Bryce Downey & Lenkov LLC

Labor & Employment Newsletter

March 2022

2022 Illinois Employment Law Updates

When we rang in 2022, several changes to Illinois employment laws took effect.

MINIMUM WAGE INCREASE

Workers in Illinois received an increased minimum wage to $12 per hour on January 1. The minimum wage will continue to grow on an annual basis until it reaches $15 per hour on January 1, 2025. To avoid substantial penalties under state wage laws, employers must be sure to comply with the minimum wage requirements and calculate overtime using the correct rate of pay.

ADDITIONAL EMPLOYEE PROTECTIONS UNDER IHRA

The Illinois Human Rights Act now prohibits "unlawful discrimination against an individual because of the individual's association with a person with a disability", which will make it consistent with the definition in the federal Americans with Disabilities Act.

RESTRICTIVE COVENANTS

Illinois law now restricts which employees can lawfully enter into non-compete and non-solicitation agreements based largely on their compensation, making the new law most impactful for lower-income employees. Illinois employers cannot legally enter into enforceable non-compete agreements with Illinois employees unless they have expected earnings of at least $75,000. Employers likewise cannot enter into enforceable non-solicitation agreements with Illinois employees who have expected earnings of less than $45,000.

The new law further restricts Illinois employers from entering into non-compete and/or non-solicitation agreements with Illinois employees:

- in the public sector covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act;
- employed in construction, other than those construction employees who "primarily perform management, engineering or architectural, design or sales functions"; and
- who are terminated, furloughed or laid off as a result of business circumstances or government orders related to the COVID-19 pandemic unless certain conditions are met.

In order to be enforceable, non-competition/non-solicitation agreements for eligible employees must also be supported by independent, adequate consideration. "Adequate consideration" means:

1. the employee worked for the employer for at least two years after signing an agreement containing a covenant not to compete or a covenant not to solicit or
2. the employer otherwise provided enough consideration adequate to support an agreement to not compete or solicit, such as a period of employment plus additional professional or financial benefits, or merely professional or financial benefits by themselves, e.g., a signing bonus.

Illinois employers will also be required to provide employees 14 days to review a non-compete/non-solicitation agreement and advise them in writing to consult an attorney before signing it.

The new law does not impact confidentiality agreements that exclude non-compete and/or non-solicitation components.

VICTIMS' ECONOMIC SECURITY AND SAFETY ACT (VESSA)

The Victims' Economic Security and Safety Act (VESSA) was amended to create the Violent Crime Victims' Leave Act, which allows employees who are victims of violence or who have family or household members who are victims of violence to take up to 12 weeks of unpaid leave per any 12-month period to seek medical help, legal assistance,

counseling, safety planning, and other assistance.
The amendment also prohibits employers from discriminating against employees who are victims of violence or have family or household members who are victims of violence

Practice Tip:
If you have any questions about any of these laws and how to implement them into your organization, confer with your employment counsel or contact us for further assistance.

OSHA Withdraws Emergency Temporary Standard

Following the emergency stay of OSHA's Emergency Temporary Standard (ETS) granted by the United States Supreme Court on January 13, 2022, OSHA voluntarily withdrew the ETS on January 26, 2022.

The ETS would have required employers with at least 100 employees to mandate that all employees be fully vaccinated against COVID-19 or (on a voluntary basis) provide an option for employees to submit to weekly COVID-19 testing and wear a mask.

As part of its Notice of Withdrawal, OSHA noted that the ETS will still serve as a proposed rule under the Occupational Safety and Health Act and that OSHA continues to strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace.

Practice Tip:
Employers that would have been covered by the ETS are no longer required to implement the vaccine mandate pursuant to the withdrawal. Employers may still be subject to similar requirements under state and local law and may still voluntarily implement or continue to require a vaccine mandate.

EEOC Clarifies When COVID-19 May be A Disability

On December 14, 2021, the Equal Employment Opportunity Commission (EEOC) once again updated its COVID-19 technical assistance, adding a new section to clarify under what circumstances COVID-19 may be considered a disability under the ADA.

First, the EEOC clarifies that a person with COVID-19 has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that, "substantially limits one or more major life activities" which is consistent with its general definition of a disability. It goes on to state that an individualized assessment is necessary to determine whether the effects of a person's COVID-19 substantially limit a major life activity. This will always be a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances. As an example, the EEOC explains that a person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA.

The EEOC provided these other examples of individuals with an impairment that substantially limits a major life activity:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities.
- An individual diagnosed with COVID-19 who initially receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months, is substantially limited in respiratory function, and possibly major life activities involving exertion, such as walking.
- An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months. The individual is substantially limited in cardiovascular and circulatory functions, among others.
- An individual diagnosed with "long COVID," who experiences COVID-19-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently, is substantially limited in gastrointestinal function, among other major life activities, and therefore has an actual disability under the ADA. For other examples of when "long COVID" can be a substantially limiting impairment, see the DOJ/HHS Guidance.

Examples of individuals with an impairment that does not substantially limit a major life activity include:

- An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and therefore, does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness.

- An individual who is infected with the virus causing COVID-19 but is asymptomatic—that is, does not experience any symptoms or effects—is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is the case even though this person is still subject to CDC guidance for isolation during the period of infectiousness.

Additional important information includes:

- Applicants or employees with disabilities are not automatically entitled to reasonable accommodations under the ADA. They are entitled to a reasonable accommodation when their disability requires it, and the accommodation is not an undue hardship for the employer. But, employers can choose to do more than the ADA requires.
- An employer risks violating the ADA if it relies on myths, fears, or stereotypes about a condition and prevents an employee's return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.

Practice Tip:
The EEOC has updated its COVID-19 technical assistance approximately 20 times as pandemic-related issues evolve. Employers should be mindful of this new guidance when making employment decisions involving employees with regarded as having COVID-19.

Wisconsin Employer Regulations of Marijuana Use

Despite numerous efforts on behalf of Wisconsin Democratic governor Tony Evers, Wisconsin has not approved usage of marijuana, neither for medical nor recreational purposes.

As a result, Wisconsin employers are faced with a situation in which many of their employees travel to Illinois to buy marijuana and return to Wisconsin to use it. Wisconsin employers are also left in the position to determine how to deal with employees' use of marijuana or otherwise restrict employee's use of marijuana.

Given the fact that marijuana remains illegal under federal law and Wisconsin law, employment actions including discipline and/or termination based on an individual's marijuana use would not be considered "lawful products" discrimination.

As a result, Wisconsin employers may still regulate marijuana usage and prohibit employees from working while under the influence of marijuana.

Wisconsin law distinguishes the between current use of illegal drugs and drug addiction. Addiction is treated as a protected disability under both Wisconsin and federal law; therefore, if an employer is aware of a prospective employee's prior addiction to marijuana, those employers must reasonably and affirmatively accommodate treatment of such a disability. Further, Wisconsin prohibits discrimination based on arrest and conviction records and therefore refusing to hire or take other employment action against an individual based on a drug-related arrest or conviction may be considered illegal discrimination in most circumstances.

Practice Tip:
Wisconsin employers may lawfully enact workplace policies prohibiting marijuana usage but must be aware of its obligations to reasonably accommodate employees who may suffer from addiction. It would violate Wisconsin law to discriminate against employees who are addicted to drugs.

EEOC's Continued Pursuit of Sexual Harassment Claims

The Equal Employment Opportunity Commission (EEOC) filed suit in the U.S. District Court for the Northern District of Illinois (*EEOC v. Monro, Inc.*, Civil Action No. 22-cv-0220) against a company that operates Car-X Tire and Auto stores across the Midwest alleging it violated federal law by maintaining a work environment rife with sexual harassment at multiple locations in the Chicago area.

According to the EEOC's lawsuit, multiple male employees were subjected to physical abuse of a sexual nature and graphic sexual comments. One female employee was subjected to different and demeaning work assignments and verbal harassment based on her gender.

The lawsuit alleges conduct and practices, including grabbing one male employee's groin, butt, and chest area and simulating sex on his body. This employee was also verbally harassed with vulgar sexual comments. Another male employee was subjected to physical touching, including a supervisor rubbing a hammer along his butt and sexual comments. The female employee's supervisor addressed her as "woman" and "bitch" rather than using her name and regularly assigned her to perform cleaning tasks and run personal errands for him rather than the duties normally associated with her technician job.

As a result of employee reports to the company, the lawsuit alleges that the company knew, or should have known, about the harassing behavior and took no action in

response. The allegations violate Title VII of the Civil Rights Act of 1964, which prohibits harassment based on sex regardless of the sex of the victim or harasser.

Practice Tip:
This case is an example of the type of enforcement activity the EEOC will continue accept to send a clear message that employers should not ignore reports of harassment and permit such illegal conduct.

Justifiable Rescission of Offer of Employment to Disabled Employee

In *Pontinen v. US Steel Corporation*, No. 21-1612 (7th Cir. Feb. 11, 2022), the Seventh Circuit Court of Appeals, which has appellate jurisdiction over federal district courts in Illinois, Indiana and Wisconsin, affirmed an order of summary judgment in favor of an Indiana employer in a disability discrimination lawsuit under the Americans with Disabilities Act (ADA). The applicant sued the employer after it rescinded its conditional offer of employment upon finding that it could not accommodate the applicant's uncontrollable seizure disorder in the position for which he was conditionally hired because he would pose a direct threat to himself and others in the workplace. The applicant argued that the employer illegally discriminated against him based on a real or perceived disability when it rescinded his employment offer.

Summary judgment was granted in favor of the employer after the court found the employer carried its burden of proving the applicant would have posed a direct threat to himself and others in the workplace. In reaching its decision to affirm the district court's ruling, the Seventh Circuit's opinion explained that a requirement that an individual does not pose a direct threat to the health or safety of others or their own safety in the workplace is permissible under the ADA, even if it tends to discriminate.

Any determination that someone poses a direct threat must rely on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment must rely on reasonable medical judgment and must consider:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

The direct threat exception applied in this case after this individualized assessment was made by the employer in reliance on the medical information it had from the applicant's physicians which confirmed the applicant's seizures were uncontrollable, and because of the safety-sensitive position for which he applied, which included working with hazardous materials and equipment. As such, the court concluded that there was an intolerable risk that justified the employer's decision to rescind its employment offer.

Practice Tip:
This case demonstrates the high standards employers must meet to overcome a disability discrimination claim based on the direct threat analysis. Employers must make individualized assessments based on adequate medical evidence when trying to prove the employee would pose a direct threat to the workplace in order to overcome a discrimination claim.

Trucking Company to Settle for Requiring Strength Test Which Disproportionately Screened Out Women

The Equal Employment Opportunity Commission's Chicago District office filed a lawsuit (*EEOC v. Stan Koch & Sons Trucking, Inc.*, Civil Action No. 0:19-cv-02148O) against a trucking company, Stan Koch and Sons Trucking, alleging sex discrimination because it required applicants and employees to undergo an isokinetic strength test which had the effect of disproportionally screening out female drivers who were otherwise qualified for driver positions. As a result of a settlement, the company will pay $500,000 and furnish other relief.

Prior to the parties coming to an agreement on damages and other equitable relief, the federal judge had ruled in the EEOC's favor on liability, finding that the test disproportionately screened out women who had been given conditional offers of hire by Koch to work as truck drivers or who were already employed by the company and were required to take the test to return to work following an injury. In addition, the judge found that Koch did not present evidence to show that the test was job-related and consistent with business necessity.

As part of the settlement, Koch has to pay $500,000 in monetary damages and make job offers to a class of women whose job offers were revoked by Koch after they failed the strength test. The settlement also prohibits Koch from using the strength test, and, if it chooses to use any other physical abilities test that has a disparate impact on female drivers, it must first demonstrate that the test is job-related for the position in question and consistent with business necessity. Additionally, the EEOC recently won a second similar case against a different trucking company Schuster Co. for use of the same physical abilities test. That case is captioned *EEOC v. Schuster Co.* (ND Iowa Civil Action No. 5:19-cv-4063).

Practice Tip:
These cases are examples of the type of enforcement activity the EEOC will take to help fulfill its goal of ensuring economic security to women. Employers who utilize tests such as these should consult with legal counsel to determine potential risks associated with their usage.

Medical Condition Alone is Not an ADA Disability

Under the Americans with Disabilities Act (ADA), "disability" is a legal term, not a medical one. The ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activities (also a person with a record of such an impairment, regarded as having such impairment, or associated with a person with a disability.) As the Sixth Circuit U.S. Court of Appeals recently confirmed, having an impairment without substantial limitation of a major life activity does not establish and ADA claim.

In *Southall v. USF Holland, LLC,* et. al, Case No. 21-5265 (6th Cir. January 26, 2022), a big rig truck driver since 1999 was diagnosed with sleep apnea in 2013. When he thereafter struggled to get medical clearance to drive, his employer suspended him from driving. Southall had also been ticketed for driving while fatigued—driving his truck into a concrete barrie, and falling asleep waiting for his truck to be loaded.

Southall sued his employer under the ADA, claiming disability discrimination and retaliation. The district court granted summary judgment to the employer and the Court of Appeals affirmed the decision. Southall's problem was that he had admitted in his deposition that his sleep apnea did not affect any of his major life activities. This foreclosed his ADA claims because he was not "disabled" under the ADA.

Practice Tip:
When an employee reports their disability to the employer, in the context of seeking a reasonable accommodation to enable the performance of essential job functions, the employer is entitled to obtain the employee's relevant medical records and ask the employee whether their condition affects one or more major life activities. Both factors are required to entitle an employee to an ADA reasonable accommodation or other ADA protection.

The EEOC's regulations provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

Newsletter Contributors

Storrs Downey, Jessica Jackler, Ryan Danahey and Cary Schwimmer contributed to this newsletter.

View more information on our
Labor & Employment practice.

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

Firm **News**

Kirsten K. Kus & Michael Milstein Named Capital Members

We are thrilled to announce the elevation of Kirsten Kaiser Kus and Michael Milstein to Capital Members.

Both Kirsten and Michael have played an integral part in growing the firm and have exemplified the highest standards of professionalism, dedication, quality work and integrity. They are joining Jeanne Hoffmann, Storrs Downey and Rich Lenkov, who have proudly led the firm together for over 20 years.

Kirsten concentrates her practice in workers' compensation and general liability defense, representing a wide variety of employers and corporations across Indiana. She frequently lends her expertise and lectures on unique claim handling techniques for the Workers' Compensation Defense Institute and Claims and Litigation Management Alliance, among other leading organizations. Outside of work, Kirsten enjoys traveling, hiking with her family and dogs, attending concerts and cheering on her beloved Green Bay Packers.

Michael concentrates his practice in workers' compensation defense, seamlessly guiding clients through all phases of complex litigation matters from inception to trial. He has been a valuable resource, actively providing clients Illinois legislative update alerts throughout the pandemic. Outside of work, Michael enjoys playing with his children, rooting on the Cubs, Bulls, Bears, Blackhawks, and Illini sports teams, and taking an active role in his community.

Please join us in congratulating Kirsten and Michael.

Read the full press release.

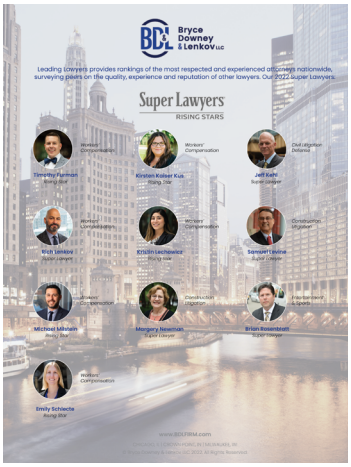
Bryce Downey & Lenkov Attorneys Selected to Super Lawyers & Leading Lawyers

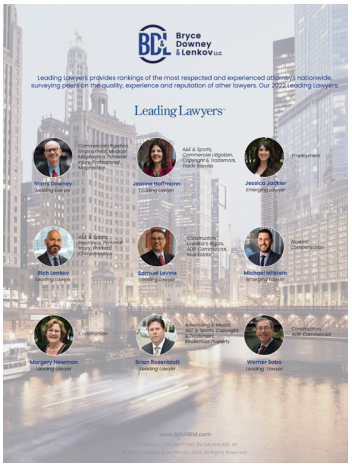
Eleven attorneys at Bryce Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their field across both Illinois and Indiana. Nine attorneys have also been selected to Leading Lawyers' 2022 rankings.

Super Lawyers recognizes attorneys who exhibit excellence in their practice based on professional achievement and peer recognition. Leading Lawyers provides rankings of the most respected and experienced attorneys nationwide. No more than 5% of all attorneys in each state are selected for either distinction

Rich Lenkov, Michael Milstein, Margery Newman, Brian Rosenblatt and Samuel Levine have been selected to both exclusive lists. Please join us in congratulating our selected attorneys!

Read the full press release here.





BDL Launches Milwaukee & Indianapolis Offices

We are thrilled to announce the opening of two new offices located in Milwaukee, Wisconsin and Indianapolis, Indiana.

We look forward to expanding our services and are fully committed to assisting clients, from small businesses to Fortune 500 companies, in the Wisconsin and Indiana community through all phases of complex litigation matters and developing their businesses further.

Our firm has experienced remarkable growth in recent years and we'd like to take the time to thank you for your continued support. We are eager to provide Wisconsin with the same exceptional service as our Illinois and Indiana clients.

342 North Water Street
Suite 600
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201 North Illinois Street
16th Floor, South Tower
Indianapolis, Indiana 46204

BDL Is **Growing**

Please join us in welcoming Marcy Bennett, Ryan Danahey, Michael Taden, Kristin Lechowicz and Kristy Sigler to the firm's Chicago office, as well as Jennifer Meyer and Abigail Iliovici to our Indiapolis and Crown Point offices.

Marcy concentrates in workers' compensation defense. She provides an aggressive and thorough approach to each claim, working closely with insurance companies, third-party administrators and employers alike to achieve positive results in the most cost-efficient manner.

Ryan handles a broad spectrum of defense litigation, including general & professional liability, insurance coverage and labor & employment. He successfully represents various corporations and entrepreneurial clients throughout Illinois and Wisconsin. He previously served as in-house counsel for two major national corporations.

Kristy specializes in general defense litigation matters involving personal injury, medical malpractice, employment and contract disputes. With over 20 years of trial experience, she is especially noted for her due diligence and close collaboration with clients from pre-litigation through verdict to manage risk and obtain positive results.

Michael joins the firm with over 40 years of experience in workers' compensation litigation defense. He has extensive knowledge on claims pertaining to permanent total disability, temporary partial disability, wage differential benefits, utilization review and penalty avoidance.

Kristen joins our workers' compensation and general liability practice teams. She has considerable experience litigating cases on behalf of both parties, giving her a unique advantage when counseling, evaluating and developing practical and effective defense strategies.

Jennifer concentrates in workers' compensation defense representing employers, insurance companies and third-party administrators throughout Indiana. She has extensive experience working with hospitals and physician groups in civil litigation, contract review, subrogation and privacy & security compliance matters

Abigail focuses on general liability and workers' compensation defense and effectively handles all aspects of litigation before the Indiana Workers' Compensation Board, as well as both jury and bench trials. She previously served as an Associate Editor for the Valparaiso Law Review.

Previous Webinars

- Responding to Internal Employee Complains: Conducting Workplace Investigations
- Common Employer Mistakes
- Reopening Your Business Amid COVID-19
- COVID-19: What Employers Need to Know
- 10 Tricky Employment Termination Questions Answered
- Approaching LGBT Issues in Today's Workplace
- Hiring Do's and Don'ts
- Employment Law Issues Every Workers' Compensation Professional Need to Know About

If you would like a copy of our other prior webinars, please email us at mkt@bdlfirm.com.