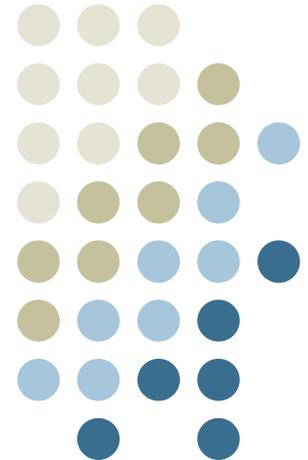


ANTI-HARASSMENT/OMNIBUS BILL and Other EEO Updates

Beverly P. Alfon
Presenter
SmithAmundsen LLC
December 4, 2019



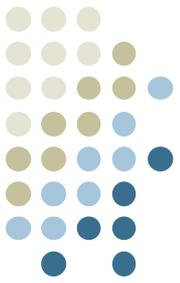
January 1, 2020



Senate Bill 75 will impact every employer and common workplace practices, such as arbitration agreements and confidentiality provisions in settlement agreements. It amends several existing laws and creates three new Acts: the Workplace Transparency Act; the Sexual Harassment Victim Representation Act; and the Hotel and Casino Employee Safety Act.

The Workplace Transparency Act and Sexual Harassment Representation Act, along with the amendments to the Uniform Arbitration Act, the Illinois Human Rights Act, and the Victims' Economic Security and Safety Act, go into effect January 1, 2020. The Hotel and Casino Employee Safety Act goes into effect July 1, 2020.

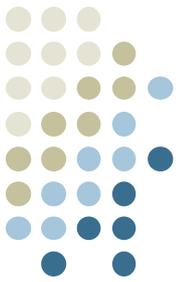
Combatting Harassment/Discrimination in the Workplace By Law



These new laws and amendments implement various measures aimed at combatting harassment and discrimination in the workplace by, among other things:

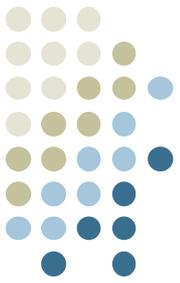
1. restricting the use of confidentiality and non-disclosure provisions in certain types of employee agreements;
2. limiting mandatory arbitration of discrimination, harassment, and/or retaliation claims;
3. requiring annual sexual harassment prevention training;
4. instituting compulsory unpaid leave for victims of gender violence; and
5. introducing mandatory annual disclosures of certain information to the Illinois Department of Human Rights.





AMENDMENTS TO THE IL HUMAN RIGHTS ACT

Expansion of Employee Protections



- “Unlawful discrimination” will be defined to include discrimination based on an individual’s perceived (and not only actual) race, national origin, age, sex or other protected characteristic;
- Employers can be held liable for unlawful harassment perpetrated against nonemployees (such as consultants, contractors, etc.) in the workplace; and
- Unlawful harassment will be prohibited not only in the physical location the employee is assigned for work-related purposes, but also outside of that location.



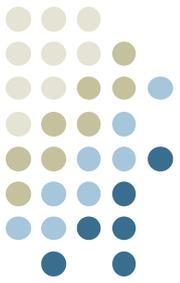
Expected Expansion of Employer Liability



- In 2009, the IL Supreme Court issued *Sangamon County Sheriff's Department v. Illinois Human Rights Commission* → **employers are strictly liable for sexual harassment by supervisors, regardless of whether the employer knew about the conduct.**
- Although it may take a few years for courts to rule on the application of Sangamon County to the amended IHRA, employers should expect expanded liability based on supervisor conduct that constitutes harassment based on race, age, religion, sexual orientation, and all other characteristics covered by the IHRA.
- Proper training, policies, and procedures will become even more important than they already are.



Mandatory Reporting to IDHR



Beginning **July 1, 2020, and each July 1 thereafter**, ALL employers, labor organizations and units of local government will be required to disclose the number of final, non-appealable adverse administrative or judicial decisions of sexual harassment and discrimination against them (entered anywhere in the U.S.) to the Illinois Department of Human Rights.

Mandatory Reporting to IDHR



- 1) The total number of sexual harassment or unlawful discrimination FINAL & NON-APPEALABLE adverse judgments or administrative rulings during the preceding year (NOTE: anywhere in the U.S. for IHRA covered employees);
- 2) Whether any equitable relief was ordered against the employer in any FINAL & NON-APPEALABLE adverse judgment or administrative ruling; and
- 3) How many FINAL & NON-APPEALABLE adverse judgments or administrative rulings in each of the following sub-categories:



Mandatory Reporting to IDHR



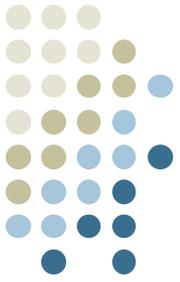
- a) Sexual harassment;
- b) Discrimination or harassment on the basis of sex;
- c) Discrimination or harassment on the basis of race, color, or national origin;
- d) Discrimination or harassment on the basis of religion;
- e) Discrimination or harassment on the basis of age;
- f) Discrimination or harassment on the basis of disability;
- g) Discrimination or harassment on the basis of military status or unfavorable discharge status;
- h) Discrimination or harassment on the basis of sexual orientation or gender identity; and
- i) Discrimination or harassment on the basis of any other characteristic protected under the IHRA.

Disclosure to IDHR Upon Request



- IF THE IDHR MAKES A REQUEST, you must disclose the NUMBER of settlements entered into with anyone (again, focus is on IHRA covered employees) alleging sexual harassment or unlawful discrimination in the workplace --- by category referenced above --- during the prior 5 years.
- **HOWEVER**, the law prohibits the IDHR from relying on the existence of any settlement to support a finding of substantial evidence and it is not subject to FOIA.

Mandatory, Annual Anti-Harassment Training



Employers in Illinois will be required to train ALL EMPLOYEES, ANNUALLY regarding prohibitions against unlawful sexual harassment.

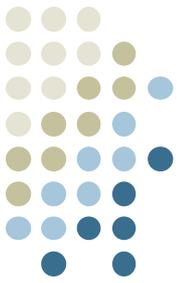
The mandatory training must include:

- (1) the definition of unlawful sexual harassment and examples of the same;
- (2) a summary of relevant federal and State statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- (3) the responsibilities of employers in preventing, investigating and taking corrective action in response to sexual harassment.

The Illinois Department of Human Rights (the Department) is expected to release model training for this purpose.

Practical Pointer:

Consider Workplace Bullying Policy

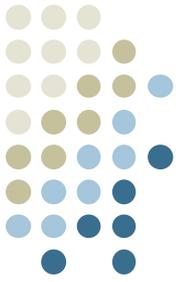


- Right now, it is not specifically, legally prohibited by Illinois law or federal law.
- Often leads to allegations of harassment based on gender, age, race, and other protected characteristics.
- Anti-bullying initiatives are on the rise.
- Workplace policies promoting harmony, cooperation, professionalism and non-violence are key.



Practical Pointer:

Serious Enforcement of Harassment Policies

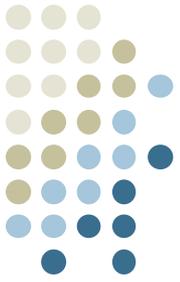


- Anti-harassment policies must be properly communicated to all employees—from entry-level to C-Suite.
- All employees should be told, in no uncertain terms, on day one of their employment and regularly thereafter, that they have the right to NOT be sexually harassed at work.
- Company management—all the way to the top of the organization—must also be put on notice that employees have the right not to be sexually harassed at work, and that credible allegations of harassment will carry real consequences for those who engage in such unacceptable behavior.



Practical Pointer:

Serious Enforcement of Harassment Policies



- Employees must also be trained on how to make internal complaints of harassment within the company. On that point, employees should know that they can contact human resources, or any appropriate member of management with whom the employee is comfortable with, to disclose improper conduct without fear of retaliation.
- Training must also extend to human resources and all members of management, so that they know to recognize harassment complaints for what they are—and so the company’s investigation and enforcement procedures can promptly be put into action.
- Management must take all complaints or possible situations of harassment seriously, and investigate them to their reasonable conclusion.





WORKPLACE TRANSPARENCY ACT

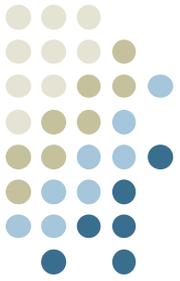
WTA: Limitations on Non-Disclosure and Confidentiality Language



- Prohibits any agreement or other document from restricting an employee from reporting any allegations of unlawful conduct to federal, state, or local officials for investigation.
- Prohibits severance and settlement agreements from containing confidentiality/non-disclosure provisions related to alleged unlawful employment practices under any law enforced by the Illinois Department of Human Rights (IDHR) or the EEOC (i.e., Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, the Genetic Information Nondiscrimination Act, and the Illinois Human Rights Act), unless certain conditions are met.



WTA: Limitations on Non-Disclosure and Confidentiality Language (cont'd)

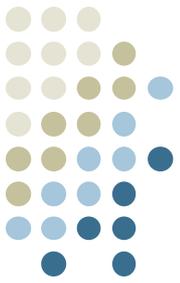


An individual CAN consent to non-disclosure and confidentiality, despite the general prohibition IF:

- Confidentiality is the preference of the employee (in writing) and it is mutually beneficial to both parties;
- Employer notifies the employee in writing of the employee's right to have an attorney or representative of his or her choice review the settlement or separation agreement before it is executed;
- There is consideration exchanged for confidentiality;
- The agreement does not waive any future claims of unlawful employment practices after the date the agreement is signed;
- The agreement is provided in writing to the employee and the employee is given 21 days to consider the agreement, and the employee is given seven days after signing the agreement to revoke the agreement (unless waived by employee, in writing).



WTA: Limitations on Arbitration Agreements



- Prohibits any unilateral condition of employment that requires an employee to waive or arbitrate any existing or future claim related to an unlawful employment practice under any law enforced by the IDHR or the EEOC.
- The WTA permits employees to recover reasonable attorney's fees and costs incurred in challenging a contract rendered unenforceable by the WTA.

WTA: Limitations on Arbitration Agreements

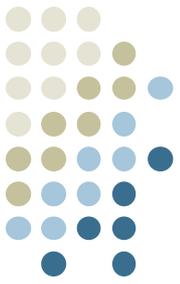


HOWEVER, WTA does permit employers and employees to enter into MUTUAL arbitration agreements, so long as the agreement is in writing, demonstrates bargained for consideration from both parties, and acknowledges the employee's right to:

- Report any good faith allegation of unlawful employment practices or criminal conduct to federal, state, and local authorities;
- Participate in a proceeding with any federal, state, or local authorities enforcing discrimination laws;
- Make truthful statements or disclosures required by law, regulation, or legal process; and
- Request or receive confidential legal advice.

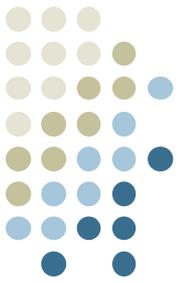


WTA: Limitations on Arbitration Agreements



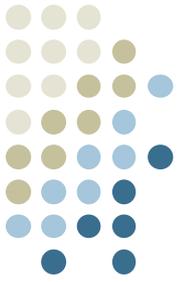
- WTA amends the Illinois Uniform Arbitration Act by providing that an employer's failure to comply with the terms of the WTA may invalidate an otherwise enforceable arbitration agreement.
- Including a brief opt-out period will also go a long way to establishing that the agreement is not compulsory.
- Nothing appears to prevent the individual from waiving monetary compensation or other relief against the employer.





AMENDMENTS TO THE VICTIMS' ECONOMIC SECURITY AND SAFETY ACT (VESSA)

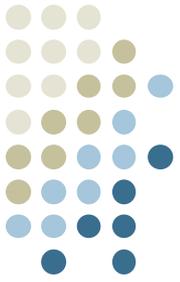
VESSA Applies to Gender Violence



Requires employers to allow an employee who is the victim of “gender violence” and/or has a family member who is the victim of gender violence to take between four and 12 weeks of unpaid, job-protected leave from work during any 12-month period, depending upon the size of the employer.

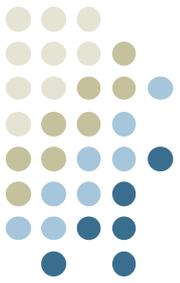
Previously, VESSA only applied to victims who experienced “domestic or sexual violence.” s.

VESSA Applies to Gender Violence

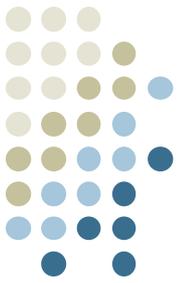


- “Gender violence” includes acts or realistic threats of violence or aggression that are committed, at least in part, on the basis of a person’s actual or perceived sex or gender and physical intrusions or physical invasions of a sexual nature.
- This means that it is that possible sexual harassment in the workplace will trigger VESSA protections; including leave mandate.
- “Gender violence” need not to result in criminal charges, prosecution, or conviction to be covered by VESSA.





AMENDMENTS TO ILLINOIS EQUAL PAY ACT



IL Equal Pay Act

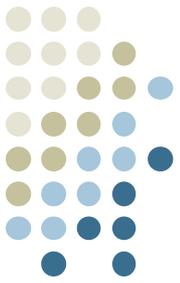
Amended by HB834

Effective September 29, 2019

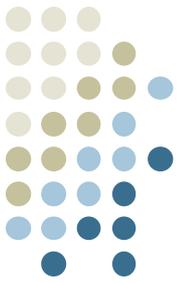
- Equal work now means --- substantially similar (so, lessens the standard in favor of the worker) --- in skills, effort and responsibility.
- No salary or wage inquiry is permitted.
- Special damages of up to \$10k are now recoverable (in addition to other make whole remedies – i.e. back pay, and attorneys’ fees).
- NOTHING prevents an applicant from volunteering the information without any prompting --- provided employer does not use that info against the individual.
- NOTHING prevents an employer from asking about salary or wage expectations.



IL Equal Pay Act

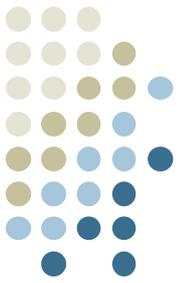


- Defenses to pay disparity continue to include MERIT, SENIORITY, QUANTITY OR QUALITY OF WORK, but the “ANY OTHER FACTOR OTHER THAN SEX OR RACE” now is limited... **“any other factor that is job related and consistent with a business necessity.”**
- Cannot prohibit non-HR employees from discussing and disclosing what they earn --- and can’t require said employees to agree to waive such rights or keep such information confidential.



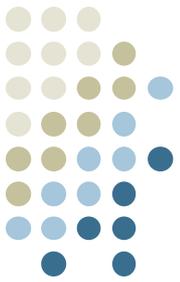
HOTEL AND CASINO EMPLOYEE SAFETY ACT

Hotel and Casino Employee Safety Act



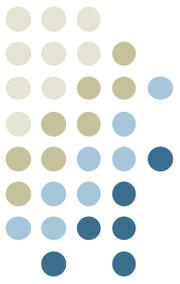
- It requires all hotels and casinos to provide its employees who are assigned to work alone in a guest room, restroom, or casino floor, with a notification device that the employee may use to summon help if the employee reasonably believes that an ongoing crime, sexual harassment, sexual assault, or other emergency is occurring in the employee's presence.
- The notification device must be provided at no cost to the employee.
- The Act also requires hotel and casino employers to develop an anti-sexual harassment policy that protects employees against sexual assault and sexual harassment by guests.





SEXUAL HARASSMENT VICTIM REPRESENTATION ACT

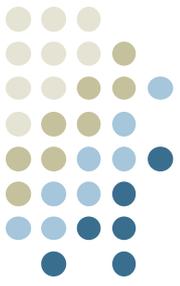
Sexual Harassment Victim Representation Act



- This law prohibits a union representative from representing both a union member who accused another member of sexual harassment and the accused member.
- Instead, the union must designate separate union representatives to represent the victim member and the accused member in the disciplinary proceeding.



RECOMMENDED ACTION ITEMS



TO DO

1. Take immediate steps to review all relevant policies and contracts—including employee handbook provisions, service and/or employment contracts, arbitration agreements and severance agreements—to ensure they are in compliance with the WTA.
2. Evaluate whether your internal sexual harassment training program meets the new requirements.
3. Develop a process for collecting information on any discrimination-based adverse judgments or administrative rulings.

TO DO (cont'd)



4. Review forms, policies and practices to ensure that you, and any recruiters they you may utilize, are not seeking or relying upon a job applicant's salary history information, from either the applicant or his or her current or former employers.
5. Analyze your compensation data. Are disparities defensible?
6. Review leave policies for compliance with amendments to VESSA.