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2020: Let ELG Help You See Employment Issues Clearly

2020 is underway and the employment law landscape has changed dramatically. Make sure you are clearly focused with the help of Enterprise Law Group, LLP and its special employment counsel, The Wood Law Office, LLC.

Small Companies Should See More Discrimination Charges Given Illinois Human Rights Act Amendments

Effective January 1, the Illinois Human Rights Act's prohibitions on employment discrimination became applicable to organizations with as few as one employee. Small companies are now subject to liability for employment decisions based on race, gender, sexual orientation, religion, national origin, or age; and continue to be subject to liability for sexual harassment, pregnancy discrimination, and disability discrimination, as well as retaliation for certain protected activities relating to opposing such discrimination.

Amendments also expanded definition of "harassment" that makes harassment on all these protected classifications prohibited (not just sex harassment). Amendments confirm that harassment can occur outside an employee's normal work location and clarify that individuals performing services as a contractor are protected. Employers also must train employees on sexual harassment annually using a model program to be established and published by the Illinois Department of Human Rights or a program that meets or exceeds those standards. Special training obligations (and sample materials) will exist for the restaurant and bar industry.

Employers should carefully review their handbooks, polices, and training of managers to ensure all comply with these new requirements and the other developments discussed below.

Employers Must Look In New Places For Pay And Sick Leave Obligations

As many employers know, all forms of government are now weighing in on minimum wage, pay and leave obligations. Both Chicago and Cook County now have paid sick leave ordinances and Chicago's minimum wage is well in excess of the Illinois state minimum wage, which itself is higher than the federal minimum wage. Ordinances can also target specific industries (like the hotel industry, for example). Further complicating matters, some ordinances (like Cook County's paid sick leave ordinance) allow towns and villages to "opt out" – adding another layer of analysis to compliance. Employers can expect this trend to continue in 2020, particularly in Chicago as the newly elected Mayor Lightfoot's administration begins to work with a more progressive City Council to expand worker protections. Employers who have not recently reviewed their handbooks, policies, and payroll practices to ensure compliance should do so in 2020.

"No Smoking" Signs Take On New Meaning, As Legalized Marijuana Takes Hold

Effective January 1, Illinois legalized recreational marijuana use. Employers already faced *high*-ly tricky situations (e.g., when medical marijuana prescribed for disabilities employers were required to accommodate, despite federal laws banning possession or use of controlled substances). Decriminalization may lead to wider-spread use, but employers should feel safe

prohibiting all types of smoking on-the-job, particularly where safety is an issue. Employers may want to re-evaluate drug-testing policies for applicants or employees but should feel comfortable prohibiting employees from being at work under the influence of any non-prescription substances, and even prescription medications that affect employee safety.

Enforcement Of Non-Compete Agreements Still Inconsistent, Making Other Agreements More Important

Illinois law regarding non-compete agreements continues to evolve – but uncertainty over enforceability requires properly tailored agreements to ensure protectable interests are, in fact, protected. Since *Reliable Fire Equip. Co. v. Arredondo*, Illinois courts have invalidated agreements when they restrain activities by an employee that do not threaten a "legitimate business interest of the employer" (e.g., customer relationships). But when employment-at-will is sufficient consideration remains uncertain and the Freedom to Work Law – passed in 2017 – now makes non-competes unenforceable for low-wage workers (e.g., below $13/hour). Thus, enforceability of agreements still depends on case-by-case analysis based on the totality of the circumstances. Your organization should be equally vigilant by tailoring each agreement to the specific interests you wish to protect and work to take advantage of other types of protections (e.g., non-disclosure or confidentiality agreements, non-solicitation agreements, etc.). If your organization has not evaluated these agreements recently, now is the time.

Applicants Will See Fewer Questions; Employees May See Others' Pay

Prohibitions on inquiries into arrests and credit remain in place for most employers, but effective September 29, 2019, the Illinois Equal Pay Act banned inquiry into an applicant's salary history. Those amendments also protect employees' ability to share pay information with each other. Examine your screening practices and handbook policies to ensure compliance.

DOL Raises Salary-Basis Exemption And Issues New "Final" Joint Employer Rule

Effective January 1, 2020, per the U.S. Department of Labor's (DOL) final rule, the salary threshold for white collar overtime exemptions went up from $455 per week to $684 per week (equivalent to $35,568 for a full-year employee). In certain situations employers may use non-discretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the new salary threshold. The rule also raises the total compensation requirement for highly compensated employees from the current $100,000 per year threshold to $107,432 per year. But employers should remember that meeting the salary threshold is just one requirement for classifying workers as exempt from overtime pay. In order to be exempt, employees must also meet the duties tests for one of the recognized exemptions.

Effective January 12, the U.S. Department of Labor issued its "final" rule for determining when temporary or contract employees are jointly employed by another organization for purposes of the Fair Labor Standards Act's minimum wage and overtime laws. But it is hard to see how the new guidance will help. Permissible and impermissible factors are described, but DOL's fact sheet explains that balancing permissible factors "will depend on all the facts in a particular case, and the appropriate weight to give to each factor will vary depending on the circumstances." The DOL will use the guidance in conducting audits and investigations, so employers should beware.