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Amendment to Illinois Equal Pay Act and New Omnibus Sexual Harassment Bill Raise the Bar for Illinois Employers

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On July 31 and August 9, 2019, Illinois Governor J.B. Pritzker signed into law two bills that expand employee rights and raise the bar for employers. House Bill 834 amends the Illinois Equal Pay Act of 2003 (the "Act") and Senate Bill 75 establishes a range of employee protections related to sexual harassment, transparency, and safety. With these laws, Illinois joins several states making recent efforts to combat unequal pay and sexual harassment.

I. Amendment to the Illinois Equal Pay Act of 2003 ("HB 834")

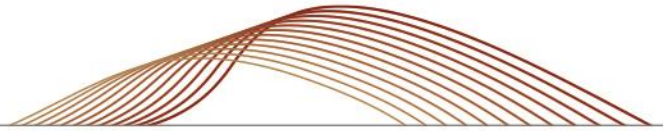
This amendment: (1) prohibits employers from requesting a job applicant's pay history and creates a new cause of action for employees who violate that prohibition; (2) lowers the bar to equal pay claims in Illinois and narrows employer defenses to those claims; and (3) establishes harsher penalties for violations of the Act.

Pay History Ban

Effective September 29, 2019, employers and employment agencies with four or more employees are prohibited from:

- Screening job applicants based on their pay history or relying on pay history in making employment or compensation-related decisions;
- Requiring that an applicant's prior wages or salary satisfy minimum or maximum criteria;
- Requesting or requiring, as a condition of being interviewed or considered for an offer, that an applicant disclose their prior pay history;
- Requiring employees to sign agreements prohibiting them from disclosing information about their own compensation; and
- Seeking pay history from any current or former employer of an applicant.

Employers may, however, seek pay history from a current or former employer if: (1) the applicant's pay history is subject to the Freedom of Information Act ("FOIA") or other equivalent laws; (2) the pay history was made public by the applicant's current or former employer; or (3) the applicant is a



current employee and is applying for another position with the same employer. Employers do not violate the Act merely because an applicant, without prompting, voluntarily discloses his or her current or prior pay history—so long as the employer does not rely on this information when making decisions regarding employment or compensation.

Employers may still require employees whose responsibilities involve or allow access to information about *other* employees' compensation to keep that information confidential.

An affected employee may bring a civil action within five years of a violation of the amendment's pay history provisions and seek to recover special damages up to $10,000, compensatory damages to the extent they exceed special damages, injunctive relief, costs, and attorneys' fees. The Illinois Director of Labor is authorized to supervise the payment of damages for pay history violations, and may bring an action to recover the damages, seek injunctive relief, and recover its costs. Employers who violate the Act's new pay history provisions are also subject to a civil penalty of up to $5,000 for each affected employee.

Lower Bar to State Equal Pay Claims

Prior to the amendment, the Act required employers to pay their employees the same amount for work that required "*equal* skill, effort, and responsibility." The amendment softens this standard by requiring the employee to show only that the work being compared required "*substantially similar* skill, effort, and responsibility."

Narrower Range of Defenses

Before the amendment, employers could defend disparate pay where the payment was based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service. The amendment narrows the fourth defense by requiring proof that:

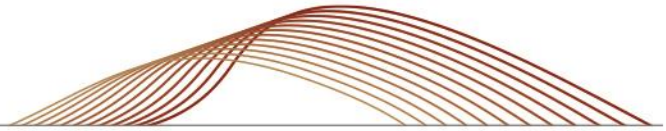
- The factor is not based on or derived from a differential in compensation based on sex or another protected characteristic;
- The factor is job-related and consistent with business necessity; and
- The factor accounts for the entire differential in pay.

Expanded Remedies for Unequal Pay Violations

The amendment increases employer liability for violations of the Act's equal pay provisions by permitting compensatory damages where an employer acts with malice or reckless indifference, and permitting punitive damages and injunctive relief "as may be appropriate."

Steps for Employers

The law takes effect September 29, 2019. In the interim, employers should consider analyzing their compensation data, bearing in mind that pay disparity under the Act is analyzed at a county level rather than by facility. Employers should also evaluate and revise as necessary their hiring processes, including applications, screening processes, interview guidelines, and compensation structures to ensure compliance with the amended Act. Finally, employers should consider providing training for



employees involved in the hiring process to convey the nuance and importance of the new legal requirements and prohibitions related to pay history.

II. Omnibus Bill Regarding Sexual Harassment, Transparency, and Safety

Senate Bill 75 is like many other recent state laws that respond to the #MeToo movement and impact 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.

Workplace Transparency Act ("WTA")

The WTA applies to contracts entered into, modified, or extended on or after January 1, 2020, except for collective bargaining agreements. It establishes different prohibitions for different kinds of employment agreements.

Unilateral Conditions of Employment. The WTA generally prohibits any agreement required by an employer as a *unilateral* condition of employment or continued employment that either:

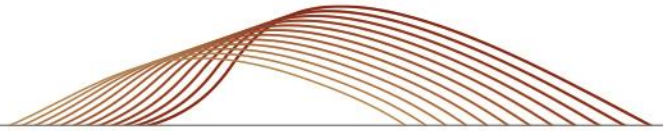
- Prevents an employee or applicant from making truthful disclosures about discrimination, harassment, or retaliation; or
- Requires the employee to arbitrate claims, or waive substantive or procedural rights or remedies related to, unlawful discrimination, harassment, or retaliation.

The former restriction is unlikely to affect most employers' policies. Significantly, however, the latter restricts employers' ability to require pre-dispute arbitration agreements as a unilateral condition of employment, unless such an agreement excludes from its coverage claims of discrimination, harassment, or retaliation.

Mutual Conditions of Employment. The WTA, however, sets forth parameters for employers to set forth *mutual* conditions of employment, even including pre-dispute arbitration agreements covering claims of discrimination, harassment and retaliation. Employers are permitted to enter into a contract as a *mutual* condition of employment or continued employment, provided that the contract is in writing, demonstrates actual, knowing, and bargained-for consideration from both parties, and acknowledges the employee's or applicant's rights to:

- Report good faith allegations of unlawful practices, including criminal conduct to appropriate authorities;
- Participate in proceedings with appropriate authorities enforcing discrimination laws;
- Make disclosures as required by law; and
- Request or receive legal advice.

Failure to comply with these requirements creates a rebuttable presumption that the contract is a unilateral condition of employment or continued employment. The WTA does not specify how an employer could rebut such a presumption. Perhaps more importantly, the WTA is silent on what effect such a rebuttal may have—a pressing question in light of the fact that the WTA only permits



employers to include otherwise prohibited clauses in contracts that are a mutual condition of employment if the requirements in this section are satisfied.

Potential Preemption and Conflicting Precedent. The WTA's restrictions on pre-dispute arbitration agreements covering claims of discrimination, harassment, and retaliation may well be preempted by the Federal Arbitration Act ("FAA") for agreements covered by the FAA. We expect this issue will be resolved in the courts.

Settlement and Termination Agreements. The WTA also limits confidentiality agreements in settlements of claims regarding unlawful employment practices. Such promises of confidentiality are permitted under the WTA only if:

- Confidentiality is the documented preference of the individual, and is mutually beneficial to both the individual and the employer;
- The employer notifies the employee or applicant, in writing, of their right to have an attorney or representative review the agreement before execution;
- Valid consideration is provided in exchange for the confidentiality;
- The agreement does not provide for waiver of future claims;
- The individual is provided with 21 calendar days to consider the written agreement before execution (waivable by the individual); and
- The individual is provided with at least seven days after execution to revoke their signature before the agreement becomes effective (waivable by the individual).

Employers are prohibited, however, from unilaterally including in any settlement or termination agreement any clause prohibiting the employee or applicant from making truthful statements about unlawful employment practices.

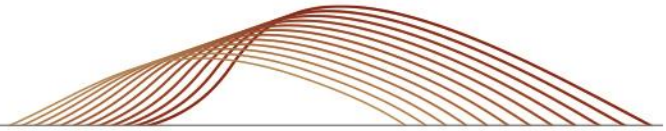
Exceptions for Certain Employees. The WTA contains exceptions permitting employers to require certain employees to maintain the confidentiality of allegations of unlawful employment practices, including employees assigned to investigate such allegations, those participating in such investigations, and employees who receive privileged communications as part of an employment dispute.

Remedies. Contract clauses that violate the WTA are void and severable from the balance of an otherwise enforceable contract. Employees who successfully challenge a contract under WTA are entitled to recover attorneys' fees and costs.

Amendment to the Illinois Human Rights Act ("IHRA")

Effective January 1, 2020, unless otherwise indicated below, Senate Bill 75 amends the Illinois Human Rights Act in several ways:

Perceived-As Discrimination. The amendment extends the discrimination protections to those *perceived* as belonging to any protected group.



Working Environment. The amendment provides that for the purposes of sexual harassment, an employee's "working environment" is not limited to the physical location in which an employee is assigned to perform their duties.

Harassment Defined. The amendment defines prohibited "harassment" as including unwelcome conduct on the basis of any category protected by the IHRA, including citizenship status, and prohibits harassment in the workplace—sexual or otherwise—against nonemployee contractors and consultants as well as employees. Notably, however, employers are only liable for harassment by non-managerial employees if they become aware of the conduct and fail to take reasonable corrective measures.

Annual Disclosure Requirements. Beginning July 1, 2020, employers with adverse judgments or administrating rulings against them in the preceding calendar year must disclose annually to the Illinois Department of Human Rights ("IDHR"):

- The total number of adverse judgments or administrative ruling during the prior year;
- Whether any equitable relief was ordered against the employer in any of those adverse judgments or administrative rulings;
- How many of those adverse judgments or administrative rulings involved (1) sexual harassment, or (2) discrimination or harassment on the basis of (i) sex; (ii) race, color, or national origin; (iii) religion; (iv) age; (v) disability; (vi) military status or unfavorable discharge from military status; (vii) sexual orientation or gender identity; or (viii) any other characteristic protected by IHRA.

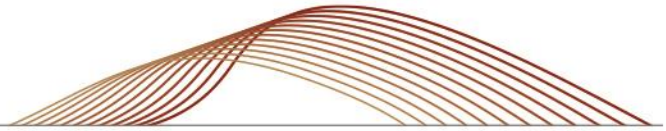
Information disclosed pursuant to these requirements is confidential and exempt from the Illinois Freedom of Information Act. IDHR will publish an annual report aggregating the information reported by employers, while ensuring no individual employer data is available to the public.

Disclosure of Settlements upon Request. Employers will also be required to disclose during IDHR investigations, at IDHR's request, certain information about agreements or settlements into which they have entered to resolve claims of discrimination or harassment over the prior five years. Failure to make required disclosures may result in civil penalties imposed by IDHR.

Annual Sexual Harassment Training. Employers will be required to train all of their employees at least once per year regarding sexual harassment prevention. The IDHR will provide a model training program for employees to use or adapt. Failure to provide the required training will result in civil penalties imposed by IDHR.

Restaurants and Bars. Restaurants and bars will be required to provide to new employees within their first week a written sexual harassment policy, which must be available in English and Spanish and satisfy various requirements. The policy must notify the employee how they can file charges with the IDHR or EEOC. IDHR will develop a supplemental model program specific to this industry and make it available to restaurants and bars at no cost. Restaurants and bars must use the model program or adapt it while adhering to various requirements. Violations of these industry-specific training obligations will result in civil penalties imposed by IDHR.

Requesting Dismissal of Pending Charges. The amendment permits employers and employees alike to request dismissal of a charge pending before IDHR if a lawsuit is filed based on the same issues underlying the charge.



Amendment to the Victims' Economic Security and Safety Act ("VESSA")

VESSA has historically provided employees who are the victim of domestic abuse or sexual violence with a certain amount of unpaid leave, depending on the size of the employer. The amendment, effective January 1, 2020, will expand this protection to victims of "gender violence", which is defined as including:

- Acts of violence or aggression satisfying the elements of a crime, committed at least in part on the basis of actual or perceived sex or gender;
- A physical intrusion or invasion of a sexual nature under coercive conditions satisfying the elements of a crime; or
- A threat of the conduct described in the above bullets causing a realistic apprehension that the originator of the threat will commit the act.

Importantly, the underlying conduct need not result in criminal charges, prosecution, or conviction to entitle the victim to relief under VESSA.

Hotel and Casino Employee Safety Act ("HCESA")

Effective July 1, 2020, HCESA imposes certain requirements on hotel and casino employers. First, they must provide to employees working in isolated places a safety notification device (i.e., a "panic button") to summon help in the event of sexual harassment. Second, they must implement a sexual harassment policy that protects employees from sexual harassment and assault by guests and encourages employees to immediately report such events.

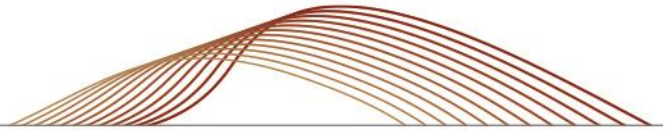
HCESA establishes a number of requirements for such a sexual harassment policy, which must be given to all employees, posted conspicuously in the hotel or casino, and be provided in English, Spanish, and any other language spoken by a predominant portion of their employees.

HCESA prohibits retaliation against employees for using the safety device, availing themselves to certain other protections under the Act, or disclosing, reporting, or testifying about any violation of the Act.

Employees claiming a violation of HCESA must, before filing suit, provide written notice to the employer and permit the employer 15 calendar days to remedy the alleged violation. If the employer fails to do so, the employee may bring suit against their employer seeking "all remedies available under the law or in equity" including without limitation injunctive relief, other equitable relief including reinstatement, compensatory damages, attorneys' fees, and costs. Economic damages for each violation are capped at $350 per each day the violation continues.

Sexual Harassment Victim Representation Act ("SHVRA")

SHVRA prohibits union representatives from representing in the same proceeding both the alleged victim and alleged perpetrator of sexual harassment. Unions are instead required to designate separate union representatives to represent each party where both parties are members of the same union.



Steps for Employers

To ensure compliance with WTA, employers should conduct a legal review of all employment-related agreements that may contain arbitration and confidentiality provisions, including agreements related to new hires, non-disclosure, settlement, and termination. Employers should also establish a process for ensuring that only compliant agreements are executed going forward, including modifications to and extensions of existing agreements entered into after January 1, 2020.

Employers should update their policies, handbooks, and training materials to align with the amendments to the IHRA and VESSA. Employers should also establish procedures for compiling and annually reporting to IDHR the adverse judgments and administrative decisions against them, and should retain information regarding prior settlements for potential IDHR requests. Employers that operate restaurants or bars should utilize or adapt the IDHR's upcoming harassment training. Those with hotel and casino operations should secure panic button devices for covered employees and establish a HCESA-compliant sexual harassment policy.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Chicago lawyers:

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