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Legal Update

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BREAKING NEWS: NEW ILLINOIS WORKPLACE HARASSMENT LAWS

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On August 9, 2019, Governor J.B. Pritzker signed sweeping anti-harassment legislation, known as SB 75. SB 75 enacts new laws and amends existing laws seeking to address harassment, discrimination, and transparency in the workplace. Illinois has joined several other states, including California and New York, which have passed employment laws in response to the #MeToo movement.

The new laws impose additional requirements and restrictions on all Illinois employers beginning next year. At a minimum, employers with employees who work in Illinois will be required to provide employees with sexual harassment prevention training at least once a year—or risk penalties of up to $5,000. Employers may also need to update their handbooks, employment and separation agreements, confidentiality or nondisclosure agreements, and other related policies and documents to comply with the new laws.

The following summary of these laws is not intended to be an exhaustive listing of the many changes affecting employers next year. Employers should consult with counsel regarding the implications of the new laws for their individual businesses.

Limits on Employee Agreements under the Workplace Transparency Act *effective January 1, 2020*

The Workplace Transparency Act ("WTA") applies to employment agreements entered into, modified, or extended on or after January 1, 2020. The WTA limits the use of agreements with current, prospective, or former employees that contain restrictive terms relating to unlawful discrimination, harassment, or retaliation claims (e.g., offer letters, employment agreements, settlement, separation, or termination agreements, confidentiality/non-disclosure agreements). It generally places certain limits, depending on whether the agreement is with a prospective, current or former employee, on an employer's ability to include a non-disclosure or non-disparagement clause that would prohibit truthful statements or disclosures about allegedly unlawful employment practices involving discrimination, harassment, or retaliation. The WTA also limits agreements requiring prospective or current employees to arbitrate claims for unlawful employment practices under Illinois or federal law, unless specific requirements are met. The WTA recognizes that there are certain exceptions where employers may require confidentiality. For example, employees or others that (a) receive complaints or investigate claims of harassment or discrimination, (b) receive privileged communications regarding lawsuits involving discrimination or harassment, or (c) have access to confidential personnel files can bound by confidentiality.

Moreover, the WTA imposes new obligations on employers who wish to use confidential settlement or separation agreements to resolve alleged unlawful employment practices involving discrimination, harassment, or retaliation. Such agreements are valid and enforceable only if the prospective, current or former employee:

(1) prefers, as shown in writing, confidentiality and the confidentiality is mutually beneficial;

(2) is notified by the employer, in writing, of the employee's right to have an attorney or representative of his or her choice review the agreement before it is signed;

(3) receives valid, bargained for consideration in exchange for the confidentiality;

(4) is not, in the agreement, waiving any claims of unlawful employment practices that accrue after the agreement is signed;

(5) receives the agreement in writing and is given a period of 21 calendar days to consider the agreement before signing, during which the employee may sign the agreement at any time, knowingly and voluntarily waiving any further time for consideration; and

(6) is given seven calendar days following the execution of the agreement to revoke the agreement, and the agreement is not effective or enforceable until the revocation period has expired, unless the employee knowingly and voluntarily waives such right.

Employers should be aware that employees who successfully challenge the validity and enforceability of a contract (whether an employment agreement, settlement agreement, separation agreement or other agreement) for violating the WTA will be entitled to receive their attorneys' fees and costs. Employers should also be aware that the federal Tax Cuts and Jobs Act of 2017 is not affected by the WTA. Under that federal tax law, there is no employer tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if it is subject to a nondisclosure agreement." This includes no deduction by an employer for attorneys' fees in connection with such a settlement.

New Employer Responsibilities under the Illinois Human Rights Act *effective January 1, 2020*

Illinois has also amended the Illinois Human Rights Act ("IHRA") to expand the coverage of the IHRA and the responsibilities of employers under it. As mentioned above, starting next year, all employers with employees who work in Illinois will be required to provide sexual harassment prevention training at least annually to employees. The required annual training must meet certain minimum standards that the Illinois Department of Human Rights ("IDHR") will set when it creates a "model program". It is not clear when the IDHR will announce these standards or release the model program. Employers who fail to comply with the new annual training requirements may face civil penalties of up to $5,000, based on the number of offenses and the employer's size. Employers who operate restaurants and bars must also: (1) provide a written sexual harassment policy, in English and Spanish, to their employees during their first calendar week of employment, and (2) provide supplemental training (meeting or exceeding additional standards to be developed by the IDHR) specifically aimed at the prevention of sexual harassment in the restaurant/bar industry (including specific conduct, activities, or videos related to the industry) in addition to the general annual harassment training requirement.

The amended IHRA prohibits discrimination and harassment not just based on an individual's actual protected characteristic (e.g., an individual's sex, disability, or race), but also an individual's *perceived* characteristic. In other words, discrimination or harassment based on a perception that the individual is a member of a protected group (e.g., an individual's perceived sexual orientation) can expose an employer to liability—even if the individual does not have that characteristic. Moreover, employers now will be responsible under the IHRA for sexual and other harassment of their non-employees (i.e., independent contractors and consultants who are directly performing services for the employer) (a) committed by managerial or supervisory employees, or (b) if the employer becomes aware of harassing conduct by non-

managerial or nonsupervisory employees and fails to take reasonable corrective measures. (The IHRA already imposes responsibility on employers for sexual harassment of employees by non-employees.) The amendment also expands the definition of "working environment," so that it is no longer limited to a physical location where an employee is assigned to perform his or her duties.

Beginning July 1, 2020, the IHRA will impose new reporting requirements on all employers with one or more Illinois employees. Employers must submit annual reports to the IDHR disclosing, among other information, adverse judgments or administrative rulings against the employer for sexual harassment or unlawful discrimination. Failure to do so may result in fines of up to $5,000. The IDHR will also have the authority, when investigating a claim under the IHRA, to require an employer to disclose the number of settlements that the employer entered into during the preceding five years, or less at the IDHR's request, relating to any alleged act of sexual harassment or unlawful discrimination.

Expanded Rights under the Victims' Economic Security and Safety Act *effective January 1, 2020*

The Victims' Economic Security and Safety Act ("VESSA") was originally passed to protect victims of domestic and sexual violence and requires Illinois employers to provide leave to support those victims while they obtain assistance and recover. SB 75 expands the coverage of VESSA to provide employees with leave rights due to gender violence (in addition to domestic and sexual violence), irrespective of whether the violence has any relationship to an employee's employer or place of work. Gender violence includes acts of violence or aggression based on a person's actual or perceived sex or gender, physical intrusions or invasions of a sexual nature under coercive conditions, and related threats. VESSA applies to all Illinois employers. It requires employers to provide at least four, and up to 12 (depending on the number of employees the employer has), weeks of unpaid leave due to domestic, sexual, or gender violence and prohibits employment discrimination based on domestic, sexual, or gender violence.

Sexual Harassment Victim Representation Act *effective January 1, 2020*

This new act prohibits a union representative from providing dual representation in any proceeding to both the victim and the alleged perpetrator of sexual harassment when they are members of the same union. Instead, unions must appoint separate union representatives to represent the parties.

Hotel and Casino Employee Safety Act *effective July 1, 2020*

This new act seeks to protect hotel and casino employees from sexual assault and harassment by guests. Hotel and casino employers will be required to provide employees with free notification or safety devices (i.e., "panic buttons") if they are assigned to work alone, or with no other employee in the area, in a guest room, restroom, or on the casino floor. Employees may use the panic buttons to summon help if they reasonably believe that a crime, sexual harassment, sexual assault, or other emergency is occurring. Hotel and casino employers must also adopt, post and provide to employees an anti-sexual harassment policy in English and Spanish designed to protect employees against sexual assault and harassment by guests. The City of Chicago already requires hotel employers to provide portable "panic buttons" to certain employees under the Chicago "Hands Off Pants On" ordinance.
