Illinois, Wisconsin, and Federal Employment Law Update - Q&A

One Day of Rest in Seven Act (ODRISA)

What employees are exempt from ODRISA's "day of rest" requirement?

Under the relevant statute, the following employees are exempt:

1. Part-time employees whose total work hours for one employer during a calendar week do not exceed 20.
2. Employees needed in case of breakdown of machinery or equipment or other emergency requiring the immediate services of experienced and competent labor to prevent injury to person, damage to property, or suspension of necessary operation.
3. Employees employed in agriculture or coal mining.
4. Employees engaged in the occupation of canning and processing perishable agricultural products, if such employees are employed by an employer in such occupation on a seasonal basis and for not more than 20 weeks during any calendar year or 12-month period.
5. Employees employed as watchmen or security guards.
6. Employees who are employed in a bona fide executive, administrative, or professional capacity or in the capacity of an outside salesman, as defined in the Fair Labor Standards Act and those employed as supervisors as defined in the National Labor Relations Act.
7. Employees who are employed as crew members of any uninspected towing vessel … operating in any navigable waters in or along the boundaries of the State of Illinois.
8. Employees for whom work hours, days of work, and rest periods are established through the collective bargaining process.

What must an employer include in a request for a permit?

Under the relevant regulation, a request must include:

1. A statement that all employees involved are in fact volunteers.
2. The anticipated number and skills of said employees.
3. Number of days covered by the permit including inclusive dates and hourly times starting on Sunday.
4. A statement that no person possessing skills in #2, above, is laid off.

What happens if an employee doesn't want to take their break within the first 5 hours, but would rather take it after 6?

Unless the employee's meal period is set by a CBA, you could require them to take their meal period within the first five hours – this isn't a negotiation, employers can set employees' meal periods.

Regarding Wisconsin employees over 18 years of age, does the employer have to provide a meal break that the employer would not pay?

Under Wisconsin law, there is no requirement that employers provide paid or unpaid breaks to employees over 18. Rather, for a break to be unpaid (to a nonexempt employee), the employee must be given at least 30 minutes where he/she is completely relieved of all duties during that time. We understand this question to ask whether an employee who skipped and worked through his/her regular (unpaid) meal break must be paid and/or given more time. The answer to that is yes, the employee should be paid for any time that he/she is not relieved of all duties, but no you do not need to provide a further (paid or unpaid) break.

IL Family Bereavement Leave Act

If we already offer paid bereavement leave, then must we offer an additional period of unpaid leave in addition to the paid leave?

Employers who are subject to the Act must offer 10 workdays of bereavement leave total. If you already offer 3 days of paid bereavement leave, for example, you will need to offer 7 additional days of unpaid bereavement leave to comply with the Act.

Paid Leave for All Workers Act

Is there a minimum amount of notice that an employer can require for this time off?

If the need for leave is foreseeable, the employer may require the employee to provide 7 calendar days' notice before the date the leave is to begin. If the need for leave is not foreseeable, employers may require only that the employee provide notice "as soon as is practicable after the employee is aware of the necessity of the leave."

Do employees who were employed before the effective date of the act start 2024 with 40 hours of leave available?

Not necessarily. If an employer chooses to frontload leave, then employees would receive all 40 hours (or their pro rata share if they work fewer than full-time) at the start of 2024. However, if the employer uses an accrual base system, then the employee would begin accruing leave at the start of 2024 at the rate of 1 hour of paid leave for every 40 hours worked.

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Paid Leave for All Workers Act (cont.)

If our PTO policy is more generous and a written policy is in place that is accessible to all employees, then must we still mention this Act in our employee handbook?
Based on the information available to us at this point, yes. Per the relevant statute**,** "An employer shall post and keep posted in a conspicuous place on the premises of the employer where notices to employees are customarily posted, **and include it in a written document, or written employee manual or policy if the employer has one**, a notice, to be prepared by the Department, summarizing the requirements of this Act and information pertaining to the filing of a charge upon commencement of an employee's employment or 90 days following the effective date of this Act, whichever is later."

Are you able to deny PLFAW time based on staffing? For example, if too many employees are off during a certain day/time, can you deny an employee's request for leave?
Again, based on the information we have available, no, we cannot deny PLFAW based on staffing needs.

Pregnant Workers Fairness Act

Under the Act, must employers count employees of an affiliated company when determining the 15-employee threshold?
We assume that by "affiliated" company, the question refers to companies that share at least some common ownership or share some management services.

First, it's important to note how an "employer" is defined under the Act. The Pregnant Workers Fairness Act adopts the definition of "employer" from Title VII, the federal statute which prohibits discrimination on the basis of many protected characteristics, among them sex. Title VII defines an employer for purposes of that Act as an entity that has "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." In 2017, the US Supreme Court adopted the "payroll' method of counting employees to determine whether an employer satisfies Title VII's jurisdictional limit of 15 employees. In its decision, the Supreme Court determined that the key issue is "whether an employer **'has'** an employee on any working day on which the employer maintains an employment relationship with the employee"—whether or not the employee was actually working on any of those days.

Second, as to "affiliated" companies, in 2020, the Seventh Circuit Court of Appeals (which covers Illinois and Wisconsin) heard the appeal of a discrimination case that had been dismissed by a lower court on the ground that the employer did not have 15 employees. The plaintiff argued on appeal that the court should count the employees of the defendant's affiliated (but corporately distinct) used car dealerships to get to the magic number of 15. (In this case, each "corporately distinct" dealership maintained corporate formalities and records—but they also received shared management services from a separate management company, and those services included marketing, financial, accounting, "visionary" and payroll services. All the dealerships also shared a joint website.) The court **rejected** the plaintiff's attempt to lump all the companies together for the count—and **laid out three circumstances when the existence of an affiliated company would result in potential liability under Title VII**. According to the court, **employee aggregation is appropriate where** (1) the enterprise has purposely divided itself into smaller corporations to dodge requirements imposed by the antidiscrimination laws; (2) a creditor of one corporation could, by piercing the corporate veil, sue its affiliate; or (3) the affiliate directed the discriminatory act or practice of which the plaintiff complains.

The takeaway from this case is that if the "affiliated" companies maintain corporately distinct formalities, the employees of the affiliated companies should not aggregate so long as none of the three "circumstances" listed above apply.

Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP")

Are employers required to provide a means of refrigeration for the breast milk?
Nothing in the PUMP Act explicitly requires an employer to provide a means of refrigeration. However, a caveat: the employer should allow the employee to use any shared refrigerator to store pumped milk and/or permit the employee to bring her own cooler or refrigerator to work. (Per the CDC, pumped breastmilk is "food" and thus can be stored alongside other types of food.) Several state and local laws may apply here as well.