BUSINESS & CORPORATE SERVICES

Illinois Imposes Sweeping Obligations on Employers to Prevent Harassment and Discrimination

By Starr M. Rayford

INTRODUCTION

Illinois Governor J.B. Pritzker recently signed into law an omnibus bill aimed at limiting harassment and discrimination within the workplace. The bill amends the Illinois Human Rights Act by requiring annual trainings and disclosures. Additionally, the bill enacts two new laws that may impact Illinois employers: the Workplace Transparency Act and the Sexual Harassment Victim Representation Act.

SEXUAL HARASSMENT TRAINING

The newly enacted amendments to the Illinois Human Rights Act go into effect on January 1, 2020. These amendments require all Illinois employers to provide annual training to its employees to prevent sexual harassment. The Department of Human Rights is currently developing a training program that employers will be allowed to use when conducting their annual training programs. Employers may also choose to develop and use their own training program, provided the program content meets or exceeds the minimum requirements set forth by the Department.

The sexual harassment prevention training must include the following requirements at a minimum:

- Definition of sexual harassment;
- Examples of unlawful workplace conduct that may constitute sexual harassment;
- Confirmation that the employer has a responsibility to prevent, investigate and address sexual harassment; and
- A summary of relevant federal and state laws with respect to sexual harassment, including available remedies for violation.

HARASSMENT AND DISCRIMINATION DISCLOSURES

Starting, July 1, 2020, every Illinois employer must make annual disclosures to the Illinois Department of Human Rights of all settlements, final judgments, and final administrative rulings entered against it over the prior year related to harassment and discrimination. The disclosure must state what, if any, equitable relief was ordered against the employer and detail whether the judgments or rulings involved harassment or discrimination on the basis of sex, race, color, national origin, religion, age, disability, military status, sexual orientation, gender identity, or any other protected characteristic.

At this time, it is unclear whether Illinois employers are required to report all settlements and judgments entered against them or only those that arise from employment within the State of Illinois.

WORKPLACE TRANSPARENCY ACT

The Workplace Transparency Act (WTA) goes into effect on January 1, 2020. The WTA will have two primary effects: (1) it will generally prohibit the use of mandatory arbitration agreements in employment contracts to compel the arbitration of harassment and discrimination claims; and (2) it will limit the use of "non-disclosure" or "confidentiality" clauses in settlement agreements.

1. Employment Contracts.

Under the Act, employers can no longer use contracts, agreements, or any other documents to prevent employees from reporting allegations of harassment or discrimination to the appropriate federal, state, or local agencies. The Act also states that any contract that requires employees to waive or arbitrate harassment and discrimination claims is void to the extent it denies employees substantive and procedural rights or remedies.

In practical terms, the WTA bars the use of mandatory arbitration agreements that compel arbitration or harassment claims as a condition of employment or continued employment. While the WTA does permit employers to enter agreements with individual employees to arbitrate harassment and discrimination claims, any such agreements must be supported by adequate consideration—separate from and in addition to employment—and such additional consideration must be identified in the employment agreement. Moreover, any agreement compelling the arbitration of harassment and discrimination claims must specifically detail the following rights of the employee:

- To report any good-faith allegation of unlawful employment practices to the appropriate federal, state, or local agency;
- To report any good-faith allegation of criminal conduct to the appropriate federal, state, or local official;
- To participate in a proceeding with any federal, state, or local agency that enforces discrimination laws;
- To make any truthful statements or disclosures required by law, regulation, or legal process; and
- To request or receive confidential legal advice.

There is an exception to the WTA's arbitration agreement prohibitions. The WTA does not apply to collective bargaining agreements that are covered by the National Labor Relations Act.

2. Confidentiality and Non-Disclosure Agreements.

Under the WTA, employers can still require employees to agree to confidentiality clauses related to unlawful employment practices in settlement or termination agreements, subject to the following conditions:

- Confidentiality is the documented preference of the employee;
- The employer notifies the employee, in writing, of his/her right to have an attorney or representative of the employee's choosing to review the settlement or separation agreement before it is executed;
- There is valid, bargained-for consideration related to the confidentiality agreement;
- The settlement or separation agreement does not waive claims that accrue after the date of the execution of the agreement;
- The employee is provided twenty-one (21) days to consider the entire written agreement prior to signing; and
- The employee is granted seven (7) days following execution to revoke the agreement and the agreement is not effective or enforceable until the revocation period has ended.

SEXUAL HARASSMENT VICTIM REPRESENTATION ACT

The Sexual Harassment Victim Representation Act goes into effect January 1, 2020. The Act requires that, when a union member accuses another union member of sexual harassment or assault, both union members must be provided with independent representation. One union representative may no longer represent both union members in such situations.

KEY TAKE-AWAYS FOR EMPLOYERS

Illinois, like many states, is pushing for greater transparency and inclusion in its workplaces. Employers should keep these two objectives in mind when assessing their formal and informal policies and practices to ensure they are not violating Illinois law. The recent enactment of an omnibus bill targeting sexual harassment will require employers to modify existing policies and documents and adopt new procedures and employment practices.

To avoid violation of the laws discussed above, employers should consider the following actions:

- Develop a statutorily-compliant training program to prevent sexual harassment at the workplace;
- Identify all settlements, final judgments, and final administrative rulings entered against the employer for harassment and discrimination claims over the course of the year, in preparation for disclosing such rulings to the Illinois Department of Human Rights annually;
- Immediately cease the use of unilateral arbitration agreements that force employees to arbitrate harassment and discrimination claims; and
- Ensure all settlement and arbitration agreements include the notices required by the WTA.

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