HANDOUTS

1. TRANSGENDER
2. LEGAL/LEGISLATIVE PART I
3. LEGAL/LEGISLATIVE PART II
4. REDUCING TORT LIABILITY EXPOSURE
5. EMPLOYEE FRINGE BENEFITS – COMMISSIONER ACCESS TO PROGRAMS, FACILITIES AND ACTIVITIES
6. HOT TOPICS IN EMPLOYMENT
7. DIRECTOR & COMMISSIONER RELATIONSHIPS
8. IAPD LEGISLATIVE YEAR IN REVIEW
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10a

Ancel Glink Diamond Bush DiCianni & Krafthefer

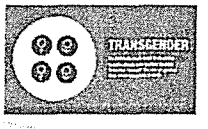
Transgender: Dealing with the Complex Issues Impacting Park Districts

January 20, 2017
3:30 p.m. – 4:45 p.m.

By: Keri-Lyn J. Krafthefer
Robert T. McCabe

It All Starts With A Name

- Transgender is the umbrella term that describes individuals whose gender given to them at birth does not match the gender that they truly feel that they are.



Other Terms With Which To Be Familiar:

- *Cisgender* – an individual whose gender given at birth matches the gender that they truly feel that they are
- *Assigned gender* – the gender given to everyone at birth based on physical anatomy
- *Gender identity or affirmed gender* – is a person's deeply held sense or psychological knowledge of their own gender

Other Terms With Which To Be Familiar:

- *Reassignment surgery* – the surgical procedure that an individual undergoes to conform their body to their gender identity
- *"Gender nonconforming"* – describes people whose gender expression differs from stereotypical societal expectations related to gender.
- "Transvestite" is a person who derives pleasure from dressing in the clothes of the opposite gender

Other Terms With Which To Be Familiar:

- *"Gender expression"* refers to the way a person expresses gender identity to others.
- *"Transition"* is the time when a person begins to live as the gender with which thy identify instead of the gender that the were assigned at birth.

Transition

- Generally begins with a diagnosis of gender dysphoria
- First step is a court-ordered name change
- To change the gender marker on an Illinois driver's license,
  - Either a certified copy of an amended birth certificate or
  - A letter or affidavit from a physician certifying that the person has taken or is taking appropriate clinical steps to change gender

Laws on Transgender Rights

The law runs the gamut across the states

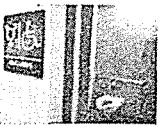
A Boy's Life

Laws on Transgender Rights

- Rapidly evolving
- Tied to developments within our society
- Emotionally charged
- All over the place

Transgender Rights

- North Carolina "bathroom law"
  - Efforts to repeal in December 2016 failed
- A few other states have similar laws which base an individual's gender strictly on their physical anatomy



Recent Texas Developments

- Poised to put forth the "Women's Privacy Act" in 2017
- Texas Lt. Governor says the purpose of the Act will be to insure that women and girls can have privacy and safety in their restrooms, showers and locker rooms
- The state chamber of commerce, the Texas Association of Business, has warned of dire economic consequences of if the Act becomes law

Recent Texas Developments

- In August of 2016, federal judge blocks President Obama's transgender bathroom rules for schools (transgender students' right to choose which facility to use)
- December 31, 2016 – same judge issues nationwide injunction against a federal mandate requiring that health care providers cannot deny service or insurance to someone because they are transgender

Other Significant Recent Developments

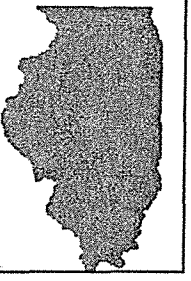
- March 2016 – North Carolina House Bill 2
- April 18, 2016 – Target says transgender people can use bathroom that matches their gender identity
- May 9, 2016 – the Department of Justice and the State of North Carolina file suit against each other regarding House Bill 2

Other Significant Recent Developments

- July 28, 2016 – The Seventh Circuit Court of Appeals rules that Title VII does not prohibit discrimination based upon sexual orientation
- September 12, 2016 – NCAA tells North Carolina that it will relocate 7 championships, including March Madness outside of the state because of House Bill 2

Transgender Rights

- About half of the states, including Illinois prohibit discrimination based on gender identity by legislation.
  - In Illinois the prohibition on gender identity discrimination is found in the Illinois Human Rights Act.



Transgender Rights

- EEOC and the Department of Justice have taken strong positions
- Very little guidance from courts – 4th circuit court of appeals did find that Title IX protects a student's rights to use the bathroom consistent with his or her gender identity.
  - In October 2016, the U.S. Supreme Court said it would hear this case and determine if the Obama administration's interpretation of federal civil rights law is correct
  - A ruling is expected in June of 2017

If Illinois Law Is So Clear, What's the Big Problem?

- The laws and the issues are so new to most that we're just not sure how to enforce them.
- Many are not quite comfortable with the issues yet.
- The law is based on an individual's personal feelings of gender identity and not physical anatomy – for many people this is a difficult issue to deal with
- Fear of abuse
- Texas keeps issuing injunctions for the whole country

So Now What?

- Conflicting laws, court opinions and agency direction
- The real issues involve states' rights and agency rule making authority
- Emotions run high on all sides
- Developments occurring almost daily

How to Comply With Transgender Protections

- Workplace
- Park district services

Workplace

- Best practices – have a policy before you have a problem
- Have policies for employees and patrons
- Train your employees on these policies

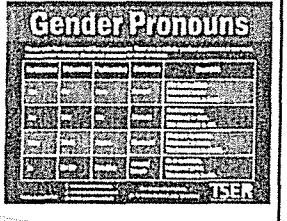
Have manuals & sign off after training

Workplace

- EEOC advises that employers should implement a policy against discrimination
- For transgender employees, policy should address the following issues:
  - Terminology
  - Prohibition against discrimination

Workplace

- Policy should minimally contain the certain things
- Who to complain to about violations
- Rights of transgender individuals in the workplace
  - Privacy rights
  - Name to be used – Be careful of pronouns
  - Employee responsibilities to respect
  - Employer responsibilities to enforce



Workplace

- Responsibilities of transitioning employees
- Dress code – Still must follow policies
- Complaints by co-workers
- Transgender employees

For Patrons It's a Bit More Complicated

- EEOC and DOJ advise to have a policy which prohibits discrimination and addresses the following:
  - Restrooms – ideally gender neutral otherwise according to gender identity
  - Locker rooms – according to gender identity but private area for transgender and other individuals who do not want to change in a group setting

Gender Neutral Rest Room

add private area for transgender / other people uncomfortable people.

For Patrons It's a Bit More Complicated

- Those who feel uncomfortable will be accommodated – whether or not they are transgender themselves
- Program participants – the big problem – we recommend that you have a registration procedure that requires proof of residency, preferably a driver's license or state identification card and a birth certificate for children to verify age for age specific programs. The birth certificate will also identify sex.
  - Consistent with Illinois anti-discrimination laws – participants should be registered by gender identity.

What if the participant's identification, presented during the registration process, doesn't match?

- You can require notation of the name that matches their ID
- Allowing the individual to register consistent with their gender identity.
- Requiring a written affirmation from the individual (or parent/guardian) that the individual identifies and expresses their gender as a (male or female).

"The End of Girls' Sports...

- Her dreams of a scholarship shattered, your 14-year-old daughter just lost her position on an all-girl team to a male, and now she may have to shower with him."

a full page newspaper ad placed by the Minnesota Child Protection League after the Minnesota State High School League voted to allow transgender student athletes to play on the team with which they identify

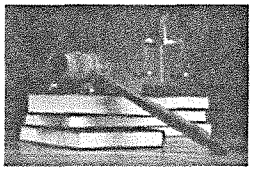
What about gender specific programs, especially sports?

- More complicated
- This needs to be addressed on a case by case basis, considering the following factors:
  - age of the participant
  - sport or program
  - gender identified on legal documents

Other Supporting Information

- Physician statement (including psychiatric reports)
- Court ordered change of name
- Requirements of sponsoring organization (most require some confirming documentation)
- Whether the minor is pre or post pubescent
- Current medical treatments

The law will develop on these issues, and we want to make sure you are not the ones who make the law.



Your To Do List

- Be aware of the developing trends and law on transgender rights
- Adopts policies for employees, patrons and participants

More To Do List

- Create gender neutral bathrooms and private areas in locker rooms
- Train your employees

Collective Bargaining Obligations

- Remember that the issues that we have been discussing may have collective bargaining implications

Frequently Asked Questions

Question 1

- Transgender rights only apply to individuals who have undergone reassignment surgery.

Answer 1

- One aspect in the demystification of transgender individuals and transgender rights is understanding what it means to be transgender. The word transgender is an umbrella term for people who identify with the gender that does not conform to the one assigned to them at birth. This may mean that a transgender person has undergone or is undergoing gender reassignment surgery, or it may mean that a person is simply living as the gender with which they identify without surgical reassignment.

Question 2

- If co-workers are uncomfortable with a transgender co-worker, the co-workers' comfort comes first.

Answer 2

- In fact, the opposite is true. Who uses which bathroom, for instance, is currently a huge topic of debate in some places. OSHA and EEOC have issued guidelines on the subject of bathrooms (as has President Obama to schools) which clearly state that while gender neutral, single bathrooms are best, if an individual complains about a transgender person's use of the bathroom that they use, it is the one who complains who should be offered an alternative facility – not the transgender individual.

Question 3

- Employers comply with the law if they provide a separate facility to the transgender individual.

Answer 3

- Separate but equal has been unacceptable for a long time. There can be no separate transgender facility that people are required to use. As we noted above, employees, whether transgender or not, should be provided bathroom and other facilities that they are comfortable using, and not relegated to the transgender facilities.

Question 4

- Transgender employees must use their legal name at work.

Answer 4

- It is true that employers must report earnings to the IRS and Social Security Administration under an employee's legal name, even if that name does not conform to the employee's gender identity, but a transgender employee must be allowed to use any name they have chosen to match their gender identity at work. Repeated or malicious use of a name or pronoun which does not match an employee's preferred name may be considered harassment under the law.

Question 5

- Employers do not have to have a separate policy for transgender issues.

Answer 5

- While this might technically be true, the best practice is to establish a policy or procedures for addressing transgender issues in the workplace. First of all, a solid policy and procedures will aid in defense of any claims of discrimination. Second, these issues are still new and unfamiliar to many in the workforce. Policies, procedures and training clarify many questions that people ask about transgender rights in the workplace.

Question 6

- If a member of public asks about the gender of a patron or participant, what should you do?

Answer 6

- Patron and program participant information, is private. It is no more appropriate for someone to ask about a person's gender assignment or identity than it is to ask about their marital status, their home address or their social security number. If you are ever asked about a participant's gender, simply respond that the Park District does not release any private information about participants or patrons.

Question 7

- A parent wants to register a minor in girls' soccer. As proof of age eligibility, the parent produces a birth certificate that reflects that the child was assigned the male gender at birth. Now what?

Answer 7

- The Park District should have a policy which informs participants of what to do in these situations, but if the parent has not followed the policy, they should be referred to the Executive Director or his designee for details and a case by case analysis.

Question 8

- Parents learn that a teenage participant in a Park District sponsored overnight ski trip is transgender, having been assigned the male gender at birth but now living as a female. They demand that the participant be segregated from their daughters for the overnight stay.

Answer 8

- Complying with the parents' demands will likely violate the transgender individual's rights. You may have to be at your creative best by ensuring that those who don't want to sleep in a group setting are given the option of other arrangements where they pay any additional expenses.

Question 9

- A co-worker announces that he or she is transitioning to the opposite gender, you would like to talk about it with him or her. Is that okay?

Answer 9

- Yes, it is okay to ask about a co-worker's transition provided they are comfortable speaking with you about it. Remember to follow their lead as to how they want to be treated, what name they want to be called and how private they want to keep the information.

Question 10

- You strongly suspect that a patron is pretending to be transgender as a joke or to mock those that really are or to have access to gender specific areas for criminal motive. How do you handle this?

Answer 10

- This is the biggest fear of all with concerns about misuse of transgender rights. Any good faith suspicion that someone is pretending to be transgender for any of these reasons should be handled like any other misconduct by employees, patrons or participants.

Question 11

- Should we change our policies based upon the election results of 2016?

Answer 11

- No. The election may result in significant changes to the federal bench, including the U.S. Supreme Court. It will likely result in significant changes at the EEOC and potential shifts in ideology. However, Illinois law still protects transgender rights.

Questions

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2017 IAPD/IPRA
Soaring to New Heights Conference
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FRIDAY, JANUARY 20, 2017

8:15 A.M. – 9:30 A.M.

SESSION #110

LEGAL/LEGISLATIVE PART I

PRESENTER:

ROBERT K. BUSH

ADA: Reasonable Accommodation *U.S.E.E.O.C. v. St Joseph's Hospital*, (Eleventh Circuit Court of Appeals, 2017)

If an employee suffers from a disability that prevents him from doing his job, the Americans with Disabilities Act (ADA) requires an employer to provide that employee with a "reasonable accommodation." This means that the employer must take measures to allow the employee to continue working despite his disability. For example, an employer must allow an employee with a broken leg to sit down at work, as long as this does not interfere with the employee's ability to perform his job duties.

However, what if an employee's disability makes him unable to perform his current job, but does allow him to perform another job for the employer that is currently vacant? Does the employer have to reassign the employee to the vacant position? Or can the employer require the disabled employee to apply for the position, and only hire him if he is the best candidate for the job? A federal appellate court just provided an answer.

A nurse in a psychiatric ward developed a debilitating back condition that required her to start walking with a cane. Her use of the cane raised concerns about patient safety, as it was feared that a psychiatric patient could take it from her and use it as a weapon. As a result, the nurse was told that she could no longer use the cane in the psychiatric ward. Without her cane, the nurse could no longer walk, and could no longer perform her job duties.

The hospital where she worked gave her 30 days to apply for another position within it. Although she applied for three positions, she was not hired for any of them. After the 30-day period elapsed, she still did not have a position, so the hospital discharged her.

The nurse filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that the hospital violated the ADA by not allowing her to fill one of the vacant positions within it, which she argued would have been a reasonable accommodation. The EEOC agreed, and filed suit on her behalf.

The trial court found that the hospital did not violate the ADA, and the appellate court agreed. It held that a reasonable accommodation does not require an employee to be reassigned to a vacant position within an organization. The court held that disabled employees can be required to compete for these positions with other applicants. A contrary holding, the court ruled, would stifle "efficiency and good-performance."

The court noted "that the ADA only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position." It does not require employers to give disabled employees special treatment. The court noted that the ADA only states that a reasonable accommodation may include reassignment to a different position.

While this decision only applies to the states within the 11th Circuit Court of Appeals, which include Alabama, Florida, and Georgia, it is possible that other circuits will develop a different rule. Employers should also remember that the ADA requires them to consider all requests for a reasonable accommodation and to provide a detailed explanation for any decision to deny such a

request. The employer needs to make a good faith attempt to make a reasonable accommodation.

FMLA: Retaliation
Wink v. Miller Compressing Company, (Seventh Circuit Court of Appeals 2016)

Tracy Wink was employed in Miller's order-processing department. Her employer granted her request to take intermittent FMLA leave to take her autistic son to medical appointments and physical therapy. Her son was later expelled from day care because of aggressive behavior. Wink asked to be allowed to work from home two days per week to take care of her child. While FMLA does not cover working at home, working at home would allow Wink to spend several hours a day caring for her son. The company agreed to allow Wink to work from home. She was required to report the number of hours worked at home and the time during which she cared for her son was deducted from FMLA leave time and she was not compensated for the FMLA leave time.

While Wink was operating under that arrangement, the company made a decision that it would not allow any of its employees to work from home. On a Friday, Wink was told she would have to work forty hours per week at the office location beginning the following Monday. Wink told the human resources department it would be nearly impossible to find day care by Monday. The human resources officer told Wink that FMLA covers leave from work only for doctors' appointments and therapy. Wink reported on Monday and was told that the first day she failed to work in the office full-time, she would be considered a "voluntary quit". She left work that day to care for her son and the company processed her termination immediately.

At trial, the jury awarded Link actual damages, punitive damages, and attorneys' fees on her claim of FMLA retaliation. The trial court reduced the attorneys' fees by 20 percent because the plaintiff failed to prove her claim that the defendant had interfered with her FMLA rights.

On appeal, the Court affirmed the jury award and restored the 20 percent of attorneys' fees that had been reduced by the trial court. The Court found that the Wink had successfully worked from home for months without the company complaining and that the company had no other reason to fire her. The Court stated that "FMLA is explicit that an eligible employee is entitled to take up to 12 work-weeks of unpaid leave per year in order to care for a family member with a serious health condition, including a child with such a condition." The Court held that Miller did not act in good faith when it 1) told Wink FMLA leave could only be used for doctors' appointments and therapy; and 2) terminated Wink without cause and without the notice required in Wink's employment contract.

Tort Immunity: Definition of Riding Trail
Corbett v. County of Lake, (Appellate Court of Illinois, Second District, 2016)

Section 3-107(b) of the Illinois Tort Immunity Act states as follows:
neither a local public entity nor a public employee is liable for an injury caused by a condition of...any hiking, riding, fishing, or hunting trail. 745 ILCS 10/3-107(b). This immunity is absolute even for willful and wanton conduct. One of the questions courts have struggled with is

how to determine if a bike path can be considered a riding trail under this statute, which would provide a local government entity absolute immunity. The Appellate Court addressed that question in this case.

Corbett was seriously injured while riding her bicycle on Old Skokie Bike Path in Lake County. While riding with friends along the bike path, the person two bikes ahead of her hit a bump and lost control of his bicycle. Corbett, with no place to go, rode over him and his bike, and was thrown off her bike, falling hard onto the paved surface. Corbett sued both Lake County and the City of Highland Park, claiming that they were both responsible for her injuries, and that Section 3-107(b) did not provide absolute immunity because the bike path is not a riding trail. The trial court ruled in favor of the City and County, finding absolute immunity under Section 3-107(b). Corbett appealed the judgment in favor of the City.

On appeal, the appellate court reversed the ruling in favor of the City, rejecting the trial court's finding that the City was immune under Section 3-107(b). Specifically, the court determined that a bike or hiking path in the midst of an easily accessible developed area does not qualify as a riding trail under the statute, supporting its analysis as follows:

As a matter of law, this restriction defeats the City's assertion that the path is a riding or hiking trail. No contention has been made that the path is located in a mountainous region (mountains being scarce in Lake County). No serious contention can be made that the path is located in a forest; no reasonable person who views the photographs of the path and its surroundings, or even reads their descriptions by those who have seen them, would describe those surroundings as a forest. The path is bordered by narrow bands of greenway that sport some shrubs and a few trees; these narrow bands are surrounded by industrial development, residential neighborhoods, parking lots, railroad tracks, and major vehicular thoroughfares (to the east and south of the area of the accident). The court held that the case for considering the path a riding trail would not succeed even if utility poles could be considered trees with power lines for branches.

Negligence
Piotrowski v. Mendard, Inc., (Seventh Circuit Court of Appeals, 2016)

Hannah Piotrowski suffered serious injuries after slipping on two small rocks in the parking lot of a Menard store. Piotrowski filed suit, alleging that the rocks must have come from a planter maintained by Menard outside the store, or from decorative rocks that the store sold in bags. The trial court granted summary judgment to Menard, finding the plaintiff's assertions regarding the source of the rocks to be pure speculation.

The Seventh Circuit affirmed the trial court's decision. The Court stated that when an injury occurs based on an invitee slipping on a foreign substance, a business can be held liable if the plaintiff can show that; 1) the substance was placed there by the business; 2) the business had actual notice of the substance; or 3) the business had constructive notice of the substance.

The Court reviewed whether the plaintiff could demonstrate that the rocks were placed in the parking lot by Menard rather than a third party. In order to demonstrate the rocks were placed there by Menard, the plaintiff needs to 1) demonstrate that the foreign substance was related to

the defendant's business, and 2) offer some further evidence, however slight, that it was more likely than not that the defendant or its servants, rather than a customer, dropped the substance on the premises. In this case, the plaintiff did not see the rocks fall, and she could not explain how the rocks ended up where they did. She asserted that a Menard employee's could have been the cause, but that assertion was only speculation and not enough to cause the case to proceed to trial.

In regard to notice, plaintiff was unable to present evidence that Menard had actual notice of the rocks in the parking lot. Plaintiff attempted to argue that Menard was aware stones were escaping the planter in the parking lot because it refilled that planter with stones from time to time. Menard presented evidence that the manager of the store walked every square foot of the store, parking lot, and perimeter every day as part of his duties. Under those circumstances, the plaintiff was unable to show a pattern of dangerous conditions or a recurring incident that was not attended to within a reasonable period of time.

Premises Liability: Proximate Cause
Berke v. Manilow, (Appellate Court of Illinois, First District, 2016)

Raymond Berke was injured when he fell in the vestibule of an apartment building where he was staying. A doorman heard Berke fall, but did not see him fall. Berke sued for negligence on a theory of premises liability, claiming the stairs and doorway were improperly designed and maintained and were the proximate cause of his injuries. The trial court awarded summary judgment to the defendant, finding that Berke presented no evidence that the defendants created and maintained a condition exposing him to an unreasonable risk of injury. Rather, Berke presented only speculative assertions. Berke had testified at trial that he had no memory of his fall. He attempted to present evidence from three expert witnesses who would provide their opinions of what caused his fall. Those opinions were based on measurements of the vestibule, doorway, and stairs, the types of injuries suffered by Berke, and a description of what people "typically" do when passing through a doorway. The court struck the opinions of the expert witnesses, finding that their assertions regarding the cause of the fall were speculation.

On review, the Appellate Court affirmed, finding that the plaintiff failed to affirmatively and positively show with reasonable certainty the cause of Berke's fall. Absent evidence of the cause of the fall, there was no genuine issue of material fact for the trial court to determine and summary judgment was appropriate.

Negligence: Proximate Cause
Doe v. Doe, (Appellate Court of Illinois, First District, 2016)

Jane Doe committed suicide after a boy she knew communicated to her over social media told her he intended to commit suicide and a third party affirmed that intention in separate communications over social media. The estate of Jane Doe sued the parents of the other two minors, alleging that their social media communications to Jane Doe were fraudulent and were the proximate cause of her suicide and that the parents were negligent because they failed to monitor their children's social media communications. The trial court granted the defendants' motion to dismiss.

The Appellate Court affirmed, finding that the general rule regarding suicide is that the injured party's voluntary act of suicide is an independent intervening act which is unforeseeable and breaks the chain of causation from negligent conduct. The Court explained that in order to survive a motion to dismiss, a plaintiff must plead facts demonstrating that the suicide was foreseeable, in that it was a likely result of the defendant's conduct. The Court held that the plaintiff's complaint failed to plead facts that the suicide was a foreseeable result of the defendant's conduct. Additionally, the Court found that the plaintiff failed to allege that the parents were aware of specific instances of prior conduct on the part of their children sufficient to put the parents on notice that their children were likely to communicate their intention to commit suicide. Thus, the parents had no duty to monitor their children's social media communications.

Open Meetings Act: Public Recital
Allen v. Clark County Park District, (Appellate Court of Illinois, Fourth District, 2016)

This case is an important one for all public bodies to understand, as it interprets the OMA's "public recital" requirement prior to taking final action on agenda items. Here, two individuals alleged that the Clark County Park Board violated the OMA by failing to provide a sufficient explanation prior to voting on two items on the agenda (approval of a lease and approval of revised covenants). According to the court, when the Board considered each of the challenged agenda items, a motion was made, seconded, and then a vote taken. No discussion took place on either item, and the documents were not made available to the public prior to the meeting. Moreover, when a member of the public asked the Board to describe what they had just voted on, the chair of the meeting responded "They gotta get recorded at the courthouse first. I'm sorry." Another commissioner stated "it's just a formality."

The following day, the individuals filed a law suit against the Clark County Park District. The complaint included three claims: (1) the agenda was insufficient to set forth the subject matter of the two items; (2) the Board improperly considered the two items in closed session; and (3) the Board failed to explain the nature of the two items before voting on them.

The trial court dismissed the case in its entirety. Plaintiffs then appealed the trial court's dismissal of the third allegation - that the Board failed to explain what was being considered prior to taking final action.

The appellate court first looked at the language in section 2.02(e) of the OMA which requires a public body to make a "public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted" prior to taking final action (voting) on an agenda item. The court acknowledged that there was little guidance on "precisely what standard of specificity is required of a public recital." In this case, however, the court found the Board's actions insufficient, based on the "key-terms" rule that had been established by the PAC in a 2014 opinion.

Applying the PAC's "key-terms" rule to the facts of this case, the court found that the public recital did not provide the public with any of the key terms of the lease agreement or covenants,

(i.e., what was being leased, who was leasing it, how much the Park District would be compensated for the lease).

Acknowledging its earlier decision in *Board of Education of Springfield Sch. Dist. No. 186 v. Attorney General*, the court noted that its holding in this case does not mean that the public body must provide a detailed explanation about the significance or impact of the proposed final action. However, the court concluded that a public body cannot provide no details at all in taking final action, as the court found in this case.

At the end of the opinion, the court acknowledged that the Illinois Supreme Court granted leave to appeal in the Springfield case. That case may provide public bodies with further guidance on how to interpret and apply the "public recital" provision of the OMA. Until then, public bodies might want to consider how this case affects its own final actions and whether they are providing sufficient information about an item prior to a vote. That may involve some explanation by the chair prior to a vote, or engaging in some discussion, or in ensuring that documents are provided to the public so they can understand what is being voted on (as happened in the *Springfield* case).

Tort Immunity: Quasi-contract
American Family Mutual Ins. Co. v. Tyler, (Appellate Court of Illinois, First District, 2016)

Michael Gaffney sold his 2006 BMW to David Tyler. After receiving a check from Tyler, Gaffney gave Tyler the car keys and faxed to him a copy of the vehicle registration. The following day, Gaffney learned that the check was counterfeit. Gaffney advised the Chicago police department and American Family Mutual Insurance that his car had been stolen. Sometime later, Gaffney called the Chicago police department and was told that the car had been recovered and returned to its "owner", undamaged. The car was recovered during a routine traffic stop nine months after the date of the "sale" to Tyler. American Family filed suit, alleging that the City breached a bailment contract with Gaffney.

The complaint alleged that the City voluntarily received Gaffney's vehicle, intended to create a bailment when it accepted and maintained control and possession of the vehicle, and failed to return the vehicle to its proper owner. The City filed a motion to dismiss, arguing that the basis of American Family's claim was the City's negligence to provide adequate police protection services or a failure to prevent, detect, or solve crimes, conduct from which the City is immune for liability under the Tort Immunity Act. American Family argued that the basis of the claim was a "bailment contract" which is excluded from immunity under the Tort Immunity Act. The trial court determined that there was no actual contract and dismissed the complaint.

On appeal, the Court held that, the bailment created a quasi-contract that was not an actual contract between the City and Gaffney for purposes of the Tort Immunity Act. The Court found that the claim was actually a tort claim and that the City was entitled to immunity under that Act.

Construction Contracts: Waiver of Subrogation
Empress Casino Joliet Corporation v. W.E. O'Neil Construction Co., (Appellate Court of Illinois, First District, 2016)

Empress Casino of Joliet engaged in a substantial facility renovation. During the course of the renovation project, a fire caused significant damage to the facility. Empress recovered $81.15 million in insurance payments from three insurance companies under 3 separate insurance policies.

The construction contract included provisions requiring Empress to purchase builders risk insurance on the project, to name the contractors and subcontractors as insureds on that insurance, and waive subrogation against the contractors for damages that occur due to fire damage. Following the fire, Empress filed a suit against the contractor and its insurance companies, attempting to recover through subrogation based on the contractor's negligence. The trial court granted summary judgment to the defendants.

On appeal, the Court upheld the waiver of subrogation provision, holding that the parties expressly foresaw the potential of property loss due to fire and chose to impose on Empress the duty to insure against that loss, and the parties expressly waived all rights against each other for damages caused by the fire.

Emotional Distress
Schweihs v. Chase Home Finance,(Supreme Court of Illinois, 2016)

Melinda Schweihs secured a mortgage from Chase Home Finance. The mortgage note included a provision that authorized the lender to upon borrower's failure to perform, "do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property." Schweihs defaulted on the mortgage and Chase obtained a judgment of foreclosure. Chase contracted with Safeguard Properties to provide property inspections and preservation services. Safeguard contracts with local vendors to perform the services. The local contractors went to the house, knocked on the door, and when there was no answer, forcefully entered the home through the back door. Schweihs was in the home and had not answered the door. She asked the men what they were doing in her home. Schweihs alleged that "in a forceful way" they told her they had been sent to winterize the home and she needed to talk to them. Schweihs called the police and her attorney. The men left, no arrests were made, and the contractors offered to replace the back door lock with a new lock and key.

Schweihs sued, alleging negligent infliction of emotional distress and intentional infliction of emotional distress. The trial court granted summary judgment for the defendants, finding the plaintiff had fail to allege that there was any physical contact, as required in a claim for negligent infliction of emotional distress. Further the claim for intentional infliction of emotional distress failed because the plaintiff could not show that the defendants' actions were extreme and outrageous.

On appeal the Court affirmed, ruling that a victim's claims for negligent infliction of emotional distress must include a claim must include an allegation of contemporaneous physical injury or impact. Additionally, the Court found that, while there may have been a better and more commonsense way to determine if the property was occupied, the entry into the home by the defendants was not conduct so extreme and outrageous that it goes beyond all possible bounds of decency.

Tort Immunity: Actual or Constructive Notice of Condition
Barr v. City of Joliet (Appellate Court of Illinois, Third District, 2016)

Public bodies who are sued by persons injured by a condition on their property are protected by Section 3-102 of the Tort Immunity Act unless they have actual or constructive notice of that condition and fail to take action to remedy or protect against that condition. Kevin Barr was walking on a sidewalk when a woman walked past with her dog. In order to avoid the dog, Barr stepped off the sidewalk and onto a grassy parkway area owned by the City of Joliet. He stepped into a hole in the parkway and was injured. The hole was described as a rabbit hole that was relatively small, but deep. At trial, the City testified that it did not have a program to inspect or maintain parkway areas. The trial court granted summary judgment to the City, finding that the City did not have actual or constructive notice of the hole in the parkway and, consequently the City was immune from liability in accordance with Section 3-102 of the Tort Immunity Act.

The relevant portion of Section 3-102 states that a local public entity "shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." On appeal, the Court held that the City had neither actual nor constructive notice of the hole in the ground. Further the Court found that it would be an unreasonable burden to expect a municipality to inspect for holes in a parkway lawn, absent any notice that one of its systems might cause a dangerous condition on the parkway. The Appellate Court affirmed the trial court's grant of summary judgment to the City.

Tort Immunity: Willful and Wanton Conduct
Perez v. Chicago Park District (Appellate Court of Illinois, First District, 2016)

Kristina Perez went to West Lawn Park to celebrate Independence Day. Two other park users illegally ignited fireworks in the park, one of which exploded next to Perez, causing injuries resulting in the amputation of her right foot and part of her lower leg. Perez sued the Park District, alleging negligence and willful and wanton conduct. The trial court granted the Park District's motion to dismiss, finding that the Park District was protected by the Tort Immunity Act because: a) the fireworks were not a "condition" of the Park District's property as described in Section 3-106 of the Act; b) the Park District never undertook to supervise the fireworks as described in Section 3-108(a) of the Act; c) the Park District had no common law duty to supervise the two men who illegally ignited the fireworks; and d) the hazardous fireworks display was not conducted by the Park District.

The Appellate Court affirmed, finding additionally that the Park District had an absolute immunity for any failure to follow its laws and enactments, to inspect property other than its own for hazards, to provide police protection, and to make arrests.

Tort Immunity: Intended and Permitted For Recreational Purposes and Condition of a Trail
Faust v. Forest Preserve District of Cook County (Appellate Court of Illinois, First District, 2016)

Molly Anne Glynn was killed when she was struck by a tree limb while riding her bicycle on a forest preserve bicycle path. Glynn's estate sued for negligence. The trial court found that the District was immune under one section of the Tort Immunity Act, but not immune under three other sections. The trial court submitted to the Appellate Court the following two questions for certification:

1) Does a tree whose base is located about seven feet from the edge of a forest preserve bicycle path, and that has a limb overhanging the approximate width of the path which breaks off and fall onto a cyclist on the path, constitute a condition of property intended or permitted to be used for recreational purposes pursuant to Section 3-106 of the Tort Immunity Act?

2) Does a tree whose base is located about seven feet from the edge of a forest preserve bicycle path, and that has a limb overhanging the approximate width of the path which breaks off and fall onto a cyclist on the path, constitute a condition of a trail pursuant to Section 3-107(b) of the Tort Immunity Act?

The Court reviewed determined that the preserve and the woods, including the tree in question, did constitute a condition of property intended or permitted to be used for recreational purposes in accordance with Section 3-106 of the Tort Immunity Act.

In regard to the second question, Section 3-107(b) of the Tort Immunity Act provides immunity for an injury caused by a condition of any hiking, riding, fishing, or hunting trail. The Court held that the tree from which the limb fell was not a part of the path, and that the tree was not a condition of a riding trail for purposes of section 3-107(b) of the Tort Immunity Act. Consequently, the Court held that the District was not immune from liability for the decedent's death under that section.

Tort Immunity: Open and Obvious Condition
Burns v. City of Chicago (Appellate Court of Illinois, First District, 2016)

Lloyd Burns tripped and fell on ADA sensory tiles within a crosswalk. Burns sued the City of Chicago, alleging negligence, failure to warn and willful and wanton conduct. At trial, Burns testified the tiles were raised 1 ½ inches from the sidewalk. The City provided photographs demonstrating the tiles were raised approximately ¾ inch. The trial court granted summary judgment to the City. On appeal, the Court affirmed, finding that the exposure of the raised ADA sensory tiles was de minimis, the trial court properly dismissed Burns' failure to warn allegations, the City had no actual or constructive notice of the raised tiles, and the tiles were an open and obvious condition.

In reaching its decision, the Court stated that the ADA sensory tiles "by design, are open and obvious to reasonable people as well as visually impaired people because of their different color and consistency to the surrounding sidewalk."

Tort Immunity: Discretionary Immunity and Willful and Wanton Conduct
Barr v. Cunningham, (Appellate Court of Illinois, First District, 2016)

Evan Barr was injured in a floor hockey game during a physical education class when the hockey ball (used instead of a puck) bounced off another player's stick and struck Barr in the eye. Barr sued, alleging the physical education teacher's failure to provide protective eyewear was willful and wanton conduct. The trial court granted defendant's motion for a directed verdict, finding that Barr had failed to provide evidence to overcome the defendant's willful and wanton conduct.

On appeal, the plaintiff argued that the teacher's failure to require students to wear protective goggles that were available at the school constituted willful and wanton conduct and the school district was also liable as the employer of the teacher. The defendants argued they were absolutely immune from liability under section 2-201 of the Tort Immunity Act because their acts were discretionary and were immune from supervisory liability under section 3-108(a) because their conduct was neither willful nor wanton.

The Court ruled that a reasonable jury could find that the teacher's failure to provide safety goggles constituted willful and wanton conduct because the goggles were readily available, were kept in the same storage box as the hockey balls, and the teacher testified she had seen the balls occasionally bounce in the air. Further, the teacher's failure to provide safety goggles did not result from a policy determination. As a result, the defendants were not immune from a claim under section 2-201 of the Tort Immunity Act.

Tort Immunity: Animal Control Act
Benton v. City of Granite City (Appellate Court of Illinois, Fifth District, 2016)

Genevieve Southward was a resident in an assisted living facility. She suffered from Alzheimer's disease and dementia. She was reported missing and the Granite City police sent personnel and a K-9 unit to search for her. Genevieve was found and rescued. During the course of that operation, the police dog bit Genevieve on the arm. Southward sued, alleging the police department failed to control its police dog. The trial court submitted to the Appellate Court the following question:

"Does section 4-102 of the Local Government and Governmental Employees Tort Immunity Act provide immunity for claims brought under section 16 of the Animal Control Act?"

The Court analyzed section 4-102 and held that the strong public policy of section 4-102 is to avoid placing police departments in the untenable position of guaranteeing the personal safety of each individual in the community. To hold the police liable for how it conducted a successful search and rescue mission would be wholly inconsistent with that policy. The Court answered the question in the affirmative, terminating the litigation.

Negligence: Foreseeability of Injury on Open and Obvious Defects
Negron v. City of Chicago, (Appellate Court of Illinois, First District, 2016)

Under section 3–102 of the Local Governmental and Governmental Employees Tort Immunity Act, a local public entity, "has the duty to exercise ordinary care to maintain its property in a reasonably safe condition." 745 ILCS 10/3–102(a). This duty does have a limited exception for

dangers that are open and obvious. If an activity or condition on the land has a known or obvious danger, the landowner is not liable for any injures, unless the landowner anticipates the harm despite such knowledge or obviousness. A landowner anticipate harm to invitees when the landowner has reason to expect that an invitee might be distracted, so that he might not see an obvious danger, or he might see it but then forget about it and fail to protect himself. The distraction exception only applies where it is reasonably foreseeable that a plaintiff might be so distracted that he blunders into an open and obvious danger.

The plaintiff in *Negron* was walking on the south side of South Division Street in Chicago, when plaintiff slipped and fell on a section of sidewalk where there was a two inch height difference between adjacent slabs. Typically, plaintiff walks on the north side of Division, but on that particular day, there was a crowd of people on the north side and so to avoid the crowd, plaintiff walked on the south side. Plaintiff heard someone behind her cursing and shouting "Everybody hit the floor." Plaintiff looked over her shoulder at the crowd while continuing to walk and ended up tripping on a section of sidewalk where there was a two-inch height differential between adjacent slabs. At the time she fell, the weather was clear, it was still light out, and there was nothing obscuring her view of the sidewalk. Plaintiff brought suit claiming, that although the defect was open and obvious, the City should have foreseen the distraction that caused her injury.

The First District Court of Appeals disagreed with plaintiff's argument. In a broad sense, one could anticipate that a pedestrian will eventually be distracted and trip on a sidewalk, especially in busy urban settings. However the mere the fact that a distraction "might conceivably occur" is insufficient to render it foreseeable as a matter of law. Furthermore, one could also conceive that a crowd gathered on the sidewalk could be noisy and exuberant however, such noise is not inherently distracting. In fact, the general noise of celebration is not what caused plaintiff's accident but the yelling obscenities, which startled her. The court concluded that the city could not have reasonably have anticipated the distraction that caused plaintiff's injury, and, therefore, the open-and-obvious doctrine applies.

Wrongful Death: Local Government and Government Tort Immunity Act
Lorenc v. Forest Preserve District of Will County, (Third District, 2016)

Plaintiff, special administrator of the estate of James F. Lorenc, alleged both a wrongful death actions as well as a violation of the Survival Act against defendant, a local government. In January 2015, James F. Lorenc participated in defendant's event, "Cruise the Creek," where Defendant planned, organized, coordinated, and conducted this bicycle riding event in the Hickory Creek Forest Preserve. During the event, a trail sentinel stepped in the middle of the trail and waved his arms, causing the riders to apply their breaks and defendant to incur serious bodily injuries that resulted in death. The defendant filed a combined motion to dismiss plaintiff's second amended complaint under section 2-619 of the Code of Civil Procedure, arguing that it was absolutely immune from liability for the accident pursuant to section 2-109 and 2-201 of the Local Government and Government Employees Tort Immunity Act. Later Defendant filed a second motion to dismiss pursuant to section 2-615 of the Code, arguing that the allegations were insufficient to satisfy the statutory definition of willful and wanton conduct.

To survive a motion to dismiss, a willful and wanton conduct claim must allege that the defendant owed a duty to the plaintiff, the defendant breached the duty, the breach was the proximate cause of the plaintiff's injury, and the defendant exhibited either a deliberate intent to cause harm or an utter indifference of conscious disregard for the welfare of the plaintiff. Plaintiff argues that from the deposition transcript, there is evidence to support that there were instructions to the trail sentinels not to stand on the path and acknowledged that this action could cause the bicyclists to attempt to avoid a collision and lead to injuries. With this, there is an utter indifference or conscious disregard by the trail sentinel, and therefore defendant, for the safety of the event participants. However, the Third District held that looking at the record, there is evidence that the defendant took several steps to ensure safety during the event and that the train sentinel's act of stepping into the path was simply a violation of the defendant's instructions to which does not amount to the level of willful and wanton conduct.

Section 2-619 allows for the dismissal of a complaint based on certain defects or defenses including claims barred by an affirmative matter. Here, Defendant argues that the plaintiff's claim was barred by the Act, which states, "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." Additionally, the Act states, "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." The record establishes, and the Third District holds, that the trail sentinel was able to exercise discretion in the performance of his duties, including being tasked with notifying the bicyclists of the upcoming bridge. The pleadings did not establish that the trail sentinels' actions were specifically prescribed, but instead served as a courtesy to the riders and received basic training to guide their actions, and therefore the immunity applies.

Mandamus: Establishment of Ordinances and Rules
The Y-Not Project, LTD. v. Fox Waterway Agency (Appellate Court of Illinois, Second District, 2016)

Margaret Borcia is the mother of a child who was killed in a tragic boating accident on Petite Lake. The Fox Waterway Agency is a unit of local government that has authority to approve and maintain the Chain O Lakes, including Petite Lake, in accordance with the Fox Waterway Agency Act. Borcia sued FWA, asking the court to issue a writ of mandamus ordering FWA to adopt and implement safety rules and programs. Mandamus is an extraordinary remedy to direct a public official or body to perform a ministerial duty that does not involve the exercise of judgment or discretion. The trial court granted summary judgment to FWA.

On review, the Appellate Court held that the Fox Waterway Agency Act does not contain language requiring that agency to adopt and implement safety rules and programs. Consequently, the duties the plaintiff sought to enforce are discretionary, not mandatory. The Court affirmed the trial court's grant of summary judgment in favor of the Agency.

Worker's Compensation: Injuries Incurred While Commuting to Work
Allenbaugh v. Ill. Workers' Compensation Comm. (Appellate Court of Illinois, Third District, 2016)

Jason Allenbaugh is a patrol officer for the City of Peoria. Allenbaugh was driving from his home to a mandatory training exercise at police headquarters. It was snowing and there was ice and slush on the road. An oncoming vehicle crossed the center line and struck Allenbaugh's truck. Allenbaugh suffered neck and back injuries. An arbitrator found that Allenbaugh had suffered a work related injury and that his accident arose out of and in the course of his employment. The Workers' Compensation Commission reversed, finding that the claimant was not on duty at the time of the accident. The Commission found that the mere fact that Allenbaugh was required to attend training outside his usual duty hours was not sufficient to avoid the general rule that an employee's trip to and from work is the product of his own decision as to where he wants to live.

On appeal, Allenbaugh argued that the City maintained sufficient control over him that he remained in the scope of his employment at the time of his accident and that he was a traveling employee when the accident occurred. The Court found that Allenbaugh presented no evidence that the City maintained control over him while he was commuting. Further, the Court found that a traveling employee is one who job duties require him or her to travel away from the employer's premises. Allenbaugh was not traveling away from the employer's premises at the time of his accident. Rather, he was commuting to his employer's premises from his home. The Court agreed with the Commission that "the traveling employee doctrine should not be extended to any claimant who is involved in an accident on the way to their normal workplace..."

Worker's Compensation: Post Traumatic Stress Disorder
Moran v. Ill. Workers' Compensation Comm. (Appellate Court of Illinois, First District, 2016)

Scott Moran was a lieutenant for the Village of Homewood fire department. He was supervising members of his department at a house fire on March 30, 2010 when members of the department dragged one of their firefighters from the house. He was not wearing his mask or helmet at the time he passed Moran. That firefighter later died from his injuries.

Following the incident, the department's Chief implemented several activities, including debriefing members of the department and having surrounding fire departments provide coverage for the department's calls for a period of a week. On April 9, the Chief told Moran not to return to work until he was cleared by a psychologist. Moran began treatment with a doctor recommended by the department on April 23 and with his own psychiatrist on May 5. Moran was diagnosed with PTSD and continued treatment until December of that year. Manus filed for Workers' Compensation benefits. His claim was denied because the Commission found that he did not suffer a sudden, severe emotional shock because he was not inside the house when the firefighter was injured, and he did not seek psychiatric treatment on his own accord. A trial court affirmed the Commission's decision.

The Appellate Court held that Moran's condition was a single work-related event and was not a gradual deterioration of his mental processes. Further, Moran had feelings of guilt about the fire and felt the burden for the firefighter's death because of his command role. Additionally, the Court found that Moran's failure to seek treatment immediately was not fatal to his claim because a claim may be compensable even if the resulting psychological injury did not manifest

itself until sometime after the shock. Finally, the Court held that the employer's actions following the fire indicated it believed the first responders had suffered a sudden, severe, emotional shock. The debriefing and the implementation of the plan to have other departments respond to their calls for a week were evidence of that belief. The Court reversed the Commission

FMLA Interference
Lasher v. Medina Hospital, (Northern District of Ohio, 2016)

Jodi Lasher is a registered nurse. She worked on the obstetrical floor of Medina Hospital. Lasher suffers from chronic migraines and takes preventative and abortive medications. One evening while on duty, she decided to take medications for her migraine condition. She did not inform any co-worker. She felt dizzy and decided to lie down. She took herself to an unused room. Without using a call button or phone, didn't alert anyone, and didn't ask for assistance for herself or her patient. Twenty minutes later she was found sleeping in the bed. She was terminated for sleeping while on duty. Lasher sued for FMLA interference.

The Court found that Lasher failed to satisfy elements necessary to establish an FMLA interference claim. Namely, that she gave her employer notice of her intention to take leave and the employer denied her FMLA benefits to which she was entitled. The Court affirmed the trial court's grant of summary judgment to the defendant.

Employment and the ADA: Reasonable Accommodation
Pesce v. New York City, (Southern District of New York, 2016)

Jonathon Pesce suffers from a seizure condition and takes anti-convulsant medication. Pesce applied to be a police officer for New York City. He passed the written examination, but was disqualified when he informed the doctors of his seizure condition and need for medication. Pesce had informed the doctors that he had never experienced a seizure while on medication. Pesce sued, alleging violation of his rights under the ADA. The trial court granted summary judgment to the City.

On appeal, the Court reversed, finding that there was conflicting medical evidence as to whether Pesce would be a threat to the health and safety to others, that a blanket policy disqualifying candidates with epilepsy is per se discrimination under the ADA, and that there was conflicting evidence of whether the NYPD had a policy that tends to screen out an individual with a disability or a class of individuals with disabilities. The Court remanded the case for further proceedings.

Employment Law: Employment Decision Based on Arrest Record
Murillo v. City of Chicago (Appellate Court of Illinois, First District, 2016)

Most employers are aware that Illinois (and most other states) prohibit employers from basing an employment decision based on a record of past arrests, but not convictions. But, what about taking an adverse employment action based on the underlying behavior of the employee or candidate that resulted in the arrest but not conviction?

The Appellate Court of Illinois affirmed that in order to terminate an employee based on their criminal record, there must be evidence the individual actually engaged in the alleged conduct. The plaintiff, Arcadia Murillo had been working as a janitor for the Chicago police department for three years when, in 2009, the station's cleaning service changed management. With this change came a required background check for every employee in order for them to obtain security badges to the building, and therefore continue working. However, the results of the background check on Murillo revealed a 1999 arrest of drug possession and obstruction of justice. Although all charges against Murillo were dismissed for lack of probable cause, which is stated on her record, she was not allowed to continue to work at the police facility. When asked why the department made this decision, a sergeant involved in the process responded that it was made "based on the fact that there was possession of a controlled substance and refusal to cooperate with the police in the investigation."

The Appellate Court found that the police department violated the plaintiff's rights under the Illinois Human Rights Act. The court found that while an employer is able to use other information which indicates that an individual actually engaged in disqualifying conduct, this information must go beyond the bare police reports to determine that a crime was, in fact, committed. It was also compelling in Murillo's case that the charges in question were dismissed for lack of probable cause, meaning that insufficient evidence of a crime existed.

The lesson for employers is clear. Past misconduct which does not result in a conviction may be relevant to an employment decision (emphasis on MAY be relevant), but any such decision must be made after a review of the facts beyond a police report. Ideally, prior to making an adverse employment decision based on past misconduct, a thorough investigation of the incident should be completed, with information gathered from as much first-hand knowledge as is possible. Additionally, it is advisable to allow the employee or candidate to provide information or perspective on the situation. If readers are thinking that this type of investigation is near impossible in some situations, you may be correct. The point, of course, is that without delving into the facts surrounding an arrest in order to determine whether misconduct occurred and that it disqualifies the individual from employment, a decision based on the mere fact that an arrest occurred (therefore, the individual engaged in wrongdoing) will violate the law.

Civil Rights: Age Discrimination
Stilwell v. City of Williams (Ninth Circuit Court of Appeals, 2016)

Ronnie Stilwell was Superintendent of the City of Williams Water Department. In August, 2009, Stilwell signed a sworn statement and agreed testify against the City in another employee's Age Discrimination in Employment Act (ADEA) retaliation claim. Shortly thereafter, he began to receive from the Assistant City Manager emails with negative comments, including attacks on his job performance. The Assistant City Manager met with Stilwell and attempted to convince Stilwell not to testify. The Assistant City Manager became the interim City Manager and continued to criticize Stilwell's job performance and accused him of neglecting security concerns at the City's water plant. Stilwell was placed on administrative leave, then dismissed. Stilwell sued, alleging violation of the ADEA and the First Amendment. The trial court granted summary judgment to the City, finding that the ADEA precluded the First Amendment claim.

The Appellate Court reversed, ruling that Congress did not intend the narrower protections provided by the ADEA to preclude First Amendment retaliation suits when it enacted the ADEA. Further, the Court held that Stilwell's signing of the sworn statement and subsequent plan to testify against the City were protected speech as a citizen for First Amendment purposes because they were outside the scope of his ordinary job duties and were on a matter of public concern. The Court remanded the case to the trial court for further proceedings.

Employment Discrimination
Felix v. Wisc. Dept. of Transportation, (Seventh Circuit Court of Appeals, 2016)

The Rehabilitation Act protects a qualified individual with a disability from discrimination solely by reason of her disability in any program receiving federal funding. To prevail on a claim of employment discrimination under the Rehabilitation Act, a plaintiff must prove that: (1) she is disabled within the meaning of the statute; (2) she was otherwise qualified for the job in question; (3) she was discharged or subject to other adverse employment action solely because of her disability; and (4) the employment program of which her job was a part received federal financial assistance. The Rehabilitation Act incorporates the standards applicable to the Americans with Disabilities Act ("ADA") concerning employment discrimination.

When an employee engages in unacceptable workplace behavior, the fact that the behavior was caused by a mental illness does not present an issue under the ADA. The behavior itself disqualifies the employee from continued employment and justifies the discharge. There is also a so-called "direct-threat defense" under the ADA that justifies denial of employment to a disabled individual because the individual poses a significant risk of harm to himself or others in the workplace that cannot be eliminated with reasonable accommodation. This case was not decided under the direct threat defense. It was decided on the legal principle that an employer may terminate an employee for inappropriate behavior even when the behavior is precipitated by the employee's disability.

In the case at hand, Felix was employed as a customer service agent and driving test proctor. Her job involved both working behind a counter to process driver's license applications, and administering road tests. During her employment, Felix experienced anxiety at work that resulted in panic attacks. Her employer accommodated these incidents by letting Felix take breaks to do breathing exercises and calm down.

The incident leading to Felix's termination occurred after she suffered a particularly acute panic attack, when a supervisor found her lying on the floor and crying loudly while trying to speak. She had visible cuts on her wrist and could be heard saying things like "everybody hates you" and "they want to get rid of you." After an ambulance arrived and Felix calmed down, she was moved to a break room. The next day, Felix was informed that she would need to undergo an independent medical exam to determine whether she was fit to return to duty, as the DOT was concerned both for her own safety and the safety of applicants with whom she drove. Ultimately, the medical examination concluded that Felix remained at increased risk for potentially violent behavior toward herself and others. Based on those results, the DOT terminated her employment on the grounds that she was unfit for duty.

Affirming the DOT's decision, the court determined that it was undisputed that Felix's termination was due to her behavior, which led the DOT to determine she was unfit for duty. The court noted that, absent a disability, the DOT would have been justified in terminating any employee who engaged in similar behavior. Although Felix argued that the DOT was wrong in its assessment of her fitness for duty, the court explained that was beside the point: the issue was not whether the DOT's reliance on the medical report was wrong, but whether the DOT's explanation for her termination was dishonest and pretext for terminating her because of a disability. The court found that the DOT was not required to tolerate Felix's conduct, and that her termination was due entirely to unacceptable workplace conduct, not because of a disability.

Enforcement of Human Rights Ordinance and Local Governmental and Governmental Employees Tort Immunity Act
Decatur Park District v. City of Decatur, (Appellate Court of Illinois, Fourth District, 2016)

Plaintiff, Decatur Park District, filed a verified petition for a writ of prohibition against Defendant, City of Decatur, requesting the court to permanently dismiss with prejudice a matter before the Commission which alleged that the Defendant engaged in unlawful retaliation against an employee of Plaintiff. Additionally, the Plaintiff sought to permanently enjoin the Commission from taking any other action on this matter.

The matter deals with a former employee of Plaintiff, Rukiya Bates-Elem, who after terminated filed racial discrimination charges with the Commission against Plaintiff. After filing these charges, another of Plaintiff's employees initiated a criminal offense report, alleging Bates-Elem committed the offense of eavesdropping against her supervisor when she was employed with Plaintiff. Bates-Elem claims this criminal offense report was a result of her filing discrimination charges against Plaintiff, stating that there was a causal relationship between her arrest and when she filed her report.

Plaintiff argues that the City had no authority over employment decisions at the Park District, claiming that it would interfere with its authority pursuant to the Park District Code to manage its own affairs. The court disagreed, stating that the legislature did not provide park districts with authority to discriminate or retaliate against their employees for filing a complaint alleging discrimination. As a result, the court found that the Commission did, in fact, have jurisdiction and granted Defendant's motion to dismiss.

The second argument that Plaintiff makes is that it is absolutely immune from the retaliation claim pursuant to the doctrine of discretionary immunity, codified in the Tort Immunity Act. However, the court stated that this argument goes to the merits of the retaliation claim, not the Commission's jurisdiction, and the Commission was not acting beyond its jurisdiction in bringing this claim against Plaintiff. The Fourth District ruled that Defendant may enforce its Human Rights ordinance against Plaintiff.

First Amendment: Adjacent-Sidewalk Violating First Amendment
Left Field Media LLC v. City of Chicago, Illinois, (Seventh Circuit, 2016):

The Chicago Municipal Code 4-244-140(b), often referred to as the Adjacent-Sidewalks Ordinance, forbids all peddling on the streets adjacent to Wrigley Field in Chicago. The ordinance does not regulate speech, but only peddling without regard to what the peddler is selling, and many decisions have concluded that regulation may occur even if the person proposes to express an idea.

In 2015, on the day of the Chicago Cubs home opener, a patrol officer of the Chicago's police force saw Left Field's editor selling their magazine, *Chicago Baseball*, on the corner of Clark and Addison. The officer told him to move across the street to comply with the Adjacent-Sidewalk Ordinance. When the editor refused to move, he was ticketed and told that the next step would be an arrest to which the editor then crossed the street. Left Field then sued the City of Chicago stating that the ordinance mentioned violated the First Amendment, applied to the states by the Fourteenth.

After the district court denied Left Field's request for an injunction against enforcement of the Adjacent-Sidewalk Ordinance, Left Field appealed to the Seventh Circuit. The Seventh Circuit determined that the ordinance regulates all sales alike and is content-neutral under the USSCT's decision of *Reed v. Gilbert*, to which the City of Chicago only needs to show rational basis for the ordinance. The City satisfies the rational basis by stating the reason for the ordinance is to curtail activity that delays entry and induces crowds to spill into the streets, and the court upholds the District Court's denial for an injunction.

Additionally, Left Field challenges the Chicago Municipal Cod 4-244-030, the Peddlers'-License Ordinance, which requires licensure of anyone selling anything on streets anywhere in the City of Chicago. This ordinance regulates who may sell *Chicago Baseball* in that each peddler must be licensed personally, placing a damper on an organization that relies on casual or daily labor. The court found the City's rationale for implementing the licensing regulation to be an invalid justification. The court, however, did not rule on the issue, holding it was not yet ripe considering neither Left Field nor any of its street sellers has ever applied for a peddler's license

First Amendment: Protected Speech
Kubiak v. City of Chicago, (Seventh Circuit, 2016)

Laura Kubiak was employed in the Chicago Police Department's Office of News Affairs. One day while on duty, she was verbally assaulted by another news media liaison in her department. In addition to the verbal assault the co-worker shook his finger in her face, called her names, and swung his hand back as if to strike her. Subsequently, Kubiak reported the incident to her superiors, but she was told they didn't have time to discuss it. Kubiak then reported the incident to Internal Affairs. Another co-worker gave a statement corroborating Kubiak's account. Later, she learned her complaint had been sustained. Within days, Kubiak was reassigned to a beat position on a midnight shift in an area Kubiak described as one of the most dangerous neighborhoods in Chicago. Kubiak filed a claim alleging violation of her First Amendment rights and retaliating against her for engaging in protected speech. The district court granted the defendants' motion to dismiss, finding that Kubiak did not speak as a private citizen and her speech was not a matter of public concern.

On review, the Seventh Circuit affirmed, holding that Kubiak did not speak as a private citizen and that when public employees make statements pursuant to their official duties, they are not

speaking as citizens for First Amendment purposes. The Court found that her speech was intimately connected with her job and with her professional duties. The Court also held that Kubiak's speech did not address a matter of public concern in that the objective of her complaints was to further her personal interest in remedying an employee grievance. The Court concluded that the content, form, and context of Kubiak's speech showed that her speech did not address a matter of public concern.

First Amendment: Demotion of Employee Engaging in Political Activity
Heffernan v. City of Paterson, (Supreme Court of the United States, 2016)

The First Amendment generally prohibits government officials from dismissing or demoting an employee because of that employee's engagement in constitutionally protected political activity. However, in *Heffernan v. City of Paterson*, a government official demoted an employee because the official incorrectly believed that the employee had supported a particular candidate running for mayor.

Plaintiff was a police officer in Paterson, New Jersey. He was seen holding a sign for an individual running for mayor at the time, to which Plaintiff claimed he was picking up for his bedridden mother. The next day, Plaintiff was demoted from detective to patrol officer and assigned a walking post. Subsequently, Plaintiff filed suit against the City in federal court, claiming he was demoted because he had engaged in conduct that constituted protected speech.

Because of the facts, the District Court found that Plaintiff did not actually engaged in any First Amendment conduct and therefore the City could not have deprived him of any constitutionally protected rights. The Third Circuit affirmed the District Court's decision, and stated that, "a free-speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."

The Supreme Court looks at the government's reason for demoting Plaintiff, paying attention to whether an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects. If this is the case, the employee is entitled to challenge that unlawful action under §1983, regardless if the employer makes a factual mistake about the employee's behavior. Here, Plaintiff was demoted because of the City's belief that Plaintiff was engaging in protected activity, and that can lead to the same kind of constitutional harm whether that belief is based on a factual mistake or not. Because there is evidence that Plaintiff was demoted due to an unconstitutional policy, the case is remanded to determine whether the policy complies with constitutional standards.

The dissent disagreed with the majority, stating that because Plaintiff concedes that he did not exercise his First Amendment rights, he had no cause of action under §1983. Justice Thomas and Justice Alito stated that a city's policy, even if unconstitutional, cannot be the basis of a §1983 suit when the policy does not result in the infringement of the plaintiff's constitutional rights. It is not enough for the City to have attempted to infringe his First Amendment rights, but Plaintiff must establish that the City actually did so in order to prevail on his claim.

First Amendment: Retaliation
Advanced Technology v. City of Jackson (Fifth Circuit Court of Appeals, 2016)

Donald Hewitt, owner of Advanced Technology, wanted to redevelop a bank building in the City of Jackson, which required the City's support in the form of issuance of bond financing from the Joint Redevelopment Authority, a separate entity. Initially, the City indicated support for the project. Subsequently, Hewitt made public comments criticizing the Mayor and complaining of cronyism in the Mayor's office. Support for the project stalled. Advanced Technology and Hewitt sued, alleging First Amendment retaliation by the Mayor. The Court found that, under Mississippi law, the City Council, and not the Mayor was the final policy maker with authority to approve or reject funding. Thus, as a matter of law, the City could not be held liable for the Mayor's withdrawal of support for the project.

First Amendment: Religious Speech
Miller v. City of St. Paul, (Eighth Circuit Court of Appeals, 2016)

The Irish Fair of Minnesota (IFM) is a nonprofit organization that conducts an annual Irish Fair in a public park. The IFM obtains a permit from the City of St. Paul to host the fair. The city requires IFM to submit a security plan. The 2014 security plan included a prohibition of signs and limited solicitation and vendors by prohibiting the distribution of merchandise, promotional items, or materials. David Miller planned to share his religious views by carrying signs, distributing literature, open air preaching, and conversations with attendees. Patrol commander Patricia Englund told Miller that during the fair, IFM made the rules for the property and that his signage and "stuff" wasn't welcome. Miller asked Englund several questions about whether he would be arrested if he went ahead with his plans. Englund told him she hadn't decided, but that if Miller posted a sign or banner, she would confiscate it until after the fair.

Miller's attorney sent a letter to the City. The City acknowledged Miller could engage in protected speech and confirmed it would ensure compliance at future fairs. Miller filed suit alleging violation of his First Amendment rights and due process.

The Court found that there was no official City policy restricting Miller's expression and Miller failed to allege facts showing that policymaking officials had notice of or authorized Englund's conduct. However, the Court held that Miller could pursue his claim against Englund because her threat to confiscate Miller's sign or banner could be construed as an official overstepping her authority or abusing her power.

Retaliation: Awarding Attorney Fees for IL Humans Rights Act violation
Mendez v. Town of Cicero, (Appellate Court of Illinois, First District, 2016)

Under the Illinois Human Rights Act a court, in their discretion, may award attorney fees and costs to the prevailing party. 775 ILCS 5/10 -102(c)(2). The purpose of this provision is to ensure proper representation of complainants and to enforce the important public policies in the Act. In the past courts used to amount the plaintiff received in damages and use it as a guide as to how much in attorney fees to award. However, recently the Seventh Circuit observed that the argument that fees should be proportional to the plaintiff's damages is "losing favor."
The plaintiff in *Mendez* sued her employer, the Town of Cicero, alleging that Town retaliated against her for reporting alleged sexual harassment by deputy police superintendent toward a subordinate, by transferring her from executive administrative assistant to superintendent to clerk in building department. At trial, the plaintiff was not awarded money damages but was reinstated

to her prior position as executive administrative assistant. The court separately awarded plaintiff $330,412 in attorney fees. Cicero tried to argue that because plaintiff's award was *de minimis*, she is not entitled to attorney fees at all. The court disagreed.

Fees are not required to be proportional to amount of Plaintiff's own award. Moreover, the reasoned that the plaintiff's award was more than *de minmis* as the reinstatement vindicated Plaintiff's right under Human Rights Act to be free from retaliation for reporting sexual harassment. Plaintiff's refusal to accept Town's unilateral decision to transfer her was not a pretext to inflate attorney fees and costs.

Furthermore, the court says that the awards obtained are not the only factor to consider when awarding attorney fees. Courts should first calculate the hours spent on litigation and multiply be the reasonable hourly rate. Then proceed to look at other factors such as novelty and difficult of the legal question, time and labor required, the skill necessary to perform the legal services, the plaintiff's failure to prevail on claims unrelated to the successful claims, and the amount involved.

Discrimination: Sexual Harassment and Retaliation
Lord v. High Voltage Software, Inc. (Seventh Circuit Court of Appeals, 2016)

Ryan Lord worked at High Voltage as an associate producer of video game software. Co-workers began to joke with him about his interest in a female co-worker. Lord complained to the human resources director. She explained that the joke did not amount to sexual harassment, but asked Lord to report any further incidents of harassment immediately. Lord was assigned to a new working group. A male co-worker, on separate occasions, poked Lord in the buttocks, slapped Lord's buttocks, and grabbed Lord between his legs. Lord did not immediately report these incidents. He did report them on July 30, 2007. On July 31, Lord and the male co-worker he had complained about received an unrelated disciplinary write up for a DVD malfunction that occurred during a presentation. Lord sent a heated email to his supervisor complaining that he was the subject of retaliation because he had complained of harassment and suggesting he would file a claim. After an investigation, the write up against Lord was withdrawn. The next day both Lord and the co-worker were fired. The reasons for firing Lord were listed as failing to immediately report incidents of harassment as instructed; obsessively tracking the performance, timeliness and conduct of his co-workers, and insubordination.

Lord sued for sex discrimination and retaliation. Lord claimed that the conduct of his co-workers in joking about his interest in a co-worker created a hostile work environment. The Court denied that claim because Lord failed to establish that his co-workers harassed him because of his sex. The mere fact that a joke has sexual overtones was not enough to establish that he was targeted because of his sex.

The Court held that Lord relied entirely on evidence of suspicious timing. He was fired within two days of submitting the second complaint and only one day after telling a supervisor he intended to file a discrimination claim. The Court rejected that argument and found that Lord did not provide any evidence that called into question the company's listed legitimate reasons for firing him.

ADA: Facility Compliance
Hummel v. St. Joseph County Board of Commissioners (Seventh Circuit Court of Appeals, 2016)

Over a period of several years, a number of individual joined suit against the County because its courthouses were not accessible as required by the ADA. The suit was a broad challenge to the accessibility of the state court facilities in St. Joseph County, Indiana. Over time, some plaintiffs were no longer litigating cases in the courtrooms, some plaintiffs died, and some plaintiffs dropped their claims. Additionally, during the years the case was litigated, the County made physical changes to the court houses and there were changes to the state court's policies. In 2014, the trial court granted summary judgment for the defendants.

On appeal, the Court affirmed summary judgment. The Appellate Court found that some of the plaintiffs lacked standing because they were not litigating claims in the courthouses and because the plaintiffs failed to raise questions of material fact on some claims. The Court held that the plaintiffs' strongest claim was that the courthouse restrooms were not accessible. The courthouse was remodeled since that claim was filed, making that claim moot. The Court did not hold that the courthouses are fully compliant with ADA, but rather that the plaintiffs failed to present sufficient evidence.

The Court added that, absent an ongoing challenge about whether the county has failed to make the court services accessible, the case was simply "an abstract dispute about the law not linked to the rights of a particular plaintiff."

Discrimination: Obesity not an ADA Protected Disability
Morriss v. BNSF Railway (8th Circuit, 2016)

The ADA makes it unlawful for an employer from discriminating against any "qualified individual on the basis of disability" 42 U.S.C. § 12112(a). In order of a claimant to succeed on a disability-discrimination claim, he must show that he was a "qualified individual" who suffered "discrimination" that was based on a "disability". The ADA defines "disability" as "(A) a physical impairment that substantially limits one or more major life activities...(B) a record of such an impairment" or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)-(C).

In *Morriss*, plaintiff claimed the obesity was a protected disability under the ADA. The plaintiff applied for a job at BNSF Railway however, the position was contingent upon a satisfactory medical review. The plaintiff was not hired after his BMI exceeded BNSF's policy limit. Plaintiff sued claiming that obesity is a disability. The trial court award summary judgment to BNSF stating the plaintiff failed to provide any evidence that obesity was a disability. The US eight circuit court of appeals reaffirmed.

In order for plaintiff to prove his claim he must show that his obesity was an actual or perceived physical impairment. The ADA does not define physical impairment but the EEOC does. The EEOC defined the terms as "any physiological disorder or condition...affecting one or more body systems." Thus under the EEOC obesity is a physical impairment if it's a physiological disorder or condition and it affects a major body system. Furthermore, the EEOC's definition of "impairment" does not include...weight...that is within the "normal" rage and is not the result of

a physiological disorder." Thus the court reasoned that an individual's weight is a physical impairment only if it falls outside the normal rage and is a physiological disorder. Since the plaintiff could not prove that his obesity was a physiological disorder, he did not have a physical impairment and no disability under the ADA.

In addition, the court concluded that this holding remains applicable despite Congress enacting ADA which forced the EEOC to broaden the coverage of individuals with disabilities. The enactment of the ADA did not affect the definition of physical impairment. Therefore, obesity, even morbid obesity, is not a disability unless the plaintiff can prove it resulted from an underlying physiological disorder or condition.

Disability Discrimination: Unreasonable Accommodation and Reassignment
Frazier-White v. Gee, (Eleventh Circuit, 2016)

According to the Eleventh Circuit, an indefinite extension of light-duty status is an unreasonable accommodation and an employer is not required to reassign employee to some other, unspecified position. An unreasonable accommodation depends on the circumstances, but it may include, among other things, job restructuring, part-time or modified work schedules, and/or reassignment to a vacant position. The burden is placed on the employee for identifying an accommodation and demonstrating that it is reasonable.

In *Frazier-White v. Gee*, Plaintiff was a community service officer (CSO) for the Hillsborough County Sheriff's Office (HCSO) for which she was responsible for security-related duties at the sheriff's detention center. In July 2010, Plaintiff was injured in a work-related accident when a heavy metal door closed on her right arm and pinned her against a door frame. As a result, Plaintiff was placed on light-duty status, which pursuant to SOP 213.00 is not available to HSCO employees on a permanent basis. After 270 days during a two-year period, employees on light-duty status are required to have a medical due process hearing to determine whether they can return to full duty within a reasonable period of time. If the employee is not able to, they are subject to a non-disciplinary dismissal.

Plaintiff consulted many doctors, but was experiencing pain and stated she could not perform the essential duties of her CSO position. Defendant sent Plaintiff two letters prior to her medical due process hearing stating how many days she had been on light-duty status and one informing her of the hearing. These letters encouraged her to contact the HSCO risk management director to discuss possible ADA accommodations and civil service application for other jobs in the HSCO as well as informed her of possible dismissal.

In response to those letters, Plaintiff requested an extension to continue to receive care until she returned to full duty, but did not specify the length of the requested extension or suggest any other specific accommodations. The question then goes to whether Defendant discriminated against Plaintiff by failing to provide a reasonable accommodation that would have enabled her to perform either her CSO duties or the essential duties of another position for which she was qualified.

The Eleventh Circuit affirmed the District Court's holding in that the Defendant did not discriminated against Plaintiff and creating a position surrounding an indefinite extension of light-duty status is an unreasonable accommodation. It is undisputed that no such position of

permanent light-duty existed and the Defendant was not required by the ADA to created one for Plaintiff. Additionally, Plaintiff did not provide any evidence of a specific, full-duty vacant position that she was qualified for and could have done with her current medical condition. Additionally, Plaintiff did not apply for any other positions she was qualified for.

Last, the court concluded that Plaintiff's request for indefinite extension of light-duty status and reassignment was in no way related to her termination. She did not request for extension until after she was subject to dismissal for exceeding the 270 limit and did not request reassignment until after being informed of the due process hearing. The evidence provided shows that Plaintiff was terminated solely as a result of her inability to return to full duty at the expiration of her light-duty eligibility.

Unjust Isolation Under the ADA and Class Certification
Steimel v. Wernert, (Seventh Circuit, 2016)

The Home and Community-Based Care Waiver Program allowed states to diverge from the traditional Medicaid structure by providing community-based services to people who would, under the traditional structure, require institutionalization, 42 U.S.C. 1396n. The Indiana Family and Social Services Administration operates the Aged and Disabled Medicaid Waiver Program (A&D waiver), the Community Integration and Habilitation Medicaid Waiver Program (CIH waiver), and the Family Supports Medicaid Waiver Program (FS waiver). Because Indiana has closed most of its institutional facilities, these waiver programs serve the vast majority of its people with disabilities. Until 2011, the Administration placed many people with developmental disabilities on the A&D waiver, which has no cap on services. The Administration then changed its policies, rendering many developmentally disabled persons ineligible for the A&D waiver. These people were moved to the FS waiver, under which they may receive services capped at $16,545 annually. The CIH waiver is uncapped, but not everyone qualifies for the CIH waiver.

Plaintiffs argue that their new assignments violated the integration mandate of the Americans with Disabilities Act, 42 U.S.C. 12101 because it deprives them of community interaction and puts them at risk of institutionalization. Unjustified isolation is discrimination based on disability in violation of the ADA. The court granted defendants summary judgment on the integration-mandate claims and denied class certification. The Seventh Circuit reversed, finding that there is a genuine dispute of material fact with respect to the individual claims based on the integration mandate. The state had the burden to prove that any changes would fundamentally alter the program and therefore would not fall under the integration mandate of the ADA. But the state provided no evidence that the plaintiffs' desired distribution of services would significantly increase their cost, let alone fundamentally alter any programs, and therefore was found to be "entirely reasonable".

When it came to the question of class certification the Seventh Circuit started by saying that a party seeking class certification bears the burden of showing, by a preponderance of the evidence, that a proposed class meets the requirements of class action rule. A district court's decision of class certification is reviewed for abuse of discretion. The definition of classes included those potential members moving from A&D waiver (uncapped) to FS waiver (capped), that needed more services than the capped program had available. Here the Seventh Circuit affirmed the District court's decision because the class was too vague, stating that the definition

did not say what ways potential class members required more services than the capped program had available.

ADA: Failure to Accommodate
EEOC v. AutoZone, Inc., (Seventh Circuit, 2016)

Margaret Zych was employed as a Parts Sales Manager by AutoZone. In July 2007, she injured her right shoulder while working. Zych underwent two years of physical therapy and treatment for the injury. During those two years, AutoZone accommodated several work restrictions. In 2009, Zych's doctor permanently restricted her from lifting anything with her right arm that weighed more than 15 pounds. Approximately one month late, AutoZone dismissed Zych because it was unable to accommodate this permanent restriction.

Zych filed a charge with the EEOC, claiming that AutoZone failed to accommodate her lifting restriction and illegally terminated her employment. A jury trial was held and the jury returned a verdict that the EEOC had failed to prove that Zych was a qualified individual with a disability of record at the time her employment was terminated.

On appeal, the Court affirmed, finding that, due to the permanent lifting restriction placed on Zych by her physician, the jury could reasonably conclude that Zych was not a qualified individual with a disability at the time she was dismissed. AutoZone had presented evidence that lifting heavy auto parts, cases of oil and antifreeze, and other items was a regular part of the job, as was unloading parts and supplies from delivery trucks. Additionally, AutoZone produced the job description for Zych's position, which state that the position constantly requires carrying items up to 50 pounds, but usually 10 to 25 pounds, and that the Parts Sales Manager must frequently lift items up to 75 pounds from floor to waist and up to 25 pounds horizontally. The description also stated the position required frequent twisting and rotating.

The EEOC had also argued that the trial court should have allowed the use of jury instructions proposed by the EEOC that included a "team concept" approach for determining the essential functions of a job. The Seventh Circuit rejected that argument, finding that the evidence presented did not show a system of distribution of labor under which the normal course of action was for Zych to substitute and reassign discrete tasks of lifting heavy items. The Court found that the EEOC's proposed team concept jury instruction was an attempt to have the jury draw the conclusion that heavy lifting was not an essential function of the position because Zych's co-workers could lift the items Zych could not lift. The trial court had allowed the EEOC to make its team concept argument in its closing arguments, and the Court found that was sufficient.

ADA: Student IEP
Koester v. YMCA of Greater St. Louis, (Eastern District of St. Louis, 2016)

The YMCA of Greater St. Louis has a policy requiring parents of students with disabilities who desire to participate in summer camp to provide a copy of the student's Individualized Education Program (IEP) to its center director. Matina Koester attempted to enroll her child in the camp. However, she refused to provide a copy of the IEP. The YMCA made an exception to its rule and allowed her child to participate in a T-ball program after receiving information from the

child's pediatrician. The child threw tantrums, would try to run away, was generally non-verbal, but would drop F-bombs when speaking with his mom. The YMCA informed Koester that, unless she provided the IEP, her child would be unable to participate in YMCA activities. Koester sued, alleging that requirement constitutes a violation of the ADA.

The Court found that the IEP requirement is not an adverse action and does not constitute unlawful eligibility criteria that screens out individuals on the basis of their disabilities. The Court held that the IEP policy is necessary to better accommodate children with disabilities and is applied to all camp applicants. The Court denied Koester's motion for injunctive relief.

Immunity: Absolute and Qualified Immunity
Novoselsky v. Brown, (Seventh Circuit, 2016)

Illinois courts have long held that state and local governments cannot be held civilly liable for statements made within the scope of their official duties. The privilege provides absolute immunity for civil actions, including defamatory statements. The sole consideration is whether the statements made were reasonably related to the official's duties. If was not related to the official's duties then the official is liable as the immunity does not protect the government officials themselves. If the statement was related to the official's duties, the government official is immune, no matter how defamatory the statement.

Similarly, courts have held government agents from liability for their actions so long as they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." This involves a two part test: (1) whether the defendant violated a constitutional right, and (2) whether that constitutional right was clearly established at the time of the violation. One of the biggest constitutional rights is the First Amendment.

In *Novoselsky,* plaintiff filed suit against the Clerk of the Circuit Court of Cook County, Dorothy Clerk, claiming First Amendment violation and defamation. The claims stem from two separate events. First Clerk filed complaint against plaintiff with the ARCD and subsequently wrote a press release regarding the complaint. The plaintiff claims that the complaint and press release defamed him. Second, Clerk wrote a letter to the Better Government Association (BGA), the Reverend Jessie Jackson, the Cook County President, and the Board of Commissioners regarding plaintiff's litigiousness. The plaintiff claimed that this violated his 1st Amendment rights. At trial Clerk asserted that her communications were protected by absolute and qualified immunities.

The Seventh Circuit Court of Appeals, found Clerk immune from both of the plaintiffs claims. Clerk was entitled to immunity on defamation action because the court determined that the ARDC complaint filed by Clerk against plaintiff and the subsequent press release, pertained to Clerk's official duties or responded to litigation that had been filed against Clerk's office. The court further found that Clerk was entitled to qualified immunity with respect to: (1) Clerk's letter to Jessie Jackson; (2) Clerk's letter to BGA; and (3) Clerk's letter to Cook County Bd. of Commissioners. Yes, the Clerk made disparaging comments about plaintiff but plaintiff failed to establish with respect to his First Amendment claim that Clerk engaged in threats, coercion, or intimidation so as to qualify as retaliatory speech.

Employment Law: Violation of Ethics Act
Crowley v. Watson (Appellate Court of Illinois, First District, 2016)

Te court upheld a judgment against Chicago State University which included a punitive damage award in the amount of two million dollars. The plaintiff, an attorney for the University, alleged he was terminated because he reported illegal conduct by the University to the Illinois Attorney General (Whistle Blower Protection 5 ILCS 430/15-5 et seq.) and because he released certain "FOIA documents" as required by law. The University claimed the Plaintiff and the President merely had a disagreement about release of the FOIA documents and that the Plaintiff was terminated for misuse of University resources and mismanagement following an independent audit of a department he administered.

The jury returned a judgment for the Plaintiff after 30 minutes of deliberation. In addition to the punitive damage award the Plaintiff was also awarded double back pay of $960,000, pre-judgment interest of $60,000 and attorney fees of $318,000.

In reviewing the claim for punitive damages against the University the Appellate Court said the University had waived its defense that punitive damages are statutorily barred. The University did not raise the defense until its post trial motion.

The Court went on to find that "defendant's position that the statute does not permit punitive damages in an Ethics Act violation case is demonstrably incorrect." The Court then reviewed the language of the Ethics Act and concluded that the Act allows the court to award "all remedies necessary" to make the State employee whole and "to prevent future violations" of the Act.

The University claimed it is immune from liability for punitive damages pursuant to sovereign immunity. The Court rejected this claim stating that the State Tort Immunity Act was amended so the state could be made a defendant in actions involving the Ethics Act (745 ILCS 5/0.01 et seq.). Consequently the state waived its sovereign immunity.

While the Local Governmental Tort Immunity Act protects local entities and local officials from punitive damage awards, this case illustrates public reaction to a public employer terminating an employee who reports illegal conduct or merely has a difference of opinion over the employee's lawful duties: Thirty minutes to deliberate and award over one million dollars in damages and attorney fees.

Illinois Human Right Act Allows for Disability Harassment Claims
Rozsavolgyi v. City of Aurora, (Appellate Court of Illinois, Second District, 2016)

In this case the Second District Appellate Court in Illinois held that the Illinois Human Rights Act (IHRA) allows individuals to file disability harassment claims. The Appellate Court also held that municipalities can assert immunity for claims seeking damages for violations of the IHRA under the Local Governmental and Governmental employees Tort Immunity Act (Tort Immunity Act).

The Plaintiff worked for the City of Aurora for twenty (20) years as a property maintenance compliance officer before being terminated for making a statement to a coworker that included the word "idiots". Plaintiff suffers from unipolar depression, anxiety, panic attacks and partial hearing loss. After she was terminated she sued the city for violating the IHRA by failing to make accommodations for her mental condition, treating her differently than other employees, firing her in retaliation and allowing for a hostile work environment. Plaintiff alleged her fellow coworkers harassed and abused her, because she suffered from depression, anxiety and panic attacks, as well as partial hearing loss. She said the alleged harassment and abuse worsened her mental condition.

In litigating the dispute, three questions arose and were certified to the Second District: (1) Does Section 2-102(A) of the IHRA prohibit disability harassment and are refusal to accommodate and hostile work environment claims cognizable civil rights violations under that section? (2) If disability harassment is prohibited, does section 2-102(D) of the IHRA apply and does the Plaintiff bear the burden of proof? (3) Does the Tort Immunity Act apply to a civil action brought under the IHRA?

First, the Appellate Court found that the unlawful section 2-102(A)'s prohibition against unlawful discrimination in the "terms, conditions, or privileges of employment" does apply to claims of disability harassment, even though the Act doesn't refer to disability harassment. The Act's use of the words "terms, conditions, or privileges of employment" could include disability harassment and the broad nature of the wording adds to the legislatures intent to encompass the full gamut of discriminatory conduct. The conclusion was that the IHRA prohibited disability harassment and reasonable accommodation claims could be brought as separate claims under the same section.

Second, after a finding that disability harassment is prohibited under the IHRA, the Appellate court held that Section 2-102(D) of applied to claims of disability harassment. The holding included that the Plaintiff had the burden of proving that an employer was aware of the harassment and failed to take corrective measures.

Lastly, the Appellate Court answered the question of whether the Tort Immunity Act applied to civil actions brought under the IHRA. The ruling was that the city can assert immunity for damages, but not for equitable relief. The Appellate court here declined to follow prior cases that determined the Tort Immunity Act only applied to tort actions and not constitutional violations.

Justice McLaren dissented on two of the issues, saying that the Appellate Court had neither adopted nor declined the district's ruling on the subject of the reach of tort immunity. Justice McLaren also disagreed with the broad application of Section 2-102(A) saying that if lawmakers wanted to include disability harassment, then they would have said so.

Workers' Compensation: Exclusive Remedy

Locasto V. City of Chicago (Appellate Court of Illinois, First District, 2016)

Joseph Locasto was injured while participating in a training program and received workers' compensation benefits for his injuries. Locasto also filed suit against the city and the training

academy. Locasto argued that his injuries fell into an exception to the exclusive remedy provision of the Workers' Compensation Act because the defendants acted intentionally in injuring him. The Court rejected Locasto's argument, ruling that once a plaintiff obtains compensation under the Workers' Compensation Act, he is barred from bringing an action against the defendants for civil damages. The Court stated "While an employee may bring suit against his or her employer alleging an intentional tort while also pursuing a workers' compensation claim once the employee actually receives compensation under the Act, this acceptance precludes recovering in the tort case."

Threshold for Claims of Disparate Pay, Retaliation, and a Hostile Work Environment
Poullard v. McDonald, (Seventh Circuit, 2016)

Plaintiff has worked as a training specialist at what is now called the Captain James A. Lovell Federal Health Care Center, since 2004. He received a pay grade promotion in 2006, but since then has not received a permanent promotion nor an increase in his pay. Plaintiff's supervisors were also alleged to have made racially motivated remarks and other conduct of discriminatory nature. Plaintiff brought suit against the U.S. Department of Veterans Affairs alleging discrimination based on sex and race (Poullard is African-American), unlawful retaliation, and a hostile work environment. The District Court granted summary judgment for Defendant on many of Plaintiff's claims because they time-barred; Plaintiff was to have exhausted administrative remedies under 29 C.F.R. 1614.105(a). On the timely claims, the District Court held that Plaintiff had not suffered an adverse employment action and that a reasonable jury could not find that the alleged harassment was sufficiently severe or pervasive to support a hostile work environment. The Seventh Circuit affirmed the District Court's decision.

Under the Civil Rights Act of 1964, inquiry into disparate pay claims, under the indirect method of proof boils down to a showing of equal work for unequal pay, with the protected class as the distinguishing factor. These arguments must be made in the District court in order to preserve them for appeal. The problem with Plaintiff's case was that he could not find a similarly situated training specialist. He argued for the first time that his supervisor is an appropriate comparator, but he is barred from making arguments on appeal that weren't presented in District court. The Seventh Circuit court held that even if Plaintiff had previously identified his supervisor as a comparator, his argument would still fall short because the two employees were not similarly situated.

The second issue deals with retaliation against Plaintiff for trying to exercise his rights under Title VII (42 U.S.C. 2000e-3(a)). The Seventh Circuit court said that Plaintiff here must show that he engaged in a protected activity, and he suffered an adverse employment action. First, Plaintiff alleges that he received ambiguous threats from two supervisors, but the Seventh Circuit rules that unspecified disciplinary action does not constitute adverse actions. Plaintiff failed to show the effect these threats had on his working conditions. Second, Plaintiff had alleged three incidents where his supervisor had made racially motivated remarks, but found them to be ambiguous. The Seventh Circuit said that no reasonable jury would find the remarks severe enough to deter the Plaintiff from exercising his Title VII rights. Finally, Plaintiff claims that the failure to compensate at a higher rate was an adverse action. This was found to be tenuous, that

the Plaintiff could not point to a significant retaliatory pattern, and that no trier of fact would find in favor of the Plaintiff.

Finally, the Seventh Circuit looked at Plaintiff's hostile work environment claim. Plaintiff here could not prove that the remarks made against him rose to the level of severe or pervasive conduct. The Seventh Circuit sided with the District court's decision that even in consideration of surrounding circumstances, the alleged harassment was not severe or pervasive conduct enough to rise to the level of a hostile work environment.

Employment Law: Political Affiliation
Yahnke v. Kane County (Seventh Circuit Court of Appeals, 2016)

Steven Yahnke was a Deputy Sherriff for Kane County. He received permission from the Sheriff to engage in secondary employment and worked as the part-time police chief of the Village of Maple Park. On several occasions, Yahnke indicated he planned to run for the office of Sheriff of Kane County. Yahnke was injured while working for Kane County and was placed on temporary total disability. Additionally, the Kane County under Sheriff asked the State's Attorney for an opinion on whether Yahnke's work for the Village constituted a conflict of interest. The State's Attorney determined that there was a conflict. Yahnke was instructed by the Sheriff to discontinue working for Maple Park.

The Sheriff opened an investigation into whether Yahnke continued to work for Maple Park during the time his secondary employment was suspended. Following the investigation, the Sheriff sent notice to Yahnke that he was seeking Yanhke's dismissal by failing to display absolute honesty and by failing to follow orders. The Kane County Merit Commission scheduled a hearing, but the hearing was never held because Yahnke agreed to take the matter to arbitration. Yahnke never moved forward with arbitration. He was fired. Yahnke sued in federal court, alleging he was terminated because of his political affiliation and his termination occurred without due process. At trial, the County was granted summary judgment on both counts.

On appeal, the Court reviewed evidence that, upon learning of Yahnke's continued employment, the Sherriff said to his under Sherriff "I'm not giving him any time off, I'm firing him. He thinks he's going to run for Sheriff against me someday." The Court found that statement to create a genuine issue of fact as to why Yahnke was fired. Thus, summary judgment was inappropriate and the Court remanded the case for trial.

The Court found that the trial court properly granted summary judgment on the due process claim, because Yahnke failed to pursue arbitration after agreeing to waive the hearing before the Merit Commission.

Employment Law: Discrimination
Chaib v. GEO Group, Inc. (Seventh Circuit Court of Appeals, 2016)

The Seventh Circuit Court of Appeals affirmed summary judgment for the employer in Title VII employment discrimination lawsuit filed in federal court. The plaintiff, Nora Chaib, worked for

GEO Group, Inc., a private company that managed a correctional facility for the State of Indiana. She was fired for "unbecoming conduct" because she improperly extended her medical leave following a workplace injury. Plaintiff sued GEO Group under Title VII alleging discrimination on the basis of sex, race and national origin.

During her medical leave, Chaib's employer became suspicious that she was malingering and hired an investigator to do video surveillance of her activities. Investigators videotaped Chaib driving her car and running errands around town while claiming to be incapable of "normal activity including minimal exertion." Plaintiff could not dispute this evidence which ultimately proved fatal to her claims.

To prevail, Chaib must show that a reasonable jury could find that GEO Group unlawfully discriminated against her by with either direct or circumstantial evidence. Plaintiff offered no direct evidence of discrimination. For circumstantial evidence of discrimination, Chaib relied exclusively on incidents in the workplace in which she accused co-workers of making racist comments to her and harassment. For plaintiff to prevail, these incidents must paint a "convincing mosaic of circumstantial evidence" sufficient to permit a jury to infer that discrimination motivated her termination. Chaib focused on her co-worker's threatening, harassing and racist actions which included the posting of a racially offensive comment on her workplace computer which Chaib contends her employer did not adequately investigate.

The court ultimately found that these disturbing incidents, assuming they, actually happened, were unrelated to the events and the investigation that led GEO Group's decision to terminate her. Plaintiff failed to produce any evidence that the co-worker responsible for the alleged remarks and conduct participated in the employer's decision. Without some connection between the offensive conduct and the termination decision, no reasonable jury could make the requisite inference that she was fired for discriminatory reasons.

Finally, the plaintiff failed to prove that her employer's stated reason for firing her (unbecoming conduct) was a pretext (phony excuse) for unlawful discrimination. In the end, the Seventh Circuit found that because Chaib has not presented sufficient evidence for a reasonable jury to find that GEO Group terminated Chaib for discriminatory reasons, GEO Group was entitled to judgment as a matter of law.

FMLA: Honest Belief of Abuse
Capps v. Mondelez Global LLC (Eastern District of Pennsylvania, 2016)

Employers already know that FMLA, ADA, Worker's Compensation and a handful of other laws can collide in a dangerous intersection of employment rights, requiring employers to carefully examine employee eligibility under each. The 3rd Circuit Court of Appeals will have to decide whether this analysis gets trickier.

In Capps v. Mondelez Global, LLC, the plaintiff suffered from a degenerative hip joint disease which led him to apply for intermittent FMLA leave when the condition would "flare-up". The employer granted the leave. In February 2014, the plaintiff called in sick, utilizing FMLA time for one of these flare-ups. Later, the employer received information anonymously that the

plaintiff was actually under arrest during that same time period for DUI. As a result, the company discharged plaintiff for FMLA abuse.

The plaintiff sued not only for violation of his rights under the FMLA, but also the ADA on the theory that if he was not eligible for FMLA leave on those or any other days, then he was entitled to a reasonable accommodation under the ADA (presumably a leave of absence). The district court ruled against the plaintiff on the basis that he never made a request for reasonable accommodation for his disability. An employer is liable for failing to make reasonable accommodations if: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

The court rejected the plaintiff's argument that the employer was effectively put on notice of his disability by virtue of his FMLA request and the information provided in support of that. The court found that the plaintiff's FMLA request was grounded on the fact that flare-ups of his condition would render him unable to work at all, which is contradictory to his argument that a reasonable accommodation might exist for his disability since he claimed that he was unable to report to work.

In light of the new focus on the fact that a reasonable accommodation might include a leave of absence, it will be interesting to see how the court of appeals rules on the issue of whether the FMLA request and certification also serves as notice of a request for reasonable accommodation under the ADA. In the meantime, employers should consider giving an expansive view towards employee provided medical information. Just because an employee doesn't say the magic words "I need an accommodation" might not necessarily mean that the employer isn't on notice. Being proactive in certain situations by reminding an employee that they can request a reasonable accommodation might reduce the risk of costly future litigation.

Defamation
Dobias v. Oak Park & River Forest High School District 200, Appellate Court of Illinois, First District, 2016)

The Illinois Appellate Court held that Danielle Dobias, a teacher and coach employed by Oak Park and River Forest High School District 200, successfully stated claims of defamation per se against her former head coach and fellow teacher, Thomas Tarrant, the school district athletic director, John Stelzer, and the school district for alleged statements Tarrant made in an internal email to Stelzer concerning Dobias.

The court noted that there are five categories of statements that are considered to be defamatory per se, including the following type of statements at issue in this case: "words that impute a person is unable to perform or lacks integrity in performing her or his employment duties." If a plaintiff claims that a statement constitutes defamation per se, the plaintiff is not required to plead or prove that his or her reputation was actually damaged, because the statement is considered so obviously and materially harmful that injury to the plaintiff's reputation may be presumed.

Dobias claimed that the following statements in an email Tarrant allegedly sent to Stelzer, and which Stelzer allegedly forwarded to two interim human resources directors, constituted defamation per se because they imputed that she lacked integrity as a school professional and otherwise prejudiced her in her profession: (1) Dobias celebrated an athlete's accomplishment by drinking alcohol. (2) Dobias was rolling around on a bed in a hotel alone with an athlete as witnessed by another coach who walked in. (3) Dobias was called after 2 am by athletes who were drunk and high. Went to where the athletes were. Hung out with them then took them home without notifying parents or the athletic office.

The defendants filed a motion to dismiss on the basis that each of the above statements was capable of reasonable, innocent constructions (which is a defense to defamation per se). The trial court granted the defendants' motion to dismiss and Dobias appealed.

On appeal, the appellate court held that the statement accusing Dobias of drinking alcohol in the presence of a student did not amount to defamation per se because an accusation that a teacher merely drank alcohol in the presence of students would not impugn a teacher's or coach's professional integrity or otherwise prejudice the teacher or coach in his or her profession.

However, the appellate court held that the statement accusing Dobias of "rolling around on a bed in a hotel alone with an athlete" could be defamatory per se because "[a] teacher rolling around on a bed with a student, when the two of them are alone in a hotel room, is inappropriate no matter how it could reasonably be viewed." The court also found that the statement that Dobias "hung out" with students who were "drunk and high" could be defamatory per se because "even if a teacher-coach did not herself use alcohol or drugs, it would reflect unfavorably on any teacher's reputation if she socialized with underage students while they were engaged in drug and alcohol abuse." Id. The appellate court returned the case back to the trial court for further proceedings.

The Appellate court footnotes that there was no discussion of whether a provision of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-210). The Act states that "[a] public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material". The court did not address whether this defense bars Plaintiff's actions because the Defendant did not raise it as a defense.

Barriers to Entering a Discrimination Claim
Wells v. Winnebago County, (Seventh Circuit, 2016)

The Seventh Circuit Court of Appeals upheld judgment in favor of Winnebago County in race and disability discrimination lawsuit filed by a County employee. The plaintiff, Barbara Wells worked as a "computer navigator" at the Winnebago County courthouse. Plaintiff's job was to help pro se litigants who came for assistance at the County's "Legal Self-Help Center."

Wells complained to her employer that many of the pro se litigants became abusive when she told them she was not a lawyer and could not act as their counselor. To deal with this situation, Wells requested that her employer create a barrier wall between her and the public similar to walls used in banks. The County declined her request and left her exposed to direct public contact. Wells alleged several other instance of discrimination including lack of access to the court's break room and a delayed raise.

Plaintiff alleged that county officials discriminated against her on the basis of race (Wells is black) and disability (Wells suffers from chronic fatigue syndrome). With respect to plaintiff's race discrimination claim, the Court ruled that Wells failed to produce any evidence that her race played any role in the employer's decisions. Rather, the Court found that Wells was treated the same as the other computer navigators, who were white. There was no evidence that Wells' supervisor said anything about race or used language with racial connotations. As a result, the County was entitled to summary judgment on plaintiff's race claim.

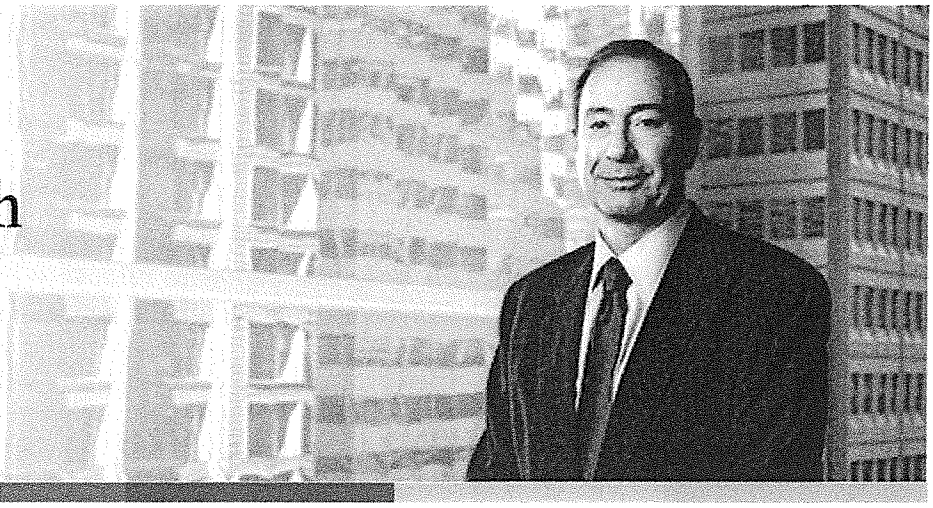
The Seventh Circuit also rejected the plaintiff's ADA claim based on her chronic fatigue syndrome disability where (1) plaintiff failed to produce evidence indicating that she requested any accommodation based on her disability; and (2) plaintiff failed to provide defendant with any medical evidence that would link her requested alterations of her work area to her chronic fatigue syndrome disability.

Drug Offense: Within 1000 Feet of School
People v. Toliver, (Appellate Court of Illinois, First District, 2016)

Marcus Toliver was found guilty of unlawful possession of a controlled substance, heroin, with intent to deliver, and unlawful possession with intent to deliver within 1000 feet of Lathrop Elementary School. Toliver appealed, arguing that the State had to prove that Lathrop Elementary School was used as school on the date of the offense. He argued that the offense took place on July 25, 2013 and the school had closed at the end of the 2011-2012 school year. The Court found that the statute does not require the school to be open at the time of the offense and that the possession with intent to deliver took place within 1000 feet of the real property comprising a school regardless of whether classes were currently in session at the time.

Robert K. Bush

Equity Partner



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Illinois parks and villages trust Rob to provide practical and creative legal solutions to their most difficult challenges.

Rob presently serves as Village Attorney for the Villages of Lisle and Harwood Heights and as Park District Counsel to the Park District of Highland Park, the Park District of LaGrange, the McHenry County Conservation District, the Cary Park District, and the Hoffman Estates Park District, among many others. Rob works closely with the many self-insured pools represented by Ancel Glink and is the corporate counsel for various self-insurance risk pools throughout Illinois. Rob has authored the "Illinois Park District Law Handbook," published by the Illinois Association of Park Districts, now in its 7th edition and heads the firm's park district practice.

Rob serves as the firm's supervisor of its park district and workers' compensation practice. He regularly presents before state and national organizations on general municipal and park district corporate and litigation matters, workers' compensation, ADA, and FMLA issues.

Experience

For over 33 years, Rob has represented Illinois municipalities, park districts and other local governments in all facets of corporate and litigation matters. He has addressed areas of controversy and concern for his clients with effective advice and deliberation. This includes work at board meetings, internal discussions, and public presentations in the court room.

Particular highlights of his recent practice include:

- Represented the Village of Harwood Heights in a redevelopment project involving a new Mariano's Fresh Market.
- Represented various public entities in public/private partnerships involving the Chicago Wolves and Benedictine University.
- Represented various park districts in the acquisition, protection and development of extensive open space.
- Created and expanded various intergovernmental pools, the most recent being a pool for Illinois Libraries, "LIRA".

Presentations

Rob is a frequent speaker at local and national conferences on local government and workers' compensation issues, including the following most recent presentations:

- Park Board Wars, IAPD/IPRA Annual Conference
- How to Avoid "High Noon" with Proper Board Practices and Procedures
- Understanding PEDA/PSEBA and the Impact on Workers' Compensation
- It's Not Privatization: Implementing Partnerships in Illinois
- Ethics in this Era of Transparency
- Is Your Agency Protected? Liability Cases that Provide the Guideposts
- Freedom of Information Act/Open Meetings Act

Publications

Rob has been published on a variety of local government and related matters, including the following:

- "Lifeguard on Duty? Safety Basics for Public Swimming Pools," Illinois Parks Association Risk Services (Jun. 2015)
- "Municipal Law," IICLE Municipal Law Series Handbook (2011)
- "Illinois Park District Law Handbook," Illinois Association of Park Districts
- Article on "Civility," Illinois Municipal League Review
- Article on compensation issues for firefighters in Illinois, Illinois Bar Journal

Awards

- "Lawyer in the Classroom" awarded by the Constitutional Rights Foundation
- "Lifetime Appreciation" awarded by the Illinois Park District Association on behalf of Ancel Glink and Rob
- Designated as Illinois "Super Lawyer" in area of Local Government
- Designated, by his peers, as a Leading Lawyer in the areas of Governmental, Municipal and Administrative Law as well as Land Use, Zoning and Condemnation Law.

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Legal/Legislative Part II

IAPD/IPRA Soaring to New Heights Conference 2017

January 20, 2017

Tressler LLP

Legal/Legislative Part II

Presented by:
Andrew S. Paine

2017 IAPD/IPRA Soaring to New Heights Conference

January 20, 2017

Presentation Outline

» 2016 Binding PAC Opinions

» Recent Cases of Interest
  › FOIA
  › OMA

Binding PAC Opinions - 2016

15 binding opinions issued (11 FOIA; 4 OMA)

» Reoccurring Topics
  › Failure to respond or otherwise comply
  › Improper closed session discussion
    - Employee compensation / bonuses
    - Pay raises
  › Final action on item not listed on agenda
  › Failure to follow closed session procedure
    - Pending, probable or imminent litigation

» New Topics
  › Invasion of personal privacy
  › Failure to conduct adequate search
  › Denial of unduly burdensome request
  › Recording meetings

2016 PAC Opinions – Failure to Respond

- Public Access Opinion 16-001
  - Chicago Police Department
- Public Access Opinion 16-003
  - Harvey School District 152
- Public Access Opinion 16-004
  - Chicago Police Department
- Public Access Opinion 16-005
  - Village of Dixmoor
- Public Access Opinion 16-010
  - Chicago Public Schools
- Public Access Opinion 16-011
  - Housing Authority of Cook County

2016 PAC Opinions – Failure to Respond

Common themes

- No response
- Initial response, no follow up
  - Auto response
- Unreasonable delay/gamesmanship
  - Clarification vs. amendment

2016 PAC Opinions – Failure to Respond

Takeaways

- Follow the statutory process
- Create tracking system, other internal controls.
- Communicate with the requester
  - Attempt to narrow the scope/clarify
  - Confirm extensions and other agreements in writing
  - Provide updates
  - Consider providing documents on a rolling basis
- Don't play games
- Good faith effort to comply
- Consider PAC response times

2016 PAC Opinions – Failure to Respond

Why else should we care?

» FOIA allows courts to impose civil penalties against a public body ranging from $2,500-$5,000 per occurrence for willful and intentional failure to comply.

» P.A. 99-586, effective 1-01-17, amended FOIA to allow requesters to file court actions to enforce binding opinions.

› If the prerequisites to filing suit are met, there is a rebuttable presumption that the public body acted willfully and intentionally in failing to respond.

› Allows additional penalties of up to $1,000 per day for each day the violation continues.

2016 PAC Opinions – Personal Privacy

Public Access Opinion 16-002

» Father (and executor of his daughter's estate) submitted a FOIA request to the Illinois State Police seeking records pertaining to the death of his daughter.

» Request sought a variety of records including "crime scene photographs, autopsy photographs, images and trajectory diagrams."

» ISP provided certain documents but withheld autopsy and crime scene photographs in their entirety pursuant to 7(1)(c)

› Clearly unwarranted invasion of personal privacy

» Father objected to the denial, claiming he was the only person legally entitled to this information.

» ISP responded by citing prior PAC opinions indicating that graphic crime scene and autopsy photographs may be exempt under 7(1)(c).

2016 PAC Opinions – Personal Privacy

Public Access Opinion 16-002

» PAC determined that the ISP improperly withheld the photos in question

› An individual's personal privacy interest ceases to exist upon death

› Deceased victim has no privacy interest in the photographs

› However, surviving family members do possess a separate personal privacy interest of certain images of close relatives

› Daughter was not married and Father was also executor of her estate

» Takeaway

› Pay attention to the identity of the requester as this may impact the application of certain exemptions

2016 PAC Opinions – Exhaustive Search

Public Access Opinion 16-006

- FOIA request from CNN for emails related to Laquan McDonald shooting.
- Sought emails from 12 named CPD officers' email accounts and personal email accounts where public business was discussed.
- CPD responded with a series of emails with attachments totaling over 500 pages.
  - No exemptions were cited and no explanation of records was provided.
  - The documents provided were unresponsive and no emails were produced.
- CPD claimed a search of email accounts revealed only 47 emails consisting of certain "News Clips" and certain other generic, office wide emails.

2016 PAC Opinions – Exhaustive Search

- CNN objected to the adequacy of CPD's search.
  - Only city-issued email accounts were searched, not other devices or platforms, including personal email.
  - Unclear as to what search terms and/or parameters CPD used.
- CPD responded that that it searched using the phrase "Laquan McDonald" and that it did not search private emails because emails on those accounts are not "public records."
- CNN argued that CPD's contention that any emails sent or received by CPD officers are not public records unless they reside on CPD servers flies in the face of FOIA and creates dangerous incentive to use personal email accounts to discuss controversial or sensitive public business

2016 PAC Opinions – Exhaustive Search

PAC determined CPD violated FOIA based on the following:

- Emails pertaining to the transaction of public business on personal email accounts of public employees are public records.
- Search was not reasonable because it did not include personal email accounts of officers.
- Search was not reasonable because it was limited to a single, proper name.

2016 PAC Opinions – Exhaustive Search

CPD was directed to:

» Ask officers to search personal email and provide copies of any responsive documents

» Expand scope of search to include additional search terms, including:
  › Alternate spellings
  › Names of other officers involved
  › Incident number
  › Location
  › Physical description of Laquan McDonald

2016 PAC Opinions – Pending, Probable or Imminent Litigation

Public Access Opinion 16-007

» Village of Lisle violated OMA by:

  › Closing a portion of the meeting to discuss "pending/imminent" litigation without recording or entering into the closed session minutes its basis for finding that litigation was probable or imminent.

  › Discussing mere possibility that opponents of bond sale might seek an injunction or initiate other legal action without reasonable grounds to believe a lawsuit was more likely than not to be instituted or that such occurrence was close at hand.

2016 PAC Opinions – Pending, Probable or Imminent Litigation

Guidance on using 2(c)(11) exception:

» If the litigation has been filed and is pending, the public, body need only announce that in the proposed closed meeting, it will discuss litigation that has been filed and is pending.

» If the litigation has not yet been filed, the public body must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for that finding.

» The legislature intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public.

» The fact that the public body may become a party to judicial proceedings because of the action it takes. does not permit it to utilize the litigation exception to conduct its deliberations in closed sessions.

» The only matters which may lawfully be discussed at the closed meeting are the strategies, posture, theories, and consequences of the litigation itself.

2016 PAC Opinions – Unduly Burdensome

Public Access Opinion 16-008

- Requester submitted a FOIA to the City of Collinsville seeking emails between the City Manager and an outside planning firm.
- FOIA officer responded by stating that the request involved 50 emails consisting of over 100 plus pages plus numerous attachments and was therefore unduly burdensome.
- Requester was then asked to narrow her request.
- When asked by the PAC, the City defended its decision by stating:
  - It did not intend to deny the request only to have it narrowed; and
  - It would involve several hours of time for two city employees to complete.

2016 PAC Opinions – Unduly Burdensome

- The City violated FOIA by failing to demonstrate by clear and convincing evidence that the burden of complying with the request outweighs the public interest in the documents being sought.
  - There is significant public interest in communications between City's chief administrative officer and a private firm assisting the City with significant development projects.
- Compliance with the Act is a primary duty of public bodies.
- Under Section 3(g), assertion of the unduly burdensome exemption and request to narrow request is considered a denial.

2016 PAC Opinions – Unduly Burdensome

National Ass'n of Criminal Defense Lawyers v. Chicago Police Department, 399 Ill.App.3d 1 (1st Dist. 2010)

- In order for the exemption to apply, compliance must be unduly burdensome, there must be no way to narrow the request, and the burden on the public body must outweigh the public interest in the information.
- Request sought the production of records concerning eyewitness identification procedures.
- Counsel for CPD estimated that redacting the responsive records would take 150 hours, equating to 20 personnel days
- The Court determined there was significant public interest in the records.
- The request was specifically targeted and the information requested was essential to a meaningful review of the study of eyewitness identification procedures.
- A request that is overly broad and requires the public body to locate, review, redact, and arrange for inspection of a vast quantity of material that is largely unnecessary to requester's purpose constitutes an undue burden.
- Identifying and redacting responsive documents in this case is significant, but it does not outweigh the vital public interest in the disclosure of the records in question.

2016 PAC Opinions – Unduly Burdensome

Shehadeh v. Madigan, 2013 IL App (4th)120742

- Request sought any and all records that could be used for guidance on complying with FOIA.
- The AG's office responded that compliance would be unduly burdensome because an initial search revealed 9,200 potentially responsive records that would need to be reviewed and redacted manually.
- The Court found the request to be patently broad on its face, as it sought any publication or record that would or could be used by any public body to comply with FOIA.
- The Court also found the requester failed to identify a public interest that would outweigh the burden of compliance.

2016 PAC Opinions – Disclosure of Information in a Criminal Complaint

Public Access Opinion 16-009

- Consolidated review of 5 related FOIA requests for disclosure of certain information contained in a criminal complaint filed by a public official.
- Requests sought a variety of information including:
  - Copies of police reports filed by state Representative Ronald Sandack.
  - Copies of any reports filed alleging cyber-security threats or fraudulent impersonation using social media.
- The Village provided heavily redacted documents relying on a number of exemptions.
- The Village also issued a supplemental response after a dispute arose providing some additional information that had originally been withheld.

2016 PAC Opinions – Disclosure of Information in a Criminal Complaint

- Village's supplemental response resolved allegations that certain records were improperly withheld.
  - Once an agency produces all records related to a plaintiff's request, the merits of the plaintiff's claim for relief, in the form of production of information, becomes moot. Duncan Publishing, Inc. v. City of Chicago, 304 Ill.App.3d 778 (1st Dist. 1999).

2016 PAC Opinions – Disclosure of Information in a Criminal Complaint

» Section 7(1)(b) – Private information is exempt from disclosure, unless disclosure is required by another provision of this Act, a State or federal law, or a court order.

» Section 2(c-5) defines Private Information as:

› **Unique identifiers**, including a person's social security number, driver's license number, employee identification number, biometric identifiers, **personal financial information**, passwords or other access codes, medical records, home or **personal telephone numbers**, and personal email addresses. Private information also includes **home address** and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

2016 PAC Opinions – Disclosure of Information in a Criminal Complaint

» Village redacted home address, personal telephone number, Facebook account names, numbers and URLs, Skype usernames, and account transaction numbers.

» PAC determined that home address, personal telephone numbers, account identification numbers, the URLs for specific Facebook pages (specific website addresses), and tracking numbers for wire transfers are unique identifiers and are exempt from disclosure.

» But Facebook and Skype account names are akin to or derived from individual's legal name and are not exempt from disclosure.
› A person's name is conspicuously absent form definition of "private information."

» Lastly, PAC determined that a person's birth date is properly withheld pursuant to 7(1)(c) as a clearly unwarranted invasion of personal privacy.
› Note, however, that an individual's age is not exempt.

2016 PAC Opinions – Public Employees' Compensation

Public Access Opinion 16-012

» Request sought the dollar amount of the increase and the names and titles of the staff members receiving bonuses as a result of the re-allocated funds.
› Housing Authority's Board had previously voted to re-allocate an increase in CEO's base pay to staff bonuses.

» The Housing Authority denied the request in its entirety pursuant to Sections 7(1)(b), 7(1)(c), and the Personnel Record Review Act.

2016 PAC Opinions – Public Employees' Compensation

» Housing Authority was asked to defend its decision, particularly in light of Section 2.5 which provides that all records relating to the obligation, receipt, and use of public funds are public records available for inspection and copying.

› The information being requested is confidential. [The Authority] has concern about providing the confidential information requested for a number of reasons. [The Authority] desires to be respectful of the privacy and private financial information of its employees and be in compliance with applicable laws in this regard, including the FOIA and the Illinois Personnel Records Review Act. [The Authority] was reasonably concerned that if it were to provide the requested information that it would disclose private personal financial information which has ramifications for the [Authority] employees involved. Further, although Mr. Carroll's request states the requests are for "noncommercial purposes," in the past, [the Authority] is aware that information about private compensation has been used to contact and harass current [Authority] employees about specific details about bonuses and compensation. This type of use of information is not in the public interest, nor is it contemplated by the FOIA.

2016 PAC Opinions – Public Employees' Compensation

The PAC Determined:

» The amount of compensation earned by an individual, standing alone, unlike a bank account number, does not constitute a "unique identifier" that could be considered "private information" under [section 2(c-5)]. Further, the compensation information relates to the [public body's] use of public funds and therefore is expressly subject to disclosure pursuant to section 2.5 of FOIA.

» There is a significant, legitimate public interest in disclosure of the compensation paid to public employees.

» Personnel Records review Act does not prohibit the disclosure of compensation information.
› It prohibits the disclosure of performance evaluations.

» FOIA does not condition disclosure of public records based on the purpose of the request.

› Public body cannot inquire regarding purpose of the request, other than to determine whether it is a commercial request or to grant a fee waiver.

› Requester denied that request was for a commercial purpose and there is no evidence in the record to support anything to the contrary.

2016 PAC Opinions – Discussion of Salary Increases in Closed Session

Public Access Opinion 16-013

» City Council entered closed session to discuss a pay raise for City employees, and then took final action to approve a 2% across-the-board raise after returning to open session.

» City argued that the closed session was proper under Section 2(c)(1) to discuss a cost-of-living pay increase for non-union City employees.

» Although not cited at the time of the meeting, the City also argued that Section 2(c)(2) would permit the discussion to occur in a closed session.

2016 PAC Opinions – Discussion of Salary Increases in Closed Session

The PAC determined:

» Reference in Section 2(c)(1) to "specific employees" signifies that General Assembly did not intend to permit public bodies to hold general discussions concring categories of employees in closed session pursuant to Section 2(c)(1).

» Failure to cite to Section 2(c)(2) at the time it was closing the meeting as required by law prevents consideration of that exemption.

› Section 2(c)(2) allows discussion of "collective negotiating matters between the public body and its employees or their representatives, or **deliberations concerning salary schedules for one or more classes of employees**."

2015 PAC Opinions – Financial Discussion

Public Access Opinion 15-003

» Board violated OMA by primarily discussing the financial condition of the college and various related issues.

» Discussion briefly touched on general matters related to employees in general, such as staffing levels and the importance of having a financial context for upcoming negotiations with employees.

» While Fiscal matters discussed by the Board may have future implications relative to the employment and compensation of employees of the College, Section 2(c)(1) does not authorize a public body to close a meeting to discuss budgetary issues.

2015 PAC Opinions – Budget Discussion

Public Access Opinion 12-011

» Village of Swansea violated OMA by discussing budget matters during closed sessions in both personnel and finance committee meetings.

» To the extent that that a public body is required to discuss the relative merits of individual employees as a result of its fiscal decisions, such discussions are properly held in closed session under 2(c)(1).

» But the underlying budgetary discussions leading to those decisions may not be closed to the public.

2016 PAC Opinions – Recording Meetings

Public Access Opinion 16-014

- Citizen requested permission to record public meeting approximately ten minutes before start of meeting and was denied because he failed to provide sufficient advance notice of his intentions as required by Board policy.
- Board policy required at least 24 hours advance notice.
- The Board also later defended its decision by arguing that children and students were present in the vicinity of the meeting and their images likely would have been captured by the recording.

2016 PAC Opinions – Recording Meetings

- Section 2.05 of the OMA provides that "any person may record the proceedings at meetings required to be open by this Act by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings."
- The AG has also previously advised that "there is no provision in the OMA which grants a public body the authority to prevent recording (other than to preserve decorum and prevent interference with the proceedings)." 1980 Ill. Att'y Gen Op. 102, 103.
- A reasonable rule authorized by Section 2.05 is one that is "designed to prevent disruptions or avoid safety hazards and that does not unduly interfere with the right to record." Ill. Att'y Gen Pub. Acc. Op. No. 12-010.
- "[A]s a practical matter, any rule requiring advance notice of recording a meeting would be difficult or impossible to enforce, given that many members of the public routinely carry cellular phones or other electronic devices capable of recording. More importantly, because OMA specifically provides that meetings may be recorded, any public body that prescribes a rule requiring advance notice of recording a meeting would have a steep burden to overcome in order to demonstrate that such a rule is reasonable. Ill. Att'y Gen Pub. Acc. Op. No. 12-010.

2016 PAC Opinions – Recording Meetings

PAC determined the Board policy language was unclear:

- **"Any person may record or broadcast an open Board meeting. Individuals wishing to record meetings must notify the Board President or Superintendent in advance.** Special requests to facilitate recording or broadcasting an open Board meeting, such as seating, writing surfaces, lighting, and access to electrical power, should be directed to the Superintendent at least 24 hours before the meeting."

  "Recording meetings shall not distract or disturb Board members, other meeting participants, or members of the public. The Board President or other presiding officer may designate a location for recording equipment, may restrict the movements of individuals who are using recording equipment, or may take such other steps as are deemed necessary to preserve decorum and facilitate the meeting."

2016 PAC Opinions – Recording Meetings

PAC also determined that the concerns related to the presence of children was misplaced.

» Given public's right to record meetings, Board should select a more suitable location where presence of children and students will not impact public's right to record meetings.

» Alternatively, Board could consider alternative remedies such as restricting children's and student's access to areas in and around meeting space during public meetings to eliminate privacy concerns.

› PAC also noted that Board did not discuss how this issue would have been avoided had the requester provided 24 advance notice.

2016 PAC Opinions – Final Action on Matter Not on Agenda

Public Access Opinion 16-015

» Board voted on a motion to amend the terms of a settlement agreement concerning a lawsuit filed against the Village.

» Citizen filed a request for review alleging that this item did not appear on the agenda.

» Village Clerk respond confirming that the agenda did not include any reference to the settlement agreement.

» Video and minutes reveal a discussion concerning the validity of the action.

› Legal counsel advised against taking action.

› A trustee argued that it was legitimate because the agenda included a reference to "old business."

2016 PAC Opinions – Final Action on Matter Not on Agenda

Section 2.02(c) of the OMA states:

» "Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting."

» General reference to "old business" does not provide adequate notice of the "general subject matter" of an item subject to final action.

» Board was directed to reconsider the action at a properly noticed public meeting.

2016 Court Opinions

» *Korner v. Lisa Madigan in her official capacity as Attorney General of Illinois, et al.*, 2016 IL App (1st) 153366

› Complaint alleging violation of FOIA should have been dismissed for failure to name a public body.

› Complaint named Lisa Madigan, Manual Flores (Acting Secretary of Illinois Department of Financial and Professional Regulation), Jay Stewart (Division Director of the Illinois department of Professional Regulation), and Sarah Pratt (Public Access Counselor).

› Trial court denied motion to dismiss and granted summary judgment on other grounds.

› Appellate Court determined that motion to dismiss should have been granted.

2016 Court Opinions

» *Bauman v. Department of Central Management Services*, 2016 IL App (4th) 150569-U

› Attorney fee provision for prevailing plaintiff is mandatory.

› However, purpose of fee award is to ensure enforcement of FOIA and is not intended as a reward for successful plaintiffs or to punishment the government.

› Despite the mandatory nature of the language, attorney fees are not available to certain plaintiffs
- Pro se attorneys
- Pro se non-attorneys
- Not-for-profit legal services organizations

2016 Court Opinions

» *Better Government Association v. Illinois High School Association*, 2016 IL App (1st) 151356

› BGA filed suit following IHSA's denial of a FOIA request based on IHSA's position that it was not a "subsidiary body" under FOIA.

› Subsidiary body is not defined in FOIA, but court opinions have developed a three part test:
- (1) whether the entity has a legal existence independent of government resolution;
- (2) the nature of the functions performed by the entity; and
- (3) the degree of government control exerted.

2016 Court Opinions

» Better Government Association (cont'd)

› Court determined that IHSA was not a subsidiary body.

- IHSA had a legal existence separate from its members schools.
- It maintained its own employees.
- Any school could decide to forego participation in IHSA to avoid its rules.
- Each member school ran and supervised its own team for those sports falling within association's parameters.
- It was controlled by its board members rather than its member schools, day-to-day functioning of association was provided by executive director and administrative staff.
- It did not receive governmental funding.

2016 Court Opinions

» Better Government Association (cont'd)

› The mere fact that a private company may be connected with a governmental function does not create a public body, for purposes of FOIA, where none existed before.

› The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State, for purposes of FOIA.

2016 Court Opinions

» *Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838

› Newspaper requested copies of certain reports prepared by a police sergeant.

› City produced one report but refused to provide a copy of a second report, arguing that it was an employee grievance exempt from disclosure pursuant to Section 7(1)(n).

› Following a request for review the PAC determined that the grievance report was improperly withheld and issued a binding opinion requiring the release of same.

› The City failed to comply and the newspaper filed suit.

2016 Court Opinions

» Peoria Journal Star (cont'd)

› Section 7(1)(n) provides an exemption for "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases."

› FOIA does not define "adjudication;" however, it is "generally understood to involve a formalized legal process that results in a final and enforceable decision."

› Additionally, the phrase "relating to" must be read narrowly and in light of FOIA's purpose to generally provide open access to public records.

2016 Court Opinions

» Peoria Journal Star (cont'd)

› A complaint or grievance is part of an investigatory process that is separate and distinct from a disciplinary adjudication.

› A complaint or grievance initiates an investigative process; any disciplinary adjudication that may take place as a result of the investigation comes later.

› Even if a substantiated complaint or grievance results in disciplinary proceedings being instituted, the complaint or grievance does not fall within the section 7(1)(n) exemption because the disciplinary proceedings "are a different matter entirely."

› In this case the report constituted a grievance that was investigated, substantiated and ultimately resulted in disciplinary proceedings. However, the report was created well before any adjudication took place and existed independent of any adjudication. That the report later led to disciplinary action against two officers is insufficient to make it exempt under FOIA.

2016 Court Opinions

» *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884

› Fraternal order of police filed suit seeking to enjoin the release of information relating to compliant registry (CR) files.

▪ CR are files generated by police oversight agencies' investigations of citizens complaints of alleged police misconduct.

› Trial court entered a preliminary injunction prohibiting the release of the records and the City appealed.

2016 Court Opinions

» *Fraternal Order of Police, Chicago Lodge No. 7 (cont'd)*

› On appeal the Appellate Court vacated the injunction.

› The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. 5 ILCS 140/7(1)(c).

› The files were not exempt under the Personnel record Review Act.
- The files are not personnel files because they relate to the "initiation, investigation, and resolution of complaints of misconduct made by the public against police officers."

› Files were not disciplinary records under the Personnel Records review Act.
- The files are investigatory in nature and not at all disciplinary.
- "While information obtained during the investigation may be potentially introduced during adjudication of a disciplinary case, a CR does not initiate that adjudication, nor can CRs themselves be considered disciplinary."

2016 Court Opinions

» *Allen v. Clark County Park District Board of Commissioners*, 2016 IL App (4th) 150963

› Park Board approved two items on the agenda at a regularly scheduled meeting:
- Approval of a lease; and
- Approval of revised covenants.

› No discussion took place on the two agenda items and the documents were not available to the public prior to the meeting.
- After the votes, a commissioner told the public: "[O]ne comment, folks, as soon as this gets recorded at the courthouse, then these'll be viewing [*sic*] for public record, now that they have been approved. Hopefully get recorded tomorrow."
- Furthermore, when the board was asked what they had just voted on, the chair responded that "[T]hey gotta [*sic*] get recorded at the courthouse first. I'm sorry." Another board member advised that "it's just a formality."

2016 Court Opinions

» *Allen (cont'd)*

› Section 2(e) of the OMA that states:
- No final action may be taken at a closed meeting. Final Action shall 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.

› The appellate court pointed out that there is little guidance to help interpret this provision. Indeed, it acknowledged that "we are unsure precisely what standard of specificity is required of a public recital." However, the board's complete failure to give *any* information at all about the agenda item before the vote was fatal. As the appellate court noted:
- In Springfield, we held that the public-recital requirement "does not *** require that the public body provide a detailed explanation about the significance or impact of the proposed final action." Springfield, 2015 IL App (4th) 140941, ~ 42, 44 N.E.3d 1245. We stand by that holding. However, Springfield does not stand for the proposition that the public body may provide no details at all. The overarching concern is whether the recital sufficiently informed the public of the nature of the matter being considered. Here, the board's recital failed to so inform.

2016 Court Opinions

- *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836
  - Requester sought 13 different types of information aimed at "raw inputs" for fields on WCC's student registration forms, as well as zip codes of students in specified classes and total numbers of students in specified classes. Examples include:
    - "The zip codes of all people taking the National Safety Council's Defensive Driving Courses (DDSA-4) in 2011."
    - "The raw input for the "U.S. Citizen" field on the student registration form for all students registered in the fall of 2011 at the Aurora campus."
  - WCC responded to each request in an identical manner indicating that it did not have documents responsive to the requests.
    - "The college does not aggregate this information as there is no purpose for the college to do so. Therefore, there is no responsive document to your request."
  - The Appellate Court was faced with two issued: (1) whether the data on WCC's databases constitutes public records and (2) whether the FOIA request required WCC to create new records.

2016 Court Opinions

- *Hites (cont'd)*
- Data and Data Points
  - After examining federal FOIA court cases for guidance, Appellate Court determined that the data in the WCC's databases are "public records" under FOIA so long as the data pertains "to the transaction of public business" and were "prepared by or for, or having been or being used by, received by, in the possession of, or under the control of the public body."
  - The distinction between compiled records, such as student registration forms, and the data from those records entered into a database is a distinction of form, not substance.
  - The distinction between a database and its individual data points for purposes of what constitutes a public record is a red herring. A database is an aggregation of data, not a discrete document. Data may continuously be input into the database, deleted from it, reorganized, reproduced, and manipulated. The common characteristics if the public records are that they are information or documentation pertaining to a public body's operation that the public body prepared, used, or had under its control.

2016 Court Opinions

- *Hites (cont'd)*
- Creation of Records
  - Generally a request to search and produce data stored in a database is not a request to generate a new record.
  - An electronic search that a public body can perform meets the definition of "copying" under FOIA.
  - However, a request for a listing of particular records differs from a request for specific points of data. The points of data existed before the FOIA request, the compilation of records did not.
  - Difference between a search of existing data points vs. creation of new document or record by asking for specific information about those records.
  - Note, however, that Illinois Supreme Court has determined that a public body may be required to create a computer program (code) to retrieve electronic information. See *Hamer v. Lentz*, 132 Ill.2d 49, 56.
  - Furthermore, the application of such code or programming to retrieve stored information, or to sort a database by particular fields, does not create a new record. See *National Security Counselors v. Central Intelligence Agency*, 898 F.Supp2d 233, 270.

Questions?

Thank you.

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CHANGING YOUR AGENCY'S CULTURE TO REDUCE TORT LIABILITY EXPOSURE

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IAPD/IPRA State Conference
Chicago, Illinois
January 21, 2017

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Changing your Agency's Culture to Reduce Tort Liability Exposure

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AGENDA

- Tort Liability Principles
  - "Tort" Defined
  - Elements and Examples of claims
    - Personal injury
    - Employment Claims
    - Premises Claims
  - Tort Immunity Act
    - Discretionary Policy Decisions
    - Hazardous Recreational Activity
- Indemnification and Insurance Issues
- Tips and Strategies to Reduce Tort Liability

What is a "Tort"?

- From the Latin, "to Twist."
- Private or civil wrong or injury other than a breach of contract.
- Court provides remedy in the form of an action for damages.
- Elements of most torts:
  - Existence of a legal duty from defendant to plaintiff;
  - Breach of that legal duty;
  - Injury to the plaintiff;
  - Proximate cause; and
  - Damages.

What is a "Tort"?

- Whether a legal duty exists is a question of law to be determined by the Court not jury. If no duty, no liability.
- Reasonable person standard. Other sources of duty.
- If duty exists, was it breached?
  - Jury (or Judge as "trier of fact") must decide whether duty was breached. *Ferentchak v. Frankfort*, 105 Ill.2d 474 (Ill. 1985).
- Jury (or Judge as "trier of fact") must also decide if a breach of duty caused the injury.
- Court decides whether "proximate cause" exists.
- Sovereign Immunity-no more.
- But... the park district may be able to avoid liability by application of the Tort Immunity Act for many tort claims.
- Other immunities may apply.

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What is a "Tort"?

- Examples:
  - Personal Injury (injury to the body, reputation or feelings):
    - Personal injuries- from operation of a ski lift; slip and fall-injuries in parking lots, recreation center entryway, etc.
    - Wrongful death-trench collapse.
    - Assault/battery and intentional torts-employee strikes a patron; manager sexually assaults an employee.
    - Invasion of privacy/emotional distress-spying on employees in restroom; extreme and outrageous conduct.
    - Defamation/libel and slander-employee falsely states in a memo to one patron that another patron has AIDS.
    - Dog bites/animal attacks-dog attacks human at dog park; snake bites patron at natural history zoo.

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What is a "Tort"?

- Certain Employment Claims:
  - Intentional infliction of emotional distress, defamation, intentional interference with employment contracts, invasion of privacy, assault and battery in the workplace, negligent hiring, training and retention.
- Property Torts (damage to real or personal property):
  - Damage to vehicles-employee totals Tesla with large tractor.
  - Breaking of valuables-employee borrows precious vase for theatrical production and it is destroyed.
  - Damage to a home or residence-employee mistakenly drives park district garbage truck into living room of residence adjoining the park.

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What is a "Tort"?

» Property Torts (damage to real or personal property):
  › Fire- Fireworks show burns down neighbor's garage.
  › Flood-employee fails to inspect earthen dam on schedule causing destruction of downstream home.
  › Environmental contamination-Leaking underground storage tank contaminates groundwater and soil on property adjoining the park.

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What is a "Tort"?

» How are these cases decided?
  › Tort liability analysis.
  › Common law-cases decided in the past.
  › Statutory violations and other evidence of wrongful or unreasonable conduct.
  › Analysis of available tort immunities.
» Tort liability analysis:
  › Duty.
  › Breach of duty.
  › Injury.
  › Proximate cause.
  › Damages.

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Is There a Duty of Care?

» *Barnett v. Zion Park District*, 171 Ill.2d 378 (Ill. 1996):
  › Youth swimmer slipped on a diving board, hit his head, fell into the water.
  › Lifeguards were notified but dismissed the notice and failed to respond, saying that they did not see anyone fall.
  › The child died.

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Is There a Duty of Care?

- The court held that:
  - Local government units can be liable in tort;
  - District owed a duty of reasonable care; and
  - District owed a duty to take reasonable precautions for the swimmer's care.

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Is There a Duty of Care?

- Each case decided on its own facts.
- Rigorously apply common sense; get your staff to open its eyes and ears.
- Get training for your staff-stay current on training.
- Risk management programs-must be a top priority.
- Work with your insurer/self-insurance risk pool.
- Periodic reporting on areas where risk of tort exposure may occur:
  - Gym.
  - Pool.
  - Golf course.
  - Classroom.
  - Recreation center.
  - Anywhere.

Robbins Schwartz

Is There a Duty of Care?

- Each case decided on its own facts:
  - No duty to prevent attack (in the absence of special circumstances).
  - No duty to protect park patron outside of park or program.
  - No duty to arrest.
  - No duty to widen, pave, smooth, sign, or mow.
  - No duty to construct sidewalk where no sidewalk previously existed.
  - No duty to close restaurant serving tainted food.

Robbins Schwartz

Was the Duty of Care Breached?

- Did the employee or the agency act unreasonably?
- Unreasonable conduct easier to prove than "willful and wanton" conduct.
- Tort Immunity Act does not require plaintiffs to prove "willful and wanton" conduct by the Park District or its employee(s) in all cases.
- Willful and wanton conduct is defined as:
  - A course of action that shows an actual or deliberate intention to cause harm or that if not intentional shows an utter indifference to, or conscious disregard of, the safety of others on their property.
  - Beyond mere negligence or inadvertence.
  - Requires conscious choke of a course of action, either with knowledge of a serious danger to others, or with knowledge of facts that would disclose a danger to a reasonable person.

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Injury and Damages

- Injury examples: Physical, mental, emotional, reputation, financial, and property harms.
- Damages: Amount of money awarded to the injured party who suffered harm due to the negligent, reckless or intentional action of the defendant.
  - General damages: flow naturally from the defendant's wrongful action regardless of whether foreseeable (e.g., pain and suffering, physical disfigurement, physical impairment, mental anguish, loss of companionship, lowered quality of life).
  - Clear link between defendant's conduct and the plaintiff's injury.
  - Special damages: financially compensate plaintiff for losses suffered due to defendant's actions. Quantifiable financial losses (e.g., lost wages and earning capacity, past and future medical bills, repair/replacement of damaged property.

Robbins Schwartz

Proximate Cause

- Part jury, part judge decision.
- Claimed injury must be must be the natural and probable result of the negligent act or omission.
- Typically, the injury must be a foreseeable result of the negligence, but this is not always required.
- Two elements of proximate cause in Illinois:
  - Actual cause- "but for" test.
  - Legal cause- may the defendant be held legally responsible? Was defendant's conduct the legal cause of the injury? Were there intervening causes that broke the chain of direct causation?
  - Legal cause tied to foreseeability concept.
  - Joint Tortfeasor Contribution Act, 740 ILCS 100/2.

Robbins Schwartz

No Sovereign Immunity

» No sovereign immunity since *Molitor v. Kaneland Community Unit District No. 302*, decided in 1959, confirmed by Illinois Constitution in 1970.

» *Harinek v. City of Chicago*, 283 Ill. App. 3d 491 (1st Dist. 1996): Court rejected city's claim that because it was a governmental body exercising its governmental power for a governmental purpose, it could not be liable in negligence.

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Tort Immunity Act (TIA) Basics

» **Local Governmental and Governmental Employees Tort Immunity Act** 745 ILCS 10/1-101 *et seq.* ("TIA"):

› Why? To protect taxpayers from their elected officials.

› Provides for immunity and indemnity.

› Generally, does not immunize a park district or employees from state or federal constitutional claims.

› Generally speaking:

- TIA's purpose is to limit the tort liability of local government entities *Dewitt V. McHenry County*, 294 Ill.App.3d 712 (2d Dist. 1998).
- TIA does not create new liabilities for negligent acts or omissions which did not previously exist *Wood ex rel. Harrold v. Village of Grayslake*, 229 Ill.App.3d 343 (2d Dist. 1992).
- Act must be strictly construed against the public entity. *Aikens v. Morris*, 145 Ill.2d 273 (1991).

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Tort Immunity Act— Employees and Entities

» Under the TIA:

› Public employees include a present or former officer, board member, commissioner, committee member, agent, volunteer, or servant or employee of a local public entity, whether or not compensated. Excludes independent contractor.

› "Local Public Entity" includes units of local government, intergovernmental agencies (SRA's), and some non-profits conducting public business (your park district foundation?).

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What types of Claims are Covered by the Tort Immunity Act?

» COVERED:
  › Tort claims for money damages.
» NOT COVERED:
  › Injunctive or declaratory relief.
  › Contract Claims.
  › Worker's Compensation.
  › Occupational Diseases Acts.
  › Federal Civil Rights cases.

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What types of damages are covered?

» Punitive or exemplary damages:
  › Not recoverable against local public entities, or against public officials who serve in official, executive, legislative, quasi-legislative, or quasi-judicial capacities.
  › But, no protection for public official/employee alleged to have acted outside the scope of his/her official capacity (i.e., individual capacity).
  › Public entities may not indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.
  › No defense or indemnity for criminal charges if conviction ensues.

Robbins Schwartz

Discretionary Immunity

» **Section 2-201** - Determination of policy when the employee exercises his or her authorized discretion:
  › A public employee involved in determining policy or exercising discretion:
    - Not liable for an injury resulting from act or omission.
    - If the result of determining policy or exercising such discretion.
    - Even if the discretion is abused."
  › Immunity applies whether the act was willful and wanton or "corrupt and malicious."
  › Section 2-109: A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109.

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Discretionary Immunity

» **DISCRETIONARY VS. MINISTERIAL:**
  › **Discretionary** if the conduct requires deliberation, decision, or judgment.
  › Require the public body to balance competing interests, and to make a judgment call as to what solution will best service those interests.
  › Unique to a particular public office.
  › **Ministerial** if the actions involve the obedience of orders or the performance of a task for which the employee has no choice.
  › Ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.
» It is discretionary to make the decision to repair roadway. Once decision is made, the act of filling holes and removing debris is ministerial. Robinson v. Wash Twp., 976 N.E.2d 610 (3d Dist. 2012).
» The decision to sell a piece of property, including the terms of the sale, is discretionary. However, once the decisions to sell the property and on what terms are made, the act of actually selling the property is ministerial in nature.

Robbins Schwartz

Discretionary Immunity

» Decisions about how to address property defects necessarily involve judgment about whether making the improvements is practical and if so, what methods should be employed to do so.
» If balancing costs and benefits in order to determine what resources should be devoted to maintaining public property, immunity likely applies.

Robbins Schwartz

Supervisory Immunity

» Section 3-108:
  › No local entity or public employee is liable for an injury caused by a failure to supervise and activity on or during the use of any public property unless the local entity or public employee is guilty of willful and wanton conduct in its supervision.
  › Broadly applied on any park district property.
» *Barnett v. Zion Park District* (cited above):
  › Although park district owed duty to child who died in swimming pool accident, Section 3-108 of the Tort Immunity Act immunized the park district from liability.
  › Local Governmental and Governmental Employees Tort Immunity Act unconditionally grants immunity to local public entity or public employee for injury caused by failure to supervise activity on or use of any public property; there is no immunity exception for willful and wanton misconduct. 745 ILCS 10/3–108.*Barnett*, 171 Ill. 2d 378, 665 N.E.2d 808 (1996).

Robbins Schwartz

Supervisory Immunity

» Other cases where supervisory immunity protected public body:
  - Park district failed to provide a staff person to supervise a public playground.
  - Gymnastics coach failed to properly supervise a gymnast.
  - Park district failed to supervise the activities of a volunteer coach who molests a player.
  - Teacher failed to adequately supervise a student who sexually assaults another student.

Robbins Schwartz

Duty to Maintain Public Property

» Section 3-102:
  - Park district has a duty to use reasonable care to maintain its property in a safe condition for the purposes intended.
  - No duty to maintain unimproved land.
  - Property must be in a reasonably safe condition for intended and permitted users.
  - Determined on a case-by-case basis.
  - Use as well as user is relevant in determining whether user was "intended and permitted user."
  - No liability under 3-102 for injuries on its property unless park district had actual or constructive notice of a dangerous condition in sufficient time to take reasonable measures to remedy or protect.

Robbins Schwartz

Duty to Maintain Public Property

» Notice?
  - How long was the condition dangerous?
  - How obvious or noticeable was the condition? Size, character and appearance.
  - Could park district have learned of its existence and fixed it if it had exercised reasonable care?
  - No exact limit.
  - Fact sensitive.

Robbins Schwartz

Exercise of Authorized Discretion

» Examples:
  › Decision not to repair playground until 2019?
  › Decision not to upgrade drains at the pool?
  › Decision not to check backgrounds on volunteers?
  › Decision to allow an employee to drive home even though you suspect she is impaired?

Robbins Schwartz

Hazardous Recreational Activity

» 3-109: Immunity for park district and public employees.

» No liability for any damage or injury to property or persons arising out of hazardous recreational activity.

» Applies to any person, "who participates in a hazardous recreational activity.

» Includes any person who assists the participant, or any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury, was voluntarily in the place of risk , or having the ability to leave failed to do so.

Robbins Schwartz

Hazardous Recreational Activity

» Hazardous recreational activity means a recreational activity conducted on property of a local public entity which creates a substantial risk of injury.

» Includes:
  › Water contact activities except diving, when no lifeguards are present and reasonable warning has been given (or injured party should reasonably have known that there was no lifeguard).
  › Diving at any place or from any structure where diving is prohibited and reasonable warning as to the specific dangers present has been given.

Robbins Schwartz

Hazardous Recreational Activity

- Animal racing
- Archery
- Bicycle racing or jumping
- Off-trail bicycling
- Boat racing
- Cross-country and downhill skiing
- Sledding, tobogganing
- Equine activity as defined in the Equine Activity Liability Act
- Hang gliding
- Kayaking
- Motorized vehicle racing
- Off-road motorcycling or 4 wheel driving of any kind
- Pistol and rifle shooting
- Rock climbing
- Rocketeering
- Rodeo
- Spelunking
- Sky diving
- Parachuting
- Body contact sports
- Surfing
- Trampolining
- Tree climbing
- Rope swinging
- Water skiing
- White water rafting
- Wind surfing.

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Hazardous Recreational Activity

» Limits on immunity for hazardous recreational activity:
  - Failure of the park district to guard or warn of a dangerous condition of which it has actual or constructive notice and of which the participant does not have nor can be reasonably expected to have had notice.
  - Act of willful and wanton conduct by a public entity or public employee which is the proximate cause of the injury.
  - An independent concessionaire, or any person or organization other than the park district or employee, regardless of contractual status.

» Does not create a new duty of care or a basis of liability for personal injury or for damage to personal property.

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Strategies for Minimizing Liability Risk

1. Avoid personal involvement in employment decisions.
2. Avoid making any oral or written statements without first vetting for tort exposure and coverage under your D & O Policy:
   a) Is it accurate?
   b) Will it cause personal injury or property damage?
   c) Is it misleading?
   d) Will others rely on it?
   e) Is it defamatory?
   f) Does it constitute a breach of your fiduciary duty?

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Strategies for Minimizing Liability Risk

3. Don't exercise your arrest powers; don't imprison anyone (Don't laugh).
4. Do not threaten, touch, or harm your employees, patrons, contractors, suppliers or vendors.
5. Do not act individually when supervising administrative officers or employees, formulating policies, or exercising park district powers.

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Strategies for Minimizing Liability Risks

6. Do not give orders or otherwise supervise employees.
7. Do not conduct personal investigations or make personal reports of employee conduct, performance or dereliction of duty.
8. Do not personally attempt to enforce your park district conduct ordinance.
9. Do not sign contracts, create liabilities, or expend park district funds without express board authority granted per the board's operating rules at a properly held meeting.

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Strategies for Minimizing Liability Risk

10. Don't make disparaging comments about employees or other officials.
11. Punitive damages usually must be paid from personal funds; so if the action you are contemplating seems malicious, improperly motivated (*i.e.*, motivated by race, religion, ethnic heritage, gender, sexual orientation, marital status, military status, etc.), refrain.

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Strategies for Minimizing Liability Risk

12. Notify the park district (and your insurance pool or carrier) of any incident which reasonably could be expected to lead to a claim as soon as possible after the incident occurs.
13. Notify the park district (and your insurance pool or carrier) of a claim or suit against you as soon as you are aware of it.
14. Do not compromise or settle a claim against you without the consent of your park district and your insurer.

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Strategies for Minimizing Liability Risk

15. Know the limits of your authority, and act within those limits - coverage may be limited to the performance of your public duties, so stay within those duties.
16. Seek and obtain legal counsel prior to acting where a question exists and a claim is possible.
17. Avoid conflicts of interest and the appearance of a conflict, and do not act from personal motivation - likelihood of suit and difficulty in settlement increase if personal motivation is present.

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Strategies for Minimizing Liability Risk

18. Understand and follow the rules that apply to your actions and decisions. Apply the rules even-handedly. Don't play favorites.
19. Change the rules if they don't work; don't ignore them, don't bend them, don't be selective.
20. Don't speak to the press on personnel matters unless you are the designated spokesman and your statements have been vetted by counsel.
21. Don't make promises or threats to the public, your employees, a contractor or vendor.

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Strategies for Minimizing Liability Risk

22. Don't waive the attorney-client privilege.
23. Don't reveal confidential information obtained in closed session.
24. Don't act out of malice, revenge, or personal motives.
25. Don't act in a manner motivated by evil motive or intent or that is reckless or indifferent to someone's legally protected rights.

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Strategies for Minimizing Liability Risk

26. Don't ignore advice from your auditor, attorney or other professional.
27. Don't act to benefit yourself or a friend or family member financially; any personal gain by virtue of holding public office should raise red flags from an ethical, civil and criminal liability perspective.
28. Don't retaliate because you disagree with an opinion expressed or legal right exercised by another.

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Strategies for Minimizing Liability Risk

29. Establish and follow simple, practical and legally sufficient procedures that meet due process requirements.
30. Keep good records of what you do and why you do it.
31. Focus on legislative and policy activities and limit administrative oversight and micromanaging – legislative and policy-making activities are the most protected.

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Strategies for Minimizing Liability Risk

32. Periodically review the park district's policies, programs, services and regulations and the liability effects of proposed new policies, programs, services and regulations.
33. Consider a written public policy addressing payment of defense costs, judgments, settlements, and attorneys fees for claims not covered by the PD Code or TIA indemnification provisions (covering non-monetary cases, contracts, worker's compensation etc.).

Robbins Schwartz

Park District Code- Indemnification Basics

» **70 ILCS 1205/8-20:**
- › Park District must indemnify (and defend)and protect its employees and members of the park board from:
  - Civil rights damage claims and suits.
  - Constitutional rights damages claims and suits.
  - Death and bodily injury claims and suits.
  - Property damage claims and suits.
- › Applies when:
  - Damages are sought for negligent or wrongful acts.
  - Alleged to have been committed within the scope of employment or under the direction of the board.

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Park District Code- Indemnification Basics

» **70 ILCS 1205/8-20:**
- › Extends to persons who are members of the park board or employees of the district at the time of the incident from which a claim arises.
- › No immunity - just indemnity.

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Park District Insurance Coverage

» 70 ILCS 1205/8-21:
  › Park District may insure (and defend) against any loss or liability of the park district, board members and employees by reason of:
    - Civil rights damage claims and suits.
    - Constitutional rights damage claims and suits.
    - Death and bodily injury claims and suits.
    - Property damage claims and suits.
    - When damages are sought for negligent or wrongful acts allegedly committed within the scope of employment or under the direction of the park board.
» 70 ILCS 1205/8-21:
  › Insurance shall be carried with a company licensed to write such coverage in the state.

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Park District Insurance Coverage

» **Public Officials Liability Insurance:**
  › Liability coverage for the errors and omissions of public officials.
  › In effect, such policies serve the same function for elected/appointed officials of state and local government as directors and officers (D&O) insurance serves for the directors and officers of corporations.
  › One major difference is that under public officials liability forms, employees and the public entity itself are insureds, whereas this is not the case with D&O policies.
  › Exclusions under this policy include losses due to fraud or dishonesty, bodily injury or property damage, false arrest, assault and battery, defamation, and fiduciary liability.

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How the Park District Will Protect You

» Public entities may choose from a few different methods to protect an employee from claims against him or her:
  › Appear and defend against the claim or action;
  › Indemnify the employee or former employee for his court costs or reasonable attorney's fees, or both, incurred in the defense of the action;
  › Pay, or indemnify the employee for a judgment based on the claim (not including punitive or exemplary damages); or
  › Pay or indemnify the employee for a settlement of the claim. 745 ILCS 10/2-301.

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How the Park District Will Protect You

- A park district may not provide representation for an employee in a criminal action if the action arises out of or is incidental to, performance of his/her duties.
- Park district may reimburse the employee for reasonable defense costs only if:
  - The criminal action is based upon an act or omission arising out of and directly related to the employee's lawful exercise of his or her official duty or under color of his or her authority; and
  - The action is dismissed or results in a final disposition in favor of the employee.
- No indemnity if the employee has a current insurance policy or a contract that entitles him/her to a defense of the action.

Robbins Schwartz

THANK YOU!

QUESTIONS?

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Robbins Schwartz

STEVEN B. ADAMS is a partner in the Chicago office of Robbins Schwartz where he handles a wide variety of legal services for government, business and commercial clients. He has provided comprehensive general counsel services for a number of Chicago area municipalities, school districts, park districts and other Illinois units of local government since beginning his practice in 1985.

Steve has been admitted to practice before the Supreme Court of the United States, the U.S. Court of Appeals for the 7th Circuit and the U.S. District Court for the Northern District of Illinois. He is a member of the American, Illinois and DuPage County Bar Associations. He is also a member of Chicago's Ely Chapter of Lambda Alpha International, the honorary society for the advancement of land economics.

Steve's practice includes complex capital projects, regulatory compliance resolution for government and private clients, finance and taxation for public clients, sunshine laws, real estate, zoning, and construction including public-private development partnerships. He has drafted state and local legislation to advance the interests of his public and private sector clients. He has assisted clients in the pursuit and defense of constitutional claims arising from a variety of activities including establishment clause matters, permitting disputes, leaflet/pamphlet disputes, vagueness/overbreadth challenges to ordinances, and First Amendment retaliatory discharge cases.

Steve has litigated federal public and private employment jury cases, and state cases pertaining to Illinois election law, intergovernmental conflict, Illinois Highway Control Act, land-cash dedication cases, civil rights (42 U.S.C 1983), First Amendment, property tax, and limited liability company member dispute litigation, among others.

Steve is co-author of the Illinois Institute for Continuing Legal Education's treatise on Park District Law, published in 2011 and co-author of the Park District Guide to Illinois Sunshine Laws, published in 2012 by the Illinois Association of Park Districts. He has made over 30 presentations for the Illinois Association of Park Districts and the Illinois Park and Recreation Association, NBI, IICLE, among others.

In addition to his work with Robbins Schwartz, Steve has served as an officer of various organizations and standing committees in Illinois and the Chicago area for more than 15 years. He has served the public as a Commissioner for the Naperville Board of Fire and Police Commissioners, as a member of the State Board of the Illinois Fire and Police Commissioners Association and as a Township Committeeman. Steve has served on the Naperville Settlement Museum Board, is an active member of the Naperville Heritage Society, and the Naperville Rotary International Committee, assisting in the planning and execution of projects to deliver medical equipment to various communities in Nigeria.

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EMPLOYEE FRINGE BENEFITS – COMMISSIONER ACCESS TO PROGRAMS, FACILITIES AND ACTIVITIES

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IAPD/IPRA State Conference
Chicago, Illinois
January 20, 2017

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Employee Fringe Benefits – Commissioner Access to Programs, Facilities and Activities

2017 IAPD/IPRA State Conference
January 20, 2017

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Robbins Schwartz

AGENDA

I. Fringe Benefits Defined-The General Rules
- A. Definition of Fringe Benefit
- B. Who is an employee? Employee v. independent contractor
- C. What is income?
- D. Valuing fringe benefits
- E. Taxing fringe benefits-the general rules

II. Special Rules for Park Commissioners
- A. Section 4-1 of the PD Code
- B. What does compensation mean under this section?
- C. Exceptions
- *D. Smith v. Waukegan Park District*
- E. Will IRS exemptions apply to commissioners?

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AGENDA

III. IRS Exemptions, Deductions, Exclusions
- A. Definitions and Examples of:
  1) No-additional costs services
  2) Qualified employee discount exclusion
  3) De Minimis exclusion
  4) Meals and lodging exclusion
  5) Employee-owned vehicle use reimbursement

IV. Suggestions for your Board Policy and your Personnel Policy

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Definition of Fringe Benefit

- Fringe benefits are a form of pay for the performance of services.
- Compensation other than salary and annual cash bonus, including:
  - Property.
  - Services.
  - Cash.
  - Cash equivalent.
- Access to amenities:
  - Swimming pools.
  - Golf courses.
  - Weight rooms.
  - Recreational programs.
- Generally any fringe benefit provided by an employer is taxable unless excluded by a specific law.
- Unless the law specifically excludes it, the benefit is subject to employment taxes and must be reported on Form W-2, Wage and Tax Statement

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Definition of Fringe Benefit

- General Categories of Fringe Benefits:
  - Accountable and Non-accountable Plans:
    - Accountable plans provide for allowances and reimbursements paid to employees for job-related expenses and advances. There must be:
      - A business connection to the expenditure;
      - Adequate accounting by the recipient within a reasonable period of time; and
      - Excess reimbursements or advances must be returned within a reasonable period of time.
    - Employees should provide documentary evidence, such as bills, receipts, canceled checks, or similar items to support almost all claimed expenses under an accountable plan.

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Definition of Fringe Benefit

- Example from the IRS Regulations: A Park District employs workers who incur expenses for travel. The employer treats a portion of the employees' hourly compensation as a nontaxable per diem allowance for travel expenses. The employees are paid the same total, regardless of whether expenses are incurred.
  - This is not a valid accountable plan because the employees receive the same amount regardless of actual expenses incurred. Therefore, the "reimbursements" are not excludable from wages and are subject to withholding.

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Fringe Benefit Types

» Working Condition Fringe Benefits:
  › Property and services an employer provides to an employee so that the employee can perform his or her job.
  › This Property or service would be deductible by an employee as a business expense:
    - An employee for purposes of working condition fringe benefits includes current employees, partners, board of directors of the employer, independent contractors, and volunteers.
  › Examples:
    - The use of a company car for business;
    - An employer-provided cell phone provided primarily for non-compensatory business purposes; and
    - Job-related education provided to an employee.

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Fringe Benefit Types

» De Minimus Fringe Benefits:
  › Any property or service, provided by an employer for an employee, with a value so small that accounting for it is unreasonable or administratively impractical.
    - An employee is any individual receiving a de minimus fringe benefit.
  › Examples of de minimus benefits:
    - Infrequent personal use of photocopier;
    - Group meals;
    - Theater or sporting event tickets;
    - Occasional coffee, doughnuts, or soft drinks;
    - Local telephone calls; and
    - Personal use of cell phone provided by employer primarily for a business purpose.

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Fringe Benefit Types

» De Minimus Fringe Benefits:
  › Examples of benefits that are NOT de minimus:
    - Cash – except for infrequent meal money to allow overtime work;
    - Certain transportation passes or costs;
    - Commuting—use of employer's vehicle more than once a month;
    - Membership in a country club or athletic facility.

» Specific Fringe Benefits:
  › No-Additional Cost Services
    - Service offered by the employer to its customers in the ordinary course of the line of business of the employer in which the employee performs substantial services, and the employer incurs no substantial additional cost in providing the service to the employee.
      - An employee may be a current employee, a former employee who retired or left on disability, a widow or widower of an individual who died while an employee or who retired or left on disability, or certain leased employees.
    - Examples:
      - The use of a golf course; and
      - The use of a recreation center or athletic facility.

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Fringe Benefit Types

» Employee Discounts:
- Allows an employee to obtain property or services from his or her employer at a price below that available to the general public.
  - An employee may be a current employee, a former employee who retired or left on disability, a widow or widower of an individual who died while an employee or who retired or left on disability, or certain leased employees.

» Qualified Transportation Fringe Benefits:
- Benefits provided to an employee for the employee's personal transportation related to commuting to and from work:
  - The definition of employee only includes current employees.
- Includes:
  - Commuter transportation in a commuter highway vehicle;
  - Transit passes;
  - Qualified parking; and
  - Qualified bicycle commuting expenses.

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Fringe Benefit Types

» Health and Medical Benefits:
- Amounts received as reimbursements by employees under an accident or medical insurance plan and employer-provided health benefits.
- Examples:
  - Direct reimbursement or payment
    - Employer may pay qualifying employee medical expenses, or reimburse those expenses.
    - Does not require written plan.
  - Health reimbursement arrangement
    - A written plan to provide employer payment or reimbursement for qualifying medical or health benefits.
  - Employer contributions to health plans
    - Contributions to the cost of accident or health insurance.
  - Flexible spending arrangement
    - The employee may choose to reduce salary and contribute to an account for medical expenses on a pre-tax basis.

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Fringe Benefit Types

» Travel Expenses:
- Reimbursements received by an employee who travels on business outside of the area of his/her tax home.
  - An employee's tax home is the general vicinity of his or her principal place of business.
  - Includes:
    - Costs to travel to and from business destination;
    - Transportation costs while at the business destination;
    - Lodging, meals, and incidental expenses;
    - Cleaning, laundry, and other miscellaneous expenses.
- Moving Expenses.
  - Payments or reimbursements for moving expenses are generally not considered fringe benefits.
  - Moving expenses incurred to change residences are considered personal expenses, unless the move is directly related to work and the expenses meet certain criteria.
  - Moving expenses include:
    - Moving household goods and personal effects;
    - The travel costs between the former and the new residence by the shortest and most direct route;
    - Certain in transit storage expenses for up to 30 consecutive days.

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Fringe Benefit Types

- Transportation Expenses:
  - Costs for local business travel that is not away from the tax home area overnight, and that is in the general vicinity of the principal place of business.
    - This does not include commuting expenses.
  - Examples of travel expenses:
    - Air, train, bus, shuttle, and taxi fares in area of tax-home;
    - Mileage expenses or costs of operating a vehicle; and
    - Tolls and parking fees.

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Fringe Benefit Types

- Reimbursement for Use of Employee-Owned Vehicle:
  - Government employees may use their personal vehicles for official use and then seek reimbursement for that use.
- Use of Equipment and Supplies:
  - Includes employee use of equipment and supplies, as well as cash allowances provided by an employer to pay for them.
  - This includes:
    - Work Clothes and Uniforms;
    - Cleaning costs for the uniforms;
    - Safety equipment.

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Fringe Benefit Types

- Professional Licenses and Dues:
  - Employer reimbursements to employees for the cost of their professional licenses and profession organization dues.
  - The expenses necessary to maintain a license or status are considered ordinary and necessary business expenses.
- Educational Reimbursements and Allowances:
  - Employer payment of educational expenses on behalf of employees, or reimbursement of educational expenses, may be considered a working condition fringe benefit.
  - Includes:
    - Tuition, books, supplies, and equipment;
    - Certain travel and transportation costs; and
    - Graduate or undergraduate level courses.

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Valuing Fringe Benefits

» General Valuation Rule:
  › Provides that taxable fringe benefits are included in wages at their fair market value (FMV).
  › Fair market value is the amount a willing buyer would pay an unrelated willing seller, neither one forced to conduct the transaction, and both having reasonable knowledge of the facts.
» Determining the Value of Specific Benefits:
  › E.g.: Use of employer's vehicle for personal use; 3 ways to calculate:
    - Annual lease value of the vehicle;
    - Fair market value;
    - Vehicle cents-per-mile; or
    - Commuting valuation rules.

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Valuing Fringe Benefits

» De minimus fringe benefit:
  › Value is determined by the frequency with which it is provided to each individual employee, or, if this is not administratively practical, by the frequency provided by the employer to the workforce as a whole.
  › Examples:
    - An employer provides daily snacks to an employee. The snacks are valued at one dollar. Because the snacks are provided regularly, the employer must tax the one dollar per day as wages.
    - Good luck with this one as the employer.
    - Really good for morale...

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Valuing Fringe Benefits

» No-additional-cost services:
  › In determining whether an employer incurs any substantial additional cost by providing an employee with a service, look at the lost or foregone revenue.
  › An employer is considered to incur substantial additional costs if the employer or employees spend substantial amount of time in providing the service, even if the time spent would otherwise be idle or if the services are provided outside normal business hours.

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Valuing Fringe Benefits

- Qualified Transportation Benefits:
  - Commuter highway vehicle
    - May use fair market value, or may use automobile lease valuation, vehicle cents-per-mile, or commuting valuation rules.
  - Transit Passes
    - For transit passes sold at a discount, use the discounted price rather than the face amount to figure the exclusion.
      - May only do this if the discount is available to the general public.
- Reimbursement for Employee-Owned Vehicle:
  - An employer may choose to reimburse employees through a standard mileage rate allowance.
  - As of January 1, 2017, the standard mileage rate is 53.5 cents per mile.
  - Lower for medical or moving miles.

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Who is an Employee for Fringe Benefit Purposes?

- Generally...
  - Full time, part time, seasonal.
  - Volunteers.
  - Independent contractors?
  - Board members.

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Taxing Fringe Benefits-General Rules

- General Rules for Taxing Fringe Benefits:
  - Fringe benefits for employees are taxable wages unless specifically excluded by a section of the Internal Revenue Code (IRC).
  - The taxable amount of a benefit is reduced by any amount paid by the employee.

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Taxing Fringe Benefits-Exceptions

» Specific Taxable Fringe Benefits:
- › Employee discounts for:
  - Real or personal property of a kind commonly held for investment;
  - Merchandise or other property in excess of the employer's gross profit times the price charged to the public for the property;
  - Services in excess of 20% of the price charged to the general public for the service;
  - Property or services not offered to the public in the ordinary course of business.
- › Commuting costs:
  - Commuting refers to travel between an employee's personal residence and main or regular place of work.
  - Examples:
    - An employee drives from his residence to his principal or regular workplace; and
    - An employee drives from her residence to her regular workplace on the weekend because of an urgent meeting called by her employer.

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Taxing Fringe Benefits-Exceptions

» What Benefits are Excludable and/or Deductible?
- › Working Condition Fringe Benefit if:
  - The benefit relates to the employer's business;
  - The employee would have been entitled to an income tax deduction if the expense had been paid personally; and
  - The business use is substantiated with records.
- › De minimus fringe benefits
  - Must be infrequent
    - For example, if an employer provides a one-dollar snack daily to its employees, the benefit is "frequent," and not de minimus, and therefore is taxable.
- › There is no specific dollar threshold for benefits to qualify as de minimus.
    - The IRS has issued advice that a benefit valued at $100 did not qualify as de minimus.

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Taxing Fringe Benefits-Exceptions

» Does the Benefit Meet the Requirements for Treatment as No-additional-cost services - IRC Section 132 (a)(1)?
- › Service offered by the employer to its customers in the ordinary course of the line of business of the employer in which the employee performs substantial services.
- › Employer incurs no costs (including foregone revenue) in providing service to employee. Employer must provide the service to its customers in the ordinary course of its line of business.
- › Service must be offered by an employer to its customers (*e.g.*, facilities such as golf courses, fitness facilities, and swimming pools are made available to the public and usually for a fee; and...
- › The service must be offered in the line of business in which the employee performs substantial services.

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Taxing Fringe Benefits-General Rules

» Employee's line of business is determined by reference to a two-digit standard industrial classification coding (Income Tax Regs, 1.132-4) that is found in the Enterprise Standard Industrial Classification Manual – Antiquated system!

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IRS Exclusions-No-Additional Cost Exclusion

» No Additional Cost Exclusion
- › IRC Sec. 132 (a) (1) and Regs. Sec. 1.132-2 (a) (2)
- › Applies to service you provide to an employee (includes Commissioners and volunteers)
- › If providing the service does not cause you to incur any "substantial additional costs."
- › Service must be offered to customers in the ordinary course of the line of business of the park district.
- › Lost revenue is a cost!
- › Cannot reduce the costs you incur by any amount the employee pays for the service
- › You are considered to incur substantial additional costs if you or your employees spend a substantial amount of time providing the service even if the time spent would otherwise be idle or if the services are provided outside normal business hours.

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No-Additional Cost Exclusion

» Applies to "excess capacity services" such as:
- › Hotel accommodations- for hotel worker.
- › Airline bus or train tickets-employer of the carrier.
- › Greens fees at a park district golf course-park district employees.
- › Cart rental-park district employees.
- › Facility rental-park district employees.
- › Program access-park district employees.

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No-Additional Cost Exclusion

» For this exclusion, treat the following as employees:
  › Current employee;
  › Volunteer including commissioners and retired commissioners;
  › Former employee who retired or left on disability;
  › Widow or widower of an individual who died while an employee;
  › A widow or widower of a former employee who retired or left on disability;
  › A leased employee who has provided services to you on a substantially full-time basis for at least a year if the services are performed under your primary direction or control; and
  › A partner who performs services for a partnership.

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No-Additional Cost Exclusion

  › Treat services you provide to the spouse or dependent child of an employee as provided to the employee;
  › Dependent child means any son, stepson, daughter or stepdaughter who is a dependent of the employee or both of whose parents have died and who hasn't reached age 25;
  › Treat a child of divorced parents as a dependent of both parents.

» You can generally exclude from an employee's wages the value of a no-additional cost service you provide to him/her.

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No-Additional Cost Exclusion

» No special treatment for highly compensated employees.
  › Must be available on the same terms to one of the following groups:
    ▪ All of your employees; or
    ▪ A group of employees defined under a reasonable classification you set up that does not favor highly compensated employees.
  › Highly compensated employee for 2016 is an employee who meets either of the following:
    ▪ Employee was a 5% owner at any time during the year or the preceding year; or
    ▪ The employee received more than $120,000 in pay for the preceding year.

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No-Additional Cost Exclusion-Examples

» Public Golf Course Use:
  › In summer, excess capacity at public golf course is at a minimum for certain times of the day.
  › If employees are allowed to play without limitation during prime tee times on the golf course in summer months, paying customers would not be able to use the course; the employer incurs an additional cost in foregone revenue.
  › If potential revenue is lost, the benefit cannot meet the "no-additional cost" condition. IRC Sec. 132(b)(2).

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No-Additional Cost Exclusion-Swimming Pool Use

» Swimming Pool Use:
  › Using the coding system referenced above, an employee who "administers" a swimming pool may not exclude income attributed to pool access, because it *is not* considered as a "no-additional-cost service."
  › Employee who "operates" the swimming pool may be entitled to income exclusion because the fringe benefit *is* considered as a no-additional-cost service."

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Qualified Employee Discounts Exclusion

» Qualified Employee Discounts IRC Sec. 132 (c)(4)
  › A discount is excludable if:
    - The property or service is offered to the public in the ordinary course of business.
    - Discount does not exceed (in the case of qualified property) the gross profit percentage of the price at which the property is offered by the employer to customers. In the case of qualified services the discount can be up to 20% of the price at which the services are being offered by the employer to customers (IRC section 143 (c)).
    - Qualified property or services means any property other than real property (and non-investment personal property) or services which are offered for sale to customers in the ordinary course of the line of business of the employer in which the employee is performing services. (IRC section 132 (c)(4).

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Qualified Employee Discounts Exclusion

- EXAMPLE 1, Prime tee-time reservation:
  - Not qualified as a "no-additional-cost" services because of the probability of foregone revenue.
  - However up to 20% of the price at which the services are offered to customers can be excluded from his taxable wages as a "qualified employee discount."
- EXAMPLE 2, Employee rental of golf cart:
  - Use of a golf cart may not be a "no-additional-cost service" because expenses for gas, maintenance, and repairs are incurred when it is used.
  - However, up to 20% of the price at which the service is being offered by the employer to customers may be excluded from the employee's taxable wages as a "qualified employee discount."

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Qualified Employee Discounts Exclusion

- NOTE: The person receiving the service must meet the definition of "employee" in order for the income to be excluded under either "no-additional-cost services" or "qualified employee discounts." IRC Section 132(h).

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Qualified Employee Discounts Exclusion

- Employee includes:
  - Current employees; or
  - Former employees in that line of business who are separated from service with that employer because of retirement or disability and any widow or widower of any individual who died while employed by the employer in the line of business in which the service is being offered.
  - Generally, use by the spouse or dependent child shall be treated as use by the employee.
  - Definition of Dependent Child:
    - Any child of employee who is a dependent of the employee; or
    - Both of whose parents are deceased and who has not attained age 25 (IRC Section 152(e)).

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General Rules for NACS/QED

» Regarding No-additional-cost Services or Qualified Employee Discounts:
  › No discrimination in favor of highly compensated employees.
  › Exclusions for these categories are only available for highly compensated employees if:
    - The fringe benefit is available on substantially the same terms to each member of a group of employees.
    - Defined under a "reasonable classification" established by employer which does not discriminate in favor of highly compensated employees. (IRC section 132(j)).
» Employee Discount and No-additional-cost to Employer exclusions are not available to elected officials!

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Other Exclusions

» Exclusion Rules for Specific Benefits
  › Qualified Transportation Fringe Benefits provided that:
    - The qualified transportation fringe benefits do not exceed monthly excludable limits ($255/month in 2017).
    - If an employer reimburses an employee for bicycle commuting expenses, the maximum exclusion is $20 times the number of months the employee uses the bicycle to commute to work (2017). Many other provisions pertaining to bicycle commuting reimbursement exclusions including exclusion for purchase, improvement, repair and storage of bike, if certain conditions are met.
  › Health and Medical Benefits:
    - Applies to any employer-paid system, whether the benefit is provided directly through self-insurance to employees or through an insurance provider or trust.
  › Travel expenses if:
    - Qualifying expense incurred for temporary travel on business away from the general area of the employee's tax home.
    - The travel must be temporary and be substantially longer than an ordinary day's work, requiring an overnight stay or substantial sleep or rest.

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Other Exclusions

  › Example: An employee is required to travel from Rockford to Carbondale to work on a project. She leaves home at 11 a.m. on Monday, with plans to return home the same day. She is unable to complete the project on Monday, so she spends the night in Carbondale. After completing the project the next day, she returns to Rockford by 10:30 a.m.
    - Even though the employee had not planned to spend the night and is gone for less than 24 hours, she has met the "away from home" rule because she spent the night away from her home on business.
    - Accordingly, her travel-related expenses are excludable.
» Reimbursement for moving expenses is excludable if:
  › The individual is an employee;
  › The employee actually incurs or pays the expenses;
  › The expenses are closely related to starting work at the new job location;
  › The employee works at least 39 weeks full-time in the first year after arriving in the new location; and
  › The new job is at least 50 miles farther from the former home than the old job location was from the former home.

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Other Exclusions

» Transportation expenses for:
- › Daily transportation between one work location and another, neither one being the employee's residence;
- › Daily transportation between the employee's residence and a temporary work location outside the metropolitan area where the employee usually works;
- › Daily transportation between the employee's residence and a temporary work location in the same business, if the employee has a regular work location away from the residence; and
- › Daily transportation between the employee's residence and another work location in the same business, if the residence is the employee's principal place of business.

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Other Exclusions

» Meals and Lodging:
- › Meals are excludable if they are provided:
  - On the employer's business premises; and
  - For the employer's convenience.
    - Meals are provided for the employer's convenience if they are provided for a substantial "non-compensatory" reason, that is, the intention is not to provide additional pay for the employee.
    - Example of a meal for the employer's convenience: an employer has pizza delivered to the office at a group meeting because the business requires the meeting be kept short, and there are not alternative facilities in the immediate area.
    - Infrequent meals of minimum value may also be considered excludable as de minimus benefits.

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Other Exclusions

- › Meals in the course of entertaining customers may be excludable if the expenses are ordinary and necessary and meet one of the following tests:
  - The directly-related test:
    - Provides that entertainment-related meal reimbursements are excludable if:
      - The main purpose of the combined business and meal is the active conduct of business;
      - Business is actually conducted during the meal period; and
      - There is more than a general expectation of deriving income or some other specific business benefit at some future time.
    - This includes meals at a hospitality room sponsored by an employer at a convention or the entertainment of civic leaders at the opening of a new city hall.
  - The associated-entertainment test:
    - Entertainment-related meal reimbursements meet the associated test and are excludable if the entertainment is:
      - Associated with the active conduct of the employer's business; and
      - Directly before or after a substantial business discussion.

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Other Exclusions

- Trade or Professional Association Meal Expenses
  - Reimbursements for meal expenses directly related to and necessary for attending business meetings or conventions of certain exempt organizations are excludable if the expenses of your attendance are related to your trade or business.
    - Chambers of commerce, business leagues, and trade or professional organizations are all exempt organizations.
- Lodging is excludable if it is provided:
  - On the employer's business premises;
  - For the employer's convenience; and
  - As a condition of employment.

» Reimbursement for Use of Employee-Owned Vehicle if:

- Paid under an accountable plan.
  - May pay at the standard federal mileage rate, at or below the Federal mileage rate if the employee substantiates the business mileage, or reimburse for actual expenses.

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Other Exclusions

» Employee use of equipment and supplies:

- Any equipment provided by the employer that represents ordinary and necessary business expenses are excludable from income. Specifically:
  - Clothing or uniforms are excludable if:
    - They are specifically required as a condition of employment; and
    - Are not worn or adaptable to general usage as ordinary clothing.
  - If the clothing is excludable, reimbursements for cleaning costs are also excludable.
- Allowances paid or reimbursements made by an employer are excludable if the payments are made under the terms of an accountable plan, which requires:
  - Business connection – expenses qualify as a business expense to the employer and would qualify as a deduction for the employee if the employer did not reimburse the expense;
  - Substantiation of amount, date and time, place, and business purpose; and
  - Any excess returned within a reasonable time.

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Other Exclusions

» Professional Licenses and Dues:

- Licenses
  - Reimbursements for the expenses necessary to maintain a license or status are excludable if paid under an accountable plan and if the license is considered an ordinary and necessary business expense.
    - Paying a game warden to maintain his CPA license, when he does not use his CPA expertise on the job for the agency, is not an ordinary and necessary business expense. Accordingly, the reimbursement is taxable.
  - Deductible as a business expense if paid by an individual.
- Business and Professional Organizations Dues
  - If related to the employer's business, payment or reimbursement of dues to clubs organized for business purposes only is excludable when the employee is performing duties for the employer that are related to the professional organization's focus or mission.
- Examples include:
  - Bar associations;
  - State CPA associations;
  - Public service organizations.

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Other Exclusions

- Education Expenses
  - Job-related educational expenses may be excluded as working condition fringe benefits.
  - Excludable for any form of educational instruction or training that improves or develops the job-related capabilities of an employee.
  - To be excludable the educational course must not:
    - Be needed to meet the minimum education requirements of the current job; or
    - Qualify the employee for a new trade or business.
  - Example: An employee is a computer technician at a state agency. The agency pays for her to take a graduate computer course at IRS University to enhance her current job skills. The class is excludable as a working condition fringe benefit because it is job-related and maintains or improves her skills, and it does not prepare her for a new trade or business.

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Special Rules for Park Commissioners

- Section 4-1 of the Illinois Park District Code.
- Sec. 4-1. Each member of the governing board of any park district before entering upon the duties of his office shall take and subscribe an oath to well and faithfully discharge his duties, which oath shall be filed with the secretary of said board. The members of such governing board shall constitute the corporate authority for such district and a majority of such members shall constitute a quorum for said board at any meeting thereof. The members of such governing boards shall act as such without compensation, and each member of the board shall be a legal voter of and reside within such district.
- (Source: Laws 1951, p. 113.)

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Park Commissioners

- Each member of a governing board,
- Of a park district,
- Shall act as such <u>without compensation.</u>
- Therefore...
  - Any commissioner who receives or accepts "compensation" attributable to his/her status as a park board commissioner,
  - VIOLATES ILLINOIS LAW.

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Park Commissioners

» What is "Compensation"?
» IRS definition: Income includes *compensation* for services, including fees, commissions, *fringe benefits* and similar items...
» IRS: fringe benefits are "income." (26 U.S.C. 61).
» Define "compensation" under 4-1 of PD Code differently?
  › NO.
» Plain meaning of compensation: "payment for work performed, by salary, wages, commission or otherwise. It can include goods or services rather than money.

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Park Commissioners

» Emolument: Any perquisite, advantage, profit or gain arising from the possession of an office.
  › *Smith v. Waukegan Park District*
    - Trial court opinion;
    - Park districts can provide to park commissioners (but not their families) limited free access to programs, facilities and activities, for oversight purposes without violating Section 4-1 of the PD Code.
» Therefore...
  › Any commissioner who receives or accepts "compensation" as a result of his/her service as a commissioner violates Section 4-1 unless it fits into *Smith* exception.
  › Note: *Smith* not binding on any appellate court in the State.
  › Not relevant to IRS determination of income and taxability.

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Park Commissioners

» IRS Considerations:
  › Is a commissioner an employee under IRC?
    - YES-Regs.: 1.132-5(r) and Preamble.
  › What is income to the IRS? IRC Sec. 61(a)(1).
    - Includes fringe benefits.
  › Will IRS Exemptions apply to commissioners?
    - Yes, but not necessarily to avoid exposure under Section 4-1 of the Park District Code.
    - Fringe benefit is generally taxable income to commissioner.
    - Commissioner can invoke exemptions if they apply.
    - Typically no-additional cost and de-minimus exemptions apply.

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Suggestions for your Board Policy and your Personnel Policy

» Board Policy:
- › Do not allow retired commissioners access, except under no additional cost exclusion.
- › Do not allow reservations long in advance.
- › Do not allow frequent use.
- › Do not allow use during peak times.
- › Do not allow access if it will displace a paying customer.
- › Treat spouses and dependent children the same as the commissioner.
- › Even with these provisions in place a commissioner may still have issues with Section 4-1 of the Park District Code.

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Suggestions for your Board Policy and your Personnel Policy

» Employee Policy:
- › No Section 4-1 issue but broad allowance of fringe benefits can have a negative "optic" effect.
- › Clearly specify what fringe benefits are available and on what terms.
- › Specify which are excluded, "including but not limited to..."
- › Advise that fringe benefits will be treated as income unless exemption clearly applies.
- › Recommend that employees consult with their personal accountant if they are unsure of the tax ramifications of fringe benefits.

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QUESTIONS?

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Robbins Schwartz

STEVEN B. ADAMS is a partner in the Chicago office of Robbins Schwartz where he handles a wide variety of legal services for government, business and commercial clients. He has provided comprehensive general counsel services for a number of Chicago area municipalities, school districts, park districts and other Illinois units of local government since beginning his practice in 1985.

Steve has been admitted to practice before the Supreme Court of the United States, the U.S. Court of Appeals for the 7th Circuit and the U.S. District Court for the Northern District of Illinois. He is a member of the American, Illinois and DuPage County Bar Associations. He is also a member of Chicago's Ely Chapter of Lambda Alpha International, the honorary society for the advancement of land economics.

Steve's practice includes complex capital projects, regulatory compliance resolution for government and private clients, finance and taxation for public clients, sunshine laws, real estate, zoning, and construction including public-private development partnerships. He has drafted state and local legislation to advance the interests of his public and private sector clients. He has assisted clients in the pursuit and defense of constitutional claims arising from a variety of activities including establishment clause matters, permitting disputes, leaflet/pamphlet disputes, vagueness/overbreadth challenges to ordinances, and First Amendment retaliatory discharge cases.

Steve has litigated federal public and private employment jury cases, and state cases pertaining to Illinois election law, intergovernmental conflict, Illinois Highway Control Act, land-cash dedication cases, civil rights (42 U.S.C 1983), First Amendment, property tax, and limited liability company member dispute litigation, among others.

Steve is co-author of the Illinois Institute for Continuing Legal Education's treatise on Park District Law, published in 2011 and co-author of the Park District Guide to Illinois Sunshine Laws, published in 2012 by the Illinois Association of Park Districts. He has made over 30 presentations for the Illinois Association of Park Districts and the Illinois Park and Recreation Association, NBI, IICLE, among others.

In addition to his work with Robbins Schwartz, Steve has served as an officer of various organizations and standing committees in Illinois and the Chicago area for more than 15 years. He has served the public as a Commissioner for the Naperville Board of Fire and Police Commissioners, as a member of the State Board of the Illinois Fire and Police Commissioners Association and as a Township Committeeman. Steve has served on the Naperville Settlement Museum Board, is an active member of the Naperville Heritage Society, and the Naperville Rotary International Committee, assisting in the planning and execution of projects to deliver medical equipment to various communities in Nigeria.

Craig Talsma
Deputy Director/Director of Finance and Administration
Hoffman Estates Park District

Craig is a 1988 graduate of the University of Illinois with a degree in Accountancy; he is a Certified Public Accountant (CPA) and has worked at the Hoffman Estates Park District for the last 20 years where he currently holds the position of Deputy Director/Director of Finance & Administration, prior to that he was the Superintendent of Finance at the Bolingbrook Park District for six years. Craig currently sits on the Board of Directors for the Illinois Park District Risk Management Association (PDRMA) where he has served as a board member since 2015. He also has served on PDRMA's Finance Committee for 10 years and their Audit Committee for four years.

Craig is a current GFOA member and has been active in IPRA. He served on the IPRA Administration and Finance Section, including being the Director of the A&F Section in 1991 and 1992. He was also a member of the IPRA Finance Committee for 14 years. Craig was awarded the 2009 IPRA A&F Section's Distinguished Service Award and the 2010 IPRA Chairman's Award. Craig was instrumental in assisting with his district's receipt of the 2009 National Gold Medal award, as well as continual accreditation from PDRMA and IAPD/IPRA as well as receipt of a perfect CAPRA score for his District's 2013 NRPA accreditation. He enjoys public service and sits on two foundation boards and is an on-going presenter for the IAPD Boot Camp educational series.

Robbins Schwartz consists of over 40 attorneys who devote their time almost exclusively to representing Illinois public governmental bodies. We have offices in Chicago, Champaign-Urbana, Collinsville, Rockford, and Bolingbrook. Established in 1970, the firm currently represents municipalities, park districts, special recreation associations, townships, special education cooperatives, public school districts and community colleges throughout the state. Several of the municipalities we represent are responsible for park and recreation functions within their respective jurisdictions.

Illinois park districts face many varied and complex legal matters that extend beyond the Park District Code and other local government laws. Robbins Schwartz applies unique insight, depth, skill and experience to the park district's public finance, real estate and land use, capital project implementation, construction disputes, legislative affairs, intergovernmental cooperation and conflict, ethics compliance, contracts for services, goods and equipment, personnel policies, employment contracts and employment actions, grant compliance, and constitutional issues.

We also provide regular advice on compliance with the Park District Code, Open Meetings Act, the Freedom of Information Act, Local Records Act, and many other state and federal laws applicable to government bodies. Our attorneys routinely help boards and park commissioners solve difficult board meeting and governance problems, board-public conflict, defective board action, and similar challenges. We have extensive experience helping our clients establish and maintain working partnerships with other government entities, community groups and public/private partnerships. Additionally, our attorneys help park districts establish park district foundations and not-for-profit affiliated corporations to enable tax deductible fundraising for park and recreational purposes. We have drafted countless opinions, ordinances, resolutions, code amendments, policies and other documents pertaining to a park district's operations.

In order to keep our clients informed, the firm regularly sends law alerts and memorandum explaining recent legislation, regulations, court and administrative decisions that could have an impact on client operations.

It's Getting Hot In Here: Hot Topics in Employment

January 21, 2017

2:00 p.m. – 3:15 p.m.

Presented by:
Darcy L. Proctor and Robert T. McCabe

FLSA- New Regulations

- Remember this?
  - Salary minimum increase to $50,400
  - Duties test change is a possibility
    - California model – greater than 50% time spent on "primary (exempt) duty"
    - Current standard is that employee can be exempt even if she spends 50% or less of her time on exempt duties, if those duties are the reason for her job

FLSA- New Regulations

- Options:
  - Increase salaries of current staff who will lose exempt status, or
  - Pay staff who will lose exempt status hourly and monitor their overtime

FLSA - Injunction

- Nationwide injunction granted in Texas
- Enjoins implementation of new salary thresholds for employees who are exempt from the FLSA overtime requirements

FLSA - Injunction

- Basis for injunction:
  - Lawfulness of the rule
  - DOL's authority to promulgate the rule – court thinks that only Congress, not the DOL, can change the rule
  - Auto update does not comply with Administrative Procedures Act

FLSA – Injunction

- DOJ has appealed
- It is unlikely that there will be any resolution of this matter before summer of 2017
- New administration could change all of this

FLSA - Injunction

- What do we do now?
  - Nothing – the dilatory are in the best position in this case
  - Made changes, increased salaries – yes, you can take the money away, and yes, it will hurt morale
  - Reclassify? – sure, not a problem

FLSA - Injunction

- Communicated intent to reclassify, raise salaries, but didn't implement yet – hold
- Found people that should never have been exempt in the first place – good camouflage to reclassify now

FLSA Lawsuits

- These were hot in 2016 and nothing will change in 2017
- Bigger than the new regulations and the litigation that may result from those is misclassification
- FLSA suits are appealing to attorneys and plaintiffs – legal fees, liquidated damages

FLSA Best Practices

- Understand that its all about the duties
- Job descriptions do not win the day
- Audit, Audit, Audit
- Fix, Fix, Fix

Wage Payment and Collection Act- Update

- Record Keeping
  - Employers must keep records for both exempt and non-exempt employees
  - No penalty for not doing so, but failure to do so will be construed against the employee in a misclassification case
  - Keeping records can benefit the employer (Merit pay; non-FLSA comp time; performance evaluation etc.)

Wage Payment and Collection Act- Update

- Use of Lose Vacation Policies
  - DOL regs are confusing
  - Current language still says vacation may be forfeited if employee is given a "reasonable opportunity" to take vacation *and* employee knew of the policy

Wage Payment and Collection Act- Update

- Use or Lose Vacation Policies
  - New language: "An employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice of the employer"
  - So now what do you do?

Wage Payment and Collection Act- Update

- Use or Lose Vacation Policies
  - Cautious approach: get rid of use or lose vacation policy
  - But, DOL website still advises that use or lose vacation policies are still valid
  - Unless DOL or court says differently, we still believe these policies are valid

Wage Payment and Collection Act – Best Practices

- Keep track of time for exempt and non-exempt employees
- If you don't have a "use or lose" vacation policy, get one
- If you do have a use or lose policy, review it
- Make sure that you cover "reasonable opportunity" to use vacation and that policy discusses how that will be accomplished

Unionization

- Recent inquiries from SEIU
- Most of the time, when unions come in management is doing or not doing something that could prevent it

Unionization

- What can you do if the union comes calling:
  - Make sure employees know what they are getting into
  - Card check – cards are good for 1 year and it's 50% +1 and they are in – NO VOTE
  - Many employees sign the card thinking they can secretly vote no later

Unionization

- Free to join or not – won't impact employment
- No obligation to join
- Fair share
- All we have to do is bargain in good faith

Unionization

- Everything is negotiable when a union comes in
- We don't deal with you anymore; we deal with the union

Unionization – Misleading Tactics

- The union will get you a wage increase
- The union will get you better insurance
- The union will keep you from getting fired or laid off

Unionization – Management Pitfalls

- Promising pay increases during campaign
- Threatening discipline, wage reductions etc.
- Retaliation
- Surveillance
- Interrogation

Unionization – What If They Get In?

- Maintain the status quo on wages, hours and terms and conditions of employment
- Be careful with discipline for union organizers
- Don't give in
- Ask for explanations and be prepared to give them with regard to proposals
- Check personality issues at the door

Transgender Employees

- Awareness of this issue is a must
- Policies that ensure protection of transgender employer rights is essential now
- EEOC has now said that Title VII prohibits discrimination against transgender individuals as a form of gender discrimination

Transgender Law Evolution

- Last year at this time, not such a big issue
- Evolving quickly
- Most recently
  - NC House Bill 2
  - Texas has similar plans
  - Texas injunction against providing protections for transgender persons re health care and insurance

Transgender Issues

- Illinois Human Rights Act prohibits discrimination based upon gender identity
- What do you need to do?
  - Clear policy that covers the following essential areas

Transgender Issues

- Policy considerations
  - General statement re non-discrimination
  - Definitions
  - Transition plans
  - Co-worker responsibilities
  - Employer responsibilities
  - Names and pronouns
  - Locker Rooms and restrooms
  - Dress Code
  - Non-discrimination for reporting and investigation

Transgender Issues

- Other considerations
  - Supervisor and employee training a must
    - Raise awareness
    - Learn to prevent discrimination in the workplace
    - Learn how to talk about this issue

Employee Sick Leave Act

- Effective January 1, 2017
- Expands use of sick leave
- In addition to employee, now include child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, step parent

Employee Sick Leave Act

- Employer can limit the amount of leave for one of the listed individuals other than the employee to an amount not less than the personal sick leave that would be accrued during 6 months at the employee's then current rate of entitlement. EMPLOYERS SHOULD DO THIS.

Employee Sick Leave Act

- Different options
- One theory we have heard is that this is an "unfunded mandate"
- Another theory is that since employer is undefined, the Act does not apply to public employers
- Collective bargaining agreements are an issue

Employee Sick Leave Act

- Most employers do 12 days per year accruing at 1 per month
- If this is the case, then the maximum number of days for someone other than the employee would be 6
- Make sure that policy regarding sick leave use and abuse applies to use for extended family

The First Amendment

- The First Amendment prohibits retaliation against public employees on the basis of speech
- A public employee's right to speech is not absolute

Section 1983 First Amendment Claims

- Is a public employee's speech constitutionally protected?
- Did the employee suffer an adverse employment action because of the protected speech?
- Was the speech a substantial or motivating factor in the employer's action?

Speech Pursuant to Official Duties

- Was the public employee speaking as a private citizen?
- Or, was the employee speaking pursuant to his official duties?
- Courts look at an employee's day to day duties and more general responsibilities

Connick-Pickering Balancing Test

If an employee's speech is not made pursuant to official duties but as a private citizen, then speech must be analyzed under the *Connick-Pickering* balancing test

Matters of Public Concern

- Is it about a matter of public concern?
- Is it related to a matter of political, social or other concern to the community?
- Look at:
  - Form
  - Content
  - Context

Matters of Public Concern (cont'd)

- Examples:
  - Corruption in the workplace
  - Discrimination in the workplace
  - Violation of safety codes
  - Political affiliation
  - Union activity

Purpose of Speech

- Examine purpose of speech
- Speech is not protected if for personal satisfaction or to air personal grievance

Governmental Interest

- Whose interests prevail?
  - Affect discipline or harmony?
  - Is employee in a position of loyalty or confidence?
  - Does speech interfere with the employer's performance?
  - General disruptions?

Substantial or Motivating Factor

- Employee must prove speech was substantial or motivating factor
- Employer can then prove it would have taken same action without speech

Lane v. Franks, 134 S.Ct. 2369 (2014)

- First Amendment protects an employee's sworn testimony
- Employee was compelled to testify pursuant to subpoena
- Although testimony related to his employment, it was not part of his official duties

Proactive Measures

- Give employees an internal forum for their speech
- Review and update job descriptions
- Document performance problems

Workplace Bullying

- OSHA defines "Workplace Bullying" as any behavior that is repeated, systemic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimize, humiliate, undermine or threaten and which creates a risk to health or safety

Workplace Bullying

- The term "risk to health and safety" includes the risk to emotional, mental or physical health of employees in the workplace.
- Workplace bullying includes physical conduct and threats but more commonly involves verbal conduct such as insulting, offensive or degrading language

Workplace Bullying

- Criticism delivered with yelling and screaming
- Teasing making someone the brunt of practical jokes
- Spreading gossip, rumors and innuendo of a malicious nature

Workplace Bullying

- Deliberately excluding or isolating a person from normal workplace activities
- Intruding on a person's space by pestering, spying or tampering with their personal effects or work equipment
- Intimidation through inappropriate comments or unjustified criticism

Proactive Measures

- Adopt anti-bullying policy
- Education and awareness training
- Respond and investigate complaints
- Take prompt corrective action including discipline
- Follow up with employees involved

Employment Best Practices: Staying Out Of Court In 2017

Updated Personnel Manual

- Include proper disclaimers that an employee handbook is not an employment agreement
- Important tool in employer's arsenal
- Policy Handbook shows employer promulgated lawful rules and procedures, notified the employee of such, and it followed those rules and procedures

Hiring and Employment Practices

- Review and update your hiring practices
- Revise applications to address changes in the law regarding use of criminal convictions and other laws
- Review interview procedures
- Remember the Do's and Don'ts of interviewing job candidates

Classify Employees Correctly

- Wage claims, like other employment litigation, continue to raise
- Periodically review employee classifications as job duties change over time
- Fair Labor Standards Act interpretations of exempt and non-exempt is still changing to address changing workplace

Pay Your Employees Correctly

- Wage claims can be very expensive
- Penalties include damages in the amount of double the wages owed, interest in the unpaid amount and the employee's attorney fees
- Employer's "honest mistake" is no defense

Update IT and Social Media Policies



- Constantly changing area of employment law
- The law moves slower than the changes in technology
- Periodically review internet and social media policies to ensure they are well-defined and reflect the current law

QUESTIONS

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SATURDAY, JANUARY 21, 2017

10:15 A.M. – 11:30 A.M.

SESSION #118

DIRECTOR & COMMISSIONER RELATIONSHIPS:

CAN FARMERS & COWBOYS BE FRIENDS?

PRESENTER:

ROBERT K. BUSH

Ancel Glink

DIRECTOR & COMMISSIONER RELATIONSHIPS:

CAN FARMERS & COWBOYS BE FRIENDS?

PRESENTED BY:
ROBERT K. BUSH

Ancel Glink

DIRECTOR'S COMPENSATION/BENEFITS

- CONTRACT OR NO CONTRACT?
- CAR OR CAR ALLOWANCE OR NOTHING
- DISCIPLINE
  - BY WHOM?
  - HOW?
  - HEARING?
  - ALTERNATIVES SHORT OF TERMINATION?
- SEVERANCE

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CHAIN OF COMMAND

- HIRING/FIRING/DISCIPLINE
- COMMISSIONERS IN PROGRAMS
- COMMISSIONERS WITH CHILDREN IN PROGRAMS
- COMMISSIONER CONTACT WITH EMPLOYEES

POLITICS

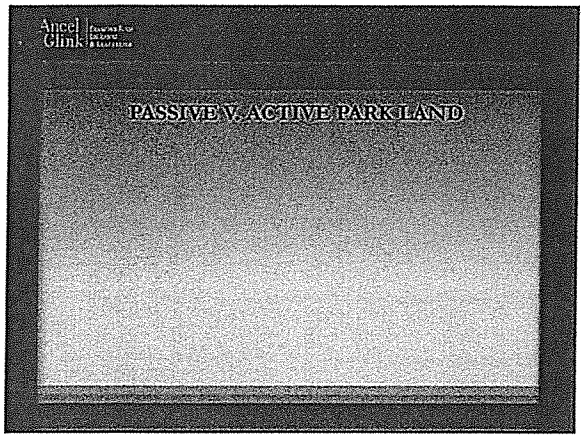
- INTERNAL (BETWEEN AND AMONGST COMMISSIONERS)
- EXTERNAL (WITH LEADERS/STAFF OF OTHER SISTER ENTITIES)
  - WHO MEETS WITH WHOM?

DEALING WITH RESIDENTS

- AT BOARD MEETINGS
- OUTSIDE BOARD MEETINGS
- PROGRAM COMPLAINTS
- PROGRAM RECOMMENDATIONS

FINANCES

- PROPERTY TAXES/TAX LEVY/RATE SENSITIVITY
- PROGRAM FEES
  - PROFITABILITY OF PROGRAMS
- GRANTS
- DONATIONS
- FOUNDATION
- REFERENDUM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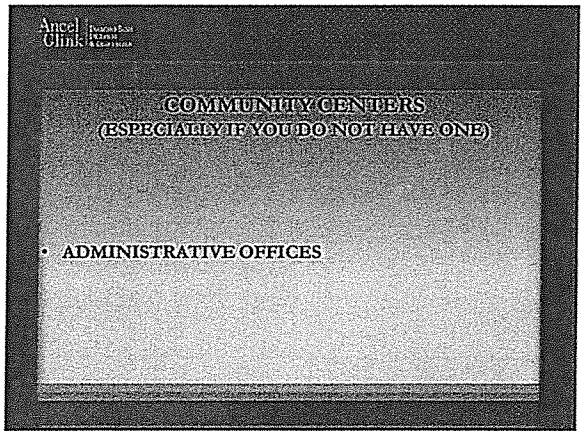
PASSIVE V. ACTIVE PARK LAND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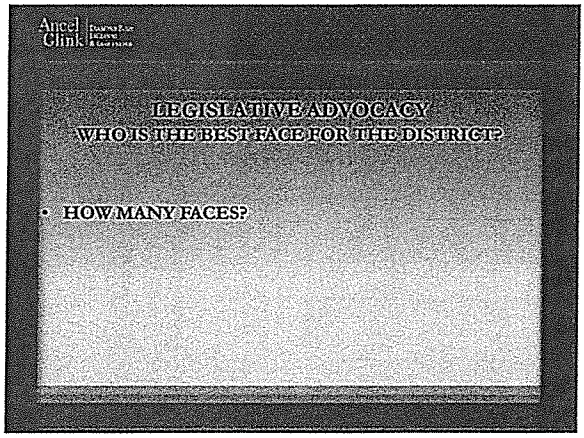
COMMUNITY CENTERS
(ESPECIALLY IF YOU DO NOT HAVE ONE)
• ADMINISTRATIVE OFFICES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LEGISLATIVE ADVOCACY
WHO IS THE BEST FACE FOR THE DISTRICT?
• HOW MANY FACES?

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CRISIS MANAGEMENT

- WHO IS THE DISTRICT'S SPOKESPERSON?
- MORE THAN ONE SPOKESPERSON?

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FORMAL POLICIES

- BOARD POLICY MANUAL
- EMPLOYEE MANUAL
- USE OF THE PARKS ORDINANCE(S)

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ANY QUESTIONS?

?

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IAPD
Illinois Association of Park Districts

2016 LEGISLATIVE YEAR IN REVIEW

New Laws Impacting IAPD Member Agencies

IAPD PLATFORM

Public Act 99-0771 (HB 4536) (Walsh, L., Jr. / Hastings, M.) - Amends the Park District Code, the Conservation District Act, and the Downstate Forest Preserve District Act. Increases the amount of a contract that requires competitive bidding for supplies, materials, and work from $20,000 to $25,000. Permits boards to require competitive bids by a lower amount if required by board policy. Effective August 12, 2016.

OPEN MEETINGS ACT

Public Act 99-0515 (HB 4630) (Ives, J. / Connelly, M.) - Amends the Open Meetings Act. Allows access to the verbatim recordings and minutes of closed meetings to duly elected officials or appointed officials filling a vacancy of an elected office in a public body; provides that access shall be granted in the public body's main office or official storage location, in the presence of a records secretary, an administrative official of the public body, or any elected official of the public body; provides that no verbatim recordings or minutes of closed meetings shall be recorded or removed from the public body's main office or official storage location, except by vote of the public body or by court order; and provides that nothing in the subsections concerning verbatim recordings and minutes of closed meetings is intended to limit the Public Access Counselor's access to records necessary to address a request for administrative review. Effective June 30, 2016.

Public Act 99-0714 (HB 5683) (Breen, P. / Nybo, C.) - Amends the Open Meetings Act. Provides that where the provisions of this Act are not complied with, or where there is probable cause to believe that the provisions of this Act will not be complied with, any person may bring a civil action in the circuit court within 60 days of the decision by the Attorney General to resolve a request for review by a means other than the issuance of a binding opinion, if the person timely files a request for review with the Public Access Counselor. Effective August 5, 2016.

FREEDOM OF INFORMATION ACT

Public Act 99-0586 (HB 4715) (Bryant, T. / Radogno, C.) - Amends the Freedom of Information Act. Provides that if the public body fails to comply with the court's order after 30 days, the court may impose an additional penalty of up to $1,000 for each day the violation continues if the order is not appealed or stayed. Provides that if the Attorney General issues a binding opinion

and the public body does not file for administrative review of or comply with a binding opinion within 35 days after the binding opinion is served on the public body, the requester may file an action and there shall be a rebuttable presumption that the public body willfully and intentionally failed to comply with the Act. Effective January 1, 2017.

LOCAL GOVERNMENT CONSOLIDATION

Public Act 99-0709 (HB 229) (Franks, J. / Bush, M.) - Amends the Counties Code. Extends the consolidation pilot program that was approved several years ago for DuPage County to Lake and McHenry Counties. Allows the county boards in those counties to dissolve units of local government with appointed board members. Removes conservation districts from the scope of the legislation, meaning that county boards would not have the authority to unilaterally dissolve conservation districts. Effective August 5, 2016.

Public Act 99-0634 (SB 2994) (Cullerton, T. / McSweeney, D.) - Provides that on or before January 1, 2017, every county shall prepare a report for the General Assembly identifying any local public entity that the county board, board of county commissioners, county board chairman or president, or county executive appoints members to and requires the report to contain additional information about these units including a description of the services the local public entity provides, the total number of members of the local public entity's governing board (with an indication of any other authorities that also make appointments to that public entity), the process by which the local public entity was first created, an indication of whether or not the local public entity levies a property tax (or, if there is no tax levy, an explanation of how the local public entity is funded), and an identification of any plans for consolidation or dissolution of the local public entity. Effective July 22, 2016.

LOCAL GOVERNMENT DISCLOSURES

Public Act 99-0604 (HB 4379) (McSweeney, D. / Cullerton, T.) - Creates the Local Government Travel Expense Control Act. Provides that school districts, community college districts and non-home rule units of local government shall, by resolution or ordinance, regulate travel, meal, and lodging expenses of officers and employees including: (1) the types of official business for which travel, meal, and lodging expenses are allowable; (2) maximum allowable reimbursement for travel, meal, and lodging expenses; and (3) a standardized form for submission of travel, meal, and lodging expenses. Provides that all travel, meal, and lodging expenses may only be approved after specified documentation has been submitted and the expenses are approved by a roll call vote. Prohibits reimbursing entertainment expenses unless ancillary to the purpose of the program or event. Effective January 1, 2017.

Public Act 99-0646 (HB 5684) (Breen, P. / Nybo, C.) - Creates the Local Government Wage Increase Transparency Act. Applies to employees under the Illinois Municipal Retirement Fund (IMRF) who began participation before January 1, 2011 and who are not subject to a collective bargaining agreement. Defines "disclosable payment". Provides that, after an employee has expressed to the employer an intent to retire or withdraw from service, the employer may not pay a disclosable payment to the employee within a specified period before the expected date

of retirement or withdrawal without first disclosing certain information about the payment at a public meeting of the governing body of the employer. Includes a home rule pre-emption. Amends the Open Meetings Act to make a conforming change. Effective July 28, 2016.

IMRF

Public Act 99-0682 (HB 6021) (Yingling, S. / Biss, D.) - Allows certain retirees who retired before June 1, 2011, without an eligible surviving spouse, and received a refund of their surviving spouse contributions, to re-establish eligibility for a surviving spouse pension if they meet one of the following conditions: (i) they entered into a marriage in Illinois on or after February 26, 2014; (ii) they entered into an Illinois civil union on or after June 11, 2011; (iii) they entered into a legal relationship in another state or jurisdiction that was not recognized in Illinois until after June 11, 2011, or February 26, 2014. Extends the provision making the second spouse eligible for a surviving spouse pension, if the annuitant had an eligible spouse at retirement who predeceased the annuitant, to all current annuitants (instead of just those who retired after March of 1992.) Effective July 29, 2016.

Public Act 99-0745 (SB 2896) (Althoff, P. / Andrade, J., Jr.) - Amends the Illinois Municipal Retirement Fund (IMRF) Article of the Illinois Pension Code. Provides that if an employer knowingly fails to notify the Board to suspend the annuity of an annuitant who returns to service as a participating employee, the employer may be required to reimburse the Fund for an amount up to ½ of the total of any annuity payments made to the annuitant after the date the annuity should have been suspended. Provides that in no case shall the total amount repaid by the annuitant plus any amount reimbursed by the employer to the Fund be more than the total of all annuity payments made to the annuitant after the date the annuity should have been suspended. Provides that the reimbursement provisions of the amendatory Act do not apply if the annuitant returned to work for the employer for less than 12 months. Requires the Fund to notify all annuitants of the requirement to notify the Fund if they return to work for a participating employer. Requires the Fund to develop and maintain a system to track annuitants who have returned to work. Effective August 5, 2016.

Public Act 99-0747 (SB 2972) (Harmon, D. / Davis, W.) - Amends the IMRF Article of the Illinois Pension Code, allows a participant who is terminating service to elect a separation benefit rather than a retirement annuity if his or her annuity would be less than $100 (now $30) per month. Effective January 1, 2017.

Public Act 99-0580 (SB 2894) (Clayborne, J., Jr. / Martwick, R.) - Amends the IMRF Article of the Illinois Pension Code. Deletes the one-year limit on backdating a survivor benefit. Provides that annuity payments for periods before the application date shall be paid without interest based on late payment. Authorizes annuitants previously limited by the one-year limit to reapply for benefits for the period denied. Applies without regard to whether the deceased spouse was in service on or after the effective date of the amendatory Act. Effective July 15, 2016.

PROPERTY TAX CODE

Public Act 99-0851 (SB 2427) (Jones, E., III / Riley, A.) - Amends the Property Tax Code. In a Section concerning the general homestead exemption, provides that, in counties with 3,000,000 or more inhabitants, if a property is not occupied by its owner as a principal residence as of January 1 of the current tax year, then the property owner shall notify the chief county assessment officer by March 1 of the next tax year that the property was not occupied by the owner as a principal residence as of January 1 of the current tax year. Provides that, if the exemption is not removed upon timely receipt of the notice by the chief assessment officer, then the exemption is considered an erroneous homestead exemption granted as a result of a clerical error or omission on the part of the chief county assessment officer, and the property owner is not liable for the payment of interest and penalties. Provides that the notice of discovery must contain language informing the taxpayer that, if the taxpayer provided timely notice to the chief county assessment officer, then the chief county assessment officer will withdraw the notice of discovery and reissue a notice of discovery in which the taxpayer is not liable for interest and penalties for the current tax year in which the notice was received. Effective August 19, 2016.

Public Act 99-0579 (SB 2889) (McGuire, P. / Fortner, M.) - Amends the Property Tax Code. In a Section requiring the board of review to serve a copy of the petition on all taxing districts when a change in assessed valuation of $100,000 or more is sought, provides that the service may be by electronic means if the taxing district consents to electronic service and provides the board of review with a valid e-mail address for the purpose of receiving service. Effective July 15, 2016.

EMPLOYMENT

Public Act 99-0765 (HB 4036) (Lilly, C. / Hutchinson, T.) - Amends the Victims' Economic Security and Safety Act. Provides that the term "employer" includes any person who employs at least one employee. Provides that leave may be used by an employee who has a family or household member who is the victim of domestic or sexual violence. Provides that leave may be used for the time a victim is experiencing an incident of domestic or sexual violence. Provides that employees working for an employer that employed at least one but not more than 14 employees shall be entitled to 4 workweeks of leave during any 12-month period. Effective January 1, 2017.

Public Act 99-0610 (HB 4999) (Guzzardi, W. / Connelly, M.) - Amends the Right to Privacy in the Workplace Act. Makes it unlawful for an employer or prospective employer to request or require an employee or applicant to authenticate or access a personal online account in the presence of the employer, to require or coerce an employee or applicant to invite the employer to join a group affiliated with any personal online account of the employee or applicant, or join an online account established by the employer. Prohibits retaliation against an employee or applicant. Removes the employee's profile on a social networking website from the scope of the Act. In language providing that certain provisions of the bill do not prohibit or restrict an employer from complying with a duty to screen employees or applicants before hiring or monitoring or retaining employee communications under specified laws if the password, account information, or access sought by the employer relates only to an online account that is supplied or paid for by an employer, deletes language relating to an exception for an account for which an employer pays

for additional features or enhancements to an employee's personal online account. Amends the Freedom from Location Surveillance Act to make a complementary cross reference change. Effective January 1, 2017.

Public Act 99-0841 (HB 6162) (Skoog, A. / Collins, J.) - Creates the Employee Sick Leave Act. Provides that employees may use personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury. Provides that employers who have policies that provide the required leave do not have to modify those policies. Provides that the Department of Labor is prohibited from adopting any rules in contravention of the Act. Effective January 1, 2017.

Public Act 99-0703 (SB 2613) (Bertino-Tarrant, J. / Manley, N.) - Creates the Child Bereavement Leave Act and amends the State Finance Act. Provides that an employee may up to 2 weeks (10 work days) of bereavement leave to grieve the death of the employee's child, attend services in relation to the death of the employee's child, or make arrangements necessitated by the death of the employee's child. Authorizes up to 6 weeks leave if more than one child dies within a 12-month period. Provides that an employee must provide 48 hours' advance notice unless notice is not reasonable and practicable and allows employer to require reasonable documentation. Provides for enforcement by the Department of Labor. Provides for civil penalties. Authorizes the Attorney General to collect penalties. Creates the Child Bereavement Fund as a special fund in the State treasury. Authorizes civil actions by employees to enforce the Act if a complaint is filed within 60 days after a violation occurs. Effective July 29, 2016.

Public Act 99-0884 (SB 3005) (Collins, J. / Cassidy, K.) - Amends the Park District Code. Provides that a park district shall not knowingly employ a person who has been convicted of specified drug offenses until 7 years following the end of a sentence imposed including periods of supervision or probation (currently, may not employ any person convicted of the specified drug offenses); prohibits employment for convictions of Class 4 felony public indecency (currently, any convictions for public indecency); and amends the Chicago Park District Act making similar changes. Effective August 22, 2016.

OTHER

Public Act 99-0673 (HB 5660) (Martwick, R. / Mulroe, J.) - Amends the Public Construction Bond Act. Provides that verified notice shall be deemed filed on the date personal service occurs or the date when the verified notice is mailed in the form and manner provided. Effective January 1, 2017.

Public Act 99-0789 (SB 2227) (Holmes, L. / Kifowit, S.) - Amends the State Mandates Act. Provides that the Department of Commerce and Economic Opportunity shall submit a bi-yearly review and report on mandates (beginning in 2019) detailing the nature and scope of each existing State mandate enacted the previous two years and another review and report every 10

years (beginning in 2017) on all effective mandates. Provides that the reports shall include for each mandate certain information concerning the mandate's citation and cost but makes the inclusion of other specified information permissive rather than mandatory. Includes comments about the mandate submitted by affected units of government as information that may be included in the reports. Makes grammatical changes. Effective August 12, 2016.

Public Act 99-0699 (SB 2321) (Syverson, D. / Welch, E.) - Amends the Child Care Act of 1969. Provides an exemption from the definition of "day care center" for programs that serve only school-age children and youth, that are operated by an entity organized to promote childhood learning, child and youth development, educational or recreational activities, or character-building, that also operate primarily during out-of-school time or at times when school is not normally in session, that comply with the standards of the Illinois Department of Public Health or the local health department, the Illinois State Fire Marshal, and specific health and safety requirements, that perform and maintain authorization and results of criminal history checks through specified law enforcement agencies and registries, that make hiring decisions in accordance with prohibitions against specified barrier crimes, that comply with staff qualification and training standards established by rule by the Department of Human Services after review of specific information, that provide parents with written disclosure that the operations of the program are not regulated by licensing requirements, and that obtain records showing the first and last name and date of birth of the child, name, address, and telephone number of each parent, emergency contact information, and written authorization for medical care. Provides that programs or portions of programs under the exemption that request funding from the Child Care Assistance Program (CCAP) must annually meet the eligibility requirements under the CCAP. Provides that where day care providers are exempt from licensure, the Department of Children and Family Services shall provide written verification of exemption and description of compliance with standards for the health, safety, and development of the children who receive the services upon submission by the provider of, in addition to any other documentation required by the Department, a notarized statement that the facility complies with: (1) the standards of the Department of Public Health or local health department, (2) the fire safety standards of the State Fire Marshal, and (3) if operated in a public school building, the health and safety standards of the State Board of Education. Effective July 29, 2016.

STOPGAP BUDGET / INTERFUND BORROWING FORGIVENESS

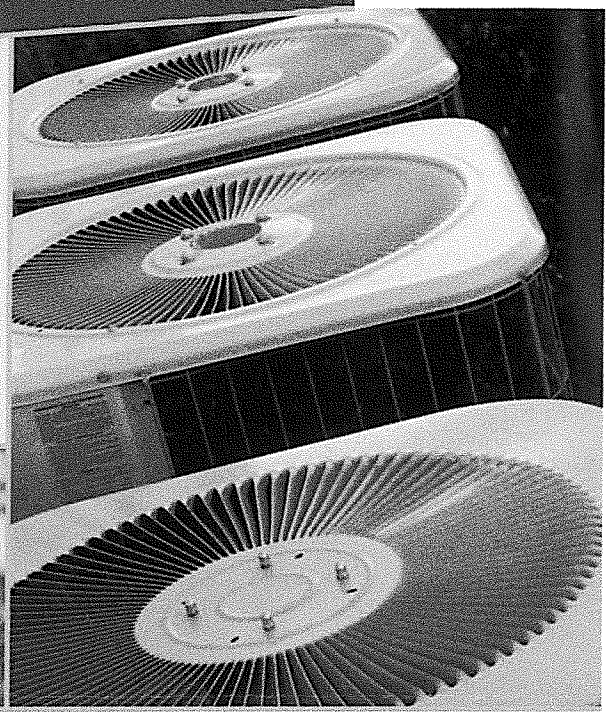
Public Act 99-0523 (SB 1810) (Trotter, D. / Currie, B.) - Creates the FY2017 Stopgap Budget Implementation Act. Provides that the purpose of the Act is to make the changes in State programs that are necessary to implement the Governor's FY2017 stopgap budget recommendations. Includes a provision that eliminates the requirement that funds, transferred as authorized for cash flow borrowing during fiscal year 2015, must be repaid within 18 months. Effective June 30, 2016.

Public Act 99-0524 (SB 2047) (Trotter, D. / Currie, B.) - Makes appropriations for Fiscal Year 2016 and 2017. Includes a $50 million appropriation for existing OSLAD grants and $50 million appropriation for PARC grants. Effective immediately with certain provisions subject to specified conditions. Effective June 30, 2016.

Illinois Department of Commerce

Illinois Energy Now

REBATES & INCENTIVES



Illinois Energy Now is an energy efficiency program administered by the State of Illinois that provides millions of dollars in rebates to public facilities that make large-scale equipment improvements to their electric and natural gas systems.

WHY APPLY FOR ILLINOIS ENERGY NOW?

Local governments receive rebates or other financial incentives for installing energy efficient products. Rebates can range from 15% up to 75% of your energy improvement costs.

It is funded by a System Benefits Charge on customer's monthly utility bill, not by taxpayer dollars. Your local government will continue to be rewarded in the future, with long-term savings on utility bills.

"Our high school was built in 1948 and desperately needed repairs to make it more energy efficient. But we couldn't afford to make them. Through Illinois Energy Now, we received a $250,000 rebate for natural gas upgrades. Now we anticipate saving up to $4,000 a month on future utility bills. That's a significant savings and translates into more money we can spend directly on our students".

Monty Aldrich, Superintendent
NORTH CLAY SCHOOL DISTRICT

WHO QUALIFIES?

All Illinois public facilities located within Ameren Illinois and ComEd electrical service areas or Ameren Illinois, Nicor, North Shore or Peoples natural gas areas are eligible. Examples include:

- Counties and Townships
- Municipalities and Villages
- Public Safety
- Water Reclamation Districts
- Public K-12 Schools
- Park Districts
- Health Departments
- Library Districts

ELIGIBLE PROJECTS

Potential upgrades to electric and natural gas systems include but are not limited to:

- Lighting Equipment
- HVAC Equipment
- Motors and Drives
- Kitchen / Refrigeration Equipment
- Ground Source Heat Pumps
- Gas Furnaces
- Boilers and Boiler Tune-ups
- Clean Water Equipment
- Water Heaters
- LED Traffic Signals

ilenergynow.org

Contact
Carol Kulek
217-741-2489
kulek79@aol.com

Illinois Department of Commerce
& Economic Opportunity
OFFICE OF ENERGY & RECYCLING
Bruce Rauner, Governor

5/31/2017 April 10