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Insights

ILLINOIS EMPLOYMENT LAW UPDATES: AI RESTRICTIONS, NEW PROTECTED CLASSES, AND MORE

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SUMMARY

The Illinois General Assembly and Governor JB Pritzker have been busy in 2024, enacting significant changes to existing statutes like the Illinois Human Rights Act (the "IHRA"), the Personnel Records Review Act (the "PRRA"), and the Right to Privacy in the Workplace Act (the "RPWA"), and enacting new laws that will impact employers across the state. Employers should become familiar with these changes, and ensure their policies and practices are up to code.

THE ILLINOIS HUMAN RIGHTS ACT

The IHRA prohibits discrimination and harassment against employees based on their membership in one or more protected categories (e.g., sex, race, disability). Recent amendments add new protected categories, restrict the use of artificial intelligence in employment decisions, and stretch the statute of limitations for filing a claim under the IHRA to 2 years—one of the longest in the nation.

NEW PROTECTED CATEGORIES

- **Effective Date**: January 1, 2025
- **Change**: The IHRA's definition of "protected categories" will expand to include the following new protected categories:
  - *Family Responsibilities*: Employers will be prohibited from discriminating against or harassing an employee based on family responsibilities.
    - "Family responsibilities" include an employee's actual or perceived provision of personal care to a family member.

        - "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 includes being physically present to provide emotional support to a covered family member with a serious health condition who is receiving inpatient or home care.

        - A "family member" is an employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.

        - **Note:** An employer is not obligated to accommodate family responsibilities, including through the modification of reasonable workplace rules and policies.

    - *Reproductive Health Decisions*: Employers may not discriminate against an employee based on "decisions regarding the person's use of: contraception; fertility or sterilization care; assisted reproductive technologies; miscarriage management care; healthcare related to the continuation or termination of pregnancy; or prenatal, intranatal, or postnatal care."

- **Action Items**: Revise existing EEO/Discrimination policies to incorporate the new protected categories. Ensure that training materials and programs reference the new protected categories. Train Human Resources professionals to be aware that employees may bring complaints regarding discrimination based on family responsibilities and reproductive health decisions.

USE OF AI IN EMPLOYMENT DECISIONS

- **Effective Date**: January 1, 2026

- **Changes**: (1) Any employer using AI or generative AI for employment purposes must first notify an employee or applicant that AI is being used. (2) Employers may not use artificial intelligence ("AI") or generative artificial intelligence in making employment decisions (e.g., recruitment, promotion, discharge, and the terms and conditions of employment) **if** such use has the "effect of subjecting employees to discrimination on the basis of protected classes." Finally, employers are prohibited from using zip codes as a proxy for race discrimination (i.e., programming AI to screen certain zip codes with a higher percentage of minority residents).

- "Artificial Intelligence" and "Generative Artificial Intelligence" are defined broadly, and may encompass programs used by employers in Illinois to, for example, screen resumes or conduct video interviews.

- **Action Items**: Review policies, programs, and applications for compliance; watch for implementing regulations from the Department of Human Rights; begin to prepare to comply with notice requirements; recognize the trend towards state-mandated AI-related protections. Additionally, employers with employees in other states should review BCLP's AI Legislation Tracker for the latest developments across the country.

LONGER STATUTE OF LIMITATIONS

- **Effective Date**: January 1, 2025
- **Change**: The IHRA will permit employees to file a claim with the IDHR within **two years** of an alleged civil rights violations. The current statute of limitations is 300 days.
- **Next Steps/Action Items**: Employers should prepare for the expanded exposure to discrimination and harassment claims under Illinois law, and should consider changes to their record retention policies.

THE PERSONNEL RECORDS REVIEW ACT

The PRRA governs personnel record requests, generally requiring employers to permit employees to inspect and copy the contents of their personnel records upon request. The recent amendments significantly expand the records which must be provided in response to personnel record requests, change the procedures for making such requests, and provide enhanced rights for employees to employers for failure to comply with the Act.

- **Effective Date**: January 1, 2025
- **Changes**:
  - Employees must make all requests for personnel records in writing (which can include electronic requests).
  - An employee will now be entitled to the following categories of documents (new provisions are in **bold**):
    - Any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, compensation, **benefits**, discharge, or other disciplinary action, except as provided in Section 10 of the Act;
    - **Any employment-related contracts or agreements that the employer maintains are legally binding on the employee;**

        - **Any employee handbooks that the employer made available to the employee or that the employee acknowledged receiving; and**
        - **Any written employer policies or procedures that the employer contends the employee was subject to and that concern qualifications for employment, promotion, transfer, compensation, benefits, discharge, or other disciplinary action.**

    - Employers must grant at least two (2) requests per calendar year to inspect, copy, and receive copies of records subject to review under the PRRA.
    - Employers may charge a fee for copying requested records, but may not include the imputed costs of time spent, or equipment used for, duplicating the information.
    - An employer is not required to produce documents or records containing its trade secrets, client lists, sales projections, and financial data. This is a new category of documents added to Section 10, "Exceptions," which contains categories of documents that an employer need not provide to an employee.

- **Right of Recovery/Damages**: An employee may now commence an action in circuit if an administrative complaint to the Illinois Department of Labor ("IDOL") remains unresolved after 180 calendar days. Previously, the employee would have to wait for the Department to commence an action after "efforts to resolve" a dispute had failed. A prevailing employee can recover actual damages plus costs; for wilful and knowing violations, an employee may recover additional damages of $200 and attorneys' fees.
- **Next Steps/Action Items**: Train Human Resources professionals on the expanded scope of personnel records that must be produced upon demand.

THE RIGHT TO PRIVACY IN THE WORKPLACE ACT

- **Effective Date**: January 1, 2025.
- **Changes**: For employers who voluntarily participate in employment eligibility verification programs like E-Verify, amendments to the RPWA imposes additional notification procedures, including:
    - requiring employers to provide notice before taking adverse action against an employee for whom the employer has received a notice of discrepancy from a federal or state agency (e.g., a "Tentative Non-Confirmation" from the Social Security Administration [SSA] that an employee's provided social security number does not match the SSA's records);

    - requiring employers to provide notice to employees within 72 hours of receiving a notice of inspection of work authorization documents from a federal or state agency; and
    - requiring employers to provide notice to an employee if a discrepancy regarding an employee's work authorization status is found by the employer or agency or if an inspection finds that an employee's documents do not establish that they are authorized to work in the US.

- **Right of Recovery/Damages**: An employee or prospective employee can file a complaint with IDOL, which will attempt to resolve a complaint via conference, conciliation or by analyzing employer records. IDOL may also conduct investigations, visit and inspect an employer's premises, as well as obtain any documentation that is pertinent to the investigation—even executing search warrants and subpoenas. Additionally, the revisions to the RPWA contain specific new penalties for knowing and wilful violations of the E-Verify section of the Act, including a civil penalty between $2,000 and $5,000 for a first violation, and $5,000 and $10,000 for each subsequent violation per affected employee plus costs, reasonable attorney's fees, and actual damages.
- **Next Steps/Action Items**: We expect IDOL to issue guidance and a proposed notice poster for employees soon. Some reviewing the statute believe that the amended language actually prohibits the use of voluntary E-Verify (i.e., an employer choosing to use the system, rather than an employer required to use it pursuant to, for example, a government contract). When Illinois previously passed a similar law barring the voluntary use of E-Verify, it was ultimately struck down. **Employers using E-Verify should contact BCLP or their employment counsel to discuss further**.

NEW FREELANCE WORKER PROTECTION ACT

- **Effective Date**: July 1, 2024, and applicable to contracts taking effect after that date.
- **Changes**:
    - A freelance agreement must be memorialized in a written contract. Failure to do so may result in statutory damages equal to the value of the underlying contract or $500, whichever is greater.
    - Employers must pay freelance workers within 30 days of completion of the work. Failure to do so may lead to damages up to **double** the amount of any underpayment, injunctive relief, and attorneys' fees and costs.
    - Employers must refrain from engaging in any discriminatory, retaliatory, or otherwise harassing behavior toward freelance workers. A freelancer who engages in such conduct

may be liable for damages equal to the value of the underlying contract **for each violation**, as well as attorneys' fees and costs.

- **Right of Recovery/Damages**: Employees may file a complaint with the IDOL or directly in circuit court (no requirement to exhaust administrative remedies at IDOL before suit). The statute of limitations for filing in either forum is two (2) years from when compensation was due.
- **Next Steps/Action Items**: Ensure all independent contractors are subject to written agreements, and that all agreements (including templates) are written to comply with the Act.

NEW WORKER FREEDOM OF SPEECH ACT ("WFSA")

- **Effective Date**: January 1, 2025
- **Changes**: Employers may no longer take adverse action against an employee who declines to attend or participate in any employer-sponsored meeting designed to communicate the opinion of the employer on "religious" or "political" matters.
  - *Religious matters* are matters relating to religious belief, affiliation, and practice and the decision to joint or support any religious organization or association.
  - *Political matters* are matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization.
- **Right of Recovery/Damages**: Any individual or class who believes their employer violated the WFAS may to file a lawsuit seeking damages, penalties, and attorneys' fees and costs. Additionally, any "interested party" (e.g., an individual or organization claiming to be concerned about workers' rights) may bring a complaint to the IDOL within three (3) years of an alleged violation.
- **Next Steps/Action Items**: The WFAS is likely to be challenged in court: an argument could be made that it is preempted by the National Labor Relations Act, and that it impermissibly infringes on an employer's right to engage in free speech. *If* it takes effect, the WFAS will significantly limit an employer's right to engage in typical union avoidance tactics—in fact, even union avoidance training sessions for managers may be impermissible under the WFAS, as the definition of "employee" includes managers.

BCLP will continue to monitor the action in Springfield and provide updates critical to employers.

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MEET THE TEAM

Patrick DePoy

Chicago

patrick.depoy@bclplaw.com
+1 312 602 5040

Ethan W. Smith

Irvine

ethan.smith@bclplaw.com
+1 949 223 7247

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