

insights

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Illinois's newly enacted 'Workplace Transparency Act' responds to the #MeToo movement

On August 9, 2019, Illinois Governor J. B. Pritzker signed the Workplace Transparency Act (the "WTA") into law.

The Act, which applies to nearly every employer in Illinois:

- Restricts non-disclosure and non-disparagement (unless made mutual) language in employment agreements, separation agreements, and settlement agreements;
- Restricts an employer's ability to require mandatory arbitration of sexual harassment or other discrimination claims;
- Requires annual sexual harassment training; and
- Directs employers to report settlements and adverse judgments to the Illinois Department of Human Rights.

There are also new civil penalties for non-compliance. The new law includes additional requirements for restaurants, bars, hotels, and casinos. Those requirements take effect immediately, whereas the broader employment law changes take effect January 1, 2020.

In signing the bill, Governor Pritzker and the measure's sponsors stressed that the WTA takes a comprehensive approach to "changing the culture" around sexual harassment and abuse in Illinois workplaces.

There can be no question that the WTA is a far-reaching law that may drastically impact tried and true policies and practices of nearly all employers in Illinois. Accordingly, employers should act now to audit and amend their current agreements and policies to ensure they are consistent with WTA mandates that go into effect in a matter of months.

Background

The WTA applies to all employment, separation and settlement agreements, entered into, extended, or modified on or after January 1, 2020, without exception. It provides in part that,

"An employer may not enter into a contract or agreement with an employee or applicant...if that contract or agreement contains a nondisclosure or non-disparagement clause that covers harassment or discrimination as provided under Section 2-102 of the Illinois Human Rights Act. Any such nondisclosure or non-disparagement clause is severable, and all other provisions of the employment contract shall remain in effect."

It also provides that,

"[A]n employer may not enforce or attempt to enforce a non-disparagement clause or nondisclosure clause described in subsection (a) or retaliate against an employee or applicant for reporting, resisting, opposing, or assisting in the investigation of harassment or discrimination as provided in Section 2-102 of the Illinois Human Rights Act."

Finally, employers cannot require applicants or employees to keep allegations of harassment or retaliation as confidential.

Similarly, where an employee or applicant is required to accept mandatory arbitration as a condition of his or her employment, the arbitration agreement must satisfy the same requirements.

Changes to confidentiality language

Finally, the WTA implicates changes to confidentiality language that is usually part of separation and settlement agreements. While the Act doesn't bar an employer and employee from agreeing to confidentiality of the agreement, an employer cannot use language that would completely prohibit employees from making truthful statement regarding unlawful employment practices. In order for the parties to agree on valid, enforceable confidentiality provisions related to harassment or other discrimination allegations, the agreement must demonstrate that:

- Confidentiality mutually benefits both parties, and is the documented preference of the employee, prospective employee, or former employee;
- The employer has notified the other party, in writing, of his or her right to have an attorney or representative review the agreement prior to execution;
- There is valid, bargained-for consideration in exchange for the confidentiality;
- The settlement or termination agreement does not waive any claims of unlawful employment practices that have not yet accrued;
- The employee received the written agreement with at least 21 days to consider whether to sign it; and
- The employee was given at least seven calendar days after signing the agreement to revoke it, or expressly waived the right to do so.

The WTA does not apply to terms of collective bargaining, nor does it prevent an employer from requiring certain employees to maintain confidentiality as to allegations made by others in certain narrow circumstances.

New required disclosures

While the bulk of the Workplace Transparency Act is set to take effect January 1, 2020, the Act also provides that, beginning July 1, 2020, covered employers must disclose the information about settlements for sexual harassment and other discrimination claims to IDHR if requested during an investigation into a pending charge of discrimination.

Although the information in these disclosures will not be subject to disclosure under a FOIA request, the IDHR may use the information to open a preliminary investigation into pattern and practice violations. In addition, failure to comply with reporting obligations could result in civil penalties up to \$5,000 per offense, depending on employer size and the number of violations.

Upon taking effect, the Act requires employers to provide annual sexual harassment prevention training to all employees, which must at minimum:

- Define sexual harassment;
- Provide examples of prohibited conduct
- State that it is the employer's responsibility to prevent, investigate and address sexual harassment; and
- Summarize federal and state laws addressing sexual harassment, and available remedies for violation thereof.

Moreover, the WTA would require all bars and restaurants in the state to provide employees a written sexual harassment policy in English and Spanish within the first calendar week of employment, as well as providing supplemental training in English and Spanish.

While there is no word on when it will be available, the WTA requires that the IDHR make available a model sexual harassment prevention training program that meets these criteria. Once published, employers must either use the model program or establish training that exceeds the minimum standards provided by the model training.

If you have questions about the WTA and its impact on your policies and procedures, please contact us.

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