



Change is on its way: Key Developments in Illinois Employment Law

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Topics Covered

- Illinois Workplace Transparency Act
- Illinois and Federal COVID-19 Guidance
- Illinois Equal Pay Act
- Illinois Business Corporation Act
- Illinois Human Rights Act
- Illinois Biometric Information Privacy Act
- Recently Passed and Pending Legislation



Illinois Workplace Transparency Act

Requirements and Risks

Illinois Workplace Transparency Act

- With limited exceptions, the WTA applies to all contracts, clauses, agreements and waivers that are entered into, modified, or extended *after January 1, 2020*.
- It applies to both employees and non-employees, including contractors and consultants.

WTA Prohibitions

- The Act prohibits employers from:
 - Restricting an employee, prospective employee or former employee from reporting any allegations of unlawful conduct to federal, state or local officials for investigation.
 - Requiring as a unilateral condition of employment or continued employment, an agreement that:
 - (i) has the purpose or effect of preventing an employee or prospective employee from making truthful statements or disclosures about alleged unlawful employment practices; or (ii) requires an employee or prospective employee to waive, arbitrate or otherwise diminish any existing or future, claim, right or benefit related to an unlawful employment practice.

WTA Risks

- Agreements that do not comport with the requirements of the WTA may be unenforceable.
- Illinois employers who use standardized employment, arbitration or confidentiality agreements not in compliance with the WTA run the risk of class action litigation.
 - A plaintiff who successfully challenges an employer's violation of the WTA can recover reasonable attorney's fees and costs.

Employment Agreements

- However, an agreement that is a *mutual* condition of employment or continued employment may include provisions of confidentiality extending over allegations of unlawful employment practices or require arbitration of any such claims if:
 - (A) the agreement is in writing; (B) demonstrates actual, knowing, and bargained-for consideration from both parties; and (C) expressly acknowledges the right of the employee or prospective employee to:
 - (i) report good-faith allegations of violations of EEO laws to any appropriate federal, state or local government agency enforcing EEO laws; (ii) report good-faith allegations of criminal conduct; (iii) participate in proceedings before EEOC and/or state or federal agency enforcing EEO laws; (iv) make truthful statements required by law; and (v) request or receive confidential legal advice.

Settlement and Termination Agreements

- Under the WTA, settlement and termination agreements that include confidentiality covenants relating to alleged violations of EEO laws are permissible only if the following requirements are met:
 - the agreement expressly notes that confidentiality is the preference of the employee and is mutually beneficial to the employee and employer;
 - the employer notifies the employee in writing of his or her right to have an attorney or representative review the agreement before it is executed;
 - there is valid, bargained-for consideration in exchange for confidentiality;
 - the agreement does not waive any claims of violations of EEO laws that accrue after the agreement is executed;
 - the employee has 21 calendar days to consider the written agreement; and
 - unless knowingly and voluntarily waived by the employee, he or she has 7 calendar days after executing the agreement to revoke it.
- Failure to comply with this section of the Act will render any confidentiality provision related to alleged violations of EEO laws void and severable from an otherwise valid and enforceable agreement.



COVID-19 Guidance

Illinois and Federal Guidance and Laws

Illinois Guidance on Paid Leave to Receive COVID-19 Vaccine

- The Illinois Department of Labor issued guidance in March 2021.
 - Under the Illinois Minimum Wage Law, if an employer requires its employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time.
 - Employees choosing to receive the vaccine voluntarily should be allowed to utilize sick leave, vacation time, flex time, or other paid time off.
 - An appointment to receive the COVID-19 vaccine qualifies as a “permissible medical appointment” under the Illinois Employee Sick Leave Act if the employer’s policies permit the use of sick leave for purposes of getting a vaccination. Employers should also allow the use of sick leave if the employee is taking a qualifying family member to receive the vaccine.

Chicago Anti-Retaliation Ordinance

- The City of Chicago passed an ordinance on April 21, 2021, effective immediately, prohibiting employers from taking adverse employment actions against employees and independent contractors who take time off of work to receive a COVID-19 vaccination.
- Under the ordinance, an employer cannot require an employee to receive a COVID-19 vaccination outside of work hours.
- Additionally, if an employee has paid sick leave or PTO available and requests to use that time to receive the COVID-19 vaccine, the employer must allow the employee to do so.

Chicago Anti-Retaliation Ordinance

- Under the Ordinance, if the employer has implemented a **mandatory** vaccine policy under which workers are required to receive a COVID-19 vaccine, the employer must compensate the worker for time spent receiving the vaccine, up to four hours per dose, if the dose is administered during working hours. Such compensation must be at the worker's normal rate of pay.
 - An employer that requires workers to receive a vaccination also cannot require that the worker use paid sick leave or paid time off for the time taken to receive the vaccine.
- A worker subjected to an adverse employment action for taking time out of the work day to receive the COVID-19 vaccine can pursue a private right of action and recover: (i) reinstatement; (ii) damages equal to *three times* the full amount of wages that would have been owed had the retaliatory action not taken place; (iii) any other actual damages directly caused by the retaliatory action; and (iv) costs and reasonable attorney's fees.
 - Violations will also result in a fine between \$1,000 and \$5,000.

Chicago Capacity Guidelines and Travel Restrictions

- The City of Chicago has released capacity guidelines for different industries and activities. The guidelines are categorized by setting. For example, non-customer facing offices currently cannot exceed 50% capacity.
- The City of Chicago's Emergency Travel Order is still in effect. As of May 4, 2021, the Order includes 19 states and 1 territory. It applies to returning Chicago residents and out-of-state visitors.
 - Anyone traveling to Chicago from a state on the “Orange list” is directed to receive a negative COVID-19 test result no more than 72 hours prior to arrival in Chicago or quarantine for a 10-day period (or the duration of their visit to the city, whichever is shorter).
 - Vaccinated persons who have traveled to states on the Orange list are not required to quarantine if they are asymptomatic and fully vaccinated.

Pending Legislation

- **HB 3682**
 - Named the COVID-19 Workplace Vaccination Program Limitation Act
 - The Act would prohibit Illinois employers from creating, implementing, or otherwise enforcing a workplace vaccination program that requires an employee to demonstrate that he or she has received a vaccine that was approved under emergency use authorization by the United States Food and Drug Administration.

Mandatory Vaccine Programs

- EEOC guidance permits mandatory vaccination programs, subject to certain exceptions.
 - An employee may not be required to receive a vaccination if they have a disability or sincerely held religious belief which prevents them from receiving the vaccine.
 - Under such circumstances, the employer must then engage in a reasonable accommodation analysis to determine whether there are workplace accommodation options that do not cause an undue hardship.
 - If after this analysis it is determined that there is no reasonable accommodation available, then it may be lawful for the employer to exclude the employee from the workplace.
- Similarly, CDC guidance permits mandatory vaccine policies and offers advice for employers on whether to utilize on-site or off-site vaccination programs.

Workplace Changes

- OSHA has issued guidance recommending that employers implement COVID-19 prevention programs to address COVID-19-related concerns and limit the spread of COVID-19 in the workplace.
 - These programs highlight physical distancing in the workplace, barrier usage, the use of face coverings, proper ventilation, and cleaning/disinfecting materials and routines.
- OSHA is set to release its Emergency Temporary Standard to address COVID-19 soon, giving employers updated guidance on workplace safety.

Workplace Changes

- The CDC has similarly issued guidance stating that non-essential travel should be put on hold, meetings should stay remote, and shifts should be staggered, if possible.
- According to EEOC guidance, employers can administer COVID-19 tests and temperature checks to employees and ask questions related to COVID-19 symptoms.
 - Employers may ask employees if they are experiencing symptoms of COVID-19 and if they have been diagnosed with or tested positive for COVID-19.
 - If an employee refuses to comply, the employer is typically permitted to bar the employee from the workplace.



Illinois Equal Pay Act

Recent Changes and Requirements

Illinois Equal Pay Act

- Illinois employers with more than 100 employees in the State are now required to apply for and obtain an Equal Pay Registration Certificate.
- To apply for the certificate, the employer must submit: (i) a filing fee; (ii) a statement affirmatively verifying compliance with certain state and federal laws; (iii) a copy of the employer's most recent EEO-1 report; and (iv) a pay report disclosing the total wages paid to each employee during the past calendar year.
- Employers are required to obtain an Equal Pay Registration Certificate by March 23, 2024, and must renew that certificate every two years thereafter.
- If an employer does not obtain an equal pay registration certificate or an employer's equal pay registration is suspended or revoked after an investigation by the IDOL, IDOL "shall impose" "a civil penalty in an amount equal to 1% of a business' gross profits."

Illinois Equal Pay Act - Pay Report

- The pay report component will require that covered employers compile and submit:
 - “A list of all employees during the past calendar year, separated by gender and the race and ethnicity categories as reported in the business’s most recently filed Employer Information Report EEO-1, and report the total wages as defined by Section 2 of the Illinois Wage Payment and Collection Act paid to each employee during the past calendar year, rounded to the nearest hundred dollar”

Illinois Equal Pay Act - Compliance Statement

- An employer will be required to certify:
 1. That it is in compliance with Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the IHRA, the Illinois Equal Wage Act, and the IEPA;
 2. The average compensation for its female and minority employees is not “consistently below the average compensation” for its male and non-minority employees within each of the major categories in the employer’s EEO-1 report, taking into account such factors as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors;
 3. It does not restrict employees of one sex to certain job classifications and makes promotion and retention decisions without regard to sex;
 4. Wage and benefit disparities are corrected when identified to ensure compliance with the laws mentioned above; and
 5. Wages and benefits are evaluated to ensure compliance with the laws mentioned above.

Illinois Equal Pay Act - Compliance Statement

- An employer must also:
 - disclose how often it evaluates wages and benefits to ensure compliance with anti-discrimination laws; and
 - provide information describing what kind of approach it uses in setting compensation and benefits.
 - Approaches include: market pricing, state prevailing wage or union contract requirements, a performance pay system, an internal analysis, or some other alternative approach.

Illinois Equal Pay Act - Compliance Statement

- Upon receipt of the employer's completed application, the IDOL will have 45 days to issue the Equal Pay Registration Certificate or reject the application.
- Issuance of the certificate does *not* establish that an employer is in compliance with the IEPA, nor does it provide a defense to any Equal Pay Act violation identified by the IDOL.
- The IDOL may also audit companies and has the ability to revoke an Equal Pay Registration Certificate for failing to comply with the Act

Illinois Equal Pay Act - Confidentiality

- The data and information provided to the IDOL either in connection with the Equal Pay Report and the Equal Pay Compliance Statement, or via a request from the Department will be not made publicly available.
- However, the IDOL's decision to issue, not issue, revoke or suspend an equal pay registration certificate is public information.

Illinois Equal Pay Act - Whistleblower Protections

- The IEPA was also amended to include whistleblower anti-retaliation protections.
- Employers are prohibited from taking any retaliatory action against an employee because he or she: (i) discloses or threatens to disclose to a supervisor or to a public body an activity, inaction, policy or practice implemented by the business that the employee reasonably believes is in violation of a law, rule, or regulation; (ii) provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule or regulation by a nursing home administrator or (iii) assists or participate in a proceeding to enforce the provisions of the IEPA.
- A claim of retaliation under the IEPA requires a showing that the protected activity at issue was a “contributing factor” in the retaliatory action by the employer. If the employer can avoid liability if it can show by clear and convincing evidence that it would have taken the same action in the absence of employee’s actions.
- A prevailing employee may be awarded reinstatement, double back-pay with interest and reasonable costs and attorneys’ fees.



Illinois Business Corporation Act

Recent Changes

Business Corporation Act - Annual Reporting Obligations

- Applies to domestic corporations organized under Illinois law as well as foreign corporations authorized to transact business in Illinois.
- Employers that are required to file an EEO-1 report with the EEOC must now include information that is substantially similar to data reported under Section D of the EEO-1 report in their annual reports to the Illinois Secretary of State starting January 1, 2023.
- In contrast to the EEO-1, which is confidentially maintained by the EEOC, the Illinois Secretary of State will publish data on the gender, race, and ethnicity of each corporation's employees on the Secretary of State's website within 90 days of receipt of a properly filed annual report.
- If a company fails to submit an annual report that complies with the Business Corporation Act, the Secretary of State may dissolve the corporation administratively.



Illinois Human Rights Act

Recent Changes and Reminders

Employee Background Fairness Act

- Effective immediately, Illinois employers are prohibited from making employment decisions based on a criminal conviction record unless they can demonstrate: (i) a substantial relationship between the conviction and the position sought; or (ii) that the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
 - A “substantial relationship” means a consideration of whether the employment position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position.

Employee Background Fairness Act

- Illinois employers will be required to consider the following factors when considering an applicant's conviction history:
 - (i) the length of time since the conviction;
 - (ii) the number of convictions that appear on the conviction record;
 - (iii) the nature and severity of the conviction and its relationship to the safety and security of others;
 - (iv) the facts or circumstances surrounding the conviction;
 - (v) the age of the employee at the time of the conviction; and
 - (vi) evidence of rehabilitation efforts.
- These factors are similar to the standards set forth in the Equal Employment Opportunity Commission's 2012 criminal history guidance.

Employee Background Fairness Act

- Process for disqualifying applicants or employees
 - If the employer makes a preliminary decision based on the enumerated factors that the applicant's or employee's conviction record disqualifies the employee, the employer is required to notify the employee of this preliminary decision in writing. The notice must contain:
 - (1) identification of the disqualifying conviction or convictions that are the basis for the preliminary decision and the employer's reasoning for the disqualification;
 - (2) a copy of the conviction history report, if any; and
 - (3) an explanation of the applicant or employee's right to respond to the notice of the employer's preliminary decision before that decision becomes final. The explanation must inform the applicant or employee that the response may include, but is not limited to, submission of evidence challenging the accuracy of the conviction record that is the basis for the disqualification, or evidence in mitigation, such as rehabilitation.
 - The employer must then provide the applicant or employee five business days to respond before the employer makes its final decision. The employer must also consider any information submitted by the employee before making a final decision.
 - If the employer makes a final decision to move forward with the adverse action, the employer must notify the applicant or employee in writing. The notice must contain:
 - (1) notice of qualifying conviction(s) that are the basis for the final decision and the employer's reasoning for the disqualification;
 - (2) any existing procedure that the employer has for the employee to challenge the decision or request reconsideration; and
 - (3) the right to file a charge with the IDHR.
 - Employers need to also consider the interaction with other laws, including the Fair Credit Reporting Act.



Illinois Biometric Information Privacy Act

Recent Settlements and Decisions, Current Cases, and Pending Legislation

Illinois Biometric Information Privacy Act

- Enacted in 2008, BIPA establishes standards for how private entities are to handle biometric information of Illinois consumers.
- BIPA requires a private entity in possession of biometric identifiers or biometric information to develop a written policy that establishes a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information. This policy must be made available to the public.
- Under BIPA, a private entity cannot collect, capture, purchase, receive through trade or otherwise obtain a person's biometric identifier or biometric information without:
 - (a) informing the person in writing that a biometric identifier or biometric information is being collected or stored;
 - (b) informing the person in writing of the specific purpose and duration for which it is being collected, stored, and used; and
 - (c) receiving the person's written consent.

Noteworthy Settlements and Decisions

- **TikTok Settlement**
 - In February 2021, the company agreed to pay \$92 million after it was alleged that the social media app violated BIPA when it collected and shared users' biometric information without their consent.
- ***Fox v. Dakkota Integrated Systems***
 - The Seventh Circuit clarified a prior ruling and held that allegations that a defendant violated Section 15(a) of BIPA can constitute an “injury in fact” under federal standing requirements. Given that an injury in fact may be recognized for pure technical violations of BIPA, there may now be grounds for defendants to consider removing BIPA claims to federal court.

Current Cases and Pending Legislation

- **Issues Currently Subject to Appeal**

- Whether the Illinois Workers' Compensation Act bars claims for statutory, liquidated damages under BIPA
 - *McDonald v. Symphony Bronzeville Park LLC*
- The amount of time a plaintiff has to file a BIPA claim before courts will consider the claim untimely (e.g., whether the claim is subject to a one-year or a five-year statute of limitations)
 - *Tims v. Black Horse Carriers*

- **Pending Legislation**

- House Bill 559
 - The bill seeks to amend BIPA and provides for a mandatory notice period of 30 days where the aggrieved person must give the private entity written notice identifying the provisions of the Act that the entity allegedly violated.
 - The private entity would then have a chance to cure the alleged violation within those 30 days and provide an express written statement that no further violations will occur.
 - If it does that, no action for individual statutory damages or class-wide statutory damages may be initiated against the private entity.
- House Bill 3697
 - The bill would amend the Workers' Compensation Act by providing that the Act does not prevent an employee from recovering damages under BIPA.



Other Recently Passed and Pending Legislation

Employee Sick Leave Act

- **House Bill 158**

- This bill was signed into law by Governor Pritzker on April 27, 2021.
- It amends the Employee Sick Leave Act by defining a “covered family member” as an employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.
- Additionally, it allows for “personal care leave.” “Personal care” means activities to ensure that a covered family member's basic medical, hygiene, nutritional, or safety needs are met, or to provide transportation to medical appointments, for a covered family member who is unable to meet those needs himself or herself.
 - “Personal care” also means being physically present to provide emotional support to a covered family member with a serious health condition who is receiving inpatient or home care.

Use of Non-competes and Non-solicits

- **House Bill 3066**

- The bill seeks to amend the Illinois Freedom to Work Act by eliminating the use of non-competition and non-solicitation restrictive covenants for Illinois employees unless certain salary thresholds and notice requirements are met.
- The bill would specifically amend the Illinois Freedom to Work Act to prohibit the use of covenants not to compete unless the employee's actual or annualized earnings exceed \$75,000 per year and prohibit the use of covenants not to solicit (both employee and client non-solicitation restrictions are included) unless the employee's actual or annualized earnings exceed \$45,000 per year.

- **House Bill 3449**

- This bill seeks to amend the Illinois Freedom to Work Act by prohibiting the use of covenants not to compete for all Illinois employees, regardless of an employee's salary, which are entered into after the date the bill were to become law.

At-will Employment

- **House Bill 3530 and Senate Bill 2332**
 - These are twin bills, titled the “Employee Security Act,” that, if passed, would eliminate at-will employment in Illinois and require severance pay for terminated employees. If passed, the Act would go into effect on January 1, 2022.
 - The bills would: (1) only allow employers to terminate employees *for just-cause* and (2) require employers to provide mandatory severance to employees upon termination.
 - The proposed legislation defines “just-cause” as a termination where: (1) the employee failed to satisfactorily perform his or her job duties or comply with employer’s policy and the employer utilized a progressive discipline schedule; (2) the employee’s misconduct was egregious; or (3) the employer had a “bona fide economic reason” for termination.
 - With regards to severance pay, terminated employees would receive one hour of severance pay for every 12.5 hours worked during the employee’s first year of employment and one hour for every 50 hours worked after the first year paid at the employee’s normal rate of pay.

Illinois Artificial Intelligence Video Interview Act

- **House Bill 0053**

- Amends the Illinois Artificial Intelligence Video Interview Act.
- If passed, the amendment would require employers who rely solely on AI to determine whether an applicant will receive an in-person interview to collect and report certain demographic information.
- Such employers would be required to report to the State of Illinois on an annual basis the race and ethnicity of applicants who are screened using AI technology and are not offered an in-person interview. Employers would also have to report the race and ethnicity of applicants who are hired.

Compassionate Use of Medical Cannabis Program Act

- **House Bill 3431**

- This bill amends the Compassionate Use of Medical Cannabis Program Act by providing that employers are not prohibited from adopting policies concerning medical cannabis by registered qualifying patients, including drug testing policies for such patients working in safety sensitive positions.
 - Safety sensitive positions are those positions in which the person performing the position, or duties required of the position, while under the influence of cannabis, may constitute a threat to or endanger the health and safety of themselves or others.
- The bill also prohibits employers from taking adverse action against registered qualifying patients who work in non-safety sensitive positions solely due to a positive drug test for medicinal cannabis, unless certain circumstances are met.



Practical Pointers for Employers

Key Takeaways: Checklist for Illinois Employers

1. Review employment, confidentiality, arbitration, separation and settlement agreements to ensure compliance with WTA.
2. Review vaccination policies and related pay and leave practices.
3. Plan for Equal Pay Certification process, which should include an internal pay equity analysis.
4. Review hiring processes to ensure compliance with IHRA regarding the use of criminal history information.
5. BIPA – are you compliant?
6. Review restrictive covenants practices, including by ensuring you are not overreaching.



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