Employment and Labor

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Illinois Workplace Transparency Act Goes Into Effect Jan. 1, 2020 – Are You Ready?

Illinois employers soon will be barred from preventing employees and prospective employees from making truthful statements or disclosures about, or participating in investigations into, alleged illegal employment practices. Part of Public Act 101-0221, signed into law by Gov. J.B. Pritzker in August, the new Workplace Transparency Act (WTA) prohibits employers from requiring nondisclosure and similar clauses in all negotiated employment-related agreements and from unilaterally compelling employees to waive or arbitrate employment claims or to sign confidentiality agreements as a condition of employment. PA 101-0221 also makes significant changes to the Illinois Human Rights Act (IHRA), including implementing new required annual harassment training and new disclosures that employers must make to the Illinois Department of Human Rights (IDHR).

Key Takeaways

The WTA:

- Significantly restricts employers' use of nondisclosure and nondisparagement provisions in employment contracts, separation and settlement agreements, and other negotiated agreements. Confidentiality provisions must be bilateral, bargained for and in writing, and the employee must have time to review and agree with them.
- Limits an employer's ability to include arbitration, waiver or confidentiality provisions as a condition of employment in unilateral contracts or employment policies.

Changes to the IHRA include:

- Requiring annual sexual harassment prevention training that uses or meets the standards of training provided by the IDHR.
- Requiring annual disclosures to the IDHR of judgments or administrative rulings against employers during the prior calendar year.
- Expanding the prohibition against harassment and discrimination to include "perceived" protected characteristics in addition to actual characteristics.
- Extending protection from harassment to contractors and consultants.
- Expanding "working environment" beyond the physical workplace so harassment can include conduct that happens outside the office.

The Workplace Transparency Act

The WTA applies to all employment-related agreements entered into, modified or extended on or after its Jan. 1, 2020, effective date, and provides that "No contract, agreement, clause, covenant, waiver, or other document shall prohibit, prevent, or otherwise

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restrict an employee, prospective employee, or former employee from reporting any allegations of unlawful conduct to federal, state, or local officials for investigation, including, but not limited to, alleged criminal conduct or unlawful employment practices."

Unilateral employment contracts and employment policies that employees must sign as a condition of employment also cannot prohibit employees from making statements or disclosures about alleged unlawful employment practices (e.g., discrimination and harassment), unless those contracts or policies satisfy the following conditions:

- The provision is in writing.
- The writing demonstrates actual, knowing and bargained-for consideration from both the employer and the employee.
- The writing acknowledges certain fundamental employee rights, including the right to report good faith allegations of unlawful discrimination or harassment to an appropriate agency; report good faith allegations of criminal conduct to an appropriate government official; participate in a proceeding with an appropriate federal, state or local government agency; make truthful statements or disclosures required by law, regulation or legal process; and request or receive confidential legal advice.

Under the WTA, employers cannot compel employees to waive their rights to file claims related to the alleged unlawful employment practices, including through mandatory arbitration provisions. The law does not bar employers and employees from bargaining for certain waivers as long as the agreement is in writing and meets the same conditions as those for unilateral contracts, as described above.

The new law also prevents employers from compelling employees to enter into one-sided confidentiality agreements in connection with settlement or termination agreements. Confidentiality agreements are permissible only if:

- Both employer and employee agree in writing that confidentiality is desired and mutually beneficial.
- There is valid, bargained-for consideration in exchange for the confidentiality.
- The employee is given 21 days to consider the agreement and seven days to withdraw from it.
- The employee is notified of his or her right to have an outside attorney review the agreement.
- The agreement does not require the employee to waive the right to file claims of illegal employment practices that accrue after the settlement or termination agreement is executed.

The WTA covers nearly all Illinois-based employers but does not apply to employment contracts that are subject to the Illinois Public Labor Relations Act or the National Labor Relations Act. A finding that an employment agreement provision violates the WTA would result in just the provision being void under Illinois law and removed from the agreement; the remainder of the agreement's terms would remain. An employee who successfully challenges the enforceability of a contract — but not an employment policy — can recover attorneys' fees and costs from the employer.

Illinois Human Rights Act Changes

The significant changes to the IHRA, which go into effect on July 1, 2020, include expanding the prohibition against harassment and discrimination to include perceived protected characteristics in addition to actual characteristics. The amendments extend protection from harassment under the IHRA to contractors and consultants in addition to employees, and they clarify that the working environment is not limited to the employee's physical workplace, so harassment can include conduct that happens outside the office.

Starting in 2020, every year on July 1 employers must disclose to the IDHR information on judgments or administrative rulings against them during the prior calendar year, including the total number of federal or state judgments, broken down by protected characteristics (sex; race, color or national origin; religion; age; disability; military status or unfavorable discharge; sexual orientation or gender identity; or any other characteristic protected under this IHRA) and any equitable relief ordered as a result. If the IDHR is investigating a charge filed against the employer, it also may request information regarding settlements of sexual harassment or discrimination claims for the past five years, broken down by the same categories.

The new amendments also direct the IDHR to establish a model training program for sexual harassment prevention to be made available to employers at no cost. Employers must provide yearly training to employees — either using the model program or creating their own program consistent with the model program — that must, at a minimum, define what sexual harassment is, with examples of prohibited conduct; summarize federal and state laws covering sexual harassment, including the remedies for violation of those laws; and acknowledge the employers' responsibility to prevent, investigate and address sexual harassment.

To prepare for these substantial changes, employers should review all current employment agreements and templates for future agreements and, if necessary, amend them to comply with the new law's disclosure, training and confidentiality provisions.

Related Professionals

For more information, please contact:

Mark Goldberg mgoldberg@loeb.com
Jason P. Stiehl jstiehl@loeb.com
Nina Ruvinsky nruvinsky@loeb.com

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