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*Legal Update*

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# SEVEN THINGS YOU SHOULD KNOW ABOUT ILLINOIS LAW BEFORE DOING BUSINESS IN ILLINOIS

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## Introduction

As companies move into their budgeting and planning processes for 2020 and continue to implement their 2019 plans, it is timely to start evaluating expansion plans and compliance of existing Illinois operations. While all operations are different, a common theme amongst the overwhelming majority is employment and retention of contractors in Illinois.

One sector of many we expect to expand in Illinois is the solar and clean energy sector. Illinois is home to a range of exciting business opportunities for the solar developer community, especially with the Adjustable Block Program and other solar incentives in the process of being rolled out. In addition to understanding the state's complex energy regulatory structures, developers need to be attentive to Illinois laws designed to protect employees. If your company has recently opened an office or facility in Illinois, is planning on doing so, or is planning on employing or engaging Illinoisans to work for or with it, below is a sample of requirements under Illinois law potentially applicable to a wide range of market entrants. If your company has been doing business in Illinois for some time, it still can be useful to review the requirements.

## 1. Non-Competition / Non-Solicitation

Unlike some jurisdictions, properly prepared non-competition and non-solicitation of customer clauses may be enforceable under Illinois law. There are, however, important limits to consider in preparing such clauses. Here are two of them.

In a 2013 decision, *Fifield v. Premier Dealer Services, Inc.*, the Illinois appellate court for the First District (i.e., Cook County) held that "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant" where the employment is at-will. The *Fifield* court ruled that the non-solicitation and non-competition provisions in a confidentiality agreement were unenforceable against an at-will employee who left his new employer after three months. The court stated that this principle applies even if an employee signs his or her employment agreement prior to or at the commencement of employment (as opposed to after having begun employment), and even if the employee voluntarily resigns prior to the expiration of the two-year period. There are some ways to avoid the two-year period requirement, but they require careful drafting.

Moreover, the Illinois Freedom to Work Act prohibits non-competition agreements with "low wage" employees, i.e., employees earning no more than the greater of (i) the applicable federal, state, or local hourly minimum wage, or (ii) $13 per hour. For example, the City of Chicago's minimum wage is currently $12 per hour.

## 2. The Illinois Human Rights Act

The Illinois Human Rights Act (the "IHRA") is a major Illinois law that protects employees against discrimination on a variety of bases.

### a. Broad Coverage

Illinois provides broader and different protections than a number of other states and federal law. For example, with only limited exceptions, the IHRA prohibits discrimination in employment due to the arrest of an employee or applicant. The IHRA also prohibits discrimination in employment based on an employee's marital status, sexual orientation, and gender identity.

Currently, the definition of the term "employer" under the IHRA includes any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation. An "employer," however, can also be any person employing one or more employees when an individual lodges a complaint of unlawful discrimination related to disability, pregnancy, or sexual harassment. Employers should be aware and plan ahead that, effective July 1, 2020, the definition of "employer" will be revised so that the minimum number of employees is reduced from 15 to one.

### b. Harassment Policy Requirements for Employers Who Are a Party to a Public Contract or an Eligible Bidder

Under the IHRA, if an employer is a "party to a public contract" or an "eligible bidder," then it must have a written sexual harassment policy that includes, at a minimum, the following information:

(i) the illegality of sexual harassment;

(ii) the definition of sexual harassment under State law;

(iii) a description of sexual harassment with examples;

(iv) the vendor's internal complaint process and penalties;

(v) the legal recourse, investigative, and complaint process available through the Department of Human Rights and the Human Rights Commission;

(vi) directions on how to contact the Department and Commission; and

(vii) protections against retaliation as provided in Section 6-101 of the IHRA.

The IHRA defines a "public contract" to include "every contract to which the State, any of its political subdivisions, or any municipal corporation is a party." The Act defines an "eligible bidder" as:

> [A] person who, prior to contract award or prior to bid opening for State contracts for construction or construction-related services, has filed with the Department a properly completed, sworn and currently valid employer report form, pursuant to the Department's regulations. The provisions of this Article relating to eligible bidders apply only to bids on contracts with the State and its departments, agencies, boards, and commissions, and the provisions do not apply to bids on contracts with units of local government or school districts.

Civil rights violations by an employer who holds a public contract may result in the employer being debarred from participating in public contracts for up to three years.

**c. Strict Liability for Hostile Working Environment by Supervisors**

Under federal law, an employer may defend against a harassment claim that alleges a supervisor created a hostile work environment if (i) the employee unreasonably failed to take advantage of preventive or corrective opportunities offered by the employer, or (ii) the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior.

The foregoing defense is not available under Illinois State law if the alleged harassment comes from a supervisory employee -- even a supervisor who has no authority over the complaining employee. Illinois law, however, does provide that an employer is responsible for sexual harassment of its employees by non-employees or non-managerial and non-supervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

**3. Mothers Who Are Nursing**

Under the Nursing Mothers in the Workplace Act, Illinois employers who have more than five employees must provide reasonable break time to an employee to express breast milk for her child for one year after the child's birth, unless doing so would be prohibitively expensive or disruptive. Such employers also must make reasonable efforts to provide a private room or other location (other than a toilet stall) for an employee to express milk. In addition, this law prohibits employers from reducing an employee's compensation for time spent breastfeeding a baby or expressing milk, although the time may run concurrently with any break time already provided to the employee.

**4. Illinois Wage Payment and Collection Act**

There are several provisions under the Illinois Wage Payment and Collection Act (the "IWPCA") that regulate how and when employers should pay employees. Here are just a few:

**a. Vacation Pay**

Under Illinois law, employers need not offer employees paid vacation. If, however, an employer chooses to do so, unless otherwise provided in a collective bargaining agreement, vacation pay for unused vacation time must be compensated at the time of separation The IWPCA requires employers to pay employees the monetary equivalent of all earned and unused vacation as part of their final compensation at their final rate of pay. Moreover, "no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation." Notably, the Illinois Department of Labor has taken the position that if an employer has an unlimited vacation policy that does not provide for a specific number of vacation days, the employer is obligated to pay a separated employee "a monetary equivalent equal to the amount of vacation pay to which the employee would otherwise have been allowed to take during that year but had not taken."

**b. Deductions from Pay**

The IWPCA restricts an employer's ability to withhold wages—even when an employer suspects that an employee has diverted, stolen, or misappropriated funds from the employer. Employer deductions from wages or final compensation are prohibited unless such deductions are "(1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) made with the express written consent of the employee, given freely at the time the deduction is made."

### c. Expense Reimbursement

Under recently effective changes to the IWCPA, Illinois employers are required, with certain exceptions, to reimburse employees for authorized expenses or losses that employees incur as part of their jobs. Illinois law also (i) provides that if an employee does not follow the employer's written reimbursement policy, an employer is not required to reimburse the employee, and (ii) allows employers to place certain limits on the amounts of the reimbursement through a written policy.

### d. Employee vs. Independent Contractor

Employers face the choice of classifying those engaged to work for them as employees or independent contractors. Similar to the federal context, in Illinois, whether someone is considered an employee or an independent contractor may depend on which particular Illinois law is at issue, be it the tax laws, the IWPCA, the IHRA, or laws concerning matters such as workers' compensation or unemployment compensation. Under the IWPCA, a business must meet a three-part test to establish that an individual is an independent contractor as opposed to an employee. The business must demonstrate that the individual:

i. is free from control over the performance of his/her work, both under his/her contract of service and in fact;

ii. performs work which is either outside the employer's usual course of business or is performed outside all the business places of the employer, unless the employer is in the business of employee placement services; and;

iii. is in an independently established trade, occupation, profession, or business.

## 5. Opportunities for Rest

Under the One Day Rest in Seven Act, with certain exceptions, employers must allow every employee at least 24 consecutive hours of rest in every calendar week, in addition to the regular period of rest allowed at the close of each working day. The law allows employers to obtain permits from the Illinois Department of Labor for employees to work on a seventh day provided the employees have voluntarily elected to work.

Except for certain specified employees, employers must permit employees who are to work for seven and a half continuous hours—or longer—at least 20 minutes for a meal period beginning no later than five hours after the start of the work period.

## 6. Employee Privacy

With only a few exceptions, under the Right to Privacy in the Workplace Act, Illinois employers may not prohibit employees from using lawful products when off duty—including not prohibiting smoking off the job. In addition, Illinois is a two-party consent state to recording conversations: under an eavesdropping law, a private conversation may not be recorded in a surreptitious manner without the consent of all parties to the conversation. The Illinois Personnel Record Review Act requires employers with five or more employees to allow employees to inspect their personnel files. With limited exceptions, personnel record information not included in the personnel record, but which should have been as required by this law, may not be used by an employer in a judicial or quasi-judicial proceeding.

## 7. Commission Payments to Sales Reps

Under the Illinois Sales Representative Act, a business, including an individual, that fails to timely pay a sales representative, may be liable to the sales representative for exemplary damages of up to three times the amount of the unpaid commissions. Additionally, the principal may have to pay the attorney's fees and court costs of the sales representative.

## Additional Changes on the Horizon

Current and future Illinois employers should also remain apprised of proposed new laws and amendments that are pending in the Illinois legislature or awaiting the governor's signature. We strive to assist our clients to be prepared for upcoming changes, including by publishing newsletters regarding some more significant changes to Illinois, and other, laws.

## Conclusion

As your business establishes a long-term foothold in Illinois and expands its presence, it is natural to focus primarily on the available business opportunities. It is important, however, to make sure your expanding Illinois presence takes into account the many different laws applicable to companies and organizations doing business in Illinois. As businesses that develop projects the right way, we are here to support developing your Illinois presence the right way as well.

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*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. To contact the authors, please call or write Jon Vegosen 312.701.6860, jvegosen@fvldlaw.com, or Michael Strong 312.701.6848, mstrong@fvldlaw.com.*

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