The Legislative Update

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HR LEGISLATIVE NEWS FROM AROUND THE WEB….THREE TRENDS TO WATCH IN 2018

Paid Leave

The first trend we explored was paid leave. Initially entitled "paid sick leave," I opted to broaden this term because states are expanding the acceptable reasons for leave beyond the more traditional idea of "employee illness" to include more parental and family leave.

Paid leave laws are written in very specific terms, echoing employer policy structure. In addition to the acceptable reasons for leave, most states define minimum thresholds for:

Amount of leave: including accrual rates (i.e. one hour for every 30 hours worked) and accrual and use limits (i.e., employees can accrue up to 40 hours annually)

Issues included: Timing: when employee can begin to earn and use leave, Balance carryover to future years, Rate of pay for leave hours taken and payout at termination.

And that's where things get tricky. Because no two states use exactly the same thresholds for every element listed above.

Currently, the following states/jurisdictions have enacted paid leave legislation: Arizona, California, Connecticut, District of Columbia, Massachusetts, Oregon, Puerto Rico, Vermont and Washington.

With each state putting their own twist on how the rules apply, multi-state employers are faced with a choice: shoulder the administrative burden of managing individual state requirements, or try to create a single plan generous enough to meet all state specifications.

Approximately 66% reported having a leave policy in place. For these employers, there may be some good news. In most cases, employers are deemed to comply with state provisions if their current plan is at least as generous as what the law requires.

The question is, can one plan keep up with numerous, varied requirements, especially as more states jump on the paid leave bandwagon?

And, there is no immediate federal relief on the horizon.

In 2016, the federal government joined the paid leave movement – but the rules only cover employees working on federal contracts entered into after January 1, 2017. More recently, President Trump's proposed 2018 budget includes a framework to offer 6 weeks of paid leave for parental care. However, there is some opposition to Trump's proposal to leverage state unemployment dollars to fund the federal family leave program – especially since some states already offer more generous leave.

State Retirement (Auto-IRA)

Similar to its approach to paid leave, the federal government took a first step toward facilitating increased individual retirement savings with its MyRA program rolled out in 2015.

Since then, several states have taken the position that the MyRA model, which requires individuals to "opt-in" and arrange for their own payroll deduction, doesn't go far enough. The fact is that even employees with access to employer-sponsored retirement savings plans are not always signing up.

That's why some states are putting the onus on employers who do not currently offer an IRS-qualified retirement plan to automatically enroll employees in the state program at a defined contribution rate. Once enrolled in the state "Auto-IRA," employees have the flexibility to opt-out or change their contribution percentage to suit their personal goals.

Currently, the following states have enacted legislation requiring mandatory employer participation in a state retirement program: California, Connecticut, Illinois, Maryland and Oregon. Several other states have voluntary programs.

Oregon is leading the charge, and has published its phased implementation plan beginning January 1, 2018. Since this plan is expected to set precedent for remaining states, all eyes are on Oregon. Oregon continues to move confidently forward, proactively reaching out to service providers, employers and plan administrators for input along the way.

But the path is not without roadblocks.

With most states still in the program development stage, several questions remain. First, what happens when an employer-sponsored plan doesn't cover ALL employees? Our webcast poll showed approximately 10% of our audience fell into this category. Current laws seem to indicate that these employers could be required to offer the state plan to employees not covered by the employer plan.

Other unresolved issues include: Determining which plan applies in multi-state situations, and the more tactical administrative burden of managing data file formats for multiple state plan administrators.

More fundamentally, industry concern that state programs could undermine the current system is becoming increasingly widespread.

In late 2016, the Department of Labor (DOL) issued a rule exempting state-run retirement plans from ERISA, which essentially cleared the path for these programs. In early May, the Senate joined the House by voting to repeal this rule – both houses had previously disapproved a similar rule allowing certain municipalities to sponsor retirement programs. The President has stated his intent to sign the repeal of both rules.

This recent move in Congress will dictate the feasibility of state Auto-IRAs, or at least how bumpy the road ahead will be for these programs.

Fair Scheduling

Finally, we looked at a lesser-known trend in fair scheduling laws. Primarily affecting the retail and hospitality industries, the scope of impact is smaller, but the implications of these laws are considerable for affected employers and employees.

In lower-wage jobs, unpredictable schedules are becoming increasingly common. As employers struggle to meet demands with limited staff, many workers end up facing schedule changes at the last minute, and are afforded little input into the days or times they work.

When shifts fluctuate wildly from week-to-week, paychecks rise and fall correspondingly. Fair scheduling laws are intended to create more stability for hourly workers who may be juggling the demands of their jobs while also caring for families, working second jobs, or going to school.

To that end, state laws define the specific actions employers must take to ensure fair scheduling. Some common elements include:

Offering new work hours to existing employees before hiring new employees

Allowing employees to request schedule accommodations without retaliation

Ensuring “reasonable consideration” of each request

Providing advance notice of schedule (e.g. one to two weeks)

Notifying employees of their schedule directly rather than a central “posting”

Restricting work on successive closing and opening shifts (aka “clopenings”)

Often, premiums are due to affected employees when an employer fails to comply with the applicable provisions. For example, if an employee reports to work and is sent home, the employer may still be required to pay for the scheduled hours.

Currently, only a handful of cities (Seattle, WA, and San Francisco, Emeryville and San Jose, CA) have passed scheduling laws. But proposed bills are beginning to spread throughout the coastal states, which is typically where trends begin.

Nevertheless, employers are actively lobbying against these laws, citing fear that the administrative costs to ensure proper schedule management will negatively impact their bottom line.

But there is also another school of thought: Could the consistent practice of fair scheduling help balance high turnover which is also costly in the targeted industries?

As with paid leave and retirement programs, the growth and ultimate impact of fair scheduling laws remains to be seen, but is unlikely to be settled at the federal level.

For now, our best recommendation for employers: As the federal government deregulates, keep your eye on the states!