In this issue: Ever-Growing Patchwork of State and Local Leave Laws | Mounting Curbs on Salary History Inquiries | New Pay Equity Protections | States and Cities Expand Employment Protections | Courts Clarify Employer Obligations | Wage Rates and Wage Payment Rules in Flux | DOL Has a Change of Heart | Federal Contractors Get Relief | CEO Pay Under Scrutiny

Ever-Growing Patchwork of State and Local Leave Laws

New York Adopts Final Paid Family Leave Rules and Sets Premium Rates

Last year, New York enacted a comprehensive Paid Family Leave law that will provide employee-funded benefits administered through the state's temporary disability insurance program. On February 22, the New York Workers Compensation Board issued proposed regulations to phase in the new benefit beginning next year, and revised regulations in May. On June 1, the state set the premium rate for PFL benefits and maximum employee contribution for coverage beginning January 1, 2018. On July 19, the New York Workers' Compensation Board released final regulations implementing the new law, which were substantively unchanged from the revised regulations proposed in May. (See our March 29, 2017, June 19, 2017, and July 28, 2017 *For Your Information* publications.)



Washington Becomes 5th State with Paid Family Leave

On July 5, Washington joined four other states and the District of Columbia in providing a paid family leave benefit. Under the state's new insurance program, workers will be eligible for up to 12 weeks of paid family or medical leave per year starting in 2020. Employer and employee contributions will fund the benefit, but businesses with fewer than 50 employees in the state will not be required to pay the employer portion. (See our July 18, 2017 *For Your Information*.)

Washington Proposes Paid Sick Leave Rules

Last November, voters in Washington approved a ballot initiative that will require employers throughout the state to provide a new employee benefit – paid sick leave – starting in 2018. On April 7, the state Department of Labor and Industries released proposed regulations to implement the paid sick-leave requirement. (See our May 5, 2017 *For Your Information*.)

District of Columbia Paid Family Leave Advances

On December 20, 2016, the Council of the District of Columbia approved the Universal Paid Leave Amendment Act of 2016. The Act would allow individuals who work in the District to take up to eight weeks of parental leave, six weeks of family leave, and two weeks of medical leave, paid for by a 0.62% payroll tax on employers. On February 16, the mayor allowed it to advance without her signature. (See our February 21, 2017 *For Your Information*.)

Mounting Curbs on Salary History Inquiries

Delaware Bans Salary History Inquiries

On June 14, Delaware enacted a law barring employers from requesting the compensation history of job applicants, effective December 14. With that, Delaware became the latest jurisdiction to join a growing trend aimed at closing the gender pay gap by curbing inquiries about past wages. (See our June 21, 2017 *For Your Information*.)

San Francisco Bans Salary History Inquiries

On July 19, San Francisco became the third major city in the nation seeking to close the gender pay gap by curbing salary history inquiries. Starting next year, a new city ordinance will prohibit employers from inquiring about an applicant's salary history or disclosing current or former employees' history without their authorization. (See our July 25, 2017 *For Your Information*.)

NYC Mayor Signs Salary History Ban Into Law

On April 5, 2017, the New York City Council passed a bill restricting employers with four or more employees from asking applicants about their salary history during the hiring process. When Mayor Bill de Blasio signed the bill into law on May 4, NYC became the latest jurisdiction to bar employers from inquiring about job applicants' compensation and benefits history and from relying on salary history in formulating a job offer. The new law will take effect on October 31. (See our April 12, 2017 and May 10, 2017 *For Your Information* publications.)

Philadelphia's On-Again Off-Again Wage Equity Law

When Philadelphia enacted its so-called wage equity ordinance in January, it was poised to become the first city in the country to prohibit salary history inquiries during the hiring process. The ordinance, which barred employers from asking about, or requiring disclosure of, prospective hires' wage history, was slated to take effect May 23 but quickly faced a legal challenge by the Chamber of Commerce for Greater Philadelphia. A federal judge blocked enforcement before it could take effect. Following a flurry of legal proceedings, the law remains on hold pending resolution of a preliminary injunction motion. (See our June 19, 2017, June 9, 2017, April 28, 2017, and January 27, 2017 *For Your Information* publications.)

New Pay Equity Protections

Oregon Enacts New Equal Pay Law

On June 1, Oregon Governor Kate Brown signed into law new equal pay protections for employees and restrictions for Oregon employers. The Oregon Equal Pay Act of 2017 curbs salary history inquiries by employers, and provides a limited safe harbor from liability for equal pay violations for employers that proactively evaluate their pay practices and take steps to eliminate wage disparities. (See our June 15, 2017 *For Your Information*.)

NY State Targets Pay Equity

On January 9, New York Governor Andrew Cuomo issued a pair of executive orders extending new pay equity protections to employees of the state and its contractors. Aimed at narrowing the gender wage gap, one order bars state agencies from asking applicants for salary history during the hiring process while the other imposes new pay data disclosure requirements on state contractors. (See our February 2, 2017 *For Your Information*.)

States and Cities Expand Employment Protections

D.C. Restricts Employer Use of Credit Information

On February 15, D.C. Mayor Muriel Bowser signed the Fair Credit in Employment Amendment Act of 2016, joining a growing number of jurisdictions that significantly limit the use of credit checks for employment purposes. Following the requisite congressional review period, the law became effective April 7, subject to appropriations. (See our February 27, 2017 and April 27, 2017 *For Your Information* publications.)

California Employers Face New Criminal History Rules

Earlier this year, California's Fair Employment and Housing Council approved new regulations on the use of criminal history in employment decision-making. Regulations limiting employers' consideration of criminal history in hiring and other employment decisions became enforceable on July 1, affecting applicant screening, hiring and other employment practices. (See our July 10, 2017 *For Your Information*.)

Los Angeles Becomes Latest City to Ban the Box

On January 22, Los Angeles became the latest in a growing list of jurisdictions to limit pre-hire inquiries into a job applicant's criminal history. Joining other cities like San Francisco and New York City that have "banned the box," Los Angeles will restrict employers from inquiring into a potential hire's criminal history during the application process. Under a new ordinance, private employers with at least 10 employees will be barred from asking about a job applicant's criminal history prior to a conditional offer of employment. (See our January 24, 2017 *For Your Information.*)

NYC Enacts "Fair Workweek" Laws

On May 30, New York Mayor Bill de Blasio signed a package of five bills into law, imposing worker scheduling limitations on retail and fast food employers. Slated to take effect on November 26, the so-called "Fair Workweek" laws regulate shift scheduling and pay practices in the fast food industry, and effectively ban on-call scheduling by retailers. (See our June 16, 2017 *For Your Information.*)

NYC Freelancer Law Poised to Take Effect

Late last year, New York Mayor Bill de Blasio signed into law the Freelance Isn't Free Act. This first-of-its-kind law in the nation creates new rights and extends certain wage protections to freelancers and independent contractors in the city. The law took effect on May 15, and applies to contracts entered into on or after that date. (See our May 4, 2017 *For Your Information.*)

San Francisco Employer Annual Reporting Form Due May 1

San Francisco employers are required to pay a certain amount toward the health care costs of their employees who work in the city, and submit to the city an Annual Reporting Form summarizing compliance with this requirement for 2016. The form is also used to report on compliance with San Francisco's Paid Parental Leave and Fair Chance (ban-the-box) Ordinances. (See our March 30, 2017 *For Your Information.*)

Courts Clarify Employer Obligations

Massachusetts Employers May Have to Accommodate Medical Marijuana Use

In a first-of-its-kind ruling, the Massachusetts Supreme Judicial Court held that employers have a duty to reasonably accommodate employees' off-duty medical marijuana use under the Commonwealth's disability discrimination laws. In light of this decision, Massachusetts employers may have to alter their drug testing, zero-tolerance, and other employment policies, and ensure that they engage in an interactive process with medical marijuana users requesting an accommodation. (See our August 4, 2017 *For Your Information.*)

Ninth Circuit OKs Pay Structure Based on Prior Salary

On April 27, a panel of the San Francisco-based 9th Circuit Court of Appeals ruled that an employer may justify gender-based pay differentials when it uses salary history alone to set pay. The court found that prior salary may qualify as "a factor other than sex" under the Equal Pay Act if its use is reasonable and serves the employer's business purposes. Contrary rulings by other federal appeals courts raise the prospect that the Supreme Court ultimately may be asked to resolve the issue. (See our May 12, 2017 *For Your Information.*)

California's "Day of Rest" Requirements Clarified

The California Labor Code limits employers' scheduling practices by generally prohibiting employees from working "more than six days in seven." In February 2015, the 9th Circuit asked the California Supreme Court to answer three unsettled questions concerning the state's so-called "day of rest" requirements. On May 8, the court provided important answers for employers, clarifying that the Labor Code requires that employees receive at least one day of rest during each workweek but they may forgo their day of rest, subject to certain limitations. (See our May 18, 2017 *For Your Information*.)

Court Blocks HHS from Enforcing Prohibition on Transgender Discrimination

Just before they were to take effect, a Texas district court temporarily blocked provisions of a new HHS regulation prohibiting certain health programs and activities from discriminating on the basis of gender identity and termination of pregnancy. It is not clear whether HHS will appeal the ruling or defend legal challenges involving similar issues going forward. Until the issue is resolved, employers and plans that are covered entities under ACA Section 1557 should work with legal counsel to assess risks associated with coverage gaps for transgender health and abortion services. (See our January 13, 2017 *For Your Information*.)

Wage Rates and Wage Payment Rules in Flux

New Year, New Salary Thresholds for NY Overtime Exemptions and Minimum Wage Increases

Effective December 31, 2016, the New York Department of Labor amended the state's overtime regulations, substantially increasing the salary thresholds for the administrative and executive exemptions based on geographic location and employer size. Along with the higher thresholds, the state also increased minimum hourly wage rates for 2017. (See our January 12, 2017 *For Your Information*.)

New York Wage Payment Regulations Struck Down

On September 7, 2016, the New York State Department of Labor adopted new regulations governing the payment of wages by direct deposit or payroll debit card. On February 16, the New York Industrial Board of Appeals invalidated those regulations, which had been scheduled to take effect March 7. The New York State Department of Labor has filed an appeal challenging the Board's decision. (See our May 11, 2017 and March 2, 2017 *For Your Information* publications.)

DOL Has a Change of Heart

DOL Brings Back Opinion Letters

On June 27, the DOL announced that it is reviving the long-standing practice of issuing opinion letters that the Obama administration eliminated in 2010. Wage and Hour Division opinion letters will replace the broader administrator interpretations, allowing businesses and workers to once again seek individualized guidance on their particular employment practices in order to ensure compliance. (See our June 30, 2017 *For Your Information*.)

DOL Withdraws Guidance on Joint Employers and Independent Contractors

On June 7, Secretary of Labor Alexander Acosta announced the withdrawal of two Obama-era Administrator's Interpretations concerning independent contracting and joint employment that took an expansive view of who is an employee or employer. Although the guidance no longer represents the DOL's interpretation of the law, its withdrawal does not change the law. While the DOL's action may signal a shift in enforcement priorities, employers must continue to exercise caution when dealing with employee classification and potential joint employment issues. (See our June 8, 2017 *FYI Alert*.)

DOL Moves to Rescind Persuader Rule

Last November, a Texas District Court permanently blocked the DOL from implementing and enforcing the Obama administration's final "persuader" rule. The final 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. On June 12, the DOL began the process of rescinding the rule. While this action does not affect the disclosure requirements currently in effect, the agency has indicated that it may consider future rulemaking and invited public comments until August 11. (See our June 20, 2017 *For Your Information*.)

DOL Hikes FLSA and Other Employer Penalties Again

For the second time in six months, the DOL increased the civil monetary penalties for violating federal minimum wage, overtime, posting and safety requirements. The increases apply to penalties assessed after January 13, 2017 for FLSA, FMLA and OSHAct violations occurring after November 2, 2015. (See our January 20, 2017 *For Your Information*.)

DOL, PBGC and HHS Increase Penalties for Violations

The DOL, PBGC, and HHS announced annual inflation penalty adjustments. (See our February 10, 2017 *For Your Information*.)

Federal Contractors Get Relief

"Blacklisting" Order Revoked and Final Rule Nullified

On March 27, President Trump issued an executive order revoking President Obama's Fair Pay and Safe Workplaces Executive Order – the so-called "blacklisting" order that required prospective government contractors to disclose past labor law violations during the federal procurement process, and imposed other obligations and restrictions. The president also signed Congress' disapproval resolution, nullifying the final rule implementing the blacklisting order and permanently blocking the government from enforcing its requirements. (See our March 7, 2017 and March 28, 2017 *FYI Alerts*.)

CEO Pay Under Scrutiny

Portland to Impose Surtax on High CEO Pay Ratios

A new SEC rule will require publicly traded companies to disclose in their 2018 proxy how much their CEOs were paid relative to their median employees in fiscal year 2017. On December 7, 2016, Portland, Oregon approved a surtax on public companies reporting that they pay the CEO at least 100 times that of the median worker, becoming the first jurisdiction in the nation to impose a tax based on CEO pay ratios. (See our January 4, 2017 *For Your Information.*)

SEC Reconsiders CEO Pay Ratio Rule Implementation

The SEC announced their intent to reconsider implementation of the CEO pay ratio rule and requested comments on challenges issuers have encountered in attempting to implement the rule. (See our February 8, 2017 *For Your Information.*)

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