Get Your Acts Together, Act IX: The Workplace Transparency Act

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On August 9, 2019, Illinois Governor J.B. Pritzker signed the Workplace Transparency Act into law. In Illinois, employers cannot force - by term or termination - employees to maintain silence in the presence of harassment. Additionally, they need to proactively train employees to prevent the harassment in the first place.

What is an "Employer" under this Act?

Following (and administered by) the Illinois Human Rights Act, an Employer is "any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental disability unrelated to ability, pregnancy, or sexual harassment."

Do I have your attention now?

Prohibited Terms and Conditions

The Act provides that "An employer may not enter into a contract or agreement with an employee or applicant, as a condition of employment, promotion, compensation, benefits, or change in employment status or contractual relationship, or as a term, condition, or privilege of employment, if that contract or agreement contains a nondisclosure or nondisparagement clause that covers harassment or discrimination as provided under Section 2-102 of the Illinois Human Rights Act."

Employers may not seek to enforce such agreements, nor retaliate against an applicant or employee for reporting, resisting, opposing, or assisting in the investigation of harassment or discrimination.

Exceptions for Settlements, Investigations, and Unions

Like any good law, exceptions abound! Settlements - so long as they are mutually agreed upon and show no sign of duress, influence, or trickery, may be upheld. However, the promise to refrain from disparagement and disclosure must go both ways -- unilateral provisions are out. Unless expressly waiving the right, applicants and employees must have 21 days to review a settlement, and 7 days thereafter to change their minds.

Investigations are also excused from the same regulations, and with good reason: when conducting a meticulous inquiry into allegations of harassment, discrimination, or both, employment lawyers, workplace investigators, and human resources professional alike often depend on some form of (temporary) confidentiality. When on a truth-seeking mission, it's best to leave little room for rumors and politics. For this reason, and employer may request that an employee participating in such an investigation hold her cards close to the vest "during the pendency of that investigation." As for those human resources professionals, they can also be required to maintain confidences.

Unions, too, are exempt. Simply put, the terms of a Collective Bargaining Agreements trump the Act.

Can an Employer Still Force Arbitration?

As any good lawyer would say: yes and no. (Also, it depends). Since that Epic decision back in 2018, arbitration agreements seem to do no wrong. But under the Workplace Transparency Act, Illinois employers must take a hard look at any boilerplate arbitration agreements and strike any language forcing arbitration on claims of harassment or discrimination. Also (and this is very important), if the employer provides the arbitration agreement, there is a rebuttable presumption that the following terms are unconscionable:

An inconvenient venue/Forum non conveniens (noun). definition: "A requirement that resolution of legal claims take place in an inconvenient venue. As used in this paragraph, "inconvenient venue" means: (i) for State law claims, a place other than the county in which the employee or applicant resides or the contract was consummated; and (ii) for federal law claims, a place other than the federal judicial district in which the employee or applicant resides or the contract was consummated.

A waiver of the applicant or employee's right to assert claims or seek remedies provided by State or federal statute.

- A waiver of the employee or applicant's right to seek punitive damages as provided by law.
- A provision limiting the time that an employee or applicant may bring an action to a period shorter than the applicable statute of limitations.
- A requirement that the employee or applicant pay fees and costs to bring a legal claim substantially in excess of the fees and costs that State or federal courts require to bring a claim.

Sexual Harassment Training (now Mandatory)

Training is always a good idea, and now it is required. Per the Act, the Illinois Department of Human Rights will produce a model sexual harassment prevention program. "Every employer shall use the model sexual harassment prevention training program under this Section or establish a training program for employees and supervisors to prevent sexual harassment that equals or exceeds the minimum standards provided by the model training. The sexual harassment prevention training shall be provided to all employees on an annual basis."

When does the Act take effect?

The EEOC reports that 25-85% of working women have experience sexual harassment on the job, and Illinois has taken major steps to say #TimesUp. The Workplace Transparency Act goes into effect on July 1, 2020, but you might as well get started now with good policy and trainings. Contact Emily Wessel Farr today to learn more.