End of the Year Compliance Issues for Employers

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As 2023 comes to a close, Illinois employers must be mindful of their compliance requirements and best practices to minimize or eliminate legal risk. Risk management is key to the overall success of any company. That is particularly true when it comes to compliance with employment laws. Any company that has endured the painful process of defending an employment dispute will tell you that "an ounce of prevention is worth a pound of cure."[1]

HARASSMENT PREVENTION TRAINING

If your company has not already complied with the state and local laws regarding harassment prevention training for your employees, you must do so by December 31, 2023.

Illinois Employers

The Illinois Workplace Transparency Act, which amended the Illinois Human Rights Act ("IHRA"), requires all Illinois employers to provide **one hour** of sexual harassment prevention training at least once a year to *all* employees (including interns, short-time or part-time workers) with sexual harassment prevention training that complies with section 2-109 of the IHRA.

Employers are required to provide or develop their own sexual harassment prevention training program that equals or exceeds the minimum standards for sexual harassment prevention training outlined in Section 2-109(B), or they may use the model training provided by the Illinois Department of Human Rights ("IDHR"). Specifically, the training must include:

- An explanation of sexual harassment consistent with the IHRA;
- Examples of conduct that constitutes unlawful sexual harassment;
- A summary of relevant Federal and State statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- A summary of responsibilities of employers in the prevention, investigation, and corrective measures of sexual harassment.

Finally, employers must keep a paper or electronic internal record of training compliance to be made available for IDHR for inspection upon request. These records may include certificates of participation, signed employee acknowledgments, or training sign-in worksheets. A record of training should include the names of employees trained, the date of training, the sign-in worksheets, copies of certificates of

[1] Benjamin Franklin famously advised Philadelphians with this quote in 1736 as it related to fire prevention.

participation issued, and a copy of all written or recorded materials that comprise the training. It should also include the name of the training provider, if applicable. These documents will be essential if and when an employer is audited by the IDHR.

Chicago Employers

The Chicago Human Rights Ordinance requires all employers with one or more employees in the City of Chicago who are either (i) subject to one or more of the license requirements in the Code; or (ii) maintain a business facility within the City to provide at least one hour of sexual harassment preventing training (or **two hours** for employees who have supervisor or managerial roles) and **one hour** of "bystander" training.

This means virtually all employees located in Chicago must complete at least two hours of harassment prevention training, which includes one hour of bystander training. It also means that all employees in a supervisory role must complete **three hours** of harassment prevention training annually. Chicago employers must also retain proof of employee training and records of compliant policies for at least five years.

Accordingly, if your company is not yet in compliance for 2023, there is still time to complete the employee trainings by the end of the year.

PAID LEAVE FOR ALL WORKERS ACT

Earlier this year, the Paid Leave for All Workers Act ("Act") was passed and it becomes effective on January 1, 2024. The Act requires almost all Illinois employers to provide a minimum of 40 hours of paid leave to employees for any purpose during a 12-month period.

Under the Act, leave must accrue at a rate of one hour of paid leave for every 40 hours worked. Exempt employees are deemed to have worked 40 hours in each work week. In the alternative, employers can front load the leave on the first day of an employee's employment. Employees must begin accruing paid leave upon hiring, but can be prevented from taking paid leave until after 90 days of employment. Employers may require up to seven calendar days' notice of foreseeable leave if they have a written policy stating the requirement. If the leave is not foreseeable, employees must provide notice as soon as practicable. Employers may not require employees to give a reason for the leave or to provide any documentation regarding the leave. Employees may determine how much leave to take at a time, but employers may limit the leave taken to no less than two hours per day.

Employees must be paid their regular wages during the leave. A tipped or commissioned employee must be paid their regular rate or minimum wage – whichever is greater. Upon termination of employment, employers do not need to pay out accrued but unused leave under the Act, unless the leave is added to the employee's already existing vacation or PTO bank. Employers must allow up to 40 hours of paid leave to carry over to the next year. Employees who leave employment, but return within 12 months must have their accrued leave restored. Therefore, the Act requires employers to keep accurate records of leave accrued and taken by employees and to maintain those records for a minimum of three years. Employers are also required to post a notice to employees regarding their right to paid leave and are subject to a penalty of $2,500 per offense for failing to comply with the posting requirement.

The Act does not apply to school districts or park districts; nor does it apply to short-term or part-time student employees of institutions of higher education. The Act does not affect the validity of collective bargaining agreements in effect on January 1, 2024. However, after January 1, 2024, the requirements of the Act may be waived only if the agreement contains a specific waiver.

Accordingly, if you haven't already reviewed your current paid leave policies for compliance, there is still time to do so.

OTHER IMPORTANT AREAS OF COMPLIANCE

Handbooks and Agreements

Employee handbooks should be reviewed each year to ensure that your policies comply with changes to employment laws and with new laws coming into effect for the upcoming year. Also, it is important to regularly review your handbook policies to ensure that they are current with the way your company actually operates. Outdated policies can lead to confusion and detract from the significance of the handbook. For example, if you have a broad non-solicitation policy, but all employees are allowed and even encouraged to circulate Girl Scout Cookie order forms, it is time to amend your policy.

In addition, it is a best practice to conduct regular HR compliance by reviewing your other employment-related documents on a regular basis. Thus, the end of the year is a good time to evaluate when your documents were most recently updated. Documents such as Employment Agreements, Severance Agreements, and restrictive covenants, like Non-Compete and Non-Solicit Agreements, routinely become outdated and unenforceable. This is due to constantly changing federal and state laws that govern these documents. In recent years, there have been significant changes with respect to each of these types of employment documents. For example, during 2023, the laws changed with regard to the enforceability of confidentiality and non-disparagement provisions. If your documents have not been updated, more than likely they are outdated and unenforceable. There also exists important carve out language that must be included within releases of claims contained within Employment Agreements and Severance Agreements in order for them to be enforceable. Therefore, if your company has not recently conducted a review of these documents for legal compliance, it is a good time to do so. It is also a best practice to maintain a schedule for regular review of these types of documents in order to ensure compliance.

Performance Evaluations

Honest and objective employee performance evaluations are the single most effective tool when defending a claim of wrongful termination. All too often, members of management get busy running the company and conducting annual performance evaluations falls off their radar. Even if your company has not conducted evaluations in recent years, there is still time to complete them for 2023 and get the company back on track for a regular annual review schedule. We all know how time consuming this process can be, but evaluations can greatly assist an employer when making difficult decisions to terminate or lay off employees. Moreover, performance evaluations also assist in communicating strengths and weaknesses to employees. Performance evaluations allow employers to provide employees with an overall assessment of their performance that can help them prioritize. Through the evaluation process, employees learn what their key

strengths are and where they should focus their development efforts. Evaluations also provide an avenue to deliver constructive criticism and avoid having it swept under the rug. The process also allows a company to set goals for employees for the following year. This type of feedback is essential in assisting your employees to grow and become more of an asset to the company. The end of the year is also a good time to conduct performance reviews and tie them to year-end bonuses.

Job Descriptions

While there are not as many compliance issues associated with job descriptions, it is also a best practice to review those documents on a regular basis. Indeed, the laws regarding classification of employees are also changing on a regular basis. Frequently, positions will change and grow over time. If your company has not properly updated the job description, you may have a situation where an employee whose position was once properly classified as non-exempt is actually performing duties that should be classified as exempt under the law. On the other hand, and much more problematic, would be a situation where an employee's duties have changed and the employee is performing non-exempt duties, but is improperly classified as exempt. In that case, the company may not be properly compensating the employee for overtime. Reviewing job descriptions on a regular basis helps to ensure that they accurately describe the duties of the position, and that the positions are properly classified in order to avoid any potential for legal liability.

I-9 Compliance

Finally, it is a best practice to review your I-9s annually to ensure that your forms were properly completed and that each of your employees remains able to legally work in the United States. First, make sure to see that you have a fully completed form for each current employee. If any signatures or documents are missing, you must obtain those. Next, for any forms that have errors such as documents that do not match the description, it is important to correct these errors. When correcting errors, the employer should strike through the incorrect information and write the corrected information and then initial and place the current date next to the correction. If the original form has too many errors or inconsistencies, you should prepare a new completed form with the current date and attach it to the original form.

It is important to keep in mind that after an employee is terminated from employment, employers are still required to retain I-9s for three years after the employee's date of hire, or for one year following his or her date of termination, *whichever date is later*.

By having a regular schedule to review these employment-related documents and conducting performance evaluations, employers are working to avoid risk, and are also helping to set their employees up for overall success.

Corporate Compliance

Although not necessarily limited to just employment related decisions, the end of the year is also an ideal time for management of closely held and family corporations and companies to update their annual corporate records, hold annual director and equity holder meetings, and ensure that they remain in compliance with corporate By-laws and operating agreements. Changes in key management personnel

throughout the year, such as officers or directors, often leave vacancies that need to be filled and properly documented under corporate rules. Even where no changes have occurred, some companies have internal rules that require officers and directors to be reappointed each year. When these vacancies or changes are not handled properly in annual paperwork, this can result in confusion over who has authority to manage the business and whether actions taken by management personnel throughout the year are, in fact, authorized. Often times, filing annual paperwork with the Secretary of State is **not** sufficient by itself to remain in compliance with internal corporate governance rules. Also, a corporation's failure to hold annual meetings or observe corporate formalities on an annual basis is often the source of disputes between shareholders and partners down the road. In updating annual corporate paperwork, management should carefully review business decisions made throughout the year, including key employment decisions, and consider having such actions formally ratified by the directors and equity holders at an annual meeting or in an annual written consent.

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