

Major Illinois Employment Law Changes: A Review of Illinois' New Workplace Transparency Act

Key Changes to the Illinois Human Rights Act Changes to the Victims' Economic Security and Safety Act Changes to the Illinois Equal Pay Act New Hotel and Casino Employee Safety Act

On August 9, 2019, Illinois Governor J.B. Pritzker signed into law Public Act 101-0221, which provides sweeping changes to the landscape of employment law in Illinois.

<http://www.ilga.gov/legislation/publicacts/101/101-0221.htm>. Among other changes, PA 101-0221 creates the Workplace Transparency Act, which limits the terms of employment agreements that restrict certain employee rights with regard to allegations of unlawful conduct. PA 101-0221 also significantly modifies the Illinois Human Rights Act (IHRA) and the Illinois Victims Economic Security and Safety Act (VESSA). The sections of PA 101-0221 cited below will go into effect on January 1, 2020. Finally, although not part of PA 101-0221, the Illinois Equal Pay Act has also been amended for the second time in 2019 with important changes effective on September 29, 2019. Below is a detailed review of all of these significant changes, with recommendations to employers on how to deal with them.

Workplace Transparency Act (WTA)

- » *Preservation of right to testify or otherwise participate in proceedings related to unlawful employment activities or criminal activities.*

The Workplace Transparency Act (WTA), with an effective date of January 1, 2020, prohibits employers from requiring employees, as a condition of employment or continued employment, to agree to refrain from making truthful statements or disclosures about alleged unlawful employment practices or criminal activity (Section 1-25(a)). The WTA also prohibits an employer from requiring an employee to waive, arbitrate or diminish an existing or future claim related to an unlawful employment practice. (Section 1-25(b)). The WTA does allow employers and employees to bargain for certain waivers if the agreement is in writing, demonstrates actual, knowing, and bargained-for consideration from both parties, and acknowledges the employee's right to: report any good faith allegations of unlawful employment practices or criminal behavior to a government agency; participate in a proceeding with any governmental agency enforcing discrimination laws; and make truthful statements or disclosures required by law, regulation, or legal process. (Section 1-25(c)).

- » *Confidentiality provisions in settlement or termination agreements.*

The WTA allows employers to enter into settlement or termination agreements with employees that contain confidentiality provisions, but with certain restrictions. First, unilateral confidentiality agreements are prohibited, and confidentiality must be the documented preference of, and mutually beneficial to, both parties. Second, similar to the requirements for a valid waiver of an age discrimination claim under the Older Workers Benefit Protection Act, an employer requiring confidentiality must notify the employee of his or her right to have an attorney review the agreement; the employee must be given 21 days to consider the agreement with a seven-day revocation period; and the waiver must be knowing and voluntary. Third, there must be valid, bargained-for consideration in exchange for the confidentiality. Fourth, the agreement

cannot require the employee to waive claims of unlawful employment practices that accrue after the date of execution of the settlement or termination agreement. (Section 1-30) (Note that the original proposed version of this law also prohibited unilateral non-disparagement clauses, but that prohibition was removed from the final version.)

Employers must therefore review their current and future employment agreements, whether entered into upon hire, during employment, or after employment has ended, to ensure that they comply with the restrictions on confidentiality and do not prohibit employees from disclosing certain conduct.

Illinois Human Rights Act

- » *Definition of “Employer”* - While not a part of PA 101-0221, in a separate bill, which passed both houses on June 27, 2019, and is awaiting Governor Pritzker's signature, House Bill 0252 would expand the definition of “employer” to include any entity that employs one or more person. Currently, the IHRA covers employers with 15 or more employees, except for sexual harassment, disability, or pregnancy claims, which only require one employee. This new definition would be effective July 1, 2020, if the governor signs the bill.
- » *Expanded Definition of “Unlawful Discrimination”* - The definition of “unlawful discrimination” has been expanded to include discrimination against a person because of his or her **“actual or perceived”** race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from the military. Previously, the concept of “perceived” discrimination only applied in the disability and sexual orientation contexts. Thus, arguably under this expanded definition, if an employer perceives an employee to be 40 years old or older and acts accordingly, it can still be liable for discrimination even if the employee is younger than 40. The same holds true for all other protected characteristics.
- » *New Definition of “Harassment”* – In addition to expanding the definition of “unlawful discrimination” to include protections for both actual and **perceived** classes of employees, the IHRA amendments also provide a specific definition of “harassment” that previously did not exist. “Harassment” is now defined as “unwelcome conduct” on the basis of a person’s “actual or perceived” race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from the military, that “has purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.” “Working environment” is not limited to a physical location an employee is assigned to perform his or her duties and can thus occur outside the office.
- » *Harassment of Non-Employees* - The IHRA now prohibits harassment (including sexual harassment) by an employer against non-employees, including contractors, consultants, and anyone else “directly performing services for the employer pursuant to a contract with that employer.” (Note that the original proposed version of this legislation would have also included “vendors” and “subcontractors” but those categories were removed from the final bill.) Employers will be liable for such harassment of non-employees by its non-managerial and non-supervisory employees only if the employer has actual knowledge of the conduct and fails to take reasonable corrective measures. This is slightly more lenient than the standard for the liability of employers for harassment of employees by non-managerial and non-supervisory employees, which includes actual or constructive knowledge by the employer.

- » *Employer Disclosure Requirements:* Under the new law, beginning July 1, 2020, employers will be required to disclose on an annual basis (every July 1) to the Illinois Department of Human Rights (IDHR) any **adverse judgement or administrative ruling** against them in the preceding calendar year. The details of what must be disclosed include the total number of adverse judgments or administrative rulings (categorized by the type of discrimination) and whether equitable relief was ordered. Failure of an employer to report may eventually result in a “civil penalty” of between \$500 and \$5000, depending on the number of employees and the number of prior offenses.

Further, **if** the IDHR is investigating a charge of discrimination filed under the IHRA, the IDHR may request the employer also submit information on any **settlements** of any sexual harassment or unlawful discrimination claims entered into during the preceding five years. It does not matter whether the settlement was in any pending administrative or litigation matter, or whether it was simply pursuant to a pre-litigation agreement. The details of what must be disclosed include the total number of settlements by type of discrimination (without disclosing the identity of the victims). (Note that an earlier version of this legislation would have required an employer to report to the IDHR annually the details on all of its settlements of sexual harassment and discrimination claims. The final version of the law on settlement reporting is limited to disclosing the information only if there is a request during an investigation of an IDHR charge of discrimination. Nevertheless, employers must keep accurate records of all settlements in the event such a request is made.)

Importantly, the new law states that the IDHR shall **not** rely on the existence of any settlement agreement to support a finding of substantial evidence under the IHRA. There is no similar statement with regard to the IDHR relying on prior adverse judgments or administrative rulings in deciding whether there is substantial evidence of discrimination.

- » *Sexual Harassment Prevention Training* – In perhaps the most significant change to the IHRA, beginning January 1, 2020, **every** employer “with employees working in” Illinois must provide sexual harassment prevention training on an annual basis. (Sec. 2-109) Importantly, the new law is vague in its definition of exactly who must receive the training by stating “every employer with employees working in this State” must provide the training. Thus, it is not clear whether employers are required only to provide the training to employees who work in Illinois, or to all employees regardless of whether they work in Illinois as long as the employer has at least one employee “working in” Illinois. Additionally, the law is also unclear regarding the extent to which an employee must work in Illinois, such as if the employee only occasionally works in Illinois, or even works in Illinois for only a day.

The law directs the IDHR to establish a model training program that will be made available to employers and the public online at no cost. The model program will include, at a minimum: 1) an explanation of sexual harassment consistent with the IHRA; 2) examples of conduct that constitutes sexual harassment; 3) a summary of relevant federal and state statutes concerning sexual harassment, including remedies available to victims of sexual harassment; and 4) a summary of employers' responsibilities with regard to the prevention, investigation, and corrective measures regarding sexual harassment. An Employer will be able to either use the IDHR's model program, or establish its own training program that equals or exceeds minimum standards of the model program. If an employer violates the training requirements, the IDHR will issue a notice to show cause giving the employer 30 days to comply. If the employer does not comply within 30 days, the IDHR will petition the IHRC for entry of an order imposing a civil penalty against the employer (the same as for failing to disclose adverse judgments, i.e. between \$500 and \$5000, depending on the number of employees and the number of prior offenses).

Hopefully, the IDHR will establish regulations that help interpret who must receive the training (when an out-of-state employer employs individuals who work in Illinois).

- » *Sexual Harassment Prevention for Restaurants and Bars* – The amendments impose additional requirements for the prevention of sexual harassment on restaurants and bars. “Restaurant” includes coffee shops, cafeterias, and sandwich stands that give or offer for sale food to the public, guests, or employees, and kitchen or catering facilities in which food is prepared on the premises for serving elsewhere. Restaurants and bars will be required to provide a written sexual harassment policy to all employees within the first calendar week of the employee's employment. The policy must include: 1) a prohibition of sexual harassment; 2) the definition of sexual harassment under the IHRA and Title VII of the Civil Rights Act of 1964; 3) details on how an individual can report an allegation of sexual harassment internally, including the option for making a confidential report to a manager, owner, corporate headquarters, or human resources department; 4) an explanation of the internal complaint process available to employees; 5) how to contact and file a charge with the IDHR or EEOC; 6) a prohibition on retaliation for reporting sexual harassment; and 7) a requirement that all employees participate in sexual harassment training. The policy must be made available in English and Spanish.

In addition to the model sexual harassment prevention training program to be developed for general industry, the IDHR will be required to develop a supplemental model program for restaurants and bars. The supplemental program will include specific conduct, activities, or videos related to the restaurant and bar industry; an explanation of manager liability and responsibility under the law; and English and Spanish options. Training must be provided on an annual basis, and failure to do so carries the same penalties as for general industry.

Victims' Economic Security and Safety Act (VESSA)

PA 101-0221 also includes changes to VESSA, specifically by expanding the definition of who is protected. VESSA provides protections, including protected unpaid leave (the exact amount depending on the size of the employer) to victims of domestic violence, sexual assault, or stalking. The leave is to be used for seeking medical attention for or recovering from such conduct, obtaining services from a victims' services organization, obtaining psychological or other counseling, participating in safety planning or relocating, and seeking legal assistance and/or participating in any legal proceeding related to such conduct.

The new law now includes “**gender violence**,” which is defined as one or more acts of violence or aggression satisfying the elements of any criminal offense under Illinois laws that are committed at least in part on the basis of a person's actual or perceived sex or gender (regardless of whether the acts resulted in criminal charges, prosecution, or conviction). Gender violence also includes a physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of a criminal offense, as well as a threat of an act violence or aggression or physical intrusion or invasion causing a realistic apprehension that the originator of the threat will commit the act. (Note that the original proposed version of the amendments to VESSA was also going to include protection for victims of “sexual harassment”; however, this greatly expanded category was left out of the final law.)

Hotel and Casino Employee Safety Act

PA 101-0221 has created the Hotel and Casino Employee Safety Act, which requires hotels and casinos to equip employees who work alone in guest rooms, restrooms or casino floors, with a **safety or notification**

device that will summon help if the employee reasonably believes that an ongoing crime, sexual harassment, sexual assault, or other emergency is occurring in the employee's presence.

Each hotel and casino employer is also required to develop, maintain, and comply with a **written anti-sexual harassment policy** to protect employees against sexual assault and sexual harassment by guests. The written policy must 1) encourage an employee to immediately report to his or her employer any instance of alleged sexual assault or sexual harassment; 2) describe the procedures that the employee and employer must follow when a report is made; 3) instruct the employee to stop working or leave the immediate area when danger is perceived; 4) offer temporary work assignments to the complaining employee during the offending guest's stay at the hotel or casino away from that guest; 5) provide the employee with the necessary paid time off to file a police report and if required, testify in a legal proceeding against the offending guest; 6) inform the complaining employee of his or her rights under the IHRA and Title VII; and 7) inform the complaining employee that retaliation against them for using the safety or notification device, or otherwise exercising rights under this law, is illegal.

IL Equal Pay Act

For the second time in 2019, the Illinois Legislature has amended the Illinois Equal Pay Act (IEPA). <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0177>. The first change went into effect on January 1, 2019 and expanded the protections under the IEPA to include African Americans in the category of covered employees, in addition to gender. On July 31, 2019, Governor Pritzker signed into law Public Act 101-0177, which goes into effect on **September 29, 2019**.

- » *Compensation Inquiries* - The IEPA now prohibits employers and employment agencies from requesting or requiring applicants to disclose prior wage, salary, benefit or other compensation history as a condition of an application process or of employment. Also, an employer may not refuse to hire an applicant or take adverse action against an employee for refusing to comply with any wage or salary history inquiry. Importantly, however, an employer may still provide an applicant with information about wages and benefits, and may also ask an applicant for his or her expectations with respect to wages and benefits. Further, if an applicant volunteers the salary history information without prompting by the employer, the employer will not be found to have violated the IEPA as long as the employer does not rely on the information provided to make the hiring decision or setting the compensation package for the employee at the time of hiring or in the future.
- » *Discussion of Wages* - Further, employers are not allowed to prohibit employees from discussing their wages, salary, benefits or other compensation with anyone else. Employers are still able to prohibit human resources employees, supervisors, and other employees who have access to wage or salary information from disclosing that information without the written consent of the employee whose information is sought or requested.
- » *Expanded Definition of Comparators* - The IEPA has a new standard for comparator consideration that expands protection for employees. Previously, with a few exceptions, the law prohibited discrimination on the basis of sex or being African American by paying at a rate less than members of the opposite sex or non-African Americans, respectively, for the same or substantially similar work on jobs the performance of which requires "equal" skill, effort, and responsibility, performed under similar working conditions. Now, the IEPA will allow employees to look at jobs the performance of which requires "**substantially similar**" skill, effort, and responsibility, instead of "equal" skill, effort, and responsibility.

- » *Damages* - Damages under the IEPA may now include compensatory damages if the employer acted with malice or reckless indifference, as well as punitive damages and injunctive relief. Employees have the right to sue in state court with a five year statute of limitations, and may recover any actual damages incurred, special damages up to \$10,000, injunctive relief as may be appropriate, and costs and reasonable attorneys' fees as necessary to make the employee whole. (Prior damages included only lost wages and attorneys' fees and costs.)

Therefore, employers must **immediately** remove any wage or salary inquiries from their job applications and train employees who participate in interviewing or hiring decisions to not make any prohibited salary inquiries. Employers who utilize the services of employment agencies or “headhunters” should also make sure that those individuals are also complying with the new law. Finally, employers should also review existing policies and agreements that include confidentiality provisions to ensure that all references to confidentiality of salary information is removed.

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