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# New Employment Laws in 2019 and 2020 Increase Employer Obligations

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A FREEBORN & PETERS LLP CLIENT ALERT

**2019 was an active legislative year and resulted in a number of new employment laws in this state, and the first half of 2020 has brought even more changes in light of the COVID-19 pandemic. The new laws cover topics such as employee shift scheduling, salary requirements for exempt employee status, and sexual harassment prevention. Others touch on the legalization of cannabis and its effect on employers' drug-testing policies. These laws, discussed below, impose a number of new obligations on employers in this state and employers must be aware of the recent and upcoming changes, some of which take effect July 1, 2020 and others which require employers take affirmative action by the end of 2020.**

**Chicago's Fair Work Week Ordinance—July 1, 2020 Implementation, Jan. 1, 2021 Private Right of Action**

Chicago employers that utilize shift workers take note—the City recently passed expansive legislation targeting an employer's ability to control employee shift assignments and to unilaterally modify an employee's scheduled work hours. That legislation, the Fair Workweek Ordinance, is intended to provide employees (in certain industries) more notice of their work schedules and better ability to predict their regular take-home pay. On the flip side, employers must now comply with numerous new obligations and requirements or face financial penalty.

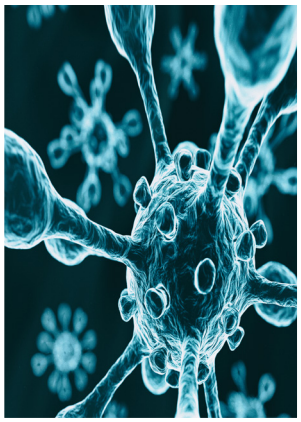
The Fair Work Week Ordinance applies to employers in the building services, healthcare, hotel, manufacturing, restaurant, retail, and warehouse services industries if they have more than 100 employees globally (or 250 if a non-profit corporation) and at least 50 "Covered Employees." Under the Ordinance, a Covered Employee includes those making less than $26 an hour and salaried employees making $50,000 or less. Restaurants are only governed by the Ordinance if they have at least 30 locations and 250 total employees.

Among other requirements, the Ordinance places the following obligations on an Employer:

- Prior to the start of employment, it must provide a Covered Employee with an estimate of the Employee's predicted schedule, including whether on-call shifts are expected;
- It must provide Covered Employee with at least 10 days' advanced notice of their schedule. If the employer modifies the schedule without providing the required notice, the Employer must pay the Employee additional compensation ("Predictability Pay" equal to the Employee's hourly rate), in addition to the regular rate of pay for each violative shift;
- A Covered Employee must be allowed to reject a shift assignment that begins less than 10 hours after the end of its prior shift. If an Employee chooses to work such a shift, the Employer must compensate the Employee at a rate of 1.25 times the Employee's regular rate of pay.

The Ordinance is set to take effect on July 1, 2020. However, due to the recent COVID-19 outbreak, the Chicago City Council has delayed the provision which allows employees to bring private lawsuits for Ordinance violations until January 1, 2021. Additionally, the City recently published a rule providing that the "predictability pay" requirement does not apply if the schedule change was "because" of the COVID-19 pandemic. The rule further explains that this exception applies when the pandemic causes the employer to "materially change its operating hours, operating plan, or the goods or services" it provides and applies only to the schedule during which the pandemic-related event changes occurred and the immediately following schedule.

Exactly how the pandemic-related exception will be applied remains to be seen, and employers are well-advised to comply with its new scheduling obligations if at all possible. Furthermore, despite the delay in private enforcement actions, employers should not delay compliance. The Chicago Department of Business Affairs and Consumer Protection may still begin investigating violations beginning on July 1, 2020 and an employer who violates the Ordinance will be subject to a fine of $300-$500 per day for each offense. These fines can add up—a covered employer who fails to abide by the scheduling notice requirements for 10 employees for 1 workweek could face a fine of up to $25,000.



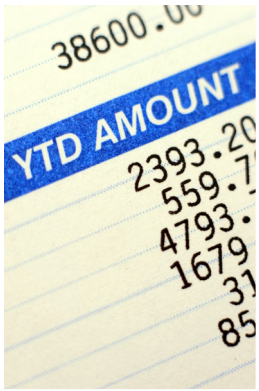
**COVID-19 Anti-Retaliation Ordinance—Effective Immediately**

The Chicago City Council recently enacted the COVID-19 Anti-Retaliation Ordinance prohibiting employers from taking adverse action against employees for remaining home for certain COVID-related reasons. Specifically, employers cannot demote or terminate an employee for obeying an order issued by the Mayor, Governor, Chicago Department of Public Health, or, in the case of items 2, 3 and 4 below, a treating healthcare provider, requiring the employee to:

1. Stay at home to minimize the transmission of COVID-19;
2. Remain at home while experiencing COVID-19 symptoms or while sick with COVID-19;
3. Obey a quarantine order issued to the Covered Employee;
4. Obey an isolation order issued to the Covered Employee; and
5. Obey an order issued by the Commissioner of Health regarding duties of hospitals and other congregate facilities.

Employees who are caring for an individual subject to categories 1-3 are also protected under the Ordinance. The Ordinance provides a private right of action against employers and employees may recover damages up to three times the amount of wages owed had the adverse action not taken place as well as costs and attorneys' fees. Employers may also face administrative action by the Chicago Department of Business Affairs and Consumer Protection if they run afoul of the Ordinance's protections.

It is important to note that the Anti-Retaliation Ordinance does not give otherwise healthy employees the right to refuse to return to work when doing so is permitted by government orders. While employers may terminate such workers, employers should take care to confirm the employee at issue does not fall within one of the protected categories above.




**Department of Labor Increases Minimum Salary for Exempt Workers**

Under the Federal Fair Labor Standards Act ("FLSA"), a salaried employee must both pass the "duties test" and earn a minimum weekly salary in order to be exempt from the FLSA's minimum wage and overtime requirements. Effective January 1, 2020, the Department of Labor ("DOL") raised the minimum salary threshold from $455 to $684 per week (equivalent to $35,568 per year for a full-year worker). The DOL did not make any changes to the requirements under the duties test, including the characteristics that qualify for the executive, administrative, and professional exemptions.

Employers should review their employee classifications to ensure that employees making less than $684 per week are properly classified under the FLSA. Some workers may need to be reclassified from exempt to non-exempt, or their salaries may need to be increased to satisfy the new minimum salary threshold. Further, the change in the law presents a good opportunity for employers to ensure that their exempt workers are indeed performing exempt duties.

**Mandatory Sexual Harassment Training for all Illinois Employers—December 31, 2020 Deadline**
The newly enacted Workplace Transparency Act ("WTA") targets discrimination and harassment in the workplace. The WTA went into effect on January 1, 2020 and it requires, among other things, that all Illinois employers provide annual sexual harassment prevention training to its Illinois employees. The first training must be completed **by December 31, 2020**.

The Illinois Department of Human Rights has released a free model sexual harassment prevention training program, which is available on its website at https://www2.illinois.gov/DHR/training/Pages/default.aspx.

Every employer must either adopt the model program or use an alternative program that meets or exceeds the model's minimum standards. The alterative program must include the following:

- An explanation of sexual harassment under Illinois law;
- Examples of conduct that constitutes unlawful sexual harassment;
- A summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- A summary of responsibilities of employers in the prevention, investigation and corrective measures of sexual harassment.

Employers should review their current sexual harassment policies and training materials to ensure they comply with the IDHR model training and consult legal counsel if needed.

**New Illinois Cannabis Laws**
Recreational cannabis use is legal in Illinois as of January 1, 2020. Under the Cannabis Regulation and Tax Act (the "Cannabis Act") Illinois residents at least 21 years of age may possess up to 30 grams of cannabis flower and 5 grams of concentrate for personal use.

The Cannabis Act, which was amended on December 4, 2019, states that employers may enact and enforce "reasonable zero tolerance or drug-free workplace policies concerning drug testing, smoking, consumption, storage or use of cannabis in the workplace." 410 ILCS 705/10-50(a). It also provides that employers may prohibit consumption of, and impairment by, cannabis while at work or while on call, and discipline or terminate an employee for violation of a workplace drug policy. However, the Act does not define the standard for "reasonableness," signaling that employers should take caution to ensure that any drug testing policy is used in a uniform and non-discriminatory manner.

At the same time, amendments to Illinois' Right to Privacy Act went into effect on January 1, 2020. The amendments provide that employers may not refuse to hire an applicant or take an adverse employment action against an employee because he uses lawful products outside of the workplace.

Thus, the Cannabis Act allows for drug-free workplace policies while the Right to Privacy Act limits employers' ability to discipline or terminate employees when they use cannabis outside the workplace. On December 4, 2019, the Cannabis Act was amended to state that it does not create or imply a cause of action for "actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test." 410 ILCS 705/10-50(e)(1). While this amendment may have been made to shore up an employer's ability to conduct pre-employment drug testing, ambiguity remains concerning whether an employee can sue his employee for failure to hire based on a positive pre-employment test under the Right to Privacy Act.

The amended Act continues to state that it does not create or imply a cause of action for actions "based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies." 410 ILCS 705/10-50(e)(2). Importantly, to discipline or terminate based on a "good faith belief," employers must be able to point to "specific, articulable symptoms" demonstrating the use of cannabis. Thus, employers must make sure all discipline or termination decisions are in line with this "good faith" requirement.

Given the complexity of the issues raised by these new laws (including additional complexities when an employee is prescribed medical cannabis), employers with drug policies already in place should carefully review and consider updating their policies. In addition, Illinois employers who do not have workplace drug policies should consider creating and implementing such policies if necessary.

**If you have any questions about how any of the legislation discussed above affects your business, please contact Erin McAdams Franzblau (efranzblau@freeborn.com), Jennifer Huelskamp (jhuelskamp@freeborn.com), or Meghan Tepas (mtepas@freeborn.com).**

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Erin helps companies navigate employment laws, and defends employers in a wide range of class, collective, and single-plaintiff disputes before federal and state courts. She regularly counsels and litigates matters brought under state and federal antidiscrimination laws, the Fair Labor Standards Act, and the Employee Retirement Income Security Act. She is experienced in all stages of litigation, from inception through trial and post-trial appeals.

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Meghan is passionate about litigation and takes a thoughtful and creative approach to each of her cases. She focuses on general breach of contract disputes and employment disputes including those involving breach of non-compete and non-solicit agreements. She has extensive experience representing clients facing claims of negligent hiring and breach of fiduciary duty relating to allegations of employee sexual harassment and sexual misconduct.

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