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Illinois Enacts Workplace Harassment Law, Creating New and Expanded Obligations for Employers

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Employers in Illinois will have new obligations related to employment contracts, training, and agency oversight under a wide-ranging bill signed by Governor J.B. Pritzker on August 9, 2019, that is intended to combat workplace harassment and provide greater protections for employees.

Senate Bill 75 unanimously passed both houses of the Illinois General Assembly and was enacted as Public Act 101-0221 (P.A. 101-0221).

Most of P.A. 101-0221 goes into effect on January 1, 2020, including the new Workplace Transparency Act and amendments to the Uniform Arbitration Act, the Illinois Human Rights Act, and the Victims' Economic Security and Safety Act.

The new Hotel and Casino Employee Safety Act goes into effect on July 1, 2020.

Workplace Transparency Act Limits Employment Agreements and Amends Uniform Arbitration Act

P.A. 101-0221 enacts the Workplace Transparency Act (WTA), which becomes effective on January 1, 2020. Employers may need to review and revise their standard arbitration, confidentiality, termination, and other employment agreements to comply with the WTA.

The WTA prohibits employers from contractually restricting a prospective, current, or former employee's ability to report allegations of unlawful conduct, including discrimination, harassment, and retaliation, for investigation by authorities. It also prohibits unilateral conditions of employment that prevent a current or prospective employee from reporting unlawful discrimination, harassment, or retaliation. In addition, the WTA also bars unilaterally requiring that a current or prospective employee waive, arbitrate, "or otherwise diminish" existing or future claims, rights, or benefits related to unlawful discrimination, harassment, or retaliation.

Provisions that would be void in a unilateral agreement under the WTA may be allowed if an employer and the current or prospective employee mutually agree to it in writing, and the agreement reflects “actual, knowing, and bargained-for consideration” from both parties. The agreement must acknowledge the employee’s right to:

1. Report a good-faith belief of an unlawful employment practice or criminal conduct to the appropriate governmental authorities;

2. Participate in governmental proceedings;

3. Make truthful statements or disclosures as required by law, regulation, or legal process; and

4. Seek or receive legal advice.

If the employer does not comply with these requirements, the WTA establishes a rebuttable presumption that the condition is unilateral and void as against public policy.

The WTA permits confidentiality provisions in settlement and termination agreements with prospective, current, and former employees if the provisions comply with certain new requirements. The agreement must state that the employee prefers confidentiality and the provision’s inclusion in the agreement is mutually beneficial. The employer must provide the employee written notification of the right to have an attorney or representative review the agreement. There also must be valid, bargained-for consideration exchanged. Employers cannot include any waiver of claims that accrue after execution of the agreement. The employee must have 21 calendar days to consider and execute the agreement, although the employee may sign the agreement before the end of the review period. The employee must have seven calendar days following execution of the agreement to revoke it. The agreement is not effective until the revocation period expires, but the WTA allows the employee to waive the right to revoke. Finally, the employer cannot unilaterally bar an employee from making truthful statements or disclosures about unlawful employment practices. Failure to follow these requirements voids the confidentiality provision as against public policy.

The WTA permits employers to include waivers and releases for claims that accrued before execution of the agreement. Moreover, employers may require confidentiality from:

1. Employees who receive or investigate complaints from others or have access to confidential personnel information;

2. Employees or third-party participants in investigations who must maintain confidentiality;

3. Employees or third-party recipients of attorney work product or attorney-client privileged communications;

4. Individuals who are legally subject to a recognized privilege; and

5. Third parties engaged by the employer for investigations of unlawful employment practices.

Under the Uniform Arbitration Act (UAA), as amended by P.A. 101-0221, a failure to comply with the WTA may be grounds for invalidating an arbitration agreement. While the impact the amendment will

have on arbitration is unclear, legal challenges are expected because the amendment appears to conflict with the Federal Arbitration Act, which preempts state law that prohibits the use of arbitration agreements. *See AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."). For example, see our article, New Jersey Prohibits Enforcement of Non-Disclosure Provisions in Settlement Agreements, Other Contracts.

The WTA does not apply to contracts entered into and subject to the Illinois Public Labor Relations Act or the National Labor Relations Act, but it applies to other contracts entered into, modified, or extended after the WTA's effective date.

Amendments to the Illinois Human Rights Act

Effective January 1, 2020, P.A. 101-0221 makes a number of amendments to the Illinois Human Rights Act (IHRA). The amended IHRA protects perceived membership in a protected class. The amended IHRA also provides a new definition of "harassment" that includes unwelcome conduct based on actual or perceived membership in a protected class, where the conduct "has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment." It clarifies that a "working environment" is not limited to the physical location where the employee works.

The amended IHRA states that employers will not be accountable for harassment by non-managerial or non-supervisory employees, unless employers are aware of the conduct and fail to take reasonable measures to address it.

The IHRA's amendments will permit non-employees in the workplace (such as contractors and consultants) to bring harassment claims that accrue after January 1, 2020. Non-employees include individuals who are "directly performing services for the employer pursuant to a contract with that employer." An employer will be liable for harassment by non-managerial and non-supervisory employees only if the employer is aware of the conduct and fails to take reasonable corrective measures.

The amended IHRA requires the Illinois Department of Human Rights (IDHR) to produce a model training program for the prevention of sexual harassment. The model program will be available online to employers and the public. Every employer with employees working in Illinois must use the model program or establish a program that "equals or exceeds" the statutory standards for the IDHR's program. Those standards require, at a minimum, an explanation of sexual harassment, examples of unlawful conduct, a summary of relevant federal and state statutes, and a summary of employer responsibilities. Employers must provide this training to all employees at least once a year. The new training requirements do not apply to state employers that are subject to the sexual harassment training requirements in the State Officials and Employees Ethics Act.

The IHRA's amendments will require bars and restaurants in Illinois to distribute a written sexual harassment policy to employees within the first week of their employment. The policy must include specific substantive information detailed in the IHRA, and it must be available in English and Spanish. The amended IHRA directs the IDHR to create a supplemental model training program for sexual harassment prevention tailored to the restaurant and bar industry. Restaurants and bars must use this supplemental IDHR program or create their own supplement that "equals or exceeds" the required standards.

An employer who does not comply with the new training requirements is subject to civil penalties, depending on the employer's size and history of offenses. Employers with fewer than four employees may face penalties of up to $500 for a first offense, up to $1,000 for a second offense, and up to $3,000 for three or more offenses. For employers with at least four employees, the maximum penalties increase to $1,000, $3,000, and $5,000, respectively.

Beginning July 1, 2020, employers must make annual disclosures to the IDHR with information about adverse judgments or administrative rulings against them in the prior year. The disclosures must include the number of adverse judgments or administrative rulings, whether an employee obtained equitable relief, and a breakdown of the judgments and rulings by unlawful employment practice. If the IDHR is investigating a charge filed under the IHRA, it may request similar information about an employer's settlements in the preceding five years that involved allegations of sexual harassment or unlawful discrimination occurring in the workplace or involving an employee or corporate executive.

The IDHR will compile the reported information about adverse judgments and administrative rulings for publication in an annual report, but it will aggregate individual data to avoid exposing personal information. P.A. 101-0221 exempts employer disclosures from the Freedom of Information Act. Employers who do not comply with these disclosure requirements could face civil penalties.

Amendments to Victims' Economic Security and Safety Act

Effective January 1, 2020, P.A. 101-0221 amends the Victims' Economic Security and Safety Act (VESSA) to include victims of "gender violence." Gender violence includes acts or credible threats of violence or aggression that are taken, even in part, based on an individual's actual or perceived sex or gender, and physical intrusions or invasions of a sexual nature under coercive conditions, or credible threats of the same. Such acts must satisfy the elements of a criminal offense, but need not result in criminal charges, to qualify as gender violence.

Affected employees will receive the same leave entitlements (which vary depending on the size of the company) as victims of domestic or sexual violence under VESSA.

New Hotel and Casino Employee Safety Act

P.A. 101-0221 establishes the Hotel and Casino Employee Safety Act (HCESA), effective July 1, 2020, which sets forth protections for employees working in the hotel and casino industries.

Under the HCESA, an "employee" includes full-time employees, part-time employees, and employees of subcontractors. The HCESA requires hotels and casinos to provide employees assigned to work alone in a guest room, restroom, or casino floor with a "safety or notification device," often called a "panic button." The device would allow the employee to summon help in a perceived emergency, including sexual harassment and sexual assault. Hotels and casinos must provide the signaling devices at no cost to qualifying employees.

The HCESA requires hotels and casinos to develop and abide by a written anti-sexual harassment policy that includes reporting procedures, immediate steps to take in response to perceived harassment, the opportunity for temporary work reassignments, and the availability of paid time off to contact authorities and participate in later legal proceedings. The policy must inform the employee of protections under the IHRA, Title VII of the Civil Rights Act of 1964, and the HCESA's anti-retaliation provision. Hotels and casinos must distribute copies of the policy to employees in English and Spanish and post both versions in conspicuous workplace locations. The HCESA also requires hotels

and casinos to provide the policy in other languages spoken by a predominant portion of its workforce.

The HCESA protects hotel and casino employees from retaliation for reasonably using the signaling device; using the reporting procedures mandated by HCESA; and disclosing, reporting, or testifying about a violation of the HCESA.

Employees and their representatives may sue in state court to seek any remedy available at law or equity, including injunctive or other equitable relief. Before an employee representative may file a lawsuit, the employee representative must notify the employer, in writing, of the alleged violation and give the employer 15 calendar days to correct the violation.

While economic damages cannot exceed $350 per violation, each day that a violation continues constitutes a separation violation. Prevailing employees and their representatives are entitled to attorneys' fees and costs.

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P.A. 101-0221 imposes many new obligations that may require Illinois employers to review their employment agreements, policies, training materials, and severance agreements.

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