

# LAW OFFICE OF LORI A. GOLDSTEIN, LLC



## CLIENT BULLETIN SUMMER 2018

**ALERT: CHICAGO AND COOK COUNTY MINIMUM WAGE INCREASED JULY 1, 2018**

**Chicago minimum wage increased from \$11 to \$12.**

**Cook County (other than Chicago and opt-out towns) minimum wage increased from \$10 to \$11.**

**When each reach \$13, increases will be based on CPI up to 2.5%.**

## Supreme Court: Changes and Impact on Businesses

As Americans prepare to celebrate our nation's independence, the Supreme Court finished its 2017-18 term on June 27 with a flurry of significant cases and announcement of a key retirement. From President Trump's immigration travel ban to workers' rights, voting rights and religious rights, the high court ruled conservatively. The term ended with Justice Anthony Kennedy's announcement that he is retiring this summer, giving the President the opportunity to appoint his second new judge to the court.

## What Will the Retirement and Appointment Mean for Future Decisions? How Are Businesses and Employees Faring Under the Recent Cases?

### New Supreme Court Justice in the Works

Often the **swing vote** in years past, Kennedy's opinions this term generally aligned with his conservative colleagues, resulting in several 5-4 decisions. Last week's decisions on immigration and abortion prompted liberal justices to write dissents. A new conservative judge will further strengthen that majority and could jeopardize a variety of **landmark Supreme Court precedents** on social issues.

Following Justice Antonin Scalia's death in early 2016, and no replacement for more than a year, the 8-member court had several deadlocked votes. Pres. Trump appointed Neil Gorsuch, confirmed in April 2017 as the court's youngest member at age 50. He authored several decisions, including a key case benefitting employers in May, holding **class action waivers** in arbitration agreements are **enforceable**. Employers can require employment disputes be resolved individually, rather through joint class-action lawsuits. In another landmark decision last month, the Court held that **public sector unions can't force employees to pay dues** because it violates the free speech rights of employees who chose not to join a union.

Mr. Trump announced plans to begin an **immediate search for a replacement** from a list of 25 conservative jurists he had previously identified as candidates. Timing could be crucial. The Republican-controlled Senate, which must confirm the President's choice, could change composition after congressional elections this fall. Whether or not a justice is nominated and confirmed before November remains to be seen.

## The “Wedding Cake Case”: Employers Can’t Discriminate Against Employees, But Can Businesses Do So with Customers?

One of the most-watched cases affecting employers and businesses was decided on June 4, 2018 by a divided 7-2 Supreme Court. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court ruled that Colorado baker and business owner Jack Phillips did **not unlawfully discriminate in 2012, when he refused to create a custom wedding cake for a same-sex couple based on his religious beliefs.**

Emphasizing that the **ruling was narrow based on the particular situation**, the Court focused on a finding that the state exhibited "religious hostility" against Phillips by imposing regulations hostile to citizens' religious beliefs. Specifically, the majority objected to the state civil rights commission's treatment of Phillips' religious objections to gay marriage, when it had allowed other bakers to refuse to create cakes that demeaned gays and same-sex marriages.

Based on the narrow ruling, the Court was quick to point out that the decision did **not resolve whether opponents of same-sex marriage can refuse to do business with gay couples.** That question is crucial, since federal law and the anti-discrimination laws of many states do not cover sexual orientation or gender identity. (More details below under Sexual Orientation Discrimination: Will the Supreme Court Resolve the Conflict?)

The opinion acknowledged that business owners **generally cannot deny equal access to goods and services to legally protected groups under a neutral public accommodations law.** (More details in the section below.) Otherwise, "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws." The American Civil Liberties Union, which represented the same-sex couple in the cake case, has said that businesses should be “open to all.”

The five-year-old legal battle evidenced a test between the Constitution's guarantees of free speech and religion, and laws in 22 states prohibiting discrimination against the LGBTQ community. Courts must **balance sincere religious beliefs with the rights of gay persons** to access goods and services and other **public accommodations.** We are likely to see a similar balance played out in cases involving abortion, from medical services to employer-provided health insurance.

### Business Ejects Public Official Based on Political Beliefs

Just weeks after the bakery decision, the owner of a small Virginia **restaurant** named Red Hen **asked** White House Press Secretary **Sarah Huckabee Sanders to leave**, based on her work in the Trump administration and how it impacted her employees. Sanders quietly cooperated, but the owner was subjected to criticism and scrutiny, including Twitter posts by President Trump.

This incident renewed questions about **whether and under what circumstances a private business can refuse service to a customer.** Business owners have some leeway, for example certain dress code rules are common for health and safety reasons. As the wedding cake case demonstrated, decisions may be based on moral reasons and religious convictions. The key is to

**compare the reasons for the decision (moral, political or discriminatory) to applicable anti-discrimination laws.**

Employers are governed by employment laws that prohibit discrimination against applicants and employees based on protected categories. Employers with **businesses that serve the public, as well as their employees, are also subject to state “public accommodations” laws.** Both types of laws differ based on location, workforce size, and categories protected.

Most state public accommodations laws, including Illinois, do **not prohibit discrimination based on political ideology.** Therefore, the Red Hen owner could lawfully ask Sanders to leave because of her official actions in the White House administration. Employers should be aware of their anti-discrimination obligations both to customers, through public accommodations laws, and to employees, based on employment laws.

Most Illinois business owners are governed by the Illinois Human Rights Act (IHRA) provisions on public accommodations and employment. Under the former, it is a **civil rights violation for any person to deny another the full and equal enjoyment** of the facilities and services of any public place of accommodation on the basis of unlawful discrimination.

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whose goods, services, facilities...or accommodations are...offered, sold, or otherwise made available to the public." The IHRA lists examples including restaurants, hotels, taverns, roadhouses, barber shops, department stores, bathrooms, theatres, public golf courses, railroads, airplanes, and cemeteries. **The statute imposes obligations on private businesses and business owners who own, lease, or occupy a place of public accommodation, as well as their employees.** Exemptions are recognized for private clubs, and based on public policy reasons, for facilities “distinctly private” such as restrooms, health clubs or hotels that restrict facilities to one sex.

Many categories are protected from discrimination by the IHRA, including sexual orientation and gender identity, plus race, color, religion, sex, national origin, ancestry, military status, age (40 and over), sexual harassment, disability including pregnancy, childbirth, or related medical conditions, marital status, unfavorable military discharge, arrest record, citizenship status, and language. These cover not only Illinois businesses that provide public accommodations. They also **ban discrimination of employees and applicants by employers with at least 15 employees. In addition, Illinois employers with 1 or more employee are covered by the categories of sexual harassment, disability and pregnancy.**

### **Sexual Orientation Discrimination: Will the Supreme Court Resolve the Conflict?**

The wedding cake case balanced religious beliefs and state law protection from sexual orientation discrimination. It fosters the continuing debate on the scope of federal prohibition of sex discrimination. While state and local laws may differ, **federal law** - Title VII of the Civil Rights Act of 1964 - which prohibits employers from discriminating based on gender and other protected categories, does **not expressly include sexual orientation,** and the Supreme Court has not weighed in. However, several federal appellate circuits have interpreted Title VII as covering this category.

In February 2018, the **2<sup>nd</sup> Circuit** Court of Appeals (covering Connecticut, New York, and Vermont) joined **our 7<sup>th</sup> Circuit** (Illinois, Indiana and Wisconsin) in **finding sexual orientation to be protected** by Title VII. In another landmark case a month later, the **6<sup>th</sup> Circuit** (Kentucky, Michigan, Ohio and Tennessee) **ruled that Title VII prohibits discrimination on the basis of transgender and transitioning status – gender identity**. The court also held that compliance with Title VII presented no substantial burden upon an employer’s sincerely held religious beliefs under the Religious Freedom Restoration Act.

In *EEOC v. R.G. & G.R. Harris Funeral Homes*, an employee who was born biologically male was **fired after telling her employer that she intended to transition from male to female** and would represent herself and dress as a woman at work. The Court ruled in favor of the employee, finding that discrimination on the basis of transgender and transitioning status is discrimination on the basis of sex. The court also rejected the employer’s defense, explaining that an **employer cannot rely on customers’ presumed biases** and that permitting an employee to wear attire reflecting a conception of gender that is inconsistent with the employer’s beliefs is not a substantial burden.

It is **unclear whether these recent cases will encourage the Supreme Court to clarify the rights of LGBTQ workers under Title VII**. In light of the impending appointment of another justice and the court’s recent wedding cake ruling, we are sure to see interesting developments. In the meantime, businesses and employers should stay current on their compliance obligations under applicable state and local laws, review and update employment policies and practices, and train supervisors.

**FMLA/ADA Training for HR Professionals: Please join me for an HR Certificate Program on FMLA & ADA Compliance training seminar, which I will conduct in Des Plaines August 6-8, 2018. This three-day program includes 15 information-packed sessions that provide complete coverage of all aspects of FMLA and ADA compliance and best practices. EARLY BIRD RATE ENDS JULY 9!**

**To see the Agenda, venue info, or to enroll, go to**

**<http://hrtrainingcenter.com/show5EDetails.asp?TCID=1218469&RID=1019849>**

#### *Announcements*

- ✓ *I am a proud recipient of the **Super Lawyers Illinois award for 2018** (3rd consecutive year.)*
- ✓ *I work with **both employers and employees** on workplace matters, compliance, contracts, training, and dispute resolution.*
- ✓ ***Career Resource Center is here for you!** As a proud CRC Board member, I can’t say enough about the wonderful career transition services offered by CRC, a nonprofit celebrating almost 30 years of success. We are here for newly separated employees, graduates, individuals returning to the workforce, those seeking a change of employment or career, and employees who need a boost in their career transition search. Stop by for a tour, try out a workshop, or join for a year. Volunteers and donors always welcome too! [careerresourcecenter.org](http://careerresourcecenter.org)*

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