Downey & Lenkov LLC

Labor & Employment Newsletter

November 2022

In Case You Missed It: New Illinois & Indiana Laws

In case you missed it, the following new Illinois and Indiana employment laws became effective over the summer:

What: Chicago, Cook County, & Illinois Minimum Wage Increases
When: Effective July 1, 2022
Where: Illinois

All non-tipped employees in Illinois must be paid a minimum wage of $12.00/hour. Employees in Cook County must be paid a minimum wage of $13.35/hour. Large employer (21 or more employees) in Chicago must pay employees $15.40/hour. Employers with 4-20 employees in Chicago must pay $14.50/hour. Youth employees (under 18) must be paid at least $12.00/hour.

What: Chicago Posting Requirements
When: July 1, 2022
Where: Chicago

Chicago employers have to post the most up to date minimum wage and paid sick leave posters and provide written notices to covered employees each year with the first paycheck after July 1st, whether by paper or electronic means.

What: Chicago Fair Workweek Ordinance
When: July 1, 2022
Where: Chicago

Employers in covered industries are required to post work schedules with at least 14 days' notice, an increase from the previous 10 days' notice. Employees will need to earn less than $29.35 per hour or $56,381.85 per year to gain protection under the Fair Workweek Ordinance. Covered industries include building services, healthcare, hotel, manufacturing, restaurant, retail, or warehouse services.

What: SB1169 a/k/a amendment to The Health Care Right of Conscience Act
When: Effective June 1, 2022
Where: Illinois

This 1977 law was originally enacted to protect medical professionals from adverse consequences should they refuse to perform medical procedures because of religious or moral beliefs. Because employees were relying on this law to avoid COVID-19 vaccine or testing mandates, the amendment now clarifies that it is not a violation of the act to enforce COVID-19 measures or requirements through "terminating employment or excluding individuals from a school, place of employment, or public or private premises in response to noncompliance." It is important for employers to remember, however, that employees may still turn to the federal exemptions for health and religious reasons.

What: Chicago Ordinance No. 02022-665 a/k/a New Sexual Harassment Training Requirements
When: Effective July 1, 2022
Where: Illinois (Employers located in Chicago and/or are subject to Chicago licensing requirements)

Chicago employers will be obligated to provide training to employees and supervisors on sexual harassment prevention and how bystanders should respond to sexual harassment, amongst other requirements, pursuant to revisions to the Chicago Human Rights Ordinance. See here for additional details from our July newsletter.

What: Indiana HB 1351 a/k/a amendment to Data Breach Notification Law
When: Effective July 1, 2022
Where: Indiana

Employers are required to disclose a data breach to employees within 45 days of the breach.

EEOC's Latest COVID-19 Guidelines

On July 12, 2022, the Equal Employment Opportunity Commission (EEOC) revised its guidance about COVID-19 and the workplace to address the evolving pandemic.

COVID-19 TESTING

Under the updated guidance, the EEOC will no longer presume that COVID-19 testing is job-related and consistent with business necessity, which is required by the Americans with Disabilities Act (ADA). Rather, employers will be required to conduct an individualized assessment to determine whether present pandemic circumstances and individual workplace circumstances justify COVID-19 testing of employees. In those circumstances requiring an individualized assessment, the EEOC advises employers to consult current guidance from the Centers for Disease Control and Prevention (CDC) and other public health authorities.

The EEOC also affirms that antibody testing should not be used to determine whether an employee may enter the workplace. Based on the CDC guidance, such testing does not meet the ADA's "business necessity" standard for medical examinations or inquiries for employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA.

OTHER COVID-19 SCREENING

Employers may continue screening employees who are physically entering a worksite with regard to COVID-19 symptoms or diagnoses but should not screen employees who are working remotely or not physically interacting with coworkers or others.

Additionally, employers may screen job applicants for COVID-19 symptoms after making a conditional job offer, as long as it does so for all employees entering the same type of job. However, an employer may only withdraw a conditional job offer because an applicant tests positive for COVID-19, has symptoms of COVID-19, or has been recently exposed, if (1) the job requires an immediate start date; (2) CDC guidance recommends the person not be in proximity to others; and (3) the job requires such proximity to others, whether at the workplace or elsewhere.

According to the EEOC, employers may also screen applicants for COVID-19 during the pre-offer stage, but only if the employer screens everyone (including visitors) for symptoms of COVID-19 before entering the workplace, the applicant needs to be in the workplace as part of the application process, and the screening is limited to the same screening that everyone else undergoes.

Lastly, employers may require employees to provide a doctor's note clearing them to return to work after having COVID-19. Employers are reminded that they may also rely on other alternatives to determine whether it is safe for an employee to return to work (e.g., following current CDC guidance).

Practice Tip:
While the updated guidance may signal the EEOC possibly returning to pre-pandemic guidance, employers should take note of these changes and apply them while they are in effect.

Jury Awards $228 Million to Employees in Historic Illinois Biometric Trial

On October 12, 2022, an Illinois federal jury in *Rogers v. BNSF Ry. Co.*, N.D. Ill., No. 19-cv-03083, awarded $228 million to a class of more than 45,000 truck drivers in the first biometrics privacy class action to go to trial in Illinois. In reaching its verdict, the jury found that BNSF Railway Co. violated the Illinois Biometric Information Privacy Act ("BIPA") by collecting employee fingerprints without proper consent.

Plaintiffs alleged that BNSF improperly required drivers entering the company's facilities to provide their biometric information through a fingerprint scanner without first obtaining informed written consent or providing a written policy that complied with the BIPA. BNSF argued that it hired a third-party vendor to operate its fingerprint scanning technology and therefore could not itself be vicariously liable for the vendor's actions. This argument was rejected. The court held that the BIPA's language is broad enough to impose vicarious liability because it provides that "[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain" an individual's biometric data. The court reasoned that the broad phrase "otherwise obtain" meant BNSF need not have actually collected biometric information itself to be held liable under the BIPA.

Practice Tip:
This case is extremely important for Illinois businesses moving forward. Employers, especially those that utilize third-party vendors for timekeeping or HR-related tasks, must strictly comply with the BIPA requirements including written consent and issuing the required written notices.

Fourth Circuit: Gender Dysphoria is Disability Under ADA

On August 16, 2022 in *Williams v. Kincaid*, No. 21-2030 (4th Cir. 8/16/22), the Fourth Circuit Court of Appeals (which includes North Carolina, South Carolina, and Virginia) became the first federal appellate court to hold that gender dysphoria is a disability under the Americans with Disabilities Act (ADA).

The Plaintiff, a transgender female inmate, alleged violations under the ADA because while incarcerated in a male prison, she was assigned to male housing, required to wear male clothing, forced her to shower in the presence of men, subjected her to strip searches by male officers, etc. Prison officials also withdrew her hormone therapy and denied her access to female commissary items.

In reaching its decision, the Fourth Circuit explained that gender dysphoria is distinct from the now-obsolete diagnosis of "gender identity disorder," which is expressly excluded and not covered under the ADA. The court looked to the updated DSM-5's definition of gender dysphoria as the "clinically significant distress" felt by some who experiences "an incongruence between their gender identity and their assigned sex," and further noted that "nothing in the ADA, then or now, compels the conclusion that gender dysphoria constitutes a 'gender identity disorder' excluded from ADA protection." The court also clarified that following a shift in medical understanding, "we and other courts have thus explained that a diagnosis of gender dysphoria, unlike that of 'gender identity disorder,' concerns itself primarily with distress and other disabling symptoms, rather than simply being transgender."

The court did not find or suggest that being transgender is, in and of itself, a disability under the ADA. Instead, it held that gender dysphoria can be disabling under the ADA.

Practice Tip:
Although this holding is not binding on the Seventh Circuit which oversees courts in Illinois, Indiana, and Wisconsin, it could signal things to come for employers in this circuit. Moreover, all employers covered by Title VII in this circuit are prohibited from discriminating against and harassing employees on the basis of gender identity. Gender identity and sexual orientation are also protected characteristics under Illinois law which applies to employers of all sizes.

Seventh Circuit Affirms Decision Against WI Employer for FMLA Violations

On August 16, 2022, the Seventh Circuit Court of Appeals affirmed findings in favor of a former employee on her FMLA retaliation claims in *Simon v. Coop. Educ. Serv. Agency #5,* No. 21-02139 (7th Cir. 8/16/22).

The employee, a former Lead Teacher who worked with students with special emotional and behavioral needs, suffered a concussion at work in 2016 and took FMLA-qualifying leave as a result. After she was cleared to return to full duty work without restrictions about a month later, the employer did not allow her to return to her former position. Instead, it placed her in a support position with significantly less responsibility, independence, discretion, and management responsibilities than her previous Lead Teacher position. The school did not allow her to return to her previous position because it determined that doing so would present an "unreasonable risk" because of her prior head injury. The employee received the same salary and benefits in her new role despite it being a paraprofessional role in comparison to her previous job.

The employee sued the employer alleging several FMLA violations. The district court held a bench trial and found in the employee's favor on one of those claims—the FMLA interference claim based on the employer's failure to return the employee to an equivalent position following her leave. The district court found that the employer had violated the FMLA by not returning the employee to an equivalent position following her leave as required by the FMLA. It entered a declaratory judgment against the employer and awarded the employee almost $60,000 in attorney's fees.

The employer appealed on several grounds including arguing that the district court erred in finding that the employee was prejudiced by its FMLA violation. The Seventh Circuit disagreed with this argument. It held that the employee showed prejudice by the FMLA violation because she was forced to work below her professional capacity for most of the school year and will likely have to explain away that wasted period to future prospective employers, and as such, she suffered harm for which the FMLA provides a remedy.

Practice Tip:
Employers with 50 or more employees are covered by the FMLA and must strictly adhere to the statute's requirements including job restoration to an equivalent position upon an employee's return from leave for an FMLA-qualifying reason.

Seventh Circuit Establishes the Ministerial Exception Standard in Indiana

In *Starkey v. Roman Catholic Archdiocese of Indianapolis*, Inc., No. 21-2524 (7th Cir. 2022), Starkey was employed as guidance counselor whose duties included supervising other guidance counselors. After Ms. Starkey admitted to being in a same-sex marriage, she was terminated by her employer, a Catholic School.

The Seventh Circuit Court of Appeals concluded that Ms. Starkey fit the ministerial exception because she had been entrusted with communicating tenets of the Catholic faith to the school's students and generally guiding the school's mission. The ministerial exception bars all claim for federal discrimination claims under Title VII and state-law torts such as tortious interference with a contractual relationship. The court held that the ministerial exception, grounded in the First Amendment, bars interference with the selection and control of religious organizations ministers.

Although Ms. Starkey attempted to rebut the application of the ministerial exception by pointing to the fact that she did not engage in any of the ministerial functions that were assigned to her, the court relied on various documents describing Ms. Starkey's position which demonstrated that her responsibilities included communicating the faith, modeling a Christ-Centered life, fostering spiritual growth, attending retreats and also identified her as "minister of the faith." The court found that there is no rigid formula as to whether any position is or is not subject to the ministerial exception based on formal title, substance of title, use of title or any specific religious function.

Lastly, the court without elaborating in any great detail, concluded that the individual review of any specific state law torts would be "excessive judicial entanglement" and found that no Indiana state law claims could proceed where it would deprive a religious organization its ability to control the selection of those who will personify its beliefs shall be allowed under the ministerial exception. That is, the court found that the ministerial exception barred all Indiana state law tort claims.

Practice Tip:
The *Starkey* case was very specific in its identification of how to identify the ministerial exception and appears to provide a very broad definition of what constitutes a "ministerial" position. Additionally, *Starkey* establishes that all state law torts would be barred with respect to the ministerial exception.

Walmart Defeats EEOC in Pregnancy Discrimination Case

On August 16, 2022, the Seventh Circuit Court of Appeals affirmed judgment in favor of Walmart in pregnancy and sex discrimination claims brought by the EEOC in *EEOC v. Wal-Mart Stores East, L.P.*, No. 21-1690 (7th Cir. 2022).

The EEOC filed suit against Walmart in Wisconsin federal court alleging violations of the Pregnancy Discrimination Act because Walmart had an established policy that offered temporary light duty to employees who were injured on the job, but it did not offer similar light duty to employees who were pregnant. Instead, Walmart required pregnant workers (and other workers with non-work-related injuries) who had lifting or other physical restrictions related to pregnancy to go on leave. Some pregnant employees had to choose between continuing to work at a job that was becoming physically too demanding, or even dangerous, or going on unpaid leave for several months. Accordingly, the EEOC argued that by accommodating all workers injured on the job, but denying all pregnant women a similar accommodation, Walmart engaged in sex discrimination.

The district court granted summary judgment to Walmart and the Seventh Circuit affirmed the decision. In reaching its decision on appeal, the court relied heavily on Walmart's defense that the light duty program was established to implement a worker's compensation program that benefits Walmart's employees while limiting the company's "legal exposure" and costs of hiring people to replace injured workers. Per the program, Walmart pays full wages while workers heal on light duty, rather than pay the reduced wages provided under the worker's compensation system if they were on leave. Under this arrangement, Walmart argued that it seeks to comply with its obligations under Wisconsin law while it also receives work from the healing employee and avoids the need to hire a replacement. It therefore argued that offering temporary light duty to workers injured on the job pursuant to a state workers' compensation law is a "legitimate, nondiscriminatory" justification for denying accommodations under the policy to everyone else, such as individuals not injured on the job, including pregnant women. Accordingly, the EEOC could not show that pregnant employees were the only individuals excluded from the program.

Practice Tip:
Although this decision favored the employer, it is a good reminder that policies generally must be evenly applied to all employees and not have the purpose or effect of discriminating against a protected group unless the employer can demonstrate with certainty a legitimate, non-discriminatory justification for applying the policy only to a certain group of workers.

Causation Standard for Federal Retaliatory Discharge Cases

In the Seventh Circuit Court of Appeals case, *Huff Buttigigeg,* Case No. 21-1257 (7th Cir. 2021), Plaintiff filed a religious discrimination case under Title VII related to her termination. Huff was an employee of the Federal Aviation Administration and was arrested for driving under the influence. In accordance with the appropriate administrative rules and statutes, Huff voluntarily agreed to attend rehabilitation. Initially, Huff would not agree to attend Alcoholics Anonymous citing religious reasons because she is a Jehovah's Witness.

Over a series of weeks and several communications between Huff and her superiors, the primary issue became whether Huff required approval for her medication via email or through telephone request.

The Seventh Circuit determined that under the causation standard for federal sector retaliation claims, a reasonable jury could conclude that Huff's superior based her decision on retaliatory animus. The court did not address whether Huff engaged in a protected activity (and apparently assumed that the rejection of Alcoholics Anonymous constituted a protected activity) but discussed at length whether the facts established the appropriate causal connection.

The court cited to inconsistent instructions received by Huff, namely that the FAA'S own physician did not know that email medication approval was prohibited, that there was conflicting testimony as to the bases for the termination, and more specifically that Huff's superior had provided inconsistent instructions as to rehabilitation and had forwarded confidential information to her husband about this case.

Practice Tip:
This case establishes the appropriate causation standard for federal sector employees with respect to retaliation claims. The court made clear that although Huff had established causation sufficient to entitle her to a jury, unless Huff was able to establish that but-for the actions of FAA she would not have been terminated (and the court made no judgment with respect to this type of causation), Huff would not be able to claim reinstatement, back pay, compensatory damage etc.

Firm **News**

Jessica Jackler Obtains Summary Judgment On An Illinois Case

Jessica Jackler secured an affirmance from the Illinois Fourth District Appellate Court granting summary judgment in favor of an employer on a retaliatory discharge claim brought by a former employee. The underlying case alleged the former employee was discharged in retaliation for exercising rights under the Illinois Workers' Compensation Act. After the trial court ruled in favor of the employer, the employee appealed the summary judgment ruling as well as several discovery orders leading up to the summary judgment order. All rulings were affirmed in favor of the employer following extensive briefing and oral argument before a 3-judge panel.

Margery Newman Secures Illinois Arbitration Panel Finding of No liability on a $2.9 Million Mechanics Lien Contract Dispute

Margery Newman secured a finding of no liability on a $2.9 million dollar contract dispute when an Illinois arbitration panel ruled in favor of Defendant. The Plaintiff was a developer of a hotel chain who hired the Defendant to design and specify furniture fixtures and equipment ("FF&E") for the hotel and to change its brand. The primary claim against Defendant was a breach of contract due to taking excessive time to prepare the various interior design "deliverables" for the project, in addition to various claims for improperly specifying certain FF&E for the hotel.

This was a complete win for the Defendant as Plaintiff recovered nothing and was ordered to pay Defendant their unpaid balance for the project.

Ryan Danahey Secures Dismissal of Illinois Breach of Fiduciary Duty Case

In an Illinois Cook County case involving alleged tortious interference with a contract and aiding and abetting a breach of fiduciary duty, Ryan Danahey was able to secure a motion to dismiss the entire case with prejudice.

In his motion Ryan successfully argued that the plaintiff employee had not responded to a specific request for assent to the contract terms and that the evidence alleged as to assent by behavior was unfounded. Further, because the contract was never signed by the plaintiff he argued that as there was no agreement on the terms and therefore our client could not have aided and abetted any breach of fiduciary duty pursuant to that alleged contract.

Jessica Jackler and Jeff Kehl Win Summary Judgment in Unlawful Termination Case

The Cook County Circuit Court granted Defendant's Motion for Summary Judgment against Plaintiff's allegations of unlawful termination, fraudulent misrepresentation, and retaliatory discharge. The court agreed with Jessica Jackler and Jeff Kehl's arguments of undisputed evidence of no unambiguous promise and/or false statement of material fact and that Plaintiff was an at-will employee.

Ryan Danahey Secures Summary Judgment in Property Damages Case

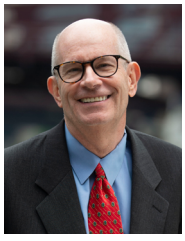
Ryan Danahey secured a summary judgment in the Illinois Cook County Circuit Court on behalf of a property management company. Plaintiff alleged negligence resulting in property damages and personal injuries related to water intrusion and subsequent mold intrusion. The property damages claim was dismissed based on a waiver of subrogation clause. The Plaintiff's insurer paid $1 million for the property damages so Plaintiff could not recover those damages twice. Such a double recovery and would have violated the clear intent of all parties to shift the risk for all property damages to the relevant insurance companies.

Summary judgment was granted as to the alleged personal injuries. Plaintiff, by virtue of being a condominium owner and agreeing to the terms in the declarations and bylaws, agreed to waive any damages related to mold, as outlined in the management agreement between the association and our insured property management company. The court dismissed any argument that such a contractual limitation violated public policy or represented an adhesion contract. The court held that the clear language of this provision was binding upon Plaintiff and prohibited a claim for personal injury damages against the property management company.

Storrs Downey Presented Employment Law Webinar at Perrin Conference

Capital Member Storrs Downey joined other Management & Professional Liability Alliance members to present topics at "The Spooky Depth of Employment Litigation: Busting Preconceptions and Myths" Perrin Conferences webinar on October 19.

Select topics included Defending Against Attorney Fee Requests, Interplay of FMLA/ADA/Work Comp Laws, The impact of the Supreme Court Decision in Dobbs and much more.



Management & Professional Liability Alliance ™

Kirsten Kaiser Kus & Werner Sabo Named to 2023 Best Lawyers in America® List

We are pleased to announce that Capital Member Kirsten Kaiser Kus and Of Counsel Werner Sabo have been recognized by their peers in the 29th Edition of Best Lawyers in America.

Kirsten was selected for her work in workers' compensation law while Werner was highlighted for his work in construction litigation. As a Best Lawyer, they both rank among the top 5% of private practice attorneys nationwide.

Congratulations to Kirsten and Werner!

Samuel Levine Named President of SOICA

Of Counsel Samuel Levine has been named President of the Society of Illinois Construction Attorneys (SOICA). SOICA recognizes Illinois lawyers who are distinguished for their skill, experience, and professional conduct in the practice of construction law. Attorneys must be nominated to join and have practiced construction law for at least 10 years.

Samuel is highly recognized throughout the construction industry for his work in construction and real estate litigation. He has been elected as a Leading Lawyer and Super Lawyer for the last 15 years. Prior to being named President, Samuel served as Treasurer and currently serves on several SOICA committees.

Join us in congratulating Samuel on this well-deserved appointment!

SOICA
TRUSTED LEADERS IN CONSTRUCTION LAW

Margery Newman Joins Association of Subcontractors & Affiliates Board of Directors

Margery Newman has been invited to join the Association of Subcontractors & Affiliates - Chicago Board of Directors. ASA Chicago is an independent, nonprofit trade association representing the subcontracting industry and its affiliates.

Join us in congratulating Margery!

ASA CHICAGO

Downey & Lenkov Participates in USLI's October Together—Stronger Together Auction

Downey & Lenkov proudly participated in USLI's October Together—Stronger Together Initiative, a month of fundraisers and events during Breast Cancer Awareness month. The firm participated in a live online silent auction that featured over 70 donated baskets, with all proceeds going to Breastcancer.org.

Our basket, "Tour of Chicago" encouraged bidders to explore the city and enjoy some of Chicago's best pizzerias and breweries.

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STRONGER TOGETHER
sponsored by USLI

DL Is **Growing**

Please join us in welcoming associates Nora Bialik, Mark Dinos Frank Swanson, Taylar Young, and William Obuchowski to the firm's Chicago office, as well as Suzanne Kleinedler to our Crown Point office.

Nora focuses her practice on workers' compensation defense matters. Nora quickly adapts to the changing demands of the legal field to meet the needs and expectations of her clients. She is a highly skilled individual who effectively handles all phases of trials with strong attention to detail and initiative. Prior to joining the firm, Nora handled professional liability defense litigation cases involving medical malpractice and more.

Mark is an experienced attorney who focuses his practice on workers' compensation defense matters. He is driven by client-focused advocacy coupled with exceptional legal knowledge and skill. He works closely to develop successful legal strategies to achieve the best results for his clients. Outside of work, Mark enjoys playing softball and basketball, spending time with friends and family, and singing the occasional song via karaoke.

Frank concentrates his practice in commercial and construction litigation Frank is a dedicated attorney who is committed to providing his clients with aggressive legal counsel from start to finish. He has considerable experience in handling insurance defense, civil litigation, personal injury claims, coverage litigation and federal criminal defense. Outside of work, Frank enjoys attending live music, watching sports, and traveling.

Taylar concentrates her practice in workers' compensation and general liability matters. Taylar is a dedicated attorney who is committed to defending her clients interests with comprehensive legal counsel from start to finish. Prior to joining Downey & Lenkov, Taylor worked at another prominent Chicago law firm managing cases in a high-volume corporate defense firm.

William has a diverse skill set to resolve complex matters while achieving the best results for his clients. He has extensive experience representing clients in a wide range of general liability matters. Prior to joining Downey & Lenkov, William worked at a Massachusetts based insurance company where he achieved a winning record for jury trial and arbitration hearing in insurance defense.

Suzanne possesses an extensive legal background that includes working closely with insurance companies in personal injury, property damage, contracts, and worker's compensation claims matters. Prior to joining the firm, Suzanne worked as in-house litigation counsel at a major insurance company where she focused on injury and premises liability defense matters.

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