Downey & Lenkov LLC

Labor & Employment Newsletter

April 2023

Illinois Private Employers to Provide Paid Leave in 2024

On January 10, 2023, the Illinois legislature passed the Paid Leave for All Workers Act (the "Act"), which will require most private employers in Illinois to provide earned paid leave to employees to be used for any reason. Governor Pritzker signed the legislation into law March 13, 2023 which will then take effect on January 1, 2024.

GENERAL REQUIREMENTS

The Act provides for a minimum of 40 hours of paid leave, or a pro rata number of hours, during a designated 12-month period. It will be applicable to all private employers and employees in Illinois with some exclusions detailed below. Employers may either frontload the leave on the first day of employment or the first day of the designated 12-month period or use an accrual method. The leave accrues at the rate of one hour of paid leave for every forty hours worked.

The Act will apply to both hourly non-exempt employees and exempt salaried employees. The Act provides that exempt employees will be deemed to have worked 40 hours in each workweek for purposes of accrual unless their regular workweeks are less than 40 hours. In that case the paid leave accrues based on the employee's regular work week.

If an employer already has a paid leave policy in place that provide at least 40 hours of leave per year, the employer is not required to modify such a policy as long as the leave can be taken for any reason.

Notably, the Act does not preempt the Chicago Minimum Wage and Paid Sick Leave Ordinance or the Cook County Earned Sick Leave Ordinance. The Act "shall not apply to any employer that is covered by a municipal or county ordinance that is in effect on the effective date of [the] Act that requires employers to give any form of paid leave to their employees, including paid sick leave or paid leave." The Act thus requires employers not covered by these ordinances to provide paid leave.

The Act does not require employees to give a specific reason for taking leave or require any documentation. Although employers may require up to 7 calendar days of notice if the leave if foreseeable and a written policy is in place requiring same. If the leave is not foreseeable, employees must provide notice as soon as practicable.
Employees may use the leave after their first 90 days, or 90 days after the effective date of the Act, unless their employer states otherwise. Employers may set a reasonable minimum of taking no less than two hours per day.

Carry-Over: Unused accrued leave under the Act may carry over annually, but employers will not be required to provide more than 40 hours of paid leave for an employee during the designated 12-month period. If an employer chooses to provide all the leave upfront (frontloading), it will not be required to carry over unused paid leave to the next 12-month period.

Payout at Seperation: Unlike unused and earned PTO and/or vacation time, the Act does not require the unused and earned paid leave to be paid out at termination as long as the employer has not credited the leave to the employee's paid time off bank or vacation account. However, should an employee separate from an employer and be rehired within 12 months, the employer must restore the previously earned paid leave to that employee.

Recordkeeping Requirements: Employers will also be required to create and maintain records documenting hours worked, leave accrued and taken, and remaining paid leave balances. Such records must be maintained for at least three years. Additionally, employers that provide paid leave on an accrual basis must provide notice of the amount of leave accrued or used by an employee upon request. Failure to comply with the recordkeeping requirements subjects employers to a penalty of $2,500 per offense.

Posting Requirements: Like other Illinois employment laws, the Act requires employers to post a notice that the Illinois Department of Labor will prepare. Failure to comply with the posting requirement will subject employers to a penalty of $500 for the first violation and $1,000 for each subsequent violation.

Exemptions: The Act does not affect the validity or change the terms of bona fide collective bargaining agreements in effect on January 1, 2024. After January 1, 2024, the requirements may be waived by a collective bargaining agreement only if the agreement includes a clear and unambiguous waiver.

The law does not apply to:

- School districts or park districts;
- Students employed on a part-time, temporary basis by the college or university they attend;
- Short-term employees of higher education institutions who are employed for less than two consecutive calendar quarters during a calendar year without a reasonable expectation that they will be rehired in a subsequent calendar year;
- Employees working in the construction industry covered by a bona fide collective bargaining agreement;
- Employees covered by a bona fide collective bargaining agreement with an employer that provides national or international services of delivery, pickup, and transportation of parcels, documents, and freight; or
- Employers covered by municipal or county ordinances in effect on January 1, 2024, that provide for paid leave or paid sick leave. After January 1, 2024, any municipal or county ordinance enacted or amended must comply with the act or give greater protections to employees.

Practice Tip:
Employers in Illinois have less than a year to become compliant with the Act and should begin to think about how to incorporate its requirements into their paid leave practices. Although employers that already have paid leave policies that provide at least 40 hours of leave per year are not required to modify their policies as long as the leave can be taken for any reason. Employers may want to consider creating a policy specifically addressing the Act and may want to change existing accrual policies.

Federal Trade Commision Proposed Ban on All Noncompetes

On January 5, 2023, the Federal Trade Commission (FTC) released a Notice of Proposed Rulemaking that would ban employers from imposing noncompetes on their workers. The proposed rule would prohibit employers from entering into noncompete clauses with their workers including independent contractors. It would require employers to rescind existing noncompete clauses with workers and actively inform them that the clauses are no longer in effect.

The proposed rule continues to be undergoing an extended comment period and has faced great opposition.

Practice Tip:
Until the proposed rule becomes final and goes into effect, employers may continue to enforce and enter into new noncompete clauses with their workers, subject to applicable state laws.

New Federal Pregnancy and Nursing Legislation

President Biden recently signed into law two new pieces of legislation protecting pregnant and nursing employees: the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act. While these new laws align with existing laws like Title VII, the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and many state laws, it expands and streamlines the rights and treatment of working mothers.

THE PWFA

Beginning in June 2023, the PWFA will require employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth and provide such accommodations without imposing an undue hardship. Many of the definitions included in the PWFA are borrowed from Title VII and the ADA such as "covered entities," "reasonable accommodation," "undue hardship," and "qualified individual."

The PWFA makes it an unlawful employment practice to:

- Fail to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, absent undue hardship;
- Require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation not arrived at through an interactive process;
- Require a qualified employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided; and
- Take any adverse employment action, including denial of employment or employment opportunities, because an employee requests or uses a reasonable accommodation provided under the PWFA.

Retalliation Prohibited: The PWFA also prohibits retaliation against employees who oppose unlawful conduct or who file a charge, testify, assist, or participate in any manner in an investigation, proceeding or hearing regarding a PWFA violation. It also prohibits coercion, intimidation, threats, or interference directed toward individuals who exercise their rights under the PWFA or who aid or encourage others in the exercise of such rights.

Remedies:
Available remedies under the PWFA are the same as those provided under Title VII, including reinstatement, back pay, front pay, compensatory damages, punitive damages, and recovery of attorneys' fees and costs.

EEOC Enforcement: The PWFA requires the EEOC to issue regulations within one year of the law's enactment and directs that the regulations include examples of reasonable accommodations.

THE PUMP ACT

The PUMP Act amends the Fair Labor Standards Act (FLSA) by requiring employers to provide all employees (exempt and non-exempt) with reasonable break time and a private location other than a restroom in which to express breast milk. It became immediately effective upon signing.

Previously, under the 2010 amendment to the FLSA, these protections were only available to non-exempt employees and exempted employers with fewer than 50 employees if the employer was able to prove that doing so would present an undue hardship in terms of expense or other difficulties because of the employer's size, resources, nature, or business structure. This exemption remains available under the PUMP Act as well as additional exemptions for air carrier crew members, rail carrier crew members, and motor coach operators. Remedies for non-compliance are the same as those available under the FLSA, including payment of unpaid wages, reinstatement, back pay, front pay, and liquidated damages.

Practice Tip:
Because the PUMP Act became effective immediately, employers covered are obligated to promptly become compliant to provide all nursing mothers adequate break time and access to a private location for purposes of expressing breast milk. Employers should also review their current policies and procedures to ensure they are prepared to address accommodation requests from pregnant employees to comply with the PWFA. Employers in Illinois are already subject to an existing pregnancy accommodation law so may already be compliant with the PWFA.

Illinois Amendment to Meal & Rest Break Rules

Effective January 1, 2023, the Illinois meal and rest break law was revised to provide at least 24 consecutive hours of rest in every consecutive 7-day period rather than every calendar week. The bill also requires employers to provide employees with an additional 20-minute meal break for every additional 4.5 consecutive hours worked beyond 7.5 consecutive hours.

Moreover, employers must post a notice summarizing the requirements of the law and information pertaining to the filing of a complaint thereunder.

Lastly, the bill revises the law's enforcement and penalty provisions with significant increases in penalties and damages. Previously, employers who violated the law would be subject to a fine for each offense of not less than $25 nor more than $100.

Under the revised law, employers with fewer than 25 employees will be subject to both a penalty not to exceed $250 per offense, payable to the Department of Labor and damages of up to $250 per offense, payable to the employee or employees affected.

Employers with 25 or more employees will be subject to both a penalty not to exceed $500 per offense, payable to the Department of Labor and damages of up to $500 per offense, payable to the employee or employees affected

Practice Tip:
Employers should review their meal and rest break practices for compliance to ensure (1) no employees work any consecutive seven-day period without at least 24 consecutive hours of rest; and (2) employees receive a second meal break when they work 12 consecutive hours and a third meal break when they work 16.5 consecutive hours. Employers should also post the required notice.

Illinois CROWN Act Effective January 1, 2023

The Illinois Human Rights Act was amended to include what is referred to as the CROWN (Create a Respectful and Open Workplace for Natural Hair) Act. The CROWN Act specifically amends the definition of "race" in the Illinois Human Rights Act to include traits associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists.

Practice Tip:
Illinois employers should review their non-discrimination and harassment policies, as well as their dress and grooming policies, to ensure compliance with the expanded definition of race under the CROWN Act.

Illinois Equal Pay Act Update

Large Illinois employers may be subject to reporting requirements due by March 2024 under the Illinois Equal Pay Act (IEPA). In preparation for this deadline, covered employers should be aware of their obligations under the IEPA.

Covered Illinois employers will include those with at least 100 employees in Illinois and who are required to file an annual EEO-1 report with the EEOC. Those employers will be required to submit an application to the Illinois Department of Labor (IDOL) to obtain an Equal Pay Registration Certificate (EPRC).

The EPRC application must include the following:

- The employer's most recent EEO-1 Report.
- A list of all employees during the previous 12-month calendar year, separated by gender and the race and ethnicity categories from the EEO-1 Report, the county in which the employee works, the employee's start date, the total number of hours the employee worked during the payroll year, and the total wages paid, rounded to the nearest $100.
- An Equal Pay Compliance Statement signed by a corporate office, legal counsel, or authorized agent that certifies:
    - That the employer is in compliance with the IEPA, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Illinois Human Rights Act, and the Illinois Equal Wage Act.
    - That the average compensation for the employer's female and minority employees is not consistently below the average compensation, according to the U.S. Department of Labor (DOL) rules, for its male and non-minority employees within each major job category from the EEO-1 Report.
    - That the employer does not restrict employees of one sex to certain jobs and makes retention and promotion decisions without regard to sex.
    - That the employer corrects wage and benefit disparities when identified.
    - How often the employer evaluates wages and benefits.
    - The employer's approach to determining employees' wages and benefits.
- A $150 filing fee.

An employer that is authorized to transact business in Illinois on March 23, 2021, shall submit the EPRC application to obtain an EPRC, between March 24, 2022, and March 23, 2024, and must recertify every 2 years thereafter.

An employer authorized to transact business in Illinois after March 23, 2021, must submit an application to obtain an EPRC within 3 years of commencing business operations, but not before January 1, 2024, and must recertify every 2 years thereafter.

Employers with fewer than 100 employees on December 31 of the year before recertification will only have to send IDOL a certification that the employer is exempt from the EPRC requirements instead of applying for recertification.

Employers who falsify or misrepresent information on an application submitted to the IDOL will be in violation of the IEPA and the IDOL may seek to suspend or revoke an EPRC or impose civil penalties.

Practice Tip:
Covered employers should begin auditing their equal pay data now to ensure compliance next year and in preparation to submit the required documentation.

Changes to Illinois Child Bereavement Leave Act

The Illinois Child Bereavement Leave Act was recently amended and requires covered employers to review their policies and procedures for compliance. As a reminder, the law has the same eligibility and coverage requirements as the federal Family and Medical Leave Act and therefore only applies to employers with 50 or more employees.

Under the Act, employees may take up to two weeks, or 10 working days, of unpaid leave time for any of the events covered by the Act to grieve, to attend a funeral, or make arrangements necessitated by the death of a family member.

Effective January 1, 2023, the definition of "covered family members" was added to expand the application of the law to the employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent. It previously applied only to an employee's son or daughter who is a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. Because of the expanded application of the law, it may also be cited as the Family Bereavement Leave Act instead of the Child Bereavement Leave Act.

The law also now permits employees to use the leave when they are absent due to a miscarriage or stillbirth, an unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure, a failed adoption match or surrogacy agreement, an adoption that isn't finalized because it is contested, or a diagnosis that negatively impacts pregnancy or fertility.

Practice Tip:
Employers should review their bereavement leave policies to ensure that they include "covered family members" and allow leave for additional reasons set forth above.

Wisconsin Appellate Court's Ruling on Proximity of Termination

In Brian Xiong v. Board of Regions of the University of Wisconsin System, 3:20-cd-242 (March 9, 2023), the 7th Circuit considered a case involving allegations of discrimination under Title VII as well as retaliatory discharge. Mr. Xiong was hired as the Director of Affirmative Action for the University of Wisconsin Oshkosh. The court held that based on the evidence a jury could find that Mr. Xiong's may not have been terminated had he not filed the Title VII complaint.

With respect to his allegations of discrimination, the court found that Mr. Xiong's claim failed to properly allege the reasons provided by the University for his termination. That is, he was not able, in the lower court, to demonstrate that the actions of employees of the University system could have potentially based their decision to fire him upon his Hmong heritage.

With respect to the retaliatory discharge claim, the court found that Mr. Xiong raised concerns about potential discriminatory hiring and a potentially lower payment for his employment than other similarly situated employees. This met the definition of a statutorily protected activity.

The court overruled the United States District Court, Western District of Wisconsin, and held that Mr. Xiong's firing the next day after making a complaint could have been determined by a jury to have been caused by his engagement in that statutorily protected activity. The court held that while the lower court determined that Mr. Xiong could have been terminated as a result of insubordination, it was not the role of the 7th Circuit or the District Court to determine what a jury might determine was the actual cause of Mr. Xiong's termination.

Practice Tip:
As with all terminations which involve an individual in a protected class, it is crucial to establish a written record of the terminated employee. Also, avoid the appearance of impropriety with a termination that could conceivably be linked with a complaint to their protected class to raise their protected rights.

In this case, it was almost ludicrous that the University chose to terminate Mr. Xiong only one day after he had raised concerns about discriminatory hiring and his own lower pay due to his minority status; had the University thought this through, they likely would have realized that although it was clear Mr. Xiong may have been terminated for his insubordination, that next-day casual connection was easy for the Appeals Court to establish in order to send this case to a jury.

Illinois' Worker's Compensation Act Not Bar to Biometric Claims

In a case of first impression, the Illinois Supreme Court held that the exclusive remedy provisions of the Illinois Workers' Compensation Act 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.

No Retaliation By Indiana Employer Against Employee Demoted for Not Reporting Sexual Harassment Claim

In the case of Alley v. Penguin Random House, No. 21-3158 (7th Cir. 2023), the Seventh Circuit upheld the finding of the lower court for the Northern District of Indiana that the plaintiff's former employer did not retaliate against her by demoting her from her position as a group leader to forklift operator because she failed to notify the human resource department of a claim of sexual harassment by one of her female workers.

Although company policy and procedure required its supervisors to advise the company of any harassment or discrimination claims raised by an employee, the plaintiff chose to conduct her own independent investigation. The lower court granted summary judgment and the Seventh Circuit affirmed the dismissal of plaintiff's claim.

The court was not dissuaded by plaintiff's argument that her demotion was in retaliation by the company for her own separate reporting of alleged sexual harassment against plaintiff by the same person whom she was investigating for harassment against the employee.

Practice Tip: A company is well within its rights to terminate or demote an employee, particularly a supervisor or higher-ranked employee, who fails to follow a known company practice and procedure that requires prompt notification to the management of the human resource department about a complaint of harassment and/or discrimination by another employee.

Illinois Private Organizations Can Be Held Liable for Discrimination as Places of Public Accommodations

On August 19, 2022, the Second District Appellate Court of Illinois in M.U. v. Team Illinois Hockey Club, Inc., et al., 2022 IL App (2d) 210568, held that plaintiff could maintain a cause of action for discrimination against a private organization under the section of the Illinois Human Rights Act (the "Act") which prohibits discrimination by a place of public accommodation because the private organization leases and operates a public ice arena.

Plaintiff, a high schooler who played hockey for Team Illinois Hockey Club ("Team Hockey"), was banished from her team after informing the coach that she struggled with mental health and suicidal thoughts. Team Hockey also prohibited any other players and families from contacting plaintiff while she was banned. Plaintiff sued Team Hockey and a related organization for disability discrimination under the Act alleging they denied or refused her the full and equal enjoyment of facilities, goods, and services of a public place of accommodation. The trial court dismissed the complaint based on its finding that Team Hockey, as a private organization, was not within the Act's definition of a "place of public accommodation," and its leasing of a public ice rink did not convert it into a place of public accommodation.

In reversing the trial court's dismissal, the appellate court found that although Team Hockey as a private organization was not a place of public accommodation, it was not immune from liability under the Act. An athletic organization may nevertheless be subject to civil rights laws if it exercises sufficient control over a place of public accommodation by, for example, leasing or operating the venue where its public sporting events are held. As such, because Team Hockey barred plaintiff based on her disability from participating in Team Illinois events being held at a place of public accommodation it leased and operated, it was not immune from liability under the Act.

The appellate court further held that once plaintiff had earned her spot on the hockey team, defendant could not deny because of her mental disability the privilege of her participation at athletic events held at places of public accommodation.

Practice Tip:
The Act provides that it is a civil rights violation for any person based on unlawful discrimination to deny or refuse the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation. While there are enumerated examples of what constitutes a place of public accommodation in the Act, this case demonstrates that liability can extend to Illinois entities beyond those which are defined in the Act, even private organizations based on

Wisconsin Court Determines Non-Compete & Confidentiality Clauses Can be Invalid on Their Face

In Diamond Assets LLC v. Godina, 2021AP1079, Wis. Ct. App., the Wisconsin Court of Appeals considered whether certain restrictive covenants could be subject to a motion to dismiss and potentially be dismissed without any discovery being conducted by the parties.

Plaintiff was a salesperson for an IT firm, and she signed a confidentiality agreement and non-compete clause. On her last day as an employee, she emailed "confidential information" to a third party. The company filed a complaint alleging breach of contract of both the confidentiality agreement and non-compete clause in light of this alleged communication by the employee.

Wisconsin statute 103.465 controls whether any restrictive covenant in an employment contract is valid. The statute states in relevant part that such a restrictive covenant is "lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principle. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void, and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."

To be enforceable the restraint must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit, 3) provide a reasonable territorial limit, 4) not be harsh or oppressive as to the employee, and 5) not to be contrary to public policy.

The employee alleged that the confidentiality and non-compete clauses were unreasonable on their face. The court found that both clauses were not enforceable under Section 103.465, finding that the clauses were not reasonable and did not meet the requirements of Wisconsin case law. As a result, the court dismissed all claims by the employer against the employee as both clauses were found to be illegal.

Practice Tip:
Wisconsin employers should closely scrutinize their confidentiality and non-compete provisions, as the court in Diamond Assets found that any such clauses can 1) be subject to a motion to dismiss without any discovery being conducted at all, and 2) can be found violative of the relevant statute on their face.

Biden Signs "Speak Out Act" Into Law

On December 7, 2022, President Biden signed the Speak Out Act into law.

The Act prohibits the judicial enforceability of a nondisclosure clause or non-disparagement clause agreed to before a dispute arises involving sexual assault or sexual harassment in violation of federal or state law. As such, once an allegation of sexual assault and/or sexual harassment is made, a dispute has arguably arisen. Employers may under those circumstances include enforceable non-disclosure and non-disparagement clauses in agreements resolving allegations of sexual harassment if agreed to by executing claimant-employee. But an employer may not enforce a non-disclosure and/or non-disparagement provisions in a sexual harassment or sexual assault situation if the agreement was entered into before an allegation of sexual harassment or sexual assault being made.

Practice Tip:
The Act is consistent with Illinois' existing Workplace Transparency Act which requires specific language to be included in agreements purported to be signed by employees who have made claims of sexual harassment. Employers in Indiana, Wisconsin, and other states should review their employment agreements and policies to

Newsletter Contributors

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

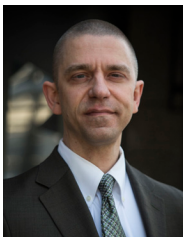
View more information on our **Labor & Employment practice.**

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**

Chris Puckelwartz Named Income Member



We are pleased to announce that Chris Puckelwartz has been elected to Income Member!

Chris has been a longtime valuable asset to our General Liability team, having successfully represented many of the largest corporations and retail chains in the U.S. He embodies firm culture, values and commitment to securing the best results for our clients. Please join us in congratulating Chris on a well-deserved advancement!

Downey & Lenkov Gives Back During the Holidays

In lieu of sending holiday baskets this past year, Downey & Lenkov made monetary donations to the Greater Chicago Food Depository, Innocence Project and Earth Justice.

Upcoming **Events**

- **4/13/23** - Jeanne Hoffmann and Brian Rosenblatt will participate at the 15th Anniversary of the LAUNCH Music Conference and Festival in Lancaster, PA. For more information and to register, click here.

Downey & Lenkov Attorneys Selected to Super Lawyers & Leading Lawyers

8 attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their field across both Illinois and Indiana. 10 attorneys have also been selected to Leading Lawyers' 2023 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, Margery Newman, Brian Rosenblatt, Jessica Jackler and Samuel Levine have been selected to both exclusive lists. Please join us in congratulating our selected attorneys!

Read the full article here.