ARONBERG GOLDGEHN Employment Law *Trending Now*

December 23, 2019

New Illinois Employment Laws Effective Now and In 2020

It has been a very busy year in terms of Illinois employment law legislation. Whether employers are impacted by the new recreational marijuana laws, restrictions on confidentiality clauses in employment agreements, or the requirement to provide annual sexual harassment training (which impacts Illinois employers with one employee), employers must ensure that their policies and procedures are compliant with these and other new laws passed in 2019.

As we near the end of the year, we wanted to share several of the following new or amended Illinois employment laws that have become effective in 2019 or that are slated to become effective in 2020:

- The Illinois Workplace Transparency Act;
- The Cannabis Regulation and Tax Act;
- The Illinois Equal Pay Act;
- The Illinois Human Rights Act;
- The Victims' Economic Security and Safety Act;
- The Artificial Intelligence Video Interview Act; and
- The Hotel and Casino Employee Safety Act.

Following is a brief explanation of the laws and how they might impact Illinois employers.

The Illinois Workplace Transparency Act Restricts Confidentiality and Arbitration Clauses in Certain Employment Agreements and Requires Annual Sexual Harassment Training

Earlier this year, Governor Pritzker signed the expansive Workplace Transparency Act ("WTA") in an effort to further address the issues raised by the #MeToo movement. This law becomes effective on Jan. 1, 2020.

Notably, the WTA applies not just to employees, but also to non-employees who directly perform services for the employer pursuant to a contract, such as a contractor or consultant.

In substance, the WTA contains several key prohibitions, restrictions and requirements impacting Illinois employers:

1. The WTA prohibits Illinois employers from requiring employees to arbitrate claims arising under any law enforced by the Equal Employment Opportunity Commission ("EEOC") or Illinois Department of Human Rights ("IDHR"), such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Any such arbitration clause

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contained in an agreement entered into after Jan. 1, 2020, may be deemed void unless: (a) the agreement is provided to all parties; (b) the employee or job applicant has 21 calendar days to consider the agreement before it is executed; (c) consideration, such as monetary or other benefits, is given in exchange for the agreement; and (d) the agreement does not preclude the employee from reporting unlawful employment practices or other criminal violations to any federal, state or local agency.

It is worth noting that because portions of the WTA conflict with the Federal Arbitration Act ("FAA"), it is possible that a court may conclude that that those conflicting provisions of the WTA are preempted by the FAA. Indeed, in a recent case decided this summer relating to a New York state law similar to the WTA, the court held that the state law prohibiting employers from enforcing mandatory arbitration clauses with respect to sexual harassment claims was preempted by the FAA, meaning that the state law was invalid. *See Latif v. Morgan Stanley & Co., No. 18 CV 11528* (S.D.N.Y. June 26, 2019).

2. Like many other state laws, the WTA restricts employers from entering into agreements with employees and contractors, such as settlement agreements, that contain a confidentiality clause. These clauses are often geared toward concealing sexual harassment and other claims raised by the employee. While confidentiality clauses remain permitted in certain circumstances under the WTA, it will be more difficult for employers to include them as a boilerplate term of many employment agreements.

3. The WTA requires all Illinois employers with a single employee in the state to provide annual sexual harassment training for all employees, and training for new hires within 90 days of hiring. Such training has never been required under Illinois law. The IDHR is required to create a free model sexual harassment training program for employers, but the training is not yet available.

The Cannabis Regulation and Tax Act and Right to Privacy Act Prohibits Disciplinary Action Against Employees for Off-Duty Use of Marijuana

Joining the ranks of 10 other states that have legalized recreational marijuana, Governor J.B. Pritzker signed the Cannabis Regulation and Tax Act ("Cannabis Act") into law earlier this year, legalizing the sale, possession and use of marijuana for recreational use by adults over the age of 21. Some of the key issues of consideration for employers are detailed below.

1. Employers Generally Cannot Discipline Employees for Off-Duty Use of Marijuana

Under the Illinois Right to Privacy in the Workplace Act ("Privacy Act"), employers cannot discipline or terminate employees for their consumption of lawful products outside of the employer's workplace and during non-work and non-call hours.

The Cannabis Act expanded the Privacy Act's definition of "lawful products" to include all products that are lawful under state law, which now includes marijuana. As a result, employers may not discipline or discharge employees who

consume recreational marijuana while off duty. Under the Privacy Act, employees who are wrongfully disciplined or terminated for marijuana consumption may pursue and recover actual damages, attorneys' fees, costs and statutory penalties for violation of the statute.

2. Possible Federal Exemption?

The Cannabis Act explicitly states that it does not impact an "employer's ability to comply with federal or state law or cause it to lose a federal or state contract or funding." 410 ILCS 705/10-50(g). Marijuana is still classified as an illegal Schedule I controlled substance at the federal level. Arguably, then, if an employer is a government contractor required to comply with the federal Drug Free Workplace Act, a recipient of federal funds, or is subject to certain federal law, such as the Department of Transportation or Federal Aviation Regulations, the employer may not be required to comply with the Cannabis Act. It may, instead, be permitted to discipline its employees for off-duty and off-site use of marijuana in addition to on duty use and possession. Interestingly, hospitals and other healthcare providers that receive Medicare reimbursements are not considered government contractors, nor are they automatically subject to the Drug Free Workplace Act. Those entities would, therefore, likely be required to comply with the Cannabis Act.

3. Employers May Continue to Implement Drug-Free Workplace Policies

While employers are prohibited from disciplining or terminating employees who consume marijuana off-site and during non-work or non-call hours, they still have the right to maintain zero tolerance policies and ban the use of marijuana in the workplace. Employers may also discipline and discharge employees who violate such workplace policies.

With that being said, employees should exercise caution in taking disciplinary action against employees who fail a drug test or who are suspected of working under the influence of marijuana. A positive test result, by itself, is likely insufficient to justify disciplinary action. Evidence of impairment on the job seems to be required. And, employers must have a "good faith belief" that an employee was impaired based on "specific, articulable symptoms" that negatively impacted that employee's job performance. This makes disciplining an employee for marijuana use much more difficult.

Employers also have the right to administer random drug tests if the testing is conducted in a nondiscriminatory manner. Employees with positive drug test results must be given a "reasonable opportunity" to contest the basis for the result. The term "reasonable opportunity" is not defined by the Cannabis Act and remains subject to interpretation.

4. Employers May Not Inquire About Expunged or Sealed Records Relating to Marijuana Possession

The Cannabis Act will result in the expungement of the criminal records of approximately 800,000 individuals who were arrested for or convicted of purchasing or possessing 30 grams or less of marijuana.

Under the Illinois Human Rights Act, employers

are prohibited from inquiring into or discriminating against employees and job applicants based on expunged or sealed criminal records. It is unlikely that all cannabis related arrests and convictions will be expunged or sealed by the state of Illinois by Jan. 1, 2020. For that reason, employers should be cautious before rejecting an applicant or disciplining an employee based on a criminal background check revealing an arrest or conviction for a marijuana related offense.

The Illinois Equal Pay Act Prohibits Employers From Asking Job Applicants About Their Salary History

The amended Equal Pay Act, which went into effect in September 2019, bans employers from inquiring into a job applicant's prior salary and benefits at any stage of the hiring process. Even if an applicant voluntarily discloses his or her salary history, the employer may not consider or use that information in deciding whether to hire the applicant or to offer a certain level of compensation. There are a few narrow exceptions to these prohibitions, including when an applicant's salary is a matter of public record or when the applicant is applying for a position with the same employer.

The amended Equal Pay Act also prohibits employers from placing restrictions on an employee's right to discuss wages and benefits in the workplace. To that end, employers may not require employees to sign an agreement, such as an employee handbook, agreeing not to disclose salary information or otherwise prohibiting the discussion of wages.

The Illinois Human Rights Act Expands the Definition of "Employer" To Include Those With Only One Employee, and Extends Protection to Non-Employees and Others Who Believe They Are Members of a Protected Class

The Illinois Human Rights Act ("Human Rights Act") was subject to a number of amendments which go into effect on July 1, 2020. Of importance, the amended Human Rights Act significantly expands the scope of the definition "employer." In the past, the Human Rights Act generally only applied to employers with 15 or more employees. The amended Human Rights Act, however, will apply to employers with as few as ***one*** employee. All businesses with one or more employees should be aware that they may now be subjected to discrimination claims that were not previously permitted under state law.

The Human Rights Act was also amended to include a more expansive definition of the term "unlawful discrimination." Soon, employees and job applicants who "perceive" that they are part of a protected class or possess protected characteristics (such as race, color, religion, national origin, etc.), may also pursue such claims, regardless of whether that perception is accurate.

Lastly, an amendment to the Human Rights Act will permit non-employees, such as contractors and consultants, to bring harassment and discrimination claims against employers.

The Victims' Economic Security and Safety Act Is Expanded to Provide Protections to Victims of 'Gender Violence'

The Victims' Economic Security and Safety Act ("VESSA") grants rights to employees who are victims of domestic or sexual violence, or who have family or household members who are victims of domestic or sexual violence, allowing them to take up to 12 weeks of unpaid leave during any 12-month period to seek medical help, legal assistance, counseling, safety planning and any other assistance.

An amendment to VESSA, which will go into effect on Jan. 1, 2020, extends protections to victims of "gender violence." Under the statute, gender violence includes threats and acts of violence committed on the basis of a person's actual or perceived sex or gender, as well as physical intrusions or invasions of a sexual nature that satisfy the elements for a criminal offense and which are committed under coercive conditions.

Employees who believe that their rights have been violated under the VESSA may pursue a cause of action before the Department of Labor, seeking damages in the form of lost compensation, equitable relief, reasonable attorneys' fees and costs.

The Artificial Intelligence Video Interview Act Places Restrictions On the Use of Artificial Intelligence in the Interview and Hiring Process

The Artificial Intelligence Video Interview Act ("AI Act"), which becomes effective on Jan. 1, 2020, requires employers who use AI technology to analyze job applicants' video interviews during the recruiting and hiring process to provide certain disclosures and obtain consent from job

applicants.

Specifically, employers who utilize such technology must ensure that they: (1) notify applicants prior to the interview that artificial intelligence may be used to analyze the applicants' video interviews for fitness for the position; (2) provide each applicant with information in advance of the video interview explaining how the artificial intelligence works and what general characteristics are used to evaluate applicants; and (3) obtain consent from applicants to be evaluated by the artificial intelligence program.

Employers should also ensure that applicants' video interviews are kept confidential. Under the AI Act, employers are not permitted to share applicants' video interviews, except to such persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position.

Further, employers are required to destroy applicants' video interviews, upon request. Specifically, employers must, within 30 days after receipt of such a request from an applicant, delete the applicant's video interview(s), including copies, and instruct other persons who received copies of the video interview(s) to do the same

The AI Act does not define the term "artificial intelligence," nor does it specify how the statute will be enforced or whether an aggrieved job

applicant may pursue a private right of action.

The Hotel and Casino Employee Safety Act Requires Hotels and Casinos To Implement Anti-Sexual Harassment Policies and To Provide Certain Employees With Safety Devices

The Hotel and Casino Employee Safety Act (the "Hotel and Casino Act"), effective July 2020, requires hotels and casinos to develop and implement sexual harassment policies that include complaint-reporting and processing procedures, the relevant rights available to employees under state and federal law, and provide employees who are victims of sexual harassment with the option of working in a different vicinity than the immediate area where the harassment occurred. The policy must also include an anti-retaliation provision specifying that employers may not retaliate against employees who avail themselves of the rights provided under this law.

The Hotel and Casino Act requires hotels and casinos to provide employees who are assigned to work alone in guest rooms, restrooms or casino floors with a "safety notification" device, at the company's expense, which allows an employee to alert hotel or casino security or other relevant personnel if the employee reasonably believes that an ongoing crime, sexual harassment, sexual assault or other emergency is occurring in the employee's presence.

Employees whose rights are violated under the law may seek injunctive and equitable relief, including reinstatement and compensatory damages, as well as attorneys' fees and costs.

If you have any questions about this Alert, or if you would like assistance in updating your employment policies and procedures in compliance with newly enacted Illinois laws referenced in this alert, please contact the authors listed below or the Aronberg Goldgehn attorney with whom you work.

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