“You’re Going to Need a Bigger Handbook”

New Employment Laws for Illinois Employers in 2020

Prepared for the Lincoln Park Chamber of Commerce

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AGENDA

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- Illinois Human Rights Act Amendments
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REIMBURSEMENT LAW

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REIMBURSEMENT FOR COSTS RELATED TO WORK

- Effective January 1, 2019, amendment to the Illinois Wage Payment and Collection Act.
- Employee must be reimbursed for "necessary expenditures" incurred that directly relate to their work. The costs must be within the scope of employment and **authorized or required**, and appropriate documentation must be provided.
- All employees are covered (designate those who may seek reimbursement in your written reimbursement policy).
- "**Necessary expenditures**" means all reasonable expenditures or losses required of the employee in the discharge of employment duties AND that benefit the employer.
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REIMBURSEMENT FOR COSTS RELATED TO WORK

- An employer is not responsible for losses due to an employee's own negligence, losses due to normal wear, or losses due to theft, unless the theft was a result of the employer's negligence.
- An employee must submit any necessary expenditures with appropriate supporting documentation within **30 calendar days** after incurring the expense. Employers may provide additional time for submitting requests for reimbursement.
- Where supporting documentation is nonexistent missing, or lost, the employees may submit a signed statement regarding any such receipts.

REIMBURSEMENT FOR COSTS RELATED TO WORK

- An employee is not entitled to reimbursement if (1) the employer has an established **written** expense reimbursement policy; and (2) the employee failed to comply with the written expense reimbursement policy.

- An employer is not liable for reimbursement *unless* the employer authorized (**in the written policy or verbally**) or required the employee to incur the necessary expenditure, or the employer failed to comply with its own written expense reimbursement policy.

REIMBURSEMENT FOR COSTS RELATED TO WORK

- If the written expense reimbursement policy of an employer establishes specifications or guidelines for necessary expenditures, the employer is not liable for the portion of the expenditure amount that exceeds the specifications or guidelines of the policy.
- So long as the employer does not institute a policy that provides for no reimbursement or *de minimis* reimbursement. (*e.g.* cell phone bill.
- **10 year statute of limitations**. Establish a firm, but fair reimbursement policy (*e.g.* submit expense for reimbursement by x date [30 days after expense incurred] or forfeit any reimbursement.

REIMBURSEMENT FOR COSTS RELATED TO WORK

- **Practical Implications**
  - No more charging employees for uniforms **required** by the employer (see next slide).
  - IRS mileage for all driving on behalf of the employer.
  - Cell phone reimbursement for any employees required to use their cell phone for work & internet for computer use at home.
  - Establish limits in your policy of how much certain expenses can be (*e.g.* $100 for any business lunch, no alcohol reimbursement, limits on hotel expenses, mandate specific airline.
  - Supervisor Training . . . Make sure supervisors are NOT regularly contacting employees on their cell phone for work related business unless you plan reimburse for the phone expense.

DEFINITION OF REQUIRED UNIFORMS

- Distinctive outfits or accessories, or both, intended to identify the employee with a specific employer shall be considered a uniform.
- If an employer **requires** a general type of ordinary basic street clothing to be worn, but permits variations in the detail of dress, this shall not be considered a uniform.
- However, when an employer requires that an employee purchase street clothes either from the employer or from a third party designated by the employer, the clothing shall be considered a uniform.

IHRA POSTERS

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ILLINOIS HUMAN RIGHTS ACT

- Effective September 18, 2018, state employers, employers with federal contracts, and employers with 15 or more employees must display the Illinois Department of Human Rights' Sexual Harassment and Discrimination in the Workplace posting
    - https://www2.illinois.gov/dhr/Publications/Documents/SH%20and%20DISCRIMINATION%20EMPLOYEE%20POSTER.pdf

- Employer Notice from IDHR: must post poster AND put information concerning the employee's rights in the employee handbook.
    - https://www2.illinois.gov/dhr/Publications/Documents/IDHR_Employer_Notice.pdf.

ILLINOIS HUMAN RIGHTS ACTS

ILLINOIS DEPARTMENT OF
Human Rights

YOU HAVE THE RIGHT TO BE FREE FROM JOB DISCRIMINATION AND SEXUAL HARASSMENT.

The Illinois Human Rights Act states that you have **the right to be free from unlawful discrimination and sexual harassment**. This means that employers may not treat people differently based on race, age, gender, pregnancy, disability, sexual orientation or any other protected class named in the Act. This applies to all employer actions, including hiring, promotion, discipline and discharge.

REASONABLE ACCOMMODATIONS

You also have the right to reasonable accommodations based on pregnancy and disability. This means you can ask for reasonable changes to your job if needed because you are pregnant or disabled.

RETALIATION

It is also unlawful for employers to treat people differently because they have reported discrimination, participated in an investigation, or helped others exercise their right to complain about discrimination.

REPORT DISCRIMINATION

To report discrimination, you may:

1. Contact your employer's human resources or personnel department.
2. Contact the Illinois Department of Human Rights (IDHR) to file a charge.
3. Call the Illinois Sexual Harassment and Discrimination Helpline at 1-877-236-7703 to talk to someone about your concerns.

Chicago:
James R. Thompson Center
100 West Randolph Street, Suite 10-100
Chicago, IL 60601
(312) 814-6200
(866) 740-3953 (TTY)
(312) 814-6251 (Fax)

Springfield:
535 W. Jefferson Street
1st Floor
Springfield, IL 62702
(217) 785-5100
(866) 740-3953 (TTY)
(217) 785-5106 (Fax)

Website: www.illinois.gov/dhr
Email: IDHR.Intake@illinois.gov

Employers shall make this poster available and display it where employees can readily see it.
This notice is available for download at: www.illinois.gov/dhr

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ILLINOIS MINIMUM WAGE LAW

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ILLINOIS MINIMUM WAGE LAW (EFFECTIVE 1/1/20)

- On February 19, 2019, Illinois Governor J.B. Pritzker signed Senate Bill 1, which increases the minimum wage in Illinois to $15 per hour by 2025.
- Under the new law, the minimum wage will increase from $8.25 to $9.25 on **January 1, 2020**, to $10.00 on **July 1, 2020.**
- Thereafter, the minimum wage will increase by $1.00 per hour each January 1, until it reaches $15.00 per hour on **January 1, 2025**.
- To mitigate the sting for small employers, the law allows employers with **50 or fewer employees** to claim a tax credit for 25% of the cost of the increase in 2020.

ILLINOIS MINIMUM WAGE LAW PENALTIES

- Previously, employees who sued to recover wages and overtime pay under the Minimum Wage Law were entitled to recover the amount of any underpayment, **plus a statutory penalty of 2%** of the amount of the underpayment per month that amount goes unpaid.
- The new law more than **doubles the statutory penalty to 5%** per month.
- Even more significantly, the law creates a new provision allowing employees to recover not just the amount of wages owed, **but triple that amount of wages owed**, in addition to the 5% statutory penalty.

ILLINOIS MINIMUM WAGE LAW

- To put this in dollar terms, before this new law, a non-exempt employee who did not receive an overtime payment in the amount of $100 that was due three years ago, that employee now would receive a total of $172 (*i.e.* the $100 dollars that was owed plus damages in the amount of $72 (36 months x 2% x $100).
- Under the amendments, that same employee will now recover a total of $480. (*i.e.* $300 [three times the $100 that was owed] plus damages in the amount of $180 [36 months x 5% x $100]).

ILLINOIS MINIMUM WAGE LAW PENALTIES

- The amendments also have given authority to the Illinois Department of Labor to conduct **random audits** of employers to ensure compliance with the law.
- The Minimum Wage Law already provided that if an underpayment is found to be **willful, repeated, or reckless**, the employer is liable to the Department of Labor for a **penalty of 20%** of the amount of the underpayment.
- The amendments add an additional penalty of $**1,500**, payable to the Department of Labor's "Wage Theft Enforcement Fund."

ILLINOIS MINIMUM WAGE LAW

- The law also adds new teeth to the Minimum Wage Law's record keeping provisions.
- Until now, the Minimum Wage Law did not provide for any monetary penalties for failure to keep **required payroll records** (*i.e.* name and address; hours worked each day in each work week; rate of pay; the amount paid each pay period; all deductions from wages).
- Under the amendments, an employer that fails to maintain these required payroll records is now subject to a penalty of **$100 for each impacted employee**, also payable to the Department of Labor's Wage Theft Enforcement Fund.

ILLINOIS MINIMUM WAGE LAW

- Among other things, the Minimum Wage Law requires employers to keep a record of "**the hours worked in each day and in each work week by *each employee***."
- The Minimum Wage Law does not create any exception to this timekeeping requirement for **exempt** employees, **and** the Department of Labor's regulations under the Wage Payment and Collection Act expressly state that employers are **required** to keep daily time records for **all employees** "**regardless of an employee's status as either an exempt administrative employee, executive or professional**."

ILLINOIS MINIMUM WAGE LAW PRACTICE TIPS

- These changes are likely to encourage employees and plaintiffs' lawyers to pursue class actions claims for even modest underpayments. Employers may also find it far more difficult and expensive to settle minimum wage and overtime claims under the new law.
- Consider the use of arbitration agreements with class waivers to minimize the risk of class clams under the IMWL
- Review all wage rates and begin planning for how to address the increased minimum wage takes effect on **January 1, 2020**.
- Plan for how the increased minimum wage may affect bargaining with unions and existing wage schedules under union contracts.

ILLINOIS MINIMUM WAGE LAW PRACTICE TIPS

- If you have fifty or fewer employees, be sure to talk with your tax advisers about the new tax credit.
- If your organization does not currently keep a daily record of hours worked by **exempt employees**, start doing so because that has been a requirement **since February 19, 2019**.
- With the assistance of legal counsel, conduct a comprehensive wage and hour compliance review.
- Don't hesitate to seek professional advice about wage and hour questions. The cost of a fifteen minute phone call with an experienced wage and hour lawyer is a drop in the bucket compared to the severe new penalties for even innocent mistakes under the new law.

EXEMPT EMPLOYEE SALARY INCREASE

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EXEMPT EMPLOYEE SALARY INCREASE

- On September 24, 2019, the U.S. Department of Labor announced new proposed overtime rules that would increase the minimum salary for employees to qualify for the Executive, Administrative, and Professional exemptions under the Fair Labor Standards Act to $684 per week, equivalent to $35,568 per year. **No exception is made for small businesses**.
- This is an increase from the current minimum of $455 per week ($23,660 per year), set in 2004.

EXEMPT EMPLOYEE SALARY INCREASE

- One new wrinkle included in the proposed rules is a provision that would allow employers to use non-discretionary bonuses and commissions paid annually or more frequently to satisfy up to **10% of the minimum salary obligation**.
- There is no proposed cost of living increase for employers to keep track of each year.
- The **duties test will remain the same for each classification**.
- As businesses planning their budgets and thinking about salary increases, review all exempt positions and salaries to begin planning for how to address the increase in exempt employees' salary.
- Determine if any exempt employees, can be **reclassified as non-exempt**, particularly if the employee does not, or rarely works over 40 hours in a single work week.

RECREATIONAL MARIJUANA

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RECREATIONAL MARIJUANA (EFFECTIVE 1/1/20)

- **Can Employers still maintain a zero tolerance drug policy?**
  - Yes. The Act permits employers to adopt zero tolerance or drug free work place policies.

- **Can Employers still drug test and maintain a drug test policy?**
  - Yes. The Act permits employers to adopt and implement reasonable "employment policies concerning drug testing."

RECREATIONAL MARIJUANA (EFFECTIVE 1/1/20)

- **Do Employers have to permit employees to use marijuana and/or be impaired at work?**
  - No. The Act prohibits employees from being under the influence, using marijuana in the workplace, or while performing the employee's job duties or while on call.

- **Can Employers discipline/terminate an employee for using marijuana and/or being impaired at work?**
  - Yes. The Act permits employers to discipline and/or terminate an employee for violating an employer's employment policies or workplace drug policy.

RECREATIONAL MARIJUANA (EFFECTIVE 1/1/20)

- **Employers may still maintain a zero tolerance drug free work place policy**
  - The Act permits employers to adopt "**reasonable**" zero tolerance or drug free work place policies, or employment policies concerning drug testing, smoking consumption, storage, or use of marijuana so long as the policy is applied in a non-discriminatory manner.
  - No employee may be under the influence of or use marijuana in an employer's workplace, or while performing the employee's job duties, or while on call.
  - An employer retains the absolute right to discipline and/or terminate an employee for violating the employer's zero tolerance or drug free workplace policy, so long as the employer has a good faith belief that the employee is impaired and/or under the influence of marijuana at work, or while performing the employee's job duties, or while on call.

RECREATIONAL MARIJUANA

- **How Can an Employer Establish that an Employee is Impaired or Under the Influence at Work?**
  - An employer may consider an employee to be impaired or under the influence at work if the employer has a **good faith belief** that an employee manifests **specific, articulable symptoms while working** that decrease or lessen the employee's performance or job duties or tasks of the employee's job.
  - The Act provides specific examples of employee conduct to support an employer's "**good faith belief**."
  - *E.g.* Sudden changes in an employee's speech, physical dexterity, agility, coordination, demeanor, and/or other irrational or unusual behavior.
  - *E.g.* An employee negligently or carelessly operating a piece of machinery, disregarding the safety of other employees, getting into an accident that results in damage to equipment or property, disrupting production or the manufacturing process, or injuring another person due to carelessness.

RECREATIONAL MARIJUANA

- **Employers may discipline employees for violating their zero tolerance and drug testing policies**
  - Employers have the right to discipline and/or terminate employees for violating their zero tolerance and/or drug free workplace policies.
  - Such action comes with a caveat, however.
  - If an employer disciplines/terminates an employee based on the employer's good faith belief that the employee is under the influence of or impaired by marijuana at work and/or while performing his/her job duties, the employer **must provide** the employee with a "reasonable opportunity" to contest the basis for that determination.
  - Notably, the Act does not provide guidance on permissible means to contest, or the length of time an employer is required to provide an employee who wishes to contest.

RECREATIONAL MARIJUANA

- **Can Employers discipline employees for violating their zero tolerance and drug testing policies?**
  - Unlike alcohol, there is no permissible threshold for impairment **yet**, nor does the Act provide a threshold for how much marijuana consumption constitutes legal impairment.
  - Thus, such decisions ultimately will be left up to the discretion of the employer and the employer's written drug policy.
  - Prior to making such decisions, employers are advised to consult with their employment attorney.

RECREATIONAL MARIJUANA

- **Do Employers have a Defense to Lawsuits Brought Under the Act?**
  - The Act states that an employee or applicant has no cause of action against an employer for:
    - Subjecting an employee or applicant to "reasonable drug testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures . . . based on the employer's **good faith belief** that the employee used or possessed cannabis in the employer's workplace, while performing the employee's job duties or while on call, in violation of the company's employment policies."
    - Disciplining or terminating an employee's employment based on the employer's **good faith belief** that the employee was impaired as a result of using marijuana, or under the influence of marijuana, while at work, while performing the employee's job duties, or while on call, in violation of the company's employment policies.
    - Injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.

RECREATIONAL MARIJUANA

- **Can Employers discipline an Employee for off duty marijuana use?**
  - The Act amends the Illinois Right to Privacy in the Workplace Act.
  - The significance of this is that recreational and medicinal marijuana are now "legal products" (*e.g.* smoking cigarettes, drinking alcohol) and employers cannot refuse to hire, discharge or otherwise discriminate against an individual solely because the individual uses marijuana off premises during non-working hours and non-call hours.
  - The Act expressly provides that federal law takes precedence over state law, stating that "Nothing in the Act shall be construed to interfere with any federal, state or local restrictions on employment, including but not limited to the United States Department of Transportation regulation 49 CFR 40.151 (e), **or impact an employer's ability to comply with federal or State law**, or cause it to lose a federal or state contract or funding.

RECREATIONAL MARIJUANA

- **Can Employers discipline an Employee for off duty marijuana use?**
  - However, the Act permits employers to maintain a zero tolerance/ drug free work environment, and using/possessing marijuana is still illegal under federal law.
  - Under the Act, use of marijuana outside of the workplace and during non-call hours, which results in an employer's **good faith belief** that an employee is "impaired" or "under the influence" of marijuana **while in the workplace, while performing the employee's job, or while on-call**, provides employers with a legitimate basis to discipline and/or terminate an employee for violation of the company's zero tolerance/drug free workplace policy.
  - Not simply because the individual uses marijuana outside of the workplace and during non-call hours. **Must have the good faith belief of impairment.**

RECREATIONAL MARIJUANA

- **If Employers must have this "good faith belief" of impairment, how does this effect pre-employment drug testing for marijuana?**
  - Employers need to determine if as part of their pre-employment drug screening, they want to continue testing for tetrahyocannabinol (THC).
  - If an applicant's pre-employment drug test comes back positive for THC, *unless* the employer can articulate specific **identifiers** to support a **good faith belief** that the applicant was impaired and/or under the influence at the time of the interview, and/or when the applicant went for the drug test, you cannot refuse to hire based on the positive test alone.
  - Remember, the Right to Privacy in the Workplace Act prohibits an employer for refusing to hire an applicant solely because the individual uses marijuana off premises.

RECREATIONAL MARIJUANA

- **If Employers must have this "good faith belief" of impairment, how does this effect *purely* random drug testing for marijuana?**
  - Purely random drug test *e.g.* "all employees whose last name starts with the letter "C" must submit to a random drug test today."
  - Employers need to determine if they want to continue post-employment, *purely* random testing for tetrahyocannabinol (THC).
  - If an employee's post-employment drug test comes back positive for THC, as a result of a *purely* random drug test, an employer likely had no basis to discipline and/or discharge for violating its zero tolerance, drug free workplace policy.
  - Remember, an employer must be able to articulate its **good faith belief** that an employee manifests **specific, articulable symptoms while working** that decrease or lessen the employee's performance or job duties or tasks of the employee's job.
  - If it is purely, random, then it likely will be difficult, if not impossible for an employer to articulate any reason to support its belief that the employee was impaired or under the influence at work.

RECREATIONAL MARIJUANA - NEXT STEPS FOR EMPLOYERS

- Drug policies should be revised to specifically prohibit employees from possessing, using, or being impaired by cannabis on the employer's premises or during working hours.
- Unless they are required to maintain more stringent policies – for example, to comply with federal DOT regulations or contract requirements - employers should remove policies that decline to hire or discipline employees for off-the-clock cannabis use.
- Because employers will now bear the burden of determining whether an employee is impaired by cannabis at work, employers are strongly advised to train managers on how to identify signs of impairment and how to document their observations.
- Employers will also need to implement a process for employees who have been disciplined for suspected cannabis use to challenge the decision. While employers will not need to hold an evidentiary hearing, employees should at least be informed of the evidence supporting the conclusion that they were impaired and allowed to provide contrary evidence.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

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AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT

- **Illinois Human Rights Act (Effective 1/1/20)**
  - **Expanded Coverage**
    - The IHRA now applies to any employer with one (1) or more employees within Illinois during twenty (20) more calendar weeks in the current year or year preceding the alleged violation. This particular change would not be effective until **July 1, 2020**.
  - **Expanded Protected Classes**
    - The IHRA redefines "unlawful discrimination" to include discrimination against a person because of his or her "actual **or perceived**" protected characteristic.
    - Thus, discrimination based on a perception that an individual is a member of a protected group can now lead to liability for employers, **even if that perception is erroneous**.

AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT

- **Illinois Human Rights Act**
  - **Expands Definition of Work Environment To Include Outside the Workplace**
    - For purposes of sexual harassment, the prohibition of harassment and discrimination in the "work environment" will **not** be limited to the physical location in which the employee is assigned. "
  - **Annual Sexual Harassment and Prevention Training:**
    - All employers will be **required** to conduct sexual harassment training for all employees at least once a year, or face penalties of up to $5,000 per year per infraction.
    - The annual required sexual harassment training must include:
      - An explanation of sexual harassment.
      - Examples of conduct that constitutes sexual harassment.
      - A summary of the federal and state statutory provisions, including remedies to victims of sexual harassment.
      - A summary of the responsibilities of employers for prevention, investigation, and corrective measures of sexual harassment.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

- **Illinois Human Rights Act**
  - **Includes special rules for bars and restaurants.**
  - Every restaurant and bar operating in Illinois must have a written anti-sexual harassment policy (available in English and Spanish) that is provided to all employees within the first calendar week of employment.
  - The policy must include (1) a prohibition on sexual harassment; (2) the definition of sexual harassment under the Act and Title VII; (3) details on how an individual can report sexual harassment internally; (4) an explanation of the internal complaint process available to employees; (5) how to file a charge with the Department and EEOC; (6) a prohibition on retaliation for reporting sexual harassment; and (7) a requirement that all employees participate in sexual harassment prevention training.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

- **Illinois Human Rights Act**
  - **Disclosure Requirements (Effective 1/1/20)**
    - On an annual basis, an employer **must disclose** to the Illinois Department of Human Rights:

      (1) the total number of adverse judgments or administrative rulings relating to sexual harassment or unlawful discrimination in the preceding year;

      (2) any equitable relief that was ordered against it;

      (3) the number of such judgments or rulings in specific categories including sexual harassment; or discrimination or harassment on the basis of any protected characteristic or any other characteristic protected by the Illinois Human Rights Act.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

- **Illinois Human Rights Act**
  - If it is **investigating a Charge of Discrimination** against an employer, the Illinois Department of Human Rights may request that the employer submit the total number of **settlements** entered into during the preceding 5 years (broken down into various categories) relating to any alleged act of sexual harassment or unlawful discrimination that occurred in the workplace, or involved the behavior of an employee or corporate executive of the employer regardless of whether that behavior occurred in the workplace.
  - Employers are prohibited from disclosing the name of the victim.
  - Information disclosed is **not** subject to FOIA request.
  - An employer who fails to make the necessary disclosures is subject to the imposition of civil penalties.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

- For most employers, the new reporting obligation for adverse judgments in harassment and discrimination cases will not be particularly burdensome.
- The reporting obligation applies only to final, non-appealable judgments against an employer – typically, cases where an employer takes a discrimination case to trial and loses, then decides not to appeal or exhausts the appeals process.
- More concerning is the requirement that employers disclose settlements when asked to do so by the IDHR during an investigation of a Charge.
- While the IDHR cannot use settlements to find against an employer on a particular Charge, it is not clear how the agency might use the information in a particular investigation or more broadly.
- To comply with the new laws, employers are strongly advised to maintain a centralized log or record of any internal complaints and external charges or lawsuits by employees, identifying the nature of the claims alleged and the outcome of the complaint, including whether there was a final judgment or administrative order or settlement.

ILLINOIS HUMAN RIGHTS ACT AMENDMENTS

- **Illinois Human Rights Act**
  - **Expands its application to consultants and contractors.**
    - Employers will now be liable for harassment and sexual harassment of **non-employees** who are present in the workplace to perform services for the employer, such as independent contractors or consultants, who are performing services pursuant to a contract with the employer.
  - **Expands civil penalties**
    - Provides new penalties for employers with: (1) **less than 4 employees**, penalties not to exceed $500 for the 1st offense, $1,000 for the 2nd, and $3,000 for the 3rd and all subsequent violations; (2) **4 or more employees**, penalties not to exceed $1,000 for the 1st offense, $3,000 for the 2nd, and $5,000 for the 3rd and all subsequent violations.

ILLINOIS VICTIMS' ECONOMIC AND SECURITY ACT

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ILLINOIS' VICTIM ECONOMIC SAFETY AND SECURITY ACT

- Effective January 1, 2020.
- Employers will be required to provide employees who are the victims of domestic, sexual **and now gender violence** or whose family members are victims, with up to twelve (12) weeks of job-protected leave in a year or other reasonable workplace accommodations.
- Expands the definition of electronic communication to include "online platforming" (including but not limited to any public-facing website, web application, digital application, or social network).
- The amount of leave required is determined by the size of the employer.
- The leave may be taken to pursue medical treatment, counseling, victim's services, safety planning, legal assistance, etc.

THE WORKPLACE TRANSPARENCY ACT

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THE WORKPLACE TRANSPARENCY ACT (EFFECTIVE 1/1/20)

- The WTA's purpose is to prevent unlawful discrimination and harassment in the workplace. To further its goal, the WTA:
  - Prohibits a provision (*e.g.* non-disclosure, non-disparagement) in **any agreement** (*e.g.* employment agreement, confidentiality agreement) that prevents an employee from (1) reporting allegations of unlawful conduct to government officials or (2) testifying in an administrative, legislative or judicial proceeding about alleged criminal conduct or unlawful employment practices.
  - The WTA also attempts to place limits on the use of arbitration clauses by prohibiting any provision in an employment agreement that requires an employee to waive or arbitrate or any existing or future claim related to an unlawful employment practice (*e.g.* discrimination, harassment, retaliation).

THE WORKPLACE TRANSPARENCY ACT (EFFECTIVE 1/1/20)

- However, the WTA does provide that an employment agreement may include, *e.g.* nondisclosure, non-disparagement and arbitration clauses if the agreement is:
  - in writing,
  - demonstrates actual, knowing and **bargained-for consideration from both parties**, and
  - acknowledges the right of the employee to:

    (1) report any good faith allegations of unlawful employment practices to federal, State or local enforcement agencies; (2) report any good faith allegations of criminal conduct to appropriate officials; (3) participate in proceedings with appropriate federal, State or local enforcement agencies; (4) make any truthful statements or disclosures required by law; and (5) request or receive confidential legal advice.

THE WORKPLACE TRANSPARENCY ACT (EFFECTIVE 1/1/20)

- The WTA limits the use of **confidentiality provisio**ns in settlement agreements that prohibit employees from making truthful statements or disclosures regarding unlawful employment practices.
- A settlement agreement **may include a confidentiality provision** only if:

(1) confidentiality is the documented preference of the employee **and** is mutually beneficial to both parties;

(2) the employer notifies the employee, in writing, of the employee's right to have an attorney review the agreement;

(3) there is consideration in exchange for confidentiality;

(4) the agreement does not waive any claims for future unlawful employment practices;

(5) the employee is provided with a period of 21 days to consider the agreement; and

(6) unless knowingly and voluntarily waived by the employee, employee shall have 7 days after execution to revoke the agreement

THE WORKPLACE TRANSPARENCY ACT

- To comply with the WTA, employers can easily add boilerplate recitals to their agreements addressing the requirements above, including stating that any covered confidentiality provision is the "documented preference" of the employee and mutually beneficial to both parties.
- However, it is not clear whether or to what extent courts will probe beyond such language in cases where employees later insist that confidentiality was the employer's "preference" but not theirs.
- Note that the Act does restrict use of confidentiality provisions that limit disclosure of the terms (e.g. monetary) of a separation or settlement agreement but does not otherwise bar statements relating to "unlawful employment practices."

THE WORKPLACE TRANSPARENCY ACT (EFFECTIVE 1/1/20)

- The WTA provides that it does not restrict an employer's right to require the following to maintain confidentiality of allegations of unlawful employment practices made by others:
  - Employees who, as part of their assigned job duties, "receive complaints or investigate allegations relating to unlawful employment practices," or "otherwise have access to confidential personnel information;"
  - Employees and third parties who are asked to participate in an investigation of unlawful employment practices, and to maintain reasonable confidentiality while the investigation is pending and thereafter;
  - Employees and third parties who receive attorney work product or attorney-client privileged information as part of any dispute, controversy, or legal claim involving an unlawful employment practice;
  - Any individual subject to a legal or evidentiary privilege by law; or
  - Any third party engaged or hired by an employer to investigate complaints of an unlawful employment practice.

ILLINOIS EQUAL PAY ACT

CLARK HILL

ILLINOIS EQUAL PAY ACT (EFFECTIVE SEPTEMBER 29, 2019)

- On July 31, 2019, Gov. J.B. Pritzker signed a new law that prohibits Illinois employers or employment agencies from:
  - Screening job applicants based on their current or prior wages or salary histories, including benefits or other compensation, by requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria.
  - Requesting or requiring a wage or salary history as a condition of being considered for employment, being interviewed, continuing or to be considered for an offer of employment, or an offer of employment of compensation; or
  - Seeking an applicant's wage or salary history from the applicant's current or former employer.

ILLINOIS EQUAL PAY ACT (EFFECTIVE SEPTEMBER 29, 2019)

- The amendment does not prohibit an employer from providing information regarding the benefits of a position or **discussing an applicant's expectations regarding compensation**.
- An employer also would not violate the EPA if a job applicant **voluntarily discloses** his or her current or prior salary, provided the employer does not consider the voluntary disclosure in deciding whether to offer the applicant employment or in setting compensation.
- Employers may not require employees to sign agreements/contracts that would prohibit them from disclosing or discussing information about their wages, salary, benefits, or other compensation.
- Employers, however, may prohibit human resources employees, supervisors, or other employees who have access to employees' wage or salary information from disclosing that information without written consent from the employee whose information is sought or requested.

ILLINOIS EQUAL PAY ACT (EFFECTIVE SEPTEMBER 29, 2019)

- An employer who violates these new amendment may be subject to:
  - Special damages not to exceed $10,000;
  - Injunctive relief;
  - Costs and reasonable attorney's fees; and
  - A civil penalty not to exceed $5,000 for each violation for each employee affected.
- The Act expressly provides that if special damages are available, an employee may recover compensatory damages only to the extent such damages exceed the amount of special damages.

ILLINOIS EQUAL PAY ACT (EFFECTIVE SEPTEMBER 29, 2019)

- Previously, the Act prohibited employers from paying unequal wages to men and women who are performing *substantially similar w*ork on jobs that required "**equal skill**, effort and responsibility," except when the wage difference is based upon a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or factors other than an employee's gender.
- The amended Act prohibits employers from paying unequal wages to men and women who are performing *substantially similar work* on jobs requiring "**substantially similar** skill, effort, and responsibility," except when the wage difference is based upon a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or factors other than an employee's gender.

ILLINOIS SECURE CHOICE RETIREMENT PROGRAM

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ILLINOIS SECURE CHOICE RETIREMENT PROGRAM

- In early 2018, Illinois launched a pilot for Illinois Secure Choice, a state sponsored retirement program.
- It **requires** all Illinois Employers who (1) have 25 or more employees; (2) have been in operation for at least two years; and (3) do **not** offer an employer-sponsored retirement plan to register.
- An employer employing 500 or more employees were required to register by 11/1/2018.
- An employer employing 100 to 499 employees were required to register by July 1, 2019
- An employer employing 25 to 99 employees were required to register by November 1, 2019.
- State of Illinois will notify employers directly when they will be required to register indicate that they are exempt.

ILLINOIS SECURE CHOICE RETIREMENT PROGRAM

- Employers required to provide the program certain information regarding employees to effectuate registration (i.e. contact information, legal name, SSN; DOB).
- Employees have 30-days from the date of registration to opt-out of the program.
- Employee contributions deducted by Employer during normal payroll process and remitted to the Fund. Must remit contributions to the Fund no later than (7) business days after deduction is made from the an employer's compensation.
- Default contribution rate is 5% of gross income, but employees can change their contribution rate or opt out at any time.
- Penalty of $250 for each employee for each calendar year for failure to comply

CHICAGO FAIR WORKWEEK ORDINANCE

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CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Covered Industries (7)**
  - Building Services (*e.g.* janitorial, private security)
  - Health care (*e.g.* hospitals, nursing homes, mental health rehab facilities
  - Hotel (*e.g.* inns, motels, or hotels)
  - Manufacturing (*e.g.* production of tangible goods for use from raw or prepared materials by giving the materials new forms, qualities, properties, or combinations, whether by hand or by machines.
  - Restaurant (*e.g.* business licensed to serve food in the City that also has at least 30 locations globally and at least 250 employees in the aggregate. The term "restaurant" does not include businesses limited to 3 or fewer locations in the City that are owned by one employer and operating under a sole franchise)
  - Retail
  - Warehouse Services (*e.g.* the storage of goods, wares, or commodities for hire or compensation).

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Other Employer Coverage Requirements**
  - In order to be covered by the Ordinance, an employer in a Covered Industry must also employ **100 or more employees** globally, or in the case of not-for-profits and restaurants, 250 or more employees.
  - The Ordinance therefore does not apply to employers with fewer than 100 employees, or to non-profits or restaurants with fewer than 250 employees.
  - Additionally, employers are covered only if they employ 50 or more "Covered Employees," as defined below.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Coverage Employees**
  - An individual is a **Covered Employee** if:
    - The individual is either an employee, as opposed to an independent contractor, as defined by relevant IRS guidance, or a worker employed by day and temporary labor service agencies (as defined by state law) who has been assigned to an employer for at least 420 hours within an 18-month period;
    - The individual earns $50,000 per year or less as a salaried employee, or $26.00 or less per hour (adjusted annually based on the annual increase in CPI);
    - The individual spends the majority of their time working within the City of Chicago; and
    - The individual performs the majority of their work in a Covered Industry.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Advance Notification of Schedules**
  - Employers must provide newly hired Covered Employees with a good faith estimate of projected days and hours of work for the first 90 days of employment.
  - Thereafter, employers must initially notify employees of their work schedules at least 10 days in advance of any new schedule. Beginning **July 1, 2022**, the notice period will increase to **14 days** in advance of any new schedule.
  - An employer may change a Covered Employee's work schedule after it is posted without penalty before these deadlines.
  - Employees may decline to work any additional hours that are scheduled with less than 10 days in advance or 14 days as of July 1, 2022.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Predictability Pay for Schedule Changes**
  - If an employer "changes" (e.g. adds hours, changes the date or time, cancels or subtracts hours)) a Covered Employee's schedule **within the 10- or 14-day** notice period, the employer will have to pay the worker **one hour of predictability pay** for each shift in which the employer changes, at the employee's "regular rate," as defined by the Fair Labor Standards Act.
  - If the employer **cancels or reduces hours with less than 24 hours' notice** (including while the employee is working on a shift), the employer will have to pay the worker 50% of the Covered Employee's regular rate of pay **per hour for any hours not worked** as a result.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Predictability Pay for Schedule Changes**
  - These requirements do not apply under the following circumstances, threats to employers or employees; public utility fails to supply water, electricity, or gas; acts of nature that prevents operations from continuing, war, civil unrest or strikes, or **if employees mutually agree to trade shifts**.
  - The employer can also avoid "predictability pay" when an employee agrees to a proposed schedule change **in writing, or if the employee requests the shift change**.
  - The employers also can avoid "predictability pay" if it subtracts hours due to disciplinary reasons.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Offer of Additional Work to Existing Employees**
  - The Ordinance requires employers seeking to fill additional shifts to first offer those shifts to existing Covered Employees who are qualified to do the work.
  - If the shifts are not filled, they must then be offered to temporary or seasonal workers who have worked on behalf of the Employer for two or more weeks.
  - Employers are not required to offer additional shifts to employees when doing so would make them eligible for overtime pay
- **Application to Collective Bargaining Agreements**
  - The Ordinance does not require any changes to the terms of any collective bargaining agreements **currently in effect**. Employers and unions may also waive the requirements of the ordinance in future collective bargaining agreements, but must do so "explicitly" in "clear and unambiguous terms."

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Employee Notices**
  - The ordinance requires all employers to post a notice, which will be published by the Commissioner of Business Affairs and Consumer Protection, in any workplace where a Covered Employee works.
  - Additionally, employers will be required to provide "with the first paycheck subject to this Chapter" a notice advising each Covered Employee of their rights under the ordinance. This notice will also be published by the Commissioner.
- **Right to Rest**
  - The Ordinance includes a "right to rest" provision, entitling Covered Employees to decline hours that occur within 10 hours of the end of a previous day's shift.
  - The ordinance provides for pay at 1.25 times the regular rate of pay for shifts beginning less than 10 hours after the end of a prior day's shift, but **does not permit employees to waive this premium pay**.

CHICAGO FAIR WORKWEEK ORDINANCE (EFFECTIVE 7/1/2020)

- **Civil Penalties and Private Right of Act.**
  - If an employer is not compliant with the Ordinance, it will be subject to a fine of $1,000 for any retaliatory action, and $300-$500 per employee whose rights were violated for **each day that a violation occurred**.
  - If an employee files a lawsuit and prevails, he or she will be entitled to compensation including lost predictability pay, litigation costs, expert witness fees, and reasonable attorneys' fees.
  - Employees will also maintain the right to bring a private action (i.e. lawsuit) within 2 years from the date of the alleged violation.
  - However, the Ordinance requires employees to file a complaint with the Department of Business Affairs and Consumer Protection and exhaust their administrative remedies there **before filing a lawsuit**.

ARTIFICIAL INTELLIGENCE VIDEO INTERVIEW ACT

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ARTIFICIAL INTELLIGENCE VIDEO INTERVIEW ACT

- Effective 60 days after signed by Governor Pritzker
- An increasingly popular use of artificial intelligence in the hiring process is the "interview bot," which provides recommendations based on factors that may include an applicant's facial expressions, body language, word choice, or vocal tone.
- The Act creates a disclosure and informed consent rule for employers requiring the following:
  - advance notice to each that artificial intelligence may be used to analyze the applicant's video interview and fitness for the position;
  - explain how the artificial intelligence works and the general types of characteristics it uses to evaluate applicants; and
  - obtain the applicant's consent to the use of the technology in a manner that is consistent with the notice.
- The Act requires employers to delete the videos within 30 days of an employee's request.

LIVING DONOR PROTECTION ACT

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THE LIVING DONOR PROTECTION ACT (EFFECTIVE 1/1/20)

- The Living Donor Protection Act ("LDP)" amends the Illinois Donor Leave Act, adding a section that prohibits employers from retaliating against employees who request or take leaves of absence related to organ donation.
- The LDP now allows employees to take leaves of up to 30 days in a 12-month period for bone marrow or organ donation, up to one hour for blood donation, and up to two hours for platelet donations.
- Employees must request leave in advance.
- Employers may **not** require employees to use accumulated sick or vacation pay before using being eligible for organ donor leave.

HOTEL AND CASINO EMPLOYEE SAFETY ACT

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HOTEL AND CASINO EMPLOYEE SAFETY ACT (EFFECTIVE 1/1/20)

- Hotel and Casino employers are required to provide employees who work alone in guest rooms, restrooms, or the casino floor with portable notification devices (i.e. panic buttons) that summon help to the employee's location when the employee **reasonably believes** that a on-going crime, sexual harassment, sexual assault, or other emergency is occurring in the employee's presence.
- Employers must have a written, anti-sexual harassment policy (in English and Spanish) that not only includes provisions encouraging employees to immediately report any alleged sexual assault or harassment by a guest, but must also include the following:
  - A description of the procedures to be used in reporting such instances;
  - Instructions to the complaining employee that he or she is permitted to cease work and leave the immediate area where the danger is perceived until hotel or casino personnel or the police arrive to provide assistance;
  - An offer of a temporary work assignment to the complaining employee away from the offending guest for the duration of the guest's stay;

HOTEL AND CASINO EMPLOYEE SAFETY ACT (EFFECTIVE 1/1/20)

- A provision for paid time off to the complaining employee to: (i) file a police report or criminal complaint against the offending guest; or (ii) testify as a witness against the offending guest resulting from a criminal complaint;
- A notice to employees that the Illinois Human Rights Act and Title VII of the Civil Rights Act of 1964 provide additional protection against sexual harassment in the workplace; and
- A notice to employees that retaliation is prohibited against any employee who complains of sexual assault or harassment or who uses the panic button.

HOTEL AND CASINO EMPLOYEE SAFETY ACT (EFFECTIVE 7/1/20)

- Employees, or their representatives, who believe a hotel or casino employer has violated this Act must provide written notice to the employer of the alleged violation.
- The hotel or casino employer then has 15 calendar days to remedy to the alleged violation.
- If the violation is not remedied, the employee or representative may file a lawsuit against the hotel or casino in the appropriate circuit court to seek relief from such violation.
- An employee or representative who successfully challenges a violation of the Act is entitled to reasonable attorney's fees and costs as well as damages up to $350 per violation, with each day constituting a separate violation.

QUESTIONS?

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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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