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Employers Should Be Aware of Developments Affecting Illinois Discrimination and Wage Payment Laws

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Statutory amendments now in effect and a recent court decision will have implications for almost every Illinois employer.

Amendments to the Illinois Human Rights Act Portend More Litigation in State Court.

As of August 24, 2018, the Illinois Human Rights Act, which is the primary Illinois law prohibiting employment discrimination, was amended in two significant respects.

First, the period to file a charge with Illinois Department of Human Rights (IDHR) has been extended from 180 days to 300 days. This change makes the charge-filing period consistent with the filing period for EEOC charges under federal employment discrimination laws.

Second and more significant, charging parties will be able to opt out of the IDHR investigative process. Prior to amendment, the IDHR was required to conduct an investigation within 365 days of the date the charge was filed at which point charging parties could elect to file a complaint with the Illinois Human Rights Commission or in Illinois circuit court. Charging parties who wanted to proceed in the Commission or in court had to wait for the IDHR investigation to conclude or 365 days, whichever came first. As a practical matter, most investigations take longer than a year. The amendment is intended to respond to this lengthy process by requiring the IDHR to advise charging parties within 10 days after filing their charge of their right to forego an investigation and proceed immediately in state court. Charging parties have 60 days after receiving the notice of election to opt out of the IDHR investigation and then have 90 days to file a lawsuit in state court once they receive a second notice allowing their opt-out request.

We anticipate that this amendment will result in more discrimination claims being filed in state court because (i) state courts are often perceived as more employee friendly than federal court and (ii) the Illinois Human Rights Act does not contain the same damages caps for compensatory and punitive damages as Title VII.

Developments under the Illinois Wage Payment Act Have Practical Implications.

Effective January 1, 2019, an amendment to the Illinois Wage Payment and Collection Act (IWPCA) requires that employers reimburse employees for all expenditures or losses incurred by employees within the scope of employment and which were authorized or required by their employer. Although the amendment contains a 30 day period for employees to submit their expenses and supporting documents after incurring such expenses, the statute does not prescribe a date by which employers must reimburse employees. An employer who has a written expense reimbursement policy may rely on that policy to deny an employee expense reimbursement if the employee fails to comply with the policy. Failure to comply with the statute can result in damages equal to the reimbursement amount and a 2 percent penalty for each month the expenses are not paid as well as attorneys' fees incurred by employees.

The best way to deal with this new rule is to ensure that you have a written expense reimbursement policy which describes the type of expenses that may be incurred, how they are authorized and the process for seeking reimbursement.

Additionally, any employer who pays commissions should be aware of a recent court decision. In *Sutula-Johnson v. Office Depot*, the federal appeals court in Chicago held that a commission plan which paid sales commissions on a quarterly basis violated the IWPCA. The IWPCA requires that commissions be paid at least monthly. In this case, a salesperson who sold office furniture generated commissions when the customer was invoiced for a purchase, but commissions were not paid until 45 days after the end of each calendar quarter and were not deemed "earned" until they were paid. The default commission rate was increased if quarterly sales exceeded a set amount. The court stated that the IWPCA specifically requires that earned commissions be paid monthly and that an employer cannot avoid this provision by instituting a policy that defers the earning of commissions until the date of payment.

This is a troubling decision because many employers calculate and pay sales commissions on other than a monthly basis. The commissions in the *Office Depot* case arguably could have been calculated and paid monthly with a bump up at the end of each quarter if the employee generated enough sales to trigger the higher commission rate. The lesson is that if commissions can be calculated monthly, they should be paid monthly to avoid potential liability under the IWPCA. Whether this decision will be used to challenge commission plans that are based on quarterly, semiannual or annual metrics is yet to be seen. Given the number and complexity of many commission plans, it makes sense to have counsel review your plans to minimize your exposure to these type of claims.

If you have any questions regarding these topics, please contact **Bruce Alper** at +1 (312) 609 7890, **Dion Beatty** at +1 (312) 609 7940 or any Vedder Price attorney with whom you have worked.