

New Employment Laws in Illinois Start Going Into Effect on September 29–What You Need to Know Now if You Employ Anyone in Illinois

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The State of Illinois has enacted new laws and amendments that create new requirements and obligations for Illinois employers. Some of them go into effect at the end of this month. All of these will likely require changes to existing policies and procedures at all stages of the employment life cycle, as well as training, existing employment agreements, and separation agreements. Employers should consider retaining legal counsel to assist with ensuring compliance now.

Salary History Ban and Other Amendments to Equal Pay Act (effective September 29, 2019)

Illinois enacted amendments to the Equal Pay Act, which soon take effect on September 29, 2019. The following components are key requirements under the amended Equal Pay Act:

- **Compensation inquiries are prohibited.** Employers and employment agencies may not request or require that employees or applicants disclose prior wage, salary, benefit or other compensation history as a condition of the application process or employment. Employers and employment agencies may simply ask applicants and employees about their expectations regarding compensation and benefits.
- **Employees may discuss compensation at work.** Employers may not prohibit employees from discussing their compensation with other employees. Employers may not require an employee to sign an agreement that prohibits the employee from disclosing the employee's compensation. This law does not prevent employers from prohibiting human resources personnel or others 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.
- **Comparators defined as “substantially similar.”** The Equal Pay Act will allow employees to compare their jobs to those requiring “substantially similar” skill, effort, and responsibility, instead of “equal” skill, effort, and responsibility found in the previous version of the law. This provides additional protection and a lessened standard to employees pursuing legal action based upon unlawful pay discrimination.
- **Heightened burden for employers to establish non-discriminatory pay practices.** The Equal Pay Act further limits an employer's ability to justify pay disparities as non-discriminatory. An employer must show that the non-discriminatory factor (1) is not based or derived from a differential in compensation based on employees' sex or other protected characteristics; (2) is

job-related with respect to the position and consistent with business necessity; and (3) accounts for the differential.

- **Increased availability of damages for employees.** Employee damages under the Equal Pay Act now include actual damages incurred, special damages up to \$10,000, potential injunctive relief, potential punitive and compensatory damages, and costs and reasonable attorneys' fees. The Equal Pay Act previously included only lost wages, attorneys' fees, and costs.

The Workplace Transparency Act (WTA) (effective January 1, 2020)

The Workplace Transparency Act (WTA) takes effect on January 1, 2020.

The WTA prohibits certain provisions in employment agreements. These include the prohibition of the use of nondisclosure or non-disparagement agreements that prevent employees from making truthful statements or disclosures about alleged unlawful employment practices.

Pursuant to the WTA, an employment agreement may include nondisclosure, non-disparagement, and arbitration clauses only if the agreement is: (a) in writing, (b) demonstrates actual, knowing and bargained-for consideration from both parties, and (c) acknowledges the right of the employee to (1) report any good faith allegations of unlawful employment practices to federal, state or local enforcement agencies; (2) report any good faith allegations of criminal conduct to appropriate federal, state or local officials; (3) participate in proceedings with appropriate federal, state or local enforcement agencies; (4) make any truthful statements or disclosures required by law, regulation or legal process; and (5) request or receive confidential legal advice.

The WTA also places limits on the use of arbitration agreements by prohibiting any provision in an employment agreement that would require an employee to waive, arbitrate or otherwise diminish any existing or future claim related to an unlawful employment practice. However, this provision may be deemed by courts to be in conflict with the Federal Arbitration Act (FAA). It will be important to monitor developments in case law regarding the apparent conflict between the WTA and the FAA.

The WTA prohibits any clause in a settlement agreement that prevents an employee from making truthful statements or disclosures regarding unlawful employment practices under Title VII or the Illinois Human Rights Act.

The WTA also allows a prevailing employee to recover reasonable attorneys' fees and costs incurred in pursuing legal action for any contract or contractual provision violating the WTA.

Amendments to the Illinois Human Rights Act (effective January 1, 2020)

The WTA also included numerous amendments to the Illinois Human Rights Act, which take effect on January 1, 2020.

- **Expanded definition of employer and worksite.** The amendments expand the definition of "employer" to include any entity that employs one or more persons. Currently, the law applies a 15-employee threshold for most protected categories. The Human Rights Act will also apply to working environments beyond the physical location at which employees work, such as any instances of remote work or any work performed outside of the workplace.

- **Expanded definitions of unlawful discrimination of harassment.** The amendments expand the definition of “unlawful discrimination” to include discrimination against a person because of his or her “actual or perceived” protected class characteristic. The amendments expand the definition of “harassment” to include unwelcome conduct on the basis of a person’s “actual or perceived” protected class characteristic that “has the purpose or effect of substantially interfering with the individual’s work performance or creating an intimidating, hostile, or offensive working environment.”
- **Prohibition against harassment of non-employees.** The Human Rights Act now prohibits harassment by an employer against independent contractors, consultants, and anyone else performing services for the employer pursuant to a contract with that employer.
- **Mandatory sexual harassment training.** Every employer with employees in Illinois will be required to provide sexual harassment prevention training on an annual basis to all employees. The Department of Human Rights will develop a model training program that will be made available to all employers and the public at no cost. Employers may use the model program or create their own program that complies with the minimum requirements of the model program.
- **Required disclosures to the Illinois Department of Human Rights.** Beginning July 1, 2020, employers will be required to disclose annually (by each July 1) any adverse judgment or administrative ruling relating to unlawful harassment or discrimination against the employer in the preceding calendar year. If the Department of Human Rights is investigating a charge filed under the Human Rights Act and makes the request, an employer may be required to disclose information on settlements of any sexual harassment or unlawful discrimination claims. An employer who fails to make the necessary disclosures is subject to the imposition of civil penalties.

Cannabis Regulation and Tax Act (CRTA) (effective January 1, 2020)

The CRTA takes effect on January 1, 2020 and permits the use of recreational cannabis for adults 21 years of age or older. The CRTA allows employers to implement zero tolerance policies in the workplace and at times when employees are on-call, to prohibit the possession or use of cannabis in the workplace, and to terminate or otherwise discipline employees who violate an employer’s workplace policies.

Employers must keep in mind that the Illinois Right to Privacy in Workplace Act states that it is unlawful for an employer to refuse to hire or discharge an individual “because the individual uses lawful products off the premises of the employer during nonworking hours.” This will cover cannabis once it becomes a lawful product on January 1, 2020.

Artificial Intelligence Video Interview Act (effective January 1, 2020)

The Artificial Intelligence Video Interview Act takes effect January 1, 2020. The Act requires employers to obtain consent from applicants before using “artificial intelligence” to evaluate an applicant’s video interview and qualifications for the position. The consent must (1) notify each applicant before the interview that artificial intelligence may be used to analyze the applicants’ video interview and fitness for the position; and (2) explain how the artificial intelligence works and the general types of characteristics it uses to evaluate applicants. The Act additionally prohibits

employers from sharing video interviews, except with persons necessary to evaluate an applicant's qualifications for the position. Employers must delete the videos within 30 days of their receipt of an employee's request.

Amendments to Victims' Economic Security and Safety Act (VESSA) (effective January 1, 2020)

Illinois' VESSA allows unpaid protected leave to certain employees who are victims of domestic violence, sexual violence, and stalking. Illinois amended VESSA to add a category of protection for victims of "gender violence." This addition takes effect on January 1, 2020.

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