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New Year's Resolutions Aplenty for Illinois Employers

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While many employers view California as a particularly challenging state in which to do business due to the variety of "unique" workplace laws and regulations, Illinois is not very far behind after a rather busy legislative session during the first year of Governor JB Pritzker's term. Whether or not you plan to hit the gym in 2020 or eat more vegetables next year, here is a list of New Year's resolutions every organization should adopt if it has employees in Illinois:

☐ ***Make sure you are not asking applicants about their salary history***.

Hopefully, this is not on your list of New Year's resolutions because the bill went into effect on September 29, 2019 after being signed into law by Governor Pritzker over the summer. Under this new law, the Illinois Equal Pay Act has been amended to bar employers from asking a job applicant about their salary history. Illinois employers may no longer screen or disqualify applicants because of their current or prior salary, nor can they insist that an applicant disclose his or her salary history in order to be interviewed, considered for or offered employment. Forget about going straight to the source as the law also prohibits seeking such information from the applicant's former employer. Perhaps most significantly, the amendment also prohibits employers from factoring salary history information into compensation or hiring decisions even if an applicant provides the information voluntarily without prompting

☐ ***Allow your employees to discuss their wages or other compensation issues with each other***.

While Illinois employers can still prohibit select employees—human resources, for example—from disclosing confidential wage and salary information, they cannot otherwise place such restrictions on other employees. The ability to discuss compensation has long been protected by federal law, so this new Illinois law should not pose any particularly unique challenges for Illinois employers. That said, employers should take steps to ensure their managers understand the extent of the rights afforded their employees to openly discuss such issues, even if it has the potential to cause waves with their coworkers.

☐ ***Schedule sexual harassment training in the latter part of the year***.

Beginning July 1, 2020, Illinois employers will be expected to provide annual workplace sexual harassment training to employees and managers. While the IDHR will be required to develop and make available a model sexual harassment prevention training to the public at no charge, it is not clear at this time when that will take

place. In the meantime, employers may develop their own program or wait for the free model program to be released. Those employers that opt to create their own program must ensure that it includes an explanation of sexual harassment, examples of unlawful sexual harassment, a summary of relevant federal and state statutory provisions, and a summary of the employer's responsibilities under the law.

☐ ***Update your EEO policies***.

There have been several amendments to the Human Rights Act, which will become effective July 1, 2020. Importantly, with a few limited exceptions, the amendments make the Illinois Human Rights Act ("HRA") applicable to all Illinois employers, not just employers with 15 or more employees. The HRA will now also apply to working environments beyond the physical location at which employees perform their assigned duties, which means that remote workers who claim to have been harassed online may presumably bring a claim against their employer; whether that will apply to individuals employed outside of Illinois but work for an Illinois company or report to an office in Illinois, remains to be seen. This also means that employers would be well-advised to pay closer attention to off-site events such as holiday parties and ensure that any off-site incidents that are brought to the company's attention are addressed as if they had occurred in the workplace. EEO policies should also be revised to reflect the fact that the HRA now protects against discrimination or harassment on the basis of an individual's "perceived" status; meaning that an employee may now bring a claim that they were discriminated against or harassed because they were perceived to be from a certain country or of a certain sexual orientation, for example, even if that is not the case.

Employers that operate a restaurant, bar or casino will face additional requirements intended to protect their employees from sexual harassment, including the need to (1) provide certain employees with personal safety and notification devices that may be used to summon help if they are the victim of or are witnessing sexual harassment or a crime; (2) expressly inform each of their employees about the protections against sexual harassment and discrimination as provided by state and federal law (by giving them a copy of a harassment-free workplace policy); and (3) to take measures to separate employees from offending guests and accommodate employees who seek legal protection against offending guests.

☐ ***Reevaluate your drug testing policy and procedures***.

The Cannabis Regulation and Tax Act ("CRTA"), which goes into effect January 1, 2020, allows individuals 21 years of age and over to consume, possess and purchase cannabis. Unlike most of the other states that now allow recreational cannabis use, Illinois took the additional step of amending the Illinois Right to Privacy Act to include cannabis within the definition of lawful products. The Right to Privacy Act, often referred to as a smokers' rights law, prohibits employers from taking adverse actions (refusing to hire, terminating, demoting) against employees because they use a lawful product while not at work. While the CRTA does not prohibit employers from adopting policies concerning drug testing, use, or storage while at work or on call, an employer must—in order to discipline or discharge an employee—have a good faith belief that the employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of employee's job. The statute sets forth a number of factors that may be considered, such as disregard for the safety of the employee or others, carelessness, physical dexterity, agility, speech and irrational or unusual behavior, among others. If an employer elects to discipline any employee on the basis that the employee was under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to

contest the basis of the determination. The State has yet to issue regulations that provide guidance regarding what constitutes a "reasonable opportunity" to challenge such a finding; for now, employers would be wise to adopt a specific process that can be used to document the explanation offered by the employee and the company's ultimate conclusion. Given these requirements, employers will likely be unable to justify taking an adverse action against an employee because of a positive random test result or against an applicant due to a pre-employment test.

☐ ***Prepare the necessary disclosures regarding adverse judgments***.

The amendments to the Human Rights Act also require employers to make certain disclosures to the Illinois Department of Human Rights. Beginning July 1, 2020, employers must make annual disclosures to the IDHR with information about adverse judgments or administrative rulings against them in the prior year. The required disclosures cover the number of adverse judgments or administrative rulings, whether an employee obtained equitable relief, and a breakdown of the judgments and rulings by unlawful employment practice including sexual harassment and discrimination on the basis of sex, race, color, national origin, age, religion, disability, military status or unfavorable discharge from military status; sexual orientation or gender identity; and any other characteristic protected under the Human Rights Act. It is not yet clear—as no regulations have issued to date—the means by which these disclosures must be made. The IDHR will compile the reported information about adverse judgments and administrative rulings for publication in an annual report, but it will aggregate individual data to avoid exposing personal information. Note, also, that the IDHR while investigating a charge filed under the Illinois Human Rights Act, may request similar information about an employer's settlements in the preceding five years that involved allegations of sexual harassment or unlawful discrimination occurring in the workplace or involving an employee or corporate executive.

☐ ***Reassess your arbitration agreements***.

Beginning in January 2020, the Workplace Transparency Act ("WTA") bars employers from unilaterally requiring that a current or prospective employee waive, arbitrate, "or otherwise diminish" existing or future claims, rights, or benefits related to unlawful discrimination, harassment, or retaliation. Unilateral arbitration provisions or "agreements" are quite common and often presented as a condition of employment, so there are many employers that will be impacted by this new law. However, provisions that would be void in a unilateral agreement under the WTA may be allowed if an employer and the current or prospective employee mutually agree to it in writing, and the agreement reflects "actual, knowing, and bargained-for consideration" from both parties. To comply with the WTA, the agreement must acknowledge the employee's right to: (1) report a good-faith belief of an unlawful employment practice or criminal conduct to the appropriate governmental authorities; (2) participate in governmental proceedings; (3) make truthful statements or disclosures as required by law, regulation, or legal process; and (4) seek or receive legal advice. If an employer does not comply with these requirements, the WTA establishes a rebuttable presumption that the condition is unilateral and void as against public policy.