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SPECIAL REPORT

Employment Law

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NEW ILLINOIS LAWS ADD TO EMPLOYER OBLIGATIONS AND LIABILITY

No man, his property nor his dog is safe while the Illinois Legislature is in session—Abraham Lincoln

Many Illinois employers doubtless will share President Lincoln's sentiments as a pro-labor Democratic Governor and General Assembly try to garner political capital by passing a spate of employee-friendly legislation. Here is a summary of the laws enacted in just the past few months.

New Illinois Law Provides Leave Rights for Domestic Abuse Victims

The Victims' Economic Safety and Security Act (VESSA) took effect on August 25, 2003. The Act has broad implications for private-sector employers with 50 or more employees, as well as all public-sector employers. Intended as a response to the needs of victims of domestic and sexual violence in the Illinois workforce, VESSA follows the same basic framework as the federal Family and Medical Leave Act (FMLA), providing a victim of domestic or sexual abuse with up to 12 weeks of unpaid leave within a 12-month period.

Employees Covered under VESSA. VESSA grants leave to employees who are victims of domestic or sexual violence, and to those who have a family or household member who is a victim of domestic or sexual violence. Although there is a question as to whether same-sex domestic partners are covered under the FMLA, VESSA might be interpreted as allowing both same-sex roommates and same-sex domestic partners of victims to take leave under VESSA.

Like the FMLA, employees eligible for leave under VESSA may take leave intermittently or by means of a reduced work schedule until the entitlement is exhausted. However, unlike the FMLA, employees are *not* subject to a minimum service requirement to be eligible for VESSA leave.

VESSA denies leave to persons who are "adverse to the individual," thereby excluding perpetrators or accomplices to perpetrators of domestic or sexual violence. This is one instance, among many, where VESSA places a new type of responsibility on the employer, asking it to "judge" whether leave is appropriate.

When to Grant VESSA Leave. Leave by an employee under VESSA may be taken to: (1) permanently or temporarily relocate; (2) seek medical or psychological attention; (3) obtain victim services; (4) participate in safety planning or other actions to increase the safety of the victim; or (5) seek legal assistance or remedies to ensure the victim's safety, including time off for civil or criminal hearings.

Notice and Certification Requirements. Unless advance notice is impracticable, VESSA requires an employee to provide the employer with at least 48 hours' advance notice of the employee's intention to take leave under VESSA. If 48 hours' notice is impracticable, an employee has a "reasonable" period of time to provide certification of the qualifying VESSA event.

Whether an absence is scheduled or unscheduled, an employer has the right to require proper certification. But unlike the FMLA, which allows an employer to request certification from a health care provider and obtain second and third opinions, an employee complies with the certification requirement by stating under oath that he or she or a family or household member is a victim under VESSA and leave is being requested for one of the statutorily prescribed

purposes. An employer may require further production of medical documentation, a police or court report, documentation from the clergy or any other corroborating evidence, but the statute does not say when the employee must obtain and provide such corroboration.

Employee Rights and Protections under VESSA. Although providing for up to 12 weeks of leave, VESSA does not "create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by, the [FMLA]." It appears that the Illinois legislature wanted to limit a leave covered by both the FMLA *and* VESSA to extend no more than 12 weeks. However, there is substantial ambiguity. For example, it is far from clear how the law should be interpreted if an employee has taken 6 weeks of FMLA for reasons not covered by VESSA and then wants to take 12 weeks of time off for a leave that would be covered by both VESSA and FMLA. Does the employee get a full 12 weeks of VESSA time or is he or she limited to just 6 weeks of VESSA time because he has only 6 weeks of FMLA time remaining? VESSA fails to provide further guidance.

Similar to the FMLA, VESSA requires an employer to restore an employee to the same or equivalent position held by the employee before leave was taken and to continue health insurance coverage during the leave. Although benefits need not continue to accrue during the leave, taking leave under VESSA cannot result in the loss of employment benefits earned before leave commenced.

VESSA prohibits discrimination and retaliation against employees who exercise their rights or oppose unlawful actions under VESSA. Additionally, VESSA prevents employers from disciplining or discharging an employee because the workplace may be "disrupted or threatened" by a perpetrator committing or threatening to commit an act of domestic or sexual violence against an employee.

The Law Also Requires Workplace Adjustments. VESSA requires employers not only to provide time off, but also to reasonably accommodate the "known limitations" of a victim of domestic or sexual abuse or of a family or household member of a victim. Reasonable accommodations include "adjustment to a job structure, workplace facility, or work requirement, including transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a security procedure, in response to actual or threatened domestic or sexual violence." The employer's obligation to provide responsible accommodations is counterbalanced by an "undue" hardship standard.

Enforcement. The Illinois Department of Labor (IDOL) is in charge of administering and enforcing VESSA. Every employer is required to post and maintain, in a conspicuous place, documentation provided by IDOL summarizing the requirements of VESSA and an employee's rights under it. No private right of action exists under VESSA, but an employee may file a complaint alleging a violation with IDOL. At its discretion, IDOL will perform its own investigation and hold a public hearing, upon request. Violations of VESSA may be reported up to three years from the date the alleged violation occurred.

An employer who violates VESSA may be liable to an employee for back pay and benefits, compensatory damages, attorneys' fees, and equitable relief such as hiring, reinstatement, promotion and reasonable accommodations. An employer's failure to pay damages within 30 days of a judgment in favor of IDOL will result in a one-percent-per-day penalty thereafter, with no cap as to how high the penalty may reach.

Law Requires Changes to Employer Applications

An amendment to the Illinois Criminal Identification Act, effective January 1, 2004, requires that employers who inquire into an applicant's criminal history add language to their applications. All such applications must contain specific language which affirmatively states that the applicant is not obligated to disclose sealed or expunged records of convictions or arrests. Nor may employers ask if an applicant has had records expunged or pardoned. Illinois employers who inquire about criminal history should prepare to make this revision for applications used to hire Illinois-based employees.

Whistleblower Protection for Private Sector Employees

Effective January 1, 2004, Illinois private employers of every size will be prohibited from enforcing any rule or policy that prevents an employee from disclosing information in good faith about a violation of a federal, state or local law to a governmental or law enforcement agency. It also prohibits an employer from retaliating against an employee for "whistleblowing" to a government agency. Further, employers cannot retaliate against an employee who refuses to participate in an activity that would result in a violation of state or federal law. Violations of the Illinois Whistleblower Act constitute Class A misdemeanors and can result in reinstatement and damages, including back pay, litigation costs and attorney's fees. Punitive damages are not available under this Act.

The new state law codifies what already is known and prohibited as "retaliatory discharge" under the common law of Illinois and many other states. However, it goes further by not limiting its protections to discharge. Arguably, any adverse employment action taken in retaliation for good-faith whistleblowing may create liability under the statute. Additionally, similar statutes in other states have been applied to prevent the enforceability of confidentiality agreements and noncompetition agreements that violate public policy. For example, a similar statute in New Jersey has given rise to case law finding employers liable for common law and statutory violations if they take adverse employment action against an employee for failing to sign or for acting contrary to a restrictive covenant found to be unenforceable. How the Illinois statute will be interpreted remains to be seen.

New Equal Pay Act Broader than Federal Counterpart

The new Illinois Equal Pay Act, effective January 1, 2004, prohibits employers with four or more employees from paying unequal wages to men and women for doing the same or substantially similar work, requiring equal skill, effort and responsibility, under similar working conditions for the same employer in the same county. Discrepancies in wages in these situations are allowed where the wage difference is based upon a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or a factor other than gender.

Broadening the Federal Law. The new Act broadens the requirements under the federal Equal Pay Act and the current Illinois Equal Wage Act. The Illinois Department of Labor expects over 330,000 additional employees, previously unaffected by equal pay law in its entirety, to be covered by the new Act, which is broader in its implication and less forgiving than its federal counterpart.

The new Illinois law looks to county-wide comparables, rather than facility-based comparables used under federal law. That is to say, employees within the same county performing substantially similar work—let alone the same physical place of business—will have to be paid equally absent gender-neutral distinctions.

Further, in contrast to existing law, the new Act increases the time period for employer liability. The old Illinois Equal Wage Act required employees to bring an action within six months after the alleged violation. The new Illinois law allows actions to be brought up to three years after the employee learns of the underpayment.

Right to Discuss and Compare Compensation with Other Employees. One of the most noteworthy provisions of the new Act will have many employers re-examining a common workplace policy that prohibits employees from discussing each other's compensation. Under the new Act, employees cannot be penalized for discussing or comparing their wages or the wages of other employees "with each other" or "among themselves."

Compliance. By mid-December 2003, IDOL will have available the Illinois Equal Pay Act notice, which, like the VESSA notice, must be posted in and where other IDOL and federal Department of Labor postings may be found in employer facilities. Likewise, employers should be mindful of the three-year record retention policy required by the Act.

Enforcement. The IDOL may investigate complaints of unequal pay by inspecting workplaces, interviewing employees and issuing subpoenas. Either the employee or IDOL can bring court action against an employer. Employers found to be in violation of the Act will be required to make up the wage difference to the employee, pay legal costs and, if IDOL brings suit, pay civil fines of up to $2,500 per violation. A one-percent increase per calendar day will accrue on any award not paid within fifteen days after either an administrative order by the IDOL or a court order, subject to a maximum accrual of twice the original amount of the award.

Minimum Wage Raised to $6.50 Over Next Two Years

On January 1, 2004, the state minimum wage will increase from $5.15 to $5.50 per hour. The wage will be raised again on January 1, 2005 to $6.50 per hour. To put this into perspective, this increase is greater, on average, than 75 percent of other state increases across the country for the same time frame. Our labor-friendly state government obviously is taking matters into its own hands due to federal inaction. The federal minimum wage has been constant at $5.15 per hour since 1997. In real dollars, it is estimated that the federal minimum wage is lower than it has been since the 1950s and 30 percent less than its peak in 1968 when employees were making a real-value rate of $7.40 an hour.

State Employees Now Covered by Federal Employment Laws

Responding to a series of recent U.S. Supreme Court decisions which exempted state and local employees from coverage under federal employment legislation, the General Assembly overwhelmingly approved legislation which

waived the immunity the Supreme Court held had excluded state workers from federal coverage. Effective January 1, 2004, state workers will be covered by the federal ADEA, Title VII, ADA, FMLA and FLSA.

Union Rights: Strikebreakers, Card-Check Recognition

Effective January 1, 2004, amendments to the Employment of Strikebreakers Act and the Day and Temporary Services Act will prevent employers from contracting with day and temporary labor service firms in an effort to replace workers during a lockout or strike. Under current law, temporary and day laborers needed be informed only that they were entering a facility under strike or lockout. The new law will bar labor service agencies from sending workers to job sites where a strike, lockout or other labor problem exists giving rise to the need for temporary laborers.

Effective immediately, through emergency rules adopted by the Illinois Labor Relations Board and pursuant to Public Act 093-044, signed into effect on August 5, 2003, public employees are now allowed to form unions based on card-check recognition. The emergency rule will be in effect until the formal rules are officially promulgated. Unions can now present evidence of majority support and, absent employer evidence of fraud or coercion, the labor board will certify the union as the exclusive bargaining representative. Several rules have been subject to heated debate and will likely change as the emergency rules are retracted and the formal rules are promulgated. Noteworthy to public employers will be the lack of time they have to mount any type of campaign against certification.

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