

Legal Updates

CUPA-HR Illinois 2024 Spring Conference

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04/03/2024

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JacksonLewis

Firm Overview

- We represent employers, including higher education institutions, exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, we understand the importance of having a workforce that reflects the various communities we serve.
- With 61 locations and more than 1,000 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

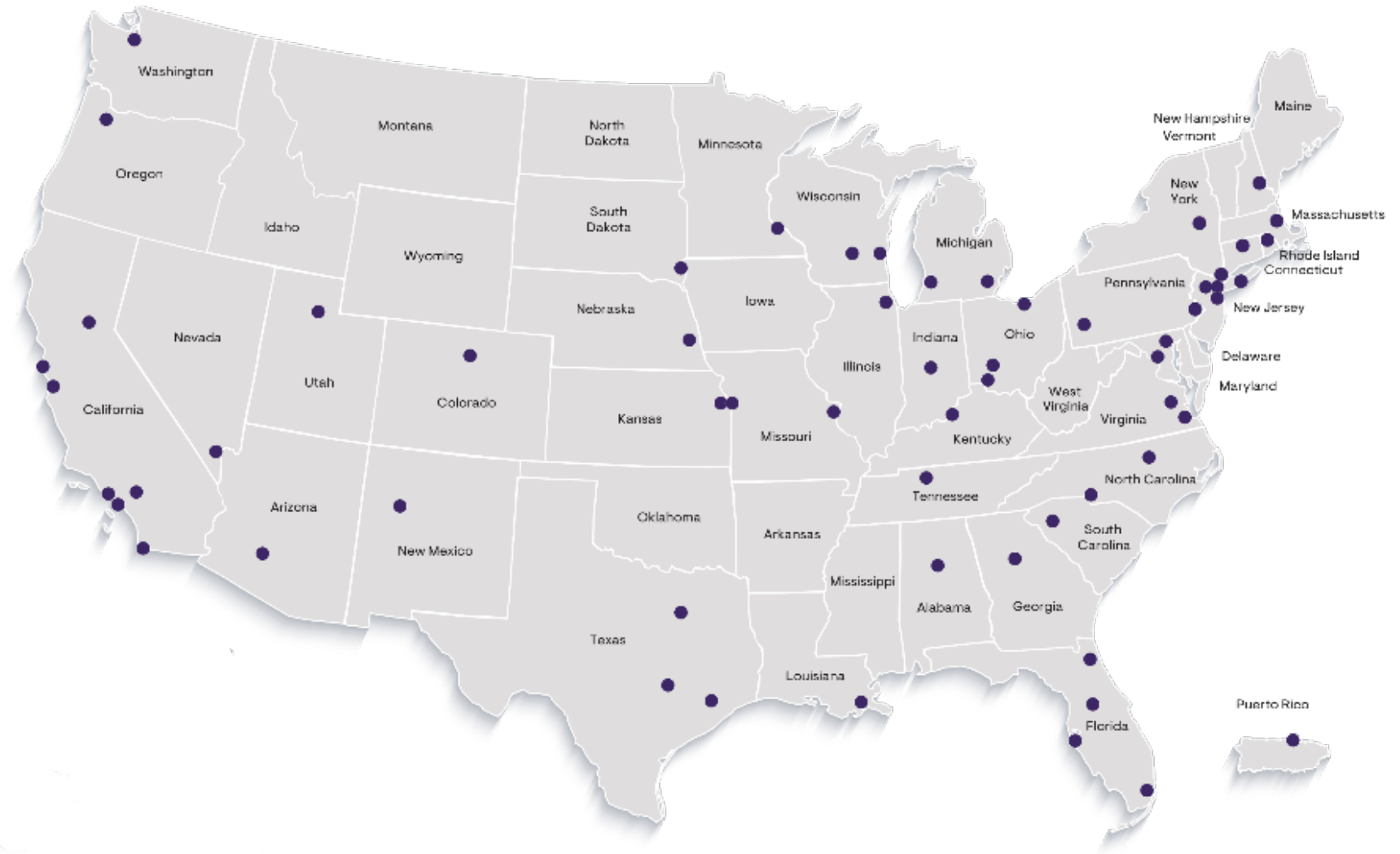
Strategically located to serve employers' needs

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Locations Nationwide

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1 | Pay Transparency

Illinois Pay Transparency Law – Effective January 1, 2025

- **Pay Transparency Requirements**

- Applies to employers with at least 15 employees
- Must include the pay scale and benefits for a specific job in a job posting in Illinois
- The “wage or salary, or the wage or salary range, and a general description of the benefits and other compensation, including, but not limited to, bonuses, stock options, or other incentives the employer reasonably expects in good faith to offer for the position.”

- **How to Determine the Pay Scale?**

- Employers should look to any previously determined range for the position, the actual range of others currently holding equivalent positions, or the budgeted amount for the position

Illinois Pay Transparency Law

Does the Illinois Pay Transparency Law Apply to Remote Positions?

Yes, in two scenarios

1. If the position will be physically performed, at least in part, in Illinois
2. If the position will be physically performed outside of Illinois, but the employee reports to a supervisor, office, or other work site in Illinois

How to Handle External Job Postings?

- If an employer makes an external job posting for a position that current employees may also apply for as a promotion, employer must announce the opportunity to current employees no later than 14 days after the external job posting is made

Illinois Pay Transparency Law

What If We Use a Third Party for the Job Posting?

- Employer must provide the pay scale and benefits, or a hyperlink to the pay scale and benefits, to the third party
- The third party is then responsible for including the information in the job posting
- Third party becomes liable for failure to include, with one obvious exception...

What Are Our Requirements for Document Retention

- Must preserve records that document the pay scale and benefits for each position as well as the job posting for each position

Illinois Pay Transparency Law

Legal Liability + Issues

- Complaints must be filed within one year from the date of the relevant violation
- Department of Labor may initiate investigations
- Fines and Penalties – when a violation occurs
 1. First Offense - \$500
 2. Second Offense - \$2,500
 3. Third Offense - \$10,000 (and for all subsequent offenses)
- Notice and Cure Period
 1. First Offense – 14 days
 2. Second Offense – 7 days
 3. Third Offense – none for 5 years following the third offense; restarts



#2

Quick Hits –
Amendments

Illinois Victims' Economic Security and Safety Act ("VESSA")

New Requirements

- Amendments to VESSA expand leave available to Illinois employees grieving a family member's death arising from a crime of violence.
- Under the amendments, employees also may take leave:
 1. To attend the funeral or alternative to funeral or wake of a family or household member who is killed in a crime of violence;
 2. To make arrangements necessitated by the death of a family or household member who is killed in a crime of violence; or
 3. To grieve the death of a family or household member who is killed in a crime of violence.

Documentation

- if the request for leave relates to a death involving a crime of violence, employees are permitted to submit a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency documenting that a victim was killed in a crime of violence.

Child Extended Bereavement Leave Act (“CEBLA”)

Requirements

- Employers with 50-249 full-time employees are required to provide 6 weeks of unpaid leave to employees who lose a child to homicide or suicide
- Employers with more than 250 full-time employees must provide 12 weeks of unpaid leave to affected employees
- Employees must have worked for their employer for at least two weeks before they are entitled to leave.
- Employees must take leave within one year from when they notify their employer of their child’s death
- Leave can be taken in a single continuous period or intermittently
- Employer can require documentation

Employee Blood and Organ Donation Leave Act

New Requirements

- Illinois expanded its Blood Donation Act to include organ donation.
- Previously, Illinois workers were eligible to take one hour of paid leave every 56 days to donate blood.
- The amended Act entitles workers to take 10 days of paid leave in any 12-month period to donate an organ.
- The law defines an organ as “any biological tissue of the human body that may be donated, by a living donor, including, but not limited to, the kidney, liver, lung, pancreas, intestine, bone, and skin or any subpart thereof.”



#3

The Pregnant
Workers
Fairness Act

Pregnant Workers Fairness Act

- Effective June 27, 2023.
- EEOC published [proposed regulations](#) on August 11.
- Public comment period closed on October 10.
- PWFA directed the EEOC to issue final regulations by December 29.
- Final Regulations released on...

**** EEOC is accepting charges and enforcing the PWFA NOW.**

5 Key Rules. Employers Cannot:

1. Fail to “make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”
2. Require an employee to accept accommodations without engaging in the interactive process.
3. Discriminate against employees based on their need for reasonable accommodations.
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided.
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation.

What is an Undue Hardship under the PWFA?

- The EEOC identifies *unique* factors to consider:
 1. length of time unable to perform the essential function(s);
 2. whether there is work for the employee if allowed to perform all the other functions of the job, transferring the employee to a different position, or otherwise;
 3. the nature of the essential function, including its frequency;
 4. whether the employer temporarily suspended the performance of essential job functions for other employees in similar positions;
 5. whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and
 6. whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.

Employees Who Cannot Perform Essential Functions May Be Entitled to Accommodation

ADA-Like Employees

- These employees can perform the essential functions of their job with or without a reasonable accommodation.
- The law does not require this ADA-Like employee to have a temporary limitation.
- If an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA).
- Employers must reasonably accommodate the ADA-Like employee subject only to the undue hardship defense.

ADA-Plus Employees

These employees **cannot perform the essential functions** of their position even with an accommodation.

ADA-Plus Employees

- The Act says:
 - These employees are qualified if (1) the inability to perform the essential job function is temporary, (2) the essential job function can be performed in the near future and (3) inability to perform the essential job function can be reasonably accommodated.
 - The EEOC says:
 - **Temporary** = lasting for limited time, not permanent, may extend beyond “in the near future”
 - **In the near future** = ability to perform essential function will “generally resume within 40 weeks.”
 - **Reasonable accommodation** may be accomplished by temporarily suspending the essential job function(s) and performing the remaining functions, transfer, light duty, or other arrangements.
- * Removing an essential function is not required if there is an undue hardship. However, the employer must consider other alternative accommodations that do not create an undue hardship.

The EEOC Says These Requests Do Not Require Medical Support:

1. Allowing an employee to carry water and drink, as needed, in the employee's work area;
2. Allowing an employee additional restroom breaks;
3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand;
4. Allowing an employee breaks, as needed, to eat and drink; and
5. Requests related to lactation

**The EEOC takes the position requesting documentation, beyond a self-attestation i.e. a signed request form, would *not* be reasonable.

What else does the EEOC say about documentation?

The employer may seek documentation that describes or confirms:

- (1) the physical or mental condition;
- (2) the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and
- (3) a change or adjustment at work is needed for that reason.

If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or parameters of a potential accommodation are not, the EEOC's position is that the employer may only request documentation relevant to the accommodation.

All medical information should be kept confidential.

Other Highlights from the EEOC's Proposed Regulations

- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified.
- Employers must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies. How much leave must be provided? *Up to the point of undue hardship.*

According to the EEOC: Some Changes May Have To Be Made To Make The Accommodation Effective

If the accommodation involves a pause in work (break, a part-time or other reduced work schedule, or leave):

An employee cannot be penalized for failing to perform work during such a non-work period.

Policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties.

Production standards may need to be prorated to account for the reduced amount of time the employee worked.

- The employee's pay for the time off work could be reduced too

OR

- The employee can be permitted (NOT REQUIRED) to make up the work on a different time.

Hypothetical #1

Shirin is a dental hygienist who is undergoing IVF treatments. She is fatigued and needs to attend medical appointments near her house every day. Shirin requests to telework for the next three months.

Shirin's essential job functions include treating patients at the dental office.

How should the employer respond?



Hypothetical #2

Nisha is a nurse working at a skilled nursing facility. Four months into her pregnancy, Nisha's doctor restricts her from lifting more than 25 pounds for the rest of the pregnancy.

Assisting patients with dressing and bathing and moving them from or to their beds are essential functions of Nisha's position. These duties require lifting more than 25 pounds.

Does the employer have an obligation to accommodate Nisha's lifting restriction?



Hypothetical #3

Tallah, a newly hired employee at a small business, has a miscarriage in the third month of her pregnancy. She requests 10 days of leave to recover. The employer is not covered by the FMLA, the employer does not have a policy regarding unpaid leave, and Tallah does not have enough paid leave to cover the full absence.

Does the employer need to consider providing unpaid leave to Tallah?






#4 | Paid Leave for All Workers Act


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Illinois Paid Leave for All Workers Act



Entitles Illinois employees to use up to 40 hours a year of paid leave *“for any reason of the employee’s choosing.”*



Passed January 10, 2023
Signed by Governor Pritzker March 13, 2023



Effective January 1, 2024

Basic Provisions of the Act

Applicability

- Covers virtually all employers in Illinois with limited exceptions
- Covers all working in Illinois (including domestic workers) with limited exceptions

Accrual

- One hour of paid leave accrues for every 40 hours worked up to 40 hours of paid leave during a 12month period (or such greater amount provided by the employer)
- Employees begin to accrue at start of employment or January 1, 2024 (whichever is later)

Rate of Pay

- Employee's hourly rate of pay; or
- Minimum wage if compensation is tip or commission based

For Any Reason

- Employee cannot be required to disclose reason for the leave or provide documentation or certification as proof or in support of the leave
- Employees cannot be required to search for replacement



Other Key Provisions

Option to frontload leave in lieu of accrual

Accrued leave carries over annually **unless** employer frontloads, then can be use-it-or-lose-it

Employers can cap use at 40 hours per 12-month period

“Reasonable minimum increments” for use of paid leave not to exceed 2 hours

Notice:

- If use is foreseeable, may require employee to provide 7 calendar days’ notice.
- If use is not foreseeable, employee must provide notice as soon as it is practicable after the employee is aware of the necessity of the leave.
- But . . . how would we know which one it is? They don’t have to tell us the reason for the leave!

More Details

For union employees:

- Existing CBA controls; do not need to comply with Act on 1-1
- Once CBA expires, must either comply, or have a new CBA with an explicit waiver in it

Does not have to be paid out on separation—unless it is lumped in with existing vacation or PTO policy

Big Compliance Questions

Combine with current vacation/PTO/sick policy? Or make a separate bucket?

Combined policy means:

- Easier administration & employees understand better
- Also will have to pay out
- Revise policy to comply with law

Separate policies means:

- Don't have to warp your current policies
- Don't have to pay out at separation
- But: increase complexity and headaches
- And: note you cannot require employees to use the buckets in a particular order—can't mandate using leave under the Act first, before regular vacation

Additional Considerations

Cook County Paid Leave Ordinance

- As of December 31, 2023, employees in Cook County can earn at least one (1) hour of paid leave for every forty (40) hours worked. This ordinance requires that all employers with employees in Cook County provide those employees with paid leave to be used for any reason.

Chicago Paid Leave and Paid Sick and Safe Leave Ordinance (effective July 1, 2024)

- Allows covered employees to take up to 40 hours of paid sick leave per year and another 40 hours of paid leave to use for any reason
- Employees can carry over up to 16 hours of paid leave for any reason and 80 hours of paid sick leave from one 12-month period to the next
- Payouts based on employer's size

Questions?

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Thank you.

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