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PREPARATION AND TRAINING CRITICAL AS ILLINOIS EMPLOYERS FACE NEW LEGAL LANDSCAPE

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Illinois employers must begin preparing now for the host of new legal requirements impacting the workplace beginning in 2020. With legal changes on topics ranging from hiring practices and pay equity to drug testing and severance agreements, employers should not only review and revise their policies, practices and expectations, but also ensure that their Human Resources and management personnel receive training to ensure compliance.

Amendments to the Illinois Human Rights Act ("IHRA")

Under new amendments to the IHRA, more employers are now subject to the IHRA, more protections are now provided to employees (and others), sexual harassment training is now a requirement, and employers now have reporting obligations to the Illinois Department of Human Rights ("IDHR") regarding adverse judgments, administrative rulings, and settlements. Specifically:

- Beginning July 1, 2020, rather than applying only to employers with 15 or more employees, the IHRA applies to all employers with one or more employees in Illinois during 20 or more calendar weeks. Newly covered employers should ensure that HR personnel and managers are aware of the areas in which the IHRA is broader than federal anti-discrimination laws, including but not limited to: (1) pregnancy accommodation requirements; (2) prohibition of discrimination based on sexual orientation, gender identity, military status, marital status, and order-of-protection status; and (3) the potential for individual liability of harassers.
- Beginning January 1, 2020, the scope of protection provided by the IHRA will expand. HR personnel and managers must be aware of the new protections so that they appropriately recognize and respond to concerns. In addition, non-discrimination/ harassment policies should be revised to incorporate the new protections. Under the expanded provisions:
- Discrimination is prohibited not only based on an individual's actual protected class, but also based on an individual's perceived protected class (race, religion, age, etc.).
- The concept of the "working environment" (in which harassment is prohibited) is not limited to a physical location (e.g., the building in which an employee performs his or her duties), but

instead can include off-site locations.

- Non-employees are protected against harassment. Contractors, consultants, and anyone else directly performing services for an employer pursuant to a contract with the employer now have protection under the IHRA.

- Beginning January 1, 2020, every Illinois employer must provide annual anti-sexual harassment training for all employees. Employers may develop their own training or use a model training program being developed by the Illinois Department of Human Rights (date of availability unknown). The training must, at a minimum, include: (1) an explanation of sexual harassment; (2) examples of conduct that constitutes unlawful sexual harassment; (3) a summary of relevant state and federal laws prohibiting sexual harassment and the remedies for violations of these laws; and (4) a summary of the employer's responsibility to prevent, investigate, and correct sexual harassment. Restaurants and bars have supplemental sexual harassment training and policy requirements. The IDHR is expected to produce a model training program, and may provide further guidance regarding the timing of mandatory trainings.

- By July 1, 2020 (and every July 1 thereafter), employers must disclose to the IDHR statistics, covering the previous calendar year, regarding: (1) the total number of adverse judgments or administrative rulings against the employer under federal and state law, broken down by protected characteristics; and (2) the equitable relief, if any, ordered against the employer in any such judgments or rulings. Employers may not disclose the name of any victim of an act of sexual harassment or discrimination in any disclosures provided to the IDHR. In addition, if requested by the IDHR as part of an investigation of a Charge of Discrimination, the employer must provide the total number of settlements it entered into during the prior five years relating to sexual harassment or unlawful discrimination either in the workplace or that involved the conduct of an employee or corporate executive regardless of location, broken down by protected characteristics. Employers should establish a tracking mechanism for this information to ensure accurate reporting.

Amendments to the Illinois Victims' Economic Security and Safety Act ("VESSA")

Effective January 1, 2020, victims of "gender violence" receive the protections of VESSA (such as unpaid leave in certain circumstances).

Amendments to the Illinois Equal Pay Act ("EPA")

Effective September 29, 2019, amendments to the EPA impact both hiring practices and employment policies/practices.

First, with respect to salary history of applicants, the EPA now prohibits an employer or employment agency from:

1. Screening job applicants based on their current or prior wages or salary histories by requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria;

2. Requesting or requiring that an employment applicant (or his/her current or former employer) provide a wage or salary history as a condition of being considered for a position, interviewed, or as a condition of an offer of employment;

3. Requesting or requiring that an applicant disclose wage or salary history as a condition of employment;

4. Refuse to hire an applicant for refusing to comply with a salary history inquiry.

Despite these restrictions, employers may still ask about an applicant's compensation expectations for a particular position during the interview and screening process. Employers should remove questions about salary history from employment applications, and ensure all those who conduct screenings or interviews understand these obligations.

Second, employers may not prohibit an employee (by policy or by agreement [such as confidentiality or restrictive covenant agreements]) from discussing his or her wages, salary or other benefits and compensation with others. Employees with access to other employees' confidential information concerning wages or salary (such as HR personnel) still may be prohibited from disclosing that information without written consent.

Finally, the scope of coverage of the equal pay provisions of the EPA has broadened. Rather than requiring equal pay (for women and men, and for African-American employees and non-African-American employees) only for jobs that require "equal" skill, effort, and responsibility, equal pay is now required for jobs that require "substantially similar" skills, effort, and responsibility.

New: The Workplace Transparency Act (Relating to Agreements)

The new Workplace Transparency Act ("WTA") substantially restricts provisions in employment contracts, separation agreements, settlement agreements, and arbitration agreements that relate to disclosure of information concerning discrimination and harassment. These changes apply to contracts and agreements entered into, modified, or extended on or after January 1, 2020.

First, the WTA imposes restrictions on any agreement or contract that is a "unilateral condition of employment." An agreement or contract is a "unilateral condition of employment" if an employer requires an employee or applicant to accept the agreement or contract as a non-negotiable material term of continued employment (i.e., a "standard" employment agreement over which the employee or applicant cannot bargain). Such agreements cannot include confidentiality or non-disparagement provisions that would prohibit any employee from making truthful statements or disclosures about alleged unlawful employment practices, including claims of unlawful discrimination, harassment, or retaliation.

However, when a contract or agreement is bargained for between employee and employer (such as when an applicant and the employer mutually negotiate the terms of an employment agreement), the agreement may contain confidentiality and non-disparagement provisions, as long as the agreement expressly recognizes the employee's right to:

1. report any good faith allegation of unlawful employment practices to any government agency enforcing discrimination laws;

2. report any good faith allegation of criminal conduct to any government office or official;

3. participate in a proceeding with any appropriate 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.

With respect to a termination agreement, severance agreement, or settlement agreement, the rules are slightly different. An employee and employer may include confidentiality and non-disparagement provisions in such agreements as long as the following conditions are satisfied:

1. Confidentiality is the "documented preference" of the employee and is mutually beneficial to both parties;

2. The employee is notified of his or her right to have an attorney review the agreement;

3. The employee is given 21 days to consider the agreement, and 7 days to revoke the agreement after signing;

4. The waiver of the employee's right to discuss the agreement and/or claims of unlawful conduct is knowing and voluntary;

5. The confidentiality provision is supported by bargained-for consideration; and

6. The agreement does not require the employee to waive claims of unlawful employment practices that accrue after the date of execution of the settlement or termination agreement.

The WTA also restricts the use of mandatory arbitration provisions in employment agreements. Specifically, any agreement that is a "unilateral condition of employment" and requires the employee to arbitrate "or otherwise diminish" any claim related to an unlawful employment practice is prohibited to the extent it denies an employee any right or remedy related to alleged unlawful employment practices. If an employer wants to retain an arbitration provision with respect to other types of claims, (again, in the context of a "unilateral condition of employment"), the agreement should contain a "carve out" for discrimination, harassment, and retaliation claims.

New: Cannabis Regulation and Tax Act (the "Cannabis Act")

The Cannabis Regulation and Tax Act makes the recreational sale, possession, and use of marijuana and cannabis legal in Illinois for adults over the age of 21 as of January 1, 2020. Previously, only medicinal use marijuana was permissible in Illinois. The Cannabis Act has implications for both hiring practices and drug testing of employees.

Importantly, employers are still permitted to enforce "drug free workplace" and "zero tolerance" policies that prohibit the use of marijuana while in the workplace or while on call, or being at work while under the influence of or impaired by marijuana. However, in order to take disciplinary action based on a belief that the employee is under the influence or impaired, the employer must have, "a good faith belief that an employee manifests specific, articulable symptoms [of impairment] while working that decrease or lessen the employee's performance," including "symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior." 410 ILCS 705/10-50(d) (emphasis added).

Moreover, employees who use marijuana recreationally are protected by the Illinois Right to Privacy in the Workplace Act, which prohibits employers from taking adverse employment actions against any employee for using "lawful products" outside of the workplace and during nonworking hours. In other words, as some have interpreted the Cannabis Act, using marijuana outside of work would be the legal equivalent of drinking a glass of wine after work hours. Additionally, individuals using medical marijuana pursuant to a prescription have separate protections in Illinois pursuant to the Compassionate Use of Medical Cannabis Pilot Program Act, although just as with those using marijuana recreationally, cannabis patients may not use medical marijuana while at work or on call.

Accordingly, employers may need to reconsider their drug testing policies, both during the hiring process and in regards to drug testing during employment (both "for cause" and "random"). Under the Cannabis Act, unless an employer is otherwise subject to federal rules and regulations regarding the use of marijuana, an applicant likely cannot be rejected for employment based on a marijuana-positive drug test alone, because such use would have occurred outside of the workplace. Nor may an employee be terminated for a marijuana-positive drug test alone; rather, the employer must be able to point to specific symptoms of impairment at work, and the employee must first be given "a reasonable opportunity to contest" the basis for the employer's decision.

New: Chicago Fair Workweek Ordinance

Effective July 1, 2020, certain Illinois employers who are present in Chicago must comply with an additional requirement, under the new Chicago Fair Workweek Ordinance, which requires so-called "predictive scheduling." Subject to certain exclusions, this ordinance applies to building services, healthcare, hotel, manufacturing, restaurant, retail and warehouse employers who have 100 or more full- or part-time employees globally (250 for non-profits), at least 50 of whom are covered

employees. Covered employees are those who work primarily in Chicago and who are: (a) hourly and earn less than $26/hour; or (b) salaried and earn less than $50,000/year.

The ordinance requires certain pre-hire notices to applicants, including a written estimate of an applicant's projected days and hours of work for the first 90 days of employment, the estimated average number of hours per week, and whether the work involves on-call shifts.

Additionally, employers must provide advance notice of work schedules: at least 10 days' notice beginning July 1, 2020 through June 30, 2022; then, at least 14 days' notice beginning July 1, 2022. The advance notice must be posted in a conspicuous area, or shared through the normal means of communication. The notice must also include the "on-call" status of any employees, when applicable.

If a schedule is changed with less than the required notice, employees are entitled to additional "predictability" pay. However, shift changes are permissible without payment of additional wages in certain circumstances, including if they are: (a) mutually agreed upon between employees (i.e., if two employees agree to switch shifts); (b) mutually agreed upon between the employer and the employee, in writing; (c) requested by employee in writing; or (d) are due to emergencies or business operation disruptions beyond the control of the employer (such as an event which causes civil authorities to recommend closure of the business).

Employees also have the right to decline shifts (i.e., additional, previously unscheduled hours of work) that do not provide 10 hours of rest between shifts, and have the right to request (but not necessarily to receive) a flexible schedule. Finally, employers must offer additional hours to existing employees—including part-time, temporary, and seasonal workers—before bringing on additional workers.

The above requirements may be expressly waived by a collective bargaining agreement.

New: Board Diversity for Illinois-Based Public Corporations

No later than January 1, 2021, each Illinois-headquartered publicly-traded corporation (a corporation with shares listed on a United States stock exchange) must file an annual report with the Illinois Secretary of State regarding the demographic diversity of its board of directors. Each corporation covered by the Act must now disclose:

1. the racial, ethnic and gender identification of each of its directors;

2. how the corporation considers diversity in identifying and selecting directors and executive officers; and

3. the corporation's policies and practices for promoting diversity, equity and inclusion among the board of directors and executive officers.

Conclusion

The effective date for the EPA amendments is just a few weeks away, and the remaining new provisions take effect in January and July 2020. Employers should take steps now to update their policies and practices and to educate their HR and management personnel.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on any state-specific laws or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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