



# Protecting Your Business: Labor and Employment Legal Issues Seminar

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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

- ▶ Review and Update on Paid Sick Leave Laws
- ▶ Review of Illinois Secure Choice Retirement Savings Program
- ▶ Review of Illinois Right to Privacy in the Workplace
- ▶ Review of Ban-the-Box Laws
- ▶ EEOC/Illinois Human Rights Act Developments
- ▶ Illinois Biometric Information Privacy Act (BIPA)
- ▶ Amendments to Illinois & City of Chicago Laws
- ▶ Proposed Changes to Illinois and Chicago Laws
- ▶ Key Issues in Wage and Hour Update Laws Facing Employers & Practical Compliance Tips to Avoid Common Pitfalls
  - ▶ On the Horizon
  - ▶ U.S. Department of Labor Position on Tip Pool Rules
  - ▶ U.S. Department of Labor Position on the 80/20 Rule
  - ▶ Avoiding Common Pitfalls

# Review and Update on Paid Sick Leave Laws

# Review of the Chicago and Cook County Paid Sick Leave Laws

	Chicago	Cook County
Covered Employer	Employs at least one (1) covered employee; AND: (a) maintains a business facility within the City of Chicago's geographic boundaries; and/or (b) is subject to Title 4 license requirements of the MCC (City of Chicago)	Employs at least one (1) covered employee; AND: maintains a business facility within the Cook County's geographic boundaries * Note: Opt-out municipalities

# Review of the Chicago and Cook County Paid Sick Leave Laws

	Chicago	Cook County
Eligible Employee	Works at least 80 hours within any 120-day period for a covered employer; AND Performs at least at least two (2) hours of work in any two-week period while in Chicago	Works at least 80 hours within any 120-day period for a covered employer; AND Performs at least at least two (2) hours of work in any two-week period while in Cook County (Excludes opt-out municipalities)

# Review of the Chicago and Cook County Paid Sick Leave Laws

	Chicago	Cook County
Accrual Rate	One (1) hour for every forty (40) hours worked in Chicago	One (1) hour for every forty (40) hours worked in Cook County (excluding opt-out municipalities)
Annual Accrual Cap	Forty (40) hours	Forty (40) hours
Annual Use Cap	Forty (40) hours for general sick leave purposes, plus an additional twenty (20) hours for FMLA purposes	Forty (40) hours for general sick leave purposes, plus an additional twenty (20) hours for FMLA purposes

# Review of the Chicago and Cook County Paid Sick Leave Laws

	Chicago	Cook County
Carryover	<p>Employees may carry over up to half (up to a maximum of 20 hours) of accrued but unused sick leave</p> <p>Employees who are eligible for FMLA may carry over up to an additional forty (40) hours of accrued but unused sick leave to use for FMLA purposes</p>	<p>Employees may carry over up to half (up to a maximum of 20 hours) of accrued but unused sick leave</p> <p>Employees who are eligible for FMLA may carry over up to an additional forty (40) hours of accrued but unused sick leave to use for FMLA purposes</p>



# Review of the Chicago and Cook County Paid Sick Leave Laws

## ▶ Basics of Chicago and Cook County Paid Sick Leave Laws

### ▶ Policy Options

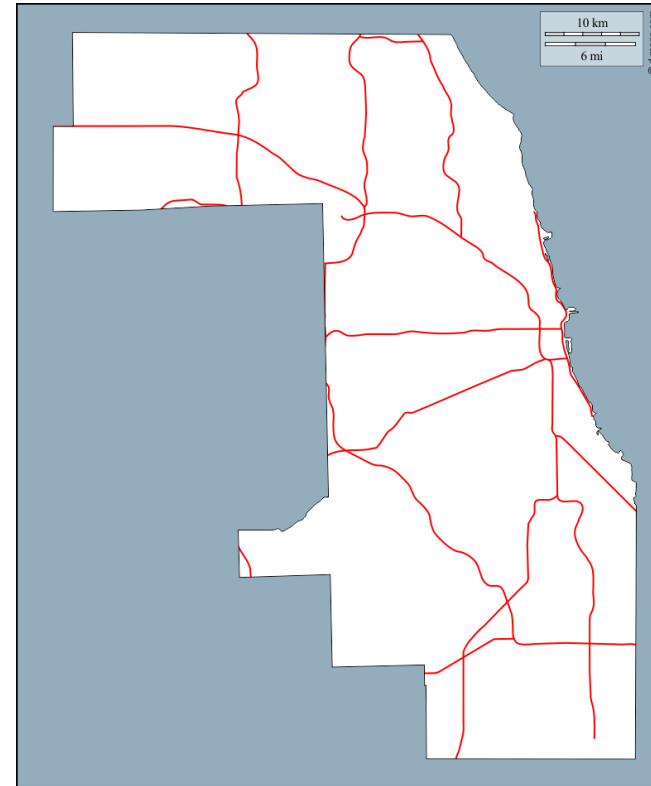
- Using Existing PTO policies
  - Meet minimum requirements of the law (i.e. amount of time off, carryover, and use purposes)
- Create a Separate Sick Leave Policy
  - Comply with all accrual, tracking, carryover, and use provisions
- Accrual vs. Upfront Policies
  - Accrue one hour of paid sick leave for every forty (40) hours worked
  - Provide forty (40) hours upfront each year, or if FMLA eligible, provide sixty (60) hours upfront each year (40 for sick leave purposes, and 20 for FMLA purposes)

# Paid Sick Leave Update - Chicago

- ▶ Effective January 1, 2019, the City of Chicago established the Office of Labor Standards to enforce Chicago's paid sick leave, minimum wage and wage theft ordinances
- ▶ More rigorous enforcement
- ▶ A dedicated, motivated, specially-appointed staff
- ▶ Thorough investigations
- ▶ Aggressive penalties for willful violations, including the suspension of business licenses

# Paid Sick Leave - Cook County

- ▶ Effective July 1, 2017
- ▶ The vast majority of suburban municipalities opted out of the Cook County Paid Sick Leave Ordinance
- ▶ The most recent trend is for municipalities to opt back into the sick leave ordinance (after initially opting out)
- ▶ Opting back in: Northbrook, Glenview, Western Springs, Wilmette



# Employer Challenges: Chicago and Cook County Paid Sick Leave Laws

- ▶ Chicago's Paid Sick Leave law includes not only employers that maintain a business facility within the City of Chicago, but also employers required to obtain a business license to operate in the City
- ▶ Watch for suburbs that are opting back into the Cook County Paid Sick Leave Ordinance
- ▶ Collective Bargaining Agreements entered into after June 30, 2017, must expressly waive the requirements of the ordinances
- ▶ Carry-over requirements: Employers without up-front policies must make sure they are allowing employees to carry-over paid sick leave in compliance with the ordinances, which includes tracking time carried over for FMLA eligible employees

# Review of the Illinois Employee Sick Leave Act

- ▶ The Illinois Employee Sick Leave Act is **NOT** a paid sick leave law and does not require employers to provide sick time
- ▶ It **ONLY** requires employers that have paid or unpaid sick leave benefits or paid time off policies, to allow employees to also use half of their available sick leave for family members' illnesses
- ▶ The law does **NOT** require employers to allow employees to use long term disability, short term disability, an insurance policy, or other comparable benefit plan or policy for the care of family members
- ▶ An employee may use sick leave benefits for:
  - ▶ Absences due to an illness, injury, or medical appointment for oneself or for the employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent

# Review of Illinois Secure Choice Retirement Savings Program

# Review of the Illinois Secure Choice Retirement Savings Program

- ▶ Businesses that are at least two years old and have twenty-five (25) or more employees are required to automatically enroll their employees in the Program unless they offer another qualified savings plan option
  - ▶ May 2018: Pilot Phase
  - ▶ November 2018, Wave 1: Employers with 500+ employees
  - ▶ July 2019, Wave 2: Employers with 100-499 employees
  - ▶ November 2019, Wave 3: Employers with 25-99 employees

# Review of the Illinois Secure Choice Retirement Savings Program

## ▶ Employer Responsibilities

- ▶ Employers that meet the program eligibility criteria, will be notified by the State of Illinois when it's time for the company to register
- ▶ Employers are responsible for:
  - Distributing informational materials about the program (materials will be provided by the program manager) to all employees
  - Facilitating auto-enrollment of their employees and managing opt-outs
  - Setting up the payroll deduction process
  - Ensuring timely remittance of employee contributions to the retirement plan provider
- ▶ There are no fees for employers to facilitate the program
- ▶ Employers cannot make contributions



# Review of the Illinois Secure Choice Retirement Savings Program

## ▶ Program Basics

- ▶ Illinois Secure Choice accounts are Roth IRAs
- ▶ The default savings rate is 5% of gross pay
  - Employees may choose a savings rate from 1% up to 100% of available wages in 1% increments, up to annual Roth IRA contribution limits
  - Contributions are made post-tax, so employers can only deduct up to the amount of compensation available after other payroll deductions that have higher preference as required by law are deducted
- ▶ Employees will be auto-enrolled after 30 days and will begin saving through payroll contributions
- ▶ Employees can opt out at any time and rejoin at any time

# Review of Illinois Right to Privacy in the Workplace



# Review of Illinois Right to Privacy in the Workplace

- ▶ Under the expanded Act (2017), Employers are prohibited from:
  - ▶ Requesting or requiring any applicant/employee to provide a user name, account information, and/or password to access the applicant's/employee's personal online accounts
  - ▶ Requesting or requiring applicants/employees to access an account while the employer is present
  - ▶ Requiring an applicant/employee to join an employer's online group or online account or to add the employer as a contact
  - ▶ Retaliating against any applicant/employee for not providing personal account information

# Review of Illinois Right to Privacy in the Workplace

- ▶ Employers may:
  - ▶ Request access to specific content without requiring an employee to provide a username or password to ensure compliance with applicable state and federal laws, or to investigate allegations based on specific information of a violation of applicable laws
  - ▶ Implement and maintain lawful workplace policies concerning the use of the Internet, social networking sites, and e-mail

# Review of Illinois Right to Privacy in the Workplace

- ▶ Under the previously existing portions of the Act, employers are prohibited from:
  - ▶ Refusing to hire, terminating employment, or otherwise disadvantaging any person because he or she uses alcohol and/or tobacco away from the job site on non-working time and during nonworking hours
    - Exceptions for certain non-profits, where use impacts employee's ability to perform assigned duties, and differences in coverage/premiums for health, disability or life insurance policies
  - ▶ Asking on an application for employment, in an interview, or in a reference check, whether a prospective employee has ever filed a claim for benefits under the Workers' Compensation Act or Workers' Occupational Diseases Act or received benefits under these Acts
  - ▶ Failing to comply with certain training, posting and privacy requirements for employers using the federal E-Verify system

# Review of Ban-the-Box Laws

A hand holding a blue pen points to a checklist of background check items. The items listed are: Criminal Record, Drug Test, Driving Record, Social Security, and Credit Report. The text is slightly blurred, suggesting a shallow depth of field.

## General Overview of Background Checks

- ▶ Employers who conduct background checks have obligations pursuant to the following laws and administrative guidelines:
  - ▶ Federal, state and local anti-discrimination statutes and other laws that prohibit employers from asking about arrests and convictions on employment applications and during interviews
  - ▶ The EEOC's guidelines prohibiting blanket exclusion of applicants with criminal convictions
  - ▶ Fair Credit Reporting Act (FCRA)

# Illinois Ban-the-Box Law

- ▶ Since January 2015, under the Illinois Ban-the-Box law, employers with fifteen (15) or more employees cannot solicit criminal background information or run a background check until one of the following situations occurs:
  - ▶ The Company has made a determination that the applicant is qualified for the position; and
  - ▶ Notified the applicant that he or she has been selected for an interview;

**OR**

  - ▶ If there is no interview, until the Company makes a conditional offer of employment.



# Chicago Ban-the-Box Law

- ▶ Since January 2015, under the Chicago Ban-the-Box law, employers with one (1) or more employees that are licensed in Chicago or have a facility within the City cannot solicit criminal background information or run a background check until one of the following situations occurs:
  - ▶ The Company has made a determination that the applicant is qualified for the position; and
  - ▶ notified the applicant that he or she has been selected for an interview;

OR

  - ▶ The Company makes a conditional offer of employment.
- ▶ In the event any employer decides not to hire an applicant based entirely or partially on the applicant's criminal record or history, the employer must inform the applicant of this basis at the time he/she is informed of the decision

# EEOC/ILLINOIS HUMAN RIGHTS ACT DEVELOPMENTS

# EEO-1 Survey - Updates

- ▶ The 2019 EEO-1 survey is now open for submission of Component 1 data
  - ▶ Requires the submission of 2018-related gender, race/ethnicity data, and job category by employers with 100 or more employees
- ▶ The reporting deadline is May 31, 2019 for Component 1 data
- ▶ For Component 1 reporting, employers are required to submit data from “one single payroll period” of the employer’s choosing between October 1 and December 31, 2018

# EEO-1 Survey - Pay Data

- ▶ Upcoming - Revised EEO-1 Pay Data Reporting Requirements:
  - ▶ Component 2 Data: Requires employers to submit W-2 pay data and hours worked during the reporting year in combination with gender and race/ethnicity data
  - ▶ March 4, 2019: Court issued a decision and ordered covered employers to submit Component 2 data
  - ▶ By September 30, 2019: Employers must submit Component 2 data for calendar year 2018
    - EEOC expects to open 2018 Component 2 data collection mid-July, 2019
  - ▶ By May 3, 2019: EEOC must notify the Court if it will collect Component 2 data for calendar year 2017 data by the September 30, 2019 deadline, or if the EEOC will, instead, choose to collect calendar year 2019 Component 2 data in 2020

# EEO-1 Survey - Pay Data (cont'd)

- ▶ Overview of Component 2 - Pay Data Reporting Requirements (as provided under prior EEOC guidance):
  - ▶ Pay Data: Each job category has 12 pay bands into which employee data must be sorted.
    - To determine the pay band into which an employee falls, use the employee's earnings as reported on form W2, box 1 for 2018.
    - The salary band into which an employee falls is based on the entire year, not based solely on the pay period selected as the workforce snapshot period.
    - For those who worked a partial year, do not annualize the data; again, use earnings as reported on form W2, box 1.

# EEO-1 Survey - Pay Data (cont'd)

- ▶ Overview of Component 2 - Pay Data Reporting Requirements (as provided under prior EEOC guidance) (cont'd):
  - ▶ Hours Worked Data: Calculate the total number of hours worked in each pay band for each job category.
    - The number of hours an employee works is based on FLSA definitions.
      - For FLSA-non-exempt employees, use actual hours worked.
      - For FLSA-exempt employees, can choose to report either:
        - ▶ (1) actual hours worked; or
        - ▶ (2) hours based on the FLSA proxy for each week actually worked, i.e., 40-hour weeks for full-time employees or 20-hour weeks for part-time employees.
    - NOTE: The revised EEO-1 does not impose any additional record-keeping requirements on employers for FLSA-exempt employees.
    - Because hours worked are governed by the FLSA definition, “hours worked” is not equivalent to hours paid and thus does not include paid leave such as sick leave, vacation, and holidays.
    - Once the number of hours each employee worked is calculated, those hours must be totaled for reporting on the Revised EEO-1.



## Amendments to the Illinois Human Rights Act (IHRA)

- ▶ Complainants now have 300 calendar days (same as the EEOC) after an alleged civil rights violation 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

# Amendments to the IHRA

- ▶ Complainants must submit a written request to opt out of the IDHR investigative process to the IDHR within 60 days of receiving notice from the IDHR of their right to opt out
- ▶ Then, the IDHR must issue a notice of right to sue within 10 business days
- ▶ The Complainant must file suit in state court within 90 days of receiving the right to sue notice





# Amendments to the IHRA

- ▶ The IDHR will continue its investigation until it receives notice of the suit
- ▶ The IDHR must immediately cease its investigation and dismiss the charge once it receives notice of the complainant's properly filed suit
- ▶ After filing suit, Complainants cannot file another charge with the IDHR based on the same alleged unlawful discrimination, harassment, retaliation, etc.

# Amendments to the IHRA

- ▶ The IDHR released a new poster titled “You Have the Right to Be Free From Job Discrimination and Sexual Harassment” that employers must display where they customarily display employee notices
- ▶ Employers must also update employee handbooks to include information concerning the rights of employees to:
  - ▶ 1 - Be free from unlawful discrimination or sexual harassment in the workplace
  - ▶ 2 - File a charge of discrimination or sexual harassment
  - ▶ 3 - Obtain certain reasonable accommodations such as those based on pregnancy and disability

# Amendments to the IHRA

- ▶ Changes to the Illinois Human Rights Commission:
  - ▶ Hiring 7 full-time commissioners versus the existing 13 part-time commissioners
  - ▶ No more than 4 commissioners from one political party
  - ▶ Commissioners must meet one of the following qualifications: (1) licensed to practice law in the State of Illinois; (2) at least 3 years of experience as a hearing officer at the Human Rights Commission; or (3) at least 4 years of professional experience working with individuals or corporations affected by the IHRA or similar laws in other jurisdictions
  - ▶ Creates a temporary panel of three (3) commissioners to clear the current backlog of requests for review

# ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT (BIPA)

A hand in a dark suit jacket points towards the left side of the slide. In the background, there are several circular icons: one with a person wearing a hat and sunglasses, and another with a person in a suit. The overall theme is digital security and biometrics.

# 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 BIPA

- ▶ 2017-2019: a barrage of class action lawsuits were (and are being) filed under BIPA
- ▶ Damages:
  - ▶ Negligent violation: Liquidated damages of \$1,000 or actual damages, whichever is greater
  - ▶ Intentional or reckless violation: Liquidated damages of \$5,000 or actual damages, whichever is greater
  - ▶ Attorneys' fees

# Illinois BIPA

- ▶ 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
  - ▶ In other words, an employee can have a viable claim under BIPA as long as the employer violates the statute, even if, for example, the employee’s biometric information was never compromised in any way

# Illinois BIPA

- ▶ Many open-ended issues:
  - ▶ Statute of limitations
- ▶ Each plaintiff: (1) \$1,000/\$5,000 in damages total or per violation? If the latter, what does “per violation” mean?
  - ▶ Many BIPA lawsuits involve uninsured claims
- ▶ Pending legislation in Springfield would significantly reduce BIPA’s impact (prospectively)



# AMENDMENTS TO ILLINOIS & CITY OF CHICAGO LAWS

# Illinois Service Member Employment & Reemployment Rights Act (ISERRA)

- ▶ Effective: January 1, 2019 - Expanded state version of federal USERRA
- ▶ The new legislation consolidated existing job protections within ISERRA, and repealed the following Illinois Acts:
  - ▶ Military Leave of Absence Act
  - ▶ Public Employee Armed Services Rights Act
  - ▶ Municipal Employees Military Active Duty Act
  - ▶ Local Government Employees Benefits Continuation Act



# ISERRA

- ▶ Key Points:
  - ▶ The right to take leave (required notice)
- ▶ The right to return from leave
- ▶ The escalation principle:
  - ▶ Pay
  - ▶ Seniority/promotions
  - ▶ Performance ratings

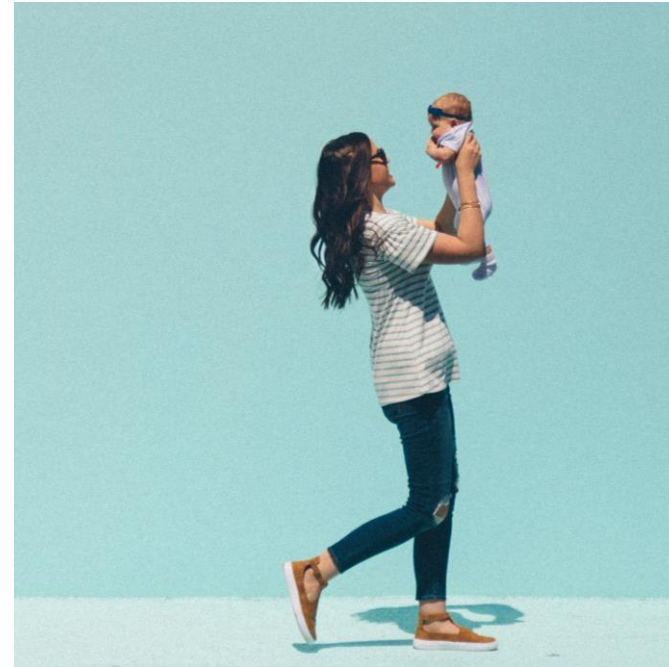
# ISERRA

- ▶ Key Points:
  - ▶ Pay (public employees in certain situations)
  - ▶ Posting requirement



# Nursing Mothers In The Workplace Act Amended

- ▶ Employers must provide “reasonable break” time for employees to express milk up to one year after childbirth, as long as it does not pose an undue hardship
- ▶ An employer may not reduce an employee's compensation for time used for the purpose of expressing milk or nursing a baby
- ▶ Breaks for expressing may run concurrently with scheduled breaks already provided (paid or unpaid), but any additional breaks needed must be paid
- ▶ Employers must provide a private area that is not a bathroom



# Ban on Salary History Requests for City of Chicago Contractors

- ▶ Contractors with the City of Chicago cannot screen job applicants based on the applicant's wage or salary history
- ▶ City Contractors must not contact applicant's current or former employer to request wage or salary history for the applicant, including benefits or other compensation
- ▶ City Contractors must adopt a policy that includes these salary history prohibitions

# Illinois Expense Reimbursements

- ▶ Requires reimbursement for necessary expenditures and losses within the scope of employment
- ▶ “Expenditures” = purchases required for an employee to perform his/her job and/or are “primarily for the benefit of the employer”
  - ▶ Uniforms
  - ▶ Mileage
  - ▶ Using cell phone data charges, downloading apps, text messages or cost of home Internet for remote access
- ▶ Excluded:
  - ▶ Damage due to employee’s negligence
  - ▶ Normal wear
  - ▶ Theft

# Expense Reimbursements (cont'd)

- ▶ Implement expense reimbursement policy
  - ▶ Prior approval
  - ▶ 30 days to submit reimbursement
  - ▶ Process to obtain reimbursement
  - ▶ Documentation, receipts, but employee statement can be enough when receipts are missing or lost
- ▶ Statute of limitations is 10 years
  - ▶ In addition to wages, plaintiffs can recover costs and attorneys' fees, and damages of up to 2%/month of underpayment



# Illinois Minimum Wage Law Amended

- ▶ Scheduled Minimum Wage Increases
  - ▶ Tip credit unchanged

Effective Date	Minimum Wage Rate	Minimum Wage Rate (under 18 & <650 hours worked in any calendar year)
January 1, 2020	\$9.25	\$8.00
July 1, 2020	\$10.00	---
January 1, 2021	\$11.00	\$8.50
January 1, 2022	\$12.00	\$9.25
January 1, 2023	\$13.00	\$10.50
January 1, 2024	\$14.00	\$12.00
January 1, 2025	\$15.00	\$13.00

# Illinois Minimum Wage Law Amended (cont'd)

- ▶ Harsh penalties
  - ▶ Treble (3x) damages
  - ▶ 5% penalty of unpaid wages compounded per month
  - ▶ Attorneys' fees
  - ▶ Illinois Department of Labor can recover a 20% penalty plus \$1,500 fine
  - ▶ Failure to maintain payroll records = \$100 per employee
- ▶ Random audits by Illinois Department of Labor
- ▶ Statute of Limitations is 3 years for an employee and 5 years for the Illinois Department of Labor

# City of Chicago Minimum Wage Rates

Effective Date	Minimum Wage Rate	Tipped Employees*
July 1, 2018	\$12.00	\$6.25
July 1, 2019	\$13.00	Amount to be determined and announced yearly on or before June 1st
July 1, 2020 (and forward)	Increases with CPI*	

\* Under both state law and the ordinance, if an employee's wages plus tips do not equal at least the number of hours worked times the applicable minimum wage per week, his or her employer must make up the difference

# Cook County Minimum Wage Rates

Effective Date	Minimum Wage Rate	Tipped Employees*
July 1, 2018	\$11.00	\$6.25
July 1, 2019	\$12.00	Greater of Tipped Wage under the FLSA, Illinois Minimum Wage Law, or Prior Year Cook County Tipped Employee Rate + Increase in CPI
July 1, 2020	\$13.00	
July 1, 2021	Increases with CPI*	

\* Under both state law and the ordinance, if an employee's wages plus tips do not equal at least the number of hours worked times the applicable minimum wage per week, his or her employer must make up the difference

# Proposed Changes to Illinois and Chicago Laws

# Proposed Legislation: Illinois Paid Sick Leave

- ▶ Illinois Paid Sick Leave: Healthy Workplace Act (bill introduced in February 2019)
  - ▶ 1 hour for every 40 hours worked up to 5 days during a 12-month period
  - ▶ Carry over of up to 40 hours per year
  - ▶ Family member includes sibling, grandparent, grandchild or other individual who is so close that it is the “equivalent to a family relationship”
  - ▶ 180-day waiting period
  - ▶ No loss of earned, but unused sick days if employee leaves and returns within 12 months

# Proposed Legislation: Workplace Transparency Act

- ▶ April 11, 2019, the Illinois Senate unanimously passed the Workplace Transparency Act Bill
- ▶ Effective Date: If signed prior to May 31, 2019, could become effective immediately
- ▶ Objective: Designed to further prevent and address sexual harassment in the workplace, and addresses other related issues, as well

# Proposed Legislation: 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: Cannot prevent employees from filing harassment or discrimination claims with the IDHR and then in court (must provide carve out for harassment and discrimination claims)
  - ▶ 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.



# Proposed Legislation: Workplace Transparency Act (cont'd)

- ▶ Workplace Transparency Act - Illinois Human Rights Act Amendments:
  - ▶ Prohibit discrimination based on “actual or perceived” protected classes
  - ▶ Expand the definition of “sexual harassment” to confirm that “work environment” is not limited to a physical location an employee is assigned to perform his or her duties
  - ▶ Confirm that an employer is responsible for harassment by the employer's nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take corrective measures (pertains to harassment of employees or nonemployees)
  - ▶ Prohibit harassment of contractors in the workplace
  - ▶ Require public contractors to submit detailed information about settlements and adverse rulings against them for harassment and discrimination claims, and then the IDHR is authorized to investigate whether there is a pattern and practice of harassment and discrimination by public contractors
  - ▶ Require all employers to conduct sexually harassment training for all employees on an annual basis

# Proposed Law: Chicago Fair Workweek Ordinance

- ▶ On June 27, 2018, a new version of the Chicago Fair Workweek Ordinance was introduced. The law is still pending approval. If passed, it would require employers to provide advance notice of work schedules.
- ▶ In an April 8, 2019 meeting, the Committee tasked with considering and voting on the Ordinance before it advances to the full City Council did not vote on the Ordinance.
- ▶ Workers' advocacy groups are pushing Mayor-Elect Lightfoot and the newly elected City Council to pass the Ordinance.

# Proposed Law: Chicago Fair Workweek Ordinance

- ▶ Overview of the Chicago Fair Workweek Ordinance:
  - ▶ Covered Employer:
    - 1) Maintains a business facility within the geographic boundaries of the City; OR Is subject to one or more of the license requirements in Title 4 of the Chicago Municipal CodeAND
    - 2) Employs fifty or more individuals.
  - ▶ Covered Employees:
    - 2) Any employee who, in any particular two-week period, performs at least two hours of work for an Employer while physically present within the geographic boundaries of the City (including compensated time spent traveling in the City including, but not limited to, deliveries, sales calls, and travel related to other business activity).
  - ▶ Note: May be waived in a collective bargaining agreement.

# Chicago Fair Workweek Ordinance (cont'd)

- ▶ Overview of the Proposed Ordinance (cont'd)
  - ▶ Employers must provide employees with notice of their rights under the Ordinance.
  - ▶ Employers must provide written notice of work hours no later than 14 days before the first day of the workweek and post the hours for all employees.
  - ▶ Upon request, schedules must be provided to employees electronically.
  - ▶ Employers must provide new employees, on or before their first day of employment, in writing, with an estimate of the employees' work schedule, including the average number of weekly hours the employee can expect to work each work week, a subset of the days and times/shifts the employee can expect to work or expect not to work, and whether the employee can ever expect to work any on-call shifts.
  - ▶ Employees have the right to decline any previously unscheduled hours added within 14-days of the shift.

# Chicago Fair Workweek Ordinance (cont'd)

- ▶ Where the employer changes an employee's work schedule without adequate notice, the employee will receive per changed shift (in addition to wages earned for the hours worked by the employee):
  - One hour of “predictability pay” if the employer: adds hours of work; changes the date or time of a work shift with no loss of hours; or with more than 24 hours notice - cancels or subtracts hours from a regular or on-call shift.
  - No less than 0.5x pay for any hours the employee does not work because the employer changes the schedule with less than 24 hours' notice, subtracts hours from a regular or on-call shift OR cancels a regular or on-call shift.
- ▶ An employee has the “right to rest.” This means the right to decline work hours that occur during the 11 hours that are scheduled or otherwise occur: less than 11 hours after the end of the previous day's shift; OR during the 11 hours following the end of a shift that spanned two days.
- ▶ If an employee agrees in writing to waive the “right to rest” and work those hours, the employee must be compensated time-and-a-half.
- ▶ Before hiring new employees, Employers must first offer additional work hours to existing qualified employees according to a distribution schedule provided in the ordinance. This section does not require or restrict an employer from offering work paid at premium rates.

# Chicago Fair Workweek Ordinance (cont'd)

- ▶ Overview of the Proposed Ordinance (cont'd)
  - ▶ Employees have the right to request a modified work schedule, without facing retaliation.
  - ▶ Violations could lead to a fine of \$500.00 for each employee for each pay period, and employees can also file suit for additional damages in a private right of action.
  - ▶ Employers may not take any action that retaliates against the employees for exercising any rights under the proposed law.
- ▶ Notably, the law does not have exceptions for hospitality workers, food service workers, or in any other industries that may require last-second shift changes or immediate re-staffing.
- ▶ An employee that calls off could put an employer in a position where it has to “offer” the shift to other employees at an increased pay rate due to overtime or shift rate obligations.
- ▶ The law is meant to mirror similar laws in New York, Seattle, San Francisco and Philadelphia.

# Key Issues in Wage & Hour Laws Facing Employers and Practical Compliance Tips to Avoid Common Pitfalls

# On The Horizon





# On the Horizon: FLSA

- ▶ U.S. Department of Labor Proposed Regulations
  - ▶ White Collar Exemptions - Increase to Salary Basis Threshold
    - Comments must be submitted by May 21, 2019
    - DOL has proposed to increase the minimum salary threshold to \$35,308 from \$23,660
    - Increase for highly compensated exemption (not applicable in Illinois) is \$147,414 from \$100,000
    - Allowing employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level

# On the Horizon: FLSA (cont'd)

## ► Clarification and Update of Regular Rate Requirements

- Comments must be submitted by May 28, 2019
- Regular Rate requirements define what forms of payment employers include and exclude in the “time and one-half” calculation when determining overtime rates
- Clarifies the following can be excluded from the regular rate calculations:
  - Cost of providing wellness programs, gym access and fitness classes, or employee discounts
  - Payments for unused paid leave, including paid sick leave
  - Reimbursed expenses, including those not solely for the benefit of the employer
  - Discretionary bonuses
  - Tuition reimbursement or repayment of educational debt

# On the Horizon: FLSA (cont'd)

- ▶ DOL proposes clarification of Joint Employer status
  - ▶ DOL proposed a new regulation to limit shared wage and hour liability for companies in franchise and staffing arrangements
  - ▶ The purpose of the proposed regulation is to narrow situations in which workers at a franchise restaurant can sue the franchisor and their direct employer for minimum wage and overtime violations
  - ▶ The regulation is also directed at protecting companies from having to collectively bargain with workers provided by a staffing firm
  - ▶ DOL proposes to collectively consider four factors—the ability to hire and fire, supervise and control schedules, set pay rates, and maintain employment records—to determine whether one company is a joint employer of another company's workers

# U.S. DOL Position on Tip Pool Rules

# Background to Tip Pool Rules

- ▶ The DOL's rules have historically made clear that employers cannot take the "tip credit" if any tips are kept by the house, or if the employer requires employees to share tips with managers or employees who do not customarily and regularly receive at least \$30 per month in tips (for example, back of the house employees such as cooks, dishwashers, etc.)
- ▶ An employer must provide the following information to a tipped employee before the employer may use the tip credit:
  - ▶ 1) the amount of cash wage the employer is paying a tipped employee;
  - ▶ 2) the additional amount claimed by the employer as a tip credit, which cannot exceed the difference between the minimum required cash wage and the current minimum wage;
  - ▶ 3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
  - ▶ 4) that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement . . . . ; and
  - ▶ 5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.
- ▶ These basic principles have not changed

A close-up photograph of a hand dropping a coin into a glass jar. The jar is filled with coins and has a white label that says "TIP BOX" with a heart symbol above the word "TIP" and "THANKS" written below it. The background is blurred, showing what appears to be a restaurant or cafe setting with warm lighting.

# Changes in the New Tip Pool Rules

- ▶ On March 23, 2018, President Trump signed H.R. 1625, the Consolidated Appropriations Act for 2018, in which Congress amended the FLSA to prohibit employers from requiring employees to share their tips with the employer, including any managers or supervisors, whether or not the employer takes the tip credit
- ▶ So, an employer can now violate the FLSA through an improper tip pooling arrangement even if it is paying employees the full minimum wage

# Changes in the New Tip Pool Rules

- ▶ How is “manager” or “supervisor” defined under the new DOL Field Assistance Bulletin (April 6, 2018)?
  - ▶ DOL states that as an enforcement policy, it will use the duties test for the executive exemption to determine whether the employee is a “manager” or “supervisor” for purposes of the FLSA
- ▶ Raises the prospect that the DOL would thus not pursue claims against employers where low-level supervisors, who do not meet the executive exemption because they lack sufficient authority over hiring, firing, etc., decisions, participate in a tip pool
- ▶ Remember though that since this is only an enforcement policy, the DOL could change its position down the road and courts could make case law that is at odds with this rule as well

# More Changes in the New Tip Pool Rules

- ▶ The new law allows tip sharing between tipped and non-tipped employees - for example, between servers and cooks or dishwashers - if the restaurant pays the full minimum wage to all employees (i.e., does not take the tip credit for any of the employees)
- ▶ The DOL published a Field Assistance Bulletin on April 6, 2018 further clarifying the following positions:
  - ▶ Employers are prohibited from keeping tips received by their employees, regardless whether the employer takes a tip credit
  - ▶ Employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools
  - ▶ Managers and supervisors are prohibited from participating in tip pools, as the Act equates such participation with the employer’s keeping the tips



# More Changes in the New Tip Pool Rules

- ▶ Review state or local laws to make sure that there is nothing to the contrary
- ▶ Practice Pointer: Employers should provide employees with written guidance regarding the tip credit practice prior to when an employer initially applies a tip credit against an employee's wages

# More Changes in the New Tip Pool Rules

- ▶ Keep in mind that the new law previously discussed is in place until “any future action” is taken by the Administrator of the DOL’s Wage and Hour Division
- ▶ The new law states that “Any person who violates [this law] shall be subject to a civil penalty not to exceed \$1,100 for each such violation. . .in addition to being liable to the employee or employees affected for all tips unlawfully kept.”

# U.S. DOL Position on the 80/20 Rule

# Background: Tipped Employees

- ▶ Under the Fair Labor Standards Act, tipped employees are employees engaged in an occupation in which the employee customarily and regularly receives more than \$30 a month in tips
- ▶ Reminder: If an employer elects to use the tip credit provision, it must ensure tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined
- ▶ If an employee's tips combined with the employee's direct (or cash) wages do not equal the minimum hourly wage per hour worked, the employer must make up the difference
- ▶ Note about Dual Jobs: If an employee is employed in a dual job (*i.e.*, two separate jobs for the same employer), for example, as a front desk receptionist in a hotel and also as a server at the hotel's restaurant, even if the employee customarily and regularly receives at least \$30 a month in tips for the employee's work as a server, the employee is a tipped employee only for the hours worked as a server. Therefore, no tip credit can be taken for the employee's time spent as a front desk receptionist

# Background: The DOL's 80/20 Rule

- ▶ Under the DOL's prior interpretation of the law, including in its 1988 Field Operations Handbook interpreting the dual jobs regulation, the DOL focused on whether the employee's "duties" were tipped
- ▶ The previous interpretation excluded from the tip credit any time that an employee in a tipped occupation spent performing related, non-tipped duties in excess of 20 percent in the workweek

# The DOL's New Position on the 80/20 Rule

- ▶ In late 2018, the DOL changed course and found that its prior focus on an employee's job duties being tipped rather than the employee's overall job being tipped was incorrect
- ▶ Under the DOL's new position, “an employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless [of] whether those duties involve direct customer service.”
- ▶ The DOL went so far as to rescind its previous interpretation setting a 20 percent limit on related, non-tipped duties and revised its Field Operations Handbook

# The DOL's New Position on the 80/20 Rule

- ▶ The revised Field Operations Handbook now specifies procedures that Wage and Hour Division staff will use to determine whether a tipped employee's non-tipped duties are related to the tipped occupation:
  - ▶ Non-tipped duties deemed related duties include: servers who spend part of their time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. (Taken from 29 C.F.R. 531.56(e))
  - ▶ Non-tipped duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O\*NET) [<https://www.onetonline.org/>] are related duties
- ▶ Employers may not take a tip credit for time spent performing any tasks that are not listed in the above sources. However, the DOL noted that some of the time that a tipped employee spends performing these tasks—which are unrelated to the employee's tipped occupation—may be subject to the *de minimis* rule in 29 C.F.R. § 785.47

# The DOL's New Position on the 80/20 Rule

- ▶ Despite the DOL's recent guidance, courts continue to hold that the thirty year old 80/20 Rule is the correct interpretation of the law
  - ▶ Courts question the DOL's shifting stance on the 80/20 rule based on policy questions (i.e. changing administrations) rather than true interpretation of the meaning of the regulation
  - ▶ Finding that in the revised DOL guidance there is no limit on how much time an employee can spend doing non-tipped work related to the tipped position, which the courts find to be inconsistent with the language in the regulations that address non-tipped work (e.g. referencing "part of her time" and "occasionally")
  - ▶ Courts in Missouri, Ohio, and Arkansas have issued opinions critical of the DOL's new position on non-tipped work by employees in tipped occupations



# The DOL's New Position on the 80/20 Rule

- ▶ Before changing course from the 80/20 Rule, employers should monitor how courts in their jurisdiction interpret the DOL's new guidance
- ▶ Prior to the DOL's new guidance, courts in the Illinois generally followed the 80/20 Rule
- ▶ Since the DOL issued the new guidance, no courts in Illinois, Wisconsin, or Indiana, have referenced the regulation that is at the center of the 80/20 debate
- ▶ Employers should also be aware that certain states have enacted 80/20 rules and watch for the implications of the DOL's position on the states' laws: Arkansas, Connecticut, Hawaii, Iowa, Maryland, New Hampshire, New York, Virginia and West Virginia

# Avoiding Common Pitfalls

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- ▶ Audit of exempt positions - evaluating both duties and salary
- ▶ Who is the employer?
  - ▶ Independent contractors
  - ▶ Joint employers
- ▶ Off-the-Clock
  - ▶ Training, meetings and conferences
  - ▶ Pre and post-shift activities
  - ▶ Telecommuting (checking/responding to e-mails too)
  - ▶ Breaks
  - ▶ Travel time
- ▶ Paying “earned” bonuses, commissions and PTO

# Avoiding Common Pitfalls (cont'd)

- ▶ Time keeping and payroll practices
  - ▶ Keep daily time records and record of breaks
  - ▶ Look at paystubs
  - ▶ Auto-deduction and rounding practices
- ▶ Compensatory time - only for public sector
- ▶ Did you know that you must:
  - ▶ In Illinois, provide notice of pay rate and payday in writing and acknowledged by employee (if possible)
  - ▶ In Cook County and Chicago, give notice of pay rate change each year

# Avoiding Common Pitfalls (cont'd)

- ▶ Calculating the overtime rate
  - ▶ Blended rates and combining all hours worked from all positions
  - ▶ Commissions
  - ▶ Non-discretionary bonuses, including longevity bonuses
  - ▶ Shift differentials
  - ▶ What may be excluded
    - Discretionary Bonuses
    - Payments not related to job performed, such as recruiting new employee awards
    - Certain overtime premiums
  - ▶ Credits for non-FLSA premium payments

# Questions?

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