Legal INSIGHTS
Ottosen DiNolfo Hasenbalg & Castaldo, Ltd.
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For over twenty-five years, ***Legal Insights*** has provided clients of Ottosen DiNolfo Hasenbalg & Castaldo, Ltd. with updates on important legal matters involving the fire service, schools, municipalities, pension funds, litigation, and small businesses.

Previously, these separate newsletters were geared toward those individual practice areas. Many clients, though, could benefit from insights into other legal topics as well. Therefore, starting with this issue, ***Legal Insights*** will combine all these areas into one newsletter, which will be released quarterly with twice as much content.

This approach demonstrates the wide range of services Ottosen DiNolfo provides. We welcome your feedback of our new newsletter. Thank you for reading!

Electronic Meeting Attendance in Light of Corona Virus Pandemic

by John H. Kelly

With Governor Pritzker's declaration of a state of emergency due to COVID-19 and public health requirements of social distancing, the ability of public bodies to conduct their business with in-person, open meetings has been severely curtailed. At the same time, an executive order by the Governor made it slightly easier to conduct meetings electronically, while creating new issues for public bodies.

Section 2.01 of the Open Meetings Act (5 ILCS 120/2.01) requires that a quorum of the members of a public body must be present at the location of the public meeting in order for that meeting to be valid. The Act's Section 7 (5 ILCS 120/7) allows for members to attend by other means if a quorum is physically present. The statute notes that the term "other means" includes video or audio attendance. Section 7 permits electronic attendance only if the member is suffering from personal illness or disability, or is absent due to employment purposes or unavailable due to a family or other emergency. The electronic attendance must be approved by a majority of the public body, after previously approving a resolution or policy allowing it, and must allow for the public and anyone else attending the meeting to hear the absent member's vote or discussion.

Governor Pritzker has issued many executive orders in response to the COVID-19 emergency. Among other things, he has limited all public or private gatherings to no more than 10 people and ordered residents to stay at home except to perform necessary activities. As a result, local governments were confronted with determining how public business would continue.

To help facilitate holding meetings, Section 6 of Executive Order 2020-07 suspended certain provisions of the Open Meetings Act related to electronic means. The order suspended the requirement that a quorum of the public body must be physically present, allowing any number of board members to participate by video or audio. The Order also suspends the normal prerequisites for participating "by other means." The Governor encouraged units of government, to the extent possible, to postpone the consideration of public business, or at least only discuss necessary items.

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Employment Related Concerns: Legalized Cannabis

by Karl R. Ottosen

2020 has come with new employment related matters which most of us never expected to face. One, which now seems ages ago, is the legalization of recreational cannabis in Illinois, which requires all employers to update policies and practices.

Except for certain regulated transportation employees, CDL-licensees, and public safety personnel (and possibly employees funded by Federal contracts or grants), employees may not be denied employment or be disciplined for lawful use of cannabis. Thus, hiring processes-including applications, interview questions and drug screening, require review and revision. Employees may be prohibited from using, possessing, and being impaired by use of cannabis at work. Policy review is required and collective bargaining agreements also must be negotiated given the impact of the legalization of an illegal controlled substance pursuant to federal laws.

Policies and collective bargaining agreements should clearly describe prohibited activity, define "work place," and "work day" (include meals and rest periods, and overtime or on-call time). Is there a reasonable period of time before the start of the workday during which employees are to be prohibited from use to prevent impairment? What is impairment; how is it displayed? Who is responsible for noting the basis for a reasonable belief an employee is impaired? Has the employee suspected of being impaired been given an opportunity to explain his or her condition before being ordered for a drug test? All of these issues and more need to be clearly addressed in policies and union contracts.

Given that the current testing processes are generally unable to accurately indicate the level of impairment or time of use, the description of perceived impairment will be critical in any disciplinary process. Supervisors need to be trained in identifying signs of impairment and in appropriately documenting them.

Cannabis needs to be accepted as a legal product in Illinois. This is a difficult shift in mindset for many people. Employers are encouraged to address an employee's use of cannabis in a similar manner as their use of alcohol. Penalties for policy violations should take into consideration that alcohol and drugs can be addictive for many people whose use is not readily controlled. Required treatment options as conditions of less severe discipline may be appropriate. Employers are urged to take each case individually and ensure legal issues are carefully analyzed before imposing discipline.

Electronic Meetings

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Subsequently, the Illinois Attorney General's Office issued "Guidance to Public Bodies on the Open Meetings Act during the COVID-19 Pandemic." This document can be viewed at foia.ilattorneygeneral.net. The recommendations and reminders on conducting electronic meetings include:

- Allow all participants to clearly hear each other at all times, along with the public and press, and allow public comment at least by submission.
- Post agendas as required by Section 2.02 of the Open Meetings Act. The agenda should include an explanation of the process by which people can attend the meeting by both telephone and internet.
- Minutes of these meetings are still required. When possible, meetings should be recorded and posted on the public body's website.
- Only hold electronic meetings where immediate action is needed.
- If votes are taken, the votes must be audible to anyone listening and recorded as part of the minutes of the meeting.

Although neither the Governor's Order nor the Attorney General's Guidance requires live public comment, it is strongly recommended that boards give the public that opportunity. If a teleconference or web-based meeting is being conducted, members of the public can be muted except during the period of public comment. At the very least, public bodies should allow individuals to submit comment by email or written form, which will then be read at the meeting.

If your Board finds it necessary to conduct a meeting during this emergency, you should follow these guidelines. Also, in an abundance of caution, we suggest that your Board ratify any actions taken in these electronic meetings at the first in-person meeting you can hold after the state of emergency is lifted. Should you have any questions about public meetings, or any other topic associated with COVID-19, please contact an attorney from Ottosen DiNolfo.

For more informaton related to COVID-19, including employment issues, please see our recent Client Alerts available at https://ottosenlaw.com/publications/

Court Affirms Line-of-Duty Death Benefits to Firefighter's Surviving Spouse

by Carolyn Welch Clifford

In a novel case decided earlier this year, the Illinois Appellate Court upheld the decision of a pension fund board of trustees to award line-of-duty surviving spouse benefits to the wife of a firefighter who died of cancer. In *Village of Buffalo Grove v. Buffalo Grove Firefighters' Pension Fund and Kim Hauber*, 2020 IL App (2d) 190171, the Second District affirmed the Board's determination that Kevin Hauber's death from colon cancer was caused—at least in part—by his long career in the fire service.

Hauber joined the Buffalo Grove Fire Department in 1994 as a firefighter/paramedic. After 20 years of service, he was diagnosed with colon cancer. Hauber underwent treatment and genetic testing, which determined that there was no genetic cause for his cancer. By August 2017, his condition rapidly began to deteriorate, causing him to file applications for pension disability benefits. The Board appointed three independent medical evaluating physicians to conduct a records-only review of Hauber's application. In addition to Hauber's voluminous medical information, the records included short summaries of all of the significant incidents to which Hauber had responded during his career. The IME physicians were also provided copies of research from

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Post-*Janus* Law Obliges Public Employers to Assist Unions

by Maureen A. Lemon

Since the 2018 U.S. Supreme Court's ruling in *Janus v. AFSCME*, public unions have sought to diminish the impact of that decision, which gave public employees the right to opt out of union membership. In a nod to Illinois public unions, Governor J.B. Pritzker signed into law Public Act 101-620 on December 20, 2019. The new law requires Illinois public employers to regularly provide updated information about their workforce to any exclusive bargaining representative, prohibits the disclosure of certain employee information to third parties, and allows union officials the right to meet with employees on work premises during the work day.

Provide union with updated employee information on a monthly basis

P.A. 101-620 requires all employers governed by the Illinois Educational Labor Relations Act (IELRA) and the Illinois Public Labor Relations Act (IPLRA) to provide the following information regarding all current employees, regardless of their union affiliation, to the applicable exclusive bargaining agent:

Employee name
Job title
Date of hire
Worksite location
Work ID number (if available)
Work telephone numbers
Work email address
Home and personal phone numbers (on file)
Personal email address (on file)

The information must be provided in an Excel file or other mutually agreed upon editable digital format. School employers must share the information within 10 calendar days from the beginning of each school term and then every 30 calendar days during the school term. IPLRA employers must provide the same information at least once each month and upon request, as long as the information is not requested more than once per payroll period. Comparable information must be provided to the applicable union within 10 calendar days from the date of hire of a new bargaining unit employee, unless the parties agree to another time frame.

Do not disclose private and union membership Information to Third Parties

The new law prohibits employers subject to the IELRA and the IPLRA, as well as all pension funds and retirement systems subject to the Illinois Pension Code, from disclosing certain information, unless such disclosures are (i) required under the Freedom of Information Act (FOIA); (ii) made for purposes of conducting public operations or business; or (iii) made to the exclusive labor representative as stated above. Specifically, the following information generally may not be disclosed to a third party by any Illinois public employer or pension fund: (1) home address; (2) date of birth; (3) home and personal phone number; (4) personal email address; (5) membership status in a labor organization and/or dues paid to such organization; and (6) emails or other communications between a labor organization and its members. A public employer that discloses information that is exempt from disclosure commits an unfair labor practice.

Public employers that receive a request for any of the above-information by anyone other than the exclusive bargaining representative must provide a written copy of the request, or a written summary of an oral request, to the exclusive bargaining representative or, if none exists, to the employee. The employer must also provide a copy of any response within five business days of sending it.

Some of this personal information was already barred from disclosure under FOIA. However, while an employee's membership status in a labor organization or emails between a union and its members would typically be subject to disclosure under FOIA, FOIA itself was amended by P.A. 101-620 to exempt that information from inspection and copying. Since the purpose of P.A. 101-620 is to protect unions, in part from third party right-to-work groups that seek to disrupt the relationships between unions and their members, it is reasonable to conclude that public entities subject to P.A. 101-620 should not release any of the information listed above in response to a FOIA request.

Allow union access to employees during work hours

School and IPLRA employers must allow union agents and their employees "reasonable access" to employees in the bargaining units they represent. This access may not impede normal operations and must be without charge to pay or leave time of employees or union representatives.

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Beyond Pensions and Pot: Other Notable Fire Service Legislation

by Shawn Flaherty

The 101st Legislative Session of the Illinois General Assembly just started its second year in January. The first year was a busy and productive session with single party control of the Governor's office and both houses of the General Assembly. Governor J.B. Pritzker vetoed few bills, and several noteworthy public acts impacting the Illinois fire service were signed into law. The public acts detailed below have been under-analyzed in the shadow of those flashy new laws regarding cannabis and pensions.

Public Act 101-0139

Section 11(k) of the Fire Protection District Act was amended to allow a fire district to approve purchases over $20,000 without bidding via a qualified joint purchasing program. The joint purchasing program may be either a governmental or nongovernmental program, but the program must require a competitive solicitation and procurement process and advertising. This legislation codifies the use of these programs, which are prevalent among firefighting and EMS vehicle dealers.

Public Act 101-0041

Section 11(k) was again amended to allow fire districts to publish the required bidding notices in a weekly newspaper instead of a daily paper. This legislation also mandates that fire districts post the bidding notices on their websites if the website is maintained by the fire district's full-time staff. Finally, at long last, this legislation eliminates the rather silly requirement that fire commissions publish a notice of promotional testing in the newspaper.

Public Act 101-1177

This legislation removed two annual legal requirements for units of local government related to prevailing wage compliance. First, public entities no longer need to make an annual determination of prevailing wage rates by resolution. Second, public entities no longer need to publish a notice of that in the newspaper, nor must they file it with the State. Please note that governments must still comply with all other aspects of the Prevailing Wage Act with regards to work performed by contractors on public works projects.

Public Act 101-0434

A new exemption from the Illinois Freedom of Information Act (FOIA) was granted to public bodies. Public bodies are no longer required to divulge credit card or debit card numbers, FEIN numbers, security codes, passwords, or similar data. Most entities have been redacting this information for years to avoid identity theft, but now the exemption is patently clear.

Public Act 101-0082

The Fire Investigation Act (425 ILCS 25) was amended to allow local jurisdictions and the Office of the Illinois State Fire Marshal (OSFM) to have concurrent jurisdiction in the enforcement of life safety violations and arson cases. This legislation provides revised administrative procedures for OSFM hearings on these fire hazards and further provides for expedited notification via email.

Public Act 101-0489

This new law permits municipalities and fire protection districts to negotiate with its full-time union to establish an apprentice program for full-time hires. Establishment of such a program that meets the criteria set by this statute would provide for qualified apprentices to receive twenty preference points on that department's hiring examination process, and these points may be awarded at any time during the eligibility process. Note that the process is optional rather than mandatory and would require collective bargaining with the union.

Public Act 101-0177

The Equal Pay Act of 2003 was recently amended to increase protection for employees and applicants. The act bars employers from screening or asking potential employees about their wage or salary history. Moreover, employers cannot solicit compensation history information from previous employers. Nothing in this act prohibits employers from discussing salary expectations with potential employees.

Public Acts 101-0602 and 101-0165

Two new requirements were established for any public buildings that have restrooms which are open and accessible to the public. The first act requires that every public body with accessible bathrooms have at least one "safe, sanitary, convenient, and publicly accessible baby diaper changing station that is accessible" to both genders. This may require the public entity to equip up

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Post-*Janus* *Continued from page 4*

This access includes:

- Meeting with employee(s) on the employer's premises during the work day to investigate and discuss grievances and workplace-related complaints,
- Meetings on the employer's premises during lunch and other non-work breaks, and before and after the workday, to discuss collective bargaining negotiations, the administration of union contracts, and internal matters involving the union,
- Meeting with newly hired employee(s) for up to one hour either within the first two weeks of employment or at a later date mutually agreed upon by the employer and union, either on the employer's premises or at another mutually agreed upon location, and
- The right to use employer facility mailboxes and bulletin boards to communicate with bargaining unit employee(s).

The employer and union may, but are not required to, negotiate greater access by the union to bargaining unit employees, including through the employer's email system. Unless such access is granted, unions may not communicate with public employees through the employer's email system.

Direct employee requests regarding union membership and dues to union

Codifying best practice since the Janus decision was issued in 2018, P.A. 101-620 specifies that all employee requests to authorize, revoke, cancel, or change authorizations for union dues deductions should be directed to the union rather than to the public employer. Public employers shall rely on information provided by the union regarding whether deductions have properly been authorized, revoked, canceled or changed. The union shall indemnify the public employer for any damages and reasonable costs incurred for any claims made by employees for deductions made in good faith reliance on such information.

We anticipate labor disagreements over certain aspects of P.A. 101-620. If you have any concerns as you implement the new law's requirements, please call Maureen Lemon or Karl Ottosen at (630) 682-0085.

Employers Must Inform Employees of Options for Leave

by W. Anthony Andrews

Employees dealing with issues of their health or their relatives' health are entitled to job-protected leave under the Family and Medical Leave Act (FMLA). In a recent appellate decision, the court highlighted that employees are no longer necessarily required to give their employer direct notice of that need or desire in order to use job protected-leave. Employers must inform employees of their options when that need becomes evident.

In *Valdivia v. Township High School Dist. 214*, 942 F.3d 395 (7th Cir. 2019), the plaintiff had successfully worked as an administrative assistant for Township High School District 214 for six years. She was described as "extremely dependable," was never disciplined, and rarely took sick days. Valdivia's mental state began deteriorating after she received a promotion. She had trouble sleeping, eating, and staying energized. In July, her symptoms worsened to include weight loss, inability to concentrate, and exhaustion. She arrived at work late and left early because of uncontrollable crying.

NEWS YOU CAN USE

Required Training on Sexual Harassment Prevention:

Starting this year, all employers in Illinois must provide annual training to their employees on methods of preventing and recognizing sexual harassment. The training must meet standards provided by the Illinois Department of Human Rights (IDHR). The model includes information on relevant statutes, summaries of employee rights and employer responsibilities, and examples of sexual harassment.

Failure to provide the required training by December 31 will result in a $1,000 fine. Subsequent penalties are $3,000 and $5,000. The penalties are less for employers with fewer than four employees. IDHR plans to check an employer's training status when investigating complaints, when employers seek state public contracts, and when employees report lack of compliance.

Ottosen DiNolfo attorneys are prepared to offer this training to your employees. Resources are also available online through various companies.

Valdivia did not conceal her symptoms. In fact, she repeatedly met with her principal and recited her symptoms. She asked for a ten-month position as an accommodation, but was denied. In August, Valdivia told the principal that she was considering leaving for "medical reasons."

On August 4, 2016, Valdivia submitted her resignation letter, which she then tried to revoke. After completing her last day of work, Valdivia was admitted to the hospital for four days and was diagnosed her major depressive disorder, and single episode, severe, and generalized anxiety disorder. The doctor testified that it would be "difficult for anybody to work" with her symptoms.

Valdivia sued her employer and prevailed at trial, successfully arguing that the District interfered with her FMLA rights. The District subsequently filed an appeal, arguing that Valdivia was not entitled to leave nor had Valdivia provided the District with adequate notice of her desire to obtain leave.

The purpose of FMLA is to "entitle employees to take reasonable leave for medical reasons." An employee is entitled to FMLA leave if (1) she is afflicted with a "serious health condition," and (2) that condition makes her unable to perform the essential function of her position. An employee has a "serious health condition" within the meaning of the FMLA when she has "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider. (29 U.S.C. § 2611(11))

The appellate court found that Valdivia's detailed testimony describing her condition and symptoms, combined with the testimony of her psychiatrist, was enough to find that she suffered from a "serious health condition." In order to qualify for FMLA, an employee does not need to be diagnosed during her employment, as long as the condition existed at the time. Her evidence made it clear that her condition did not arise for the first time on the day she saw the doctor.

The court also rejected the District's argument that Valdivia did not provide it with notice. Direct notice to an employer is not always required; an employee's constructive notice may be sufficient. Quoting language from a previous decision, the appellate court noted that "clear abnormalities in an employee's behavior may be enough to alert the employer to a serious health condition." The court reasoned that it was enough that the principal knew Valdivia needed leave; she did not need to mention "FMLA" by name, nor did she need to demand its benefits expressly. Thus, the district court was correct that Valdivia's documented abnormal behavior gave the District sufficient notice to qualify her for leave under FMLA.

Whenever an employee exhibits behavior that suggests a serious health condition, the employer should tactfully inform the employee about paid-leave options, without infringing on the employee's privacy. Then, if the employee's attendance or condition becomes more of a problem, employers should offer FMLA before taking other employment action. When in doubt, it is wise to call an attorney at Ottosen DiNolfo who deals regularly in this area.

Recent Legislation

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to two bathrooms with changing stations in each public building. The second act requires public entities to designate any and all single-occupancy restroom as "all gender" and outfit the restroom with exterior signage to allow for use by either gender. Multi-occupancy restrooms are not required to be similarly designated. Both acts were made effective on January 1, 2020.

Public Act 101-0375

One of the most important laws passed this session aimed at suicide prevention for public safety employees. This law creates the Illinois First Responder Suicide Prevention Act, which advances confidential peer support counseling programs within fire and police departments. In addition, the Act creates a cause of action for employees against confidentiality breaches and also creates a cause of action against employers for taking adverse employment actions against participants in the peer support process. Finally, the Act also allows for training resources to help public safety employees better identify stress, trauma and PTSD among others in their professions. Effective now.

Still another dozen or so public acts impacting the fire service were signed into law by Governor Pritzker and summaries of those laws can be found on the IFCA and IAFPD websites. As you are reading this, understand that nearly one hundred bills in this legislative session have been introduced and your fire service legislative advocates are advancing certain bills while simultaneously resisting legislation that negatively impacts the fire service.

Line-of-duty death benefits

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the International Agency for Research on Cancer and several studies on firefighters and cancer that had been submitted by Hauber's attorney.

One of the IME physicians found that there was association between firefighting and Hauber's colon cancer, citing the testing that had ruled out a genetic cause. The second IME physician noted that "there is [a] statistically significant excess risk for colon cancer in firefighters with at least 20 years of service" and thereby found that Hauber's "risk of developing colon cancer was significantly increased due to his service as a firefighter/paramedic."

Before the third IME report was received, Hauber died of colon cancer. Because Section 4-112 of the Illinois Pension Code requires three IME reports be considered before awarding disability benefits, the Board had not yet ruled on his applications. Three months after his death, the third IME physician concluded she was "unsure" whether it was medically possible that Hauber's cancer "resulted from the performance of an act of duty or from the cumulative effects of acts of duty."

Hauber's widow, Kim, applied for line-of-duty surviving spouse benefits under Section 4-114(i) of the Illinois Pension Code (40 ILCS 5/4-114(i)). Accordingly, she needed to prove that her husband died "as a result of sickness, accident, or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty."

In weighing the IME reports, the Board found that the third IME physician had erroneously asserted that genetic testing had not been done. As a result, the Board found her report less reliable and assigned more weight to the reports of the first and second IME physicians. The Board further found that Hauber had been in good health and physical condition, which contrasts with the typical factors leading to colon cancer, "such as poor diet, excessive weight, alcohol consumption, tobacco use, or sedentary lifestyle." The Board voted 3-2 to award a line-of-duty surviving spouse benefit to Kim Hauber, determining that her husband developed fatal colon cancer as a result of the cumulative effects of performing acts of duty.

The Village appealed the Board's decision, arguing that the Board could not have awarded a line-of-duty surviving spouse benefit because Kim Hauber did not point to a specific act of duty that caused Kevin Hauber's cancer. Furthermore, the Village asserted that the Board had improperly applied a rebuttable presumption that Hauber's colon cancer and resulting death had been caused by an act of duty or the cumulative effects of acts of duty, which is not provided for by statute.

On January 17, 2020, the appellate court unanimously affirmed the Board's decision. The court explained that a firefighter need not prove that his or her job duties were the sole or primary cause of the disabling condition. Rather, the causation requirement is met if an act of duty or the cumulative effects of acts of duty contributed to or exacerbated the disability. And in this case, the record reflected that Hauber participated in at least 127 documented fire calls. These calls, coupled with the opinions of the first two IME physicians and the Village's own job description that warned of potential carcinogenic exposures, provided enough competent evidence for the Board to conclude that his colon cancer and resulting death were duty-related.

The court also disposed of the Village's fallback argument that the Board had improperly applied the occupational disease disability rebuttable presumption for cancer in this line-of-duty death case. The court found that the Village had misconstrued the Board's findings and decision, which had provided supplemental findings of fact on Hauber's occupational disease disability application in case the Board's decision was overturned. In short, the Board's decision was upheld in its entirety.

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