The Illinois Workplace Transparency Act (WTA) (Public Act 101-0221) is designed to protect employees, consultants, and contractors who truthfully report alleged unlawful discrimination and harassment or criminal conduct in the workplace by prohibiting nonnegotiable confidentiality obligations, waivers, and mandatory arbitration of allegations of discrimination, harassment, or retaliation. The WTA became effective January 1, 2020, and makes these provisions void unless the agreement demonstrates that the employer and employee mutually agreed to the provisions. The WTA carries important implications for all sorts of employment or consulting/independent contractor agreements, as well as settlement agreements and termination agreements.

Who Must Comply With the Workplace Transparency Act?

The WTA applies to “employer[s],” as the term is defined in the Illinois Human Rights Act (IHRA). Until July 1, 2020, that means that employers that have 15 or more employees within Illinois during 20 or more calendar weeks in a calendar year are subject to the WTA's provisions.

On July 1, 2020, amendments to the IHRA will go into effect that will apply the WTA to any employer with one or more employees within Illinois during 20 or more calendar weeks in a calendar year.

The WTA’s protections apply to employees including full-time and part-time employees, apprentices, unpaid interns, and to consultants and contractors who perform work for the employer pursuant to a contract.

The WTA does not apply to collective bargaining agreements.

What Does the WTA Say About Employment Agreements?

Under the WTA, employment agreements cannot impose nonnegotiable, unilateral conditions (i.e., conditions that prospective or current employees must accept to obtain or keep their jobs) that:

- prevent prospective or current employees from making truthful statements about alleged unlawful discrimination, harassment, or retaliation;
- require prospective or current employees to arbitrate claims relating to alleged unlawful discrimination, harassment, or retaliation; or
waive or otherwise diminish existing or future claims, rights, or benefits relating to unlawful discrimination, harassment, or retaliation.

These conditions may be allowed if they are part of a mutual agreement between the employer and the employee that is:

- written;
- reflects "actual, knowing, and bargained-for consideration from both parties"; and
- acknowledges the employee’s right to:
  - report a good-faith allegation of an unlawful employment practice or criminal conduct to the appropriate government authorities;
  - participate in any appropriate governmental agency’s enforcement of discrimination laws;
  - make truthful statements or disclosures required by law, regulation, or legal process; and
  - request or receive confidential legal advice.

If the employer does not comply with these requirements for mutual agreements, there is a rebuttable presumption that the condition is unilateral. Unilateral conditions are void as against public policy, and severable from an otherwise valid and enforceable agreement.

What Does the WTA Say About Settlement or Termination Agreements?

Under the WTA, a settlement and termination agreement can require confidentiality relating to alleged unlawful discrimination, harassment, or retaliation, only if the following requirements are met:

- the agreement states that confidentiality is the employee’s preference and beneficial to both parties;
- the employer notifies the employee in writing of the employee’s right to have an attorney or representative of the employee’s choice review the agreement before it is executed;
- there is valid, bargained-for consideration in exchange for confidentiality;
- the settlement or termination agreement does not waive claims of unlawful discrimination, harassment, or retaliation that arise after the settlement or termination agreement is executed;
- the employee is given 21 calendar days to consider the written agreement (but the employee may execute the agreement waiving any remaining time to consider it); and
- the employee has seven calendar days after executing the agreement to revoke it, and the agreement is not enforceable until the revocation period has expired.

Employers cannot unilaterally include any clause that prohibits the employee from making truthful statements or disclosures regarding unlawful discrimination, harassment, or retaliation.

When Does the WTA Prohibit Confidentiality Even in a Mutual Agreement?
Even in a mutual agreement that meets the WTA requirements above, employees cannot waive their right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged unlawful employment practices by the employer when required or requested to attend pursuant to a court order, subpoena, or written request from an administrative agency or the legislature. This type of waiver is void and unenforceable as against public policy.

**When Does the WTA Allow Employers to Require Confidentiality Without a Mutual Agreement?**

The WTA allows employers to require confidentiality from employees or third parties who:

1. receive or investigate complaints of unlawful discrimination, harassment, or retaliation from others, or have access to confidential personnel information;
2. participate in ongoing investigations into unlawful discrimination, harassment, or retaliation during the pendency of and after an investigation;
3. receive attorney work product or attorney-client privileged communications as part of any dispute, controversy, or legal claim involving unlawful discrimination;
4. by law are subject to legal or evidentiary privilege; or
5. are engaged or hired by the employer to investigate complaints of unlawful discrimination, harassment, or retaliation.

**Key Takeaways**

Employers may want to consider whether employment agreements, nondisclosure or confidentiality agreements, independent contractor or consulting agreements, settlement agreements, or termination agreements contain unilateral requirements or waivers that may be void under the WTA and require revision. Employers may also want to consider revising existing agreements to comply with the requirements to demonstrate that an agreement is mutual, and to provide the employee protections required by the statute.

The WTA’s provisions purporting to limit the use of employment arbitration agreements for claims relating to alleged unlawful discrimination, harassment, or retaliation may be preempted by the Federal Arbitration Act (FAA). Employers should be aware that the FAA does not cover transportation workers, who would therefore be subject to the WTA’s limitations on arbitration regardless of FAA preemption.