Employment laws are changing daily across the country. To remain in compliance, employers and HR departments must pay close attention to both local and state legislative agendas.

Help Wanted

Compliance headaches abound due to the continued increase in state and local governments passing employment laws

By Shannon T. O'Connor

Newton's third law of physics states that, "For every action, there is an equal and opposite reaction." The same principle seems to hold true for every inaction — look hard enough and you'll find there is also an equal and opposite reaction. It may seem strange to begin a legal article with physics, but the analogy fits with the rise of state and local governments increasingly enacting legislation in areas once thought reserved for the federal government.

Gridlock or inaction by Congress has created an environment where major developments in employment law occur in statehouses and local governments. Employment law is an ever-changing landscape in many aspects, such as administrative guidance and regulations on the federal level, but federal statutes themselves have remained largely unchanged for years. As such, one of the biggest challenges confronting employers is the trend of statehouses, county governments, and city governments enacting employment law, and the associated compliance issues.

Federal law is considered the minimum standard. In other words, federal law creates the floor and not the ceiling. States and local governments are free within our framework of government to step in and say that the floor is too low, and enact legislation otherwise. That is exactly what is happening all across the country in the context of labor and employment law. State and local governments have been stepping in and legislating at a slow but steady pace over the past few years, creating changes in employment law affecting both public and private employers alike. Notably, it is unlikely that this trend will slow down or reverse itself anytime soon. As the federal government continues to roll back regulations, state and local governments will likely continue to fill that void.

Obviously, this creates compliance issues for employers operating in multiple states, or even within the same state but in different regions. Employment and labor compliance issues are already a patchwork of laws difficult, if not impossible, for the best Human Resource departments to keep up with, much less stay ahead of the curve. Employers often focus on the patchwork and myriad of applicable federal statutes and well-settled state laws when updating employee handbooks, hiring or recruiting, and determining pay or sick leave. Handbooks that employers spend significant money to revise may be obsolete or inconsistent with the enactment of local laws or ordinances that HR staff may not even know to be on the lookout for. Rarely, if ever, do local governments draft administrative guidance in relation to local laws or ordinances, which complicates matters further. As such, employers and HR officials are left with little to no guidance to ensure compliance with implementation.

This article seeks to highlight and provide examples of some of the common employment laws recently passed by state and local governments. The scope and range of recent legislative activity is far too extensive for one article. If employers have questions about a specific issue or topic, consulting counsel is the best option, because in all likelihood, there is some law governing that issue at the state and local level. In addition, if employees are asking about it, such issues may be sitting on common council agendas.

State and Local Minimum Wage Laws

Currently, the federal minimum wage is $7.25, which has been in place since July of 2009. In other words, Congress has not voted to increase the federal minimum wage for almost a decade. States, cities, and other municipalities have stepped in to fill this void on the federal level with state and local laws that provide for higher minimum wages, and in some instances, two times as much as the federal minimum wage.

Beginning in 2018, 18 states started the new year with higher minimum wages than the federal law requires. Ten states, including Arizona, California, Colorado, Hawaii, Maine, Michigan, New York, Rhode Island, Vermont, and Washington, saw their minimum wages increase due to previously passed legislation or ballot initiatives from previous years taking effect. The remaining eight states — Alaska, Florida, Minnesota, Missouri, Montana, New Jersey, Ohio, and South Dakota — had automatic increase in minimum wages due to cost of living adjustments. Additional states, such as Maryland, Oregon, and the District of Columbia set minimum wage increases to go into effect in July of 2018. New York state decided that its minimum wage increase would take effect on December 31, 2018. Notably, this trend in 2018 is consistent and on par with the statewide minimum wage increases taking effect in 2017. In 2017, 19 states began the year with higher minimum wage requirements. The pattern in 2017 is the same — some of the states experienced automatic increases set by previous enactments, ballot initiatives approving an increase, or previously passed laws setting 2017 as the start date.

Notably, many of the minimum wage increases passed by various states include future enacted increases set to go into effect in 2019 and 2020. Employers and HR officials will need to continue to monitor the effective dates to ensure compliance.

To complicate matters further, the actual number of cities or local municipalities with local minimum wage laws is a moving target. Some estimates provide that there are over 120 local minimum wage laws on the books as of the beginning of 2018. The difficulty posed by local laws is that employers or HR officials may not even know where to look to determine if such laws exist, much less whether those laws are applicable.

Equal Pay and Salary History

Another hot topic is pay equity and prohibiting employers from asking about salary history, and depending on the jurisdiction, prohibiting questions related to the benefit history of prospective employees. Some of these laws only ban public employers from asking about an applicant's pay history, while others apply equally to public and private employers.

(cont. on page 12)

States that have enacted these types of laws include California, Delaware, Massachusetts, and Oregon all of which have created statewide bans on salary history inquiries by employers. Several municipalities have enacted such measures, and without question, additional localities are likely contemplating these laws over the next year. New York City, San Francisco, Albany County, and Philadelphia have enacted salary history bans. The Philadelphia local law is tied up in legal challenges and implementation is currently stayed. Pittsburgh and New Orleans have similar local laws, but as of this writing, they only apply to public employers.

Although these laws seek to address the same perceived inequalities, these laws are, in fact, very different. For example, the New York City law applies to all employers and prohibits them from communicating "any question or statement to an applicant, an applicant's current or prior employer, or current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history." In contrast, the Massachusetts state statute merely prohibits employers from seeking "the wage or salary history of a prospective employee or a current or former employer." The New York City law in comparison is quite broad.

Interestingly, New York City's ordinance and Delaware's state statute permit an employer to inquire about an applicant's salary expectations. Another interesting caveat is found in California's statute where it provides that upon a reasonable request by an applicant, an employer must provide the pay scale for the position the applicant is seeking. This appears to create an affirmative duty upon employers to have internal pay scales for various positions, and then to presumably adhere to those internal pay scales.

Penalties for violations are quite different as well. Delaware imposes civil penalties up to $10,000 for each infraction. On the other hand, violations of the New York City law are considered violations of the city's human rights law. As such, employers may be required to pay damages and penalties up to $250,000 and be required to undergo training for violations of the New York City law.

At a minimum, employers in these states and municipalities should proactively seek to address this issue. Also, this may be a change of culture, but removing template or form questions about salary at any pre-offer stage will avoid issues later. These bans are likely to increase in momentum across the country and proactive actions may alleviate unnecessary problems in the future.

Ban-the-Box States

Arizona	Nebraska
California	Nevada
Colorado	New Jersey
Connecticut	New Mexico
Delaware	New York
Georgia	Ohio
Hawaii	Oklahoma
Illinois	Oregon
Indiana	Pennsylvania
Kentucky	Rhode Island
Louisiana	Tennessee
Maryland	Utah
Massachusetts	Vermont
Minnesota	Virginia
Missouri	Washington
	Wisconsin

Ban-the-Box

Ban-the-box laws or "fair chance" policies began with a nationwide effort by the National Employment Law Project (NELP) seeking to convince or persuade employers to remove the "box" on an application asking whether the applicant has ever been convicted of a crime. The premise behind this effort was that the box created barriers to employment for individuals with a criminal history.

In response, many states and cities have enacted ban-the-box laws. Approximately 31 states, all over the country have passed or adopted ban-the-box legislation. Ten of these states also mandate that conviction history questions be removed from job applications for private employers. As of February 2018, the NELP indicated that over 150 cities and counties have adopted ban-the-box laws.

In general, "ban-the-box" or "fair chance" laws prohibit employers from asking applicants to provide arrest or conviction histories until after the potential employee is determined to be otherwise qualified. However, as with most laws, there are substantive differences and nuances among these state and local regulations. Some laws apply only to public employers. Others apply to

all employers. To complicate issues further, some laws apply based on the number of employees. Many ban-the-box laws go further than restricting questions about arrests or criminal convictions at the pre-employment stage, and limit how the criminal histories are evaluated once a person is deemed qualified.

Some ban-the-box laws permit limited inquiries into the conviction after a determination that the employee is qualified. This inquiry is essentially job-related screening with lists of statutory factors, such as whether there is a direct relationship between the conviction and the job, the nature of the offense in relation to the job, and length of time between conviction and application. Most of these laws include exceptions or job-specific scenarios where inquiries into criminal histories are permissible, but you need to read the actual language of the law in that jurisdiction to determine whether an exception applies.

Ban-the-box laws are also interesting in that they provide an example of how quickly waves of legislation can spread across the country once an area of law gains momentum. Updating forms or applications to remove this information would be an easy place to start.

Paid Sick Leave

Currently, there is no federal law that provides or mandates an employer provide paid sick leave to its employees. The Family Medical Leave Act (FMLA) provides that employees can take up to 12 weeks of unpaid leave, for certain types of qualifying events under the statute. States and local governments are getting into the mix with enacting paid or protected leave laws. An actual figure on local laws is illusive. Various resources put the number of cities and counties with these types of local laws on the books at the time of this writing at 30 cities and at least two countywide laws. Local paid leave laws outnumber their state counterparts, with approximately 10 states having paid leave laws on the books. Notably, in those jurisdictions where there are statewide laws and local laws on the books, employers must comply with both.

Navigating these multiple leave laws can be tricky. There are different threshold issues that trigger these laws, different types of permissible reasons that cover leave, different types of illnesses covered, and even different notice requirements. As explained below, the variables in and among these laws are striking. Right from the beginning, an employer seeking to determine who is a covered employee will notice that depending on the jurisdiction, a small office with six employees may qualify in Vermont, whereas in Washington D.C. there needs to be over 100 employees before an employer is required to provide paid leave.

The other relevant and significant variables among these laws include:

- Employee eligibility
- Notice issues
- Accrual of time and the manner in which time is used
- Accrual of days or an accrual of a maximum number of hours
- Whether an employee can carryover accrued time earned in the given year to the next year, or in the alternative, if employers are required to provide a payout of unused accrued time
- Posting requirements of the law
- Exceptions for certain types or categories of employees
- Penalties for non-compliance.

One substantive similarity among state and local paid leave laws is in relation to employees affected or impacted by domestic violence or sexual assault. Several specifically enumerate that these employees are covered under the law.

Discrimination Protections for Victims of Domestic Violence

Some states are seeking to expand protections for victims of domestic violence or sexual assault survivors as stated above with paid leave protections. However, some states and local laws are going further than protected and paid leave laws. Again, these laws vary from state to state, as well as local jurisdiction. Although not explicitly mentioned in federal statutes such as the FMLA, Title VII of the Civil Rights Act of 1964 (Title VII), and the Americans with Disabilities Act (ADA), these laws could easily be interpreted to provide protections for domestic abuse or sexual assault survivors.

Again, in the absence of federal law, states are addressing this issue. By way of example, Nevada mandates employers provide leave and accommodations to employees who are victims of domestic abuse, or when an employee's family member is a victim of domestic violence.

(cont. on page 14)

Recently, the State of Washington followed this path and enacted a law set to go into effect in June of 2018, that protects survivors of domestic violence, sexual assault, and stalking from employment discrimination. This law covers all the typical areas of other anti-discrimination laws from hiring and promoting, to pay and discharge of an employee. Interestingly, this law includes a specific provision requiring "reasonable safety accommodations" to be made if the employee requests them. Those well-versed in employment law see the similarity to reasonable accommodations under the ADA, which imposes mechanical procedural requirements for employers and employees alike, and affirmative obligations on employers. This Washington law is no different.

Examples under the Washington law of "reasonable safety accommodations" include:

- Job transfers or reassignments
- Modifying work schedules
- Change of telephone numbers, email addresses, or workstations
- Installing locks
- Implementing safety procedures
- Any other adjustment to a job structure, workplace facility, or work requirement in response to an actual or threatened domestic violence, sexual assault, or stalking

An employer may request verification from an employee seeking leave or submitting a request to implement a reasonable safety accommodation.

It is not too hard to imagine that this type of legislation is going to continue to gain momentum in most jurisdictions across the country.

Issues on the Horizon

A number of issues have begun to see movement in terms of recent or potential legislation. The issue of predictive scheduling, weapons in the workplace, and pregnancy accommodations are all gaining traction. For example, cities have already enacted legislation referred to as "flexible schedules" or "predictive scheduling." These laws mainly apply in retail, hospitality, or fast food industries. New York City requires that fast food employers post all work schedules 14 days in advance and provide new hires a good faith estimate of weekly hours. In addition, some of these laws provide that employers must provide additional pay for last minute schedule changes.

In Missouri, employers can prohibit employees with conceal and carry permits from carrying concealed firearms on the employer's property. Given recent history and incidents related to public shootings, again, around the country this may gain traction.

Conclusion

The importance of this trend of statehouses to city halls around the country increasing their legislative activity in areas of employment law cannot be overlooked or ignored. Since this trend affects public and private employers alike and is unlikely to change, employers ignore these trends at their own peril. Even if employers are operating in areas where states or local governments have not enacted legislation on a particular topic, it may not be long before it is on the agenda. Legislators always look to other regions or cities to see what legislation is currently proposed, recently enacted, or even whether public meetings are held on a certain topic, to determine what legislation to introduce in their own state or city.

With all of these various and divergent laws in place, and more expected, everything from hiring to leave time has become more complicated for employers. All of these issues create and pose risks for employers operating in multiple jurisdictions. Multistate employers may seek to use uniform applications, policies, or handbooks. It is simply no longer enough to assume compliance with federal law only will decrease exposure to liability. Not only do employers need to comply with federal law, but also with state-specific laws, in addition to checking city and county ordinances to ensure compliance. More importantly, employers should recognize complying with one type of law does not guarantee compliance with similar laws in different areas. PLM