

ILLINOIS EMPLOYEE AGREEMENTS: NEW YEAR, NEW REQUIREMENTS YOU SHOULD HAVE ON YOUR RADAR

Insights
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Do you have employees in Illinois subject to an arbitration agreement? What about severance or settlement agreements? Restrictive covenants? Before ringing in the New Year, be sure to review all employment-related agreements to determine if such agreements need to be modified to comply with the new Illinois Workplace Transparency Act (IWTA) amendments. The expanded law, set to take effect on January 1, will limit the types of waivers and restrictions that can be included in employment agreements for Illinois employees. Here's a rundown of what's in and what's out in Illinois next year.

A Quick Refresher

Illinois originally enacted the IWTA in 2020 in the wake of the #MeToo Movement. The current version sets several key prohibitions and requirements for what should be included in employment agreements. Notably, the IWTA makes it unlawful for employers to prohibit, prevent, or restrict employees from reporting certain allegations of unlawful conduct to officials.

The IWTA also:

- prohibits employers from restricting employees from testifying when required by court order, subpoena, or written request from an administrative agency or the Illinois Legislature; and
- restricts and limits the type of confidentiality provisions that can be contained in settlement or termination

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agreements. Specific conditions must be met to include such confidentiality provisions.

Key Changes

Public Act 104-320, signed by Governor Pritzker in August, significantly amends and expands the IWTA. It's important to note these amendments only apply to contracts entered, modified, or extended on or after Jan. 1. Here are five key things the beefed-up transparency law does:

1. Broadly expands the definition of "unlawful employment practice" under the act (which applies to employer prohibitions on employee reporting).
2. Makes any agreement unlawful and void if it unilaterally applies non-Illinois law to an Illinois employee's claim, requires a venue outside of Illinois to adjudicate an Illinois employee's claim, and purports to shorten the applicable statute of limitations for any claims.
3. Prohibits any "agreement, clause, covenant, or waiver" as a unilateral condition of employment (or continued employment) that requires the employee or applicant to waive, arbitrate, or diminish existing or future claims to which they would otherwise be entitled under any provision of state or federal law if it denies the employee or prospective employee a substantive or procedural right or remedy. These amendments are intended to prevent employers from using procedural mechanisms to disadvantage employees in pursuing alleged unlawful employment practices.
4. Requires mutual conditions and agreements to include acknowledgment of an employee's right to participate in proceedings with any appropriate federal, state, or local government agency enforcing discrimination laws.
5. Requires any severance or termination agreements with confidentiality provisions to include separate documented consideration to support the addition of such clauses. In other words, if the agreement contains a confidentiality provision, it must not only comply with the procedural requirements of the IWTA, but employers must now provide an additional consideration specific to the confidentiality provision to support inclusion in the agreement. Employers are also prohibited from unilaterally deeming the inclusion of a confidentiality

provision to be the employee's preference and adding waivers of concerted activity rights in such agreements.

What Are the Repercussions?

Employees who successfully claim violations of the IWTA can now recover compensatory damages, in addition to attorneys' fees and costs.

Are There Any Exclusions to the IWTA?

Yes, but they are limited. The IWTA specifically excludes any contracts that are entered into and subject to the Illinois Public Labor Relations Act or the National Labor Relations Act. The IWTA amendments also do not apply retroactively, and only impact contracts entered, modified, or extended on or after January 1.

What Can My Business Do?

Now is the time to review any employment agreements, including confidentiality, restrictive covenant, settlement, severance, or other agreements and consult legal counsel regarding compliance. Specific to arbitration, employers should evaluate all substantive or procedural restrictions within any arbitration agreement with an Illinois employee or prospective employee to assess IWTA compliance.

Conclusion

We will continue to monitor developments and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about your agreements or want to develop a proactive plan to protect your business, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Chicago](#) Office.