

# THE VANTAGE POINTE™

PROACTIVE PERSPECTIVES ON ISSUES AFFECTING THE WORKPLACE

## Illinois Alters Course on How Discrimination Claims are Handled

### Introduction

On January 1, 2008, Illinois Public Law 095-0243 goes into effect. This law authorizes significant changes in how charges of discrimination pursuant to the Illinois Human Rights Act (“IHRA”), are handled. Under the old and new law, charges of discrimination pursuant to the IHRA must be filed with the Illinois Department of Human Rights (“IDHR”). Currently, however, a complainant with potentially meritorious claims is limited to adjudication of those claims before an administrative law judge. Under the new law, a complaining party may bypass the IDHR process and proceed to circuit court.

Historically, employment discrimination claims have been adjudicated before the federal courts where summary judgment is more likely and the probability of an experienced judge presiding over the case much higher. By contrast, in the state circuit courts, judges rarely preside over employment discrimination cases and juries in these courts are typically pro-employee. What this means for employers, potentially, is an increased cost in defending these claims with the added uncertainty of how the circuit courts will handle them. Consequently, employers are urged to develop sound preventive techniques to minimize filings and to consider early resolution of appropriate claims that are filed.

### Handling of Discrimination Complaints

A complainant alleging prohibited discrimination in the workplace must first file a charge of discrimination (“Charge”) under state or federal law, before filing a complaint in court. This is a jurisdictional requirement which if not satisfied, can result in the complainant being barred entirely from filing suit on the basis of alleged discrimination. The IHRA is enforced by IDHR while the federal laws (Title VII, ADA, ADEA, etc.) are enforced by the U.S. Equal Employment Opportunity Commission (“EEOC”).

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Both frameworks for filing a complaint provide a similar process to aggrieved complainants. An employer subject to EEOC jurisdiction is typically subject to IDHR jurisdiction as well. Employees can file with both agencies but must select only one agency for processing of the Charge. A complainant pursuing remedies through the IDHR must file a Charge within 180 of the last discriminatory act, while a complainant pursuing remedies through the EEOC must file a Charge within 300 days of the last discriminatory act. This article will focus on the process before IDHR.

### The IDHR Process

The process before the IDHR begins when a complainant files a Charge. The employer is served with the Charge within 10 days of the filing and is then required to provide a verified response to each and every allegation in the Charge within 60 days of receipt of the Charge. Once the response is received, the IDHR may commence a full-blown investigation, which includes personnel interviews, document requests, and holding a fact-finding conference where parties appear in person before the IDHR investigator. At the conclusion of the investigation, a report is issued by the Director of IDHR (“Director”). The Director may do one of two things: issue a finding of “no substantial evidence” and dismiss the Charge or issue a finding of “probable cause” of a violation of the law.

### Finding of No Substantial Evidence

Under current law, if the Charge is dismissed for lack of substantial evidence, a complainant may seek review of the dismissal order before the Illinois Human Rights Commission (“IHRC”). The new law allows a complainant to commence a civil action in circuit court instead of seeking review before the IHRC. This will allow a complainant with potentially frivolous claims to draw the process out further the claim. Instead of going to court, the complainant might

potentially frivolous claims to draw the process out further for the employer while driving up the expense of defending the claim. Instead of going to court, the complainant might choose to have the IHRC review the "no substantial evidence" finding of the IDHR Director; to do so, he must file a request for review with the IHRC within 30 days after receipt of the Director's dismissal. If the complainant chooses to file a request for review with the IHRC, he or she may not also go to circuit court. If the complainant chooses to file in circuit court, he must do so within 90 days after receipt of the Director's report.

### **Finding of Probable Cause**

If the Director issues a finding of "probable cause", a complaining party again may elect to have the claim heard either before the IHRC or the circuit court. If choosing the IHRC, the complaining party must make the election within 14 days of receipt of the Director's report. If the complaining party misses this deadline, he or she is then limited only to filing the complaint in circuit court and must file within 90 days of receipt of receipt of the Director's notice. Once the lawsuit is commenced, either party may request a trial by jury.

### **No Report in 365 Days**

In addition to the two potential findings that may be made after charge processing, if the IDHR does not issue its report determining whether there is substantial evidence of a violation within 365 days after the date the Charge is filed (or any longer period agreed to in writing by all parties), the complainant has 90 days to either file a complaint with the IHRC or file a lawsuit in circuit court. As already discussed, a complainant who files a complaint with the IHRC is barred from later commencing a lawsuit in circuit court.

### **Practical Effect of the New Law**

The old maxim, "an ounce of prevention is worth a pound of cure," rings especially true for employment discrimination claims. Although statistically most of these claims settle before trial, the overall cost to business is significant. In addition to the many hours spent by internal managers who must deal with the claims, there are hard costs. It is not uncommon for attorney fees for an employer's legal defense to range from \$150,000 to \$250,000 through a jury trial. Additionally, should the complainant prevail, the employer will be responsible for the legal fees of the complainant, court costs, and the judgment award. The price tag can be enormous. That said, adopting solid preventive techniques is a sound and necessary business practice that cannot be overvalued.

In our experience, preventive techniques can be grouped in two categories: Tier 1 techniques and Tier 2 techniques.

**Tier 1 preventive techniques** should focus on heading off the filing of complaints with administrative agencies and the courts. This can be accomplished by:

- Providing effective training to employees
- Providing effective training to all managers and supervisors
- Conducting thorough investigations of any internal complaints
- Taking prompt remedial measures when allegations of discrimination arise.

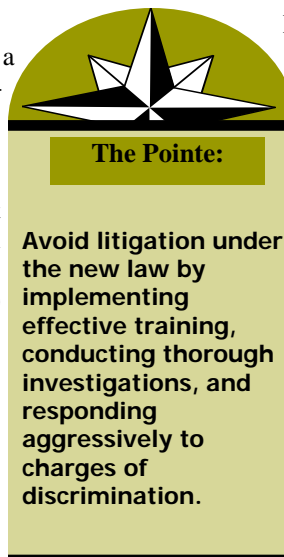
**Tier 2 preventive techniques** should focus on mounting a vigorous defense, with the goal of foreclosing the possibility of having claims presented to a jury. This can be accomplished through:

- Drafting effective position statements
- Engaging in tough settlement negotiations
- Utilizing skilled litigation tactics such as strategy-driven discovery and the use of aggressive motion practice.

### **Conclusion**

The new Illinois law opens the door for less predictable administration of employment discrimination cases by the courts, which might result in more claims filed at the state court, rather than administrative level, resulting in increased costs in litigation. Illinois employers should partner with skilled counsel early in the process to adopt creative approaches to handling these claims with an eye toward early resolution of appropriate cases.

If Vantage Legal Solutions, P.C. can assist you in the creation of prevention policies or in any other employment issues, please contact Betty Tsamis at 312.440.0602.



## **Smoke Free Illinois Act To Take Effect January 1, 2008**

### **Prohibited Smoking Areas**

Governor Rod R. Blagojevich has signed into law a statewide smoking ban. Beginning January 1, 2008, the Smoke Free Illinois Act, Illinois Public Act 095-0017 ("Act") will prohibit smoking in

all public places or places of employment, or within 15 feet of an entrance to any public place or place of employment. This prohibition will include places where smoking had traditionally been anticipated, such as bars, restaurants, and designated areas in public buildings. Additionally, smoking will be prohibited in any vehicle owned, leased, or operated by the state or a political subdivision of the state. Business owners, to be in compliance, must clearly and conspicuously post no smoking signs or symbols at every entrance and remove all ashtrays where smoking is prohibited. This Act will repeal the Illinois Clean Indoor Air Act, 410 ILCS 80, that previously governed smoking restrictions in the state.

### Permissible Smoking Areas

Smoking will be permitted in private residences, except those used for child care, adult day care, health care services, or home-based businesses opened to the public. Nursing homes and long-term care facilities may permit room occupants to smoke, if all occupants are smokers and the request is made in writing. Hotel and motel sleeping rooms are permitted to have designated smoking rooms as long as the smoking rooms are on the same floor, are contiguous and there is no infiltration of the smoke to nonsmoking areas. Additionally, retail tobacco stores may continue to operate and permit smoking as strictly defined by the Act.

### Violation and Enforcement

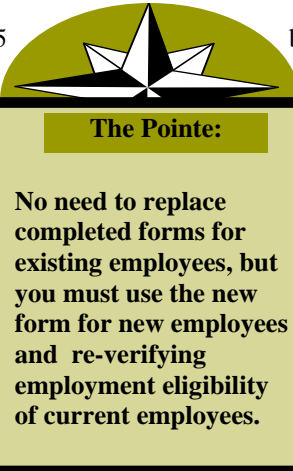
Any violation of the Act may be reported by an individual to the Illinois Department of Public Health, local state public health departments and local law enforcement agencies. Violations of the Act may result in fines for each day of violation. For individuals, fines can range from \$100 to \$25 while business owners are subject to fines of not less than \$250 and up to \$2,500 for repeated violations.

If you have any questions on the Smoke Free Illinois Act, please contact Dyahanne Ware at [dware@vantage-legal.com](mailto:dware@vantage-legal.com) or 312.440.0602.

## Employers Must Use New I-9 Form by December 26, 2007

### Background

The U.S. Citizenship and Immigration Services (USCIS) announced on November 7, 2007 that only the newly revised Employment Eligibility Verification Form I-9 (Form I-9) may be used for hiring purposes. While the government requires all employers to use the newly modified Form I-9 beginning November 7, 2007, a grace period permits a transition until Decem-



#### The Pointe:

**No need to replace completed forms for existing employees, but you must use the new form for new employees and re-verifying employment eligibility of current employees.**

ber 25, 2007. That means that using the old Form I-9 after December 26, 2007 will subject employers to penalties.

### The Rules

Employers do not need to replace completed forms for existing employees, but you must use the new form when re-verifying employment eligibility of current employees. To prevent confusion, we strongly recommend that you discard all old, unused Form I-9s. Therefore, when the documents that were used to verify employment reach their expiration date, you must use the new Form I-9 to verify that the employee remains eligible for U.S. employment.

### Recordkeeping Requirements

The Form I-9 is not a document required to be submitted to the government, so there are no filing fees, but the employer must have in its files completed forms for each employee. Employers must retain each form for 3 years after the date of hire or 1 year after employment ends, whichever is later.

### How to Obtain the New Form

The new Form I-9 and the "Handbook for Employers, Instructions for Completing Form I-9" are available online from USCIS, [www.uscis.gov](http://www.uscis.gov), or by calling USCIS, 1-800-870-3676, or calling the National Customer Service Center, 1-800-375-5283. The new form contains the revision date, (Rev. 06/05/07)N, in the lower right corner. Once received, the form may be photocopied for use with each new employee, but it is important that both sides be copied. The form must also now be used for re-verifying employment eligibility. That is, for any document that was used to verify employment that contained an expiration date, you must provide the updated information on the new Form I-9.

A Spanish version is available for those employers who have Spanish speaking employees; however it is to be used only for translation purposes. Only employers located in Puerto Rico may use the Spanish language version for their records.

If you have any questions on the new Form I-9, please contact Dyahanne Ware at [dware@vantage-legal.com](mailto:dware@vantage-legal.com) or 312.440.0602.

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EMPLOYMENT COUNSELING & CONSULTING



PROACTIVE  
PERSPECTIVES ON  
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The Vantage Pointe™ is a quarterly publication of Vantage Legal Solutions, P.C. and Vantage Solutions LLC®, Chicago-based firms specializing in employment law and human resource strategies. Our 110 years of experience in employment law and HR gives us the superior position from which to provide employers of all sizes with proactive strategies to better manage their workforce. Our workplace solutions help maximize worker productivity, reduce turnover, and minimize employment practices lawsuits.

Our integrated and customized services include policy and procedure development, customized on-site training for managers and employees, ongoing advice and counsel on employment law topics, independent investigations of employee complaints, and conflict and dispute resolution.

For more information, contact us at 312.440.0602 or 877.816.4818.

This newsletter is for informational purposes only and should not be considered legal advice. For more information on any of the articles here, please contact Dyahanne Ware at the number above or at [info@vantage-solutions.com](mailto:info@vantage-solutions.com).

**Vantage Legal Solutions, P.C.**  
Welcomes  
**Dyahanne Ware**  
as its  
**Regional Managing Counsel**  
in the Chicago office

Dyahanne Ware is Regional Managing Counsel for Vantage Legal Solutions, P.C. Ms. Ware has over 20 years experience representing international organizations as in-house counsel. She has overseen a broad range of legal issues including employment representation before the Equal Employment Opportunity Commission and the Illinois Department of Human Rights, transactional matters, and regulatory compliance. Ms. Ware is skilled at working with all levels of employees and providing creative solutions for complex matters involving disability management, reductions in force, employee absences and requests for accommodation. Having been a small business owner, she understands small and local business needs. She enjoys working with them to develop employment policies and practices and helping them to incorporate sound legal practices with a small business focus.

Dyahanne earned her undergraduate degree from the University of Illinois at Chicago, her Juris Doctor from The John Marshall Law School, and her MBA from the University of Chicago. She is licensed in Illinois and is a member of the bar for the U.S. District Court for the Northern District of Illinois.

Dyahanne resides in Chicago where she is an active member of the local Chamber of Commerce.