

# IDC Defense UPDATE

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## Illinois Legislature Passes The Secure Choice Savings Program Act

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The Illinois Secure Choice Savings Program Act (the "Act") became effective on June 1, 2015. The Act is codified at 820 ILCS 80/1 *et seq.*, and generally requires that certain employers automatically enroll workers in retirement investment vehicles. The Act applies to certain employers with 25 or more employees who do not otherwise offer a qualified retirement plan to their employees. The Act also applies to other smaller employers who voluntarily choose to participate. The Act generally requires that affected employers automatically enroll their employees into an automatic payroll deduction retirement IRA. However, employees may opt out of the program.

By its terms, the Act applies to "employers" and certain "small employers." An "employer" is defined as a person or entity engaged in business, industry, profession, trade or other enterprise in Illinois, whether for profit or not for profit, with 25 or more employees in Illinois and which does not offer a qualified retirement plan. To fall within the parameters of the Act, the employer must have been in business at least 2 years. A "small employer" is a person or entity engaged in business in Illinois with 25 or fewer employees or who has been in business less than two years, but who is interested in being a participating employer. The Act defines an employee as any individual who is 18 years of age or older, who is employed by an employer, and who has wages that are allocable to Illinois during a calendar year.

The Act creates the Illinois Secure Choice Savings Program ("Program"). The Program is a retirement savings program in the form of an automatic enrollment payroll deduction IRA. The Act also authorizes the Illinois Secure Choice Savings Board (the "Board") to administer the Program. The Program's fund is set up as a trust, outside of the State Treasury. The fund includes the individual retirement accounts of enrollees. Moneys in the fund consist of those automatic payroll deductions and contributions to the fund made under the Act. The Board operates the fund, but must do so in a way that meets the requirements for IRAs under the Internal Revenue Code. 820 ILCS 80/15(a).

The Act provides that the default investment option for enrollees will be a "life-cycle fund," with a target date based upon the age of the enrollee. The statute also allows the Board to establish other investment options, including a conservative principal protection fund, a growth fund, an annuity fund, and a secure return fund whose primary objective is the preservation of the safety of principal and the provision of a stable and low-risk rate of return. 820 ILCS 80/45.

The Act places the burden upon the employer to establish a payroll deposit retirement savings arrangement, allowing each employee to enroll in the Program.

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820 ILCS 80/60(a). Participating employers must automatically enroll all employees who have not opted out of participation. Employers may, but are not required to, provide payroll deduction retirement savings arrangements for each employee who elects to participate in the Program.

When choosing to participate, enrollees have the ability to select a contribution level, up to the deductible amount for the enrollee's taxable year under Section 219(b)(1)(A) of the internal revenue code. Enrollees may change their contribution level at any time, subject to rules promulgated by the Board. If an enrollee fails to select a contribution level, the default level of contribution is 3%, provided that such contributions do not cause the enrollee's total contributions to IRAs for the year to exceed the deductible amount provided by the IRS. 820 80/60(c).

Enrollees may also select an investment option from the permitted investment options provided. Enrollees may change their investment option at any time, subject to rules promulgated by the Board. In the event that an enrollee fails to select an investment option, that enrollee shall be placed in the investment option selected by the Board as the default option. If the Board does not select an investment option, then the life-cycle fund investment option is the default. 820 80/60(d). Employers must designate one open enrollment period throughout the year, during which employees may elect to enroll in, or opt out of, the program. 820 ILCS 80/60(e), (f).

In addition to the primary fund, the Act also creates a second, administrative fund. This administrative fund is created as a non-appropriated "separate and apart trust fund" within the State Treasury. Moneys in the administrative fund will be used to pay for the administrative expenses incurred by the Board in furtherance of the Act. The Act provides that "the Administrative Fund may receive any grants or other moneys designated for administrative purposes from the State, or any unit of federal or local government, or any other person, firm, partnership, or corporation." 820 ILCS 80/16. Thus, it appears that the statute contemplates the administrative fund will be funded primarily by allocations from local, state or federal governments.

The Board is generally tasked with designing and disseminating an information packet to all employers. They are also required to provide employers with an employee packet. These informational packets will include background information on the Program, appropriate disclosures for employees, and information regarding the vendor Internet website. 820 ILCS 80/55. The disclosure form includes the benefits and risks associated with making contributions to the Program, how to participate in the program with a level of employee contributions other than 3%, the process for withdrawal of retirement savings, and related information. 820 ILCS 80/55. The employee information packet will also include a form for an employee to note his or her decision to opt out of the Program, or to elect a level of employee contributions other than 3%.

The Board is also charged with establishing and maintaining an internet website designed to assist employers in identifying private sector providers of retirement arrangements that can be set up by the employer rather than allowing employee participation under the Act. 820 ILCS 80/60(i). However, the Board is only required to establish the website if there is "sufficient interest in such an internet website by private sector providers and if the private sector providers furnish the funding necessary to establish and maintain the Internet website. *Id.* In the event that such a website will be established, the Board must provide public notice of the availability of, and the process for inclusion on, the website.

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In light of Illinois' well-publicized financial problems—including problems with debt—certain provisions of the Act are notable. First, § 35 of the Act provides that the Board will annually prepare and adopt a written statement of investment policy. 820 ILCS 80/35. Of note, this provision *explicitly prevents* the Board, the Program or the fund from borrowing for investment purposes. In addition, the Act explicitly provides that the State shall have no liability for the payment of any benefit to any participant in the program. 820 ILCS 80/50. Section 70 of the Act outlines that—rather than the State—liability for the payment of retirement savings benefits in excess of funds available under the Program shall rest with the entities that the Board contracts to provide insurance to protect the value of the Program. In addition, no State board, commission, or agency, or any officer, employee, or member thereof is liable for any loss or deficiency resulting from particular investments selected under this Act. 820 ILCS 80/70(b).

The one exception to this immunity is when liability arises out of a breach of certain enumerated fiduciary duties. Section 25 of the Act provides that the Board and its members, any trustee appointed by the Board, other agents appointed or engaged by the Board, and all persons serving as Program staff shall discharge their duties with respect to the Program pursuant to certain fiduciary duties. This duty requires that these individuals discharge their duties solely in the interest of the Program's enrollees and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable administrative expenses; by investing in accordance with the applicable standard of care; and by using any contributions from employees and employers exclusively for the purpose of paying benefits to the enrollees and for administrative and investing costs. 820 ILCS 80/25.

Finally, the Act also provides for annual audits and financial reports. The annual audits must be performed by an independent certified public accountant and shall include (but are not limited to) direct and indirect costs attributable to the use of outside consultants, independent contractors, and any other persons who are not State employees for the administration of the Program. 820 ILCS 80/80.

## **Illinois Appellate Court Finds Trip on Curb Compensable under Workers' Compensation Act Due to "Street Risk" Doctrine**

by Molly P. Connors  
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*In Nee v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 132609WC, the Appellate Court of Illinois, First District, held that a traveling employee's trip on a curb arose out of his employment and, therefore, was compensable under the Illinois Workers' Compensation Act (the Act), 820 ILCS 305/1 *et seq.*

At the time of his accident, the claimant in *Nee* was a plumbing inspector employed by the City of Chicago (City). His job duties required him to inspect five to seven sites per day, which were located throughout the City. The claimant began each day by reporting to a filtration plant, where he received his inspection assignments. He then drove to each site. The City admitted that the claimant was a traveling employee under the Act.

According to the claimant, his injury occurred after completing an inspection, while he was walking back to his car to go to the next inspection site. He testified he tripped on a curb and twisted his knee. He initially stated he may have tripped because the curb was not level with the sidewalk. However, upon further questioning, the claimant admitted he did not look at the curb and did not know if any defect was present.

After a hearing, the arbitrator awarded workers' compensation benefits, finding that the claimant's injury was compensable because it arose out of and in the course of his employment with the City. The City appealed to the Illinois Workers' Compensation Commission (Commission), which reversed the arbitrator's decision. The Commission held that the claimant was not entitled to benefits because he failed to prove that his injuries arose

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out of and in the course of his employment. The claimant then appealed to the Circuit Court of Cook County, which confirmed the Commission's decision.

On appeal, the First District found that the Commission's decision was against the manifest weight of the evidence because the accident arose out of and in the course of the claimant's employment. The court explained that in order to justify compensation, the claimant in a workers' compensation case must show, by a preponderance of the evidence, that he suffered an accident which arose out of and in the course of his employment. For an accident to occur in the course of employment, it must be "sustained at a place where a claimant might reasonably have been while performing his work duties." 2015 IL App (1st) 132609WC, ¶ 20. According to the court, it was undisputed that the claimant's accident occurred in the course of his employment with the City because he had just left one inspection site and was on his way to the next site.

An accident arises out of the course of employment if "its origin is in some risk connected with, or incidental to, the employment so as to create a causal connection." *Id.* ¶ 21. The court cited *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (1st Dist. 2007) and *Illinois Institute of Technology Research Institute v. Industrial Com'n*, 314 Ill. App. 3d 149, 162 (1st Dist. 2000) in explaining there are three categories of risk: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." In *Illinois Institute of Technology Research Institute*, the court elaborated on those categories, stating employment risks include industrial accidents and occupational diseases, and they are almost always compensable. 314 Ill. App. 3d at 162. Personal risks are typically noncompensable; they include "injuries caused by personal infirmities" and "injuries caused by personal enemies." *Id.*

Finally, risks which are neither associated with employment nor personal to the employee are considered neutral risks. They are non-compensable unless the employee is exposed to the risk to a greater degree than the general public. Courts find evidence of a greater degree of risk when "some aspect of the employment contributes to the risk" or when "the employee is exposed to the risk more frequently than the general public." 2015 IL App (1st) 132609WC, ¶ 24.

The court in *Nee* found that traversing a curb was a neutral risk. There was no evidence that the claimant had a physical condition which caused him to fall. The court also determined that no aspect of the claimant's employment contributed to his risk while traversing the curb. The claimant was required to carry a clipboard while walking, but there was no evidence the clipboard contributed to his accident. There was also no evidence that the curb at issue was different from any other curb, since the claimant admitted he did not know if it had a defect.

As a result, the risk of traversing the curb was compensable only if the claimant was exposed to the risk more frequently than the general public. The court recognized that the general public is exposed to the risk of traversing curbs on a daily basis, as was the claimant. However, the court applied the "street risk" doctrine, which states that when an employee's job requires him to travel the streets, the risks of the street become risks of his employment. As a result of the "street risk" doctrine, courts presume traveling employees are exposed to street risks more frequently than the general public. Therefore, the court concluded, the claimant's injury arose out of his employment with the City.

The *Nee* decision is troubling for employers because it entitles traveling employees to workers' compensation benefits when they trip on curbs (and, presumably, streets or sidewalks), even if there is no evidence of a defect. After *Nee*, employers of traveling employees should expect an increase in workers' compensation claims stemming from trips and falls. However, the *Nee* opinion indicates that the same accident would not be compensable if the claimant was not a traveling employee. In future cases, the issue of whether an employee's job "requires him to travel the streets" will likely be fiercely contested.

## NLRB Clamps Down on Employers' Email Policies

by Kimberly A. Ross  
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In yet another pro-employee decision, the National Labor Relations Board (NLRB) has held that company policies that limit the use of the company's email for only business related purposes violate Section 7 of the National Labor Relations Act (NLRA) because they unduly interfere with employees' rights to communicate with one another regarding self-organization and other terms and conditions of employment. ***Purple Communications, Inc. and Communications Workers of America***, AFL-CIO. Cases 21-CA-095151, 21-RC-091531, and 21-RC-091584. Purple Communications, Inc. had a policy that provided that company emails were for "business purposes only." Its policy also prohibited employees from using company email to "engag[e] in activities on behalf of organizations or persons with no professional affiliation or business with the company," and to "send uninvited email of a personal nature."

The NLRB found that employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email systems. This decision, recorded on December 11, 2014, specifically overturned a 2007 NLRB decision that had held that an employer could limit the use of its emails to business purposes no differently than the employer could limit the use of its other communications *equipment* (such as copy machines, bulletin boards and telephones) to business purposes only. The *Purple Communications* decision found that an email is not "equipment" but rather is "fundamentally a forum for communication." Thus, the NLRB determined that there is a presumption of the right to communicate in the workplace on nonworking time, whether verbally or through a company's email system.

The decision appears to be limited to employees who already have been granted access to the employer's email system in the course of their work and **does not require employers to provide such access**. Although undefined, the NLRB also stated that an employer may attempt to justify a total ban on non-work use of email if it is able to demonstrate that "special circumstances" make the ban necessary to maintain production or discipline. Finally, even in the absence of "special circumstances," the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.

Although the NLRB specifies that the personal use of company email must be off work time, it ignores the fact that an email authored during non-working time can be read by its intended recipients during work time. Further, to enforce the policy would require the company to actively monitor employees' use of its email system to know whether an email was drafted (or read) during working hours. Although not prohibited under this decision, such monitoring could lead to an employer being accused of unlawful surveillance of Section 7 activity.

The NLRB's decision only addresses policies that limit use of email "for business purposes only" (or similar wording), and does not address personal use of the employer's email beyond Section 7 activity, such as online shopping or signing up for news alerts. Therefore, one possible solution to avoid interference in Section 7 activity but still prohibit this other personal use would be to have a policy prohibiting non-business usage of email, but to provide a clear disclaimer regarding an exception for Section 7 activity (including limiting to sending or reading during non-working hours).

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Although the *Purple Communications* decision is likely to be appealed, it is fully enforceable for now and applies to all workplaces, not just those where unions are present. Moreover, the new law will be applied retroactively, which means that employers who currently have a total prohibition of personal use of their email system should amend those policies immediately.

## Public Employee Receives First Amendment Protection

by Andrew Makauskas  
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*Lane v. Franks*, 134 S. Ct. 2369 (2014), involved the firing of Edward Lane (Lane). In 2006, Lane was hired as Director of Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC). His job called for oversight of CITY's day-to-day operations, hiring and firing of employees, and making decisions for the respective program's finances. Lane conducted an audit and discovered that Suzanne Schmitz, an Alabama State Representative who was on the payroll for CITY, had not been reporting to work. After Schmitz refused to report to the office to serve as counselor, Lane fired Schmitz. The firing drew the attention of the FBI, which conducted an investigation of Schmitz' employment with CITY. A grand jury indicted Schmitz on four counts of mail fraud and four counts of theft from a program receiving federal funds. *United States v. Schmitz*, 634 F. 3d 1247, 1256-1257 (CA 11 2011).

Schmitz' trial began in August of 2008. Under subpoena, Lane testified regarding the events that led to his termination of Schmitz. The jury failed to reach a verdict. Approximately six months later, the case was retried, and again, under subpoena, Lane testified. Schmitz was convicted on three counts of mail fraud and four counts of theft from a program receiving federal funds. In January 2009, Steve Franks (Franks), who had become president of CACC in January, 2008, terminated 29 probationary CITY employees, including Lane. However, soon after the termination, Franks rescinded all but 2 of the 29 terminations. Lane was one of the two employees whose termination was not rescinded.

In January 2011, Lane sued Franks in his individual and official capacities under Rev. Stat. §1979, 42 U.S.C. §1983, alleging that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz. He sued for damages against Franks in his individual capacity and equitable relief, including reinstatement, for Franks in his official capacity.

The District Court granted Franks' motion for summary judgment. The Eleventh Circuit affirmed. The Supreme Court granted *certiorari* to resolve discord among the Courts of Appeals as to whether public employees may be fired – or suffer other adverse employment consequences – for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.

The First Amendment protection of a public employee's speech depends on the careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of

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the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Board of Ed. Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968).

The Supreme Court first addressed whether Lane’s testimony was speech of a citizen. It found that it was. “Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). Sworn testimony in court is citizen speech because of the obligation to the Court and to society at large, to tell the truth. *Lane*, 134 S. Ct. at 2378-2379. The Supreme Court disagreed with the Eleventh Circuit’s interpretation of *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). The Eleventh Circuit reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, his testimony was to be treated as speech of an employee rather than that of a citizen. The Supreme Court disagreed. *Garcetti* involved an internal memorandum prepared by a deputy District Attorney during the course of his work. The Supreme Court did not read *Garcetti*’s holding as saying that a public employee’s testimony cannot be that of a citizen. The Supreme Court noted the importance of public employee speech in cases involving public corruption as follows:

“It would be antithetical toward jurisprudence to conclude the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”

*Lane*, 134 S. Ct. at 2380.

The Supreme Court also found that Lane’s testimony was also speech on a matter of public concern. On this issue, speech involves a matter of public concern “when it can ‘be fairly considered as relating to any matter of political, social or other concern to the community’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and a valid concern to the public’ ” *Id.* (citation omitted). “The inquiry turns on the ‘content, form and context’ of the speech.” *Id.* (citation omitted). The Supreme Court found that corruption in a public program and misuse of state funds clearly involved matters of significant public concern. The form and context of the information, sworn testimony in a judicial proceeding, further supported the conclusion that the testimony was a matter of public concern.

Finding that Lane’s truthful sworn testimony at the criminal trial was speech as a citizen on a matter of public concern, the court then looked to see whether the government had “an adequate justification for treating the employee differently from any member of the public” based on the government’s needs as an employer. *Id.* at 2381 (citation omitted). No justification was found in this case. There was no evidence that the testimony was false or that Lane unnecessarily disclosed sensitive, confidential or privileged information.

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As such, the Supreme Court ruled that Lane's speech was entitled to protection under the First Amendment. The Eleventh Circuit erred in dismissing Lane's claim of retaliation on that basis.

The Supreme Court then addressed whether the claims against Franks, in his individual capacity, should be dismissed on the basis of qualified immunity, as found by the Eleventh Circuit. The Supreme Court affirmed the dismissal.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id.* (citation omitted). Under this doctrine, courts may not award damages against a government official in his personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct." *Id.* (citation omitted). The Supreme Court found that Franks could have reasonably believed, at the time he fired Lane, that a governmental employer could fire an employee on account of testimony the employee gave, under oath, and outside the scope of his ordinary job responsibilities. In making this determination, the Supreme Court discussed *Morris v. Crow*, 142 F. 2d 1379, an Eleventh Circuit decision which held, under similar circumstances, that testimony was not provided First Amendment protection because the testimony was in the role of an employee instead of a citizen.

The Supreme Court reversed the judgment of the Eleventh Circuit to address the claims initially brought against Franks in his official capacity. The claims had not been addressed because the District Court and the Eleventh Circuit had initially found that Lane's speech was not entitled to First Amendment protection.

While specifically addressing the rights of public employees who are subpoenaed to testify in court, the case does not specifically address whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. The concurring opinion mentioned police officers, crime scene technicians, and laboratory analysts as individuals who testify on a routine basis and whose testimony is a critical part of their employment duties. The concurring opinion stated that the Court properly left the constitutional questions raised by these scenarios for another day.

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