Illinois Enacts Sweeping Legislation In Response To #MeToo Movement

Insights
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Illinois recently enacted sweeping legislation in an effort to combat sexual harassment in the workplace. Illinois Senate Bill 75 created the Workplace Transparency Act, amended the Illinois Human Rights Act and the Victims' Economic Security and Safety Act, and introduced the Sexual Harassment Victim Representation Act and the Hotel and Casino Employee Safety Act. Additionally, Illinois House Bill 252 amended the Illinois Human Rights Act, further changing the legal landscape for Illinois employers. Both new measures will significantly impact how employers do business in Illinois. The implications are vast, ranging from what constitutes an "employer" in Illinois to the validity of certain employment agreements (and almost everything in between).

Amendments To The Illinois Human Rights Act

SB75 and HB252 amended the Illinois Human Rights Act (IHRA) in a number of ways. The IHRA is the state-level anti-discrimination, anti-harassment, and anti-retaliation statute for Illinois. Unlike its federal counterparts, which generally require at least 15 employees to subject an employer to the statutes' requirements, the IHRA now applies to any employer with one or more employees. Previously, the IHRA only applied to employers with 15 or more employees except in specific circumstances, so now far more employers are subject to the IHRA's requirements.

The expanded scope of what constitutes an "employer" in Illinois is also significant due to the IHRA's new training requirements. Beginning January 1, 2020, all Illinois employers will be required to provide sexual harassment training to all employees on an annual basis. The Illinois Department of Human Rights (IDHR) will create a model training program that can be used in addition to an employer's existing training program, but an employer's training program must, at minimum, address the following:

- An IHRA-consistent explanation of sexual harassment;
- Examples of conduct that constitutes unlawful sexual harassment;
- A summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- A summary of responsibilities of employers in prevention, investigation, and corrective measures of sexual harassment.

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For employers in the bar and restaurant industries, employees need to receive additional, industry-specific training and policies that are available in both English and Spanish. These include, but are not limited to, an explicit prohibition on sexual harassment, an explanation of manager liability and responsibility, and contact information for the IDHR and Equal Employment Opportunity Commission (EEOC).

SB75 and HB252 amended the IHRA in other respects as well. The IHRA now prohibits discrimination based on whether an individual (even a nonemployee) is perceived to belong to a protected category, expands the definition of what constitutes a "working environment," requires that employer disclose to the IDHR settlements and adverse administrative and court judgments, and implements other procedural requirements concerning claims pursuant to the IHRA. This is not an exhaustive list, so employers should consult with legal counsel to determine their compliance with the IHRA's new requirements.

Indeed, compliance with the new amendments will be necessary, lest an employer be subject to the new penalty provisions. The failure to train employees could result in a $500 penalty to businesses with fewer than four employees, or a $1,000 penalty for larger employers. Failing to provide the necessary disclosures to the IDHR can result in financial penalties of $500 to $5,000. Obviously, not complying with the IHRA's new requirements can prove costly.

Creation Of The Workplace Transparency Act

Due to the enactment of the Workplace Transparency Act (WTA), employers can no longer include nondisclosure or non-disparagement clauses for claims of harassment or discrimination in employment agreements beginning January 1, 2020. The WTA applies not only to employees but also to includes nonemployees, such as contractors and consultants. Specifically, the WTA prohibits agreements that prohibit, prevent, or otherwise restrict an employee, applicant, or former employee from reporting any allegations of harassment and discrimination.

Under the WTA, an employer cannot unilaterally condition employment or continued employment on an agreement that prevents an individual from making truthful statements or disclosures regarding alleged discrimination or harassment, subject to limited exceptions. Moreover, nondisclosure and confidentiality provisions in settlement or separation agreements are not enforceable unless they meet the following requirements:

- Confidentiality is the preference of the employee and is mutual;
- The employer notifies the employee in writing of their right to have an attorney review the agreement before execution;
- There is valid and bargained-for consideration in exchange for confidentiality;
- There is no waiver of any claims of discrimination or harassment that accrue after the date of execution;
- The employee is given 21 days to consider the agreement before executing; and

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- Unless knowingly and voluntarily waived by the employee, the employee is given seven days in which to revoke the agreement.

The WTA gives special treatment to arbitration agreements as well. To the extent such agreements apply to discrimination or harassment claims, employees must have the option to choose either an arbitral or judicial forum. Of particular note, however, the WTA may conflict with the Federal Arbitration Act (FAA) in this regard. Recently, a federal court in New York concluded that a state law similar to the WTA was preempted by the FAA and did not enforce the state-level requirements. Therefore, after these requirements under the WTA take effect, it is possible that we will see a similar challenge to the WTA in the future.

Miscellaneous Statutes And Additional Provisions
SB75 and HB252 also add a multitude of other protections for employees. For example, beginning January 1, 2020, the Victims' Economic Security and Safety Act (VESSA) will permit leave in connection with gender violence and sexual harassment in addition to domestic violence or sexual violence. Furthermore, hotels and casinos will be required under the Hotel and Casino Employee Safety Act (HCESA) to take detailed steps to protect their employees from, among other things, sexual assault and harassment by guests.

Of course, the new statutes and amendments carry their own forms of penalties for noncompliant employers. These are by no means the only changes imposed by SB75 and HB252, but they are some of the most significant.

What Should Employers Be Doing?
All employers with employees working in Illinois (including nonemployee contractors or consultants) should take immediate steps to review their internal policies, procedures, and agreements with counsel to ensure legal compliance.

We will continue to monitor any further developments and provide updates on this and other labor and employment issues affecting Illinois employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Chicago office.

This Legal Alert provides an overview of new state laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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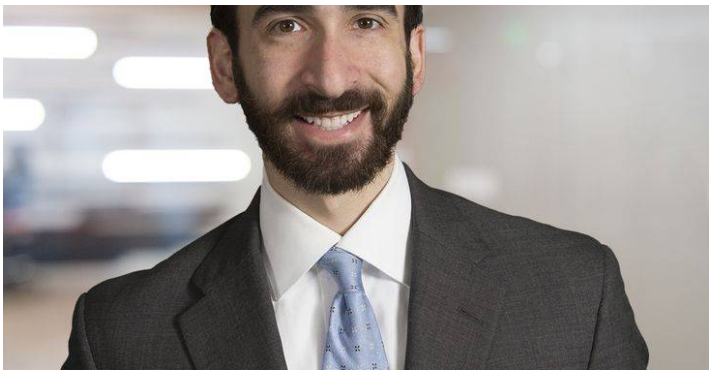

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