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Big Changes For Illinois Employers: Workplace Transparency Act

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When Gov. J.B. Pritzker signed into law the Workplace Transparency Act (WTA), it put into effect a substantial number of dramatic changes that Illinois employers should be aware of and plan for. The bulk of the WTA takes effect January 1, 2020, with new annual reporting obligations for employers beginning July 1, 2020.

The WTA applies to all Illinois employers. Among other things, it curtails workplace arbitration agreements, restricts the use of confidentiality provisions, creates new annual reporting obligations for employers and imposes new annual training requirements.

Changes to Workplace Arbitration Agreements

The WTA makes a number of changes to the permissible contours of workplace arbitration agreements. For example, under the WTA, arbitration agreements must now include a specific, explicit carve-out for harassment and discrimination claims. In addition, the WTA imposes a rebuttable presumption of unconscionability with regard to any arbitration agreement term that:

- imposes an “inconvenient” venue (meaning any location other the county or federal district where the employee/applicant resides or the agreement was consummated)

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- waives any rights or remedies afforded employees under state or federal statute (which likely encompasses an intended prohibition on waivers of class and collective actions)
- waives punitive damages
- shortens any applicable statute of limitations
- imposes any fees or costs "substantially" in excess of the fees and costs an employee would be required to pay in state or federal court

The WTA's apparent prohibition on class and collective actions runs squarely into the teeth of Supreme Court jurisprudence regarding arbitration under, for example, *Epic Systems and Lamps Plus*.

Certain Confidentiality and Non-Disparagement Clauses Prohibited

Significantly, with regard to agreements entered into after January 1, 2020, the WTA prohibits any confidentiality or non-disparagement clause which covers harassment or discrimination. This prohibition applies to employment contracts as well as separation and settlement agreements, but does not apply to terms contained in collective bargaining agreements.

Separation and settlement agreements may contain confidentiality or non-disparagement clauses only if all of the following criteria are met:

- the claims being released accrued prior to the agreement
- the parties mutually agree to the confidentiality or non-disparagement clause
- the confidentiality or non-disparagement clause mutually benefits both parties
- the employee is given 21 days to review the agreement prior to execution
- the employee is given seven days after execution to revoke the agreement

Annual IDHR Reporting Obligations

Beginning July 2020, Illinois employers are required to make an annual report to the Illinois Department of Human Rights (IDHR), listing:

- the total number of settlements entered into in the previous year relating to either sexual harassment or unlawful discrimination, including settlements relating to conduct by employees or executives outside the workplace
- the number of settlements entered into in the previous year, breaking down the settlements into the following categories of discrimination or harassment:
    - sex

    - race, color or national origin
    - religion
    - age
    - disability
    - military status
    - sexual orientation or gender identity
    - any other characteristic protected under the Illinois Human Rights Act
- the total number of adverse judgment or administrative rulings against the employer in the previous year, without apparent limitation, including whether equitable relief was ordered
- the number of adverse judgment or administrative rulings against the employer in the previous year, breaking down the adverse judgment or administrative rulings into the same categories as the required breakdown for settlements

In making the required disclosures to the IDHR, employers are not permitted to disclose the names of any victims of any prohibited acts.

The WTA imposes civil penalties of $500 to $5,000 for reporting failures. While the employer reports will not be subject to FOIA requests, the reports can form the basis of an IDHR investigation.

New Sexual Harassment Training Obligations

The WTA requires employers to provide annual sexual harassment training to all employees. To assist employers in complying with this new requirement, The IDHR will provide a model sexual harassment training program, which will be made available to employers for free.

Annually, employers must either give employees the model IDHR sexual harassment training, or an equivalent (or superior) training program. Employers who fail to provide the required annual sexual harassment training are subject to civil penalties of $500 to $5,000.

In addition, bars and restaurants are now required to have a written sexual harassment policy in both English and Spanish. The policy must be given to employees in their first week of employment.

Expansion of Illinois Human Rights Act Protections

The WTA also expands the coverage of the Illinois Human Rights Act (IHRA). Notably, in addition to employees, the IHRA now protects contractors and consultants. Additionally, the IHRA now prevents harassment or discrimination based on any “perceived” protected characteristics. Previously, the IHRA’s “perceived as” protection extended only to perceived disabilities.

Illinois Employer Takeaways

A number of the WTA’s other provisions will play out in the courtroom for the

foreseeable future, and certain portions of the WTA are likely to run into legal challenges, including the WTA's apparent prohibition on class and collective actions.

What is clear, though, is that the WTA enacts sweeping changes that will impact numerous aspects of the way Illinois employers conduct business. To ensure compliance with the WTA, employers will likely need to be both proactive and reactive across their operations, and would be well served by planning for the new requirements immediately.