

Publications

#Metoo legislation set to take effect in Illinois



Employment Alert

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By: [Ryan Vann](#) | [Miriam Petrillo](#) | [Karun Ahuja](#)

Illinois is set to join the growing list of US states further protecting the rights of workers who have experienced sexual harassment, with the recently passed Workplace Transparency Act (WTA), which is expected to be signed by Governor JB Pritzker and which will largely take effect on January 1, 2020.

The WTA addresses many aspects of workplace discrimination and harassment, such as limiting non-disclosure and non-disparagement clauses, excluding certain claims from forced arbitration, mandating sexual harassment training and reporting, and broadening the scope of the worker protections against discrimination and harassment.

Many of the new limitations and obligations under the WTA mirror legislation recently passed in New York and California. Last year, the state of New York and New York City enacted comprehensive state anti-sexual harassment legislation (read more in our [Employment Alert here](#)). As of 2019, California employers also have new obligations and restrictions related to sexual harassment issues (read more in our [Employment Alert here](#)).

Illinois employers should be aware of and prepare for the following new requirements that should take effect in 2020:

Contract provisions that prevent employees from reporting discrimination and harassment or pursuing these claims in court will be restricted.

Illinois will prohibit employers from using non-disclosure or non-disparagement restrictions that cover harassment or discrimination. Employers should review their form employment and confidentiality agreements to ensure they carve out protected communications (including the ability to express concerns about workplace harassment or discrimination) from any restrictions on what an employee can say or disclose. Otherwise, these restrictions may be severed from any agreement that includes them and be ineffective.

Employers can use non-disclosure or non-disparagement clauses covering harassment or discrimination in separation or settlement agreements, if they follow procedures similar to those required under the Older Workers' Benefit Protection Act (OWBPA) to validly release federal age discrimination claims:

- the legal claims arise before the agreement is signed
- the clauses are mutually agreed upon and benefit both parties
- the employee/applicant is given 21 calendar days to review the agreement before its execution (similar to the OWBPA, this requirement can be knowingly and voluntarily waived) and
- the employee/applicant has 7 calendar days after signing the agreement to revoke it, and the agreement is not enforceable until that revocation period expires (unlike the OWBPA, the 7-day

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revocation period can also be knowingly and voluntarily waived).

The WTA also limits arbitration agreements. Under the WTA, unless an arbitration agreement creates an exception for discrimination and harassment claims and allows an employee to pursue these claims in arbitration or court, the arbitration clause will be unenforceable. In addition, the WTA will make it difficult to enforce arbitration terms that choose an inconvenient venue for disputes (*ie*, outside the county or federal district in which the employee/applicant resides or the contract was consummated); waive the employee's or applicant's right to assert or seek statutory claims or remedies; waive an employee's or applicant's right to seek punitive damages provided by law; limit the time that an employee/applicant may bring an action to a period shorter than the applicable statute of limitations; or require an employee or applicant pay substantial fees and costs to bring a claim. The WTA limitations on arbitration agreements may be inconsistent with federal law, and we anticipate they may be subject to challenge as being preempted by federal law.

Employers will be required to disclose annually judgments or settlements relating to harassment or discrimination.

Illinois will add mandatory annual disclosure requirements for employers. This requirement will go into effect on July 1, 2020.

All employers with one or more employees in Illinois will have to report information annually to the Illinois Department of Human Rights (IDHR) on: (1) settlements with employees over allegations sexual harassment or unlawful discrimination under the Illinois Human Rights Act (IHRA), the state's anti-discrimination and anti-harassment statute; and (2) final adverse judgments or final administrative rulings in favor of Illinois employees based on claims of sexual harassment or unlawful discrimination under any federal, Illinois, or local law prohibiting sexual harassment or unlawful discrimination.

Employers will be required to disclose the following information:

- the total number of settlements entered into during the preceding year
- a breakdown of the number of settlements based on protected characteristics
- the total number of adverse judgments or administrative rulings during the preceding year
- whether any equitable relief was ordered against the employer in any adverse judgment or administrative ruling and
- a breakdown of the number of adverse judgments or administrative rulings based on protected characteristics.

The IDHR may use the reported information to open an investigation and possibly bring a civil rights charge against an employer. Failure to comply with the reporting requirements is subject to penalties ranging from \$500 to \$5,000 per violation.

Employers will be required to provide annual sexual harassment and prevention training.

Illinois will require employers to provide annual sexual harassment and prevention training. A model training program will be published by the IDHR, which will set the minimum standards for the training. It is expected that the model program will include:

- a definition of sexual harassment
- examples of prohibited conduct
- identification of an employer's responsibility to prevent, investigate and address sexual harassment and
- a summary of federal and state laws addressing sexual harassment, including available remedies.

Failure to provide the required training is subject to penalties ranging from \$500 to \$5,000 per violation.

More information on the required trainings should be forthcoming from the IDHR, and Illinois employers should stay tuned.

Non-employees will be protected from harassment.

Illinois will extend harassment protections to contractors, subcontractors, vendors, consultants, and other contract workers. Currently, the IHRA protects employees and applicants for employment, but does not cover independent contractors. Once the WTA is effective, employers could be held liable for harassing conduct that substantially interferes with the work of an independent contractor and conduct that creates a hostile work environment adversely affecting an independent contractor.

Employees will be allowed up to 12 weeks of job-protected, unpaid leave if they or their family or household members experience sexual harassment.

The WTA will extend the protections of the Illinois Victims' Economic Security and Safety Act (VESSA) to cover sexual harassment. The VESSA currently allows employees to take up to 12 weeks of job-protected, unpaid leave for certain reasons if they or their family or household members experience

domestic or sexual violence. Effective January 1, 2020, in addition to domestic violence or sexual violence, sexual harassment will be among the qualifying reasons for taking leave under the VESSA. That sexual harassment does not need to have any connection to the workplace or to employment for an employee to take such leave. Employers should review and update their leave and VESSA practices and policies to ensure they capture this new requirement.

Discriminating against employees because of a perceived protected characteristic under the IHRA will be prohibited.

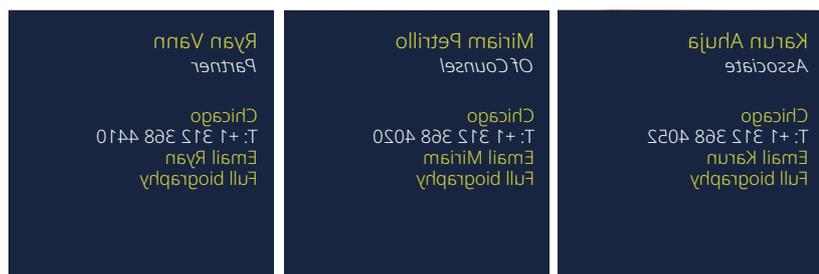
Currently, the IHRA does not specifically prohibit discrimination based on a perceived status in a protected class for all protected characteristics. This will change in 2020. The WTA will amend the IHRA to prohibit discrimination based on any *actual or perceived* protected characteristics. This means that an employer's conduct towards an employee can be discriminatory and unlawful even if the employer's conduct is based on the mistaken belief that the employee is a member of a protected class.

Illinois employers should already be familiar with the prohibition against this type of "misperception discrimination." At the state level, the IHRA already prohibits discrimination based on perceived sexual orientation. Also, the VESSA prohibits discrimination against an employee because the employee is perceived as a victim of domestic or sexual violence. At the federal level, the Americans with Disabilities Act (ADA) specifically prohibits discrimination against people with perceived disabilities. Furthermore, employers in Cook County likely know that a county ordinance already prohibits discrimination against employees based on the actual or perceived status in a protected class.

Please contact any of the authors or any of the attorneys in DLA Piper's Employment group for assistance or with any questions on these developments.

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