

■ Illinois Supreme Court Affirms Pension Asset Consolidation Is Constitutional

by Hayley Loufek

On January 19, 2024, the Illinois Supreme Court issued its decision declaring constitutional Public Act 101-610 (the “Act”), which consolidated the assets of downstate local police and firefighter pension funds into two statewide investment funds.

The purpose of the Act is “to streamline investments and eliminate unnecessary and redundant administrative costs, thereby ensuring more money is available to fund pension benefits for the beneficiaries of the transferor pension funds.” 40 ILCS 5/22B-114, 22C-114. After it passed, however, several active and retired members of local police and firefighter pension funds filed a complaint against Governor Pritzker, the Department of Insurance, and two statewide investment funds, arguing that the Act was unconstitutional in that it violated the pension protection clause and the takings clause of the Illinois Constitution.

The circuit court found no violation of either clause and declared the Act constitutional. This ruling was upheld by the appellate court.

The Illinois Supreme Court then took up the case. In a unanimous opinion, the high court held that the Act is constitutional. *Arlington Heights Police Pension Fund, et al. v. Jay Robert “J.B.” Pritzker, et al.*, 2024 IL 129471.

The Illinois Supreme Court first addressed the plaintiffs’ first argument—that the Act violated the pension protection clause by impacting and diluting their voting rights and rights to control the management of their respective pension funds, and that voting rights are a “benefit” under the pension protection clause that cannot be altered.

The court began by noting that the Illinois Constitution’s pension protection clause provides that “[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable

contractual relationship, the benefit of which shall not be diminished or impacted.” Ill. Const. 1970, art. XIII, § 5. Therefore, once an individual becomes a member of a public retirement system, any subsequent changes to the Illinois Pension Code that would diminish the benefits that an individual might receive from that retirement system cannot be applied to them.



However, the “benefits” that are protected by the pension protection clause are *monetary* benefits, such as a participant’s ability to continue participation or increase service credits (which impacts the calculation of benefit payments), subsidized healthcare, disability and life insurance coverage, and eligibility to receive a retirement annuity and survivor benefits.

According to the Illinois Supreme Court, “the ability to vote in elections for local pension board members is not such a constitutionally protected benefit, nor is the ability to have local board members control and invest pension funds.” The court said the Act changes only a local board’s power to invest assets of the local funds; it does not affect pensioners’ right to elect members of their local funds’ boards or their local boards’ authority to determine the amount of benefits Plaintiffs may receive. So, the Act does not diminish or impact the actual monetary benefits members were promised when they joined their funds, and thus does not violate the pension protection clause.

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Illinois Supreme Court

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The Illinois Supreme Court also found that the Act does not violate the takings clause of the Illinois Constitution. Plaintiffs argued that, because the Act requires them to transfer their private property, including securities, funds, assets, monies, and cash reserves to the new statewide pension investment funds and bear the cost of the transition, their private property has been taken in violation of the takings clause.

The high court did not agree. It explained that the takings clause provides that private property shall not be taken or damaged for public use without just compensation as provided by law. However, the pensioners only have a constitutional right to receive the benefit payments promised to them, which the Act does not change—"they do not have a property right to any particular level of assets used to pay those benefits or in the way those assets are held or invested." As such, the Plaintiffs failed to identify any property rights affected by the Act.

With this unanimous decision, the Illinois Supreme Court has affirmed that Public Act 101-610 does not diminish any protected benefits under the pension protection clause or effectuate an unlawful taking of private property of participants in a defined benefit plan. This decision allows the Act's full implementation.

New in Schools, Part I: Bullying Prevention Law Changes

by Maureen Anichini Lemon

The Illinois General Assembly recently made several changes to the Illinois Bullying Prevention Law. 105 ILCS 5/27-23.7.

In a nutshell, the Law prohibits bullying on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic.

Public Act 103-47 expanded the list of actual or perceived characteristics to include: physical appearance, socioeconomic status, academic status, pregnancy, and homelessness.



Additionally, the Act replaced the Law's original "prompt" notice to parents or guardians of all students involved in an alleged incident of bullying with notice "within 24 hours after the school's administration is made aware of the student's involvement" in the incident.

Also, the school must make diligent efforts to notify the parent or guardian, using all contact information that can be reasonably obtained by the school within the 24-hour period. This notice is required after all individual instances of bullying, as well as all threats, suggestions or instances of self-harm determined to be the result of bullying.

Furthermore, beginning in August 2024, each school district must collect, maintain, and submit to the Illinois

State Board of Education ("ISBE") non-identifiable data regarding verified allegations of bullying by August 15 of each year. The ISBE will, in turn, adopt rules for the submission of this data including, but not limited to (i) a record of each verified allegation of bullying and action taken; and (ii) whether the instance of bullying was based on actual or perceived characteristics noted above and, if so, the relevant characteristics.

P.A. 103-47 also required the ISBE to publish a template model bullying policy. The model policy which was published on January 1, 2024, and can be found on the ISBE's website. Notably, the model policy now contains a recommendation that schools have a "bullying report manager," whose contact information should be listed.

It is imperative that the contact information for the appropriate district administrator is listed on your district's bullying policy so that students, parents, and others who wish to make a bullying report know how to do so.

The model policy further affirms the right of an individual to make an anonymous bullying report, but states that formal disciplinary action cannot be taken solely on the basis of an anonymous report. A school district should not ignore a report simply because it is anonymous; that report must be taken seriously, investigated, and the results of the investigation properly documented. Any formal disciplinary action would arise out of the investigation rather than the anonymous report alone.

Consistent with ISBE regulation 1.295 implementing schools' Bullying Prevention Policy (23 Ill. Admn. Code. §1.295), school districts must review and re-evaluate their bullying policy every two years to assess its outcomes and effectiveness and make necessary revisions based on factors listed in the model policy. The reviewed policy shall be submitted to the ISBE through the IWAS system by September 30.

If you have any questions or need guidance implementing your bullying prevention policy and procedures, please contact one of your attorneys for assistance.



■ New in Schools, Part II: Amendments to Student Administrative Transfer Procedures

by *Maureen Anichini Lemon*

Public Act 103-0473 recently revised Article 13A of the School Code to allow schools to “immediately” transfer students determined to be subject to suspension or expulsion to an alternative school program. Nevertheless, students remain entitled to the same due process rights (including a hearing before the school board) that they receive prior to an expulsion.

Beginning January 1, 2024, certain information must be provided to the parents/guardians prior to an Article 13A transfer to an alternative school, including: the specific nature of the curriculum; the number of students in the program; any available services; the program's disciplinary policies; a typical daily schedule; and any extracurricular activities that may be offered at the alternative school program.

The transferring school and alternative school personnel must still convene a meeting at the earliest time following the transfer to develop an alternative education plan. The student, parents and/or guardians must be invited to this meeting. The transferring school district and alternative school program may convene the meeting to develop the alternative education plan without the student and their parent/guardian if they are unable to attend that meeting. Then, the appropriate staff from the alternative school program shall provide a copy of the alternative education plan to the student and their parents/guardians and offer a meeting within 30 days after the effective date of the transfer to the student and the student's parents or guardians to discuss and provide input on the student's alternative educational plan.

The plan must also now include transitioning the student back to the transferring school at the end of the plan, in addition to specifying (1) the date after which the student shall return to the transferring school district; (2) the academic and behavioral components; and (3) a method and time frame for reviewing the student's progress. This will include a transition meeting between the transferring school, the alternative school program and the student's parent/guardian at least 30 days prior to the return date.

Prior to January 1, 2024, a parent or guardian could object to the student's return to the regular education program at the end of the student's alternative transfer.

Under the recent amendment, the student “shall” return to the transferring school district at the end of the plan's duration; parents will no longer have the opportunity to object to the student's return. The return date may be extended if agreed to in writing by the transferring school district, the alternative program and the student's parent/guardian.



To be prepared when the need for an Article 13A transfer occurs, contact your Regional Safe Schools and other alternative school programs now to gather the requisite information that can be shared with families prior to a transfer. Confirm that the information is updated each time you need to share it with a family. Additionally, ask to see the alternative education plan template used by those programs to ensure that they contain all the statutorily required components.

If you have any questions or need guidance implementing your alternative transfer policy and procedures, please contact one of our Ottosen DiNolfo attorneys for assistance.



■ PAC: Public Bodies May Not Approve Closed Session Minutes in Closed Session

by Michael Castaldo III

It is standard practice for public bodies to keep written minutes of all their closed session meetings, along with verbatim recording. But what is the appropriate procedure once closed session minutes are created? The Illinois Attorney General's Public Access Counselor ("PAC") recently took up that question in a binding opinion.

In that case, a Village Trustee filed a request for review alleging that the Village's Board of Trustees violated Section 2(e) of the Open Meetings Act (the "Act") by taking final action on a matter during a closed session meeting. At issue was the Village's practice of approving—in closed session—the Board's meeting minutes from its prior closed session meetings.

Ultimately, the PAC found that all action, even approval of closed session meeting minutes, must be done in open session to avoid violating the Act.



At first blush, the PAC's conclusion appears obvious. The Act provides that "[n]o final action may be taken at a closed meeting." Instead, final action must be "preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

However, in its response to the PAC's inquiry, the Village argued the Board's actions were intended to maintain the confidentiality of the underlying closed sessions subject

matter. Put another way, the Village claimed that voting to approve closed session minutes is linked with the content of the minutes, and airing out the approval process in open session may jeopardize the confidentiality of the minutes. Indeed, this issue arises periodically, as some public bodies fear that approving closed session minutes in open session could subject them to production under the Freedom of Information Act.

The PAC tried to address this argument by stating open session action "to approve closed session minutes does not compromise a public body's ability to maintain the confidentiality of the substance of closed session discussions." Yet, the PAC did not directly say whether the approval of closed session minutes is even required until a public body deems the content no longer requires confidential treatment.

So, what is the proper way to discuss closed session minutes? The Act says that "[d]iscussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06" is a permitted subject for deliberation in closed session.

Once created, public bodies must periodically (but no less than every six months) meet to review minutes of all closed meetings. During these reviews, the public body must decide in open session whether (1) the need for confidentiality still exists as to all or part of those minutes, or (2) the minutes or portions thereof no longer require confidential treatment and are available for public inspection.

In attempting to resolve the apparent confusion surrounding this part of the Act, the PAC held that closed session minutes may be discussed in closed session for purposes of approval by the body, but the Act does not allow the approval itself to occur in closed session.

In light of this opinion, we recommend reviewing your current closed session and minute taking procedures with your legal counsel to ensure compliance with the Act.



Federal Court Rules COVID Screenings Non-Compensable Work Time

by Adam Hudoba

A federal district court in the Northern District of Illinois recently ruled that COVID screening activities were not compensable work time. This decision provides clarification on whether employers need to compensate for COVID screenings.

In *Johnson v. Amazon.com Services, LLC*, Amazon's warehouse employees' job duties ordinarily included moving boxes, stacking packages, and loading boxes. No. 23 C 685, 2023 WL 8475658, at *1 (N.D. Ill. Dec. 7, 2023). During the COVID pandemic, Amazon implemented a 10-15 minute pre-work screening process for its warehouse workers that included temperature checks and health questioning. The workers believed their time spent participating in these screenings was compensable. Amazon disagreed and the workers sued.

Under the Fair Labor Standards Act, employers are required to pay each employee for his or her time spent on preliminary or postliminary activities "integral and indispensable" to the principal activity the employee was employed to perform. See 29 U.S.C. § 254(a)(2). The Illinois Minimum Wage Law shares the language of the FLSA, so courts treat the two equally.

Agreeing with Amazon, the court found that the COVID screenings were not integral or indispensable to the functioning of the warehouse generally.

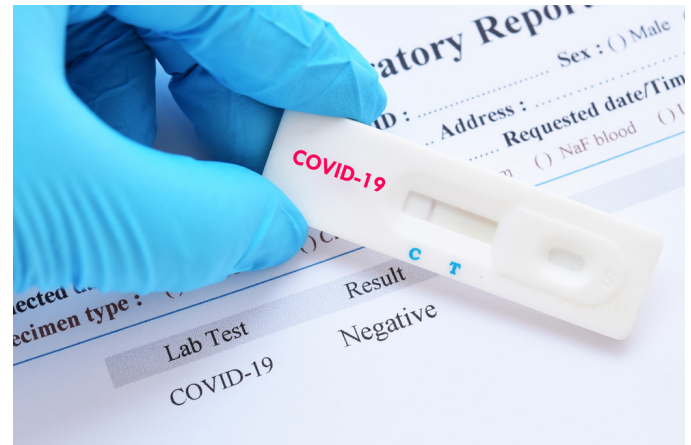
In reaching this conclusion, the court relied on the United States Supreme Court precedent. In *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), for instance, the court found that meatpackers sharpening knives was an integral and indispensable part of their job. However, the time spent by meat-processing plant workers waiting for the opportunity to dress in protective gear was not—rather, it was "two steps removed" from their ordinary duties on the assembly line.

Furthermore, the time warehouse workers spent undergoing post-shift security screenings (*i.e.*, to check whether they were stealing) was not part of their principal activity of retrieving products from warehouse shelves and packaging them for shipment.

The Supreme Court additionally ruled non-compensable a pre-shift search of employees in a "rocket-powder plant" when they were searched "for matches, spark producing devices such as cigarette lighters, and other

items which have a direct bearing on the safety of the employees."

The *Johnson* court found that COVID screenings are akin to the security screenings for theft described above. It reasoned that, while these types of screenings enable a business to function more efficiently or safely, they are not necessary for the business to function on any given day; and, therefore, they are not compensable.



Whether COVID and similar health-related screening time is compensable has been controversial, so the *Johnson* decision provides some welcome clarity. However, the case has been appealed, and there is no telling if the Seventh Circuit Court of Appeals will concur. Accordingly, employers must still carefully consider whether pre-work health screenings are compensable work time.

■ Paid Leave for All Workers Act Now Effective

by *Erica J. Thomas and Brian Johnston*

Illinois recently enacted a sweeping paid leave law that experts call the nation's strongest state policy yet. The Paid Leave for All Workers Act ("PLAWA") entitles all employees in Illinois (with limited exceptions) to accrue up to 40 hours of paid time off annually for any purpose. The Act became effective on January 1, 2024. This Article discusses the Act and your new obligations.

PLAWA stipulates that all employees, including those working full-time, part-time, or seasonally, are eligible to accrue up to 40 hours of paid leave per year. Notably, the Act applies to most employers in Illinois, with exceptions including federal government employers, public school districts, and public park districts. As such, the Act applies to units of local government.

Employers have the option to allow employees to accrue paid leave, with a minimum accrual of one hour of paid leave for every 40 hours worked, or to provide the full 40 hours of paid leave at the start of employment (front load) or a designated 12-month period. The Act has specific rules regarding the carryover and use of paid leave. If an employer decides to use the accrual method, then hours accrued shall carry over to the next year. However, an employee may only use up to 40 hours in one given year unless the employer allows for more. Employers that choose to front load employees do not have to carry over or bank into the next year.

Significantly, this leave is usable for any purpose, and employees are not required to tell their employers why they are taking PLAWA leave. Nor are employers permitted to insist on justification or documentation for the leave. An employer shall not require an employee to search for or locate a replacement worker to cover the employee's use of paid leave time. The Act also allows employees to choose whether to use paid leave under the Act before other types of leave. Employers may require notice for foreseeable leave and immediate notice for unforeseen circumstances, as per their written policies. Employers may enact reasonable policies that establish circumstances in which the employer may deny an employee's request due to operational necessity. This must be in the employers' written employee handbook and distributed to all employees.

The Act does have an exception for collective bargaining units. Employees under an existing collective bargaining agreement are considered "grandfathered in" until it expires. Thereafter, PLAWA will apply unless the parties waive the Act's benefits in their new contract. The Illinois Department of Labor has proposed a rule, with some limitations, that permits employees covered under a collective bargaining agreement to negotiate minimum standards of paid leave meeting or exceeding what is required by the Act.



Importantly, the Act does not require employers to pay for unused paid leave upon an employee's termination, except where the leave is added or combined with vacation or PTO. Employers are restricted from imposing certain conditions on the use of paid leave, such as demanding reasons or documentation for leave, requiring employees to find replacements during their leave, or retaliating against employees for using their rights under the Act. Employers may also establish a policy that requires a minimum of 2 hours to be used at a time but cannot place any other requirements upon usage. The Illinois Department of Labor's Proposed Rules on the Act also require that if an employee takes leave under the Act, then the employer must continue to provide the same health plan coverage for the employee and the employee's family during the duration of the paid leave time.

Now that PLAWA is effective, here's what you must be doing:

1. **Frontload 40 Hours of Leave or Begin PLAWA Leave Accruals:** Beginning January 1, 2024, employees are entitled to begin accruing PLAWA leave at a rate of 1 hour per every 40 worked. You must have a protocol in place for tracking this accrual, unless it is decided to frontload 40 hours of leave.

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Paid Leave for All Workers

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2. **Display the Required Notice:** Under the Act, employers must display a notice prepared by the Department of Labor that outlines the Act's requirements and informs employees about their rights and complaint filing processes.
3. **Keep Records:** Employers are also mandated to keep records of hours worked, paid leave accrued and taken, and leave balances for a minimum of three years.
4. **Consider Revising Policies:** Employers with existing vacation or PTO policies that comply with or exceed the Act's requirements can apply these policies towards meeting the Act's obligations, provided they clearly state this in their policies. The Act may also prompt changes to existing leave policies. Therefore, we recommend reviewing your standing policies on paid leave accordingly.

Failure to act in accordance with the Act may be met with penalties. In cases where employees feel their rights under the Act have been violated, they can file a complaint with the Department of Labor within three years of the alleged violation. Employers found in violation of the Act may be liable for various penalties and legal costs. Additionally, employers who violate the Act face civil penalties of up to \$2,500 per offense.

Therefore, we recommend strict compliance with the Act. If a question of compliance under the Paid Leave for All Workers Act arises, please contact your legal counsel for clarification and guidance.



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OSHA Seeks Public Comment on Significant Overhaul to Fire Brigades Regulations

Seeking to update its 40-year-old regulations, the federal Occupational Safety and Health Administration (“OSHA”) has announced a public comment period on proposed rules that would vastly expand the scope of its fire protection and emergency medical standards.

OSHA’s mission is to ensure workplace safety and health standards. The Administration’s rules do not directly impact Illinois’ local governments, which are governed by Illinois’ own Occupational Safety and Health Administration. However, Illinois OSHA is funded, in part, by its federal counterpart and usually follows its lead. Therefore, it is reasonable to expect that federal OSHA’s changes may trickle down to Illinois governmental fire departments.

The proposed rules are verbose and weigh in at 250 pages and are thus incapable of being fully described in detail here. But of note, the proposed rules:

- Incorporate National Fire Protection Association (“NFPA”) standards on training, health, safety, and equipment.
- Require tracking exposures to harmful substances.
- Mandate health and fitness programs.
- Explicitly *include* volunteer fire departments and volunteer emergency medical service providers as covered entities. Indeed, OSHA believes that volunteers should meet the same safety and health standards as their professional counterparts.

OSHA’s public comment period closes on May 6, 2024. We urge you to exercise your right to participate and ensure OSHA understands the implications of its proposed rules.