

Monthly Minute Memo: *Hot Topics*

I. Illinois Mandated Sexual Harassment Training for All Employers

As of January 1, 2020, all Illinois employers are required to train employees once a year on sexual harassment prevention. The minimum training requirements must include (1) an explanation of sexual harassment consistent with the Act; (2) examples of conduct that constitutes unlawful sexual harassment; (3) a summary of relevant federal and State statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and (4) summary of responsibilities of employers in the prevention, investigation, and corrective measures of sexual harassment.

Restaurant and bar employers, in addition to the above requirements, are also required to provide supplemental sexual harassment prevention training including (1) specific conduct, activities, or videos related to the restaurant or bar industry; (2) an explanation of manager liability and responsibility under the law; and (3) English and Spanish language options.

The deadline for this year for employers to complete this training is December 31, 2020. Despite the COVID-19 pandemic and subsequent stay at home orders issued by the Governor, the Illinois Department of Human Rights has not extended the deadline. Failure to complete this training could result in a civil penalty against the employer.

With COVID-19 restrictions in the regular operations of many of our clients, we are providing the necessary sexual harassment training to our Illinois Employer clients on various forms of video conferencing, which allows for screen sharing the materials including the employer's written anti-harassment policy and affords the opportunity for questions. While in-person training is generally preferred, the video conferencing method is the second-best option for those employees working remote.

II. Illinois Biometric Information and Privacy Act

As a result of an Illinois Supreme Court case in 2019, class action lawsuits against employers for violating the Illinois Biometric Information and Privacy Act ("BIPA") have increased dramatically and show no signs of slowing down unless the courts or the Illinois General Assembly intervene.

BIPA regulates a company's use of biometric technology, such as finger or hand scans for time keeping purposes or potentially facial scans for measuring an employee's temperature for COVID-19 screening, depending on the technology used. BIPA requires companies in possession of biometric information to develop a written policy, made available to the public, establishing a retention schedule and guidelines for destroying biometric information. Additionally, a company

must also provide written notice to individuals, prior to obtaining their biometric data, regarding the specific purpose for the use of the biometric data and the length of time their biometric data is being collected, stored, and used. Finally, companies must obtain written consent from an employee prior to obtaining biometric data.

If a company is found liable by a court under BIPA, damages for each violation are calculated as follows: \$1,000 per negligent violation and \$5,000 per intentional or reckless violation. Additionally, BIPA provides for reasonable attorney's fees, costs, and any other relief, including injunctive relief, that a court deems appropriate. The law is silent on whether a violation occurs when the employer initially collects the biometric information or whether a violation is continuous and occurs each time the biometric information is used, such as each time an employee clocks in and out of a shift.

The Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corp*, 2019 IL 123186 (2019), ruled BIPA did not require actual injury or harm. Employers are now exposed to significant liability for only technical violations of BIPA, such as for not obtaining consent even if the biometric data is not stolen or used inappropriately. Therefore, it is critical that an employer that uses biometric technology follows every aspect of BIPA.

Currently, there are two appeals pending before the First District Appellate Court. The first appeal is whether BIPA claims that arise in an employment context are preempted by the Illinois Workers' Compensation Act and the second appeal will decide if a one-year statute of limitations (or a longer period, such as five years) applies to BIPA claims. In addition to these appeals, amendments to BIPA were introduced this year to the Illinois General Assembly. Amendments sought include: a one-year statute of limitation; removal of the requirement the written policy be made available to the public; requiring an individual to give notice to a business of a BIPA violation and caps on actual and liquidated damages. This proposed legislation is still in the early stages. Thus, until the appellate courts or the Illinois legislature revise the current BIPA statute, employers must review and update their policies to ensure strict compliance with the current BIPA law.

III. Employment Practices Liability Insurance

During the current pandemic, employee lawsuits are on the rise. Employment practices liability insurance ("EPLI") generally covers employers for claims of harassment, discrimination or wrongful termination filed by employees. It is important when purchasing or renewing an EPLI policy to specifically name your employment defense law firm, ensure your choice of counsel in the event of a claim. Otherwise, the insurance carrier will appoint an EPLI panel attorney to defend the claim. Although in the past many insurance carriers allowed employers to request their own attorney to defend the claim, even if the firm was not written into the policy, insurance carriers are becoming stricter, denying such requests, and requiring an EPLI panel attorney to defend the claim.

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