

Retail Regulation And Legislation To Watch in 2016

By **Shayna Posses**

Law360, New York (December 24, 2015, 8:37 PM ET) -- The Christmas rush may be over, but 2016 is already gearing up to be a busy year for retailers. With everything from long-awaited developments such as the U.S. Department of Labor's overtime rule and the Trans-Pacific Partnership inching toward the finish line to newer initiatives like the minimum-wage hike gaining steam, here's what experts say are the big-ticket items for the year ahead.

DOL's OT Rule

When the 60-day comment period on the DOL's proposed overtime changes ended in September, the agency had received nearly 250,000 comments on the controversial rule expected to be released in late 2016.

Under current regulations, employees have to meet certain job duties-related tests and be paid at least \$455 per week — or \$23,660 annually — on a salary basis in order to be exempt from minimum wage and overtime requirements under the Fair Labor Standards Act exemption for executive, administrative, professional, outside sales and computer employees.

The proposal calls for raising that salary level, last updated in 2004, to equal the 40th percentile of weekly earnings for full-time, salaried workers, bringing it to a projected level of \$970 per week, or \$50,440 annually. The DOL is also proposing automatically updating that salary threshold in order to stop it from becoming outdated between rulemakings.

In the rule's first year, an estimated 4.6 million exempt workers who make at least \$455 weekly but fall short of the 40th earnings percentile would become entitled to minimum wage and overtime protections, unless employers make changes to their compensation or hours.

The proposal has garnered a mixed response in the retail industry, with some saying the move will force businesses to take on prohibitive costs and others arguing the measure will help long-underpaid workers.

"It's going to, I think, have a big impact on retail," Armstrong Teasdale LLP partner JP Hasman said. "They'll feel it more acutely than other industries."

Some in the retail industry were worried the DOL would go the way of California with the rule and adopt some version of the so-called duty test, which addresses how much time a manager is expected to

spend fulfilling traditional management duties. However, such a requirement isn't on the table for now, Shook Hardy & Bacon LLP associate Meg Inomata said.

Still, the DOL will likely take on the duty test at some point, Shook Hardy partner Bill Martucci said. The agency asked for comments on the test when it opened the public comment period for the overtime rule.

"That would be the issue that would be ever more impactful in the retail space," Martucci said. "But the increase in the salary threshold will be sufficiently dramatic and affect national retailers in a major way."

Fair Scheduling

With a number of states including New York and California considering fair scheduling statutes, the issue will be a hot topic in 2016, experts say.

Typically, so-called predictable scheduling bills require employers to give employees at least two weeks' notice on work schedules and to provide extra pay for shifts altered later, Inomata said. The legislation is particularly important for families, employees with children and those working multiple jobs.

"Predictive scheduling gives employees the ability to look ahead," Martucci added. "The focus here is to be respectful of an individual's time."

Two bills seeking these protections are pending in the California assembly: A.B. 1038, introduced by Assemblyman Brian Jones, R-Santee; and A.B. 357 — known as the Fair Scheduling Act of 2015 — introduced by Assemblymember David Chiu, D-San Francisco, and Speaker Toni Atkins, D-San Diego.

In New York, the Senate and Assembly each have four bills pending in committee, including the Schedules that Work Act, A.B. 8592 — introduced in December by Assemblywoman Patricia Fahy, D-Albany — and companion bill S. 6263, sponsored by Sen. Jose Peralta, D-Queens.

While predictable scheduling is expected to continue being a big push at the state and local level in 2016, it's doubtful any federal legislation will go through this year, Inomata said.

Another concern being addressed at the state and city level is on-call scheduling, which involves employees calling or texting to learn, on short notice, whether they are needed at work.

Major retailers including **J. Crew** and Bath & Body Works LLC agreed to end the policy in 2015 after New York Attorney General Eric T. Schneiderman launched an April inquiry into retail scheduling.

The attorney general's warning letters were sent out several weeks after San Francisco passed legislation punishing businesses that use on-call shifts and placing restrictions on employers that require them to provide employees with more-predictable work schedules.

Attorneys should expect to see more legislation like this going into 2016, experts say.

\$15 Minimum Wage Hike

Across the United States, 2015 saw a boom in efforts to increase the minimum wage at local and state levels. With success stories such as Seattle's hike to \$15 per hour and orders from New York Gov.

Andrew Cuomo's administration matching that rate for fast-food and state workers, the trend is likely to continue into 2016, said Armstrong Teasdale partner JP Hasman.

While minimum-wage change has been a hot topic for years, recent efforts seem to have more staying power, Hasman said. The last year has seen a more organized and strategic attempt, he said, pointing to the union-backed Fight for \$15 campaign as an example.

"It's definitely something that's not going away — even if they don't achieve the \$15 number," he said.

The push thus far has mainly focused on large metropolitan areas and heavily populated states where wage changes will have the most impact, and next year seems on track to follow suit, Hasman said.

The first bill filed for the Florida Legislature's 2016 session was a \$15-an-hour minimum wage bill sponsored by Sen. Dwight Bullard, D-Culter Bay, while Pennsylvania's S.B. 195 — which calls for a \$10.10 minimum wage — remains stalled after a bid to move the bill out of committee by sponsor Sen. Christine Tartaglione, D-Philadelphia, faltered. The bill has been stalled in committee since January 2015.

While Democratic presidential candidate and U.S. Sen. Bernie Sanders, I-Vt. announced a bill in July that would raise the federal minimum wage to \$15 an hour, the approach taken by unions and other advocates of raising the minimum wage seems to be to push for change at the local level to make it easier to address federally, Hasman said.

"I think they've decided to go from the bottom up instead of the top down," he said. "A city mayor or alderman is much easier to convince than the U.S. Congress."

Data Breach Notification

Experts say attorneys working in the retail sphere should also keep an eye on legislation regarding data breach reporting. While states are very active in this area, with established standards in 47 states, retailers are gunning for one federal standard, said Jennifer Safavian, top lobbyist for the Retail Industry Leaders Association.

Though the attorneys general of New York, California and Florida joined 44 other state and territorial attorneys general in a July letter urging Congress to avoid preempting their authority when drafting data security laws, Safavian says consumers and retailers alike can benefit from having one standard.

Not every breach is worth alarming consumers, but with the patchwork of laws currently in place, it is hard to know when it is time to make the announcement, Safavian said.

As it stands, a retailer is required to use the notification laws in the state where an individual's information was compromised rather than the state of the company's incorporation, said Alfred Saikali, co-chair of Shook Hardy's privacy and data security practice.

With large-scale breaches affecting multiple states, it's a headache for companies to comply with each individual reporting law.

However, though bills like the Data Security and Breach Notification Act, H.R. 1770 — introduced by House Energy and Commerce Committee Vice Chair Marsha Blackburn, R-Tenn., and Rep. Peter Welch,

D-Vt. — and the Data Security Act of 2015, H.R. 2205 — sponsored by Sens. Tom Carper, D-Del., and Roy Blunt, R-Mo. — went through markups in 2015, Nelson said legislation of this nature pops up every year.

“I think it’s a little hard to predict with any certainty that 2016 will be the year,” he said. “There are lots of competing tensions between national security concerns, commercial interests and consumer protection.”

Trans-Pacific Partnership

Following more than five years of negotiation, the full text of the Trans-Pacific Partnership is now available for public consumption after the 12-nation free-trade deal was reached in October. The massive accord covers matters ranging from intellectual property to the environment.

Following years of high-stakes negotiations and partisan squabbling, the agreement’s release has predictably triggered debate across various industries waiting to see what the deal will ultimately look like in the United States.

“There’s a lot of hope that it passes, but there are also a lot of industries that aren’t in love with it,” Safavian said.

For retailers, experts say one of the agreement’s most important aspects is the potential to reduce product costs. If the deal were to pass, about 18,000 tariffs would be cut, helping retailers broaden where they can get goods, Safavian said.

However, she said, the ultimate outcome for the industry remains to be seen. The more than 2,000-page agreement contains plenty of minutia, meaning the results could differ widely depending on what gets through, she said.

Once the 90-day public-viewing period has run out and Obama signs the TPP, the House Ways and Means Committee and the Senate Finance Committee will likely hold a series of hearings on implementation legislation.

Tax Reform

As e-commerce continues to boom, brick-and-mortar stores are increasingly forced to compete with online retailers that aren’t required to collect taxes from states wherein they don’t have a physical presence, putting traditional retailers at a major disadvantage in the marketplace.

To address the imbalance, lawmakers have introduced the Marketplace Fairness Act, S. 698 — reintroduced by a bipartisan group of senators including Sens. Dick Durbin, D-Ill., and Mike Enzi, R-Wyo. after the measure died in the House in 2013 — and the Remote Transactions Parity Act, H.R. 2775, sponsored by Utah Republican Rep. Jason Chaffetz. The measures would allow states to collect sales taxes on Internet purchases.

Retail advocates say without such measures to level the playing field, the current system won’t be sustainable for long.

“It’s not fair,” said David French, chief lobbyist at the National Retail Federation. “It’s bad for local communities, and it’s ultimately bad for online retailers.”

Broader tax reform is also a key issue for retailers that experts predict will generate buzz in the upcoming presidential election. In a country that already has the world's highest corporate tax, retailers can't utilize many of the tax breaks enjoyed by companies in other industries, Frech said.

"Retailers are hit very, very hard," he said.

--Additional reporting by Alex Lawson, Daniel Wilson, Allison Grande, Jonathan Randles, Jeannie O'Sullivan and Kelly Knaub. Editing by Jocelyn Allison and Kelly Duncan.

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