Legal update of federal, state and local employment laws

TMA HR Peer Group

Dec. 3, 2020

Jeralyn H. Baran & Michael F. Hughes
Virtual TMA HR Peer Group complete with a virtual cupcake and coffee...

Next meeting in person ?????
Meet your speakers

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WHAT TO EXPECT FROM A BIDEN ADMINISTRATION
Let me look into my crystal ball...
Supreme Court

• President Trump appointed 3 Supreme Court Justices in just one term:
  o Gorsuch
  o Kavanaugh
  o Barrett

• Justice Stephen Breyer is 82 and has served 26 years.

• Next oldest is Justice Clarence Thomas, 72; has served 29 years.

• Will President Biden look to “pack” the Court?
Legislation?

- ACA Reforms
- Forced Arbitration Injustice Repeal (FAIR) Act
- Paycheck Fairness Act
- PRO Act
- Make FMLA paid leave? Other paid leave?
- Immigration Reform?
- Unless the Democrats win control of the Senate, major legislative goals will be difficult to enact—meaning it is likely more changes will be carried out by Executive Order and Agency regulations.
Potential ACA Amendments

• ACA action hinges on U.S. Supreme Court’s anticipated decision in California v. Texas.
• If overturned as non-severable, a new ACA would need to be reenacted from scratch.
• If upheld, a Biden Administration will likely look to enhance coverage options for uninsured/underinsured and look for ways to strengthen the law in general.
Forced Arbitration Injustice Repeal (FAIR) Act

• Would prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment.

• Introduced in 2019 with little chance of passage. If the Republicans maintain their Senate majority, a reintroduced bill is unlikely to fare any better.

• President-elect Biden is almost certain to sign such a bill if it comes to his desk.
Paycheck Fairness Act

• If passed, it would amend the Fair Labor Standards Act to
  o (1) restrict the use of the “bona fide factor” defense to wage discrimination claims,
  o (2) enhance non-retaliation prohibitions,
  o (3) make it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about wages, and
  o (4) increase civil penalties for violations of equal pay provisions.
The PRO Act: Be Afraid, Be very Afraid

• Card Check
• Quickie Elections
• Secondary Boycotts/Picketing
• Prohibit Permanent Replacements
• Outlaw Right-to-Work laws
• Forced CBAs—interest arbitration
• Gag Rule on Employers
• Intermittent strikes
• Expand penalties for ULPs
• Etc.
Executive Orders

• Likely, this is where the initial changes will be made, as they do not need to pass through the legislative or regulatory process.

• This is where a President Biden can immediately begin to roll back EOs issued by President Trump.

• We can expect certain EOs will be ready to go upon inauguration.
Potential Early Executive Orders

- DACA
- Posting of Employee Organizing Rights
- Decrease ICE Employment Actions / Raids
- Federal Contractors; AA; CRT Diversity Training
- Rejoining Paris Climate Accords
- Rejoining WHO
- Initial focus will be on “undoing” Trump Executive Orders
• EEOC just announced largest haul in fines against employers in any year. $535.4 million
• During a Biden administration, the EEOC is expected to expand enforcement activities.
• Priorities?
• CROWN Act: Create a Respectful and Open World for Natural Hair. EEOC issued previous guidance on this topic.
Department of Homeland Security

• Faster Visa Processing Times
  o Less scrutiny = quicker approval
• Rollback of Student Visa time limitations
• Rollback of increased H-1B pay levels
  o Increases in Level 1 and Level 2 pay requirements, make entry-level H-1B jobs scarce
• More H-1B availability (number and reason)
• Less ICE raids; more I-9 audits.
• Emergency Temporary Standard For COVID-19
• Double The Number Of OSHA Inspectors
• Appoint Asst. Dep. of Labor -- Head of OSHA, with labor union ties.
• Restore The Original Electronic Reporting Rule, requiring employers (more than 250 employees at a single location) to, among other things, report employee injury and illness information to OSHA, who will make public.
• Increase General Duty Clause Citations For COVID-19 Violations of CDC Guidelines
• Enforce The 2016 OSHA Anti-Retaliation Rule (blanket post-accident drug testing would be prohibited)
Dept. of Labor

• Minimum Wage
• White Collar Exemptions
  o Duties
  o Salary Level
• Joint Employer—rollback of Trump test
• Employer / Contractor
• Persuader Rule
• Board Member terms. Current Board is 3-1 for GOP; one seat vacant. Next GOP seat opens in August 2021.
• GC Peter Robb’s four-year term expires in November 2021, but pressure to remove him upon Biden taking office
• Rule-making
  o Micro Units
  o Quickie/Ambush Elections
  o Employer Policies / Handbooks
• Overturning Precedent
NLRB Precedent Ripe to Fall

• Purple Communications
  o Overturned precedent and allowed employees organizing a union to utilize employer email systems for organizing efforts.
  o Trump NLRB rolled back; now ripe for reversal
  o Could see expansion to employer real property?

• Browning-Ferris
  o Made it easier to be a joint employer on even unexercised authority
  o Trump NLRB rolled back; now ripe for reversal
ILLINOIS
CORONAVIRUS
RESTORE ILLINOIS TIER 3 RESURGENCE MITIGATION

• Effective November 20, 2020
• All regions in the State will operate under the new mitigation requirements to combat the surge of COVID-19 across Illinois
• Illinois Department of Public Health will continue to track the positivity rates and hospital capacity metrics in regions over a 14-day monitoring period to determine if mitigations can be relaxed, if additional mitigations are required or if current mitigations should remain in place.
• To transition to Tier 2, a region must experience, a less than 12% positivity rate for 3 consecutive days AND a greater than 20% ICU and hospital bed availability AND declining 7-day average COVID hospitalizations in 7 out of the last 10 days
Uniform Guidelines

- Guidelines vary by industry, but all business and industries should ensure signage is displayed; conduct regular sanitizing and cleaning; promote social distancing whenever possible; and ensure staff and customers use face covering when within 6 feet of others.
- Follow guidelines on capacity limits and group sizes
- Employees should not report to, or remain at work, if sick or symptomatic
- Employers should make temperature checks available for employees and encourage their use
- Employers and business are being urged to continue use of work from home arrangements; assign staffing with extra space for personnel; limit travel unless essential; implement on-site health screening procedures; ensure social distancing; and provide reasonable accommodations for vulnerable employees
- (Handbook of FAQs, Illinois Department of Commerce & Economic Opportunity)
Tier 3 Resurgence Mitigation: Manufacturing
Tier 3 Resurgence Mitigation: Manufacturing

- Required additional COVID training for all employees
- Operators should coordinate with IDPH to implement testing protocols and contact tracing, upon request, are consistent with available testing supplies
- All employees must wear face coverings at all times unless eating or drinking (exemptions only for safety purposes)
- Only manufacturing staff and key personnel should be allowed in facilities. Non-production employees should work remotely. Non-essential staff and visitors should not be permitted. (Exemptions only for critical equipment repairs, supply deliveries and safety reasons (“Critical Visitors”).)
- Critical Visitors should have risk assessment done in advance, including travel history, tracking and temperature check prior to entrance.
Tier 3 Resurgence Mitigation: Manufacturing (cont.)

- Implement additional workstation realignment when feasible.
- Stagger and space shifts, and designate shift entrances and exits (when possible) to minimize interactions of employees.
- Station required sanitation at beginning and end of shifts.
- Review policies to ensure that workers are not encouraged or incentivized to report to work while sick or potentially contagious.
- Develop and implement safety protocols for employee travel vans to promote spacing, require face coverings, temperature checks, air circulation and vehicle sanitization.
Tier 3 Resurgence – Mitigations: Office

All employees who can work remotely should work remotely
MORE FOR ILLINOIS

- Minimum wage increase
- Mandatory sexual harassment prevention training
- Required annual reporting
- Expanded Illinois Human Rights Act
- Expanded VESSA
- Confidentiality changes to severance, employment and arbitration agreements
- Illinois Minimum Wage Law
State Minimum Wage Increases

- January 1, 2020 – increased to $9.25 per hour
- July 1, 2020 – increased to $10.00 per hour
- January 1, 2021 – will increase to $11.00 per hour
- Up to $15/hour on January 1, 2025
Illinois Minimum Wage Law – stiffened penalties

• The Illinois Minimum Wage Law always required employers to keep records of the hours each employee worked each day in a work week, the rate of their pay and the amount of paid to each employee and all deductions made from their wages. There was no distinction between exempt and non-exempt employees.

• In February 2019, an employer that fails to keep the required records is subject to a penalty of $100 per impacted employee, payable to the DOL’s Wage Theft Enforcement Fund. If an employee is underpaid, the employee can recover 3x the amount they were underpaid (in a three year period) and be granted damages equivalent to 5% of the total amount they were underpaid per each month following underpayment.
Mandatory Sexual Harassment Prevention Training

• Employers are required to annually provide mandatory sexual harassment prevention training for all employees (including short term, temporary and part time employees). This year, it must be completed by December 31, 2020. Employers may use their own programming. However, the IDHR has provided sample programming on its website free of charge.

• At a minimum, the training must include an explanation of sexual harassment; examples of conduct that constitutes unlawful sexual harassment, a summary of relevant federal and state law provisions concerning sexual harassment and available remedies; and a summary of responsibilities of employers in the prevention, investigation and corrective measures of sexual harassment.

• Employers must keep a record of all trainings. It can be a certificate or a signed employee acknowledgement or even a sign in sheet. They can be paper or electronic.

• Fines: first offense, $500 for employers with less than 4 employees going up to $1000; $1000 for larger employers up to $5000.
Required Annual Reporting

- Each year by July 1, employers, labor organizations and state and local governments are required to disclose to the IDHR adverse judgments or administrative rulings of sexual harassment or unlawful employment discrimination.
- In this first reporting year, the disclosure form was due on October 31
- The report needs to include: the total number, whether equitable relief was ordered, and breakdown by protected category
- An adverse judgment or administrative ruling does not include settlements or decisions entered in unemployment proceedings, but is not limited to Illinois only. If an employer has no adverse judgments or administrative rulings in the year, it is not required to submit a report
- Upon request, the IDHR may also require employers to disclose all settlements involving sexual harassment and unlawful discrimination for the prior 5 year period.
Expanded Illinois Human Rights Act

Coverage and scope

- “working environment” is protected – not just physical location
- “employee” is any individual performing services for remuneration, including temporary workers and independent contractors
- Employers liable for sexual harassment of “non-employees”
- “Perceived” protected categories are now covered, including race, age, national origin, pregnancy, etc.
Victims Economic Security and Safety Act (VESSA) expanded

• VESSA provides an employee who is a victim of domestic or sexual violence or who has a family or household member who is a victim of domestic or sexual violence to up to 12 weeks of unpaid leave per 12 month period to address those issues.

• Employers with less than 15 employees are required to give 4 weeks of VESSA leave; employers who employ between 15 and 49 employees are required to give 8 weeks of VESSA leave; employers with more than 50 employees are required to give 12 weeks.

• VESSA was expanded on 1-1-2020 to include victims of gender violence.
Workplace Transparency Act

• Limits on Confidentiality and Non-Disparagement
  
  o The WTA prohibits unilateral prohibitions on truthful statements or disclosures regarding unlawful employment practices.
  
  o The WTA permits employers to require confidentiality related to unlawful employment practices in settlement or termination agreements if confidentiality is the documented preference of the employee; the employer notifies the employee of their right to have an attorney review the agreement before it is executed; there is valid, bargained for consideration; the agreement does not waive claims of unlawful employment practices after the agreement is executed; the employee has 21 days to review the agreement and 7 days to revoke their acceptance.
WTA’s amended Uniform Arbitration Act

The WTA prohibited mandatory arbitration provisions for claims involving unlawful employment practices. However, they are permitted if the arbitration provision is mutual, in writing, reflects bargained for consideration (not just employment or continued employment) and includes written acknowledgments of an employee’s rights. That is, the employee’s right to report a good faith belief of an unlawful employment practice or criminal conduct to appropriate government authorities; participate in government proceedings; make truthful statements or disclosures as required by law, regulation or legal process and seek or receive legal advice.

Still an unresolved question whether this prohibition is preempted by the Federal Arbitration Act.
Remember.... 2019
Legalized Recreational Marijuana

- On January 1, Illinois legalized marijuana for adult recreational use.
- Employers may continue to maintain and enforce zero tolerance policy that prohibit use of marijuana or being impaired while working or on company premises. Drug testing policies must be fair, reasonable and applied in a non-discriminatory manner.
- Employers may subject employees to reasonable drug tests under their drug testing policy; they may act on an employee’s refusal to be tested or cooperate in testing procedure; they may discipline/terminate employment based on a good faith belief that the employee is impaired as a result of the use of marijuana, while performing job duties or while on call.
- Employers can rely on positive drug tests.
- Illinois employers still can rely on federal law.
BIPA: an attractive newer area of claims for the plaintiffs’ bar
Illinois Biometric Privacy Information Act

• BIPA, enacted in 2008, is a uniquely expansive Illinois law that imposes requirements on businesses that collect or otherwise obtain biometric information, including fingerprints, retina scans and facial geometry scans.

• It requires informed consent prior to collection, public disclosure of policies for usage and retention, and companies to follow protection obligations and retention guidelines. It also prohibits profiting from biometric data and creates a private right of action for individuals harmed by BIPA violations, providing statutory damages up to $1000 for each negligent violation and up to $5000 for each intentional or reckless violation.

• Facebook settlement

• Very active area for the plaintiffs’ class action trial bar
# Chicago Fair Workweek Ordinance

## Employee Work Schedule

<table>
<thead>
<tr>
<th>Date</th>
<th>Sunday</th>
<th>Monday</th>
<th>Tuesday</th>
<th>Wednesday</th>
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<th>Saturday</th>
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<td>3:30 PM</td>
<td>12:00 PM</td>
<td>8:00 PM</td>
<td>12:00 PM</td>
<td>6:00 PM</td>
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Payroll Allotted: 50
Payroll Used: 76
Remaining (Over): 26.00

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chuhak.com
The Fair Workweek Ordinance requires certain employers to provide workers with predictable work schedules and compensation for changes. Employees are covered by the ordinance if they work in one of seven “covered” industries (Building Services, Healthcare, Hotels, Manufacturing, Restaurants, Retail, and Warehouse Services), they make less than $26 per hour or $50,000 per year, and the employer has at least 100 employees globally (250 employee and 30 locations for a restaurant).

Covered Employees are given:

- Advance notice of work schedules (10 days)
- Right to decline previously unscheduled hours
- 1 hour of predictability pay for any shift change within 10 days
- Right to rest by declining work hours less than 10 hours after the end of the previous days’ shift
Chicago and Cook County Minimum Wage Ordinances
As of July 1, 2020, the minimum wage in Chicago is $13.50 per hour for employers with 4-20 employees and $14.00 per hour for employers with 21 or more employees. The minimum wage for Cook County (in communities that did not opt out: $13.00 per hour.)

Tipped workers (workers who receive tips as part of their wages, like restaurant servers) have a minimum wage of $8.10 per hour for employers with 4-20 employees and $8.40 per hour for employers with 21 or more employees. If a tipped worker’s wages plus tip do not equal at least the full minimum wage, the employer must make up the difference.

If an employer has less than 4 employees, they are paid the state minimum wage, which is $10 per hour. (This does not apply to domestic workers.)
Chicago Paid Sick Leave Ordinance
The Paid Sick Leave Ordinance mandates that all Chicago businesses provide paid sick leave to employees.

Any employee who works at least 80 hours for an employer in Chicago within any 120 day period is covered by the ordinance and is eligible for paid sick leave.

Employees begin to accrue paid sick leave on the first calendar day after they begin their employment.

For every 40 hours worked, employees accrue one hour of paid sick leave.

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CHICAGO LABOR STANDARDS

IF YOU WORK AT LEAST 2 HOURS IN ANY 2 WEEK PERIOD FOR AN EMPLOYER IN CHICAGO, YOU ARE COVERED BY THE MINIMUM WAGE AND PAID SICK LEAVE ORDINANCE

<table>
<thead>
<tr>
<th>MINIMUM WAGE</th>
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<tr>
<td>Sets Minimum Wage in Chicago (MMC § 2-24)</td>
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<tr>
<td>July 1, 2020</td>
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<tr>
<td>Effective Date</td>
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<td>Large Employers</td>
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<td>Small Employers</td>
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</table>

Tipped Workers are workers who receive tips as part of their wages, like restaurant servers. If their tipped wages plus tips do not equal at least the minimum wage, the employer must make up the difference.

All Domestic Workers, regardless of how many Workers' Employer employs, must receive the minimum wage ($11.00 per hour for employees with 6 to 19 Employees, and $12.00 per hour for larger employers).

PAID SICK LEAVE

REQUIRES PAID LEAVE FOR MEDICAL OR SAFETY REASONS (MMC § 2-24)

Employers must provide Employees with Paid Sick Leave (PSL) to care for themselves or a family member. If they work at least 80 hours per year and 120 days in a calendar year:

- 1 hour of Paid Sick Leave for every 20 hours worked (up to 40 hours a year in a 12-month period).
- Up to 60 hours in a 12-month period, when the Employee or a family member (child, parent, grandparent, grandchild, sibling, stepparent, adopted child, foster child, adoptive parent, grandparent, grandchild, foster parent, or other domestic relative) is sick, injured, or prescribed or referred for treatment or care for an illness, injury, or other health condition.
- One half of PSL hours can be carried over between 12-month periods, up to 20 hours. In certain cases, up to 40 hours may be carried over.

HUMAN TRAFFICKING

WORKERS ARE PROTECTED UNDER CHICAGO AND ILLINOIS LAW

If you or someone you know is being forced to work, is being forced to work, or is being threatened with deportation if they don’t work, call the National Human Trafficking Hotline: 1-888-373-7888 or Text “HELP” to 237333 to access free help and services.

Available at all times in 300 languages and operated by a non-government organization.

FILE A COMPLAINT

Call 311, use the CHI 311 app, or file a Complaint Form at www.chicago.gov/ls	

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Chicago Anti-Retaliation Ordinance

COVID-19
COVID-19 Anti-Retaliation Ordinance

- The Anti-Retaliation Ordinance prohibits employers from retaliating against employees for obeying an order issued by the Mayor, the Governor, the Chicago Department of Public Health or a health care provider having to do with COVID-19.

- Employers also are prohibited from taking any adverse action against an employee for caring for someone who has been issued certain orders having to do with COVID-19.

<table>
<thead>
<tr>
<th>Order</th>
<th>Issued By</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Stay at home to minimize the transmission of COVID-19</td>
<td>The Mayor, the Governor, or the Chicago Department of Public Health</td>
</tr>
<tr>
<td>2</td>
<td>Remain at home while experiencing COVID-19 symptoms or sick with COVID-19</td>
<td>Treating healthcare provider</td>
</tr>
<tr>
<td>3</td>
<td>Obey a quarantine order issued to the Covered Employee</td>
<td>Treating healthcare provider</td>
</tr>
<tr>
<td>4</td>
<td>Obey an Isolation order issued to the Covered Employee</td>
<td>Treating healthcare provider</td>
</tr>
<tr>
<td>5</td>
<td>Obey an order issued by the Commissioner of Health regarding the duties of hospitals and other congregate facilities</td>
<td>Commissioner of Health</td>
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</table>
Questions?