Updates
February 24, 2020
Illinois Overhauls Employment Laws: Is Your Business in Compliance?

The Illinois legislature engaged in a flurry of recent activity in the area of employee protections. Included below are highlights of new employment laws in place as of January 1, 2020.

Significant Restrictions on Severance Agreements, Arbitration Clauses, As Well As Non-Disparagement and Confidentiality Provisions

Illinois' new Workplace Transparency Act (WTA) includes several major implications for employers, not the least of which are the restrictions imposed on employment-related agreements and provisions. In particular, the WTA significantly restricts an employer's ability to use nondisclosure and non-disparagement provisions in employment agreements, separation agreements, and settlement agreements. It also limits an employer's ability to "unilaterally" require certain terms (including mandatory arbitration) as a condition of employment. Further, it mandates that all employees—regardless of age—are given 21 days to consider and 7 days to revoke a settlement agreement. Civil penalties and a private right of action are available for noncompliance.

Expanded Employee Protections Under the Illinois Human Rights Act

In enacting the WTA, Illinois also expanded employee protections under the state's main anti-discrimination statute, the Illinois Human Rights Act (IHRA). The amended IHRA now expands the act's scope to reach independent contractors, temporary workers, and consultants. It also prohibits discrimination based on an employee's "perceived" protected characteristic, as opposed to his or her "actual protected characteristic," as previously required. In addition, it expands liability for employers where the alleged harasser is a supervisor. While not a huge change from a practical standpoint, the WTA also expressly states that a hostile "working environment" is not limited to the physical space in which an employee is assigned to work.

Ban on Salary History Information

In a stated attempt to curtail historical disparities in pay on the basis of gender, Illinois's Equal Pay Act (IEPA) was amended to prohibit employers from doing the following:

1. Screening job applicants based on their current or prior salary
2. Requesting that applicants disclose information about their salary history as part of the application and interview process
3. Factoring salary history information into compensation or hiring determinations, even if the information was voluntarily provided by the applicant

Violations can result in special damages up to $10,000 for each offense, plus compensatory damages and reimbursement of costs and attorneys' fees.

Compensation and Benefits Information Can No Longer Be Confidential

In addition to avoiding conversations about salary history during the hiring process, Illinois employers are now prohibited from requiring that employees keep their compensation and benefits packages confidential. Employers still may prohibit certain employees with access to sensitive salary information (for example, those in finance and human resources) from discussing the compensation of other employees without first obtaining the employee's written consent.

New Tracking, Reporting, and Harassment Training Requirements

The amended IHRA also requires Illinois employers to: (1) provide sexual harassment training to all employees on an annual basis; and (2) submit annual disclosures to the Illinois Department of Human Rights (IDHR), which detail the number of adverse judgments or administrative rulings entered against the employer with respect to harassment or certain types of discrimination. The IDHR has not published sample training, nor indicated that it will. It also has not provided any standard form for the required disclosures. At this point, employers are left to figure out on their own, or on the advice of counsel, how to comply.

Legalized Marijuana and the Workplace

As of January 1, 2020, recreational marijuana is legal in Illinois and, per the Illinois Cannabis Regulation and Tax Act (CRTA), employers generally may not discriminate against employees or applicants based on their legal, off-duty consumption of cannabis. Illinois law, however, still permits employers to enforce reasonable policies that prohibit employees from possessing, using, or being impaired by marijuana during working or on-call hours. According to the CTRA, 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.

The new intersection between legalized marijuana and workplace drug testing leaves many questions for Illinois employers, particularly when 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. Following a flurry of confusion over the CRTA, the law was amended in December 2019 to clarify that it 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."

New Workplace Protections for Victims of Gender-Based Violence

Since its enactment, the Illinois Victims' Economic Security and Safety Act (VESSA) has required employers to provide unpaid leave to employees who experience, or have family or household members who experience, domestic or sexual violence. Effective January 1, 2020, VESSA expanded its reach 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."

First-in-the-Nation Legislation on the Use of Artificial Intelligence During Job Interviews

While certainly not yet the norm, AI is used by some employers to attract applicants and to predict a candidate's fit for a position. In adopting the Artificial Intelligence Video Interview Act, Illinois became the first state to regulate the use of AI during the job interview process. Under the act, employers who use AI to analyze videos of job candidates' interviews must: (1) notify the candidate that the AI may be used to analyze the applicant's fitness for the position; (2) 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 (3) obtain the candidate's consent. 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 destroy copies of any videos within 30 days of a request.

Paid Nursing Breaks Now Required

As of January 1, 2019, Illinois employers must provide reasonable break time for employees who need to express breast milk for up to one year after a child's birth. Previously, employers in Illinois were not required to pay employees for additional time to express breast milk beyond their regularly scheduled paid breaks. Under the amended law, employers must now compensate employees who require additional break time for this purpose, unless doing so would create an undue hardship.

Specific Requirements for Expense Reimbursement Policies

Although now more than a year old, Illinois' expense reimbursement legislation requires that employers reimburse "all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." Illinois modeled its law after California's expense reimbursement statute, under which courts have held that employers must reimburse employees when they are required to use their personal cell phones for work. This is true, even if the actual cost of an employee's cellphone usage for work cannot be determined—for example, if an employee has an unlimited minutes/texting plan—in which case the employer must reimburse the employee for a "reasonable percentage" of the personal cell phone bill.

Unlike California, however, Illinois employers are permitted to have a written policy whereby they can reimburse for less than 100% of the actual costs provided that the amount stated in the policy is not zero and is not considered "de minimis." Employers are entitled to reimbursement only if they follow the employer's guidelines and submit documentation of the expense within 30 calendar days of incurring the expense. An employee is not entitled to reimbursement if the employer has an established written expense reimbursement policy and the employee fails to comply with that policy as written.

Takeaways

Companies with operations in Illinois should review their policies and practices related to employees in order to ensure they are in compliance with Illinois' myriad employment laws. Noncompliance could result in steep penalties and costly class-action litigation.

Authors

Explore more in

Labor & Employment

Related insights

Update

HHS Proposal To Strengthen HIPAA Security Rule

Update

California Court of Appeal Casts Doubt on Legality of Municipality's Voter ID Law