Illinois General Assembly Passes A Tidal Wave Of New Laws Impacting Illinois Employers

David Moore and Peter Gillespie
06.05.2019

The Illinois General Assembly recently passed a number of bills that will, if signed by Governor Pritzker, create new laws and amend existing laws that will significantly impact all Illinois employers and employees.

As we discuss in greater detail below, among other changes, these laws will create limitations on contract terms and employee handbooks, amend the Illinois Human Rights Act, the Illinois Equal Pay Act and the Victims' Economic Security and Safety Act, and create additional, annual anti-harassment training requirements for employers.

On top of all that, the legalization of cannabis for recreational use will also create additional concerns for employers that maintain policies prohibiting drug use by employees.

The Workplace Transparency Act (Effective January 1, 2020)

The Workplace Transparency Act (IWTA) states that it is intended to better secure employees' rights to a workplace free of harassment and discrimination by prohibiting certain forms of confidentiality, non-disparagement, and arbitration clauses in employment contracts and policies, unless certain statutory requirements are met.

It will require employers in Illinois to review and likely revise existing employment contracts, non-compete, non-solicitation, and confidentiality agreements, separation/severance agreements, arbitration agreements, and employee handbooks and other workplace policies. Public and private

Attorneys

Peter J. Gillespie

David A. Moore

Practice Areas

Business Immigration

Counseling and Transactional

Employee Benefits and Executive Compensation

Labor Management Relations

Public Sector

employers with unionized workforces should note that these provisions will not apply to the terms of a collective bargaining agreement.

All Contracts & Policies: Under the IWTA, no contracts or other "documents" can include provisions that prohibit prospective, current, or former employees from reporting allegations of "unlawful conduct" to federal, State, or local officials for investigation. For purposes of the IWTA, unlawful conduct includes criminal conduct or "unlawful employment practices," (*i.e.*, conduct violating the anti-harassment and discrimination laws enforced by the Illinois Department of Human Rights (IDHR) and the Equal Employment Opportunity Commission (EEOC)). This rule applies to any form of employment contract, including, for example, formal employment agreements, executive compensation agreements, non-compete, non-solicit, and confidentiality agreements, and separation agreements. It also applies to all "documents," which likely means employee handbooks and other workplace policies.

Contracts also cannot include provisions that prevent an employee from testifying about criminal conduct or unlawful employment practices (*i.e.,* discrimination and harassment) in response to a court order, subpoena, or written request from an administrative agency or the legislature. There are no exceptions to these two general rules.

Unilateral Employment Contracts & Policies: Non-negotiated employment contracts and policies that must be signed as a condition of employment cannot prohibit a prospective, current, or former employee from making truthful statements or disclosures about alleged unlawful employment practices (*i.e.,* discrimination and harassment). This rule applies to any form of employment contract.

For example, regardless of intent or the manner in which the provision had been enforced, if a confidentiality or non-disparagement clause in a non-negotiated agreement could be read to have the effect of preventing an employee from making truthful statements or disclosures about discrimination or harassment, the entire clause could arguably be rendered unenforceable. In order to retain these types of provisions, employers may be required to ensure that agreements containing confidentiality clauses are negotiated with employees, include bargained-for consideration, and also include an express acknowledgment of the employee's right to: (1) report any good faith allegation of unlawful employment practices to any appropriate federal, State, or local government agency enforcing discrimination laws; (2) report any good faith allegation of criminal conduct to any appropriate federal, State, or local official; (3) participate in a proceeding with any appropriate federal, State, or local government agency enforcing discrimination laws; (4) make any truthful statements or disclosures required by law, regulation, or legal process; and (5) request or receive confidential legal advice.

Unilateral Arbitration Agreements: Non-negotiated agreements requiring arbitration of discrimination and harassment claims (as compared to wage and hour claims) as a condition of employment may not be enforceable. However, much like confidentiality agreements, discussed above, arbitration agreements that are negotiated with the employee, include bargained-for consideration, and expressly acknowledge the same five (5) employee rights discussed above may still be enforceable under the expected new law.

The Illinois Uniform Arbitration Act would also be amended to provide that arbitration agreements may be void based on non-compliance with the IWTA. Questions remain, however, as to whether federal law will preempt Illinois law regarding arbitration agreements in certain circumstances. Therefore, arbitration agreements must be carefully drafted to ensure enforceability.

Settlement & Termination Agreements: Settlement and "termination agreements" (*i.e.*, separation/severance agreements) may include promises of confidentiality relating to discrimination and harassment if the following statutory requirements are met: (1) confidentiality is the documented preference of the employee and is a mutual contractual obligation; (2) the employee is told in writing of the right to have an attorney or representative of his or her choice review the agreement before it is executed; (3) there is valid, bargained for consideration in exchange for the confidentiality (*e.g.,* a severance payment as compared to payment of final earned compensation); (4) the agreement does not waive any claims of discrimination or harassment that accrue after the date agreement is signed; and (5) the agreement gives the employee twenty-one (21) days to consider it before signing and seven (7) days to revoke his or her acceptance of the agreement (similar to the manner in waivers of federal age-related claims with individuals who are over age forty (40) need to be drafted). The IWTA would not in any way preclude the employee from releasing claims relating to discrimination and harassment (except prospective claims).

Enforcement: Employees shall have the right to recover attorney's fees and costs if successful in challenging the enforceability of a contract (but not an employment policy) that violates the IWTA.

Other Exceptions: Employers, however, would be allowed to require the following to maintain confidentiality of allegations of harassment and discrimination: (1) employees who receive complaints or investigate allegations or otherwise have access to confidential personnel information as a part of their assigned job duties, such as Human Resources professionals; (2) an employee or third party who is notified and requested to participate in an open and ongoing investigation (*i.e.,* witnesses); (3) an employee or any third party who receives attorney work product or attorney-client privileged communications or is otherwise subject to a recognized privilege; and (4) any third party engaged or hired by the employer to investigate complaints.

Illinois Equal Pay Act Amendments (Effective 60 Days After Signed)

The Illinois Equal Pay Act would also be amended in several significant respects.

Wage & Salary History of Job Applicants: Under the amended statute, employers and employment agencies will be prohibited from requesting or requiring job applicants to disclose prior wage, salary, benefit, or other compensation history as a condition of the application process or as a condition of employment, or otherwise screen job applicants by requiring that the applicants meet minimum or maximum compensation criteria.

Employers and employment agencies also may not seek that information from any current or prior employers of job applicants. Employers are not prohibited from communicating with job applicants about their expectations about wages, salaries, benefits or other compensation.

In the event a job applicant voluntarily discloses his or her prior compensation history, the employer is not allowed to consider that information when determining whether to make a job offer or the terms of that job offer. Employers may need to revise job applications, job posting boards, and recruiting and interviewing practices accordingly.

Wage Differentials: In addition, employers may be subject to heightened burdens to justify pay variations among employees. In particular, employers who pay employees who perform "substantially similar" jobs at different pay rates may be required to demonstrate that the reason for the pay differential is based on a job-related reason that is both consistent with a business necessity and that accounts for the pay difference, if the employer is alleged to have underpaid employees relative to their peers on the basis of sex or for being African-American.

Wage & Salary Information of Employees: Employers could not prohibit an employee from disclosing or discussing information about the employee's wages, salary, benefits, or other compensation. However, Human Resources professionals, supervisors, or other employees whose job duties require or allow access to such information may be directed to keep such information confidential. Many employers will need to update their existing handbook policies and confidentiality agreements accordingly.

Penalties: Employees may file lawsuits in State court to enforce the new requirements, seeking "special damages" up to $10,000 or actual damages if greater than $10,000, injunctive relief, and costs and reasonable attorney's fees. Employees who prove that they were underpaid because of their sex could also receive, not only the amount of the underpayment, but also uncapped compensatory damages if the

employer acted with malice or reckless indifference, punitive damages, and injunctive relief. The Illinois Department of Labor could also pursue enforcement actions, seeking additional penalties as high as $5,000 for each violation for each employee affected.

Illinois Human Rights Act Amendments (Effective January 1, 2020)

The Illinois Human Rights Act (IHRA) would also be amended in numerous respects to further secure employees' rights to a workplace free of harassment and discrimination.

Expanded Coverage: The IHRA would apply to any employer with one (1) or more employees within Illinois during twenty (20) or more calendar weeks in the current year or year preceding the alleged violation. The IHRA currently applies only to employers with fifteen (15) or more employees. This particular change would not be effective until July 1, 2020.

Expanded Protected Classes: The prohibition against discrimination and harassment will be expanded to cover all "actual" and "perceived" protected classes (*e.g.,* race, sex, age, religion, sexual orientation, etc.). In addition, the IHRA has been amended to define "harassment" more broadly than under federal law, as any "unwelcome conduct" that "has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment."

Clarified Work Environment: The prohibition of harassment and discrimination in the "work environment" will not be limited to the physical location in which the employee is assigned.

Employer Liability: The IHRA would also provide that an employer may be responsible for harassment by the employer's non-managerial and non-supervisory employees if the employer becomes aware of the conduct and fails to take appropriate action. Employers would also be liable for harassment of non-employees who are present in the workplace to perform services for the employer, such as contractors or consultants.

Annual Training: All employers will be required to conduct sexual harassment training for all employees at least once a year, using training materials to be developed by the IDHR or equivalent to them.

Restaurants, Bars, & Coffee Shops: Every restaurant, bar, or coffee shop must have a written sexual harassment policy given to all employees within the first calendar week of employment. The policy must meet numerous statutory requirements, including, among others, notice to the employee about how to file charges with the IDHR and EEOC. A supplemental sexual harassment training program will be designed for the restaurant and bar industry by the IDHR that must be provided, in addition to the training program

designed for all employers. The policy and training must be available in English and Spanish.

Disclosure Requirements: Beginning July 1, 2020, and by each July 1 thereafter, each employer that had an adverse judgment or ruling against it relating to discrimination or harassment must report certain information about the judgment(s)/ruling(s) to the IDHR. When investigating charges of discrimination, the IDHR may request that the employer disclose certain information about settlements involving allegations of discrimination and harassment (excluding the alleged victim's names).

New Penalties: Employers who do not meet the training and disclosure requirements will face penalties not to exceed $500 for the first offense, $1,000 for the second offense, and $3,000 for the third and subsequent offenses.

Union Employees: Where the victim and alleged perpetrator of sexual harassment are represented by the same union, the union must designate different representatives from the union to represent them in any related proceeding.

Procedural Changes: The charge filing and investigation procedures would also be amended in multiple respects, including by allowing either party to ask the IDHR to dismiss a pending charge if a State or federal lawsuit is filed based on the same issues raised in the charge and by clarifying the prior 2018 amendments that allow a charging-party to bypass the investigation procedure in order to go directly to State court.

The Victims' Economic Security and Safety Act (Effective January 1, 2020)

The Victims' Economic Security and Safety Act (VESSA) would be amended to expand the protections to victims of domestic and sexual violence, sexual assault, and stalking to victims of gender violence. Gender violence includes one or more acts of violence or aggression that is a crime under State law committed, at least in part, on the basis of a person's actual or perceived sex or gender, or any physical instruction or invasion of a section nature that is a crime (whether or not criminal charges are brought), or threats of any such actions.

Employers would be required to provide employees who are the victims of domestic, sexual and, now, gender violence or whose family members are victims, with up to twelve (12) weeks of job-protected leave in a year or other reasonable workplace accommodations. The amount of leave required is determined by the size of the employer. The leave may be taken to pursue medical treatment, counseling, victim's services, safety planning, legal assistance, etc.

Hotel and Casino Employee Safety Act (Effective July 1, 2020)

The Hotel and Casino Employee Safety Act is intended to protect employees of hotels and casinos in Illinois from sexual harassment and assault. It would require industry employers to provide employees with safety or notification devices to summon help if the employee believes that an ongoing crime, sexual harassment, sexual assault, or other emergency is occurring.

It would also require industry employers to adopt and comply with anti-harassment policies meeting certain statutory requirements, including, among others, complaint reporting procedures, temporary work assignments, and paid time off to file police reports and/or to testify. Employees may file lawsuits directly in State court to enforce the law and, if successful, may recovery attorneys' fees and economic damages of $350 per day, per violation.

Cannabis Regulation and Tax Act (Effective January 1, 2020)

Employer Obligations Under the Cannabis Act. In addition to the number of changes to employment laws, Illinois is now also poised to become the eleventh State to permit recreational cannabis. Effective January 1, 2020, the Cannabis Regulation and Tax Act (Cannabis Act), if signed, will allow adults in Illinois to possess and consume cannabis. This law will create significant issues for employers to consider. On the one hand, the Cannabis Act expressly permits employers to adopt and enforce "reasonable" and nondiscriminatory zero tolerance and drug-free workplace policies, including policies on drug testing, as well as prohibiting the possession or use of cannabis in the workplace or while on-call.

The law also allows employers to prohibit the use of cannabis in order to comply with state or federal funding requirements or contract obligations, or other state and federal legal requirements. On the other hand, employers are generally prohibited from taking an adverse action against an applicant or employee for marijuana use outside of the workplace. In particular, the Cannabis Act amends the Illinois Right to Privacy in the Workplace Act to provide that recreational and medical marijuana are legal products that must be treated like alcohol and tobacco. Thus, employers may not base an employment decision on whether an employee or applicant lawfully uses cannabis (recreationally or medically) off-premises and during nonworking or non-call hours.

Because employers are not permitted to consider lawful, non-work use of cannabis, employers considering discipline should assess whether an employee was "impaired" or "under the influence" of marijuana during working hours. In particular, the law provides that an employer can discipline an employee based on a "good faith belief" that an employee is under the influence of cannabis in circumstances that are similar to,

but arguably less stringent than what is considered a "reasonable suspicion" standard.

However, if an employer acts on this basis, the employer must also provide the employee with a chance to contest the determination, which could include drug testing. Under current testing protocols, unlike alcohol impairment testing, cannabis-related impairment is difficult to determine accurately, which may provide a basis for legal challenges. Aggrieved employees can recover actual damages, costs, attorneys' fees and fines. For these reasons, employers should make sure their practices and procedures are consistent with these changes to the law.

Labor Peace Agreements. Separately, businesses that are preparing applications for licenses to dispense cannabis should note that the State will take into account whether the business has entered into a "labor peace agreement" with a recognized labor organization. These agreements are intended to allow labor organizations access to and an opportunity to organize the workforce of an establishment that is licensed to dispense cannabis. These agreements should be negotiated with the assistance and input of experienced labor counsel.

Conclusion

Due to the sweeping nature of the pending legislation, Illinois employers will need to review and revise as necessary, their employee handbooks, employment agreements, separation agreements, non-disclosure agreements, and other standard employment-related agreements and policies so as to comply with these new changes in the law.