Update on New/More Recent Illinois Employment Laws

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Please Note:

- The following information is provided as a membership service for restaurant operators, and is not intended as legal or professional advice or counsel.
- Any local, state, or federal rules, regulations, or laws summarized are subject to change.
- The Illinois Restaurant Association strongly encourages readers to consult with their attorney or competent professional prior to taking action based on the following information.
Agenda

- Illinois Recreational Cannabis Act
- Chicago Fair Workweek Ordinance
- Workplace Transparency Act (WTA)
- Illinois Human Rights Act Amendments
- Sexual Harassment Victims Representation Act
- VESSA Amendments
- Amendments to the Equal Pay Act
- Chicago Minimum Wage Ordinance
- Cook County Minimum Wage Ordinance
- Illinois Minimum Wage Law Amendments
- Illinois Secure Choice Registration Requirements
- Department of Labor Overtime Rules
- Department of Labor Proposed Tip Pooling/Tip Credit Rules
- Illinois Biometric Information Privacy Act
Illinois Recreational Cannabis Act
Marijuana affects many skills that matter in the workplace, including:

- Ability to think and solve problems;
- Judgment;
- Motor skills;
- Reaction time;
- Perception;
- Mood; and
- Memory.

“When you’re drunk you run red lights, and when you’re stoned you stop at the green lights.” Kevin Hill, MD, assistant professor of psychiatry at Harvard Medical School and director of the Substance Abuse Consultation Service at McLean Hospital.

Usage of marijuana could be immediately noticeable to guests.
Changes Coming Effective January 1, 2020

- Decriminalization: Possession, consumption, use, purchase, obtaining, or transporting an amount (within the Cannabis Act’s limits) of cannabis for personal use is legal in the state of Illinois for persons aged 21 and over effective January 1, 2020.

- Employers may not discriminate against employees for the recreational use of cannabis when the use has no impact on performance.

- Employers still have options to prohibit cannabis from impacting the workplace.
What Rights Do Employers Have?

- **Section 10-50**: The Act does not prohibit employers from adopting reasonable *zero tolerance* or drug-free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis:
  - in the workplace; or
  - while on call

  provided that the policy is applied in a nondiscriminatory manner.
What Rights Do Employers Have? (cont’d)

- **Section 10-50**: The Act does not require an employer to permit an employee to be under the influence of or use cannabis:
  - in the employer’s workplace; or
  - while performing the employee’s job duties; or
  - while on call.

- Employers **can** discipline or terminate an employee for violating an employer’s employment policies or workplace drug policy.
Cannabis Act: Detecting Impairment

- How can an employer test for Cannabis impairment?
  - *Urine tests*: can detect days to weeks after exposure;
  - *Hair test*: up to 90 days after exposure; and
  - *Saliva*: up to 24 hours of use.

- Can an employer rely on a drug test alone to establish impairment in the workplace?

- What does your workplace policy say about drug testing?
How Do I Discipline - Good Faith Belief

- Section 10-50:
  Good Faith Belief Safe Harbor

- An employer may consider an employee to be impaired or under the influence of cannabis 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 of the duties or tasks of the employee’s job position.
Good Faith Belief Factors

- **Specific, articulable symptoms** while working that decrease or lessen the employee’s performance:
  - symptoms of the employee’s speech, physical dexterity, agility, coordination, or demeanor;
  - irrational or unusual behavior;
  - negligence or carelessness in operating equipment or machinery;
  - disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property;
  - disruption of a production or manufacturing process; or
  - carelessness that results in any injury to the employee or others.
Good Faith Belief of Impairment

- What should you be looking for?
- **Specific, articulable symptoms** while working that decrease or lessen the employee’s performance:

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Good Faith Belief: Documentation

- **Document** suspected specific, articulable impairments via:
  - Email or memo;
  - Statements from witnesses;
  - Two signatures from managers or supervisors;
  - Surveillance video (if it depicts the employee’s impaired physical dexterity, agility, coordination, or demeanor); and/or
  - Any other objective proof.
Cannabis Act: Discipline or Discharge

» If an employer elects to discipline an employee based on the employer’s good-faith belief that the employee is under the influence or impaired by cannabis, the employer must afford the employee a **reasonable opportunity to contest the basis of the determination**.

» No formal hearing process required. Consider the pros and cons of:
  - Listing this “right” in your Employee Handbook or another Policy; AND/OR
  - Using a specific written form to inform an employee of an under-the-influence-of cannabis finding, and adding a section for the employee to contest; AND/OR
  - Allow an alternative opportunity to contest in writing, verbally, or both.
Cannabis Act:
Discipline or Discharge

- “Good Faith Belief” Safe Harbor provides protection against a potential cause of action against an employer for actions:
  - subjecting an employee/applicant to reasonable drug and alcohol testing under the employer’s workplace drug policy (including employee’s refusal);
  - disciplining/terminating based on the employer’s good faith belief that an employee was impaired, under the influence of cannabis, and/or used or possessed cannabis while at work or on call in violation of the employer’s workplace drug policy; or
  - injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.
Cannabis Act v. Privacy Act:

- The Illinois Right to Privacy in the Workplace Act ("Privacy Act"), 820 ILCS 55/1, et seq.
  - "[I]t shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking and non-call hours."
  - As used in this Section, "lawful products" means products that are legal under state law.
Cannabis Act v. Privacy Act:

- **Liability under the Privacy Act:** If an employee or applicant for employment alleges that he or she has been denied his or her rights under the Privacy Act, he or she may file a complaint with the Department of Labor.
  - Possible violations of Section 10-50 of the Cannabis Act:
    - (1) That an employer **did not have a good faith belief** that the employee was impaired or under the influence of cannabis at work/on-call; and/or
    - (2) That the employer did not give the employee a **reasonable opportunity** to contest the basis of the determination.
Cannabis Act v. Privacy Act:

- Sued under the Privacy Act?
  - DOL investigates;
  - DOL attempts to resolve via conciliation; and
  - DOL or employee can sue.

- Standard under which DOL will give deference to employers? Open question, so:
  - **TAKEAWAY**: In making such personnel decisions: Document, document, document!
Privacy Act: Exceptions

- Exceptions: Does Not Apply To:
  - Any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.
  - The use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.
    - Another nod to safety-sensitive professions: employee’s must be able to perform assigned duties. Need evidence of impairment; not just a drug-test.
Safety-Sensitive Positions Under Federal Law

Section 10-50 of the Cannabis Act:

Nothing in this 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.

49 CFR 40.151(e): Medical Review Officers are prohibited from “verify[ing] a negative test based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted).

TAKEAWAY: Employee who cannot pass a federally mandatory testing (e.g. DOT) is unlikely to be protected by the ADA or otherwise because passing such testing is an essential job requirement.
ADA Considerations:

- **Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 330, (Conn. D.C. 2017):**
  
  Federal law **did not preempt** the enforcement of a state employment anti-discrimination statute when employer did not hire based on preemployment drug test and no suggestion that plaintiff’s medicinal use of cannabis adversely would affect her job performance.

- **Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159, 161 (Ore. 2010):**
  
  Federal law **did preempt** enforcing a state employment anti-discrimination statute - still illegal under federal law.
How do we reconcile *Emerald Steel* with *Noffsinger*?

In *Emerald Steel*, Oregon’s medical cannabis statute contained no provision explicitly barring employment discrimination.

In *Noffsinger*, by contrast the question was whether the CSA preempted a state law provision that prohibited an employer from taking adverse action against an employee on the basis of the employee’s otherwise state-authorized medicinal use of cannabis.
ADA Accommodations: Illinois Law

- As in Noffsinger, Illinois’ medical marijuana statute has an anti-discrimination provision:
  - See 410 ILCS 130/40(a): “No...employer...may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the...employer...in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules.”
Can Illinois employers still drug test their employees and have drug-free policies under the Act?

- Yes, so long as these policies are applied in a nondiscriminatory manner.
  - Employers may still maintain a reasonable zero-tolerance drug policy.
    - A reasonable zero-tolerance policy may, for example, preclude employees from being impaired or under the influence, or storing or using cannabis at the workplace.
  - Employers may still drug test as part of their pre-employment screening.
    - However, testing positive for cannabis during a pre-employment drug screen cannot typically be grounds for an employment decision under the Act.
“But I don’t want to take the risk”


- In a failure to hire case, the Defendants emphasize that their manufacturing facility has dangerous equipment and couch their concern as one of workplace safety.

- They suggested that if the Court were to rule in favor of Plaintiff, an employer would have to accommodate “an employee who shows up to work in the morning under the influence after spending the entire night—or possibly the entire weekend—ingesting medical marijuana, simply because they used the drug outside the physical workplace.”

- The Court rejected this argument.
“But I really don’t want to take the risk”


- “This argument utterly ignores the plain words of the General Assembly, which has explicitly contemplated this scenario. The Hawkins-Slater Act shall not permit ‘[a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice.’ Sec. 21-28.6-7(a)(1). If an employee came to work under the influence, and unable to perform his or her duties in a competent manner, the employer would thus not have to tolerate such behavior.”

- **TAKEAWAY:** State law may carry the day when it comes to pre-employment drug testing for cannabis, because the use of cannabis necessarily occurred outside of the workplace. Review policies and consider removing pre-employment testing to the extent it is in current policy and/or practice - focus more on reasonable suspicion.
What Is The Accommodation?


- “Regardless, this Court agrees that Defendants are not required to make any accommodations for Plaintiff as they are defined in the employment discrimination context.”
  - They do not need to make existing facilities readily accessible.
  - They do not need to restructure jobs, modify work schedules, reassign to a vacant position, or acquire or modify devices or examinations.
  - They do not even need to alter their existing drug and alcohol policy, which prohibits “the illegal use, sale or possession of drugs or alcohol on company property.”
  - While that policy provides that “all new applicants who are being considered for employment will be tested for drug or chemical use,” it does not state that a positive result of such test will be cause for withdrawal of the job offer.

- **TAKEAWAY:** ADA does not require employers to allow cannabis use at work or on the employer’s premises. Address whether to continue pre-employment testing.
Cannabis Act and Drug Free Workplace Act

- The Drug-Free Workplace Act of 1988 ("Drug-Free Act"), 41 U.S.C. § 8102, et seq., provides that no person shall be considered a responsible source for the purposes of being awarded a contract for the procurement of any property or services of a value of $250,000 or more from any federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace.

- Non-compliance with the Drug-Free Act subjects the private employer’s federal contract to possible termination or suspension.

- Scope of these requirements and your policies should be assessed.
OSHA and Drug Testing

Cannot retaliate against employees for reporting work-related injuries or illness

Permitted to conduct some post-incident drug testing
OSHA and Drug Testing

Drug Test

Post-accident testing may be permitted

Employers should be testing all employees who contributed to the accident. Not just the employee who was injured.
Questions to Consider

- Do I reasonably accommodate a failed drug test for cannabis if I have no evidence of impairment in the workplace?
- Do I have to hire someone who cannot pass a drug test (due to a positive cannabis finding), if I have no evidence that the applicant would be impaired in the workplace?
- Do I have to employ someone who uses cannabis medicinally at home, if I have no evidence of impairment in the workplace?
Cannabis Act: Takeaways

- Employers are not required to accommodate intoxication, use, or possession in the workplace; continue to enforce Drug and Alcohol Policies in this regard.

- Focus on positions governed by federal, state or local law requirements and/or other safety-sensitive positions - do employees handle machinery? Do they handle sharp instruments (e.g., knives)?

- Don’t hang your hat on drug-testing alone and decide when (if at all) to conduct post-offer, pre-employment testing and random testing.

- Follow the case law developments in Illinois and other states being mindful of specific protections under state medical marijuana laws.

- Review your Drug and Alcohol Policies in your Employee Handbooks and consider what form of documentation you are going to use as it relates to establishment of the Good Faith Safe Harbor belief.
Chicago Fair Workweek Ordinance
Chicago Fair Workweek Ordinance

- The Chicago Fair Workweek Ordinance goes into effect on July 1, 2020. It will require employers to provide certain amounts of *advance notice* of work schedules.

- Overview of the Chicago Fair Workweek Ordinance:
  - **Covered Employer:**
    1) For profit: employs 100 or more employees (globally).
    2) Restaurant: employs 250 or more employees and has at least 30 locations (globally).
    3) Not-for-profit: employs 250 or more employees (globally).
    4) At least 50 employees must work in Chicago.
  - **Covered Employees:**
    2) Any employee who performs work for an employer.
    3) The majority of the work took place in Chicago.
    4) Earned less than or equal to $50,000 or less than or equal to $26/hour.
    5) Works in a covered industry.
  - **Note:** May be waived in a collective bargaining agreement.
Fair Workweek Ordinance: Who Does It Apply To?

What is a covered employer? Specific industries including:
- Hotels
- Restaurants
- Building Services
- Retail
- Warehouse Services

What is a covered employee? An employee that performs a majority of their work within the City, and makes less than or equal to $50,000 per year, or less than or equal to $26.00 per hour. Income levels will increase with the consumer price index.
- Includes temporary workers on assignment for 420 hours in an 18-month period.
- Does not include bona fide independent contractors.
Definition of Restaurant

► “Restaurant” is defined under the Ordinance as a business which has at least 250 employees in the aggregate and which has, globally, at least 30 locations.

► Franchisees that operate three or fewer locations within the City of Chicago are not “restaurants” under the Ordinance, and shall be considered separate from franchisors and other franchisees operating the same brands.
Employer Requirements: New Employees

- New Employees must receive advance notice of expected schedule:
  - Employers must provide employees with notice of their rights under the Ordinance;
  - Prior to the employee’s first day, the employer must provide the employee with a good faith estimate in writing of the employee’s projected days and hours of work for the first 90 days of employment, including: average number of hours in a week, whether on call shifts will happen, what days an employee will be expected to work, the start and end time of the employee’s shifts; and
  - Employees may ask the employer to change the days and hours, and the employer must consider the request and inform the employee of its decision within 3 days.
Employer Requirements: Advance Notice for Existing Employees

- Employers must provide “covered” employees with at least **10 days’** advance notice of their work schedule (including shifts and on-call status).
  - **Beginning July 2022:** The notice period increases from 10 days to 14 days.
- Schedules must be posted and transmitted electronically to employees upon request.
- Once the deadline for posting the schedule has passed, employers must take additional steps to alter the schedule.
Employer Requirements: Advance Notice and Predictability Pay

What happens if an employer does not give 10 days’ notice?

► An employee may decline the previously unscheduled hours.

► Employees that work altered schedules may be entitled to “predictability pay”:
  
  ► If the employer changes the date or time of shift without a loss of hours: the employer must pay 1 hour of predictability pay to the employee at the employee’s normal hourly rate.

  ► If employer reduces or cancels an employee’s schedule hours with less than 24-hours notice: the employee is entitled to 50% of the regular rate of pay for the hours lost because of that change.
Fair Workweek Ordinance: Exceptions to the Rules

- Exceptions where the work schedule change occurred as a result of:
  - A mutually agreed upon shift trade or coverage between 2 employees in writing;
  - A mutual agreement in writing;
  - An employee requesting a shift change in writing;
  - Disciplinary reasons that are documented in writing;
  - A threat to property;
  - A utility outage;
  - Acts of nature (flood, earthquake, tornado, etc.);
  - War, civil unrest, strikes, threats to public safety;
Offer of Additional Work To Existing Employees:

- Employers are required to offer additional shifts to qualified employees prior to offering the work to anyone else.
- If the additional shifts are not accepted, the employer has to offer shifts to temporary or seasonal employees who have been employed for 2 or more weeks.
- Wherever practicable, the employer needs to offer the hours to part-time employees first.
- Employers are not required to schedule an employee if it would result in overtime.
Fair Workweek Ordinance (cont’d)

- The Right to Rest:
  - A covered employee may decline work schedule hours where there is less than a 10-hour break from when the previous day’s shift ended.
  - A covered employee who agrees to work hours where there is less than a 10-hour break, but has not consented in writing to doing so, has to be paid at a rate of 1.25 times their regular rate of pay for any hours worked less than 10 hours following the end of a previous shift.
Fair Workweek Ordinance (cont’d)

- Right to Request a Flexible Working Arrangement:
  - A covered employee has the right to request a modified work schedule (including changes to days, hours, and start times).
  - Employees have the right to request permission to trade shifts, work part-time, job share, or reduce or change work duties.
  - Note: the Ordinance permits employees to make these requests without consequence, but the Ordinance does not create any obligation for employers to grant any of the requests.
Chicago Fair Workweek Ordinance: Additional Details

- Employers must display a poster and distribute notice to employees with their first paycheck.
- Broad anti-retaliation provisions.
- Penalties: fines between $300 - $500 for each offense; each employee whose rights are affected counts as an offense; each day a violation occurs counts as a separate offense; fines for retaliation are $1,000.
- Private cause of action: employees must exhaust administrative remedies with the City and the City has to come to some sort of determination before suit can be filed; 2 year statute of limitations; damages include payment of predictability pay, costs, expert fees, and reasonable attorneys’ fees.
- Record retention: 3 years.
Additional Considerations

- Job offers and hiring paperwork should be updated to reflect employee rights.
- Evaluate all schedules in advance of July 1, 2020.
- Develop or adopt tracking capability to provide guidance on when an employee is permitted to decline work or receive premium pay.
- Draft explicit waivers in future union contracts.
- Review which positions are more likely to have unpredictable scheduling to develop strategies for minimizing “overscheduling.”
- Develop policies strictly prohibiting late call-offs to minimize the amount of times you will have to call in substitutes.
  - However, do not punish employees for call-offs if doing so would violate local paid sick leave ordinances or collective bargaining agreements.
Workplace Transparency Act
Workplace Transparency Act

- June 2, 2019, the Illinois General Assembly passed the Workplace Transparency Act.
- Effective Date: January 1, 2020.
- Objective: Designed to further prevent and address sexual harassment in the workplace, and addresses other related issues, as well.
Workplace Transparency Act (cont’d)

- Overview - Workplace Transparency Act:
  - Employment Contracts: With applicants and employees cannot contain non-disclosure or non-disparagement clauses covering harassment or discrimination prohibited by the Illinois Human Rights Act.
  - Arbitration Agreements: Non-negotiated agreements requiring arbitration of discrimination and harassment claims as a condition of employment may not be enforceable.
  - Separation Agreements: Cannot contain non-disclosure and non-disparagement clauses unless numerous requirements are met.
  - Victims Economic Safety and Security Act: Amended to require employers to provide employees who are victims of sexual harassment or whose family members are victims of sexual harassment up to 12 weeks of job protected leave per year or other reasonable accommodations.
Workplace Transparency Act (cont’d)

- **Required disclosures:**
  - Beginning July 1, 2020, covered employers must disclose information about settlements for harassment or discrimination claims, and any adverse judgments or rulings to the Department of Human Rights.
  - This information can be used for the Department to open a preliminary investigation into pattern or practice violations.
  - Failure to comply with reporting obligations could result in civil penalties up to $5,000 per offense.

- **Trainings**
  - All employers must provide sexual harassment training to all employees and managers on an annual basis.
  - Training programs must meet or exceed standards that will be produced by the Department.
Workplace Transparency Act (cont’d)

- Prohibits unilateral confidentiality agreements in settlement or termination agreements, but does NOT prohibit mutual confidentiality agreements if:
  - If confidentiality is the documented preference of and mutually beneficial to both parties;
  - The employee is notified of his or her right to have an attorney review the agreement;
  - The employee is given 21 days to consider the agreement with a seven-day revocation period;
  - The waiver is knowing and voluntary;
  - There is valid, bargained-for consideration in exchange for the confidentiality; and
  - The agreement does not require the employee to waive claims of unlawful employment practices that accrue after the date of execution of the settlement or termination agreement.
Workplace Transparency Act (cont’d)

This Act does not apply to:

- Collective bargaining agreements subject to the Illinois Public Labor Relations Act or the National Labor Relations Act.

- Contracts entered into before the effective date of the Act, UNLESS the contract is modified or extended after the effective date of the Act.
Amendments to the Illinois Human Rights Act
IHRA Amendments

- **Expanded Coverage:** Effective July 1, 2020, the IHRA will apply to any employer with one or more employees.
- **Expanded Protected Classes:** IHRA will cover discrimination based on any “actual or perceived” protected class.
- **Expanded Work Environment:** IHRA “work environment” is not limited to the physical location where an employee is assigned.
- **Expanded Definition of Harassment:** “[A]ny unwelcome conduct” on the basis of an individual’s “actual or perceived” protected class that “has the purpose or effect of substantially interfering with the individual’s work performance or creating an intimidating, hostile, or offensive working environment.”
Amendments to the Illinois Human Rights Act (IHRA)

- Complainants now have 300 calendar days (same as the EEOC) to file a charge with the Illinois Department of Human Rights (extended from 180 days).
- Complainants can now opt out of the IDHR’s investigation process and file a complaint in state court sooner than previously allowed.
Harassment Policy Revisions

- An employer will be responsible for harassment by the employer’s non-supervisory employees if the employer becomes aware of the conduct and fails to take appropriate action.

- An employer will also be liable for harassment against NON-employees such as: consultants and contractors who perform services in the workplace for the employer or any other non-employees who are present in the workplace to perform services for the employer.
Mandatory Annual Training and Reporting

- All employers must conduct sexual harassment prevention training for all employees at least once a year.

- Mandatory Disclosures: Beginning July 1, 2020, and by each July 1 thereafter, employers must annually report:
  - The total number of adverse judgments or administrative rulings regarding harassment or discrimination during the preceding year.
  - Whether any equitable relief was ordered against the employer.

- During an investigation, the Department may request that the employer being investigated submit the total number of settlements entered into during the preceding five years that relate to any alleged act of sexual harassment or unlawful discrimination.

- Penalties: Failure to comply with training and disclosure requirements may result in penalties up to $5,000 per offense.
IHRA Amendments

Restaurants and Bars:

► Must give employees a written anti-sexual harassment policy within the first calendar week of employment.

► The policy must include notice to the employee about how to file charges with the IDHR and EEOC.

► The IDHR will produce a model sexual harassment prevention training program that is tailored to the bar and restaurant industries.

► Sexual harassment policy and training must be available in English and Spanish.
Victims’ Economic Security and Safety Act Amendments
VESSA Amendments

Current Law: Employers are required to provide employees who are victims of domestic or sexual violence, or who are the family or household member of such a victim, with up to 12 weeks of job-protected leave in a year to address matters involving domestic violence.

Amended Law: Expands VESSA’s protections to victims of “Gender Violence.”

- Gender violence is an act of violence or aggression satisfying the elements of a criminal offense committed on the basis of a person’s actual or perceived gender.
- Gender violence also includes the threat of such an act.
Sexual Harassment Victim Representation Act
Sexual Harassment Victim Representation Act

Union Employees: Where the victim and alleged perpetrator of sexual harassment are represented by the same union, the union must designate different representatives from the union to represent them in any related proceeding.
Equal Pay Act Amendments
Illinois Equal Pay Act Amendments

- Illinois Equal Pay Act Amendments (went into effect September 29, 2019):
  - Employers and employment agencies will be prohibited from requesting or requiring job applicants to disclose prior wage, salary, benefit, or other compensation history or otherwise screen job applicants by requiring that the applicants meet minimum or maximum compensation criteria.
  - Employers and employment agencies also may not seek that information from any current or prior employer of job applicants.
  - Employers are not prohibited from communicating with job applicants about their expectations about wages, salaries, benefits or other compensation.
Illinois Equal Pay Act Amendments (cont’d)

- In the event a job applicant voluntarily discloses his or her prior compensation history, the employer is not allowed to consider that information when determining whether to make a job offer or the terms of that job offer.

- Employers who pay employees who perform “substantially similar” jobs at different pay rates may be required to demonstrate that the reason for the pay differential is based on a job-related reason that is both consistent with a business necessity and that accounts for the pay difference.
Illinois Equal Pay Act Amendments - Salary History Ban

- What constitutes “wage or salary history”?
  - All “benefits or other compensation” of a job applicant. This includes commissions, bonuses, retirement plans, health insurance benefits, or any other renumeration offered by a current or past employer.

- What if the candidate will be working outside of Illinois?
  - The ban extends to any employee regardless of whether the candidate lives, works, or will be working in Illinois.

- Does the ban apply to internal candidates?
  - No. You may request salary history from candidates within the same organization.

- Can you ask an applicant what salary range that they are expecting?
  - Yes. This does not amount to requesting past salary history, but rather employee expectations for future compensation.
Chicago Minimum Wage Ordinance
Chicago Minimum Wage

➢ The City's ordinance raised the hourly minimum wage to $13 in 2019, indexed annually to the Consumer Price Index (CPI) after 2019.

➢ If the CPI increases by more than 2.5 percent in any year, the minimum wage increase shall be capped at 2.5 percent.

➢ The minimum wage for tipped employees in Chicago is currently $6.40 per hour.
Cook County Wage Ordinance
Cook County Minimum Wage

- Effective July 1, 2019, minimum wage for employees in Cook County was raised to $12.

- The base wage for tipped employees increased from $5.10 per hour to $5.25 per hour.

- On or about May 15 of each year, the minimum wage will increase based on any increases in the CPI.

- There shall be no increase in the minimum wage pursuant to an increase in the CPI in any year when the unemployment rate in Cook County is equal to or greater than 8.5 percent.
Illinois Minimum Wage Law Amendments
Illinois Minimum Wage

The Lifting Up Illinois Working Families Act amends the Illinois Minimum Wage Law (IMWL) to raise the state minimum wage in stages until it reaches $15.00 per hour.

- Currently = $8.25 per hour.
- January 1, 2020 = $9.25 per hour.
- July 1, 2020 = $10.00 per hour.
- Thereafter, the minimum wage will increase by $1.00 per hour effective January 1 of each year until the minimum wage reaches $15.00 per hour on January 1, 2025.
Illinois Minimum Wage

Increased Damages:

- **Currently:** Employee could recover the amount of any underpayment PLUS damages of 2% of the amount of the underpayment for each month that the underpayment remains unpaid.

- **Amended IMWL:** An aggrieved employee may recover **TRIPLE** the amount of the underpayment plus 5% of the amount of the underpayment for each month that the underpayment remains unpaid.
Illinois Minimum Wage

Increased Administrative Authority:

- The IMWL amendments give the Illinois Department of Labor (IDOL) the authority to conduct random audits of employers to ensure compliance with the law.

- The Act also increased the penalties that the IDOL can recover for violations.
  - $100 per impacted employee for failure to maintain proper payroll records;
  - Penalties for failure to properly pay minimum wage or overtime have been increased to include a $1,500 penalty on top of the prior penalty of up to 20% of the total underpayment.
Practical/Client Advice

- On an individual basis, the increases in recoverable damages may not appear extreme. However, many IMWL cases are prosecuted on a class-wide basis.

- Consider the use of arbitration agreements (subject to our discussions on Workplace Transparency Act) with class action waivers to minimize the risk of class claims under the IMWL.

- Consider a self-audit of your wage-and-hour practices to ensure that your payroll and timekeeping practices are compliant with Illinois and federal law.
Illinois Secure Choice
Registration Requirements
Illinois Secure Choice Registration Requirements

- Employers that do not offer a retirement savings plan must register their business.

- Registration deadlines are as follows:
  - 100-499 employees: registration date was July, 2019.
  - 500+ employees: registration date was November 1, 2018.

- Exemptions: employers that have been in business for less than two years, have fewer than 25 employees, or already offer an employer-sponsored retirement plan are not required to register.
Department of Labor Final Rule on Employee Exemptions
Final Rule

- Rule updates the earning thresholds necessary to exempt executive, administrative, or professional employee from the Fair Labor Standards Act’s minimum wage and overtime pay requirements (last set in 2004).
  - Raises “standard salary level” from $455 to $684 per week (equivalent to $35,568 per year for a full-year employee).
  - Raises the total annual compensation level for “highly compensated employees” from $100,000 to $107,432 per year.
  - Allows employers to count nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level.
  - Revises special salary levels for workers in U.S. territories.
Department of Labor Proposed Tip Pooling/Tip Credit Rules
Proposed Rule

The DOL has announced a proposed rule for tip pooling/tip credits under the Fair Labor Standards Act:

- Employers may use mandatory tip pools that include non-tipped employees (i.e., cooks, dishwashers, barbacks), provided that the employer does not take a tip credit and pays full minimum wage.

- Managers and supervisors are ineligible for participation. The DOL will rely on the FLSA executive exemption test to determine whether an individual is a manager or a supervisor; however, salary would not be considered.

- Employers that utilize mandatory tip pools would be required to maintain records of the tips received by employees, even if the employer does not take a tip credit.

- Employers using a mandatory tip pool must distribute tips no later than the regular payday for the workweek(s) in which the tips were collected.

- Employers would be able to take a tip credit for all time spent by an employee performing related duties (i.e. work that does not directly produce tips) provided that such duties are performed contemporaneously with tipped duties “or for a reasonable time immediately before or after performing the tipped duties.”
Illinois BIPA

- What is biometric information? "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.

- "Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual.

- In the workplace, employee time-keeping devices and security scanning devices are most commonly related to biometric information.
Illinois Supreme Court in Rosenbach (January 2019):

- A person can be “aggrieved” (and, thus, qualified to seek damages and attorneys’ fees) even if the individual does not allege an actual injury or adverse effect beyond his/her employer’s violation of the technical requirements of the statute.

- Put another way: A viable claim under BIPA exists even if the employee’s biometric information was never compromised in any way.
Questions?

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