Sweeping Changes To Ill. Law Will Require Employer Diligence

By **Paul Starkman, Scott Cruz and Autumn Moore**

Paul Starkman

Scott Cruz

Autumn Moore

On July 31, 2019, Illinois Gov. J.B. Pritzker started to sign several amendatory bills into law expanding employer obligations with regard to strengthening workplace sexual harassment protections, achieving gender pay equality and providing leave for gender-related violence. The most significant provision of the amendments signed by the governor is a ban on salary history inquiries by Illinois employers.

Another major new law awaiting the governor's signature is the Workplace Transparency Act, which provides further protections regarding sexual harassment and requires anti-harassment training. Some of the other new rules bring sweeping changes to Illinois' employment discrimination laws by banning salary history inquiries and expanding the employment obligations of small businesses prohibiting discrimination based on actual or perceived discrimination.

Effective Dates

The hodgepodge of new laws have various effective dates detailed below. The new laws that Pritzker signed will go into effect 60 days after being signed (or on Sept. 29, 2019), others awaiting signature are scheduled to become effective on Jan. 1, 2020 and the ones involving small businesses will go into effect on July 1, 2020.

Illinois Equal Pay Act Amendments

Coverage Expansion

The Illinois Equal Pay Act prohibited employers from paying a lesser wage based on gender for jobs that required "equal" skill, effort and responsibility. These new amendments will prohibit an employer from paying a lesser wage based on gender for jobs that require "substantially similar" skill, effort and responsibility, instead of the previous harder-to-establish burden of proving that the jobs required "equal" skill, effort and responsibility. The new amendments also clarify that the burden of proof is on employers to establish an affirmative defense that wage differentials are based on some factor other than gender.

Illinois employers will no longer be able to justify wage differentials between jobs with some different job duties solely by asserting that the jobs are not "equal." Employers may still defend disparities using legitimate factors such as seniority, merit or productivity, but employers must demonstrate that each legitimate factor is applied reasonably, is job-related and consistent with business necessity. Further, any factors used must account for the entire wage disparity. It appears that salary history will no longer be considered a legitimate factor that can be used to explain wage disparities between jobs involving similar but not equal job duties.

Ban on Salary History Inquiries

The amendments also prohibit employers from asking applicants about their salary history or seeking salary history information from an applicant's current or former employers. Even 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. However, employers will not be prohibited from communicating with applicants about their compensation expectations.

The bottom line on the ban on salary history inquiries is that employers in Illinois will no longer be able to justify differences in pay on prior salary alone. Although similar legislation was vetoed last year, Illinois now joins five other states, one county and three cities that have banned salary history inquiries.

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.

Added Damages and Penalties

A prevailing employee in an action under the IEPA 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 under the IEPA. 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 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 under the IEPA.

Effective Date

These amendments will go into effect 60 days after Pritzker signed them into law or on Sept. 29, 2019.

It remains to be seen whether lawsuits under the IEPA will become more popular now that the Illinois Legislature has lowered the burden of proof on employees, raised the burden on employers and increased the penalties for violations of the IEPA. Employers that want to be proactive about their compliance with the new changes to the Illinois Equal Pay Act may want to conduct gender pay equity audits and should review their pay scales, job application forms, job posting boards and written policies (including confidentiality clauses). Employers should also train hiring personnel about the requirements of the new IEPA amendments, particularly the ban on salary history inquiries.

Illinois Human Rights Act Amendments

Expanded Definition of Discrimination

Still awaiting signature by the governor are the new Illinois Human Rights Act amendments that redefine "unlawful discrimination" to include discrimination against a person because of his or her "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 liability for employers, even if that perception is erroneous.

Federal cases frequently involve claims that an employee was discriminated against based on mistaken perceptions about the employee's sexual orientation and disability status, to name two examples. Now, Illinois employers will need to revise their anti-discrimination and equal employment opportunity policies to include prohibitions against discrimination based on perceptions about an individual's protected status. Proactive employers will also institute training on how to avoid discrimination based on mistaken perceptions.

Annual Anti-Harassment Training

One especially significant new requirement is that Illinois employers will now be required to train all employees once per year on sexual harassment prevention techniques or else face monetary fines. Eventually, the Illinois Department of Human Rights will issue a model sexual harassment prevention training program that 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.

The new requirement of annual sexual harassment training will leave Illinois employers with some tough decisions, even after the IDHR issues its model program. Employers will have to decide whether to bring all employees together for in-person training or whether web-based e-learning or remote video-conferencing training will suffice.

Illinois employers will have to decide whether to train supervisors and managers with rank-and-file employees, even though supervisors and managers need separate training on how to recognize harassment and how to handle harassment complaints. Multistate employers may have to reconcile Illinois' new annual training requirement with the once every two years requirements in California and Delaware, and New York's requirement of annual interactive sexual harassment training.

Expansion to Cover Small Businesses

The new IHRA amendments will expand all IHRA harassment and discrimination coverages 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 IHRA primarily applied only to employers with 15 or more employees, except employers with one or more employees were liable for sex harassment and disability discrimination.

With the new amendments, small employers will also potentially face claims for discrimination; harassment and retaliation based on age, race, religion, marital and veteran status, sexual orientation and gender identity, and all of the other characteristics protected by the IHRA. This change will be effective July 1, 2020.

Harassment Expanded to Cover Situations Outside the Office

The amendments will clarify the "work environment" is not limited to a physical location an employee is assigned to perform his or her duties. This expands coverage to incidents that occur outside the office.

Illinois employers have long been held liable by courts when employees are harassed away from the workplace. The new amendments codify this case law. The new law will require employers to institute new policies and procedures to protect employees who work remotely, including but not limited to establishing hotlines and other ways for remotely based employees to lodge anonymous complaints about harassment out in the field.

Expanded Coverage to Include Nonemployee Contractors

These amendments will expand coverage to apply to an employer's nonemployees who are present in the workplace, such as its contractors, subcontractors, vendors, consultants or other nonemployees performing work pursuant to a contract. Now, employers could be held liable for harassment or discrimination perpetuated against nonemployee contractors and consultants while they are providing services for employers at the employers' work site.

This is a major change in Illinois law that previously limited anti-harassment/discrimination protections strictly to employees and expressly excluded independent contractors and consultants. Employers will now have to walk a narrow line between protecting contractors from harassment through new policies and procedures while maintaining their independent, nonemployee status under wage-and-hour laws. Employers may need to revise their harassment policies to include these nonemployees and review their agreements with contractors or consultants to ensure they are protected in accordance with this new law.

Special Rules for Restaurants, Bars and Coffee Shops

Owners of restaurants, bars and coffee shops will be required to give new employees a written sexual harassment policy within their first week of employment. The policy will have to be made available in English and Spanish. The written policy must notify the employees of how to file charges with the Illinois Human Rights Department or U.S. Equal Employment Opportunity Commission. The IDHR has been ordered to distribute additional training materials to these types of businesses.

Businesses operating restaurants, bars and coffee shops in Illinois will need new policies and procedures to make sure that all new employees receive a copy of the company's sexual harassment policy within their first week of work. These businesses will also be required to provide special training materials to their employees. National chains will have to make exceptions to their usual procedures to account for this new Illinois law, while small businesses will have to enhance their HR functions to comply.

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

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 Illinois 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.

Victims' Economic Security and Safety Act Amendments

Expansion of coverage

New Victims' Economic Security and Safety Act amendments also still await the governor's signature, though if he does not sign them in 60 days after passage, they too will become law. VESSA 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.

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 expansion of VESSA's coverage will require employers and their supervisors to be sensitive when employees and their family members seek leave under VESSA's new protections for domestic, sexual or gender violence.

Effective Date

The VESSA amendments will be effective this January 1, 2020.

Conclusion

Now that these new laws have become a reality, employers should review their applicable policies to ensure compliance, evaluate whether their anti-harassment training meets the new requirements, and review their pay scales and wage data to ensure gender equity.

Paul E. Starkman is a member and a leader of the labor and employment practice group at Clark Hill PLC in Chicago.

Scott Cruz is a member and Autumn L. Moore is an associate at the firm.