

2020 Ushered in Significant and Far-Reaching Changes to Illinois' Employment Laws: Is Your Business in Compliance?

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On January 1, 2020, Illinois enacted a series of new employment laws and expanded existing laws which significantly impact every employer and employee in the state of Illinois. What follows is a brief overview of the changes to Illinois' employment laws and the new obligations they impose on Illinois employers.

I. Expanded Coverage and Requirements of the Illinois Human Rights Act

The Illinois Human Rights Act ("IHRA") is the Illinois state counterpart to the most well-known anti-discrimination employment laws which prohibits Illinois employers from discrimination or harassment in the workplace on the basis of race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service. 735 ILCS 5/1-103(Q) and 5/2-101(E-1). As part of the 2020 overhaul of Illinois' employment laws, the Illinois legislature substantially expanded the scope, coverage and obligations imposed by the IHRA.

Discrimination based on "Perceived" Characteristics: The recent amendment to the IHRA expressly prohibits workplace discrimination and harassment based on a person's "perceived" membership in a protected class. As such, discrimination or harassment based on an erroneous or mistaken belief that the person is a member of a protected class violates the IHRA.

Unlawful Harassment Covers Non-Employees and Conduct Outside the Workplace: The IHRA's prohibition against unlawful workplace harassment now extends to non-employee contractors or consultants. 775 ILCS 5/2-102(A-10). The IHRA was also amended to clarify that unlawful harassment is not limited to an employer's conduct or activities at the "physical location an employee is assigned to perform his or her duties." 775 ILCS 5/2-101(E-1).

IHRA Will Cover All Illinois Employers effective July 1, 2020: Currently, the IHRA covers only Illinois employers with at least 15 or more employees (except for claims involving disability discrimination, pregnancy discrimination, or sexual harassment which covered employers with one or more employees). Effective July 1, 2020, all Illinois employers with at least 1 employee will be subject to the IHRA, irrespective of the nature of the claim. Small businesses throughout the State of Illinois should be prepared to comply with the IHRA's requirements, prohibitions, and resulting potential legal exposure for the very first time.

Mandatory Reporting of Adverse Decisions Involving Harassment or Discrimination: Beginning July 1, 2020, all Illinois employers will be required to report to the Illinois Department of Human Rights any adverse decisions involving unlawful harassment or discrimination each year, including the number of adverse decisions, any equitable relief ordered, and the category of discrimination or harassment alleged. 775 ILCS 5/2-108.

Mandatory Annual Sexual Harassment Prevention Training: Beginning this year, all Illinois employers are required to provide sexual harassment prevention training to all employees every year. To satisfy this requirement, employers may use a model sexual harassment training program prepared by the IDHR or establish their own program. The program must include each of the following:

- (1) An explanation of sexual harassment consistent with the IHRA;
- (2) Examples of conduct that constitute unlawful sexual harassment;
- (3) A summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims;
- (4) A summary of employer responsibilities with respect to prevention, investigation, and corrective measures of sexual harassment.

775 ILCS 5/2-109. Illinois restaurants, bars, hotels and casinos are subject to additional sexual harassment prevention obligations. Failure to comply with the new reporting and training requirements may result in civil penalties from \$500 to \$5,000 per offense.

II. The Illinois Workplace Transparency Act

A primary feature of Illinois' newly enacted employment legislation is the Workplace Transparency Act (the "WTA"), which imposes restrictions on an employer's ability to (i) restrict an employee from reporting allegations of unlawful conduct or "unlawful employment practices," i.e., discrimination, harassment or retaliation that violates Title VII or the IHRA, (ii) require confidentiality or non-disparagement agreements prohibiting the disclosure of unlawful employment practices as a unilateral condition of employment, or (iii) require employees to waive or arbitrate claims involving unlawful employment practices as a unilateral condition of employment. 820 ILCS 96/1-25.

A term or provision of an employment agreement imposing any such restrictions, obligations or requirements is void and unenforceable, *unless* the (i) agreement was entered into as a mutual condition of employment, in writing; (ii) reflects actual, knowing and bargained for

consideration from both parties; and (iii) acknowledges the employee's right to report unlawful employment practices or criminal conduct to the government, participate in proceedings of a government agency to enforce discrimination laws, make truthful disclosures required by law or legal process, and request confidential legal advice. 820 ILCS 96/1-25(c).

The WTA also provides that a separation or settlement agreement imposing confidentiality obligations with respect to unlawful employment practices is valid and enforceable *only if*: (1) the agreement expressly provides that the confidentiality provision is preferred by and mutually beneficial to both parties; (2) the employee is notified in writing of the right to retain an attorney to review the agreement before executing it; (3) the confidentiality obligation is supported by valid, bargained for consideration; (4) the agreement does not waive future claims; (5) the employee has at least 21 days to review the agreement before signing, and 7 calendar days to revoke after signing. 820 ILCS 96/1-30(a).

An employee who successfully challenges the enforceability of an agreement or obligation under the WTA may recover attorneys' fees and costs incurred in the action. 820 ILCS 96/1-35.

VESSA Leave of Absence Rights Extended to Victims of Gender Violence: Illinois also expanded the **Victims' Economic Security and Safety Act ("VESSA")**, a law which entitles **victims of domestic violence, sexual violence or stalking to take unpaid, job protected leaves of absence**. The amendment extends VESSA's leave of absent protections to victims of gender violence.

Equal Pay Act Amendment Prohibits Inquiries Regarding Applicant's Compensation: A recent amendment to the Illinois Equal Pay Act effective September 2019 restricts an employer from requesting a prospective employee's compensation history, or using compensation thresholds or ranges to screen-out applicants. The amendment also prohibits employer's from requesting compensation history from a prospective employee's current or former employer, unless the information is a matter of public record or subject to FOIA. An employer may not prevent an employee from disclosing or discussing the employee's compensation or benefits. 820 ILCS 112/10(b).

The amendment's restrictions regarding requests for compensation history do not apply when a job applicant is an employee applying for a position with the same employer. Employers are also free to discuss a prospective employee's compensation expectations or information that a prospective employee voluntarily discloses without prompting employer. However, an employer

is prohibited from considering the voluntarily disclosed compensation information in determining whether to make an offer of employment, or the terms of any offer. 820 ILCS 112/10.

III. Recommendations for Illinois Employers

Every Illinois employer must carefully review all employee handbooks, policies, and procedures to ensure compliance with the changes to the IHRA, including the new annual mandatory reporting requirements and sexual harassment prevention training obligations. Similarly, the newly enacted WTA necessitates that all Illinois employers closely review their existing employment contracts, restrictive covenants, non-compete, non-solicitation, and confidentiality agreements, separation agreements, employee handbooks and other required policies to ensure compliance with the WTA's requirements.

Additional steps that employers should take to ensure compliance with other key employment obligations include the review of employee classifications to ensure compliance with federal and state minimum wage and overtime requirements, development of an internal workplace investigation procedure to address allegations of discrimination or harassment, and verification that all required workplace postings and notice requirements are up-to-date.

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