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Practice Update

Avalanche of New Laws Create Additional Requirements for Illinois Employers

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Illinois employers must be cognizant of new Illinois laws including bans on salary history inquiries, restrictions on artificial intelligence interview programs, mandatory sexual harassment prevention training, limitations on non-disclosure and arbitration provisions, increasing minimum wage, implications of the new cannabis law and, within the City of Chicago, predictive scheduling.

Workplace Transparency Act (WTA)

Effective January 1, 2020

The WTA's purpose is to prevent unlawful discrimination and harassment in the workplace. To further its goal, the WTA:

- Prohibits a provision in any agreement that prevents an employee from (1) reporting allegations of unlawful conduct to government officials or (2) testifying in an administrative, legislative or judicial proceeding about alleged criminal conduct or unlawful employment practices

The WTA prohibits any provision in an employment agreement that prevents an employee from making truthful statements or disclosures about alleged unlawful employment practices. The WTA also

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attempts to place limits on the use of arbitration agreements by prohibiting any provision in an employment agreement that requires an employee to waive, arbitrate or otherwise diminish any existing or future claim related to an unlawful employment practice. Recently, the U.S. District Court for the Southern District of New York held that the Federal Arbitration Act (FAA) preempted a similar limitation contained in a New York statute. *Latif v. Morgan Stanley & Co.,* No. 18 CV 11528 (S.D.N.Y. June 26, 2019). See Federal Judge Rejects New York Law Prohibiting Mandatory Pre-Dispute Arbitration of Sexual Harassment Claims.

Although the FAA may preempt the WTA's limitation on arbitration clauses, an employer must be aware of its limitations subject to a determination that the provision is unenforceable. The WTA further provides that an employment agreement may include nondisclosure, non-disparagement and arbitration clauses if the agreement is: (a) in writing, (b) demonstrates actual, knowing and bargained-for consideration from both parties, and (c) acknowledges the right of the employee to (1) report any good faith allegations of unlawful employment practices to federal, State or local enforcement agencies; (2) report any good faith allegations of criminal conduct to appropriate federal, State or local officials; (3) participate in proceedings with appropriate federal, State or local enforcement agencies; (4) make any truthful statements or disclosures required by law, regulation or legal process; and (5) request or receive confidential legal advice.

- Places limitations on the use of nondisclosure and non-disparagement provisions in employment agreements and attempts to place limits on the use of arbitration agreements

The WTA prohibits any clause in a settlement agreement that prevents an employee from making truthful statements or disclosures regarding unlawful employment practices. The WTA also limits

the use of confidentiality provisions relating to the alleged unlawful employment practice. A settlement agreement may include a confidentiality provision only if: (1) confidentiality is the documented preference of the employee and is mutually beneficial to both parties; (2) the employer notifies the employee, in writing, of the employee's right to have an attorney review the agreement; (3) there is consideration in exchange for confidentiality; (4) the agreement does not waive any claims for future unlawful employment practices; (5) the employee is provided with a period of 21 days to consider the agreement; and (6) unless knowingly and voluntarily waived by the employee, employee shall have 7 days after execution to revoke the agreement.

- Allows a prevailing employee to recover reasonable attorneys' fees and costs incurred in challenging a contract for violating the WTA

Amendments to the Illinois Human Rights Act

Effective January 1, 2020

- Requires Annual Sexual Harassment Prevention Training

The Illinois Department of Human Rights (Department) shall produce a model program including (1) an explanation of sexual harassment; (2) examples of conduct constituting sexual harassment; (3) a summary of applicable statutory provisions concerning sexual harassment and available remedies for victims; and (4) a summary of an employer's responsibilities in preventing, investigating, and implementing corrective measures of sexual harassment. An employer shall provide the sexual harassment prevention training annually to all employees and may use the Department's model program in conjunction with its existing program. An employer who fails to provide the annual training is subject to the imposition of civil penalties.

- Requires Annual Disclosure by Employers
  Obligation begins July 1, 2020

On an annual basis, an employer must disclose to the Department: (1) the total number of adverse judgments or administrative rulings relating to sexual harassment or unlawful discrimination in the preceding year; (2) any equitable relief that was ordered against it; (3) the number of such judgments or rulings in specific categories including sexual harassment; or discrimination or harassment on the basis of sex; race, color or national origin; religion; age; disability; military status or unfavorable discharge from military status; sexual orientation or gender identity; or any other characteristic protected by the Illinois Human Rights Act. If it is investigating a charge against an employer, the Department may request that the employer submit the total number of settlements entered into during the preceding 5 years (broken down into various categories) relating to any alleged act of sexual harassment or unlawful discrimination that occurred in the workplace, or involved the behavior of an employee or corporate executive of the employer regardless of whether that behavior occurred in the workplace. An employer who fails to make the necessary disclosures is subject to the imposition of civil penalties.

- Expands the definition of harassment and discrimination

For purposes of sexual harassment, the WTA provides that “working environment” is not limited to a physical location where an employer assigns an employee to perform duties. The WTA expands the definition of unlawful discrimination to include “perceived” discrimination and harassment to include unwelcome conduct based on, among others, an employee’s “perceived” race, color, religion, national origin, ancestry, age, sex, sexual orientation, pregnancy, disability or citizenship status. Again, working environment is not limited to a physical location where an employer assigns an employee to perform duties.

- Expands its application to consultants and contractors

The WTA also prohibits harassment and sexual harassment of nonemployees (defined as a person who is not otherwise an employee who is directly performing services pursuant to a contract with the employer, including contractors and consultants).

- Expands civil penalties

The WTA provides new penalties for employers with: (1) less than 4 employees, penalties not to exceed $500 for the 1st offense, $1,000 for the 2nd, and $3,000 for the 3rd and all subsequent violations; (2) 4 or more employees, penalties not to exceed $1,000 for the 1st offense, $3,000 for the 2nd, and $5,000 for the 3rd and all subsequent violations.

- Includes special rules for bars and restaurants

Every restaurant and bar operating in Illinois must have a written anti-sexual harassment policy (available in English and Spanish) that is provided to all employees within the first calendar week of employment. The policy must include (1) a prohibition on sexual harassment; (2) the definition of sexual harassment under the Act and Title VII; (3) details on how an individual can report sexual harassment internally; (4) an explanation of the internal complaint process available to employees; (5) how to file a charge with the Department and EEOC; (6) a prohibition on retaliation for reporting sexual harassment; and (7) a requirement that all employees participate in sexual harassment prevention training.

The Department shall develop a supplemental model-training program aimed at the prevention of sexual harassment in the restaurant and bar industry that shall include certain categories of information as described in the Act.

An employer who fails to provide the supplemental sexual harassment training is subject to the imposition of civil penalties.

Illinois Equal Pay Act of 2003

Amendments effective 60 days after signature by the governor

- Bans employers from asking job applicants for information regarding their wage, salary or benefits history

The Act bans employers from (1) screening job applicants based on their wage or salary history; (2) requiring that an applicant's wages satisfy minimum or maximum criteria; and (3) requesting or requiring an applicant to disclose wage or salary history as a condition of employment. Employers may share information with the applicant regarding the compensation and benefits or discussing the applicant's expectations for the position in question. An employer does not violate the Act if an applicant voluntarily discloses the information, but the Act prohibits an employer from relying on such information when deciding whether to offer employment or determining compensation.

- Bans agreements restricting employers from disclosing compensation

The Act prohibits an employer from requiring an employee to sign an agreement that prohibits the employee from disclosing the employee's compensation. The Act already prohibits an employer from taking any action against an employee for discussing the employee's wages or the wages of any other employee. The amendment, however, clarifies that an employer may prohibit employees whose job responsibilities allow them access to other employees' compensation information (including HR employees and supervisors) from disclosing that information in the

absence of prior written consent from the employee whose information is being disclosed.

- Expands claims under the Equal Pay Act

Rather than having to demonstrate that an employee is performing work that requires "equal" skill, effort and responsibility, an employee need only show that the work is "substantially similar." The Amendment also limits an employer's ability to justify pay disparities. To establish that a factor other than unlawful discrimination was the reason for the pay disparity, an employer must show that the factor (1) is not based or derived from a differential in compensation based on sex or another protected characteristic; (2) is job-related with respect to the position and consistent with business necessity; and (3) accounts for the differential.

- Increases liability for violations

In relation to unequal pay claims, and in addition to recovery of the entire underpayment with interest, as well as attorneys' fees and costs, the amendment allows for injunctive relief and permits an employee to recover compensatory damages if the employee demonstrates that the employer acted with "malice or reckless indifference," and punitive damages as appropriate. For violations on the salary history ban or unrestricted disclosure of compensation information, the amendment allows employees to recover any damages incurred, special damages not to exceed $10,000, injunctive relief, and costs and reasonable attorneys' fees. If special damages are available, an employee may recover compensatory damages only to the extent such damages exceed the amount of special damages.

Artificial Intelligence Video Interview Act

Effective six months after signature by governor

The Act requires employers to obtain consent from applicants before using "artificial intelligence" to

evaluate an applicant's video interview and fitness for the position. The consent must (1) notify each applicant before the interview that artificial intelligence may be used to analyze the applicants' video interview and fitness for the position; and (2) explain how the artificial intelligence works and the general types of characteristics it uses to evaluate applicants.

The Act also prohibits employers from sharing video interviews, except with persons whose expertise is necessary for evaluating an applicant's fitness for the position.

The Act requires employers to delete the videos within 30 days of an employee's request.

Minimum Wage Law

Effective January 1, 2020

The minimum wage will increase from $8.25 per hour to $9.25 on January 1, 2020, and then to $10 per hour on July 1, 2020. It will then increase $1 per year until it reaches $15 per hour in 2025 ($13 on 1/1/21, $14 on 1/1/22, and $15 on 1/1/25). The minimum wage for tipped employees will remain 60 percent of that amount (employers are entitled to take a tip credit up to 40 percent for the tips employees receive). If the lower minimum wage together with the tips actually received by the employee do not equal the state minimum wage, an employer must pay the difference to get the employee to the minimum wage.

Employers with less than 50 employees in 2020 will be entitled to a tax credit for a portion of the wage increases. The tax credit, however, will decline over time.

Employers with employees working in Chicago or Cook County already are required to comply with higher minimum wages. Currently, the minimum wage for employees working in Chicago or Cook

County is $13 or $12 per hour for non-tipped employees ($6.40 and $5.25 for tipped employees), respectively.

Cannabis Regulation and Tax Act

Effective January 1, 2020 (See Smoke Clears for Employers under New Illinois Marijuana Law)

Section 10-50 of the Act allows employers to: maintain zero tolerance policies in the workplace and while on call; prohibit use of cannabis in the workplace; and discipline or terminate employees who violate an employer's workplace drug policies.

The Act explicitly states that it does not provide a cause of action against an employer who subjects employees or applicants to reasonable drug and alcohol testing, or who disciplines or terminates an employee based on a good faith belief that the employee was impaired as a result of cannabis use or under the influence of cannabis while at work or on call.

The Illinois Right to Privacy in Workplace Act (Privacy Act) provides that "[e]xcept as otherwise specifically provided by law, including Section 10-50 of [the Cannabis Act as described above]" it is unlawful for an employer to refuse to hire or discharge an individual "because the individual uses lawful products off the premises of the employer during nonworking hours." The Cannabis Act defines "lawful products" as "products that are legal under state law." Pursuant to that definition, an employer terminating an employee for cannabis use during nonworking hours may be opening itself up to a claim under the Privacy Act.

Chicago Fair Workweek Ordinance

Effective July 1, 2020

- Advance notice of work schedule – Beginning July 1, 2020, an employer must post its covered

employees' work schedules at least 10 days in advance. As of July 1, 2022, the advance notice period extends to 14 days

- Right to decline – subject to certain exceptions, a covered employee may decline any previously unscheduled hours that an employer adds to that employee's schedule
- Alterations – subject to certain exceptions, if an employer alters a covered employee's schedule, in addition to the regular rate of pay, the employee is entitled to receive:
  (1) one hour of predictability pay for each shift in which the employer (a) adds hours of work, (b) changes the date or time of a work shift with no loss of hours, and (c) with more than 24 hours' notice, cancels or subtracts hours from a regular or on-call shift (2) at least 50% of the covered employee's regular rate of pay for any scheduled hours the employee does not work because the employer, with less than 24 hours' notice, subtracts hours from a regular or on-call shift or cancels a regular or on-call shift
- Right to rest – a covered employee may decline scheduled work hours that are less than 10 hours after the end of a previous day's shift. If a covered employee works such a shift, the employee is entitled to 1.25 times the employee's regular rate of pay
- Civil penalties and private right of action – employers shall be subject to a fine between $300 and $500 for each offense. Each covered employee whose rights are affected and each day a violation continues shall constitute separate and distinct offenses to which a separate fine shall apply. An employee may bring a civil action after exhausting the employee's administrative rights before the Department. A prevailing employee shall be entitled to an award of compensation for any damages sustained, including reasonable attorneys' fees
- Employers and covered industry – Employers include any person/entity who (a) employs (i)

globally 100 or more employees (250 for not-for-profits), (ii) 50 of whom are covered employees, and (b) is primarily engaged in a covered industry. Covered Industry means building services (including janitorial, building maintenance services and security services), healthcare, hotels, manufacturing, restaurants, retail and warehouse services. Restaurants are limited to businesses licensed to serve food in Chicago which have, globally, at least 30 locations and 250 employees in the aggregate and specifically excludes any businesses limited to three or fewer locations in Chicago that are owned by one employer and operating under a single franchise

- Covered employee – means employees who spend the majority of their work time while physically present in Chicago, perform a majority of their work in a covered industry and earn $50,000 or less as a salaried employee, or $26 per hour or less as an hourly employee

Hotel and Casino Employee Safety Act

Effective January 1, 2020

Employers are required to provide certain employees with panic buttons. Employers must have a written, anti-sexual harassment policy (in English and Spanish) that includes provisions encouraging employees to immediately report any alleged sexual assault or harassment by a guest and describing the procedures to be used in reporting such instances; instructing the employee to cease work and leave the area where danger is perceived until security or law enforcement personnel arrive; offering temporary work assignments to the employee during the offending guests stay; providing the employee with necessary time off to file a police report or criminal complaint and to testify; notifying employee of employee's rights under the Human Rights Act and Title VII; and informing the employee that retaliation for exercising rights under the Safety Act is prohibited.

The Victims' Economic and Security Act

Effective January 1, 2020

- Amends the Act to protect victims of gender violence (in addition to the already protected victims of domestic or sexual violence)
- Expands definition of electronic communications to include "online platforming (including, but not limited to, any public-facing website, web application, digital application, or social network)"
- Employers must provide employees who are victims of domestic, sexual or gender violence, or whose family members are victims, with up to 12 weeks of job-protected leave in a year or other workplace accommodations. The size of the employer determines the available amount of leave and the Act sets forth the authorized reasons for leave (i.e. medical treatment, victim services, counseling, safety planning, legal assistance).
