Downey & Lenkov LLC

Labor & Employment Newsletter

March 2024

New Illinois Paid Leave Laws

Recently, several new paid leave laws were enacted in Illinois including the Illinois Paid Leave for All Workers Act (PLFWA), the new Cook County Leave Ordinance, and the new Chicago Paid Leave and Paid Sick and Safe Leave Ordinance.

The PLFWA is entirely new and became effective January 1, 2024.

The Cook County ordinance replaced the Cook County Earned Sick Leave Ordinance and became effective December 31, 2023.

The Chicago Paid Leave and Paid Sick and Safe Leave Ordinance will take effect on July 1, 2024 and will replace the current Chicago Paid Sick Leave Ordinance.

Below is a portion of a chart that was prepared by the City of Chicago with an overview of each law and their differences. View the full chart here: Paid Leave Ordinance and Regulations

Paid Leave Ordinance and Regulations

	City of Chicago – Paid Leave and Paid Sick and Safe Leave	Cook County – Paid Leave Ordinance	State of Illinois – Paid Leave for All Workers Act (PLAWA)
Effective Date	12/31/23 *Delayed implementation until 7/1/24	12/31/23 *Enforcement begins 2/1/24	1/1/2024
Where does it apply?	Within the City of Chicago.	All municipalities within Cook County, except Chicago, unless a municipality has opted into IL Paid Leave for All Workers Act (PLAWA) or has an equivalent ordinance.	Entire State of Illinois. Some jurisdictions (i.e. Cook County, City of Chicago) may have their own laws.
Where does it apply?	"Covered Employees" - means any employee who performs at least 80 hours of work for an Employer in a 120-day period while physically present within the geographic boundaries of the City of Chicago (this includes domestic workers and individuals that travel within the boundaries of the city of Chicago on compensated time).*Some exceptions apply.	"Employees" are covered by the Cook County Paid Leave Ordinance if: (1) you work for an employer in Cook County; and/or (2) your employer has a place of business in Cook County. This also includes Domestic Workers. *Some exceptions apply.	"Employees" - individuals who perform work in Illinois for an employer that does business in Illinois. *Some exceptions apply.
For what reasons can leave be used?	Paid Leave – for any reason. Paid Sick Leave – for illness, injury, family illness, victim of domestic violence, victim of sex offense or trafficking, business closed for public health emergency, family care, etc.	For any reason.	For any reason.

Practice Tip:
Illinois Employers must comply with these new laws and determine which one they are covered by to avoid potential violations and penalties. The rules are still being finalized for the new laws and may still be amended. If you have any questions about these laws, please contact us.

Request for Transfer to Different Shift Not ADA Protected

The Seventh Circuit Court of Appeals upheld the Illinois Central District trial court's order granting of summary judgment to an employer on a claim that a city police department violated a former police officer's rights by not granting his request to be transferred to another shift because of his sleep apnea condition. *Brooks v. City of Pekin*, No. 23-2140 (7th Cir. 3/8/24).

The city police department offered plaintiff various other accommodations including allowing plaintiff to return home to take a nap during his shift as well as providing him with staggered shifts, rest periods and approved naps at work during a shift. Plaintiff agreed to try these accommodations but before these accommodations could be undertaken and while plaintiff was on vacation, various improprieties and misconduct by plaintiff came to light. As a result he was placed on unpaid leave pending an investigation and plaintiff thereafter retired from the police force.

In granting summary judgment in favor of the city police department, the trial court, as affirmed by the Seventh Circuit, concluded that the city police department provided plaintiff with reasonable accommodations and plaintiff's demand to change his shift was not reasonable nor necessary. Additionally, plaintiff's own physician opined that plaintiff required no form of accommodation.

Practice Tip:
Engaging in a meaningful interactive process with an employee who seeks an accommodation and providing reasonable accommodations, where possible, to that employee will go a long way towards defeating a possible future ADA claim by that employee.

Chicago Company to Pay $70,000 to Settle EEOC Religious Discrimination Lawsuit

A Chicago company, Blackwell Security Services, Inc., has agreed to pay $70,000 to settle a religious discrimination lawsuit filed by the EEOC in the U.S. District Court for the Northern District of Illinois (Civil Action No.1:23-cv-14110).

In its lawsuit, the EEOC alleged that Blackwell refused to accommodate a Muslim employee's religious practice of wearing a beard. The now-former employee worked as a concierge and had a beard when he was hired. He was told by a supervisor that it was company policy that all employees be clean-shaven. He requested an exemption from the policy to accommodate his religious practice, but he was told he had to shave his beard or be terminated. The employee shaved his beard to keep his job, causing him "significant distress" according to the lawsuit. The EEOC reported that the employee eventually left this job.

As part of the settlement, in addition to paying $70,000 to the employee, Blackwell also agreed to provide training to management employees regarding religious discrimination.

Practice Tip:

Employers must be aware that Title VII protects employees' religious beliefs and requires employers to make reasonable accommodations for employees' religious practices when doing so does not impose an undue hardship on the employer's business.

In the recent Supreme Court case, *Groff v. DeJoy*, the new standard for religious accommodations under Title VII made clear that "under hardship" is shown when a burden is substantial in the overall context of an employer's business rather than the previous lower standard which only required more than a de minimis cost. Under this standard, employers must show significant difficulty and expense to deny religious accommodation. Employers should therefore evaluate each request for religious accommodation on a case-by-case basis taking into consideration whether the burden would be substantial to its business.

Being Tardy to Work is Not Always a Protected Activity Under the ADA

In an ADA lawsuit filed by a former employee who suffered from PTSD arising out of her service in the Army Reserve, the Seventh Circuit Court of Appeals affirmed the jury's finding of liability on the employer's part and granted as a matter of law the dismissal of the ADA claim brought against her former employer. *Arroyo v. Volvo Group North America, LLC,* No. 23-1165 (7th Cir. 2/27/24).

The former employee, Arroyo, "arrived at work late several times and ultimately accumulated sufficient" late arrivals to result in a violation of the company's strict attendance policy which penalized employees who were even a few minutes late for work without a valid excuse for such tardiness. The company ultimately terminated her for such excessive tardiness.

Plaintiff sued her former employer and claimed she was discriminated against because of her disability and military status. The lower court found in favor of the employer and plaintiff appealed.

In affirming the lower court, the Seventh Circuit Court of Appeals held that where, as here, attendance was an essential function of the employee's job, the employer was not required to "accommodate unreliable attendance."

Practice Tip:
An employer can create a strict, written attendance policy and terminate employees, including even those with a disability or other protected class characteristics, as long as the policy is consistently applied to all employees and there is no legitimate, reasonable basis presented by the terminated employee for their late arrival at work.

Wisconsin Court Rules That Employees May be Discharged for Civil/Municipal Offenses

In *Oconomowoc Area School Dist. v. Cota & Labor and Industry Review Commission*, 2020 AP 1158, the Second District Court of Appeals in Wisconsin considered a case in which both plaintiffs had been terminated because they had allegedly retained funds after selling scrap metal owned by their employer (the "District"). Plaintiffs alleged that they were terminated due to citations they had received for this theft and therefore their terminations violated the Wisconsin Fair Employment Act ("WFEA") because that law prohibits discrimination based on an individual's "arrest record."

After engaging in extensive statutory interpretation, the court held that the LIRC had improperly found both plaintiffs had been wrongfully terminated. The court held that the WFEA only protects information received by an employer related

to criminal offenses. Given the fact that both plaintiffs had received civil/municipal citations related to the unsanctioned sale of the District's scrap metal and ultimately each paid a $500.00 fine, the court held that the terminations were appropriate.

Practice Tip:
The WFEA is an entirely separate and distinct set of regulations from federal employment law. In Wisconsin, termination for the type of criminal offense an employee engaged in must be scrutinized. Wisconsin employers would be wise to determine the exact categorization of any potential offense, and specifically, whether it was criminal, before considering it as a basis for termination.

7th Circuit Reversed Summary Judgment in Age Discrimination Case

In December 2023, the Seventh Circuit Court of Appeals reversed a summary judgment ruling in favor of the employer in an age discrimination case, *Vichio v. U.S. Foods, Inc.,* No. 22-1180 (7th Cir. 2023). In the underlying case, the plaintiff employee claimed he was fired and replaced by a younger person after a new younger supervisor started to give him negative reviews despite a long history of positive performance.

Between the years of 2013 and 2016, plaintiff had nothing but positive performance reviews. In 2017, a new 37-year-old supervisor was hired to oversee plaintiff, who was age 54 at the time. Within a month of the new supervisor's employment, plaintiff received his first negative performance review. Within two days of that negative review, plaintiff was placed on a performance improvement plan that was to "facilitate" plaintiff leaving the company. Another employee, who was the oldest employee in plaintiff's position, was likewise put on a performance improvement plan by the same supervisor. Shortly thereafter, plaintiff was terminated and was replaced by a 43-year-old individual.

Plaintiff sued the company for age discrimination. The company moved for summary judgment claiming that it terminated him for non-pretextual performance reasons and the lower court agreed and dismissed the case. He appealed.

In reversing the lower court's ruling, the Seventh Circuit found plaintiff presented sufficient evidence that would allow a reasonable jury to find that the employer engaged in age discrimination and that the newly found performance problems were merely pretext. It heavily relied on the fact that plaintiff's employment record was "virtually pristine" until the arrival of the new supervisor. Moreover, the court considered the fact that the company was already looking for his replacement while he was under a performance improvement plan which could indicate that his termination was "predetermined." Additionally, the court considered the fact that plaintiff was replaced by a younger employee after he was fired.

Practice Tip:
Even though the plaintiff in this case was replaced by an individual over the age of 40, courts still look at whether the employee is younger than the person they replaced. Employers must have a legitimate, non-discriminatory basis for terminating employees. In this case, the proffered reasons were deemed pretextual because their reasoning was not supported by the plaintiff's stellar performance history and the timing was suspicious after a much younger supervisor began overseeing plaintiff and quickly found reasons to terminate and replace him.

Tortious Interference: It's Not Always About False Statements

The Illinois Appellate Court recently addressed the issue of when tortious interference is actionable. *Grako v. Bill Walsh Chevrolet-Cadillac, Inc.,* 2023 IL App (3d) 220324 ¶ 53 (10/13/23). The court specifically focused on the third element of a tortious interference cause of action: "the intentional and unjustified interference by the Defendant that induced or caused a breach or termination of the 'expectancy'" and what is required to prove it.

Plaintiff, a former at-will employee of a full-service insurer, filed suit against Bill Walsh Chevrolet Cadillac, Inc., an independent contractor for the insurer by whom she was employed. After Plaintiff filed for bankruptcy and returned her vehicle to the dealership alleged that Defendant improperly leveraged their status as a client of her former employer, Ramza Insurance, to cause her termination.

The Circuit Court granted summary judgment in favor of Defendant on various grounds including no direct evidence that Defendant requested Plaintiff's termination or provided false information to Ramza insurance agents.

The Appellate Court reversed the Circuit Court's ruling.

In deciding this issue, the Circuit Court relied on Calabro v. Northern Trust Corp., which established that a party is not liable for tortious interference as a result of merely providing truthful information. The Appellate Court disagreed with the lower court's reliance on Calabro and stated that it mischaracterized the issue. Here, Plaintiff's claim was not based on information that was provided to her employer, but rather that Defendant leveraged his personal ties and influence over Ramza Insurance to get her fired. Thus, proof of falsity was not a requirement of her claim. The Appellate Court concluded that Plaintiff proved the allegation of coercion by providing text messages from Defendant memorializing his threat

to pull his business if she was employed at Ramza Insurance. The Appellate Court further reasoned that although Defendant's animosity towards Plaintiff would be a legitimate reason to refuse continued business with Ramza Insurance, they might have taken it a step further by applying financial pressure on Ramza Insurance to secure Plaintiff's termination.

Practice Tip:
The *Grako* decision emphasized that a tortious interference claim is not the same as a defamation claim where truthful statements serve as an absolute defense if the purported interference involves the conveyance of information. Instead, the Court stated that a tortious interference claim is not always alleging the conveyance of false information and a defendant can be liable for preventing a business opportunity for someone when based on providing truthful information to a third party with the intent of causing the termination of an existing or potential business relationship.

7th Circuit Rules in Favor of Employer in Disability Accommodation Case

On November 20, 2023, the Seventh Circuit Court of Appeals reached a decision in favor of an employer who denied a plaintiff's accommodation request to delay the start of her workday by 2 hours each day.

In *Smithson v. Austin*, No. 22-2566 (7th Cir. 2023), the plaintiff, a teacher who suffered from multiple medical conditions that regularly interfered with her ability to conduct classroom instruction requested several accommodations over many years, all of which were granted by her employer, including occasionally arriving late to work by 15 minutes. She later amended her request for flexible reporting time of up to two hours. The employer approved her to use sick leave for any absence up to two hours so long as it was not an undue hardship to the school schedule.

A few weeks after receiving the school's response, plaintiff reported that she would be late every day. However, the COVID-19 pandemic resolved the situation because of remote instruction and plaintiff transitioned to a work from home position which was acceptable to both parties.

Despite her remote position, she sued the school under the Rehabilitation Act (interpreted very similarly to the ADA) alleging disability discrimination and failure to accommodate for the time she was required to use sick leave when she arrived late.

The U.S. District Court for the Southern District of Indiana granted summary judgment in favor of the school and plaintiff appealed.

On appeal, plaintiff argued that the court erred in finding that she was unable to fulfill the essential functions of her position as a teacher, with or without an accommodation because she argued that regular early morning attendance was not essential to her position. The Seventh Circuit Court of Appeals affirmed the lower court's ruling finding that "… her employer is allowed to designate in-person attendance as an essential function, she has conceded that in-person attendance was necessary for teachers, and she was regularly unable to attend for up to a quarter of the designated school day, a significant part of the workday" and "[t]hat means that she is not a qualified individual as a matter of law." Therefore, her failure to accommodate and disability discrimination claims both failed as a matter of law.

Additionally, the court pointed out that the school should not be punished for previously granting plaintiff an accommodation that may have gone beyond its legal obligations. This included a delayed start time because her initial request for a delayed start time was limited to 15 minutes and infrequent and that limited measure of delayed arrival did not mean that physical attendance at school was not essential.

It went on to explain that an employer that goes further than the law requires in accommodating a disabled person, must not be punished for its generosity by being deemed to have conceded the reasonableness of a far-reaching accommodation.

Practice Tip:
While employers must generally consider accommodations for occasional absences under well-established case decisions, requests that limit regular and significant attendance most likely will not be considered a required accommodation under federal disability discrimination laws for certain positions such as teachers and positions in which in-person duties are considered essential.

Illinois First District Appellate Court At Odds with the Seventh Circuit on BIPA Coverage

The Illinois First District Appellate Court recently issued a ruling in *National Fire Insurance Company of Hartford and Continental Insurance Company v. Visual Pak Company, Inc.* that clarified coverage issues in favor of insurers denying coverage related to claims brought pursuant to the Illinois Biometric Privacy Act ("BIPA") 740 ILCS 14/15 (West 2016). In doing so, it directly and thoroughly distinguished a Seventh Circuit opinion concerning identical policy provisions in *Citizens Insurance Co. of America v. Wynndalco Enterprises, LLC*, 70 F.4th 987, 997 (7th Cir. 2023).

Visual Pak required temp agency staffers to clock in and out for work using fingerprint scans and found itself subject to a class action lawsuit under BIPA. It turned to several of its insurers, including Plaintiffs National Fire Insurance Company of Hartford, which held a general liability policy, and Continental Insurance Company, which held an excess/

umbrella policy, for coverage of these claims. While Plaintiffs denied coverage, Visual Pak was defended and indemnified through a third policy that covered employment practices. Visual Pak entered into a settlement in the class action and assigned its claims against Plaintiffs National Fire Insurance Company of Hartford and Continental Insurance Company.

Plaintiffs filed suit seeking a declaration that they did not owe a defense or indemnification to Visual Pak for the BIPA claims. When presented with a motion for summary judgment from these Plaintiffs, the trial court initially ruled that there was a question of fact as to whether Visual Pak was entitled to coverage. However, the court then reversed itself on reconsideration.

On appeal, the First District found that the BIPA claims constituted "advertising and personal injury" related to "oral or written publication, in any manner, of material that violates a person's right of privacy." Therefore, there was coverage under Plaintiffs' policies. However, analyzing the policies further, Plaintiffs' "violation of law" exclusion applied.

Plaintiffs' "violation of law" exclusion specifically referred to violations of the Telephone Consumer Protection Act ("TCPA"), the CAN-SPAM Act of 2003, The Fair Credit Reporting Act ("FCRA") and "any federal, state or local statute, ordinance or regulation, *other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.*"

BIPA was not specifically referred to in the "catch all" provision of the exclusion, but the First District held that the "violation of law" exclusions did exclude coverage for BIPA claims. BIPA, and the specific acts cited in the exclusion, all pertain to the protection of personal privacy interests. Moreover, the "catch all" provision clearly describes BIPA in substance.

As was noted in the opinion, this is a clear departure from the Seventh Circuit's treatment of an identical "violation of law" exclusion in *Citizens Insurance Co. of America v. Wynndalco Enterprises* where the Seventh Circuit went so far as to determine that the same "catch all" provision "swallowed" the coverage and was ambiguous, requiring it to find in favor of the insured. The First District disagreed, and clarified, that this "violation of law" exclusion did not swallow or nullify coverage. It only pertained to the specific acts or laws cited and did not exclude coverage for common law invasion of privacy.

Practice Tip:

In Illinois, the First District's thorough analysis and opinion in National Fire Insurance Company of Hartford and Continental Insurance Company v. Visual Pak Company, Inc. will shape future rulings in coverage actions. It should also influence companies that rely on collecting biometric data to seek more specific coverage, such as the business practices policy that covered Visual Pak, rather than relying on general liability policies in the face of a BIPA violation.

Firm **News**

Downey & Lenkov Attorneys Selected to Super Lawyers and Leading Lawyers

Nine attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their fields. Ten attorneys have also been selected for Leading Lawyers' 2024 rankings.

Capital Members Rich Lenkov and Storrs Downey; Income Members Margery Newman and Brian Rosenblatt; Associate Jessica Jacker; and Of Counsel Samuel Levine have been selected on both esteemed lists.

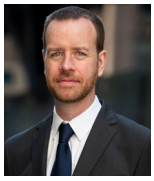
Read the full article here.

Downey & Lenkov has Been Named in the 2024 Best Law Firms® Ranking – Tier 1 in Construction Law

We're excited to share that Downey & Lenkov has been named in the 2024 Best Law Firms® rankings by Best Lawyers®. This year, we were selected as Tier 1 in Construction Law both nationally and regionally. Additionally, we've been ranked nationally and regionally for Construction Litigation and Workers' Compensation.

We appreciate the recognition and are thankful for the support! To view details about our rankings, visit our profile here.

Ryan Danahey and Jessica Jackler Presented Labor & Employment Webinar




On January 24, Income Member Ryan Danahey and Associate Jessica Jackler presented "Examples of Employer Do's & Don'ts." Ryan and Jessica provided employers' do's and don'ts to implement, as well as strategies to mitigate risk.

Downey & Lenkov Welcomes New Attorneys

Please join us in welcoming our new attorneys Mary Yong, David Ryan, Donn LaHaie and Kealia Hollingsworth.

Illinois

Mary has extensive experience in general insurance defense matters, including property, casualty, product liability and transportation claims. Mary represents clients in both state and federal courts from pre-litigation to trial.

David is a highly respected lawyer with over 30 years of experience in handling complex and valuable cases across the nation. He specializes in defending clients in personal injury, transportation, medical malpractice, legal malpractice, construction defect, and insurance coverage cases.

Donn returns to the firm as a seasoned attorney concentrating in workers' compensation. Over the last 20 years, he has successfully resolved hundreds of complex workers' compensation claims involving thirdparty action claims, product liability, automobile accidents, construction disputes, slip and falls and other catastrophic incidents.

Indiana

Kealia concentrates her practice in workers' compensation defense. She works hard to ensure that her clients are aware and wellinformed throughout the litigation of their claim. Kealia also has experience as a Deputy Prosecuting Attorney with the Marion County Prosecutor's Office.

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.

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

Newsletter Contributors

Storrs Downey, Jessica Jackler, Ryan Danahey and Mary Yong 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

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- **Crown Point, IN**
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- **Milwaukee, WL**