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New Illinois Workplace Transparency Law Limits Employers' Ability to Stop Disclosure of Alleged Illegal Acts



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When signed into law last month, the new Illinois Workplace Transparency Act (WTA) included a variety of provisions creating substantial changes for employers and employees starting Jan. 1, 2020. We covered one of the provisions – mandatory annual sexual harassment prevention training – in our blog post [here](#).

The WTA also includes new restrictions on how and whether employers can limit by contract an employee's disclosure of the employer's alleged unlawful conduct. The following FAQs address what employers should consider when reviewing their current policies and employment agreements in light of the new restrictions.

What restrictions does the Workplace Transparency Act address?

It limits an employer's ability to restrict the disclosure of alleged unlawful conduct with respect to government reporting, employment agreements and post-employment agreements.

What if an employer is already subject to a collective bargaining agreement that conflicts with the law?

The WTA does not apply to any contracts that are entered into under and subject to the Illinois Public Labor Relations Act or the National Labor Relations Act.

When does the law apply? Can an employer prevent an employee from reporting alleged unlawful conduct to government authorities?

No. The WTA includes a blanket prohibition on any agreement, clause, covenant or waiver that prevents an employee (prospective, current or former) from reporting allegations of unlawful conduct to federal, state or local officials for investigation. Likewise, an employer cannot prohibit an employee from testifying in an administrative, legislative or judicial proceeding concerning alleged unlawful conduct.

What does "unlawful conduct" include?

Unlawful conduct includes:

- alleged criminal conduct and/or
- unlawful employment practices, including any form of unlawful discrimination, harassment or retaliation under state and federal law.

Can an employer prevent an employee from disclosing alleged unlawful employment practices by use of an employment agreement?

Only if certain conditions are met. The general rule is that an employer cannot unilaterally require an employee or prospective employee to enter into an employment agreement that:

- prevents the employee from making truthful statements or disclosures about alleged unlawful employment practices, and/or
- requires the employee to waive, arbitrate or otherwise diminish any existing or future claim, right or benefit related to an unlawful employment practice.

However, such provisions will not be void so long as the parties mutually enter into an employment agreement that:

- demonstrates actual, knowing and bargained-for consideration from both parties
- acknowledges the right of the employee to:
 - report any good faith allegation of unlawful employment practices to any appropriate federal, state or local government agency enforcing discrimination laws,
 - report any good faith allegation of criminal conduct to any appropriate federal, state or local official,
 - participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws,
 - make any truthful statements or disclosures required by law, regulation or legal process, and
 - request or receive confidential legal advice.

Can an employer prevent an employee from disclosing alleged unlawful employment practices by use of a settlement or termination agreement post-employment?

Again, only if the agreement (often called a “separation” or “severance” agreement) includes certain provisions. The general rule is that agreements with departing employees that include “promises of confidentiality related to alleged unlawful employment practices” are void. However, such provisions will not be void if the agreement states that:

- confidentiality is the employee’s preference and is mutually beneficial to both parties,
- the employee has been told of the right to have an attorney or representative review the agreement prior to being signed,
- there is valid, bargained-for consideration in exchange for the confidentiality,
- the settlement or termination agreement does not waive any claims of unlawful employment practices that accrue after the date of execution of the agreement,
- the employee has 21 calendar days to consider the agreement before signing, which the employee may knowingly and voluntarily waive without further consideration, and
- the employee has seven calendar days to revoke the agreement and the agreement is not effective or enforceable until the revocation period has expired.

What are the consequences for violating WTA?

An employee who successfully challenges an agreement that violates the law is entitled to reasonable attorney’s fees and costs.

Are there situations when WTA does not apply?

Yes. An employer may still require an employee to maintain confidentiality of allegations of unlawful employment practices made by others under the following circumstances:

- an employee’s job duties include receiving or investigating complaints related to unlawful employment practices,
- an employee is requested to participate in an open and ongoing investigation into alleged unlawful employment practices,

- an employee receives attorney work product or attorney-client privileged communications as part of any legal dispute involving an unlawful employment practice,
- any individual who by law is subject to a recognized legal or evidentiary privilege, and/or
- any third party engaged or hired by the employer to investigate complaints of an unlawful employment practice.

For additional information, please contact a member of Gould & Ratner's [Human Resources and Employment Law Practice](#).