A NEW CENTER STAGE

The Expansion of State and Local Employment Laws

U.S. CHAMBER OF COMMERCE
Workforce Freedom Initiative

U.S. CHAMBER OF COMMERCE

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INTRODUCTION

Since entering office on January 20, 2017, President Trump has made it clear that reducing the regulatory burden built up during eight years of the Obama administration is a top priority. Among the manifestations of this goal have been repeated requests for delays in legal proceedings around the overtime regulations,[1] proposed spending reductions by many federal agencies,[2] and an executive order establishing cabinet-level task forces dedicated to regulatory reform.[3] Top government officials have also adopted a different tone, including remarks by President Trump's acting Solicitor of Labor Nicholas Geale that the Department of Labor needed to act with "a little bit more humility" and provide opportunities for smaller businesses to comply with the law before commencing enforcement actions.[4] Indeed, in the Trump era, regulations that impede job creation will be under much closer scrutiny.[5]

Indeed, in the Trump era, regulations that impede job creation will be under much closer scrutiny.

Thus, after eight years of alignment with, and support from, the Obama Administration, interest groups that advocate for more expansive labor and employment regulations are facing a new environment and need a different strategy. The federal agencies upon which they have relied will, once fully staffed, no longer push their agenda. As a result, groups seeking more stringent employment regulations are increasingly focusing on the state and local levels,[6] forums in which much work already has been done to introduce aggressive new policies.[7] While some of these policies may be well-intentioned, they can also be

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1 The National Law Review, *Trump DOL Presses Pause Button on Appeal of Overtime Rule Injunction*, Jan. 26, 2017, *available* at http://www.natlawreview.com/article/trump-dol-presses-pause-button-appeal-overtime-rule-injunction.

2 The Associated Press, *Agency-by-agency look at President Trump's proposed budget*, March 19, 2017, *available at* http://www.newsday.com/news/nation/agency-by-agency-look-at-president-trump-s-proposed-budget-1.13289031.

3 Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs" (Jan. 20, 2017); Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017).

4 Jimmy Hoover, *Trump's DOL To Embrace 'Humility,' Acting Solicitor Says*, Law360, March 17, 2017, *available at* https://www.law360.com/articles/903430/trump-s-dol-to-embrace-humility-acting-solicitor-says.

5 *See* Jacob Pramuk, *Trump tells business leaders he wants to cut regulations by 75% or 'maybe more,'* CNBC, Jan. 23, 2017, *available at* http://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html.

6 The National League of Cities, for instance, has increasingly advanced progressive laws in large urban centers, where mayors where more likely to support them, than Congress. *See, e.g.*, Joseph Hincks, *Philadelphia Is About to Ban Employers From Asking Potential Hires About Their Salary History*, Fortune, Jan. 20, 2017, *available at* http://fortune.com/2017/01/20/philadelphia-wage-history-employee-salaries/. On May 30, 2017, New York City passed a package of predictive scheduling and opportunity to work ordinances. In announcing the new ordinances, Council Member Brad Lander stated, "With the Trump Administration working to undermine the progress we've made on workers' rights and setting an anti-worker agenda, it's instrumental that we continue to protect all working New Yorkers." *See* New York City Office of the Mayor News, *Mayor de Blasio, Speaker Mark-Viverito Announce That New York City Is The Largest City To End Abusive Scheduling Practices In The Fast Food And Retail Industries*, May 30, 2017, *available at* http://www1.nyc.gov/office-of-the-mayor/news/372-17/mayor-de-blasio-speaker-mark-viverito-that-new-york-city-the-largest-city-end#/0.

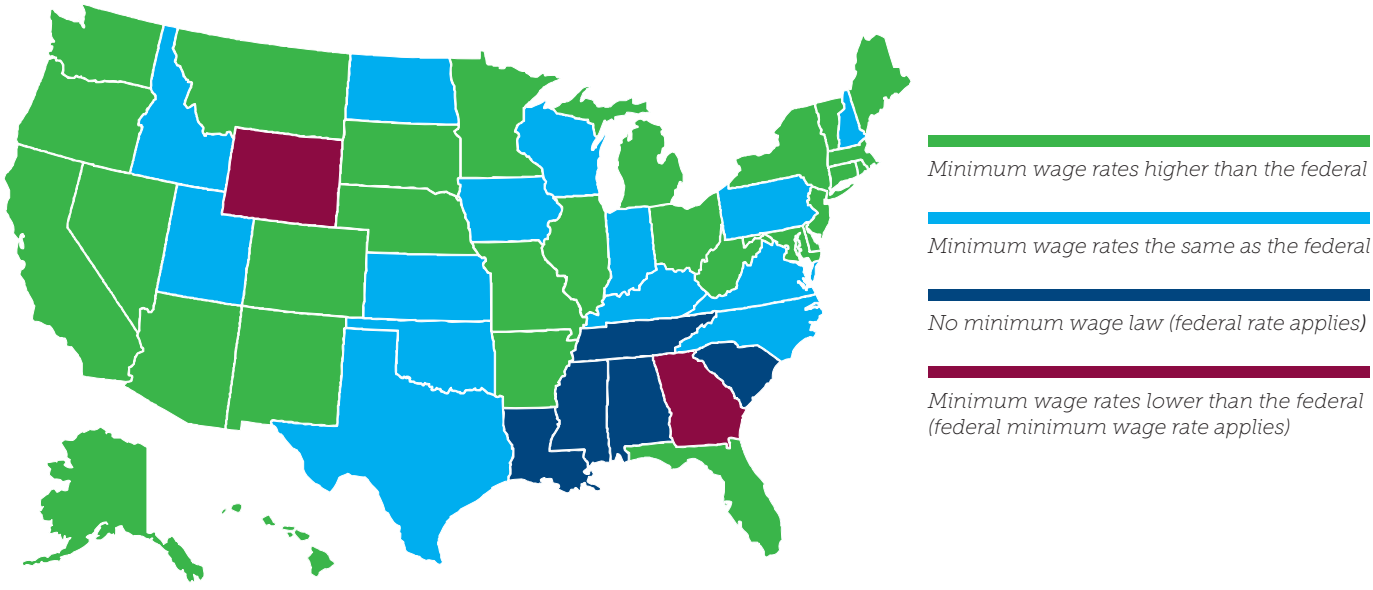
7 As stated by U.S. Congressman Keith Ellison, "We know that a progressive group of state legislators can probably make more progress than us in Congress." *See* State Innovation Exchange, About Us, https://stateinnovation.org/about/. The State Innovation Exchange ("SiX") is a progressive political group that nationalizes issues by coordinating progressive lawmaking efforts at the state level. On February 28, 2017, in a response to President Trump's first joint address to Congress, SiX introduced a rebuttal agenda of 130 bills in state legislatures from Oklahoma to Alaska, an impressive effort it coordinated with 40 different organizations across the nation. Lydia DePillis, *Legislators organize blitz of equal-pay legislation in nearly half the states*, The Washington Post, Jan. 28, 2017, *available at* https://www.washingtonpost.com/news/wonk/wp/2016/01/28/legislators-organize-blitz-of-equal-pay-legislation-in-nearly-half-the-states/?utm_term=.8cfa98deb168; Heidi M. Przybyla, *Democratic legislators in 30 states to rebut Trump's Congress address,* USA Today, Feb. 27, 2017, *available at* http://www.usatoday.com/story/news/politics/2017/02/27/democratic-legislators-30-states-rebut-trumps-congress-address/98314184/. Some predict that this may result in more conflict between local, state and the federal government. *See, e.g.*, Sophie Quinton, *With the federal government and most states controlled by conservative Republicans this year, Democrats are looking to Democratic cities and counties to stand up for progressive policy*, Pew Trusts, Jan. 25, 2017, *available at* http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/01/25/expect-more-conflict-between-cities-and-states.

redundant, excessive, and difficult to comply with—potentially imposing real costs and litigation risks on employers with a commensurate impact on jobs. As an example, *The Wall Street Journal* recently noted that restaurants lost $3.2 billion in revenue in 2016 because of the lowest level of lunch traffic in four decades.[8] Part of the decline was attributed to the fact that restaurants "have raised their tabs over the past few years to cope with rising labor costs...."[9]

As the new political environment continues to develop, the business community should be mindful that, even as Washington seeks a lighter regulatory touch, the opposite might be taking place right in their backyard. This report is intended to educate employers and the public about the types of laws that have already been, or may soon be, debated in their communities.

While some of these policies may be well-intentioned, they can also be redundant, excessive, and difficult to comply with—potentially imposing real costs and litigation risks on employers with a commensurate impact on jobs.

Minimum Wage Laws By State



(U.S. Department of Labor, Wage and Hour Division)

8 Julie Jargon, *Going Out for Lunch is a Dying Tradition*, The Wall Street Journal, May 30, 2017, *available at* https://www.wsj.com/articles/going-out-for-lunch-is-a-dying-tradition-1496155377.

9 *Id.*

EXISTING TRENDS IN LOCAL EMPLOYMENT LAWS

Minimum Wage Laws

One area of significant focus among organized labor and other interest groups is the minimum wage. Since the enactment of the federal Fair Labor Standards Act (FLSA) in 1938, under which the federal government sets the floor for the minimum wage, all but five states have adopted state minimum wage laws of their own.[10] Nevertheless, a number of high-profile organizations and interest groups have launched campaigns to increase state and local minimum wages based at least in part on the premise that minimum wages around the country are too low. In addition, unions like the Service Employees International Union (SEIU), which launched the "Fight for $15" campaign, see the issue as a way to promote unionization of the fast food sector. These advocates have achieved some policy successes, and through state and local ordinances, ballot initiatives, or administrative actions, the minimum wage has gone up in a number of states and cities.[11] At the same time, however, the SEIU has yet to make any progress in its organizing objective.

Since 2015, the states of New York and California, along with the cities of Seattle and Washington, D.C., have passed legislation raising the minimum wage to $15 an hour. At least 23 other states and cities also raised their minimum wages by a smaller amount during this time.[12] Typically, these new minimum wage laws phase in the increase over a few years. Arizona, Colorado, and Maine, for example, will incrementally increase their minimum wages to $12 per hour by the year 2020.[13] In addition, many provide for automatic inflation adjustments in the future.[14]

There is a legitimate debate to be had over the "right" minimum wage. The bottom line is that the business community should be prepared for additional minimum wage campaigns at the state and local level, particularly as Congress is unlikely to take up the issue.

Seattle's $15 minimum wage includes a unique feature that, in addition to phasing in the new minimum wage over several years, also differentiates between employer size and the nature of medical benefits that the employer offers. Seattle's law divides employers into "Schedule I" and "Schedule II" employers. Schedule II employers, or those with less than 500 employees in the U.S. will become subject to the $15 minimum on January 1, 2021, but that amount will be phased in with a $.50 increase per year beginning each January.[15] Schedule I employers, or

10 Alabama, Louisiana, Mississippi, South Carolina and Tennessee do not have state minimum wage laws.

11 The Fight for $15, http://fightfor15.org/2016-year-minimum-wage-increase/; *see also* Colorado Amendment 70 (by a 55% / 45% margin of Colorado voters on November 8, 2016, raising Colorado's minimum wage from $8.31 to $12 per hour by 2020); 12 NYCRR § 141-1.1, *et seq.* (New York State Department of Labor Wage Orders effective December 31, 2016, raising minimum wages to up to $15 based on size and industry by year 2020); SB 3, 2015-2016 California Regular Session (amending Cal Lab Code §§ 245.5, 246 and 1182.12 to raise minimum wage gradually to $15 per hour by year 2023).

12 *See* National Conference of State Legislatures, State Minimum Wages | 2017 Minimum Wage by State, Jan. 5, 2017, *available at* http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.

13 *See, e.g.*, Colorado Amendment 70 (by a 55% / 45% margin of Colorado voters on November 8, 2016, raising Colorado's minimum wage from $8.31 to $12 per hour by 2020 with annual adjustments thereafter based on the consumer price index); Arizona Proposition 206 (by a 58% / 42% margin of Arizona voters on November 8, 2016, raising Arizona's minimum wage gradually to $12 per hour by year 2021 and providing for annual cost-of-adjustment raises from year 2022); Maine Question 4 (by a 55% / 45% margin of Maine voters on November 8, 2016, raising Maine's minimum wage gradually to $12 by 2020, and providing for subsequent adjustments to the minimum wage with fluctuations in the consumer price index).

14 *See* National Conference of State Legislatures, State Minimum Wages | 2017 Minimum Wage by State, Jan. 5, 2017, *available at* http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.

15 Seattle Municipal Code § 14.19.035 (hourly minimum wage schedule for "Schedule II Employers" or those with 500 or fewer employees in the US), *available at* www.employmentlawworldview.com/files/2016/01/Ordinance-124960.pdf

those with over 500 employees in the U.S., are subject to a $15 minimum wage from January 1, 2017, if they do not pay medical benefits, but they have an extra year to implement the $15 minimum wage, or until January 1, 2018, if they do provide such benefits.[16] Besides the usual conception of a "large employer," the Seattle ordinance also defines Schedule I employers to expressly include "all franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate . . ."[17] The International Franchise Association ("IFA") quickly organized a group of five Seattle-area franchises to challenge the new minimum wage ordinance, arguing that it violated the Equal Protection Clause, Commerce Clause, and First Amendment of the U.S. Constitution. On September 25, 2015, however, the lawsuit ended unsuccessfully when the Ninth Circuit upheld an unfavorable district court ruling against the IFA.[18]

A number of new minimum wage laws have also been the targets of legal challenges, and as in Seattle, the minimum wage laws have been upheld to date. In Missouri, for instance, the Supreme Court of Missouri unanimously upheld St. Louis's 2015 ordinance to raise the minimum wage to $11 per hour by 2018. The ordinance had been challenged on the basis that the city acted without charter authority and that local ordinances were preempted by state law.[19]

However, Missouri also illustrates another trend in minimum wage debates—state preemption. In May 2017, the Missouri legislature passed a preemption bill that would block local governments in the state from setting their own minimum wage. [20] A similar situation occurred in Alabama when Birmingham became the first southern city to raise the minimum wage. In July 2016, the Birmingham City Council approved an incremental increase to $10.10 but before it could be enacted, the Alabama state legislature passed a wage preemption law which effectively voided the Birmingham ordinance.[21] This state preemption law itself is now being challenged in the courts.[22]

There is a legitimate debate to be had over the "right" minimum wage. The bottom line is that the business community should be prepared for additional minimum wage campaigns at the state and local level, particularly as Congress is unlikely to take up the issue. As illustrated, however, there are many different provisions that can be included in such a law and the mechanics of an increase may be as impactful as the absolute amount.

16 Seattle Municipal Code § 14.19.030 (hourly minimum wage schedule for "Schedule I Employers" or those with more than 500 employees in the US).

17 Seattle Municipal Code §14.19.010 (definition of "Schedule I employer").

18 *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

19 *Coop. Home Care, Inc. v. City of St. Louis*, No. SC95401, 2017 Mo. LEXIS 64 (Mo. Feb. 28, 2017) ("there is no conflict preemption when a local law simply supplements state law, such as when the locality prohibits more than the state prohibits . . . . Plaintiffs are incorrect that the Missouri minimum wage law is an affirmative authorization to pay no more than the state minimum wage. To the contrary, it simply sets a floor below which an employee cannot be paid . . . .").

20 Bloomberg BNA Daily Labor Report, 5/12/17.

21 *See* 2016 Al. ALS 18, 2016 Ala. Acts 18, 2016 Al. Pub. Act 18, 2016 Al. HB 174A, Section 2(b) (providing that a "county, municipality, or any other political subdivision of this state shall not enact or administer any ordinance, policy, rule, or other mandate requiring an employer to provide any employee, class of employees, or independent contractor with any employment benefit, including, but not limited to, paid or unpaid leave, vacation, wage, or work schedule, that is not required by state or federal law, and shall not require an employer to compensate an employee, class of employees, or independent contractor for any vacation or other form of leave for which state or federal law does not require the employee, class of employees, or independent contractor to be compensated").

22 John Sharp, *Racially tinged battle over minimum wage intensifies in Alabama*, AL.com, Jan. 29, 2017, *available at* https://www.bna.com/trump-freezes-overtime-n73014450151/.

Misclassification Laws

Groups such as the National Employment Law Project (NELP) have identified certain industries in which it asserts workers should be classified as employees rather than independent contractors and has pushed for numerous laws related to this alleged misclassification. In a May 2015 fact sheet, for instance, NELP referred to wage misclassification as "payroll fraud" and identified home health care as one industry that changed the classification of its workers from 1099 to W-2, in part due to recent court cases.[23] While there are always debates about the clarity of the line between independent contractors and employees, misclassification is a fairly well regulated area of the law, which makes it unclear why new state and local laws are needed.

However, aside from the policy aspects of this debate, both federal and state governments may look to misclassification as a revenue raiser. On September 19, 2011, the Internal Revenue Service (IRS) and U.S. Department of Labor (DOL) entered into a Memorandum of Understanding to form a "joint initiative" to "reduce the incidence of misclassification of employees as independent contractors, help reduce the tax gap, and improve compliance with federal labor laws."[24] Per the Memorandum of Understanding, both agencies agreed to participate in joint outreach programs and refer violators to each other to reduce worker misclassification, questionable employment tax practices, and abusive employment and unemployment tax schemes.[25] Though the Memorandum of Understanding referenced additional legal protections for those classified as employees, it was clear that a primary motivator was the preservation of employment tax revenues.

While there are always debates about the clarity of the line between independent contractors and employees, misclassification is a fairly well regulated area of the law, which makes it unclear why new state and local laws are needed.

DOL has entered into similar partnerships to reduce misclassification and increase employment tax revenues with 37 states.[26] The partnerships between the DOL and individual state departments of labor are similar in that most contain an agreement to share data between the two agencies, to appoint a contact person in each to facilitate this sharing of data, and to work together to conduct outreach and education. However, the length and start dates of the partnerships differ. North Dakota and Tennessee, traditionally conservative states, were the most recent states to enter into a federal-state partnership to increase employment taxes, from January 4, 2017, and January 17, 2017, respectively, for three years each. On the other end, Connecticut was the first state to enter into such a partnership agreement, effective September 19, 2011, the same date of the Memorandum of Understanding between the IRS and DOL. It has since been renewed until November 20, 2017.[27]

California was also among the early participants, entering into a DOL-state partnership on December 21, 2011. According to the California Department of Industrial Relations' website, "misclassification of workers results in a loss of payroll tax revenue to the state, estimated at $7 billion per

23 *See* National Employment Law Project, Independent contractor classification in home care (May 2015). In 2015, Georgia became one such state to take legislative action. Perhaps surprisingly, the action was on a bipartisan and majority basis. By a vote in the Georgia Senate of 51-3 and a vote in the Georgia House of 162-2, the Georgia General Assembly passed the Home Care Patient Protection Act, which requires that all home health care providers classify their workers as employees rather than contractors. O.C.G.A. § 31-7-300, *et seq*.

24 IRS and DOL, Memorandum of Understanding Between The Internal Revenue Service and The US Department of Labor (Sept. 19, 2011), *available at* https://www.dol.gov/whd/workers/MOU/irs.pdf.

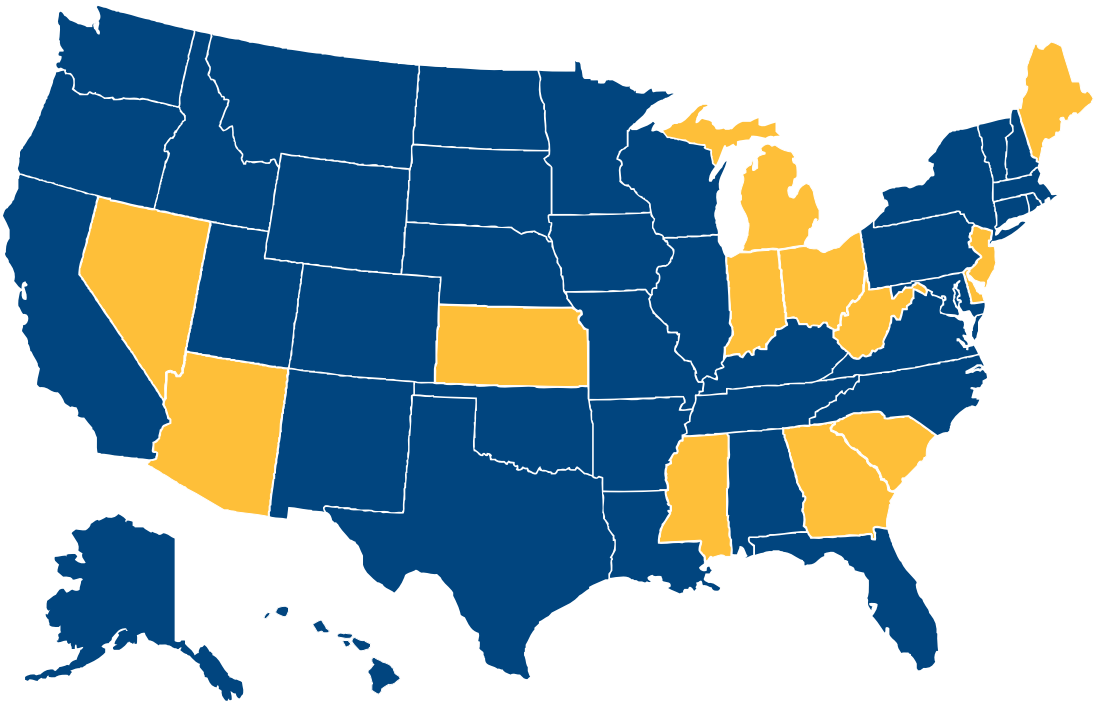
25 *Id.*

26 U.S. Department of Labor, Wage and Hour Division, *Misclassification of Employees as Independent Contractors*, https://www.dol.gov/whd/workers/misclassification/.

27 *Id.*

year."[28] A few months prior, California Governor Jerry Brown had signed into law a bill that significantly increased the civil penalties for employers that misclassify workers as independent contractors. While misclassification under the federal minimum wage law, the Fair Labor Standards Act, can result in overtime damages, liquidated damages, and tax penalties, California's state misclassification law, which became effective January 1, 2012, goes further by creating statutory penalties up to $25,000 per violation.[29]

The DOL Misclassification Initiative



Current Participant in DOL Misclassification Initiative

Current Non-Participant in DOL Misclassification Initiative

(U.S. Department of Labor, Wage and Hour Division)

28 State of California Department of Industrial Relations, *Worker Misclassification*, https://www.dir.ca.gov/dlse/worker_misclassification.html

29 Cal. Lab. Code § 226.8

Wage Theft Laws

"Wage theft" is an amorphous term used to describe a number of indirect means, such as job misclassification, improper deductions, or late payment, through which an individual may allege denial of proper compensation. Though wage theft is already illegal in all 50 states, advocacy groups such as Interfaith Worker Justice and NELP have pushed for stringent new measures at the state and local level. These generally include increased enforcement, stiffer penalties, more burdensome recordkeeping requirements, and stronger anti-retaliation provisions.

In 2010, for example, Illinois enacted new legislation called the Wage Payment and Collection Act.[30] This Act included streamlined procedures allowing workers to take claims under $3,000 to the Illinois Department of Labor, strengthened anti-retaliation provisions,[31] and new measures allowing class action lawsuits against employers and business owners *as individuals*.[32] Employers found to have violated the Act are required to pay claimed back wages, a fine, interest, and legal fees. Three years later, the city of Chicago passed an even more stringent wage theft law. Under Chicago's legislation, a business convicted of a "willful" violation can have its business license revoked.[33] In 2015, Cook County followed suit and passed a county-wide wage theft ordinance.[34] Other localities with strict new wage theft ordinances include Washington, D.C., Miami-Dade County, San Francisco, Seattle, Fayetteville, and Philadelphia. Philadelphia's wage theft law, which became effective July 1, 2016, adds a unique requirement that employers must provide notice to their employees that they may file complaints for unpaid wages in a foreign language if 5% or more of the employer's workforce speaks a first language other than English.[35]

> ***Though wage theft is already illegal in all 50 states, advocacy groups such as Interfaith Worker Justice and NELP have pushed for stringent new measures at the state and local level.***

Like the minimum wage, stringent new wage theft laws are a trend that seems to be spreading. The activists supporting this trend hope that the provisions in these laws, in particular the revocation of a business license, will at some future point become the federal standard.[36]

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30 820 ILCS 115/1, *et seq*.

31 820 ILCS 115/14(c) was amended in 2010 to protect employee wage complaints made to a "community organization" and "in a public hearing" in addition to the existing protected activity to an employer and the Director of Labor. The revisions also expanded the anti-retaliation provisions by providing a private right of action, and for costs and attorneys' fees in that private civil action. *See* 2009 ILL. ALS 1407, 2009 Ill. Laws 1407, 2009 ILL. P.A. 1407, 2009 ILL. SB 3568 (amending Wage Payment and Collection Act).

32 820 ILCS 115/11.

33 Chicago Code of Ordinances § 4-4-320.

34 Cook County Government, *Cook County Board of Commissioners Passes Wage Theft Ordinance*, http://www.cookcountyil.gov/2015/02/11/cook-county-board-of-commissioners-passes-wage-theft-ordinance/.

35 The Philadelphia Code § 9-4309(2).

36 Josh Eidelson, *Big win for labor in Chicago*, Salon, Jan. 18, 2013, *available at* http://www.salon.com/2013/01/18/big_win_for_labor_in_chicago/. At the same time, some states have enacted preemption laws covering health insurance benefits, leave policies, hourly wage standards, or prevailing wage standards that include a prohibition against local governments enacting wage theft ordinances, stating that enforcement of existing wage statutes is the province of the state and federal government. Tennessee is an example. *See* Tenn. Code Ann. §§ 50-2-112.

Paid Leave

In 1993, Congress passed the federal Family and Medical Leave Act (FMLA). While the law allows workers to take time off to deal with medical and family matters, leave under the FMLA is unpaid. Since that time, state and local governments have begun passing laws requiring that leave time under their jurisdiction be compensated. They have also substantially expanded the circumstances under which leave can be taken. State laws now include protected leave for things like disaster relief and so-called small necessities leave, which, while important, stray beyond the original scope of the FMLA.[37]

Ten years ago, only two cities in the nation, San Francisco and Milwaukee, had paid sick leave ordinances.[38] Now, at least 30 cities and counties do, along with seven states plus Washington, D.C.[39] Of these seven states, four passed earned or paid sick leave laws since 2015,[40] and a majority of the cities passed them in 2015 or after as well. The most recent additions on the state level are Arizona and Vermont,[41] while cities and municipalities include Berkeley, CA; Chicago, IL; Cook County, IL; Minneapolis, MN; St. Paul, MN; Spokane, WA; and Los Angeles, CA.[42]

To the extent that localities pass laws with differing requirements, they create a patchwork of mandates that may be difficult for state-wide employers to administer. Regardless of the impact, calls for state and local leave mandates continue to expand.

The exact parameters of each law vary regarding accrual rates, waiting periods, rollover, usage, and exemptions. Vermont's "earned sick time" law, which became effective January 1, 2017, for those with six or more full-time employees, requires that employers provide one hour of paid sick leave for every 52 hours worked.[43] It phases in the maximum amount of paid leave that an employee may use from 24 hours until December 31, 2018, up to 40 hours in 2019 and subsequent years.[44] Small employers, defined as those with five or less full-time employees, will not be subject to Vermont's law until January 1, 2018. The law also provides that newly-hired employees may not use their earned sick time until after one year of employment, but must still be permitted to accrue it at a rate of not less than one hour per 52 hours worked.[45]

Arizona's paid sick leave law is unique in that organizers went directly to the voters instead of the

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37 *See, e.g.*, Mass. Gen. L. Ch. 149, § 52D. Massachusetts's small necessity leave permits leave for employees to attend their child's school activities and appointments related to an elder's care, for instance.

38 Washington, D.C. also had paid sick leave laws in 2008.

39 The cities and counties include San Francisco, Seattle, New York City, Jersey City, Newark, Irvington, Passaic, East Orange, Paterson, Trenton, Montclair, Bloomfield, Elizabeth, Plainfield, Morristown, San Diego, Oakland, Tacoma, Philadelphia, Emeryville, Berkeley, Pittsburgh, New Brunswick, Spokane, Santa Monica, Minneapolis, Los Angeles, St. Paul, Chicago, Montgomery County and Cook County, and District of Columbia. The seven states are Connecticut, California, Massachusetts, Oregon, Vermont, Arizona and Washington. *See* National Partnership for Women & Families, Paid Sick Days – State, District and County Statutes, *available at* http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf; *see also* A Better Balance, *Paid Sick Time Legislative Successes*, *available at* http://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/.

40 The four states are Oregon, Vermont, Arizona and Washington.

41 Arizona Proposition 206 (by a 58% / 42% margin of Arizona voters on November 8, 2016, establishing earned paid sick time); Vermont H. 187 (Act 69) (by a 15/14 vote in the Senate and an 81/64 vote in the House, passing earned sick time law).

42 *See* Berkeley Municipal Code §§ 13.100.010, *et seq.* (ordinance passed August 31, 2016); Chicago Code of Ordinances §§ 1-24-45, *et seq.* (ordinance passed June 22, 2016); Cook County Code of Ordinances §§ 42-2, *et seq.* (ordinance passed October 5, 2016); Minneapolis Code of Ordinances §§ 40.10, *et seq.* (ordinance passed May 27, 2016); St. Paul Code of Ordinances §§ 233.01, *et seq.* (ordinance passed September 7, 2016); Spokane Code of Ordinances §§ 09.01.010, *et seq.* (ordinance passed over mayor's veto on January 25, 2016); Los Angeles Code of Ordinances §§ 187.00, *et seq.* (ordinance passed on June 1, 2016).

43 21 V.S.A. § 482(a).

44 21 V.S.A. § 482(c)(1)(A)-(B).

45 21 V.S.A. § 482(b).

state legislature, a strategy that, similar to minimum wage laws, could become more frequent.[46] The Arizona ballot measure, passed by a 58%-42% margin on November 8, 2016, also contains different requirements based on employer size.[47] Employees at businesses with 15 or more workers may accrue up to 40 hours of paid leave per year, while those at businesses with less than 15 employees may accrue up to 24 hours per year.[48] Similar to the FMLA, the Arizona law permits leave to care for a "family member," but unlike the FMLA, which limits "family member" to strictly legal family members, the Arizona law broadly defines this term to include someone whose "close association with the employee is the equivalent of a family relationship."[49]

As with laws regarding wages, paid leave ordinances are often well-intentioned. However, they do add to labor costs, and compliance can be particularly hard for small businesses. Moreover, to the extent that localities pass laws with differing requirements, they create a patchwork of mandates that may be difficult for state-wide employers to administer. Regardless of the impact, calls for state and local leave mandates continue to expand.

Laws Regulating Pre-Employment Inquiries

The federal Fair Credit Reporting Act in 1970 ("FCRA") was one of the first laws in the nation to regulate pre-employment inquiries, a topic that has become more widely debated in recent years. The FCRA requires that employers obtain applicant consent if they conduct a background investigation, credit check, or criminal record check for employment purposes, and it imposes limits on the type of information that may be provided. Although applicable to the employment context, the FCRA was initially aimed more towards consumer protections with regard to credit agencies. Over the years, however, a number of interest groups have gone beyond the requirements of the FCRA to make it far more difficult for employers to obtain information about applicants during the hiring process.

For example, several state and local governments have passed "Ban-the-Box" laws.[50] These laws seek to prevent employers from conducting certain types of pre-employment screenings related to an applicants' criminal history. Although the Ban-the-Box movement started in the late 1990s, it gained more traction during and after the Great Recession, when unemployment reached record levels.[51] The campaign was then picked up by the non-profit organization NELP as one of its key movements and was embraced by the Obama Administration, which instructed federal agencies to delay certain job application inquiries for their own hires.[52]

Recently, "Ban-the-Box" laws were passed in Pennsylvania, Utah, Nevada, Oregon, Vermont, and Wisconsin. In addition, former Missouri governor Jay Nixon signed an Executive Order in 2016 that applies only to applicants for jobs with state agencies.[53] Oregon's law, which became effective January 1, 2016, is typical of these statutes and forbids employers from screening applicants for prior criminal history at the initial interview stage and from requiring disclosure of a criminal conviction.[54] Like similar laws, however,

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46 *See, e.g.*, Justin Miller, *Emboldened by Trump, Minimum-Wage-Hike Opponents Fight Back*, Prospect.org, March 14, 2017, *available at* http://prospect.org/article/emboldened-trump-minimum-wage-hike-opponents-fight-back.

47 Arizona Proposition 206 (by a 58% / 42% margin of Arizona voters on November 8, 2016, creating a right to paid sick time).

48 A.R.S. § 23-372(B).

49 A.R.S. § 23-371(H).

50 *See, e.g.*, National Employment Law Project's Ban-the-Box campaign, http://www.nelp.org/campaign/ensuring-fair-chance-to-work/.

51 *See* Christina O'Connell, *Ban The Box: A Call To The Federal Government To Recognize A New Form Of Employment Discrimination*, 83 Fordham L. Rev. 2801 (April 2015).

52 The White House, Office of the Press Secretary, *FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly- Incarcerated* (Nov. 2, 2015), *available at* https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation.

53 Missouri Executive Order 16-04 (April 11, 2016).

54 Or. Rev. Stat. § 659A.360(2).

Oregon's law provides that an employer may take into account an applicant's conviction history after the initial application stage when making a hiring decision.[55]

The growth of the "Ban-the-Box" movement has led to restrictions on additional categories of pre-employment inquiry, particularly pre-employment credit checks. The District of Columbia became the newest jurisdiction to prohibit an employer's use of "information bearing on an employee's creditworthiness, credit standing, credit capacity, or credit history" in employment decisions through a law that was signed into law on February 15, 2017.[56] The law, D.C. Act 21-673, amends the District of Columbia's existing human rights law by adding credit information as a prohibited basis for any employment decision, not just hiring, and it applies to employers of any size.[57] The law does have several exemptions, however, including financial institutions (if the employee has access to personal financial information) and firms whose employees require a security clearance. In seeking to eliminate or regulate this practice, the District of Colombia joins at least 11 other states and two cities.[58]

Although some studies indicate that these laws are actually having the opposite of the intended effect, it is likely that more states and localities will impose additional restrictions on the type of information that can be gathered during the hiring process, and that states with existing laws related to government employees will expand them to employers in the private sector.

"Ban-the-Box" laws and their progeny are popular because they are based on the non-controversial principle that everyone deserves a second chance. As of May 2017, more than 150 cities and counties and 27 states prohibit or limit certain pre-employment inquiries into credit, criminal, or arrest records.[59] Although some studies indicate that these laws are actually having the opposite of the intended effect,[60] it is likely that more states and localities will impose additional restrictions on the type of information that can be gathered during the hiring process, and that states with existing laws related to government employees will expand them to employers in the private sector.[61]

55 Or. Rev. Stat. § 659A.360(3).

56 D.C. Code § 2-1402.11(e)(1), as amended.

57 D.C. Code § 2-1402.11(a)(1) and (a)(1)(4)(D), as amended.

58 The states that currently prohibit, limit or regulate the use of credit checks in employment are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. The cities include New York City and Chicago.

59 *See* Michelle Natividad Rodriguez and Beth Avery, National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, May 2017, *available at* http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

60 *See, e.g.*, Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, The Atlantic, Aug. 14, 2016, *available at* https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/.

61 The states that currently have "Ban-the-Box" laws applying to private employers are Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont.

Equal Pay Laws

There is no disagreement with the principle that pay discrimination is wrong and should be against the law. In fact, since the federal enactment of the Equal Pay Act of 1963, 48 states have adopted their own equal pay laws.[62] Despite this extensive legal foundation, the issue continues to be on the agenda of groups seeking more labor and employment regulations. In 2016, for instance, the progressive political group State Innovation Exchange ("SiX") led an "Equal Pay Can't Wait" campaign that was responsible for the coordinated introduction of new equal pay laws in 30 states.[63] Five of those states—Utah, Nebraska, Delaware, Maryland and Massachusetts—have since passed a new law or strengthened their existing laws.[64] These expanded equal pay laws tend to require employers to reveal more information about their pay practices, establish greater penalties for disparities, or lower the standards for establishing a claim of unequal pay.[65]

> ***Salary history is clearly an issue that is gaining more attention, as this type of legislation has been introduced in approximately 25 states.***

Another related area involves so-called "pay transparency" laws that expressly allow employees to discuss wage information. Such laws were recently passed in California, Connecticut, Delaware, Maryland, Massachusetts, New York, and Oregon.[66] Delaware's new law, which is a typical example, includes a provision making it an unlawful employment practice to "[r]equire as a condition of employment that an employee refrain from inquiring about, discussing, or disclosing his or her wages or the wages of another employee" or to "[r]equire an employee to sign a waiver or other document which purports to deny an employee the right to disclose or discuss his or her wages."[67] The law also made it unlawful to "[d]ischarge, formally discipline, or otherwise discriminate against an employee for inquiring about, discussing, or disclosing his or her wages or the wages of another employee."

At the opposite end of the disclosure spectrum, laws enacted in Philadelphia, New York City, and Massachusetts prohibit employers from asking about an applicant's salary history.[68] The supporters of these laws reason that asking for an applicant's salary history may further unfair pay disparities if an individual was not paid fairly in a previous job.[69] Massachusetts' law, the first of its kind in the nation, and effective July 1, 2018, prohibits employers from seeking "the salary history of any prospective employee from any

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62 Alabama and Mississippi are the exceptions.

63 State Innovation Exchange, About Us, https://stateinnovation.org/about/.

64 *Id.*

65 *See* Progress in the States for Equal Pay, National Women's Law Center (Sept. 2016), *available at* http://nwlc.org/resources/progress-in-the-states-for-equal-pay/.

66 SB 358, 2015 California Regular Session (amending Cal. Lab. Code § 1197.5), H.B. 6850, 2015 Connecticut General Assembly (creating Conn. Gen. Stat. § 31-40z), H.B. 314, 148th Delaware General Assembly (amending 19 Del. C. § 711), H.B. 1003, 2016 Maryland General Assembly (amending Md. Labor and Employment Code Ann. §§ 3-301, 3-304, 3-306, 3-307), S. 2107, 189th Massachusetts General Court (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151), S. 1, 2015 New York General Assembly (amending N.Y. LAB. LAW §§ 194, 198), and H.B. 2007, 78th Oregon Legislative Assembly (amending Or. Rev. Stat. § 659A.885).

67 19 Del. C. § 711(i).

68 Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151; The Philadelphia Code § 9-1131; New York City Administrative Code 8-107(25) (bill signed into law on May 4, 2017 by Mayor Bill de Blasio). California also passed an amendment, effective January 1, 2017, to its Fair Pay Act that eliminated salary history as a basis to justify pay disparity. Philadelphia's law is an example of how states and localities often model laws from other states and localities. In passing Bill No. 160840, which created Philadelphia's ordinance prohibiting inquiries into salary history, the City Council specifically referenced Massachusetts's law in the preamble. Philadelphia is also a good example of how employment law trends can build within a single jurisdiction. In 2012, Philadelphia passed city ordinances which restricted how an applicant's criminal history could be used. It then expanded this ordinance to criminal inquiries, and then later, to credit information. The restriction on salary history information is a continuation of this trend.

69 For instance, the City Council of the City of Philadelphia found that "[s]ince women are paid on average lower wages than men, basing wages upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities . . . ." The Philadelphia Code § 9-1131(1)(c).

current or former employer[.]"[70] While it does permit an employer to confirm prior wages or salary history upon written authorization by the applicant, it may only do so only after any offer of employment with compensation has been made.[71] Philadelphia's ordinance on the other hand prohibits employers from relying on the wage history of applicants "*at any stage* in the employment process, including the negotiation and drafting of any employment contract," and appears to permit use of past wage history only if the applicant "knowingly and willingly disclosed his or her wage history . . . ."[72] However, the ordinance is silent as to what constitutes a "knowing and willing" disclosure. Though the individual contours of these types of laws will vary, salary history is clearly an issue that is gaining more attention, as this type of legislation has been introduced in approximately 25 states.[73]

Finally, a handful of equal pay laws have operated by making it more difficult to use "safe harbors" or establish employer defenses. These laws were recently enacted in California, Maryland, Massachusetts, and New York, among others.[74] Maryland's law, which became effective on October 1, 2016, limits an employer's use of the "bona fide defense" for pay disparity unless all three of the following conditions are met: the pay difference must not be based on or derived from a gender-based differential in compensation, it must be job related with respect to the position and consistent with a business necessity, and the non-discriminatory explanation for the pay difference must account for the "entire differential" in pay between two employees who are paid differently for performing "work of comparable character . . . ."[75] Maryland's law also adds a section expressly stating that an employee may demonstrate pretext to overcome the employer's bona fide reason for the pay differential.[76] This means that even if an employer successfully establishes the three prongs of the bona fide defense to explain its pay differences, an employee could still successfully state a claim for pay discrimination if he or she can establish that the explanation is pretext for unlawful discrimination. Maryland's law also expressly provides that in correcting pay differences in violation of its new law, an employer may not reduce another employee's wage.[77]

Pay discrimination has been illegal in the United States since 1963, and in many states even before then. Nonetheless, employers can expect a patchwork of different laws allegedly intended to deal with this issue to continue to be introduced around the country.

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70 Mass. Gen. Laws Ch. 149 § 105A, as amended (effective July 1, 2018).

71 *Id.*

72 Yuki Noguchi, *Proposals Aim To Combat Discrimination Based On Salary History*, NPR, May 30. 2017, *available at* http://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history.

73 *Id.*

74 *See* SB 358, 2015 California Regular Session (amending Cal. Lab. Code § 1197.5), 14 H.B. 1003, 2016 Maryland General Assembly, (amending Md. Labor and Employment Code Ann. §§ 3-301, 3-304, 3-306, 3-307), S. 2107, 189th Massachusetts General Court (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151), and 16 S. 1, 2015 New York General Assembly (amending N.Y. Lab. Law §§ 194, 198).

75 Md. Labor and Employment Code Ann. § 3-304(c)(7)(i)-(iii).

76 Md. Labor and Employment Code Ann. § 3-304(d).

77 Md. Labor and Employment Code Ann. § 3-304(e).

78 *See* Bureau of National Affairs, *Equal Pay for Equal Work: Federal Equal Pay Law of 1963*, at 39-51, n.30 (1963). In 1919, Michigan and Montana first enacted equal pay laws, with 20 other states passing similar laws between 1944 and 1962. *Id.* The federal Equal Pay Act was passed in 1963.

Labor Peace Ordinances

State and local governments have also enacted legislation designed to strengthen the hands of labor unions by essentially coercing businesses to accept union representation when they are involved with a development project. This so-called "labor peace" legislation requires that, as a condition of public financing assistance, being awarded a public contract, or doing business at a facility in which a government body asserts a "proprietary interest,"[79] employers sign an agreement with a labor union. These labor peace agreements are inherently favorable to unions in that they can require a party to the agreement to accept card check certification, union access, a standard union contract, or neutrality during organizing election campaigns.[80] As a result, labor peace agreements essentially force employers into accepting union organizing concessions or relinquishing their rights under federal labor laws in order to do business with a state or local government or on projects with only a tenuous connection to the government.

Some jurisdictions have used labor peace ordinances for years. One such example is in Pittsburgh, which passed an ordinance in 1999 covering contractors and subcontractors hired to staff hospitality operations of the City of Pittsburgh's capital projects.[81] Pittsburgh's ordinance explicitly provides that employers "shall be or become signatory to valid collective bargaining agreements" with any labor organization seeking to represent its employees "as a condition precedent to its contract with the City of Pittsburgh."[82] This language goes beyond that seen in other labor peace ordinances, including those in San Francisco and Washington, D.C. Even under San Francisco's two labor peace ordinances, a union still must campaign for worker support, though such campaigns are heavily tilted toward the union since support can be expressed by signed cards rather than a secret ballot.[83]

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Other jurisdictions, such as the states of New York and Maryland, have enacted less specific labor peace ordinances.[84] These laws require covered employers to enter into agreements with unions under which the union consents not to engage in economic action such as strikes and pickets, but the laws leave it to the parties to determine the specific content of the agreements. Importantly, that negotiable content includes the nature of the rules that will govern the parties' behavior during organizing campaigns and the method by which employees will express their decision regarding collective representation. Such statutes provide unions with substantial leverage to demand card check since a covered employer *must* provide state or local authorities with a labor peace agreement signed by a union, and most unions will only sign if their demands for card check and other negotiating concessions are met.[85]

More recently, on July 14, 2016, New York City enacted a labor peace ordinance by executive order

79 *See, e.g.*, Baltimore City Code, Art. 11, §13-6(b).

80 *See* U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate (Sept. 12, 2013), https://www.uschamber.com/report/labor-peace-agreements-local-government-union-advocate.

81 City of Pittsburgh Code, § 161.30.1(a).

82 *Id.*

83 San Francisco Administrative Code, Ch. 23, Art. VI, §23.51.

84 NY CLS Pub A § 2879-b and Md. State Code §9-1A-07 (c)7 (v).

85 *See, e.g.*, Pittsburgh (Penn.) Ordinance ch. 161.30; 20 Ill. Comp. Stat. Ann. 689/15(a)(3), 689/25(a); *see also* U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate (Sept. 12, 2013), *available at* https://www.uschamber.com/report/labor-peace-agreements-local-government-union-advocate.

of the mayor.[86] Executive Order No. 19 applies to developers who receive city financial assistance or operate retail or food service establishments on the premises of a city development project. As a condition, New York City will now require certain covered employers to enter into a labor peace agreement that allows a union to represent the covered employees.

Supported by union and union-backed organizations, state and local governments are likely to continue enacting or considering similar labor peace legislation. By contrast, a few states have passed legislation prohibiting local governments from imposing such policies. States including Georgia, Tennessee, Louisiana, Michigan, Alabama and Mississippi have already passed legislation banning labor peace agreements.[87]

THE NEXT EMPLOYMENT LAW TRENDS

While the policies discussed above have been on the agenda for some time, a few new trends have emerged, particularly those relating to work schedules, "opportunity to work" ordinances, overtime, and paycheck deductions.

Predictive Scheduling Laws

"Predictive scheduling" or "secure scheduling" laws seek to regulate how employers may set their employees' work hours and schedules. The laws typically require employers to set an employee's schedule one to two weeks in advance and provide premium pay if a change is made within that window. The idea for predictive scheduling laws appears to have originated with the San Francisco chapter of Jobs with Justice, and the idea was subsequently endorsed by a dozen other organizations including NELP.[88] Initially, Jobs with Justice sought to impose scheduling restrictions on large chain stores categorized as "formula retail," which it defined as "businesses with 20 or more locations globally and 20 or more employees in San Francisco."[89] According to Jobs with Justice, the objective of such laws is to promote full-time work and encourage job security,[90] though a recent study found that San Francisco's predictive scheduling law actually resulted in 17% of retail employers offering fewer jobs across the board.[91]

> ***The ordinance requires retail employers to inform employees of their estimated number of work hours and shifts per month, provide two weeks' notice of work schedules, and compensate employees for schedule changes made with less than seven days' notice.***

In 2014, San Francisco became the first jurisdiction to pass a predictive scheduling provision, which came in the form of the "Predictive Scheduling and Fair Treatment for Formula Retail Employees Ordinance."[92] Though the ordinance exempts certain entities covered by a collective bargaining agreement,[93] it adopted the Jobs with Justice definition of "employer" and applies to employers with 20 or

86 The City of New York Office of the Mayor, Executive Order No. 19 (July 14, 2016), *available at* www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_19.pdf.

87 O.C.G.A. § 34-6-20, *et seq.*, Tenn. Code Ann. § 50-1-207, La. R.S. § 23:984; MCLS § 423.210; Code of Ala. § 25-7-42; Miss. Code Ann. § 71-15-7.

88 *See* Retail Workers Bill of Rights, Jobs with Justice San Francisco, http://retailworkerrights.com/.

89 *See id.* at http://retailworkerrights.com/get-the-facts/.

90 *Id.*

91 Dr. Aaron Yelowitz and Dr. Lloyd Corder, *Weighing Priorities for Part-Time Workers: An Early Evaluation of San Francisco's Formula Retail Scheduling Ordinance*, Employment Policies Institute (May 2016), *available at* https://www.epionline.org/wp-content/uploads/2016/05/EPI_WeighingPriorities-32.pdf.

92 San Francisco Police Code §§ 3300G.1, *et seq.*

93 The collective bargaining agreement exemption only applies if the requirements of the predictive scheduling ordinance are expressly waived in clear and unambiguous terms. San Francisco Police Code § 3300G.18 (waiver under collective bargaining agreement).

more workers in San Francisco.[94] The ordinance requires retail employers to inform employees of their estimated number of work hours and shifts per month, provide two weeks' notice of work schedules, and compensate employees for schedule changes made with less than seven days' notice.[95] Specifically, for schedule changes given with between 24 hours and seven days of advance notice to the employee, the employer must pay the employee one hour of pay at the employee's regular rate.[96] For schedule changes given with less than 24 hours' notice, the employer must pay the employee two hours of pay at his or her regular rate for shifts of four hours of less, and four hours of pay for shifts of more than four hours.[97]

Since San Francisco passed its ordinance in 2014, Seattle, WA, Emeryville, CA (the jurisdiction with the highest current minimum wage) and New York City have each passed some version of a predictive scheduling law. Emeryville's "Fair Workweek Employment Standards" ordinance was passed in October 2016[98] and followed Seattle's successful passing of a "Secure Scheduling Ordinance" one month earlier.[99] While Seattle's law applies to only large employers—those with 500 or more—Emeryville's ordinance applies to retail employers with 56 employees or more anywhere in the world, or fast food employers with 20 or more employees within the city limits of Emeryville.[100]

New York City's predictive scheduling ordinance, part of a series of new ordinances called the "Fair Workweek" package, was signed into law on May 30, 2017, by Mayor Bill de Blasio. These new ordinances regulate scheduling for retail establishments with 20 or more employees and fast food establishments with 30 or more establishments nationally.[101] For retail employees, employers may no longer: (1) schedule "on-call" shifts, (2) cancel its employees' regular shifts within 72 hours of the scheduled start of the shift, (3) require them to work with fewer than 72 hours' notice without written consent, or (4) require them to contact their employer to confirm their availability for work fewer than 72 hours before the start of the shift.[102] For fast food employees, employers must now pay a fixed "schedule change premium" between $10 and $75 to each employee whose shift is changed, canceled and/or added on to, depending on the amount of notice provided.[103] For violations of either of the subsections relating to retail or fast food employees, the affected employee may seek administrative enforcement or pursue a private right of action, with the ordinance allowing for the recovery of attorneys' fees.[104]

A separate ordinance that was included in the "Fair Workweek" package, perhaps the first of its kind, requires fast food employers to pay a flat premium of $100 to each employee who is required to work two shifts with less than 11 hours off in between, unless the employee requests or consents to the shifts in writing.[105]

In August 2017, the State of Oregon enacted its own version of a predictive scheduling law that requires large employers in the retail, hospitality, and food service industries with more than 500 employees worldwide to provide notice regarding employees' schedules. The statute states that employers must give new employees a "written good faith estimate of the employee's work schedule at the time of hire," which must include the median number of hours the employee is expected to work in a month. The law also requires employers to provide all employees with a written work schedule that must be posted in the workplace at least seven days prior to the beginning of a work period, and it imposes a penalty wage if

94 San Francisco Police Code § 3300G.3 (definition of "Employer").
95 San Francisco Police Code § 3300G.4.
96 San Francisco Police Code § 3300G.4(c)(2)(A).
97 San Francisco Police Code § 3300G.4(c)(2)(B)-(C).
98 Emeryville Municipal Code §§5-39.01, *et seq.*
99 Seattle Municipal Code §§ 14.22.005, *et seq.*
100 Emeryville Municipal Code §§5-39.02(a)(1)-(2).
101 Administrative Code of the City of New York § 20-1201, as amended by Introduction 1396-2016.
102 Administrative Code of the City of New York § 20-1251, as amended by Introduction 1387-2016.
103 Administrative Code of the City of New York § 20-1222(1)-(5), as amended by Introduction 1396-2016.
104 Administrative Code of the City of New York §§ 20-1208 to 1212, as amended by Introduction 1396-2016.
105 Administrative Code of the City of New York § 20-1231, as amended by Introduction 1388-2016.

New York City's Preddictive Scheduling Ordinance (Fair Workweek Package)

- *Employers may not schedule "on-call" shifts*
- *Employers may not cancel employees' regular shifts within 72 hours of the scheduled start of the shift*
- *Employers may not require employees to work with fewer than 72 hours' notice without written consent*
- *Employers may not require employees to contact their employer to confirm their availability for work fewer than 72 hours before the start of the shift*
- *Fast food employers must pay a flat premium of $100 to each employee who is required to work two shifts with less than 11 hours off in between, unless the employee requests or consents to the shifts in writing*

an employer changes scheduled shifts with less than seven days' notice. The law extends the notice period to two weeks starting July 1, 2020, and it states that employees may refuse to work any hours not included on the written schedule.[106]

Oregon's law also allows employers to maintain a standby list of employees to work additional hours if there are "unanticipated customer needs or unexpected employee absences," but employees must agree in writing to be included on such a standby list. Employers must notify employees in writing that the standby list is voluntary, give instructions on how to be removed from it, and explain that employees do not have to accept additional hours even if they have volunteered to be on the standby list.[107]

In addition, the statute imposes a recordkeeping requirement on employers, who must maintain "records that document the employer's compliance" for a minimum of three years. It also prohibits retaliation against employees for exercising their various rights under the statute or inquiring about them, and it provides for penalties up to $1,000 for violations. Interestingly, as passed, the law declares that it is "necessary for the immediate preservation of the public peace, health and safety" and declares an emergency, making the statute effective immediately.[108]

Opportunity to Work Laws

In addition to the predictive scheduling ordinance it passed in 2014, San Francisco also approved an ordinance regulating how employers may distribute work hours. The "Hours and Retention Protections for Formula Retail Employees Ordinance" states that "before hiring new Employees or using contractors or a temporary services or staffing agency to perform work in a Formula Retail Establishment, an Employer shall first offer the additional work to existing Part-time Employee(s)" if they are qualified and the work is the same or similar to their existing work.[109] In addition to requiring employers to offer additional hours to current employees, the San Francisco ordinance also requires retail employers to retain employees for 90 days upon a change in control of the business,[110] something that the city already required of certain other

106 Oregon Senate Bill 828, signed August 8, 2017. *See* Oregon Revised Statutes, Chapter 653.

107 *Id.*

108 *Id.*

109 San Francisco Police Code § 3300F.3 ("Offering Additional Work to Part-Time Employees"); *see also* Formula Retail Employee Rights Ordinances, San Francisco Police Code Article 33F and Article 33G Frequently Asked Questions (Aug. 5, 2015), *available at* http://sfgov.org/olse/sites/default/files/FileCenter/Documents/13080-FRERO_FAQs_08_05_15.pdf.

110 San Francisco Police Code §§ 3300F.4 to F.6.

businesses, such as workers in the grocery and hospitality industries.[111]

Along the same lines, San Jose voters on November 8, 2016, passed "Measure E," the Opportunity to Work measure. Sponsored by the South Bay Labor Council, a coalition of non-profit organizations and labor unions with funding from the Popular Democracy Action Fund, the measure was placed on the November 8, 2016, ballot after receiving the requisite number of signed petitions. Like San Francisco's law, the ordinance requires that prior to hiring additional employees or subcontractors, employers "must offer additional hours of work to existing employees who, in the employer's good faith and reasonable judgment, have the skills and experience to perform the work, and shall use a transparent and nondiscriminatory process to distribute the hours of work among those existing employees."[112] The ordinance, however, only applies to employers with 36 or more employees, and does not require a covered employer to offer additional hours to existing employees if such arrangement would result in overtime.[113] San Jose's law has already inspired similar legislation on the state level, with assemblywoman Lorena Gonzalez (D-San Diego) and assemblyman Ash Kalra (D-San Jose) introducing a state-level bill entitled the "Opportunity to Work Act"[114] in December 2016. The Opportunity to Work Act, A.B. 5, was passed by the California Assembly Committee on Labor and Employment in April 2017 and referred to the Appropriations Committee, which reportedly decided not to consider it for remainder of the year.[115]

Most recently, New York City became the newest jurisdiction to join San Francisco and San Jose. On May 30, 2017, as part of the "Fair Workweek" package of ordinances, Mayor de Blasio signed into law a new subchapter of the Administrative Code of the City of New York entitled "Access to Hours."[116] Under this new subchapter, fast food establishments with 30 or more establishments nationally must first offer shifts to current employees before hiring new employees or transferring employees from other locations to fill the shifts.[117] The ordinance contains detailed notice provisions that require the employer to post notice of the available extra shifts for three consecutive days, provide the notice electronically to each employee, and obtain written confirmation from current employees that they do not accept the shifts offered.[118] However, the ordinance does not require employers to offer the shifts to employees if it would result in overtime wages.[119]

The San Francisco ordinance also requires retail employers to retain employees for 90 days upon a change in control of the business, something that the city already required of certain other businesses, such as workers in the grocery and hospitality industries.

Observers of labor policy are watching these first jurisdictions carefully, as organizers have already begun introducing similar bills in states and cities across the nation. In fact, legislatures in eleven states and at least three cities considered predictive scheduling/opportunity to work laws in 2016, and at least one state considered a similar law in 2017.[120]

111 San Francisco Police Code §§ 3300D.1, *et seq.* (grocery worker retention ordinance); San Francisco Police Code §§ 3300E.1, *et seq.* (hospitality industry worker retention ordinance).

112 San Jose Municipal Code, § 4.101.040(A).

113 San Jose Municipal Code, § 4.101.090 (stating that small business enterprise not subject to new ordinance); San Jose Municipal Code, § 4.12.060 (defining small business enterprise).

114 A.B. 5, 2017 California Regular Session, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB5.

115 *See* Fisher Phillips, *Temporary Relief? "Opportunity to Work" Bill Reportedly Shelved For Year*, J.D. Supra, May 5, 2017, *available at* http://www.jdsupra.com/legalnews/temporary-relief-opportunity-to-work-32491/.

116 Administrative Code of the City of New York § 20-1241, as amended by Introduction 1395-2016.

117 Administrative Code of the City of New York § 20-1241(b)-(g), as amended by Introduction 1395-2016.

118 *Id.*

119 Administrative Code of the City of New York § 20-1241(i), as amended by Introduction 1395-2016.

120 Simultaneously, however, some states such as Georgia and Ohio have passed laws preempting cities and localities from passing predictive scheduling laws. *See* Georgia House Bill 243 (effective July 1, 2017) and Ohio Senate Bill 331 (effective March 20, 2017).

State and Local Overtime Regulations

On May 16, 2016, the U.S. Department of Labor ("DOL") issued a much-anticipated final overtime rule that radically increased the salary threshold for determining whether employees covered by the "white collar" exemptions in the Fair Labor Standards Act ("FLSA") are eligible for overtime pay. The DOL rule, which was originally slated to take effect on December 1, 2016, more than doubled the requisite salary threshold from $23,660 per year to $47,476.[121] It also raised the minimum compensation level to $134,004 for the highly compensated employee exemption.[122] However, on November 22, 2016, a federal judge in Texas blocked the overtime rule from taking effect, and since taking office, the Trump administration asked for three extensions in the deadline for filing an appeal[123] before ultimately informing the court that the Department would proceed with a "request for information" to assist with the development of a new proposal, which it did on July 26, 2017.[124]

Taking no time to fill the void left by the blockage of DOL's overtime rule, the New York State Department of Labor formally adopted revised wage orders on December 28, 2016, that operated in a similar fashion as the DOL rule—by raising the minimum salary thresholds for exempt employees. Effective December 31, 2016, exempt employees in New York City must earn at least $825 per week ($42,900 annually) if their employers have eleven or more employees or $787.50 per week ($40,950 annually) for employers with ten or fewer. Employers in downstate New York—Nassau, Suffolk and Westchester counties—must earn at least $750 per week ($39,000 annually), and in all other parts of the state of New York, $727.50 per week ($37,830 annually).[125]

In a similar fashion, the Maine Department of Labor also raised the minimum salary threshold from the federal minimum of $455 per week ($23,660 annually) to $519.24 per week ($27,000.48 annually).[126] Although the new salary minimum was to take effect on January 7, 2017, the Maine Department of Labor adopted a temporary policy of non-enforcement until January 31, 2017, to allow employers additional time to comply with the requirements.[127] Unlike New York's raised minimum salary threshold, Maine's new threshold took effect by operation of a state statute, which provides that a salaried employee must earn compensation that exceeds 3000 times the state's minimum hourly wage.[128] When Maine's voters voted in November 2016 to raise the minimum wage to $9.00 per hour, the annualized salary requirement for exempt employees also rose to $27,000 per year.[129]

California has also introduced legislation, A.B. 1565, that would raise the salary threshold in the state

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121 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38515 (July 6, 2015) (to be codified at 29 CFR Part 541).

122 *Id.* at 38537; *see also* Department of Labor, Final Rule: Overtime, Questions and Answers, *available at* https://www.dol.gov/whd/overtime/final2016/faq.htm#S7.

123 *State of Nevada, et al. v. U.S. Dept. of Labor*, Dkt. 60, Case No. 4:16-CV-00731-ALM (E.D. Tex. Nov. 22, 2016); *see also* Chris Opfer, *Trump Freezes Overtime, Pay Data Regulations*, Daily Labor Report, Jan. 24, 2017, *available at* https://www.bna.com/trump-freezes-overtime-n73014450151/.

124 Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34616 (July 26, 2017).

125 N.Y. Comp. Codes R. & Regs. tit. 12 § 141-3.2(c)(1), *available at* http://labor.ny.gov/legal/laws/pdf/minimum-wage/19-amended-rule.pdf.

126 The raise in the minimum salary threshold actually took effect by operation of a state statute, 26 M.R.S. § 663(3)(K), which provides that the minimum salary threshold must exceed 3000 times the state's minimum hourly wage. The salary threshold raised when Maine's voters voted to increase minimum wage on the November 8, 2016 ballot. *See* Maine Question 4 (by a 55% / 45% margin of Maine voters on November 8, 2016, raising Maine's minimum wage gradually to $12 by 2020, and providing for subsequent adjustments to the minimum wage with fluctuations in the consumer price index).

127 State of Maine Department of Labor, *New Minimum Wage and Overtime-Exempt Minimum Salary Take Effect in Maine Jan. 7*, http://www.maine.gov/labor/news_events/article.shtml?id=723943.

128 26 M.R.S. § 663(3)(K).

129 Maine Question 4 (by a 55% / 45% margin of Maine voters on November 8, 2016, raising Maine's minimum wage gradually to $12 by 2020, and providing for subsequent adjustments to the minimum wage with fluctuations in the consumer price index).

from $43,680 to $47,472—the exact amount in the Obama overtime rule.[130] As of this writing, the legislation had passed the Assembly on a 43-27 vote and was pending in the state senate.

Unions and their allies have discussed pushing for legislation incorporating the Obama overtime rule in other states as well, including Rhode Island, Connecticut, Maryland, Wisconsin, and Michigan.[131] Whether these laws could pass in states with unified Republican control such as Wisconsin is open to question, but the fact that such legislation is being introduced at all suggests that the business community has not seen the end of the overtime issue.

California has also introduced legislation, A.B. 1565, that would raise the salary threshold in the state from $43,680 to $47,472—the exact amount in the Obama overtime rule. As of this writing, the legislation had passed the Assembly on a 43-27 vote and was pending in the state senate.

CONCLUSION

Advocates for more stringent labor and employment regulation had a run of eight years during the Obama administration to impose new federal mandates on employers. The advent of the Trump administration means they are now looking beyond the Beltway for the policy changes they desire.

This paper has highlighted some of the most prevalent trends in state and local labor and employment laws and regulations. While they may not draw the same level of attention, these policies can burden employers as much as any federal regulation and result in increased costs and litigation risks. Businesses need to know which of these policies have been passed in their communities as well as what may be coming so they can ensure compliance.

An administration in Washington, D.C., that is focused on jobs and growth is a welcome development. The heavy hand of government has, however, not gone away. It has simply taken up a new residence.

130 A.B. 1565, 2017 California Regular Session, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1565.

131 Josh Eidelson, *Wage & Hour: Democrats Want to Revive Overtime Rule State by State*, Bloomberg/BNA Daily Labor Report, Jan. 13, 2017.

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