Downey & Lenkov LLC

Labor & Employment Newsletter

March 2025

Texas Federal Court Vacates DOL Final Overtime Rule

On November 15, 2024, the U.S. District Court for the Eastern District of Texas vacated and set aside the U.S. Department of Labor (DOL)'s final rule which increased the salary threshold for the "white collar" overtime exemption under the Fair Labor Standards Act. Significantly, this means that the increase in the salary threshold scheduled to become effective on January 1, 2025 will no longer go into effect. The court's ruling also nullified the July 1, 2024 increase. As such, the salary level in effect prior to July 1, 2024 ($35,568 per year, $684 per week) is now restored.

Prior to this ruling, the final rule was scheduled to raise the salary threshold to $1,128 per week ($58,656 annually) as of January 1, 2025 and was set to increase every three years.

The court held that the final rule exceeded the DOL's authority and also found that the DOL lacked the authority for the automatic future increases.

Practice Tip:
Employers should take note that the January 1, 2025 increase did not go into effect as scheduled, and the July 1, 2024 increase is invalidated. The DOL is currently under new leadership because of the change in administration and there is no indication at this time that the new leadership intends to appeal this decision. We recommend consulting with experienced counsel before making any further changes to employees' salaries that were made in response to the July 2024 threshold increase and/or in anticipation of the January 2025 final rule.

Amendment to Illinois Human Rights Act Effective January 1, 2025

Extended Statute of Limitations

As reported in our last newsletter, effective January 1, 2025, the deadline for filing an administrative charge with the Illinois Department of Human Rights (IDHR) based upon employment discrimination, harassment or retaliation will be two years after the date that a civil rights violation allegedly has been committed. Prior to the amendments to the IHRA implementing this change, the deadline to file a charge was 300 calendar days from the date of an alleged civil rights violation.

This amendment to the IHRA does not impact the limitations period for federal employment discrimination claims, such as under Title VII, brought in Illinois, which still must be filed with the Equal Employment Opportunity Commission (EEOC) within 300 calendar days from the day the alleged discrimination took place. However, if an employee untimely files a charge with the EEOC, the employee may still bring a claim in the IDHR.

Practice Tip:
Since employees have more time to file discrimination charges under the IHRA, employers should modify their recordkeeping practices to ensure employment records are retained longer with the understanding that employees now have more time to file a charge.

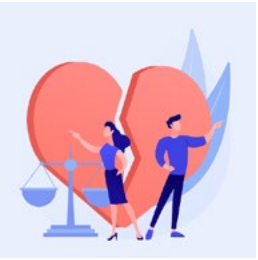
Because two years is a lengthy period for memories of potential witnesses or supervisors, employers should also consider enhancing or improving their documentation policies and procedures to better preserve relevant records and statements that may help defend against an employee's future claim.

Required Salary Postings in Illinois Effective January 1, 2025

Effective January 1, 2025, pursuant to an amendment to the Illinois Equal Pay Act, all employers in Illinois with 15 or more employees are required to specify a pay scale and available benefits for any job they post. Failure to do so could result in a fine.

Practice Tip:
Employers should closely review their company's website, outside vendor posts or other written means of communicating job listings to ensure the pay scale and benefits are specified in compliance with this new requirement.

Teachable Moment from 'It Ends With Us' Lawsuit



There have been many headlines related to allegations of sexual harassment claims from the movie 'It Ends With Us' by Blake Lively against Justin Baldoni, his studio and others. Notable allegations from the lawsuit by Lively include sexually inappropriate behavior on set such as showing explicit videos and images, discussing sexual acts, unwanted sexual comments, physical touching and other claims.

This lawsuit further exemplifies that sexual harassment claims can happen in any type of industry, regardless of the type of business and notoriety of persons involved. Below is a refresher of some key aspects of sexual harassment claims.

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and other state and local laws. Title VII applies to employers with 15 or more employees, but many states, including Illinois, require less employees to be covered by state laws. Sexual harassment can be unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that explicitly or implicitly affects an individual's employment. These acts can also rise to the level of sexual harassment when they unreasonably interfere with an individual's work performance or create a hostile or offensive work environment.

To help mitigate the risk of sexual harassment claims in the workplace, employers should have clear written policies against sexual harassment which include complaint procedures. Employers in Illinois, as a further example, are required to include external reporting contact information for state and federal administrative agencies to make complaints. Additionally, employers should train their employees and managers on their anti-harassment policies and retain records of training. In Illinois, annual training is required by law for all employers with at least 1 employee.

The EEOC provides policy guidance about sexual harassment which was recently expanded and updated in 2024 in which the EEOC provides guidance on defining sexual harassment and establishing employer liability in light of recent cases.

Practice Tip:
Employers of all sizes and types of business can be faced with claims of sexual harassment. Employers can help mitigate the risk of a claim and also be more prepared from a defense perspective if they have proper policies, procedures and training implemented.

Illinois Appellate Court Revives Employment Discrimination Claim Despite Severance Agreement

On February 14, 2025, an Illinois appellate court reinstated a discrimination lawsuit brought by the former head athletic trainer for the Chicago White Sox who claimed that he signed a termination/severance agreement that waived his claims because the employer fraudulently concealed the real reason for his termination which he claims was because of his sexual orientation. See *Ball v. Chicago White Sox*, Ltd., No. 1-23-0949 (Ill. App. Feb. 14, 2025).

Plaintiff had a long career with the White Sox until he was terminated in 2020 during the pandemic and following a violent carjacking resulting in Plaintiff's forced medical leave. When he attempted to return to work, he was told he was no longer a good fit with the organization. He was presented with and accepted severance and health insurance benefits in exchange for a broad release agreement, which included waiving protections of the Illinois Human Rights Act and Title VII. After the severance agreement expired, he sued the White Sox, alleging that the real reason for his termination was his sexual orientation. The White Sox moved to dismiss, which was granted by the trial court, finding that the severance agreement refuted discrimination allegations.

On appeal, Plaintiff argued that the trial court improperly shifted the burden to him rather than accepting the truth of his allegations and considering the allegations in the light most favorable to him and that the White Sox procured the termination agreement through fraudulent concealment and misrepresentation of a material fact. The appellate court agreed that the lawsuit was improperly dismissed by the trial court, which mistakenly placed the burden on the employee to prove the White Sox fraudulently misrepresented the reason

for his firing to induce his signature. It agreed that the trial court should have accepted the employee's allegations as true and considered them in a light most favorable to him at the motion to dismiss phase.

Additionally, the White Sox argued, among other things, that Plaintiff ratified the agreement by accepting the severance payments and other benefits. The trial court did not address that argument, and the appellate court found it to be a factual dispute that should be considered on remand by the trial court.

Practice Tip:
The appellate court's opinion suggests that post-termination agreements might not truly eliminate the risk of litigation. The opinion stated that the law does not condone deception and implied that by withholding the actual reason for termination, an employer deprives an employee of the ability to make an informed decision when entering into a post-termination agreement. It further stated that "fraudulent concealment violates the principles of good faith and fair dealing and jeopardizes the integrity of the employment relationship." These statements by the appellate court may be impactful in how Illinois courts enforce post-termination agreements, given that it is common for employers to offer post-termination release agreements when the reason for termination is disputed and to avoid litigation. We will monitor this case for additional appeals and/or rulings by the trial court.

EEOC: Wearables in the Workplace and Employment Discrimination

The Equal Employment Opportunity Commission (EEOC) recently issued a fact sheet regarding employer rules which require employees to use wearable technologies. According to the EEOC's fact sheet, a "wearable" is described as "digital devices embedded with sensors and worn on the body that may keep track of bodily movements, collect biometric information and/or track location." Such devices include the following: [S]mart watches or rings that track their activities and monitor their physical or mental condition in the workplace; environmental or proximity sensors that warn wearers of nearby hazards; smart glasses and smart helmets that can measure electrical activity of the brain (electroencephalogram or "EEG" testing) or detect emotions; exoskeletons and other aids that provide physical support and reduce fatigue; Global Positioning System (GPS) devices that track location; and various other devices.

The fact sheet identifies some ways federal anti-discrimination laws, including Title VII and the ADA, may apply to employers' use of wearable devices.

Application to the ADA

The ADA strictly limits disability-related inquiries or medical examinations for all employees, not just those with disabilities, to situations when it is "job related and consistent with business necessity" for a specific employee or otherwise permitted under the ADA. As such, policies that mandate wearables may violate the ADA because wearables may collect information about an employee's health and thus could constitute either a medical examination or a prohibited disability-related inquiry. The EEOC fact sheet explains that employers using wearables to collect information about an employee's physical or mental conditions (such as blood pressure monitors or eye trackers) or to do diagnostic testing (such as EEGs) may be conducting "medical examinations" under the ADA. Employers also may be making "disability-related inquiries" under the ADA if they direct employees to provide health information (such as information about prescription drug use or a disability) in connection with using wearables.

Adverse Employment Actions Based on Wearable Information

If an employer uses information collected by wearables, it must comply with EEO laws. If an employer uses information generated from wearables to make employment decisions that have an adverse effect on employees because of a protected basis, they could violate EEO laws. For example, an employer could violate the EEO laws' nondiscrimination requirements by using wearable-generated information in the following ways: using heart rate and other information to infer that an employee may be pregnant; using information from wearables that may be less accurate for employees with dark skin; relying on heart rate information to conclude that an employee has a heart condition that qualifies as a disability; or to infer that an employee is going through menopause.

Practice Tip:
The fact sheet cautions employers about using collected information for discriminatory purposes and from engaging in practices that could be discriminatory to employees of certain protected classes. It further explains that an employer's existing obligations to consider reasonable accommodations apply in the ADA context to potentially provide exceptions to workplace policies mandating wearables. Moreover, if an employer collects medical or disability-related data from wearable devices, the ADA requires employers to maintain that data in separate medical files and treat it as confidential medical information with limited exceptions.

NLRB Challenges Love is Blind Worker Classification

In December 2024, the National Labor Relations Board (NLRB) filed a complaint against the producer of the popular Netflix reality show, Love is Blind, alleging it intentionally misclassified its contestants as independent contractors. The NLRB asserted that the contestants should have been classified as employees and seeks an order that requires the show's creators to reclassify all participants since January 2023 as employees and notify them in writing, among other requirements. If the contestants are reclassified as employees, they would be entitled to employee benefits such as minimum wage, overtime pay, unemployment insurance, as well as organizing rights. The outcome of this case could significantly impact reality shows going forward.

The NLRB got involved after two former contestants complained in 2023 that the show exercised significant control over their lives, including rigorous schedules and behavior restrictions. Contestants were allegedly paid a $1,000 daily stipend during filming which had limitations, and they were otherwise personally responsible for all other financial obligations and expenses related to their participation on the show. Additional complaints include mental health neglect, lack of transparency about contractual obligations and coercion to remain on the show.

The producer of the show denied any wrongdoing. The case will proceed to a hearing this spring before an administrative law judge and if the judge agrees with the NLRB, the producer could face penalties and be required to reclassify contestants as employees. Employees are typically eligible to a range of protections under labor laws, including minimum wage, overtime pay, unemployment insurance, workers' compensation, and employer benefits such as health insurance, retirement plans, etc. as well we unionization, whereas independent contractors do not receive these benefits and protections.

Practice Tip:
The Love is Blind complaint aligns with a broader agenda by the NLRB about the rights of gig workers and other potentially misclassified workers. If the NLRB is successful in its claim, it could impact other challenges in other industries.

Seventh Circuit Applies Lower Harm Standard For Title VII Cases

In *Thomas v. JBS Green Bay, Inc.*, No. 24-1404 (7th Cir. 2024), Plaintiff a police officer alleged race discrimination based on delayed training, being denied vacation and being transferred to a different shift. The case was originally dismissed by the United States District Court for the Eastern District of Wisconsin for failure to state a claim because that court held that there was no "significant" serious injury for an actionable Title VII discrimination claim.

The Seventh Circuit Court of Appeals reversed this decision and applied the Muldrow Standard recently handed down by the United States Supreme Court. The Seventh Circuit noted that it was no longer required that any injury be "significant" or "material" for a Title VII complaint to survive a motion to dismiss. As long as there is "some harm" to the terms, conditions or privileges of employment, no matter how significant, Plaintiff has met the notice-pleading standard required by federal courts. The case was remanded for further proceedings.

Practice Tip:
The *Thomas* decision indicates that the courts within the Seventh Circuit will now adjudicate motions to dismiss under Title VII applying the lower standard propounded by the United States Supreme Court. This will likely lead to difficulty in dismissal of these claims unless a Defendant is able to establish that a Plaintiff has not suffered any injury, whatsoever.

Wisconsin Retaliation Claims When Attempting To Enforce A Right

In *Radtke v. The Labor & Indus. Review Comm'n,* No. 2024AP332 (Wis. Ct. App. January, 22, 2025), the Labor and Industry Review Commission (LIRC) and Plaintiff's former employer appealed an order granting Plaintiff's petition for review and reversing the LIRC's decision that there was no probable cause to believe that Plaintiff was retaliated against in violation of the Wisconsin Fair Employment Act (the "Act"). The appeal raised two issues:

1. did the LIRC err in concluding that there was no probable cause to believe that Plaintiff "attempted] to enforce [a] right" under the Act when she asked the employer to compensate her for unpaid overtime work; and

2. was there substantial evidence in the record to support the LIRC's ultimate factual finding that the employer did not believe that Plaintiff might have filed a wage complaint for the unpaid overtime at the time it terminated her employment?

During a meeting in which Plaintiff was notified she was being demoted for performance issues and complaints, she commented that if the employer was going to reduce her pay, then it should make up for that reduction in pay by compensating her for all of her unpaid overtime going back 30 years. This conversation marked the first occasion on which Plaintiff had raised the issue of unpaid overtime.

In the second meeting with Plaintiff, the employer informed her that it was only required to compensate her for unpaid overtime, going back two years and that it would do so once it was determined the amount she was owed. Plaintiff was then told her services were no longer needed and she was terminated. The employer subsequently determined the amount of overtime that Plaintiff was owed and added that amount to her final paycheck. According to the employer, Plaintiff never indicated that she intended to file a complaint with any governmental entity regarding the unpaid overtime on or before her termination.

Plaintiff made a claim with the Wisconsin Department of Workforce Development after she was terminated alleging, she was terminated because her former employer believed she might make a wage complaint. The agency determined there was no probable cause to her claim and she appealed. The LIRC agreed and Plaintiff appealed to the circuit court.

During a long discussion of statutory interpretation, the court held that unless an employee tries to enlist the help of a government agency, the employee has not attempted to

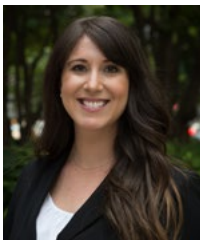
enforce a right under the Act. Merely requesting an employer to look into a potentially protected right, such as overtime, is not sufficient. The court agreed with LIRC that Plaintiff did not threaten to file any complaints during the subject conversations prior to her termination.

The impact of this decision is substantial. Employers in Wisconsin should be aware that internal discussions, such as those described above, will not be construed as attempted "enforcement" of rights (e.g. hours of labor, minimum wage, when wages are payable, internet privacy, or otherwise assisting in similar proceedings, etc.) unless/until a formal government complaint is filed. This should allow for more open discourse of these rights in the employment setting. When an employee makes it clear or alludes to their desire/intent to file any such governmental complaint and that employee later terminated, the employer could be liable for unlawful retaliation under Wisconsin law.

Practice Tip:
During meetings with Wisconsin employees, Wisconsin employers should monitor the intent and language of any employee who indicate they intend to file a complaint or enforce their labor rights and document any such intent (or lack thereof) to evaluate the risk of a retaliation claim in connection with a decision to terminate.

Firm **News**

Jessica Jackler Secures Summary Judgment Victory in Illinois Wage Dispute



Congratulations to Income Member Jessica Jackler on securing summary judgment in Illinois!

The case involved complex alleged violations of the Illinois Wage Payment Collection Act (IWPCA) and tortious interference. One of the key wage-related issues was whether the IWPCA applied to Plaintiff's claims for post-termination paid administrative leave. The court agreed with Jessica's arguments and statutory interpretations that the IWPCA only applies to earned compensation in exchange for the rendering of services to an employer. In this case, it was undisputed that the Plaintiff had not performed work for the employer since 2017.

This ruling marks a significant victory and a positive resolution for our clients who were facing multiple legal claims from this Plaintiff.

Downey & Lenkov Attorneys Selected to 2025 Leading and Super Lawyers

We are pleased to announce that 11 attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their fields. 10 attorneys have also been selected for Leading Lawyers' 2025 rankings.

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

Read the full press release here.

Downey & Lenkov has Been Named in the 2025 Best Law Firms® Ranking

We're excited to share that Downey & Lenkov has been named in the 2025 Best Law Firms® rankings by Best Lawyers®. This year, we were selected as Tier 1 in Construction Law and Construction Litigation nationally and regionally. Additionally, we've been ranked regionally for Workers' Compensation.

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

Welcome to the Team

Please join us in welcoming our new Illinois Associate Abdu-Raheem "A.R." Igbadume.

A.R. concentrates his practice in workers' compensation and general liability. He is a dedicated attorney who is committed to protecting his client's interests and has extensive experience in trying cases, delivering oral arguments and successfully representing clients in arbitration and appeals.

Before transitioning to defense work, A.R. gained valuable experience representing petitioners, which provides unique insight into opposing strategies to advocate for employers. Prior to becoming an attorney, A.R. worked as a lobbyist in the Georgia General Assembly, where he developed a strong foundation in legislative processes.

Outside of work, he enjoys playing pool, photography, watching soccer and movies.

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:

- Illinois Employer Liability in Personal Injury Cases: Kotecki Doctrine and Insurance Coverage for Such Claims
- 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

Management & Professional Liability Alliance™

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 Ryan Danahey and visit the website at https://www.mplalliance.org/.

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, and Ryan Danahey contributed to this newsletter.

View more information on our **General Liability practice.**
Our other practices Include:

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- Labor & Employment Law
- Products Liability
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