

## WORKPLACE DEVELOPMENTS FOR 2005 AND BEYOND

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As a part of our effort to inform you of legal developments that may impact on your workplace, the following are things you should know for 2005 and beyond:

### **Add a Safe Harbor Policy for Overtime**

A “safe harbor” policy may protect you from errors in overtime pay. Overtime regulations issued last year by the U.S. Department of Labor offer employers some protection in the event mistakes are made in paying overtime. To take advantage of the protections, your employment policies must include a “safe harbor” provision. Although a sample is offered by the Department of Labor on its website, we prefer a variation more applicable to Illinois.

In an odd twist, Illinois law makes the U.S. regulations apply only when they provide a greater benefit for employees. Determining when a greater benefit is provided poses challenges for employers—and their lawyers. We think adding a safe harbor provision makes sense and could protect you.

### **Add Sexual Orientation to the List of Protections.**

Illinois discrimination law covers “sexual orientation” as of January 2006, and your employment policies should include that protection as well. If your harassment policy has not been updated in a while, this would be a good time. Businesses in Cook County and Chicago are already prevented by ordinance from discriminating on the basis of sexual orientation. Now the protection will extend throughout the State. The definition of sexual orientation includes homosexuality of course, but also includes bisexuality, heterosexuality, gender-related identity (which may include trans-gender and cross dressing) and an employer’s *perception* of the employee’s orientation. The law is clear, however, it does not apply to adult attraction to a minor.

### **Family and Medical Leave—New Regulations?**

If you have 50 or more employees, it is critical you have a policy tracking the Family and Medical Leave Act. Protections are available to employers that can only be taken advantage of by including them in written policies. Also, watch for new regulations being proposed by the U.S. Department of Labor this year (if it doesn’t become too much of a hot potato). *And, employees returning from active military service are entitled to FMLA as though they worked continuously.*

### **Victims of Domestic Violence Leave—Add a Policy.**

**We recommend an employment policy tracking this Illinois leave law that took effect in 2004.** Employers of all sizes are required to permit up to 12 weeks unpaid leave for victims or family members of victims of domestic violence, and are prohibited from discriminating on this basis. A policy similar to the family and medical leave policy spells out how it works. Also, the State requires a poster for this law, known as the Victims' Economic Security and Safety Act (VESSA).

### **Keep Current with Technology.**

**Update your technology/internet policies to keep up with rapid changes.** Regulating employee use of company technology, from telephones to the internet, is difficult to keep up with when technology changes so fast. Does your policy prohibit telephone and videophone pictures of your workplace? Do you permit internet surfing? Some employers allow limited personal use of the internet, while others allow only business use. Drawing that line poses a real challenge, and periodic review is a good idea.

### **Review Your Employment Posters.**

We still find many employers without posters required by law, including new ones required in 2004. These include Equal Pay Act, Minimum Wage and VESSA, which are available on the Illinois Department of Labor's website or from Stahl Cowen Crowley. These Illinois posters are in addition to federal posters covering equal rights, OSHA, USERRA (new poster!) and overtime, among others. If an agent of the Department of Labor pays you a visit, you can expect a review of your posters.

### **Update Job Application Forms.**

**Application forms need specific language to protect your business.**

1. A 2004 Illinois law requires applications that ask about criminal convictions to expressly exclude sealed or expunged records, using specific language.
2. Most application forms now include "at will" disclaimers (to avoid a contract claim), and a statement about the adverse consequences of inaccuracies.
3. If you are doing credit checks or criminal background checks, the law is very strict about getting a proper release from the applicant.

### **Get your I-9's in Order.**

**Immigration law requires a completed I-9 form for every employee,** demonstrating the legal work status of the employee. Most businesses face greater risk from improper recordkeeping than from the hiring of illegal workers. As long as the forms are in order, the worst that is likely to happen is you will be required to discharge illegal employees. Failure to keep proper paperwork, however, will result in fines even if all your workers are legal. This is another area covered in investigations by the Department of Labor, even when the primary purpose of the investigation is something unrelated, such as overtime.

The I-9 form contains detailed instructions, but we find most employers make minor mistakes that can add up to big fines. Also, many employees are on temporary authorizations, which require updating. A system for keeping up with the expiration dates is helpful. It is a good idea to audit I-9 records periodically, and keep them all in a single file rather than individually in personnel files. If you are required by an investigator to permit review of them, it is easier to go to the single file than go through each personnel file.

Finally, we are often asked if it is necessary to make copies of the identification records supplied by employees. The answer is you are **not** required to make copies. As long as the I-9 form is filled out correctly, you are fine.

### **Make Your New Facilities Accessible.**

**Proposed regulations** would require new or newly altered facilities to offer more accessibility. The U.S. Department of Justice is proposing to require greater access for persons with disabilities in work areas. These proposed new Americans with Disabilities Act (ADA) regulations should be considered by employers planning, building or altering work facilities.

### **FOCUS ON: POLICIES. WHY HAVE POLICIES AT ALL?**

The decision whether to have employee policies is still a difficult one for some companies. *The simple answer is you need at least some policies.*

### **Policies Encourage Consistency—and Make a Good Defense.**

Large employers would not consider operating without clear employment policies. The more employees, the more issues that come up, and consistent treatment of employees is only possible by relying on clear policies. In turn, consistent treatment of employees is essential to defending against claims of discrimination.

Employers with 50 or more employees must have a Family & Medical Leave policy because the law applies to employers of this size, and the law provides advantages to those with a policy.

Regardless of size, all employers need a policy that covers sexual harassment as well as harassment based on other categories such as race, national origin, age and disability. The U.S. Supreme Court has made it clear the absence of a harassment policy is one strike against you in a harassment claim. Conversely, the presence of a policy can provide you a defense in a claim.

Smaller employers can benefit the same way large employers benefit from clear policies, provided they keep familiar with them and apply them consistently. Smaller employers may prefer to have fewer policies, such as harassment, time off, and discipline, adding other policies as the need arises. Most employers realize they need a policy when questions keep coming up on the subject, or they grow out of their current practices.

## **Don't Let Policies Put You in a Bind.**

Policies are **not** binding—**provided** they are drafted with adequate disclaimer language. Flexibility can be maintained by:

- careful consideration of the *reasons* for treating employees differently (they must be lawful reasons)
- consideration of the *impact* of decisions, and
- good *communication* with employees.

Amending or eliminating policies need not be painful. **An employer that is unwilling or unable to follow policies is likely to have problems at some point whether it has policies or not.**

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If you have further questions about these issues, or other issues in employment relations, please contact Todd Hunter Thomas or Brian Troglia at 312-641-0060 (tthomas@StahlCowan.com or btroglia@StahlCowan.com). Opinions provided are for general informational purposes only, and should not be relied on for application to particular circumstances without review by an attorney. We invite you to contact us for assistance.