

BakerHostetler

Brief

FIRST QUARTER 2019

The BakerHostetler Quarterly Illinois Employment Law Newsletter



All employers should be aware of these new labor and employment laws and regulations that took effect in 2018 or will take effect in 2019 at the federal, state and local levels. Below is a summary of key employment laws, regulations and trends that will impact Illinois employers in 2019.

Federal Activity

Epic Systems v. Lewis

In the biggest employment decision of the year, the Supreme Court ruled 5-4 on May 21, 2018, that requiring employees to sign arbitration agreements that include class action waiver provisions was not a violation of the National Labor Relations Act. In a trio of cases involving *Epic Systems Corp.*, *Murphy Oil USA Inc.* and *Ernst & Young*, the Court held that companies may use class action waivers to limit their exposure to potential collective claims from workers. The decision allows employers with arbitration agreements to require individual arbitration of disputes instead of class or collective action litigation.

In the wake of *Epic Systems*, employers that already have mandatory arbitration agreements in place should revise those agreements to include appropriate enforceable class action waivers. Employers are also encouraged to ensure adherence to state requirements regarding substantive and procedural conscionability. Employers without arbitration agreements in place, or employers using arbitration agreements without class action waivers, should work with their counsel to assess the potential impact of such agreements and waivers.

- The **#MeToo movement** continues to impact federal and state laws and U.S. Equal Employment Opportunity Commission (EEOC) enforcement. More information about workplace harassment in the #MeToo era is provided [below](#).
- On Nov. 8, 2018, the Department of Labor (DOL) retracted its “80/20 rule,” which barred employees from receiving tip credit when tipped employees spent more than 20 percent of their time performing non-tipped duties. The DOL retracted the rule by reissuing **DOL Opinion Letter FLSA2009-23**, which was first promulgated by the George W. Bush administration but withdrawn by the Obama administration. The 80/20 rule effectively required employers to meticulously monitor the daily tip-generating and non-tip-generating tasks performed by tipped employees. The rule proved problematic and triggered a surge of class actions from employees claiming they performed too many non-tipped duties for their employer to properly take a tip credit. The reissued opinion letter has provided many employers with much-needed clarity and has alleviated the burden of tracking time spent by tipped employees on tip-generating and non-tip-generating tasks.

- In 2019, the **Tax Cuts and Jobs Act**, or **TCJA** (originally signed into law on Dec. 22, 2017), will continue to impact certain employment-related deductions. The TCJA has eliminated, at least through 2025, the exclusion for employer-paid relocation expenses and the business deduction for entertainment expenses.
- The **TCJA** also continues to contain provisions ending the tax deductions for severance-related payments that include nondisclosure agreements related to the settlement of sexual harassment claims. The TCJA provides that no business expense deduction will be allowed for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney’s fees related to such a settlement or payment. This exclusion applies to amounts paid or incurred after Dec. 22, 2017, the date the tax bill was enacted.

Illinois Activity

- Amendments to the **Illinois Wage Payment and Collection Act** effective Jan. 1, 2019, expand employers’ obligations to reimburse business expenses. More detail about this amendment is provided [below](#).
- Amendments to the sexual harassment prohibitions in the **Illinois Human Rights Act**, effective Aug. 24, 2018, have increased the time frame in which sexual harassment charges may be filed, and allow complainants to bypass Illinois Department of Human Rights (IDHR) investigations and proceed directly to court. More detail about these amendments is provided [below](#).
- Amendments to the **Illinois Nursing Mothers in the Workplace Act**, effective Aug. 21, 2018, require employers to provide paid milk expression breaks when needed by nursing mothers. More detail about these provisions is provided [below](#).
- Illinois consolidated its regulations regarding military leave and expanded the rights of Illinois employees providing military service in the **Illinois Service Member Employment and Reemployment Rights Act (ISERRA)**, effective Jan. 1, 2019. More information about ISERRA is provided [below](#).

The Continuing Impact of the #MeToo Movement

The New York Times first reported on sexual harassment and assault allegations against former Hollywood film producer Harvey Weinstein in October 2017. Since then, the #MeToo movement has drawn increased attention to sexual harassment and assault in the workplace. No industry or sector has been spared from the ripple effects of the #MeToo movement.

EEOC Reports That Sexual Harassment Claims Have Spiked in the #MeToo Era

On Oct. 4, 2018, almost one year after #MeToo took the country by storm, the EEOC released [preliminary sexual harassment charge data](#), which showed:

- A 12 percent increase in sexual harassment charges filed between FY 2017 and FY 2018. This was the first increase in sexual harassment charges in almost a decade, coming at a time when the overall number of charges filed with the EEOC decreased.
- Of the 66 harassment suits filed by the EEOC in FY 2018, 41 included allegations of sexual harassment – a 50 percent increase from FY 2017.
- The EEOC recovered nearly \$70 million from employers in FY 2018 related to sexual harassment charges, up from \$47.5 million in FY 2017.

EEOC Increases Enforcement Efforts

During the week of June 14, 2018, the EEOC filed seven highly publicized lawsuits against different employers, each alleging sexual harassment, in federal courts across the U.S. (Alabama, California, Missouri, New Mexico, Ohio and Texas), in an apparent attempt to pursue nationwide enforcement of Title VII's anti-harassment provisions. At the time of the lawsuits, Acting EEOC Chair Victoria Lipnic noted, "There are many consequences that flow from harassment not being addressed in our nation's workplaces. These suits filed by the EEOC around the country are a reminder that a federal enforcement action by the EEOC is potentially one of those consequences." Some key attributes of the lawsuits:

- Six of the suits allege sexual harassment against female employees, and one alleges racial and same-sex sexual harassment of a male Asian-American employee.
- Five of the seven suits allege that the harassment was perpetrated by a direct supervisor, manager or owner. Of these five, two suits also allege post-complaint retaliation.
- Four suits are premised on individual claims of harassment – the EEOC has customarily focused on class/pattern and practice cases.
- Two of the seven suits allege a failure to distribute a policy against sexual harassment and/or to train

employees on harassment prevention or complaint procedures.

Illinois Human Rights Act Amendments

On Aug. 24, 2018, Illinois amended Public Act [100-1066](#) to broaden employee rights and impose new, immediate notice requirements on employers. The act took effect upon its enactment and included several important changes:

Longer time period to file charges

Prior to the amendments, the IDHR imposed a time limit of 180 days within which an employee could file a charge alleging unlawful discrimination or harassment. Now, employees have up to 300 days to file charges with the IDHR. The amendment is incorporated into [775 ILCS 5/7A-102\(A\)](#).

Opting out of IDHR's investigation process

Prior to the amendments, complaints were assigned to IDHR investigators who conducted factual investigations before a complainant could bring a suit in state court. Under the amendments, a complainant may opt out of the IDHR's investigative process and bring a lawsuit directly in state court. To opt out, the complainant must submit a written request to the IDHR within 60 days after receiving notice from the IDHR of his or her right to opt out, and the IDHR has 10 business days thereafter to issue a notice of right to sue, allowing the complainant to file suit in state court. The employer must be copied on the IDHR's issuance of the notice of right to sue, and a complainant with an IDHR notice of right to sue must bring suit within 90 days of receiving the notice. The amendment is incorporated into [775 ILCS 5/7A-102\(B\)](#).

Updated posting and notice requirements

The amendments now require employers to update their sexual harassment handbooks to include specific information about the rights of employees to be free from sexual harassment. Public Act 100-0588 also requires employers to post the sexual harassment notice issued by the IDHR. The amendment is incorporated into [775 ILCS 5/2-102\(K\)](#).

These amendments apply to employers with one or more employees and extend to all employers operating in the state of Illinois.

New Public Sector Regulation

In the wake of the #MeToo movement, Illinois amended Public Act [100-0588](#) to increase the protection of public employees with respect to sexual harassment. The law was effective June 8, 2018. In addition to requiring lobbyists and state employees to complete annual sexual harassment training, Illinois restricts taxpayer funds from being used to fund public sector severance agreements related to allegations of sexual harassment and sexual discrimination in the public sector.

Illinois Amends Act to Expand Rights of Breastfeeding Mothers

On Aug. 21, 2018, Gov. Rauner signed an immediately effective amendment to the **Illinois Nursing Mothers in the Workplace Act** expanding the rights of employees who need to express milk while they are at work. The act with amendments continues to apply to employers who have more than five employees.

The key features of the amendment are discussed below:

- Prior to the amendment, the act provided that the employee's pumping break "must, if possible" run concurrently with other break times provided. The amendments now state that the pumping break does not have to coincide with other break times and adds that employers must provide "reasonable breaks each time the employee has the need to express milk for one year after the child's birth." The amendments confirm that an employer cannot require an employee to schedule pumping breaks around other previously scheduled breaks, giving nursing mothers greater control over their pumping breaks.
- The act previously required employers to provide unpaid breaks for mothers who needed to express milk during the workday. The amendments remove the word "unpaid," and instead state that an "employer may not reduce an employee's compensation for the time used for the purpose of expressing milk." This does not necessarily mean that all pumping breaks must be paid, but the new language does prohibit employers from reducing an employee's pay for pumping breaks. Put simply, employers must pay employees exactly as they would have if the employees were not taking pumping breaks. However, if an employee needs to pump during a regularly scheduled unpaid break, the employer does not need to pay for that time.

The former version of the act provided that an employer is not required to provide break time for pumping if it would "unduly disrupt the employer's operations." Under the amendments, an individual may be restricted from pumping only if it causes an "undue hardship," as defined by the Illinois Human Rights Act, which essentially means that an employer would need to show that a pumping break would be prohibitively expensive or disruptive given the employer's size, financial resources and operation.

- In order to not permit a lactation break, the employer has the burden of showing that the break would be "prohibitively expensive or disruptive" based on the following factors:
 - » The nature and cost of the accommodation needed.
 - » The overall financial resources of, and number of people employed at, the facility involved in providing

the reasonable accommodation, the effect on expenses and resources, or the impact otherwise of the accommodation upon the operation of the facility.

- » The overall financial resources and size of the employer, including the number of employees and the number, type and location of its facilities.
- » The nature of the operations of the employer, including the composition, structure and functions of the workforce; the geographic separateness; and the administrative or fiscal relationship of the facility in question to the employer.

Employers with operations in Illinois should review and update their current lactation break policies and procedures to ensure compliance with the new amendments.

Illinois Imposes New Expense Reimbursement Obligations in 2019

Effective Jan. 1, 2019, amendments to the **Illinois Wage Payment and Collection Act** (IWPCA) will expand the rights of Illinois employees to seek reimbursement for business-related expenses. Under newly added Section 9.5 of [Public Act 100-1094](#), the IWPCA will require all Illinois private sector employers to reimburse employees for "all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." As defined by the IWPCA amendments, "necessary expenditures" include "all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer."

Under the newly drafted Section 9.5 of the IWPCA, an employee must follow the company's specifications or guidelines for necessary expenditures in order to avoid incurring expenditures in excess of the guidelines. A company will not be liable for excess expenditures so long as the guidelines do not include "no reimbursement or de minimis reimbursement" clauses.

The terms of the IWPCA amendments leave many key items open to interpretation, particularly with respect to reimbursement of smartphone or other "offsite" work expenses, which while not requested by an employer may "inure to the primary benefit of the employer" and be deemed "required" if supervisors are texting/emailing employees outside of work hours about work matters and expecting (or receiving) after-hours responses. It is thus important that Illinois employers review their policies and guidelines to identify all employee "requirements" that may lead to expenses and establish a written reimbursement policy that specifically outlines activities that are and are not required, expected or reimbursable.

Illinois Enacts Job Protection Statute for Military Service Members

Effective Jan. 1, 2019, **ISERRA** will govern the rights of Illinois employees serving in the military. Public Act 100-1101.

The Illinois General Assembly enacted ISERRA to streamline and consolidate the various job-related protections already afforded to Illinois service members. ISERRA repealed the state's Military Leave of Absence Act, Public Employee Armed Services Rights Act, Municipal Employees Military Active Duty Act and Local Government Employees Benefits Continuation Act, and consolidated them into ISERRA. The Illinois Family Military Leave Act, which provides family members of a service member with up to 15 or up to 30 days of unpaid leave when the service member is called to military service lasting more than 30 days, remains intact. ISERRA is modeled after the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), but the Illinois statute provides additional protections.

1. ISERRA expands upon USERRA's definition of "military service" to include the following:
 - » Service in a federally recognized auxiliary of the United States Armed Forces when performing official duties in support of military or civilian authorities as the result of an emergency.
 - » Service covered by the Illinois State Guard Act.
 - » A period during which service members are absent from employment for medical or dental treatment related to a condition, illness or injury sustained or aggravated during a period of active service.
2. Under ISERRA, a service member on military leave must be credited with the average of his or her efficiency or performance ratings or evaluations over the three years preceding the leave. The average rating cannot be less than the rating that the employee received for the last rating period preceding his or her leave.
3. Military service members are afforded a private right of action as well as enforcement authority by the Illinois attorney general. Of note, ISERRA expressly nullifies any statute of limitations for individuals or the attorney general to bring suit. Finally, in addition to actual damages, ISERRA authorizes the recovery of attorneys' fees and up to \$50,000 in punitive damages to a prevailing plaintiff.
4. ISERRA creates an "ISERRA Advocate" in the Illinois Office of the Attorney General. The ISERRA Advocate's role is to assist service members and employers with questions about service members' protections under the statute.
5. ISERRA requires that employers post a notice of employee rights under ISERRA. The required posting

can be downloaded from the Illinois Office of the Attorney General website.

ISERRA applies to all Illinois employers, who must post the ISERRA notice of rights where other employee-facing notices are posted as of Jan. 1, 2019.

Paid Sick Leave in Chicago and Cook County: One Year Later

Chicago and Cook County Earned Sick Leave Ordinances went into effect on July 1, 2017. More than a year later, more than 80 percent of the municipalities in Cook County have opted out of the requirements of the [ordinance](#). Chicago is not among the municipalities that have opted out. The ordinance mandates that covered employers in Cook County allow eligible employees to accrue up to 40 hours of paid sick leave in each 12-month period of their employment. Private sector employers with a place of business in Cook County that employ at least one covered employee are subject to the ordinance. Employees are "covered" if they (1) perform at least two hours of work for a covered employer while physically present in Cook County in any particular two-week period; and (2) work at least 80 hours for a covered employer in any 120-day period.

As a reminder, under the ordinance, a covered employee is entitled to carry over half of his or her accrued, unused earned sick leave to the second accrual period, up to a maximum of 20 hours. Additionally, FMLA-eligible covered employees are entitled to carry over up to an additional 40 hours of accrued, unused earned sick leave to the second accrual year for use exclusively for FMLA-qualifying reasons. If employers have not yet done so, now is a good time to check whether they have calculated the amount of sick leave their employees are entitled to carry over to the second accrual period.

Office of Labor Standards to Enforce Chicago's Employment Ordinances

On Oct. 31, 2018, the Chicago City Council approved the formation of the Office of Labor Standards (OLS) to enforce the city's employment ordinances and investigate alleged violations of the city's employment ordinances. The law will go into effect on Jan. 1, 2019. Historically, employees submitted complaints of violations of the city's employment ordinances directly to the Department of Business Affairs and Consumer Protection (BACP). However, in addition to handling these complaints, the BACP is also tasked with licensing businesses and protecting consumers from fraud. As a consequence, the BACP had limited time and resources to devote to investigating allegations of employment ordinance violations.

If the OLS determines that a violation has occurred, it can enforce the relevant law by ordering the employer to pay the penalties provided by that ordinance. An employer that is found liable for violating one of the ordinances can also be referred to the chief procurement officer and may be subject to the suspension or cancelation of the employer's current contracts with the city.

If an employer is found to have committed willful or repeated violations of the ordinances, the issue may be escalated to the commissioner of the BACP, who may deny, revoke or suspend the employer's business license. Effectively, the OLS will increase enforcement of Chicago city ordinances, and both public and private employers should evaluate their compliance with said ordinances. Employers that fail to comply with these ordinances risk revocation of their licenses to do business in the city of Chicago.

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