LEGAL UPDATES

PUBLISHED: SEPTEMBER 3, 2019

Illinois Governor Signs Omnibus Legislation with Extensive Changes to Employment Laws

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Key Points

The law prohibits employers from including unilateral non-disclosure clauses in employment agreements for unlawful employment practice claims of harassment, discrimination and retaliation.

The law prohibits unilateral non-disclosure provisions in settlement or termination agreements but allows parties to mutually agree to limited confidentiality of unlawful employment practices so long as certain criteria are satisfied.

The law prohibits unilateral provisions in employment contracts that compel waiver or arbitration of existing or future claims of harassment, discrimination and retaliation.

The law amends the Illinois Human Rights Act by substantially expanding the scope of harassment claims allowed, placing new obligations on employers related to harassment training and disclosure of adverse rulings against the employer, and expanding protection against harassment to nonemployees.

The law expands protections under the Victim Economic Security and Safety Act and the Hotel and Casino Employee Safety Act.

The law is effective beginning January 1, 2020, except that the provisions related to mandatory disclosures under the Illinois Human Rights Act are

effective July 1, 2020, and provisions related to the Hotel and Casino Employee Safety Act became effective August 9, 2019.

On August 9, 2019, Governor J.B. Pritzker signed the Illinois Workplace Transparency Act (WTA) which amends multiple state laws that affect Illinois employers or employers whose employees work in Illinois. An overview of the more significant provisions of this omnibus legislation is provided below.

Non-disclosure provisions in employment agreements

The WTA bars agreements that prevent former, prospective, or current employees from reporting to federal, state or local authorities unlawful conduct, including criminal conduct and unlawful employment practices, such as sexual harassment, discrimination, and retaliation.

Additionally, the WTA bars the use of *unilateral* agreements to prevent disclosure of "truthful statements" or that demand confidentiality relating to allegations of discrimination, harassment and retaliation.

The WTA permits, however, parties to enter into mutual agreements that "include provisions that would otherwise be unilateral and against public policy" only if the agreement:

Is in writing;

Demonstrates equal, actual, knowing, and bargained for consideration from both parties;

Acknowledges the employee's right to report good faith allegations of unlawful employment practices and criminal conduct to authorities, to participate in proceedings with enforcement agencies, to make truthful disclosures required by law, and to request and receive legal advice.

Arbitration agreements related to employment

The WTA bars any *unilateral* agreement that attempts to waive, arbitrate or diminish the right to pursue existing or future claims of harassment, discrimination or retaliation under federal or state law. The *Illinois Uniform Arbitration Act* was similarly amended to require arbitration agreements to comply with the provisions of the WTA to be enforceable, with exceptions for hospitals and health care providers.

As a caveat, the WTA provides that the prohibition on waivers and arbitration agreements applies "to the extent" the agreement "denies … a "substantive" or "procedural" right or remedy related to an unlawful employment practice." The lack of clarity in arbitration law over the meaning of the terms substantive and procedural rights as well as difficulties reconciling the arbitration provisions of the

WTA with the Federal Arbitration Act will result in litigation to determine the extent to which the WTA's arbitration provisions are enforceable.

Non-disclosure provisions in settlement or termination agreements

Settlement or termination agreements with *unilateral* provisions barring disclosure of harassment, discrimination and retaliation are prohibited. However, the parties may agree *mutually* in writing to a confidentiality provision in a settlement or termination agreement regarding unlawful employment practices so long as the following conditions are met:

The agreement is mutually agreed to by both parties and is the documented preference of the current, former or prospective employee;

The agreement applies only to claims arising before the execution of the settlement or termination agreement;

The agreement is supported by valid bargained for consideration;

No waiver of unlawful employment practices exists for events that occur after the execution of the agreement;

The agreement provides the current, former or prospective employee 21 days to consider the agreement and to consult an attorney prior to execution; and

The agreement is not effective until the expiration of a seven-day revocation period.

Current, former and prospective employees who successfully challenge the validity and enforceability of an agreement under the WTA are entitled to costs and attorney's fees.

The Illinois Human Rights Act

The WTA makes several changes to the Illinois Human Rights Act (Act) as explained below:

Extends scope of cause of action for harassment

The WTA significantly extends a cause of action for harassment to cover unwelcome conduct based on an individual's "actual or perceived" race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, sexual orientation, pregnancy, unfavorable discharge from military services or citizenship status that substantially interferes with work performance or creates an intimidating hostile or offensive working environment. Additionally, the definition of work

environment protects the employee beyond the physical location to which the employee is assigned to work.

Protects non-employees and employees from co-worker harassment

The WTA extends the protections against harassment to non-employees who are defined as individuals who are not employees of the employer but who are providing services to the employer pursuant to a contract, including contractors, and consultants. Employers will be held liable to non-employees and employees for harassment by non-managerial, non-supervisory employees to the extent the employer is aware of the harassment and fails to take corrective action.

Requires mandatory sexual harassment prevention training

The WTA places a new obligation on employers to institute annual mandatory sexual harassment prevention training for virtually all employees who work in the State of Illinois. The training program must either use a model sexual harassment prevention training program developed by the Illinois Department of Human Rights (Department) or another program equivalent to the Department's program. Failure to institute the mandatory training program subjects the employer to civil penalties.

Requires mandatory annual disclosures by employers

Beginning on July 1, 2020, the WTA places a new obligation on employers to disclose annually to the Department any final, non-appealable, adverse judgment or administrative ruling against it in the preceding year for any discrimination, harassment or retaliation actionable under the Act in favor of an employee or nonemployee to whom the employer owes a duty under the Act. Additionally, the Department may also require an employer which is a party in an investigation by the Department to disclose the total number of settlements the employer has entered into for up to the past 5 years regarding an alleged act of sexual harassment or unlawful discrimination by category of protected characteristics. The employers are barred from disclosing the names of the victims. Data submitted by the employer is exempt from disclosure under FOIA.

Based on the data submitted by employers, the Department will prepare an aggregated report regarding the number of adverse judgments and rulings categorized by each protected characteristic over the preceding calendar year to the General Assembly and the public. Employers that fail to comply with the disclosure requirements are subject to civil penalties. The mandatory disclosure requirement includes a sunset provision repealing the disclosure obligation as of January 1, 2030.

Protects employees of restaurants and bars

The WTA adds new provisions protecting employees who work in restaurants and bars from sexual

harassment. All restaurants and bars are required to have a written sexual harassment policy that must be provided to all employees in English and Spanish languages within the first week of employment. The Department must develop an online sexual harassment training program specific to the restaurant and bar industry that is available to all such employers at no cost. Employers are required to provide the Department's or an equivalent training program to all employees annually. Violations of these provisions subject the employer to civil penalties.

Victim Economic Security and Safety Act (VESSA)

VESSA, a law which helps victims of domestic and sexual violence was expanded to include gender violence. Gender violence is defined as violent or aggressive acts that are committed at least in part on the basis of a person's actual or perceived gender or sex and that constitute a criminal offense. Includes coverage of electronic communications on social media, website or application.

Hotel and Casino Employee Safety Act

Hotel and casino employers must provide to employees who will be working alone in a guest room, bathroom, or casino floor a portable emergency contact device to call for help in the event of an ongoing crime, sexual assault, or sexual harassment. Employers must also maintain and provide a copy to employees of the anti-sexual harassment and sexual assault policy that protects employees from sexual harassment and assault by guests. The policy must include provisions regarding complaint procedures, provide alternative temporary work assignments and paid time off to file a complaint, and inform employees of their rights under federal and state laws. Violation of the provisions of the law subject employers to a private right of action that includes injunctive and other equitable relief, and recovery of damages including economic damages not exceeding $350/day for violation of the law, and attorney's fees.

What this means to you

The WTA places new substantial burdens on employers to modify employment documents and implement new practices within 6 months of the law's enactment, in most cases. Employers should initiate steps to achieve the following tasks:

Review all employment, settlement, termination, and related boilerplate agreements to remove language excluding disclosure of harassment, discrimination, and retaliation claims.

Review all boilerplate arbitration agreements to modify their scope after consulting with your attorney regarding appropriate revisions.

Review and modify harassment and discrimination policies and procedures to comply with expanded protections and obligations, including dual language requirements.

Prepare to develop and offer annual harassment training to all employees on a yearly basis beginning January 1, 2020.

Maintain a list of final, non-appealable, adverse judgment or administrative rulings relating to claims of harassment, discrimination and retaliation that complies with the WTA's mandates and prepare a template to use for filing with the Department.

Hotels and casinos must determine the appropriate communication device to provide to employees when working alone and must review and modify harassment policies.

All employers should modify their leave policies to take into consideration the expanded rights for VESSA victims and their family members.

The timeline for compliance is short, and we can help. If you'd like assistance with the review and revision of your forms and policies and legal advice regarding compliance with the WTA, contact Erik Eisenmann, Anne Mayette or your Husch Blackwell attorney.

Tracey Oakes O'Brien was a contributing author of this content.