WORKPLACE LAW PARTNERS

Illinois Employment Law Handbook

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Chapter 1
Illinois Wrongful Termination

Can my boss fire me for that? Many people assume they were wrongfully terminated if their termination was unfair. Being unfairly fired from your job is tough, particularly when it was for an unfair reason. Sometimes the unfair reason is also illegal and sometimes it is not. There are no laws against firing someone for unfair reasons unless it is also an illegal reason.

What is Wrongful Termination? Illinois is an at-will state and, as such, an employee can generally be terminated from their position at any time for any reason, or for no reason at all. While this is the general rule, there are many exceptions that have fallen into the general category of wrongful termination lawsuits.

If an employee is terminated in violation of an employment contract, in retaliation for exercising his or her rights, or because of a protected characteristic—such as race, religion, sex, sexual orientation, wage, age, or disability, the employee may have a wrongful termination lawsuit. On the other hand, being fired because your company wants to save money or thinks you are lazy (even if it is not true) is not illegal.

Finally, employers are prohibited from terminating an employee in retaliation for engaging in protected activity—such as filing a workers' compensation claim, reporting an employer's unlawful conduct, being a whistleblower, and cooperating in a criminal investigation.

What Should I Do? If you are wrongfully terminated, it is important that you contact an employment lawyer to avoid waiving the right to bring your lawsuit. All employment lawsuits have a time limitation in which you must either make an appropriate complaint with a governmental agency (for example the EEOC) or to file a lawsuit. Some of the deadlines to file a wrongful termination claim are very short.

An example of a wrongful termination lawsuit (*Crowley v. Wayne Watson*) was decided in 2016. In that case, a lawyer employee at Chicago State University was awarded $480,000 in damages and punitive damages of $2 million. The jury further found that he was entitled to be reinstated. The trial court doubled the back pay to $960,000, ordered defendants to pay attorney fees of $318,173.33, and awarded prejudgment interest in the amount of $60,000 for a total of

$1,338,173.33. The plaintiff claimed he was discharged in retaliation for contacting the Attorney General's office and disclosing information he reasonably believed was a violation of the law. The Ethics Act claim at issue was found to be similar to "retaliatory discharge, a narrow exception to Illinois's general rule of at-will employment". A cause of action for retaliatory discharge similarly involves discharge in retaliation for protected activities, in violation of a clear public policy mandate. There were many significant issues raised in the appeal. Most notably, the defendants argued the damages were excessive. The court squarely disagreed. The defendants' were found to have acted "nothing short of reprehensible and that they acted with malice and deceit." They were found to have tried to protect their own reputation at the employee's expense. **This decision follows a trend showing that juries do not like employer retaliation. When employees are able to provide that there is a public interest at stake and an employee stands up for what is right, punitive damage awards are frequently substantial.**

Chapter 2
Sexual Harassment

What is Sexual Harassment? Sexual harassment involves unwelcome sexual conduct, requests for sexual favor, advances and other conduct. Private employers are prohibited from discriminating on the basis of sex: "It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex…." 42 U.S.C. § 2000e–2(a)(1). Employers can be held vicariously liable for a supervisor's sexual harassment of a subordinate. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 846 (7th Cir. 2001)

An employer can avoid liability by showing: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 846 (7th Cir. 2001).

Tips For Sexual Harassment Prevention:

Some tips if you are victim of sexual harassment include:

- document in writing/email through a complaint to human resources that the sexual harassment is occurring and you need it to stop,
- file a sexual harassment claim with a governmental agency,
- don't quit your job if at all possible,
- follow the sexual harassment/discrimination guidelines in your employment handbook,
- contact a sexual harassment attorney to advise you through the process.

Sample Sexual Harassment Complaint: We are frequently asked how to file a sexual harassment complaint at your company. You should always be truthful and direct. Do it in your own words. Here is an example:

Dear Human Resources:

I am being sexually harassed at work by _____. I need it to stop because I feel uncomfortable. I do not like being subjected to unwanted sexual touching and comments. Please help me stop this so I can continue to work.

Sincerely,

Additional Ways To Complain About Sexual Harassment: You can also file a formal complaint with the EEOC or the Illinois Department of Human Rights about sexual harassment in the workplace. In fact, if you plan to bring a sexual harassment lawsuit, you are required to timely file with the appropriate governmental agency. Here is a link to the EEOC web site to find out more about how to file a charge of employment discrimination: https://www.eeoc.gov/employees/howtofile.cfm

Chapter 3
Pregnancy Discrimination

Is it a wrongful termination to fire someone after they get pregnant in Illinois? Illinois passed a law (PA 98-1050) requiring that employers of any size make reasonable accommodations arising out of pregnancy. The law relates to accommodations while the employee is pregnant, recovering from childbirth, and if the employee is having common medical conditions associated with being pregnant.

Reasonable Accommodations: Employers must provide reasonable accommodations unless the employer can show an undue hardship. Reasonable accommodations are reasonable, temporary changes that let an individual do the essential functions of a job while pregnant or recovering from childbirth. Employers cannot retaliate against an employee who requests a reasonable accommodation. In Illinois, the Illinois Department of Human Rights processes employment discrimination claims.

Under federal law, the EEOC enforces the Pregnancy Discrimination Act. Notably, the EEOC regards inquiry into whether an applicant intends to become pregnant as evidence of employment discrimination. Here is the EEOC's web site for filing a charge of discrimination: https://www.eeoc.gov/employees/howtofile.cfm

The general rule that rules be applied uniformly to all employees applies to pregnant women as well. That is, women who are pregnant cannot be adversely affected by work policies based on their pregnancy, childbirth or associated conditions. Pregnancy discrimination may occur in various situations, including hiring, firing, pay, job assignments, promotions, training, and benefits.

Furthermore, employers may not implement policies that are discriminatory against pregnant women on their face. An employer may not discharge or refuse to hire or promote a woman because she is pregnant. However, an employer is further prohibited from implementing policies that discriminate against pregnant women even if those policies benefit the employee. For example, employers may not establish mandatory

maternity leave that is unrelated to the employee's ability to work and employers may not prohibit the employee from returning to work for a predetermined period following childbirth.

The Equal Employment Opportunity Commission ("EEOC") has deemed pregnancy discrimination a growing problem. As such, the EEOC recently issued a new guidance on pregnancy discrimination in the workplace that requires "pregnant employees to be treated the same as non-pregnant employees," and requires accommodations to be provided to pregnant employees that is of equal accommodations provided to non-pregnant employees. Thus, because a pregnant female employee must be treated just as another temporarily disabled employee would be treated, an employer must make reasonable accommodations to allow the employee to perform modified job duties or an alternative work assignment. If neither a modification of job duties or an alternative work assignment is not sufficient, the employer may need to allow the employee to take disability leave or unpaid leave as it would for other employees.

Family and Medical Leave Act: Aside from the aforementioned, the Family and Medical Leave Act ("FMLA") adds additional protections to the Pregnancy Discrimination Act. In particular, the FMLA provides for additional rights for break times when nursing and allows pregnant employees who meet certain conditions to take up to twelve weeks of unpaid leave during a twelve month period for childbirth, adoption, serious health conditions, or to take care for a sick child or family member.

The Bottom Line: It is ultimately unlawful for an employer to differentiate between pregnancy related and other disabilities. Employees who are or were pregnant and feel they are being or have been discriminated against due to their pregnancy should discuss their circumstances with an attorney.

Chapter 4
Retaliation

Retaliation is generally treating someone different because for protecting their legal rights. Illinois workers facing retaliation may ask: Is it illegal to fire an employee for complaining about a protected activity?

Title VII (and many other laws) prohibit employers from discriminating as well as retaliating against employees who engage in protected activities, such as reporting or opposing unlawful employer behavior. *Henson v. Canon Bus. Sols., Inc.,* 69 F. Supp. 3d 730, 737 (N.D. Ill. 2014)

A retaliation claim can be shown by proving that an employee (1) she engaged in a statutorily protected activity; (2) that Canon took an adverse employment action against her; and (3) a causal connection between the two. *Coleman v. Donahoe***,** 667 F.3d 835, 859 (7th Cir. 2012). Depending on the context, a plaintiff must prove that but for the protected act, he or she would not have suffered the adverse employment action.

A plaintiff may present "smoking gun" direct evidence of causation which requires "something akin to an admission" of retaliation by an employer. A plaintiff may also demonstrate the requisite causal link by constructing a "convincing mosaic" of circumstantial evidence, relying on "suspicious timing, ambiguous statements […], and other bits and pieces from which an inference of retaliatory intent might be drawn." *Id. Henson v. Canon Bus. Sols., Inc.*, 69 F. Supp. 3d 730, 739–40 (N.D. Ill. 2014). Different laws require different proof to prove a retaliation claim.

The Illinois Supreme Court made an interesting ruling in the case of *Michael v. Precision Alliance Group, LLC*., 2014 IL 117378. The ruling helps clarify the standard in Illinois for retaliatory discharge cases. The Court explained "while there is no precise definition of what constitutes clearly mandated public policy, a review of Illinois case law reveals that retaliatory discharge actions have been allowed in two settings: where an employee is discharged for filing, or in anticipation of filing, a claim under the Workers' Compensation Act (820 ILCS 305/1 et seq. (West 1992)); or where an employee is discharged in retaliation for the reporting of illegal or

improper conduct, otherwise known as "whistleblowing." *Jacobson v. Knepper & Moga, P.C.*, 185 Ill. 2d 372, 376 (1998). The rationale is that, in these situations, an employer could effectively frustrate a significant public policy by using its power of dismissal in a coercive manner. Therefore, recognition of a cause of action for retaliatory discharge is considered necessary to vindicate the public policy underlying the employee's activity, and to deter employer conduct inconsistent with that policy.

To sustain a lawsuit for retaliatory discharge, an employee must prove: (1) the employer discharged the employee, (2) the discharge was in retaliation for the employee's activities (causation), and (3) the discharge violates a clear mandate of public policy.

The Supreme Court clarified that the burden of proof is on the employee to demonstrate their case. The Court held that "in retaliatory discharge cases, an employer is not required to come forward with an explanation for the employee's discharge, although an employer may choose to offer a reason if it desires. Id. If an employer provides a reason for the employee's dismissal, that does not automatically defeat a retaliatory discharge claim. However, "if an employer chooses to come forward with a valid, non-pretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met." Id. Again, the burden rests on plaintiff to prove each of the elements of the cause of action."

Chapter 5
Whistleblowers

False Claims Act/Qui Tam: If you blow the whistle (i.e. exposed your employer's wrongdoing), you may be entitled to money as a whistleblower. Examples of claims include improper billing, charging the government for services that were not provided, or misrepresenting things to the government to get money. Sometimes referred to as "false claims" lawsuits, these claims allow a whistleblower to recover money if their employer is getting money unfairly. An example in the healthcare industry of false claims is Medicare fraud. Sometimes employers will bill Medicare or Medicaid or insurance companies for services that were not performed or that were unnecessary. This is illegal.

Is it illegal to fire or retaliate against an employee for reporting illegal activity? Illinois law has historically protected employees who report unlawful activity to outside public entities or internally to supervisors. These individuals, better known as "whistleblowers," are additionally protected by the Whistleblower Act if they report unlawful activity to outside public bodies, such as a government or law enforcement agency. The Whistleblower Act further protects an employee from being retaliated against for refusing to participate in an activity that violates state or federal law. There are many laws that protect employees who report illegal activity. For example, the Nuclear Regulatory Commission (NRC) has its own agency that investigates retaliation by whistleblowers.

Can my employer demote me for complaining about illegal activity? Retaliation may come in many forms, including: voicing anger or attempting to intimidate an employee, suspending an employee after making a report or voicing concern, demoting an employee or subjecting the employee to negative terms of employment, reducing an employee's pay, wrongfully terminating an employee after complaining. Often an issue that will arise in litigation is whether an employer had a "legitimate" reason for the adverse action. Typically, a factual inquiry into an employee's work performance history, when the employee made his or her complaint, and when the adverse action by the employer began can help determine whether retaliation is occurring.

Can my employer fire me after I filed for workers compensation? It is illegal to retaliate against an employee for filing a workers compensation claim. Our Chicagoland lawyers also can assist if you have a workers compensation claim and were retaliated against for your work injury. Injured workers in Illinois often have legal rights. Depending on the nature of the injury, it may be illegal for an employer to retaliate or terminate an injured worker or someone who files for workers compensation. For example, if an employee files a workers compensation claim and is fired for going so, the employee may have a claim for workers compensation retaliation.

In Illinois, the Workers' Compensation statute is in place specifically to protect employees from work-related injuries. Under the statute, an employee who is injured at the workplace while performing work duties is entitled to medical care for their injury so long as the employee makes a claim. The statute requires most employers to purchase workers' compensation insurance to pay for work-related injuries that may occur and, thus, almost every employee in Illinois is covered by workers' compensation from the moment they begin working. Importantly, the Illinois workers' compensation statute is a no-fault system, meaning the injured party does not have to prove the employer was negligent or at fault prior to becoming entitled to compensation. Employees who are uncomfortable about filing a workers' compensation claim with their employer may take comfort in the fact that workers' compensation claims benefit both the employer and the employee. That is, when an employee files a workers' compensation claim, he agrees not to file a lawsuit against their employer for their work injury in return for receiving compensation benefits. In fact, employers are not harmed because it is not the employer who pays the expense, but the employer's workers' compensation insurance. Our Chicagoland attorneys are here to help you and can point you in the right direction to find a workers compensation lawyer or to help you if your employer discriminates against you for filing a workers compensation claim.

Chapter 6
Overtime for Illinois Workers

Many workers in Illinois are entitled to overtime. There is a right to overtime under both federal and state law. Here are common answers to overtime questions:

I am on a salary, should I get overtime pay? One frequent overtime myth is that just because someone gets a salary, they don't get overtime. That is not always the case. Overtime pay is partially governed by the rules set forth in the Fair Labor Standards Act ("FLSA"). Whether an employee is eligible for overtime pay depends on whether the employee is classified as an "Exempt Employee" or a "Non-Exempt Employee" under the FLSA. Just because your employer says you are exempt does not mean that you are, in fact, exempt. Generally, employees deemed exempt by the FLSA are those employees who are salaried and occupy a managerial position. For these employees, the job title the employee holds is not determinative of whether they are to be paid overtime under the FLSA. Rather, exempt employees often manage or direct employees and require advanced education. Thus, what determines whether an employee is exempt is the actual responsibilities the employee performs. For simplification purposes, exempt employees are typically classified as the following: executives, administrative, and professionals.

Non-exempt employees are those individuals who work hourly and salary and are not specifically exempt from being paid overtime. That is, non-exempt employees often do not have managerial responsibilities. To qualify for overtime pay, non-exempt employees must work in excess of 40 hours in a 7-day workweek. For purposes of calculating the 40 hours worked, only hours actually worked may be included. That is, holiday pay or sick pay does not count towards the 40 hours. Furthermore, because a workweek is defined as a period of seven consecutive days, hours worked in excess of 8 hours on any single day may not require overtime pay if the employee has not worked 40 hours during the workweek.

Are independent contractors entitled to overtime? Many independent contractors are misclassified to avoid paying them overtime. Under the law, even if your employer says you are

an independent contract, you may still be entitled to overtime pay if you work over 40 hour per week.

How much do I get for overtime: In determining the amount due for overtime, the typical method of calculation is generally based on an employee's regular pay rate. Each hour worked in excess of 40 hours must be paid at one and one-half rate of pay.

For employees whose regular pay rate is less than the minimum wage, the legal minimum wage rate is substituted as the employee's regular rate of pay.

How Do I Complaint About Overtime Pay: A good starting point is to write a letter:

Dear Human Resources:

I feel that I am not being paid my overtime. Therefore, I am requesting that my overtime pay be reviewed.

Sincerely,

Additional Overtime Resources: If are not being paid correctly, you can also complain to the federal or the Illinois Department of Labor.

Chapter 7
Unpaid Wages

In Illinois, payment of employees is governed by the Illinois Wage Payment and Collection Act ("Act"). The Act provides rules relating to procedures of how an employee should be paid, when an employer may deduct from an employee's wages, when and how an employee must be paid final compensation, and penalties for any violations of the Act. The Illinois Department of Labor helps enforce the Act.

If You Earn Minimum Wage: As of 2014, the minimum wage in Illinois is currently $8.25 per hour for those individuals who are 18 years and older. Individuals under 18 years of age may be paid at the rate of $7.75 per hour, but may not be paid less. Failure to pay an employee at or above these rates can result in an employer being liable for past due wages. The employer may further be liable for interest on the amount due, penalties, and the employee's reasonable attorney fees incurred in an attempt to recover their wages.

If You Are a Tipped Employee: Compensation relating to tipped employees differs from that described above. As of 2014, tipped employees must receive at least the minimum wage, though an employer may elect to pay the employee only $4.95 per hour and use the employee's tip as a credit for up to 40% ($3.30) of the minimum wage. There are other requirements for an employer to take the tip credit.

My Employer Deducted Money!: The Act also provides for regulations relating to when an employer may deduct from an employee's wages. It is illegal for an employer to unilaterally deduct from an employee's wages without the employee's voluntary and signed consent. Under the act, an employer may only deduct from an employee's wages under the following circumstances: when the deductions are (1) required by law, (2) to the employee's benefit, (3) in response to a valid wage deduction order or wage assignment, (4) with the express written consent freely given at the time the deduction is made, (5) by certain entities for certain debts, or (6) the result of an accident over payment. Finally, even if an employer receives an employee's consent to deduct from the employee's wages when the employee starts the job, the

employer is required to receive the employee's written consent each individual time the employer makes a deduction.

Here are common questions that Illinois workers have about their unpaid wages:

Can an employer hold my paycheck? Typically, in Illinois, if you are owed wages, they must be paid. This is the case even if you owe your employer money for something (i.e., for a uniform).

Am I entitled to vacation pay with my final paycheck? Yes, in Illinois, employers typically are required to pay out accrued vacation pay but it depends on the language of the vacation policy.

Can my employer make deductions from my paycheck without my permission? Typically, the answer is no (although certain deductions are allowed).

Top 10 Employment Wage Violations:

Here is what we see as the top 10 paycheck violations:

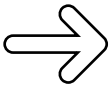
1. Overtime not paid when more than 40 hours worked in a week at 1.5 times the regular rate of pay.
2. Deductions for mistakes, breaking dishes, cash register shortages, dine and dash, etc. can be illegal.
3. Tip Pool sharing with management, cooks, dishwashers and other non-service positions can be illegal.
4. Time Stealing when punched in and out times are reduced, always rounded to employer's benefit, or automatic deduction for lunch when not taken.
5. Independent Contracts/1099 misclassification so employers can avoid paying taxes, overtime, and other benefits.
6. Vacation Time not paid out when you stop working for any reason.
7. Unpaid Work by making employees work when not punched in or when they are at home.
8. "Salary" or "Exempt" classification to avoid paying overtime can sometimes be illegal.
9. Minimum Wage not earned because employee must pay expenses like gas.
10. Servers working for below minimum wage and performing excessive (more than 20% of their time) non-tipped work like cleaning.

Chapter 8
Non-Compete Agreements

What is a Non-Compete Agreement? In Illinois, a Non-Compete Agreement is an agreement signed by an employee often upon being hired or upon acceptance of a severance package. The non-compete agreement typically limits an employee from competing with their former employer during and after termination of employment. It does so by restricting the geographical area in which an employee can work if their new position operates in the same industry as their previous employment. Often, non-compete agreements will further protect the employer by restricting an employee from using an employer's confidential information for his benefit or for the benefit of a subsequent employer.

In Illinois, non-compete agreements are only enforceable if they protect legitimate business interests. *Reliable Fire Equip. Co. v. Arredondo,* 358 Ill.Dec. 322, 965 N.E.2d 393, 396–97, 2011 IL 111871 (2011); *Cronimet Holdings, Inc. v. Keywell Metals, LLC*, 73 F. Supp. 3d 907, 915 (N.D. Ill. 2014). A legitimate business interest is determined from the totality of the circumstances, including, for example, "the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions." *Reliable Fire Equip.,* 358 Ill.Dec. 322, 965 N.E.2d at 403.

Whether or not a non-compete agreement is enforceable is dependent on the individual agreement at issue. Illinois courts, under certain circumstances, will enforce a non-compete contracts when the terms of the agreement are reasonable. That is, the agreement will be deemed valid when it is limited in duration and geographical scope and when it is narrowly tailored to protect only that information which needs protection (ie. confidential or sensitive information). An overly broad non-compete in Illinois is not likely to be enforceable.



A Real Life Example: In *Saban v. Caremark Rx, L.L.C.*, 780 F. Supp. 2d 700, 711–12 (N.D. Ill. 2011), the court noted that "the language of [the] non-compete is unreasonable because of its canyon-like broad coverage, which has its genesis in the expansive definition of "Competitor" and "Competition." As noted above, "competition" in the non-

compete means "engaging in ***any activity*** for a Competitor of the Company in any capacity." "If the plain terms of the non-compete were enforced, [the employee] would be precluded from working in a wide variety of jobs which have zero relation to his work at Caremark. For example, the magistrate judge noted in the Report that Saban could not work as a grocery store manager if the grocery store had a pharmacy." "For example, under the terms of the non-compete, [the employee] could not serve as a 'greeter' at a Wal–Mart that had a pharmacy. That scope of restriction extends well beyond what is necessary for Caremark to protect its legitimate interests." This is a good example of when non-competes are too broad.

In essence, in order to be enforceable, the employer must be able to show it has a legitimate business interest in protecting the information it seeks to keep confidential. Some of the relevant factors in Illinois to determine if a non-compete agreement is enforceable is: 1) whether the non-compete agreement is no greater than required to protect the employers business interest, 2) whether the non-compete agreement imposes undue hardship on the employee, and 3) whether enforcing the non-compete agreement would prove harmful to the public.

Importantly, in determining whether an agreement is valid, courts attempt to balance the employee's right to earn a living against the employer's interest in protecting its information. A court may deem an agreement unenforceable if it is overly restrictive, unfairly limits the ability of workers to earn a living, provides for an unreasonably long period of time, or seeks to protect information that is not sensitive or confidential.

Use Caution Online: In our experience, LinkedIn is the worst enemy of employees navigating the dangers of working at a new employer. We have seen many situations where a new employee posts his or her new job and LinkedIn publicizes this to the employee's connections. The problem is that usually employees from the old job (where the non-compete or other restrictions exist) get notified of everything that is being done because they are still connected. This is not to say LinkedIn is doing anything wrong; its business model seems to focus on promoting professional advancement. But, when a former employer gets notified from LinkedIn, the former employee's potential restrictive covenant/non-solicitation/non-compete issues are now front and center and there is evidence of this.

Non-Competes for Low Wage Earners: Illinois passed the Freedom to Work Law. This law prohibits employers from requiring low wage employees to agree to non-compete agreements/covenants not to compete. Employees who are paid $13 per hour (or the applicable minimum wage) or less are considered low wage employees. The Act provides that a covenant not to compete with a low wage employee is "illegal and void".

Chapter 9
Confidentiality and Trade Secrets

Many employment contracts contain confidentiality and trade secret language. The law and employers do not always agree on this, however. In our experience, what a company thinks is a trade secret and what the law thinks is a trade secret is often very different.

Illinois has its own state-wide Trade Secrets law. In addition, President Obama signed the Defend Trade Secrets Act of 2016 into law. It creates federal court jurisdiction for trade secret violations involving interstate commerce. As most things impact interstate commerce, this will allow jurisdiction in federal court for most employer and employee disputes over trade secrets.

 Key Points:

1. There is a whistleblower immunity that is granted if an employee takes trade secrets for reporting a violation of a law. ("An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—"(A) is made—"(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and"(ii) solely for the purpose of reporting or investigating a suspected violation of law; or"(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."

2. If there is an anti-retaliation lawsuit, the employee can disclose the trade secret if it is filed under seal. ("An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—(A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.")

3. Employers are required to give notice of the immunity in trade secret agreements or they are barred from recovering certain damages against employees.

Overall, this law gives employers some additional remedies against employees who take trade secrets. It also provides employees with some important protections such as with regard to whistleblowing.

Employers are not always successful in enforcing confidentiality agreements. For example, in *Bridgeview Bank Group v. Meyer*, 2016 IL App (1st) 160042 (February 17, 2016) the Illinois appellate court affirmed a Cook County judge's decision to deny to a bank a temporary restraining order against a former senior vice president. The employee was terminated and received a severance agreement that waived his covenant not to compete/restrictive covenant. The severance agreement, however, kept in place his confidentiality obligations. Like many lawsuits against former employees with employment agreements, the lawsuit and request for a temporary restraining order alleged that the employee had contacted customers and taken information during his departure process. The court focused upon the fact that obtaining a temporary restraining order is an extraordinary remedy and that the lawsuit was not specific. The court explained that "At the outset, we note that there are virtually no well-pled facts in Bridgeview's complaint regarding information Meyer allegedly took with him or customers he solicited after he left. Rather, the complaint is replete with nonspecific and conclusory allegations." The court also focused upon the delay in seeking a temporary restraining order: "If, as Bridgeview now contends, Meyer's possession of the contact list, standing alone, is an obvious breach of his confidentiality agreement, we can conceive of no reason why Bridgeview would take such a leisurely approach to protecting that information."

There are <u>three important points from this appeal</u>.

1. Courts are often reluctant to enter a temporary restraining order against an employee unless there is good reason to do so. My experience is that judges will want to see evidence of irreparable harm that has a specific factual basis.
2. The waiver of a non-compete in the severance/separation agreement was important. The court noted that the employee was free to compete.
3. It is important not to delay in seeking injunctive relief. Why should the court treat a case as an emergency if the employer did not do so?

Chapter 10
Severance Agreements and Employment Contracts

When workers are hired, they occasionally are given an employment contract. And, when employees are fired, sometimes, they are presented with a severance agreement. Almost always, there are strings attached like waiving your legal rights. So, employees should think carefully before signing a separation or severance agreement or an employment contract.

Severance agreements are binding agreements wherein an employee (usually one terminated or laid off) pays the outgoing employee money and/or benefits and the employee usually agrees to give up his or her legal rights to sue the employer for any legal claims. There are often other significant rights waived in a separation agreement.

Whether to sign a severance agreement frequently depends on the nature of an employee's termination. For example, if there was something improper about the termination, an employee may not want to give up their legal rights or may want to negotiate better severance agreement benefits. If no rights were violated, and severance was not required, it may be that you should "take the money and run."

Under Illinois law, employers usually don't need to provide severance to employees that are terminated or laid off. Despite this, many businesses have implemented severance polices that award employees for their length of service while securing a release of claims from an employee.

Severance packages often include one or more of the following:

(1) severance pay based on the employee's wages,

(2) continuation of health insurance and other benefits at the employer's expense; and

(3) out-placement services.

Severance packages are sometimes offered in terms of weeks based on the length of the employee's employment. Of course, each employer will differ in its offer, and employees should be prepared for an offer that may differ from that discussed here. Further, employees should keep in mind that unless the employee has a written employment agreement that provides for a severance upon termination, the employee has no specific right to a severance payment and may not be offered any severance at all.

In offering a severance agreement, the goal of the employer is often to prevent a possible lawsuit as a result of the termination. For the employee, the goals are likely to maximize the amount of money obtained as part of the severance, obtain all of the benefits that she or he is entitled to and ensure that his or her subsequent job search is not hampered by having been terminated. The ultimate goal for both parties, however, should be to reach a fair and equitable agreement that offers adequate protection for both sides.

Many employers make employees sign arbitration agreements. Usually employees don't read them but they sign them anyway. Employees signing these packets often say to themselves: I need the job and I don't want to lose it if I don't sign. The United States Supreme Court handed down an opinion that holds that arbitration provisions in employment agreements are enforceable even if they strip the employee from his/her right to file their wage and hour claims as a collective or class action. *Epic Systems Corp. v. Lewis, Ernst & Young, LLP v. Morris and National Labor Relations Board v. Murphy Oil, U.S.A.*, Nos. 16-285, 16-300, 16-307, (2018).

An employee who is offered a severance package should be prepared to address the following:

- **Severance Amount:** As discussed above, the amount offered as severance may be based on the length of years an employee has worked at their employment. The amount of a severance can vary greatly between companies depending on the company's individual policy.
- **Health Insurance:** The Severance Agreement should detail the continuation of health insurance benefits, how long such benefits will last, and due dates of any payments the terminated employee must make payments by.
- **Restrictions/Waivers:** Severance Agreements sometimes contain oppressive and illegal terms that are not standard.

- **Re-Employment:** The Agreement should set forth terms relating to whether the employee is eligible for re-employment, when they may be considered for such re-employment, and how they may apply for such re-employment.
- **Non-Disparagement Clause:** A non-disparagement clause provides that neither party to the agreement may speak negatively of the other to third parties. In Severance Agreements, a non-disparagement clause will help employees because their employer cannot make unfavorable comments about them to prospective employers. On the other hand, a non-disparagement clause will help employers because their employee cannot make unfavorable comments to other employees, clients, or customers.
- **Release of Claims:** A Severance Agreement will likely contain a comprehensive list of the types of claims and lawsuits the employee agrees to give up upon execution of the agreement. Typically, this claim list will be very comprehensive and will contain almost every conceivable claim with the exception of those claims that cannot be waived in a general release.

Sometimes, a severance agreement will also contain a non-compete agreement, which restricts the employee from working a company in the same or similar industry within a geographic area for a specified period of time. A non-compete agreement can greatly restrict an employee's ability to find a new job.

Talk to a qualified employment lawyer about whether the severance agreement is reasonable and sufficient.

Chapter 11
Work Injuries

It is often illegal in Illinois for an employer to retaliate or terminate an injured worker or someone who files for workers compensation. In fact, even if someone suffers an on the job injury and a workers compensation claim is anticipated, it may be illegal to fire the worker.

In 2016, an injured worker received a jury verdict of $2.65 million against a well-known grocery store chain in a workers comp retaliation lawsuit. The employee alleged that the store fired him after unilaterally changing his absences from excused for injury to "no call, no show" after he filed for workmans compensation. The Workers' Compensation statute is in place specifically to protect employees from work-related injuries. Under the statute, an employee who is injured at the workplace while performing work duties is often entitled to medical care and compensation for their injury so long as the employee makes a claim.

To provide a workers compensation retaliation claim, an injured employee often shows they were fired in retaliation for engaging in legally protected conduct (i.e., filings for workers compensation benefits). The typical issue in workers compensation retaliation cases is whether the employer can prove that the employee was terminated for a legitimate reason other than the protected conduct.

Illinois recognizes a cause of action when the employee is injured and is discharged in anticipation of a workers' compensation claim. *Wolcowicz v. Intercraft Industries Corp.*, 478 N.E.2d 1039 (Ill. App. Ct. 1st Dist. 1985). For example, in *Gordon v. Fedex Freight, Inc*., 674 F. 3d 769, 773-74 (7th Cir. Ill. 2012), the court ruled that Illinois law states "…an employee exercises a right under the IWCA merely by requesting and seeking medical attention." The Court explained that:

"After Gordon sustained her injury, she reported to First and requested to go to the hospital. The following day, [**9] Gordon called the service center and informed Mallonee that she would be seeking additional medical attention from her family doctor. In light of these facts, First and Mallonee were surely aware that Gordon was actively requesting and seeking medical attention. Under *Hinthorn*, Gordon has met her burden of demonstrating the exercise of a right under the IWCA."

Likewise, in *Gacek v. Am. Airlines, Inc*., 614 F.3d 298, 299 (7th Cir. Ill. 2010) the employee injured his finger and reported the injury to the employer. When he had first reported the injury, a claim file had been opened by the airline's administrator of workers' claims. The court ruled that a discharge motivated by an injury report is a retaliatory discharge under Illinois workers' compensation law. This is true even if the employee files a workers' comp claim years later after the discharge. *Washburn v. IBP, Inc*., 910 F.2d 372, 373 (7th Cir. Ill. 1990) stated "Illinois courts have recognized a cause of action when a plaintiff is discharged in retaliation for filing a claim for workers' compensation, or for seeking medical attention." *Bryant v. Avon Prods*., 1998 U.S. Dist. LEXIS 3637, at *12 (N.D. Ill. Mar. 19, 1998) found that Illinois recognizes a cause of action for retaliatory discharge when an employee is discharged in retaliation for seeking medical treatment for a work-related injury. Finally, *Lambert v. Lake Forest*, 186 Ill. App. 3d 937, 941 (Ill. App. Ct. 2d Dist. 1989) stated that Illinois state common law recognizes a cause of action when the employee is injured and is discharged in anticipation of a workers' compensation claim.

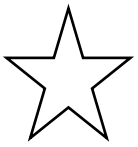
In Illinois, the Workers' Compensation statute is in place specifically to protect employees from work-related injuries. Under the statute, an employee who is injured at the workplace while performing work duties is entitled to medical care for their injury so long as the employee makes a claim.

The statute requires most employers to purchase workers' compensation insurance to pay for work-related injuries that may occur and, thus, almost every employee in Illinois is covered by workers' compensation from the moment they begin working. Importantly, the Illinois workers' compensation statute is a no-fault system, meaning the injured party does not have to prove the employer was negligent or at fault prior to becoming entitled to compensation.

Employees who are uncomfortable about filing a workers' compensation claim with their employer may take comfort in the fact that workers' compensation claims benefit both the employer and the employee. That is, when an employee files a workers' compensation claim, he agrees not to file a lawsuit against the employer for their work injury in return for receiving

compensation benefits. In fact, employers are not harmed because it is not the employer who pays the expense, but the employer's workers' compensation insurance.

On the other hand, employees benefit because when they file a workers compensation claim, they may be entitled to payment for their medical bills, eliminating most, if not all, out-of-pocket expenses. Furthermore, if an employee is injured to the point where they are unable to work following the workplace injury, a workers compensation claim may allow the employee to get 2/3 of their average weekly wages until they are able to return to their position following the claim. Finally, because Illinois is a worker-friendly state, employees may also receive payment for the permanency of their injuries depending on the workers compensation claim.



It is important that an injured employee notify the employer of their injury soon after being injured to help preserve a workers comp claim and that they also seek our appropriate advice from a worker compensation lawyer who practices work worker injuries.

The Illinois Supreme Court made an interesting ruling in the case of *Michael v. Precision Alliance Group, LLC*., 2014 IL 117378. The ruling helps clarify the standard in Illinois for retaliatory discharge cases. The Court explained that "while there is no precise definition of what constitutes clearly mandated public policy, a review of Illinois case law reveals that retaliatory discharge actions have been allowed in two settings: where an employee is discharged for filing, or in anticipation of filing, a claim under the Workers' Compensation Act (820 ILCS 305/1 et seq. (West 1992)); or where an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as "whistleblowing." *Jacobson v. Knepper & Moga, P.C.,* 185 Ill. 2d 372, 376 (1998).

The rationale is that, in these situations, an employer could effectively frustrate a significant public policy by using its power of dismissal in a coercive manner. Therefore, recognition of a cause of action for retaliatory discharge is considered necessary to vindicate the public policy underlying the employee's activity, and to deter employer conduct inconsistent with that policy. To sustain a cause of action for retaliatory discharge, an employee must prove:

(1) the employer discharged the employee, (2) the discharge was in retaliation for the employee's activities (causation), and (3) the discharge violates a clear mandate of public policy."

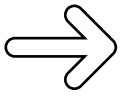
In essence, retaliatory discharge/whistleblower cases arise when an employee is wrongfully fired in retaliation for an activity that relate to something important to public policy. Examples of retaliatory discharge/whistleblowing cases that are sometimes raised involve when an employer is involved in illegal misconduct, cheating the government, or violating other laws. The Supreme Court clarified that the burden of proof is on the employee to demonstrate their case. The Court held that "in retaliatory discharge cases, an employer is not required to come forward with an explanation for the employee's discharge, although an employer may choose to offer a reason if it desires. Id. If an employer provides a reason for the employee's dismissal, that does not automatically defeat a retaliatory discharge claim. However, "if an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met." Id. Again, the burden rests on plaintiff to prove each of the elements of the cause of action."

Chapter 12
Employees Who Are Shareholder and Partners/ Executives

Many minority shareholders or executive employees have devoted years to helping to build a company— only to learn that their legal rights are often very limited. The laws of many states provide minority owners with certain statutory rights, such as the right to receive a fair price for their ownership interest but a non-owner employee may have almost no legal rights.

Common tactics that majority shareholders use to force minority shareholders out of a company include: (1) Cooking the company's books to financially benefit the majority shareholder-- to the minority shareholder's detriment; (2) Bad-mouthing the minority shareholder to company employees; (3) Firing the minority shareholder from his or her job at the company; (4) Refusing to share financial information with the minority shareholder; (5) Changing the locks on the door to deny the minority shareholder access to the company`s facilities; and (6) Starting a competing company--and then siphoning business secretly to the new business to avoid sharing profits.

Employees with fiduciary duties (i.e., owners and executives in some instances) need to be careful. Unlike a regular employee, fiduciary employees are held to a much higher standard. Examples of such cases involve partners and shareholders who fight over how profits are being shared, accounted, allocated, and distributed.



A Real Life Example: A recent case from Florida illustrates the length that courts will sometimes go to protect oppressed minority shareholders. In *Williams v. Stanford*, 977 So.2d 722 (1st Dist. 2008), two brothers (the "Williams Brothers") owned 30% of a carpentry company called B&S. Their partner, John Stanford, owned the other 70% of B&S and, along with Stanford's wife, served as B&S's Board of Directors. The Williams Brothers began to get suspicious about Mr. Stanford's management of B&S's finances, since B&S revenues were increasing— but profitability was decreasing. The Williams Brothers demanded to see B&S's financial records.

There was good reason Mr. Stanford did not want the Williams Brothers to see B&S's financial records. Mr. Stanford and his wife had allegedly charged numerous personal expenses to B&S's credit card (including charges totaling approximately $48,000 to a popular home-shopping network), and had used B&S funds to build a 3,200-squarefoot home for themselves and to improve property belonging to Mr. Stanford's father. The Williams Brothers then demanded that B&S's Board of Directors vote to sue the Stanfords. But, since the Board of Directors was Mr. and Mrs. Stanford, they (not surprisingly) refused. The Williams Brothers then filed a shareholder derivative action on behalf of B&S, naming the Stanfords as defendants. Mr. Stanford then resigned from B&S--after all, why would he want to work for the benefit of the Williams Brothers, who were still shareholders? Despite his resignation, Mr. Stanford continued to take a paycheck from B&S. But, Mr. Stanford apparently did not want to waste his business relationships, so (with the help of lawyers) he decided to form a new company called Stanford & Son. Mr. Stanford then proceeded to cause a "merger" by transferring B&S's assets to Stanford & Son in exchange for Stanford & Son agreeing to assume B&S's liabilities. Mr. Stanford then offered to purchase each of the Williams Brothers' stock for $25,000 and informed them of their statutory appraisal rights. Stanford & Son maintained the same location, the same telephone number, and the same staff, equipment, and vehicles as previously used by B&S. The Williams Brothers sued for: (I) breaches of fiduciary duty by the Stanfords, stemming from their alleged personal use of corporate assets and corporate funds; (II) breaches of fiduciary duty by the Stanfords in conjunction with their transfer of B&S's assets to Stanford & Son; (III) breaches of common law duty of loyalty by the Stanfords; and (IV) trade name infringement by the Stanfords, stemming from the use of B&S's trade name by Stanford & Son, among other claims. The main issue before the court was a statutory issue under Florida law—whether Florida's "appraisal rights" statute prevented the Williams Brothers from obtaining judicial scrutiny of the transfer of B&S assets from B&S to Stanford & Son, a company Mr. Stanford created with the admitted intention of withdrawing from the business relationship with the Williams Brothers. Under Florida law, a shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, under certain circumstances. Appraisal must determine the "fair value" of the dissenting shareholder's shares. In most cases, the statute denominates

appraisal as a dissenting shareholder's exclusive remedy. However, the Williams Brothers argued that they were entitled to more than just the "fair value" of their shares due to the corporate malfeasance described above. The court agreed. The court being heavy handed, however, will often backfire. relied upon Delaware precedent that appraisal would be an inadequate remedy for dissenting minority shareholders who alleged that corporate directors and officers manipulated the timing of a merger to artificially depress the cash-out price that minority stockholders would be paid for their shares post-merger. The court found that the Williams Brothers were not limited to their appraisal rights. The court relied upon evidence that Mr. Stanford secretively transferred B&S assets to a newly created company with the intention of effectuating a squeeze-out of the Williams Brothers.

Chapter 13
Illinois Child Bereavement Leave Act

Illinois has a law that provides for a cause of action against larger employers (those governed by the Family Medical Leave Act) who retaliate against employees who need time off work due to the death of a child. Employees are entitled to 10 days of unpaid leave. It is sad that we need such a law in this state. Any reasonable employer would allow an employee time off to go to a child's funeral.

Here is the core portion of the law:

(a) All employees shall be entitled to use a maximum of 2 weeks (10 work days) of unpaid bereavement leave to:

(1) attend the funeral or alternative to a funeral of a child;

(2) make arrangements necessitated by the death of the child; or

(3) grieve the death of the child.

Chapter 14
Illinois Employee Misclassification

To avoid paying overtime and other benefits, employers will sometimes misclassify workers as independent contractors. The standard for misclassification depends on which law is being analyzed. If a worker is misclassified, there are several laws that may be implicated, including:

A. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
B. Illinois Minimum Wage Law, 820 ILCS § 105/1 et seq.
C. Illinois Wage Payment and Collection Act (i.e., for deductions)
D. Employee Classification Act, 820 ILCS § 185/1
E. Illinois Prevailing Wage Act, 820 ILCS § 130/0.01 et seq.
F. Family Medical Leave Act, 29 U.S.C. § 2601 et seq.
G. ERISA
H. Workers' Compensation ($500 per day fine/minimum $10,0000 and Criminal Penalties)
I. Unemployment Insurance trust contribution
J. Department of Revenue

Illinois Classification: Illinois utilizes a relatively strict standard for employee misclassification. Sometimes it is referred to as "Easy as 1-2-3" because of its 3 part test. Illinois law states:

"Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it's proven in any proceeding where such issue is involved that:

1. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
2. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
3. Such individual is engaged in an independently established trade, occupation, profession, or business."

Federal – Department of Labor's View: In order to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the multi-factorial "economic realities" test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself. A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA. The application of the economic realities factors must be consistent with the broad "suffer or permit to work" standard of the FLSA.

Chapter 15
Workplace Privacy and Social Media Rights

Illinois Workers Have Social Media Privacy Rights: Under the Right to Privacy In the Workplace Act (820 ILCS 55/1), Employers cannot:

1. Request or coerce an employee/applicant to provide a username or password to gain access to employees' personal "online account".

a. "Online account" was expanded last year to mean one used by a person primarily for personal purposes.

2. Request or coerce the employee/applicant to authenticate or access a personal online account in the presence of the employer.

3. Require or coerce the employee/applicant to invite the employer to join any personal employee's online group.

4. Require or coerce the employee/applicant to join an online group that would allow the employer to gain access to their friends.

ii. For violations, employees can commence an action in court for actual damages. Additionally, for "willful and knowing" violations, between $200 and $500 in damages plus attorney fees may be awarded.

Biometric Privacy Rights: Illinois passed the Biometric Information Privacy Act (or "BIPA"). BIPA is of importance to employees. Workers are sometimes asked for fingerprint/hand/retina (or other biometric) scans for things like clocking in and out. Some employers are so concerned about wage theft (people clocking others in and out), they have resorted to capturing biometric information. In our experience, the most common form of biometric utilization in the workforce is with fingerprint or hand scans.

An American Bar Association article reported in *Employment Privacy: Is There Anything Left?* that "Biometrics can also create the risk of identity theft on an unprecedented scale. It is easy to change a password or issue a new ID card, but we cannot give people new fingerprints. If a hacker gained access to the biometric database of a large employer that uses fingerprints, the

identity theft harm is almost beyond imagination. Linking the records of biometric systems can create a record of a person's location similar to GPS."

Illinois' BIPA law requires that employers get permission and have policies in place to protect biometric information such as fingerprinting. It requires informed consent and written policies. These are useful safeguards to at least minimize the risk of biometric abuses. Employees who work (or have worked) for an employer who violated BIPA can file a claim in court and recover between $1,000 and $5,000 per violation. Notably, nothing prevents employers in Illinois from capturing biometric information; however they must protect that information and make sure there is informed consent, etc.

There has been a push/lobbying by social media companies to limit the scope of BIPA because they have been sued for allegedly violating biometric laws. So far, they have been unsuccessful in changing the law.

It is critical that within the employment venue, the biometric laws remain strong. Employees need to work and should not be subjected to making a decision of having their biometric information placed at risk or not being able to feed their families.

Chapter 16
The Right to Improve Workplace Conditions

The National Labor Relations Act (NLRA) protects the rights of employees to act together to address conditions at work, with or without a union. This includes conducting these activities on social medial. Section 7 of the NLRA gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7″ of the Act.

Exercise Caution!: An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

Chapter 17
How To Request Your Personnel File

If you want to investigate the reason for your termination, it is important that you request a copy of your personnel file. By law, you have the right to receive it. Illinois' law is called the Personnel Record Review Act, 820 ILCS 40/2.

Sample Letter To Request Your Personnel File

[Employer Address]

Re: Personnel File Request

Dear Human Resources:

Pursuant to the, please release a complete copy of my personnel file which shall include all documents required by law to be included.

Please feel free to email the personnel file to: _____.

Pursuant to law, the response is due within 7 days. Thank you for your anticipated cooperation.

Sincerely,