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State and Local Legislators Are the 'Tail Wagging the Dog' When It Comes to Federal Employment Litigation Impacting Retailers

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ABSTRACT

Perhaps as a result of the ever-broadening political divide, the #MeToo era and social justice movements, the rise of the gig-based economy, the COVID-19 pandemic, or a combination of all or some of these factors, retail employers are facing an unprecedented number of state and local laws that increase the burden on management, decrease employer autonomy, and raise the cost of doing business. Bolstered and emboldened by more homogenous groups of elected officials in these smaller political arenas, federal, state, and local lawmakers have proposed initiatives and begun implementing new laws that will require retailers to change the way they operate. In this article, we explore the trend of aggressive state and local legislatures implementing increasingly employee-friendly laws through an examination of three of the most impactful of such laws. For each, we dive into the respective growth patterns at the state and local levels, explore the impact on retailers, and discuss how federal legislatures are piggybacking on the momentum created by state and local policy makers.

Fair Workweek Laws

Fair workweek laws, also known as predictive scheduling laws, first burst onto the scene in 2015, and the ensuing proliferation of such laws at the state and local levels has significantly impacted retailers ever since. Generally, fair workweek laws seek to create predictable work schedules for employees by, among other things, prescribing how far in advance employers must provide work schedules to employees (e.g., two weeks before a shift) and, further, by limiting an employer's ability to make schedule changes within a particular period of time (e.g., requiring that no schedule changes be made for up to seven days prior to an employee's scheduled shift and by requiring employers to provide "on-call pay" to employees in the event they are on-call but not called into work). While the goal may be laudable when it comes to eradicating abusive employee scheduling tactics, the concern is over the over-reaching and counter-productive impact of these initiatives in many cases.

According to the Washington Center for Equitable Growth, these laws "aim to improve the quality of work schedules that employers offer to their workforce." Proponents of

such legislation argue that "[u]nstable and unpredictable work hours yield unstable and unpredictable incomes and make it extremely challenging for working people to manage responsibilities like caregiving, pursuing higher education, or holding down a second job."[1]

However, research returns show that fair workweek laws may not benefit retail employees the way legislatures had hoped. In 2022, a University of Kentucky economist found that, instead of increasing the proportion of employees working full time, which is one of the intended aims of fair workweek laws, the proportion of part-time employees actually increased by 9.2 percent after such scheduling laws were implemented in San Francisco, New York, Seattle, and Oregon.[2] Nearly two-thirds of the interviewed employees reported that the drop to part-time hours was involuntary.

Similarly, a study from researchers at the University of Illinois concluded that there was "limited evidence" that fair workweek laws in Oregon had any impact on improving workers' schedules.[3]

As retailers well know, the ability to enjoy a flexible work schedule is one of the primary benefits for many young workers when deciding to build a career in the retail space. Indeed, a recent survey of U.S. retail workers concluded that, unlike other industries where compensation is ranked as the top motivator, retail candidates rank type of work and schedule flexibility as the top two reasons they seek retail employment.[4] These same retail workers are also nearly twice as likely to prefer to choose their own shifts over workers in other industries. Given the impact these laws have on retail employers and the distaste for them shared by retail workers, the spread of these laws is troubling.

Unsurprisingly, in 2015, the City of San Francisco became the first locality in the country to enact fair workweek legislation. Since then, seven more major local governments have passed similar laws across the country. These include New York City, Los Angeles, Seattle, Philadelphia, Chicago, Emeryville, and Berkeley. The state of Oregon became the first state to enact statewide fair workweek laws in 2017.

Undoubtedly noticing the state and local trends, U.S. Congresswoman Rosa DeLauro (D-CT-03) and Senator Elizabeth Warren (D-MA) introduced a bill, H.R. 6670, the Schedules that Work Act, to the U.S. House of Representatives on February 9, 2022. This marked the federal government's first attempt to pass fair workweek legislation nationwide. The bill has not yet been presented to a vote, but it looms large over our nation's largest retailers as it would increase management's burden, decrease work schedule flexibility, and ultimately drive up working costs.

While Democratic members of Congress and state and local legislators ramp up their attempts to enact fair workweek laws, the states of Arkansas, Georgia, Iowa, and Tennessee have fought back by passing legislation that prohibits local governments from enacting such laws.

It is clear that state and local legislatures are driving the bus when it comes to fair workweek laws that are curbing retail employers' ability to freely create employee schedules based on the nuances and unique aspects of their businesses and workforces. Retail employers across the country should remain keenly aware of the proliferation of these laws and take aim at stopping them where they count, at the state and local levels.

[1] Equitable Growth (April 15, 2022) "Factsheet: Six Frequently Asked Questions About Schedule Quality and Fair Workweek Laws Across the United States", https://equitablegrowth.org/factsheet-six-frequently-asked-questions-about-schedule-quality-and-fair-workweek-laws-across-the-united-states/#footnote-1

[2] Yelowitz, Aaron, Institute for the Study of Free Enterprise (January 2022), *Predictive Scheduling Laws Do Not Promote Full-Time Work*, https://isfe.uky.edu/sites/ISFE/files/research-pdfs/Predictive%20Scheduling%20Laws%20Do%20Not%20Promote%20Full-Time%20Work.pdf

[3] Petucci, Larissa, et al., IRL Review, Vol. 75, Iss. 5 (Dec. 14, 2021), *Persistent Unpredictability: Analyzing Experiences with the First Statewide Scheduling Legislation in Oregon*, full article available at https://journals.sagepub.com/doi/abs/10.1177/00197939211064902?journalCode=ilra#tab-contributors

[4] *U.S. Retail Workers Want Flexible Work Twice as Much as any Other Industry* (October 18, 2015), https://www.prnewswire.com/news-releases/us-retail-workers-want-flexible-work-twice-as-much-as-any-other-industry-300538569.html

Biometric Privacy Laws

With the increasing use of fingerprint scan punch clocks and fingerprint or face scan accessible laptop computers, states and localities have acted where the federal government has not by enacting biometric information privacy laws. These laws require employers that use and store biometric identifiers (in part defined as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry") to comply with requirements that often impose administrative burdens, or else incur heavy penalties. Among the requirements that employers must meet are to:

- Inform all employees that their information is being collected and stored
- Inform all employees of the duration of the storage and the specific purpose for which the biometric data is being collected or stored
- Receive affirmative consent by employees to collect and store their biometric data
- Draft biometric information policies that are made available to the public
- Refrain from selling any biometric data

To date, only three states have enacted statewide biometric privacy laws – Illinois, Texas, and Washington – however, another ten states[5] are actively seeking to enact similar legislation. Such proposed legislation has been offered by both Democrats and Republicans, signaling that both sides of the political divide are focused on the issue. These state laws have led to more localities enacting similar legislation, with New York City and Portland recently enacting biometric privacy laws. Of the three states with active biometric privacy laws, Illinois has the strictest law in the nation, which includes a private right of action permitting employees to sue their employers for violations of the law. And sue they have. In 2020, a class of plaintiffs brought suit alleging that Facebook violated the Illinois law by not obtaining employee consent for the collection of biometric data. Facebook thereafter settled the matter for $650 million, a figure that should reverberate throughout the retail employer landscape and illustrate the potential perils of biometric privacy laws. As such laws continue to proliferate, retail employers are, and will continue to be, left navigating a patchwork landscape of state-specific biometric requirements that require them to reevaluate their employment policies and compliance programs.[6]

Just as with fair workweek legislation, it seems that state and local legislation in the absence of federal action has emboldened Congress to draft its own proposed bill. In 2020, Oregon Senator Jeff Merkley introduced Senate Bill S.4400, the National Biometric Information Privacy Act of 2020, which includes a private right of action for employees to sue employers on behalf of all aggrieved employees. While the bill has not yet been voted on, it further illustrates that increasing activity on the state and local levels has once again foreshadowed a potential new federal law that will have a significant nationwide impact on retail employers.

Limitations on Independent Contractor Relationships

One of the most high-profile examples of state legislation prompting federal legislative action is related to the classification of employees as independent contractors versus employees. For decades, the federal courts have employed an "economic realities" test to determine if a worker is an employee or independent contractor. The test considers factors such as the level of control by the employer over the worker and the permanency of the relationship.

In a drastic move to implement employee-friendly policy driven by the rise of the gig economy, the California legislature, following on the heels of a California Supreme Court decision, formally abandoned the economic realities test in 2020 through the passage of AB5, which implements the "ABC test"

[5] Including Arizona, Minnesota, Missouri, Tennessee, Kentucky, Maryland, New York, Massachusetts, Vermont, and Hawaii.

[6] Strict compliance is also imperative, particularly in Illinois, where biometric privacy laws have recently been ruled to have a five year statute of limitations. See *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (Ill. 2023). Such a prolonged statute of limitations creates long exposure periods that can lead to high dollar value litigation and also provides plaintiff's attorneys plenty of time to shop for cases that they believe have a high possibility of reaching a favorable result.

for determining independent contractor status. The ABC test starts with a presumption that every worker is an employee, and an employer may only overcome the presumption by showing that:

(a) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(b) The person performs work that is outside the usual course of the hiring entity's business; **and**

(c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB5, as it was originally drafted, all but eliminated most employers' ability to independently contract and effectively converts the majority of workers to employee status, bringing with it the obligation to pay unemployment taxes, payroll taxes, overtime pay, workers' compensation insurance liability, and benefits costs – all expenses that are traditionally borne by employers. Since its enactment, the voters of California voted in favor of Proposition 22, a ballot initiative to add a carve-out to AB5 by allowing rideshare and delivery drivers to be classified as independent contractors regardless of the ABC test. Prop 22 has been heavily contested in the courts, but a California appeals court recently upheld the majority of Prop 22, meaning that rideshare and delivery drivers will continue to be excluded from the ABC test in California.

Democratic federal legislators quickly took notice and have since made multiple efforts to implement the ABC test nationwide. The first attempt came with the introduction of a House Bill in early 2020 known as the PRO Act (the Protecting the Right to Organize Act), which, among other things, employs an ABC test in an effort to widen National Labor Relations Act (NLRA) protections to workers that were previously classified as independent contractors and, thus, not protected under the NLRA. Given this, the PRO Act, which passed in the House of Representatives but now faces heavy Republican opposition in the Senate, is being championed heavily by unions and would represent one of the most dramatic shifts in U.S. labor and employment law in decades.

Why Are We Seeing These Trends and What Do They Mean for Retailers?

So, what is driving the surge of this aggressive legislation? While the answer is likely not due to any one factor, at least part of the equation seems to be the political makeup of state and local legislatures around the country. In 2018, for the first time in over a century, all but one state legislature was dominated by a single political party.[7] Even today, every state except for Pennsylvania and Virginia has a legislature where both chambers of the legislative body are politically aligned.[8] In this environment, state legislators are emboldened to propose heavily partisan legislation knowing they have the majority support in both chambers. The natural consequence is that legislation is more polarizing and quicker to be enacted. A side effect of overpowered state legislatures is that it has created an even further political divide among their constituents, as "lopsided party dominance has not brought resignation; instead of minority parties conceding that they lack the numbers to effectively fight back, the mood has grown more tense and vitriolic."[9] Accordingly, as the political divide continues to widen, the number of strongly partisan bills and other legislation will inevitably increase.

In an atmosphere where federal legislation is slow and disjointed due to a split in the House and Senate, galvanized state and local legislatures are, more than ever, in a position to create employment law legislation that impacts retailers. In right-leaning states with majority conservative lawmakers, this traditionally benefits retailers, as legislatures in such states are less focused on employee-friendly, progressive policies and may even enact legislation forbidding such measures,

[7] Williams, Timothy, New York Times (June 11, 2019), *With Most States Under One Party's Control, America Grows More Divided*, https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html

[8] National Conference of State Legislatures (Updated February 28, 2023) State Partisan Composition, https://www.ncsl.org/about-state-legislatures/state-partisan-composition

[9] See, *infra*, n. 6.

similar to how state legislatures in Iowa and Georgia managed to pass prohibitions on fair workweek laws. However, some of these neoteric laws, such as biometric privacy laws, are being pushed by both sides of the aisle, and retailers must simply learn to adapt to this changing landscape or invest more heavily in research and lobbying efforts.

What is clear is that retail employers' ability to manage their operations and payroll and to define their policies and practices continue to be impacted not only by the patchwork and ever-evolving landscape of state and local laws, but by the prospect of copycat federal legislation imposing national standards and requirements. Retailers that value and are focused on investing in lobbying activities should keep a finger on the pulse of these state and local trends as they continue to proliferate, and they should focus their political efforts and resources on stemming the spread of such business-second employment laws and policies at the state and local levels.

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