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The Top 10 Changes to Illinois Employment Law From 2019

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In 2019, legislators in the land of Lincoln took an expansive and aggressive approach with respect to new workplace rules.

Here are the top 10 most impactful legislative developments in Illinois employment law that employers should be aware of heading into the new year.

10. Salary History Inquiries

Some employers consider job applicants' salary histories in developing compensation packages. That's not a surprise.

But, in an apparent attempt to curtail historical disparities in pay on the basis of gender, Illinois employers no longer may make inquiries of this nature, as the Illinois Equal Pay Act, or IEPA, was amended to prohibit employers from:

- Screening job applicants based on their current or prior salary;
- Requesting or requiring that applicants disclose information about their salary history as a condition of being interviewed, considered for employment or offered employment;
- Soliciting salary history information from an applicant's former employer; or
- Factoring salary history information into compensation or hiring determinations even if the information was provided by the applicant voluntarily without prompting by the employer.[1]

This new law has teeth: Violations can result in special damages up to $10,000 for each offense plus compensatory damages to the extent they exceed any special damages award and reimbursement of costs and attorney fees.

9. Compensation and Benefits Information

While employers now must tread lightly with respect to salary discussions in the hiring process, another amendment to the IEPA protects the right of employees to share their compensation and benefits among one another. Effective Sept. 29, 2019, employers are prohibited from preventing employees from disclosing or discussing information related to their compensation and benefits.[2]

However, employers still may prohibit certain employees with access to sensitive salary information (e.g., human resources employees) from discussing the compensation of other employees without first obtaining the employee's written consent.

Spoiler: It's noteworthy that these changes are occurring at a time when equal pay protections are expanding, as discussed below.

8. Chicago's Predictable Scheduling Ordinance

Chicago employers in the building services, health care, hotel, manufacturing, restaurant, retail and warehouse industries soon will face new requirements with respect to scheduling employees. Chicago's Fair Workweek Ordinance, effective July 1, 2020, will require such employers to provide new employees with a written good faith estimate of expected weekly hours, on-call shifts and the day and time of shifts.[3]

Covered employers will also be required to publish shift schedules at least 10 days in advance of the first day of a new schedule, or be required to pay employees predictability pay premiums that are equivalent to one hour of pay per shift that is added or changed at affected employees' regular rate of pay. Changes to schedules made within 10 days of a new schedule will generally be subject to these predictability pay premiums except in circumstances where schedules are changed pursuant to, among other conditions:

- Changes mutually agreed upon in writing between an employer and employee;
- Exchanges between employees pursuant to an employer's scheduling policy;
- Employees' requests for available sick leave or vacation pay; or
- A reduction in schedule for disciplinary reasons.

However, if the employer cancels or reduces the hours of a shift with fewer than 24 hours' notice, the employer must pay the employee for all scheduled hours not worked at a rate of 50% of the employee's regular rate of pay.

The ordinance also imposes right-to-rest requirements that obligate employers to pay employees at a rate of 1.25 times the employee's regular rate of pay for shifts that begin fewer than 10 hours after the employee's last shift ended. Employees are also given the right to decline any previously unscheduled hours that are added more than 10 days after a schedule has been posted.

Of course, the ordinance has the potential to create practical challenges for covered employers whose scheduling needs may be unpredictable given the nature of the services that they provide.

7. VESSA Is Expanded to Protect Victims of Gender Violence

The Illinois Victims' Economic Security and Safety Act has long required employers to provide unpaid leave to employees who experience, or have a family or household member who experiences, domestic or sexual violence. As of Jan. 1, VESSA will expand to also include victims of gender violence, which the statute defines to include acts of criminal violence that are motivated at least in part by an individual's "actual or perceived sex or gender."[4]

Another spoiler: As noted below, similar language covering perceived membership in a protected class, including sex and gender identity, will soon be added to the Illinois Human Rights Act, or IHRA, showing the Illinois Legislature's apparent increasing focus on protecting nonbinary or gender-diverse individuals.

6. Expanded Sex Harassment Protections for Hotel and Casino Workers

Illinois employers within the hospitality and casino industries will face new requirements aimed at protecting employees from sexual harassment by guests. Beginning July 1, covered employers must inform each of their employees of the sexual harassment and discrimination protections afforded to them by the IHRA and Title VII.[5]

Covered employers also must maintain a written anti-sexual harassment policy that instructs employees to leave their working area immediately if they perceive danger. Importantly, hotel and casino employers must also equip employees working in hotel rooms and/or on casino floors with a portable emergency contact devices to be used in the event employees must summon help.

In addition, covered employers must take steps to accommodate employees who complain that they have been sexually harassed by guests, including offering the employee a temporary work reassignment and providing paid time off if the employee needs to file a police report or attend legal proceedings regarding any such complaints.

5. Illinois Becomes the First State to Regulate AI in the Job Interview Process

Over the last few years, Illinois employers have become familiar with the Illinois Biometric Information Privacy Act, or BIPA, considered one of the most stringent employee data and privacy protection laws in the country. While waves of class actions were being filed under BIPA,[6] the Illinois Legislature turned its attention to further regulating the use of technology in the employment setting.

In particular, the Illinois Legislature has enacted the Artificial Intelligence Video Interview Act, a first-in-the-nation statute that imposes transparency, consent and data-destruction duties upon employers using artificial intelligence to screen applicants for Illinois-based positions.[7]

Employers who use AI to analyze videos of job candidates' interviews must:

- Notify the candidate that the AI may be used to analyze the applicant's video interview and consider the applicant's fitness for the position;
- Provide the candidate information prior to the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and
- Obtain the candidate's consent to be evaluated by the software

This law also prevents employers from sharing a candidate's video "except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position," and requires employers to delete all copies of the videos within 30 days of receiving such a request from the applicant.

Notably, the statute does not define artificial intelligence, and it lacks a private right of action and does not provide for damages or penalties.

Some are concerned that the use of machine/robot-driven job interviews could lead to various disparate impact discrimination claims and it has been reported that the U.S. Equal Employment Opportunity Commission is investigating at least two cases involving claims that AI was excluding certain groups of workers. Also, in 2017, the EEOC issued a strategic enforcement plan identifying the increasing use of data-driven selection devices as one of its priorities.

What's more, as a practical matter, there are questions over whether AI could result in employers weeding out applicants before considering their uniquely valuable qualities, such as creativity, ingenuity and business acumen.

4. Equal Pay Protections Expanded

As of Sept. 29, 2019, the Illinois Equal Pay Act prohibits employers from paying employees of different sexes or races unequal rates for "substantially similar skill, effort, and responsibility."[8] Previously, the IEPA stated that employers could not discriminate between employees who performed jobs requiring equal skill.

The IEPA also was amended to address an employer's burden under the "any factor other than sex" defense. To successfully assert this defense, employers have been required to show that the differential in compensation "is based on any other factor other than: (i) sex or (ii) a factor that would constitute unlawful discrimination under the Illinois Human Rights Act."

The 2019 amendment requires employers to further show that the factor:

> (A) is not based on or derived from a differential in compensation based on sex or another protected characteristic; (B) is job-related with respect to the position and consistent with a business necessity; and (C) accounts for the differential.

Under the amendments, employees may recover damages they incurred as a result of being underpaid plus special damages up to $10,000 and their costs and attorney fees. Employers will also be subject to penalties of up to $5,000 "for each violation for each employee affected."[9]

This legislation becomes particularly noteworthy when considered against the backdrop of increased equal pay claims and related legislation around the country.

3. Expanded Protections Under the IHRA, and Training Requirements

Beginning July 1, 2020, the Illinois Human Rights Act will expand in several respects. Coverage will expand to all Illinois employers (this is a change from coverage of only employers with 15 or more employees), and will extend protections to independent contractors and temporary workers.[10]

The definition of "discrimination" will also be expanded, attaching liability for both discriminatory and harassing conduct that occurs outside the workplace as well as for discrimination or harassment that is based on an individual's perceived membership in a protected class.

In addition, employers will now be required to: (1) provide annual sexual harassment training to all employees; and (2) submit annual disclosures to the Illinois Department of Human Rights that detail the number of adverse judgments or administrative rulings entered against the employer with respect to harassment or certain types of discrimination.

Additionally, when investigating a civil rights charge, the Illinois Department of Human Rights will now be authorized to require employers to disclose the number of settlement agreements it has entered with respect to sexual harassment or discrimination allegations.

These expansions require employers to prepare for Illinois-specific claims, and they add to the patchwork of training requirements in various jurisdictions around the country.

2. Legalization of Recreational Marijuana

Effective Jan. 1, 2020, recreational marijuana is legal in Illinois.

In June 2019, Illinois passed a bill that legalizes the recreational use of cannabis by creating the Cannabis Regulation and Tax Act, or CRTA.[11] By simultaneously amending the Illinois Right to Privacy in the Workplace Act, the Legislature has indicated that employers generally may not discriminate against employees or job candidates based on their legal, off-duty consumption of cannabis.

However, employers may enforce reasonable policies that prohibit employees from possessing, using or being impaired by marijuana during working or on-call hours. According to the statute, an employer may consider an employee to be impaired if the employer has a "good faith belief that the employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance," and lists examples of such articulable symptoms.

While the CRTA requires only that employers have a good faith belief that an employee is impaired, it does seem to envision some form of workplace due process, requiring that employers give employees "a reasonable opportunity to contest the basis of the determination," before taking disciplinary action.

The CRTA and its amendment to the privacy act initially spawned questions about the future usefulness of drug testing, as drug testing technology has not evolved to a point where it can determine exactly when an individual consumed cannabis or whether the individual is currently impaired.

Notably, however, the CRTA was amended on Dec. 4, 2019, to clarify that the amendment to the privacy act does not create a cause of action against employers for "subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test."

Questions still abound, particularly given that cannabis remains illegal at the federal level. While the CRTA does make some attempt to address this tension by stating that nothing in the law should be construed to impact an "employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding," the interaction of state and federal law on this point remains somewhat gray.

1. Use of Arbitration and Confidentiality Agreements Will Be Strictly Regulated

In the wake of the U.S. Supreme Court's decision in Epic Systems Corp. v. Lewis supporting the use of arbitration agreements,[12] many employers have either continued or started to rely upon such agreements. Likewise, employers consistently utilize confidentiality agreements in a variety of phases of the employment relationship.

However, employment, severance or settlement-related agreements that are entered into, modified or extended after Jan. 1 must comply with the requirements of Illinois's new Workplace Transparency Act.[13]

First, employers may no longer unilaterally require mandatory arbitration of any claim arising under laws enforced by the EEOC or the Illinois Department of Human Rights. An arbitration clause found to be unilaterally imposed will be void to the extent it denies an employee any substantive or procedural rights or remedies under the identified laws. Query whether the foregoing restrictions on the use of arbitration agreements may be preempted by the Federal Arbitration Act.

Second, the use of confidentiality clauses will be similarly curtailed. Employers may no longer unilaterally condition employment offers (or continued employment) on agreements with the purpose or effect of preventing individuals from making truthful statements or disclosures about violations of equal employment opportunity, or EEO, laws. However, an agreement that is a mutual condition of obtaining or retaining employment, meaning it has been negotiated between an employer and employee in good faith in exchange for consideration, will be enforceable.

Such agreements must be in writing; demonstrate actual, knowing and bargained-for consideration from both parties; and expressly acknowledge the employee's right to report good faith allegations of violations of EEO laws, report good faith allegations of criminal conduct, participate in proceedings before the EEOC and/or state or federal agency enforcing EEO laws, and make truthful statements required by law.

Additional requirements will be imposed upon confidentiality clauses within employee termination or separation agreements if they restrict an employee's ability to disclose alleged EEO violations. Such clauses are enforceable only if confidentiality is the employee's preference and is mutually beneficial to the parties; the employee is notified in writing of his or her right to have an attorney review the agreement prior to execution; the clause is supported by valid and bargained-for consideration; the agreement does not waive EEO claims that arise after the agreement is executed; the employee is given 21 days to consider the agreement prior to execution; and unless knowingly and voluntarily waived by the employee, the employee is given seven calendar days to revoke the agreement following its execution.

Outlook and Takeaways

Looking forward, Illinois employers should be mindful of the following:

- New restrictions on the use of mandatory arbitration agreements and confidentiality clauses will require close examination of existing agreements.
- Given the expanded bases for liability under the IHRA and IEPA, employers may see an uptick in employment discrimination actions under those statutes.
- The legalization of recreational marijuana will require Illinois employers to revisit their workplace drug policies, and it's possible that there will be an uptick in applicant and employee use of marijuana as a consequence of the new law legalizing the recreational use of the drug.
- New requirements with respect to employee scheduling as well as the use of AI in the hiring process could render employers increasingly vulnerable to fines for noncompliance.
- Employers should be sensitive to the risk of pay equity claims.

In sum, the fact that there are so many new protections for Illinois employees is a sign that the Legislature is closely focused on the employment relationship and in some respects apparently wants to lead the way in enacting certain employee protections.

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[1] 820 ILCS § 112/10 (b-5)-(b-10).

[2] 820 ILCS § 112/10 (b).

[3] Chicago Mun. Code, Tit. I, Ch.1-25-010, et seq.

[4] 820 ILCS § 180/1, et seq.

[5] 820 ILCS § 325, et seq.

[6] On Jan. 25, 2019, in a highly anticipated case, the Illinois Supreme Court held that an individual need not allege some actual injury or adverse effect beyond a mere technical violation of his or her rights under BIPA to qualify as an "aggrieved" person entitled to bring a private action. Rosenbach v. Six Flags Entm't Corp. , 2019 IL 123186, 129 N.E.3d 1197 (2019). An avalanche of complaints followed.

[7] 820 ILCS § 42, et seq.

[8] 820 ILCS § 112/10(a).

[9] 820 ILCS § 112/30.

[10] 775 ILCS § 5/2-101(B)(1).

[11] 410 ILCS § 705, et seq.

[12] Epic Systems Corp. v. Lewis , 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

[13] 820 ILCS § 96, et seq.

Related Professionals

- **Steven J. Pearlman**
  Partner

- **Edward C. Young**
  Senior Counsel