

# *Labor and Employment Laws in the State of Illinois*



**FISHER & PHILLIPS** LLP

A T T O R N E Y S   A T   L A W

*Solutions at Work*<sup>®</sup>

Atlanta Baltimore Boston Charlotte Chicago Cleveland Columbia Columbus Dallas Denver Fort Lauderdale Gulfport Houston Irvine Kansas City Las Vegas  
Los Angeles Louisville Memphis New Jersey New Orleans Orlando Philadelphia Phoenix Portland San Antonio San Diego San Francisco Seattle Tampa Washington, DC

# Labor And Employment Laws In The State Of Illinois

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>THE EMPLOYMENT RELATIONSHIP.....</b>	<b>1</b>
<b>A.</b>	<b>Employment At Will.....</b>	<b>1</b>
<b>1.</b>	<b>Generally.....</b>	<b>1</b>
<b>2.</b>	<b>Implied Employment Contracts And Disclaimers.....</b>	<b>2</b>
<b>B.</b>	<b>Labor Organizations.....</b>	<b>2</b>
<b>1.</b>	<b>Private Sector Employers, 820 ILCS 35/1, <i>et seq.</i>, 710 ILCS 10/1, <i>et seq.</i>, 820 ILCS 5/1, <i>et seq.</i>.....</b>	<b>2</b>
<b>2.</b>	<b>Public Sector Employers, 5 ILCS 315/1, <i>et seq.</i>, 115 ILCS 5/1, <i>et seq.</i>.....</b>	<b>3</b>
<b>C.</b>	<b>Background Screening And Investigations Into Employee Wrongdoing.....</b>	<b>3</b>
<b>1.</b>	<b>Criminal Background Inquiries, Job Opportunities For Qualified Applicants Act, 820 ILCS 75/1.....</b>	<b>3</b>
<b>2.</b>	<b>Criminal-Background Checks, 775 ILCS 5/2-103.....</b>	<b>3</b>
<b>3.</b>	<b>Credit History, 820 ILCS 70/1.....</b>	<b>4</b>
<b>4.</b>	<b>Drug And Alcohol Testing, 30 ILCS 580/1, <i>et seq.</i>.....</b>	<b>5</b>
<b>5.</b>	<b>Pre-Employment Medical And Psychiatric Exams.....</b>	<b>5</b>
<b>D.</b>	<b>Health Insurance.....</b>	<b>6</b>
<b>1.</b>	<b>Coverage And Mandated Benefits, 215 ILCS 97/1, <i>et seq.</i>.....</b>	<b>6</b>
<b>2.</b>	<b>Continuation Of Coverage, 215 ILCS 5/367e And 125/4-9.2.....</b>	<b>6</b>
<b>a.</b>	<b>The Federal COBRA Law.....</b>	<b>6</b>
<b>b.</b>	<b>Illinois Continuation Of Coverage Laws.....</b>	<b>7</b>
<b>E.</b>	<b>Employment Of Minors, 820 ILCS 205/1, <i>et seq.</i>.....</b>	<b>8</b>
<b>1.</b>	<b>Minors 14 And 15 Years Of Age.....</b>	<b>8</b>

a.	Work Conditions For Minors .....	8
b.	Prohibited Hazardous Occupations .....	8
c.	Agriculture .....	9
d.	Show Business Exceptions .....	10
e.	Occupations Not Covered .....	10
f.	Notice Requirement .....	10
g.	Workers' Compensation .....	10
2.	<b>Minors 16 And 17 Years Of Age.....</b>	<b>10</b>
3.	<b>Enforcement And Penalties.....</b>	<b>11</b>
<b>F.</b>	<b>Employment Of Day Laborers, 820 ILCS 175/5, et seq.....</b>	<b>11</b>
1.	<b>Wages And Wage Deductions .....</b>	<b>11</b>
2.	<b>Third-Party Employers .....</b>	<b>12</b>
3.	<b>Recordkeeping.....</b>	<b>12</b>
a.	Records Provided To Day Laborers.....	12
b.	Records Provided To The Illinois Department Of Labor .....	13
4.	<b>State Requirements, Enforcement And Penalties .....</b>	<b>13</b>
5.	<b>Enforcement By Day Laborers .....</b>	<b>14</b>
<b>G.</b>	<b>Employee Surveillance In The Workplace .....</b>	<b>14</b>
1.	<b>Searches .....</b>	<b>14</b>
2.	<b>Surveillance .....</b>	<b>15</b>
3.	<b>Telephone Monitoring, 720 ILCS 5/14-3 .....</b>	<b>15</b>
<b>H.</b>	<b>Open Personnel Records, 820 ILCS 40/0.01, et seq.....</b>	<b>15</b>
<b>I.</b>	<b>Mass Layoffs Or Plant Closures .....</b>	<b>16</b>
<b>III.</b>	<b>WAGES AND HOURS.....</b>	<b>16</b>
<b>A.</b>	<b>Wage Payment.....</b>	<b>16</b>
1.	<b>Minimum Wage, 820 ILCS 105/1, et seq. ....</b>	<b>16</b>
a.	Covered Employers.....	16
b.	How Much .....	17
c.	Tipped Employees .....	17

	d.	Employee Training.....	17
	e.	Handicapped Persons .....	17
	f.	Volunteers .....	17
	g.	Underpayment.....	18
<b>2.</b>		<b>Overtime Pay, 820 ILCS 105/4a .....</b>	<b>18</b>
	a.	Covered Employers.....	18
	b.	Exempt And Nonexempt Employees.....	18
	c.	Time Not Actually Worked .....	19
	d.	Computer Systems Professionals.....	19
	e.	Special-Case Exemptions.....	19
<b>3.</b>		<b>Paying Employees, 820 ILCS 115/1, et seq.....</b>	<b>20</b>
	a.	Wages.....	20
	b.	Time And Place Of Payment .....	20
	c.	Form Of Payment.....	21
	d.	Final Compensation .....	21
	e.	Illinois Wage Theft Enforcement Act 820 ILCS 115 et. seq. ....	21
	f.	Enforcement.....	22
	g.	Repayment Of Cash Advances .....	22
	h.	Garnishments, 735 ILCS 5/12-800-819 .....	22
	i.	The Wage Assignment Act, 740 ILCS 170/1, et seq. ....	23
	j.	Child And Spousal Support .....	24
	k.	Defaulted Student Loans.....	24
	l.	Tax Levies.....	25
	m.	Order Of Priority For Deductions.....	25
	n.	Bankruptcy.....	25
	o.	Chicago Wage Theft Ordinance.....	25
	p.	Cook County Wage Theft Ordinance .....	25
<b>B.</b>		<b>Work Hours, 820 ILCS 140/1, et seq. ....</b>	<b>26</b>
	<b>1.</b>	<b>Hours Actually Worked .....</b>	<b>26</b>
	<b>2.</b>	<b>Recordkeeping Requirements.....</b>	<b>27</b>
	<b>3.</b>	<b>Meal Periods .....</b>	<b>27</b>
	<b>4.</b>	<b>Holidays .....</b>	<b>28</b>
	<b>5.</b>	<b>Compensatory Time Off.....</b>	<b>29</b>
<b>C.</b>		<b>Employee Classification Act, 820 ILCS 185/1, et seq.....</b>	<b>29</b>
	<b>1.</b>	<b>Coverage .....</b>	<b>29</b>

2.	<b>Purpose And Private Right Of Action .....</b>	<b>29</b>
3.	<b>Penalties .....</b>	<b>29</b>
<b>IV.</b>	<b>EMPLOYMENT DISCRIMINATION.....</b>	<b>30</b>
<b>A.</b>	<b>Protected Classes, 775 ILCS 5/1-101, <i>et seq.</i>.....</b>	<b>30</b>
1.	<b>Generally.....</b>	<b>30</b>
2.	<b>Age Discrimination .....</b>	<b>31</b>
3.	<b>Arrest Record .....</b>	<b>31</b>
4.	<b>Marital-Status Discrimination.....</b>	<b>31</b>
5.	<b>Physical And Mental Disability Unrelated To Ability.....</b>	<b>31</b>
6.	<b>Religious Discrimination .....</b>	<b>32</b>
7.	<b>Sex Discrimination .....</b>	<b>32</b>
8.	<b>Pregnancy Discrimination/Accommodation.....</b>	<b>32</b>
9.	<b>Sexual Orientation .....</b>	<b>33</b>
<b>B.</b>	<b>The Victims’ Economic Security and Safety Act, 820 ILCS 120/1 <i>et.seq.</i>.....</b>	<b>33</b>
<b>C.</b>	<b>Equal Wage Act, 820 ILCS 110 .....</b>	<b>34</b>
<b>D.</b>	<b>Privacy In The Workplace, 820 ILCS 55/1-20 .....</b>	<b>34</b>
<b>E.</b>	<b>Equal Pay Act, 820 ILCS 112/ <i>et seq.</i> .....</b>	<b>34</b>
<b>F.</b>	<b>Employee Activities.....</b>	<b>34</b>
1.	<b>Jury Duty, 705 ILCS 305/4.....</b>	<b>34</b>
2.	<b>Time Off For Military Duty, 775 ILCS 5/1-102 .....</b>	<b>35</b>
3.	<b>Time Off For Families Of Persons Called To Military Duty, 820     ILCS 151/1, <i>et seq.</i> .....</b>	<b>35</b>
4.	<b>Time Off For Voting, 10 ILCS 205/1, <i>et seq.</i> .....</b>	<b>35</b>
5.	<b>School Visitation Rights Act, 20 ILCS 147/1, <i>et seq.</i> .....</b>	<b>35</b>
6.	<b>Time Off For Official Meetings Act, 50 ILCS 115/1.....</b>	<b>36</b>

7.	Nursing Mothers In The Workplace Act, 820 ILCS 260/15.....	36
8.	Medical Marijuana Law, 410 ILCS 130/1, <i>et seq.</i> .....	36
9.	Firearm Concealed Carry Act, Public Act 098-0063.....	36
<b>V.</b>	<b>WORKPLACE SAFETY .....</b>	<b>37</b>
A.	General Provisions .....	37
B.	Smoking In The Workplace .....	37
1.	Illinois Clean Indoor Air Act, 410 ILCS 890/1, <i>et seq.</i> .....	37
2.	Illinois Clean Indoor Air Ordinances .....	37
3.	Chicago Clean Indoor Air Ordinance.....	37
C.	Toxic Substances, 820 ILCS 225/1, <i>et seq.</i> .....	38
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>38</b>

*This booklet is intended to provide an overview of the most important parts of Illinois state employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.*

## **I. INTRODUCTION**

The number and scope of laws regulating the employment arena has grown tremendously in the past few decades. While some areas of labor and employment law are governed exclusively by federal law, others see employers covered by supplemental (or overlapping) state laws, while a handful are exclusively of state or even local concern. In general, federal law serves to establish the threshold of what an employer absolutely must do and to what employees are entitled in various situations. State law may still govern if it either establishes a higher, stricter standard for employers than federal law, or applies to a class of employers not covered under federal law. This means that where both state and federal laws apply, an employer should follow the more stringent requirement as between the two laws.

This booklet provides a basic overview of the employment laws in effect in Illinois and is divided into four main themes, or sections, as follows: 1) the employment relationship; 2) wages and hours; 3) employment discrimination; and 4) workplace safety. Citations to Illinois Compiled Statutes (ILCS) are provided for each law discussed.

Bear in mind that this booklet is not meant to be an exhaustive treatment of Illinois employment law in any particular area. Neither does it review applicable federal law in these areas, except to briefly point out areas of difference where the two overlap. Rather, this booklet is intended to provide a basic reference guide to help employers quickly and successfully address common employment issues in accordance with Illinois law.

Always remember that where state and federal laws differ and an employer is covered by both, the higher, stricter standard must be followed. For additional information about federal employment issues you may want to review the various other booklets published by Fisher & Phillips LLP which summarize and explain the federal laws that govern employers. This booklet is no substitute for legal advice. Any questions or concerns relating to these or other employment topics should be directed to qualified legal counsel.

## **II. THE EMPLOYMENT RELATIONSHIP**

### **A. Employment At Will**

#### **1. Generally**

The general rule is that Illinois is an “at-will” employment state, meaning that absent some form of employment contract providing to the contrary, employment may be terminated at any time by either the employer or employee for any reason or no reason at all. There are, of course, legal limits to this “at-will” status. An employee may not be discharged for any legally prohibited reason, such as age, sex, race, or disability. Neither may an employee be discharged in retaliation for exercising a legal right or for failing or refusing to engage in illegal conduct. Furthermore, a collective bargaining agreement or other form of employment contract may impose additional limits on the permissible grounds and processes for dismissal.

## 2. Implied Employment Contracts And Disclaimers

Even if an employee is not subject to an employment contract there is still the possibility that a court may find that the provisions of an employee handbook or other policy statement constitute an implied employment contract. Merely inserting a disclaimer into such a policy statement or handbook may not be sufficient to escape a finding by a court that an employment contract exists. The employer's stated policies and practices must not be inconsistent with an employee's "at-will" employment status. For example, if the employee handbook states that all employees are probationary for 90 days and then will be reviewed, without sufficient disclaimer language a court could rule that new employees have a contractual right to complete the probation period before review or termination. Thus, you should not promise that a procedure or condition of employment will always be followed.

Disclaimers can, however, be used effectively to weaken the case that an employee reasonably relied on policies in a handbook as an employment contract. Any such disclaimer should be clearly visible (for example, spelled out in large, bold type, conspicuously located in the document) and should clearly state that the handbook is not a contract and that employment may be terminated at any time. Similarly, any list provided to employees as potential grounds for dismissal or the like should include a conspicuous and clear statement that the list is not intended to be all-inclusive and any procedures described should be accompanied by a statement that the company may deviate from, change, or delete any or all such procedures at any time.

### B. Labor Organizations

#### 1. Private Sector Employers, 820 ILCS 35/1, *et seq.*, 710 ILCS 10/1, *et seq.*, 820 ILCS 5/1, *et seq.*

Labor relations in the private sector are primarily regulated under the federal National Labor Relations Act. There is no similar comprehensive state law governing private sector employer-labor relations in Illinois, although there are several narrower laws governing discrete aspects of employer-labor relations. The **Illinois Employee Arbitration Act** (820 ILCS 35/1, *et seq.*) for example, provides that employers with 25 or more employees, or a majority of such employees on their own, may apply to the Illinois Department of Labor to mediate any controversy.

In addition, the **Illinois Labor Arbitration Services Act** (710 ILCS 10/1, *et seq.*) provides for the enforcement of arbitration proceedings set out in any valid collective bargaining agreement. It also prohibits a judge from granting an injunction against lawful striking and picketing over terms and conditions of employment and bans the use of professional strikebreakers except to maintain and protect property. The law also provides that employers may not interfere in any way with the right of employees to join, become or remain members of, or withdraw from any labor or employment organization.

Under the **State Construction Minority and Female Building Trades Act** (30 ILCS 577/1, *et seq.*), by January 15 of each year, all construction apprenticeship programs in Illinois are required to submit a report to the Illinois Department of Labor reporting the race, gender, ethnicity and nationality of apprentices in their programs. (*See* also Ill. Admin. Cd. Title 56 Section 270.200)



Illinois' **Employment Contract Act** (820 ILCS 15, *et. seq.*) provides that any contract between an employer and an employee is void and against public policy if it would require the employee to agree not to join or to withdraw from any labor organization as a condition of employment.

Lastly, the **Illinois Labor Dispute Act** (820 ILCS 5/1, *et seq.*) prohibits courts from issuing injunctions that would restrain employees involved in a labor dispute from stopping work or picketing an employer. In addition, the act also states that judges may not issue injunctions to prevent employees from encouraging others to stop work, picket, or boycott an employer.

## **2. Public Sector Employers, 5 ILCS 315/1, *et seq.*, 115 ILCS 5/1, *et seq.***

In the public sector, the **Illinois Public Labor Relations Act** (5 ILCS 315/1, *et seq.*) and the **Illinois Educational Labor Relations Act** (115 ILCS 5/1, *et seq.*) essentially grant public sector employees the same rights to join a union and enter into collective bargaining as private sector employees under the National Labor Relations Act. Together, the two laws cover all public sector employees, including firemen and policemen, except they do not cover employees of local governments with fewer than five employees.

### **C. Background Screening And Investigations Into Employee Wrongdoing**

#### **1. Criminal Background Inquiries, Job Opportunities For Qualified Applicants Act, 820 ILCS 75/1**

Effective January 1, 2015, employers with 15 or more employees may not make inquiries into the criminal history of an applicant until the applicant has been: i) deemed qualified for the position and notified of selection for an interview; or ii) issued a conditional offer of employment.

These restrictions are not applicable if: i) the employer is required to exclude applicants with certain criminal convictions from employment due to federal or state law; ii) a standard fidelity bond or an equivalent bond is required and an applicant's conviction of specified criminal offenses would disqualify the applicant from obtaining such a bond, in which case you may inquire whether the applicant has ever been convicted of any of those offenses; or iii) the employer employs individuals licensed under the Emergency Medical Services (EMS) Systems Act. This law is enforced by the Illinois Department of Labor and violators are subject to civil fines that are progressive in nature.

#### **2. Criminal-Background Checks, 775 ILCS 5/2-103**

After an interview or a conditional offer of employment has been made, employers generally may consider prior criminal convictions in making employment decisions, subject to the restrictions outlined in Section IV, Employment Discrimination. *See* subpart A.3 therein. Use of arrest information or sealed or expunged convictions for such purposes, however, is prohibited and constitutes a civil rights violation under the **Illinois Human Rights Act**. 775 ILCS 5/2-103. Criminal background checks may be obtained from either the Illinois State Police or from private firms. You need a signed authorization form from the subject of the background check before requesting it, though you may make agreeing to submit to a criminal-background check a condition of employment.

Note that the Fair and Accurate Credit Transaction Act (FACT) amended the Fair Credit Reporting Act and excluded workplace investigations into employee wrongdoing from the cumbersome notice and consent requirements contained in the Fair Credit Reporting Act. The amendments also contain new disclosure requirements when a workplace investigation results in an adverse employment action for an employee. These changes, however, only govern the investigation of employee wrongdoing by current employees, not applicants. The federal Fair Credit Reporting Act has its own procedures and noncompliance can result in civil actions, including class action lawsuits for damages and attorneys' fees.

In addition, employers of certain non-licensed health care workers providing direct care to patients are *required* to have criminal-background checks performed by the Illinois State Police. Likewise, Illinois school districts are required to have the State Police perform criminal-background checks on all applicants for jobs involving direct, daily contact with students.

If you need more information regarding required criminal-background checks of non-licensed health care workers it may be obtained from the Illinois Department of Public Health, Office of Health Care Regulations at (217) 782-2913. For information concerning required criminal-background checks for Illinois school district employees, call the Illinois State Board of Education at (312) 814-2220.

### **3. Credit History, 820 ILCS 70/1**

Under a fairly new State law, the use of credit history as a basis for making employment decisions is limited. However, as stated in Section 30 of the **Employee Credit Privacy Act**, nothing in the Act precludes employers from “conducting a thorough background investigation, which may include obtaining a report *without information on credit history* or an investigative report *without information on credit history*, or both, as permitted under the Fair Credit Reporting Act.” *See* 820 ILCS 70/30 (emphasis added). Notwithstanding the limits on using credit history information in the context of employment decisions, the Act provides that private employers may use credit history information when making employment decisions when any of the following circumstances exist:

- the duties of the position include custody of or unsupervised access to cash or marketable assets valued at \$2,500 or more;
- the duties of the position include signatory power over business assets of \$100 or more per transaction;
- the position is a managerial position which involves setting the direction or control of the business; or
- the position involves access to personal or confidential information, financial information, trade secrets, or State or national security information.

Outside of the foregoing carve-outs, employers may not base employment decisions on credit worthiness, credit standing, credit capacity or credit history. Again, you must get the authorization of the applicant before requesting any credit check, if any of the foregoing exceptions apply, or general background check that will not contain credit history information.

#### **4. Drug And Alcohol Testing, 30 ILCS 580/1, et seq.**

There is no law in Illinois that either requires or prohibits private employers from testing employees for drugs or alcohol.

Not even the **Illinois Drug Free Workplace Act**, which applies only to employers with 25 or more employees with contracts or grants of \$5,000 or more with the state of Illinois, requires employers to actually test employees for drugs. Rather, the law requires only that covered employers doing business with the state establish a drug free workplace policy, mirroring provisions of the federal Drug Free Workplace Act of 1988, which applies to employers with 25 or more employees who have at least \$25,000 in contracts with the federal government.

Both the state and federal laws require covered employers to 1) publish a statement announcing the drug free workplace policy; 2) post and distribute the notice/statement to all employees involved in contract or grant work with the state/ federal government; 3) establish a drug free awareness program to inform employees of potential penalties, available counseling, and dangers of drug use in the workplace; 4) notify the contracting or granting agency of any criminal drug convictions of employees; 5) impose penalties or require employees to complete a rehabilitation program in response to any such convictions; 6) assist employees if drug counseling, treatment and rehabilitation are required; and 7) make a good faith effort at maintaining a drug free workplace.

#### **5. Pre-Employment Medical And Psychiatric Exams**

Medical and psychiatric examinations *may* be used to screen applicants for employment who would be unable to perform the particular job being applied for safely and efficiently. Under no circumstances, however, may such exams be used to discriminate against applicants with disabilities. Concern over the use of such exams to discriminate has led to requirements that medical and psychiatric exams be given only after an applicant has received an offer of employment conditioned on passing the exam. So long as the applicant can perform all the essential functions of the job safely and efficiently with or without reasonable accommodation, an employer may not refuse to hire based on the applicant's disability.

Employers wishing to use pre-employment medical or psychiatric examinations must: 1) apply them uniformly to all applicants regardless of disability; 2) perform them after all other forms of evaluation are concluded (keep in mind the federal Americans with Disabilities Act requires that medical exams not be given until after a job offer is made); 3) be prepared to make reasonable accommodations where appropriate; and 4) take all necessary steps to safeguard the confidentiality of all medical information, including physical examinations and test results.

Furthermore, an employer may not disqualify applicants on the basis of physical conditions which may pose a risk of future injury unless the employer can demonstrate that the applicant has a high probability of sustaining substantial harm in performing that job. Employers should communicate to the doctor performing the examination the precise nature and demands of the position so that he or she may examine the applicant in light of the specific job requirements.

## **D. Health Insurance**

### **1. Coverage And Mandated Benefits, 215 ILCS 97/1, et seq.**

There is no Illinois law that requires an employer to provide health insurance as an employee benefit (but see the federal Affordable Care Act). However, once an employer chooses to offer health insurance to employees there are a number of state and federal laws impacting the medical benefits to be offered and how the plan is to be administered. In addition to Obamacare requirements, the **Illinois Health Insurance Portability And Accountability** requires employers to limit exclusions for pre-existing conditions, eliminate pre-existing condition exclusions for pregnancy, and provide certificates of creditable coverage for employees. In addition, employers who provide fully insured plans in Illinois are required to offer certain *mandated benefits*, including but not limited to the following:

- mammograms
- breast surgery
- PAP smears
- maternity benefits
- infertility treatment
- mental health benefits
- coverage for adopted children
- coverage for rehabilitation in hospitals lacking surgical facilities

Employers offering such covered insured plans should obtain a complete list of required benefits from their health insurer. Note, however, that employers offering *self-insured plans* are not subject to these state-mandated benefit requirements.

### **2. Continuation Of Coverage, 215 ILCS 5/367e And 125/4-9.2**

Employers electing to offer group health insurance plans are also regulated by state and federal laws that impose certain obligations on them to provide for the *continuation* of such health insurance. In Illinois, employers are covered not only by the federal health care continuation law (COBRA), but several Illinois laws as well.

#### **a. The Federal COBRA Law**

This law applies to employers with 20 or more employees and requires “qualified beneficiaries” who would ordinarily lose coverage under the employer’s group health plan due to certain “qualifying events” be given the chance to purchase continued coverage under the employer’s plan for 18 to 36 months at a rate up to 102% of the applicable group rate. COBRA applies to any employer group healthcare plan that provides medical, dental, vision, or prescription drug benefits, but does not apply to disability or life insurance plans. Separating employees can be directed to the Federal Department of Labor for questions concerning changes to the Federal COBRA law (*e.g.*, changes to the premium reduction subsidy under the American Recovery and Reinvestment Act).

## **b. Illinois Continuation Of Coverage Laws**

The first of these laws covers all employers with group insurance plans administered in Illinois and subject to the Illinois Insurance Code. The law requires that employees who have been covered by the group insurance plan, including Health Maintenance Organizations (HMOs) for at least three months prior to termination of employment must be given the option of continuing hospital, surgical, and major medical coverage for 12 months for themselves and their dependents.

An employer may elect to exclude from the 12-month continuation option certain other *supplementary benefits*, including dental and vision care, prescription drug benefits, and disability income. Employees covered by Medicare or covered by another group plan, or discharged due to theft or commission of a felony in connection with the employee's work are ineligible for this continuation option.

Under the Illinois Continuation Law (also referred to as mini-COBRA), you must provide written notice to your employees of their legal coverage continuation rights either at the time of termination or within 10 days of their termination, after which the employee has 30 days to elect the continuation option. The 30 day period is measured from the later of the termination date or notice date but cannot be more than 60 days from the termination date.

Electing to continue means that the employee must pay the total applicable amount of the plan premium, including the employer's share, but is allowed to pay at the employer's group rate. Coverage ends 12 months after termination of employment, or when the employee becomes eligible for Medicare, becomes covered under another group plan, fails to make a timely premium payment, or when the group contract is terminated and no replacement plan is offered under another group contract.

The second and third of these laws, Illinois Spousal Continuation Law and the Illinois Dependent Child Continuation Law provide continuing coverage rights to a widowed spouse and dependent children of a deceased employee covered the day before death, or a divorced spouse and dependent children if covered the day before the divorce, or a covered spouse age 55 or older if covered the day before the retirement of the employed spouse. In each case the covered spouse must be given the option of continuing all health insurance coverage, including all supplementary benefits such as dental, vision and prescription drug coverage. Spouses and dependent children are no longer eligible once they become an insured employee under another group health plan or are covered by Medicare.

The notice requirements of these laws are lengthy, but the process begins with the spouse or former spouse of an employee having 30 days from the time of the covered event to provide the employer with written notice of the intent to continue coverage along with proof of death, retirement or divorce of a covered employee. This triggers the employer's 15-day deadline for notifying the insurance carrier of the covered event. Once elected, the spouse or former spouse is responsible for payment of the entire premium, including the employer's share, but at the employer's group rate. The person may then continue coverage for up to two years if under age 55, or until either eligible for Medicare if 55 or older at the time of the qualifying event, or until remarriage, becoming covered under another group plan, failing to make a timely premium payment, or until the group contract is terminated and no replacement plan is offered under another group contract.

Questions about any of these Illinois laws may be directed to the Illinois Division of Insurance at (217) 782-4515. Where both the state and federal laws apply, covered employees must be offered the choice between them.

**E. Employment Of Minors, 820 ILCS 205/1, *et seq.***

**1. Minors 14 And 15 Years Of Age**

Under the **Illinois Child Labor Law** the general rule is that minors under 16 years of age, except for minors 14 or 15 years of age who are participating in federally funded work experience career education programs directed by the State Board of Education, may not be employed or allowed to work in any gainful occupation. This general rule, however, is subject to numerous exceptions, the largest being that minors between 14 and 16 years of age may be employed outside school hours and during school vacations so long as it does not involve dangerous or hazardous factory work or is in any occupation otherwise prohibited by law.

**a. Work Conditions For Minors**

Minors 14 or 15 years of age may work at all non-hazardous occupations, provided the following conditions are met:

- the employer obtains a one-year employment certificate for the minor from the school system prior to starting work, which should be kept in the employee's file;
- minors work no more than three hours on school days, and school hours plus work hours do not add up to more than eight hours in any one day (Note that the Fair Labor Standards Act (FLSA) does not permit minors ages 14 and 15 to work more than 18 hours per week during school weeks);
- while minors may work up to eight hours a day on Saturday or Sunday, they may not work for more than six consecutive days in any week;
- whenever school is not in session, minors are restricted to working no more than eight hours in any one day and no more than 48 hours in any week (Note that the federal Fair Labor Standards Act (FLSA) limits the hours minors ages 14 or 15 may work when school is not in session to 40 hours per week);
- minors are only permitted to work between the hours of 7 a.m. and 7 p.m. from Labor Day to June 1, and between 7 a.m. and 9 p.m. from June 1 to Labor Day;
- minor employees working for the Park District may work until 9 p.m. when school is in session and 10 p.m. during school vacations; and
- minors working more than five continuous hours must be given at least one 30 minute meal period break. A break of less than 30 minutes is not deemed to interrupt a period of continuous work.

**b. Prohibited Hazardous Occupations**

Occupations identified as hazardous and in which minors 14 and 15 years of age are prohibited from being employed or allowed to work in connection with are:

- any public messenger or delivery service;
- a bowling alley, or pool or billiard room;

- skating rinks (except for ice rinks operated by a school or local government);
- exhibition parks or places of amusement;
- any garage;
- as bell-staff in any hotel or rooming house;
- the operation of power-driven machinery;
- oiling, cleaning, or wiping of machinery or shafting;
- in any mine or quarry;
- stone cutting or polishing;
- any hazardous factory work;
- manufacturing or transporting explosives or articles containing explosive components;
- manufacturing iron or steel, ore reduction works, smelters, foundries, forging shops, hot rolling mills or any other place in which the heating, melting, or heat treatment of metals is carried on;
- operation of machinery used in the cold rolling of heavy metal stock, or in the operation of power-driven punching, shearing, stamping, or metal plate bending machines;
- sawmills or lath, shingle, or cooperage-stock mills;
- operation of power-driven woodworking machines, or off-bearing from circular saws;
- operation of freight elevators or hoisting machines and cranes;
- spray painting or occupations involving exposure to lead or its compounds or to dangerous or poisonous dyes or chemicals;
- oil refineries, gasoline blending plants, pumping stations on oil transmission lines;
- the operation of laundry, dry cleaning, or dyeing machinery;
- occupations involving exposure to radioactive substances;
- filling or service stations;
- construction work, including demolition and repair;
- roofing operations;
- excavating operations;
- logging operations;
- public and private utilities and related services;
- slaughtering, meat packing, poultry processing, and fish and seafood processing;
- working on an elevated surface, with or without use of equipment;
- security positions or occupations requiring the use or carrying of a firearm/weapon;
- handling or storage of blood, blood products, body fluids, or body tissues; and
- places or establishments in which alcoholic liquors are served or sold for consumption on the premises, or in which such liquors are manufactured or bottled (except as bus-boys or kitchen employment in connection with the service of meals at any private club, fraternal or veterans' organization).

*\*Note that office work and other nonhazardous employment of minors ages 14 or 15 is not prohibited. The federal list of prohibited hazardous occupations, while similar, is not the same as the Illinois list for minors 14 and 15 years of age.*

### **c. Agriculture**

Minors under the age of 12 are not permitted to work in agriculture during school hours unless they are a member of the farmer's own family and live at the farmer's principal place of

residence. However, even minors 10 years of age or older are permitted to work in agriculture outside school hours or during school vacations.

**d. Show Business Exceptions**

Illinois law provides for numerous exceptions related to the performing arts and entertainment industries. The language of the statute specifically outlines conditions allowing for employment certificates for minors under the age of 16 working in connection with professional theatrical productions, modeling, motion pictures, radio or television productions.

**e. Occupations Not Covered**

Illinois law allows work in the following occupations during hours when school is *not* in session:

- the selling and distributing of magazines and newspapers;
- work in and around the home so long as it is not in connection with a business, trade or profession of the employer;
- minors 13 years of age or older may work as caddies at a golf course; and
- minors 14 or 15 years of age may participate in an occupational, vocational, or educational program funded by the Job Training Partnership Act during the period of May 1 to September 30.

**f. Notice Requirement**

Employers are required to post a printed notice from the Department of Labor in a conspicuous place where minors under 16 years of age are employed or allowed to work. The notice describes provisions of the Illinois Child Labor Law and lists prohibited occupations as well as days and hours of work and gives the Department's toll free telephone number.

**g. Workers' Compensation**

Copies of workers' compensation reports having to do with work-related injuries or deaths of a minor must be submitted to the Illinois Department of Labor. Illegally employed minors or their legal guardians, may, within six months of the work-related injury or death, elect to forgo workers' compensation benefits and pursue other legal remedies available to them. Furthermore, if they do elect to accept workers' compensation, those benefits will be increased by 50%.

**2. Minors 16 And 17 Years Of Age**

Minors over 16 years of age are not covered by the Illinois Child Labor Law but are covered by the federal Fair Labor Standards Act (FLSA). As such, there are no limitations as to hours of work or requirements for employment certificates with 16 and 17 year-olds. There is, however, a similar listing of hazardous occupations from which minors 16 and 17 years of age are prohibited from working.



### 3. Enforcement And Penalties

It is unlawful to employ or allow any minor 14 or 15 years of age to work in connection with any gainful occupation without first procuring an employment certificate. The certificate should be kept on the premises where the minor is working and should be accessible to authorized personnel of the Department of Labor or to truant officers and other school officials charged with enforcing compulsory education laws.

Employers of minors 14 and 15 years of age must keep a register at the premises with the name, age and place of residence of each minor. A copy of a minor's birth certificate, or certificate of baptism, or some other form of documentary proof that the minor is of the required age should also be kept in the employee's personnel file.

The Department of Labor is charged with the enforcement of Illinois' Child Labor Law. The law itself provides for a maximum penalty of up to \$5,000 for each violation. It also provides that any individual who willfully violates the act is guilty of a Class A misdemeanor. Each Class A misdemeanor may carry with it a term of imprisonment of six months to one year.

#### F. Employment Of Day Laborers, 820 ILCS 175/5, *et seq.*

The **Illinois Day and Temporary Labor Services Act** was enacted on January 1, 2000, but was substantially strengthened by the legislature through amendments that took effect in January, 2006. The Act defines day or temporary labor as work that is occasional or irregular in nature in which a labor agency assigns the services of day laborers to third-party employers and the agency pays the workers on a daily basis. However, the legislature has specifically exempted work of a professional or clerical nature from the definition of "day and temporary labor."

#### 1. Wages And Wage Deductions

As long as temporary labor service agencies do not allow the wages of day laborers to fall below the minimum wage, the **Illinois Day and Temporary Labor Services Act** allows these agencies to deduct several items from the wages of day laborers. For example, a temporary labor service agency may sell meals to day laborers, although they may charge no more than the actual cost of the meal. However, temporary labor service agencies are not permitted to charge day laborers for any meals they do not actually consume, nor may they make the purchase of the meal a condition of employment for any day laborer. Temporary labor service agencies may also charge a fee to transport a day laborer to a designated work site, but the charge may be no more than the actual cost of the transportation. In addition, any transportation fee a temporary labor service agency charges to a day laborer may not exceed three percent of the day laborer's daily wages.

The only exception to the requirement that the wages of day laborers may not fall below the minimum wage is that temporary labor service agencies may deduct the fair value of any equipment loaned to a day laborer that he or she fails to return.

Any day laborers who are hired by a temporary labor service agency to work at a third-party employer's worksite but are not utilized must still be paid a minimum of four hours' pay at the agreed-upon rate.

## **2. Third-Party Employers**

Illinois law prohibits temporary labor service agencies from sending day laborers to any place where a strike, lockout, or other labor trouble exists. Therefore, day laborers can never be hired as replacement workers during a strike or lockout.

Temporary labor service agencies may not prevent a day laborer from accepting a permanent position with a third-party employer to whom the day laborer was referred for work by the agency. However, a temporary labor service agency is permitted to charge the third-party employer a placement fee. The fee is determined by subtracting the commission the temporary labor service agency has received from the day laborer's work over the past 12 months from the amount of commission the agency would have received from the day laborer's work over a 60 day period. But there are no caps on placement fees for skilled laborers who have gone through screening processes such as an interview or advanced testing by the agency.

## **3. Recordkeeping**

The **Illinois Day and Temporary Labor Services Act** provides that, in general, required records must be kept for a period of three years from their creation. They must be available for inspection by the Illinois Department of Labor during normal business hours. They must also be made available for copying by day laborers during normal business hours within five days following a written request.

### **a. Records Provided To Day Laborers**

Each time a temporary labor service agency assigns a day laborer to begin working for a third-party employer, the agency is required to provide the day laborer with a record of the new assignment, called an Employment Notice. The Employment Notice must be written on a form approved by the Illinois Department of Labor, and must include the name of the day laborer, the name and nature of the work performed, the wages offered, the name and address of the day laborer's destination, the terms of transportation, whether a meal and equipment is provided and the cost of the meal and equipment, if any.

Remember that an Employment Notice must be completed for every day laborer each day. The only exception to this rule is that a day laborer who is assigned to the same job for more than one day must receive a completed Employment Notice only on the first day of the assignment, provided that the terms of employment do not change.

In addition, temporary labor service agencies are required to provide day laborers who work only a single day for the agency with a Work Verification Form that has been provided by the Illinois Department of Labor. This form must contain the date, the day laborer's name, the work location and the number of hours worked on that day.

In the event that a temporary labor service agency is not able to place a day laborer with a third-party employer on a particular day, the agency is required, upon request of the day laborer, to provide written documentation of this. This written confirmation must be signed by an employee of the agency and must include the name of the agency, the name and address of the day laborer, and the day and time that the day laborer received the confirmation.

Upon request of the day laborer, a temporary labor service agency is required to hold the day laborer's earnings and pay him or her in weekly, bi-weekly, or semi-monthly intervals. Along with each paycheck, the temporary labor service agency must also include a statement containing the name, address and telephone number of each third-party client a day laborer worked for during that period, the number of hours worked for each such third-party client, the rate of payment for each hour worked, the total pay period earnings and all deductions made by the third-party client or temporary labor service agency and the purpose for which the deductions were made. Please note that if a temporary labor service agency pays a day laborer daily, this statement would need to be provided to the day laborer for each day he or she has worked.

Finally, Illinois law requires that all temporary labor service agencies provide their day laborers with an annual earnings summary no later than February 1 of the following year. When the annual earnings summaries are ready for viewing, the temporary labor services agency must notify its day laborers individually, or may post a notice in a conspicuous place in its public reception area.

#### **b. Records Provided To The Illinois Department Of Labor**

In addition to the records that must be given to day laborers, temporary labor service agencies are also required to keep data for their own records, subject to inspection by day laborers and the Illinois Department of Labor. Specifically, any time a temporary labor service agency sends one or more day laborers to work for a third-party employer, the agency must record:

- the name, address and telephone number of each third-party client to which day laborers were sent, and the date of the transaction;
- the name and address of each day laborer sent to work;
- the type of work each day laborer performed, the rate of pay, the number of hours worked and the date the worker was sent;
- the name and title of the individual or individuals at each third-party client's place of business responsible for the transaction;
- any specific qualifications or attributes of a day laborer that were requested by third party clients;
- copies of all contracts with third party clients and copies of all invoices sent to third-party clients;
- copies of all employment notices;
- all deductions to be made from each day laborer's compensation;
- verification of the actual cost of any equipment or meals charged to a day laborer; and
- the race and gender of each day laborer, as provided by that day laborer.

#### **4. State Requirements, Enforcement And Penalties**

Any temporary labor service agency that is located in or transacts business in Illinois must register with the Illinois Department of Labor. The fee to register a temporary labor service agency may not exceed \$1,000 per year. Temporary labor service agencies with more than one office must also register each branch office, although the maximum fee to register a branch office is \$250. Upon registration, each agency must provide the state of Illinois with proof of an account number

issued by the Department of Employment Security for the payment of unemployment insurance contributions. Each agency must also provide proof of valid workers' compensation insurance.

The Illinois Department of Labor has the power to conduct investigations and hold hearings to determine if a temporary labor services agency has violated the **Illinois Day and Temporary Labor Services Act**. If the Department finds that a temporary labor service agency has violated the act, or poses other health or safety concerns, it may revoke or suspend the registration of that agency. In addition, the Department of Labor may impose civil penalties upon a temporary labor services agency that it determines violated the **Illinois Day and Temporary Labor Services Act**. These penalties may not exceed \$6,000. Keep in mind, however, that each violation of the Act for each day laborer and for each day the violation continues are considered to be separate and distinct violations, each subject to its own penalty.

## **5. Enforcement By Day Laborers**

The **Illinois Day and Temporary Labor Services Act** provides for a private right of action for day laborers, meaning that they can sue their temporary labor service agency (and the client employer) if they believe the agency has violated one or more provisions of the Act. If a court finds violations of the Act, the day laborer may collect up to \$500 per violation, any lost wages and attorneys' fees, as well as other damages that may be appropriate, depending on the facts of the case.

In addition to the right of a day laborer to sue his or her temporary labor service agency, the Act also protects day laborers from retaliation for exercising any rights granted under the Act. Specifically, it is a violation of the **Illinois Day and Temporary Labor Services Act** for a temporary labor service agency to retaliate against a day laborer who makes a complaint directly to the agency, or to a third-party client, coworker or community organization. It is also a violation of the Act to retaliate against a day laborer who testifies in a public hearing, or tells a state or federal agency that the Act has been violated. In addition, it is a violation of the Act to retaliate against a day laborer who causes a proceeding to be instituted based on the Act, or who testifies or prepares to testify in an investigation or proceeding under the Act. A temporary labor service agency that is found to have retaliated against a day laborer for such activities may be subject to both a lawsuit by the day laborer and the penalties that accompany it, as well as penalties from a suit brought by the Department of Labor.

## **G. Employee Surveillance In The Workplace**

### **1. Searches**

Private sector employers are subject to few restrictions on their right to search articles and lockers on the employer's premises. In fact, the primary motivation for employers to exercise restraint is one of maintaining good employee relations, rather than legally imposed restrictions. Whatever your practice, it is a good idea to be clear and forthright in communicating any surveillance or search practices at the time of hire and to post appropriate notices outlining the policy to not only discourage undesirable behavior, but to maintain good employee relations.

## 2. Surveillance

As with searches, private-sector employers are limited in their surveillance of employees while on the employer's premises first and foremost by concerns over employee relations. A general guide to what is appropriate is to inform employees at the outset when and how they are being monitored and limit such surveillance to only that which is reasonable. A camera directed at a factory floor is obviously different from a camera in a locker room or a changing area.

## 3. Telephone Monitoring, 720 ILCS 5/14-3<sup>1</sup>

Re-enacted December 30, 2014, this law provides that employers engaged in the sale of goods or services through telephone solicitation, telemarketing or opinion research, or bank or credit card administration are permitted to electronically monitor employee telephone conversations for certain *limited purposes* under an exemption in the **Illinois Criminal Code**. Permitted purposes are limited to 1) service quality control; 2) education or training; 3) telephone solicitation; and 4) internal research.

There are also a number of additional requirements that employers must meet if they fit within the above exception. Specifically, employers must: 1) obtain the consent of at least one party to the call; 2) provide written notice, which at a minimum requires signage in work area, to employees (current and prospective) that their telephone calls may be monitored; 3) limit monitoring to business-related calls; 4) cease monitoring immediately and destroy any recording once the employer realizes a call is not business-related; 5) provide employees with access to telephones which are not monitored for use in personal calls (access to "pay phones" is sufficient); and 6) refrain from using information obtained through monitoring in legal proceedings or from providing the information to law enforcement or other third parties.

If the employer does not fit within an exception above, the employer must obtain the consent of all parties to the call.

Note, however, the law applies only in those instances where an electronic eavesdropping device is used. It does not apply to an employer who is standing nearby and happens to overhear what is said. Furthermore, the federal Electronic Communications Privacy Act also prohibits the monitoring of employees through use of an electronic eavesdropping device, except in certain limited circumstances.

## H. Open Personnel Records, 820 ILCS 40/0.01, *et seq.*

The **Illinois Personnel Record Review Act** provides the general rule that employers with at least five employees, excluding immediate family, must provide employees or former employees who have left the employer's service within the preceding year, with any personnel records or documents upon request which are, have been, or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, pay raise, discharge or other disciplinary action. Letters of reference for an employee are specifically excluded from this provision. Additional exceptions exist where the materials relate to, affect or contain private

---

<sup>1</sup> The former version of this law was declared unconstitutional by the Illinois Supreme Court in 2014.

information about another employee. A willful violation of the Illinois Personnel Record Review Act can expose an employer to actual damages and attorneys' fees (820 ILCS 40/12).

## **I. Mass Layoffs Or Plant Closures**

The Illinois Worker Adjustment and Retraining Notification Act (Illinois WARN Act) is similar to its federal counterpart, which is also named the Worker Adjustment and Retraining Notification Act (federal WARN Act). Unlike the federal WARN Act, which covers employers with a minimum workforce of 100 full-time employees and is triggered by 50 (percentage based) or 500 (regardless of percentages) job losses, the Illinois WARN Act covers employers with a minimum workforce of 75 full-time employees and is triggered by 25 (percentage based) or 250 (regardless of percentages) job losses. Once an employer determines that its contemplated employment action will trigger the Illinois WARN Act, the employer may not order a mass layoff until it has given written notice of such layoffs 60 days before the first round of layoffs are scheduled to take place.

The Illinois WARN Act can be triggered by either a "Mass Layoff" or a "Plant Closing." A mass layoff means a reduction in force which i) is not the result of a plant closing; and ii) results in an employment loss at the single site of employment during any 30 day period for: a) at least 33% of the employees (excluding part-time employees) and at least 25 employees (excluding part-time employees); or b) at least 250 employees (excluding part-time employees), regardless of the percentage of full-time employees affected by the mass layoff. A "Plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30 day period for 50 or more employees (excluding part-time employees).

A minimum of 60-days of notice must be given to: the affected employees and representatives of affected employees (local union president and shop steward for smaller layoffs); the Illinois Department of Commerce and Economic Opportunity; and the chief elected official of each municipal (mayor or township president) and county government (county board chairman) within which the mass layoff or plant closure will occur.

## **III. WAGES AND HOURS**

### **A. Wage Payment**

#### **1. Minimum Wage, 820 ILCS 105/1, et seq.**

##### **a. Covered Employers**

Every employer with four or more employees, excluding the employer's immediate family, is covered by the **Illinois Minimum Wage Law**. In addition, employees may also be covered by the provisions of the Federal Fair Labor Standards Act (FLSA) if the employer 1) is engaged in interstate commerce; 2) has annual gross revenue of at least \$500,000; or 3) is a hospital, nursing home, or school. Remember that whenever the federal and state laws differ, the employer must pay the higher rate.

**b. How Much**

The current adult minimum wage in Illinois is \$8.25 per hour, which exceeds the current federal minimum wage of \$7.25 per hour. Additionally, Illinois allows employers to pay minimum wages to their employees under the age of 18 at a rate which can be as much but not more than \$0.50 less per hour than the minimum wages paid to their employees who are over the age of 18. Federal law also allows employers to pay workers under the age of 20 a lower wage. But federal law limits this differential to only the first 90 consecutive calendar days of employment. In Illinois, new employees can be paid at a rate of \$.50 per hour less than minimum wage for the first 90 days of employment. Chicago employers should be prepared for the increase in the local minimum wage – to \$10.00 per hour – effective July 1, 2015. This Chicago minimum wage requirement is separate from (and higher than) the state minimum wage.

**c. Tipped Employees**

Tipped employees must receive at least the minimum wage, though an employer may pay only \$4.95 per hour and use the employee’s tips as a credit for up to 40% (\$3.30) of the minimum wage. The rule with respect to tipped employees can be summarized as follows: 1) tips plus wages must equal or exceed the Illinois minimum wage; 2) an accurate record of tips claimed must be kept; and 3) the employee must actually receive tips equaling or exceeding \$20 per month. Also, note that while federal law permits a wage of \$2.13 an hour for tipped employees and a tip credit of \$5.12, in Illinois employers must pay the higher state wage and take the lower tip credit. Chicago employers should be prepared for the increase in the local minimum wage for tipped employees – to \$5.45 per hour – effective July 1, 2015. This Chicago minimum wage requirement for tipped employees is separate from (and higher than) the state minimum wage rate for tipped employees.

**d. Employee Training**

Employees undergoing *occupational training* may be paid a sub-minimum wage during such training, but not at a rate less than 70% of the state minimum rate (\$5.76). Under Illinois law, an employee may be classified as a “learner” for no more than six months for purposes of paying sub-minimum wages.

**e. Handicapped Persons**

Employees whose productive capacity is impaired by age, physical or mental deficiency, or injury may be paid below the minimum wage to fairly reflect such reduced capacity, provided the employer obtains a license from the Fair Labor Standards Division of the Illinois Department of Labor (IDOL) to employ these workers at less than the minimum wage.

**f. Volunteers**

Individuals who donate their time and effort, usually on a part-time basis, for public service, religious, or humanitarian objectives, and who do so without expectation of payment, are not considered employees of the organizations receiving their services. Similarly, members of religious orders who serve their faith through institutions operated by churches or religious organizations are not considered employees of these institutions and need not be paid. For purposes

of Illinois wage and hour law, employees are not volunteers and must be compensated, including for overtime when appropriate, for all work performed for their employers.

**g. Underpayment**

Employees claiming back-pay for allegedly being paid less than the minimum wage have three years to initiate a civil action against their employer for the alleged underpayment. If successful in a civil suit, an employee can recover reasonable attorneys' fees. In addition, an employer may be liable for punitive damages in the amount of 2% of the underpayment for each month underpaid, without temporal limitation.

Pursuant to 820 ILCS 115/14, willful underpayment may be penalized by an additional amount equal to 20% of the total underpayment if the employer fails to timely appeal or comply with an administrative or court order commanding payment, and if IDOL is forced to litigate to bring about compliance, the employer may be further liable for those costs. Under a recent amendment, additional penalties (on a daily basis) may be assessed against an employer and for the benefit of the employee if an employer continues to fail to pay wages after the IDOL or a proper court has demanded such payment. The IDOL can also recover a fine of between \$500 and \$1,000.

**2. Overtime Pay, 820 ILCS 105/4a**

**a. Covered Employers**

Every private employer with four or more employees, excluding the employer's immediate family, is covered by the minimum wage and overtime law. Public sector employers are covered by the federal Fair Labor Standards Act (FLSA), as are private employers engaged in interstate commerce or operating a business with gross annual revenue of \$500,000 or more, as well as hospitals, nursing homes, and schools of all types and sizes. Remember that where the state and federal laws differ, the covered employer must implement the more stringent standard.

**b. Exempt And Nonexempt Employees**

Nonexempt employees must be paid time and one-half their regular pay for all hours actually worked in excess of 40 in a seven-day workweek. Non-exempt employees are those workers, hourly and salaried, not specifically exempt from being paid overtime. Exempt employees are those who fall into certain specific categories.

To be exempt, employees must be paid a salary. However, paying an employee a salary does not guarantee that he or she is exempt. Nonexempt employees may be either salaried or hourly. What determines whether employees are classified as exempt or non-exempt is what the employees actually do in their job, e.g., the amount of time devoted to performing exempt tasks, not their job title, or method of payment, or the amount they are paid. For example, executives, professionals, and administrators are exempt if they are paid a guaranteed weekly salary of at least \$455 per week and meet the corresponding occupational tests.

Examples of nonexempt work include manual or production work, routine data entry, clerical or recordkeeping duties, maintenance and cleaning work. Typical examples of exempt



work include physicians, pharmacists, lawyers, engineers, teachers, and those performing non-manual duties related to management policy and/or business operations. Exempt work tends to be more creative or original in character and of the type on which the results depend primarily on the skill and independent judgment of the employee. (For a more in depth analysis of exemptions see the Fisher & Phillips booklet, *FLSA - Exemptions and Recordkeeping*).

**c. Time Not Actually Worked**

Paid time not worked (*e.g.*, holiday or sick pay) does not count towards the 40 hours worked for purposes of overtime. Also, the law applies only to time worked over 40 hours in a seven-day workweek and does not require overtime to be paid for time worked in excess of eight hours in any single workday. A workweek is defined as a period of seven consecutive days (168 hours) from the time the employer has determined the workweek to begin, which need not be the same as the calendar week unless the employer so chooses.

**d. Computer Systems Professionals**

Despite the impression one might get from their job title, computer systems professionals are generally non-exempt employees. In order for computer specialists to qualify as exempt professionals they must be highly skilled systems analysts, programmers, or software engineers, making a minimum of \$27.63 per hour whose primary duties consist of applying systems analysis techniques and procedures; designing, developing, documenting, analyzing, creating, testing or modifying computer systems or programs; designing, documenting, testing, creating, or modifying computer programs related to machine operating systems; or a combination of these duties.

**e. Special-Case Exemptions**

- Outside salespeople who regularly work away from the employer's place of business and whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities are exempt from being paid overtime.
- Commissioned employees in retail and service organizations who receive at least one and a half times the minimum wage and for which at least 50% of their earnings come from commissions are exempt from being paid overtime.
- Agricultural workers in small agricultural businesses are exempt from both state and federal minimum wage and overtime requirements.
- Interstate truck drivers, helpers, and mechanics are exempt from both state minimum wage and federal overtime requirements.
- Small town radio and television personnel are exempt from state and federal overtime requirements.
- Auto dealers, salespersons and mechanics are exempt from state and federal overtime requirements.
- Domestic service employees who reside in the house in which they work are exempt from state and federal overtime requirements.
- Employees receiving remedial education are partially exempt from being paid overtime between the 40th and 50th hours in a workweek for the purpose of receiving remedial education. In order to qualify for such remedial education, the employee must lack a high school diploma or "educational attainment at the eighth grade level," and the program must

provide instruction in reading and other basic skills at an eighth grade level or below and not include job-specific training.

- Hospital and residential care establishment employees may agree to a 14 day work period for purposes of calculating overtime. Under such an agreement, employees receive overtime pay for the greater of the number of hours worked in excess of eight in any single day or the hours over 80 in the 14 day work period.

### **3. Paying Employees, 820 ILCS 115/1, et seq.**

#### **a. Wages**

The Wage Act covers any and all compensation owed an employee by an employer pursuant to an employment contract or other agreement. In addition, where an employer is legally committed to contribute to an employee benefit, trust or fund on the basis of a certain amount per some period of time, the amount due from the employer to such employee benefit, trust or fund is also treated as wages. There is an exception for different payment arrangements provided by a valid collective bargaining agreement.

#### **b. Time And Place Of Payment**

Under the **Illinois Wage Payment and Collection Act** every employer in Illinois irrespective of size or number of employees, excluding only the state and federal governments, but including local governments and school districts, is required to pay all non-exempt employees at least semi-monthly all wages earned during the semi-monthly pay period. Payment must be made no later than 13 days after the end of the pay period in which the wages were earned.

If you choose a weekly pay period, rather than a semi-monthly schedule, employees must be paid all wages earned in that pay period no later than seven days after the end of such period. Wages paid on a daily basis should be paid, if possible, the same day earned, but in any event not later than 24 hours after the day the wages were earned.

Exempt employees (executives, administrators, and professionals) may be paid once a month as long as they are paid within 21 calendar days of the end of the pay period. Likewise, employee commissions may also be paid once a month.

Employers are required to notify employees at the time of hiring of the rate of pay as well as the time and place of payment. Similarly, employees should be notified as to any changes in payment arrangements prior to such changes taking effect.

When an employee is absent at the fixed time of payment, the employee is to be paid upon demand anytime within the next five days, after which he or she must be paid within five days of making such a demand.

In cases involving wage disputes over the amount owed, the law requires the employer to pay the amount not in dispute without condition and within the normal time period, leaving the employee to pursue all legal remedies available to pursue any balance claimed.

**c. Form Of Payment**

All wages and final compensation must be paid either by cash, check, payroll card or the direct deposit of funds in an account at a bank or other financial institution designated by the employee. You may not pay an employee by direct deposit unless the employee elects to use direct deposit and designates the particular financial institution to receive the payment or deposit. If the employee has not designated a particular financial institution, you must make payment in the form of cash, payroll card or check.

Effective January 1, 2015, if an employee elects to receive wages by payroll card, the employer must disclose in writing to the employee all fees, penalties and costs associated with the use of the payroll card (as a debit card for making purchases) and the employee must be able to deposit and withdraw the full monetary value on the payroll card without discount. Within 30 days of the employee's separation from employment, the employer must advise the former employee that the terms and conditions of continuing to use the payroll card as a debit card may change if the employee is considering whether to continue his or her relationship with the payroll/debit card company. 820 ILCS 115/14.5

**d. Final Compensation**

Payments to "separated employees" are termed "final compensation" and include all wages, salaries, earned commissions, earned bonuses, the monetary equivalent of earned vacation and holidays, and any other compensation that may be owed to an employee up to the time of separation.

There is no law requiring that separation or severance pay be included as part of final compensation to a terminated employee. Such separation pay is either left to the discretion of the employer or may be subject to a collective bargaining agreement.

The law does require that when an employment agreement provides for paid vacations and an employee resigns or is terminated without having taken all the pro rata vacation time earned, the monetary equivalent of such earned vacation must be paid at the employee's normal rate of pay as part his or her final compensation, unless a collective bargaining agreement provides otherwise.

Final compensation should be paid in full at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee. Similarly, employees on strike or layoff must be paid no later than the next regular payday for all wages earned up to the time of such strike or layoff.

**e. Illinois Wage Theft Enforcement Act 820 ILCS 115 et. seq.**

The **Illinois Wage Payment and Collection Act** has been amended to strengthen employees' rights in wage and hour disputes. Among the changes to the IWPCA, under the **Illinois Wage Theft Enforcement Act**, (i) employees can pursue claims for personal liability against officers and agents acting directly or indirectly to withhold earned wages; (ii) the Illinois Department of Labor (IDOL) now has jurisdiction to make binding wage and hour rulings where the wages in question are \$3,000.00 or less; and (iii) employees may recover, from the date of the

underpayment, interest at 2% of the underpayment for each month the wages remain unpaid. The IDOL can also recover a fine of between \$500 and \$1,000.

In addition, if an employer fails to comply with or timely appeal an IDOL or court award, the employer will also be liable to pay a penalty to the IDOL totaling 20% of the amount owed, along with a penalty to the employee of 1% per calendar day of the amount owed for each day of delay. Finally, employees can now assert retaliation causes of action in connection with an unpaid wages complaint made to their employer, the IDOL, during a public hearing, or to a community organization, by filing a claim with the IDOL or by filing a civil lawsuit to recover money damages and equitable relief, such as reinstatement (as well as costs and reasonable attorneys' fees in connection with civil lawsuits).

#### **f. Enforcement**

The law gives the Illinois Department of Labor authority to inquire into violations, as well as impose penalties on employers and enforce generally the law with respect to wage payment and collection, including assessing penalties and fines. Pursuant to a recent change in the law, the Illinois Department of Labor can now issue rulings in cases where the wages in question are equal to or less than \$3,000. The law also provides for private actions and recently was amended to add enhanced civil damages for employees. Note that any officers of a corporation or agents of an employer who knowingly permit violations of the **Illinois Wage Payment and Collection Act** (820 ILCS 115/1, *et seq.*) are deemed to be the employers of the employees of the corporation and, as such, they are subject to individual penalties. 735 ILCS 5/12-801-819, 740 ILCS 170/1, *et seq.*

As a general rule, deductions from wages or final compensation are prohibited unless they are 1) required by law; 2) to the benefit of and approved by the employee; 3) in response to a valid *wage assignment or wage deduction* order; or 4) made with the express written consent of the employee, given freely at the time the deduction is made. Under certain circumstances, deductions may be made by local authorities in municipalities with a population of 500,000 or more.

#### **g. Repayment Of Cash Advances**

Cash advances are permitted, provided both the employer and employee sign an agreement specifying the amount of the cash advance as well as the method and schedule of repayment, and that the agreed-to schedule does not cause the employee's wages to fall below the minimum wage. In case of termination, any outstanding cash advance may be deducted from final compensation *only if* such a provision was included in the signed agreement.

In cases of an inadvertent overpayment, the amount of overpayment may be deducted from the next paycheck even without the employee's consent. Beyond the next paycheck, however, the employer must treat the overpayment as a cash advance.

#### **h. Garnishments, 735 ILCS 5/12-800-819**

This involves a court proceeding regarding the non-payment of a debt in which a court instructs the employer to withhold the proper amount from the employee's pay and send it directly to the creditor. Employers should notify an employee of any withholding. If the employee disputes the creditor's right to garnish his or her wages the only recourse for the employee is with the court.

The employer has no choice but to obey a court's garnishment instruction and failure to follow all of the court's requirements or instructions could result in the employer becoming liable for the debt.

Once you receive a Wage Deduction Order from a court, you should withhold either: 1) 15% of weekly gross pay; or 2) weekly net pay less 45 times the Illinois minimum wage, whichever is greater. Wages that are subject to garnishment include salaries, commissions, and bonuses, *but not* ordinary disbursements from a retirement or pension plan.

Furthermore, you are permitted to claim the *greater* of \$12 per garnishment proceeding or 2% of the amount withheld as a processing fee. This fee is taken from the amount withheld but is charged to the debtor-employee rather than credited against the debt owed.

If you receive an order from a court of another state in which your company operates (has a legal presence), you should obey the court order regardless of where the employee resides.

**i. The Wage Assignment Act, 740 ILCS 170/1, et seq.**

This refers to a written agreement between an employee and a creditor in which the employee gives the creditor authority to deduct part of his or her wages in the event the employee fails to make payment. Unlike garnishments, wage assignments do not involve a court proceeding or order.

To be valid, a wage assignment must meet all of the following: 1) be signed by the employee at the time credit was provided; 2) show the date agreed to or entered into; 3) contain the employee's Social Security number; 4) provide the name of the employer; 5) state the amount of money involved; 6) explain the interest rate to be charged; 7) describe the schedule of payments to be made (amount and date due); 8) state in bold letters of not less than 1/4 inch in height at the head of the wage assignment and also one inch above or below the line where the wage earner signs that assignment: **“WAGE ASSIGNMENT”**; 9) given to secure an existing debt of the employee or one contracted by the employee simultaneously with its execution; 10) an exact copy must be given to the employee at the time the assignment is executed; and 11) written on a separate document that is not a part of a conditional sales contract or other document.

If the employee has been in default for more than 40 days, the creditor may then serve a Notice of Intent to assign wages on the employee (providing a copy to the employer). In response, the employee may file a Notice of Defense within 20 days, in which case the employer need not take any action. If the employee fails to assert a valid defense, the creditor may provide a copy of the wage assignment and serve a demand on the employer to begin withholding pay. The employee then has five business days from the time of service of the demand to offer a written defense to assignment. If the employee asserts a valid defense in writing, no wages are subject to the demand at that time. If no such defense is provided, however, and assuming the assignment meets the legal criteria to be valid, you are obligated to honor it.

An employer who refuses to honor a valid wage assignment may be subject to legal action from the creditor for the full amount of the debt owed. More typically, however, creditors seek a judgment against the employee and then begin garnishment proceedings.

As with garnishments, you may claim a processing fee for wage assignments equal to \$12 (\$1 for each week of deduction). Unlike garnishments, however, the processing fee for wage assignments, while still taken out of the amount withheld, is credited against the debt owed so the creditor, not the employee, pays the fee.

#### **j. Child And Spousal Support**

When an Illinois Circuit Court issues an order for child or spousal support, a separate order for withholding from the employee's income takes effect immediately. Every employer, public and private, must thereafter withhold from every paycheck the prescribed amount until either the employer receives a written formal release or the employee is no longer being paid by the employer. The only exception is when both parties enter into a written agreement that provides for an alternative arrangement that is approved by the court and ensures payment of support.

As with any wage deduction, you should notify the employee of the deduction prior to the first withholding and provide the employee with a copy of the order. The employer must pay the amount withheld to the person owed support or to the appropriate public office within seven business days after the date the amount would have been paid or credited to the employee.

You may deduct a small processing fee of \$1 per week, up to a maximum of \$5 per month, but this fee must come from the employee's pay and not the support withholdings. If the employee ceases to work for the employer, a copy of the withholding order should be returned to the other parent or the issuing court along with any information known to the employer that would assist in the future enforcement of the support order, such as the employee's new work location or home address.

Note that under federal law the maximum deductions allowable for child support, spousal support and any employer withholding fee may not exceed 60% of the employee's disposable earnings (gross income less federal, state and local taxes), or 50% of disposable earnings if the employee is supporting other dependents. An additional 5% of disposable earnings may be withheld if the employee falls 12 or more weeks behind in payments.

Remember, too, that employers in Illinois are required to honor child and spousal support withholding orders from other states regardless of whether the employer operates or has any legal presence in the other state. For additional information on child or spousal support withholdings, contact the Illinois Division of Child Support Enforcement at 1-800-447-4278.

#### **k. Defaulted Student Loans**

Superseding Illinois law governing wage garnishment is a federal law granting the U.S. Department of Education and its designated organizations, including private collection agencies, authority to issue a withholding order called an administrative wage garnishment. The law is enforced by the Illinois Student Assistance Commission (ISAC), which administers the federal student loan program in Illinois. Upon receiving such an order, an employer should give a copy to the employee to provide notice before the first deduction is withheld and return the "Employer Acknowledgment of Wage Withholding" form within 10 business days.

For defaulted student loans, the amount to be deducted is calculated at 15% of the employee's disposable earnings (gross income less all federal, state and local taxes), pursuant to the Debt Collection Improvement Act of 1996. The withholdings should continue until a formal release is received from ISAC. Questions may be directed to ISAC at (847) 945-7040 or (800) 934-3572.

**l. Tax Levies**

In the case of a **federal tax levy**, the employer should immediately inform the employee that it will begin withholding from the employee's wages according to the levy's instructions. All earnings above an exempt amount determined by tax filing status and number of exemptions, less any amount being withheld for child support payments, should be forwarded to the IRS until the debt is paid.

**m. Order Of Priority For Deductions**

Withholding orders should be honored in the following order: 1) state and federal taxes, 2) child support; 3) defaulted student loans, spousal support, garnishments and wage assignments. If confusion arises as to whether to honor a wage assignment or garnishment, follow the court's direction.

**n. Bankruptcy**

If you receive official notice from a court that an employee has filed for personal bankruptcy, child support and federal tax levies may possibly continue, but all other wage deductions must cease. In addition, any garnishment or wage assignment withholdings not yet sent should be held until further instruction is provided from the bankruptcy order. Once the bankruptcy order is received, you should send a copy to the court that previously ordered the withholding as well as to the creditor's attorney. If child support payments or tax levies are involved, consult with the court or government agency that ordered the withholding.

**o. Chicago Wage Theft Ordinance**

Under this recently enacted ordinance, Chicago based employers face the possibility of having their business license revoked if they are found to have failed to pay their employees the wages that they have earned for their services.

**p. Cook County Wage Theft Ordinance**

Effective May 1, 2015, Cook County may refuse to allow certain businesses to operate in or do business with the County for up to five years, if the business has been found in repeated and/or willful violation of state or federal wage-payment laws, regardless of whether the employees lived or worked in the County. Under this new local ordinance, businesses accused of violating the Illinois Wage Payment and Collection Act, Illinois Worker Adjustment and Retraining Notification, the Illinois Employee Classification Act, the federal Fair Labor Standards Act, or any other comparable state laws governing the payment of wages, also risk being found:

- barred from contracting with Cook County;

- in default under existing County contracts;
- ineligible for property tax incentives; and
- disqualified from receiving or renewing County business licenses.

**B. Work Hours, 820 ILCS 140/1, *et seq.***

**1. Hours Actually Worked**

The term “hours worked” refers to the total time an employee is required to either work, be at the employer’s place of work, or be at some other designated place of work, and any additional time the employee is required or permitted to work for the employer. This includes, for example, employees attending mandatory offsite and/or after hours job training classes. In addition, an employer must pay for all actual time worked, including time when the employee was not required to work, such as when an employer merely permits employees to come to work early or stay late.

You may establish certain policies to limit the time an employee is allowed to work by prohibiting employees from starting or continuing to work before or after a certain time, or by prohibiting overtime work without prior approval of a supervisor. Violations of such a policy should be dealt with as a disciplinary matter, however, and not by refusing to pay for time actually worked.

The law in Illinois does not impose a limit on the number of hours an employee may be required to work either in a day or a workweek. The only limit on mandatory overtime is provided by the **Illinois One Day Rest In Seven Act** (820 ILCS 140/1, *et seq.*), which requires that employees receive at least 24 consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each work day.

Employers are required to provide unpaid break time each day to an employee who needs to breastfeed or express milk. The break time may run concurrently with any break time already provided. However, employers are not required to provide this break time if doing so would unduly disrupt the employer’s operations.

Time an employee spends “on call” is generally not considered work time. However, when overly restrictive limitations are placed on employees “on call” it may necessitate counting this time as hours worked. Examples of such limitations include requiring a reporting time of less than twenty minutes or restricting an employee to one location (even the employee’s home).

Time spent attending training programs is generally considered time worked. In order for it *not* to be counted as time worked, *all four* of the following conditions must be met: 1) attendance is voluntary; 2) training occurs outside normal working hours; 3) the training is not directly related to the employee’s current job; and 4) the employee does not do any productive work during this time.

Any time spent working while traveling, when part of an employee’s principal activity, is also included in hours worked. Furthermore, time spent traveling between places of work is considered time worked, though normal commuting time between work and home is not. In instances where an employee is asked to travel either to another city or to another location in the



same city and return home the same day, all travel time, less the employee's normal commute, is considered hours worked. Where an overnight stay in another city is involved, travel during normal working hours, no matter the day of the week, is counted as hours worked, while time spent traveling away from home after normal working hours is not.

## 2. Recordkeeping Requirements

Employers are required to keep records to demonstrate compliance with the law in paying all non-exempt employees for time worked. The following information must be kept for **all employees** (exempt and non-exempt): 1) name and identification number; 2) home address, including zip code; 3) date of birth (if under 19); 4) sex; 5) occupation; 6) time and day when employee's workweek begins; 7) total amount paid each pay period; and 8) the date of payment and period covered.

In addition, the following information must be kept for **non-exempt employees** only: 1) the regular rate of pay and an explanation of any payments not included; 2) number of hours worked each workday and workweek; 3) total regular pay; 4) total overtime pay; 5) basis on which an employee's wages are paid (e.g. \$8 per hour); and 6) an itemized list of additions and deductions for each pay period.

While the format of such records is generally left up to the employer, all records must be kept for a period of three years, either at the place of employment or at a centralized record storing facility. The records should be easily accessible to employees or state officials and if stored centrally offsite, they should be available to the place of employment within 72 hours upon notification.

Note that because the state places the burden on the employer to properly maintain accurate records demonstrating compliance, if the employer's records show inconsistencies with regard to time worked and wages paid, the IDOL may either question their accuracy or *presume* the employer to have not paid the proper amounts. Furthermore, if the employer fails to provide proper records, the records of the employee will be considered accurate.

Finally, note that employers may use rounding in their records of time worked provided three requirements are met: 1) the rounding increments do not exceed 15 minutes; 2) the practice or policy is posted and understood by employees; and 3) the effect is that employees are fully and accurately paid for the time actually worked.

## 3. Meal Periods

Illinois law under the **One Day Rest In Seven Act** requires that employees who work 7½ continuous hours or longer be permitted to take at least one 20 minute break during the first five hours as a meal period, but it does not require that this be paid time. However, where an employer is also covered by federal law, a meal period is required to be at least 30 uninterrupted minutes before the time may be deducted from hours worked. Therefore, employers covered by both state and federal law must count a meal period of less than 30 minutes as time worked. Note that meal period provisions for employees age 14 or 15 are different than for adults (see section on Child Labor).

There is no general provision governing eating facilities at work, though when an employer requires employees to eat at their work stations, they are generally not considered to have had a meal period. Even so, you are not required to give employees the right to leave the premises during a meal period.

A general exception exists for employees covered under a collective bargaining agreement which specifically addresses employee meal periods. Another exception exists for employees whose job requires monitoring individuals with developmental disabilities or mental illnesses. These employees are allowed to eat a meal while continuing to monitor the individuals in their care.

Each violation of the law requiring employee meal periods carries with it a potential penalty of \$25 to \$100 for each employee each week.

#### **4. Holidays**

There are 14 legally recognized bank and school holidays in Illinois, including all 10 federal holidays. When a holiday falls on a Sunday, it is officially observed the following Monday, though no policy is provided for those falling on Saturday. The legally recognized holidays are as follows:

New Year's Day*	January 1
Martin Luther King's Birthday*	3rd Monday in January
Lincoln's Birthday	February 12
Washington's Birthday/President's Day*	3rd Monday in February
Casimir Pulaski's Birthday	1st Monday in March
Good Friday	Friday before Easter Sunday
Memorial Day*	Final Monday in May
Independence Day*	July 4
Labor Day*	1st Monday in September
Columbus Day*	2nd Monday in October
Veterans' Day*	November 11
Thanksgiving Day*	4th Thursday in November
Christmas Day*	December 25
General Election Day	As designated

\*Federal Holidays

Nothing in state or federal law requires private sector employers to recognize holidays, either as paid or unpaid time off from work. Furthermore, employers who voluntarily elect to offer

such paid benefits may determine the class of employees (e.g., full or part-time or temporary) that are eligible for a paid holiday policy and those that are not.

## **5. Compensatory Time Off**

Contrary to common belief, the law does not allow an employer to give an employee time off work in the future without additional pay in lieu of paying for overtime worked in the current pay period, even if the employee requests it. Such an agreement or arrangement between an employer and employee is illegal.

### **C. Employee Classification Act, 820 ILCS 185/1, *et seq.***

#### **1. Coverage**

This law covers the construction industry and, within that industry, nongovernmental employers who employ individuals. Under this law, individuals are to be classified as employees, not independent contractors, unless it is shown that: a) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact; b) the service performed by the individual is outside the usual course of services performed by the contractor; and c) the individual is engaged in an independently established trade, occupation, profession or business; or d) the individual is deemed a legitimate sole proprietor or partnership.

#### **2. Purpose And Private Right Of Action**

This law was passed to address the misclassification of Illinois employees as independent contractors, which resulted in lost tax revenue for the State and gave contractors who misclassified workers an economic advantage over contractors who properly classified workers. An employee aggrieved by a violation of this law may file suit in circuit court, in the county where the alleged offense occurred or where any person who is party to the action resides, without regard to exhaustion of any alternative administrative remedies. This law also provides for a private right of action for retaliation if an employer discharges an individual for exercising rights under this law.

#### **3. Penalties**

An employer or entity that violates any of the provisions of this Act or any rule adopted under this Act shall be subject to a civil penalty not to exceed \$1,500 for each violation found in the first audit by the Department. Following a first audit, an employer or entity shall be subject to a civil penalty not to exceed \$2,500 for each repeat violation found by the Department within a five-year period. For purposes of this Section, each violation of this Act for each person and for each day the violation continues shall constitute a separate and distinct violation. Whoever willfully violates any of the provisions of this Act or any rule adopted under this Act shall be liable to the employee for punitive damages in an amount equal to the penalties assessed

## IV. EMPLOYMENT DISCRIMINATION

### A. Protected Classes, 775 ILCS 5/1-101, *et seq.*

#### 1. Generally

Employers may be held accountable for practices that discriminate against a legally protected class, whether the practices are purposely discriminatory or merely having an unintended discriminatory effect. In general, employers should be prepared to explain their legitimate, nondiscriminatory reasoning whenever a member of a protected class is terminated, not hired, does not receive or is not considered for a promotion, is recalled from a layoff or strike in any order other than by seniority, or is compensated differently than other employees of substantially equal skill, responsibility or experience.

The **Illinois Human Rights Act** (775 ILCS 5/1-101, *et seq.*) covers the employment practices of all employers, public and private, with at least 15 employees working during 20 or more weeks in the calendar year or in the year preceding the violation. The provisions covering disability and sexual harassment apply to every employer with at least one employee. Specifically, the law prohibits discrimination based on any of the following protected categories:

- age (40 and older);
- arrest record;
- marital status;
- military status or discharge from military service;
- national origin/ancestry/citizenship status;
- physical or mental handicap unrelated to ability;
- race or color;
- religion;
- sexual harassment in employment;
- sex/pregnancy; and
- sexual orientation

Even within these protected classes there are some circumstances in which discrimination is permitted due to the specific requirements or qualifications of a particular job. Such exceptions to the general non-discriminatory rule are called bona fide occupational qualifications (BFOQs). Examples of BFOQs include a job requiring a driver's license or where a female attendant is needed for a women's locker room. Note, however, that height and weight restrictions normally do not qualify as BFOQs and race never does. Because BFOQs represent instances where the law permits otherwise impermissible discrimination, the law construes BFOQs narrowly and requires proof that such restrictions are in fact job-related and necessary.

In order to bring a charge of illegal discrimination under the Illinois Human Rights Act, an individual must file a charge of discrimination with the Illinois Department of Human Rights within **180 days** of either the alleged act of discrimination or the time when the individual should reasonably have known of the alleged discrimination.

Note that even if no charge is filed within the requisite 180 days, an individual has **300** days from the time of the alleged violation to file a federal charge of discrimination with the EEOC. Accordingly, employers should make it a practice to retain job applications and other relevant records of rejected applicants for at least a year after the decision not to hire. Likewise, you should retain records for at least a year after terminating an employee.

Employees can bypass seeking administrative redress, e.g., a hearing before an administrative judge with the Illinois Human Rights Commission, and assert claims under the Illinois Human Rights Act in state court where they may be heard by a jury. But employees still have an obligation to first file a timely administrative charge.

## **2. Age Discrimination**

Under Illinois law, employers with 15 or more employees may not discriminate against employees over the age of 40, including through the institution of a mandatory retirement age. There is a public safety exception for state and local governments with regard to employing police officers, paramedics, and firefighters. Other than this limited exception, an employer may be susceptible to an age discrimination claim as long as a covered employee can show a link between age and the action taken against him or her, even if the complaining employee was replaced by another worker over the age of 40.

## **3. Arrest Record**

Employers may not make employment decisions based on the mere fact of an individual's arrest record. Employers are also prohibited from making employment decisions based upon expunged or sealed convictions. An employer's consideration of prior convictions may be found discriminatory if related to misdemeanors or remote felony convictions unrelated to the work at issue. Nonetheless, employers may consider convictions or the underlying facts of an arrest if they are related to the position that the individual holds or seeks.

## **4. Marital-Status Discrimination**

Employment decisions based on an individual's status as single, married, divorced, separated or widowed is prohibited. Pre-employment inquiries into this area are inappropriate and may be viewed as discriminatory. Nevertheless, employers may prohibit spouses from working together. The Illinois Supreme Court has held that such a rule does not violate the Illinois Human Rights Act.

## **5. Physical And Mental Disability Unrelated To Ability**

The general rule is that employers should not consider an individual's disability in making employment decisions when the disability itself would not prevent the person from performing the essential functions of the job. Furthermore, an employer may have a duty to provide a reasonable accommodation if that would allow the individual to satisfactorily perform all the essential functions of the job.

The Illinois Human Rights Act itself defines "disability" as a physical or mental condition or characteristic resulting from disease, injury, functional disorder or a condition of birth. The law

covers individuals who either 1) have such a disability, 2) have a history of such a disability, or 3) are thought to have such a disability and suffer discrimination as a result of this perception. The only significant deviation the law makes from the federal Americans with Disabilities Act is that the Illinois law does not require that an individual's disability interfere with, or limit a major life activity. Unlike the ADA, the Act does not cover associational discrimination (*i.e.*, a family member's disability).

In order for the law to apply to a disabled person, however, the disability in question must be **unrelated** to the individual's ability to satisfactorily perform the essential functions of the job, allowing for reasonable accommodations by an employer.

Note that alcoholism, drug addiction and obesity may qualify as a covered disability *if* medically documented as being the result of a functional disorder or disease. The law specifically excludes, however, illegal drug use as a covered disability. Finally, note the law covers individuals diagnosed with AIDS or the HIV virus, meaning that employers must make reasonable accommodation for someone with AIDS or HIV the same as they would for any other person with a covered disability.

## **6. Religious Discrimination**

Illinois law provides that an employer may grant an employee time off with or without pay to observe that individual's religious holidays and that such practice is not discriminatory.

## **7. Sex Discrimination**

The general rule is that the law requires employers to treat male and female employees equally. Providing for any differences in working conditions or hours for employees based on sex is prohibited. In addition, special accommodations are neither required nor permitted for a pregnant employee that would not be made for a non-pregnant employee. A pregnancy-related disability should be treated like any other covered temporary disability and employers should avoid basing hiring decisions on an applicant's pregnancy. Policies including such things as mandatory maternity leave should also be avoided.

**Sexual harassment** in the workplace is one form of sex discrimination involving an employer who either bases employment decisions on an employee's submission to or rejection of unwelcome sexual advances, or engages in sexually related conduct that either unreasonably interferes with an employee's work performance or creates an unreasonably offensive working environment. Note that an employer is legally responsible for sexually harassing conduct by an agent (e.g., a manager, supervisor, or foreman) as well as that committed by a non-supervisory employee or even a non-employee (e.g., a client) if the employer knew or should have known about such conduct and failed to take reasonable corrective action.

## **8. Pregnancy Discrimination/Accommodation**

Effective January 1, 2015, the Illinois Human Rights Act includes pregnancy status as a protected classification. Pregnant employees are covered by this amendment regardless of whether their pregnancy rises to the level of a disability under the ADA or Illinois law. In addition to prohibiting discrimination in the workplace, employers must reasonably accommodate an

employee's pregnancy status. This may include job restructuring, providing more frequent rest and water breaks and leaves of absence.

Unlike the FMLA, this law impacts employers who have even one employee and does not contain minimum service or work-hours requirements. Employers may instruct their employees to have their treating physician provide medical justification as to the need for the employee's requested accommodation, the approximate date that this need arose and the approximate date that the accommodation will no longer be medically required.

Employers bear the burden of establishing that an employee's requested accommodation is unreasonable. There are also notice requirements in the form of postings and handbook policies (for employers who maintain handbooks) – the Illinois Department of Human Rights' website contains a color, printer friendly poster for downloading. Employers should consult with their labor and employment counsel in drafting a compliant accommodation/discrimination policy.

## **9. Sexual Orientation**

Discrimination on the basis of sexual orientation has long been prohibited by the Illinois Human Rights Act. Sexual orientation is defined by the Act as “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth.”

Even before the Act was amended to cover sexual orientation, a number of local ordinances prohibiting discrimination on the basis of sexual orientation were already in effect. Specifically, the ordinances listed below consider sexual orientation to be an additional protected class:

- Chicago Human Rights Ordinance
- City of Champaign Human Rights Ordinance
- Cook County Human Rights Ordinance
- City of Evanston Fair Employment Practices Ordinance
- Village of Oak Park Ordinance
- City of Urbana Commission on Human Rights
- Village of Wheeling Human Rights Ordinance

### **B. The Victims' Economic Security and Safety Act, 820 ILCS 120/1 *et.seq.***

The Victims' Economic Security and Safety Act (VESSA), provides that employers (defined as the State or any agency of the State; any unit of local government or school district; or any person that employs at least 15 employees) may not discharge or discriminate against an employee because such employee is or is perceived as a victim of domestic violence or has a family or household member who is a victim of domestic violence. VESSA also provides covered employees with a total of 12 workweeks of leave from work during any 12-month period to address domestic violence, e.g., to seek: psychological or other counseling; medical attention for, or recovering from, physical or psychological injuries caused by domestic or sexual violence; legal assistance; or services from a victim services organization.

This 12 workweeks of *unpaid* leave can be taken intermittently and runs concurrent with the employee's FMLA leave (assuming that the employee qualifies for FMLA). Most important

to employers, VESSA prohibits the taking of adverse employment actions against covered employees because the workplace is disrupted or threatened by the actions of a person whom the covered employee states has committed or threatened to commit domestic or sexual violence against the individual or the individual's family or household member.

**C. Equal Wage Act, 820 ILCS 110**

The Equal Wage Act covers Illinois manufacturers that employ at least six persons and provides that it is a petty offense (punishable by not less than \$25) to pay differing wages to females than the wages paid to males, unless there are legitimate non-discriminating factors supporting the differing rates, i.e., seniority, experience, training, differing duties, availability. The timeframe for bringing a claim is six months following the alleged violation.

**D. Privacy In The Workplace, 820 ILCS 55/1-20**

The **Illinois Right To Privacy In The Workplace Act** prohibits employment discrimination based on an employee's use of lawful products away from employer's premises and during non-working hours. Two exceptions exist for the use of products that may impair the employee's ability to perform his or her job (such as the use of alcohol) and those that increase the cost of benefits (such as smoking). In the latter case, a higher premium may be charged to reflect the increased cost of health insurance, but you may not refuse employment because of the lawful activity.

The law also prohibits an employer from making any inquiry into whether an applicant or employee has ever filed a workers' compensation claim. The Act also prohibits employers from requesting the password to employees' social media or social networking accounts.

**E. Equal Pay Act, 820 ILCS 112/ et seq.**

The **Equal Pay Act** prohibits employers from discriminating against employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee of the opposite sex for the same or substantially similar work where the difference in pay is not based on: 1) a seniority system; 2) a merit system; 3) a system that measures earnings by quantity or quality of production; or 4) a differential based on any other factor other than gender.

Officers or agents of employers can be personally held liable for discrimination, retaliation, or failing to allow the employer to satisfy an award issued under this Act. Effective January 1, 2015, an aggrieved employee may file a charge alleging a violation of the Equal Pay Act with the Illinois Department of Human Rights, as going forward, all such claims are covered by the Illinois Human Rights Act.

**F. Employee Activities**

**1. Jury Duty, 705 ILCS 305/4**

Employers are required to allow employees time off work in accordance with a jury summons. Furthermore, you may not deny an employee time off work even if the employee is scheduled to work nights and the jury duty is scheduled during the day.



You need not pay non-exempt employees for days off work for jury duty nor are you required to pay the difference in jury duty pay and their regular pay. Exempt employees must be paid for the day but you may deduct the amount received for jury pay.

## **2. Time Off For Military Duty, 775 ILCS 5/1-102**

Illinois law mirrors the federal law in prohibiting employment discrimination due to an individual's military service. Employers must grant all employees time off work for military duty and, upon discharge, you must return the employee to his or her prior position or one of similar seniority, status and pay.

In addition, once an employee returns from military service in excess of 30 days, he or she is protected from discharge *without cause* for a specified period of time. Specifically, service between 30 and 180 days requires a period of six months protection from discharge without cause and service of more than 180 days garners protection from discharge without cause for one year.

Note that employers are entitled to advance notice of an employee's absence for military duty, unless the circumstances are such that advance notice would be impossible or unreasonable.

## **3. Time Off For Families Of Persons Called To Military Duty, 820 ILCS 151/1, et seq.**

The Family Military Leave Act requires employers with 15 or more employees to provide unpaid leave to any employee who is the parent or spouse of an individual called to military service lasting more than 30 days. Employers with 15-50 employees must provide up to 15 days of leave, and employers of more than 50 employees must provide up to 30 days of leave.

In order to qualify, an employee must have worked for the company for at least 12 months, and for a total of at least 1250 hours over the previous year. Employees must give at least 14 days' notice if the leave is going to last for more than five days. However, employees do not become eligible for Family Military Leave until they have depleted all vacation time and other types of leave, except for sick leave and disability leave.

## **4. Time Off For Voting, 10 ILCS 205/1, et seq.**

All employees eligible to vote in general or special elections, including primaries, are entitled to take up to two hours off work during the time the polls are open (6:00 a.m. - 7:00 p.m.). Employees requesting time off work to vote must make their request prior to Election Day. An employer must pay employees for this time.

An employer is also entitled to set the hours during the day when employees may take time off to vote in order to minimize disruption of the workday. An example would be an employer who schedules the time to be taken off work to vote either at the beginning or end of the workday. You may also require the employee to produce proof of voting in return for granting the time off.

## **5. School Visitation Rights Act, 20 ILCS 147/1, et seq.**

Individuals who have been employed for at least six months and are working at least one-half of your company's full-time employee hours are entitled to up to four hours in a given day

and up to a total of eight hours during a single school year to attend school conferences or classroom activities related to the employee's child *if* the activity cannot be scheduled during non-working hours.

An employer is entitled to seven days of advance notice unless it is an emergency, in which case only 24 hour notice is required. The law does not require that you pay non-exempt employees for time taken off work for school visitations, though it does require a good faith effort to allow employees to make up the time missed during normal working hours. There is an exception where granting such visitation requests would result in more than **5% of the workforce** being absent at the same time. Under this circumstance, you may refuse to grant the time off.

#### **6. Time Off For Official Meetings Act, 50 ILCS 115/1**

Any **elected official** of a unit of local government or school district, “on the day and time of an official meeting of the public body” to which he or she has been elected, is entitled to “absent himself from any service or employment” for the period of time in which the official meeting is held plus any necessary travel time. Employers need not pay a non-exempt employee for any such time off work and employees are required to provide advance notice of any expected or intended absence. Given reasonable notice, you may not refuse an elected official time off to attend an official meeting or subject an employee to any penalty for exercising this privilege.

#### **7. Nursing Mothers In The Workplace Act, 820 ILCS 260/15**

This law was passed in July, 2001 and has yet to be tested in a reported case. The law requires an employer to provide reasonable unpaid break time each day to an employee who needs to express milk for her infant child. It further requires an employer to make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a toilet stall, where the employee can express her milk in privacy.

#### **8. Medical Marijuana Law, 410 ILCS 130/1, et seq.**

In August 2013, Illinois became the 20<sup>th</sup> state to legalize medical marijuana. Effective January 1, 2014, the law primarily removes state-level criminal penalties in Illinois for the medicinal use and cultivation of cannabis. Qualifying patients will be allowed to receive up to 2.5 ounces of cannabis in any 14-day period.

The law does not prevent a private business from restricting or prohibiting the medical use of cannabis on its property. Employers may also prevent a guest, client, customer, or visitor who is a registered patient from using cannabis on or in its property. But no employer may “penalize” a person (including prospective and current employees) based solely on their status as a registered qualifying patient or a registered designated caregiver.

#### **9. Firearm Concealed Carry Act, Public Act 098-0063.**

The Firearm Concealed Carry Act allows qualified individuals who meet extensive requirements and receive licensure from the State of Illinois to carry a concealed (loaded or unloaded) handgun on their body or to store the weapon in a concealed manner in a vehicle in areas not prohibited by law.

In the employment context, the owner of private real property of any type may prohibit the carrying of a concealed firearm on the property under his or her control. Additionally, nothing in the new law prohibits Illinois employers from enforcing workplace policies prohibiting employees from displaying, brandishing, discharging, or otherwise using any and all weapons, including concealed firearms, within the workplace or during work functions.

However, in the public sector, generally a concealed-carry licensee may store an unloaded gun in a parking area and the firearm and ammunition may be stored in a case within the locked vehicle (out of plain view). A case includes a glove compartment, console, trunk, firearm carrying box, shipping box, or other container.

## **V. WORKPLACE SAFETY**

### **A. General Provisions**

Illinois does not have a state version of the federal Occupational Safety and Health Act (OSHA) and so private-sector employers are governed exclusively by federal OSHA regulations. Similarly, public sector employers in Illinois are governed by OSHA, though here the federal regulations are administered and enforced by the Illinois Department of Labor (IDOL). In addition, IDOL provides consulting services to private and public employers alike to assist them in eliminating workplace hazards and meeting OSHA requirements.

### **B. Smoking In The Workplace**

#### **1. Illinois Clean Indoor Air Act, 410 ILCS 890/1, *et seq.***

Illinois law prohibits smoking in public places, including places of work and other commercial facilities, except in designated areas. Employers are obligated to create a work environment where non-smokers can perform all of their normal work functions without having to inhale secondhand smoke. As a result, you should eliminate smoking in all common work areas, including hallways and restrooms.

In creating designated smoking areas, employers are obligated to use existing ventilation and architectural barriers to determine where smoking can occur without intruding into a non-smoking area. However, the law provides specific exemptions for factories, warehouses, private offices occupied exclusively by smokers, bowling alleys, bars and hotel rooms.

#### **2. Illinois Clean Indoor Air Ordinances**

In communities with local clean indoor air ordinances that predate October 1, 1989, the local ordinance controls over state law. Check with the city your business is located in to determine if you are subject to a local ordinance.

#### **3. Chicago Clean Indoor Air Ordinance**

This law prohibits smoking in a public place or in any place of employment. Further, no person may smoke in any vehicle owned, leased, or operated by the City of Chicago.. The Chicago Clean Indoor Air Ordinance has been amended to include e-cigarettes in the law. Chicago was the

first of the 20 largest U.S. cities to propose legislation to include e-cigarettes in their clean indoor air law.

### **C. Toxic Substances, 820 ILCS 225/1, *et seq.***

The **Illinois Toxic Substances Disclosure to Employees Act** also called the “Illinois Right-to-Know Law” (IRTK) states that “[e]mployees have an inherent right to know about the known and suspected health hazards which may result from working with toxic substances so that they may make more knowledgeable and reasoned decisions with respect to any personal risks of their employment.” Public and private-sector employers with five or more full-time, or 20 total, employees are covered by *both* the IRTK law and the federal OSHA Hazard Communication Standard, while those with fewer employees are covered only by OSHA.

The IRTK law places responsibility on employers for knowing if any of the chemicals used by their employees are toxic. Employers must post, and obtain “material safety data sheets” (MSDS) for every toxic substance used, produced or stored in the workplace to which employees may be exposed. MSDS’s are federal OSHA forms that include detailed information about toxic substances (e.g., potential hazards, safe handling procedures, what to do if exposed, etc.). The state requires employers to provide an annually updated list of MSDS’s in their possession.

This minimal information about toxic substances must be made readily accessible to employees and kept for at least 10 years after a toxic substance is no longer used, produced or stored in the workplace. Failure to provide an employee with an MSDS within 10 days of a written request for a substance to which he or she is routinely exposed may permit employees to refuse to work with a toxic substance.

In addition, you are also required to post notices of employee rights under the law, label all containers with toxic substances, notify the local fire department of all toxic substances used, produced or stored at the workplace, and provide adequate employee training related to precautionary and emergency procedures. Finally, note also that the federal OSHA standard requires employers to draft a written Hazard Communication Program.

The law gives enforcement and administrative authority to the Safety Inspection and Education Division of IDOL, which publishes a list of substances that must be treated as toxic, all of which are also listed as toxic substances under OSHA. Anyone needing additional information should contact IDOL at (217) 782-9386 or call the OSHA regional Midwest office at (312) 353-2220.

## **VI. CONCLUSION**

Employers in Illinois are subject to numerous state and federal laws regulating nearly every area of labor and employee relations. This booklet provides a basic summary of Illinois employment law under which employers must operate their business or workplace. Our hope is that by providing this summary we will give employers a useful reference to help them quickly answer some of the common, everyday employment questions that can and do arise.

We have tried to write this book from the perspective of the employer so that the law is presented in way that makes it easy for employers to understand what Illinois law requires of them

as well as what it allows them to do in various situations. First and foremost this book should be used to help guide the actions of employers by helping them better understand Illinois employment law so they may develop policies and procedures which allow them to successfully avoid a lawsuit. Second, this book is also intended to help employers make more legally informed decisions so that when lawsuits do arise they will be in a stronger legal position from which to defend.

Finally, the scope of this booklet deals only with Illinois employment law and, while aspects of federal law were briefly discussed where different or overlapping with Illinois law, remember to consider any employment issue in light of both applicable state and federal law.

*Employers with questions or problems related to any of the material covered in this book are urged to contact the Chicago office of Fisher & Phillips LLP, at 312.346.8061 or visit our website at [www.laborlawyers.com](http://www.laborlawyers.com).*