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Expansion of Illinois Workplace Transparency Act Requires Update to Employment Agreements

Amendments to the Illinois Workplace Transparency Act (WTA) under HB 3638 introduce new requirements and restrictions on employment agreements addressing workplace misconduct, effective for agreements entered into, modified, or extended on or after January 1, 2026. The WTA covers employers with one or more employees, including non-employee contractors and consultants who are directly performing services for the employer. Non-compliance renders conflicting provisions void as against public policy and exposes employers to damages in the event of litigation. Employers should:

1. Review agreements that restrict employees, former employees, or prospective employees from disclosing allegations of unlawful employment practices or engaging in concerted activity.

2. Revise such agreements to conform with the mandates of the WTA amendments.

Expansion of the WTA

Definition of Unlawful Employment Practices

The WTA ensures that employees are not prohibited by any agreement from reporting unlawful employment practices to federal or state authorities. The amendments broaden "unlawful employment practices." Previously, the WTA voided agreements that prevented an employee from making truthful statements or disclosures about alleged unlawful employment practices actionable under the Illinois Human Rights Act, the Equal Employment Opportunities Act, or Title VII of the Civil Rights Act of 1964, which we previously discussed in our blog post here. The amendments to the WTA expand that scope to include employment practices made unlawful under *any*

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state or federal law regulating employment that is enforced by the following agencies: the Department of Labor, Illinois Labor Relations Board, U.S. Department of Labor, the Occupational Health and Safety Administration, or the National Labor Relations Board. Inclusion of the additional state and federal agencies extends the application of the WTA beyond claims of discrimination, harassment, and retaliation to include other claims of unlawful employment practices, such as workplace safety, wage and hour claims, FMLA claims, and claims related to engaging in concerted activities to address work-related issues.

Protections Related to Concerted Activity

Employers are prohibited from entering into agreements that prevent or restrict employees from engaging in concerted activities to address work-related issues. "Concerted activity" includes collective bargaining, participation in labor organizations, or discussing work-related issues. The WTA does not apply to collective bargaining agreements (CBA); in case of conflict, CBA terms prevail.

Restrictions on Unilateral Conditions of Employment or Continued Employment

The amendments to unilateral conditions of employment prohibit employers from requiring employees or prospective employees to waive, arbitrate, or otherwise diminish existing or future claims related to unlawful employment practices. Employers may not unilaterally shorten statutes of limitation, apply non-Illinois law to Illinois employees, or require adjudication outside of Illinois. Unilateral conditions of employment are defined as non-negotiable agreements, including clauses and waivers that employees or prospective employees are required to accept in order to obtain or retain employment.

Requirements for Mutual Conditions of Employment or Continued Employment

Employers may enter into mutual agreements negotiated in good faith for consideration. Such agreements must be in writing, demonstrate actual, knowing, and bargained-for consideration from both parties, and acknowledge the employee's right to engage in protected conduct, including participating in proceedings related to unlawful employment practices and engaging in concerted activity. Failure to meet these conditions creates a rebuttable presumption that the agreement is unilateral and void if it contravenes the WTA.

Confidentiality Clauses in Settlement or Termination Agreements

The WTA clarifies that confidentiality provisions in settlement or termination agreements:

Cannot restrict concerted activities related to workplace conditions.

Must be supported by consideration separate from any release of claims.

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Cannot include unilateral provisions preventing truthful disclosures, or stating confidentiality is the employee's preference.

Right to Testify

The right of an employer, prospective employee, or former employee to testify in proceedings related to alleged criminal conduct or unlawful employment practices is expanded to now include arbitral proceedings, including depositions taken in administrative, legislative, arbitral, or judicial proceedings.

Recovery of Damages

Employees prevailing under the WTA may now recover consequential damages, in addition to the original recoverable damages of attorney's fees, and costs. Damages are recoverable for successful challenges to contracts and for "defending an action for breach of a confidentiality agreement."

What this means to you

Employers should review employment contracts, including confidentiality agreements, separation agreements, termination agreements, and restrictive covenants—such as non-competition and non-solicitation agreements—to ensure compliance with the Illinois Workplace Transparency Act. In particular, it is recommended that employers ensure that:

Confidentiality clauses and agreements related to unlawful employment practices are supported by a separate allocation of consideration;

The right to engage in concerted activity to address work-related issues and the right to testify pursuant to a court order, subpoena, or written request from an administrative agency or legislature is not restricted;

Required acknowledgements used to establish the mutuality of the agreement relating to promises that would be void if non-negotiable are updated; and

Provisions in agreements and covenants with Illinois employees related to the statute of limitations and choice of law are mutual where the agreement contractually waives or shortens the statute of limitations period or subjects the employee to jurisdiction and venue provisions at a location outside of Illinois.

Contact us

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Husch Blackwell can assist employers with updating or drafting agreements to comply with the amendments to the WTA. If you have questions relating to the effect of the amendments on your employment contracts, contact Sam Mitchell, Tracey O'Brien, Ryan Probasco, or your Husch Blackwell attorney.

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