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PANDEMIC STATE: NAVIGATING THE STATE OF ILLINOIS' RESPONSE TO THE CHALLENGES OF COVID-19 IN THE WORKPLACE

By Jane Flanagan and Scott Lerner

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I. INTRODUCTION

As we write this Article in the fall of 2021, on the heels of yet another nationwide spike in COVID-19 cases due to the Delta variant, and as the Omicron variant begins circulating, it seems both too late and too soon to reflect on how the COVID-19 pandemic has changed the labor and employment landscape in Illinois: too late because so much change has already been integrated in the day-to-day functioning of private and public workplaces; too soon because we do not yet know what future changes will result from variants and surges of this virus. As such, the goal of this article is simply to provide some insight, from the perspective of our roles as lawyers within the Governor's Office,[1] into the kinds of legal and practical questions that the COVID-19 pandemic presented for the State of Illinois, both in its capacity as a large public employer and in its role interpreting, implementing, and enforcing state labor and employment laws.

Because of the ever-evolving nature of the pandemic and the attendant legal questions it has raised and continues to present in workplaces, this Article focuses largely on the immediate pandemic response in the spring and summer of 2020, and then on some of the additional considerations that arose as we learned to live with the pandemic during the fall of 2020, and into 2021. Throughout the Article, we highlight lessons learned and truths reinforced while the State faced an unprecedented challenge: the importance of collaboration and communication (across agencies, between employers and their labor partners, and between government and community and industry); and that crises present opportunity to demonstrate that even large bureaucracies can accomplish tremendous change in a short period of time when there is no choice.

[1] Jane Flanagan and Scott Lerner are Deputy General Counsels in the Office of Illinois Governor JB Pritzker. We have written this article from our personal experience and recollection, as well as the observations of our colleagues within the Governor's Office the broader State team. There are countless State employees who spearheaded and contributed to the initiatives that we describe in this article. In particular, the Department of Central Management Labor Relations team was instrumental throughout the pandemic response.

II. IMMEDIATE PANDEMIC RESPONSE

A. Considerations for the State as Employer

The State employs approximately 50,000 people at agencies that report to the Governor.[2] When the pandemic reached a turning point in the U.S. in March 2020, the State, in its role as large employer, faced the same novel and urgent questions that other employers encountered: how to keep employees safe during a deadly pandemic; how to continue critical in-person operations as safely as possible for employees and members of the public; how to continue non-critical but important operations to the extent possible remotely; and how to pivot a significant contingent of the workforce to remote work with as little disruption as possible. In addition to these questions common to most large employers, the State had to navigate a number of additional complexities given its unique role and charge. For instance, the State runs congregate facilities for people in its care and custody; remote work was not an option for employees of these facilities, and safeguarding both staff and individuals in care and custody was a significant challenge. Relatedly, the State has a large number of boards, agencies, and commissions with different functions and missions and on-the-ground operations. The State attempted to provide direction and guidance that would apply across agencies with a baseline level of consistency, while also allowing agencies flexibility to craft appropriate solutions for their specific needs and workforce. In addition, unlike many private sector employers, the State's workforce is overwhelmingly unionized (more than 90 percent), so communication and negotiation with its labor partners was essential.[3]

In the section below, we describe some of the steps the State took as an employer in light of these unique challenges. Looking back, we believe that the early response to the pandemic forced a State bureaucracy that is reputed to be (and often is) slow to change given its size and complexity, to quickly adapt in an unprecedented way.

1. Immediate Considerations

"Gradually, then suddenly."[4] For many of us reflecting on the early days of the pandemic, that phrase aptly describes how the pandemic came to be the dominant force in our work and our lives. In late 2019 and early 2020, we read and watched the news with fear and horror as a novel coronavirus overwhelmed hospitals in Wuhan, China, and then began to spread.[5] The warnings were alarming, but not so different from those that public health officials had issued about the swine flu, and Ebola, and other diseases that never ultimately interrupted everyday

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[2] Mark Maxwell, Illinois Executive Agencies Still 40% Remote or Hybrid, Pritzker Administration Memo Says, Central Illinois News and Weather (Aug. 10, 2021, 3:23 PM), https://www.wcia.com/illinois-capitol-news/illinois-executive-agencies-still-40-remote-or-hybrid-pritzker-administration-memo-says/.

[3] Kyle Bentle, *By the Numbers: Janus Ruling and 873,110 Union-Covered Workers in Illinois*, CHI. TRIB. (Jun. 27, 2018, 1:10 PM), https://www.chicagotribune.com/news/breaking/ct-unions-illinois-janus-by-the-numbers-20180626-htmlstory.html.

[4] ERNEST HEMINGWAY, THE SUN ALSO RISES (1926).

[5] Listings of WHO's Response to COVID-19, World Health Organization, (Jun. 29, 2020), https://www.who.int/news/item/29-06-2020-covidtimeline.

life in the U.S. on any large scale.[6] In the first months of 2020, it seemed as though COVID-19 might likewise remain something that Illinoisans would mourn at a distance as it was reported in the news.

Things changed at a remarkable pace in March 2020, as mitigation steps that had been unthinkable just days earlier became universal throughout the State and the U.S. On March 9, Governor Pritzker issued what would be the first of many disaster proclamations due to COVID-19.[7] At that time, there were eleven confirmed cases of COVID-19 in Illinois, all in Cook County; there had not yet been any deaths in the State from the disease.[8] On March 13, the Governor limited gatherings to no more than 1,000 people[9] and ordered closure of the State's schools for in-person learning.[10] On March 17, the Governor ordered bars and restaurants closed for in-person service.[11] By March 20, the Governor had issued a statewide stay-at-home order that generally only permitted essential businesses and services in the State to operate in person and limited gatherings to no more than ten people.[12]

Although the stay-at-home order technically exempted governments—allowing them to determine their essential operations for themselves[13]—the public health emergency left the State as an employer in the same position as other private employers: pressed to immediately determine what operations were essential and needed to continue in person, which could be moved remote, and which needed to be paused in the short term. As it became clear that the State was headed in the direction of a stay-at-home order, the Governor's Office had provided high-level direction to its agency leadership intended to help them navigate this unprecedented challenge. That guidance stressed a few principles for agencies to consider as they identified three main categories of staff: first, those who would need to continue to report to work in person because of their job duties; second, those who would work remotely, and already had the capability to do so; and third, those who would not report to work in person, but as of that time lacked the capacity to work remotely—because of lack of technology (such as laptops, cell phones, or remote access), or because the nature of the job was on-site but the

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[6] 2009 H1N1 Timeline, Center for Disease Control ("CDC"), https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html (last visited November 29, 2021) and 2014-2016 Ebola Outbreak in West Africa, CDC, https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html (last visited November 29, 2021).

[7] Gubernatorial Disaster Proclamation (Mar. 9, 2020), *available* at https://coronavirus.illinois.gov/content/dam/soi/en/web/coronavirus/documents/coronavirus-disaster-proc-03-12-2020.pdf.

[8] What We Know About the 4 New Coronavirus Cases in Illinois, NBC Chicago (March 10, 2020, 3:32 PM), *https://www.nbcchicago.com/news/local/what-we-know-about-the-4-new-coronavirus-cases-in-illinois/223391O/*.

[9] Ill. Exec. Order No. 2020-04 (March 13, 2020), https://coronavirus.illinois.gov/resources/executive-orders/display.executive-order-number-4.2020.html.

[10] Ill. Exec. Order No. 2020-05 (March 13, 2020), https://coronavirus.illinois.gov/resources/executive-orders/display.executive-order-number-5.2020.html.

[11] Ill. Exec. Order No. 2020-07 (March 16, 2020), https://coronavirus.illinois.gov/resources/executive-orders/display.executive-order-number-7.2020.html.

[12] Ill. Exec. Order No. 2020-10 (March 20, 2020), https://coronavirus.illinois.gov/resources/executive-orders/display.executive-order-number-10.2020.html.

[13] *Id.*

stay-at-home order had stopped the core job activity (such as inspectors whose facilities were not in operation).[14] The State emphasized that:

- All employees would continue to be paid. Those employees who at the moment lacked capacity to work from home were expected to be available and in contact with supervisors as expectations changed, and as remote work capacity expanded.
- Agencies were instructed to err on the side of public health directives, sending employees home at least temporarily, and to support remote work requests whenever possible, including for those employees dealing with school closures—recognizing that not all State employees can work from home given the nature of their jobs, and that many critical functions of State government needed to continue uninterrupted.
- Agencies needed to quickly assess needs and procure the necessary IT equipment to facilitate remote work. Over the course of the coming weeks and even months, agencies and the Governor's Office worked closely with the State's Department of Innovation and Technology (DoIT) to order additional laptops and phones; obtain licenses that would allow employees to remotely connect to their work computer from their personal computer; and develop timekeeping measures and other policies to allow for remote work.

Another key element of the guidance to agencies was the importance of keeping their labor relations teams apprised of the work status for all unionized employees.[15] That directive was in line with the State's broader goal of consistently apprising its labor partners regarding its actions in response to COVID-19, both at the State leadership level and also at the agency level. As agencies were determining as quickly as possible which employees would continue to report on-site and which would not, the State also determined and communicated to its labor partners a few critical decisions based on the then-existing science and its desire to err on the side of caution with respect to its employees' health and safety:

- If an employee was diagnosed with or quarantined as a result of COVID-19, that employee would continue to receive pay without needing to use their own leave time. The State made clear that supervisors could expect quarantined employees to work remotely, as possible.
- Agencies could require employees with symptoms of COVID-19 to leave the workplace to seek medical evaluation. As with diagnosis or quarantine, employees would not need to use their own leave time to cover this absence.

[14] *Id.*
[15] *Id.*

- Through Executive Order, the Governor allowed agencies more flexibility to advance any employee necessary leave time,[16] and the State also directed agencies to be liberal in their application of leaves and advancement of time.
- As with other use of sick and leave time, the State made clear that if it suspected abuse of such absences, it would request documentation in accordance with applicable collective bargaining agreements ("CBAs") and agency policies and procedures.

In this way the State tried to promote safety while also maintaining essential operations.

2. New Initiatives

After the frenetic early days during which this initial guidance was sent, and agencies scrambled to determine who to have report in person and who would work remotely, the State adopted a few critical initiatives and policy decisions, in light of discussions with its labor partners, to formalize and make more specific this earlier and more high-level guidance.

One critical initiative was creating a centralized protocol for all agencies to follow in the event they learned of or suspected a positive COVID-19 case on their premises. This "COVID-19 Exposure Response Statewide Team" was comprised of members from the Illinois Department of Public Health (to provide the latest guidance with respect to testing, quarantine, cleaning, and other mitigation); the Department of Central Management Services (CMS) Labor Relations (to ensure a level of consistency across agencies and an ability to quickly update labor partners on any developments); and CMS Facility Management (to quickly send staff to clean and sanitize an area or shift employees from one location to another). Each agency was instructed to appoint a COVID-19 point person, who then would gather a list of identified relevant information to submit on an Incident Report form to an email address that was accessible to the entire COVID-19 Exposure Response Statewide Team.

This COVID-19 Exposure Response Statewide Team developed guidance that it circulated to agencies to help determine what to do in frequently occurring situations, and when to and when not to report an incident to the centralized email address. It generally instructed that reporting was not needed when quick investigation revealed that the COVID-19 exposure was remote, or simply rumored. When reporting was appropriate, agency point people were directed to also copy their Labor Relations Manager on the email, to flag any potential incident for labor partners. The Labor Relations Managers, in turn, were directed to notify any affected unions of the potential exposure and to let them know that they would be updated as quickly as possible regarding subsequent responsive measures.

[16] Ill. Exec. Order No. 2020-04 (March 13, 2020), https://coronavirus.illinois.gov/resources/executive-orders/display.executive-order-number-4.2020.html.

The State committed that the COVID-19 Exposure Response Statewide Team would, quickly after receiving an Incident Report, respond to the agency with direction including:

- a point of contact for the COVID-19 Exposure Response Statewide Team;
- whether office or facility closure was necessary;
- whether and how to notify external entities (such as local public health departments);
- required cleaning procedures;
- how to notify employees regarding potential exposure and work status—i.e., should employees continue to report to the work site in light of the incident;
- office or facility reopening criteria and procedure; and
- any expected reports or follow up after responsive action has been taken.

The State had a few goals in devising this centralized process for handling incidents. First, the State wanted incident responses to be reasonably uniform across agencies. This centralized process fostered consistent reactions to an exposure at one agency compared to another. Second, as the public health guidance quickly shifted, this centralized process allowed agencies to receive the most up-to-date instruction from knowledgeable public health personnel. Third, and relatedly, this process allowed for a proactive response calibrated to the situation and informed by science. Whereas early in the pandemic some agencies over-reacted to potential exposure (for instance, sending all employees home and perfoming deep cleaning based on an employee having remote contact with someone who had, in turn, had remote contact with an infected person), this process encouraged quick fact gathering—instead of reliance on rumors—and let the facts and public health guidance dictate the response. While this process was not perfect and improved as both the COVID-19 Exposure Response Statewide Team and agencies learned and adapted, it also facilitated a quick and important partnership between various agencies and agency divisions that previously had not frequently interacted.

Another key initiative was determining the appropriate leave policies for COVID-19 exposures and quarantine, as well as how to both incentivize and compensate State employees working in congregate settings that involved new risk as a result of the pandemic. The federal government put in place a useful framework to address some of these questions with the Families First Coronavirus Response Act (FFCRA).[17] FFCRA required employers to provide certain COVID-19 related leave and pay, including when (1) the employee was subject to a quarantine or isolation order, advised by a health care professional to self-quarantine, or experiencing COVID-19 symptoms and seeking a medical diagnosis; (2) the employee was caring for an individual who was quarantining or isolating; or (3) the employee was caring for

[17] Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat 178 (2020).

a child whose school or place of care was closed due to the pandemic.[18] For a good proportion of State employees, FFCRA worked and provided the necessary framework so that the State as an employer, and its employees, understood available leave and pay options.

At the same time, FFCRA contained exemptions that applied to a number of job categories across State government. Perhaps most significantly, FFCRA allowed employers to exclude "health care providers" and "emergency responders" from its coverage as appropriate.[19] The concept behind this exclusion made sense: employers, including the State, simply could not continue to function if a large number of critical employees were out for extended periods on FFCRA leave. And yet, the State had many employees who were "FFCRA excluded" and were reporting to work on a daily basis in many cases with a heightened risk of exposure to COVID-19 due to the congregate work setting. After dialogue with its labor partners, the State adopted a framework for these FFCRA excluded employees. There were a few goals of this framework.

For one, the State hoped to demonstrate its appreciation for the critical work these employees were performing, and to compensate staff for the new challenges of reporting to work each day during a pandemic. The State provided this subset of employees with "Premium Pandemic Pay for COVID-19," a twelve percent pay increase to an employee's base salary for days worked after April 16, 2020. This pandemic pay continued through October 31, 2020, for those employees in direct contact with individuals in the State's care and custody. The State coupled this pay benefit with an extra Personal Benefit day that employees would receive as of January 1, 2021. In addition to recognizing these employees' important work, the State hoped that these measures would promote attendance through the most difficult days of the pandemic, providing incentive to report to work during difficult circumstances.

On the other hand, the State did not want employees who had COVID-19 symptoms or documented exposures to show up to work and risk exposing other employees and people in the State's care and custody. Similar to leave afforded to FFCRA-covered employees, the State developed a "COVID time" policy for FFCRA-excluded employees, whereby absences as a result of quarantine or COVID-19 sickness would not be docked from an employee's benefit time.

The State also tried to address the issue of childcare for employees who were exempted from the stay-at-home order and had to continue physically reporting to work. The Governor's Executive Order 2020-10 specifically allowed certain day care facilities to continue to operate in order to serve the children of employees who were exempted from the Order such as first responders, law enforcement, and paramedics.[20]

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[18] Families First Coronavirus Response Act: Questions and Answers, U.S. DEP'T OF LAB. https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (last visited November 30, 2021).
[19] *Id.*
[20] Ill. Exec. Order No. 2020-10 (Mar. 13, 2020) ("Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure, and the following: . . . Day care centers for employees exempted by this Executive Order. Day care centers granted an

These decisions during the first several weeks of the pandemic provided the State with the framework for how it would adapt as an employer to the challenges of the pandemic. As is described in later sections of this article, some of these policies remained consistent as the pandemic and the public health situation changed, while others required updates and modifications.

B. Considerations for Private Employers and Workers

In the early days of the pandemic, at the same time that the State was grappling with how to respond to the pandemic as an employer, it was concurrently working to support private sector workers and employers as they navigated some of the same questions around workplace safety and employee leave, among others. This work—that of interpreting, advising, and engaging employers and workers around novel and emerging employment issues and enforcing workplace standards in the context of the pandemic—also required engagement and collaboration from a diverse set of state agencies, some of which had rarely worked together previously. It also necessitated input and ongoing dialogue with community stakeholders including workers advocates, unions, employers of all sizes, and other government agencies, as is described below.

1. Essential Workplace Guidance & Safety Protocols

In these early days of the pandemic, the immediate goal was relatively clear but unprecedented: to limit spread of the virus by getting as many people as possible to stay home, while at the same time not disrupting industries and businesses that were part of the pandemic response and were needed to meet basic community needs. The Governor's initial "stay at home" order, like many similar orders issued by other states and localities, rested on a distinction between "essential" and "non-essential" operations. It allowed for the continuation of "healthcare and public health operations," "human services operations," "essential infrastructure," and "essential government functions," as well as a number of categories of businesses designated as "essential business and operations."[21] The Governor's Office developed a framework by reviewing the few similar orders that had been issued by that point (March 20), and by referencing guidance promulgated by the federal Cybersecurity & Infrastructure Security Agency (CISA) regarding its identification of "16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a

emergency license pursuant to Title 89, Section 407.400 of the Illinois Administrative Code, governing Emergency Day Care Programs for children of employees exempted by this Executive Order to work as permitted.").

[21] By one estimate "essential" workers made up about 50 percent of Illinois's labor force or 3.1 million people. *See* Frank Manzo & Robert A. Bruno, *The Effects of the Global Pandemic on Illinois Workers: An Analysis of Essential, Face-to-Face, and Remote Workers During COVID-19*, IL. ECON. POL'Y INST., (Jun. 4, 2020), https://illinoisepi.files.wordpress.com/2020/06/ilepi-pmcr-effects-of-global-pandemic-on-illinois-workers-final-6.4.20.pdf.

debilitating effect on security, national economic security, national public health or safety, or any combination thereof."[22]

In this time, the most pressing questions from employers and workers concerned the parameters of who was an "essential" worker and, for those essential workers and workplaces, what were the health and safety protocols that employers should have in place in order to prevent the spread of COVID-19. The Illinois Department of Public Health (IDPH) became a convergence point for many of these conversations, organizing the public health research and federal guidance developed and disseminated by the CDC, as well as the on-the-ground experience and perspective of the local health departments in communities throughout the state. Another crucial partner in that work was the Department of Commerce and Economic Opportunity (DCEO). The Governor's Office and DCEO conducted outreach to industry leaders and business groups to determine what in-person operations could be temporarily halted and what in-person operations needed to be continued. As speculation grew regarding what a "stay-at-home" order might cover, State government officials were flooded with input regarding what categories of activity should be counted as "essential." DCEO quickly stood up a call center to answer specific business questions, to provide guidance and feedback, and to receive input and suggestions for additional modifications.

The State always allowed any business to perform "Minimum Basic Operations": "[t]he activities necessary to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, and process payroll and employee benefits, or for related functions." [23] That also included tasks critical to allowing employees "to continue to work remotely from their residences."[24] The State universally encouraged remote work—even for those who qualified as "essential" but nonetheless could perform some or all of their operations virtually.[25] The identified lists of "essential" and "non-essential" were adjusted in future executive orders as the State and the world learned more about the pandemic and how the virus spread.[26]

As soon as the State's "stay-at-home" order went into effect, questions turned to how to safely expand permitted activity and allow more businesses to resume their in-person operations. DPH took the lead on this work by supplying the public health guidance that would underpin both safety protocols and the attendant metrics and phases that could serve as benchmarks of pandemic spread. DCEO and the Governor's Office then worked with IDPH to translate those metrics into rules of the road for businesses that were operating and—as the COVID-19 infection numbers stabilized—would allow for the phased expansion of activities across the

[22] Cybersecurity & Infrastructure Security Agency, Identifying Critical Infrastructure During COVID-19, 16 Critical Infrastructure Sectors, https://www.cisa.gov/identifying-critical-infrastructure-during-COVID-19.
[23] Ill. Exec. Order No. 2020-10 (March 20, 2020), §1(13) https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx.
[24] *Id.*
[25] *Id.* §1(2), §1(16).
[26] *See* Ill. Exec. Order No. 2020-32 (April 30, 2020) https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx.

State. DCEO partnered with the Civic Consulting Alliance, a nonprofit group in Chicago focused on public-private collaboration, as well as Bain & Company, to reach out to hundreds of Illinois business leaders to develop both universal and industry-specific guidance for how to reopen safely. This new framework—which did not rely significantly on the "essential" versus "non-essential" designation but instead allowed most industries to resume at least limited in-person operations—was announced in May 2020.[27]

In addition to this general industry guidance, as spring and summer 2020 progressed, it became apparent that some essential workplaces, including meatpacking, migrant farmwork, and temporary warehouse and logistics work, were at particularly high risk for COVID-19 outbreaks and employed workers whose working conditions were particularly precarious. In partnership with legal teams at the Governor's Office and the agencies, IDPH began to focus on getting specific guidance out to some of these industries. This guidance was, by necessity, developed with the help and input of local health departments, and worker and public health advocates in communities, all of whom were in contact with workers on the ground and could relay some of the particular issues they were experiencing.

One example of such a collaborative process was an interagency group comprised of representatives from the Department of Labor, IDPH, and local health departments, that began regular calls with legal aid lawyers and social service providers who represent and support migrant farmworkers in order to develop specific guidance on preventing the spread of COVID-19 in crowded migrant labor camp housing. This group was able to understand the particular vulnerabilities of migrant farm workers, develop protocols for positive cases and exposures, and to spread the word about resources such as COVID-19 testing locations even in rural and remote parts of the state. As a result of this group's efforts, IDPH issued specific Migrant Farmworker Guidance and Migrant Labor Camp Guidance.[28]

Another example of the importance of the industry-specific community guidance was the Guidance for Temporary Staffing Agencies and Temporary Workers.[29] Because the guidance was developed with input from temporary staffing advocates and employee representatives, it included relevant details for the industry, such as the importance of distancing, ventilation, and crowding on shared transportation, such as buses or vans, a critical factor because many staffing agencies transport temporary warehouse workers every day from Chicago to the outer suburbs where large warehousing and manufacturing operations are located. Indeed, both the migrant labor guidance and the temporary worker guidance underscore what should be

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[27] Restore Illinois, State of Illinois Coronovirus Response, https://coronavirus.illinois.gov/restore-illinois.html (last visited November 30, 2021); Ill. Exec. Order No. 2020-38 (May 29, 2020) https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx.

[28] Covid-19 Community Guidance, Migrant Farmworkers, Ill. Dep't of Pub. Health, https://dph.illinois.gov/covid19/community-guidance/migrant-farm-worker.html (last accessed November 30, 2021); Covid-19 Community Guidance, Migrant Labor Camps, Ill. Dep't of Pub. Health, https://dph.illinois.gov/covid19/community-guidance/migrant-labor-camp.html (last accessed November 30, 2021).

[29] Covid-19 Community Guidance, Temporary Workers, Ill. Dep't of Pub. Health, https://www.dph.illinois.gov/covid19/community-guidance/temporary-worker-guidance (last visited November 30, 2021).

obvious but has nonetheless been a lesson reinforced again and again throughout this pandemic: government guidance and action are most effective when informed by advocates and communities who are on the ground and directly impacted.

2. Other Legal Changes around Leave, Benefits, & Protections from Retaliation

The need for guidance on novel issues posed by the COVID-19 pandemic extended far beyond health and safety concerns and into almost all aspects of employment law. Particularly in the early pandemic, employers were suddenly grappling with significant new federal legislation including the federal FFCRA[30] and the CARES Act.[31] In addition, there were a number of changes to state law adopted, either temporarily or permanently, in response to the pandemic.

The Department of Financial and Professional Regulation was also able to identify areas where regulations and licensing requirements could become more flexible to meet the urgent and critical needs for essential medical workers and services. Through proclamation, IDFPR allowed out-of-state medical professionals and medical professionals whose license had lapsed to provide care for patients with COVID-19 at long term care facilities and hospitals.[32] IDFPR also suspended certain so-called "scope of practice" regulations that typically limit the tasks that individuals with certain degrees can perform to allow, among other things, for licensed pharmacists to administer COVID-19 tests.[33]

The Illinois Department of Employment Security (IDES) adopted changes in response to the volume and factual questions raised by the pandemic. First, for individuals who had been temporarily laid off due to COVID-19, it suspended longstanding statutory and regulatory requirements that typically require individuals who are laid off to register with the State's job registry, IllinoisJobLink, and upload a resume.[34] Second, IDES amended its rules to clarify what constitutes being "available for work" in the context of the COVID-19 pandemic and what kind of a job search individuals need to conduct.[35] The amended rules state that an individual is still available for work "even if he or she imposes conditions upon the acceptance of work" and provides a pandemic-related example of an individual who had previously worked in person during the day but must now stay home to care for a child whose school has

[30] Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat 178 (2020).
[31] Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. Ch. 136 (2020).
[32] *See* Illinois Department of Financial and Professional Regulation, Proclamation to Invoke Emergency Powers to Modify and Professional Certification Statutes and Regulations for Out-of-State Physicians, Nurses, Respiratory Care Therapists, and Physician Assistants to Provide for Medical Assessment, Screening, and Treatment, and any Health Relief Necessary to Care for COVID-19 Patients at Long-Term Care facilities, Hospitals, Federally Qualified Health Centers and Other Facilities as Directed by IEMA and IDPH, (Mar. 20, 2020), https://www.idfpr.com/forms/DPR/03%2020%202020%20DPR%20Variances.pdf.
[33] *See* Illinois Department of Financial and Professional Regulation, Proclamation to Invoke Emergency Powers to Modify Professional License and Certification Statutes and Regulations for Out-of-State Licensed Physicians to Provide Medical Assessment, Screening, and Treatment, and any Health Relief Necessary to Care for COVID-19 Patients and for Illinois Licensed Pharmacists to Administer COVID-19 Tests, (Apr. 10, 2020), https://www.idfpr.com/Forms/COVID19/Physician%20Pharmacist%20Proclamation.pdf.
[34]56 Ill. Admin. Code § 2865.100(a)(1)(K).
[35] 56 Ill. Admin. Code Section § 2865.110.

closed."[36] The rule makes clear that that individual could limit their job search to positions that could be performed from their home and still be "available" for work within the meaning of the law.

IDES also prepared and modified internal guidance on how to interpret legal precedents for an employee having "good cause" to refuse work or to voluntarily quit work in order to take into account the degree of risk associated with the COVID-19 pandemic. In determining whether work is not suitable for an individual, and thus good cause to refuse work exists, the Department's updated interpretation of the law considered the degree of risk involved to the individual's health and safety in light of the employer's compliance with the Governor's directives, and DPH/DCEO/CDC cleaning and disinfection requirements. In this way, it was intended to account for claimants who either are particularly vulnerable because of their own health, or who quit or refuse to work because of the unsafe conditions at their former job.

Another pandemic-related legal change was to the workers' compensation law. On June 5, 2020, Governor Pritzker signed into law Public Act 101-0633, which amended the Occupational Diseases Act to create a rebuttable presumption for first responders and front-line workers who are exposed to and contract COVID-19 in the course of their employment that "the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front-line worker employment."[37] This presumption could be rebutted through evidence of several other factors, including that the employee was working from home or that the employee had been exposed to COVID-19 by "an alternate source" than at the workplace.[38] Although initially set to expire at the end of 2020, the Illinois General Assembly extended this presumption to all COVID-19 diagnoses made on or after March 9, 2020 through June 30, 2021.[39]

In addition to these legal changes, the novel factual context of the pandemic prompted questions regarding the application of longstanding employment laws and protections around issues such as paid leave, civil rights, and medical privacy among others. In an effort to address a host of these issues in one document for the benefit of workers and employers without counsel, the Illinois Departments of Labor, Employment Security, Health, and Human Rights, as well as the Workers' Compensation Commission, and the Office of the Illinois Attorney General created a comprehensive Guidance for Employers and Employees on Workers' Rights and Safety During the Restore Illinois Plan.[40] The Guidance included best practices and frequently asked questions addressing issues like anti-discrimination and anti-retaliation protections, medical privacy, and entitlement to wages and benefits. As with other

[36] *Id.* at § 2865.110(a).
[37] 820 ILCS 310/1(g)(1).
[38] 820 ILCS 310/1(g)(3).
[39] 820 ILCS 310/1(g)(4).
[40] State of Illinois, et al., Guidance for Employers and Employees on Workers' Rights and Safety During the Restore Illinois Plan, Illinios Attorney General (Dec. 9, 2020), https://illinoisattorneygeneral.gov/rights/Guidance%20on%20Workers%20Rights%20and%20Safety.pdf.

pandemic cross-agency collaborations, one of the benefits of this document was to facilitate agencies talking to each other and cross-trained on issues such that they would be better equipped to direct an inquiry from a member of the public than they would have been previously.

III. LIVING WITH THE PANDEMIC AND ONGOING RESPONSE

A. Considerations for the State as Employer

As the spring of 2020 gave way to summer and into fall, a "new normal" began to slowly emerge for the State. For congregate care settings such prisons and veterans' homes, employees continued to work on site, as they had since the beginning of the pandemic. They continued to receive pandemic pay through October 2020 and to have access to additional paid leave if they were symptomatic or had been exposed to COVD-19 at work. For these employees, the only significant changes were to the required mitigation safety practices that continued to evolve with the emerging science and public health recommendations.

For another group of state agencies that had initially sent most employees home to work remotely, considerations of when to bring staff back in person were largely a function of finding the right balance between safeguarding staff and members of the public, while also performing the agencies' fundamental duties and serving those who needed them most. For example, the child protection officers at the Department of Children and Family Services resumed in-person visits to children while continuing to complete many of their administrative duties by working from home. The Department of Human Services (DHS) reopened local offices to ensure that low-income members of the public -- including those seeking public assistance for the first time as a result of the pandemic -- could apply for or resolve issues with their benefits. These in person services were particularly important for individuals who lacked reliable internet access. To provide these in-person services, DHS implemented a "cohort" or team system, in which only about 30% of staff would be present in a local office at any given time. The same group of employees would be physically present for a two-week pay period and then that team or cohort would rotate out and work from home while the next cohort would rotate in. During the time that staff was working at home, they would provide assistance over the phone, including working with individuals who might be talking to them from a conference room at a local DHS office. This structure allowed for distancing and limited everyone's potential COVID-19 exposure while providing needed in-person services.

These kinds of hybrid state office openings, while driven by necessity, have highlighted ways in which State agencies can use technology to expand existing capacity. For example, agencies like IDES and DHS found that many claimants and customers prefer to address issues electronically or through a call center model than a physical location and that employees may also prefer and be as or more efficient working a hybrid in-office and remote schedule.

At the same time, the pandemic also revealed that there are still many Illinoisans who cannot access state services electronically or by phone either because of limited English proficiency, a disability, or a lack of predictable access to or comfort with technology. In response to the first two concerns, the Governor's Office instructed state agencies for the first time to designate both a language access coordinator and a disability access coordinator and to engage in a planning process to make their respective agencies' websites and services accessible for all. For individuals who lack access to technology, there is no perfect substitute for physical offices and in-person help provided by knowledgeable public-employees or community-based organizations. However, with lower volume of customers at physical offices, State agencies may have greater flexibility to tailor services at these offices to the specific populations that most need in-person support. IDES, for one, is experimenting with how to increase access to technology by introducing resource rooms at American Job Center locations that could be used for various functions such as filing for unemployment insurance, applying for other benefits, or even preparing a resume or a cover letter.[41]

For the remainder of state agencies with limited-to-no public interaction, returning staff to the office was largely driven by technology capabilities, ability to perform work at home and the specific mission and working dynamic of the agency. Some state agencies began to get in a rhythm of remote work and find that for some jobs, employees could be as, if not more, productive working from home, depending largely on the nature of the job and the availability of the necessary technology. Once employees were equipped with laptops, remote access to servers and shared drives, and work phones, a variety of jobs including IT, legal, and regulatory tasks, were very well suited to remote work. However, without the appropriate infrastructure or technology, it was nearly impossible to perform such tasks at home. At agencies like the Workers Compensation Commission and the Illinois Department of Labor, for example, the lack of electronic access to case files meant that administrative law judges—jobs that might otherwise be suited to remote work—reported to the state offices on a regular basis to obtain the paper case files with which to hold hearings or write administrative decisions. As such, state agencies learned that remote work can be feasible and beneficial, but only for certain kinds of jobs and when supported by the IT infrastructure.

B. Considerations for Private Employers and Workers

As the State was beginning to resume more in-office operations, private sector employers and businesses were also reopening, and an ongoing challenge became how to encourage and enforce guidance and safety standards. Given the realities of the pandemic and the State's limited resources, the State's overall message was focused on education and persuasion as the goal and the best methods of keeping residents safe.

[41]See generally American Job Center Southern Illinois, http://www.americanjobcentersi.org/ (last visited Nov. 29, 2021).

In the context of occupational safety, Illinois does not have an OSHA-approved private sector "state plan."[42] Illinois OSHA does inspect and have authority to adopt occupational safety and health standards in public workplaces, but only the Occupational Safety and Health Administration of the United States Department of Labor has authority to inspect and issue citations for occupational safety and health violations in private sector workplaces in Illinois. Thus, while measures such as masking, social distancing, frequent cleaning and sanitizing became recommended public health guidance—and generally well-adopted protocols in many workplaces—Illinois OSHA had no authority to adopt mandatory workplace standards in private workplaces, in contrast to private sector state plan states such as California that have adopted various emergency temporary standards for COVID-19.[43] Illinois OSHA did receive a grant from federal OSHA to allow it to offer free COVID-19 workplace safety consultation to small and medium-sized Illinois businesses through its "Back to Business" service.[44] As of this writing, 549 employers have utilized the Back to Business Illinois service, either by taking an online self-certification course offered by Illinois OSHA or through a live virtual or on-site safety consultation with Illinois OSHA.[45]

For the most part, education and persuasion, as well as most businesses' genuine desire to keep their employees and customers safe, worked. Nonetheless, as more regular activities began to resume, the State and concerned workers and constituents who contacted the State, were concerned about flagrant violations, particularly in workplaces, because people generally do not often have a choice about whether to go to work. The Attorney General's Office Workplace Rights Bureau expanded its existing hotline so that workers could call and speak to an attorney or paralegal if they were experiencing safety concerns at work. The Attorney General's Office in turn spoke weekly, and often more regularly, with an interagency group of executive branch agencies that included DPH, DCEO, and the Governor's Office. In this way, information was shared about particular industries or areas of concern in terms of compliance with safety protocols.

This interagency working group allowed for information sharing about particular issues and collaborative brainstorming about how to bring all possible tools to bear to gain compliance with masking and safety guidance. For example, when one agency learned of concerns about hotels or large venues planning on holding an event, DCEO would reach out with guidance for businesses about capacity limitations and required safety measures prior to the event. When the State received a report of casinos or restaurants with gaming on the premises not requiring masks, agents from the Illinois Gaming Board could visit the establishment and, if necessary, temporarily shut down gaming if public safety was at risk. Agents from the Illinois

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[42] Many other states have these plans published through the federal OSHA. Occupational Safety and Health Administration, State Plans, United States Deparment of Labor, https://www.osha.gov/stateplans (last visited Nov. 29, 2021).

[43] California's COVID-19 specific emergency temporary standards are available at California Department of Industrial Relations, COVID-19 Prevention Emergency Temporary Standards—Fact Sheets, Model Written Program and Other Reousrces, https://www.dir.ca.gov/dosh/coronavirus/ETS.html (last visited Nov. 5, 2021).

[44] Further information on the Illinois OSHA consultation process is available at Illinois Department of Labor, Illinois OSHA,https://www2.illinois.gov/idol/Laws-Rules/safety/Pages/default.aspx (last visited Nov 5, 2021).

[45] Information provided to the authors by the Illinois Department of Labor's Occupational Safety and Health Division.

Department of Agriculture (DOA) who routinely inspect smaller meat processing plants in Illinois, began including considerations like masking and distancing in their inspections. The Illinois Liquor Control Commission issued warnings to bars and restaurants that were flouting public health guidance. The Illinois Department of Financial and Professional Regulation assisted with entities in industries that it regulates such as the barbering, cosmetology, esthetics, hair braiding, and nail technology professions regarding critical safety and mitigation measures that needed to be in place for those facilities. In this way, the Governor's Office and the interagency working group functioned as a sort of informal hub with different state agency spokes that could bring enforcement or compliance resources to bear depending upon the situation.

In the case of actual outbreaks of COVID-19 in a workplace, the authority of IDPH and the local health departments to enforce public health directives and the Communicable Disease Code became relevant. Because of the nature of this respiratory pandemic, public health was intertwined with worker health: an outbreak of COVID-19 in a meat processing plant would spread in the community when workers went home at the end of a shift; a COVID-positive employee in a grocery store could potentially infect both coworkers and customers, which in turn posed risk to the broader community. Regional health departments and IDPH have authority to investigate COVID-19 outbreaks, and issue quarantine and isolation orders, among other measures to control spread.[46] These enforcement strategies, among others, were discussed in weekly standing calls with IDPH and all of the local health departments, as well as in one-on-one conversations and consultations between local health departments and their applicable Regional Health Officer at DPH. Again, these collaborations were imperfect and could not provide all of the resources that small under-resourced local health departments suddenly needed, but it did promote unprecedented levels of information sharing and collaboration—both with IDPH and among the local health departments.

[46] 20 Ill. Comp. Stat. 2305/2 (2021 State Bar Edition) ("The State Department of Public Health has . . . supreme authority in matters of quarantine and isolation, and may declare and enforce quarantine and isolation when none exists . . .).

C. COVID-19 Vaccines and the Workplace

On December 11, 2020, the U.S. Food and Drug Administration (FDA) issued the first emergency use authorization (EUA) for a vaccine for the prevention of COVID-19 in individuals 16 years of age and older.[47] The vaccine was a game-changer for the State, providing new hope of a way to combat the virus and return to more normal activities. At the same time, the vaccine posed new questions and challenges to the State in its role as an employer.

When the vaccine was first approved, supply was extremely limited and the focus was on getting it to the State's most critical and at-risk populations. Illinois was among some of the states that prioritized vaccine availability for "frontline essential workers" in group 1b, at the same time as residents 65 years and older.[48] Frontline essential workers were defined to include individuals performing work in education, food and agriculture, including processing plants, manufacturing, first responders and law enforcement, shelters and adult day care centers, grocery stores, and public transit, including taxi and rideshare drivers.[49] The guidance also instructed vaccine providers regarding the types of documentation that had to be provided, and clarified that vaccination should be made available to eligible frontline workers regardless of immigration status. As with earlier iterations of guidance, DPH and the Governor's Office also met with community organizations to disseminate this information and raise awareness about vaccine availability, with a particular focus on reaching immigrant communities and vulnerable workers and residents.

Many State employees qualified for vaccination early in its distribution by virtue of their work and work setting. For instance, Phase 1a included healthcare personnel, including at congregate care facilities, as well as long-term care facility residents and staff, and Phase 1b included additional essential workers and staff as well as incarcerated individuals in the custody of the Illinois Department of Corrections.[50] IDPH partnered with IEMA to distribute vaccines to qualifying facilities, including State-run facilities. The State faced challenges in this initiative: transporting and storing vaccine supply safely (when it required cold storage) and distributing it to all geographic regions of the State.

As vaccine supply increased and additional populations became eligible in the spring of 2021, the State attempted to make vaccination easy and convenient for all State employees. The Governor announced that all State employees would become eligible for the vaccine as of

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[47] U.S. Food & Drug Admiminstration, Comirnaty and Pfizer-BioNTech COVID-19 Vaccine, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-COVID-19/comirnaty-and-pfizer-biontech-COVID-19-vaccine (last visited Nov. 5, 2021).
[48] Illinois Department of Public Health, Vaccine Provider Instructions, https://dph.illinois.gov/covid19/healthcare-providers/vaccine-provider-instructions.html (last visited Nov. 5, 2021).
[49] *Id.*
[50] *Id.*

March 22, 2021.[51] In the weeks after that decision, the State made vaccinations available for employees on set days at a number of locations at workplaces throughout the State.

By summer 2021, vaccine supply outstripped demand, and the State turned its efforts to encouraging hesitant employees at its congregate care facilities to get the vaccine. The State and its agencies worked with labor partners to host vaccine information sessions for employees who wanted to learn more about the vaccine. The four principal congregate facility agencies (the Department of Veterans' Affairs, the Department of Human Services, the Department of Corrections, and the Department of Juvenile Justice) each coupled those informational sessions with drawings and prizes for employees who got vaccinated.[52] Frontline employees who got vaccinated were eligible for cash bonuses ranging from $5,000 to $10,000; State-sponsored prizes (such as lifetime hunting and fishing licenses from the Department of Natural Resources, Abraham Lincoln Presidential Museum passes, and State Fair admission and concert tickets); airline vouchers; and sports tickets.[53] (Most State employees also were eligible for the Statewide series of lottery drawings for all Illinoisans who received the vaccine.)

The widespread availability of the vaccine separately prompted the State to develop plans for bringing more employees back to in-person work. At the same time, the pandemic had shown that remote work or a hybrid model could be successful in many areas of State government, at least in the short term, and many State employees who had converted to working part of the time from home expressed a desire to continue to do so. While State government had previously discussed a remote work policy, no such policy had ever been implemented on a large scale. Thus, the question going forward has been whether and how remote work might be utilized to produce results as good or better as an in-person workplace on a permanent, non-emergency basis. To begin to develop answers to those questions, the State engaged its largest union partner, AFSCME, to discuss a remote work pilot program. In late June, 2021, the State and AFSCME agreed on a framework whereby the State would pilot a number of positions for remote work or hybrid work through January 2022. As a result, agencies and their local union partners have engaged in discussions regarding the specific employee titles and classifications that should be included in this pilot program. For perhaps the first time it seems possible that, because of the necessary experiment in remote work due to the pandemic, coupled with the lessons of this pilot program, the State will be able to develop a long-term framework and plan with respect to remote work.

IV. Lessons and Looking Ahead

[51] A.D. Quig, *More essential workers can get shots over the next two* weeks, CRAIN'S CHICAGO BUSINESS (Mar. 19, 2021), https://www.chicagobusiness.com/health-care/more-essential-workers-can-get-shots-over-next-two-weeks.
[52] Press Release, "Gov. Pritzker Announces New Package of Incentives for Vaccinated Frontline State Employees" (Jul. 7, 2021), https://www.illinois.gov/news/press-release.23533.html.
[53] *Id.*

As we write this Article, public and private employers continue to grapple with when and whether to return to the office, and whether, and for which employees, to require proof of vaccination or routine COVID-19 testing. The pandemic continues to raise questions and evolving challenges for the State, private and public employers, and workers. However, given our collectively warped sense of time due to the pace and speed of recent change, it is not too soon to reflect on what lessons the pandemic has already taught, reinforced, or revealed.

First, the pandemic strongly reinforced a well-known truth about government: that cross-agency collaboration is critical and bureaucratic silos should be broken down whenever possible. While this has long been an acknowledged goal of the State, in practice cross-agency collaboration is often held back by concerns about turf, acting outside accepted chains of command, or the slow process of building trust. By sheer necessity, the COVID-19 pandemic tore down these familiar obstacles and cleared a path for state agencies that had rarely interacted before, such as DPH and DCEO, to suddenly be in near constant communication. Similarly, and as discussed previously, it required state and municipal entities to work together and collaborate much more closely and frequently than they had previously. While all of this cross-agency communication was not seamless, it was truly essential and led to a more comprehensive understanding and response to a host of pandemic-related questions. Hopefully increased comfort with and buy-in for cross-agency collaboration will prove a lasting positive effect of the pandemic and, as we reflect on what might be done now in advance of the next unforeseen crisis, we believe that forming new synapses between unfamiliar parts of government is incredibly useful. It would be ideal to routinely foster and build connections and relationships between even seemingly unrelated parts of State government as a matter of course and before the need arises in order to even more quickly and effectively stand up emergency response teams or address novel issues when needed.

A second well-recognized truth nonetheless reinforced by the pandemic is the importance of community partnerships to effective governance, including with unions, employers, community groups, and industry associations. With public employee unions, these partnerships mattered at both the agency level (in terms of ongoing communication regarding remote work, safety measures, and protocols for employees testing positive) and also at leadership levels as the State and union partners worked to quickly establish new paradigms for work (sick leave during a pandemic, child care leave when schools have gone remote for most children, expectations for performing work remotely) in a pandemic world. These relationships also allowed dialogue about the future of work as a State employee, including a new experiment into a more permanent form of hybrid or remote work. With both employer and workers' advocates, open communication led to a real-time feedback loop about what was happening on the ground in private workplaces, where additional guidance was necessary, and what was and wasn't working in terms of the State's response to COVID-19 on an ongoing basis.

Finally, we hope that the pandemic will prove the adage "never let a good crisis go to waste." For those of us working in State government during the COVID-19 pandemic, it has often

been difficult to focus on anything more than the immediate and urgent work right before us. However, it is also important to note and build upon the areas in which State government has improved or innovated as a result of changes forced by the pandemic and where we learned real lessons about how government can work better and serve its constituents better. From making more State information and services accessible electronically, including for individuals with limited English proficiency or visual impairments; to exploring a pathway for hybrid and remote schedules for some State employees; to reexamining professional licensing and recognition standards, the pandemic provided both the opportunity and urgency to upend entrenched practices that had previously been slow to adapt. By pausing to reflect, even as the pandemic's challenges continue to evolve, we can assess how to prepare better for the next emergency, or simply reassess entrenched practices and whether they can be improved, and not let this crisis go to waste.

RECENT DEVELOPMENTS

By Student Editorial Board:
Enrique Espinoza, Eric R. Halvorsen, MaryKate Hresil, Erin Monforti

I. IPLRA

A. Employee Classification

American Federation of State, County, and Municipal Employees, Council 31 and the City of Chicago, L-RC-19-024 (Oct. 21, 2021)

On October 21, 2021, the Illinois Labor Relations Board issued *In re AFSCME, Council 31 and the City of Chicago*, affirming the recommended decision and order (RDO) of the administrative law judge (ALJ). AFSCME had petitioned to represent individuals working in the "Attorney" job classification within several departments in the City of Chicago: the Department of Aviation, the Department of Business Affairs and Consumer Protection, the Office of the City Clerk, the Civilian Office of Police Accountability, the Chicago Police Department, the Department of Procurement Services, the Department of Public Health, and the Department of Water Management. The City contended that the employees were excluded from representation under the managerial exclusion in Section 3(j) of the Illinois Public Labor Relations Act (IPLRA), that several specific employees were confidential employees under Section 3(c), and that one attorney was a supervisory employee under Section 3(r).

The ALJ rejected the City's arguments. None of the employees were found to be managerial employees because they did not predominantly engage in executive or management functions, nor were their interests so aligned with management to warrant the use of the exception. The attorneys were further found not to be managerial because no statutory language dictates their powers or duties. None of the attorneys were found to be confidential employees, either—while COPA attorneys participate in the police investigative process, they do not direct the investigations, control their outcome, or impose discipline. The single attorney identified by the City as a supervisory employee was similarly found not excepted because she did not spend the majority of her time performing supervisory functions.

The City filed exceptions to the ILRB, challenging the conclusions of the ALJ. The Board, however, agreed with the ALJ and modified his findings only to apply an alternative test for managerial employees to all of the attorneys which were petitioned for by AFSCME. This test, outlined in *Salaried Employees of North America (SENA) v. City of Chicago*, 4 PERI 3028 (IL LLRB 1988), assesses whether the nature of an attorney-client relationship is such that the interests of an employee are so aligned with management to warrant the managerial exclusion. The Board found that this exclusion could not apply to any of the attorneys, because the test outlined was limited to the City's Law Department, which routinely represents City management. The

attorneys in this case, however, were staff attorneys who do not regularly represent management, and thus are not excluded as managerial employees.

B. Unit Appropriateness

Reaching Across Illinois Library System (RAILS) and International Brotherhood of Teamsters, Local 325, S-RC-21-003 (Sept. 24, 2021)

The International Brotherhood of Teamsters Local 325 filed a petition seeking to represent the positions of sorter, driver, and floater at the Rockford facility of the Reaching Across Illinois Library System (RAILS). RAILS objected to the proposed unit as it would only represent a small fraction of the total number of workers in those titles. The ALJ concluded that the proposed unit was appropriate. The ALJ acknowledged that the Board generally preferred larger bargaining units based on job function, and that a unit was presumptively inappropriate when the employer had a centralized personnel system and the unit sought only to represent a portion of employees in the same or similar job classifications. However, this presumption can be rebutted with evidence that the job classifications encompass employees with different functions and interests, or if there is a legitimate and rational basis for the smaller unit.

In this case, the petitioned unit was presumptively inappropriate; however, the ALJ found that the Union had rebutted the presumption by articulating a legitimate and rational basis for the smaller unit. The Union showed that each facility had its own staff who did not work with the drivers, sorters, and floaters from the other facilities. Further, the ALJ reasoned that the Board had approved other small units in the past, and to deny the petition would leave the workers without representation at all, or force them to organize workers who lived and worked hundreds of miles away—contrary to the goals of the Act. The employer filed exceptions to the ALJ's findings and decision, but the Board upheld the ALJ.

C. DFR and Judgment Compliance

Carmelita Otis, et al. and Local 200, Chicago Joint Board, L-CB-06-035-C (Sept. 24, 2021)

This case began its long procedural history in 2006 when pharmacists at Provident Hospital and members of the bargaining unit represented by Retail, Wholesale, and Department Store Union Local 200 accused the Local of breaching its duty of fair representation in a grievance concerning overtime. In short, they accused the Local of overpaying certain members, including the Local's president, and underpaying their share of the settlement. In 2010, the Board found that the Local had indeed violated its duty of fair representation and in violation of section 10(b)(1) of the Act. As a remedy, the Local was ordered to recalculate and properly distribute the $375,000 award. The Local did not do so.

In 2014, the Board issued a compliance order ordering the Local to pay the Charging Parties the amounts owed plus interest. The Illinois Appellate Court upheld the compliance order in an unpublished opinion. Then in 2017, the payment still not

having been made, the Appellate Court entered a rule to show cause as to why the Local should not be held in contempt. In 2018, the Court remanded the case back to the Board to determine the Local's ability to pay the judgement.

A hearing on the Local's ability to pay was conducted over four days, and the ALJ made a series of recommended findings that: (1) the Local had not shown that it lacked the ability to pay; (2) the Local and the Chicago Area Joint Board had an agency relationship; (3) that neither the Local nor the Joint Board had shown that they could not recoup the money that was wrongly distributed; and (4) that neither the Local nor the Joint Board had shown that they could not borrow money to satisfy the judgment through interunion loans.

It was undisputed that the Local held no assets, however the Joint Board had approximately $78,000 in assets in 2018. The Local had argued that it and the Joint Board were entirely distinct entities and as such the Joint Board could not be held responsible for the judgment against the Local. However, the ALJ took note of the fact that all dues collected by the Local were automatically turned over to the Joint Board, and the Local had no independent treasury or bank account. Further the Joint Board President had authorized settlement offers to the Charging Parties earlier in the case, and the Joint Board had paid for the Local's legal expense throughout the case. The ALJ concluded that the Local had not proven that it could not pay the judgment because of its relationship with the Joint Board.

The ALJ further concluded that a principal agent relationship existed between the Joint Board and the Local. Using the common law control test, the ALJ found that the Joint Board exercised a high degree of control over the affairs of the Local, and that the Joint Board could and did act on behalf of the Local. The Joint Board's decisions and bylaws were binding on the Local, the Joint Board President presided at meetings of the Local, and the Joint Board had to approve all contract entered by the Local.

The ALJ found that the Joint Board and Local had not made any attempt to recoup overpayments made to members of the Local in order to pay the Charging Parties. The President of the Local who had been personally overpaid $20,000 had not returned the money, and had not asked any of the other recipients to return their overpayments. The Joint Board did not discuss this option of raising the funds at all.

Finally, the ALJ found that the Local and Joint Board had not proven that they could not comply with the judgment through interunion loans. The evidence showed that the Joint Board had loaned locals money in the past, and that the UFCW and RWDSU had outstanding loans to locals. Further there was no evidence that the Joint Board could not segregate the Local's dues payments to satisfy the judgment.

The Union filed exceptions to the ALJ's recommended findings and decisions, and requested oral argument before the Board. The Board denied the request for oral argument, and upheld the ALJ's recommendations in full finding that the Local had not proven that it did not have the means to pay the judgment.

II. IELRA

A. Duty to Provide Information

Federation of College Clerical and Technical Personnel, Local 1708, IFTAFT, AFL-CIO, and City Colleges of Chicago, Dist. 508

On November 6, 2019, Federation of College Clerical and Technical Personnel, Local 1708, IFT-AFT, AFL-CIO (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that City Colleges of Chicago, District 508 (College) committed unfair labor practices within the meaning of Section 14(a)(5)&(6) of the Illinois Educational Labor Relations Act (Act or IELRA), *115 ILCS 5/1 et. seq*.

The ALJ found that the College violated both sections of the Act and issued a Recommended Decision and Order (ALJRDO). The Board affirmed the ALJ and held that the College violated the Act.

An employer violates Section 14(a)(5) of the Act when it refuses to provide the Union with information that the Union has requested that is directly related to its function as the exclusive bargaining representative and reasonably necessary for the Union to perform this function. Here, the Board found that the College failed to provide all the required information in connection with a reduction in force (RIF) of certain bargaining unit members. Despite the College's allegations of having provided the Union with all the requested information, the evidence showed that the College provided the Union with only some of the requested information, failing to provide information about who was to perform the work of the laid-off employees at each campus and in each department, the specific department each laid-off employee worked in, and information from the College's individual campuses regarding the financial reasons underpinning the need for the RIF.

The College argued that certain requests were not relevant under the Act. However, the Board has adopted the NLRB's liberal definition of relevancy, requiring only that the requested information be directly related to the Union's function as bargaining representative and that it appears reasonably necessary for the performance of this function.

B. Position Elimination

Maine Township High School District 207 v. Maine Teachers Association, 2021 Il. App. (1st) 200910-U (1st Dist. Sept. 20, 2021)

In *Maine Township High School District 207 v. Maine Teachers Association, IEA-NEA, et al.*, a decision by the IELRB was upheld where the Board found the school district violated the IELRA by moving bargaining unit work outside of the unit.

In 2017, the District eliminated the position of career counselor at the high school. The three counselors who served in that position remained employed but were classified as general counselors. In December of that year, the District created a new position called "specialist." After the removal of career counselors, the Union filed a ULP alleging the District removed work from the bargaining unit. In a separate filing, the Union sought a petition to include the specialist position in the bargaining unit.

At the ULP hearing, representatives of the District admitted the specialist position would initially be doing the work of the career counselors, but overtime the specialists would use "data and analytic tools" to assist students, but did not explain why the existing bargaining unit members could not use the tools. At the hearing, it was also established that the specialist position did not require a teaching license like the career counselor position, but two of the three people employed in the position did in fact have a teaching license. Moreover, the specialist position completed all of the same tasks as the career counselor, but differed in the amount of time employed (twelve months versus ten months) and the specialist did not "counsel." The ALJ ultimately found the District had transferred bargaining unit work out of the unit and granted the Union's petition to have the specialist position included in the bargaining unit. The District sought review by the Board and the Board upheld the ALJ's findings. The District sought review in the Appellate Court only on the inclusion of the specialist position in the bargaining unit.

On appeal, the District argued the Board did not apply the correct criteria for its determination. However, the Appellate Court determined that while the Board did not explain each factor for its decision to include the position, it was not required to do so. Rather, the Board "need only be specific enough to permit an intelligent review of its decision." The Appellate Court also determined the positions were virtually the same so the Board's finding to include the position was supported by the evidence.

C. Review of Arbitration Awards

Western Illinois University v. Illinois Educational Labor Relations Board, 2021 IL 126082

On October 21, 2021, the Illinois Supreme Court issued *Western Illinois University v. Illinois Educational Labor Relations Board*. The case came before the court after the University laid off nineteen professors throughout the 2016–2017 academic year, and ten of these faculty members and their union representatives pursued grievances that proceeded to arbitration. The arbitrator determined that the University violated the collective bargaining agreement with regard to two professors. The arbitrator ordered the University to comply with the layoff and reassignment provisions in the agreement, and retained remedy jurisdiction for ninety days to "resolve any issues regarding the implementation of [his] Award."

The union, alleging that the University had failed to comply with the arbitration award, invoked the arbitrator's remedy jurisdiction to ask for an order demanding compliance from the University. The union also filed an unfair labor practice charge with the IELRB at this time, alleging violations of sections 14(a)(8) and 14(a)(1) of the Illinois Educational Labor Relations Act. The arbitrator elected to hold a second hearing to determine whether the University had complied with his award. Holding that it had not, the arbitrator issued a supplemental award, ordering compliance and individual remedies for the two professors who were not made whole after the original award was issued. Several days after this hearing, the union amended its charge to the IELRB, alleging that the University had also failed to comply with the arbitrator's supplemental award.

During the hearing before the IELRB, the Board found that the arbitrator was within his authority in issuing a supplemental award finding that the University was noncompliant and refused to hear evidence offered by the University beyond what it had presented to the arbitrator. The IELRB deferred to the arbitrator's decision and held that the University failed to comply with the original award and had thus committed an unfair labor practice. The appellate court disagreed—it held that the arbitrator had exceeded his statutory authority by reviewing compliance with his own award, and that the Board had erred in refusing to consider the University's additional evidence.

On review, the Illinois Supreme Court affirmed the appellate court. After a review of the statutory language of the Act and relevant case authority, the Court held that the IELRB has exclusive primary jurisdiction to review arbitration awards and enforce them. The arbitrator overstepped his authority by conducting a compliance review of his own award, which within the exclusive purview of the Board as set out by the Act. The court further concluded that the IELRB's decision was clearly erroneous because it misread the Act to permit the arbitrator to review his own award, and that it erred in not considering the evidence presented by the University at its hearing. The Act grants parties the right to present evidence in their defense of an unfair labor practice charge, and the Board improperly constricted that right during the hearing.

Two of the Justices filed a dissenting opinion advocating that the arbitrator's supplemental award was within his authority in reviewing the implementation of the original award. The dissent reviewed the statutory language of section 14(a)(8) to distinguish a willful refusal to comply with an award from an indeliberate failure to do so—it warned that equating the action of refusal with the inaction of failure to comply would create a new wave of actions unreviewable by arbitrators that would bog down the Board with reviews.

III. Circuit Court of Cook County: Vaccines

Fraternal Order of Police Chicago Lodge No. 7 v. City of Chicago, 2021 CH 5276 (Nov. 1, 2021)

In November, the Circuit Court of Cook County issued an order granting a temporary restraining order prohibiting the City from enforcing portions of its COVID-19 Vaccination Policy. The Order stipulated that the City could require employees to report their vaccination status and require biweekly testing for unvaccinated employees, but could not require all employees be vaccinated by December 31, 2021. The Fraternal Order of Police Chicago Lodge 7 and the Policemen's Benevolent and Protective Association of Illinois sought to stay the policy until the Unions' grievances could be arbitrated pursuant to their collective bargaining agreements.

The City initially announced a policy in August 2021. Following the announcement, the Unions met with the City to discuss policies related to the health of officers and the public. These discussions fell through. On October 8, 2021, the City announced the finalized policy that required: (1) all employees to report their vaccination status by October 15, 2021; (2) any unvaccinated employees to be tested twice a week; and (3)

all employees be vaccinated by December 31, 2021, except those with medical and religious exemptions. Failure to comply with the policy would result in "no pay" status until compliance was met. Since October 15, 2021, 27 police officers have been put on "no pay" status and were ineligible to work.

On October 14, 2021, the Unions filed ULPs against the City and sought arbitration for grievances against the City related to the policy. In the interim, the Unions sought a TRO in court until the matters could be arbitrated.

The court granted the TRO, in part. It noted that while typically injunctions are not granted in labor disputes, there are certain circumstances where an injunction is "warranted under ordinary principles of equity." In its analysis, the court determined the vaccination policy was a subject of arbitrability; the vaccine requirement could cause irreparable injury; the Unions made the requisite showing of colorable grievances; the Unions' request to have their grievances heard comes ahead of the City's request for vaccination when balanced against each other because the City can still require testing; and the order is narrowly tailored to an injunction of the mandatory vaccination by December 31, 2021, not the reporting or testing requirements.

IV. New and Pending Legislation

A. New Legislation

Public Act 102-0667: Amending the Health Care Right of Conscience Act

On November 8, 2021, Governor Pritzker signed a bill introduced in the Illinois General Assembly during the Fall Veto Session amending the Health Care Right of Conscience Act. The Act generally protects an individual's right to refuse to obtain, receive, or accept medical treatment without facing discrimination based on that decision. The amendment provides an exception to the Act for COVID-19 treatment and intervention. Any person, public official, employer, or institution may impose requirements that are intended to prevent the contraction, transmission, and spread of the coronavirus or "its subsequent iterations." The bill was presented and signed as a declaration of existing law, or legislative interpretation, rather than a change in Illinois public policy.

B. Pending Legislation

HB 2778: COVID-19 Paid Administrative Leave

On October 28, 2021, the Illinois General Assembly passed legislation that, if signed by Governor Pritzker, would provide mandatory paid administrative leave for school and Illinois public college and university employees for COVID-19-related absences. On November 1, 2021, the legislation passed both houses.

HB 2778 would:

- Require districts to provide COVID administrative days to any school or college employees to be used for all COVID-related absences like quarantining and testing, so employees will not have to use all of their accrued benefit time during the pandemic.
- Provide paycheck protection for hourly employees. This means that if a school or higher education institution has to close because of an emergency, hourly employees would still receive their entire paycheck.

The legislation does not specify a cap on the amount of leave used for this purpose. However, to be eligible, the employee must either be vaccinated or submit to weekly testing. The leave is only applicable while the Governor has declared a disaster due to a public health emergency according to Section 7 of the Illinois Emergency Management Agency Act.

As of November 30, 2021, the legislation has been sent to Governor Pritzker, who could sign or use his amendatory veto power.