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RECENT TRENDS IN EMPLOYMENT & LABOR LAW

by

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Introduction

While the Trump administration is pushing deregulation at the federal level, expect more employment and labor law protections to appear at the local level as states step in to "fill the gap." The futures of the Dodd-Frank Act's whistleblower protections, DOL's overtime rule, the EEOC's equal pay data rule, and many Obama-era NLRB decisions are in doubt. However, state and local laws relating to pay equity, parental leave, medical marijuana, minimum wage, and predictable scheduling are all likely to proliferate. In addition, wage and hour class action filings likely will continue to increase, the Supreme Court (with a full roster of Justices) is set to address a circuit split on the validity of including class action waivers in employment arbitration agreements, and the Court may address another recent split with respect to sexual orientation discrimination claims under Title VII.

I. Overtime Rule Enjoined

President Obama's late-term changes to the salary threshold for exempt employees faces an uncertain future under the Trump administration. The rule would extend overtime eligibility to more than four million workers and double the minimum salary threshold required to qualify for the white collar overtime exemption under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, from $26,660 to $47,476. Amos Mazzant, a federal judge for the District Court of the Eastern District of Texas, enjoined the rule on November 22, 2016, days before its December 1, 2016 effective date. *Nevada v. Dep't of Labor*, No. 4:16-CV-00731, 2016 U.S. Dist. LEXIS 162048, at *5 (D. Tex. Nov. 22, 2016).

Judge Mazzant granted the nationwide preliminary injunction on the theory that the Department of Labor (DOL) may lack statutory authority under FLSA to raise the salary threshold as much as it did. He concluded DOL was not entitled to *Chevron* deference because it ignored Congress's intent that the exemption apply only to the tasks an employee *actually performs* (known as the "duties test"). *See id.* at *24-25. Rather, DOL's rule imposes a salary threshold without regard to whether an employee is performing bona fide executive, administrative, or professional duties, which would exempt him or her from receiving overtime salary or minimum wages. *Id.* at *25 ("[T]his significant increase to the salary level creates essentially a de facto salary-only test."). The Obama administration immediately appealed the injunction to the Fifth Circuit, but the case has lagged since President Trump's inauguration as DOL, still lacking a permanent head, waits for guidance on how to proceed.

AFL-CIO head Richard Trumka has threatened to sue if the new DOL makes any changes to the rule. Specifically, in December 2016 the Texas branch of the AFL-CIO moved to intervene in the district court case, citing concerns that the new DOL would not defend the rule. If the court prohibits the AFL-CIO from intervening, the preliminary injunction will essentially become permanent. However, if the union is allowed to make its case, many experts believe it stands a good chance in overturning the district court's decision, due to how well-established the salary test has been within DOL for the past seven decades.

For its part, the Trump administration has signaled it may withdraw the rule's appeal and allow the preliminary injunction to become permanent. Alexander Acosta, President Trump's pick to head DOL, has questioned the agency's authority to set a salary threshold, let alone to raise its level. *But see Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528 (1985) (finding that Congress has constitutional authority to impose FLSA's minimum wage and overtime requirements on state and local employees). Other possible outcomes include Congress rolling back the overtime regulations, or the new DOL raising the exempt salary level from $26,660 to around $33,000, an amount that adjusts the 2004 value (the year the threshold was last raised) to 2017 dollars. Experts believe this more modest threshold would not only comply with FLSA but also face less opposition from business groups, which have condemned the Obama rule as something that would substantially increase their employment costs. However, any attempt by the new DOL to amend or replace the existing rule would trigger a new rulemaking process, including notice-and-comment periods.

II. Wage & Hour Class Actions

In 2016, for the first time in fifteen years, the number of wage and hour class action filings decreased compared to the previous year, and complex employment-related litigation filings were flat. However, the settlement valuation for wage and hour class actions has increased significantly over the last two years, running counter to other employment law class actions such as employment discrimination, Employee Retirement Income Security Act (ERISA), and government enforcement actions. The monetary value of the top ten employment-related settlements decreased in value, from $4.48 billion in 2015 to $1.75 billion in 2016; conversely, the value of the top ten wage and hour class action settlements increased from $463.6 million to $695.5 million (which is triple the $215.3 million valuation in 2014).

Even with the injunction against the overtime rule (see above), employers should expect the number of wage and hour class actions to rise again in 2017, due in part to the increase in employees performing after-hours work on mobile devices. Employers should also see a greater combination of claims under multiple statutes as employment-law class actions become more sophisticated. The private plaintiffs' bar will likely offset the reduction in DOL wage and hour enforcement, primarily due to the low investment needed to pass the threshold for class certification and case consolidation. Indeed, wage and hour cases can be prepared for a few thousand dollars and have over a seventy-five percent certification rate, whereas employment discrimination cases can cost upwards of $250,000 (due to expert opinions and discovery costs) yet are certified less than half the time. Decisions certifying wage and hour actions increased eleven percent over the previous year, though employers won decertification motions at a slightly higher rate than in 2015. The rise in both rates reflects the twenty-eight percent increase in certification cases overall, from 175 in 2015 to 224 in 2016.

In addition, several Supreme Court decisions in 2016 have affected class-action dynamics. Both *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (plaintiffs may use and rely on statistical and representative evidence when suing under FLSA), and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (certain intangible harms may give plaintiffs standing to sue under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*), were plaintiff-friendly decisions that made it easier for class actions to advance. By refusing to impose additional class actions restraints and resolving these cases on relatively narrow grounds, the Court has left many gaps to be filled in by lower courts.

III. Future of Class Action Waivers, the Joint Employment Test, and the NLRB

On January 13, 2017, the Supreme Court agreed to hear *Epic Systems v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), where they will consider whether arbitration agreements containing class action waivers violate the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*. The Court agreed to hear two other cases that hinge on the same issue, which were consolidated with *Epic Systems*: *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (holding that employment agreements precluding employees from bringing concerted actions relating to their wages, hours, and terms and conditions of employment are unenforceable under NLRA), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (finding that, in line with Fifth Circuit preceding, a class or collective action waiver in an employment agreement does not violate NLRA).

The Federal Arbitration Act allows employees and employers to define the terms of their arbitration agreements, so long as the agreement does not require the employee to waive a substantive federal right. Of note, both the Seventh and Ninth Circuits determined that the ability to bring a class or collective action *is* a substantive federal right, putting them at odds with the Second, Fifth, and Eighth Circuits. Some observers believe the recently confirmed Justice Gorsuch could be the deciding vote in favor of employers' use of such arbitration agreements.

Regardless of how the Court disposes the *Epic Systems* case, many experts believe the Trump administration will roll back or reverse key Obama-era National Labor Relations Board (NLRB) policies. These policies include not only the NLRB's stance against employee class action waivers in mandatory arbitration agreements but also its revision to the joint-employer standard under its *Browning-Ferris* decision in August 2015 (expanding the standard to include "indirect control," or the ability to exert control over workers). *Browning-Ferris*, which reversed over thirty years of NLRB precedent, has drawn vehement criticism from business groups for opening up franchisors such as McDonald's to joint employer liability.

The NLRB currently has two Democratic members, one Republican member, and two vacancies. On top of filling the vacancies, President Trump can replace NLRB General Counsel Richard F. Griffin in November 2017 and nominate his third board member in August 2018, when Democrat Mark Gaston Pearce's term expires. Thus, less than two years into his term, he can establish a clear Republican majority on the board, which presumably will be more friendly to employers and management. Furthermore, given the GOP's belief that the Obama board was exceptionally pro-labor, some congressional Republicans have indicated their desire to "punish" the board for this perceived activism through severe budget cuts, thereby impeding the agency's ability to investigate complaints and effectively administer federal labor law.

IV. Title VII Sexual Discrimination Litigation

In recent years, there has been a marked expansion in the categories of workers protected by federal, state, and local anti-discrimination laws. Since June 2016, the Equal Opportunity Employment Commission (EEOC) has defined harassment on the basis of sex to include matters involving sexual orientation and gender identity, and numerous states and cities have passed laws barring discrimination based on sexual orientation, transgender status, and gender dysphoria.

Most importantly, on April 4, 2017, an en banc panel of the Seventh Circuit Court of Appeals ruled 8-3 that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, 2017 U.S. App. LEXIS 5839, at *2 (7th Cir. Apr. 4, 2017) Indiana professor Kimberly Hively argued that, but for her gender, her former employer Ivy Tech would have promoted her and kept her on staff. Writing for the majority, Chief Circuit Judge Diane P. Wood found that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Id.* at *25-26. Hively's arguments persuaded the court to overrule contrary Seventh Circuit precedent and become the first federal appeals court to find that Title VII protections cover sexual orientation. Judge Wood relied on several Supreme Court decisions, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that discrimination based on sexual stereotypes falls within Title VII's prohibition against sex discrimination. *Id.* at *15 (noting that Hively is openly gay, making her "the ultimate case of failure to conform to the [heterosexual] female stereotype"). Ivy Tech does not plan to seek Supreme Court review of the decision.

Hively comes on the heels of the Second Circuit's decision in *Anonymous v. Omnicom Group, Inc.*, No. 16-748, 2017 U.S. App. LEXIS 5278 (2d Cir. Mar. 27, 2017), where in a per curiam opinion the court reversed and remanded the district court's dismissal of Plaintiff Matthew Christiansen's sexual orientation discrimination claims. The court found that Mr. Christiansen's gender stereotyping allegations were cognizable under both *Price Waterhouse* and Second Circuit precedent. *See id.* at *12. On the other hand, *Hively* directly conflicts with a March 10, 2017 holding out of the Eleventh Circuit Court of Appeals. In *Evans v. Georgia Regional Hospital*, No. 15-15234, 2017 U.S. App. LEXIS 4301 (11th Cir. Mar. 10, 2017), a split three-judge panel found "that there is no sexual orientation action under Title VII." *Id.* at *13. Plaintiff Jameka Evans, who claims she was harassed because she was a lesbian and did not conform to gender norms, has petitioned the Eleventh Circuit for an en banc review.

On April 11, 2017, in light of *Hively*, four members of Congress asked permission to file an amicus brief in support Ms. Evans' petition. Sens. Jeffrey A. Merkley (D-Ore.), Tammy Baldwin (D-Wis.), and Cory A. Booker (D-N.J.), and Rep. David N. Cicilline (D-R.I.), all previously co-sponsored the Equality Act of 2015, an unsuccessful bipartisan effort to add "sexual orientation" and "gender identity" to Title VII. The lawmakers criticized the panel's reliance on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), arguing that *Price Waterhouse* explicitly overruled *Blum's* holding that discrimination on the basis of gender non-conformity is not sex discrimination. The American Civil Liberties Union (ACLU) has also asked permission to file an amicus brief supporting Evans along with several women's groups, including the National Center For Lesbian Rights and the GLBTQ Legal Advocates & Defenders (GLAD).

Experts believe the *Hively* holding creates certainty in an uncertain, localized area of law, providing a path for other circuits to follow in the future. They note that the Seventh Circuit's reasoning applies just as clearly to gender identity and transgender discrimination as it does to sexual orientation discrimination. Still, for some employers, the practical impact of the case will be blunted: as mentioned above, many state and local statutes prohibit sexual orientation discrimination (including those of Illinois and Wisconsin in the Seventh Circuit), with these laws already having influenced employer anti-discrimination policies and practices.

V. Whistleblower Protections under the Dodd-Frank Act

During the 2016 election, many congressional Republicans campaigned on the promise to do away with the Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq.*, known colloquially as the Dodd-Frank Act. Rep. Jeb Hensarling (R-Tex.), who chairs the House Financial Services Committee, says that reform is a priority for 2017. In addition, one member of President Trump's transition team, former Republican SEC Commissioner Paul Atkins, has heavily criticized the SEC whistleblower program for its lack of mandatory internal reporting with employers. He alleges this system incentivizes employees to report to the SEC first in hopes of getting a financial reward. Atkins similarly objects to the large fines imposed by the SEC over the past few years, arguing for greater deregulation.

Proponents of the current legislative scheme fear the Republican-majority Congress will pass legislation gutting Dodd-Frank and eliminating federal protections for SEC whistleblowers. Some have also voiced concerns that Republicans might target protections under other federal laws as well, such as those under the Sarbanes-Oxley Act (SOX), 15 U.S.C. § 7201 *et seq*. The fact that Republicans do not have a filibuster-proof majority in the Senate might serve as only a weak obstacle to reform, given the recent invocation of the so-called "nuclear option" by Senate Republicans to confirm Judge Neil Gorsuch to the Supreme Court. At the same time, their failure to repeal and replace the Affordable Care Act highlights the legislative challenges Republicans will face as they target Dodd-Frank's more maligned provisions.

Still, experts are skeptical that Republicans will attempt a full-scale overhaul of Dodd-Frank's whistleblower protections. Since 2012, the SEC has issued almost $150 million in whistleblower awards, with $75 million awarded in 2016 alone, a fact prominently touted on the SEC's website as part of their aggressive enforcement and education efforts. The perceived success of the whistleblower provisions have earned them praise among senior law enforcement officials and relatively broad bipartisan support, in contrast to Dodd-Frank's "regulatory" provisions that place additional (and allegedly costly) reporting and administrative burdens on companies.

Republican support for whistleblower protections is not limited to those in Dodd-Frank. For example, the Fraud Enforcement and Recovery Act of 2009 included expansive amendments to the False Claims Act (FCA), 31 U.S.C. § 3729, which reward individuals for blowing the whistle on frauds against the federal government. Also worth noting: Sen. Chuck Grassley (R-Iowa), the chairman of the Senate Whistleblower Protection Caucus, is a supporter of both whistleblower protections and President Trump. Many insiders believe Republicans will pick and choose which provisions of Dodd-Frank to repeal while leaving the whistleblower provisions largely intact. Rep. Hensarling's Financial CHOICE Act, which he has sponsored as a replacement for Dodd-Frank, passed out of the Financial Services Committee in September 2016. In its current form, the CHOICE Act does not alter either the whistleblower reward programs or enhanced whistleblower protections currently available under Section 21F of Dodd-Frank.

While Dodd-Frank's whistleblower provisions will survive in some way, shape, or form, Republicans may shift the focus of SEC enforcement from corporations to individuals, making it more difficult for whistleblowers to qualify for awards (especially if, as expected, Trump's new SEC leadership decreases the size of sanctions levied against corporate offenders). Accordingly, over the next year, a Republican-controlled Congress and Trump-appointed SEC officials likely will try to scale back certain federal whistleblower protections and incentives.

VI. Medical Marijuana in the Workplace

Over twenty percent of the U.S. population now lives in a state where using marijuana is legal. Eight states and the District of Columbia have legalized, either in full or in part, the recreational use of marijuana: Colorado (2012), Washington State (2012), Alaska (2014), District of Columbia (2014), Oregon (2014), Washington, D.C. (2014), California (2016), Maine (2016), Massachusetts (2016), and Nevada (2016). In addition, on April 13, 2017 Canadian Prime Minister and Liberal Party leader Justin Trudeau introduced his marijuana legalization and regulation initiative to Parliament. The bill, which is widely expected to pass, would make Canada the first industrialized nation in the world—and second nation total, after Uruguay—to legalize marijuana for recreational use (medical marijuana use is already legal in Canada, dating back to 2001). The bill is set to take effect sometime in mid-2018.

With respect to medical marijuana laws in the US, West Virginia recently became the twenty-ninth state to legalize medical marijuana use: the West Virginia Legislature approved Senate Bill 386 on April 6, 2017, and Gov. Jim Justice "proudly" signed the measure into law on April 19, 2017. However, marijuana remains classified as a Schedule 1 drug under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, and statements from both President Trump and Attorney General Jeff Sessions suggest they plan to aggressively enforce federal marijuana laws. This potential conflict between federal and state law has created uncertainty over whether and to what extent state marijuana laws are preempted by federal law.

Most state medical marijuana laws share certain key characteristics: for example, each requires a patient to have a "qualifying" condition or symptom (as specified under state law), and for a medical professional to certify said condition or symptom, before he or she can qualify for the state's medical marijuana program and receive a medical marijuana ID card. Most laws prohibit medical marijuana patients from using or consuming it in public or operating a motor vehicle while under the influence. Furthermore, employers generally do not have to accommodate employee medical marijuana use, especially if doing so would cause them to violate federal law or potentially cost them a federal contract or grant.

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, prohibits discrimination against disabled employees, but its protections do not encompass medical marijuana use. Courts have uniformly held that an employee's right to use medical marijuana under state law does not necessitate or require an employer to accommodate such use under the ADA. Some state discrimination laws do prevent employers from discriminating against certified medical marijuana users, unless the employer can demonstrate the employee was under the influence at the time of a positive test result. For example, the New York Compassionate Care Act requires an employer with four or more employees to reasonably accommodate employees certified to use medical marijuana. However, the law does *not* require an employer to allow the employee to carry or use marijuana on work property. Indeed, most state medical marijuana laws allow employers to prohibit on-site marijuana use, and several laws specify they do not protect negligent conduct stemming from workplace marijuana use. The laws also do not require insurance providers to cover the costs of medical marijuana.

VII. Rise in Pay Equity Laws

In 2016, pay equity laws took effect in California, Maryland and New York, strengthening existing equal pay laws by making it more difficult to discriminate against workers based on sex. A pay equity statute was also signed into law in Massachusetts, set to become effective in 2018.

Each of the laws has unique provisions. For example, Massachusetts prohibits salary history questions, with employers instead allowed to use market surveys (to the extent they are available for positions). Likewise, New York Executive Order 161 prohibits state agencies from asking an applicant for current or prior salary information before extending a conditional offer of employment. New York Executive Order 162, similar to the EEOC equal pay data rule (see below), requires state contractors and their subcontractors to submit job title and salary information for each employee working on a contract, on top of the equal employment opportunity information (e.g., sex, race, and ethnicity) already required. Maryland requires employers to inform employees about promotions in the full range of career tracks, incentivizing them to post *all* open positions (even those not typically posted in the past). In addition, while pay comparisons in New York and Maryland are made between similar positions in the same county, pay comparisons in Massachusetts and California have no geographical limitations.

Beyond the state level, the EEOC's equal pay data rule, finalized in September 2016, faces hostility from the Trump administration. The rule would require employers with more than one hundred workers to submit pay data by gender, race, and ethnicity on their employer information report, known as EEO-1, as well as include summary pay data and report the number of hours worked by employees. It was expected to cover 60,000 employers and 63 million employees, with the first deadline for the new report set for March 31, 2018. Critics have argued the rule would be both overly burdensome and ineffective, with the job categories and pay bands used in the reports too broad to help the EEOC achieve its equal pay goal. On January 25, 2017, President Trump designated Victoria Lipnic as the EEOC's acting chair. Commissioner Lipnic voted against the rule, and once the EEOC has a Republican majority many expect the rule to be rolled back if not eliminated entirely.

Despite uncertainty at the federal level, pay equity laws are likely to spread into more states in 2017. Therefore, all employers, even those in jurisdictions without newly updated laws, should review compensation data to ensure that employees within a given region are being fairly and consistently paid without regard to sex, race, or some other protected characteristic.

VIII. State Limitations on the Hiring Process

One area involving particularly active state and local legislation over the past few years has been the pre-employment process, most notably laws restricting employers from inquiring into an applicant's credit or criminal history—and, more recently, an applicant's salary history—during the hiring process. Massachusetts has adopted the salary history restriction, and New York City is considering passing a similar law.

These laws coincide with the sharp rise of class actions filed under FCRA, which governs an employer's use of background checks. Thus, all employers—particularly those with a multistate presence—should review and think about revising each step in their pre-employment processes, from job postings to background checks authorization forms to offer letters.

IX. Parental Leave Regulations

Under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2611 *et seq.*, businesses with fifty or more employees must provide up to twelve weeks of unpaid leave to eligible employees for certain qualifying events, including baby bonding. However, federal law does not provide for paid leave. At the state level, only California, New Jersey, and Rhode Island offer paid family leave; however, the number of states offering such benefits is expected to grow.

Paid parental leave is another area expected to see increased action at the state level, with several local paid-sick-leave laws set to take effect over the next few years. New York passed a law that will take effect in 2018, and Washington, D.C. has approved one of the most expansive paid leave laws for private-sector employers: eight weeks of paid leave for new parents after the birth or adoption of a child.

Activists, who do not expect the Trump administration to support such expansive regulations, will likely continue to push for reforms at the state level. For his part, President Trump has proposed six weeks of partially paid maternity leave benefits for new mothers. The proposal does not include paid leave for new fathers or for adoptive or foster parents. Experts note that providing paid leave for baby bonding to mothers and not fathers could create legal issues.

X. Changes to State Minimum Wage Rates

Several jurisdictions are considering raising their local minimum wage this year, which is set at $7.25 per hour at the federal level. The largest such jurisdiction, Illinois, is attempting to raise the state's minimum wage to $15 per hour. In 2016, Cook County voted to increase its minimum wage to $13 per hour in 2020, while Chicago's 2014 ordinance is incrementally raising the minimum wage within city limits to $13 per hour by 2019.

Illinois' current statewide proposal would gradually raise the state's minimum hourly wage from the current $8.25 to $15 in 2022. It won a state House committee's approval in early April 2017, but its future is unclear due to staunch opposition from both business groups and Republican Gov. Bruce Rauner. Proponents claim it mimics the minimum wage bills of other high-population states like New York and California, which both passed laws in 2016 to raise their minimum wages to $15 per hour. Seventeen other states also passed minimum wage hikes in 2016, though to lower rates.

XI. Growing Interest in Predictable Scheduling

Ongoing state and local efforts to raise their minimum wage rules may overlap with efforts to pass predictable-scheduling laws that limit "just-in-time" or "on-call" scheduling practices, particularly in the retail and food service industries. Across most of the US, employers generally opt for schedules that fluctuate relative to customer demand, which can represent a higher-than-normal burden for employees dealing with the fluctuations. Employee advocates claim these problems have only grown worse with the increasing use of scheduling software among employers, allowing them to gauge with scientific precision how and when workers are needed. Thus, predictable (or predictive) scheduling laws require employers to provide stable work schedules to employees in advance and compensate them for any last-minute changes.

San Francisco enacted the first predictable scheduling measure in 2014, which took effect in 2015. The following year, in September 2016, Seattle's city council unanimously passed a proposal requiring employers to post the schedules of hourly employees at chain restaurants and large retailers no less than two weeks ahead of time. The proposal, which will take effect in July 2017, will require employers to compensate employees with "predictability pay" for last-minute schedule changes. Legislation is currently pending in several other states and municipalities, suggesting the movement will continue to gain momentum in 2017 and beyond. Indeed, on March 3, 2017, the New York City Council's Committee on Civil Service and Labor introduced a pair of initiatives: Initiative No. 1387 would prohibit "on-call" scheduling for retail employees—forbidding employers from cancelling scheduled work hours within 72 hours of the shift's start time—and Initiative No. 1396 would aim to increase the scheduling predictability of fast food workers—requiring employers to pay premiums of up to $45 per shift for schedule changes with less than 14 days' notice.

However, predictable scheduling does have its share of detractors, who criticize these recent laws for making it more difficult for employers to control work attendance (e.g., having someone fill in when an employee calls in sick). Some argue that more predictable scheduling has resulted in job cutbacks and less flexibility for employees who need time away. The measures have faced criticism from employees as well: over 1,000 Seattle-based workers at restaurants with sit-down service protested the city's proposal, arguing that it limits their freedom and flexibility. Perhaps in response to these concerns, New York's announced initiatives omit full-service-restaurant workers from predictable-scheduling requirements.