



State and Federal Employment Law Update for 2022

Technology and Manufacturing
Association

PRESENTED BY:

Michael F. Hughes
Labor & Employment



SmithAmundsen

FEBRUARY 17, 2022

Disclaimer: The information and materials contained in this slide deck are for informational and educational purposes only and shall not be construed as legal advice. Consult an experienced attorney for specific questions and answers. Information included is up-to-date as of date listed. ©SmithAmundsen LLC | www.salawus.com

New & Updated Illinois Laws

- Changes to Illinois Human Rights Act (IHRA) –
 - Conviction Record Amendment (CRA)
 - Discrimination based on Work Authorization Status
 - Discrimination based on association with disabled persons.
- Freedom to Work Act changes impact Non-Competes and Non-Solicits
- COVID-19 Corner: Vaccine Mandate and Exemptions
 - Governor's Executive Order
 - Healthcare Right of Conscience Act
- Min Wage Reminder and Penalty Increase for unpaid wages
- Miscellaneous Laws and Updates
 - VESSA Amendments
 - Personnel Record Review Act
 - Equal Pay Act – Amendments and Additional Information on Reporting
 - Consumer Coverage Disclosure Act – Health Insurance disclosures
 - Illinois Secure Choice Retirement Savings Act
- What's on the Horizon for 2022

IHRA Changes – Conviction Record Amendment

CRA amended the Illinois Human Rights Act

- **Effective March 23, 2021 – Conviction = protected status**
- May not use a conviction record as basis for adverse employment actions/decisions (recruiting, hiring, promoting disciplining, terminating etc.), except as provided by IHRA.
- Separate from and in addition to:
 - “Ban the Box”
 - Use of “Arrest Record” and/or “Sealed or Expunged Convictions”
 - EEOC guidance on arrests/convictions and FCRA for background checks

IHRA and EEOC re: Use of Criminal Convictions “Job Related and Consistent with Business Necessity”

- **What is “job related and consistent with business necessity”?**
 - An employer who excludes applicants with certain convictions must be able to demonstrate that the exclusion operates to *effectively link specific criminal conduct (and its dangers) with the risks inherent in the duties of a particular position.*
 - Example: a cashier position may exclude someone with a theft or fraud conviction.
 - This analysis doesn’t go away! Focus is typically on crimes involving drugs, violence and theft/dishonesty.

IHRA: 3 Key Exemptions under CRA

1. Unless otherwise authorized by law...

- Usually occupation/job specific:
 - Illinois has laws for Schools, Childcare, Healthcare, Police, Private Security Guards and Detectives, and the Cannabis Industry
 - Federal Gov't has laws for FDIC Banks and the Transportation Industry (amongst others)

2. Substantial relationship...

3. Unreasonable risk...



IHRA – “Substantial Relationship” or “Unreasonable Risk”

775 ILCS 5/2-103.1 (New) – “Substantial relationship” means whether:

1. The employment position offers the opportunity for the same or a similar offense to occur; **AND**
2. Whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position.

Employer **MUST** engage in Interactive Assessment...and **MUST** consider the following to determine if there is an “Unreasonable Risk”:

- Length of time since the conviction;
- Number of convictions that appear on the conviction record;
- Nature and severity of the conviction and its relationship to the safety and security of others;
- Facts or circumstances surrounding the conviction;
- Age of the employee at the time of the conviction; **and**
- Evidence of rehabilitation efforts.

“Unreasonable Risk” is NOT defined in the IHRA.

***BUT will likely be viewed under an Objective *Reasonableness Standard*

IHRA: Interactive Formal Assessment

Involves a documented 2 Step Decision Process:

I. PRELIMINARY decision analysis and communication

- Notice of the disqualifying conviction(s) that are the basis for the initial disqualification.
- Copy of the Conviction history report;
- Explanation of the Employee's rights to respond before the decision becomes final including submission of evidence challenging accuracy of conviction report or mitigation, e.g. rehabilitation.
- **Employee response. Employee must be allowed at least 5 business days to respond to this PRELIMINARY notification before a final decision is made.**

II. FINAL decision analysis and communication

- Notice of the disqualifying conviction(s) that are the basis for the final decision AND the employer's reasoning for the disqualification;
- Any existing procedures the employer has for the employee to challenge the decision or request a reconsideration; AND
- **Information regarding the employee's right to file a charge of discrimination with the IDHR.**

Employer's Main Reasoning for Criminal Background Checks

- Combatting theft and fraud in workplace and concerns regarding workplace violence
 - If there is a unreasonable risk of related crimes or a likelihood that someone with a criminal history would commit these crimes in workplace, CRA exceptions apply.
- Compliance with state or federal law pertaining to background checks
 - “Unless Otherwise Authorized by Law” language accommodates this concern.
- Preventing use, possession or distribution of illegal drugs in the workplace
 - If there is a unreasonable risk of drug related crimes or a likelihood that someone with a criminal history would commit these crimes in workplace, CRA exceptions apply.
- Risk of Negligent Hiring or Retention Claims
 - Employers owe a duty of care not to hire or retain employees who create a foreseeable risk to coworkers or third parties.
 - **IL does NOT provide for any blanket civil immunity for employers.**

Disclaimers And Certifications in the Application Process...



When doing criminal background checks, the following disclaimers / certifications should be considered:

- “Conviction will not automatically exclude you from consideration for employment opportunities.”
- “Under no circumstances should you disclose an arrest that did not result in conviction or a conviction that has been ordered expunged, sealed or impounded.”
- “Certifies that the facts and information set forth in this application are true and complete to the best of my knowledge. I understand that any falsification, misrepresentation, or omission of facts on this application, resume, and any attachments or additional required documents related to my application or interview for employment will be cause for the denial of employment or immediate termination of employment, regardless of how or when it was discovered.”

IHRA: Discrimination Prohibited based on Work Authorization Status and Disability Association

IHRA amended to clarify:

- "Work authorization status" – means being a person born outside of the U.S., and not a U.S. citizen, who is authorized by the federal government to work in the United States
 - Employers prohibited from refusing to honor work authorization based upon the specific status or term of status that accompanies the authorization to work.
- Disability Association – unlawful to discriminate against an individual based on their association with a disabled person.

IL Freedom to Work Act (FTWA) Amended (Effective January 1, 2022)

FTWA enacted in 2017 limiting noncompete agreements

SB 672 – Amended FTWA:

- Amendments apply to agreements entered on or after January 1, 2022
- Expanded to also cover Non-Solicits of clients and employees
- For non-competes employees must earn at least \$75,000 annually
- For non-solicits employees must earn at least \$45,000 annually
- Earnings defined as all forms of taxable consideration, including salary, bonuses and commissions
- Prohibits enforcing agreements who lose job due to COVID-19 pandemic or under circumstances similar to pandemic, UNLESS employee receives compensation equivalent to base salary for the full restrictive period (minus any compensation from new employment)
- Prohibits enforcing agreement to those who work in the construction trades
- **Provides employees with Attorney's Fees and costs if they prevail in a claim brought by an employer to enforce an agreement.**

IL Freedom to Work Act (Cont'd)

Amended (Effective January 1, 2022)

- **Review Period** – Requires employees be provided at least 14 days to review an agreement and requires statement in agreement that employee has the right to consult with an attorney before signing the agreement.
- **Consideration** – Follows current case law stating employee must work for at least 2 years OR be provided an additional professional or financial benefit.
- **Post-Employment Non-Compete/Non-Solicit must be supported by a Legitimate Business Interest** – Courts must review on a case-by-case basis considering the totality of the facts and circumstances.
- **KEY EXCEPTIONS**
 - Does not apply to confidentiality, trade secret and invention assignment agreements
 - Does not apply to agreements related to sale, acquisition or disposition of ownership interests in a business
 - Does not apply to “garden leave” provisions that require an employee to provide advance notice of termination of employment (where the employee remains employed and paid during the termination notice period).
 - Does not apply to “no re-application” provisions in agreements.

COVID-19 CORNER – IL Recap/Latest

- **Mask Mandate Effective August 30, 2021 –**
 - **Employees must wear face coverings in indoor workplaces.**
 - May be removed when they can consistently maintain six feet of distance (such when in their office or cubicle space).
 - ***Indoor Mask Mandate ends February 28, 2022.***
- **Vaccine Mandate for Health Care workers, K-12 School Personnel, Higher Education (College/University) and State Owned/Operated Facilities (IL Dept. Veteran Affairs, DHS, IDC, IDJJ) –**
 - IDPH provided guidance stating it was a “Soft Mandate” – except for except for State Owned/Operated Facilities).
 - IDOL has not addressed whether costs of tests/vaccination is a business expense and if employers must pay employees for time it takes to get tested/vaccinated under a “Hard” or “Soft” mandates.
- **IDPH recently adopted the new revised CDC guidance on “isolation” and “quarantine” (quarantine 5 days after exposure (unless up-to-date with vax); isolate 5 days if confirmed C19+; wear mask 5 days after quarantine/isolation)**
- **Healthcare Right of Conscience Act Amended**
 - Amendment states it is not a violation of Act for an employer to take any measures or impose any requirements intended to prevent COVID-19.

Misc. New Laws/Updates

VESSA – Amended to Expand and Clarify

- Family/household member definition expanded to include civil unions, grandparents, grandchildren, siblings, or any other individual with equivalent family relationship.
- Expands to “any other crime of violence” not just domestic, sexual, or gender violence
- Clarifies employee chooses what document to submit and employer cannot request or require more than one document be submitted during a 12 month period if related to same incident(s) or perpetrator(s)
- Clarifies Employer must keep information in strictest of confidence.

Personnel Record Review Act

- Amended to provide that, except as allowed under the Act, if an Employer violates the Act by disclosing a disciplinary action, an employee may file a complaint with the IDOL or a civil action within 3 years of the disclosure.

Misc. New Laws/Updates

Equal Pay Act – Registration and Related Reporting Mandates

- Private employers having 100+ employees in the State of Illinois.
- Clarifies procedures on when and how pay data reporting must be done.
- Implementation to start in 2022 with applications to be submitted between March 24, 2022 and March 23, 2024 based on IDOL notification.
- Slight tweak also added that permits an employer to require an applicant to verify the aggregate amount of unvested equity or deferred compensation the applicant would forgo by resigning the applicant's current position.

Consumer Coverage Disclosure Act

- Public and Private Employers must disclose to employees upon hire, annually, and EE's request differences in employees' health coverage and benefits options under plans regulated by Illinois.
- Focus on notification, so applies to ERISA or Self-Funded plans.

Equal Pay Changes – in focus

(820 ILCS 112/11 **new section**)

- Sec. 11. Equal pay registration certificate requirements; application.
 - “Business” means any private employer who has more than 100 employees in the State of Illinois, and must also file an EEO-1 Report with the EEOC --- but does not include the State of Illinois or any political subdivision, municipal corporation, or other governmental unit or agency.
 - **A business must obtain an equal pay registration certificate from the Department.**

Equal Pay Changes

Any business subject to the requirements of this Section 11 that is authorized to transact business in this State on March 23, 2021 shall submit an application to obtain an equal pay registration certificate, between March 24, 2022 and March 23, 2024, and must recertify every 2 years thereafter.

Any business subject to the requirements of this Section that is authorized to transact business in this State after March 23, 2021 must submit an application to obtain an equal pay registration certificate within 3 years of commencing business operations, but not before January 1, 2024, and must recertify every 2 years thereafter.

The Department shall collect contact information from each business subject to this Section. The Department shall assign each business a date by which it must submit an application to obtain an equal pay registration certificate. The business shall recertify every 2 years at a date to be determined by the Department.

When a business receives a notice from the Department to recertify for its equal pay registration certificate, if the business has fewer than 100 employees, the business must certify in writing to the Department that it is exempt from this Section.

Any new business that is subject to this Section and authorized to conduct business in this State, after the effective date of this amendatory Act of the 102nd General Assembly, shall submit its contact information to the Department by January 1 of the following year and shall be assigned a date by which it must submit an application to obtain an equal pay registration certificate.

The Department's failure to assign a business a registration date does not exempt the business from compliance with this Section. The failure of the Department to notify a business of its recertification deadline may be a mitigating factor when making a determination of a violation.

Equal Pay Changes

A business shall apply for an equal pay registration certificate by paying a \$150 filing fee and submitting wage records and an equal pay compliance statement to the Director as follows:

- (A) Wage Records. Any business that is required to file an annual Employer Information Report EEO-1 with the Equal Employment Opportunity Commission must also submit to the Director a copy of the business's most recently filed Employer Information Report EEO-1. The business shall also compile 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 the county in which the employee works, the date the employee started working for the business, any other information the Department deems necessary to determine if pay equity exists among employees, 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 \$100, to the Director.
- (B) Equal Pay Compliance Statement. The business must submit a statement signed by a corporate officer, legal counsel, or authorized agent of the business.

Equal Pay Changes

The Compliance Statement Must Contain:

- i. that the business is in compliance with this Act and other relevant laws, including but not limited to: Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Illinois Human Rights Act, and the Equal Wage Act;
- ii. that the average compensation for its female and minority employees is not consistently below the average compensation, as determined by rule by the United States Department of Labor, for its male and non-minority employees within each of the major job categories in the Employer Information Report EEO-1 for which an employee is expected to perform work, taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, education or training, job location, use of a collective bargaining agreement, or other mitigating factors; as used in this subparagraph, “minority” has the meaning ascribed to that term in paragraph (1) of subsection (A) of Section 2 of the Business Enterprise for Minorities, Women, and Persons with Disabilities Act;
- iii. that the business does not restrict employees of one sex to certain job classifications, and makes retention and promotion decisions without regard to sex;
- iv. that wage and benefit disparities are corrected when identified to ensure compliance with the Acts cited in item (i);
- v. how often wages and benefits are evaluated; and
- vi. the approach the business takes in determining what level of wages and benefits to pay its employees; acceptable approaches include, but are not limited to, a wage and salary survey.

Equal Pay Changes

Receipt of the equal pay compliance statement by the Director does not establish compliance with the Act.

A business that has employees in multiple locations or facilities in Illinois shall submit a single application to the Department regarding all of its operations in Illinois.

Equal Pay Changes

Issuance or rejection of registration certificate. The Director must issue an equal pay registration certificate, or a statement of why the application was rejected, within 45 calendar days of receipt of the application. An application may be rejected only if it does not comply with the requirements of subsection (c) [a/k/a the Application].

BUT... the receipt of an application by the Department, or the issuance of a registration certificate by the Department, shall not establish compliance of the Equal Pay Act of 2003 as to all Sections except Section 11. The issuance of a registration certificate shall not be a defense against any Equal Pay Act violation found by the Department, nor a basis for mitigation of damages.

Equal Pay Changes

Revocation of registration certificate. An equal pay registration certificate for a business may be suspended or revoked by the Director when the business fails to make a good faith effort to comply with the Acts identified in subparagraph (A) of paragraph (1) of subsection (c), fails to make a good faith effort to comply with this Section 11, or has multiple violations of this Section or the Acts identified in subparagraph (A) of paragraph (1) of subsection (c).

Prior to suspending or revoking a registration certificate, the Director must first have sought to conciliate with the business regarding wages and benefits due to employees.

The Director, or his or her authorized representative, may interview workers, administer oaths, take or cause to be taken the depositions of witnesses, and require by subpoena the attendance and testimony of witnesses, and the production of all books, records, and other evidence relative to the matter under investigation or hearing. Such subpoena shall be signed and issued by the Director or his or her authorized representative.

Equal Pay Changes

Upon request by the Director or his or her deputies or agents, records shall be copied and submitted for evidence at no cost to the Department. Every employer upon request shall furnish to the Director or his or her authorized representative, on demand, a sworn statement of the accuracy of the records. Any employer who refuses to furnish a sworn statement of the records is in violation of this Act. In case of failure of any person to comply with any subpoena lawfully issued under this Section or on the refusal of any witness to produce evidence or to testify to any matter regarding which he or she may be lawfully interrogated, it is the duty of any circuit court, upon application of the Director or his or her authorized representative, to compel obedience by proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued by such court or a refusal to testify therein. The Director may certify to official acts. Neither the Department nor the Director shall be held liable for good faith errors in issuing, denying, suspending or revoking certificates.

Equal Pay Changes

Administrative review.

A business may obtain an administrative hearing in accordance with the Illinois Administrative Procedure Act before the suspension or revocation of its certificate is effective or imposition of civil penalties by filing a written request for hearing within 20 calendar days after service of notice by the Director.

Technical assistance.

The Director must provide technical assistance to any business that requests assistance regarding this Section.

Equal Pay Changes

Access to data.

- *Any individually identifiable information submitted to the Director within or related to an equal pay registration application or otherwise provided by an employer in its equal pay compliance statement shall be considered confidential information and not subject to disclosure pursuant to the Illinois Freedom of Information Act. “Individually identifiable information” means data submitted that is associated with a specific person or business.*
- *Aggregate data or reports that are reasonably calculated to prevent the association of any data with any individual business or person are not confidential information. Aggregate data shall include the job category and the average hourly wage by county for each gender, race, and ethnicity category on the registration certificate applications.*
- *The Department of Labor may compile aggregate data from registration certificate applications.*
- *The Director's decision to issue, not issue, revoke, or suspend an equal pay registration certificate is public information.*
- *A current employee of a covered business may request “anonymized” data regarding their job classification or title and the pay for that classification. No individually identifiable information may be provided to an employee making a request under this paragraph.*
- *The Department may share data and identifiable information with the Department of Human Rights, pursuant to its enforcement of Article 2 of the Illinois Human Rights Act, or the Office of the Attorney General, pursuant to its enforcement of Section 10-104 of the Illinois Human Rights Act.*
- *Any Department employee who willfully and knowingly divulges, except in accordance with a proper judicial order or otherwise provided by law, confidential information received by the Department from any business pursuant to this Act shall be deemed to have violated the State Officials and Employees Ethics Act and be subject to the penalties.*

IL EPA Fines/Penalties

Employers who violate any provision of the IEPA or any rule adopted under the Act are subject to a civil penalty **for each employee affected** as follows:

- (1) An employer with fewer than 4 employees: first offense, a fine not to exceed \$500; second offense, a fine not to exceed \$2,500; third or subsequent offense, a fine not to exceed \$5,000.
- (2) An employer with between 4 and 99 employees: first offense, a fine not to exceed \$2,500; second offense, a fine not to exceed \$3,000; third or subsequent offense, a fine not to exceed \$5,000.
- (3) An employer with 100 or more employees who violates any Section of this Act except for the CERTIFICATION provisions shall be fined up to \$10,000 per employee affected. An employer with 100 or more employees that is a business as defined under the new CERTIFICATION requirements shall be fined up to \$10,000 for failure to comply with the certification requirements.

Misc. New Laws/Updates

Illinois Secure Choice Retirement Savings Act

- Coverage: 25 employee threshold reduced to 5 employees – Number of employees determined by average in the employer's quarterly data.
 - September 1, 2022 – Earliest enrollment deadline for 15-25 employees
 - September 1, 2023 – Earliest enrollment deadline for 5-14 employees
- Employers with 5+ employees are required to (1) participate in the IL Secure Choice Retirement Savings Program, OR (2) offer another qualifying retirement plan, such as 401(k) Simplified Employee Pension (SEP) Plan, Simple or Traditional IRA or Roth IRA plan – or be assessed a penalty.
- Secure Choice Program includes annual, automatic increases to contribution rates up to a maximum of 10% of employee's wages.
- Extends time to come into compliance from 90 to 120 days after notice of violation/penalty.

Proposed Amendment to Illinois Constitution: Ban “Right-to-Work”

On May 26, 2021, the Illinois legislature passed Senate Joint Resolution Constitutional Amendment 11.

- The proposal asks voters on the November 8, 2022 Ballot whether the IL Constitution should be amended to ban/prohibit “right-to-work” laws
- Right-to-work laws limit or prohibit employers and unions from agreeing to union-security clauses in a CBA which require employees become union members, pay compulsory union dues (typically out of paychecks)... and be subject to being fired by the employer if they refuse.
- According to the U.S. Chamber of Commerce, from 2001 to 2016, states that have right-to-work laws experienced more job growth, lower unemployment rates and economic output (resulting in personal income growth at a higher rate) compared to non-right-to-work states.

Changes to Wage & Hour Laws

Increased IWPCA interest penalty from 2% to 5% per month

Illinois Minimum Wage –

- **Since January 1, 2021** – \$11.00 – Tipped \$6.60
 - January 1, 2022 – Increase to \$12.00 – Tipped \$7.20
 - January 1, 2023 – Increase to \$13.00
 - January 1, 2024 – Increase to \$14.00
 - January 1, 2025 – Increase to \$15.00

Chicago Min Wage – Increased July 1, 2021

- 21+ employees - \$15 per hour – Tipped \$9.00
- 4 to 20 employees - \$14.00 per hour – Tipped \$8.40
- **July 1, 2022:** Increase based on Consumer Price Index (CPI) increase of up to 2.5% increase

Cook County Min Wage – Did NOT Increase July 1, 2021 (except for Tipped EEs)

- July 1, 2021: \$13 per hour – Tipped \$6.60 (increased to \$7.20 on Jan. 1, 2022 with State Minimum)
- **July 1, 2022:** Increase based on Consumer Price Index (CPI) increase of up to 2.5% increase...BUT there will not be an increase if Cook Cty unemployment greater than 8.5%

IDOL's NEW Joint Employer Liability Rule is now in effect!!!

The Illinois Department of Labor has adopted its amendments to the Part titled Minimum Wage Law (56 IAC 210; 45 Ill Reg 6894) effective 1/ 21/22. The rule changes address situations in which one individual is jointly employed by two or more closely associated employers. The rulemaking lists factors to be considered in determining whether a joint employment relationship exists among other entities that are associated with a person's main employer. If this is the case, the employee's work in a given period for all the related entities counts as one employment subject to the Minimum Wage Law and all joint employers become liable for any violations of that law. (If the entities are found to be completely independent of one another, the employee is working separate jobs and each employer may disregard work performed for the other employers.)

Factors to be considered include: whether the employee's work benefits the alleged joint employer or is an integral part of the alleged joint employer's business; whether the alleged joint employer has direct or indirect control or influence over the employee's terms or conditions of employment (e.g., work schedule, work quality); whether the alleged joint employer owns or leases the premises where the work is performed or provides tools, equipment or materials used by the employee; and whether the alleged joint employer controls the main employer's operations via contractual obligations, ownership interest, joint management, or economic dependence. An inquiry into a joint employment relationship depends on all the facts of a particular case; no single factor should be regarded as determining, and not all factors need be present for a joint employment relationship to exist.

What's On the Horizon... in IL

BUCKLE UP!

New Liabilities for Employers under the Gender Violence Act

- Rep. Will Guzzardi (D-Chicago) HB4850.
- This measure would create new liabilities for employers under the Gender Violence Act. It is in response to the 2019 3rd Illinois Appellate Court decision *Gasic v. Marquette Management*. That Court held that the Act was unclear as to whether a corporation was a “person” as provided under the Act.
- HB 4850 provides that an employer would be liable for gender-related violence committed by an employee or nonemployee if the employer, through the employer’s acts or omissions, engages in: (1) encouraging or assisting in the commission of the gender-related violence by failing to supervise, train, or monitor an employee or nonemployee; (2) having prior knowledge of an employee’s or nonemployee’s propensity for engaging in similar conduct but failing to take remedial measures; (3) failing to investigate complaints or reports of similar conduct by an employee or nonemployee; or (4) otherwise failing to investigate or take remedial measures in response to complaints or reports of similar conduct by an employee or nonemployee.

Expansion of Bereavement Leave

- Sen. Melinda Bush (D-Grayslake) SB3120 is seeking to change Illinois' Child Bereavement Act to include bereavement leave for additional family members.
- This proposal which already has been approved by the House Labor Committee and is on second reading, requires an employer of 250 or more full-time employees to provide up to 26 weeks of intermittent, unpaid leave if the employee experiences the loss of a child, 26 years of age or younger, by suicide. An employee of an employer of at least 50 but fewer than 250 full-time employees is entitled to use a maximum of 12 weeks of intermittent, unpaid leave if the employee experiences the loss of a child, 26 years of age or younger, by suicide.

HB85 – Wage Insurance Act

- (FLOWERS M) Creates the Wage Insurance Act.
- Requires the Department of Employment Security to establish a Wage Insurance Program.
- Provides that an individual is eligible for wage insurance benefits if the individual is a claimant under the Unemployment Insurance Act at the time the individual obtains reemployment and is not employed by the employer from which the individual was last separated.
- Provides that benefits shall be paid in an amount sufficient to pay the difference between the wage received by the individual at the time of separation and the wages received by the individual from reemployment. Imposes a 0.4% payroll tax on employees beginning January 1, 2022.
- Provides that claims for wage insurance benefits may be filed beginning June 1, 2022. Contains provisions concerning the recovery of erroneous payments; hearings; civil penalties; unpaid taxes; rules; and other matters.
- Creates the Wage Insurance Fund as a special fund in the State treasury.
- Amends the State Finance Act to include the Wage Insurance Fund.
- Amends the Freedom of Information Act.
- Exempts from inspection and copying information that is exempt from disclosure under the Wage Insurance Act.

HB3066 – Non-Compete Higher Threshold

- (BURKE K) Amends the Illinois Freedom to Work Act to establish higher thresholds.

HB3530 – Employee Security Act

- (AMMONS C) Creates the Illinois Employee Security Act.
- Establishes a framework for employee discipline and discharge.
- Prohibits the unjust discharge of an employee.
- Requires employers to utilize progressive discipline measures.
- Limits the use of electronic monitoring.
- Provides for severance pay. Directs the Department of Employment Security to adopt rules and administer the Act.
- Provides statutory remedies for wrongfully discharged employees and authorizes the recovery of damages.
- Creates the Wrongful Discharge Enforcement Fund as a special fund in the State treasury.
- Applies to disciplinary and discharge actions occurring one year after the Act's effective date.

HB4116 – Right to Privacy-Drug Test

- (MORGAN B) Amends the Right to Privacy in the Workplace Act.
- Provides that an employer may not refuse to hire an individual or discipline an employee because results of an individual's drug test indicate the presence of THC on the part of that individual.
- Permits an employer to enforce a pre-employment drug testing policy, zero-tolerance drug testing policy, random drug testing policy, or a drug-free workplace policy or disciplining an employee for violating such policy, but provides that an employer may not take adverse action against an employee solely because of a positive drug test for cannabis unless the test result exceeds limits set forth in certain DUI provisions of the Illinois Vehicle Code.
- Sets forth conditions under which an employer may discipline an employee for impairment.
- Provides that there is not a cause of action for any person against an employer for disciplining or terminating the employment of an individual when enforcing a compliant policy.

HB4600 – One Day of Rest

- (COLLINS L) Amends the One Day Rest In Seven Act. Provides that any employer who violates any of the provisions of the Act, shall be guilty of a civil offense (rather than a petty offense), and shall be subject to a civil penalty of up to \$500 per offense, payable to the Department of Labor, and damages of up to \$500 per offense, payable to the employee or employees affected (rather than be fined for each offense in a sum of not less than \$25 nor more than \$100). Provides for which actions shall constitute a separate offense.
- Provides that the 7 day period be CONSECUTIVE vs. calendar.
- Provides that the Director of Labor shall enforce the Act in accordance with the Illinois Administrative Procedure Act.
- Provides that any funds collected by the Department shall be deposited in the Child Labor and Day and Temporary Labor Services Enforcement Fund.

HB4179 – Human Rights Act-Family Responsibility

- (GONG-GERSHOWITZ J) Amends the Illinois Human Rights Act.
- Provides that it is the public policy of the State to secure from all individuals within the State the freedom from discrimination against any individual because of the individual's family responsibilities.
- Defines “family responsibilities” as an employee's actual or perceived provision of care to a family member, whether in the past, present, or future. Makes a corresponding change in the definition of “unlawful discrimination”.

The Biden L&E Agenda

His Pre-Election Promise...

- Check the abuse of corporate power over labor and hold **corporate executives personally accountable** for violations of labor laws;
- Encourage and **incentivize unionization** and collective bargaining; and
- Ensure that workers are treated with dignity and receive the pay, benefits, and **workplace protections they deserve.**

Changing of the Guard

- **US DOL:** Marty Walsh, Secretary of Labor. Former head of the Boston Building and Construction Trades Council and Local Union President as Secretary of Labor. A union member with strong support from the AFL-CIO and its affiliated unions.
- **OSHA:** Doug Parker, Asst. Secretary to Head up OSHA. Formerly, the Chief of the State of CA's OSHA.
- **US DOL Deputy Secretary:** Julie Su, USDOL's Deputy Secretary. Former CA Labor Secretary. Heralded by progressives as an “ardent worker advocate” and “innovative wage enforcer.”
- **EEOC:** Charlotte Burrows, EEOC Chair. Former Associate Deputy Attorney General at the DOJ, where she worked on employment litigation, voting rights, combating racial profiling, and implementing the Violence Against Women Act, which was first co-sponsored in Congress in 1994 by then-Sen. Biden.
- **OFCCP:** Jenny R. Yang, OFCCP Director. Formerly served the Obama-Biden Administration, from 2013-2018 as Chair, Vice-Chair, and Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC).

And... the New NLRB

- **The NLRB Majority is Pro-Union**

- Lauren M. McFerran, Chairman
- John F. Ring
- Marvin E. Kaplan
- Gwynne A. Wilcox***
- David M. Prouty***

***Biden appointees

The New NLRB's GC

In settlements involving unfair labor practice charges that result in economic harm to an employee the NLRB is pursuing and insisting on “Consequential Damages.”

- Traditionally remedies in such matters have been focused on back pay and loss of benefits, as well as possible reinstatement of employment
- “Consequential Damages” could include medical, legal or moving expenses, damages to credit ratings, liquidating investment accounts to cover living expenses and **any other award to make an employee whole for all economic losses as a result of an employer's unfair labor practice.**

IMPORTANT: Such settlements may also require the employer to actually ADMIT TO WRONGDOING.

The New NLRB's GC

In cases involving unlawful conduct committed during a union organizing drive, remedies could encompass the following, amongst other remedies:

- Requiring an employer to provide a union with (1) employee contact information, (2) equal time to address employees if they are convened by their employer for a “captive audience” meeting about union representation, and (3) reasonable access to an employer’s bulletin boards;
- Requiring an employer to pay for organizational costs that a union incurs in a re-run election because the employer has engaged in unlawful conduct sufficiently egregious as to cause the results of the prior election to be set aside;
- Requiring a reading of the “Notice to Employees and the Explanation of Rights” to employees by a principal of the employer or, in the alternative, by a Board Agent, in the presence of supervisors and managers, with union representatives being permitted to attend all such readings; **and (most concerning)**
- **Ordering an employer to recognize and bargain with a union where the union presents evidence of a card signing majority and the employer cannot establish a good faith doubt of such majority status.**

The New NLRB's GC

In cases involving unlawful failures to bargain (challenges to certification, withdrawals of recognition, first-contract negotiations, and any other situations where disruptions in collective bargaining have occurred), the following remedies could be sought:

- Requiring an employer to bargain on a specified schedule (i.e. not less than twice a week, at least six hours per session), until an agreement or a bona fide impasse is reached;
- Requiring the submission of periodic detailed bargaining progress reports to the NLRB on the status of bargaining;
- Creating 12-month insulation periods, including extensions, from the date an employer commences compliance with its bargaining obligations, during which a union's status as bargaining representative may not be challenged;
- Requiring the reinstatement of previously withdrawn proposals;
- Requiring the engagement of a mediator from the Federal Mediation and Conciliation Service (FMCS) to help facilitate good-faith bargaining between parties; **and (most concerning)**
- **Requiring an employer to reimburse the union for bargaining expenses in which the employer is found to have not bargained in good faith.**

SEC Votes to Revive Clawback Rule Stripping Executives of Their Paychecks

Executive Compensation Clawback Rule mandated by Congress in Section 954 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), is back.

- Under Section 954 of the Dodd-Frank Act, the SEC was to issue rules requiring companies listed on national securities exchanges to create and enforce clawback policies relating to executive compensation.
- In 2015, the SEC proposed an initial draft of rules under Section 954
 - The rules enabled the SEC to recoup executive compensation (i.e., bonuses or other incentive-based pay), in the event of corporate misconduct. Regardless of whether the executive was directly involved in or accused of any wrongdoing.
- The draft rules fell dormant after issuance and was not revisited for six years.

Quick Recap re: COVID Vaccine Mandates

- Federal Contractor Mandate – on hold/subject to additional legal action
- CMS Mandate – in effect
- OSHA Mandate for Large Employers – no longer in effect (but, employers are subject to OSHA's General Duty Clause!!)

***And, now waiting for local and state governmental engagement going forward...

EEOC & OFCCP Strategic Plans?

1. Pay equity. ***NOTE: Pay equity analysis may not be privileged (ACP and/or AWP). The EEOC is going to be zeroing in on securing an employer's internal analysis and related email communications. BE READY! BE SMART!
2. ADA.
3. Sexual harassment (and expanding Title VII's historical reach).

What To Do Today for What's Coming Tomorrow...

- 1) Review Union-Free preference statements & assess vulnerabilities to Union organizing. Know the ABC's! **Awareness – Benefits/Compensation – Communication - Supervision**
- 2) Conduct Employment Practices Audits (i.e. wage & hour/pay practices – including Rounding Rules, Automatic Deductions for Breaks, Start and End Times, Expense Reimbursements; internal complaint processes and procedures).
- 3) Revise Handbooks/Policies (i.e., NLRA Disclaimers from Obama era, Social Media Policies, Personal Use of Equipment, Solicitation/Distribution Rules).
- 4) Audit/review and address pay disparity amongst job titles/classifications. Equal Pay is a big priority at the EEOC.
- 5) Review joint employer relationships/issues. Review and update 3rd party contracts.
- 6) Review independent contractor relationships (use bona fide Corp's and LLC's, and review/update IC contracts).
- 7) Review/update COVID-19 Plan – communicate efforts to maintain a safe and healthy work environment.

QUESTIONS? Thank You!



OFFICES IN:

CHICAGO

ST. CHARLES

ROCKFORD

CRYSTAL LAKE

INDIANAPOLIS

MILWAUKEE

ST. LOUIS

COLUMBUS



Michael F. Hughes

630.217.1228

mhughes@saLAWus.com

FRONTLINE MANAGEMENT SIDE LABOR & EMPLOYMENT COUNSEL

www.laborandemploymentlawupdate.com

Disclaimer: The information and materials contained in this slide deck are for informational and educational purposes only and shall not be construed as legal advice. Consult an experienced attorney for specific questions and answers. Information included is up-to-date as of date listed. ©SmithAmundsen LLC | www.salawus.com