

Morgan Lewis

Labor and Employment Summer Webinar Series: State Employment Law Road Trip Across the United States

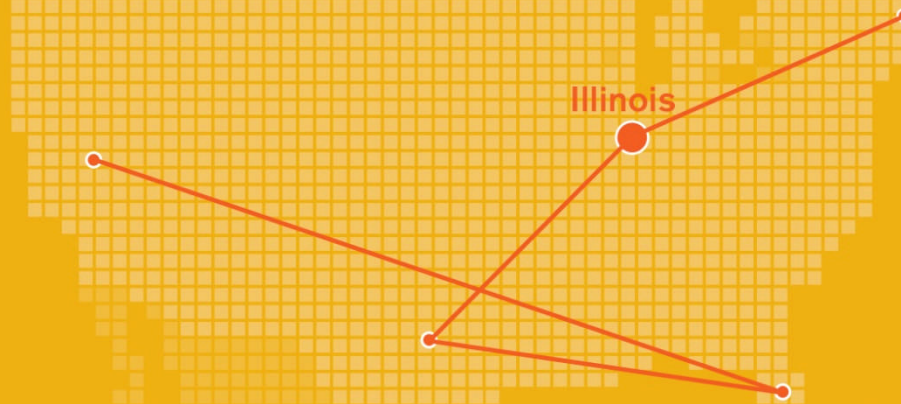
Illinois

July 10 | 1–2 p.m. ET

presenters

Sari Alamuddin

Tom Hurka



Avoiding Employment Law Traps in Illinois: What Every Illinois Employer Needs to Know

Introduction

1. *IL Human Rights Act*
2. *Leaves of Absence*
3. *IL Wage and Hour Laws*
4. *Independent Contractors*
5. *Day and Temporary Labor Services*
6. *Restrictive Covenants*
7. *Whistleblower Protection*
8. *IL WARN Act*
9. *Review of Personnel Records*
10. *Employee Privacy: Credit Checks*
11. *“English Only” Workplace Rules Prohibited*
12. *Privacy Concerns in the Workplace*



Governor Pat Quinn

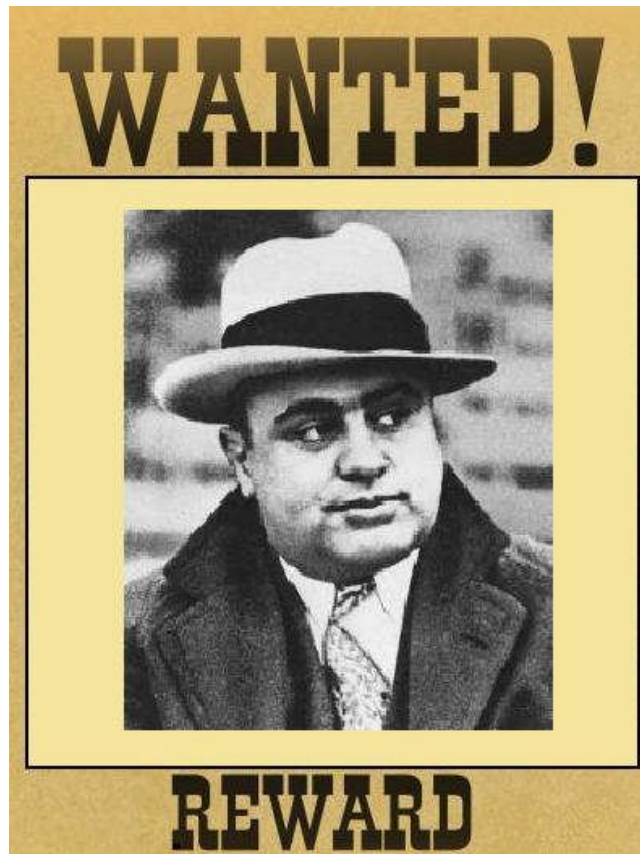


Illinois Human Rights Act

Illinois Human Rights Act Overview

- Illinois Human Rights Act (IHRA)
 - Broadly prohibits many forms of discrimination and identifies several specific protected classes:
 - *race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, and unfavorable discharge from military service.*
 - *Title VII defines fewer protected classes under federal law.*
 - Generally covers all employers, labor organizations, and employment agencies that employ 15 or more employees in Illinois for at least 20 weeks during the year.
 - The disability discrimination provision covers all employers (regardless of number of employees), labor organizations, and employment agencies.
 - *The ADA applies only to employers with 15 or more employees.*

Illinois Human Rights Act
Use of Arrest Records Prohibited



Illinois Human Rights Act

Use of Arrest Records Prohibited

- Under the IHRA, an employer may not inquire into or use an individual's arrest record or criminal history information that was ordered expunged or sealed:
 - *as a basis 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.*
- But an employer may obtain or use other information indicating that the individual actually engaged in the conduct for which he or she was arrested.

Illinois Human Rights Act

Pursuing Claims Under the IHRA

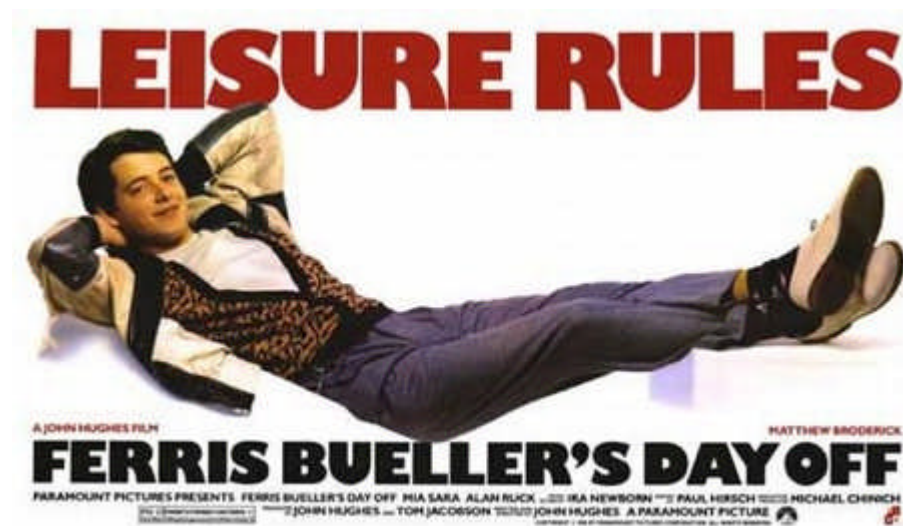
- Employees must file a charge of discrimination with the Illinois Department of Human Rights (IDHR) within 180 days after a violation has occurred.
- Claims no longer limited to administrative forum:
 - Prior to 2009, employees were precluded from bringing civil lawsuits for claims under the IHRA. Instead, if the IDHR found substantial evidence that a civil rights violation occurred, the employee could litigate his or her claim before the Illinois Human Rights Commission.
 - The statute was amended in 2009 to permit employees to sue in state court after receiving a notice of right to sue.
 - Employees also may sue in state court if the IDHR does not complete its investigation into the charge within 365 days.

Illinois Human Rights Act

Unique Aspects of the IHRA

- No Cap on Punitive Damages
 - Unlike its federal counterpart, the IHRA does not place a cap on the award of punitive damages.
- Recovery of attorneys' fees
 - Under the IHRA, the court may award reasonable attorneys' fees and costs to the prevailing party.
 - Under Title VII, an employer generally can only recover attorneys' fees if the court determines that the employee's claim was frivolous, unreasonable, or without foundation.

Leaves of Absence



Leaves of Absence in IL

Laws Governing Leaves of Absence in IL

- Federal Family and Medical Leave Act (FMLA)
- Illinois Family Military Leave Act
- Americans with Disabilities Act (ADA)
- Illinois Human Rights Act (IHRA)
- Victim's Economic Security and Safety Act
- Additional Illinois Leave Statutes

Leaves of Absence in IL

Federal Family and Medical Leave Act

- FMLA Refresher

- Provides for 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:
 - The birth and/or care of a newborn child
 - The adoption/foster care of a child
 - The care of an immediate family member (spouse, child, or parent) with a serious health condition
 - The employee's own serious health condition
 - Exigent circumstances associated with the employee's spouse, son, daughter, or parent on active duty or being called to active duty in a foreign country
- Provides for 26 weeks of unpaid leave in a single 12-month period for an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained or aggravated in the line of duty while on active duty.

Leaves of Absence in IL

The Family Military Leave Act

- An employer with 15 to 50 employees must grant up to 15 days of unpaid leave to an employee who is the parent or spouse of a person called to active military service lasting longer than 30 days, pursuant to the orders of the Governor of Illinois or the President of the United States, during the time that the federal or state deployment orders are in effect.
- For employers with more than 50 employees, the maximum amount of leave is 30 days.
 - If an employer has more than 50 employees and leave is granted because an employee's spouse or child is called to military service, the leave will be reduced by the number of days of leave provided to the employee under the FMLA's "qualifying exigency leave" provision.

Leaves of Absence in IL

The Family Military Leave Act

- To be eligible for such leave, an employee:
 - Must have been employed for at least 12 months and performed 1,250 hours of service during the 12 months immediately preceding the leave.
 - Must provide 14 days' notice prior to taking five or more days of such leave.
 - Must have exhausted all other paid leave, except for sick or medical leave.
- An employee who takes leave under the Act is entitled to be restored to the position that he or she held at the time the leave began or to a position with equivalent seniority, benefits, pay, and other terms and conditions of employment.
- The employer must make it possible for the employee to continue his or her benefits at the employee's expense.

Leaves of Absence in IL Victim's Economic Security and Safety Act

- Employers with 15 or more employees must permit full- and part-time employees who are the victims of sexual or domestic violence, or have a family member who is the victim of sexual or domestic violence, to take leave of up to 12 weeks during a 12-month period to:
 - seek medical attention related to the sexual or domestic violence;
 - obtain services from a victim's service organization;
 - obtain psychological or other counseling;
 - participate in safety planning, temporarily or permanently relocate, or engage in other actions to increase safety of the employee or the employee's household member; or
 - seek legal assistance or remedies.

Leaves of Absence in IL Victim's Economic Security and Safety Act

- Under the Act:
 - Employees generally must provide at least 45 hours' advance notice of intent to take leave, where possible.
 - Employees need not notify the police or file criminal charges to take advantage of leave.
 - Leave may be taken intermittently or on a reduced work schedule.
 - Employees may substitute available paid or unpaid leave; however, employers cannot require employees to substitute available leave.
- Employers also are prohibited from discriminating in terms of hiring, termination, compensation, and other terms of employment against individuals who are victims of domestic or sexual violence or who have family or household members who are victims of domestic or sexual violence.

Leaves of Absence in IL

ADA and IHRA

- Unpaid leave may be a reasonable accommodation for employees with disabilities under the Americans with Disabilities Act (ADA) or Illinois Human Rights Act (IHRA).
- But employers should keep in mind that:
 - Employers are not required to provide indefinite leave.
 - Each request for leave or extension of leave must be assessed on a case-by-case basis.
 - Determination of whether a leave or extension of leave is reasonable or poses an undue hardship for the company depends on facts specific to the employee and his/her position—not simply passing a certain number of days/weeks/months of leave.
 - Leave-of-absence policies and communications to employees on leave should reference the availability of additional leave as a possible reasonable accommodation.

Leaves of Absence in IL

Additional Illinois Leave Statutes

- Voting Leave
 - Two hours of paid leave.
- Jury Duty Leave
 - Must permit employees to take unpaid leave. No adverse action for taking such leave.
- School Visitation Rights Act
 - Up to eight hours of leave during any school year.
- One Day Rest in Seven Act
 - Employees are entitled to at least 24 consecutive hours of rest each week.
- Meal Period
 - 20-minute meal break required if employee works for 7½ continuous hours or longer.
- Blood Donation Leave Act
 - Full-time employees are entitled to one hour of paid leave every 56 days to donate blood.

Leaves of Absence in IL

Additional Illinois Leave Statutes

- Organ Donation Leave
 - Full-time employees with at least six months of employment may take 30 days off every year for organ donation and two hours to donate blood platelets.



Wage and Hour Laws

Wage and Hour Laws

Illinois Minimum Wage Law

- The Illinois Minimum Wage Law (IMWL) deals with minimum wage and overtime.
 - The minimum wage in Illinois is \$8.25; federal minimum wage is \$7.25.
 - Illinois overtime is calculated on a weekly basis (rather than a daily basis), just as under federal law.
 - Exemptions for outside salesmen; inside salesmen; and executive, administrative, and professional employees.
 - Under Illinois law, there is no “highly paid” exemption.

Wage and Hour Laws

Illinois Minimum Wage Law

- Bringing claims under the IMWL
 - Statute of limitations for minimum wage and overtime claims is three years.
 - Prevailing employee may recover costs, attorneys' fees, and liquidated damages in the amount of 2% per month.
 - An employer also may be subject to criminal penalties for failure to keep records required by the statute, failure to post the required wage and hour posters, and failure to cooperate with the Illinois Department of Labor (IDOL) during an investigation into claims of violation of the IMWL.
- Illinois law also allows for individual liability for IMWL violations, defining an “employer” as:
 - *“any individual, partnership, association, corporation, limited liability company, business trust, governmental or quasi-governmental body, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee...”*

Wage and Hour Laws

Illinois Minimum Wage Law

- IMWL relies on pre-2004 FLSA regulations addressing exemptions from overtime
 - To avail oneself of the exemptions to overtime, an employer must meet the applicable short or long test under the pre-2004 FLSA regulations as well as the current FLSA regulations
 - In some cases, the tests do not differ drastically; in others, they do

Wage and Hour Laws

Illinois Wage Payment and Collection Act

- The Illinois Wage Payment and Collection Act (IWPCA) establishes the timing and frequency of the payment of employee wages.
 - Generally, employees must be paid wages, at minimum, on a semimonthly basis
 - Executive, administrative, and professional employees can be paid wages once per month
- The IWPCA defines “wages” as:
 - any compensation owed an employee by an employer pursuant to an employment contract or agreement between the two parties, whether the amount is determined on a time, task, piece, or any other basis of calculation

Wage and Hour Laws

Illinois Wage Payment and Collection Act

- “Final compensation” must be paid to all separated employees no later than the next regularly scheduled payday.
- The IWPCA defines “final compensation” as:
 - wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the two parties.
- The Illinois Administrative Code contains various provisions governing final compensation.
 - Vacation. Although “use it or lose it” vacation policies are permissible under Illinois law, the IWPCA requires that any earned but unused vacation be paid out upon separation.
 - Bonuses. If an employer has a “length of service” bonus, an employee who resigns or who is terminated through no fault of his/her own is entitled to a pro rata portion of the bonus if he/she completed all requirements except being employed on a particular date.
 - Commissions. If an employee was the “procuring cause” of a sale, but the sale was consummated by the employer personally or through another employee, the employee still is entitled to receive his/her commissions.

Wage and Hour Laws

Illinois Wage Payment and Collection Act

- The IWPCA limits the types of deductions from wages and final compensation. Permissible deductions include those that are:
 - required by law (e.g., employment taxes);
 - to the benefit of the employee (e.g., health insurance);
 - in response to a valid wage assignment or wage deduction order (e.g., court-ordered wage garnishment); or
 - made with the express written consent of the employee, given freely at the time the deduction is made.

Wage and Hour Laws

Illinois Wage Payment and Collection Act

- Bringing claims under the IWPCA
 - The IWPCA has a 10-year statute of limitations for claims of unpaid wages and final compensation.
 - Like the IMWL, the IWPCA allows for individual liability.
 - A prevailing employee may recover back pay, attorneys' fees and costs, and liquidated damages in the amount of 2% per month.
 - An employer also may be subject to criminal penalties for
 - *failure to keep records required by the statute;*
 - *failure to post the required wage and hour posters; and*
 - *failure to cooperate with the Illinois Department of Labor during an investigation into claims of violation of the IWPCA.*

Wage and Hour Laws

IL Equal Pay Act

- IL Equal Pay Act provides:
 - Employers may not pay men and women at different rates for the same or substantially similar work, on jobs requiring equal skill, effort, and responsibility that is performed under similar working conditions.
 - Wage differentials under seniority systems or merit systems, or for productivity are permissible.
 - Employers must preserve employee wage information for five years.
 - Employers are subject to civil penalties up to \$2,500 per violation.
 - Employers must post the required notice.



Independent Contractors

IL Law Regarding Independent Contractors

Overview

- The test for delineating independent contractor/agency relationships is critical because misclassification poses significant risks:
 - Joint Employer Status Risks
 - Benefits-Related Risks
 - Tax- and Insurance-Related Risks
 - Wage and Hour-Related Risks
 - Unanticipated Liability for Litigation
 - Additional Risks

IL Law Regarding Independent Contractors

Federal Tests

- There are different tests used to determine whether a worker is an independent contractor or an employee based on the law involved. The tests applied are complex and subjective.
 - Common Law Test: “Control/Right of Control”
 - IRS Three-Factor Test
 - Economic Reality Test

IL Law Regarding Independent Contractors

Illinois Tests

- The IMWL and IWPCA each has its own test to determine whether individuals are employees or independent contractors.
- The IMWL considers the following factors:
 - the degree of control the alleged employer exercises over the individual;
 - the extent to which services rendered by the individual are an integral part of the alleged employer's business;
 - the extent of the relative investments of the individual and the alleged employer;
 - the degree to which the individual's opportunity for profit and loss is determined by the alleged employer;
 - the permanency of the relationship; and
 - the skill required in the claimed independent operation.

IL Law Regarding Independent Contractors

Illinois Tests

- The IWPCA considers whether the employer:
 - issues assignments and sets quotas;
 - schedules work and imposes time requirements;
 - has the right to change the methods the worker uses in performing the individual's services;
 - requires the individual to follow a routine or schedule;
 - requires the worker to report to a specific location at regular intervals;
 - requires the worker to furnish a record of his time;
 - engages the workers on a permanent basis;

(Cont.)

IL Law Regarding Independent Contractors

Illinois Tests

- The IWPCA considers whether the employer (Cont.):
 - reimburses the worker for expenses incurred;
 - provides pensions, bonuses, and sick pay;
 - reports the worker's income to the Internal Revenue Service and deducts taxes;
 - does not allow the worker to engage in other employment;
 - restricts the worker in choice of customers;
 - limits the territory in which the worker performs;
 - has the right to discharge the worker; and
 - requires attendance at meetings and training sessions.

IL Law Regarding Independent Contractors

Illinois Employee Classification Act

- The Illinois Employee Classification Act was enacted in 2008.
- Under the Act, an individual performing services for a contractor is deemed to be an employee of the contractor, unless it is shown that:
 - the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;
 - the service performed by the individual is outside the usual course of services performed by the contractor; and
 - the individual is engaged in an independently established trade, occupation, profession, or business; or
 - the individual is deemed a legitimate sole proprietor or partnership under the Act.

IL Law Regarding Independent Contractors Illinois Employee Classification Act

- The Act defines “contractor” as:
 - *“any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted by law to do business within the State of Illinois who engages in construction as defined in this Act.”*
- Under the Act, “construction” includes:
 - *“any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project, development, real property or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site.”*
- Very little case law interpreting “construction.”

IL Law Regarding Independent Contractors Illinois Employee Classification Act

- A company that engages individuals as independent contractors must post notice of the Act at its facility.
- It is a violation of the Act to misclassify an individual as an independent contractor and to retaliate against an individual for exercising his/her rights under the Act.
- Under the Act, an interested individual or entity may file a complaint with the IDOL or file a civil lawsuit alleging violations of the Act.
 - The IDOL may fine a company up to \$1,500 per violation following a first audit, and up to \$2,500 per violation following any subsequent audits in a five-year period.
 - *Each violation of the Act for each person and for each day the violation continues constitutes a separate and distinct violation.*
 - *If the violation is “willful,” the IDOL may award damages to the individual in the amount of the statutory penalty.*
 - A prevailing individual in a civil lawsuit may recover compensation and benefits lost due to misclassification; liquidated damages; compensatory damages, up to \$500 for each violation of the Act; equitable relief (in the case of unlawful retaliation); and attorneys’ fees and costs.



Day and Temporary Labor Services

Day and Temporary Labor Services

- Day and temporary labor service agencies and their clients have certain payment and notice obligations:
 - Employers must verify that the agency is registered with the IDOL.
 - Employers must recertify that the agency is registered on March 1 and Sept. 1 of each year.
 - Employers must provide single-day workers with documentation at the end of the workday containing worker's name, location, and hours worked.
 - Employers face a fine of \$550 per day if they contract with an unregistered agency.
 - Employers share liability with the agency for wages due to workers under IL wage and hour laws.



Restrictive Covenants

Restrictive Covenants in Illinois

- Illinois courts enforce noncompetition and nonsolicitation agreements where certain requirements are met.
 - Generally must be ancillary to an employment agreement.
 - Must protect a legitimate business interest.
 - Must have a reasonable limitation on temporal and geographic scope.
- Previously, under the legitimate business interest test, an employer could show either:
 - Customer’s relationship with employer is “near permanent”; or
 - The employee gained genuinely confidential information through employment and then attempted to use it for his/her benefit.
- However, IL Supreme Court recently rejected this test.

Restrictive Covenants in Illinois Recent Developments

- *Reliable Fire Equipment Co. v. Arrendondo*, 965 N.E.2d 393 (2011)
 - Recent Illinois Supreme Court case with far-reaching implications in the noncompete context.
 - Discouraged the rigid application of the legitimate business interest test and instead held that courts should look to the “totality of the facts and circumstances of the individual case.”
 - Under this broad standard, an employer could argue that its goodwill or reputation constitute legitimate business interests.
 - No one factor carries more weight than another; each case rests on its own facts and circumstances.



Whistleblower Protection

Whistleblower Protection in Illinois

Whistleblower Act

- All employers are subject to the Illinois Whistleblower Protection Act (WPA).
- The WPA prohibits employers from discriminating or retaliating against an employee who participates in an investigation of unlawful activity or refuses to participate in an activity that would result in a violation of state or federal laws, rules, or regulations
- It also prohibits employers from discriminating or retaliating against an employee who discloses information to a government or law enforcement agency, or in a court or other proceeding, if the employee has reasonable cause to believe that the information disclosed pertains to a violation of state or federal laws, rules, or regulations
- Penalties: back pay; actual damages; attorneys' fees; and costs



IL Worker Adjustment and Retraining Notification Act (IL WARN Act)

IL WARN Act

- The IL WARN Act covers employers with at least (1) 75 full-time employees; or (2) 75 employees who in the aggregate work at least 4,000 hours per week.
- The IL WARN Act applies when employees are subject to a “mass layoff”:
 - An employment loss at a single site during any 30-day period:
 - Of at least 250 employees (excluding part-time employees); or
 - At least 1/3 of the employees (excluding part-time employees) and at least 25 full-time employees.
- Similar to federal law, the IL WARN Act requires 60 days’ notice of a plant closing or mass layoff regardless of the number of employees at the site.
- Similar to federal law, the IL WARN Act has certain narrowly defined exceptions to the notice requirement.
- In addition to recovery of back pay and benefits for every day that notice is not provided, the law provides for civil penalties of up to \$500 per day.

Review of Personnel Records



Review of Personnel Records

Illinois Personnel Record Review Act

- The Personnel Record Review Act provides employees with the right, upon request, to review, copy, and correct the employees' personnel records.
 - Generally, the employer must comply with the request within seven (7) working days.
 - Requires the employer to provide the employee with written notice of release of the employee's disciplinary report to third parties.
 - Cannot track off-work activities of the employee (e.g., political activities, publications).
- If an employee disagrees with any information contained in his/her personnel records, the employee may request removal or correction of the information.
 - If an agreement cannot be reached, the employee may submit a written statement explaining the dispute, and the employer must attach the written statement to the disputed portion of the records.
- An employee may file a claim with the IDOL or state court to enforce the Act.
- Potential penalties for failure to comply with the Act include restriction on use of record in legal proceedings; actual damages plus costs; for willful violations, \$200 plus costs, attorneys' fees, and actual damages.




Employee Privacy: Credit Checks

Employee Privacy

Illinois Employee Credit Privacy Act

- Effective January 1, 2011
- Applies to all employers, with exceptions (e.g., banks, insurance companies)
- The Act:
 - Prohibits employment decisions based on credit history and prohibits inquiring about an applicant's or employee's credit history.
 - Exception if good credit history is a bona fide occupational requirement in that it is required by federal or state law, involves custody of assets of \$1,000 or more, or involves signatory power over business assets of \$100 or more per transaction.
 - Cannot be waived.
- An aggrieved party may bring a civil suit in state court to recover injunctive relief and/or damages. A prevailing plaintiff is entitled to attorneys' fees and costs.



“English Only” Workplace Rules Prohibited

“English Only” Workplace Rules Prohibited

- Employers may not prohibit employees from speaking a language other than English when the employee is addressing matters unrelated to his/her job duties.
- Limited restrictions are permissible when there is a business necessity and employees are notified of such restrictions.
- Applies to employers with 15 or more employees in Illinois during 20 or more calendar weeks in a year or preceding the alleged violation.
- Employers face a civil penalty of up to \$75,000 for repeated offenses, in addition to compensatory and punitive damages and attorneys’ fees.



Privacy Concerns in the Workplace

Privacy Concerns in the Workplace

- **IL Genetic Information Privacy Act:** Employers may not solicit, request, require, or purchase genetic information of employee, applicant, or family member of employee/applicant, or use genetic information to alter terms/conditions of employment
- **IL Drug & Alcohol Testing:** Employers may adopt and administer reasonable policies to ensure that an employee is no longer engaging in illegal drug use
 - “The Human Rights Act is not to be construed to encourage, prohibit, or authorize testing to determine illegal drug use by applicants or employees, or to make employment decisions based on results.”

Privacy Concerns in the Workplace

- **Surveillance:** Illinois law generally prohibits the monitoring of telephone conversations, but grants exceptions to certain businesses for specified activities
 - **Exceptions:** Businesses engaged in marketing, opinion research, or telephone solicitation
- **Polygraph Examinations:** In Illinois, polygraph tests may be given before or during employment, but certain topics are restricted; the use of voice stress analyzers is prohibited in the employment context
- **HIV/AIDS:** An employer cannot inquire about an applicant's HIV/AIDS status

Questions?

What is on your mind about Illinois employment law?



Presenters



Sari Alamuddin
312.324.1158
salamuddin@morganlewis.com



Tom Hurka
312.324.1735
thurka@morganlewis.com



international presence

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh
Princeton San Francisco Tokyo Washington Wilmington