



# Employment Law Update 2017

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# Employment Law Update - 2017

The latest efforts at improving our lives through governmental regulation





# Status of DOL Overtime Rule

- “New” OT Rule was set to take effect on Dec. 1, 2016
  - DOL said new rule was to simplify and make easier the identification of overtime protected employees under FLSA
  - Proposed significant changes to the minimum salary requirements of the “White Collar Exemptions”
    - **Executive**
    - **Administrative**
    - **Professional**
    - **Highly Compensated Employees (HCE)**
- No proposed changes to the “Primary Duties” tests



# Status of DOL Overtime Rule

## “New” Minimum Salary levels for Exempt Employees

- (1) Must pay employee \$913/week or \$47,476 annually [currently is \$455/week or \$23,660 annually];
- (2) For HCE employees, increases required annual salary to \$134,000 [currently is \$100,000 per year];
- (3) Proposed OT Rule does allow for Non-Discretionary bonuses to satisfy up to 10% of salary;
- (4) New OT Rule builds in automatic updating of salary levels every three years [estimated to increase to \$51,168 by 2020].



# Status of DOL Overtime Rule

## *So what happened to the Rule?*

- Nationwide Preliminary Injunction Issued on November 22, 2016 [by federal judge in Texas]
  - 21 states filed suit challenging Rule
  - Enjoined the DOL from implementing and enforcing Rule
- Court found that language of FLSA did not support new OT Rule, as “White Collar Exemptions” depend on duties of employee not the employee’s salary
  - Rule created “de facto salary-only test” making 4.2 million workers non-exempt without any change in their duties
- Also found DOL lacked authority to provide for automatic updates



# Status of DOL Overtime Rule

## *So what happened to the Rule?*

- DOL filed a notice of appeal on December 1, 2016
  - Briefs were due to be filed by March 1, 2017
  - But Trump DOL asked for 60 day extension until May 1<sup>st</sup>
  - On April 14, 2017, asked for extension until June 30, 2017
  - DOL then filed its Brief on Appeal – asking 5<sup>th</sup> Circuit Court of Appeals to address only the question of the DOL’s authority to set a salary level
    - Stating affirmatively that the DOL had decided not to advocate for the \$913 per week salary level in the original proposed rule
- On July 25, 2017, DOL began a new “rulemaking” process by issuing an RFI



# Status of DOL Overtime Rule

## *So what happened to the Rule?*

- While appeal pending, on August 31, 2017, Texas District Court Judge entered final judgment in case – invalidating the proposed OT Rule
  - Determined the proposed rule was based on impermissible construction of the FLSA [basing exemptions on salary only]
  - But recognized authority of DOL to implement salary level test
- DOL filed unopposed motion to dismiss the pending appeal on September 5, 2017
- 5<sup>th</sup> Circuit Court of Appeals dismissed on Sept. 6<sup>th</sup>
- Obama proposed OT Rule effectively dead



# Status of DOL Overtime Rule

## *So what happened to the Rule?*

- For now, prior salary level test applies [\$455/week]
- Comment period on DOL RFI closed on Sept. 25, 2017
- What can we expect:
  - During Senate confirmation hearings, Sec. Acosta stated OT Rule salary threshold should be updated to match inflation [at about \$33,000]
  - Said impact on economy needs to be considered, as well as impact on non-profits [stated Obama administration went too far]
  - Would not commit to a DOL position, but said the DOL would review and possibly revise the proposed OT Rule





# Status of EEOC Proposed Rule to Revise EEO-1 to collect Pay Data

- Why?
  - In an effort to advance equal pay, EEOC in conjunction with DOL announced in January of 2016 its intent to seek revisions to EEO-1 to collect pay data
- Who is required to file an EEO-1?
  - Employers with more than 100 employees, federal contractors with more than 50 employees
- What is an EEO-1?
  - A compliance survey that requires employees to categorize employment data by race/ethnicity, gender, and job category



# EEOC Proposed Revisions to EEO-1

- What Pay Data will be required under new Rule?
  - Would require reporting earnings and hours worked by race and gender and job category
  - Proposes grouping in twelve pay bands, ranging from about \$20,000 to above \$200,000
    - For instance, the employer would report that it employs 6 White males and 8 African-American women Professionals in the eighth pay band of \$80,080 to \$101,900
- When would rule go into effect?
  - The proposed changes were set to take effect in 2017 with first and new reporting deadline of 3/31/18



# EEOC Proposed Revisions to EEO-1

- Potential Impact on Employers:
  - Millions of hours and dollars spent compiling and reporting data
  - Intended use of data by EEOC to “discern potential pay discrimination” is actually complicated by questionable reliability of manner in which data reported
    - Use of W-2 data in Box 1 could produce misleading results
    - Use of “proxy hours” for exempt employees also misleading
    - Failure of data to take into account other variables like education, seniority, and level of responsibility
- Businesses and Employers voiced strong concerns and criticisms over proposed costs and unreliability of data [Obama Administration ignored criticisms/concerns and pushed rule forward]



# Proposed EEO-1 Revisions Stayed

- On August 29, 2017, EEOC Acting Chair announced that the OMB was initiating an *immediate stay* and review of the new EEO-1 pay reporting requirements
- OMB announced stay was result of:
  - Data file specifications issued by EEOC after rule was proposed, which were not part of rule-making process for public comment
  - Fact that EEOC's burden/cost analysis did not account for these data file specifications
  - OMB believes the collection of the information violates the Paperwork Reduction Act, lacks practical utility, is unnecessarily burdensome, and does not address privacy/confidentiality issues



# *New Illinois Statutes*

## **Employee Sick Leave Act**

- Effective January 1, 2017 (amended January 13, 2017)
- **DOES NOT REQUIRE EMPLOYERS TO PROVIDE SICK LEAVE**
- **DOES REQUIRE:** Employers to allow Employees to use personal sick leave benefits already provided by the Employer to cover absences due to an illness, injury, or medical appointment of the employee's family member [on the same terms upon which the employee is able to use sick leave benefits for his/her own illness or injury].
  - “**Family member**” includes the “employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.”



# *New Illinois Statutes*

## **Employee Sick Leave Act**

- **Personal sick leave benefits** means “any paid or unpaid time available to an employee as provided through an employment benefit plan or paid time off policy to be used as a result of absence from work due to personal illness, injury, or medical appointment.”
  - An employment benefit plan or paid time off policy does not include long term disability, short term disability, an insurance policy, or other comparable benefit plan or policy.



# *New Illinois Statutes*

## **Employee Sick Leave Act**

- **Limitations on Application**

- Does not apply to employers subject to Title II of the Railway Labor Act, employers/employees under federal Railroad Unemployment Insurance Act, or Sections 51 through 60 of the Federal Employer's Liability Act
  - Essentially means that the Act applies to employers not in railroad or airline business
- Does not invalidate, diminish, or interfere with any CBA or any party's power to collectively bargain for such an agreement
- Department of Labor may adopt rules that could further limit application or create exemptions



# *New Illinois Statutes*

## **Employee Sick Leave Act**

- Limitations on Application
  - Employers may limit the use of personal sick leave benefits for absences due to an illness of family member to an amount not less than the leave that would be earned or accrued during 6 months at the employee's then current rate of entitlement.
  - Employers who base personal sick leave benefits on years of service may limit amount of sick leave to be used to half of the employee's maximum annual grant.
  - Act does not extend the maximum period of leave to which an employee is entitled under FMLA





# *New Illinois Statutes*

## **Employee Sick Leave Act**

**Retaliation Prohibited:** An employer may not deny an employee the right to use sick leave in accordance with the Act, and may not retaliate against an employee for using personal sick leave benefits, attempting to exercise his/her rights under the Act, filing a complaint with the DOL, or cooperating in an investigation associated with a violation of the Act, or opposing any policy or practice prohibited by the Act.

- HOWEVER – the Act expressly states that it does not prohibit an employer from applying/enforcing the terms and conditions set forth in the employment benefit plan or paid time off policy applicable to personal sick leave benefits.



# *New Illinois Statutes*

## **Child Bereavement Leave**

- Passed and Effective on July 29, 2016
- Allows employees up to 2 weeks (10 work days) of unpaid leave to attend the funeral (or alternative) of a child, to make arrangements necessitated by the death of a child, or to grieve the death of a child.
  - Up to six weeks in the event of the death of more than one child
- **Child** means an employee's "son or daughter who is a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis."



# *New Illinois Statutes*

## **Child Bereavement Leave**

- Employer and Employer are defined in accordance with the Family and Medical Leave Act (FMLA).
  - Only applies to employers with 50 or more employees.
  - Employees must have worked 1,250 hours in prior 12 months to be eligible for leave under Act.
- Leave must be completed within 60 days of notice of the death.
- Employee must provide the employer with at least 48 hours' advance notice, unless it is not reasonable and practicable.
- Employer may require reasonable documentation [death certificate, published obituary, written verification from funeral home, religious institution or governmental entity].



# *New Illinois Statutes*

## **Child Bereavement Leave**

- Act expressly prohibits an Employer from retaliating against an employee exercising, or attempting to exercise, his or her rights under the Act
- Employee who believes his/her rights under Act have been violated may file complaint with IL DOL w/in 60 days of violation
- Penalties
  - Civil penalty not to exceed \$500 for first offense (for each employee affected)
  - Civil penalty not to exceed \$1,000 for subsequent offenses (for each employee affected)
  - Civil action seeking injunction and other equitable relief



# *New Illinois Statutes*

## **IL Right to Privacy in the Workplace Act**

- Previously the Act prohibited Employers from requesting an employee's passwords to social networking websites;
- Effective January 1, 2017 the scope of the Act was expanded to include "Personal Online Accounts (POAs)" defined as "an online accounts that is used by a person primarily for personal purposes."
  - POAs do not include an account created, maintained or used by a person for a business purpose of the person's employer



# *New Illinois Statutes*

## **IL Right to Privacy in the Workplace Act**

- Amended Act now prohibits an employer from:
  - Requesting, requiring or coercing any employee or prospective employee to authenticate or access an online account in the presence of the employer;
  - Requiring or coercing an employee to invite an employer to join a group affiliated with the POA;
  - Requiring or coercing the employee to join an online account established by the employer or add the employer to the employee's list of contacts in the employee's POA.
- Act also now includes Retaliation provisions, prohibiting an employer from disciplining or discharging employee who refuses access to a POA or refuses to participate in any prohibited activity under the Act.



# *New Illinois Statutes*

## **IL Right to Privacy in the Workplace Act**

- Act also states that nothing in statute shall prohibit an Employer from:
  - Complying with State and federal laws, rules, and regulations and the rules of self-regulatory organizations created pursuant to federal or State law
  - Requesting or requiring employees or prospective employees to share **specific content** that has been reported in order to:
    - (1) ensure compliance with applicable laws or regulatory requirements;
    - (2) to investigate an allegation, based on receipt of specific information, of the unauthorized transfer of an employer's proprietary or confidential information or financial data to an employee or applicant's personal account;
    - (3) to investigate an allegation, based on receipt of specific information, of a violation of applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct;
    - (4) to prohibit an employee from using a personal online account for business purposes; or
    - (5) to prohibit an employee or applicant from accessing or operating a personal online account during business hours, while on business property, while using an electronic communication device supplied by, or paid for by, the employer, or while using the employer's network or resources, to the extent permissible under applicable laws.

**NOTE:** Even when engaged in above activity, an employer may not require a password or other means of authentication that provides access to the employee or applicant's personal online account.



# *New Illinois Statutes*

## **IL Right to Privacy in the Workplace Act**

- Amended Act also provides that an employer that “inadvertently receives” the password or other info which would allow it to gain access to a POA is **not** liable unless:
  - uses that information, or enables a third party to use that information, to access the employee or potential employee's personal online account; or
  - after the employer becomes aware that such information was received, does not delete the information as soon as is reasonably practicable, unless that information is being retained by the employer in connection with an ongoing investigation of an actual or suspected breach of computer, network, or data security. Where an employer knows or, through reasonable efforts, should be aware that its network monitoring technology is likely to inadvertently to receive such information, the employer shall make reasonable efforts to secure that information.





# *New Illinois Statutes*

## **Illinois Freedom to Work Act**

- Effective January 1, 2017
- **Background:** IL Attorney General sues Jimmy Johns in June of 2016 over covenants not to compete required of its delivery drivers and shop workers
  - For 2 years after leaving Jimmy Johns, the employee may not work at another business within 2 miles of a Jimmy Johns that gets 10% of its revenue from selling sandwiches;
  - State of New York piled on – brought its own action
- Concerned about impact of covenants on limiting mobility of low-wage workers, Illinois legislature acted “*freaky fast*” and passed law on August 19, 2016



# *New Illinois Statutes*

## **Illinois Freedom to Work Act**

- Prohibits and declares void any covenant not to compete between an Employer and low-wage Employee.
  - **Low-wage employee:** an employee who earns the greater of (1) the hourly rate equal to the minimum wage or (2) \$13.00 per hour.
  - **Covenant not to compete:** any agreement that restricts the employee from performing (A) any work for another employer for a specified period of time, (B) any work in a specified geographical area, or (C) work for another employer that is similar to the work that the employee is performing for the employer.



# *New Illinois Statutes*

## **Victims' Economic Security and Safety Act**

- Amended Effective January 1, 2017 to increase the number of Employers subject to the Act;
- Expands definition of Employer (Section 10) to include any person that employs at least one employee [previously required Employer to employ 15 employees to be covered].
- Section 20 of the Act amended to add additional category of required leave, now providing that an employee working for an employer that employs at least one but not more than 14 employees shall be entitled to a total of 4 workweeks of leave during any 12-month period.
  - Law also provides 12 weeks of leave if the Employer has 50 or more employees, and 8 weeks of leave if the Employer has 15 to 49 employees



# *New Illinois Statutes*

## **Domestic Workers Bill of Rights Act**

- Effective January 1, 2017
  - Domestic Workers historically excluded from protections of State Law
- Amends the Illinois Human Rights Act, Minimum Wage Law, Wages of Women and Minors Act, and One Day Rest in Seven Act to include Domestic Workers.
- Domestic Worker defined as a person performing any of the following: (1) housekeeping; (2) house cleaning; (3) home management; (4) nanny services; (5) caregiving, personal care or home health services for elderly persons or persons with an illness, injury, or disability who require assistance in caring for themselves; (6) laundering; (7) cooking; (8) companion services; (9) chauffeuring; or (10) other household services for members of households or their guests in or about a private home or residence or any other location where the domestic work is performed.



# *New Illinois Statutes*

## **Domestic Workers Bill of Rights Act**

Excluded from coverage under the Act:

- Persons performing domestic work for immediate family members;
- Child and day care home providers participating in the child care assistance program under the IL Public Aid Code
- Persons employed by one or more employers and who perform domestic work for less than 8 hours per week in the aggregate on a regular basis, exclusive of individuals whose primary work duties are caregiving, companion services, personal care or home health services for elderly persons or persons with an illness, injury, or disability who require assistance in caring for themselves
- Persons who are (a) free from control and direction over the performance of his/her work; (b) are engaged in an independently established trade, occupation, profession or business; (c) or who are deemed a legitimate sole proprietor or partnership.



# *New Illinois Statutes*

## **Illinois Wage Assignment Act**

- Effective January 1, 2017 the Act was amended as follows:
  - Eliminated the 84-day expiration period for wage assignments, and now provides that a wage assignment demand will apply to wages due at the time of service of the demand and upon subsequent wages until the total amount due under the assignment is paid;
  - Act also now allows an employee to revoke a wage assignment by written notice, if the wage assignment is revocable under federal law.
- Changes were also made to language set out in the Act to be used as “form” demands and notices to reflect the above changes.



# Legislation Pending in Illinois:

## *How may the government help you?*

**SB 2147: Healthy Workplace Act** – If enacted into law, it would require employers to provide paid sick days to employees:

- Would allow employees to earn and use up to 7 paid sick days during a 12-month period;
  - Would apply to full-time and part-time employees;
  - Could be used for events such as illnesses, injuries, or health conditions of the employee or his or her family member; medical appointments or seeking medical diagnosis for the employee or his or her family member; closures related to a public health emergency; and being or having a family member who is a victim of domestic violence.
- Family member is defined in the bill as a child, spouse, parent, or the child or parent of an employee's spouse.



# Legislation Pending in Illinois:

## *How may the government help you?*

**HB 3297: Employee Paid Health Care Time Act** – if enacted it would require employers to provide accrued paid health care time to employees:

- For employers with 50 or more employees, paid health care time would be provided at a rate of not less than 1 hour for every 22 hours worked;
  - For employers with less than 50 employees, paid health care time would be provided at a rate of not less than 1 hour of paid health care time for every 40 hours worked.
- Employees could use paid health care time for illnesses, injuries, and medical appointments, or for caring for family members.
    - Family member: child, stepchild, foster child, parent, parent-in-law, grandparent, spouse, or domestic partner, or a ward of the employee who lives with the employee.
  - Accrued but unused time is not compensable on termination/separation unless otherwise agreed upon.





# Legislation Pending in Illinois:

## *How may the government help you?*

**SB 981 and HB 2462: Amendments to Equal Pay Act of 2003** – if enacted would prohibit an Employer from:

- 1) Screening job applicants based on their wage or salary history;
- 2) Requiring that an applicant's prior wages satisfy minimum or maximum criteria, and
- 3) Requesting or requiring as a condition of being interviewed or as a condition of continuing to be considered for an offer of employment that an applicant disclose prior wages or salary.

Also prohibits an employer from seeking the salary, including benefits or other compensation or salary history, of a job applicant from any current or former employer.



# Legislation Pending in Illinois:

## *How may the government help you?*

### **SB 981 and HB 2462: Amendments to Equal Pay Act of 2003**

Proposed Amendments provide for enhanced civil penalties if the Act is violated, including:

- Compensatory damages where an employee shows that the employer acted with malice or reckless indifference;
- Punitive damages and injunctive relief as may be appropriate in cases involving an employee who is paid less than the wage to which he or she is entitled.
- Director of DOL may seek injunctive relief for unpaid wages.
- **VETOED BY GOV. RAUNER ON AUGUST 25, 2017**



# Legislation Pending in Illinois:

## *How may the government help you?*

**SB 81 Minimum Wage Increase** – if enacted would increase minimum wage in Illinois:

- To \$9 per hour from Jan. 1, 2018 to Dec. 31, 2018;
- To \$10 per hour from Jan. 1, 2019 to Dec. 31, 2019;
- To \$11.25 per hour from Jan. 1, 2020 to Dec. 31, 2020;
- To \$13 per hour from Jan. 1, 2021 to Dec. 31, 2021;
- And to \$15 per hour after Jan. 1, 2022.

**VETOED BY GOV. RAUNER ON AUGUST 25, 2017**