

Diving Into the New Year: HR 2020

Recent conversations with colleagues have led me to uncover and share a focus on connections: in this case, connections between my passions for both scuba diving and for the work I do to serve business clients.

In this brief booklet, I will highlight some HR issues to watch as the New Year 2020 approaches and begins. To fit them together, lighten the tone, and for good fun, I'll use some scuba diving analogies.

This information is not offered or intended as legal advice or counsel. It is offered to help you follow a plan toward continued success in the New Year, 2020.

Several topics will be highlighted:

- Diving Inside the Fringe Reef
 - New federal Form W-4
 - Illinois Secure Choice
 - Illinois VESSA
- Planning the Dive
 - Federal Overtime Rules
 - Illinois Minimum Wage
 - Illinois Artificial Intelligence Video Interview Act
- Watching the Reef
 - The Illinois Equal Pay Act amendment
 - Pay History Ban
 - “Substantially similar” work
- Knowing What – or Who – May Do Harm
 - The Illinois Human Rights Act amendment
 - Required sexual harassment training
 - Disclosure of judgments
 - Reviewing arbitration agreements
- Experiencing Current
 - Illinois Cannabis Regulation and Tax Act
 - Illinois Right to Privacy in the Workplace Act amendment
- Savoring – and Planning Again
 - July 1, 2020: Illinois Human Rights Act – covered employer
 - July 1, 2020: Illinois Minimum Wage – rises again
 - Proposed federal rules
 - Fluctuating workweek
 - Tip sharing
 - Regular rate definition
 - Joint employer definition

Diving Inside the Fringe Reef



Planning your dive to stay within a fringe (aka barrier) reef lets you plan for relaxing throughout a dive. Within that protective space, there is time to move slowly and view the surrounding beauty.

From a Human Resources (HR) perspective, working and planning within the “fringe reef” of the following framework for compliance can offer confidence to continue focusing on business-critical goals.

Federal Form W-4

The IRS has issued an updated Form W-4 (withholding), which follows recent tax law changes. Employees may choose to complete the new form but are not required to do so.

The new form (available at <https://www.irs.gov/pub/irs-pdf/fw4.pdf>) includes instructions to help employees recognize when a new form may be useful to them.

If employees choose to complete a new form, they need only complete Step 1 and Step 5 for the form to be valid.

Illinois Secure Choice

Illinois Secure Choice applies to employers of at least 25 employees, who do not sponsor a qualified retirement plan for their employees. The program was launched in early 2018 and requires employers to:

- Automatically withhold 5% of an employee’s pay (up to the maximum allowed annual IRA contribution) and
- Remit contributions to the Secure Choice program.

An employee may elect a different percent or may opt out of the program.

Covered employers do not make any employer contribution, act as a plan manager or fiduciary or have any obligation under pension/ERISA law, and pay no administrative fees to the program.

Secure Choice is a ROTH IRA program run by the Illinois Treasurer’s Office. Savings in individual accounts are pooled and managed by an investment company selected through competitive bidding. Accounts are owned by individual participants and are portable from job to job.

Illinois VESSA

Changes in Illinois' Victims' Economic Security and Safety Act (VESSA) go into effect January 1, 2020. This law was initially in effect in 2017 and has historically provided employees who are the victim of domestic abuse or sexual violence with a certain amount of unpaid leave time from work, depending on the size of their employing organization:

1 to 14 employees	up to 4 weeks of unpaid leave in a 12-month period
15 to 49 employees	up to 8 weeks
50 or more employees	up to 12 weeks

Effective January 1, 2020, the amended law will expand protection to victims of "gender violence," which is defined in the law. Note that the conduct need not result in criminal charges, prosecution, or conviction to entitle a victim to relief under VESSA.

VESSA rights are described in one of the required posters employers are to make available in their workplaces (available for free at www2.illinois.gov, following the Employer tab to "Required Posters" and "Your Rights Under Illinois Employment Laws" – either English or Spanish).

Planning Your Dive



It's as true in diving as in other endeavors: plan your dive (or your work) and then, dive (or work) your plan. Know the conditions: weather, currents, visibility. Check you gear and your buddy's gear: air, weights, safety equipment, etc. Share a dive plan: direction, depth, time, leader/follower, shared signs, what to do if....

Applying effective HR practices within your business is similar in many ways. In this writing, we'll explore knowing the conditions. If you have employees, these rules will direct how you pay them and, perhaps, your interviewing and selection practices.

New Federal Overtime Rules Effective January 1, 2020

For the most part, employees must be paid at least the appropriate minimum wage and 1 ½ times their regular rate of pay for hours worked over 40 in a work week.

Federal law (and Illinois law, in these cases) permits limited exceptions for what are considered exempt positions. Exceptions permit exemption from minimum wage and from overtime if two key requirements are met:

1. Duties
2. Salary

The duties tests remain a key method for determining whether an employee is exempt, subject to (new) higher salary thresholds. The duties tests, which require that Executive, Administrative and Professional employees meet certain duties requirements in order to be exempt from overtime, have not changed under laws effective January 2020.

Also important, exempt employees must still be paid on a “salary basis.”

Starting January 1, 2020, that salary threshold will rise from \$455 per week to \$684 per week (\$35,568 annually). Employees who do not meet the duties and new salary threshold must be paid overtime for hours worked over 40 in a work week. This new salary threshold will also apply to employees who fall under the Computer Employee exemption.

To assist with meeting the new salary threshold, the Department of Labor (DOL) will allow employers to apply certain additional types of pay to meet up to 10% of the new salary threshold.

Illinois Minimum Wage Changes January 1, 2020 (and again July 1, 2020)

When federal and state laws conflict (e.g., different minimum wages) employees must typically be treated under the “better” applicable law.

Effective January 1, 2020, while the federal minimum wage will remain at \$7.25 per hour, Illinois’ will rise to \$9.25 from the current level of \$8.25 per hour. Beginning January 1, 2020, non-exempt employees must be paid at least \$9.25 per hour for all hours worked. They must also be paid 1 ½ times their “regular rate” for hours worked over 40 in a work week.

Tipped employees may be paid 60% of the hourly minimum wage.

There may be a payroll deduction tax credit available for employers of 50 or fewer employees.

In July of 2020, the minimum wage rate in Illinois will rise to \$10.00 per hour.

Subsequent increases in the rate will be effective on January 1 of each following calendar year, until it reaches \$15.00 per hour on January 1, 2025.

Now is a good time to review not only each employee’s hourly rate but the rates of employees whom you have employed for several years, to pay attention to compression (i.e., new employees’ pay rates crowding the rates of experienced employees so that differences in pay no longer reflect appropriate differences in skills, knowledge, experience, etc.).

Illinois Artificial Intelligence Video Interview Act

Artificial Intelligence (AI) may seem like science fiction, but it is growing in use. In efforts to make the hiring process more objective, employers are using AI to measure an applicant's facial expression, word choice, body language, vocal tone, etc.

Effective January 1, 2020, a unique Illinois law will require employers who use AI to analyze video interviews, to inform applicants, explain how AI will be used, obtain consent, maintain confidentiality and destroy the video and any copies at an applicant's request.

As with many new laws, questions remain to be answered regarding interpretation and implementation.

Knowing What – or Who – May Do Harm



Observing the beauty that surrounds one on a dive can take your breath away. You know it's dangerous for you and for ocean creatures whose home you're visiting to touch anything! Sometimes heeding that warning is more important than others (see above: a dangerous stonefish and some cute anemone fish).

Within your business, there are key requirements under key laws: the Human Rights Act is one of those keys surrounding your business in Illinois, and it has been amended.

Effective January 1, 2020, the Illinois Human Rights Act (IHRA), has been amended, under the Workplace Transparency Act (WTA), in several ways:

- Discrimination protections are extended to individuals "perceived as" belonging to any protected group (e.g., gender, sexual orientation, ethnicity, etc.), even if they are not a part of such a group.
- For the purposes of sexual harassment, an employee's "working environment" is extended beyond the physical location in which (s)he is assigned to areas outside of their physical office or workspace.
- Unwelcome harassment will include any category protected by the IHRA – including citizenship status – and prohibits harassment of any kind, against non-employee contractors and consultants as well as employees.

- Employers may (still) be held liable for harassment by managerial employees (by virtue of their position and role). Employers will be liable for harassment by non-managerial employees if they become aware of the conduct and fail to take reasonable corrective measures.

Employers will be required to provide sexual-harassment prevention training to employees at least once per year. The Illinois Human Rights Department is expected to create a model training program that will be provided at no cost. Employers can base their training on the department-provided model or create their own that meets or exceeds the model program.

- Restaurant and bar employers with operations in Illinois must create a written sexual-harassment policy, in both English and Spanish, and provide it to employees within the first calendar week of employment. These employers must develop a supplemental training program aimed at preventing sexual harassment and addressing issues unique to the restaurant and bar industry. The Department is expected to create a model supplemental training program for these employers' use at no cost.
- Beginning July 1, 2020 employers experiencing at least one adverse judgment or ruling under the IHRA must disclose it to the Department. Required reports will remain confidential and not available to the public under the Freedom of Information Act (FOIA).
- Civil penalties may be imposed by the Department for failure to follow new reporting and training requirements.
- Provisions of the new law may compel employers to reconsider existing arbitration agreements, based upon additional WTA provisions.

Watching the Reef



You're diving inside the protective reef, and you and your buddy have conferred on a good dive plan. You're in the water to enjoy the best part: the diving. And, sometimes conditions change.

Change can happen in your business from an HR practices perspective, too. Here we will review changes in some pay-related laws in Illinois.

The Illinois Equal Pay Act of 2003 has been amended in several ways, and amendments were effective September 29, 2019.

Illinois employers are prohibited from requesting or requiring job applicants to disclose their prior wages or salary. This has been titled, the Pay History Ban.

If you have not already done so, be sure your Application for Employment – in paper or electronic form – and your interview process do not include these questions.

This is the law that traditionally required employees to be paid the same amount for work that required “equal” skill, effort and responsibility. The amendment – effective January 1, 2020 – changes the standard by requiring the same pay for work requiring “substantially similar” skill, effort and responsibility.

To the extent disparate (not equal) pay exists, there may be a reason (e.g., a seniority or merit system or a quantity/quality of production basis).

The new law makes it clear that employees are permitted to reveal or discuss their (own) wages and other compensation without penalty.

Experiencing Current



I’ve been there: skimming the reef along a fast-moving current, enjoying the ride... and then twisting wildly, literally moving my body in two directions at once because the current is changing. What to do?

The Illinois legislature has passed a combination of new laws – effective January 1, 2020 – which may create a similarly complex web of compliance challenges.

Briefly:

- Besides making use of recreational marijuana legal, Illinois’ laws have been specially written to declare that marijuana will be a “legal substance” beginning January 1, 2020. This is an important declaration. That means marijuana use will fall under the same law(s) as tobacco use. [If you recall, several years ago Illinois legislators and employers had this conversation, state insurance requirements were changed, etc., to declare tobacco and its use legal: the Right to Privacy in the Workplace Act resulted.]

- Recognizing a “legal substance” means, among other things, that an employer cannot take adverse employment actions against a person who uses such a substance...especially if that use is off duty (i.e., not at work or during work time).

Why is this important?

For employers with a drug-testing program in place, clearly, pre-employment testing would be testing an individual’s “off duty” use: they haven’t yet been on the job. Hence, “adverse” action, such as not hiring, would be risky: it could be discriminatory under Illinois law, based upon use of a legal substance.

Importantly, employers retain the ability to maintain drug-free workplaces:

- Employers may adopt and implement reasonable, nondiscriminatory drug-free workplace policies for use of marijuana and other substances in the workplace or while on call (i.e., when an employee is scheduled with at least 24 hours’ notice to be on standby or perform work).
- Employers may prohibit employees from using or being under the influence of marijuana and other substances in the workplace or while performing duties or while on call.
- Employers may discipline employees or terminate employment for violation of workplace policies, including appropriate drug-related policies.

The situation leaves employers many questions:

- Employers seemingly are faced with not conducting pre-employment testing for marijuana; will they continue to test for other, illegal substances?
- Similarly, random and post-accident testing, lacking individualized suspicion, for marijuana, during employment - leaves questions, as testing for marijuana is simply not very precise regarding when the use may have occurred.
- Testing for “reasonable suspicion” of current impairment - based upon qualified observations by supervisors – may remain an option.

The new Cannabis Regulation and Tax Act does not enhance or diminish protections under the Illinois Medical Marijuana Law or the Opioid Alternative Pilot Program.

Savoring – and Planning Again



The end of a dive – or of a dive trip – is a mix of pleasures now a part of memory and the let-down of an ending. To maintain focus, my buddy and I focus on what may be next: where might we go to practice our passion?

Maintain your focus on your business goals by watching what’s happening – or what’s being discussed – in the relevant community. While not letting yourself be overwhelmed by, “what if...?”, don’t let yourself be surprised by important changes. Choose the issue(s) that may impact your business and watch how the discussion progresses. Here is a sampling:

“Hard changes” (those already coming):

- The Illinois Human Rights Act (IHRA)
 - Beginning July 1, 2020, all Illinois employers will be subject to provisions of the IHRA.
 - Currently, (until July 2020, provisions of the IHRA apply to employers of 15 or more employees.
- Illinois Minimum Wage
 - The minimum wage rate in Illinois will rise to \$10.00 per hour effective July 1, 2020, following its increase to \$9.25 effective January 1, 2020.

“Soft changes” (those, which are still just possibilities being discussed):

At the federal level, the Department of Labor (DOL) is considering several issues:

- Proposals to update the fluctuating workweek method of calculating overtime (public comments accepted through 12/5/19).
- Proposed rules about tip sharing under the Fair Labor Standards Act (FLSA) making it easier for employers to require “front of house” employees to share tips with “back of house” workers who are not usually tipped (public comments accepted through 12/9/19).
- Changing the definition of the “regular rate” on which overtime pay calculations are made under the FLSA and clarifying which perks and other forms of pay must be included.
- Proposal to clarify whether businesses are joint employers, which must share liability for FLSA wage and hour violations. Generally, the proposal indicates employers will not be considered joint employers, if they stay out of the day-to-day employment decisions of contractors and franchisees.

If you would like guidance to review or improve your HR practices: hiring and employee selection, employee relations, training, your compensation program, etc., please call or email me:

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