ILLINOIS WORKPLACE TRANSPARENCY ACT GOES INTO EFFECT JANUARY 1, 2020

The Illinois Workplace Transparency Act (the Act) will go into effect on January 1, 2020, imposing annual anti-harassment training and reporting requirements for Illinois employers, as well as various limitations on the use of confidentiality and arbitration provisions in employment agreements.

In passing this sweeping law, Illinois is the latest state to follow in the trend of other jurisdictions, including New York and California, which have passed similar laws expanding protections against harassment and discrimination in the workplace.

ANNUAL SEXUAL HARASSMENT PREVENTION TRAINING

As of January 1, 2020, Illinois employers must provide annual sexual harassment prevention training to all employees. Employers can satisfy this requirement by either utilizing a model training that will be issued by the Illinois Department of Human Rights (IDHR), or issuing their own sexual harassment prevention training program that must, at a minimum, include the following:

- An explanation of sexual harassment consistent with the Illinois Human Rights Act (IHRA);
- Examples of conduct that constitute unlawful sexual harassment;
- A summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- A summary of responsibilities of employers in the prevention, investigation and corrective measures of sexual harassment.

In addition to the above, there are supplemental training and policy requirements specific to employers in the restaurant and bar industry under the Act.

THE BOTTOM LINE

With the January 1, 2020 effective date of the Act rapidly approaching, Illinois employers should:

1) Update confidentiality and separation agreements to include all compliant language to ensure enforceability of the agreements;
2) Revise anti-harassment policies to preclude harassment of third parties and to include complaint mechanisms for third parties;
3) Start planning to implement mandatory sexual harassment prevention training to all employees in the 2020 calendar year; and
4) Remain mindful of the July 1, 2020 date to submit mandatory disclosures to the IDHR.

ANNUAL REPORTING TO THE IDHR

Beginning in July 2020, all Illinois employers must disclose annually to the IDHR the total number of adverse judgment or administrative rulings against the employer in the previous year in sexual harassment and unlawful discrimination cases, including whether equitable relief was ordered, and a breakdown of the judgments and rulings by protected characteristics under the IHRA. The IDHR will publish an annual report aggregating this data, which will not publicly identify employers.

The Act also authorizes the IDHR, during its investigations, to require employers to disclose the total number of settlements of sexual harassment or unlawful discrimination claims the

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employer entered into in the prior five year period.

PENALTIES

Illinois employers who fail to make these mandatory disclosures or to provide the annual training may be subject to civil penalties, which can range from $500 to $5,000, depending on the employer's size and number of violations.

RESTRICTIONS ON CONFIDENTIALITY AND ARBITRATION PROVISIONS IN EMPLOYMENT AGREEMENTS

Under the Act, employers cannot:

1) Mandate arbitration of discrimination or harassment claims, or

2) Require current or prospective employees to waive or diminish any existing or future claims or rights relating to alleged, unlawful discriminatory practices.

Similar laws in other jurisdictions, such as New York, have been found to contradict the Federal Arbitration Act (FAA), which requires enforcement of arbitration agreements involving interstate commerce. Accordingly, if this provision of the Act is ultimately challenged, it is questionable whether a court would enforce it.

In addition, any agreement that prevents a current, former or prospective employee from making truthful statements or disclosures about alleged unlawful employment practices is against public policy and void. To maximize likelihood of enforcement of agreements containing confidentiality and mandatory arbitration provisions, agreements must:

1) Be in writing;

2) Demonstrate actual, knowing and bargained-for consideration from both parties; and

3) Acknowledge the right of the current or prospective employee to:

   >> Report any good faith allegation of unlawful employment practices to any appropriate federal, state or local government agency enforcing discrimination laws;

   >> Report any good faith allegation of criminal conduct to any appropriate federal, state or local official;

   >> Participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws;

   >> Make any truthful statements or disclosures required by law, regulation or legal process; and

   >> Request or receive confidential legal advice.

Employers need to carefully review and revise existing template agreements to ensure they include this necessary carve-out language.

The Act similarly imposes limitations on the inclusions of confidentiality provisions relating to alleged unlawful employment practices in settlement and separation agreements, permitting such provisions only if the following conditions are met:

>> Confidentiality is the documented preference of the employee and is beneficial to both parties;

>> The employer notifies the employee in writing of his or her right to have an attorney or representative of his or her choice review the agreement;

>> There is valid, bargained-for consideration in exchange for the confidentiality;

>> The agreement does not waive any claims of unlawful employment practices that accrue after the agreement is executed;

>> The agreement is provided in writing, and the employee is given 21 calendar days to consider the agreement, during which the employee may sign the agreement at any time, knowingly and voluntarily waiving any further time for consideration; and

>> The employee has 7 calendar days to revoke the agreement, and the agreement is not effective or enforceable until the revocation period has expired, unless the employee knowingly and voluntarily waives the revocation period.

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ADDITIONAL EXPANSIONS OF ANTI-HARASSMENT PROTECTIONS

In addition, the Act further expands workplace anti-harassment protections as follows:

- For purposes of determining unlawful harassment, an employee's work environment is not only the physical location an employee is assigned to perform his or her duties.
- Employers can be liable for its employees' harassment of non-employees, such as independent contractors, who perform services for the employer *if* the employer was aware of the conduct and fails to take reasonable corrective measures. Illinois employers should accordingly revise anti-harassment policies to specifically preclude third-party harassment and include a complaint mechanism for third parties to raise discrimination and harassment complaints.
- The definition of unlawful harassment and discrimination is expanded to prohibit discrimination and harassment on the basis of an individual's actual or *perceived* protected status.

EXPANDED LEAVE PROTECTIONS FOR GENDER VIOLENCE VICTIMS

The Act expands the requirements of the Illinois Victims' Economic Security and Safety Act, which provides unpaid leave to victims of domestic violence, sexual violence and stalking, to also protect victims of "gender violence."

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