Downey & Lenkov LLC

Labor & Employment Newsletter

July 2022

New Chicago Sexual Harassment Requirements

Effective July 1, 2022, Chicago employers will be obligated to provide sexual harassment prevention training to employees and supervisors, including how bystanders should respond to sexual harassment. This is amongst other requirements in accordance with the Chicago Human Rights Ordinance revisions.

The ordinance defines an employer as "any individual, partnership, association, corporation, limited liability company, business trust, or any person or group of persons that provides employment to one or more employees in the current or preceding calendar year and any agent of such an entity or person." Covered employers are those subject to Chicago licensing requirements or who maintain a business facility within the city limits.

An employee is defined as "an individual who is engaged to work within the geographical boundaries of the City of Chicago for or under the direction and control of another for monetary or other valuable consideration."

The revisions establish new policy and training obligations for employers licensed by or with work locations in the city. Importantly, every employer must have a written policy provided to employees in the employee's primary language within the first calendar week of employment. The policy must include the following elements:

1. The definition of sexual harassment as: "any (i) unwelcome sexual advances or unwelcome conduct of a sexual nature; or (ii) requests for sexual favors or conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for any employment decision affecting the individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment; or (iii) sexual misconduct, which means any behavior of a sexual nature which also involves coercion, abuse of authority, or misuse of an individual's employment position"
2. A statement that sexual harassment is illegal in Chicago
3. A requirement that employees participate in the following training annually
    a. A minimum of one hour of sexual harassment prevention training for all employees
    b. A minimum of two hours of sexual harassment prevention training for anyone who supervises or manages employees
    c. One hour of bystander training for all employee
4. Examples of sexual harassment
5. Details on how an employee can report sexual harassment claim. The policy should include, as appropriate, instructions on how to make confidential reports, with an internal complaint form, to managers, corporate headquarters, human resources, or other internal reporting processes
6. Information about legal services, including governmental agencies, that are available to employees who may be victims of sexual harassment
7. A statement that retaliation for reporting sexual harassment is illegal in Chicago

Every employer must require its employees to participate in the mandatory annual trainings for the required number of hours. All employees must complete 1 hour of sexual harassment prevention training and supervisors/managers must complete two hours of training. One hour of bystander training must also be completed for all employees annually.

For the sexual harassment prevention training, employers may use the model sexual harassment prevention training program prepared by the Illinois Department of Human Rights pursuant to the annual training requirements in the Illinois Human Rights Act (IHRA), or they may establish their own training that equals or exceeds the minimum requirements in the IHRA. The ordinance does not identify a similar standard for bystander training, however, training modules for the additional hour of

training and for the bystander training will be made available to employers at the Commission's website.

Employers must display, in at least one location where employees commonly gather, posters designed by the Commission on sexual harassment prohibitions. The employer must display at least one poster in English and one in Spanish.

Employers also must retain written records of the policies and trainings given to each employee, as well as other records necessary to show compliance with the ordinance. The records must be retained for a period is at least five years or the duration of any claim, civil action, or investigation pending pursuant to the ordinance, whichever is longer.

A person who violates the sections of the ordinance prohibiting sexual harassment, defining the mandatory elements of the policy, and mandating annual training is subject to a fine ranging between $500 and $1,000 per day.

Practice Tip:
Covered employers should implement these new requirements beginning in July 2022 to be in compliance with the city's revised ordinance. The new required training must be completed by June 30, 2023.

Is CBD Drug-Free? Indiana Court Says No

In *Rocchio v. E&B Paving, LLC, and Int'l Union of Operating Engineers Local 103,* Case No. 1:20-cv-00417 (S.D. Indiana March 31, 2022), an Indiana federal court dismissed an employee's disability discrimination lawsuit after he tested positive for marijuana because of CBD use.

The former employee was subject to random drug testing under his employer's drug testing policy which required testing for marijuana and also provided for termination in the event of a positive test result. After testing positive for marijuana, he claimed that the positive test result was because of his use of CBD oil rather than marijuana. His employment was terminated pursuant to the employer's drug policy.

The employee sued the employer and his union claiming they violated the Americans with Disabilities Act (ADA) by terminating him and failing to rehire him in connection with his use of a legal drug. The court disagreed because there was no evidence that the employer had knowledge the employee was using CBD oil rather than marijuana at the time it made the termination decision. Rather, the employer terminated the employee based on the positive drug test result that indicated the presence of marijuana.

Additionally, the employee argued that the employer's policy of terminating employees who test positive in a drug test are regarded as disabled and also as users of illegal drugs. The court disagreed with this contention and did not agree that conducting drug tests means employers regard employees who test positive as disabled under the ADA. Moreover, there was no evidence that the employer believed that the employee was disabled, or that he was terminated because of any perceived disability.

Practice Tip:
As CBD products continue to grow in popularity, employers may face similar issues as in *Rocchio* relating to random drug testing. While many CBD products are legal and widely accessible, there remains the chance that certain products could trigger a positive drug test result. Employers can enforce zero tolerance drug testing policies but should be mindful of potential issues associated with randomly testing employees rather than for post-accident purposes or upon reasonable suspicion, especially in states in which recreational marijuana is legal such as Illinois.

Illinois Workers' Compensation Act Not Bar to Biometric Claims

In a case of first impression, the Illinois Supreme Court held that the Illinois Workers' Compensation Act's exclusive remedy provisions do not preclude a civil claim by an employee against the employer for damages under the Illinois Biometric Privacy Act. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511.

Plaintiff filed a putative class action suit against his employer under the Privacy Act contending that he and other employees did not consent to be fingerprinted under the company's biometric system when this site was used to store and track employees' whereabouts during the workday.

In affirming the denial of the employer's motion to dismiss premised on the Exclusive Remedy Doctrine, the court reasoned that the form of injuries alleged by the class action members were distinguishable from physical and psychological injuries incurred at work.

Practice Tip:
As required by the Illinois Biometric Privacy Act, it is imperative that any employer who seeks to secure an employee's fingerprints, eye scan or similar personal identifying characteristics must secure the written consent of such employees to avoid a potential civil privacy claim for damages.

What Illinois Employers Can Learn From the U.S. Women's Soccer Equal Pay Outcome

After fighting a decades-long battle for equal pay, the U.S. women's soccer team has reached a first-of-its-kind collective bargaining agreement creating true pay equity in the sport. The team negotiated an agreement in which women will be paid equal salaries and bonuses as the men's team. This momentous agreement is a reminder of the importance of pay equity for employers with Illinois employees.

Beginning in 2016, the Illinois Equal Pay Act (IEPA) applied to employers of any size. The IEPA prohibits employers from pay discrimination on the basis of sex. Specifically, it prohibits paying wages to an employee at a lesser rate than it pays another employee of the opposite sex "for the same or substantially similar work on jobs the performance of which requires equal skill effort, and responsibility, and which are performed under similar working conditions." However, the IEPA allows for a difference in pay when the difference is based on a seniority system, a merit system or a system measuring earnings by quantity or quality of production.

Effective September 29, 2019, the IEPA further prohibited Illinois employers from inquiring about a job applicant's compensation history. The IEPA makes it unlawful for Illinois employers to:

1. Screen job applicants based on their current or prior wages or salary histories, including benefits or other compensation, by requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria;
2. Request or require a wage or salary history as a condition of an employment offer or compensation, of being considered for employment or interviewed, of continuing to be considered for an employment offer; or
3. Request or require that an applicant disclose wage or salary history as a condition of employment.

The IEPA includes limited exceptions to these prohibitions. An employer may request the wage or salary history, including benefit or other compensation information, in the following situations:

1. The job applicant is applying for a position with the current employer.
2. The job applicant's wage or salary history is a matter of public record under the Freedom of Information Act, or any other equivalent state or federal law, or is contained in a document completed by the job applicant's current or former employer and then made available to the public by the employer, or submitted or posted by the employer to comply with state or federal law.

If an employee is paid less than the wage they are entitled in violation of the IEPA, in a civil action the employee may recover the entire amount of any underpayment together with interest, as well as compensatory damages if the employee demonstrates that the employer acted with malice or reckless indifference. The employee may also recover punitive damages, injunctive relief, and the costs and reasonable attorney's fees allowed by the court to make the employee whole. An employer who violates the IEPA may also be subject to special damages not exceeding $10,000. If special damages are available, an employee may recover compensatory damages only to the extent such damages exceed the amount of special damages.

Employees must initiate an action under the IEPA within 5 years from the date of the violation.

Practice Tip:
To avoid damages and claims under the IEPA, Illinois employers should closely review their payroll records to ensure that employees doing the same or substantially similar work are paid equally, unless one of the limited exceptions above applies. Employers should also review their applications and remove all questions requesting salary or wage history. Employers should also ensure that they do not ask salary or wage history questions during the interview process.

Wisconsin Fast Food Franchisee Ordered To Pay Damages & Prevent Future Discrimination

In *EEOC v. Pensec, Inc.* (Civil Action No. 21-cv-1409), the U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a Wisconsin Corporation which operates nine McDonald's restaurants for race discrimination in connection with the restaurants' hiring practices. According to the lawsuit, the company refused to hire Black applicants because of their race. Unsuccessful Black applicants at the location were told the store manager did not like Black people and that the store needed "Spanish people." Moreover, at least one location had a statistically significant shortfall on the hiring of Black employees based on census data for the area.

The company was ordered to pay over $31,000 in damages and must make its best effort to reach hiring goals for Black employees and provide training on Title VII to its employees.

Practice Tip:
As in all other states, Wisconsin employers should advise and train all interviewers to avoid any discriminatory hiring practices and to conduct their interviews, and ultimately make their hiring decisions, based upon non-discriminatory qualifications of potential applicants.

EEOC Examines Discrimination Against Women & People of Color in Construction Industry

In May, the U.S. Equal Employment Opportunity Commission (EEOC) held a hearing which examined discrimination in the construction industry, specifically against women and people of color. The EEOC's hearing highlighted the historical pattern of discrimination against these marginalized groups within the construction sector including harassment and in hiring practices.

Some examples of harassing behavior discussed at the hearing included displays of nooses, threats, physical harassment, and physical or sexual assaults.

The purpose of the hearing was to explore ways in which women and people of color can have more opportunities to thrive in the traditionally male-dominated industry and to address the rampant discrimination commonly associated within the industry.

Practice Tip:
Increased diversity and combatting discrimination within industries that are commonly dominated by particular groups was the focus of the EEOC's hearing, but these topics are not new for the agency. The increased focus on these issues should remind employers about the importance of diversity and inclusion as well as addressing discrimination and harassment in the workplaces. All employers should have written policies against discrimination and harassment and train employees and managers on such policies and procedures. Employers should also examine their hiring and promotion practices to ensure equal opportunity and avoid discrimination claims.

Wisconsin Review Commission: Employer May Terminate Employee Based on Prior Sexual Assaults

In *Vega v. Labor & Indus. Review Comm'n*, No. 2021AP24 (Wis. Ct. App. Apr. 19, 2022), a former employee filed a claim under the Wisconsin Fair Employment Act alleging that he was wrongfully terminated after his employer found out that he was a registered sex offender and the employee's admission that he committed multiple felony-level sexual assaults.

The employee was terminated originally because of his prior convictions as a sex offender. The Wisconsin Labor and Industry Review Commission (LIRC) determined that the employer wrongfully discriminated against the employee on the basis of his conviction record. The termination of his employment due to his status as a registered sex offender is in violation of the Wisconsin Fair Employment Act.

Notwithstanding the violation, the LIRC also determined that the employer lawfully relied on the employee's admission to prior sexual assaults he committed but was not convicted for. Specifically, the LIRC found that the employer would have terminated the employee based solely on the employer's own investigation into the employee's felony-level sexual assaults.

Therefore the LIRC concluded that the employee was not entitled to reinstatement or backpay.

On appeal, the court agreed with the LIRC's decision and determined the employee was not entitled to any damages.

Practice Tip:
This decision establishes that an employee, generally, may not be discriminated against based upon a prior conviction as a registered sex offender in Wisconsin. However, a termination based on an independent investigation by the employer was a sufficient reason to avoid any reinstatement or damages to the employee. Although the Wisconsin Fair Employment Act would have protected the employee from termination for his prior convictions, the employee's admissions that he had committed other, different sex offenses for which he had not been convicted at the time of his hire, the LIRC found that the admissions provided sufficient legal basis for termination.

In light of this ruling, it is advisable that employers in Wisconsin not only be aware of the fact that employees who are registered sex offenders are entitled to protections under the Wisconsin Fair Employment Act. However, an independent investigation by the employer into similar criminal acts that an employee has yet to be charged for could, pursuant to this ruling, provide sufficient basis for termination of an employee.

Newsletter Contributors

Storrs Downey, Jessica Jackler and Ryan Danahey 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**

Ryan Danahey Named Divorce Volunteer Attorney of the Year

Downey & Lenkov is pleased to announce that Income Member Ryan Danahey has been named Divorce Volunteer Attorney of the Year by Legal Aid Chicago and was honored at their 2022 Annual Luncheon on 6/14.

Ryan was recognized for his work on the Simple Divorce pro bono project as well as his dedication, support, and service to Legal Aid Chicago as a volunteer.

Join us in congratulating Ryan!

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EQUAL JUSTICE STARTS HERE

Kirsten Kaiser Kus Named Influential Women of Northwest Indiana Award Finalist

We are excited to announce that Capital Member Kirsten Kaiser Kus is a finalist for the 2022 Influential Women of Northwest Indiana Awards. Kirsten was nominated in the Law Influential Woman category for her commitment to empowering and supporting women within her industry and demonstrating exemplary leadership in the community.

Winners will be announced at the Influential Women Awards Banquet on 9/29.

Congratulations to Kirsten on her nomination!

Samuel Levine Named Inaugural Recipient of ISBA CLE Distinguished Service Award

Downey & Lenkov is pleased to announce that Of Counsel Samuel Levine has been selected as the inaugural recipient of the Illinois State Bar Association CLE Distinguished Service Award.

Samuel will be honored for his outstanding, quality contributions to ISBA continuing legal education programing throughout the years.

Join us in congratulating Samuel on this amazing distinction!

ILLINOIS STATE BAR ASSOCIATION™

Firm Name Change & New Chicago Office

We are pleased to announce that our firm name has changed from Bryce Downey & Lenkov LLC to Downey & Lenkov LLC, effective April 4, 2022. Our updated website and e-mail domains are noted below. Our telephone number and facsimile number remain the same.

Website: www.dl-firm.com
Tel.: (312) 377-1501
Fax: (312) 377-1502

In addition, our Chicago office has moved to a new location., 30 North LaSalle, Suite 3600, Chicago, IL 60602, effective June 1, 2022.

We remain fully committed to exceeding expectations in the years to come. Thank you for your continued support.

30 N LaSalle Street
Suite 3600
Chicago, Illinois 60602

Downey & Lenkov Is Ring Certified

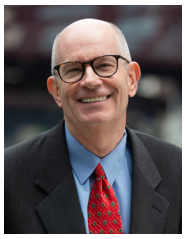
We are proud to announce that Downey & Lenkov has been acknowledged by Recognizing Inclusion for the Next Generation (RING) for our ongoing commitment to diversity and inclusion.

We believe in creating and maintaining a positive, healthy, inclusive and safe environment for our clients and employees regardless of their race, sex, religion, sexual orientation, gender identity, etc. We believe in achieving excellence through diversity and respect for differences among firm members.

RING is a certification program that evaluates an organization's commitment to embracing and expanding Diversity, Equity, Inclusion and Allyship initiatives.

Storrs Downey Presented Recent Employment Law Developments with Perrin

Capital Member Storrs Downey moderated fellow members of Management & Professional Liability Alliance during the "Emerging Issues and Recent Developments in Employment Law" Perrin webinar on 6/2. Select topics included sexual harassment & assault claims, COVID-19 litigation issues, remote workers and more.



Samuel Levine Published in ALI CLE's The Practical Real Estate Lawyer

Of Counsel Samuel Levine authored an article for ALI CLE's *The Practical Real Estate Lawyer* May 2022 issue.

"Consequences of Stopping Construction: Delays and Disruptions Resulting from Catastrophes" details the impacts of suspending a construction project and the importance of defining the suspension parameters in contracts to ensure protection of all parties involved.

DL Is **Growing**

Please join us in welcoming associates Dana Djokic and Ryan Dezonno to our Chicago office.

Dana joins the firm with 20 years of litigation experience. She worked as in-house counsel for a major insurance company for 12 years. She has successfully resolved hundreds of complex workers' compensation claims. Dana has also tried many claims before the Illinois Workers' Compensation Commission and obtained a "no accident" decision.

Ryan focuses his practice on representing employers, insurance companies, and third party administrators in the defense of worker's compensation and general liability defense matters. He is an experienced litigator who collaborates with his clients to develop successful legal strategies. Ryan brings a unique perspective to the firm having previously worked for two Illinois county public defenders' offices.