

Legal Update

January 2010

SIGNIFICANT CHANGES IN THE LAW

By Orley Moskovits Desser

We wish our clients and friends continued health, happiness, and prosperity in the New Year.

To ring in the New Year, the Illinois legislature passed hundreds of new laws that took effect on January 1, 2010. In keeping with FVLD tradition, here is a selection of new laws that may affect you and your business in 2010 and beyond.

E-Verify in Illinois

E-Verify is a free Internet-based program jointly administered by the U.S. Department of Homeland Security and Social Security Administration that helps participating employers determine employment eligibility of new hires. In 2007, Illinois passed a law that prohibited Illinois private employers from using E-Verify due to privacy concerns and doubts about the accuracy of the federal database. The Department of Homeland Security challenged the Illinois law in federal court – and won. In August 2009, Illinois amended the Illinois Right to Privacy in the Workplace Act to include provisions concerning the use of E-Verify in Illinois.

Now, Illinois employers may use E-Verify to verify employment eligibility of potential new hires, but they may not use the database to pre-screen applicants or check information for existing employees. Use of E-Verify in Illinois for private employers is voluntary, except in circumstances involving federal contractors.

To use E-Verify, Illinois employers must sign a sworn statement provided by the Illinois Department of Labor that all employees using E-Verify have completed the E-Verify tutorial (the deadline for Illinois employers already enrolled in E-Verify is January 31, 2010). Illinois employers using E-Verify must post certain notices and non-discrimination procedures in the workplace. Penalties will result for failing to display notices, allowing an untrained employee to use E-Verify, or using E-Verify to prescreen applicants or wrongfully terminate, discriminate, or take an adverse action against an employee. Advice to employers using E-Verify: confirm that posters are conspicuously posted and verify that employees receive proper training. Click on the following hyperlinks to obtain the [“E-Verify Poster”](#) and [“Right to Work Poster.”](#)

FVLD®

Order of Protection Status

The Illinois Human Rights Act (“IHRA”) guards against discrimination and retaliation based on certain classifications including race, national origin, disability, age, sex, sexual orientation, and marital status. Effective January 1, 2010, a person who has received protection pursuant to an order of protection is also safeguarded under the IHRA, and discrimination or retaliation against a person based on his or her order of protection status is also prohibited. “Order of protection status,” as defined by the IHRA, means a person’s status as being a person protected or previously protected under an order of protection issued under the Illinois Domestic Violence Act of 1986 (or an order of protection issued by a court of another state).

It is good practice to educate managers and supervisors about the Illinois Human Rights Act generally, and update employee handbooks to include a reference to this newest protected class of persons.

Illinois Freedom of Information Act

Major revisions have been made to the Illinois Freedom of Information Act (“FOIA”). The FOIA grants Illinois citizens the right to access and inspect government records. There is a presumption that public records are open and accessible. Subject to certain exceptions, nearly all records in the possession or control of any Illinois public body are subject to disclosure under the FOIA. Reporters frequently use the FOIA to obtain records in the course of an investigation of a state agency or public official.

The new FOIA provisions confirm that a public body has the burden of proving a record is exempt from disclosure by clear and convincing evidence. In addition, the new FOIA provisions require a public body denying access to notify the Illinois public access counselor, who has authority to review the agency’s refusal to disclose the information.

The new FOIA provisions make the process for accessing public records easier and less expensive. For example, a public body must now respond to FOIA requests within five (previously seven) working days. Each Illinois public body must also designate at least one employee to receive and comply with FOIA requests.

The new provisions also give the FOIA teeth. Courts can now fine public bodies between \$2,500 - \$5,000 for intentionally or in bad-faith failing to comply with FOIA requests and may also award the requester’s legal fees. A public body cannot simply assert that a request is unduly burdensome or that the same requester seeks information unless it can actually prove by clear and convincing evidence the request is indeed “unduly burdensome.”

Restrictions on Cell Phone Use While Driving

As of January 1, 2010, it is illegal for drivers in Illinois to send or receive text messages, instant messages, or any other command or request to access an Internet site while operating a motor vehicle. There is a narrow exception for reporting or communicating with emergency personnel during an emergency or using the communication device in hands-free or voice activated mode. Drivers are now



also prohibited from using a cell phone in school zones or on a highway in a construction or maintenance speed zone unless the device is hands-free. If employers do not have a mobile device policy in their employee handbooks, they would be wise to consider adopting one.

Voluntary Convenience Deposit Accounts

The Banking Convenience Account for Depositors Act permits (but does not require) banks to offer “convenience deposit accounts” to Illinois residents. Convenience deposit accounts allow the primary account holder to grant another person the authority to make deposits or withdraw funds on behalf of and for the primary account holder’s convenience and needs.

The primary account holder legally owns all funds held in a convenience account, and the second person can deposit or withdraw funds without raising gift tax issues or rights of survivorship. Thus, for example, instead of naming a joint tenant on a deposit account, an elderly or disabled person can now specifically grant deposit and withdrawal right to a caregiver or adult child. Upon the primary account holder’s death, the bank is authorized to deliver the deposited funds to the designated executor, administrator, or estate representative.

Good Funds In Real Estate Transactions

Escrow funds in real estate transactions now may only be disbursed by a title insurance company or escrowee if the funds are “good funds” as defined in the amended Title Insurance Act. For amounts in excess of \$50,000, good funds include wired funds, a title company check, a check issued by the state or the federal government, or funds deposited, finally settled, and credited to the title insurance company or escrowee’s fiduciary trust account. They do not, however, include personal checks, certified checks, or cashier’s checks. Amounts less than \$50,000 can be presented by U.S. currency, wire transfer, cashier’s or certified check, money orders, bank checks, teller’s checks, personal checks not exceeding \$5,000 in the aggregate, or checks drawn on the trust account of a lawyer or real-estate broker. Avoid delays at closing by following these “good funds” provisions.

Additional Recent Significant Changes

We do not want to ignore some important new laws that took effect before the New Year. Here are a few:

Illinois Equal Pay Act

Recent amendments to the Illinois Equal Pay Act (“IEPA”) increase protections to victims of gender-based wage discrimination. The amended IEPA applies to employers in Illinois with four or more employees. Like the federal Lilly Ledbetter Fair Pay Act, each discriminatory paycheck is a continuing violation and restarts the statute of limitations for filing claims. The amended IEPA extends the time period for filing a complaint with the Illinois Department of Labor from 180 days to one full year from the date the employee learned of the underpayment, and extends the statute of limitations for filing actions in state court from three years to five years from the date of the underpayment. Each time wages are underpaid is a “date of the underpayment.”



Victims' Economic Security & Safety Act

Recent amendments broaden the scope and coverage of the Illinois Victims' Economic Security & Safety Act ("VESSA"). VESSA grants unpaid leave rights and protection against discrimination when an employee or a member of the employee's family or household is a victim of domestic or sexual violence. The Act had covered public employers and private employers with 50 or more employees. It now covers employers with 15 or more employees. Eligible employees who work for an employer with 15-49 employees are entitled to 8 weeks of unpaid VESSA leave during any 12-month period. VESSA unpaid leave entitlement remains 12 weeks for eligible employees at employers with 50 or more employees. The amendments also expand the definition of "family or household member" to include any person who is related by blood or by present or prior marriage, and any other person who shares a relationship through a son or daughter. The Act now explicitly prohibits employers from requiring that employees substitute available paid or unpaid leave for VESSA leave.

Every Illinois employer is required to conspicuously post a "Your Rights Under Illinois Employment Laws" poster in the workplace. This poster includes, among other things, a VESSA notice provision. Confirm that your organization is posting the most recent poster and revise employee handbooks to ensure compliance with the broader VESSA provisions.

COBRA

Click on the following hyperlink to review our December 2009 *Legal Update* for information regarding the COBRA subsidy extension: [COBRA Subsidy Extended; Employers Must Take Action](#).

We look forward to bringing you additional informative *Legal Updates* in 2010.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen 312.701.6860 jvegosen@fvldllan.com, Glenn Rice 312.701.6895 grice@fvldllan.com, or Orley Moskovits Desser 312.701.6873 odesser@fvld.com, or your regular FVLD contact.

FVLD®

© 2010, Funkhouser Vegosen Liebman & Dunn Ltd.
All rights reserved.