

# LAW OFFICE OF LORI A. GOLDSTEIN, LLC



CLIENT BULLETIN DECEMBER 2019

## DON'T RELY ON "2020 HINDSIGHT" – BE PREPARED FOR NEW RULES

Employers have seen a significant expansion of obligations under state and federal employment laws, with more in store for 2020. Here's a handy to-do list - more details below.

### 2020 TO-DO LIST

- ✓ **Review and update** offer letters, employment contracts, separation agreements, arbitration agreements, and employee handbooks to comply with **new Illinois discrimination and harassment laws**.
- ✓ Schedule **annual sexual harassment training, required for all Illinois employers** starting 2020.
- ✓ Comply with **new state minimum wage** or applicable city/county minimum wage.
- ✓ Review/audit **overtime "exempt" employees** and consider raises or discretionary bonuses for compliance with **new increased minimum salaries** and FLSA duties test.
- ✓ Revise policies and procedures for compliance with Illinois' legalization of recreational marijuana.
- ✓ Be aware of notice, consent, and **confidentiality** requirements under the new Artificial Intelligence Video Interview Act.
- ✓ Know and train managers on the latest requirements for collection, usage, storage, retention, and destruction of **biometric information** under the Illinois Biometric Information Privacy Act.
- ✓ Make sure you're already **complying with recent pre-2020 laws**: salary history question ban, nursing mothers' rights, expense reimbursement, paid sick leave laws, and mandated retirement plans.

### WORKPLACE TRANSPARENCY ACT AMENDS DISCRIMINATION LAW

Illinois made significant changes to Illinois' antidiscrimination law, some effective **January 1, 2020** and some next July. The IHRA prohibits **discrimination, harassment and retaliation against employees and applicants** based on protected categories like age, race, disability, gender, and sexual orientation. Manager harassment can cause employer and **individual manager liability**. Beginning on **January 1, contracts, policies and procedures must change**:

- IHRA will expand to **protect nonemployees, such as contractors** and consultants. (On July 1, 2020, it will expand to **cover ALL employers** (currently covers those with 15+

employees, except for disability, pregnancy and sexual harassment which apply to all-size employers.)

- **Confidentiality/nondisclosure** and **non-disparagement** clauses for harassment or discrimination claims in severance or employment contracts require specific **conditions**, including 21 days to consider agreement and 7 days to revoke.
- Discrimination/harassment claims can no longer be subject to **mandatory arbitration**.
- Claims based on “**perceived**” **characteristic** now cover all protected categories (not just disability.)
- All employers with **1 or more employee** are required to provide employees and supervisors with **annual sexual harassment prevention training**. (Stricter requirements apply to restaurants and bars.)
- **Illinois’ VESSA statute will add “gender violence”** as a basis for providing unpaid leave rights to employees who are - or have family/household members that are -victims of domestic, sexual violence, or general violence.

## MINIMUM WAGE INCREASES

Most employers with Illinois employees will see wage increases based on their location and applicable law – state, Chicago, or Cook County. (General rule: when applicable laws conflict, the law most generous to employees applies.)

- **Illinois minimum wage** increases on **1/1/20** to **\$9.25** for employers with 4 or more employees not covered by Chicago/Cook minimum wage laws. (Smaller employers are subject to the federal wage of \$7.25.) Per recent legislation, the state wage will increase to **\$10 on 7/1/20**, and steadily to **\$15 by 2025**. A 7-year tax credit will help businesses with 50 or fewer employees with the added labor costs.
- Employers also face stiffer penalties for violations – triple the amount of wages owed and **statutory penalty of 5% per month** of underpayment. “**Willful, repeated, or reckless violations will add a new \$1500 penalty** to the **current penalty of 20%** of the amount of the underpayment.
- **Chicago employers** will face a new wage hike in July. Based on a late November vote, the Chicago Minimum Wage Ordinance will **accelerate its \$15 minimum wage hike four years ahead** of schedule. Instead of tying the increases to CPI in 2020, the amendment will increase the minimum wage to \$14 on July 1, 2020 and to \$15 on July 1, 2021.
- These changes and will have less immediate impact on **small businesses** with less than 20 employees. Their wage increases to \$13.50 on July 1, 2020 and 50 cents per year until it reaches \$15 in 2023.
- Finally, businesses in Cook County outside of Chicago - in **towns that did not opt out of the 2017 Cook County Minimum Wage ordinance** - are subject to the county wage: currently \$12 and rising to \$13 on July 1, 2020. On July 1, 2021 and thereafter, it will be indexed to the CPI.

## OVERTIME LAWS - MINIMUM SALARY REQUIREMENTS ARE INCREASING

Unlike the threatened changes that were pulled back in late 2016, these will be new law on January 1. The **first significant changes to overtime laws in over 50 years** will reduce the number of overtime “exempt” employees nationwide. The changes:

- **Raise the minimum “standard salary level”** for exempt employees from the current \$23,660 to **\$35,568** per year (\$455 to \$684/week);
- Raise the total annual compensation level for “highly compensated employees” from the currently-enforced level of \$100,000 to \$107,432 per year; and
- Allow employers to **use nondiscretionary bonuses and incentive payments** (including commissions) that are paid at least annually to satisfy up to **10 percent of the standard salary level**.

## LEGAL RECREATIONAL MARIJUANA AND THE WORKPLACE

When the Illinois Cannabis Regulation and Tax Act (CRTA) becomes effective on New Years’ Day, employers face a multitude of questions. Can they maintain a “**zero tolerance**” policy and impose discipline for violations? What about **safety-sensitive** jobs? Is drug-testing allowed and is a positive drug test a sufficient basis for discipline? Is marijuana use a **reasonable accommodation** for applicants/employees with disabilities?

A November amendment to CRTA aimed to address **employers’ concerns about terminating employees for testing positive** under zero-tolerance policies without proof that employees are under the influence at work: “Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for actions taken pursuant to an employer’s **reasonable** workplace drug policy, including but not limited to subjecting an employee or applicant to **reasonable** drug and alcohol testing, **reasonable** and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.”

But the subjectivity of the “reasonableness” standard, ambiguity in the law, and the impact of Illinois privacy law still fail to answer many questions. Time under the new law, claims and court/agency decisions will eventually add clarification. For now, employers should know the basics:

- Employers **may prohibit use and possession** at work.
- Employers with **federal contracts, DOT** drivers and employees who operate machinery, drive, or are in other **safety-sensitive positions** are subject to **strict federal law** which makes marijuana (legal and medical) illegal.
- Employers can discipline an employee based on a “**good faith belief**” **that the employee is “impaired”** or under the influence of marijuana at work, while performing job duties, or while on call.
- Employees are entitled to a “**reasonable opportunity**” **to contest** the basis for the employer’s adverse decision.

- **Reasonable drug testing policies** for are permitted, but companies may want to reconsider using pre-employment drug screening and random drug testing, since they must have a "good faith belief" of impairment.
- Businesses should **train supervisors** in detection signs and procedures.

## ARTIFICIAL INTELLIGENCE VIDEO INTERVIEW ACT

Privacy rights are a focus of other Illinois laws besides CRTA. Many companies use **artificial intelligence (AI) to streamline hiring** and make the process more objective. Some use AI to scan resumes and schedule interviews, and more recently, employers are using it to conduct and analyze video interviews. Illinois recently enacted **first-of-its-kind legislation** regulating the use of AI. (See [What the Artificial Intelligence Video Interview Act Means For You](#)). Effective Jan. 1, employers who use AI to analyze video interviews will have new requirements:

- **Notice:** Advise applicants that AI will be used to analyze their interview videos.
- **Explain:** Tell the applicant how the program works and what characteristics the AI uses to evaluate qualification for the position.
- **Consent:** Obtain the applicant's consent before the video interview.
- **Confidentiality:** Interview shared only with those with expertise or technology to evaluate the applicant.
- **Destroy:** Destroy video and all copies within 30 days of applicant request.

## NEW COURT REQUIREMENTS: BIOMETRIC INFORMATION PRIVACY ACT

The Illinois Supreme Court gave a recent boost to employees under the 2008 Biometric Information Privacy Act (BIPA.) Since enactment, many class actions have been filed based on employers' failure to provide **required notice** and obtain employee **consent to the collection and use of employee fingerprints for timekeeping systems**.

Last year, the Court held that an individual does **not need to allege actual injury** to seek statutory damages. The employer's simple failure to comply with BIPA could result in litigation by affected employees and customers. *Rosenbach v. Six Flags Entertainment Corp.*

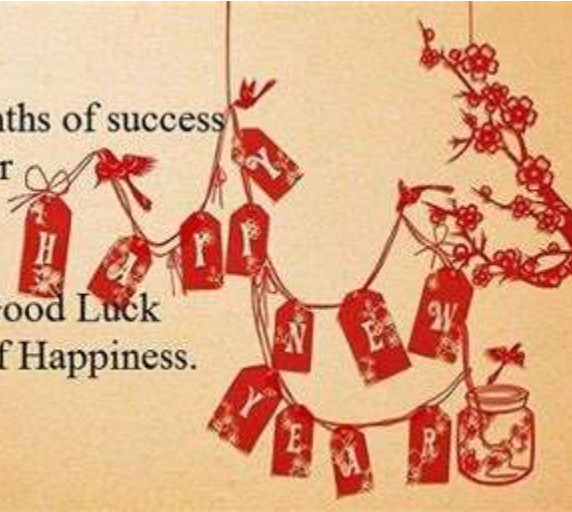
Based on BIPA's private right of action without demonstrating actual harm, employers' exposure to lawsuits and damages have skyrocketed and will continue to increase. Companies should learn about and train managers on the **latest requirements for collection, usage, storage, retention, and destruction of biometric information**, and monitor new developments in the law.

## DON'T FORGET PRE-2020 LAWS AND OUT-OF-STATE LAWS

**As you make changes in forms, contracts, policies and procedures for 2020, be sure you are also complying with recent pre-2020 laws**, including salary history question ban, nursing mothers' rights, statutory expense reimbursement, paid sick leave laws, and mandated retirement plans. I will be happy to send my prior Client Bulletin detailing these requirements upon request.

Finally, always be sure to **check the state and local employment laws wherever you have employees**. Laws can vary – from minimum wage to breaks to leave laws – be sure applicable laws are followed.

Wishing You 12 Months of success  
52 Weeks of Laughter  
365 Days of Fun  
8760 Hours of Joy  
525600 Minutes of Good Luck  
31536000 Seconds of Happiness.



### **Announcements**

- ✓ **Sexual Harassment Training** I am scheduling sexual harassment training sessions for employers and organizations. Please contact me to learn more about how you can meet Illinois' new annual harassment training requirement.
- ✓ **Legal Recreational Marijuana and the Workplace** This has become a popular presentation for Illinois businesses, HR managers and others. Let me know if your organization is interested.
- ✓ For other topic ideas, please ask me for a copy of my **presentation list**.
- ✓ **Employee handbooks and policies should be reviewed and updated annually**, as laws continue to change. In addition to those covered in this bulletin, parental leave policies, navigating ADA and FMLA, non-competes, 1099 contractor vs. W-2 employee classification, and social media are all hot topics.
- ✓ **Career Resource Center is here for you!** I am a proud CRC Board member, a nonprofit celebrating 30 years of success in 2020. We are here for newly RIF'd 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**
- ✓ **I represent employers and employees in legal workplace matters, compliance, contracts, training, and dispute resolution.** I can often answer a question quickly.

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