WINSTON & STRAWN LLP

CLIENT ALERT

Illinois Enacts Comprehensive Anti-Sexual Harassment Legislation

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Illinois Governor J.B. Pritzker recently signed into law S.B. 75, a comprehensive, #MeToo-inspired piece of legislation aimed at addressing unlawful harassment and discrimination in the workplace. S.B. 75 enacts three new laws (the Workplace Transparency Act, the Hotel and Casino Employee Safety Act, and the Sexual Harassment Representation Act) and amends three existing laws (the Uniform Arbitration Act, the Illinois Human Rights Act, and the Victims' Economic Security and Safety Act).

Taken together, these new laws and amendments implement a variety of measures designed to combat harassment and discrimination in the workplace, including by: (i) restricting the use of confidentiality and non-disclosure provisions in certain types of employee agreements; (ii) limiting mandatory arbitration of discrimination, harassment, and/or retaliation claims; (iii) requiring annual sexual harassment prevention training; (iv) instituting compulsory unpaid leave for victims of gender violence; and (v) introducing mandatory annual disclosures of certain information to the Illinois Department of Human Rights.

The Workplace Transparency Act and Sexual Harassment Representation Act, along with the amendments to the Uniform Arbitration Act, the Illinois Human Rights Act, and the Victims' Economic Security and Safety Act, go into effect January 1, 2020. The Hotel and Casino Employee Safety Act goes into effect July 1, 2020.

The Workplace Transparency Act

The Workplace Transparency Act (WTA) applies to contracts entered into, modified, or extended on or after January 1, 2020.

Limitations on Non-Disclosure Agreements

The WTA prohibits any agreement or other document from restricting an employee from reporting any allegations of unlawful conduct to federal, state, or local officials for investigation. The WTA also prohibits separation and settlement agreements from containing confidentiality/non-disclosure provisions related to alleged unlawful employment practices under any law enforced by the Illinois Department of Human Rights (IDHR) or the EEOC (*i.e.*, Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, the Genetic Information Nondiscrimination Act, and the Illinois Human Rights Act), unless:

- Confidentiality is the documented preference of the employee and it is mutually beneficial to both parties;
- The employer notifies the employee in writing of the employee's right to have an attorney or representative of his or her choice review the settlement or separation agreement before it is executed;
- There is consideration exchanged for confidentiality;
- The agreement does not waive any future claims of unlawful employment practices after the date the agreement is signed;
- The agreement is provided in writing to the employee and the employee is given 21 days to consider the agreement, during which period the employee can waive in whole or in part by signing before the 21-day period expires; and
- Unless waived by the employee, the employee is given seven days after signing the agreement to revoke the agreement.

Limitations on Arbitration Agreements

The WTA also purports to ban any *unilateral* condition of employment that requires an employee to waive or arbitrate any existing or future claim related to an unlawful employment practice under any law enforced by the IDHR or the EEOC, to the extent it denies the employee a substantive or procedural right or remedy related to alleged unlawful employment practices.

However, the WTA does permit employers and employees to enter into *mutual* arbitration agreements, so long as the agreement is in writing, demonstrates bargained for consideration from both parties, and acknowledges the employee's right to:

- Report any good faith allegation of unlawful employment practices or criminal conduct to federal, state, and local authorities;
- Participate in a proceeding with any federal, state, or local authorities enforcing discrimination laws;
- Make truthful statements or disclosures required by law, regulation, or legal process; and
- Request or receive confidential legal advice.

In addition, the WTA amends the Illinois Uniform Arbitration Act by expressly providing that an employer's failure to comply with the terms of the WTA may invalidate an otherwise enforceable arbitration agreement.

Like other states' legislation invalidating arbitration agreements, the WTA's limitations on arbitration are likely preempted by the Federal Arbitration Act (FAA) for any arbitration agreement governed by the FAA. We continue to recommend that employers ensure that their arbitration agreements are expressly governed by the FAA if they plan to rely on that statute to avoid state laws purporting to limit arbitration agreements.

Damages

The WTA permits employees to recover reasonable attorney's fees and costs incurred in challenging a contract rendered unenforceable by the WTA.

The Sexual Harassment Victim Representation Act

The Sexual Harassment Victim Representation Act prohibits a union representative from representing both a union member who accused another member of sexual harassment and the accused member. Instead, the union must designate separate union representatives to represent the victim member and the accused member in the disciplinary proceeding.

The Hotel and Casino Employee Safety Act

The Hotel and Casino Safety Act requires all hotels and casinos to provide its employees assigned to work alone in a guest room, restroom, or casino floor, with a notification device that the employee may use to 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. The notification device must be provided at no cost to the employee. The Act also requires hotel and casino employers to develop an anti-sexual harassment policy that protects employees against sexual assault and sexual harassment by guests.

Amendments to the Illinois Human Rights Act

S.B. 75 amends the Illinois Human Rights Act (IHRA) by expanding the definitions of certain key terms in the Act to provide additional protections to employees. First, the IHRA expands the definitions of "discrimination" and "harassment" to prohibit discrimination and harassment based on any *perceived* protected characteristic. Previously, the IHRA limited perceived discrimination and harassment claims to individuals who were perceived as having a disability. Second, S.B. 75 amends the IHRA by clarifying that an employee's "working environment" is not limited to the physical location in which an employee is assigned to perform his or her duties. Third, S.B. 75 amends the IHRA by providing protections to "nonemployees," which includes contractors and consultants. As to the harassment of nonemployees by the employer's nonmanagerial and nonsupervisory employees, an employer will only become liable if the employer becomes aware of the conduct and fails to take reasonable corrective measures to stop the harassment.

S.B. 75 further amends the IHRA by requiring employers who have had an adverse judgment or administrative ruling against them in the preceding calendar year to disclose to the IDHR the number of adverse judgments or administrative rulings it received during the preceding year, categorized by the protected characteristic(s) at issue, and whether any equitable relief was ordered against the employer in any adverse judgment or administrative proceeding. This annual disclosure requirement begins on July 1, 2020. Failure to disclose this data may subject employers to civil penalties up to $5,000 per offense. S.B. 75 clarifies that no individual employer data will be available to the public and that the confidential employer data is exempt from the Freedom of Information Act. The law also provides that the Department of Human Rights may request information regarding the number of settlements entered by the employer in the last five years that relate to allegations of discrimination and harassment.

S.B. 75 also amends the IHRA by requiring employers to provide sexual harassment prevention training to all of their employees at least once a year. In conjunction with this requirement, S.B. 75 directs the IDHR to create a model sexual harassment prevention training that will be available to employers at no cost. The model program will include: (i) an explanation of sexual harassment; (ii) examples of conduct that constitutes unlawful sexual harassment; (iii) a summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and (iv) a summary of responsibilities of employers in the prevention, investigation, and corrective measures of sexual harassment. Employers are free to develop their own sexual harassment prevention training program that equals or exceeds the model program. Like the annual disclosures, failure to comply with the mandatory sexual harassment training requirements may subject employers to civil penalties up to $5,000 per offense.

Amendments to the Victims' Economic Security and Safety Act

S.B. 75 amends the Victims' Economic Security and Safety Act (VESSA) by requiring employers to allow an employee who is the victim of "gender violence" and/or has a family member who is the victim of gender violence to take between four and 12 weeks of unpaid, job-protected leave from work during any 12-month period, depending upon the size of the employer. Previously, VESSA only applied to victims who experienced "domestic or sexual violence." "Gender violence" includes acts or realistic threats of violence or aggression that are committed, at least in part, on the basis of a person's actual or perceived sex or gender and physical intrusions or physical invasions of a sexual nature. "Gender violence" need not to result in criminal charges, prosecution, or conviction to be covered by VESSA.

Moving Forward

Illinois employers of all sizes should begin developing employment, separation, and arbitration agreements that comply with the WTA's various provisions and develop a process for collecting data on any discrimination-based adverse judgments or administrative rulings. Illinois employers should also ensure that their sexual harassment prevention training programs meet the minimum requirements of the newly-amended IHRA and that leave policies are updated to reflect the amendments to VESSA.

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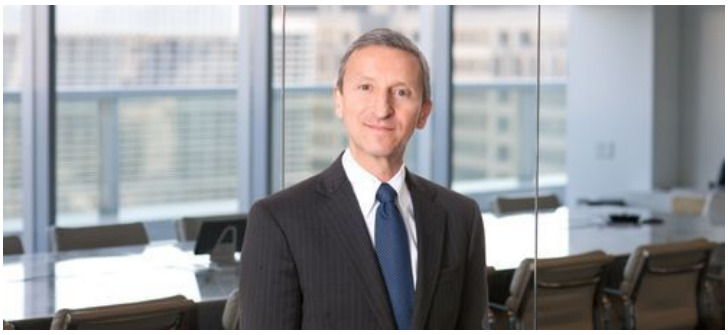

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