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Sweeping New Illinois Law Mandates Sex Harassment Training, Restricts Use of Arbitration and Non-Disclosure Agreements, and Much More

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On August 9, 2019, Illinois Governor J.B. Pritzker signed into law a sweeping piece of legislation, SB 75, enacted as Public Act 101-0221 ("SB 75"). Among other measures, SB 75 (i) imposes a sexual harassment training requirement on *all* employers with employees working in Illinois, (ii) places tight restrictions on the use of mandatory arbitration agreements and non-disclosure clauses in employment contracts and settlement agreements, (iii) significantly expands the rights of certain non-employees under the Illinois Human Rights Act ("IHRA"), (iv) imposes a reporting requirement on employers with respect to certain sexual harassment and discrimination rulings and judgments, and (v) extends job-protected leave to victims of gender violence. These provisions become effective January 1, 2020, except for the reporting requirement, which goes into effect on July 1, 2020.

The Sexual Harassment Training Mandate

Among other provisions (discussed below), SB 75 amends the IHRA to require employers *with any employees working in Illinois* to provide annual sexual harassment prevention training to their employees using either a model program that will be provided by the Illinois Department of Human Rights ("IDHR") or a program of the employers' choosing that meets or exceeds the criteria set forth in the IHRA, as reflected in the IDHR model training.

SB 75 expressly requires that the mandatory training (i) explain and provide examples of sexual harassment, (ii) summarize relevant federal and state law and remedies available to victims of sexual harassment, and (iii) describe the employer's responsibilities under applicable law. SB 75 permits online as well as in-person training but does not mandate a minimum duration for the training. Employers in the restaurant and bar industry must also supplement the mandatory training with a program—either their own or a supplement to be created by the IDHR—addressing harassment issues specific to the industry.[1]

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[1] SB 75 further requires restaurant and bar industry employers to create an anti-harassment policy, in English and Spanish, and provide it to new hires during their first week of work. In addition, SB 75 contains the Hotel and Casino Employee Safety Act ("HCESA"), which mandates that employers in those industries

Restrictions on Mandatory Arbitration Agreements and Non-Disclosure Provisions in Certain Employment Agreements and Settlements

SB 75 incorporates the legislative bill that was originally the stand-alone Workplace Transparency Act ("WTA"). The WTA does not completely bar arbitration and non-disclosure agreements ("NDAs") in the employment context, but it does decree that such agreements may not be unilaterally imposed on a current, former, or prospective employee who has raised a discrimination, harassment, or retaliation claim. Specifically, to be enforceable, an arbitration agreement must (i) be in writing; (ii) demonstrate actual, knowing, and bargained for consideration from *both* parties; and (iii) acknowledge the employee's right to report good-faith allegations to federal, state, or local agencies; make any truthful statements as required by law, regulation, or legal process; participate in agency proceedings; and obtain confidential legal advice.

Further, the WTA still permits employers to use NDAs and confidentiality provisions in settlement and termination agreements pertaining to discrimination, harassment, and retaliation claims, but only if all of the following conditions are met: (i) the NDA or confidentiality clause is the documented preference of the current, former, or prospective employee; (ii) the employer notifies the individual that he or she has the right to have an attorney or representative review the agreement; (iii) the provision is the result of valid, bargained-for consideration; and (iv) the agreement does not waive any claims that accrue after the agreement is executed.

In addition, the individual must be allowed 21 days to review the NDA/confidentiality agreement, and an additional seven days to revoke the agreement after execution. The employer cannot enforce the agreement until the seven-day revocation period has elapsed, unless the individual has voluntarily waived the right to revoke.

If an employer fails to meet all of these requirements, the NDA may be deemed void as against public policy. Notably, however, employers are permitted to require certain individuals to agree to confidentiality—for example, persons with access to confidential personnel information and individuals who are subject to a privilege obligation recognized by law, such as attorneys.

New Rights for Non-Employees and Protections Based on "Perceived" Status

In addition to creating the training requirement discussed earlier, SB 75 significantly broadens the scope of the IHRA in other ways. First, it expands the definition of "unlawful discrimination" to include discrimination and harassment based on an individual's actual *or perceived* sex, race, or other protected status. Permitting individuals to bring discrimination and harassment claims based on *perceived*, as well as actual, status as a member of a protected class is an expansion of the anti-discrimination statute that could significantly increase an employer's exposure to claims under the IHRA.

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also maintain an anti-harassment policy and equip certain employees with a safety/notification device, commonly known as a "panic button." The provisions of the HCESA go into effect on July 1, 2020.

Second, SB 75 creates a private right of action for contract employees—i.e., individuals who are "directly performing services for the employer pursuant to a contract with that employer"—to bring harassment claims. Currently, contract employees, such as consultants, do not have legal recourse against harassment under the IHRA.

Employers should note that the expansion of the IHRA to non-employees and to discrimination based on perceived status relies on the same definition of "employer" as set forth in Section 2-101 of the IHRA—i.e., any person or company employing 15 or more employees within Illinois during 20 or more calendar weeks. However, a bill that would change the IHRA's definition of "employer" to any person employing *one* or more employees during 20 or more calendar weeks is currently awaiting Governor Pritzker's signature. Thus, if that bill is signed into law, SB 75 would allow these expanded private rights of action against virtually all Illinois employers, starting July 1, 2020.

In contrast to this expansion of individuals' rights under the IHRA, SB 75 clarifies that an employer is responsible for harassment by its non-managerial and non-supervisory employees "only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."

Annual Disclosure of Sexual Harassment and Discrimination Claims

Beginning July 1, 2020, employers with one or more employees in Illinois must annually disclose to the IDHR all final and non-appealable adverse judgments and non-appealable administrative rulings involving sexual harassment and other discrimination claims brought by employees and nonemployees (contractors or consultants). The disclosures must specify the total number of adverse judgments or administrative rulings (broken down by protected categories) during the preceding year, and whether any equitable relief was ordered against the employer. Employers do not have to disclose *settlements* entered into during the preceding year that relate to sexual harassment or unlawful discrimination, but the IDHR may request this information when investigating a charge.

Job-Protected Leave for Victims of Domestic, Sexual, or Gender Violence

As of January 1, 2020, SB 75 expands the protections of the Victims Economic Security and Safety Act ("VESSA") granted to victims of sexual and domestic violence to victims of gender violence. "Gender violence" is defined as "one or more acts of violence or aggression," or "a physical intrusion or physical invasion of a sexual nature under coercive conditions," or the threat of either kinds of conduct, which constitutes a criminal offense, regardless of whether the acts resulted in criminal charges, prosecution, or conviction.

Accordingly, employees who have suffered (or have a family member who has suffered) domestic violence, sexual violence, or gender violence may be entitled to take job-protected leave to:

1) seek medical attention to recover from physical or psychological injuries caused by the domestic violence, sexual violence, or gender violence;

2) obtain services from a victim services organization;

3) obtain psychological or other counseling;

4) participate in safety planning, temporarily or permanently relocate, or take other actions to protect their safety; or

5) seek legal assistance or remedies to ensure their own or a family or household member's safety.

What Employers Should Do Now

Employers with employees and/or contractors in Illinois should do the following:

- Given SB 75's aggressive timetable for mandatory training, immediately review your sexual harassment training program to ensure compliance with SB 75's mandates, including the requirement that employees be advised of their rights under federal and state law. If you have not previously provided sexual harassment training to your employees, immediately consider developing or purchasing an anti-harassment training program or waiting until the IHRA releases its model program.

- Review and revise, as necessary, employment and settlement agreements to conform to SB 75's substantive restrictions and procedural requirements concerning arbitration and NDA/confidentiality provisions with respect to discrimination, harassment, and retaliation claims.

- Revise VESSA policies to reflect the expansion of the law permitting leave for gender violence.

- Implement a system to track relevant administrative rulings and adverse judgments in preparation for the IHRA's disclosure requirements.

We will continue to provide updates on any significant developments regarding the implementation of SB 75.

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