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2020 in the Rearview Mirror: Looking Forward to Key Illinois Employment Issues in 2021 and Beyond

Annual Illinois Employer Update Part 1 | February 2, 2021

Welcome! We will begin the program shortly.

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2020 In the Rearview Mirror: Looking Forward to Key Illinois Employment Issues in 2021 and Beyond

1. Impact of COVID-19 in the Workplace
2. I&D Considerations for 2021
3. What to Expect from a Biden Administration
4. Update on Illinois laws

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Impact of COVID in the workplace

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Impact of COVID in the workplace

1. COVID-19 vaccines
2. Practical tips for notification and reporting
3. COVID-19 leave laws
4. Permanent work from home arrangements
5. Expense reimbursements

COVID-19 vaccines

What is your company planning to do by way of vaccinating employees?

1. Incentivize
2. Voluntary
3. Mandatory
4. Unsure

COVID-19 vaccines

Can employers make COVID-19 vaccines mandatory?

Generally, yes, with two exceptions

First exception: "Reasonable accommodations" for employees who have an ADA-covered disability that would prevent them from taking the vaccine, unless providing the accommodation would constitute an undue hardship for the employer's business (a significant difficulty or expense).

- The FDA has advised individuals with a history of significant allergic reactions, those who are on immunosuppressive therapies and pregnant and breastfeeding women to consult with a physician before taking the vaccine. These are examples of health-related reasons employees may proffer in response to a mandatory vaccine policy.
- Allergies: There is ADA case law that considers allergies in the context of vaccines, with one case holding that commonplace allergies don't rise to the level of a disability, while another case found that severe anxiety about the side effects of a vaccine might constitute a protected disability.

COVID-19 vaccines

Can employers make COVID-19 vaccines mandatory?

Second exception: Under Title VII, employers also must provide reasonable accommodations to employees whose sincerely held religious beliefs or practices prohibit them from the taking the vaccine, unless doing so would constitute an undue burden for the business (a more than *de minimis* cost or burden).

In addition, state and local statutes prohibiting religious or disability discrimination may apply.

- The Illinois Human Rights Law, the Chicago Human Rights Ordinance and the Cook County Human Rights Ordinance all prohibit discrimination in employment on disability or religious observance grounds.

COVID-19 vaccines

Requesting proof for reasonable accommodations

When employees request a medical exemption under the ADA

- Employers can request medical certification of the disability limiting vaccination (if the disability and need for accommodation aren't obvious). Specifically, employers can require an employee seeking an accommodation to provide a health care provider certification confirming that the employee is disabled and describing the restrictions imposed by the disability on the employee's ability to be inoculated with an employer-required vaccine.

When employees request an exemption based on a sincerely held religious belief

- The employer may inquire into the sincerity of the employee's religious belief, including requesting third-party verification that the employee sincerely holds the asserted religious belief (from a religious official, fellow church member, or others who are aware of the employee's religious belief).
  - Employers should not insist on clergy certification, and should accept verification from non-clergy who can verify the employee's religious beliefs.

COVID-19 vaccines

Consider a three-tier strategy for vaccinating employees

Voluntary

- Several employees may be eagerly awaiting the opportunity to be vaccinated. Encourage these employees to be vaccinated as soon as possible, and to report that they have been vaccinated for tracking purposes.

Incentives (“the carrot”)

- There may be certain “slow to say yes” employees who might agree to be vaccinated if you offer an incentive.
- For example, Dollar General has offered to provide employees with 4 hrs of pay if they get the vaccine, and Instacart will give $25. Trader Joe’s and Aldi will provide 2 hrs of pay/dose.
- Keep an eye on the EEOC’s proposed wellness final rule (which is currently subject to President Biden’s broad-based regulatory freeze, but it remains to be seen whether the final rule—either in its current form or another version—will ultimately prevail).

Mandatory (“the stick”)

- When widespread vaccination is available, consider requiring employees to be vaccinated by a certain date (assuming availability of vaccine supplies and notwithstanding necessary reasonable accommodations), with vaccination required before they can enter the worksite.

COVID-19 vaccines

Helpful Q&A as your workforce becomes vaccinated

If I've been vaccinated, do I still have to wear a mask?

- Yes. The CDC and OSHA recommend that those who have been vaccinated continue to take all of the same COVID-19 safety precautions as those who have not been vaccinated (i.e. wearing a mask, keeping a 6' social distance from others, washing hands often, etc.). There's not enough information at this time regarding the protection vaccines provide in real-world conditions, or whether the vaccine prevents spread of the virus, to do away with masks.

I've been vaccinated, and had some symptoms as a result. I'm fine now, but I didn't like feeling sick. Will I have to be vaccinated again in the future?

- Possibly. The CDC won't know how long immunity lasts after vaccination until there is more data on how well COVID-19 vaccines work in real-world conditions. In addition, depending on variants and other mutations, you may need to receive a booster.

I already had COVID-19 and recovered. Do I have to be vaccinated?

- Yes. The CDC recommends vaccination regardless of whether you already had COVID-19 infection. Check with your doctor regarding timing, because if you were treated for COVID-19 symptoms with monoclonal antibodies or convalescent plasma, you should wait 90 days before getting a COVID-19 vaccine.

COVID-19 vaccines

Incentives for vaccines and the EEOC's proposed wellness rule

Employers should be careful when considering incentives for a voluntary vaccine.

The ADA applies to employer-sponsored wellness programs that include a medical exam or disability-related inquiry, generally permitting employers to make medical examinations or inquiries in connection with a wellness program but only if the program is "voluntary."

In January 2021 the EEOC issued a Notice of Proposed Rulemaking that would limit incentives in connection with a participation-only wellness program to "de minimis“ value (i.e. water bottle or gift card). More than “de minimis” value could make the program mandatory instead of voluntary, triggering ADA restrictions.

Employers can avoid the ADA if they structure their vaccination program for employees to be vaccinated by a third-party provider not under contract with the employer, because medical pre-screening questions would not be attributed to the employer. If the employer requires proof of vaccination, that should not trigger ADA restrictions because vaccination status alone is not a medical examination or inquiry.

This rule is subject to the Biden Administration’s broad-based regulatory freeze. It is unclear whether the rule will ultimately be adopted.

COVID-19 vaccines

Who pays for mandatory vaccines—the employer or the employee?

Many states and municipalities require employers to pay or reimburse employees for expenses incurred by employees in order to perform their duties. This may require employers to pay for employees to take a COVID-19 vaccine.

- The Illinois expense reimbursement law requires the employer to reimburse employees for all necessary expenditures (including reasonable expenditures required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer) incurred by the employee within the employee's scope of employment and directly related to services performed for the employer (with certain exceptions).

The time spent by a current employee waiting for a vaccination and submitting to a vaccination could be argued to be "hours worked" under the Fair Labor Standards Act (FLSA).

- The DOL opined in a FLSA opinion letter regarding employer-mandated drug tests that "attendance by an employee at a meeting during or outside of working hours for the purpose of submitting to a mandatory drug test imposed by the employer would constitute hours worked for FLSA purposes . .[.]"
- The DOL also takes the position that time spent traveling to and from the test and waiting for the test would also likely be deemed hours worked.

Employers may want to be on the safe side and compensate employees for the time spent traveling to receive and receiving COVID-19 vaccinations

COVID-19 vaccines

Possible liability issues related to mandatory vaccines

Claims if employees have severe adverse reactions from taking a required COVID-19 vaccine.

- Possible claims include claims based in negligence, violation of workplace safety compliance standards, workplace injury/wrongful death claims, claims related to requested (but denied) sick leave, and workers' compensation claims.

Claims for violation of workplace privacy standards (if, for instance, confidential employee medical information regarding vaccination is breached), and disability / religious accommodation claims.

Other claims that could arise include claims of discrimination by individuals of certain ethnic communities who have not only been hit harder by the virus, but also may be reluctant to vaccination.

Employers should check with insurance carriers to find out how carriers would handle claims, such as worker's compensation claims, related to a vaccine.

There may be immunity for employers who administer vaccines in accordance with the public health and medical response and emergency declarations of federal, state, or local authorities under the Public Readiness and Emergency Preparedness Act (the PREP Act).

State and local laws may provide a certain level of immunity for employers.

COVID-19 vaccines

When can my employees be vaccinated?

Currently, vaccine distribution is being coordinated at the state level, with many states following federal distribution guidelines.

Current CDC recommendations for those who should receive vaccinations as soon as possible:

- health care workers and long-term facility residents.
- anyone over age 65 and anyone over age 16 with underlying health conditions that would put them at increased risk for severe illness from COVID-19.

Check state and local distribution plans.

- Illinois has moved into Phase 1B of its plan, making eligible those age 65 or older and frontline essential workers (including first responders, teachers and support staff, childcare workers, grocery store employees, and postal service workers).
- Phase 1A continues (covering health care personnel, residents/employees of long-term care and assisted living facilities, and home health caregivers).

COVID-19 vaccines

What employers should be thinking about as it relates to vaccines

- Get a lay of the land when it comes to vaccines in the workforce in the jurisdictions where the company operates. Continue to monitor any new relevant federal, state and local guidance, and be certain to modify policies and protocols as applicable guidance is issued.
- Be thoughtful about company policies. Keep in mind that some individuals don't want to be vaccinated. Consider instituting policies that include religious and disability-related exemptions, as well as a three-tier (voluntary / incentive / mandatory) approach.
- Consider alternatives to mandatory vaccines, such as requiring employees who do not get vaccinated to wear face coverings in the workplace. This practice is common in medical settings when employees refuse annual flu shots.
- Don’t forget to address contract employee and visitor vaccination rules.

Practical tips for notification and reporting

Reporting a COVID-19 case in the workplace

Practical tips

Start with state and local health department websites.

- If there are particular requirements or guidelines in place, state and local health department websites will usually have helpful information and links to executive orders or laws employers should be aware of, as well as explanatory FAQs, model documents and required posting templates.

Train managers and supervisors to immediately report suspected or positive COVID-19 cases to designated Company personnel.

- Designated personnel should be well-trained on the reporting requirements and how to quickly investigate COVID-19 cases (such as determining when the individual with COVID-19 was last on the premises, where, etc.) to be able to notify and report with accurate information in a timely manner.
- The CDC website has tips on how to conduct an investigation of possible COVID-19 cases, and state and local health departments may also have helpful information.

Reporting a COVID-19 case in the workplace

Practical tips

Be aware of how, when, and to whom you need to notify of a positive or suspected positive case.

- Employers may need to provide notice not only to employees, subcontractors, and independent contractors, but also to clients or customers who were on the premises during the infectious period of an individual who has or is suspected of having COVID-19. In addition, employers may be required to report to state or local health departments or other agencies.
- Under Illinois Department of Public Health guidance, if two or more employees report having COVID-19 related symptoms or test positive for COVID-19, the employer **must** notify the local health department within 24 hours of being informed of the presence of COVID-19 symptoms or positive test results.
  - The employer should conduct contact tracing, notify all employees who were in close contact with the affected employee as soon as possible (while keeping the affected employee's name confidential), and allow those employees to quarantine for 14 days.
  - The employer should also notify its employees that there has been a confirmed COVID-19 case in the workplace (while keeping the name of the affected employee confidential).

Reporting a COVID-19 case in the workplace

Practical tips

Keep personal identifying information and any medical information of any individual with COVID-19 or who may have been exposed to COVID-19 confidential when notifying others.

- Under the ADA, and often state and local law, employee medical information must be kept confidential and only accessed on a "need to know" basis. Under the ADA, if employers keep medical information, the information must be kept in a confidential medical file separate from the employee's personnel file.

Reporting a COVID-19 case in the workplace

Practical tips

OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. If you have workers covered by a state-approved OSHA plan, check your state OSHA guidance.

- In Illinois, state and local government workers are covered by a state-approved OSHA plan, while private sector workers are covered by federal OSHA.
- Under OSHA, COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties if the case is a confirmed case of COVID-19, the case is work-related (as defined by 29 CFR 1904.5), and the case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (which includes requiring medical treatment beyond first aid, or requiring days away from work).

Have checklists in place to check through all required notifications and reporting.

COVID-19 leave laws

COVID-19 leave laws

Refresher on COVID-19 leave

Families First Coronavirus Response Act (FFCRA) update

- FFCRA entitlements for paid leave were not extended in the second coronavirus stimulus package (the Consolidated Appropriations Act, 2021), and expired December 31, 2020.
- However, the company may elect to provide employees who have not already exhausted their Emergency Paid Sick Leave Act (EPSLA) leave entitlements with paid leave under EPLSA for leaves taken between January 1, 2021 and March 31, 2021.
  - Employers can still take payroll tax credits for the paid leave they provide until March 31, 2021 (but only to the extent the employee did not previously exhaust their EPSLA leave entitlements).

Family Medical Leave Act (FMLA)

Company paid sick leave/paid vacation/personal/family/PTO leave

Workers' compensation

Disability insurance

Other applicable state and local leave laws (including, if applicable, the Illinois Employee Sick Leave Act, the Chicago Paid Sick Leave Ordinance, and the Cook County Paid Sick Leave Ordinance).

Permanent work from home arrangements

Permanent work from home arrangements

Considerations to keep top-of-mind

Define "remote" for your workforce

- Temporary v. permanent remote work / work from home v. work from anywhere.
- Know where your workforce is actually working (or wants to work) and then determine your compliance (employment, tax, privacy, corporate, etc.) obligations.

Define guardrails

- Determine where you will allow employees to work.
- Key employment considerations will be head count triggers, such as application of paid sick leave laws in certain US states which have minimum head count requirements, changes in pay equity analysis due to impact of location change on cohort analysis, change in EEO-1 reporting to the Equal Employment Opportunity Commission.
- Other employment considerations: ensuring that telecommuting employees can remain subject to company rules and expectations — such as policies regarding anti-discrimination and anti-harassment, information technology resources and communications systems, confidential and proprietary information, and workplace safety.
- The decision point is often whether to allow employees to relocate to states (or countries) where the company does not yet have a legal presence.

Permanent work from home arrangements

Considerations to keep top-of-mind

Design an application process with established criteria

- Set out a clear policy on the application process and eligibility criteria, while reserving the right to terminate the remote work opportunity.
- Develop template application requirements, such as minimum seniority, excluded positions, interviewing with management in the new location, and whether a justification is required.
- Determine which job positions can be performed productively in a remote setting.
- Define eligible locations and decide whether to implement headcount limits by qualifying location.
- Establish objective criteria for accepting and rejecting applications.
- Consider that once the remote work policy is implemented, it will be difficult for the company to reject remote work requests outside of the policy — e.g., as a reasonable disability accommodation on the basis of business hardship.
- The communication related to this application process should make clear that the applicant is responsible for all changes in the individual's tax consequences as a result of relocations made in connection with the program.

Permanent work from home arrangements

Considerations to keep top-of-mind

Craft policies to support the remote model. Consider:

- What salary/cost of living adjustments may be appropriate depending on the transferring employee's new location.
- How the employer will provide remote workers with the equipment necessary and whether certain costs will be covered.
- How the company will track hours/overtime for remote workers in accordance with applicable local law.
- How the company will provide mandatory rest breaks to remote workers in accordance with applicable local law.
- What business travel policy updates may be necessary.
- How to mitigate increased risks of misappropriation of confidential information and loss of trade secret status.
- How to strengthen the payroll function so that the more complicated employer tax withholding requirements are appropriately satisfied.
- Carefully set expectations with employees that remote work is a privilege — not a right — to maintain flexibility to deny applications and/or recall employees back to the workplace if necessary.

Permanent work from home arrangements

Considerations to keep top-of-mind

Communicate expectations and compensation

- Provide employees with an individualized remote work agreement.
- Communicate the effective date of the arrangement, expected hours of work, home office inspection agreement, use of equipment, reimbursement/stipends and insurance requirements.
- If necessary, align compensation with the local market/workforce.
- Confirm the work location — to document the employee's representation of which state they are actually working, and paying taxes in — and remind employees that they continue to be responsible for the tax consequences.
- Protect the company's right to recall employees to an onsite location, to the extent allowable under local law.

Expense reimbursements

Expense reimbursements

The basics

- No federal requirement to reimburse employees for business-related expenses
  - Though the FLSA does not require employers to reimburse their employees, under the FLSA "kickback" rule, employees cannot be required to directly pay business-related expenses or reimburse their employer for such expenses if doing so would cause the employee's wage rate to fall below the required minimum wage or overtime compensation thresholds.
- Several states / municipalities (including Illinois, New York, California, and the District of Columbia) have specific requirements applicable to employee expense reimbursements
- Failing to reimburse employees can lead to class or collective actions and quickly become incredibly burdensome for employers

Expense reimbursements

Illinois expense reimbursement law (amendment to the Illinois Wage Payment and Collection Act, 820 ILCS 115/9.5)

Illinois employers are required to reimburse employees for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer.

- "Necessary expenditure" covers all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer.
- Excludes losses due to an employee's own negligence, losses due to normal wear, or losses due to theft (unless the theft was a result of the employer's negligence) from the scope of reimbursement.
- Employees are not entitled to reimbursement if (i) the employer has an established written expense reimbursement policy and (ii) the employee failed to comply with the written expense reimbursement policy.
- If the written expense reimbursement policy establishes specifications or guidelines for necessary expenditures, the employer is not liable for the portion of the expenditure amount that exceeds the specifications or guidelines of the policy as long as the employer does not institute a policy that provides for no reimbursement or *de minimis* reimbursement.

Expense reimbursements

Common reimbursable items

Some common reimbursable items for remote work situations could include reimbursement for the purchase of (or the cost of a portion of):

- Office equipment
- Office supplies
- Electronic supplies (such as a mouse, a headset, and additional cables)
- Subscriptions
- Training / seminar costs

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Inclusion & diversity considerations for 2021

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Inclusion and diversity considerations for 2021

1. Setting diversity goals/benchmarks
2. Collecting and documenting diversity data
3. Pros and cons of publishing diversity goals
4. Pay equity

Setting diversity goals / benchmarks

Setting diversity goals / benchmarks

General considerations to keep top-of-mind

- Avoid the use of actual quotas (i.e., mandating that "X" number of women or people of color are hired/promoted, for example).
  - While the diversity goals are factors that should be considered, decisions are not to be made solely based on protected group membership.
- Focus on goals that are realistic based on your organizational profile.
  - If you would like to achieve 40% female representation at a certain organizational level, is that possible based on the pipeline of potential female candidates at lower levels of the Company? Or should a lower percentage be used based on that pipeline?
- Ensure the metrics the company is using are consistent with, and will help in achieving, its diversity goals.
  - If the company's goals focus on more diversity in lower-level positions, then it may not make sense to focus on metrics limited to just management-level and above.

Setting diversity goals / benchmarks

General considerations to keep top-of-mind

Take a holistic approach that is in substantial part grounded in data and data analytics.

- Look at factors like rate of application in external and internal applicant data, rates of promotion, hiring-related data (including, potentially, census data), and data reflecting turnover rates.
- Analyze your particular data – both internally and, potentially, externally in the form of applicant flow and/or census data – in order to determine what goals may be realistic based on where things are currently.
- Set **realistic** goals based on your data analysis. There are adverse consequences if you set goals and don't meet them (because they were unrealistic to begin with).

When setting benchmarks, include some concept of timing to ensure that the numbers are realistic.

- For instance, it may be feasible to increase total representation of persons of color from 20% to 30% in 10 years, but less so in 5 years and unlikely in 3 years.

Review goals and benchmarks to confirm they are data-driven.

- For example, a goal to increase from 20% to 25% POC in new hire representation over a three-year period may be more closely tied to data than a goal of doubling the percentage (i.e. from 20% to 40% POC). Take care to ensure figures are based on data such as applicant data and census information.

Collecting and documenting diversity data

Collecting and documenting diversity data

Mitigate risks and pitfalls in documenting diversity metrics

Develop a cohesive strategy around privilege and confidentiality.

- There is legal risk associated with the tracking of diversity-related metrics, especially when documents/materials are not protected by the attorney-client privilege.
- If legal is involved/copied on the documents/emails, there is greater flexibility in terms of the content since those documents are likely protected by the attorney-client privilege (assuming the counsel is being engaged for purposes of providing legal advice).
- Ensure only very limited individuals at the company have access to the data.

Determine whether the diversity information the company needs can be lawfully and successfully collected.

- There are various issues associated with collecting race information outside of the US.
- Gender data can generally be collected in and outside of the US.
- There can also be an issue with having insufficient data (e.g., a company has the race of only 30% of its employees) and making decisions off of it.

Collecting and documenting diversity data

Mitigate risks and pitfalls in documenting diversity metrics

Ensure that conclusions are supported by data.

- If women hold a lower percentage of positions at higher levels in the Company, there may be an inference that they are "underrepresented" or "disfavored." However, unless you have actually analyzed your own data (both internally and potentially externally) to determine actual statistical underrepresentation, these statements may be misleading, and embedding them in diversity-related documents can create legal risk.

Avoid unnecessary characterizations of diversity-related data.

- Avoid discussing diversity data/metrics in a way that suggests the company has done something wrong (e.g., "we did not promote enough women this past cycle"), especially in documents not protected by attorney client privilege.
- Rather, when discussing such data, the emphasis should be on identifying opportunities for future improvement (e.g., "we should strive to increase our gender representation next year by…").

Which of the following best describes where your company is right now with its D&I goals?

1. Publishing our goals externally
2. Setting goals internally but no plans to publish externally
3. Setting goals internally with aspirations to publish externally
4. Still deciding

Pros and cons of publishing diversity goals

Pros and cons of publishing diversity goals

The pros

Any risks of publishing diversity goals should be balanced against the pros

- Potential positive impact on employee engagement
- Increased employee morale
- More effective recruiting
- Increased accountability in the organization
- Goodwill in the community and with clients/customers

Pros and cons of publishing diversity goals

The cons

To the extent you publish diversity goals, these documents may be used against you in litigation.

- This is true both in "traditional" discrimination cases and "reverse" discrimination cases.
- The use/misuse of company diversity materials is commonplace.
  - If a company publishes a diversity goal of wanting to promote X% of diverse candidates into management roles, or Y% of females into "senior roles," and those goals aren't achieved, the company might face an argument that the failure to achieve the stated diversity goal is evidence of mistreatment of the protected group.
  - Conversely, if the company publicly states that it has specific diversity goals around promotion, those statements can be used by non-protected group members who may argue that the company has an express policy that favors diverse/minority employees.

Ensure that any publicly announced diversity goals align with any governmental reporting obligations, to avoid subjecting the company to additional risk from a governmental investigation perspective.

Once a company starts publishing goals, there will be pressure to continue publishing such information externally, as well as scrutiny if the goals aren't achieved or if the goals are viewed as “insufficient.”

Publishing goals may result in government contractors’ objections to FOIA requests for EEO-1 data to be overruled.

Pay equity

Pay equity

Illinois Equal Pay Act refresher

Equal pay

- Employers may not discriminate on the basis of sex by paying to an employee wages less than an employee of the opposite sex who performs the “same or substantially similar work.”
- Employers may not pay African-American employees who are performing the “same or substantially similar work” less than other employees.
- Employers can defend against pay disparities based on seniority, earnings, merit, quantity or quality of production, or any other non-discriminatory fact that:
  - Is not derived from a differential in compensation based on sex or another protected characteristic;
  - Is job related and consistent with business necessity; and
  - Accounts for the differential.

Pay equity

Illinois Equal Pay Act refresher

Freedom to discuss wages:

- Employers cannot require employees to enter contracts prohibiting them from discussing their wages, salary, benefits or other compensation.
- However, there's an exception for Human Resources Professionals, who cannot disclose other employees' information without the employee's prior written consent.

Salary history ban:

- An employer cannot:
  - Screen job applicants based on current or past wages or salaries.
  - Request or require a wage or salary history from the applicant in order for the applicant to be considered for an interview or for employment.
  - Request or require that an applicant disclose wage or salary history as a condition of employment.
- However:
  - Employers can ask candidates about salary expectations.
  - There is no violation for the candidate's voluntary and unprompted disclosure of wage information, as long as the employer does not consider or rely on the disclosure when making hiring or employment decisions.

Pay equity

Updates

- **California enacted SB 973 (effective Jan. 1, 2021):** California employers with 100 or more employees will be required to submit to DFEH a "pay data report" by no later than March 31, 2021, and annually thereafter, providing detailed information regarding employee compensation.
- **Colorado's Equal Pay for Equal Work Act (effective Jan. 1, 2021):** Intended to increase pay equity and transparency, imposes new notice and recordkeeping requirements, and encourages companies to self-audit their compensation practices.

Pay equity audits

Key considerations

The purpose and goals of the audit. If the company is facing threatened or immediate litigation—as opposed to conducting the audit for general compliance purposes—it could change the way the audit is conducted.

The breadth and scope of the audit. Whether the audit covers the entire workforce, or just certain departments, and the time period and forms of compensation being included. Companies with operations in multiple states or countries will need to consider different compliance requirements--both for conducting the audit and complying with pay equity laws.

The data collected and analyzed. Pay disparities may be explained by an employee's gender, race, ethnicity, age, location, education, experience, performance, and other factors. Companies should determine which data points to focus on, including the type of compensation and the factors used to determine pay.

Timing of the audit. If a company is conducting an audit to remediate pay disparities, the company may want to consider timing the finalization of the audit to coincide with the company's annual cycle for reviews, promotions, or pay increases to decrease the likelihood of litigation or decreased employee morale that can follow off-cycle pay increases for only a certain population of employees.

After the audit. Establish and follow a remediation plan to address pay disparities, and monitor the outcome to make adjustments as necessary. Periodically revisit company policies and systems to resolve pay disparities, and train and educate personnel to ensure mitigation of future pay equity issues.

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What to expect from a Biden administration

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What to expect from a Biden administration

1. Executive Orders and Memoranda—a flurry of activity from Day One
2. Big changes in agency leadership
3. The PRO Act—a sea change in the labor landscape
4. Other expectations

What to expect from a Biden administration

Executive Orders and Memoranda—a flurry of activity from Day One

- Biden issued a memorandum to all agencies to freeze all new so-called “midnight regulations” put in motion by the prior administration to give the Biden Administration time to determine whether they will become final, be amended, or rescinded altogether.
- Biden issued an Executive Order reversing Trump’s Order banning diversity training, requiring all federal agencies to make “rooting out systemic racism” central to their work. All federal agencies must review and report on equity in their ranks within 200 days and must provide a plan on how to remove barriers to opportunities in their policies and programs. The Order also establishes an Equitable Data Working Group to gather datasets in federal agencies’ key demographic variables so the government can measure and advance equity.
- Biden issued an executive order reinforcing that Title VII prohibits the federal government from discriminating on the basis of sexual orientation or gender identity.
- Biden issued an executive order restoring collective bargaining power for federal workers. During his campaign, Biden endorsed provisions of the Protecting the Right to Organize Act (PRO Act), which would make it easier for unions to organize workers by increasing penalties for companies breaking the law in trying to keep unions out.

What to expect from a Biden administration

Executive Orders and Memoranda—a flurry of activity from Day One

- Biden issued an Executive Order directing OSHA to issue revised guidance on workplace safety during the pandemic within 2 weeks (which OSHA issued on January 29, 2021), to consider whether COVID-19 emergency temporary standards are necessary for businesses (and to issue any such standards by March 15, 2021), and to launch a national program to focus OSHA enforcement efforts related to COVID-19.
- Biden issued an Executive Order increasing the amount of federal spending going to American companies to procure goods, products, materials, and services from sources to help American businesses, and ordering an increase in domestic content.
- Biden issued a Memorandum directing federal agencies to combat the resurgence of xenophobia and racism against Asian Americans and Pacific Islanders surfacing during the pandemic.

What to expect from a Biden administration

Big changes in agency leadership

- Biden replaced National Labor Relations Board General Counsel Peter Robb with Peter Sung Ohr (Regional Director of the Chicago Region, Region 13) as Acting General Counsel, and terminated Robb's chief assistant, Alice Stock. Biden also appointed Lauren McFerran to be the Chairman of NLRB, replacing John Ring (though Ring will remain as a Board member until his term expires).
- Biden nominated Boston mayor Marty Walsh as Secretary of Labor to head the Department of Labor. Walsh is a former union leader, and if confirmed, would be the first union member in nearly half a century to be Secretary of Labor.
- Biden also named Commissioner Charlotte Burrows (Democrat) as the Chair of the EEOC, with Janet Dhillon (Republican) stepping down. Commissioner Jocelyn Samuels (Democrat) will serve as Vice Chair of the EEOC, replacing Keith E. Sonderling (Republican). Burrows will focus specifically "on initiatives to combat harassment, foster pay equity, and advance diversity and inclusion"; however, Republicans still maintain the majority in the Commission (3 to 2).
- President Biden named Jenny Yang (who previously served as EEOC Chair during the Obama Administration) to head the Office of Federal Contract Compliance Programs.
- Biden also named Jim Frederick as OSHA's Deputy Assistant Secretary. For 25 years, Frederick worked in the United Steelworkers HSE department. Given Frederick's history, employers can likely expect to see tougher workplace safety enforcement.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

- Biden campaigned on a promise to sign the Protecting the Right to Organize Act of 2019 (the PRO Act) into law. The PRO Act is a wide-ranging pro-union labor law reform bill which passed in the US House in early 2020, but stalled in the Senate.
- Organized labor is currently making a concerted push for the passage of the PRO Act, with the AFL-CIO recently declaring it as one of its top priorities for 2021.
- With a Democratic majority in the House and the Senate (albeit slim), the PRO Act is likely to be passed, which would cause a significant change in the labor landscape for employers of both unionized and non-unionized workforces.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

Under the PRO Act:

- Certain pro-employee NLRB decisions handed down from the Obama-appointed Board will be codified:
  - *Browning-Ferris Industries* (which expanded the joint employer rule, meaning employers would be more likely to be deemed “joint employers” with increased liability)
  - *Specialty Healthcare* (regarding gerrymandering bargaining units)
  - *Purple Communications* (allowing workplace email access for organizing purposes)
- California AB 5’s “ABC” test will become the federal standard for determining whether a worker is an employee or independent contractor
  - The ABC test institutes stricter requirements for classifying a worker as a contractor instead of an employee, leading to a higher likelihood of “employee” classification. The rule has tremendous implications on gig economy workers.
- All Right-to-Work laws will be banned:
  - Right-to-work laws prohibit employers and unions from requiring employees to join or pay fees to the union as a condition of employment.
  - Currently, 28 states have right-to-work laws.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

Under the PRO Act (cont.):

- "Ambush" election rules would be codified
  - The PRO Act would return to (and codify) the NLRB's 2015 "ambush" election rules. The rules dramatically shorten the time period between the filing of a petition for election and the actual election (giving employers less time to effectively communicate with employees about unions and unionization), require employers to provide unions with more sensitive personal employee contact information, and delaying review of voter eligibility issues until after the election.
- The "stealth" card check would be instituted
  - Under the PRO Act, when a union loses an election, the Board can declare that the employer interfered. The burden of proof would then be on the employer to show that it did not interfere in the election. If the employer can't do that, and the union certifies that it received signed authorization cards from a majority of workers (the so-called "card check" option), the NLRB can certify the union as the representative of the employees and issue an order requiring the employer to bargain with the union.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

Under the PRO Act (cont.):

- A private cause of action for unfair labor practices would be available
  - The PRO Act would inflict greater penalties on employers who violate labor laws by creating a private cause of action outside of NLRB jurisdiction, as well as by increasing the amount and type of damages available to workers.
- New civil penalties would be enforceable by the NLRB for labor law violations
  - The PRO Act would grant the NLRB the ability to award liquidated damages in amounts that are up to two times the amount of damages awarded, in addition to the traditional back pay, front pay, and consequential damages for unfair labor practices.
- Terminating an employee for engaging in strike activity would be an unfair labor practice
  - The termination of an employee who supported or participated in strike activity would be added as an unfair labor practice (but this avenue for an employee to challenge a termination is not included in Section 8(a)(3), so no private right of action and no new civil penalties would be available).
- Two years of binding arbitration would be required for first contracts
  - The bill would mandate binding arbitration upon employers and unions for two years when negotiating a first contract; instead of bargaining in good faith, employers would be required to engage in lengthy mediation until the ratification of an initial contract.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

Under the PRO Act (cont.):

- *Epic Systems v. Lewis* would be reversed
  - The PRO Act would reverse *Epic Systems Corp. v. Lewis*, in which the US Supreme Court held that arbitration agreements mandating individual arbitration are enforceable under the Federal Arbitration Act. The reversal would likely lead to a dramatic increase in class action lawsuits.
- Employers would be banned from permanently replacing strikers
  - The PRO Act would forbid employers from permanently replacing strikers, severely restricting employers' ability to hire qualified employees to continue operations when a union strikes.
- Secondary boycotts would be allowed
  - Secondary boycotts occur when the union engages in picketing at the employer's suppliers' and customers' locations, with the goal of so disrupting or crippling the suppliers or customers that they pressure the employer to settle its labor disputes.

What to expect from a Biden administration

The PRO Act: a sea change in the labor landscape

Under the PRO Act (cont.):

- Partial and intermittent strikes would be legalized
  - A partial strike occurs when employees refuse to perform some of their job duties but typically remain at work, and intermittent strikes typically last for an entire day but occur repeatedly over several weeks or months, always without notice. Employees do not lose any significant wages or benefit coverage during these strikes, so they have little to no incentive to end the strike before their demands are met.
- Offensive lockouts would be banned
  - Thus, an employer would not be able to lockout employees until after the union strikes. Offensive lockouts allow the employer to bring a labor dispute to a head during the employer's slow season, when it is not likely to suffer as serious a rupture with its customers. Absent the offensive lockout, unions would have sole and exclusive control over the timing of the labor stoppage at any particular facility.
- The NLRB's 2011 "Notice Posting" requirement would be codified
  - Employers would be required to post a notice informing employees of their rights under the NLRA.
  - In 2013, the D.C. Circuit Court of Appeals held the rule was invalid.

What to expect from a Biden administration

Other expectations

Return of the revised EEO-1 Form collecting compensation data and more enforcement of pay equity measures

- This federal initiative began during the Obama years, and ended under the Trump administration.
- It seems likely that the Biden Administration will address pay equity legislation passed at the federal level.
- As a candidate, President Biden announced a holistic Agenda for Women focusing on five key areas, including economic security.

Increased national minimum wage

- Biden's platform while a candidate called for a $15 federal minimum wage.
- The Biden Administration will also likely seek to eliminate the reduced minimum wage for tipped employees (i.e., the tip credit) and will likely seek an increase in the minimum salary to qualify as an exempt employee under the FLSA.

What to expect from a Biden administration

Other expectations

Paid leave benefits for employees

- President Biden is expected to support paid leave benefits for all employees (regardless of length of time working for the employer), including 12 weeks of paid leave for all workers to care for their newborns, newly adopted or fostered children, for their own or a family member's serious health condition, or to care for injured service members or deal with "qualifying exigencies arising from the deployment" of a family member in the Armed Services.

What is your top concern with the new Biden Administration?

1. Increased union organizing / collective bargaining
2. Expanded definition of “joint employer”
3. FMLA leave mandated as 12 weeks of paid leave
4. Uncertain / no concerns

Attendance code for NY CLE

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Update on Illinois laws

Remi Balogun
Chicago

Update on Illinois laws

1. Minimum wage increases
2. Illinois venue ruling provides warning regarding remote work
3. Illinois Human Rights Act amendments
4. Private right of action under Chicago predictive scheduling law
5. HB 789 could severely curtail restrictive covenants
6. SB 1480: aims to end wage disparity, problematic for employers

Update on Illinois laws

Minimum wage increases

Illinois minimum wage increase (effective January 1, 2021)

- $11/hr for standard workers (set to reach $15/hr by 2025)
- $6.60/hr for tipped workers (set to reach $9/hr by 2025)
- $8.50/hr for workers under the age of 18 who work less than 650 hours per calendar year (set to increase to $13/hr by 2025)

Chicago / Cook County minimum wage increase (effective July 1, 2020)

- In Chicago:
  - Minimum wage increased to $13.50/hr for employers with 4 to 20 workers, and $14/hr for employers with 21 or more workers.
  - Tipped workers (workers who receive tips as part of their wage, like restaurant servers) have a minimum wage of $8.10 for employers with 4 to 20 workers, and $8.40 for employers with 21 or more workers. If a tipped worker's wages plus tips do not equal at least the full minimum wage, the employer must make up the difference.
- In Cook County, minimum wage increased to $13/hr.

Update on Illinois laws

Illinois venue ruling provides warning regarding remote work

Tabirta v. Cummings, 2020 IL 124798:

- The Illinois Supreme Court ruled a defendant food manufacturer would have had to specifically target an employee's home office in Cook County, Illinois as a place to further the defendant's business activities–as opposed to just allowing the employee to remotely work there–in order to subject the defendant to venue in Cook County.
- The court said the defendant would have needed to specifically target the part-time employee's home office as a place to further its business activities in order for it to count as an "other office" for venue selection purposes. Since the manufacturer focused on the employee's industry experience and didn't pay for any expenses related to the office (such as utility bills or rent) the manufacturer "hired a person" rather than selecting a new place of business.
- Employers should be careful.
  - Home offices in people's homes could be the basis for venue if employers advertise an employee's home office as a company location, or increase the amount of business being conducted from a particular worker's home office.
  - Employers should pay close attention to why people are working in their various locations in their home office.

Update on Illinois laws

Illinois Human Rights Act amendments (effective July 1, 2020)

Amended definition of “employer”

- The amended definition of “employer” includes employers with one or more employee.
- Prior to the amendment, an “employer” was defined as an employer with 15 or more employees (except in cases of sexual harassment, pregnancy discrimination, and disability discrimination, where the definition is one or more employees, or in cases of retaliation against individuals who file sexual harassment or discrimination charges).
- The expanded definition means:
  - Small business are subject to the IHRA (and possible race, national origin, gender, sexual orientation, religion, age discrimination and other claims under the IHRA).
  - Larger multistate businesses employing one or more Illinois workers are “employers” under the IHRA.

Update on Illinois laws

Private right of action under Chicago predictive scheduling law

Employees covered by Chicago Fair Workweek Ordinance now have a private right of action against their employers for violations of the Ordinance.

- Though the Ordinance took effect July 1, 2020, the City of Chicago delayed the effective date for an employee's private right of action under the ordinance to January 1, 2021, in response to the COVID-19 pandemic.
- Employers who employ 100 of more employees globally of which 50 or more perform the majority of their work in the City of Chicago (in the building services, healthcare, hotels, manufacturing, restaurants, retail, or warehouse services industries) are subject to the Ordinance.
- The Ordinance requires employers to post work schedules in advance and pay covered employees for schedule changes that occur after the posting deadline.
  - Covered employers must publish schedules for covered employees at least 10 days before the first working day of any new schedule (this requirement will increase to 14 days starting July 1, 2022).
  - Employers also must post amended work schedules and transmit said schedule to covered employees within 24 hours of a schedule change.
  - When an employer changes an employee's schedule after the posting deadline, the employer must provide the employee with "predictability pay" (one hour of pay at the employee's regular rate of pay).

Update on Illinois laws

HB 789 could severely curtail restrictive covenants

HB 789 would significantly limit **noncompetes** and **covenants barring customer solicitation** in the employment context

- HB 789 was introduced January 8, 2021 in the Illinois House.
- It would amend (essentially replace) the existing Illinois Freedom to Work Act, which prohibits the enforcement of noncompete covenants against “low wage employees” (those whose earnings do not exceed the greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, State, or local minimum wage law or (2) $13.00/hr).
- HB 789 would amend and expand the protections of the Freedom to Work Act to cover a significantly larger portion of the workforce.
- HB 789 applies to noncompetes and covenants not to solicit customers (does not address covenants barring the solicitation of employees or nondisclosure / confidentiality covenants).
- Coverage is limited to covenants entered into after the effective date of the act (i.e. not retroactive).

Update on Illinois laws

HB 789 could severely curtail restrictive covenants

Under HB 789:

- A covenant not to compete is void and unenforceable:
  - Unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year on the effective date of the covenant, with increases in the earnings rate to $80,000 per year in January 2027, $85,000 in January 2032, and $90,000 per year in January 2037.
  - For any employee who an employer terminates or furloughs as the result of circumstances related to the COVID-19 pandemic (or under similar circumstances), unless enforcement of the covenant includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment.
- A covenant not to solicit customers is void and unenforceable unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year.

Update on Illinois laws

HB 789 could severely curtail restrictive covenants

Under HB 789 (cont.):

- The covenant is illegal and void unless the employer advises the employee in writing to see a lawyer and provides the employee with 14 calendar days to review the covenant.
- The employee is entitled to attorneys' fees if the employee prevails in litigation regarding the agreement.
- The Bill sets forth criteria for a court to consider if the court, in its discretion, chooses to reform a restrictive covenant, including the fairness of the restraints as originally written, whether the challenged restrictions reflect a good faith effort to protect a legitimate business interest of the employer, the extent the covenant would be reformed, and whether the agreement included a clause authorizing modification.

Update on Illinois laws

SB 1480: aims to end wage disparity, problematic for employers

If signed, SB 1480 would prevent Illinois employers from discriminating against people with histories of criminal conviction

- SB 1480 passed the House and the Senate, and requires only the governor's signature to become law.
- The bill would make it a civil rights violation for an employer to use an individual's conviction record as a basis to refuse to hire or terminate employment, unless there is a "substantial relationship" between the criminal offenses and the employment position the individual is seeking.
- SB 1480 would expand protections Illinois law already provides for individuals with conviction records seeking employment. Under the Job Opportunities for Qualified Applicants Act, an employer "may not inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview" or "a conditional offer of employment is made."

Update on Illinois laws

SB 1480: aims to end wage disparity, problematic for employers

Employer considerations:

- Under the bill, before making a preliminary disqualification of a candidate, employers must consider the length of time since the conviction, the number of convictions, the nature of the conviction and the facts surrounding it, the age of the applicant at time of conviction, and evidence of rehabilitation.
- In addition, employers would be required to issue a written statement providing reasoning to any candidate they preliminarily disqualify because of a criminal record, giving the candidate an opportunity to respond within five days before a final decision is made.
  - In the written statement, employers must notify the applicant of the conditions that led to the disqualification, provide a copy of the conviction history report, and explain that the employee has an opportunity to respond to the preliminary decision by challenging the accuracy of the conviction record or providing evidence of rehabilitation.
- If the employer makes a final decision to disqualify the applicant due to a conviction record, it must then notify the applicant in writing that they have a right to file a complaint with the Department of Human Rights.

Update on Illinois laws

SB 1480: aims to end wage disparity, problematic for employers

Opponents argue vague / ambiguous language

- The bill defines a “substantial relationship” as the “job offer[ing] an opportunity for the same or similar offense to occur.”
  - Employers may also consider “whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position.”
  - Opponents argue you can’t predict whether a similar offense will occur.
- In addition, the bill also allows employers to disqualify a candidate if the candidate is deemed an “unreasonable risk” to property or the public, which opponents argue is vague.
  - Opponents argue lack of predictability and lack of clearly defined standards, including uncertainty over what qualifies as substantial (or not) and what’s reasonable (or not).

Update on Illinois laws

SB 1480: aims to end wage disparity, problematic for employers

SB 1480 would also amend the Equal Pay Act

- Requires businesses with 100 or more full-time employees to obtain an Equal Pay Certificate within three years of meeting employee count requirements, recertifying every two years afterward. The application to the Department of Labor costs $150 and must be accompanied by an “equal pay compliance statement.”
- Covered businesses would also be required to compile a list of employees over the previous calendar year broken down by gender, race and ethnicity as reported in the business's most recently filed Employer Information Report (EEO-1) with the EEOC, including salary information.
- Companies will be granted a certificate if (among other requirements) the “average compensation for its female and minority employees is not consistently below the average compensation” of male and non-minority employees – with exceptions for experience level differences.

Update on Illinois laws

SB 1480: aims to end wage disparity, problematic for employers

SB 1480 would also amend the Equal Pay Act (cont.)

- A license may be revoked when the business fails to make a “good faith effort” to comply with requirements.
  - The department must first work with a business before revocation, and has the authority to audit a business.
  - The business has a right to an administrative review of a revoked license, and can impose a civil penalty in an amount equal to 1% of the business’ gross profits if a certificate is not granted.
- The bill also ensures that employers required to file EEO-1 reports with the EEOC will also submit the employment data from that report to the Illinois Secretary of State’s Office, which will publish the data.

Q&A

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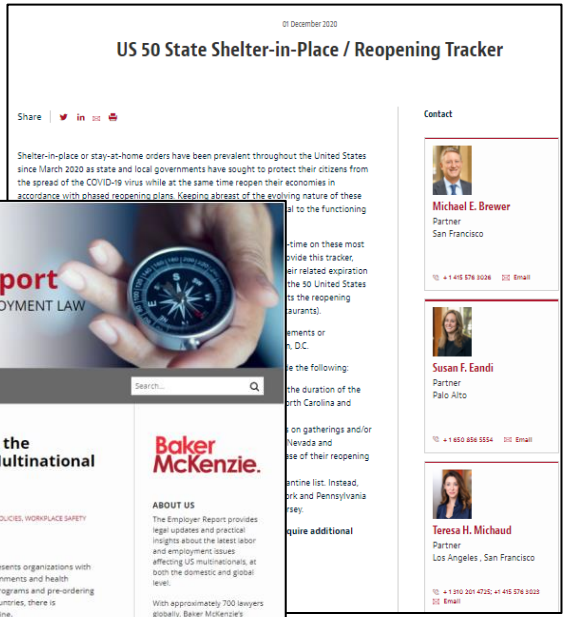
Thank you for joining us!

And, remember we have lots of resources for you ☺



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