



IT'S THE LAW



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HOW ILLINOIS GAY RIGHTS LAW AFFECTS EMPLOYERS

“Sexual orientation” is now a protected status under the Illinois Human Rights Act.

The Act prohibits unlawful discrimination in most contexts of society, including housing, public accommodations, higher education, access to financial credit, and employment. In the employment setting, it is a civil rights violation “[f]or any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the

basis of unlawful discrimination or citizenship status. The Act also prohibits harassment based upon one of the protected groups.

“ ‘Unlawful discrimination’ means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, sexual orientation, or unfavorable discharge from military service.”

“ ‘Sexual orientation’ means actual or perceived heterosexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.” A person need not actually be gay to be protected. The perception of homosexuality is treated the same as actual homosexuality.

The new “sex orientation” law does not protect sexual criminals such as molesters since the law includes a statement that “ ‘Sexual orientation’ does not include a physical or sexual attraction to a minor by an adult.” The Act also does not protect homosexual activity. While the United States Supreme Court ruled that a state statute making it a crime for two persons of the same sex to engage in a consensual act of sodomy in the privacy of their home was unconstitutional, Illinois courts generally do not state that homosexual sex is a fundamental right. The Act also does not include sexual activity in the definition of “sex,” so it may not protect homosexual sex itself.

This Newsletter is not intended as legal advice since each situation depends specifically on the facts presented. Persons reading this Newsletter should seek competent legal advice with regard to the subjects contained herein before making any employment or other decisions.

The new law applies only to an employer with at least 15 employees in Illinois for at least 20 weeks during the year of or preceding the alleged violation, but also applies to any employer that has a public contract.

Employees cannot bring suit against employers. Instead, relief is only available in and from the Illinois Department of Human Rights (“IDHR”) or the Illinois Attorney General can litigate a sexual orientation employment discrimination claim, by filing suit on behalf of the people of Illinois in certain limited circumstances by alleging a pattern and practice of discrimination. Relief in that case would be limited to equitable relief and not more than a \$50,000 fine.

What actions should employers take?

At a minimum, an employer must supplement its written non-discrimination and non-harassment policies with “sexual orientation.” Care should be given in drafting so that it would not prohibit an employee from merely expressing a religious belief or moral objection to homosexuality. Disciplining an employee for such conduct may constitute religious discrimination.

An employer also needs to train its managers to disregard sexual orientation in their management decisions while being conscious of it in the workplace. Managers will need to monitor the workplace more closely and, possibly, stop gay jokes.

A customer’s preference to work with a heterosexual employee cannot be accommodated. The Act does not permit customers’ bias to justify an employer’s unlawful discrimination, even if the employer loses business as a result.

Finally, employers should deal with workplace “sexual orientation” violations swiftly and in the same manner as sexual harassment.

Other Laws

No federal law protects gays and lesbians from private employment discrimination. However, Cook County, the City of Chicago and the City of Champaign have also prohibited sexual orientation discrimination. Employers would be prudent to check with each municipality to determine if the municipality has its own ordinance. Employers must separately comply with all such laws.

The IDOL may make a finding of failure to cooperate. The IDOL can also deny a Complaint, order discovery, subpoenas or depositions or other affirmative action under the statute.

EMPLOYER RESPONSIBILITY FOR CHILD SUPPORT

Illinois imposes various requirements on employers to comply with the child support obligations of its employees. Over 75% of child support collections comes from income withholding. However, employers must be aware of potential pitfalls and statutory penalties related to withholding employee income. The magnitude of penalties imposed by Illinois courts highlights the importance of complying with Illinois child support statutes. In 2004, an appellate court reversed a DuPage County Circuit court’s attempt to limit a failure to withhold penalty to \$38,1000 and imposed the statutorily required \$90,600 penalty on the employer. In re Marriage of Chen and Ulner, 354 Ill.App.3d 1004 (2d Dist. 2004).

Reporting

All employers are required to report newly hired employees to a state New Hire Directory. This requirement was adopted to improve support collections and reduce fraudulent unemployment and worker's compensation payments. All new employees must be reported within 20 days of their start date, and this includes full-time, part-time, temporary employees and rehires (off of the payroll for 180 or more days). Employers that hire employees from multiple states can choose to send the information to each individual state or can report to just one of the states by notifying the U. S. Department of Health and Human Services. Failure to report new employees, after being given notice by the Department, can result in penalties of \$15 per employee (or \$500 per employee and criminal penalties if the employer conspires with a newly hired employee to file false or fraudulent reports).

In addition, under 750 ILCS 5/714, employers (and unions) must provide location information regarding non-custodial parents upon request by a public office for the purpose of establishing, enforcing or modifying a child support obligation. Failure to respond within 15 days of the request can result in penalties of \$100 per day.

Health Coverage

Every employer has an obligation to report information regarding dependent coverage plans that are available to new employees upon request from the agency responsible for child support enforcement. If an employee is ordered to provide health insurance and the employer receives a copy of the court order, the employer must allow enrollment of the beneficiary without regard to any seasonal restrictions on enrollment and also provide coverage for the beneficiary at the request of the beneficiary's parents or the Illinois Department of Public Aid. An employer cannot eliminate coverage from a beneficiary unless the employee has been terminated and is no longer covered by the plan, the employer has written documentation that the order for support is no longer in effect, or the beneficiary has been

included in a comparable health plan. If the health care plan is completely eliminated, the employer may also remove the beneficiary. In any event, if the beneficiary is terminated from insurance coverage, the employer must notify the child support recipient within ten days.

If an employer receives a National Medical Support Notice ("NMSN"), the employer is required to send the health care plan administrator the notice within 20 days of receipt. The NMSN is a standard form that all state child support agencies use. Note that the NMSN qualifies under the Employment Retirement Income Security Act as a "Qualified Medical Support Order" and specifically requires the employee to provide medical insurance for an employee's dependent.

The employer must also ensure that the amount due for premiums from the employee are withheld and paid directly to the health care plan. If, for a valid reason such as the termination of the plan or employee the employer cannot comply with the NMSN, the employer must return the notice to the child support enforcement agency within 20 business days of the date on the notice.

Withholding Income From Employee

The employer has a statutory duty to withhold income from the employee and forward to the applicable agency. Employers must begin withholding income from the next payment of income to the employee that occurs 14 days after the date that the withholding order was served on the employer. After withholding, the amount withheld must be transmitted to the applicable agency disbursement unit within 7 business days of the date it would have been paid to the employee. Failing to withhold or forward payments can subject employers to a \$100 per day penalty after the 7 day period elapses. In addition,

courts have penalized employers with \$100 per day fines for each separate failure to withhold or forward payment. Note that these penalties can quickly become exorbitant, such as the \$90,600 penalty previously noted in DuPage County. Employers that employ 250 or more employees or that are required to withhold income from at least 10 employees must transmit payments to the applicable agency utilizing electronic funds transfer. The flip side of these withholding requirements is that employers can also be subject to liability if they continue to withhold income from an employee after the withholding order has terminated. Employees can sue the employer for conversion and seek punitive damages for continuing to withhold income from an employee after the withholding order has terminated.

SEPARATION AGREEMENTS

The use of certain separation agreement language has caught the attention of the Equal Employment Opportunity Commission ("EEOC"). The EEOC was created in the historic Civil Rights Act of 1964 and serves as the lead enforcement agency in the area of workplace discrimination. The EEOC received litigation authority from Congress which effectively allows the EEOC to sue non-governmental employers, unions and employment agencies for discriminatory conduct. The EEOC has maintained that public policy precludes any attempt by an employer to interfere with an employee's ability to file a charge or participate in the EEOC's investigation of a charge. Hence, the EEOC has focused its efforts on challenging employer's release agreements that are viewed as an attempt to process.

For instance, many employers release agreements condition a severance payment upon an employee agreeing to release all ADA, age, sex, race, and sexual orientation discrimination based federal claims as well as other state statutes that prohibit discrimination. The EEOC, however, has recently filed a flurry of lawsuits against employers alleging the inclusion of such language is retaliatory and, therefore, discriminatory because the language

allows employers to interfere with the employee's protected right to file a charge with the EEOC or to pursue a pre-existing charge.

In one such suit, an employee received a letter informing her that her position would be eliminated within two weeks. The letter also informed her that she would receive severance benefits under the Corporation Salary Continuation Plan but only in exchange for signing a Release of Claim that was attached to the letter. In addition to releasing all claims which fall within the confines of federal and discriminatory statutes, the release also prohibited the employee from pursuing charges against the employer. The employee refused to sign the Release and instead file a charge with the EEOC alleging her employer violated several anti-discrimination statutes. The employer provided a written response providing a deadline to sign the Release and dismiss the EEOC charge. No severance benefits would be paid unless the employee complied with this request. The employee, however, proceeded with her charge claiming the Release violated Title VII of the Civil Rights Act of 1964¹ and the Age Discrimination Employment Act (ADEA) because it was facially retaliatory and unenforceable. The Court found in favor of the employee.

First, the employer argued since it presented the employee with the Release prior to the filing of the EEOC Charge, the Release could not have been retaliation for her filing the Charge. The Court disagreed stating the Retaliatory Act was making severance contingent upon executing the Release. The fact the employer also reiterated its position after the Charge was filed certainly did nothing to advance its position.

¹Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

Secondly, the employer argued the employee had an entitlement to severance benefits and was offered additional compensation in exchange for giving up a right. The Court disagreed and reasoned that while the employer may have been free to offer severance benefits to no one, it cannot provide them only to employees who refrain from participating in protected activity. Under these circumstances, the Court determined the Release was retaliatory and violated Title VII of the ADEA. The Court's opinion, however, did not address what remedy the employee would be entitled to and the Court requested additional evidence be presented on that issue.

The case is particularly troublesome for employers because of the liberal articulation of "retaliation". The EEOC will undoubtedly seek to broaden the reach of retaliation principles to apply to all federal law discrimination claims such as the Americans With Disabilities Act and Older Worker's Benefits Protection Act. In light of these developments, it would be prudent to consult counsel to determine whether your company's release agreement comports with federal statutes and regulations.

**ILLINOIS VICTIMS
OF VIOLENCE ENTITLED
TO 12 WEEKS UNPAID LEAVE**

The Victim's Economic Security and Safety Act ("VESSA") allows employees up to twelve weeks unpaid leave in a twelve-month period to allow employees or household members who are the victims of domestic or sexual violence to take time off to pursue such matters as court hearings, counseling, relocating, and seeking medical or legal services to insure the victim's safety.

For an employer to be covered, the employer must employ at least fifty employees. Unlike the Family and Medical Leave Act (the "Act"), there is

no minimum service requirement to be eligible for leave.

The Illinois Department of Labor ("IDOL") has issued some rules regarding complaints brought before the Agency which provide, in part, that IDOL is empowered to determine initially whether the allegations in the Complaint state a claim under VESSA; if it is decided that there is a lack of jurisdiction, the Complaint may be dismissed. Either party may specifically request that the IDOL recommend denial of the Complaint and all parties must be notified of denial.

If the IDOL finds jurisdiction, it shall serve on each Respondent a copy of the Complaint with a written notice setting forth the rights and obligations of the party. The Respondent must submit a written response within 21 calendar days signed by an authorized representative. The answer must include a complete, accurate response and explanation specifying any defenses, identifying the disputed and undisputed facts. If Respondent relies on any records, it must submit a copy of such records with the response. Failure to submit an appropriate response may result in a finding of failure to cooperate with the IDOL. The response is sent to the Complainant, who must submit a rebuttal within twenty-one days. Failure to submit a timely rebuttal may result in a finding of failure to cooperate or may be deemed a waiver of all proceedings.

The IDOL can conduct its own investigation and decide whether the Act has been violated. This investigation may be made in person or by telephone and can include written or oral inquiry, a field visit, or any method or combination of methods deemed suitable. Investigation is limited to three years prior to the date the Complaint was filed.

The IDOL may make a finding of failure to cooperate. The IDOL can also deny a Complaint, order discovery, subpoenas or depositions or other affirmative action under the statute.

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