Downey & Lenkov LLC

Labor & Employment Newsletter

October 2023

Illinois Mandatory Pay and Transparency in Job Postings

On August 11, 2023, the Illinois Equal Pay Act (IEPA) was amended to include mandatory pay transparency in job postings for most Illinois employers. The new law will be effective on January 1, 2025.

The new law makes it unlawful for an employer with 15 or more employees to fail to include the pay scale and benefits for a position in any specific job posting. "Pay scale and benefits" is defined as the "wage or salary, or the wage or salary range, and a general description of the benefits and other compensation, including, but not limited to, bonuses, stock options, or other incentives the employer reasonably expects in good faith to offer for the position, set by reference to any applicable pay scale, the previously determined range for the position, the actual range of others currently holding equivalent positions or the budgeted amount for the position."

The inclusion of a hyperlink to a publicly viewable webpage that includes the pay scale and benefits satisfies the disclosure requirements. The disclosure requirement also applies to a third party who is engaged by an employer to post a job.

The law applies to positions that (i) will be physically performed, at least in part, in Illinois or (ii) will be physically performed outside of Illinois, but the employee reports to a supervisor, office, or other work site in Illinois.

The new law also requires an employer to announce, post, or otherwise make known all opportunities for promotion to all current employees no later than 14 calendar days after the employer makes an external job posting for the position.

An employer or employment agency is not prohibited from asking an applicant about his or her wage or salary expectations for the position the applicant is applying for. However, an employer or employment agency shall disclose to an applicant for employment the pay scale and benefits to be offered for the position prior to any offer or discussion of compensation and at the applicant's request, if a public or internal posting for the job, promotion, transfer, or other employment opportunity has not been made available to the applicant. Per a prior law, employers in Illinois are also prohibited from asking job applicants for information about their past compensation and benefits during the hiring process.

Employers will also be required to make and preserve records that document the pay scale and benefits for each position, as well as the job posting for each position.

The failure to comply with the new law may result in complaints to be handled by the Illinois Department of Labor (IDOL). If the IDOL finds a violation of the new law, employers may be subject to fines of up to $500 for a first offense, $2,500 for a second offense, and $10,000 for a third or subsequent offense.

Practice Tip: Although the new law does not go into effect until 2025, employers in Illinois, or that employ workers in Illinois, should prepare to comply with its requirements well in advance to avoid potential claims and penalties. Internally reviewing pay information may also help employers identify pay disparities that may be based on protected characteristics and help to mitigate risk of discrimination or equal pay claims. Employers should consider conducting an audit of their pay practices to identify and address potentially unlawful pay disparities.

Form I-9 Changes Effective Now

Beginning August 1, 2023, the new Form I-9 became available for use by employers which includes several significant revisions including the ability by employers to verify new employees remotely. The old version will remain effective through October 31, 2023, but beginning November 1, 2023, employers who fail to use the new Form I-9 to verify new employees may be subject to penalties.

An overview of the Form I-9 changes includes:

- Reduced Sections 1 and 2 to a single sheet. No previous fields were removed. Multiple fields were merged into

fewer fields when possible, such as in the employer certification.

- Moved the Section 1 Preparer/Translator Certification area to a separate Supplement A that employers can use when necessary. This supplement provides three areas for current and future preparers and translators to complete as needed. Employers may attach additional supplements as needed.
- Moved Section 3 Reverification and Rehire to a standalone Supplement B that employers can use as needed for rehire or reverification. This supplement provides four areas for current and subsequent reverifications. Employers may attach additional supplements as needed.
- Removed use of "alien authorized to work" in Section 1 and replaced it with "noncitizen authorized to work" and clarified the difference between "noncitizen national" and "noncitizen authorized to work."
- Ensured the form can be filled out on tablets and mobile devices by downloading onto the device and opening in the free Adobe Acrobat Reader app.
- Removed certain features to ensure the form can be downloaded easily. This also removes the requirement to enter N/A in certain fields.
- Improved guidance to the Lists of Acceptable Documents to include some acceptable receipts, guidance, and links to information on automatic extensions of employment authorization documentation.
- Added a checkbox for E-Verify employers to indicate when they have remotely examined Form I-9 documents

Practice Tip: Employers should start using or transition to using the new Form I-9 prior to November 1, 2023 to avoid penalties.

Employee Workplace Incidents Not So Severe or Pervasive as to Support Claim of Discrimination or Hostile Work Environment

In the case of *Hambrick v. Kijakzi*, No. 22-3217 (7th Circuit 2023), the Seventh Circuit Court of Appeals affirmed the decision of the district court that the various claims of alleged severe or pervasive workplace incidents raised by the plaintiff employee did not support her claim against her employer of being discriminated or retaliated against or creating a hostile work environment.

Plaintiff, a 53-year-old Black woman, worked as a service manager for the Social Security Administration. She alleged that her supervisor and peers regularly harassed her based on her age and race. At one point, she was moved from an office to a cubicle, unlike her counterpart managers. She would receive emails rather than in-person requests and inquiries and would be "bombarded" with emails about how her cases were progressing.

She applied for other roles with SSA but did not receive some of them including one where a younger white male was given the requested role. The white employee came with high recommendations whereas plaintiff received a qualified recommendation ("with reservations").

She also argued that she was not properly recognized for carrying a heavy workload and securing various recommendations.

In granting summary judgment to the employer, the district court found that the "totality of undisputed facts… consisted of unremarkable workplace disagreements" and plaintiff's "dissatisfaction with her supervisor, heavy workload and lack of recognition" failed to establish a hostile work environment.

In affirming the lower court, the Seventh Circuit also noted that plaintiff failed to demonstrate that any of the alleged harassing incidents "were based on membership in a protected class".

Practice Tip: Just because an employee is in one or more protected classes does not automatically mean that there is validity to their claims of discriminatory or hostile treatment by their employer. Well-documented and well-reasoned evidence an employer has maintained regarding how they have treated an employee can sometimes be enough to overcome a Title VII claim.

Former Hospital Employee Who Requested to Work Remotely and Not Wear a Mask Loses ADA Claims

On August 7, 2023, the Seventh Circuit Court of Appeals affirmed a summary judgment ruling in favor of the employer-hospital in *Kinney v. St. Mary's Health, Inc.*, No. 22-2740 (7th Cir. 2023). The case was brought in *Kinney v. St. Mary's Health, Inc.*, No. 3:20-cv-00226-RLY-MPB, 2022 WL 4745259 (S.D. Ind. Aug. 31, 2022) by a former employee who claimed she was unlawfully forced to resign back in March 2020 because the hospital rejected her requests to work remotely and not wear a mask on-site at the hospital.

The plaintiff-employee began her employment with the hospital in 2016. In 2018, the hospital approved her request for intermittent medical leave due to anxiety. Like many other employees at the time, she began working remotely in March 2020 because of the COVID-19 pandemic. When safety protocols were developed by the hospital, her coworkers returned to work in person at the hospital, but the plaintiff-employee kept working remotely without asking permission or notifying her supervisor of her decision to remain at home full-time. The plaintiff-employee also asserted she could not wear a mask or other face covering in compliance with the hospital's COVID-19 protocol because face coverings exacerbated her anxiety.

When her absence from the hospital led to complaints and questions about her job performance, the hospital told the plaintiff-employee that she had to return to work on-site at least several days each week. The plaintiff-employee submitted a doctor's note requesting that she be allowed to work solely from home to avoid having to wear a mask in the hospital. The hospital denied this request and a later request for accommodation, the plaintiff-employee eventually resigned.

She sued the hospital for many claims, including under the ADA alleging that the employer failed to accommodate her disability, discriminated against her by denying her requested accommodation, constructively discharged her, and retaliated against her.

The Indiana district court entered summary judgment in favor of the employer-hospital on all counts and the Seventh Circuit affirmed. Specific to the ADA claim, the court found that no reasonable juror could find the plaintiff-employee could perform certain essential functions of her job without being present on-site because she oversaw an entire department and had numerous supervisory and liaison-type responsibilities for employees working on-site. The plaintiff-employee was thus not a qualified individual for the job under the ADA, even if she had been, the accommodation she requested to not wear a mask was not reasonable in light of the pandemic safety protocols in place at the time.

Practice Tip:

Employers must evaluate accommodation requests on a case-by-case basis and engage in the interactive process before decision-making. The employer in this case evaluated the employee's specific job functions to determine whether she could work full-time at home before rejecting her request.

Because the employee was not able or willing to perform the in-person work that was essential to her position while wearing the personal protective equipment that her job required, the hospital – and the court – properly found that it was not obligated to grant her requests.

To determine whether a particular job function is essential, courts consider written job descriptions, and the consequences of not requiring that the function be performed, among other factors. However, determining whether a specific job has essential functions that require in-person work has become much more of a case-specific inquiry since the pandemic and employers should carefully consider each request before making a decision

Employers May Face Sanctions for Employees' Failure to Preserve Texts on Personal Cell Phones

In *Miramontes v. Peraton, Inc.*, No. 3:21-CV-3019-B, 2023 WL 3855603 at *6 (N.D. Tex. June 6, 2023), a federal district court for the N.D. Texas, Dallas Division, addressed if an employer can be deemed liable for an employee's failure to preserve business-related texts received on the employee's personal cell phone. The court held that whether an employer is required to preserve such texts depends on the case's specific circumstances. The court affirmed that an employer may face punishment for an employee's failure to do so with the severity of the punishment dependent on the specific circumstances.

Plaintiff alleged that he was selected for a reduction in force due to his age. Peraton acquired the company where Plaintiff had been employed for over twenty-five years. Peraton initiated layoffs in a process that was internally referred to as "Project Falcon." Plaintiff was one of the employees laid off in the first round of layoffs. He claimed that his supervisor told him twice that he was not being laid off due to his age.

Plaintiff's counsel sent a letter pre-suit that included a settlement demand and insisted that Peraton preserve all documents regarding Plaintiff's claims, including any text messages. The company issued a litigation hold letter to its employees. The communication to Peraton's employees did not mention the need to preserve any text messages on employees' personal devices.

Plaintiff filed suit alleging that he was laid off by Peraton due to his age. A manager from Peraton, Victor Stemberger, admitted during his deposition that he was involved in the decision to terminate Plaintiff. He admitted that "immediately" after receiving the demand letter and before suit was filed, he sent "one or two" text messages on his personal phone to another manager allegedly involved in selecting Plaintiff to be laid off by Peraton. Mr. Stemberger deleted and could not produce the texts because no one at the company told him to save text messages.

Peraton filed a motion for summary judgment premised on the argument that Plaintiff's layoff was not a pretext for discrimination. Plaintiff filed a motion for sanctions, claiming that Peraton failed to preserve text messages that were critical to his claim. Plaintiff argued that the failure to preserve the texts warranted entry of judgment in his favor.

The court considered the following factors when rendering its decision: whether Peraton controlled the texts and had a duty to preserve them; whether the texts were intentionally destroyed by Peraton; whether Peraton acted in bad faith; and whether Peraton's failure to preserve the text messages prejudiced Plaintiff's claim. Peraton argued that it did not control the text messages because it did not provide the managers with their cell phones, the texts were on their personal devices, and no policy signed by the managers gave the company the right to obtain the messages.

The court held in favor of Plaintiff on each of the five factors, stating that because employees regularly conduct business on their cell phones, Peraton had control over the text messages and destruction of the same. The court determined that the messages were intentionally destroyed despite Peraton receiving a litigation hold letter requiring it to preserve such information. The court denied Peraton's motion for summary judgment as a sanction for its failure to preserve the text messages.

Federal courts, including those in Illinois and Indiana, follow Federal Rule of Civil Procedure 37(e) regarding the imposition of sanctions when a party fails to preserve electronically stored information (ESI) where such ESI is relevant to impending litigation. Federal Rule of Civil Procedure 37(e) authorizes courts to issue sanctions for spoliation of ESI where four conditions are met: (1) the ESI at issue should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost; (3) the loss is due to a party's failure to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery.

Once those four conditions are satisfied, the court must determine if (1) the non-offending party has been prejudiced from the loss of ESI and/or (2) the offending party acted with the intent to deprive another party of the information's use in the litigation. If the court determines that the non-offending party has been prejudiced, Rule 37(e)(1) allows the court to "order measures no greater than necessary to cure the prejudice." If the offending party acted with intent, Rule 37(e)(2) allows the court to (a) presume that the lost information was unfavorable to the party, (b) instruct the jury that it may or must presume the information was unfavorable to the party, or (c) dismiss the action or enter a default judgment.

Practice Tip: It is critical that employers have policies in place regarding the retention of business-related information, including emails, and texts, on both company and personal devices used by employees because failure to do so can result in severe consequences, including sanctions.

Summary Judgment Reversed by Seventh Circuit in ADA Accommodation Case

In 2018, the EEOC filed suit against Charter Communications, LLC in a Wisconsin federal court alleging disability discrimination for failing to accommodate an employee. The employee worked at a call center for the defendant-employer. Cataracts in both eyes made his vision blurry and made seeing in the dark difficult, thus making nighttime driving unsafe. Public transit was not an option on the employee's schedule. The employee asked for an earlier work schedule to reduce his nighttime driving for his long drive home from work. The employer granted his first request for a thirty-day change but denied his request to extend the schedule.

The district court granted summary judgment to the employer holding that the employer had no obligation to accommodate the employee's commute because his disability did not affect his ability to perform any essential function of his job once he arrived at the workplace. EEOC v. Charter Commc'ns LLC, No. 18-cv-1333-bhl, 2021 WL 5988637 (E.D. Wis. Dec. 17, 2021).

On appeal, the Seventh Circuit Court of Appeals reversed the summary judgment ruling in favor of the employer. Equal Employment Opportunity Commission v. Charter Communications, LLC, No. 22-1231 (7th Cir. 2023). The main question on appeal was whether the employee was entitled to a modified work schedule as an accommodation to make his commute safer. The court concluded that the answer is "maybe" and that the case should not have been resolved on summary judgment.

The appellate court found that there is no bright-line rule as to when an employee's disability interferes with essential job attendance or whether particular accommodations are reasonable. However, if a qualified individual's disability substantially interferes with the employee's ability to commute to work and attendance at work is an essential function, an employer may sometimes be required to provide a commute-related accommodation when reasonable under the circumstances. It further found that the requested accommodation, a second thirty-day change to the employee's work schedule, was not, at least as a matter of law, unreasonable given the employee's circumstances and his job with this particular employer. His vision impairment interfered with commuting to work safely, and attendance was an essential function of his job. There was also a genuine dispute of material fact as to whether the employee was actually disabled. The court also found summary judgment to be improper because the employer did not demonstrate that the accommodation would have imposed an undue hardship.

The court noted, however, that whether an employee with a disability can show that the employee's commuting situation is the unusual exception requiring accommodation from an employer will depend on many facts, including the benefits of the accommodation, alternatives to the accommodation, the cost to the employer, and consequences for others.

Practice Tip: This ruling implies that reasonable accommodations may extend to commuting, which previously was outside the scope of an employer's obligations under the ADA. This broad concept could open the door to failure to accommodate claims. Employers should carefully consider all requests for accommodations by employees and engage in the mandatory interactive process to help mitigate the risk of a failure to accommodate claims.

NLRB Significantly Alters Handbook Rules

On August 2, 2023, the National Labor Relations Board (NLRB) changed the law again governing employee handbooks. The NLRB's decision in *Stericycle, Inc.* overruled the employer-friendly precedent in place for the past six years under Boeing Co. (2017), which was later refined in *LA Specialty Produce Co.* (2019).

The NLRB explained that the primary problem with the standard previously in place under *Boeing and LA Specialty Produce* was that it improperly permitted employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7 of the National Labor Relations Act. According to the NLRB, under that prior standard, an employer was not required to narrowly tailor its rules to promote its legitimate and substantial business interests without unnecessarily burdening employee rights.

Under the new standard adopted in *Stericycle,* the NLRB's General Counsel must prove that a challenged rule has a "reasonable tendency to chill employees from exercising their Section 7 rights." If the General Counsel does so, then the rule is presumptively unlawful. However, the employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain. This rule will be interpreted from the perspective of the employee and on a case-by-case basis.

The new standard applies retroactively to pending cases.

Practice Tip: Typically, it is recommended that employers review and revise employee handbooks on annual basis. With the NLRB's employee-friendly ruling impacting workplace policies, employers should review current rules and policies to assess their compliance with the recent ruling. Specifically, employers should carefully review their workplace civility rules, investigative/confidentiality rules, non-disparagement rules, social media civility policies, no recording policies, insubordination rules, and codes of conduct policies which may be impacted by this new ruling.

NDIL: BIPA Damages are Discretionary

On June 30, 2023, in *Rogers v. BNSF Railway, Co.,* No. 19-cv-03083 (N.D. Ill. June 30, 2023), the Northern District of Illinois (NDIL) vacated a $228 million damages award previously entered in the first jury trial arising under Illinois' Biometric Information Privacy Act (BIPA) and ordered a new jury trial limited to the determination of damages only.

The underlying case was brought on behalf of a class of truck drivers who claimed that BNSF illegally required them to scan their fingerprints when entering its railyards. The jury found that BNSF violated BIPA 45,600 times based on the estimated number of truck drivers in the class. The jury also determined that the BIPA violations had been "reckless or intentional" which made the damages $5,000 per violation instead of $1,000 for a "negligent" violation. The judge awarded damages in the amount of $228 million by multiplying 45,600 by $5,000.

The court granted a new trial on damages following motions by both parties. The NDIL agreed with BNSF on its argument that the damages amount is a question for a jury. It relied on Cothron v. White Castle Sys., Inc., 2023 IL 128004, an Illinois Supreme Court case which held that BIPA damages are discretionary rather than mandatory. The Court also concluded that because damages under BIPA are discretionary, a damages award is a question for a jury.

Practice Tip: This NDIL holding is an important decision for employers because it may have the impact of limiting BIPA damages to plaintiffs. Notwithstanding, employers should mitigate their risk of BIPA violations by complying with the statute's requirements.

Department of Labor Announces Proposed Overtime Rule

On August 23, 2023, the U.S. Department of Labor (DOL) announced a notice of proposed rulemaking that would restore and extend overtime protections to more than 3 million salaried workers.

As a refresher, unless specifically exempted, an employee covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rate of pay. This is referred to as "overtime" pay.

Currently, to fall within the exemption to overtime, an employee generally must:

1. be paid a salary, meaning that they are paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed;

2. be paid at least a specified weekly salary level, which is $684 per week (the equivalent of $35,568 annually for a full-year employee) in the current regulations; and

3. primarily perform executive, administrative, or professional duties, as provided in the DOL's regulations (the "duties test").

Under the proposed rule, the salary level would increase from $684 per week to $1,059 per week which would guarantee overtime pay for most salaried workers earning less than $55,000 per year.

The DOL stated it does not intend to change the duties test.

The DOL proposed rule has not been finalized yet and it will first undergo a comment period.

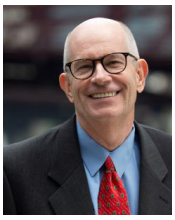
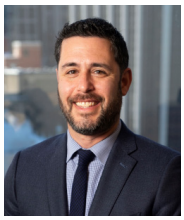
Practice Tip: Employers should closely monitor this proposed rule, and if implemented, they must audit their pay practices to ensure compliance. If employees are misclassified as exempt, employers could subject themselves to significant damages and penalties.

Firm **News**

Downey & Lenkov Hosted Education Seminar at the Omaha Zoo & Aquarium

Capital Members of Downey and Lenkov, Storrs, Michael, and Kirsten, co-hosted an educational seminar on September 12, 2023, at Omaha's Henry Doorly Zoo & Aquarium.

The seminar included discussions of Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri and Nebraska. The topics covered were catastrophic claims, pain management referrals, unfair claims settlement practices, subrogation, and third-party suits to name a few. Attendees received 3 CE credits for the states of KY and TX for attending the seminar.


UPCOMING WEBINAR

Examples of Employer Do's & Don'ts

Labor & Employment
1/24/2024
Jessica Jackler and Ryan Danahey


REGISTER NOW

Natalie Christian Returns to Downey & Lenkov

Natalie concentrates her practice in insurance and workers' compensation defense. As an experienced claims examiner, Natalie brings a unique perspective to the firm, previously working for two international insurance companies.

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

Downey & Lenkov is proud to participate in USLI's October Together—Stronger Together Silent Auction benefiting Breastcancer.org.

October Together is a month of fundraisers and events where all proceeds benefit Breastcancer.org, a non-profit organization that helps women and their families by providing expert medical information about breast health and breast cancer, as well as peer support through their large online community.

The silent auction features a variety of items donated by companies. This year, Downey & Lenkov donated "Spa Day at Home.

Kirsten Kaiser Kus Selected As Lawyer of the Year

We are pleased to announce that Kirsten Kaiser Kus is again a recipient of the Best Lawyers® award. In addition to receiving the Best Lawyers® designation, she was also named their 2024 "Lawyer of the Year". She has received this accolade for her work in Workers' Compensation Law - Employers. Only a single lawyer in each practice area and community is honored with this prestigious award.

Management & Professional Liability Alliance™

We are a proud co-originating firm of the Management & Professional Liability Alliance (MPLA) which consists of independent law firms which share a commitment to excellence, affordable representation, and integrity in the representation of management and professionals.

The independent law firms of MPLA have extensive experience in handling all types of defense litigation including employment and all professional lines. MPLA firms practice in multiple states including Illinois, Indiana, and Wisconsin amongst several others.

They offer complimentary webinars and actively participate in regional and national conferences. For more information, please contact Storrs Downey and visit the website at https://www.mplalliance.org/

Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey.

Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

If you would like a copy of our other prior webinars, please Email us at mkt@dl-firm.com.

Newsletter Contributors

Storrs Downey, Jessica Jackler and Kirsty Singler 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

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent

Offices located in:

- **Chicago, IL**
- **Crown Point, IN**
- **Indianapolis, IN**
- **Milwaukee, WL**