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New Illinois Employment Laws (Likely) Coming Soon!

By: Kimberly A. Ross FordHarrison LLP

The Illinois Legislature has been busy this 2024 session, passing more than 10 new employment laws or amendments to existing employment laws in May 2024, only one of which in any manner affirmatively helps employers. We will summarize the laws and amendments below that have passed both houses and are waiting to be signed into law by Governor J. B. Pritzker. **Importantly, this is simply a preview of what is likely coming, but any of this legislation can be amended, withdrawn, or vetoed prior to the Governor signing it into law.** We will update this article when and if these bills are signed into law.

Limitation to Biometric Information Privacy Act (BIPA)

In perhaps the only amendment helpful to employers this legislative session, SB2979 provides some much-needed limitation on the concept of what constitutes a violation of BIPA. Currently, courts have been forced to interpret not only the original collection of biometric data as a violation of BIPA, but also find separate violations each time someone uses the device (i.e. each fingerprint scan), which can be multiple times per day over many years. SB 2979 states that for the purposes of both Subsections (b) and (d) of Section 15 of the Act (which prohibit collection or being in possession of biometric information without proper notice and consent), if the company is using the same biometric identifier (i.e. a fingerprint) or biometric information from the same person using the same method of collection, this will constitute a single violation of Section 15, and the person will be entitled to at most, one recovery under that section. Unfortunately, the legislation lacks language that would make the changes retroactive and protect companies that may have violated BIPA in the past. The business community is hoping retroactivity will be included before the bill is signed. (The amendment also allows a release to be signed electronically.) This bill was sent to the Governor for signature on June 14, 2024.

Changes to Illinois Human Rights Act (IHRA)

Statute of Limitations – 2 YEARS!

In perhaps the most significant of all changes to the employment law landscape in Illinois this session, the Legislature, in SB3310, has extended the statute of limitations from 300 days to 2 years for employees to file employment claims under the IHRA. (The original proposed amendment was 3 years!) (Another proposed bill, HB4821, which has not yet made its way through the legislative process, would give plaintiffs the right to file complaints in court without first going through an IDHR investigation. It is possible that this bill has been temporarily shelved while waiting for the Statute of Limitations to be expanded and will be brought up again in the future.) There is no language in the bill regarding applying it prospectively and therefore, the presumption is that it will apply retroactively, which could resurrect prior claims that have already expired under the 300-

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day statute of limitations but which are still less than 2 years old. This bill was sent to the Governor for signature on June 21, 2024.

Family Responsibilities

HB2161 adds "family responsibilities" to the list of classes protected from harassment and discrimination under the IHRA. "Family responsibilities" is defined as an employee's "actual or perceived provision of personal care to a family member." "Personal care" and "family member" have consistent definitions as found in the Employee Sick Leave Act, which are broad. The legislation does state, however, that it is not intended to obligate an employer to make accommodations or modifications to reasonable workplace rules or policies for an employee based on family responsibilities, including accommodations or modifications related to leave, scheduling, productivity, attendance, absenteeism, timeliness, work performance, etc. This bill was sent to the Governor for signature on June 21, 2024.

Reproductive Health Decisions

HB4867 adds "reproductive health decisions" to the list of classes protected from discrimination under the IHRA. "Reproductive health decisions" is defined as a person's decisions regarding their use of: contraception; fertility or sterilization care; assisted reproductive technologies; miscarriage management care; healthcare related to the continuation or termination of pregnancy; or prenatal, intranatal, or postnatal care. This bill was sent to the Governor for signature on June 24, 2024.

Artificial Intelligence and Zip Codes

HB3773 would regulate the use of artificial intelligence in matters relating to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment. Specifically, employers will be prohibited from using artificial intelligence that has the effect of subjecting employees to discrimination on the basis of protected classes under the IHRA. Employers will also be prohibited from using zip codes as a proxy for protected classes under the IHRA. Employers must also provide notice to employees that they are using artificial intelligence in their employment decisions listed above.

"Artificial intelligence" means "a machine- based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Artificial intelligence includes generative artificial intelligence.

"Generative artificial intelligence" means "an automated computing system that, when prompted with human prompts, descriptions, or queries, can produce outputs that simulate human-produced content, including, but not limited to, the following:

1) textual outputs, such as short answers, essays, poetry, or longer compositions or answers;

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2) image outputs such as fine art, photographs, conceptual art, diagrams and other images;
3) multimedia outputs, such as audio or video in the form of compositions, songs, or short form or long form audio or video: and
4) other content that would be otherwise produced by human means.

This bill was sent to the Governor for signature on June 21, 2024.

New E-Verify Requirements and Possible Prohibition?

E-Verify Ban?

Employers in the United States are required by federal law to verify the identity and work authorization for each person they hire by completing and retaining Form I-9 Employment Eligibility Verification for each employee. Most employers fulfill this task through manual review of documents. The standard imposed on these employers is that the document must reasonably appear genuine on its face and relate to the person presenting it. Therefore, manual review can be somewhat subjective and may cause a fraudulent document to be accepted, particularly with improving technology used to create fake identifications. As a result, some employers will opt to use the Federal E-Verify system, which allows the federal government to review and match the information provided by the employee and alert the employer if there is a potential issue.

Following the 2023 legislative session, we reported on an amendment to the Illinois Right to Privacy in the Workplace Act (SB1515), which passed both houses but was ultimately vetoed by Governor Pritzker at the request of the sponsors due to "irreconcilable drafting errors" that, in their estimation, would have an adverse effect on the workers it sought to protect. The original version of SB1515 would have outright banned Illinois employers from using the federal E-Verify system unless they were required by law to use it (such as if the employers had a federal contract). Notably, Illinois previously tried to bar the use of E-Verify in 2007, which was ultimately struck down by a federal court as a violation of the Supremacy Clause of the U.S. Constitution. A ban on the use of E-Verify would leave most employers with only the option to subjectively review documents based on the reasonableness standard.

Similar legislation was introduced this year (on a second Senate amendment to what was introduced as a shell bill in February 2023) in the form of SB0508. The bill went through numerous additional amendments and ultimately resulted in the enrolled version that was sent to Governor Pritzker for signature on June 20, 2024. The bill adds language, however, that was not in SB1515, and one may conclude that the language is either intended to bar the use of E-Verify for most employers, or is at least intended to cause enough confusion among employers to scare them into not using the system. Specifically, Section 12(a) of the Right to Privacy in the Workplace Act states:

> "*Nothing in this Act shall be construed to require an employer to enroll in any Electronic Employment Verification System, including the E-Verify*

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> *program…beyond those obligations that have been imposed upon them by federal law*."

Further, Section 13(b) states:

> *"[a]n employer shall not impose work authorization verification or re-verification requirements greater than those required by federal law*."

Thus, reading these two sentences together, if employers are not required by federal law (i.e. the federal government or a federal contractor) to use E-Verify (which most are not), then they cannot use E-Verify or another verification system to determine work authorization status. Despite presumably knowing that the state is prohibited from barring the use of E-Verify, whether intended or not, this legislation, as written, will seemingly do just that. If it is not the intent to prohibit the use of E-Verify, an easy fix would be to add something like: "nothing in this Act shall be construed to prohibit an employer from using E-Verify" or by changing the word "required" to "allowed" to read that an employer shall not impose work authorization verification greater than what is allowed by federal law. Attempts to have such language added or clarified, however, failed. Therefore, if and when this legislation is signed into law, Illinois employers should be aware of the additional risk before using E-Verify if they are not otherwise obligated to use it. It would not be surprising to see court challenges once employers realize that it can be interpreted to bar the use of E-Verify.

New Requirements if Verification Discrepancy

Employers should also be prepared to comply with the new required procedures provided in the amendment if they either find a discrepancy in an employee's employment verification information, or if they receive notification from the Social Security Administration or IRS of a discrepancy. If an employer discovers a discrepancy in an employee's employment verification information, the employer must provide the employee with: 1) the specific document or documents that are deemed to be deficient and the reason why they are deficient; 2) instructions on how the employee can correct the deficient documents; 3) an explanation of the employee's right to have representation present during the verification or re-verification process; and 4) an explanation of any other rights the employee may have with the verification or re-verification process.

If the employer receives notice from a federal or state agency of a discrepancy as it relates to work authorization, the legislation adds new language that was not found in the vetoed SB1515. The new language states, in Section 13(d)(1) that when notified by a federal or state agency of a discrepancy, "*The employer must not take any adverse action against the employee, including the re-verification, based on the receipt of the notification.*" There is no further language found in the amendment that would actually give employers the green light to terminate an employee following such a notification, even after the employee has exhausted the appeal process, has indicated they do not intend to challenge the finding, or after a final nonconfirmation notice has been issued. Thus, in addition to the possible prohibition against using E-Verify, the legislation can be

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interpreted as also trying to prohibit employers from ever acting on information they receive from the federal government after discovering an employee might not have the legal right to work in the United States. While this also might not have been the intent, the language of the law can certainly be read that way.

In addition to not taking any adverse action, there are further steps required of an employer when it receives notice of a discrepancy from a state or federal agency. The employer must also provide notice of the discrepancy to the employee within five business days after notification with: 1) an explanation that the federal or state agency has notified the employer that the work authorization documents do not appear to be valid or reasonably relate to the employee; and 2) the time period the employee has to contest the determination. The notice shall be hand delivered if possible and, if not, notification by mail or email is acceptable. The employee must be allowed to have a representative present during any meetings, discussions, or proceedings with the employer. The employer will be prohibited from taking any adverse action during the above process.

The amendment also requires employers to notify employees when employers have been notified of an inspection of I-9 Employment Eligibility Verification forms, within 72 hours of receiving the notice. If, during an inspection of the I-9 forms, the inspecting entity determines the employee's work authorization documents do not establish the employee is authorized to work in the United States, the employer shall notify the employee of the finding within five business days. The employee then has time to inform the employer whether he is contesting the determination.

Illinois Personnel Record Review Act (IPRRA)

Pay Stubs

SB3208 will provide for new mandates pertaining to the preservation and production of employee pay stubs under the IPRRA. The amendment would require employers to maintain copies of employee pay stubs for not less than three years after the date of payment, regardless of whether the employee's employment ends during that period, and regardless of whether the pay stub was provided on paper or electronically. In addition, the amendment would require employers to provide copies of pay stubs on request (which can be required to be in writing). Employers would have 21 days to provide the pay stubs after the request. The employer must provide the pay stubs in the manner requested by the employee, either physical or electronic, email, through computer access, or regular mail.

Importantly, employers who furnish electronic pay stubs in a manner that the former employee cannot access after separation shall, upon separation from employment, offer to provide the outgoing employee with a record of all the pay stubs from the year prior to the separation. The employer must record in writing that the offer was made, when, and how the employee responded. Thus, it will be a best practice for employers to add this task to their separation checklists and exit interview process. Noncompliance with the

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pay stub requirements may result in a civil penalty of up to $500 per violation payable to the IDOL. This bill was sent to the Governor for signature on June 21, 2024.

Additional Documents Employers Must Produce

The IPRRA requires certain documents to be produced upon request. Specifically, the IPRRA requires employers to produce "*any personnel documents which are, have been, or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge, or other disciplinary action*" (with a few exceptions). Thus, it has been important for employers to understand and follow this standard and not just produce a personnel "file" when requested. It requires employers to dig deeper and gather other possibly relevant documents pertinent to the requesting employee, which could include time records, performance evaluations, write ups, complaints about the employee, sales records, other performance documentation, and much more depending on the circumstances of each individual employee's employment and decisions made throughout employment. Employers have an initial seven days to produce the records but, if needed, can take up to seven additional days. Employers who fail to produce all such records upon request may be barred from later using them in litigation and also may be subject to an adverse inference as to the genuineness of documents that were not originally produced.

HB3763 will greatly expand the documents that must be provided to requesting employees, and with no additional time in which to comply. Specifically, employers will now be required to also provide:

- Any employment-related contracts or agreements that are legally binding on the employee;

- Any employee handbooks that the employer made available to the employee or that the employee acknowledged receiving (which presumably includes all prior versions);

- Any written employer policies or procedures that the employer contends the employee was subject to and that concern qualifications for employment, promotion, transfer, compensation, benefits, discharge, or other disciplinary action.

Thus, employers must be aware of these requirements (which are automatically included with a request for "personnel records" and do not require any additional request language other than simply requesting "all" records under the Act). Best practices will include creation of a checklist for employers to follow each time they receive requests for personnel records. Employers must also train supervisors on what to do when such a request is made, which would likely include providing the request to an HR department without delay.

The employee's request must: 1) specify what personnel records the employee is requesting or if the employee is requesting all the records allowed to be requested

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under this Section; 2) specify if the employee is requesting to inspect, copy, or receive copies of the records; 3) specify whether records be provided in hardcopy or in a reasonable and commercially available electronic format; 4) specify whether inspection, copying or receipt of copies will be performed by the employee's representative (including family members, lawyers, union stewards, or other union officials, or translators); and 5) if the records include medical information and medical records, must include a signed waiver to release medical information and records to the employee's representative. This bill was sent to the Governor for signature on June 18, 2024.

New Law Alert! Freedom of Speech Act

The Illinois Legislature has now passed the Freedom of Speech Act (SB3649), which if enacted, would go into effect immediately upon signing. The legislation states that it is in the public policy interests of the State for all working Illinoisans to have protections from mandatory participation in employer-sponsored meetings if the meeting is designed to communicate an employer's position on religious or political matters. It also seeks to prevent employees from being subjected to intimidation tactics, including acts of retaliation, discipline, or discharge from their employer for choosing not to participate in employer-sponsored meetings.

To that end, the Act provides that employers may not discharge, discipline, or otherwise penalize, threatened to discharge, discipline, or otherwise penalize, or take any adverse action against an employee:

1) because the employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer or the agent, representative, or designee of the employer if the meeting or communication is to communicate the opinion of the employer about religious matters or political matters;

2) as a means of inducing an employee to attend or participate in meetings or receive or listen to communications described in paragraph (1); or

3) because the employee or a person acting on behalf of the employee, makes a good faith report, orally or in writing, of a violation or a suspected violation of this Act.

"Political matters" means matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization. "Religious matters" means matters relating to religious belief, affiliation, and practice and the decision to join or support any religious organization or association.

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Section 20 of the Act provides that employees who believe this law has been violated may bring a civil action to enforce the Act within one year after the date of the alleged violation. The court may award the prevailing employee relief including injunctive relief, reinstatement to the employee's former position or an equivalent position, back pay, reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible if the violation had not occurred, and any other appropriate relief deemed necessary by the court to make the employee whole. The court "shall" also award a prevailing employee reasonable attorney's fees and costs. Not surprisingly, the Act is silent as to awarding a prevailing employer any attorney's fees or costs, which likely means the only option for employers to recover attorney's fees will be if the employer can prove the litigation was frivolous under state or federal procedural rules.

In addition, the Illinois Department of Labor (IDOL) must inquire into any alleged violations that are brought to its attention by an "interested party" to institute actions for additional penalties that are called for in the Act. Section 25 of the Act states "*In addition to the relief set forth in Section 20, an employer shall be assessed a civil penalty of $1,000 for each violation of Section 15, payable to the Department*." Although it is not clear, presumably the IDOL must institute a proceeding to impose the penalty, rather than a court having jurisdiction to impose a fine that becomes payable to the IDOL.

In addition, the Act also calls for "interested parties" to bring claims to the IDOL. An "interested party" means an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements. This is an exceptionally vague definition (and the term "organization" is not defined) and might be broadly interpreted to include nearly anyone who claims to care about worker rights, such as an attorney wo represents employees. Interested parties may bring actions for penalties in the county where the violation is alleged to have occurred or where the principal office of the employer is located in the following sequence of events:

1) The interested party submits to the Department a complaint describing the violation and naming the employer;
2) The Department sends notice of the complaint to the named party alleged to have violated the Act and to the interested party. The named party may either contest the alleged violation or cure the alleged violation;
3) The named party contests or cures the alleged violation within 30 days after the receipt of the notice of complaint or, if the named party does not respond within 30 days, the department issues a notice of right to sue to the interested party as described in paragraph 4.
4) The department issues a notice of right to sue to the interested party, if one or more of the following has occurred:
    a. the named party has cured the alleged violation to the satisfaction of the director;
    b. the director has determined that the allegation is unjustified or that the department does not have jurisdiction over the matter or the parties; or

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c. the director has determined that the allegation is justified or has not made a determination, and either has decided not to exercise jurisdiction over the matter or has concluded an administrative enforcement of the matter.

The Act then provides conditions under which an interested party can initiate litigation. Astonishingly, interested parties are given three years after the alleged conduct to file suit, which is tolled during the investigation period at the IDOL. Thus, this Act gives so-called "interested parties" far more rights and leeway than "aggrieved parties." Even more astounding is the fact that these interested parties can not only recover the damages allowed for aggrieved parties, but also 10 percent of any statutory penalties assessed, plus any attorney's fees and expenses in bringing the action. Thus, employers can likely expect a slew of litigation by plaintiff's lawyers and others purporting to be "interested parties" whether legitimate or not, and whether damages have been suffered or not (much like claims under the BIPA and Illinois Genetic Information Privacy Act (GIPA)).

There are a few exceptions to the Act, such as voluntary meetings that discuss religious or political matters; conveying information required by law; communicating information necessary for employees to perform their job duties; attending training intended to foster a civil and collaborative workplace or prevent workplace harassment or discrimination; or prohibiting political or religious organizations from requiring their employees to attend meetings discussing that organization's political or religious beliefs. This bill was sent to the Governor for signature on June 24, 2024.

Day and Temporary Labor Services Act: Change to Timing of When Temporary Employment Agencies Must Pay "Equivalent Benefits" to Employees

In 2023, Illinois enacted changes to the Day and Temporary Labor Services Act, which among other things, required temporary employment agencies to provide pay to employees employed for 90 calendar days the "equivalent benefits" as the lowest paid, comparable, directly hired employee at the third-party client or the hourly cash equivalent of the actual cost of benefits. SB3650 would amend the 90 calendar days and instead apply when the laborer has worked more than 720 hours within a 12-month period. The amendment also adds new pay requirements for situations when the temporary laborer works more than 4,160 hours in a 48-month period based on the most recent Standard Occupational Classification System published by the Department of Labor's Bureau of Labor Statistics. The amendment would also require the temporary agencies to inform eligible laborers of the seniority and hourly wage of the comparator being used to determine the wage. The amendment also would provide alternative methods (quite detailed and complicated) for computing the rate of pay based on Bureau of Labor Statistics data. This bill was sent to the Governor for signature on June 21, 2024.

Again, none of these bills have yet been signed by Governor Pritzker, and any of them can be amended, withdrawn, or ultimately vetoed. We are merely providing an update of

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what is likely to be coming soon. We will continue to keep you updated on the status of these proposed amendments.

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[1] If you have any questions regarding this article please feel free to contact the author, Kimberly Ross, (312) 960-6111 or kross@fordharrison.com, or the FordHarrison attorney with whom you usually work.

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