Action Items for Illinois Employers in 2019

By Paul E. Starkman / Jan 02, 2019

2019 is here. Now is a great time for employers in Illinois to consider if and how they want to address new employment laws and workplace trends that will impact 2019 and beyond. New military leave procedures, class action waivers, expense reimbursement, and commission plans are just some of the action items that Illinois employers may want to address in 2019. Here is an "ABC" list of action items for Illinois employers in 2019.

Absences

Military Leave: The Illinois Service Member Employment and Reemployment Rights Act (ISERRA) is effective on January 1, 2019 and may require employers in Illinois to revise their existing military leave policies because it repeals the prior patchwork of state military leave laws. Among other unique protections, an Illinois employee on military leave must receive:

- An average of 3 years' performance evaluation ratings, as long as the average is not less than the rating received just prior to military service.
- Full salary continuation for annual training service for up to 30 non-consecutive days each calendar year.

Illinois employers will have to post a notice of rights and benefits under the ISERRA (which can be found here).

Paid Breaks for Nursing Mothers: Under new amendments to the Illinois Nursing Mothers in the Workplace Act, Illinois employers should consider if they need to revise their policies and procedures to meet a new requirement to provide "reasonable" paid breaks (that may run concurrently with other available break time) each time employees who are nursing parents need to express milk at work unless these breaks would constitute an "undue hardship" as defined by the Illinois Human Rights Act ("IHRA").

Paid Sick Leave under Cook County and Chicago Ordinances: Employers in Cook County, IL, but located outside of Chicago may want to check if their municipality has opted out or into the Cook County Earned Sick Leave Ordinance. Over 100 of Cook County's 132 municipalities have opted out of the Ordinance's paid sick leave requirements since it was enacted in 2017. Wilmette voted in 2018 to continue to opt out of the sick leave requirements, but opted into its minimum wage increases. Western Springs and Northbrook, IL opted back into both aspects of the Ordinance effective Jan. 1, 2019.

Employers in Chicago may also want to review their paid sick leave compliance because the City formed the Office of Labor Standards that, effective January 1, 2019, is tasked with more rigorously enforcing Chicago's paid sick leave and other employment ordinances. Penalties can include suspension or revocation of an employer's business license.

Alternative Dispute Resolution (ADR) – Class Action Waivers

Employers in Illinois may also want to consider adding class action waivers to their ADR procedures, including mandatory arbitration agreements.

- Properly drafted class action waivers (i.e., provisions that preclude employees from bringing employment claims as class and collective actions) are now enforceable in Illinois after the U.S. Supreme Court in Epic Systems Corp. v. Lewis (U.S. 2018) reversed the Seventh Circuit's anti-class action waiver decision.
- Illinois employers, however, may want to consider whether or not to carve out sexual harassment and sexual assault claims from mandatory arbitration agreements or other confidential ADR procedures. Google, Facebook, Microsoft, Uber, and several large law firms have voluntarily given up mandatory arbitration and confidentiality requirements for employees who bring sex harassment and sexual assault claims, due to the #MeToo movement and similar pressures.
- Employers may also want to reconsider their use of confidentiality and non-disclosure agreements when addressing sexual harassment or sexual abuse claims. New Internal Revenue Code Section 162(q) precludes employers from taking business deductions for settlement payments and attorneys' fees "related to" confidential resolutions of such claims.

Anti-Discrimination/Harassment Poster

Illinois employers should be aware that there is a new mandatory notice entitled "You have the Right to Be Free From Job Discrimination and Sexual Harassment" (which can be found here and here) that has been prepared by the Illinois Department of Human Rights (IDHR) to provide additional information on employee rights under the Illinois Human Rights Act(IHRA), including the right to be free from sexual harassment, the right to reasonable accommodations for employees who are pregnant or have a disability, and the right to be free from retaliation for exercising rights under the Act.

The notice also provides three options for reporting discrimination, including contacting the Illinois Sexual Harassment and Discrimination Helpline. The amendments took effect in September 2018, but the new notice was released only recently.

Background Checks

The New "Summary of Your Rights" Form: There is a new version of the form entitled "A Summary of Your Rights" (found here) that all employers must now provide to applicants and employees at various stages when obtaining and using "consumer reports" (background checks) conducted by third-party consumer reporting agencies (such as a credit-reporting company, a record-checking company, or an investigative firm).

The 2018 federal Economic Growth, Regulatory Relief, and Consumer Protection Act amended the Fair Credit Reporting Act (FCRA). Now, whenever the FCRA requires that a "consumer" (which includes applicants and employees) receive a "Summary of Consumer Rights" form, it must be the new form that has been amended to include a notice that, free of charge to consumers, nationwide consumer reporting agencies must provide a "national security freeze" that restricts prospective lenders from obtaining access to the consumer's background report.

When Illinois employers replace their old "Summary of Consumer Rights" forms with this new form, they may also want to re-examine their procedures to comply with the FCRA's "stand-alone" disclosure and affirmative authorization requirements, the notice requirement before and after taking an adverse employment action based on a consumer report, as well as applicable Illinois "ban the box" limitations on criminal history inquiries and other laws affecting background checks.

Biometric Information

Illinois employers are increasingly using or considering the use of employee's fingerprints, facial recognition software, voice or retina scans and other forms of biometric information for attendance, access to company equipment or data, immigration compliance, or security purposes. These Illinois employers may also want to continue to reevaluate their compliance with the strict written disclosure and consent provisions of the Illinois Biometric Information Privacy Act (BIPA).

- The Illinois BIPA is one of only three state law of its kind in the US, but the only one that provides employees with a private cause of action for liquidated damages of up to $5,000 for each willful violation and attorneys' fees.
- In the past two years, over 100 BIPA class action laws have been filed (which is yet another reason to consider utilizinge class action waivers) against Facebook, Southwestern Airlines, Google, Shutterfly, to name a few high-profile targets.
- On Sept. 28, 2018, the Illinois Appellate Court's First District (covering Chicago and surrounding Cook County) in *Sekura v. Krishna Schaumburg Tan Inc.* revived a previously dismissed BIPA class action. The *Sekura* court rejected a line of cases holding that an "aggrieved person" under BIPA must allege some additional injury resulting from an employer's collection, use or disclosure of biometric information. Instead, the Illinois Appellate Court joined federal court decisions holding that simply alleging noncompliance with the BIPA's procedural requirements was enough to state a cause of action.
- The Illinois Supreme Court appears poised to decide the scope of an "aggrieved person" under the BIPA, as the *Sekura* case and another BIPA decision are currently on appeal.

In the meantime, Illinois employer may want to consider the following measures to reduce the threat of BIPA liability:

- Adopt mandatory arbitration agreements with class action waivers that cover BIPA claims.
- Develop or review existing written policies and procedures to provide notice to employees and other affected persons about the employer's procedures for the collection, storage, use, transmission, and destruction of biometric information.
- Institute written procedures and forms to obtain written and signed consent forms (whether via e-signatures or with "wet" signatures on hard-copies) from all affected persons (including employees and consumers who provide biometric information).
- Establish written policies and procedures to protect biometric information that (i) utilize security measures commensurate with best practices used in the industry, such as the security used to protect trade secrets and HIPAA-protected medical data, (ii) provide accommodations for those unable or unwilling to provide biometric information due to a disability or religious objections, and (iii) establish response protocols in the event of a data breach involving biometric information.

Compensation

Expense Reimbursement: Illinois employers may also want to review and revise their expense reimbursement policies to comply with recent amendments to the Illinois Wage Payment and Collection Act (IWPCA). Effective January 1, 2019, in Illinois:

> [a]n employer shall reimburse an employee for 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.

In order to comply with the new IWPCA amendments and avoid unanticipated reimbursements, Illinois employers should consider establishing new written policies or re-examining existing policies so that the policies "authorize or require" the employee to incur the expense and contain specific limits for reimbursable expenses, BUT the policies cannot provide only "minimal" or no reimbursement.

A written reimbursement policy may require that employees request reimbursement, with supporting documentation, within 30 days of incurring the expense. BUT the employer may not shorten the 30-day period for submitting expense reimbursement requests, though the policy may provide a longer period; BUT if an employee losses a receipt or never receives one, the employer must accept the employee's signed statement as sufficient documentation for the expense.

Commission Plans, Bonuses and Incentive Compensation: Illinois employers should also consider reviewing and revising their 2019 written commission, bonus and incentive compensation plans, if feasible, in light of the Seventh Circuit's 2018 decision in *Sutula-Johnson v. Office Depot*.

In *Sutula-Johnson*, following a merger of with OfficeMax, Office Depot eliminated a prior commission plan for furniture salespeople and established a new compensation plan involving a salary and "incentive payments" that were "accrued" upon invoicing, but were not "earned" until Office Depot actually paid the incentive payments, usually 45 days after the end of each quarter.

Because both plans contained contractual disclaimer language that allowed the plans to revised or terminated (as to unearned compensation), the Seventh Circuit rejected a breach of contract claim based on the change of plans.

However, the Seventh Circuit held that (i) Office Depot's incentive payments were really commissions (because they were calculated based on the value of the sale) and (ii) paying such commissions 45 days after the end of each quarter violated the IWPCA's requirement that "earned" commissions must be paid on a monthly basis.

The Seventh Circuit's decision in *Sutula-Johnson v. Office Depot* is problematic for employers in Illinois because:

- The Seventh Circuit gave no weight to the plan provisions that the commissions were not earned until paid.
- It ignored the IWPCA's regulation that states: "to be entitled to receive compensation for a commission under the [IWPCA], *the commission must be earned under the terms of the agreement or contract*." (emphasis added).
- It held for the first time that an employer cannot "impos[e] an arbitrary date on which wages are earned, *completely unrelated to the employee's duties*." (emphasis added).
- It determined that the incentive payments were "earned" for purposes of the IWPCA, not based on the "terms of the agreement or contract," but on when the employee completes all work on the sale.

Consequently, in order to avoid potential IWPCA liability and the budgeting and cash flow issues that may arise from having to pay commissions before transactions are completed and sales proceeds are received, Illinois employers may want to revisit 2019 commission plans that are not already in effect or that can be revised:

- To determine whether or not to add a provision requiring an employee complete all work on a sale in order to "earn" a commission and to define all of the work that an employee must complete in order to "earn" a commission on a sale.
- To consider if it is feasible and advisable to add plan provisions that sales employees have continuing responsibilities to assist in completing the entire transaction beyond getting the customer to "sign on the dotted line," (such as helping employers obtain payment in full from customers, handling returns and post-sale adjustments, and resolving disputes).

Illinois Equal Pay Act (IEPA) Amendment: An amendment to Illinois's Equal Pay Act of 2003 ("IEPA") effective January 1, 2019, will prohibit pay discrimination between African-Americans and non-African-Americans (as well as between male and female employees) who perform "the same or substantially similar work" on jobs that require equal skill, effort, and responsibility, and for work that is performed under "similar working conditions." The amended IEPA allows wage differentials pursuant to a seniority system, merit system, a system that measures earnings by quantity or quality of production, or any other wage differential based on any factor "other than race."

Illinois employers may want to consider whether or not to perform race and/or gender pay equity audits to determine which jobs are sufficiently similar, if there are race/gender pay disparaties between these similar jobs, whether the pay disparities are legally significant, and if they can be explained by lawful reasons. Whether to conduct a pay equity audit and how to do so should be decided in consultation with experienced legal counsel, lest the audit become a "smoking gun" that may be used against the employer in an IEPA lawsuit. Class action waivers and arbitration agreements that Illinois employers may want to consider when addressing the expanded potential liability under recent IEPA amendment.

Salary and Wage Inquiries: For now, Illinois does not bar employers from inquiring about or screening applicants based on salary and wage history, as the legislature in 2018 failed to override a veto of such legislation by out-going Governor Rauner. This may change in 2019 with a new administration in Illinois and 20 other states and municipalities (most recently Massachusetts) barring salary history inquiries.

Effective April 10, 2018, the City of Chicago issued an order that City departments may not ask for applicants' salary histories.

Confidentiality of Trade Secrets and Other Sensitive Information

Trade Secrets: If employers in Illinois and elsewhere have confidentiality provisions in policies, personnel manuals, codes of conduct, and agreements with employees, contractors and other third parties, the employers should consider reviewing (and, if necessary, revising) those provisions include the whistleblower immunity notice required by the federal Defend Trade Secrets Act (DTSA). Employers in Illinois and elsewhere have found to their dismay that if they fail to provide the required notice, they cannot recover attorneys' fees and punitive damages from employees and contractors even if they have stolen the employer's trade secrets in violation of the DTSA.

Employers should also consider whether or not they have taken sufficient security measures to protect their trade secrets and confidential information when they allow employees to store and use such critical data on their personal smartphones, laptops, and other electronic devices. The case of *Yellowfin Yachts v. Barker Boatworks* is an example of what employers in Illinois and elsewhere should NOT do. In 2018, the Eleventh Circuit rejected a

company's theft of trade secret claims against its former VP of Sales who allegedly downloaded "hundreds" of the company password-protected confidential supplier and customer files just before he left to start a competing business, because:

- The company permitted and paid for him to store the company's confidential customer information on his personal cellphone and laptop as part of the company's round-the-clock, "white-glove" customer service program.
- The company did not require him to sign a non-disclosure agreement (NDA), even though it had presented him with a proposed employment agreement with a confidentiality provision that he never signed.
- The company did not instruct him to return or delete the company's information when he left.

Bring-Your-Own-Device-To-Work (BYOD) Policies: Based on the *Yellowfin Yachts* case and other court decisions, Illinois employers that allow employees to keep company trade secrets on personal smartphones, laptops and other electronic devices may want to take the time now to re-examine their BYOD, Acceptable Computer/Data Usage, Return of Company Property, and other data protection policies and practices in order to determine if they should include:

1. written agreements that company information kept on personal devices must be kept confidential and used only on behalf of the company;
2. "instruction ... as to how to secure the information on [employees'] cellphone[s] or personal laptop[s];"
3. employee training and periodic reminders of restrictions on access to and storage of the company's valuable information via personal devices; and
4. procedures to obtain the return of company property and data at the end of employment (e.g., exit interviews).

To quote UCLA basketball coach John Wooden, "Failing to prepare is preparing to fail." Illinois employers may want to act now in order to prepare for the new employment law challenges that Illinois employers will confront in 2019.

Employers with questions about this article and the issues discussed in it can contact Paul Starkman at (312) 517-7508 or pstarkman@clarkhill.com, or another member of Clark Hill's Labor and Employment team.