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Amendments to Human Rights Act will require diligence by employers

Gov. J.B. Pritzker is expected to sign several amendatory bills into law expanding employer obligations with regard to preventing workplace sexual harassment, achieving gender pay equality, workplace transparency and providing leave for gender-related violence.

One of the major new laws set to take effect with the governor's signature is the Workplace Transparency Act. The act would provide further prohibition regarding sexual harassment and requires anti-harassment training.

These new laws also bring sweeping changes to Illinois' employment discrimination laws and expand coverage to provide protections for alleged discrimination based on actual or perceived discrimination.

Details on the proposed amendments are discussed below.

Illinois Human Rights Act amendments

Expanded definition of discrimination — The act redefines "unlawful discrimination" to include discrimination against a person because of his or her "actual or perceived" protected class or characteristic (e.g., race, color, religion, national origin, etc.).

Thus, discrimination based on a perception that an individual is a member of a protected group can now lead to

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liability for employers, even if that perception is erroneous.

Annual anti-harassment training — An entirely new requirement is that employers will now be required to train all employees once per year on sexual harassment prevention techniques or else face monetary fines.

The Illinois Department of Human Rights will issue a model sexual harassment prevention training program. It will be made available to employers at no cost. Failure to comply with this section may subject employers to penalties of up to \$5,000 per infraction.

Expansion of employees covered — Already prohibiting harassment and discrimination in the workplace, the act amendments would expand coverage to any employer with one or more employees within Illinois during 20 or more calendar weeks in the current year or year preceding the alleged violation.

Prior to the new amendments, the act applied only to

employers with 15 or more employees. This change will be effective July 1, 2020.

Harassment expanded to cover situations outside the office — The amendments clarify the "work environment" is not limited to a physical location an employee is assigned to perform his or her duties, expanding coverage to incidents that occur outside the office.

Expanded coverage to non-employee contractors — This amendment expands coverage to apply to an employer's employees, as well as an employer's non-employees who are present in the workplace, such as its contractors, subcontractors, vendors, consultants or other persons performing work pursuant to a contract.

Thus, employers could be held liable for harassment or discrimination a non-employee contractor is subjected to while providing services for the employer.

New disclosure requirements — Effective July 1, 2020, employers with adverse

judgments against them regarding discrimination or harassment will be required to report details about the matters to the Human Rights Department. In addition, during department investigations, employers will be required to disclose information about agreements or settlements the employers may have entered into to resolve claims of discrimination or harassment.

However, the department will not request the names of the alleged claimants. Failure to comply could result in penalties of up to \$3,000.

Restaurants, bars and coffee shops — Owners of restaurants, bars and coffee shops will be required to give new employees within their first week a written sexual harassment policy. The policy must be made available in English and Spanish. The written policy must notify the employee of how to file charges with the Human Rights Department or Equal Employment Opportunity Commission. The department will be distributing additional training materials to these types of businesses.

Procedural changes — Prior 2018 amendments allowed a charging party to bypass the investigation procedure in order to sue directly in court. Now, these 2019 amendments clarify that either party can ask the Human Rights Department to

dismiss a pending charge if a state or federal lawsuit is filed based on the same issues raised in the charge.

Effective date — These amendments would become effective next Jan. 1 except where otherwise stated above.

Illinois Equal Pay Act amendments

Coverage expansion — Until the new amendments, the act prohibited an employer from paying a lesser wage based on gender for jobs that required “equal” skill, effort and responsibility.

The amendments will prohibit an employer from paying a lesser wage based on gender for the same or similar work, performed under the same or similar working conditions with respect to jobs that require “substantially similar” skill, effort and responsibility, instead of the previous harder-to-establish “equal” skill, effort and responsibility.

The new amendments clarify that the burden of proof is on employers to demonstrate that wage differentials are based on some factor other than gender.

Thus, employers can no longer justify wage differentials between jobs with some different job duties solely on the assertion that such jobs are not “equal.” Employers may still defend disparities using legitimate factors such as seniority, merit or productivity, but employers must demonstrate that each factor

is applied reasonably, is job-related and consistent with business necessity. Further, any factors used must account for the entire wage disparity.

Salary history prohibition — The amendments also essentially prohibit employers from justifying otherwise unlawful differences in pay on prior salary alone. Employers would be prohibited from asking applicants about their salary history or seeking salary history information from an applicant’s current or former employers.

However, employers will not be prohibited from communicating with applicants about their compensation expectations. If an applicant voluntarily discloses his or her prior salaries, the employer is nonetheless still prohibited from considering that information when determining whether to make a job offer and the terms of the offer.

Wage discussions by employees allowed — Consistent with federal law, Illinois employers will now be prohibited from trying to stop employees from revealing or discussing information about their wages and other compensation. However, Illinois employers are allowed to direct certain employees, such as their human resources personnel, to keep such information confidential.

Damages and penalties — A prevailing employee has always been able to recover

the amount of the underpayment, interest and costs and attorney fees in a civil action under the Illinois Equal Pay Act. However, these amendments also allow for “special damages” of up to \$10,000 or actual damages if greater than \$10,000, and injunctive relief.

Employees who prove that they were underpaid because of their gender could also receive, not only the amount of the underpayment, but also uncapped compensatory damages, punitive damages if the employer acted with malice or reckless indifference and injunctive relief. Enforcement by the state Department of Labor could result in additional penalties as high as \$5,000 for each violation for each employee affected.

Statute of limitations — An employee continues to have five years from the date of the underpayment to commence a civil action.

Effective date — These amendments will go into effect 60 days after Pritzker signs them into law.

Compliance tips — Employers that want to be proactive about their compliance with the anticipated changes to the Equal Pay Act may want to conduct gender pay equity audits and should review their pay scales, job applications, job posting boards and written policies (including confidentiality clauses). Employers should also train hiring personnel about the requirements of the new amendments.

Victims’ Economic Security and Safety Act amendments

Expansion of coverage — The Victims’ Economic Security and Safety Act already provides that an employee who is a victim of domestic or sexual violence, or who has a family or household member who is a victim of domestic or sexual violence, can take up to 12 weeks of unpaid leave per any 12-month period to address issues arising from domestic or sexual violence. However, the amendments to the act will expand the protections to include victims of gender violence.

The amendments define “gender violence” as violence or aggression that is illegal under state law and committed, in part, on the basis of a person’s actual or perceived sex or gender, whether or not criminal charges were ultimately brought.

The employee may take this leave intermittently or on a reduced work schedule in order to seek medical attention, victim services, counseling, safety planning or legal assistance.

Effective date — The act’s amendments will be effective this Jan. 1.

In anticipation of these new laws, employers should review their applicable policies to ensure compliance, evaluate whether their anti-harassment training meets the new requirements and review their pay scale and wage data to ensure gender equity.