

## ILLINOIS

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### I. AT-WILL EMPLOYMENT

#### A. Statute

Illinois is an at-will employment state, meaning that generally, an employer may fire an employee-at-will for any reason or no reason at all. There is no statute governing at will employment.

#### B. Case Law

An at-will employee, also called a noncontracted employee, “is one who serves at the employer’s will, and the employer may discharge such an employee for any reason or no reason.” *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 32, 645 N.E.2d 877, 879 (1994). Employment contracts are presumed to be at-will and are terminable by either party; this rule of course, is one of construction and may be overcome by a showing that the parties agreed otherwise, *McInerney v. Charter Golf*, 176 Ill. 2d 482, 488 (1997)(citing *Duldulao v. St. Mary’s of Nazareth Hosp., Ctr.*, 115 Ill. 2d 482 (1987)). Where an employment agreement does not specify a fixed duration, either party can terminate the relationship “at will.” *Krum v. Chicago Nat’l League Club, Inc.*, 365 Ill. App. 3d 785, 788 (1st Dist. 2006). The parties may alter the at-will nature of their employment by fixing the duration of the agreement. *Id.* Consideration for additional employment terms must be supported by additional consideration. A contract of lifetime employment requires additional consideration beyond the standard employment duties. *McInerney*, 115 Ill. 2d at 486.

In *Board of Trustees of Community College District No. 508 v. Migaj*, 2023 IL App (1st) 230285, the court affirmed a hearing officer’s reversal of a decision of the plaintiff to discharge a tenured professor based on his failure to report to work during a four-day, unexcused absence, finding that there was no basis to find that the hearing officer acted in an arbitrary or unreasonable manner when she determined that the plaintiff had caused to discipline the professor but not to discharge him.

In *Wagner v. Board of Education of North Shore School Dist. 112*, 2023 IL App (2d) 220453, the court affirmed the circuit court order affirming the decision of defendant to terminate plaintiff from his employment as a tenured teacher, finding that the board did not err in its determination where plaintiff did not show any remorse for his actions and where a warning could not have corrected the effects that plaintiff’s conduct had on the school, faculty, and students.

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## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

### A. Implied Contract Exceptions to At Will Employment

The “at-will” presumption can be overcome by evidence that the parties contracted otherwise. *Wood v. Wabash County*, 309 Ill. App. 3d 725, 728 (5th Dist. 1999), referencing generally *Duldulao v. Saint Mary Nazareth Hospital Center*, 115 Ill. 2d 482 (1987). Whether an implied contract exists is a question of law. *Id.* at 728.

#### 1. Handbook or Policy Statement

The presumption of at-will employment may be rebutted by the language in the employee handbook. “Some employee handbooks, if sufficiently clear on a termination procedure, can convert an at-will employment situation into a contractual employment situation.” *Denis v. P&L Campbell, Inc.*, 348 Ill. App. 3d 391, 392 (5th Dist. 2004). If the handbook converts the nature into contractual employment, the end of the employee relationship must comply with the process set out in the handbook. *Id.*

The case of *Duldulao v. Saint Mary Nazareth Hospital Center*, 115 Ill. 2d 482 (1987), acts as the seminal case concerning an employee handbook as an implied contract. In *Duldulao*, the plaintiff was continuously employed by the hospital for over 11 years. *Id.* at 484. After approximately four months in a new position, she was given a written “Probationary Evaluation” and “Final Notice,” indicating that she was to be terminated at the end of that workday for “unsatisfactory performance.” *Id.* In 1970, the same year that plaintiff was hired, the hospital published its employee handbook. *Id.* at 316. The handbook was later revised on two separate occasions, each time adding new language more favorable to employees. *Id.*

The plaintiff in *Duldulao* sued for breach of the handbook provisions, claiming that the handbook created enforceable contractual rights. *Id.* at 315. The trial court granted the hospital’s motion for summary judgment and denied the plaintiff’s motion. The appellate court reversed the trial court decision and entered judgment in favor of the plaintiff. *Id.* In affirming the appellate court, the Illinois Supreme Court held:

[A]n employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee’s continued work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed.

*Id.* at 318.

Courts have distinguished *Duldulao* on various bases. The court in *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 74-75 (1st Dist. 2004) distinguished *Duldulao*, reasoning that the municipal code on which the plaintiff relied as an implied contract did not state anything about specific employees’ rights, nor does it obligate the plaintiff to follow particular procedures contingent upon acceptance or continued work. *Id.* at 993. In affirming the lower court’s dismissal, the court held that the language of the municipal code, as it pertained to department personnel, did not create a contract between the city and its employees. *Id.* at 994-96.

Illinois courts have been careful to enforce the requirement of consideration in implied contracts based on employee handbooks. In *Ross v. May Co.*, 377 Ill. App. 3d 387, 393 (1st Dist. 2007), the court found that modifications to the employee handbook that did not favor the employee were not supported by consideration, and therefore did not modify the contract. In short, the modifications were imposed by the employer and there was no bargained-for exchange.

Courts have also required specificity in implied contracts. In *Green v. Trinity Int'l Univ.*, 344 Ill. App. 3d 1079, 1089-90 (2d Dist. 2003), the court reversed an order of dismissal, holding that an employee failed to allege facts specific to establish the elements of an implied contract from an employee handbook, including that (1) the language was clear enough that the employee would reasonably believe an offer had been made; (2) the statement was disseminated in such a manner that he is aware of its contents and reasonably believe it to be an offer; and (3) the employee must accept the offer by commencing or continuing to work after learning of the policy statement. *Id.* at 1090. The court found that the professor failed to allege any facts that would indicate that the handbook applied to the existing employment agreement, and therefore the professor had no basis for his argument that the handbook created binding contractual rights. *Id.*

## 2. Other Writings

On occasion, Illinois courts have held that other writings other than handbooks may constitute enforceable promises of employment, at least with respect to wages. In *Pokora v. Warehouse Direct, Inc.*, 322 Ill. App. 3d 870 (2d Dist. 2001), the court found that the employer's letter created an unambiguous employment contract for a certain term at a certain rate of pay, even though the outlined compensation was for commission with guarantee and the letter did not indicate that the former employee was required to satisfy any performance requirements. In *Tidwell v. Toyota Auto Mart, Inc.*, 59 Ill. App. 3d 378 (2d Dist. 1978), the court found that language on cards in plaintiff's personnel file constituted a promise to pay bonuses.

However, in *Stoll v. United Way of Champaign County, Ill.*, 378 Ill. App. 3d 1048 (4th Dist. 2008), the court found that a Memorandum of Understanding was not sufficient to create a contract, and commented on the unusual relationship by which two separate entities created the Liaison position at issue. The Liaison/employee was not a party to the Memorandum, and the Memorandum documented the purpose and objectives of the Liaison position. The court held that the Memorandum did not vest the Liaison with contractual rights.

## 3. Provisions Regarding Fair Treatment in Writings

Illinois courts have found progressive discipline policies can create enforceable contracts. In *Wheeler v. Phoenix Co.*, 276 Ill. App. 3d 156, 157-60 (2d Dist. 1995), an employee handbook promising an employee progressive discipline in lieu of immediate termination was a contractual promise, absent prominent and unambiguous language disclaiming the promise of progressive discipline, and an employee who did not have the benefit of the employer's progressive disciplinary procedure as outlined in the contract, had a valid claim for breach of contract against the employer.

Likewise, in *Jackson v. Avanti/Case-Hoyt, Inc.*, 2003 U.S. Dist. LEXIS 3373, \*8-9 (N.D. Ill. 2003) applying Illinois law, the court held that a progressive discipline system in the employee handbook was too vague to confer an enforceable right to the progressive system, when the employer was allowed to skip one or more of the steps in the progression or, "jump the queue," and move directly to termination.

However, vague statements in company writings have been found insufficient to create an implied contract. In *Arnold v. Janssen Pharmaceutica*, 215 F. Supp. 2d 951 (N.D. Ill. 2002), the court held that the company's "credo" was too vague to base a breach of contract case. The *Arnold* court reasoned, "[m]ost of this language amounts to nothing more than a vague promise that the company 'will treat its employees fairly,' which is not sufficient under Illinois case law to support reasonable reliance by an employee." 215 F. Supp. 2d at 963, quoting *Brown v. R.R. Donnelly & Sons Co.*, 272 Ill. App. 3d 94, 96 (4th Dist. 1995). The court held that the credo's language did not contain a clear promise that would "lead an employee to reasonably believe that an offer has been made." *Arnold*, 215 F. Supp. 2d at 963. Thus, the court held the employee's breach of contract claim, to the extent it relied on the credo, was dismissed. *Id.*

#### 4. Disclaimers in Writings

A document that disclaims any attempt to bind the parties cannot constitute a promise clear enough that an employee would reasonably believe that an offer has been made. *Jackson v. Avanti/Case-Hoyt, Inc.*, 2003 U.S. Dist. LEXIS 3373, at \*5-6 (citing *Duldulao*, 115 Ill. 2d 482 (1987)). Where a disclaimer in an employee manual indicates that the manual does not promise anything or create a contract, the employee does not have enforceable contractual rights under the employee manual. *Ivory v. Specialized Assistance Servs.*, 365 Ill. App. 3d 544, 546 (1st Dist. 2006).

Illinois courts applying the *Duldulao* decision are divided over whether disclaimers contained within employee handbooks are sufficient to negate promises contained therein. See *Wheeler v. Phoenix Co.*, 276 Ill. App. 3d 156, 157-60 (2d Dist. 1995). Where the language disclaiming promises contained in an employee handbook is unambiguous (i.e. "this is not a contract"; or "this handbook is intended as a general policy statement and not as a contract or commitment"), and is conspicuous ("highlighted, printed in capital letters, or in any way prominently displayed"), the language may negate the promises contained in the employee handbook. *Id.* at 161.

In *Tatom v. Ameritech Corp.*, 305 F.3d 737, 743-44 (7th Cir. 2002), the court, applying Illinois law, found that an express disclaimer in an employee handbook, reserving the right of the employer to modify said handbook, eliminated any reasonable belief that the handbook created a promise to an employee.

In *Robinson v. Christopher Greater Area Rural Health Planning Corp.*, 207 Ill. App. 3d 1030, 1036 (5th Dist. 1991), the court held that the promises in an employee manual may be negated by language in the manual stating that the employer "assumes no contractual liability to any employee via the job description or this publication."

#### B. Public Policy Exceptions

The Illinois Supreme Court notes that public policy controls what is right and just and can "be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." *Turner v. Mem'l Med. Ctr.*, 233 Ill. 2d 494, 501 (2009). An employee's discharge is actionable when "the discharge is contrary to a clear mandate of public policy." *Id.* at 503. Illinois courts have not specifically defined the phrase "clearly mandated public policy." See *Chi. Commons Ass'n v. Hancock*, 346 Ill. App. 3d 326, 328 (1st Dist. 2004). Yet, courts have stated generally that public policy concerns what is "right and just and what affects the citizens of the State collectively." *Hancock*, 346 Ill. App. 3d at 328 (quoting *Palmateer v. Intl Harvester Co.*, 85 Ill. 2d 124, 130 (1981)).

It is often stated that to constitute a clearly mandated public policy, the matter at issue "must strike at the heart of a citizen's social rights, duties, and responsibilities," *Hancock*, 346 Ill. App. 3d at 328; *Palmateer*, 85 Ill. 2d at 130; *Johnson v. World Color Press, Inc.*, 147 Ill. App. 3d 746, 749 (5th Dist. 1986), or "involve the protection of

the health and safety of citizens generally, rather than implicating purely private matters.” *Crompton v. Abbott Labs*, 186 F. Supp. 2d 850, 855 (N.D. Ill. 2002). Additionally, the courts have indicated that public policy can be found in the federal law, as well as in the statutory and common law of Illinois. *Bea v. Bethany Home*, 333 Ill. App. 3d 410 (3d Dist. 2002)(quoting *Johnson*, 147 Ill. App. 3d at 749).

### C. Retaliatory Discharge

The tort of retaliatory discharge “seeks to achieve ‘a proper balance among the employer’s interests... and society’s interest in seeing its public policies carried out.’” *Turner v. Mem’l Med. Ctr.*, 233 Ill. 2d 494, 502 (2009). A claim for retaliatory discharge requires that an employee be (1) discharged; (2) in retaliation for the employee’s activities; and (3) that the discharge violate a clear mandate of public policy. Illinois Courts have recognized two circumstances in which the tort of retaliatory discharge applies: “where the discharge stems from asserting a worker’s compensation claim and where the discharge is for certain activities referred to as ‘whistle-blowing.’” *Paris v. Cherry Payment Sys.*, 265 Ill. App. 3d 383, 385 (1st Dist. 1994). However, the tort of retaliatory discharge is not limited to these two categories. *Levine v. UL LLC*, 2023 IL App (1st) 221845 at \*22.

#### 1. Discharge stemming from asserting a workers’ compensation claim

It is well-settled that filing a workers’ compensation claim implicates a “clear mandate of public policy,” and that discharge for filing such a claim will subject the employer to a retaliatory discharge claim. *See Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (Ill. 1978). The court in *Kelsay* reasoned that permitting employers to abuse their power to terminate by threatening to discharge employees for seeking compensation under the act would leave employees without a remedy in common law or under the statute. *Id.* at 181-182 and 357, *See also Workers’ Compensation Act*, 820 ILCS 305/1 (2014); *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 155 (2006).

The Illinois legislature amended the Workers’ Compensation Act in August of 2011 to substitute the population language requirement in paragraph (b) (1) from 200,000 to 500,000. *See* 820 ILCS 305/1(b) (1) (2014).

Under Illinois law, a retaliatory discharge claim can be proven by a plaintiff if she shows: “(1) that she was an employee before the injury; (2) that she exercised a right granted by the Illinois Workers’ Compensation Act; and (3) that she was discharged and that discharge was causally related to her filing a claim under the Workers’ Compensation Act. *Hubbard v. Certified Grocers Midwest, Inc.*, 2004 U.S. Dist. LEXIS 4155 (N.D. Ill. 2004). In *Hubbard*, the court recognized a retaliatory termination claim on the basis of a workers’ compensation claim as an independent cause of action.

In *Siekierska v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 221-22 (3d Dist. 2007), the court determined that the ultimate issue concerning the element of causation is the employer’s motive in discharging the employee. “The element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee.” *Id.* at 222 (quoting *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992)). In *Siekierska*, the court found that there was a factual question for the jury to decide, namely, whether the company’s non-pretextual basis - that plaintiff failed to return to work following an authorized leave - was the cause for the employee’s discharge, after the employee filed a workers’ compensation claim. *Id.*

In *Hollowell v. Wilder Corp.*, 318 Ill. App. 3d 984, 989 (5th Dist. 2001), an independent medical examiner cleared plaintiff to return to work despite plaintiff’s personal physician not providing that clearance. *Id.* Plaintiff provided evidence that the employer accused plaintiff of being lazy and trying to get a free ride. *Id.* at 987. On

appeal, the court held that there was sufficient evidence to support the judgment entered in favor of the employee and for the imposition of punitive damages. The court stated: “We wish to be clear on this point. An employer may not discharge an employee on the basis of a dispute about the extent or duration of a compensable injury. An employer that fails to heed this rule subjects itself to a retaliatory discharge action under *Kelsay*.” *Id.* at 712 (quoting *Clark v. Owens- Brockway Glass Container, Inc.*, 297 Ill. App. 3d 694 (5th Dist. 1998)).

## 2. Discharge for whistleblowing

Whistleblower causes of action are codified under the Illinois Whistleblower Act (“IWBA”). 740 ILCS 174/1, *et seq.* (2014). The IWBA prohibits an employer from making, adopting or enforcing any rule, regulation or policy that prevents an employee from disclosing information to a governmental or law enforcement agency “if the employee has a reasonable cause to believe that the information discloses a violation of a State or federal law, rule or regulation.” 740 ILCS 174/10 (2014). Section 20 of the IWBA prohibits an employer from retaliating against an employee for refusing to participate in an activity that would result in a violation of state or federal law, rule, or regulation. 740 ILCS 174/20 (2014).

Section 30 of the IWBA provides that an employee may bring a civil action against their employer for all relief necessary to make them whole including, but not limited to, the following as appropriate:

- (1) reinstatement with the same seniority status that the employee would have had, but for the violation;
- (2) back pay, with interest; and
- (3) compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney’s fees.

740 ILCS 174/30 (2014).

To date, Illinois courts have narrowly construed the IWBA, finding its language to be unambiguous. One of the questions typically addressed is whether the employee must specifically report the allegedly illegal conduct to a governmental agency or entity or is an internal report of the conduct sufficient. In *Callahan v. Edgewater Care & Rehab. Ctr., Inc.*, 374 Ill. App. 3d 630 (1st Dist. 2007), the court noted that the IWBA’s legislative history suggests that it was intended only to protect individuals who reported violations of the law to the authorities. *Id.* at 632. When an employee complains to a supervisor, as opposed to a government agency, and is terminated as a result, a common law claim of retaliatory discharge arises, with which the IWBA does not interfere. *Id.* Accordingly, the IWBA is limited to external reporting to government or law enforcement agencies of violation(s) of law(s) or regulation(s). However, as indicated above, case law permits retaliatory discharge claims based on an employee’s internal reports of illegal and/or improper activity, as well.

## 3. External Reporting

The seminal whistleblower case is *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 (1981). In *Palmateer*, a long-term employee alleged that his termination was in retaliation for supplying local law-enforcement authorities with information about an employee possibly involved in criminal activity. Plaintiff agreed to cooperate with law-enforcement and gather further evidence and to testify against the employee at trial. The Illinois Supreme Court held that plaintiff was fired in violation of an established public policy supporting



disclosure of wrongdoing to the proper authorities. In doing so, the court adopted a broad interpretation of the *Kelsay* decision regarding what constitutes a clear mandate of public policy. The court further held that no specific constitutional or statutory provision is required to support such a cause of action. The court reasoned that public policy favors citizen crime-fighters and thus favored plaintiff's conduct in volunteering information to his local law-enforcement agency. The court stated:

Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

*Palmateer*, 85 Ill. 2d at 130.

The reported conduct itself, which forms the alleged basis of the discharge, need not be work-related. In *Vorpagel v. Maxell Corp. of Am.*, 333 Ill. App. 3d 51 (2d Dist. 2002), after plaintiff was fired for reporting incriminating statements made by his supervisor to him about a sexual relationship the supervisor had with the supervisor's minor daughter, plaintiff brought a claim for retaliatory discharge against his former employer. The court reversed the motion to dismiss, holding that the reported conduct did not need to be work-related. *Vorpagel*, 333 Ill. App. 3d at 56.

Whistleblower protections have been applied to governmental employees as well. In *Brame v. City of North Chicago*, 955 N.E.2d 1269 (2d Dist. 2011), plaintiff, a lieutenant in the North Chicago Police Department reported what he believed to be criminal activity to the mayor of North Chicago. The mayor was the Chief Executive officer of the city and had general supervisory control over the police department. Plaintiff was terminated and brought an action under Section 15(b) of the IWBA. The appellate court agreed with plaintiff's argument that he complied with the Act by reporting what he believed to be illegal activity to a "government or law enforcement agency" even though that entity was his own employer. *Brame*, 955 N.E.2d at 1272-73.

In *Lucas v. County of Cook*, 2013 IL App (1<sup>st</sup>) 113052, plaintiff claimed that she was terminated after refusing to treat male patients and refusing to attend training to treat male patients infected with sexually transmitted diseases. Following her termination, plaintiff brought a Section 20 claim against her employer. The appellate court affirmed summary judgment for defendant finding that plaintiff failed to establish that the above activity violated any rule, law or regulation. *Lucas*, 2013 IL App (1<sup>st</sup>) at P26 (citing to *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56 (1st Dist. 2011)), the *Lucas* court noted that "the language of Section 20 is unambiguous and that a 'plaintiff must actually refuse to participate' in an activity that would violate a law or regulation." *Id.* The court further noted that "refusing" under Section 20 means refusing and does not mean merely complaining or questioning. *Id.*

#### 4. Internal Reporting

An employee's complaint of illegal activity need not start with a report to a public official to preserve a retaliatory discharge claim. *Lanning v. Morris Mobile Meals, Inc.*, 308 Ill. App. 3d 490 (3d Dist. 1999). In *Lanning*, the court determined that "reports to internal personnel do not transform public issues into private disputes." *Id.* at 1130 (citing *Parr v. Triplett Corp.*, 727 F. Supp. 1163, 1167 (N.D. Ill. 1989)). The court explained that "in many instances, complaints to internal personnel and supervisors may be the first step in an investigation." *Lanning*, 720 N.E.2d at 1131 (citing *Hicks v. Clyde Federal Sav. & Loan Assn.*, 722 F. Supp. 501, 504 (N.D. Ill. 1989) (well-

intentioned employees should not be penalized for attempting “to rectify wrongdoing internally before taking public action”). The court reasoned that employees contemplating a complaint must not be intimidated by fear of retaliation. *Id.* This remains true whenever the health, safety or welfare of the public is involved. *Id.*

Likewise, in *Carty v. Suter Co.*, 371 Ill. App. 3d 784 (2d Dist. 2007), the court reversed summary judgment for the employer and permitted the employee’s two-count retaliatory discharge claim. The plaintiff, a food product manufacturer employee, complained that foods were being put into different containers to circumvent true expiration dates. Citing public health issues, and FDA regulations, the court found that the plaintiff’s internal report of illegal and improper practices was sufficient to base his claim on.

However, as with any discharge claim, a non-discriminatory basis is always a defense. In *Addis v. Exelon Generation Co.*, 378 Ill. App. 3d 781 (1st Dist. 2007), the court upheld the employer’s verdict. On appeal, the employer argued that it discharged the employee based on her documented poor performance and not due to safety concerns she reported to the Employee Concerns Program immediately following her last performance review.

In *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007 (1st Dist. 2006), the court affirmed a verdict for the employer. The employee alleged that he was discharged for objecting to what he believed were improper accounting practices. In addressing the causation element, the court stated that the inquiry is whether the employee was discharged as a result of the conduct, not whether the conduct was in fact illegal. *Id.*

The appropriate defendant in a retaliatory discharge claim is the employer, not the supervisory employees. In *King v. Senior Servs. Assoc.*, 341 Ill. App. 3d 264 (2d Dist. 2003), a terminated employee brought a retaliatory discharge action against her former employer and executive director. Plaintiff claimed that her discharge was the result of internal complaints she made to the executive director and attempted to justify her retaliatory discharge action on public policy grounds. *Id.* at 271(citing *Buckner v. Atlantic Plant Maintenance*, 182 Ill. 2d 12, 16 (1998)), the court stated, “the only proper defendant in a retaliatory discharge action is the plaintiff’s former employer.” *Id.*

In *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 277 F.3d 936, 945 (7th Cir. 2002), the court held that recovery for retaliatory discharge under Illinois law was not preempted by the Federal False Claims Act’s anti-retaliation provision, thereby allowing recovery from retaliation resulting from reporting false claims against the government.

In *Shores v. Senior Manor Nursing Center, Inc.*, 164 Ill. App. 3d 503 (5th Dist. 1988), the court held that a nurse’s complaint to the nursing home administrator was sufficient to sustain claim.

In *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502 (5th Dist. 1982), the plaintiff claimed that he was discharged in retaliation for his reports to management of suspicions of embezzlement. The court held that the plaintiff had stated a claim for retaliatory discharge based on valid public policy considerations. *Id.*

In *Corah v. Bruss Co.*, 2017 IL App (1st) 161030, the Court granted summary judgment on Plaintiff’s whistleblower claim. The Accident Investigation Injury Report that plaintiff was instructed to complete gave an explanation of root cause of injury and was not a fraudulent report. *Id.* at ¶ 16. Plaintiff failed to show that Defendant instructed Plaintiff to engage in unlawful behavior or interfered with co-worker’s rights under Workers’ Compensation Act. *Id.* at ¶ 16.



There are limits to the reach of whistleblowing law. Speaking out at public meetings does not qualify as a mandate of public policy. In *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 27, the Plaintiff filed a whistleblower complaint against the City, his former employer. The Court properly dismissed the complaint with prejudice under Section 2-615 of Code of Civil Procedure. *Id.* at ¶ 30. Plaintiff's allegations that he told the alleged government violator that his acts were improper does not constitute "disclosing information" under Section 15(b) of Whistleblower Act. *Id.* at ¶¶ 17-19. Plaintiff failed to state a cause of action for retaliatory discharge as he failed to plead facts supporting instance of whistleblowing. He cannot plead a violation of a clear mandate of public policy based on whistleblowing or based on his exercise of his first amendment rights by speaking at a department meeting. *Id.* at ¶ 19, ¶ 25, ¶ 30.

5. Where the discharge is in violation of statute or law

Actions for retaliatory discharge have been allowed in Illinois "where the employee was fired for refusing to violate a statute." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130 (1981). Where a statute bases a claim for retaliatory discharge, the court will consider whether the public policy behind the cited provision was violated by the employee's discharge. *Carty v. Suter*, 371 Ill. App. 3d 784, 787 (2d Dist. 2007). As a general matter, the Illinois Human Rights Act (775 ILCS 5/2-100 et seq.), which prohibits discrimination based on sex, race, and citizenship, creates a statutory right which fulfills the first element of establishing a retaliatory discharge claim.

Courts will consider the intent of the statute at issue when determining whether retaliatory discharge applies. In *Jandeska v. Prairie Int'l Trucks, Inc.*, 383 Ill. App. 3d 396, 400 (4th Dist. 2008), plaintiff employee told a customer that some of the repairs to the customer's truck were not justified. Shortly thereafter, the employee was discharged. Because the Act was intended to protect customers and not employees, the facts fell short of the high threshold required to extend to the tort of retaliatory discharge for violation of a statute. *Jandeska*, 383 Ill. App. 3d 405.

In *Carter v. GC Electronics*, 233 Ill. App. 3d 237, 238-40 (2d Dist. 1992), the employee alleged that he was discharged in retaliation for his questioning of an illegal transaction. On appeal, summary judgment was affirmed for the employer. The appellate court concluded that plaintiff's evidence did not show that the employer was aware that plaintiff was going to refuse to participate in allegedly illegal conduct and did not support the inference that plaintiff was discharged in retaliation for such refusal. *Carter*, 233 Ill. App. 3d at 244. Rather, the evidence suggested that the only reasonable inference was that plaintiff was discharged because his job was eliminated. *Id.*

In *Russ v. Pension Consultants Co.*, 182 Ill. App. 3d 769, 771-72 (1st Dist. 1989), plaintiff alleged that he was ordered to backdate pension plans, which he claimed was in violation of federal law. When plaintiff informed his employer that he would not do this, he was discharged. *Id.* at 772. The court determined that the plaintiff stated a sufficient cause of action for retaliatory discharge based on public policy considerations, holding that "an Illinois citizen's obedience to the law, including federal law, is clearly mandated public policy of this state." *Id.* at 776.

D. Implied Covenant of Good Faith and Fair Dealing

There is a duty of good faith and fair dealing included in every contract as a matter of law. *Powers v. Delnor Hospital*, 135 Ill. App. 3d 317, 320-21 (2d Dist. 1985)(citing *Cuerton v. Abbott Laboratories, Inc.*, 111. App. 3d 261, 263

(2d Dist. 1982)). However, there is no independent cause of action for breach of an implied covenant of good faith and fair dealing, and will not be interpreted to limit the right to terminate an at-will employment relationship. *Powers*, 135 Ill. App. 3d at 972.

In *Spann v. Springfield Clinic*, 217 Ill. App. 3d 419 (4th Dist. 1991), the court was hesitant to state a new rule, effectively overturning the rule articulated by the Supreme Court that an at-will employee can be discharged for any reason or no reason. The court declined to create a duty to act in good faith when discharging an employee.

### III. CONSTRUCTIVE DISCHARGE

In an action under the Illinois Human Rights Act, the court noted, “The focus in a constructive discharge case is whether a reasonable person in plaintiff’s position would feel compelled to leave her job.” *Motley v. Human Rights Comm’n*, 263 Ill. App. 3d 367, 636 N.E.2d 100 (Ill. App Ct. 4th Dist. 1994) (internal citations omitted).

In *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 742 N.E.2d 858 (Ill. App. Ct. 1st Dist. 2000), plaintiff attempted to extend the tort of retaliatory discharge to claims of constructive retaliatory discharge. Rejecting the plaintiffs claim, the court noted: “[d]ischarge in an employment context is commonly understood to mean the release, dismissal or termination of an employee.” *Id.* “The tort of retaliatory discharge does not encompass any behavior other than actual termination of employment.” *Id.* The court refused to expand the definition of “discharge” to encompass the discharge from one position to a lower position, or a “constructive discharge.” *Id.*; *See also Zimmerman v. Buchheit of Sparta*, 164 Ill. 2d 29, 645 N.E.2d 877 (Ill. 1994) (plurality opinion); *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 713 N.E.2d 679 (Ill. App. Ct. 1st Dist. 1999) (declining to extend retaliatory discharge claim where plaintiff alleged demotion, placement in new job at a different location, pay loss and deterioration of working conditions).

In *Bajalo v. Northwestern Univ.*, 369 Ill. App. 3d 576, 860 N.E.2d 556 (Ill. App. Ct. 1st Dist. 2006), the court ultimately concluded that the tort of retaliatory discharge does not encompass the failure to rehire. In early January 2003, Plaintiff received a letter of insubordination from her supervisor and was notified on February 6, 2003 that her contract would not be renewed for a fourth year. In response, plaintiff filed a claim for retaliatory discharge. *Bajalo*, 860 N.E.2d at 558. The trial court certified the question whether a contract employee, whose contract is not renewed, can file a claim for retaliatory discharge for whistle blowing for interlocutory appeal. The appellate court thoroughly examined the history of retaliatory discharge in Illinois. *Id.* at 559-67.

Nor does Illinois recognize the tort of retaliatory demotion. *Emery v. Northeast Ill. Reg’l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 880 N.E.2d 1002 (Ill. App. Ct. 1st Dist. 2007).

### IV. WRITTEN EMPLOYMENT AGREEMENTS

#### A. Standard “For Cause” Termination

Generally, where there is a written employment agreement that allows an employee to be terminated for cause, the burden of proof falls on the employer to prove that the termination was for cause. *Rosenberger v. United*

*Cnty. Bancshares, Inc.*, 2017 IL App (1<sup>st</sup>) 161102 at P38 (“the burden is on the employer to prove that the employee was guilty of conduct justifying termination”). Where reasonable minds can differ as to whether the employee was fired for cause, summary judgment is inappropriate. *Id.*

Whether a written policy manual constitutes a written employment agreement that creates enforceable contract rights is determined by the test laid out in *Duldulao v. St. Mary of Nazareth Hosp. Center*, 115 Ill. 2d 482 (1987): (1) a clear promise that an employee would reasonably believe a promise has been made; (2) a statement disseminated in a way that the employee is aware of its contents and reasonably believes it to be an offer; and (3) the employee must accept the offer by continuing to work after learning of the policy statement. *Thierry v. Carver Community Action Agency, Inc.*, 212 Ill. App. 3d 600, 603 (3d Dist. 1991). In *Thierry*, an express provision in the employer’s written personnel policy defined various categories of employees and provided that only certain employees could be terminated for cause. In interpreting “termination for cause,” the court focused on the definitions contained in the written personnel policy as controlling and held that “[t]he language in the personnel policy ... [could not] be interpreted by a reasonable person to constitute an offer ... of the right to a hearing ... upon her termination.” *Id.* at 604.

#### B. Arbitration Clauses

The Illinois Uniform Arbitration Act, 710 ILCS 5/1 et seq., states that arbitration clauses are enforceable unless the contract is validly revoked or fails to comply with the Workplace Transparency Act.

Sec. 1. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, including failure to comply with the terms of the Workplace Transparency Act, except that any agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages arising out of (1) injuries alleged to have been received by a patient, or (2) death of a patient, due to hospital or health care provider negligence or other wrongful act, but not including intentional torts, is also subject to the Health Care Arbitration Act.

710 ILCS 5/1 (2014).

In 2006, in *Melena v. Anheuser-Busch*, 219 Ill. 2d 135 (2006), the Illinois Supreme Court reversed the appellate court’s finding and enforced the arbitration agreement at issue. The Court reasoned that the employer’s introduction of a “Dispute Resolution Program” amounted to an offer and by continuing her employment, the employee accepted the offer and provided the necessary consideration. *Id.* at 152. The court reversed the appellate court’s reasoning that an employee would only waive substantive rights (including those to a civil proceeding) if she did so in a “knowing” and “voluntary” manner. *Id.* at 142-43. The court also rejected plaintiff’s public policy argument, holding that the right to recover for retaliatory discharge was founded in public policy and could not be bargained away did not “mean that an individual [could] not agree to submit such claims to arbitration.” *Id.* at 153.

Federal courts are not so inclined to invalidate arbitration clauses. In *Campbell v. Keagle Inc.*, 2022 U.S. App LEXIS 5776 (7<sup>th</sup> Cir.), the court vacated and remanded the district court’s denial of the defendant-employer’s request to refer plaintiff-employee’s employment-related action to arbitration pursuant to arbitration clause contained in parties’ employment agreement. Although defendant did not contest the district court’s finding that aspects of arbitration clause requiring plaintiff to bear all costs of arbitration, the Court held that the district court erred in finding that entire clause was unenforceable, where: (1) agreement reflected that both parties had agreed to arbitrate instant dispute; (2)

agreement could be enforced without portions of agreement that Dist. Ct. found were too favorable to defendant; (3) decision on who pays for arbitration could be resolved by federal statute that formed basis of plaintiff's claim; and (4) arbitration rules allowed Dist. Ct. to select arbitrator for arbitration that would occur in same judicial district as instant litigation.

C. Illinois Employment Contract Act and Restrictions on Labor Organization Membership

The Illinois Employment Contract Act, 820 ILCS 15/1 voids employment agreements that restrict labor organization membership.

Sec. 1. Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association or corporation, and any employee or prospective employee of the same, whereby (a) either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization, is hereby declared to be contrary to the public policy of the State of Illinois and wholly void, and it shall not be enforceable in any court and shall not afford any basis for the granting of legal or equitable relief by any court. CS 15/1, et seq.

V. ORAL AGREEMENTS

A. Promissory Estoppel

1. Generally

Promissory estoppel is a common law doctrine followed in Illinois by which a person who relies on a promise to his detriment may seek to enforce that promise, despite the absence of a contract between the parties. *See Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 91; *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009); Restatement (Second) of Contracts § 90(1) (1981). To establish a claim of promissory estoppel, the plaintiff must plead and prove the following four elements: (1) that defendant made an unambiguous promise to plaintiff; (2) that plaintiff relied upon that promise; (3) that plaintiff's reliance was expected and foreseeable by defendant; and (4) that plaintiff relied on the promise to his detriment. *See Matthews*, 2016 IL 117638, ¶ 95; *Newton Tractor Sales, Inc.*, 233 Ill. 2d at 51; Restatement (Second) of Contracts § 90(1) (1981). However, a claim of promissory estoppel is not exempt from the application of the statute of frauds. *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 492 (1997).

Incentive plans have been found to be insufficiently unambiguous to be enforced under a theory of promissory estoppel. In *Moore v. Illinois Bell Tel. Co.*, 155 Ill. App. 3d 781 (2d Dist. 1987), the employees sued their employer under a theory of promissory estoppel to recover compensation under an employer-issued incentive plan. The incentive plan stated that "the Plan is a statement of management's intent and is not a contract or assurance of compensation." *Moore*, 508 N.E.2d at 520. The court explained that "to prevail on a promissory estoppel theory, there must have been: (1) a promise, unambiguous in its terms, (2) which defendant expected and could have foreseen would be relied upon by plaintiffs, (3) who relied upon the promise, (4) to their detriment." *Id.* at 521 (citing *Dale v. Groebe & Co.*, 103 Ill. App. 3d 649 (1st Dist. 1981)). The court held that the incentive plan did not create any

enforceable contractual rights because the plan did not contain a promise such that the employees would reasonably believe that an offer has been made. The plan was a statement of management's intent, but was subject to modification by the employer at any time. In turn, the court held that "there was no promise unambiguous in its terms, and the doctrine of promissory estoppel is inapplicable." *Id.* at 522.

In *Robinson v BDO Seidman, LLP*, 367 Ill. App. 3d 366, 854 N.E.2d 767 (Ill. App. Ct. 1st Dist. 2006), plaintiff brought a promissory estoppel claim based on a statement made by the employer that if the plaintiff accepted the position "he would be employed as long as it takes to successfully build the department, and then as long as [he] desired." Plaintiff failed to allege that the statement was a sufficiently unambiguous promise of permanent employment. *Robinson*, 854 N.E.2d at 773. As such, the court held that "defendant's assurance ... was merely an informal expression of goodwill and hope that naturally occur[s] between a prospective employer and a prospective employee in an interview situation." *Id.* at 770.

## 2. Sufficiency of Consideration

In *Ladesic v. Servomation Corp.*, 140 Ill. App. 3d 489 (1st Dist. 1986), the court held that an employee's allegation held that an employee's allegation that he rejected a competing job offer in exchange for the employer's oral promise for the employer's oral promise of permanent employment did not amount to make the oral agreement legally enforceable. However, in *McInerney v. Charter Golf*, 176 Ill. 2d 482, 680 N.E.2d 1347 (Ill. 1997), the Illinois Supreme Court held that promises of permanent or lifetime employment must be supported by additional consideration beyond standard employment duties, such as the agreement to forego another business opportunity, taking issue with decisions such as *Ladesic*:

Several decisions have held that a promise of lifetime employment, which by its terms purports to alter an employment-at-will contract, must be supported by "additional" consideration beyond the standard employment duties. *Heuvelman v. Triplett Electrical Instrument Co.*, 23 Ill. App. 2d 231 (1st Dist. 1959); *Koch v. Illinois Power Co.*, 175 Ill. App. 3d 248 (3d Dist. 1988); *Ladesic v. Servomation Corp.*, 140 Ill. App. 3d 489, 488 N.E.2d 1355 (1st Dist. 1986).

These cases have held that an employee's rejecting an outside job offer in exchange for a promised guarantee of lifetime employment is not sufficient consideration to alter an employment-at-will relationship. One case, however, has taken issue with this analysis. In *Martin v. Federal Life Ins. Co.*, the appellate court held that an enforceable contract for lifetime employment was formed when an employee relinquished a job offer in exchange for a promise of permanent employment from his current employer. 109 Ill. App. 3d 596 (1st Dist. 1982). The *Martin* court recognized that there was consideration in an exchange of promises: the employer promised to give up his right to terminate the employee at-will, and in exchange the employee agreed to continue working for his current employer and to forego a lucrative opportunity with a competitor.

In *McInerney*, 176 Ill. 2d at 486, the court reasoned that "McInerney gave up a lucrative job offer in exchange for a guarantee of lifetime employment; and in exchange for giving up its right to terminate McInerney at-will, Charter Golf retained a valued employee. Clearly both parties exchanged bargained-for benefits in what appears to be a near textbook illustration of consideration." *Id.*

In *Equity Ins. Managers of Ill., LLC v. McNichols*, 324 Ill. App. 3d 830 (1st Dist. 2001), the court found that an employment contract entered into by the parties for a set time of three years did not violate public policy. As such, the former employee breached the contract in terminating her employment for a "better offer" before the contract expired. The court reasoned that the defendant negotiated the terms of her contract including the deletion of a non-

compete clause and increase in salary. *Id.* at 836. Therefore, the terms of the contract, as agreed to, did not allow either party to terminate the employer-employee relationship at-will. *Id.*

Illinois law has developed a different rule for the sufficiency of consideration in cases involving contracts of permanent employment than in cases involving contracts of a limited duration. See *Thomas v. Heatherton Staff Leasing*, 1995 U.S. Dist. LEXIS 16220, at \*18 (N.D. Ill. Nov. 2, 1995) (“Employment contracts . . . involving limited duration terms of some degree of clarity and definiteness have been held to be enforceable.”); see also *Johnson v. George J. Ball, Inc.*, 248 Ill. App. 3d 859 (2d Dist. 1993) (employee who was hired through 1991 at a specified annual salary held to have made a sufficient showing to override the presumption of at-will employment); *Berutti v. Dierks Foods, Inc.*, 145 Ill. App. 3d 931(2d Dist. 1986) (employee who was “guaranteed salary for twelve months at \$750.00 per week” had been hired for one year and could enforce the contract); *Grauer v. Valve & Primer Corp.*, 47 Ill. App. 3d 152 (2d Dist. 1977) (clear duration of employment found where employee was guaranteed “a minimum of \$22,500.00 in 1973” and an annual review after each year of performance).

#### B. Fraud

In Illinois, the elements required to allege fraud are well-settled. However, the courts do not often deal with fraud related to oral agreements. In order to state a claim for common law fraud, a plaintiff must allege that any misrepresentations were: (1) a false statement of material fact; (2) known or believed to be false by the party making them; (3) intended to induce the other party to act; (4) acted upon by the other party in reliance upon the truth of the representations; and (5) damaging to the other party as a result. *Talbert v. Home Sav. Bank of Am.*, 265 Ill. App. 3d 376 (1st Dist. 1994). The facts must be pled with specificity. *Cwikla v. Sheir*, 345 Ill. App. 3d 23 (1st Dist. 2003).

Fraud renders the contract voidable at the option of the injured party. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (1st Dist. 2003).

In *Rose v. Dolejs*, 1 Ill. 2d 280 (1953), the court enforced an oral agreement to extend the time for payment on a written real estate purchase agreement, finding that the buyers had partially performed by building a house on the property. Not enforcing the oral agreement would perpetrate a fraud since the buyers relied on it in deciding to build the house.

#### C. Statute of Frauds

The Statute of Frauds is an affirmative defense. 735 ILCS 5/2-619(a) (7) (2019). The Illinois Statute of Frauds Acts states that:

No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

740 ILCS 80/1 (2014).



The Statute of Frauds prohibits oral contracts that cannot be performed within one year; consequently, courts generally find oral agreements for lifetime employment invalid. *Robinson v BDO Seidman*, 367 Ill. App. 3d 366 (1st Dist. 2006); *McInerney v, Charter Golf, Inc.*, 176 Ill. 2d 482, 491 (1997).

There is an exception to the Statute of Frauds in equity, based on the partial performance of the parties. *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771 (5th Dist. 2000). If a party's partial performance makes it "impossible or impractical to place the parties in status quo or restore or compensate the performing party for the value of his performance," then the contract will fall outside the application of the Statute of Frauds. *Robinson*, 367 Ill. App. 3d at 372. Where there is compensation for work performed, the exception does not apply. *Id.*

In *Lund v. E.D. Etnvre & Co.*, 103 Ill. App. 2d 158 (2d Dist. 1968), the oral agreement was contingent on the termination of a previous restrictive covenant which was not set to terminate until two years after the agreement was made. The applicability of the Statute of Frauds involves whether performance is possible within the space of a year. *Id.* The plaintiff could not have reasonably performed the agreement within a year and therefore, the Statute of Frauds applied. *Id.*

## VI. DEFAMATION

### A. General Rule

Illinois abolished all distinctions between libel and slander, with exception to the extent that defamation is written or spoken. *Mitchell v. Peoria Journal-Star, Inc.*, 76 Ill. App. 2d 154, 221 N.E.2d 516 (Ill. App. Ct. 3d Dist. 1966), *O'Donnell v. Field Enters.*, 145 Ill. App. 3d 1032, 491 N.E.2d 121 2 (Ill. App. Ct. 1st Dist. 1986). A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him. *Van Horne v. Muller*, 185 Ill. 2d 299, 705 N.E.2d 898 (Ill. 1998).

#### 1. Libel

All discussion of libel is included in the discussion of defamation under "Slander."

#### 2. Slander

To prove defamation, the plaintiff must show that the defendant: (1) made a false statement about the plaintiff; (2) there was an unprivileged publication to a third party by the defendant; and (3) that the publication damaged the plaintiff. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 823 N.E.2d 184 (Ill. App. Ct. 1st Dist. 2005). Publication is an essential element of a defamation cause of action. *Popko*, 823 N.E.2d at 188.

In *Van Horne v. Muller*, 185 Ill. 2d 299, 705 N.E.2d 898 (Ill. 1998), defendant made statements on a morning radio show regarding an alleged altercation between plaintiff and defendant where plaintiff allegedly assaulted and threatened defendant. Plaintiff brought a defamation per se claim alleging that defendant's statement that alleged criminal conduct by plaintiff. The court identified five categories of statements that are defamatory, per se:

- 1) those imputing the commission of a criminal offense;
- 2) those imputing infection with a loathsome communicable disease;

- 3) those imputing an inability to perform or want of integrity in the discharge of duties of office or employment;
- 4) those that prejudice a party, or impute lack of ability in his or her trade, profession or business; and
- 5) those imputing adultery or fornication.

*Id.* at 903. In holding that plaintiff sufficiently stated an action for defamation per se, the court reasoned that a plaintiff does not have to plead or prove damage to his reputation to recover for a statement that is per se defamatory. *Id.*

Recovery for a defamatory action per se will not be allowed where the statement can be given an innocent construction. “[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonable be interpreted as referring to someone other than the plaintiff it cannot be actionable per se.” *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 667 N.E.2d 1296 (Ill. 1996) (citing *Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195 (Ill. 1982)).

B. References

In *Myers v. Phillips Chevrolet, Inc.*, 2004 U.S. Dist. LEXIS 21635 (N.D. Ill. Oct. 25, 2004), the plaintiff sufficiently alleged defamation per se, where he alleged that his former employer told prospective employers that he was terminated because he was impaired by the use of drugs and/or alcohol. The trier of fact determined that, prior to plaintiff’s termination, management was aware that plaintiff’s high blood pressure medicine occasionally caused him to suffer from sleepiness and red cheeks. *Id.* at \*3-4. According to the court, “plaintiff’s complaint sufficiently allege[d] that defendant’s statements impute[d] an inability to perform or want of integrity of duties of office or employment, or prejudice to him, or impute lack of ability, in his trade, profession, or business, to survive a motion to dismiss.” *Id.* at \*15.

In *Stratman v. Brent*, 291 Ill. App. 3d 123, 683 N.E.2d 951 (111. App. Ct. 2d Dist. 1997), the court held that the defendant’s statements were defamatory per se. Even after applying the innocent construction test, the court found that the statements were intended to convey that the plaintiff was unable to perform his duties as a police officer. The police department stated that plaintiff was “unpredictable,” and “incapable of handling stress.” *Stratman*, 683 N.E.2d at 953. The defendant also stated that it was “glad to see the plaintiff leave,” “would not rehire the plaintiff,” and “would go to any length to prevent [his] return.” *Id.* These statements were made in the contexts of a professional recommendation for the plaintiff. The court was unable to find any innocent construction and affirmed the denial of defendant’s motion to dismiss. *Id.* at 960.

In *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 667 N.E.2d 1296 (Ill. 1996), a supervisor’s statements to the plaintiff’s prospective employer regarding plaintiff’s “inability to get along with co-workers” were not defamatory per se because statements could be innocently interpreted to mean that plaintiff did not fit in with the organization of the employer making that assessment. *Anderson*, 667 N.E.2d at 1301-02. Additionally, the court held that plaintiff did not demonstrate defamation per quod because plaintiff did not plead extrinsic facts establishing that the alleged remarks made to the prospective employer were defamatory. *Id.* at 1303.

In *Taradash v. Adelet/Scott-Fetzer Co.*, 260 Ill. App. 3d 313, 628 N.E.2d 884 (Ill. App. Ct. 1st Dist. 1993), the employer’s comment to a prospective employer that plaintiff was terminated for “lack of performance” was

subject to an innocent construction. *Taradash*, 628 N.E.2d at 885. The court noted the variety of possible reasons for the employee's lack of performance, including conditions in the industry, the assessment of his performance against unrealistic standards, and the existence of some other conflict preventing the employee from meeting the employer's standards. *Id.* at 887.

### C. Privileges

A defamatory statement is not actionable if it is subject to a privilege. There are two types: absolute privilege and qualified privilege. The following case law addresses each privilege.

#### 1. Absolute Privilege

If a statement is protected by an absolute privilege, the action for defamation per se is not actionable. *Zych v. Tucker*, 363 Ill. App. 3d 831, 844 N.E.2d 1004 (Ill. App. Ct. 1st Dist. 2006). An absolute privilege provides complete immunity from civil liability even though the statements were made with malice because public policy favors the free and unhindered flow of such information. *Zych*, 844 N.E.2d at 1008.

In *Thomas v. Page*, 361 Ill. App. 3d 484, 837 N.E.2d 483 (Ill. App. Ct. 2d Dist. 2005), the court found the judicial deliberation privilege to be an absolute privilege. A privilege will be created where: 1) the communication must originate in confidence that they will not be disclosed; 2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; 3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and 4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. *Thomas*, 837 N.E.2d at 489. The court held that each of these conditions existed. *Id.* at 489-90. The court further held that the privilege was absolute, rather than based on public good achieved from the privilege, and the fact that the privilege was already narrowly tailored. *Id.* at 494.

#### 2. Qualified Privilege

For qualified privileges, a court looks only to the occasion itself for the communication and determines as a matter of law and general policy whether it created some recognized duty or interest to make the communication privileged. *Coghlan v. Beck*, 2013 IL App (1st) 120891, 984 N.E.2d 132 (Ill. App. Ct. 1st Dist. 2013). "Situations that involve some interest of the party publishing the statement, such as a corporate employer investigating certain conduct by its employees." *Coghlan*, 984 N.E.2d at 147, quoting *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 823 N.E.2d 184 (Ill. App. Ct. 1st Dist. 2005). Once a defendant has established a qualified privilege, "the plaintiff must then prove that the defendant either: (1) intentionally published the material while knowing the matter was false; or (2) displayed reckless disregard as to the matter's falseness." *Id.* (internal citations omitted). *Ray v. R.A. Mech., Inc.*, 2023 IL App (1st) 221639, quoting *Coghlan*, 984 N.E.2d at 30.

"Reckless disregard is defined as publishing the defamatory matter despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." *Kuwik*, 156 Ill. 2d at 24, quoting *Mittelman v. Witous*, 135 Ill. 2d 220, 237-38, 552 N.E.2d 973 (Ill. 1989). "This burden is not satisfied by the bare allegations that a defendant acted maliciously and with knowledge of the falsity of the statement; the plaintiff must allege facts from which actual malice may be inferred." *Kiss v. Old Renwick Trail Homeowners Ass'n*, 2022 IL App (3d) 210115, citing *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 431, 633 N.E.2d 929 (Ill. App. Ct. 1st Dist. 1994).

In *Achanzar v. Ravenswood Hosp.*, 326 Ill. App. 3d 944, 762 N.E.2d 538 (Ill. App. Ct. 1st Dist. 2001), the court found as a matter of law that a qualified privilege existed on the ground that the alleged defamatory statement regarding alleged threats made by an employee was limited in scope and purpose and was revealed only to proper parties. *Achanzar*, 762 N.E.2d at 543. Also, testimony indicated that the concerned coworker's alleged defamatory comments were limited to a supervisor and published only to human resources department personnel charged with investigating incidents related to worker safety. *Id.*

In *Vickers v. Abbott Lab.*, 308 Ill. App. 3d 393, 719 N.E.2d 1101 (Ill. App. Ct. 1st Dist. 1999), the court held that a group of employees' statements made to their supervisor that a coworker was sexually harassing, and statements made by the employees during the sexual harassment investigation, were protected by the qualified communications privilege.

Specifically, three conditionally privileged occasions are recognized: (1) situations that involve some interest of the person who publishes the defamatory matter; (2) situations that involve some interest of the person to whom the matter is published or of some third person; and (3) situations that involve a recognized interest of the public." *Cianci v. Pettibone Corp.*, 298 Ill. App. 3d 419, 698 N.E.2d 674 (Ill. App. Ct. 1st Dist. 1998), citing *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129 (Ill. 1993). In *Cianci*, the court held that the statements made during management's meeting and included in the plaintiffs' termination letters occurred in situations in which the interests of the employer, a third person, were involved. 698 N.E.2d at 679-80.

In *Quinn v. Jewel Food Stores*, 276 Ill. App. 3d. 861, 658 N.E.2d 1225 (Ill. App. Ct. 1st Dist. 1995), the court explained that "[a]lthough Illinois courts have not addressed whether an employer's statements in response to a prospective employer may be conditionally privileged, the Seventh Circuit United States Court of Appeals has held that an employer may invoke a conditional privilege to respond to direct inquiries by prospective employers." (internal citations omitted). Additionally, the court emphasized that "Illinois courts have recognized an interest of former employers in disclosing limited information to prospective employers." *Id.* (citations omitted). The court held that the employer's statements regarding plaintiff's work performance to prospective employers were subject to a qualified privilege, and that plaintiff had to demonstrate an abuse of said privilege to recover for defamation (i.e. (1) failure to properly investigate the truth of the matter, (2) limit the scope of material, or (3) send the material only to proper parties). *Id.* at 1234.

As indicated above, a plaintiff may overcome the conditional privilege by demonstrating an abuse of the privilege. To do so, the plaintiff must show "a direct intention to injure another or ... a reckless disregard of the defamed party's rights and of the consequences that may result to him." *Kuwik*, 619 N.E.2d at 135, quoting *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 467 N.E.2d 126 (Mass. 1984). Again, an abuse of a qualified privilege may consist of "any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Kuwik*, 619 N.E.2d at 136.

That said, *Kuwik* holds that a qualified privilege respecting communications under defamation law exists when: (1) a statement is made in good faith by the defendant; (2) the defendant has an interest or duty to uphold; (3) the statement is limited in its scope to that purpose; (4) it is made in a proper occasion; and (5) the statement is published in a proper manner to the proper parties. 619 N.E.2d at 133.

### 3. Statutory Privilege

The Illinois Unemployment Insurance Act provides for an “absolute privilege” for all communications by an employer to the Illinois Department of Employment Security, subject to a possible exception for malicious intent. 820 ILCS 405/1900, *et seq.* (2022). The Act specifically provides: “[a]ll letters, reports, or communications of any kind, either oral or written, from an employer or his workers to each other, or to the Director or any of his agents, representatives, or employees, made in connection with the administration of this Act shall be absolutely privileged and shall not be the basis of any slander or libel suit in any court of this State unless they are false in fact and malicious in intent.” *Id.*

#### D. Other Defenses

##### 1. Truth

There is a “defense of substantial truth in defamation and false light cases.” *Myers v. Levy*, 348 Ill. App. 3d 906, 808 N.E.2d 1139 (Ill. App. Ct. 2d Dist. 2004) (note *Myers* was superseded as stated in *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 942 N.E.2d 544 (Ill. App. Ct. 2d Dist. 2010) and subsequently reversed by the Illinois Supreme Court as stated in *Hammons v. Soc’y of Permanent Cosmetic Professionals*, 2012 IL App. (1st) 102644, 967 N.E.2d 405 (Ill. App. Ct. 1st Dist. 2012). “Such [a] demonstration is made when a defendant shows that the ‘gist’ or ‘sting’ of the allegedly defamatory material is true.” *Andrews v. AT World Props., LLC* (Ill. App. Ct 1<sup>st</sup> Dist. 2023) citing *Harrison v. Chi. Sun-Times, Inc.*, 341 Ill. App. 3d. 555, 793 N.E.2d 760 (Ill. App. Ct 1st Dist. 2003). The substantial truth of a statement is normally a question for the jury, but where no reasonable jury could find that substantial truth had not been established, the question is one of law. *Id.*

##### 2. No Publication

“To prove defamation, a plaintiff must show that the defendant made a false statement about the plaintiff, there was an unprivileged publication to a third party by the defendant, and the publication damaged the plaintiff.” *Popko v. Cont’l Cas. Co.*, 355 Ill. App. 3d 257, 823 N.E.2d 184 (Ill. App. Ct. 1st Dist. 2005). Again, publication is an essential element to a cause of action for defamation. *Id.*

The court in *Popko* rejected the so-called “non-publication rule,” under which there cannot be libel in the communication of defamatory matters within a corporation because the corporation is merely “communicating with itself.” 823 N.E.2d at 189. As such, the court held that “communication[s] within a corporate environment may constitute publication for defamation purposes.” *Id.*

*Popko* involved a plaintiff who allegedly used profanity during a performance review. *Id.* at 186. The supervisor’s superior officer then prepared a written “termination memo,” to the company’s vice-president describing plaintiff’s alleged use of profanity during the review, and prior actions showing a “pattern of unacceptable conduct,” including two other incidents in which the plaintiff allegedly directed derogatory comments toward his supervisors. *Id.*

The court concluded that “[t]he element of publication is satisfied, even within a corporate environment, where the communication is made to a third party.” *Id.* at 191. “

### 3. Self-Publication

Compelled self-defamation is not a valid cause of action in Illinois. *Emery v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 880 N.E.2d 1002 (Ill. App. Ct. 1st Dist. 2007); *Harrel v. Dillard's Dep't Stores*, 268 Ill. App. 3d 537, 644 N.E.2d 448 (Ill. App. Ct. 5th Dist. 1994).

### 4. Invited Libel

Invited defamation is not a defense in Illinois.

### 5. Opinion

Statements that are not factual are protected under the First Amendment of the Constitution. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 367 Ill. App. 3d 48, 853 N.E.2d 770 (Ill. App. Ct. 1st Dist. 2006). Whether a statement is a fact or opinion is a question of law. *Imperial Apparel, Ltd.*, 853 N.E.2d at 775. The court in *Imperial Apparel, Ltd.* applied and adopted the approach used in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir 1984), to determine if a statement was fact or opinion. Under the *Ollman* approach, courts should consider whether the statement: (1) has a precise core of meaning; (2) is objectively verifiable; (3) whether the literary context of the statement implies that it has factual content; and (4) the broader social context in which the statement appears implies fact or opinion. *Imperial Apparel, Ltd.*, 853 N.E.2d at 775-76 (internal citation omitted).

A statement is not actionable as defamation, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." *Myers v. Phillips Chevrolet, Inc.*, No. 04 C 0763, 2004 WL 2403126, at \*7 (N.D. Ill. Oct. 26, 2004)

### E. Blacklisting Statutes

The Illinois Blacklist Trade Law forbids financial institutions, governmental agencies, and shipping companies from entering into contracts which discriminate on the basis of race, color, creed, national ancestry, gender, ethnicity, or religion. 775 ILCS 15/3 (2019). The law also provides that no contract will be valid if it discriminates on the basis of race, color, creed, national ancestry, gender, ethnicity, or religion. *Id.*

### F. Non-Disparagement Clauses

Non-disparagement clauses were held not void as against public policy in Illinois in a case brought by a pathologist where the statements that allegedly violated the clause did not reasonably relate to patient treatment or improvement of medical care. *Patlovich v. Rudd*, 949 F. Supp. 585, 595 (N.D. Ill. 1996) (applying Illinois law). The statements do not have to be defamatory to be considered disparaging statements. The ordinary meaning of "disparage" should be used. *Id.*



## VII. Emotional Distress

### A. Intentional Infliction of Emotional Distress

In *Gianforte v. Elgin Riverboat Resort, No. 2-02-1390*, 2003 WL 22208916, at \*6 (Ill. App. Ct. 2d Dist. Sept. 17, 2003), the plaintiff, who was fired after allegedly rigging a cash drawing, argued, “being accused of a crime involving dishonesty necessarily constitutes conduct of an extreme and outrageous nature.” In support of his argument, plaintiff presented several affidavits from patrons and employees indicating they had heard non-management employees state that plaintiff was fired for rigging a cash drawing. *Id.* The court explained that a cause of action for intentional infliction of emotional distress requires a party to plead that the defendant’s conduct was (1) extreme and outrageous; (2) that defendant intended conduct to inflict emotional or knew there was a high probability that their conduct would cause it; and (3) that defendant’s conduct in fact caused severe emotional distress. *Id.*, at \*7 (citations omitted). Additionally, the court explained, “mere insults, indignities, threats, annoyances or petty oppressions do not qualify as outrageous conduct.” *Id.*

In *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 742 N.E.2d 858 (Ill. App. Ct. 1st Dist. 2000), plaintiff, a foreman in a nuclear plant, reported safety violations to the U.S. Nuclear Regulatory Commission. For his intentional infliction claim, plaintiff alleged that his employer temporarily reassigned and then later demoted him as a result of his reporting the violations. *Graham*, 742 N.E.2d at 862. The employer also investigated plaintiff’s comments which included interviews of over 100 employees, making several defamatory statements about plaintiff and requesting that those who were interviewed confirm plaintiff’s statements. *Id.* The court concluded that the temporary assignment and demotion did not constitute extreme and outrageous behavior, but were merely “everyday stress of the workplace.” *Id.* at 868. However, the court held that the employer’s actions in conducting a sham investigation constituted extreme and outrageous conduct. *Id.* at 868. The court reasoned that plaintiff’s “allegations of a sham investigation for the sole purpose of retaliating against him because he reported that his [employer] was violating nuclear safety regulations [were] sufficient to constitute extreme and outrageous behavior.” *Id.*

Determining what constitutes extreme and outrageous conduct does not follow a strict or clear-cut rule. *Graham*, 742 N.E.2d at 858. Instead, it is evaluated using an objective standard that considers all the relevant facts and circumstances unique to each case. *Id.* Relevant factors include (1) whether the defendant holds a position of authority over the plaintiff, abuses that authority, or maintains power to affect the plaintiff’s interests; (2) whether the defendant reasonably believed his objective was legitimate; and (3) whether the defendant was aware the plaintiff could be particularly susceptible to emotional distress. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10-11, 607 N.E.2d 201 (1992).

In cases of alleged extreme and outrageous conduct, the level of control a defendant has over the plaintiff significantly influences the likelihood of the conduct being deemed outrageous. *McGrath v. Fahey*, 126 Ill. 2d 78, 86-90, 533 N.E.2d 806 (1988). This is particularly the case when the conduct includes threats to use such authority or power to the detriment of the plaintiff. *Id.* As such, the dynamic of power and control in the relationship between the defendant and plaintiff plays a critical role in these determinations. *Id.*

### B. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress is a tort, and the general elements must be proven: existence

of a duty, breach of the duty, and injury proximately caused by the injury. *Brackett v. Galesburg Clinic Ass'n*, 293 Ill. App. 3d 867, 689 N.E.2d 406 (Ill. App. Ct. 3d Dist. 1997). To state a cause of action for negligent infliction of emotional distress, the plaintiff must allege that the emotional distress arose out of the negligent acts of the defendant. *Brackett*, 689 N.E.2d at 410. In *Lundy v. Calumet City*, 209 Ill. App. 3d 790, 567 N.E.2d 1101 (Ill. App. Ct. 1st Dist. 1991), a case where two police officers did poorly on a psychological profile test, but were later found to be acceptable upon retesting, the court found that removing them from active duty was proper and not negligent prior to their retesting. The court explained that “[c]onduct which otherwise amounts to no more than insults or indignities is not transformed into extreme and outrageous conduct simply by virtue of an employer-employee relationship.” *Lundy*, 567 N.E.2d at 1103 (citations omitted).

C. Preemption

1. Workers’ Compensation Act

The Illinois Workers’ Compensation Act (“IWCA”) provides for the exclusive remedy of accidental injuries in the workplace. 820 ILCS 305/1 (2014); *See also Hunt-Golliday v. Metro. Water Reclamation Dist.*, 104 F.3d 1004, 1016 (7th Cir. 1997). (“Under Illinois case law, an injury that was intentionally inflicted upon an employee by another employee nevertheless is considered accidental on behalf of the employer if it was unexpected and unforeseen by the injured party, unless the employer expressly authorized the co-employee to commit the tort.”) (internal citations omitted). In *Hunt-Golliday*, the court held that plaintiff’s intentional infliction of emotional distress claim, filed in conjunction with a suit for sexual harassment, was barred by the IWCA. *Id.* at 1017. The fact that the plaintiff’s co-employee and/or supervisor were acting within the scope of their employment did not automatically constitute authorization by the employer for the commission of the intentional tort. *Id.* (internal citations omitted).

In contrast, the court in *Arnold v. Janssen Pharmaceutica*, 215 F. Supp. 2d 951 (N.D. Ill. 2002), held that the exclusivity provisions of the IWCA did not bar the employee’s intentional infliction of emotional distress claim against her former employer and parent company. The court reasoned that the employee may be able to successfully prove that the supervisors, employees, and agents, who allegedly mistreated her, were the defendants’ alter egos or, in the alternative, that defendants expressly authorized the alleged misconduct. *Arnold*, 215 F. Supp. 2d at 957. The court reasoned that under the exclusive provisions of the IWCA, the employer should not be permitted to assert that the injury was “accidental” when the employer committed the act. *Id.*, citing *Mecrbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 564 N.E.2d 1222 (Ill. 1990).

Notably, in *Arnold* the plaintiff alleged that the misconduct took place over an extended period of time and that she made numerous complaints which resulted in her alleged retaliatory demotion and other adverse conditions of her employment. 215 F. Supp. 2d at 961. The court held that where superiors in their official capacity engage in an extended pattern of abusive conduct, they may qualify as alter egos of the employer. *Id.* at 957, citing *Johnson v. Federal Reserve Bank*, 199 Ill. App. 3d 427, 557 N.E.2d 328 (Ill. App. Ct. 1st Dist. 1990). Such a pattern, the court found, can also give rise to an inference that the employer expressly authorized its employees’ misconduct. *Id.* (citation omitted).

In deciding whether a plaintiff’s intentional infliction of emotional distress claim is preempted by the IWCA, the court in *Poulos v. Village of Lindenhurst*, No. 00 C 5603, 2002 WL 31001876 (N.D. Ill. Sept. 3, 2002) stated that although “the language of the [Workers’ Compensation] statute suggests that it bars intentional tort claims made by one employee against another, the Illinois Supreme Court has expressly held that it does not.”

*Id.* at \*15, citing *Mecrbrey*, 564 N.E.2d at 1229. Therefore, a plaintiff's state-law claims against the Village are only preempted if the plaintiff can prove that her injury: "(1) 'was not accidental;' (2) 'did not arise from ... her employment;' (3) 'was not received during the course of employment;' or (4) 'was not compensable under the Act.'" *Id.* (quoting *Mecrbrey*, 564 N.E.2d at 1226). Additionally, an injury is accidental only if it is "unforeseen by the person to whom it happens." *Id.* at \*16. Furthermore, the Village can only be held liable for accidental injuries if: "(1) they were intentionally inflicted upon her by the Village or its alter ego; or (2) the injurious acts were 'commanded or expressly authorized' by the Village." *Id.* However, "according to the Illinois Supreme Court, only express authorization of [the] conduct will expose the Village to liability." *Id.* The court held that although the record suggests that the Village may have been guilty of carelessly failing to address plaintiff's concerns, it does not suggest that the Village expressly authorized the actions. *Id.* Accordingly, plaintiff's intentional infliction of emotional distress claim against the Village was preempted by the IWCA. *Id.* at \*17.

## 2. Illinois Human Rights Act

The Illinois Human Rights Act ("IHRA") includes this preemption provision: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS 5/8-111(D). This provision "preempts all state law claims seeking redress for a civil rights violation within the meaning of [the IHRA]." *Krocka v. City of Chicago*, 203 F.3d 507, 516 (7th Cir. 2000) (alterations and internal quotation marks omitted).

In *Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, 992 N.E.2d 509, the court held that plaintiff's claims were barred by the exclusivity provisions of the IWCA and IHRA. Plaintiff alleged that in 2008 his supervisor called him a "faggot, flamer and queer" and that some of these comments occurred in the presence of his co-workers. *Schroeder*, 2013 IL App (1st) at \*512. Plaintiff then quit and left work. He was later reinstated and transferred to another location that required plaintiff to drive a further distance. Plaintiff alleged that he was present during a conference call concerning his transfer when one of his district managers stated "[i]f the drive doesn't get rid of him, the jungle form Gary will." *Id.* at 513. Plaintiff alleged that this type of discriminatory behavior continued through 2010 and without any investigation into his complaints. *Id.* at \*513-514.

The court in *Schroeder* noted that the circuit court is not precluded from exercising jurisdiction over all tort claims that relate factually to a civil rights violation. *Id.* at \*517, citing *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 687 N.E.2d 21 (Ill. 1997). The court noted that whether the circuit court may exercise jurisdiction over a tort claim depends upon "whether the tort claim is inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Act itself." *Id.* If a plaintiff is able to establish "the necessary elements of the alleged tort independent of any duties created by the Human Rights Act, then the common law claim is not inextricably linked with a civil rights violation and the circuit court may exercise jurisdiction." *Id.*, citing *Maksimovic*, 177 Ill. 2d at 519. The court held that Schroeder's intentional infliction of emotional distress claim was inextricably linked to a civil rights violation (i.e. the retaliation he endured after reporting his supervisor's discriminatory conduct towards him), and therefore barred by the IHRA. *Id.* at \*30.

In *Temores v. SG Cowen*, 289 F. Supp. 2d 996 (N.D. Ill. 2003), defendant claimed that plaintiff's intentional infliction of emotional distress claims were preempted by the IHRA because they were factually related to incidents of sexual harassment. *Id.* at 1006. The court explained that common law claims are preempted only if they are "inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the IHRA itself." *Id.*, quoting *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 687 N.E.2d 21 (Ill. 1997). However, like assault, battery and false imprisonment, intentional infliction of emotional distress claims

are tort actions that exist “wholly separate and apart from a cause of action for sexual harassment under the IHRA.” *Id.* In fact, intentional infliction of emotional distress claims have been recognized by Illinois courts as independent actions prior to the adoption of the IHRA. *Id.* at 1007. While the court recognized that the Seventh Circuit Court of Appeals has found intentional infliction of emotional distress claims which depended on allegations of sexual harassment to be preempted by the IHRA, the court also recognized that the “final word on whether an Illinois statute preempts an Illinois claim comes from Illinois’ highest court.” *Id.* Therefore plaintiff’s intentional infliction of emotional distress claim was not preempted by the IHRA. *Id.*

## VIII. PRIVACY RIGHTS

### A. Generally

In Illinois, the tort of invasion of privacy can take the form of: (1) a public disclosure of private facts; (2) publicity which reasonably places another in a false light before the public; (3) an unreasonable intrusion upon the seclusion of another; or (4) an appropriation of another’s name or likeness. *Lawlor v. N. Am. Corp. of Ill.*, 2012 IL 112530, 983 N.E.2d 414 (Ill. 2012).

“Actions for slander libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.” 735 Ill. Comp. Stat. Ann. 5/13-201. The statute does not apply to intrusion upon seclusion. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, 451 Ill. Dec. 879, 184 N.E.3d 466 (App. Ct. 1st Dist. 2021).

#### 1. Public Disclosure of Private Facts

In *Cordts v. Chi. Tribune Co.*, 369 Ill. App. 3d 601, 860 N.E.2d 444 (Ill. App. Ct. 1st Dist. 2006), the court affirmed the dismissal of the “invasion of privacy” action. In its lengthy discussion, the court restated the prima facie elements for the tort of public disclosure of private facts; that: (1) publicity was given to the disclosure of private facts; (2) the facts were private, and not public, facts; (3) the matter made public was such as to be highly offensive to a reasonable person; and (4) that the matter published was not of legitimate public concern. *Cordts*, 860 N.E.2d at 450 (internal citations omitted). In *Cordts*, plaintiff’s employer, the Chicago Tribune Company, hired the Medeval Corporation to evaluate plaintiff’s disability claim who in turn disclosed to plaintiff’s ex-wife that he was receiving treatment for depression.

On appeal, the court focused on the publicity element. Generally, this element is satisfied where the information is disclosed to the public at large, but an exception exists where a disclosure is made to a small number of people who have a “special relationship” with the plaintiff. *Cordts*, 860 N.E.2d at 450-51, citing *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 560 N.E.2d 900 (Ill. App. Ct. 1st Dist. 1990) (holding that disclosure to a co-worker of personal medical information sufficiently satisfies the requirement that publicity disclose private facts) (note *Miller* was superseded by statute (i.e. HIPAA) as stated in *Herman v. Kratche*, 2006 Ohio 5938, \*15 (Ohio Ct. App., Cuyahoga County Nov. 9, 2006)). However, the “special relationship” exception to the general public disclosure rule will not apply where the person in the “special relationship” with the plaintiff has a “natural and proper interest” in the information. *Cordts*, 860 N.E.2d at 450. The court affirmed that the ex-wife would have a natural and proper interest in learning about any debilitating condition suffered by her ex - husband that could impact his ability to maintain support of their children. *Id.* at 610.

"Private facts" under Illinois law, are intimate personal facts, and thus, matters of public record, including information such as a person's name, address, and age, do not qualify. *Huon v. Breaking Media, LLC*, 75 F. Supp. 3d 747, 42 Media L. Rep. (BNA) 2709 (N.D. Ill. 2014).

In *Grimes*, a jail medical technician alleged that his status as a transgender man was private, arguing that his immediate supervisor invaded his privacy by disclosing the technician's transgender status to co-workers. *Grimes v. County of Cook*, 455 F. Supp. 3d 630, 640 (2020). The technician's complaint alleged that only three of his co-workers knew or suspected that technician was a transgender man. *Id.* The court found that this yielded the inference that his transgender status was not widely known at the jail, and the complaint allowed for an inference that those co-workers only perceived that technician was a transgender man, not that they definitely knew he was. *Id.* at 641. In other words, the supervisor's disclosure of technician's transgender status revealed concrete information that had previously remained private. *Id.*

## 2. False Light

In order to recover for false light a plaintiff must plead and prove the following: (1) that defendant placed him in a false light before the public; (2) that the false light in which he was placed would be highly offensive to a reasonable person; and (3) that defendant acted with actual malice. *Poulos v. Lutheran Soc. Servs. of Ill., Inc.*, 312 Ill. App. 3d 731, 728 N.E.2d 547 (Ill. App. Ct. 1st Dist. 2000).

In *Green v. Trinity Int'l Univ.*, 344 Ill. App. 3d 1079, 801 N.E.2d 1208 (Ill. App. Ct. 2d Dist. 2003), the court determined that an associate professor could not show that his employer put him in a false light, because everything stated in a memorandum following his dismissal was true. The associate professor argued that his cause of action arose from what was not said in the memorandum, and complained that the memorandum failed to include language wishing him well or thanking him for his service. *Id.* However, the court stated that the memorandum was not phrased in a way that a reasonable person could conclude that the associate professor had committed acts of moral turpitude, and the employer was under no obligation to wish him well or thank him for his service in announcing the termination of his employment. *Id.*

Illinois courts have applied the rule in *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 560 N.E.2d 900 (Ill. App. Ct. 1st Dist. 1990), to false light claims. "Accordingly, the element of 'before the public' in an action for false light may be satisfied by establishing that false and highly offensive information was disclosed to a person or persons with whom a plaintiff has a special relationship," *Poulos*, 728 N.E.2d at 555-56, *Miller v. Motorola*, 560 N.E.2d at 902.

Additionally, if a false light invasion of privacy claim is based on statements that are not defamatory per se, a plaintiff must allege with particularity that he suffered special damages. *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 17, 44 N.E.3d 1134. In other words, special damages must be pled in cases where the claim for false light invasion of privacy is based on language where the defamatory meaning can be established only by reference to extrinsic facts. *Schaffer*, 196 Ill. App. 3d at 736, 554 N.E.2d 988.

## 3. Intrusion Upon Seclusion

In *Johnson v. K mart Corp.*, 311 Ill. App. 3d 573, 723 N.E.2d 1192 (Ill. App. Ct. 1st Dist. 2000), the court expressly recognized a cause of action for the tort of invasion of privacy by intrusion upon seclusion. To

demonstrate such a claim, plaintiff must prove: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) an intrusion that is offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs is private; and (4) the intrusion causes anguish and suffering. *Johnson*, 723 N.E.2d at 1196, citing *Melvin v. Burling*, 141 Ill. App. 3d 786, 490 N.E.2d 1011 (Ill. App. Ct. 3d Dist. 1986).

In *Morris v. Ameritech Ill.*, 337 Ill. App. 3d 40, 785 N.E.2d 62 (Ill. App. Ct. 1st Dist. 2003), an employee sued his employer claiming invasion of privacy for eavesdropping and inspecting message unit detail records (i.e., telephone records). The employer terminated the employee after confronting him with evidence that he falsified work records to cover up that he was at home not working during hours he claimed to be at work. *Morris*, 785 N.E.2d at 64. The court held that the employee could not recover against the employer for invasion of privacy. *Id.* The employer was authorized to use "its records to protect its right not to pay employees for time they falsely claimed to have spent working." *Id.*

In *Schmidt v. Ameritech Ill.*, 329 Ill. App. 3d 1020, 768 N.E.2d 303 (Ill. App. Ct. 1st Dist. 2002), the court held that to successfully plead a cause of action for unreasonable intrusion upon seclusion, a plaintiff must demonstrate that the intrusion is not only offensive, but also highly offensive to a reasonable person.

The facts must be private, not merely personal. *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 813 N.E.2d 1013 (2004). Personal information such as names, addresses, telephone numbers, social security numbers, or dates of birth are not considered to be private facts. *Id.*

In *Johnson*, the court determined that the plaintiffs presented sufficient evidence to overcome the defendant's motion for summary judgment, where they showed that defendant placed undercover investigators posing as employees to spy on them. *Johnson*, 723 N.E.2d.1197-98. These investigators, in addition to obtaining information regarding theft, vandalism, and drug use at the facility, gathered information concerning family problems, health problems, sex lives, future work plans, and attitudes about the defendant, and thereafter reported all this information to the defendant. *Id.* The court also held that plaintiffs presented sufficient evidence to support a claim for invasion of privacy based on publication of private facts, in light of the investigators' disclosure of the gathered information to the employer. *Id.* at 1197.

In *Jacobson v. CBS Broad., Inc.*, 2014 IL App (1st) 132480, 19 N.E. 3d 1165, plaintiff news reporter sued her employer CBS for damages (including defamation, false light, and intrusion upon seclusion) after video footage was taken of her and her two young children while swimming in a backyard pool of a high-profile source in a story upon which she was reporting. Broadcast footage showed plaintiff in swimsuit top and towel, then immediately showed an image of the estranged husband of a missing woman putting on his shirt (although the two events occurred minutes apart and in different locations of pool area). *Id.* at ¶ 11. Although the footage could be viewed by some as connoting a sexual relationship between the plaintiff and the estranged husband, there were other permissible interpretations, as plaintiff's children were shown near her. *Id.* at ¶ 43. The circuit court ruled that plaintiff had no reasonable, legitimate expectation of privacy or seclusion, and that the videotape revealed no specific act that could be considered private. *Id.* at ¶45. Court affirmed the decision of the circuit court and granted summary judgment in favor of CBS.

#### 4. Misappropriation

Illinois no longer recognizes the common-law tort known as the appropriation of one's likeness, or the right of publicity. *Blair v. Nevada Landing Partnership, RBG, LP*, 369 Ill.App.3d 318, 322–23, 859 N.E.2d 1188



(2006). This change occurred due to the enactment of the Right of Publicity Act. *Id.* The Act effectively replaced the common-law right, although it essentially incorporated common law principles. *Brown v. ACMI Pop Division*, 375 Ill.App.3d 276, 283, 873 N.E.2d 954 (2007).

Section 30(a) of the Act states that prior written consent is required to use an individual's identity for commercial purposes while they are alive. 765 ILCS 1075/30(a) (West 2010). The term "identity" encompasses photographs. 765 ILCS 1075/5 (West 2010).

"Commercial purpose" means the "public use" or "holding out" of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of "advertising or promoting" products, merchandise, goods, or services; or (iii) for the purpose of fundraising. 765 ILCS 1075/5 (2024). A person who violates the Act can be liable for either actual damages, profits derived from the unauthorized use, or both, or \$1,000. 765 ILCS 1075/40(a)(1), (a)(2) (2024). Punitive damages may be awarded for a willful violation of the Act. 765 ILCS 1075/40(b) (2024). Section 55 of the Act provides that the court "may" award to the prevailing party reasonable attorney fees, costs, and expenses. 765 ILCS 1075/55 (2023).

"To plead misappropriation of identity, the plaintiff must claim an appropriation without consent, of one's name or likeness for another's use or benefit." *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 799 N.E.2d 432 (Ill. App. Ct. 1st Dist. 2003). *Petty* involved an automobile sales manager who voluntarily ended his employment with one Dodge dealership and began working for another Dodge dealership. 799 N.E.2d at 436. Under a marketing program operated by Chrysler, dealerships pay a fee to have Chrysler send their customers newsletters and quarterly magazines promoting their dealerships. *Id.* Each dealership must designate a representative whose name will appear in the promotions. *Id.* The sales manager's prior employer designated him as its representative, and his name appeared in the dealership's promotional literature, even after the sales manager began working for another dealership. *Id.* The sales manager sued, claiming misappropriation of his name. *Id.*

The trial court granted summary judgment on the misappropriation claim, finding that the sales manager had failed to demonstrate that he suffered any damages as a result of the misappropriation. *Id.* at 437. However, the appellate court reversed, stating that "[a] claimant alleging misappropriation of identity need not prove actual damages, because the court will presume [nominal] damages if someone infringes another's right to control his identity." *Id.* at 441-42.

## B. New Hire Processing

### 1. Eligibility Verification & Reporting Procedures

Employers in Illinois, as with every other state, are barred from hiring people not legally authorized to work in the United States. However, employers are also prohibited from discriminating against noncitizen job applicants. The key for employers is to follow the Department of Homeland Security's USCIS Form I-9 requirements when verifying the employment eligibility of prospective new hires. At the same time, employers must be careful not to impose more demanding and stringent hiring requirements on noncitizens. *See also*, 820 ILCS 55/12 (2014) ("Use of Employment Eligibility Verification Systems").

Pursuant to the Immigration Reform and Control Act of 1986, employers are barred from hiring individuals, including undocumented aliens, who are not legally entitled to work in the United States. Employers must verify that all prospective hires are eligible to work by obtaining an Employment Eligibility Verification Form, commonly referred to as a “Form I-9,” and inspect all required supporting documentation within 3 days of the prospective employee’s hire date. Once completed, employers must retain the Form I-9 for 3 years after hiring the worker or for 1 year after termination, whichever is longer. *See* 8 C.F.R. §274a.2(b) (2) (i) (A). There are no exceptions for temporary or part-time employment. *See* 8 C.F.R. §274a.2(b) (1) (i).

i. Background Checks

Under the Illinois Job Opportunities for Qualified Applicants Act, employers with at least 15 employees are barred from asking about or considering a job applicant's criminal history until either an interview is scheduled or, in cases where no interview takes place, a conditional job offer is made. 820 ILCS 75/1, et seq (2015). The act imposes penalties ranging from a written warning for the first violation to up to \$1,500 every 30 days for continuing violations. 820 ILCS 75/20.

Further, employers may not make adverse employment decisions based upon arrest records, sealed or expunged criminal histories, or arrests for which an individual has pleaded guilty to a crime, received supervision, complied with the supervision requirements, and received a judgment dismissing the charges. *See* 775 ILCS 5/2-103 (2014); 20 ILCS 2630/5 (2014). That said, Illinois employers may consider conviction information to evaluate prospective employees for job suitability. *See* 775 ILCS 5/2-103 (2019); 20 ILCS 2630/3 (2021).

When obtaining conviction information, Illinois employers must first obtain a signed release from the employee applicant, keep a copy of the signed release on file for a minimum of two years, and provide the subject applicant with a copy of the report. Employers are not liable for their actions reasonably taken in good faith reliance on such reports. *See* 20 ILCS 2635/7 (2021); 20 Ill. Admin. Code 1215.30 (2014).

It is generally not permitted, with certain exceptions, for employers to ask about or consider a job applicant's credit history when making decisions about employment or compensation. 820 ILCS 70/10 (2011).

C. Other Specific Issues

1. Artificial Intelligence Video Interviews

The Artificial Intelligence Video Interview Act makes Illinois the first state to specifically regulate AI in the context of employment video interviews. 820 ILCS 42/1, et seq. (2024). This Act requires employers to notify applicants about the use of AI, including an explanation of how it functions, obtain consent from applicants for AI analysis, restrict the sharing of interview recordings, and ensure the destruction of such recordings upon 30 days of a request. *Id.*

(a) Employers that rely solely upon AI analysis of a video interview to determine whether an applicant will be selected for an in-person interview must collect and report the following:

- (1) the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the use of artificial intelligence analysis; and
- (2) the race and ethnicity of applicants who are hired.

820 ILCS 42/20

## 2. Workplace Searches

Illinois courts do not permit employees to sue their employer for invasion of privacy for searches at the workplace. *Johnson v. C&L, Inc.*, No. 95C6381, 1996 WL 308282 (N.D. Ill. June 6, 1996) (applying Illinois law). There is no statute that applies to searches in the workplace. However, Article I., Section 6 of the Illinois Constitution prohibits warrantless searches. *See* Illinois Const., Art. I, § 6 (2019).

## 3. Electronic Monitoring

There is an exception to the Illinois Eavesdropping Act for certain businesses. *See* 720 ILCS 5/14-1, *et seq* (2014). The statute creates an exception for:

The use of a telephone monitoring device by either (1) a corporation or other business entity engaged in marketing or opinion research or (2) a corporation or other business entity engaged in telephone solicitations...to record or listen to oral telephone solicitation conversations or marketing or opinion research conversations by an employee of the corporation or other business entity when: (i) the monitoring is used for the purpose of service quality control of marketing or opinion research or telephone solicitation, the education or training of employees or contractors engaged in marketing or opinion research or telephone solicitation, or internal research related to marketing or opinion research or telephone solicitation; and (ii) the monitoring is used with the consent of at least one person who is an active party to the marketing or opinion research conversation or telephone solicitation conversation being monitored.

720 ILCS 5/14-3(i) (2014). None of the conversations obtained through this exemption may be used in any administrative, judicial, or other proceeding or divulged to any third party. *Id.*

In 2012, the Illinois legislature amended the Right to Privacy in the Workplace Act to prohibit Illinois employers from requesting, or requiring password or account information, or demanding access to employees' or prospective employees' social networking profiles. *See* 820 ILCS 55/10 (2014). The amendment went into effect on January 1, 2013, defines the term "social networking website" to include all Internet-based services that allow users to create profiles, list of persons they are connected to within that network, and other users' connections. Notably, "social networking website[s]" do not include email.

Notwithstanding the above limitations, the amendment does not prevent employers in Illinois from enforcing lawful policies regarding their employees' use of the employer's electronic equipment in the workplace. This includes an employer's right to monitor employees' use of electronic equipment and use of electronic mail at work. Employers are also free to obtain information available in the public domain.

#### 4. Social Media

Under the Right to Privacy in the Workplace Act, it is unlawful for employers or prospective employers to:

- (A) Request, require, or coerce any employee or prospective employee to provide a user name and password or any password or other related account information in order to gain access to the employee's or prospective employee's personal online account or to demand access in any manner to an employee's or prospective employee's personal online account;
- (B) Request, require, or coerce an employee or applicant to authenticate or access a personal online account in the presence of the employer;
- (C) Require or coerce an employee or applicant to invite the employer to join a group affiliated with any personal account of the employee or applicant;
- (D) Require or coerce an employee or applicant to join an online account established by the employer or add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account;
- (E) Discharge, discipline, discriminate against, retaliate against, or otherwise penalize an employee for (i) refusing or declining to provide the employer with a user name and password, password, or any other authentication means for accessing his or her personal online account, (ii) refusing or declining to authenticate or access a personal online account in the presence of the employer, (iii) refusing to invite the employer to join a group affiliated with any personal online account of the employee, (iv) refusing to join an online account established by the employer, or (v) filing or causing to be filed any complaint, whether orally or in writing, with a public or private body or court concerning the employer's violation of this subsection; or
- (F) Fail to hire an applicant as a result of his or her refusal to (i) provide the employer with the user name and password, password, or any other authentication means for accessing a personal online account, (ii) authenticate or access a personal online account in the presence of the employer, or (iii) invite the employer to join a group affiliated with a personal online account of the applicant.

820 ILCS 55/10(b)(1) (2019).

5. Taping of Employees

The Illinois Eavesdropping Act prohibits certain forms of monitoring and recording that occasionally take place in an employment context. 720 ILCS 5/14-1, et seq. (2014). Under the Act, a person “commits eavesdropping” if he or she, “[k]nowingly and intentionally uses an eavesdropping device ... for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation.” 720 ILCS 5/14-2(a)(1) (2019).

Under the Act, “[a]n eavesdropping device is any device capable of being used to hear or record oral conversation or intercept, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means.” 720 ILCS 5/14-1 (2014). “[T]he term private conversation means any oral communication between 2 or more persons ... when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation.” *Id.*

6. Release of Personal Information on Employees

Under the Illinois Personnel Record Review Act (“IPRRA”), employers are required to review all personnel records prior to releasing information to a third party. 820 ILCS 40/8 (2014). The Act further requires that employers delete all disciplinary actions which are more than 4 years old, except when the release is ordered to be produced to a party in a legal action or arbitration. *Id.*

Effective January 1, 2024, IPRRA mandates that employers must furnish employees with copies of their personnel records either through email or mail upon the employee’s request. 820 ILCS 40/2 (2024). This requirement is in place regardless of whether the employee has the option to inspect these records in person. *Id.* While employers retain the right to charge a fee for this service, it is restricted to the actual cost incurred in duplicating the records. *Id.*

i. Medical Information

Under Illinois’ Medical Examination of Employees Act, no employer can require an employee to pay for the cost of the medical examination or the cost for furnishing medical records of such examination required by the employer as a condition of employment. 820 ILCS 235/1, et seq. (2014).

Pursuant to Illinois’ Health and Safety Act, all employers are required to keep files of all injuries, deaths and illnesses that occurred at the work site. 820 ILCS 305/6(b). All information is to be kept confidential. *Id.*

The Illinois Health Insurance Portability and Accountability Act protects some medical history of employees. 215 ILCS 97/1, et seq. (2014).

ii. Restrictions on Requesting Salary History

Following an amendment to the Illinois Equal Pay Act, employers are restricted from using a job

applicant's past compensation or salary history as a basis for screening candidates. 20 ILCS 112/10 (2019). Additionally, this amendment prohibits employers from determining compensation based on such salary history, even if the applicant voluntarily discloses this information. *Id.* "If an employer violates [the Act], the employee may recover in a civil action any damages incurred, special damages not to exceed \$10,000, injunctive relief as may be appropriate, and costs and reasonable attorney's fees as may be allowed by the court and as necessary to make the employee whole. If special damages are available, an employee may recover compensatory damages only to the extent such damages exceed the amount of special damages. Such action shall be brought within 5 years from the date of the violation." 820 ILCS 112/30 (a)(a-5) (2019).

### iii. Salary Transparency Requirements

Beginning January 1, 2025, an amendment to the Illinois Equal Pay Act mandates that employers with 15 or more employees must include salary ranges in job postings for positions based in Illinois. 820 ILCS 112/10 (2025). This requirement is specific to job postings created by the employer and does not obligate employers to create such postings.

When an employer issues a job posting, they can meet the requirement to disclose pay scales and benefits by including a link to a publicly available webpage that lists this information. 820 ILCS 112/10(b-25). Alternatively, employers may comply by posting a current, general description of benefits in a central, easily accessible, and public section of their website. *Id.* If an employer enlists a third party, such as a recruitment agency or job posting site, to advertise the position, the employer is responsible for providing the third party with either the pay scale and benefits information or a link to this information. *Id.* The third party is then obligated to include this information in the job posting. *Id.* If the third party fails to do so, they may be held liable unless they can prove that the employer did not supply the necessary details. *Id.*

### iv. Use of Lawful Products

Under the Illinois Right to Privacy in the Workplace Act, an employer cannot discriminate against an employee because that employee "uses lawful products" (e.g., tobacco, alcohol) off the premises of the employer during nonworking hours. 820 ILCS 55/5 (2019). However, this provision does not apply to non-profit organizations that, as one of their primary objectives, discourage the use of the lawful product(s) at issue by the general public. *Id.* Further, employers can provide health, disability, or life insurance policies that distinguish between employees regarding the type of coverage, or the cost of coverage, based on the use or non-use of lawful products. *Id.*

### v. Illinois Workplace Privacy Act

The Illinois Right to Privacy in the Workplace Act also prohibits employers from inquiring of prospective employees, or of any previous employers of prospective employees, whether the prospective employees have ever filed a claim for workers' compensation. 820 ILCS 55/10 (2014).

## vi. Biometric Information Privacy Act

The Biometric Information Privacy Act (BIPA) in Illinois mandates the protection of individuals' biometric information, such as fingerprints and facial recognition data. 740 ILCS 14/1, et seq. (2008). BIPA provides that a private entity may not “collect, capture, purchase, receive through trade, or otherwise obtain” a person’s biometric data, unless it first (1) informs the individual or their legal representative in writing about the collection or storage of biometric identifiers; (2) discloses the purpose and duration for which the data will be kept; and (3) secures a written consent from the person or their authorized representative. 740 ILCS 14/15 (b).

BIPA also allows individuals to sue companies for violations. 740 ILCS 14/20. If a private entity negligently breaches the Act, victims may receive \$1,000 or actual damages, whichever is greater. *Id.* For intentional or reckless violations, it's \$5,000 or actual damages. Successful claimants can also recover reasonable legal fees, including expert witness costs, and other court-deemed appropriate relief, like injunctions. *Id.*

**IX. WORKPLACE SAFETY****A. Negligent Hiring**

“Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons.” *Van Horne v. Muller*, 185 Ill. 2d 299, 705 N.E.2d 898 (Ill. 1998). However, “Illinois has not recognized a cause of action for negligent referral.” *Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor*, 295 Ill. App. 3d 567, 692 N.E.2d 812 (Ill. App. Ct. 1st Dist. 1998).

To state a cause of action for negligent hiring or retention, plaintiff must allege and prove that: (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; and (2) the employee’s unfitness created a foreseeable danger to others. *Van Home*, 185 Ill. at 904. The plaintiff may maintain an action even when the employee committed a criminal or intentional act, if the employee was on the employer’s premises or using the employer’s chattel, and the employer has a reason to know of the need for exercising control over the employee. *MacDonald v. Hinton*, 361 Ill. App. 3d 378, 836 N.E.2d 893 (Ill. App. Ct. 1st Dist. 2005).

In *Anicich v. Home Depot U.S.A., Inc.*, 852 F.3d 643 (7th Cir. 2017), the Court reversed the judgment of the district court in favor of defendants that granted defendants joint employers' motion to dismiss plaintiff-estate of employee's complaint alleging that defendants were negligent in hiring employee's supervisor. The defendants employed as a supervisor a man with a history of sexually harassing his young female subordinates. He fixated on one. He began making advances on her and calling her his girlfriend. His behavior escalated over time, from such inappropriate comments to verbal abuse, public outbursts, throwing and slamming objects, and finally, to deadly violence. *Id.* at 647. While the district court agreed with defendants that they did not owe duty of care to the employee for the supervisor's criminal acts against the employee, the court of appeals found that there was a triable issue as to whether it was foreseeable that the supervisor would harm the employee given his prior pattern of conduct against her. *Id.* at 654-655.

The fact that the supervisor never made explicit threats to the employee or inflicted physical harm on her prior to the fatal attack, that that attack took place outside of the workplace, or that the supervisor



committed the instant intentional tort outside the scope of employment did not require a different result. *Id.* at 654.

In *Luss v. Vill. of Forest Park*, 377 Ill. App. 3d 318, 878 N.E.2d 1193 (Ill. App. Ct. 1st Dist. 2007), the court affirmed summary judgment for the employer Wal-Mart. Plaintiff alleged that Wal-Mart and the Village of Forest Park negligently hired, trained, and supervised certain employees who restrained the plaintiff's decedent. Plaintiff further alleged that such negligence proximately caused the decedent to commit suicide while in police custody. *Luss*, 878 N.E.2d at 1202-03.

In *Luss*, the initial restraint of plaintiff's decedent occurred on Wal-Mart's premises. Thus, the issue on appeal was whether: (1) Wal-Mart knew or should have known of the employees' alleged unfitness; and (2) should have been able to foresee the danger which the alleged unfitness posed to others. Discovery yielded facts favorable to the employer, such as no history of prior batteries or false arrests involving the employees at issue. Thus, summary judgment for Wal-Mart was upheld. *Id.* at 1208.

The Workplace Violence Prevention Act aims to support employers in safeguarding their workforce, clients, guests, and property by restricting access of potentially violent individuals to workplace areas. 820 ILCS 275/5 (2014). This includes employees who exhibit violent behavior at work. 820 ILCS 275/20. The Act allows employers to obtain protection orders to prevent further acts or threats of violence. 820 ILCS 275/20.

#### B. Negligent Supervision/Retention

To hold an employer liable for injuries resulting to third persons from negligent training or supervision of an employee, a plaintiff must establish that the employer "knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, having this knowledge, failed to supervise the employee adequately, or take other action to prevent the harm." *Doe v. Brouillette*, 389 Ill. App. 3d 595, 906 N.E.2d 105 (Ill. App. Ct. 1st Dist. 2009).

In *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530, 24 N.E.3d 48, 50, defendant semi-truck driver attempted to make an illegal U-turn in the middle of a highway, when a vehicle being driven by decedent struck the side of tractor-trailer and decedent died nearly two years later from injuries sustained in collision. Plaintiff alleged that the freight broker was negligent in its hiring, retention, and supervision of the truck driver's employer, whom the freight broker retained as an independent contractor. *Id.* at ¶ 34. Summary judgment was properly entered in favor of the freight broker, as it had no reason to believe that the driver, who had a safe driving record for several years prior, or his employer, engaged in unsafe practices when transporting freight. *Id.* at ¶ 43.

In *Reynolds v. Jimmy John's Enters.*, 2013 IL App (4th) 120139, 988 N.E.2d 984 (Ill. App. Ct. 4th Dist. 2013), the court reversed and remanded the trial court's dismissal of plaintiff's complaint alleging defendants (collectively referred to as "Jimmy John's") negligently trained and supervised one of their employee delivery drivers. Plaintiff alleged in his amended complaint that Jimmy John's employee: (1) drove across the parking lot to avoid a traffic signal and (2) made an illegal left turn out of a parking lot which resulted in the employee's delivery vehicle colliding with plaintiff who was riding a motorcycle at the time. *Reynolds*, 2013 IL App (4th) at ¶41. In reversing the trial court's decision, the appellate court held that even with the word "illegal" omitted

from plaintiff's allegations, plaintiff adequately pled a cause of action for negligent supervision. *Id.*

"Proof of the employer's prior notice of the employee's unfitness at the time of hiring is not required." *Doe v. Coe*, 2019 IL 123521, 135 N.E.3d 1 (Ill. 2019). In *Doe*, the Illinois Supreme Court held that, while notice remains a necessary element of negligent hiring and retention claims, it is no longer necessary to state a claim for negligent supervision. *Id.* *Doe* involved allegations that a director of youth ministries used his position to rape Jane Doe. The trial court dismissed Doe's claim for negligent supervision because her complaint failed to allege there had been any notice to the defendants that Coe was predisposed to sexually assault a minor. However, the Supreme Court agreed with the Appellate court that notice was not a necessary element of a negligent supervision claim.

In its ruling, the Supreme Court explained that notice is not required in negligent supervision claims because the reasonable performance of an employer's duty to supervise all of its employees "will put the supervisor on notice of an employee's conduct or perhaps prevent the employee's tortious conduct all together." Specifically, the Court held that there was no need for Jane Doe to allege notice because "it is generally foreseeable that abuse could occur in programs providing adults with unsupervised access to children."

#### C. Interplay with Workers' Compensation Bar

As indicated in Section VII ("Emotional Distress Claims"), Illinois' Workers' Compensation Act provides for the exclusive remedy of accidental injuries in the workplace. 820 ILCS 305/1 (2019); *See also Hunt-Golliday v. Metro. Water Reclamation Dist.*, 104 F.3d 1004, 1016 (7th Cir. 1997). ("Under Illinois case law, an injury that was intentionally inflicted upon an employee by another employee nevertheless is considered accidental on behalf of the employer if it was unexpected and unforeseen by the injured party, unless the employer expressly authorized the co-employee to commit the tort.") (internal citations omitted).

#### D. Firearms in the Workplace

On July 9, 2013, the Illinois General Assembly approved Public Act 98-0063, and enacted the Firearm Concealed Carry Act. In passing the Act, Illinois became the 50th state to enact legislation authorizing the concealed carrying of firearms. The Act, which went into effect on the date it was enacted, provided the Illinois State Police with a period of 180 days before concealed carry license applications must be made available. 430 ILCS 66/10 (2015).

Similar to other states, the Act allows employers in Illinois to prohibit the carrying of firearms on their private property. However, in order to do so the employer must "clearly and conspicuously" post 4x6 inch signs, approved by the Illinois State Police, at the entrance of the property/building stating that firearms are prohibited on the property. In addition to signage, it is recommended that employers have written weapons policies restricting employees and visitors from carrying firearms into the workplace.

Notably, there is a parking lot exception. Under the Act, employers may not prohibit licensed concealed carry employees from bringing concealed firearms onto the employer's parking lot and storing their firearms in their vehicles while the employee is at work.

E. Use of Mobile Devices

There is no statute that applies to the use of mobile devices by employees in the workplace.

X. TORT LIABILITYA. Respondeat Superior Liability

Under the doctrine of respondeat superior, an employer can be held vicariously liable for the tortious acts of its employees including negligent, willful, malicious, or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer. *Alms v. Baum*, 343 Ill. App. 3d 67, 796 N.E.2d 1123, 1127 (Ill. App. Ct. 1st Dist. 2003). As such, liability may attach if the employee is deemed to be in the scope of his or her employment at the time of the incident. *See Hicks v. Korean Airlines Co.*, 404 Ill. App. 3d 638, 936 N.E.2d 1144 (Ill. App. Ct. 1st Dist. 2010).

Whether the employee is deemed to be within the scope of employment is based upon the existence of three factors. Conduct of a servant is within the scope of employment only if: (1) it is of the kind he is employed to perform; (2) it occurred substantially within the time and space limits of his employment; and (3) it is actuated, at least in part, by a purpose to serve the master. *Nulle v. Krewer*, 374 Ill. App. 3d 802, 872 N.E.2d 567, 569-70 (Ill. App. Ct. 2d Dist. 2007), citing *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 862 N.E.2d 985, 992 (Ill. 2007).

In *Bagent*, the court held that a disclosure of confidential medical information by a hospital employee while at a bar was outside the scope of the employee's employment. 862 N.E.2d at 989. As such, the hospital was not vicariously liable for the employee's disclosure. In reaching its decision, the court stated that "Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* at 992.

The status of an individual as a volunteer worker does not automatically exclude the possibility of establishing a master-servant relationship for the purposes of vicarious liability under the doctrine of respondeat superior. *Alms v. Baum*, 343 Ill. App. 3d 67, 277 Ill. Dec. 757, 796 N.E.2d 1123 (1st Dist. 2003). In such cases, the entity utilizing volunteer services may still be held vicariously liable for the volunteers' tortious acts, depending on the circumstances. *Id.*

B. Tortious Interference with Business/Contractual Relations

"To succeed in proving that the defendant committed tortious interference with contract, the plaintiff must plead and prove: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contractual relationship between the plaintiff and another; (3) the defendant's intentional and unjustifiable inducement of a breach of the contract; (4) a breach of contract by the other caused by the defendant's wrongful acts; and (5) damage to the plaintiff." *Cress v. Rec. Servs., Inc.*, 341 Ill. App. 3d 149, 795 N.E.2d 817, 842 (Ill. App. Ct. 2d Dist. 2003). "In addition, where the plaintiff alleges that the defendant, in his capacity as a corporate officer, tortiously interfered with a contract between the plaintiff and that corporation, the plaintiff must plead that the defendant acted outside the qualified privilege he enjoys as a corporate officer to influence the actions of the corporation." *Cress*, 795 N.E.2d at 842-43.

In *Cress*, plaintiff had a deferred compensation agreement with his employer, which guaranteed him employment until the age of 65. *Id.* at 829. Plaintiff brought a tortious interference claim against the president of the corporation that employed him, who was also the corporation's sole shareholder. *Id.* Plaintiff claimed that the president knowingly and unjustifiably induced the employer to terminate plaintiff at age 61 in breach of the deferred compensation agreement. *Id.* at 843. According to the court, "a plaintiff who claims that the defendant's conduct exceeded the qualified privilege for corporate officers need not plead and prove that the defendant's conduct actually harmed the corporation." *Id.* at 843. The court noted that "Illinois law forbids a corporate officer from interfering with a contract between his corporation and the plaintiff solely out of self-interest or solely from a desire to harm the plaintiff because such action done with such motives is ipso facto not in the corporation's interest." *Id.*

The court stated further that although a defendant cannot tortiously interfere with a contract to which he is a party, "[t]he mere fact that the defendant was acting as a corporate officer in inducing a breach of his corporation's contract will not render the defendant and the corporation identical for purposes of tortious interference with contract." *Id.* at 844.

Illinois courts also recognize a cause of action for tortious interference with prospective economic advantage. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 667 N.E.2d 1296, 1299 (Ill. 1996). This tort focuses on an expectancy of entering into a valid business relationship. *Anderson*, 667 N.E.2d at 1299.

## XI. RESTRICTIVE COVENANTS / NON-COMPETES

### A. General Rule

Because restrictive covenants in employment agreements are a form of restraint on trade, they are carefully scrutinized to ensure their intended effect is not to prevent competition *per se*. *Arpac Corp. v. Murray*, 226 Ill.App.3d 65, 589 N.E.2d 640, 649 (1992). In turn, a restrictive covenant will only be upheld if it contains a reasonable restraint, and the agreement is supported by consideration. *Storer v. Brock*, 351 Ill. 643, 184 N.E. 868, 869 (Ill. 1933).

Illinois courts employ a three-prong analysis in determining the enforceability of a restrictive covenant. *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, 965 N.E.2d 393, 396-97 (Ill. 2011). According to the three-prong rule of reason, a restrictive covenant is reasonable where it is ancillary to a valid employment relationship and meets the following criteria: (1) no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public. *Arredondo*, 965 N.E.2d at 396, citing *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999); RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. B, § 188(1) & cmts. a, b, c (1981).

With respect to the first prong, the Illinois Supreme Court held in *Arredondo* that courts must determine whether a noncompetition agreement reasonably serves a legitimate business interest on a case-by-case basis. 965 N.E.2d at 397-98. In doing so, the court invalidated the previous two-factor test created in *Nationwide Advertising Service, Inc. v. Kolar*, 28 Ill. App. 3d 671, 329 N.E.2d 300, 302 (Ill. App. Ct. 1st Dist. 1975).

Factors to be considered in this analysis include, but are not limited to, the near-performance of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. *Arredondo*, 965 N.E.2d at 397-98.

*Arredondo* expressly held that the appellate court precedent “for the past three decades remains intact, but only as non-conclusive examples of applying the promisee’s legitimate business interest, as a component of the three-prong rule of reason, and not as establishing inflexible rules beyond the general and established three-prong rule of reason.” *Id.*

The following cases reflect various instances in which restrictive covenants were either upheld or deemed unenforceable.

In *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 887 N.E.2d 437 (Ill. App. Ct. 3d Dist. 2008), the court found that: (1) a Florida choice of law provision was invalid as Florida law violated public policy by prohibiting courts from considering hardship on the employee; and (2) 7 months of continued employment was not sufficient consideration for a post-employment restrictive covenant. Illinois courts generally hold that at least two years of continued employment after the threat of discharge constitutes adequate consideration. *Id.* citing *McRand, Inc. v. Van Beelen*, 138 Ill. App. 3d 1045, 486 N.E.2d 1306 (Ill. App. Ct. 1st Dist. 1985).

In *Virendra S. Bisla, M.D., Ltd. v. Parvaiz*, 379 Ill. App. 3d 567, 884 N.E.2d 790, 794-95 (Ill. App. Ct. 1st Dist. 2008), the court did not enforce the restrictive covenant after finding that there was no agreement in place at the time that the employee allegedly violated it. Following the expiration of a 3 year contract, plaintiff worked under an oral contract for the next five years before leaving to work for a competitor. 884 N.E.2d at 794. The employer argued that the new terms offered in 2001 did not repudiate the written contract, but the court held that the written contract expired by its own terms and was therefore not controlling. *Id.* at 795.

In *Cambridge Enq’g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 879 N.E.2d 512, 522-23 (Ill. App. Ct. 1st Dist. 2007), the court restated the well-settled principle that restrictive covenants are generally unenforceable. For a restrictive covenant to be valid and enforceable under Illinois law, the terms must be reasonable and necessary to protect a legitimate business interest of the employer. Reasonableness of a restrictive covenant is a question of law. 879 N.E.2d at 522. Relevant considerations include the hardship caused to the employee, the effect upon the general public, and the scope of the restrictions. *Id.* This requires courts to consider not only the propriety of the limitations in terms of their length in time, but also their territorial scope, and activities they restrict, *Id.*, citing *Lawrence & Allen v. Cambridge Human Resources Group*, 292 Ill. App. 3d 131, 685 N.E.2d 434 (Ill. App. Ct. 2d Dist. 1997). The court found that the non-compete clause was unreasonable in its territorial space (North America) and its activities prohibited (all activities for competitors). *Id.* at 524. It further found that the non-solicitation clause was unreasonable, in that it barred all contacts with all of the employer’s customers. *Id.* at 527. The restrictions were far broader than necessary to protect the employer’s interest in preventing the employee from abusing the specific client relationships he built up during his employment. *Id.*

In *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 880 N.E.2d 188, 197 (Ill. App. Ct. 4th Dist. 2007), the court found for the employer, and affirmed the preliminary injunction entered against the employee and his new employer. The court found that the employer’s “open quotes” were protectable confidential information that the employee gained through the employment and later attempted to use for his own gains. 880 N.E.2d at 197-98. The employee’s access to the open quotes may have allowed him to undercut the quotes in his new employment. *Id.* Customer information may constitute confidential information only when the information has been developed by the employer over a number of years at great expense and kept under tight security. *Lifetec*, 880 N.E.2d at 196-97, quoting *A.J. Dralle, Inc. v. Air Technologies*, 225 Ill. App. 3d 982, 627 N.E.2d 690 (Ill. App. Ct. 2d Dist. 1994). Even though the quotes were available to anyone after they are given to customers, the

confidentiality applied to the method as to how those quotes were calculated. *Id.* The open quotes were akin to confidential mark-ups, *Id.*, citing *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 839 N.E.2d 606 (Ill. App. Ct. 2d Dist. 2005), and confidential worksheets and profiles. *Id.* citing *Lyle R. Jager Agency v. Steward*, 253 Ill. App. 3d 631, 625 N.E.2d 397 (Ill. App. Ct. 3d Dist. 1993).

In *Stenstrom Petroleum Servs. Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 874 N.E.2d 959 (Ill. App. Ct. 2d Dist. 2007), the court declined to extend the temporal restriction of the restrictive covenant, from six months from the last date of employment as stated in the covenant, to six months from the date of the injunction. Compare to *Prairie Eye Ctr. v. Butler*, 329 Ill. App. 3d 293, 768 N.E.2d 414 (Ill. App. Ct. 4th Dist. 2002) (extending the temporal restriction based on the express provision in the agreement to lengthen the temporal restriction by two years upon proof of breach of the restrictive covenant).

In *Mohanty v. St. John Heart Clinic*, 225 Ill.2d 52, 866 N.E.2d 85, 99-100 (Ill. 2006), the Illinois Supreme Court upheld the restrictive covenant against two cardiologists. The court found that the temporal restriction of five years was reasonable; the territorial restriction of five miles was reasonable; and the scope of “practice of medicine,” as opposed to a more limited scope of cardiology, was reasonable. 866 N.E.2d at 100. The court rejected the argument that the restrictions should be void against public policy after considering various statements from the American Medical Association. *Id.* at 104-108. It further rejected the argument that the clinic breached the employment agreement first based on improper payment calculations and failure to promote. *Id.* at 98.

In *Dam, Snell & Taveirne, Ltd. v. Verchota*, 324 Ill. App. 3d 146, 754 N.E.2d 464 (Ill. App. Ct. 2d Dist. 2001), the court found that an accounting firm’s restrictive covenant was not overly broad because the accounting firm had a near-permanent relationship with its clients and a protected interest in maintaining its client base. The court noted that the restriction, which prevented a former employee from providing services to any of the firm’s clients, was valid even though it extended beyond clients the employee had directly served. 754 N.E.2d at 470. Further, the former employee had gained specific knowledge of the needs and services required by firm’s clients, such that he was in a unique position to provide such services upon termination of his employment. *Id.*

An employer has no protected interest in customers when the former employee knew or dealt with the customers prior to his or her employment. *Com-Co Ins. Agency v. Serv. Ins. Agency*, 321 Ill. App. 3d 816, 748 N.E.2d 298 (Ill. App. Ct. 1st Dist. 2001) (insurance salesperson); *LSZB, Inc. v. Brokis*, 237 Ill. App. 3d 415, 603 N.E.2d 1240 (Ill. App. Ct. 2d Dist. 1992) (hair stylist).

In *Scheffel Fin. Servs., Inc. v. Heil*, 2014 IL App (5th) 130600, 16 N.E.3d 385 (Ill. App. Ct. 5th Dist. 2014), the court properly entered a preliminary injunction in favor of a wealth management company seeking to enforce the non-solicitation clause contained in its employment agreement with its former employee. The court held that the clause did not prevent the former employee from working, but only from soliciting the company’s clients and from using or disclosing any of the company’s confidential information. 16 N.E.3d at 393. The court held that the company had a protectable interest in its clients and presumed that solicitation would cause it irreparable injury. *Id.*, citing *Clifton, Gunderson & Co. v. Richter*, 158 Ill. App. 3d 789, 792, 511 N.E.2d 971 (Ill. App. Ct. 3d Dist. 1987).

Illinois courts have applied the general rules with respect to restrictive covenants in situations involving independent contractor relationships. See *Eichmann v. National Hosp. & Health Care Servs.*, 308 Ill. App. 3d 337,

719 N.E.2d 1141, 1145 (Ill. App. Ct. 1st Dist. 1999).

The Illinois Freedom to Work Act is effective as of January 1, 2017. In this Act, "Covenant not to compete" is defined as an agreement: (1) between an employer and a low-wage employee that restricts such low-wage employee from performing any work for another employer for a specified period of time, any work in a specified geographical area, or work for another employer that is similar to such low-wage employee's work for the employer included as a party to the agreement. 820 ILCS 90/5 (2019).

The Act defines "Low-wage employee" as an employee who earns the greater of the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or \$13.00 per hour. No employer shall enter into a covenant not to compete with any low-wage employee of the employer. A covenant not to compete entered into between an employer and a low-wage employee is illegal and void. *Id.*

#### B. Blue Penciling

In *Cambridge Eng'g*, the court declined to judicially reform the restrictive covenants because the clauses were severely overbroad, so that significant modification would have been necessary to make them conform to legal standards of reasonableness. *Cambridge Eng'g, Inc. v. Mercury Partners 90 Bl, Inc.*, 378 Ill. App. 3d 437, 452, 879 N.E.2d 512, 526 (2007). The court contrasted the instant facts with other cases where judicial reformation was appropriate. 378 Ill. App. 3d 437, 879 N.E.2d 512, 522, compare to *Weitekamp v. Lane*, 620 N.E.2d 454, 250 Ill. App. 3d 1017 (Ill. App. Ct. 4th Dist. 1993) (upholding the judicial modification based on a finding that the original covenant was not extremely unfair nor did it extensively restrain trade), *North American Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 526 N.E.2d 621, (Ill. App. Ct. 1st Dist. 1988) (upholding the decision to not judicially modify based on a finding that the original covenant was unconscionable, unreasonable and overbroad in its application and scope).

In *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 842 N.E.2d 265, 274 (Ill. App. Ct. 1st Dist. 2005), the court held that Illinois law allows courts to modify a restrictive covenant, but "a court should refuse to modify an unreasonable restrictive covenant, not merely because it is unreasonable, but where the degree of unreasonableness renders it unfair."

#### C. Confidentiality Agreements

There is a presumption of validity and enforceability attaching to settlement agreements which include confidentiality provisions. *Jordan v. Knafel*, 355 Ill. App. 3d 534, 823 N.E.2d 1113, 1119 (Ill. App. Ct. 1st Dist. 2005). Confidentiality agreements are used to prevent the disclosure of valuable information. *Jordan*, 823 N.E.2d at 1119. Merely signing a confidentiality agreement is not enough to establish an existence of a trade secret. *Arcor*, 842 N.E.2d at 271.

Additionally, Illinois Workplace Transparency Act (820 ILCS 96/1, et seq.) provides requirements relating to the enforceability of confidentiality provisions within settlement and termination agreements between an employer and employee. The Act requires that for a confidentiality provision to be enforceable, it must be: (1) the documented preference of the employee and mutually beneficial to both parties; (2) the employer must notify the employee of the right to have an attorney review the agreement before execution; (3) there must be a valid and bargained-for exchange for the confidentiality; (4) the agreement does not waive claims concerning unlawful employment practices accruing after the date of



execution; (5) the employee is given 21 days to consider the agreement; and (6) the employee is given 7 days to revoke the agreement. The failure to adhere to these requirements would render a confidentiality clause unenforceable and against public policy under the Act.

D. Trade Secrets Statute

The Illinois Trade Secrets Act provides for a civil action for damages and injunctive relief for any actual or threatened misappropriation of trade secrets. 765 ILCS 1065/1, et seq. (2019). If the court finds that there is an overriding public interest in employing the trade secret, the court may condition the injunction so as to require reasonable royalties to be paid. 765 ILCS 1065/3(b) (2019). To establish a claim under the Trade Secrets Act, a plaintiff must demonstrate: (1) a trade secret; (2) misappropriation; and (3) use in the defendant's business. See *Strata Mktg. v. Murphy*, 317 Ill. App. 3d 1054, 740 N.E.2d 1166 (Ill. App. Ct. 1st Dist. 2000).

In *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 874 N.E.2d 959, 375 Ill. App. 3d 1077 (Ill. App. Ct. 2007), the court affirmed the denial of the preliminary injunction because the employer failed to establish a likelihood of success on the merits of its Trade Secrets Act claims against the employee. The plaintiff in such a claim must show that the information was sufficiently secret to give it a competitive advantage, and that it took affirmative measures to prevent others from acquiring or using the information. 765 ILCS 1065/2(d) (2019); See also *Instant Technology, LLC v. DeFazio*, 40 F. Supp. 3d 989, 1015 (N.D. Ill. 2014), aff'd, 793 F.3d 748 (7th Cir. 2015) ("[I]t is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets.").

Furthermore Illinois courts consider six common law factors derived from the RESTATEMENT (FIRST) OF TORTS § 757: (1) the extent to which the information is known outside of the plaintiff's business; (2) the extent to which it is known by the employees and others involved in the plaintiff's business; (3) the extent of measures taken by the plaintiff to guard the secrecy of the information; (4) the value of the information to the plaintiff and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See *ILG Industries, Inc. v. Scott*, 49 Ill. 2d 88, 273 N.E.2d 393, 396 (Ill. 1971). After lengthy discussion, the court concluded that information within the employer's Excel bid spreadsheets were not a trade secret. 273 N.E.2d at 396. Examples of trade secrets are customer lists, formulae, patterns and blueprints; however, knowledge of a supplier's pricing policies or an employer's profit margins generally does not qualify. 874 N.E.2d at 974. *Mesch*, 874 N.E.2d at 973.

In *RFK, Inc. v. Grimes*, 177 F. Supp. 2d 859, 873-74 (N.D. Ill. 2001), the court explained that information meeting the Illinois Trade Secret Act "secrecy" criterion includes customer lists that are not readily ascertainable. An example of a protectable trade secret might include a salesman obtaining a list of end users through telephone books, catalogues, and other public sources, then contacting those people in order to get names of potential customers, and then developing a relationship with those potential customers. 177 F. Supp. 2d at 865. Further examples include pricing, distribution and marketing plans. *Id.* at 874.

In *RFK*, a former employee downloaded to his home computer large amounts of his former employer's confidential customer and financial information and intended to use the information to solicit customers for a competitor. 177 F. Supp. 2d at 868. The court found that the non-compete clause in the employer's contract was enforceable, because the employer had a near-permanent relationship with many of its customers and the former employee would not have had contact with those customers but for his work for the employer. *Id.* at

877-78.

Illinois courts recognize the inevitable disclosure theory for purposes of a claim under the Trade Secrets Act. *See Strata Mktg.*, 740 N.E.2d 1166; *PepsiCo., Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). Under this theory, a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant's new employment "will inevitably lead him to rely on plaintiff's trade secrets." *PepsiCo.*, 54 F.3d at 1269.

E. Fiduciary Duty and their Consideration

"In the absence of a contractual restrictive covenant, the improper taking of a customer list, or fraud, former employees may compete with their former employer and solicit former customers so long as there was no demonstrable business activity by the former employee before the termination of employment." *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 611 N.E.2d 1054, 1059 (Ill. App. Ct. 1st Dist. 1993). Corporate officers, however, stand on a different footing; they owe a fiduciary duty of loyalty to their corporate employer not to (1) actively exploit their positions within the corporation for their own personal benefit, or hinder the ability of a corporation to continue the business for which it was developed. *Veco Corp.*, 611 N.E.2d at 1059; citing *Smith-Shrader Co. v. Smith*, 136 Ill. App. 3d 571, 577, 483 N.E.2d 283 (Ill. App. Ct. 1st Dist. 1985).

Under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restrictive covenant in an employment agreement. *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728, 887 N.E.2d 437 (Ill. App. Ct. 3d Dist. 2008). Illinois courts analyze the adequacy of consideration in the context of post-employment restrictive covenants because it has been recognized that a promise of continued employment may be an illusory benefit where the employment is at-will. *Id.* Generally, Illinois courts have held that continued employment for two years or more constitutes adequate consideration. *Id.* at 728-29. A restrictive covenant will not be enforced unless there is adequate consideration given. *Id.* This rule is maintained even if the employee resigns on his own instead of being terminated. *Fifield v. Premier Dealer Servs.*, 2013 IL App (1st) 120327, ¶ 19, 2013 Ill. App. LEXIS 424 (Ill. App. Ct. 1st Dist. 2013).

XII. DRUG TESTING

A. Public Employers

The Department of State Police and the Department of Corrections each has a zero tolerance drug policy, which provides that any employee who tests positive or who refuses to test will be discharged from employment. 20 ILCS 2610/12.5 (2021); 730 ILCS 5/3-7-2.5 (2020). Also, Chicago Crime Laboratory employees must pass the required drug screening test. 20 ILCS 415/12e (2020).

Also, the Metropolitan Transit Authority and the Regional Transportation Authority Act each shall administer and enforce a comprehensive drug testing program for its employees. 70 ILCS 3605/47 (2020); 70 ILCS 3615/2.24 (2020).

B. Private Employers

There is no Illinois statute prohibiting the use of drug testing for private employers. The Illinois Human Rights Act states "[i]t shall not be a violation of this Act for an employer to adopt or administer reasonable

policies or procedures, including but not limited to drug testing, designed to ensure that an individual ... is no longer engaging in the illegal use of drugs.” 775 ILCS 5/2- 104(C)(2)(c). The Act states further that “[n]othing in this Act shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.” 775 ILCS 5/2- 104(c)(4) (2020).

Two acts apply to private employers who engage in public grants, contracts, or works. The Drug Free Workplace Act applies to grantees and contractors who are awarded contracts for property or services from the state. These contractors and grantees must provide a drug-free workplace in order to be awarded the contract. 30 ILCS 580/1, et seq. (2020). The Substance Abuse Prevention on Public Works Projects Act requires prospective and current employees who work on public works projects to submit to random, pre-employment, post-accident, and probable cause drug testing. 820 ILCS 265/15 (2020).

Some statutes require employees to submit to and pass a drug test before employment. Commercial driver’s license qualification standards require applicants to submit to a drug test before a commercial driver’s license with a school bus driver endorsement may be issued. 625 ILCS 5/6- 508(c-1) (3) (2020); 625 ILCS 5/6-106.1 (2020). Further, the Secretary of State may not issue a school bus driver permit for three years to an applicant who fails to produce a negative result on a drug test. 625 ILCS 5/6-106.1(g)(4) (2019). Similarly, the School Code requires charter bus drivers to pass a drug test and otherwise demonstrate fitness to a state regulatory body. 105 ILCS 5/10-20.21(a) (2020). In addition, the Child Care Act requires childcare facility employees to pass drug tests if they have a prior drug offense within the past ten years. 225 ILCS 10/4.2 (2020).

Other statutes require drug testing during the employment. The Carnival and Amusement Rides Safety Act requires that carnival employees be subjected to mandatory random drug-testing from their employer. 430 ILCS 85/2-20(c) (2020). The Illinois Aeronautics Act requires that operators and crew of aircraft submit to drug testing based on a probable cause threshold. 620 ILCS 5/43(e) (2020).

Some statutes refer to conflicts between drug testing requirements and other governing documents. For example, the licensure section of the Health Facilities Emergency Medical Services (EMS) Systems Act states that where there is a conflict between drug testing requirements for licensure and collective bargaining agreements, the collective bargaining agreement controls. 210 ILCS 50/3.50(e) (2020).

### C. Cannabis Regulation and Tax Act

On January 1, 2020, Illinois legalizes adult-use cannabis. 410 ILCS 705/1, et seq. (2019). Under the Cannabis Regulation and Tax Act, employers have the right to implement “reasonable zero tolerance or drug-free workplace policies” and set rules about drug testing, and smoking, consumption, storage, or use of cannabis in the workplace or during on-call hours, as long as these policies are enforced equally and without discrimination. 410 ILCS 705/10-50 (a). The Act does not require employers to allow employees to be under the influence of, use, or consume cannabis at the workplace, during the performance of their job duties, or while on call. 410 ILCS 705/10-50 (b).

The Cannabis Act does not specifically define what constitutes a “reasonable” workplace drug policy.

An employer can suspect an employee of being impaired or under the influence of cannabis at work if they believe, in good faith, that the employee is showing clear signs that negatively affect their job performance.

410 ILCS 705/10-50 (d). These signs can include changes in speech, lack of physical coordination, unusual behavior, operating equipment unsafely, causing accidents that lead to significant damage or injury, disrupting work processes, or any negligence that harms themselves or others. *Id.* If an employer decides to take disciplinary action based on the suspicion that an employee is impaired by cannabis, they must give the employee a fair chance to challenge this claim. *Id.*

These policies can prohibit employees from reporting to work while impaired or under the influence of marijuana and may include provisions for both applicant and employee drug testing, as long as these practices are reasonable and non-discriminatory. 410 ILCS 705/10-50 (e)(1).

According to the Act, the “workplace” encompasses the “employer’s premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in the performance of the employee’s job duties, and vehicles, whether leased, rented, or owned.” 410 ILCS 705/10-50(h). The Act also includes that the workplace “...may be further defined by the employer’s written employment policy, provided that the policy is consistent with this Section.” *Id.*

Moreover, employees might have a private right of action under the Right to Privacy in the Workplace Act if they face employment actions that violate the stipulations of the Cannabis Act. 820 ILCS 55/15 (2010).

### XIII. STATE ANTI-DISCRIMINATION STATUTES

#### A. Employers/Employees Covered

“Any person employing 1 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation” is a covered employer within the meaning of the Illinois Human Rights Act. 775 ILCS 5/2-101(B) (1) (a) (2023). Additionally, “[t]he State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees,” is a covered employer under the Act. 775 ILCS 5/2-101(B) (1) (c) (2023).

The Illinois Human Rights Act broadly defines “employer” for certain types of harassment allegations. The definition of “employer” includes “[a]ny person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental disability unrelated to ability, pregnancy, or sexual harassment.” 775 ILCS 5/2-101(B) (1) (b) (2023). Accordingly, the Act appears to provide for individual liability for certain types of allegations.

The Act defines an employee as “[a]ny individual performing services for remuneration within this State for an employer; [a]n apprentice; [or] [a]n applicant for any apprenticeship.” 775 ILCS 5/2-101(A)(1)(a) (2023). For purposes of subsection (D) of Section 2-102 of this Act, “employee” also includes an unpaid intern. An unpaid intern is a person who performs work for an employer under the following circumstances; the employer is not committed to hiring the person performing the work at the conclusion of the intern’s tenure; the employer and the person performing the work agree that the person is not entitled to wages for the work performed; and the work performed supplements training given in an educational environment that may enhance the employability of the intern; provides experience for the benefit of the person performing the work; does not displace regular employees; is performed under the close supervision of existing staff; and provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer. *Id.* An employee does not include, “[i]ndividuals employed by persons who are not “employers”

as defined by this Act; [e]lected public officials or the members of their immediate personal staffs; [p]rincipal administrative officers of the State or of any political subdivision, municipal corporation or other governmental unit or agency; [or] [a] person in a vocational rehabilitation facility certified under federal law who has been designated an evacuee, trainee or work activity client.” *Id.*

B. Types of Conduct Prohibited

The Illinois Human Rights Act defines unlawful discrimination as discrimination against a person because of his or her actual or perceived: race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service. 775 ILCS 5/1-103 (Q) (2023).

The following are considered civil rights violations under the Illinois Human Rights Act (775 ILCS 5/2-102):

(A) Employers. For any employer to refuse to hire, to segregate, to engage in harassment, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges, conditions of employment on the basis of unlawful discrimination of citizenship status, or work authorization status. An employer is responsible for harassment by the employer’s nonmanagerial and nonsupervisory employees if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

(A-5) Language. For an employer to impose a restriction that has the effect of prohibiting a language from being spoken by an employee in communications that are unrelated to the employee’s duties.

(A-10) Harassment of nonemployees. For any employer, employment agency, or labor organization to engage in harassment of nonemployees in the workplace. An employer is responsible for harassment of nonemployees by the employer’s nonmanagerial and nonsupervisory employees if the employer becomes aware of the conduct and fails to take reasonable corrective measures. For the purpose of this subdivision (A-10), “nonemployee” means a person who is not otherwise an employee of the employer and is directly performing services for the employer pursuant to a contract with that employer. “Nonemployee” includes contractors and consultants.

(B) Employment Agency. For any employment agency to fail or refuse to classify property, accept applications and register for employment referral or apprenticeship referral, refer for employment, or refer for apprenticeship on the basis of unlawful discrimination, citizenship status, or work authorization to accept from any job order, requisition or request for referral of applicants for employment or apprenticeship which makes or has the effect of making unlawful discrimination or discrimination on the basis of citizenship status or work authorization status as a condition of referral.

(C) Labor Organization. For any labor organization to limit, segregate or classify its membership, or to limit employment opportunities, selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely any person’s status as an employee or as an applicant for employment or as an apprentice, or as an applicant for

apprenticeships, or wages, tenure, hours of employment or apprenticeship conditions on the basis of unlawful discrimination of citizenship status, or work authorization status.

(D) Sexual Harassment. For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or non-managerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

(D-5) Sexual harassment of nonemployees. For any employer, employee, agent of any employer, employment agency, or labor organization to engage in sexual harassment of nonemployees in the workplace. An employer is responsible for sexual harassment of nonemployees by the employer's nonmanagerial and nonsupervisory employees if the employer becomes aware of the conduct and fails to take responsible corrective measures. For purposes of this subdivision (D-5), "nonemployee" means a person who is not otherwise an employee of the employer and is directly performing services for the employer pursuant to a contract with that employer. "Nonemployee" includes contractors and consultants.

(E) Public Employers. For any public employer to refuse to permit a public employee under its jurisdiction who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than such employee's regular working house, consistent with the operational needs of the employer and in order to compensate for work time lost for such religious reasons. Any employee who elects such deferred work shall be compensated at the wage rate which he or she would have earned during the originally scheduled work period. The employer may require that an employee who plans to take time off from work in order to practice his or her religious beliefs provide the employer with a notice of his or her intention to be absent from work not exceeding 5 days prior to the date of absence.

(E-5) Religious discrimination. For any employer to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement, or transfer, any terms or conditions that would require such person to violate or forgo a sincerely held practice of his or her religion including, but not limited to, the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion, unless after engaging, in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held belief, practice, or observance without undue hardship on the conduct of the employer's business. Nothing in this section prohibits an employer from enacting a dress code or grooming policy that may include restrictions on attire, clothing, or facial hair to maintain workplace safety or food sanitation.

(F) Training and Apprenticeship Programs. For any employer, employment agency, or labor organization to discriminate against a person on the basis of age in the selection, referral for or conduct of apprenticeship or training programs.

(G) Immigration-related practices. For an employer to request for purposes of satisfying the requirements of Section 1324a(B) of Title 8 of the United States Code, as now or hereafter amended, more or different documents that are required under such section or to refuse to honor the documents tendered

that on their face appear to be genuine or to refuse to honor work authorization based upon the specific status or term of status that accompanies the authorization to work; or for an employer participating in the E-Verify Program, as authorized by 8 U.S.C 1234a, Notes, Pilot Programs for Employment Eligibility Confirmation to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment without following the procedures under the E-Verify Program.

(H) (Blank)

(I) Pregnancy. For an employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth. Women affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work, regardless of the source of the inability to work or employment classification or status.

(J) Pregnancy reasonable accommodations. If after a job applicant or employee including a part-time, full-time, or probationary employee, requests a reasonable accommodation, for an employer to not make reasonable accommodations for any medical or common condition of a job applicant or employee related to pregnancy or childbirth, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer. The employer may request documentation from the employee's health care provider concerning the need for the requested reasonable accommodation or accommodations to the same extent documentation is requested for conditions related to disability if the employer's request for documentation is job-related and consistent with business necessity. The employer may require only the medical justification for the requested accommodation or accommodations, a description of the reasonable accommodation or accommodations medically advisable, the date the reasonable accommodation or accommodations became medically advisable, and the probable duration of the reasonable accommodation or accommodations. It is the duty of the individual seeking a reasonable accommodation or accommodations to submit to the employer any documentation that is requested in accordance with this paragraph. Notwithstanding the provisions of this paragraph, the employer may require documentation by the employee's health care provider to determine compliance with other laws. The employee and employer shall engage in a timely, good faith, and meaningful exchange to determine effective reasonable accommodations.

For an employer to deny employment opportunities or benefits to or take adverse action against an otherwise qualified job applicant or employee, including a part-time, full-time, or probationary employee, if the denial or adverse action is based on the need of the employer to make reasonable accommodations to the known medical or common conditions related to the pregnancy or childbirth of the applicant employee.

For an employer to require a job applicant or employee, including a part-time, full-time, or probationary employee, affected by pregnancy, childbirth, or medical or common conditions related



to pregnancy or childbirth, or medical or common conditions related to pregnancy or childbirth to accept an accommodation when the applicant or employee did not request an accommodation and the applicant or employee chooses not to accept an accommodation when the applicant or employee did not request an accommodation and the applicant or employee chooses not to accept the employer's accommodation.

For any employer to require an employee, including a part-time, full-time, or probationary employee, to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known medical or common conditions related to the pregnancy or childbirth of an employee. No employer shall fail or refuse to reinstate the employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits upon her signifying her intent to return or when her need for reasonable accommodation ceases, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer.

For the purposes of this subdivision (J), "reasonable accommodations" means reasonable modifications or adjustments to the job application process or work environment, or to the manner of circumstances under which the position desired or held is customarily performed, that enable an applicant or employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to be considered for the position the applicant desires or to perform the essential functions of that position, and may include, but is not limited to: more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest; private non-bathroom space for expressing breast milk and breastfeeding; seating; assistance with manual labor; light duty; temporary transfer to a less strenuous or hazardous position; the provision of an accessible worksite; acquisition or modification of equipment; job restructuring; a part-time or modified work schedule; appropriate adjustment or modifications of examinations, training materials, or policies; reassignment to a vacant position; time off to recover from conditions related to childbirth; and leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth.

For the purposes of this subdivision (J), "undue hardship" means an action that is prohibitively expensive or disruptive when considered in light of the following factors: the nature and cost of the accommodation needed; the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of the accommodation upon the operation of the facility; the overall financial resources of the employer, the overall size of the business of the employer with respect to the number of its employees, and the number, type, and location of its facilities; and the type of operation or operations of the employer, including the composition, structure, and functions of the workforce of the employer. The employer has the burden of proving undue hardship. The fact that the employer provides or would be required to provide a similar accommodation to similarly situated employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

No employer is required by this subdivision (J) to create additional employment that the employer would not otherwise have created, unless the employer does so or would do so for other classes of employees who need accommodation. The employer is not required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job, unless the employer does so or would do so to accommodate other classes of employees who need it.

(K) Notice. For an employer to fail to post or keep posted in a conspicuous location on the premises of the employer where notices to employees are customarily posted, or fail to include in any employee handbook information concerning an employee's rights under this Article, a notice, to be prepared or approved by the Department, summarizing the requirements of this Article and information pertaining to the filing of a charge, including the right to be free from unlawful discrimination, the right to be free from sexual harassment, and the right to certain reasonable accommodations. The Department shall make the documents required under this paragraph available for retrieval from the Department's website

Upon notification of a violation of this subdivision (K), the Department may launch a preliminary investigation. If the department finds a violation, the Department may issue a notice to show cause giving the employer 30 days to correct the violation. If the violation is not corrected, the Department may initiate a charge of a civil rights violation.

755 CS 5/2-102.

C. Administrative Requirements

Any charge of discrimination alleging a violation of the Illinois Human Rights Act must be filed in writing and under oath within 300 days with the Illinois Department of Human Rights or the EEOC from the date of the last violation. 775 ILCS 5/7A-102(A)(1) (2023). Employees may now request a "Right to Sue" letter within 60 days of filing the charge, thereby bypassing an administrative investigation. 775 ILCS 5/7A-102 (2023).

D. Remedies Available

1. General Remedies and Damages

Pursuant to the Illinois Human Rights Act, 775 ILCS 5/8A-104 (2023), a successful complainant may be awarded:

- A cease and desist order;
- Actual damages, with interest;
- Hiring;
- Reinstatement;
- Promotion;
- Backpay, with interest; Fringe benefits previously denied;
- Restoration of Membership; admission to programs;
- Public Accommodations; and

- Services

## 2. Attorney's Fees and Expert Witness Fees

A successful complainant under the Act may also be awarded attorney's fees and expert witness fees. 775 ILCS 5/8A-104(G) (2023).

### E. State Court Jurisdiction over Civil Rights Claims

Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act. 775 ILCS 5/8-111(D) (2023).

Significant amendments and additions to the Illinois Human Rights Act became effective in 2020. The amended Act has broadened the definition of "sexual harassment" to expand actionable working environments to physical locations beyond where the employee is assigned to perform his/ her duties. 775 ILCS 5/2-101(E). Section 2-108 has been added to the Act. This section requires employer with adverse judgment against them to disclose to the Illinois Department of Human Rights, ("IDHR"), every July 1, the total number of adverse judgments against them from the previous year. Section 2-109 has been added to the Act. This section requires employers with any number of employees to utilize the IDHR's model sexual harassment training program or to establish its own sexual harassment training program on a yearly basis. Failure to provide training after receiving notice from the IDHR to show good cause, shall subject an employer to civil penalties. Another addition to the Act was section 2-110. This section requires restaurants and bars to have in place a written sexual harassment policy, which is provided to all employees within the first calendar week of their employment. The policy must be made available in both English and Spanish. Failure to comply, after receiving notice from the IDHR to show good cause, shall subject the employer to civil penalties.

### F. Other Anti-Discrimination Statutes

The Illinois Workplace Transparency Act (820 ILCS 96/1, et seq.) ensures that employment contracts do not undermine the State's interest in ensuring that all workplaces are free of unlawful discrimination and harassment. To accomplish this purpose, the Act provides that no contract between an employer and employee can prohibit an employee from reporting any allegations of unlawful conduct to federal, state, or local officials. The Act also states that a unilateral condition of employment which prevents an employee from making truthful statements about unlawful employment practices is against public policy.

Prohibited by the Act are unilateral conditions which require an employee to arbitrate a claim. To overcome this prohibition, an employer who wishes to require employees to arbitrate their claims as a condition of their employment, must demonstrate actual, knowing, and bargained-for consideration from the employee and must further acknowledge an employee's right to: (1) report good faith allegations to the government; (2) report criminal conduct to the government; (3) make truthful statements; and (4) request or receive confidential legal advice. Failure to establish these conditions renders the arbitration agreement unenforceable and against public policy

It should be noted that the Act authorizes an employee to bring a civil action challenging a contract which violates the Act. In such a civil action, an employee is entitled to recover their attorneys' fees if it is found that the contract violates the Act.

The Illinois Hotel and Casino Employee Safety Act, ("HCESA"), went into effect on July 1, 2020 (820 ILCS 325/1, *et seq.*). The HCESA requires hotel and casino employers to equip their employees with a safety device to be able to summon for help if the employee reasonably believes that an ongoing crime, sexual harassment, sexual assault, or other emergency is occurring in the employee's presence. 820 ILCS 325/5-10(a).

The HCESA also requires these employers to develop, maintain, and comply with a written anti- sexual harassment policy to protect employees against sexual assault and sexual harassment by guests. 820 ILCS 325/5-10(b). The HCESA requires that the policy include provisions which encourage an employee to immediately report to the employer any instance of sexual assault or sexual harassment by a guest; describes the procedures to report a complaint; instructs the complaining employee to cease work and leave the immediate area until security personnel or police arrive; offers temporary work assignments to the complaining employee for the duration of the hotel guest's stay; provides the complaining employee with necessary paid time off to file a police report to testify in legal proceedings; informs the complaining employee of their additional rights under the Illinois Human Rights Act and analogous federal law; and informs the employee that they will not be retaliated against. *Id.* This policy must be provided in both English and Spanish. *Id.*

The Illinois Sexual Harassment Victim Representation Act (820 ILCS 61/1, *et seq.*) is effective as of January 1, 2020. The purpose of this exact is to prohibit the dual representation by the same union representative of a union employee who has been the victim of sexual harassment and the alleged perpetrator. Under this Act unions are required to designate separate union representatives to represent the parties in any such grievance proceedings.

#### XIV. STATE LEAVE LAWS

##### A. Paid Leave for All Workers Act

Starting January 1, 2024, the Paid Leave for All Workers Act ("PLAWA") in Illinois requires most employers to provide at least 40 hours of paid leave per year, which can be used for any purpose. 820 ILCS 192/15 (2024). The stated intent of the legislation is to establish a minimum standard for paid leave for all workers in Illinois. 820 ILCS 192/5.

Under PLAWA, the definition of "employee" excludes certain groups. 820 ILCS 192/10. These exclusions include employees covered under the federal Railroad Unemployment Insurance Act or the Railway Labor Act, students who are working temporarily at their educational institution, and short-term employees at higher education institutions who work for less than two consecutive quarters in a year without an expectation of rehire in the same service for the following year. *Id.*

Qualified employees are not obligated to give their employer a reason for taking leave. 820 ILCS 192/15 (e). They also are not required to provide documentation or certification to justify or support their leave. *Id.* Furthermore, employees have the discretion to choose whether to use the paid leave provided by this Act before utilizing any other type of leave available through their employer or under State law. *Id.*

Regarding unused leave, if leave accrues over time, it must carry over to the next year, but employers are not obligated to provide more than 40 hours of paid leave in a 12-month period. 820 ILCS 192/15 (c). If leave is provided all at once, rollover is not required. *Id.* Payment for unused leave at termination depends on the employer's policy regarding whether the leave is charged to the employee's paid time off or vacation account. *Id.*

Employee notice requirements provide:

(h) Paid leave under this Act shall be provided upon the oral or written request of an employee in accordance with the employer's reasonable paid leave policy notification requirements which may include the following:

(1) If use of paid leave under this Act is foreseeable, the employer may require the employee to provide 7 calendar days' notice before the date the leave is to begin.

(2) If paid leave under this Act is not foreseeable, the employee shall provide such notice as soon as is practicable after the employee is aware of the necessity of the leave. An employer that requires notice of paid leave under this Act when the leave is not foreseeable shall provide a written policy that contains procedures for the employee to provide notice.

820 ILCS 192/15

Employers are also allowed to set a reasonable minimum usage increment for paid leave, not exceeding two hours per day for full-time employees. 820 ILCS 192/15 (b).

Employers are required to maintain records of leave for at least three years and must display and include in employee handbooks notice about the Act's requirements. 820 ILCS 192/20 (a). Employers who violate its provisions or any rules enacted under it are liable to a civil penalty of \$2,500 per offense. 20 ILCS 192/35

#### B. Jury/Witness Duty

In Illinois, if an employee gives his or her employer "reasonable notice" that he or she has been summoned for jury duty, the employer must give the employee time off work to fulfill his or her jury duty. 705 ILCS 305/4.1(a) (2020). An employer cannot require a night-shift employee to work the night-shift while that employee is fulfilling his or her jury duty during the daytime. 705 ILCS 305/4.1(a) (2020). An employer may not discharge or threaten to discharge an employee for fulfilling his duty. 705 ILCS 305/4.1(a) (2020).

Employers are not obligated to compensate an employee for time taken off for jury duty. 705 ILCS 305/4.1(g) (2020).

#### C. Voting

In Illinois, while the polls are open on election day, employees eligible to vote must be given a period of two hours in which to do so, without incurring any penalty, including any reduction in compensation. 10 ILCS 5/17-15 (2020). In order to take advantage of this right, the employee must apply for the leave sometime prior

to election day. 10 ILCS 5/17-15 (2020).

Generally, the employer can specify when the two-hour period will occur. 10 ILCS 5/17-15 (2020). However, if an employee begins working less than two hours after the polls open, and ends working less than two hours before the polls close, the two-hour period must take place during working hours. 10 ILCS 5/17-15 (2020).

#### D. Family/Medical Leave

Illinois does not have an all-encompassing statute regarding family/medical leave. Rather, with respect to sick/medical leave, there are several Illinois statutes which deal with individual groups of employees in the public sector. Some sick leave statutes give specific lengths of time and others only state that sick leave is required.

Officers and employees of the government may take advantage of the sick leave bank, where an employee can place unused sick leave on reserve to be used when that employee has exhausted all his sick leave. 5 ILCS 400/1 (2020). Illinois recognizes the hardships that occur when there is a catastrophic injury to an employee or an employee's family.

The Department of Central Management Services has jurisdiction to determine the sick leave plan for its employees. 20 ILCS 415/8c(2) (2020).

Township tax assessors and employees are entitled to sick leave in their benefits package. 35 ILCS 200/2-65(b) (2020).

In computing the service for the County Employees' and Officers' Annuity and Benefit Fund, sick leave is taken into account. 40 ILCS 5/6-219 (2020).

The public school teacher pension plans for cities over 500,000 acknowledge sick leave in computing time served. 40 ILCS 5/17-134 (2020).

Full-time teachers and other employees eligible to participate in the Illinois Municipal Retirement Fund are entitled to at least 10 days paid sick leave for each academic school year. Unused sick days may be rolled over to the following school year. 105 ILCS 5/24-6 (2020).

Public community college teachers and employees are entitled to at least 10 days of paid sick leave each academic year. Unused sick leave will roll-over to the following academic year. 110 ILCS 805/3-29.1 (2020).

Highway commissioners and their employees are entitled to sick leave in their benefits package. 605 ILCS 5/6-201.20 (2020).

Victims of domestic violence are entitled to 12 weeks of unpaid leave to resolve issues regarding domestic violence. 820 ILCS 180/20 (2020). The statute applies to public employers and private employers with over 50 employees. 820 ILCS 180/10 (2020).

E. Pregnancy/Maternity/Paternity Leave

Like family/medical leave, Illinois does not have one statute addressing pregnancy/maternity/paternity leave. Rather, there are statutes that deal with individual groups of employees within the public sector. In short, the statutes require maternity leave as a benefit. However, they do not describe the amount of time or manner in which maternity leave is to be afforded.

On January 1, 2015, Public Act 98-1050, a legislative enactment intended to protect pregnant women and new mothers from discrimination and retaliation in the workplace, went into effect. The new provisions in Illinois law establish that pregnancy, childbirth, and medical conditions related to pregnancy or childbirth are now protected under the Illinois Human Rights Act (775 ILCS 5/1 *et seq.*). In Illinois, it is now a civil rights violation to discriminate against applicants or employees because they are pregnant, have recently given birth, or have medical conditions related to pregnancy or childbirth. The new legal provisions apply to all employers having one or more employees—without regard to whether they are part-time, full-time, or probationary employees.

An employer can deny a request for pregnancy accommodations only where granting it would present an undue hardship. 775 ILCS 5/2-102(J). To successfully assert an undue hardship defense, an employer has the burden of demonstrating that the nature and cost of the accommodation, the overall financial resources and size of the employer, the type of operations the employer is engaged in, and the impact the accommodation would have upon overall operations are such that the accommodation substantially impacts the ordinary operations of the business. *Id.*

The Family Bereavement Leave Act (FBLA) serves as an expansion of the Child Bereavement Leave Act (CBLA), broadening the scope of leave time provisions. 820 ILCS 154/1. This amendment includes circumstances such as pregnancy loss, unsuccessful adoptions or surrogacy agreements, failed reproductive procedures, and other events or medical conditions that adversely affect pregnancy or fertility. 820 ILCS 154/10. Additionally, the FBLA extends the range of family members for which bereavement leave is applicable, now encompassing spouses, domestic partners, siblings, grandparents, and stepparents, in addition to those previously covered under the CBLA. 820 ILCS 154/5

Township tax assessors and employees are entitled to maternity leave in their benefits package. 35 ILCS 200/2-65(b) (2024).

Public school teacher pension plans for cities over 500,000 acknowledge maternity and paternity leave in computing time served. 40 ILCS 5/17-134 (2024).

The township board is required to include maternity leave in its benefits package to employees. 60 ILCS 1/100-5(b) (2024).

Highway commissioners and their employees are entitled to maternity leave in their benefits package. 605 ILCS 5/6-201.20 (2024).

F. Day of Rest Statutes

Illinois has a One Day Rest In Seven Act. 820 ILCS 140/1, *et seq* (2024). Under this statute, employers



must allow all employees, except those specifically exempted by the Act, “at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day.” 820 ILCS 140/2 (2024). Further, “[b]efore operating on the first day of the week” (i.e., Sunday), employers must post a list of all employees required or allowed to work on Sunday, and designating the day of rest for each.” 820 ILCS 140/4 (2024). “[N]o employee shall be required to work on the day of rest so designated for him.” *Id.* Finally, under the Act, employers must permit employees who work seven and one-half continuous hours or longer to take “at least 20 minutes for a meal period beginning no later than 5 hours after the start of the work period,” unless meal periods are established through a collective bargaining agreement. 820 ILCS 140/3 (2024).

The One Day Rest In Seven Act does not apply to the following:

- i. Part-time employees whose total work hours for one employer during a calendar week do not exceed 20;
- ii. Employees needed in case of the breakdown of machinery or equipment or some other “emergency requiring the immediate services of experienced and competent labor to prevent injury to person, damage to property, or suspension of necessary operation;
- iii. Employees employed in agriculture or coalmining;
- iv. Employees engaged in canning and processing perishable agricultural products;
- v. Watchmen or security guards;
- vi. Those employed in a bona fide executive, administrative, or professional capacity, or in the capacity of an outside salesman, as those terms are defined by the FLSA; and
- vii. Those employed as supervisors, as that term is defined by the NLRA.

820 ILCS 140/2 (2020).

#### G. Military Leave

On January 1, 2019, the Illinois Service Member Employment and Reemployment Rights Act (ISERRA) took effect. ISERRA repealed portions of several previous laws including the Service Member’s Employment Tenure Act. 330 ILCS 61/1 (2024). Under ISERRA, an employer may not impose conditions for military service, nor is the military employee required to accommodate the employer’s needs. *Id.* Military service shall be counted as civilian service for purposes of seniority and service requirements for promotions at the employee’s job. The military employee must also “be credited with the average of the efficiency or performance ratings or evaluations received for the 3 years immediately before the absence for military leave.” *Id.* at 61/5-5(3) (2024).

ISERRA also provides additional protections for public employees in the State of Illinois. The Act allows public employees in military service to receive concurrent or differential compensation. 330 ILCS 61/5-10 (2024). Concurrent compensation allows public employees to receive “full compensation as a public employee for up to 30 days per calendar year and military leave for purposes of receiving concurrent compensation.” *Id.*

#### H. Sick Leave

Illinois employers are not required to provide their employees with sick leave, unless the employee is entitled to FMLA.

However, if the employer provides sick leave to employees, the employer must be in compliance with the Illinois Employee Sick Leave Act, which went into effect January 1, 2017. The Act requires employers to allow employees to use such time “for absences due to an illness, injury, or medical appointment of the employee’s child, spouse, [domestic partner], sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee’s attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee’s own illness or injury.” 820 ILCS 191/10(a) (2024). However, an employer who has a paid time off policy that would otherwise provide benefits as required under this Act shall not be required to modify such policy. 820 ILCS 191/10(c) (2024).

#### I. Domestic Violence Leave

Under the Victims’ Economic Security and Safety Act (“VESSA”), employers with more than 50 employees are required to give employees who are victims of domestic or sexual violence, or who have family members who are victims of domestic or sexual violence, up to 12 weeks of unpaid leave per year to seek medical treatment, legal help, counseling, safety planning, and other assistance. 820 ILCS 180/20 (2024). Employees with less than 15 employees are required to allow up to 4 weeks of unpaid leave, and employers with 15 to 49 employees are required to provide up to 8 weeks of unpaid leave. *Id.* Employers cannot discriminate against employees who are victims of such violence or who have family members who are victims of such violence. *Id.*

#### J. Bereavement Leave

Under the Child Bereavement Leave Act, an employer with at least 50 employees must allow an employee to take up to ten (10) days of unpaid leave to attend the funeral or an alternative memorial service for a family member who has passed away; handle arrangements necessitated by the family member’s death; mourn the death of the family member; take time off work due to a pregnancy loss, which can include situations such as a miscarriage, an unsuccessful round of intrauterine insemination or assisted reproductive technology procedure, a disrupted adoption process or an adoption not finalized due to legal challenges, a surrogacy agreement that falls through, a medical diagnosis adversely affecting pregnancy or fertility, or a stillbirth. 820 ILCS 154/10 (2024).

The employer has the right to ask for documentation to justify the employee’s request for bereavement leave under the Act. 820 ILCS 154/10 (d). The types of acceptable documentation can vary, but they may encompass a range of proofs such as a death certificate, an obituary notice, written verification of death, or documents related to burial or memorial services provided by entities like mortuaries, funeral homes, burial societies, crematoriums, religious institutions, or government agencies. *Id.*

K. Other Leave Laws

Illinois employers are not required to provide their employees with vacation time. However, if the employer has a policy in which it pays employees for vacation time or contracts with the employee to provide vacation time, the employer must pay the employee for the vacation benefit. 820 ILCS 115/2 (2024). In addition, an employer cannot require an employee to forfeit accrued vacation time when the employment relationship ends if the employer allows for vacation time. 820 ILCS 115/5 (2024). An employer can institute a “use-it-or-lose-it” vacation policy, but the policy must allow employees a reasonable amount of time to use the vacation time. 56 Ill. Adm. Code. 300.520(e) (2024).

Under the School Visitations Right Act, an employer with at least 50 employees must allow an employee up to eight hours of unpaid leave during a school year (but no more than four hours in one day) to attend school conferences and activities when the conferences and activities cannot be rescheduled to non-work hours. 820 ILCS 147/15 (2024). Leave can be taken under the Act only after accrued leave time has been exhausted, with the exception of sick and disability leave. *Id.*

Employers with 50 or more employees are required to allow their employees to take one hour of unpaid leave every 56 days to donate blood under the Employee Blood Donation Leave Act. 820 ILCS 149/1, et seq. (2024).

XV. ILLINOIS WAGE AND HOUR LAWS

A. The Illinois Minimum Wage Law

The Illinois Minimum Wage Law (“IMWL”), 820 ILCS 105/4(a)(1) (2023), establishes a minimum hourly wage of \$13 per hour. On January 1, 2025, employers will be required to pay employees who are 18 years and older at least \$15 per hour. *Id.* Workers under the age of 18 may be paid no more than 50 cents less than the minimum wage paid to persons 18 years of age and older. *Id.*

The current minimum wage is greater than the Federal Minimum Wage of \$7.25. The IMWL also requires employers to pay certain employees, time and one half for all hours worked in excess of 40 hours in any given workweek. 820 ILCS 105/4a(1) (2023).

The IMWL exempts employees employed in an executive, administrative, or professional capacity, “as defined by or covered by the Federal Fair Labor Standards Act of 1938 and the rules adopted under that Act.” 820 ILCS 105/4a(2) (E) (2023). The regulations and interpretations of the U.S. Department of Labor, issued in administering the ELSA, may be used for guidance in interpreting the IMWL. 56 Ill. Adm. Code 210.120 (2013).

However, the Illinois legislature has, for the most part, rejected the U.S. Department of Labor’s recent regulations defining and de-limiting the exemptions for executive, administrative, and professional employees, which were issued on April 23, 2004, and which went into effect on August 23, 2004. Instead, under the IMWL, the so-called “white-collar” exemptions are defined by the FLSA and the Department of Labor’s regulations, “as both exist[ed] on March 30, 2003.” 820 ILCS 105/4a(2) (E) (2023).

One exception to the Illinois legislature’s rejection of the U.S. Department of Labor’s 2004 regulations concerns the salary level exempt employees must be paid. Currently, the IMWL states that exempt employees must be “compensated at the amount of salary specified in subsections (a) and (b) of § 541.600 of Title 29 of

the Code of Federal Regulations as proposed in the Federal Register on March 31, 2003 or a greater amount of salary as may be adopted by the United States Department of Labor.” 820 ILCS 105/4a(2) (E) (2023). The salary level proposed in the Federal Register on March 31, 2003 was \$425 per week. 68 Fed. Reg. 15,592 (March 31, 2003). However, in its new regulations, the U.S. Department of Labor adopted a “greater amount of salary,” namely \$684 per week. 29 C.F.R. § 541.200(a) (1) (2019). *See also*, One Day Rest In Seven Act, 820 ILCS 140/1, et seq. (2019), regarding rest breaks, which are discussed in Section XIII.D.

If an employer pays its employee less than the required minimum wage, the employee may recover treble damages for the amount of such underpayment, as well as costs and attorney’s fees. 820 ILCS 105/12(a) (2024). In addition, the employee can recover damages of “5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid.” *Id.*

Any employer who does not keep payroll records as required under the IMWL shall be subject to a \$100 penalty per impacted employee, payable to the Department of Labor’s Wage Theft Enforcement Fund. 820 ILCS 105/11(a) (2019).

#### B. Overtime Rules

Section 4a of Illinois’ Minimum Wage Law provides that employers must pay employees time and a half for hours worked over 40 per week. 820 ILCS 105/4a (2023). Generally, all employees are subject to the protections afforded by the Minimum Wage Law. *See* 820 ILCS 105/4(a) (2023) However, the Illinois legislature specifically exempted certain occupations from coverage. *See* 820 ILCS 105/3(d) (2023). The following employers/employees are excluded from the Minimum Wage Law’s overtime rules:

- (1) An employer employing fewer than 4 employees exclusive of the employer’s parent, spouse or child or other members of his immediate family;
- (2) An employee employed in agriculture or aquaculture (for further description this particular exemption *See* 820 ILCS 105/3(d) (2)(2023);
- (3) (Blank)
- (4) Individuals employed as an outside salesman;
- (5) Individuals employed as members of a religious corporation or organization;
- (6) Individuals that are employed by an accredited Illinois college or university at which he or she is a student are covered under the provisions of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. §201, *et seq.*;
- (7) Motor carriers with respect to whom the U.S. Secretary of Transportation has the power to establish qualifications and maximum hours of service under the provisions of Title 49 U.S.C. or the State of Illinois under Section 18b-105 (Title 92 of the Illinois Administrative Code, Part 395 – Hours of Service of Drivers) of the Illinois Vehicle Code (625 ILCS 5/18b-105).

- (8) As an employee employed as a player who is 28 years old or younger, a manager, a coach, or an athletic trainer by a minor league professional baseball team not affiliated with a major league baseball club, if (A) the minor league professional baseball team does not operate for more than 7 months in any calendar year or (B) during the preceding calendar year, the minor league professional baseball team's average receipts for any 6-month period of the year were not more than 33 1/3% of its average receipts for the other 6 months of the year.

a. Breaks and Meal Periods

Illinois employers are required to allow employees a meal period of at least 20 minutes who work 7 ½ continuous hours; the break must be provided no later than five hours after the employee's shift begins. 820 ILCS 140/3 (2023). If an employee works in excess of 7 ½ continuous hours shall be entitled to an additional 20 minute meal period for every additional 4 ½ continuous hours worked.

Employers are required to provide employees under 16 years-old with a meal break of at least 30 minutes if the minor is scheduled to work more than five continuous hours. 820 ILCS 205/4 (2020).

C. Illinois Equal Pay Act of 2003

Similar to the federal Equal Pay Act of 1963, the Illinois Equal Pay Act of 2003, 820 ILCS 112/1, *et seq.* (2020), provides that: No employer may discriminate between employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pay wages to another employee of the opposite sex for the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made under:

1. a seniority system;
2. a merit system;
3. a system that measures earnings by quantity or quality or production; or
4. a differential based on any other factor other than:
  - i. sex; or
  - ii. a factor that would constitute unlawful discrimination under the Illinois Human Rights Act, provided that the factor:
    - Is not based on or derived from a differential in compensation based on sex or another protected characteristic;
    - Is job related with respect to the position and consistent with a business necessity; and
    - Accounts for the differential. 820 ILCS 112/10 (2022).

In 2019, a new provision of the Act went into effect regarding African-Americans. The Act states that “[n]o employer may discriminate between employees by paying wages to an African-American

employee at a rate less than the rate at which the employer pays wages to another employee who is not African-American.” The same standards and exceptions as for discriminating on account of sex apply to African-Americans. 820 ILCS 112/10 (2022).

The Act reaches employers not subject to the federal government’s Equal Pay Act, in that it defines “employer” to include any, “entity for whom employees are gainfully employed in Illinois.” 820 ILCS 112/5 (2023).

Interestingly, under Illinois’ Act, employers are not required to pay employees at a workplace at one county wages equal to those paid by that employer at a workplace in another county. 820 ILCS 112/10 (2022).

Recently the Act was amended to prohibit employers from requesting job applicants to disclose their salary history as a condition of being considered for an offer of employment. 820 ILCS 112/10(b-5). The Act was also amended to broaden the types of recovery for claims under the Act, to include compensatory and punitive damages, as well as injunctive relief, in addition to other penalties, where appropriate. 820 ILCS 112/30(a).

#### D. Wage Payment and Collection Act

Under the Illinois Wage Payment and Collection Act, an employer must notify an employee of any change to the employee’s rate of pay “prior to the time of the change.” 820 ILCS 115/10 (2023). Further, employers “shall furnish each employee with an itemized statement of deductions made from his wages for each pay period.” *Id.*

Under the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 et seq. (2023), employers must pay their employees all wages earned during a particular pay period no later than 13 days after the end of that pay period. 820 ILCS 115/4 (2023). However, “[w]ages of executive, administrative, and professional employees, as defined in the Federal Fair Labor Standards Act of 1938, may be paid on or before 21 calendar days after the period during which they are earned.” 820 ILCS 115/4 (2023).

With respect to an employee’s final paycheck, the Act requires employers to “pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee.” 820 ILCS 115/5 (2023). If an employee requests in writing that his or her final paycheck be mailed to him or her, the employer must comply with their request. 820 ILCS 115/4 (2023).

If an employer has a policy providing for paid vacation time, and an employee resigns or is terminated, without having taken all of the vacation time he or she has earned under the policy, “the monetary equivalent of all earned vacation shall be paid to him or her as part of his or her final compensation at his or her final rate of pay and no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation.” 820 ILCS 115/5 (2023).

Section 14 of the Illinois Wage Payment and Collection Act (“Wage Act”) has been changed twice in regards to its interest rate. 820 ILCS 115/14(a). The first time was in 2010 (“2010 amendment”), adding section (a) entirely and creating a right for successful plaintiffs to collect prejudgment interest of 2% monthly and to recover attorney’s fees. 2009 Ill. SB 3568. The 2010 amendment was signed into law by the governor on July 30, 2010, but did not become effective until January 1, 2011. *Id.* The second interest rate

amendment came in 2021 (“2021 amendment”), when the state legislature increased the interest rate from 2% to 5%. 2021 Ill. HB 118. The 2021 amendment was signed into law on July 9, 2021, and became effective that same day. *Id.* Section 14(a) currently reads as follows:

(a) Any employee not timely paid wages, final compensation, or wage supplements by his or her employer as required by this Act shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, the amount of any such underpayments and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid. In a civil action, such employee shall also recover costs and all reasonable attorney’s fees.

820 ILCS 115/14(a).

Previous case law regarding the 2% interest rate suggests that the 5% interest rate will not apply retroactively. *Thomas v. Weatherguard Constr. Co.*, 2015 IL App. (1st) 142785, ¶¶ 74-75. When determining whether an amended statute should be applied retroactively, Illinois courts follow the Supreme Court precedent illustrated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *People ex. rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29 (Ill. 2015). The Supreme Court’s *Landgraf* analysis consists of two steps: “First, if the legislature has expressly prescribed the statute’s temporal reach, the expression of legislative intent must be given effect absent a constitutional prohibition. Second, if the statute contains no express provision regarding its temporal reach, the court must determine whether the new statute would have retroactive effect \*\*\*.” *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330-331 (Ill. 2006). Illinois courts rarely go beyond step one of the *Landgraf* analysis, so if there is no retroactive effect or impact, an amended statute likely applies retroactively. *Thomas*, 2015 IL App. (1st) 142785, ¶¶ 64-65. Amended acts which are “procedural in nature *can* be applied retroactively, but those which are substantive may not.” *Caveny v. Bower*, 207 Ill. 2d 82, 94 (Ill. 2003) (emphasis added). A procedural amendment cannot apply retroactively if it would have a retroactive impact. *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 38 (Ill. 2001). An amended statute has retroactive impact when the “application of the new statute would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Thomas*, 2015 IL App. (1st) 142785, ¶ 67; citing *Allegis Realty*, 223 Ill. 3d at 331.

The 2010 amendment was deemed to have created a new liability which was a substantive change and the 2% interest rate did not apply to causes of action which accrued before the effective date of the amendment. *Thomas*, 2015 IL App. (1st) 142785, ¶ 75. In contrast to attorney’s fees, which were always recoverable, even if not through the Wage Act, the 2% interest rate was not previously available and therefore was a substantive change which could not be applied retroactively. *Id.* In addition, subsequent appellate court decisions held that the 2010 amendment was intended to apply prospectively and not retroactively because the effective date of the amendment was not until January of the following year. *Gilmore v. Carey*, 2017 IL App (1st) 153263, ¶ 39 (Ill. Ct. App. 2017). A statute which “has an express delayed implementation date but is otherwise silent as to temporal reach will be applied prospectively.” *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 23 (Ill. 2016).

#### 1. Employee Scheduling Laws

See One Day Rest in Seven Act.



## XVI. MISCELLANEOUS STATUTES REGULATING EMPLOYMENT PRACTICES

### A. Smoking in Workplace

Effective January 1, 2008, Illinois became the 23rd state to ban smoking in public places with the passage of the Smoke Free Illinois Act (Senate Bill 500, P.A. 95-0017), codified as 410 ILCS 82/1, et seq. (2024). Pursuant to the Act, smoking in public places, including places of employment is prohibited. 410 ILCS 82/15. The Act further states that “no person may smoke in any vehicle owned, leased, or operated by the State or a political subdivision of the State.” *Id.* Employers/Owners are required to reasonably assure that smoking is prohibited in indoor public places and workplaces unless specifically exempted by Section 35 of the Act.

In accordance with Section 35 of the Act, the following areas are exempted from the Act:

- (1) Private residence or dwelling place, except when used as a child care, adult care, or healthcare facility or any other home-based business open to the public.
- (2) Retail tobacco stores as defined by Section 10 of the Act [410 ILCS 82/10] in operation prior to the effective date of this amendatory Act [P.A. 95-17].
- (3) (Blank).
- (4) Hotel and motel sleeping rooms that are rented to guests and are designated as smoking rooms, provided that all smoking rooms on the same floor must be contiguous and smoke from these rooms must not infiltrate into nonsmoking rooms or other areas where smoking is prohibited. Not more than 25% of the rooms rented to guests in a hotel or motel may be designated as rooms where smoking is allowed. The status of rooms as smoking or nonsmoking may not be changed, except to permanently add additional nonsmoking rooms.
- (5) Enclosed laboratories that are excluded from the definition of “place of employment” in Section 10 of this Act.
- (6) Common smoking rooms in long-term care facilities operated under the authority of the Illinois Department of Veterans’ Affairs or licensed under the Nursing Home Care Act [210 ILCS 45/1-101 et seq.] that are accessible only to residents who are smokers and have requested in writing to have access to the common smoking room where smoking is permitted and the smoke shall not infiltrate other areas of the long-term care facility.
- (7) A convention hall of the Donald E. Stephens Convention Center where a meeting or trade show for manufacturers and suppliers of tobacco and tobacco products and accessories is being held, during the time the meeting or trade show is occurring, if the meeting or trade show:
  - (i) is a trade-only event and not open to the public;
  - (ii) is limited to attendees and exhibitors that are 21 years of age or older;
  - (iii) is being produced or organized by a business relating to tobacco or a professional

- association for convenience stores; and  
(iv) involves the display of tobacco products.

Smoking is not allowed in any public area outside of the hall designated for the meeting or trade show. This paragraph (7) is inoperative on and after October 1, 2015.

410 ILCS 82/35 (2024).

B. Health Benefit Mandates for Employers

Illinois does not have any state enacted mandates.

C. Immigration Laws

None reported at this time.

D. Right to Work Laws

Illinois is not a “right-to-work” state. In 2018 the 7<sup>th</sup> Circuit Court of Appeals agreed with the Northern District of Illinois and struck down a local right to work ordinance passed by the Village of Lincolnshire, Illinois. The Court of Appeals said that the ordinance was preempted by federal law, which states that a state may pass a right to work statute, but a political subdivision may not. On May 15, 2015, the Illinois House voted down a proposed right to work bill 0-72-37.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

Whether lawful or unlawful off-duty conduct, in recent years Illinois courts have limited the extent to which an employment provision prohibiting certain conduct “while in the course of” one’s employment can be applied.

In *Eastham v. Hous. Auth. of Jefferson County*, 2014 IL App (5th) 130209, 22 N.E.3d 499, 2014 Ill. App. LEXIS 830, 387 Ill. Dec. 454, Unemployment Ins. Rep. (CCH) P8542 (Ill. App. Ct. 5th Dist. 2014, plaintiff was required to submit to a random drug test by his employer, which had a drug and alcohol-free workplace policy. In advance of his drug test, plaintiff advised his supervisor that he smoked marijuana during a recent vacation and would likely fail the test. Despite the test returning negative, plaintiff’s employment was terminated for violating the policy, and later denied unemployment insurance benefits.

In affirming the lower court’s decision, finding that the plaintiff’s claim for unemployment benefits was improperly denied, the court held that the policy that resulted in his discharge contained the phrase “in the course of employment.” The appellate court rejected the employer’s argument that this policy should be interpreted to prohibit any use of illicit substances at any time during an employee’s tenure, and to allow the discharge of any employee who admits to using marijuana even if he or she does not subsequently fail a drug test. Rather, the court interpreted this provision to mean that use or possession of alcohol or drugs or being under the influence, was only prohibited while an employee was on the job or on the employer’s property. Since the plaintiff’s conduct did not occur while he was working or on the employer’s property the claimed misconduct was insufficient to disqualify him from receiving unemployment benefits.

F. Gender/Transgender Expression

In *Hively v. Ivy Tech Cmty. Coll. of Ind.*, the plaintiff, who is openly lesbian, appealed the district court's decision granting defendant's motion to dismiss because plaintiff failed to state a claim on which relief could be granted. 853 F.3d 339 at 340 (7th Cir. 2017). Plaintiff believed she was blocked from fulltime employment because of her sexual orientation and that her rights under Title VII of the Civil Rights Act of 1964 were violated. *Id.* "For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation." *Id.* However, the Court of Appeals held that the district court erred in dismissing the case. While the district court's dismissal was in conformity with Seventh Circuit case law at time it was entered, the Court of Appeals, in overruling *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000) and other cases, found that sexual orientation discrimination is form of sex discrimination under Title VII involving either prohibited gender stereotyping or discrimination on basis of sex with whom a person associates. *Id.* at 359.

G. Freelance Workers

Taking effect on July 1, 2024, the Freelance Worker Protection Act (FWPA), establishes strict protections for freelance workers. 820 ILCS 193/1 (2024). The Act defines "freelance worker" as anyone hired or retained as an independent contractor in Illinois for compensation of at least \$500. 820 ILCS 193/5.

The FWPA sets forth three requirements for hiring or retaining a freelance worker. First, the agreement for work must be memorialized in a written contract. 820 ILCS 193/15. Second, payment to a freelance worker is required within 30 days following completion of the services or product. 820 ILCS 193/10. Third, companies or contracted entities cannot engage in any discriminatory, retaliatory, or otherwise harassing behavior toward freelance workers. 820 ILCS 193/20

The hiring party must provide a copy of the written contract to the freelance worker and retain the contract for at least two years. 820 ILCS 193/15 (c). It also must produce the contract to the Illinois Department of Labor (IDOL) upon request. IDOL is required to make available model contracts for use by the general public at no cost. 820 ILCS 193/15 (d).

H. Other Key State Statutes

The following is the table of contents from the Employment Section of the Illinois Compiled Statutes. Chapter 820.

**General:**

Labor Dispute Act, 820 ILCS 5/1, et seq. (2024)

Collective Bargaining Successor Employer Act, 820 ILCS 10/0.01, et seq. (2024)

Collective Bargaining Freedom Act, 820 ILCS 12/5, et seq. (2024)

Employment Contract Act, 820 ILCS 15/1, et seq. (2024)

Broadcast Industry Free Market Act, 820 ILCS 17/1, et seq. (2024)

Artistic Contracts by Minors Act, 820 ILCS 20/1, et seq. (2024)

Advertisement for Strike Workers Act, 820 ILCS 25/1, et seq. (2024)

Employment of Strikebreakers Act, 820 ILCS 30/1, et seq. (2024)

Employee Arbitration Act, 820 ILCS 35/2, et seq. (2024)

Personnel Record Review Act, 820 ILCS 40/1, et seq. (2024)

Artificial Intelligence Video Interview Act, 820 ILCS 42/1, et seq. (2024)

Health Insurance Claim Filing Act, 820 ILCS 45/1, et seq. (2024)

Workplace Literacy Act, 820 ILCS 50/1, et seq. (2024)

Right to Privacy in the Workplace Act, 820 ILCS 55/1, et seq. (2024)

Union Employee Health and Benefits Protection Act, 820 ILCS 60/1, et seq. (2024)

Sexual Harassment Victim Representation Act, 820 ILCS 61/1, et seq. (2024)

Worker Adjustment and Retraining Notification Act, 820 ILCS 65/1, et seq. (2024)

Employee Credit Privacy Act, 820 ILCS 70/1 et seq. (2024)

Job Opportunities for Qualified Applicants Act, 820 ILCS 75/1, et seq. (2024)

Illinois Secure Choice Savings Program Act, 820 ILCS 80/1, et seq. (2024)

Apprenticeship Study Act, 820 ILCS 84/1, et seq. (2024)

Commission on Young Adult Employment Act, 820 ILCS 85/1, et seq. (2024)

Illinois Freedom to Work Act, 820 ILCS 90/1, et seq. (2024)

Employee Misclassification Referral System Act, 820 ILCS 92/1, et seq. (2024)

Lodging Services Human Trafficking Recognition Training Act, 820 ILCS 95/1, et seq. (2024)

Workplace Transparency Act, 920 ILCS 96/1, et seq. (2024)

Customized Employment for Individuals with Disabilities Act, 820 ILCS 97/1, et seq. (2024)

**Wages and Hours:**

Minimum Wage Law, 820 ILCS 105/1, et seq.( 2024)

Equal Wage Act, 820 ILCS 110/1, et seq. (2024)

Equal Pay Act of 2003, 820 ILCS 112/1, et seq. (2024)

Illinois Wage Payment and Collection Act,, 820 ILCS 115/1, et seq. (2024)

Sales Representative Act, 820 ILCS 120/1, et seq. (2024)

Wages of Women and Minors Act, 820 ILCS 125/1, et seq. (2024)

Prevailing Wage Act, 820 ILCS 130/1, et seq. (2024)

Burial Rights Act, 820 ILCS 135/1, et seq. (2020)

One Day Rest in Seven Act, 820 ILCS 140/1, et seq. (2024)

Eight Hour Work Day Act, 820 ILCS 145/1, et seq. (2024)

School Visitation Rights Act, 820 ILCS 147/1, et seq. (2024)

Civil Air Patrol Leave Act, 820 ILCS 148/1, et seq. (2024)

Employee Blood Donation Leave Act, 820 ILCS 149/1, et seq. (2024)

Employee Medical Contribution Act, 820 ILCS 150/1, et seq. (2024)

Family Military Leave Act, 820 ILCS 151/1, et seq. (2024)

Family Bereavement Leave Act, 820 ILCS 154/1, et seq. (2024)

Employer as Lessee Bond Act, 820 ILCS 155/1, et seq. (2024)

Child Bereavement Leave Act, 820 ILCS 156/1, et seq. (2024)

Employee Benefit Contribution Act, 820 ILCS 160/1, et seq. (2024)

Personal Service Wage Refund Act, 820 ILCS 165/1, et seq. (2024)

Earned Income Tax Credit Information Act, 820 ILCS 170/1, et seq. (2024)

Day and Temporary Labor Services Act,, 820 ILCS 175/1, et seq. (2024)

Victims' Economic Security and Safety Act, 820 ILCS 180/1, et seq. (2024)

Domestic Workers' Bill of Rights Act, 820 ILCS 182/1, et seq. (2024)

Employee Classification Act, 820 ILCS 185/1, et seq. (2024)

Illinois Fringe Benefit Portability and Continuity Act, 820 ILCS 190/1, et seq. (2024)

Paid Leave for All Workers Act, 820 ILCS 192/1, et seq. (2024)

Illinois Freelance Worker Protection Act, 820 ILCS 193/1, et seq. (2024).

### **Health and Safety**

Child Labor Law, 820 ILCS 205/1, et seq. (2024)

Disclosure of Offenses Against Children Act, 820 ILCS 210/1, et seq. (2024)

Occupational Safety and Health Act, 820 ILCS 219/1, et seq. (2024)

OSHA Program Reorganization Act, 820 ILCS 227/1, et seq. (2024)

Employee Washroom Act, 820 ILCS 230/1, et seq. (2024)

Medical Examination of Employees Act, 820 ILCS 235/1, et seq. (2024)

Work Under Compressed Air Act, 820 ILCS 245/1, et seq. (2024)

Underground Sewer Employee Safety Act, 820 ILCS 250/1, et seq. (2024)

Toxic Substances Disclosure to Employees Act, 820 ILCS 255/1, et seq. (2024)

Nursing Mothers in the Workplace Act, 820 ILCS 260/1, et seq. (2024)

Substance Abuse Prevention on Public Works Projects Act, 820 ILCS 265/1, et seq. (2024)

Aerial Exhibitors Safety Act, 820 ILCS 270/1, et seq. (2020)

Workplace Violence Prevention Act, 820 ILCS 275/1, et seq. (2024)

Workers' Compensation Act, 820 ILCS 305/1, et seq. (2024)

Workers' Occupational Diseases Act, 820 ILCS 310/1, et seq. (2024)

Line of Duty Compensation Act, 820 ILCS 315/1, et seq. (2024)

Public Safety Employee Benefits Act, 820 ILCS 320/1, et seq. (2024)

Hotel and Casino Employee Safety Act, 820 ILCS 325/1, et seq. (2024)

Unemployment Insurance Act, 820 ILCS 405/100, et seq. (2024)

The following are other relevant employment related statutes from the Illinois Compiled Statutes:

Public Employee Benefits Act, 820 ILCS 320345/1, et seq. (2024)

Displaced Homemakers Assistance Act, 20 ILCS 615/1 (2024)

Illinois Procurement Code, 30 ILCS 500/1-1 (2024)

Employment of Illinois Workers on Public Works Projects Act, 30 ILCS 570/1 (2024)

School Code, 105 ILCS 5/1-1 (2024)

Farm Labor Contractor Certification Act, 225 ILCS 505/1, et seq. (22024020)

Child Care Act of 1969, 225 ILCS 10/1, et seq. (2024)

Health Care Worker Background Check Act, 225 ILCS 46/1, et seq. (2024)

Nurse Agency Licensing Act, 225 ILCS 510/1, et seq. (2024)

Private Employment Agencies Act, 225 ILCS 515/0.01, et seq. (2024)

Smoke-Free Illinois Act, 410 ILCS 82/1, et seq. (2024)

Environmental Protection Act, 415 ILCS 5/1, et seq. (2024)

Carnival & Amusement Rides Safety Act, 430 ILCS 85/2-1 (2024)

Labor Arbitration Services Act, 710 ILCS 10/0.01, et seq. (2024)

Illinois Abortion Law, 720 ILCS 510/1 (2024)

Freelance Worker Protection Act, 820 ILCS 193/1, et seq. (2024)