SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

The Illinois Appellate Courts, and occasionally the Illinois Supreme Court, analyzed various employment related cases in 2016—the majority in the realm of arbitration and collective bargaining agreements. Various statutes were evaluated including the Illinois Wage Payment and Collection Act,[1] the Trade Secrets Act,[2] the Whistleblower Act,[3] the Employee Classification Act,[4] and the Public Safety Employee Benefits Act.[5] Other employment issues scrutinized included an employer's duty of care, employment contracts, and *respondeat superior* liability.

The First District analyzed a sole, notable sexual/age harassment case. In *Cook County Sheriff's Office v. Cook County Comm'n on Human Rights*,[6] it was determined that injunctive relief was appropriate where repeated sexual advances sufficiently constituted sexual misconduct, thus creating a hostile and abusive work environment. The First District also affirmed the significant damages award in *Mendez v. Town of Cicero*,[7] where the jury found that the plaintiff was transferred in retaliation for reporting sexual harassment. The issuance of unemployment insurance benefits continues to be a disputed. In *Petrovic v. Department of Employment Security*,[8] the Illinois Supreme Court held that the Illinois Department of Employment Security improperly denied a former employee her unemployment insurance benefits because the court concluded that she did not violate any rules.

The cases discussed within this article are organized by subject, as displayed in the outline above.

II. DISCRIMINATION

A. *Kreczko v. Triangle Package Machinery Co.*, 2016 IL App (1st) 151762

The Illinois Appellate Court, First District, affirmed summary judgment in a Human Rights Act claim in *Kreczko v. Triangle Package Machinery Co*.[9]

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1. 820 ILL. COMP. STAT. 115.
2. 765 ILL. COMP. STAT. 1065.
3. 740 ILL. COMP. STAT. 174.774
4. 820 ILL. COMP. STAT. 185.
5. 820 ILL. COMP. STAT. 320.
6. Cook Cty. Sheriff's Off. v. Cook Cty. Comm'n on Hum. Rts., 2016 IL App (1st) 150718.
7. Mendez v. Town of Cicero, 2016 IL App (1st) 150791.
8. Petrovic v. Dep't of Emp't Sec., 2016 IL 118562.
9. Kreczko v. Triangle Package Mach. Co., 2016 IL App (1st) 151762.

In that case, Triangle Package Machinery Company (Triangle), a food packaging company that designs, manufactures, and services food packaging equipment, terminated a 51-year-old employee after receiving multiple customer complaints about his unprofessional behavior and job performance.[10] According to Triangle, customers complained about the employee's, Andrew Kreczko's (Kreczko), lack of adequate knowledge. On one occasion, Kreczko allegedly left a service call without completing several essential tasks.[11] Kreczko met with management; however, he continued to demonstrate unsatisfactory performance.[12]

Four months after Kreczko's termination, Triangle hired a younger, Hispanic employee to fill his position.[13] Kreczko sued Triangle alleging age, disability and racial discrimination.[14] Kreczko alleged that he was in a protected class and met Triangle's legitimate expectations.[15] As to the disability claim, Kreczko alleged that he had a preexisting heart condition and Triangle knew that he had difficulty working in certain conditions.[16] The race discrimination claim was based on the fact that a Hispanic employee, a minority, replaced him.[17] The circuit court granted Triangle's summary judgment motion as to Kreczko's disability and race discrimination claims and dismissed the case.[18] Kreczko appealed.[19]

In analyzing the age discrimination claim, the First District noted that Kreczko did not dispute that he failed to perform his job satisfactorily.[20] Triangle memorialized each performance issue in writing and met with Kreczko on two occasions advising him that he needed to improve.[21] In response, Kreczko argued that he submitted an affidavit to the contrary.[22] Furthermore, he argued that he did not receive documentation about the customer complaints until his deposition and therefore did not have the opportunity to dispute them.[23] Regardless, Kreczko failed to identify a younger employee, similarly situated, who was permitted to retain his or her

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10. *Id.* at ¶¶ 1, 5.
11. *Id.* at ¶¶ 5–6.
12. *Id.* at ¶¶ 7–8.
13. *Id.* at ¶ 1.
14. *Id.*
15. *Id.* at ¶ 12.
16. *Id.*
17. *Id.*
18. *Id.* at ¶ 15.
19. *Id.* at ¶ 2.
20. *Id.* at ¶ 28.
21. *Id.* at ¶ 30.
22. *Id.* at ¶¶ 30–31.
23. *Id.* at ¶ ¶30.

job.[24] Therefore, he failed to establish a *prima facie* case of age discrimination.[25]

Next, Kreczko supported his disability claim by contending that he was involved in an accident, which caused a heart attack, was hospitalized, and prescribed medication.[26] Triangle responded that Kreczko never provided any verifiable medical documentation that substantiated a heart condition.[27] Kreczko mentioned the condition during his initial interview, but never declared that it was a disability or that restricted his job performance.[28] Furthermore, he never asked for accommodations.[29] The court determined that Triangle's reason for firing Kreczko was legitimately based on his poor work performance.[30] Therefore, the trial court's order granting summary judgment on both age and disability discrimination claims were affirmed.[31]

B. *Murillo v. City of Chicago,* 2016 IL App (1st) 143002

In *Murillo v. City of Chicago*,[32] the court analyzed the Illinois Human Rights Act to determine whether it was proper to utilize an employee's background check as a reason to terminate her employment. In *Murillo*, the plaintiff was required to agree to a background check to keep her job of three years as a janitor at a Chicago police station.[33] The background check revealed that Murillo had a 1999 arrest for a drug charge, which had been dismissed for lack of probable cause.[34] The City of Chicago (City) refused to give Murillo security clearance, causing her contractor to terminate her employment.[35] Shortly thereafter, Murillo filed suit against the City, alleging that it coerced or compelled her employment contractor to terminate her employment based on her previous arrest, which prevented employers from using the "fact of an arrest" as a basis to discriminate in employment.[36] The circuit court granted Murillo's partial summary judgment which ruled that the

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24. *Id.* at ¶ 33.
25. *Id.* at ¶ 34.
26. *Id.* at ¶ 39.
27. *Id.* at ¶ 40.
28. *Id.*
29. *Id.*
30. *Id.* at ¶ 42.
31. *Id.* at ¶ 43.
32. Murillo v. City of Chi., 2016 IL App (1st) 143002.
33. *Id.* at ¶ 2.
34. *Id.*
35. *Id.*
36. *Id.* at ¶ 11.

City violated section 5/2-103 of the Illinois Human Rights Act[37] (Act) by using Murillo's arrest to alter the terms of her employment. The court awarded costs of $11,208.10 and prejudgment interest of back pay and pension to Murillo.[38]

On appeal, the City argued that the use of the arrest report was permissible under subsection (B) of the Act "because the reports were 'other information' and indicated that Murillo 'actually engaged in the conduct for which she was arrested.'"[39] Murillo argued that subsection (B) required an investigation into her arrest beyond the police report to determine whether she actually committed the crime.[40] Because the City failed to investigate further, the City's actions against her were based on her arrest and violated subsection (A) of the Act.[41] The First District noted that Murillo's arrest records did not provide any information that she actually engaged in criminal conduct or that she failed to cooperate with police.[42] The arrest report described that "Murillo was in physical proximity to some narcotics at her place of employment," but there existed no statement from her or any other witness and there was a lack of physical evidence.[43] The court noted that the Act does not "prevent an employer from firing employees who were arrested even though their actions did not result in a legal penalty."[44] The court further noted that although both parties argued the legislative history supported their position, the plain language established "that the Act protects a person whose arrest is not an accurate signifier of their character" and "was arrested without probable cause or was simply in the wrong place at the wrong time."[45] The evidence showed that the City used Murillo's arrest to deny her security clearance and caused her contractor to change the terms of her employment. The appellate court affirmed Murillo's partial summary judgment[46] and remanded the issue relating to attorney's fees to the circuit court.[47]

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37. 775 ILL. COMP. STAT. ANN. 5/2-103(A) (West 2014).
38. *Murillo,* 2016 IL App (1st) 143002 at ¶¶ 13, 16.
39. *Id.* at ¶ 23.
40. *Id.*
41. *Id.*
42. *Id.* at ¶ 25.
43. *Id.*
44. *Id.* at ¶ 28.
45. *Id.* at ¶ 29.
46. *Id.*
47. *Id.* at ¶ 38.

C. *Decatur Park District v. City of Decatur*, 2016 Il App (4th) 150699

The Fourth District reviewed a racial discrimination claim in *Decatur Park District v. City of Decatur*.[48] In that case, the Decatur Park District ("District") filed a petition for a writ of prohibition against the City of Decatur ("City") and the Decatur Human Relations Commission (Commission), alleging that the District engaged in unlawful retaliation against a District employee, Rukya Bates-Elem ("Bates-Elem").[49] Bates-Elem alleged that she was retaliated against because she filed a racial discrimination claim against the District.[50] After her employment was terminated, Bates-Elem alleged that her supervisor, human resources manager and risk manager engaged in misconduct.[51]

The circuit court dismissed the District's petition for writ of prohibition, finding the Commission had jurisdiction to proceed with its claim of unlawful retaliation against the District pursuant to chapter 28 of Decatur's City Code.[52] The District appealed and argued the court erred in dismissing the petition and "erred in declining to rule on the District's claim that it was entitled to immunity pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act)."[53]

The Fourth District affirmed the circuit court's dismissal of the District's petition[54] and first noted the requirements for a writ of prohibition, which include:

> "first, the action sought to be prohibited must be judicial or quasi-judicial in nature; second, the jurisdiction of the tribunal against whom the writ is sought must be inferior to that of the issuing court; third, the action sought to be prohibited must be either outside the jurisdiction of the inferior tribunal or if within the jurisdiction, beyond its legitimate authority; and

48. 2016 IL App (4th) 150699.
49. *Decatur Park District,* 2016 IL App (4th) 150699, ¶ 3.
50. *Id.* at ¶ 5.
51. *Id.*
52. *Id.* at ¶¶ 17, 1. "Section 2-1 of chapter 28 of the City Code states: 'It shall be unlawful, and shall constitute a human rights violation, for any person to discriminate against another person because of his or her race, color, religion, national origin, age, sex, sexual orientation, marital status, disability or unfavorable discharge from military service.'" *Id.* at ¶ 17.
53. 745 ILL. COMP. STAT. ANN. 10/1-101 to 10-101 (West 2012); *Decatur Park District,* 2016 IL App (4th) 150699, ¶ 17.
54. *Decatur Park District,* 2016 IL App (4th) 150699, ¶ 33.

> fourth, the party seeking the writ must be without any other adequate remedy."[55]

The City and Commission conceded that the District's claim met the first two elements and therefore focused on "whether the Commission had jurisdiction to enforce the human rights ordinance against the District."[56]

The court disagreed that section 7-108 of the Illinois Human Rights Act[57] provided the City or Commission with jurisdiction to adjudicate a retaliation claim, and reasoned the City had authority to prohibit an employer from retaliating against an employee for filing a race discrimination claim.[58]

The District next argued it was protected by the immunities afforded in the Tort Immunity Act, because the alleged retaliatory actions would constitute discretionary policy determinations.[59] Again, the Fourth District agreed with the circuit court in that "any ruling made with regard to the Tort Immunity Act would be premature."[60] The court held the Tort Immunity Act does not affect the Commission's jurisdiction. Rather, the Tort Immunity Act is an affirmative defense.[61]

Employers who request employees include their credit history information may be in compliance with the Fair Credit Reporting Act,[62] but should also be aware that states, such as Illinois, have strict requirements for using credit information in employment screening purposes.

D. *Ohle v. Neiman Marcus Group*, 2016 IL App (1st) 141994

In *Ohle v. Neiman Marcus Group*,[63] the plaintiff, Catherine Ohle ("Ohle"), failed a credit check and was therefore denied a job with the defendant, Neiman Marcus Group ("Neiman Marcus"), and claimed that her rejection was in violation of the Employee Credit Privacy Act[64] ("Act").[65] "The Act prohibits an employer from inquiring about a potential employee's

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55. *Id.* at ¶ 15 (citation omitted).
56. *Id.* at ¶ 16.
57. 775 ILL. COMP. STAT. ANN. 5/7-108 (West 2012).
58. *Decatur Park District,* 2016 IL App (4th) 150699, ¶ 24.
59. *Id.* at ¶ 28.
60. *Id.* at ¶ 29
61. *Id.* at ¶ 30.
62. 15 U.S.C. § 1681 (2012).
63. 2016 IL App (1st) 141994.
64. 820 ILL. COMP. STAT. ANN. 70/1-30 (West 2012
65. *Ohle*, 2016 IL App (1st) 141994, ¶ 1.

credit history" and refusing to hire the applicant or discriminating against her based on credit history.[66]

Ohle interviewed for a dress collection sales associate position at Neiman Marcus.[67] "Sales associates process sales and returns of Neiman Marcus's merchandise."[68] They are also responsible for operating the cash registers.[69] Neiman Marcus sales associates accept in-store applications and payments for Neiman Marcus credit cards, which contain personal information.[70]

After the interview, Ohle was told that she could expect an offer pending the results of her background check.[71] Neiman Marcus completed the background check through a third-party reporting agency, which later informed her that Ohle failed her credit check.[72] The credit check revealed that Ohle had several civil judgments against her and several accounts in collections.[73] Ohle was notified by the reporting agency that she failed the credit check and would not be hired.[74]

Plaintiff filed a claim alleging that Neiman Marcus violated Act.[75] Neiman Marcus denied it engaged in any unlawful conduct and instead alleged an affirmative defense.[76] Neiman Marcus claimed it was covered by the Act's exemption because the position gave the employee access to personal and confidential customer information.[77] The Act provides an exemption where a "satisfactory credit history" is an "established bona fide occupational requirement of a particular position."[78] The circuit court agreed with the defense and held the sales associate position was exempt under the Act.[79] The circuit court "based its ruling on section 10(b)(5) of the Act which creates an exemption to allow employers to inquire into and use an applicant's credit history as a basis of hiring for a position involving '[a]ccess to personal or confidential information, financial information, trade secrets or national security information.'[80]

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66. *Id.* at ¶ 3.
67. *Id.* at ¶ 2.
68. *Id.* at ¶ 7.
69. *Id.*
70. *Id.* at ¶ 8.
71. *Id.* at ¶ 2.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at ¶ 3.
76. *Id.* at ¶ 5.
77. *Id.*
78. *Id.* at ¶¶ 3, 5.
79. *Id.* at ¶ 14.
80. *Id.* at ¶ 21.

Upon review, the First District noted "the term 'access' was not defined within the Act and no Illinois court had construed the meaning of the term."[81] Looking at the Act's legislative history, the intention of the bill was not for the use of credit cards by cashiers and other employees during business transactions.[82] Moreover, the court did not see any meaningful distinction between a credit card's confidential information or a credit card application, which also contains a customer's private information.[83] However, the plaintiff argued Neiman Marcus's vice president of loss prevention testified at trial that sales associates only have access to customer social security numbers and other confidential information when a new credit card application is submitted.[84] The sales associate immediately inserts the information into a cash drawer and later turns the information into the cash department.[85] Thus, the sales associate only has access to the customer's name, address and phone number.[86] Only the loss prevention manager or credit department would have access to the customer's social security number.[87] In addition, it was against corporate policy for sales associates to copy a customer's confidential information or access it after the credit account has been opened.[88]

The First District agreed with the plaintiff's argument and held there was no evidence in the record which identified that any type of detailed credit information was made available to or accessible to sales associates selling dresses for Neiman Marcus.[89] Furthermore, the court held to construe "access" to personal or confidential information so broadly as to include merely accepting credit card applications by an entry level employee applying for this type of position nullifies the legislative intent evidenced in the Act.[90] Therefore, the court held the defendant did not maintain its burden of proof that an exemption to the Act applied to the dress collection sales associate position, and therefore discriminated against Ohle due to her credit score.[91] Accordingly, the case was reversed and remanded.[92]

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81. *Id.* at ¶ 26.
82. *See id.* at ¶ 29.
83. *Id.* at ¶ 30.
84. *Id.* at ¶ 32.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at ¶ 40.
90. *Id.*
91. *Id.* at ¶ 47.
92. *Id.* at ¶ 49.

III. SEXUAL HARASSMENT

A. *Cook County Sheriff's Office v. Cook County Comm'n on Human Rights*, 2016 IL App (1st) 150718

The single noteworthy sexual harassment case from 2016 is *Cook County Sheriff's Office v. Cook County Commission on Human Rights*.[93] In that case, Cynthia Walker ("Walker") filed a claim with the Cook County Commission on Human Rights ("Commission"), alleging she was subjected to ongoing sexual discrimination and harassment in violation of Cook County Code of Ordinances while working at the Department of Corrections.[94] Walker alleged that within a four-year period, her coworker and eventual supervisor, Antonio Belk (Belk), subjected her to ongoing sexual discrimination by displaying unwanted physical contact and making sexual comments.[95] The Commission found in favor of Walker and the circuit court confirmed.[96] The Cook County Sheriff's Office (Sheriff's Office) appealed, arguing, *inter alia*, that the Commission's determination that Walker was subjected to sexual harassment was against the manifest weight of the evidence.[97]

The Sheriff's Office first argued that Walker failed to demonstrate that she subjectively perceived her work environment to be hostile or abusive, reasoning that the Commission found that Belk's conduct did not rise to the level of sexual harassment during the first year.[98] The court disagreed with the Sheriff's Office reasoning.[99] The court noted that Walker testified that she found Belk's acts of hugging her and massaging her shoulders to be unwelcome during that period of time, but did not initially consider them to be sexual harassment.[100] The court noted that it was not the nature of those acts, "but rather [the] pervasiveness and severity that formed the basis for the Commission's determination." Walker made it clear by her testimony and journal entries that Belk's physical advances and comments escalated in frequency and intensity after he became her direct supervisor.[101]

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93. 2016 IL App (1st) 150718.
94. Walker also filed a claim for age discrimination, alleging that Belk made age-related jokes and derogatory comments in front of her. *Id.* at ¶ 2; *Cook County Sheriff's Office*, 2016 IL App (1st) 150718, ¶ 1.
95. *Id.* at ¶ 2.
96. *Id.* ¶ 1.
97. *Id.*
98. *Id.* at ¶ 33.
99. *Id.* at ¶ 34.
100. *Id.*
101. *Id.*

Consequently, Walker's ability to perform her job became impaired. In addition, Walker's efforts to stop Belk's behavior often resulted in Belk making profane comments and physical threats. Walker's mental state eventually declined and she was referred to the Department of Corrections' Employee Assistance Program.[102] She was also treated by a psychologist and diagnosed with post-traumatic stress disorder.[103] Therefore, the court concluded that Walker's experience of a hostile work environment, which was a result of Belk's sexual advances, was not against the manifest weight of evidence.[104]

"The Sheriff's Office also argu[ed] that the evidence [did] not support a finding of sexual harassment under the objective" standard because Belk's physical advances were not sufficiently sexual in nature, but rather his conduct was, at worst, unprofessional, disrespectful, and threatening.[105] The court disagreed and held that even though Belk subjected Walker to a range of demeaning behaviors, he also engaged in undeniable behaviors of a sexual nature, in attempting to kiss her, massaging her shoulders, running his hands through her hair, touching her face, and pressuring her for dates.[106] Therefore, the court concluded that the aforementioned circumstances "sufficiently constituted sexual misconduct giving rise to a work environment that a reasonable person would consider hostile and abusive . . . ."[107]

In its last argument, the Sheriff's Office maintained that Walker's account of events was not credible because she relied on a journal throughout her testimony rather than testifying from her own memory.[108] In addition, the Sheriff's Office claimed that the Commission placed too much emphasis on the evidence in Walker's journal.[109] The court rejected both contentions, reasoning that Walker frequently looked at her journal to refresh her recollection as to particular dates or special details, but there was no basis to discount her testimony.[110] Because the Commission found Walker to be credible, the court was unable to conclude that their finding was against the manifest weight of the evidence.[111] In addition, the Sheriff's Office argument, which challenged the competency of the evidence contained in the journal,

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at ¶ 35.
106. *Id.* at ¶ 37.
107. *Id.*
108. *Id.* at ¶ 38.
109. *Id.*
110. *Id.* at ¶ 39.
111. *Id.*

was found to be untimely because evidentiary rulings cannot be challenged on appeal without being properly preserved.[112] The court affirmed the circuit court's ruling, which confirmed the Commission's decision.[113]

IV. RETALIATION

A. *Mendez v. Town of Cicero*, 2016 IL App (1st) 150791

In *Mendez v. Town of Cicero*,[114] Elizabeth Mendez (Mendez) observed the deputy superintendent sexually harass a coworker and reported it in May 2010.[115] The following November, the new police superintendent transferred Mendez to a clerk position in the building department with the same salary and benefits.[116] She filed a charge of discrimination with the Illinois Department of Human Rights, which determined there was substantial evidence that she was transferred in retaliation for reporting.[117] Mendez filed a lawsuit against the Town of Cicero alleging she was transferred from the executive administrative assistant to a clerk position in retaliation for reporting the alleged sexual harassment.[118] She sought punitive and compensatory damages, back pay, front pay, lost future wages, prejudgment interest and attorneys' fees and costs.[119] During the trial, settlement negotiations ensued, but failed.[120] The jury found in favor of Mendez on the retaliation claim, but declined to award the $150,000 for emotional distress and $30,000 for future lost wages.[121] After the trial, Mendez asked the court to order her reinstatement and back pay for overtime and additional pay she earned in her former position.[122] While the court considered the request, Cicero transferred Mendez to executive assistant to the commander of the gang crime tactical unit.[123] An emergency motion was filed to keep Mendez in her current position as building department clerk, until the court rendered a decision on her motion for equitable relief.[124] The court held Mendez was to be returned to her

112. *Id.* at ¶ 40.
113. *Id.* at ¶ 54.
114. 2016 IL App (1st) 150791.
115. *Id.* at ¶ 2.
116. *Id.*
117. *Id.* at ¶ 3.
118. *Id.* at ¶ 4.
119. *Id.*
120. *Id.* at ¶¶ 6–7.
121. *Id.* at ¶ 8.
122. *Id.* at ¶ 9.
123. *Id.* at ¶ 10.
124. *Id.*

position under the police superintendent, but, since that position was held by the police superintendent's sister, it was agreed that Mendez would be transferred to the executive assistant to the commander of the gang crime tactical unit.[125] The court denied back pay and a $10,000 salary increase.[126] Her attorney petitioned the court for fees in the amount of $346,337 and costs of $20,198. The court awarded $314,489 for fees and $15,923 for costs. Cicero sought to have those amounts reduced by 90% based on its opinion that Mendez was nominally successful in her lawsuit.[127] The trial court denied the reduction.[128]

Cicero appealed on the grounds that the court's award of attorneys' fees and costs were unreasonable considering Mendez's result.[129] Based on a Seventh Circuit case, *Anderson v. AB Painting and Sandblasting, Inc.*,[130] the appellate court reasoned that it is important that claims for violations of the law be sought through private litigation even if it is for minimal monetary damages.[131] Fee-shifting the expense ensures those claims are not abandoned.[132] Further, the court did not agree with defendant's characterization of Mendez's victory as nominal, since she was reinstated to a comparable position vindicating the retaliation she suffered for reporting sexual harassment.[133] The appellate court acknowledged the trial court had already reduced the legal fees and costs by 10%, and expressly stated that, "[a] defendant who elects to aggressively litigate a claim under the Act is not well-positioned to criticize the correspondingly greater fees a plaintiff is required to incur to pursue her claims."[134] The court found the trial court did not abuse its discretion and affirmed the judgment for fees and costs.[135]

125. *Id.* at ¶ 11.
126. *Id.*
127. *Id.* at ¶ 12.
128. *Id.*
129. *Id.* at ¶ 17.
130. 578 F.3d 542, 545 (7th Cir. 2009).
131. *Mendez*, 2016 IL App (1st) 150791 ¶ 18.
132. *Id.*
133. *Id.* at ¶ 19.
134. *Id.* at ¶ 23.
135. *Id.* at ¶ 24.

V. RESTRICTIVE COVENANTS

A. *McInnis v. OAG Motorcycle Ventures, Inc.*, 2015 IL App (1st) 142644

In *McInnis v. OAG Motorcycle Ventures, Inc.*[136] (OAG) the appellate court reviewed and affirmed the circuit court of Cook County's decision that there was not adequate consideration to support the noncompete agreement, and, therefore, it was unenforceable.[137] The defendant would not be able to meet the high burden for injunctive relief.[138]

Chris McInnis (McInnis) was a salesman/employee of OAG from August 2009 until October 2012.[139] When he was hired he had no experience selling motorcycles.[140] Through training and experience, he became a top salesman for OAG.[141] He left his position voluntarily to work for a competitor, Vroom Vroom, LLC d/b/a/ Woodstock Harley Davidson (Woodstock).[142] After working for one day for Woodstock, he asked for his former job back at OAG.[143] He was rehired.[144] OAG waived the 90-day trial period, but McInnis had to sign an employee confidentiality and noncompetition agreement.[145] The agreement set forth the consideration as the offer of employment and McInnis' exposure to proprietary and confidential information. McInnis was restricted from accepting employment with any Harley-Davidson dealership within 25 miles and directly or indirectly inducing customers that had a business relationship with OAG to discontinue or reduce the extend of such relationship. He worked for OAG from October 2012, until he voluntarily resigned on May 1, 2014, to return to work for Woodstock on May 5, 2014.[146] McInnis filed a complaint for declaratory judgment that there was not adequate consideration to support the noncompete agreement.[147] OAG filed a counterclaim against McInnis and a third-party claim against Woodstock.[148] OAG sought a temporary restraining order and preliminary injunction, which

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136. 2015 IL App (1st) 142644.
137. *McInnis*, 2015 IL App (1st) 142644 ¶ 51.
138. *Id.*
139. *Id.* at ¶¶ 3–5.
140. *Id.* ¶ 4.
141. *Id.*
142. *Id.* at ¶ 5.
143. *Id.*
144. *Id.* at ¶ 7.
145. *Id.*
146. *Id.* at ¶ 14.
147. *Id* at ¶15.
148. *Id.*

were denied.[149] McInnis' motion for declaratory judgment was granted.[150] The court based its decision on the fact that McInnis was not reemployed by OAG for at least a period of 2 years and the waiver of the 90-day trial period was not consideration under the law and no trial period was necessary, because McInnis was a proven top salesman.[151]

Inquiry into the adequacy of consideration is, as a general rule, not something the courts do.[152] However, in post-employment situations, there is a concern that the employment alone in an at-will situation may be illusory.[153] Thus, relying on *Fifield v. Premier Dealer Services, Inc.*,[154] the court concluded two years was sufficient for adequate consideration. Since McInnis only worked 18 months, and waiving the 90-day trial period was not consideration, there was no adequate consideration, so the restrictive covenants were unenforceable. Without such enforceability, OAG could not demonstrate the required likelihood of succeeding on the merits for injunctive relief.

Justice Ellis dissented based on three reasons: (1) there is no bright-line two-year rule with regard to continued employment as adequate consideration, (2) there is no need for additional consideration in the context of a newly hired employee versus an existing employee, and (3) employee voluntarily left to work for a competitor and since he left on his own accord, 18 months was a substantial period of time and not illusory.[155]

B. *AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863

In *AssuredPartners, Inc. v. Schmitt*,[156] the court examined noncompetition, nonsolicitation, and confidentiality provisions in an employment contract. Williams Schmitt (Schmitt), a wholesale insurance broker, was employed by ProAccess, LLC (ProAccess), a wholesale insurance brokerage firm.[157] He resigned. A lawsuit was filed alleging Schmitt unfairly competed and wrongfully diverted business away from ProAccess.[158] Prior to working for ProAccess, Schmitt worked for ProQuest and developed a

149. *Id.*
150. *Id.* at ¶ 17.
151. *Id.* at ¶ 19.
152. *Id.* at ¶ 27.
153. *Id.*
154. Fifield v. Premier Dealer Servs., 2013 IL App (1st) 120327.
155. *Id.* at ¶¶ 54–87.
156. AssuredPartners, Inc. v. Schmitt, 2015 IL App (1st) 141863.
157. *Id.* at ¶¶ 3, 6.
158. *Id.* at ¶ 3.

substantial book of business of lawyers' professional liability insurance (LPLI) and established contacts with retail brokers and insurers in a dozen states and the United Kingdom.[159] When hired by ProAccess, Schmitt was told he would be expected to sign a non-compete agreement, but LPLI would be excluded.[160] The agreement expressly excluded any LPLI "produced in the ProAccess Mid-West office."[161]

ProAccess was acquired by AssuredPartners, Inc. (AssuredPartners). Employees had to execute new employment agreements with restrictive covenants.[162] Schmitt was able to purchase a membership interest in AssuredPartners and execute a Senior Management Agreement (SMA) instead of the employment agreement other employees had to sign.[163] Plaintiff asserted the SMA was heavily negotiated; Schmitt's position was that it was a take it or leave it situation.[164] Schmitt resigned approximately one year and 8 months later and began working for Insurance Solutions Network, LLC as a broker of wholesale LPLI.[165]

Plaintiff filed a complaint and moved for a temporary restraining order, which was denied.[166] The trial court granted Schmitt's motion for summary judgment on the breach of contract claim and injunctive relief based on its opinion that the noncompete provision was unreasonable, because it was too broadly drafted and unreasonably restricted Schmitt in soliciting business.[167] The court also found the confidentiality provision unreasonable.[168] Plaintiff filed a second amended complaint adding three new counts, which the court denied as merely rephrasing and reorganizing the counts it granted to Schmitt on summary judgment.[169]

The appellate court upheld the unenforceability of the noncompete provision, because it was overbroad in geography and scope by not limiting it to the specific kind of LPLI Schmitt developed and instead prohibited him from working with all types of professional insurance in any capacity within the United States and territories. The court reasoned it was broader than necessary to protect the legitimate business interests of AssuredPartners.[170]

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159. *Id.* at ¶ 9.
160. *Id.* at ¶ 10.
161. *Id.* at ¶ 11.
162. *Id.* at ¶ 13.
163. *Id.*
164. *Id.* at ¶ 15.
165. *Id.* at ¶ 19.
166. *Id* at ¶ 21.
167. *Id.* at ¶ 22.
168. *Id.*
169. *Id.* at ¶ 23.
170. *Id.* at ¶¶ 35–36.

The court also found the nonsolicitation provision unenforceable as being overbroad, because it extended to entities regardless of its involvement in the LPLI trade with plaintiff.[171] Court declined plaintiff's desire to have the court redraft the provision narrowing it to only the clients Schmitt serviced while employed.[172] The confidentiality provision was determined to be drafted too broadly because it was drafted to include any and all information and it is not possible for an employee to not use any information from a past job.[173] The court finally found no error in the lower court's decision to deny plaintiff's motion for leave to amend its complaint to add the three new counts.[174] The trial court's rulings were all affirmed.

C. *Capstone Financial Advisors, Inc. v. Plywaczynski*, 2015 IL App (2d) 150957

In *Capstone Financial Advisors, Inc. v. Plywaczynski*,[175] the court reviewed the denial of a temporary restraining order. Keith Plywaczynski (Plywaczynski) was a certified planner who was employed by Capstone Financial Advisors, Inc. (Capstone).[176] He resigned and went to work for a competitor, Mariner Wealth Advisors LLC and Mariner Wealth Advisors LLC-Chicago (Mariner).[177]

In consideration of continued employment and $1,000, Plywaczynski was presented with and signed an agreement containing confidentiality and non-disclosure provision, a two-year non-solicitation provision and a two-year non-compete provision.[178] Plywaczynski was successful and became a shareholder.[179] Five years later he resigned and advised the managing partner he was going to work for Mariner.[180] Within one week Capstone lost forty-one accounts formerly serviced by Plywaczynski.[181] Plywaczynski denied taking any protected information but had retained some of it in his head and on handwritten notes. He also stated he had a professional obligation to timely notify clients of any material changes to his contact information and his

171. *Id.* at ¶¶ 37–40.
172. *Id.* at ¶ 42.
173. *Id.* at ¶ 48.
174. *Id.* at ¶¶ 57–59.
175. Capstone Fin. Advisors, Inc. v. Plywaczynski, 2015 IL App (2d) 150957.
176. *Id.* at ¶ 1.
177. *Id.*
178. *Id.* at ¶ 2.
179. *Id.*
180. *Id.* at ¶ 3.
181. *Id.*

employer's contact information.[182] Plywaczynski gave clients information about Mariner, but also gave them information about Capstone depending on the client's desire to go with him or stay with Capstone.[183] Capstone filed a lawsuit against Plywaczynski and Mariner and moved for a temporary restraining order.[184] On appeal, Capstone claimed the trial court focused only on the non-solicitation and non-disclosure provisions and failed to consider the non-compete provision.[185] Considering both the oral judgment and written ruling, the appellate court disagreed, because the trial court's written order disposed of all three, finding no likelihood of success on the merits even though the oral ruling mentioned only two of those claims.[186] The appellate court, however, found that the failure to show a likelihood of success on the merits of its claims was due to the conclusory allegations, vague claims, and lack of specific facts in the pleadings.[187] Denial of the temporary restraining order was affirmed, but the court expressly noted it was not an opinion on the merits of Capstone's complaint or the validity of a future request for injunctive relief.[188]

D. *Bridgeview Bank Group v. Meyer*, 2016 IL App (1st) 160042

In *Bridgeview Bank Group v. Meyer*,[189] the appellate court affirmed the denial of a temporary restraining order against a former employee.[190] Meyer was a senior vice president at Bridgeview Bank Group (Bridgeview) for approximately two years and three months.[191] He signed an employment agreement containing a provision (1) prohibiting him from competing in the area of small business administration lending for six months, (2) to keep all nonpublic information confidential, and (3) to refrain from soliciting customers and employees for one year.[192] He was terminated. He was given a severance agreement eliminating the noncompete provision. He began working for CenTrust Bank. Bridgeview filed an action alleging Meyer violated the severance agreement and his employment agreement.[193] Two

182. *Id.* at ¶ 4.
183. *Id.*
184. *Id.*
185. *Id.* at ¶ 8.
186. *Id.*
187. *Id.* at ¶¶ 11–12.
188. *Id.* at ¶ 16.
189. 2016 IL App (1st) 160042.
190. *Id.* at ¶ 1.
191. *Id.* at ¶ 2.
192. *Id.*
193. *Id.* at ¶ 3.

weeks later Bridgeview sought a temporary restraining order (TRO).[194] The trial court concluded, "this case needs some evidence because there's a lot of inference, innuendo, [and] guesswork" and denied the TRO.[195] An appeal ensued. The appellate court affirmed the denial of the TRO based on the lack of well-pled facts in the complaint. The complaint failed to describe the strategies, processes, or information or what made them unique.[196] It failed to describe how it initiated, cultivated and nurtured customer relationships.[197] It failed to provide facts supporting Meyer breached the agreements.[198] The conclusory allegations were insufficient.[199] In addition, the only claimed violation was a communication that occurred in the past and a TRO cannot remedy something in the past.[200] It was also noted by the court that, standing alone, the delay in seeking the TRO to protect the information is not enough, but it was a factor to be considered.[201] Denial of the TRO was affirmed.

VI. ARBITRATION

A. *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160

In a nursing home dispute, the Illinois Appellate Court, Second District, considered whether a health-care power of attorney could bind a nursing home resident to an arbitration provision in gaining admission to the long-term care facility.[202] In *Fiala v. Bickford Senior Living Group*, Edward M. Fiala Jr. (Fiala) filed a complaint against Bickford Senior Living Group (Bickford) alleging violations of the Nursing Home Care Act (NHA),[203] and other claims including battery, false imprisonment, intentional infliction of emotional distress, and civil conspiracy.[204] Bickford filed a motion to dismiss and moved to compel arbitration based on a provision within the establishment contract, which was executed on his behalf by Fiala's daughter, Susan Kahanic (Kahanic).[205] The circuit court denied the motion to dismiss noting that the contract was insufficient because it did not appear that it was executed on

194. *Id.* at ¶ 4.
195. *Id.* at ¶ 9.
196. *Id.* at ¶ 14.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at ¶ 20.
201. *Id.* at ¶ 21.
202. Fiala v. Bickford Senior Living Group, LLC, 2015 IL App (2d) 141160.
203. 210 ILL. COMP. STAT. 45/1-101
204. *Fiala*, 2015 IL App (2d) 141160, ¶ 3.
205. *Id.* at ¶ 6.

behalf of Fiala, but rather, Kahanic endorsed the contract in a way that indicated that she read it but did not execute it.[206] At trial, the circuit court held that the language in the arbitration provision did not provide for arbitration of any dispute arising out of the diagnosis, treatment, or care of the resident.[207] Thus, the circuit court held that the arbitration provision was not a broad and generic provision with a wide scope, but instead, was narrowly limited to the terms of the establishment contract.[208] Therefore, the Kahanic did not have the authority to agree to arbitrate any matters related to the finances or property rights of Fiala.[209]

Bickford appealed and argued that (1) Fiala's claims were within the arbitration provision of the establishment contract, (2) the health-care power of attorney authorized Kahanic to bind Fiala to the arbitration provision, and alternatively, (3) the Federal Arbitration Act provided an independent basis by which to enforce the arbitration provision.[210]

The Second District reversed the circuit court's decision, stating "the unambiguous language of the Power of Attorney Law[211] encompasses a decision to admit the principal to an assisted-living facility such as defendant's."[212] The court noted that while the general rule limits the scope of a health-care power of attorney to matters involving the principal's healthcare and there is no authority over the principal's property or financial matters, health-care decisions, such as placement in an assisted-living facility, is more complex.[213] Under Section 4-10(c) of the short-form power of attorney for health-care, it "authorizes the agent to 'make any and all health-care decisions on behalf of the principal' and, importantly, to 'sign and deliver all instruments, negotiate and enter into all agreements and to do all other acts reasonably necessary to implement the exercise of the powers granted' by the health-care power of attorney."[214]

Fiala also argued that Kahanic "did not have authority to agree to arbitrary claims unrelated to payment for health care services and facilities."[215] However, the court ruled that the decision whether to admit a patient to a nursing home was a health-care decision.[216] The court looked to other states'

206. *Id.* at ¶ 10.
207. *Id.* at ¶ 13.
208. *Id.*
209. *Id.*
210. *Id.* at ¶ 16.
211. 755 ILL. COMP. STAT.45/2-3
212. *Fiala*, 2015 IL App (2d) 141160, ¶ 31.
213. *Id.* at ¶ 40.
214. *Id.* at ¶ 33.
215. *Id.* at ¶ 36.
216. *Id.* at ¶ 43.

on this issue to demonstrate a clear trend of holding that health-care decisions that encompass collateral issues, such as the acceptance of an arbitration clause, may still be considered to be legitimate health-care decisions under the authority granted by a health-care power of attorney.[217] The court concluded that the circuit court erred in holding that the health-care power of attorney did not grant Kahanic the authority to execute the arbitration provision.[218]

As it related to the Federal Arbitration Act, the court noted that the provisions in the Nursing Home Care Act appeared to forbid a contractual specification for the arbitration of any claims brought under it.[219] However, the Supreme Court has definitively held that the NHA's prohibition of the arbitration agreements between a nursing home and a resident are precluded by the Federal Arbitration Act in *Carter v. SSC Odin Operating Co., LLC.*[220] Thus, claims brought pursuant to the NHA are also arbitratable pursuant to the arbitration provision in the establishment contract.[221]

B. *Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245

In a case of first impression in the First District, *Perik v. JPMorgan Chase Bank, N.A.*,[222] Sharon Perik (Perik) appealed from an order of the circuit court which denied her motion to vacate the decision of the American Arbitration Association (AAA), which dismissed her arbitration claim against JPMorgan Chase, N.A. (Chase).

Perik maintained a bank account with Chase.[223] In doing so, she was bound by Chase's deposit account rules and regulations when she opened her account and agreed to be bound by those rules and regulations when they were later amended in 2006. The amendment provided that "'any dispute must be resolved by binding arbitration' and the customer waived any right it had to bring claims before a court or participate in a court case filed by others."[224] Furthermore, it applied "to all Claims relating to [the customer's] account that arose in the past, which may presently be in existence, or which may arise in the future" and would "survive termination" of the account.[225]

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217. *Id.*
218. *Id.* at ¶ 50.
219. *Id.* at ¶ 52.
220. 237 Ill. 2d 3050 (2010); *Fiala,* 2015 IL App (2d) 141160, ¶ 53.
221. *Fiala*, 2015 IL App (2d) 141160, ¶ 53.
222. 2015 IL App (1st) 132245
223. *Id.* at ¶ 3.
224. *Id.*
225. *Id.*

Perik filed a libel claim against Chase as successor in interest to Washington Mutual Bank (Washington Mutual), as well as against Washington Mutual and two other defendants.[226] Perik asserted that the defendants published a false fraud report regarding her use of her Chase account.[227] Chase's motion to compel arbitration was granted.[228] Chase moved to dismiss the arbitration claim against it as successor in interest to Washington Mutual and argued that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989[229] (FIRREA) barred jurisdiction of plaintiff's successor claim against Chase because Perik failed to submit the claim to the Federal Deposit Insurance Corporation (FDIC) for administrative review in a timely fashion.[230]

The question presented on appeal was "whether a [circuit] court ha[d] jurisdiction to consider a motion to vacate an arbitration award where the arbitrated claim was based on [a] pre-receivership conduct of a failed bank and the plaintiff had failed to file the claim with the FDIC as required by FIRREA."[231]

The First District delved into a lengthy analysis of FIRREA and noted that Section 1821(d)(13)(D) "bars claimants from taking claims directly to court without first going through an administrative determination" and "requires that a plaintiff exhaust these administrative remedies with the FDIC before filing certain claims."[232] Here, Perik filed her claim in the circuit court against Washington Mutual, which went to arbitration.[233] However, by failing to file her claim with the FDIC, she failed to exhaust her administrative remedies under FIRREA prior to filing suit.[234] "Therefore, under FIRREA, the [circuit] court did not have subject matter jurisdiction to consider the claim."[235] Furthermore, the court lacked jurisdiction to consider Perik's motion to vacate the arbitrator's award on the claim because her failure to exhaust administrative remedies prior to filing her motion to vacate the arbitration award prevented the circuit court from acquiring subject matter jurisdiction to

226. *Id.* at ¶ 4.
227. *Id.*
228. *Id.*
229. 12 U.S.C. § 1821(d)(13)(D) (2012).
230. *Perik*, IL App (1st) 132245, ¶ 8.
231. *Id.* at ¶ 13.
232. *Id.* at ¶ 18 (quoting Miller v. Federal Deposit Insurance Corp., 738 F.3d 836, 842 (7th Cir. 2013); Benson v. JPMorgan Chase Bank, 673 F.3d 1207, 1211 (9th Cir. 2012)).
233. *Id.* at ¶ 20.
234. *Id.*
235. *Id.* at ¶ 23.

consider the motion.[236] Thus, the circuit court was instructed to vacate its judgment and dismiss the action.[237]

C. *Glover v. Fitch*, 2015 IL App (1st) 130827

Illinois Supreme Court Rule 9, which addresses party participation and presence at arbitration hearings, was examined in *Glover v. Fitch*.[238]

Glover involved arbitration that arose from the subrogation of a personal injury action.[239] Tiffany Glover (Glover) suffered physical injuries and property damage following an automobile collision with Beverly Fitch (Fitch).[240] Glover's insurer, National Heritage, paid Glover's damages and subsequently brought a claim against Fitch as Glover's subrogee to recover the amount of damages paid.[241] Shortly thereafter, the case was transferred from assignment to arbitration.[242]

The circuit court acknowledged multiple procedural issues. Fitch filed a motion to consolidate the case with an action filed by Fitch's insurer, State Farm, related to the same automobile collision, but the motion was denied.[243] Net, Plaintiff was granted leave to file an amended complaint to include personal injuries and added a count for subrogation.[244] However, Fitch failed to appear at arbitration, and an arbitration award was entered in favor of Glover and National Heritage.[245] The court entered an order granting Fitch's motion to vacate the award.[246] The case was transferred to a jury trial on Glover and National Heritage's claims, but State Farm's claims were to be heard in a separate pending action because the cases were not consolidated.[247] The verdict was entered in favor of Fitch; National Heritage and Glover timely appealed.[248]

The First District addressed National Heritage's argument that the arbitration award should not have been vacated because counsel had an affirmative duty to appear for the hearings and knew that the case had been

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236. *Id.* at ¶ 24.
237. *Id.* at ¶ 33.
238. Glover v. Fitch, 2015 IL App (1st) 130827.
239. *Id.* at ¶ 1.
240. *Id.* at ¶ 5.
241. *Id.*
242. *Id.* at ¶ 6.
243. *Id.* at ¶ 12.
244. *Id.* at ¶ 9.
245. *Id.* at ¶ 13.
246. *Id.* at ¶ 16.
247. *Id.* at ¶ 20.
248. *Id.*

assigned to arbitration.[249] The court noted that pursuant to Illinois Supreme Court Rule 91(a), a party who fails to appear at an arbitration hearing has the burden of showing that his or her absence was reasonable or the result of extenuating circumstances.[250] However, the First District noted that in this case, defense counsel appeared for the hearing, but was not sent notice.[251] The court concluded that "while attorneys have a duty to keep track of their cases on the docket, the court did not abuse its discretion in vacating an arbitration award where defendant's counsel did not receive notice of the arbitration hearing date because the clerk's office did not timely enter counsel's appearance…"[252] Illinois Supreme Court Rule 91 specifically allows for an arbitration hearing to proceed in the absence of a party only when there has been "due notice."[253] Thus, the arbitration should not have been allowed to proceed due to the lack of proper notice. The court further reasoned that if the arbitration center or the arbitration panel properly inquired into whether defense counsel received notice of the hearing date, the default judgment and subsequent litigation regarding the motion to vacate could have been avoided.[254]

D. *Coe v. BDO Seidman, LLP*, 2015 IL App (1st) 142215

In *Coe v. BDO Seidman, L.L.P.*,[255] plaintiff Douglas Coe (Coe) was the president and majority shareholder of a private company.[256] After selling the company and cashing in his stock, he sought the services of the defendant, BDO Seidman, LLP (BDO), which advised him to use its distressed debt strategy on his tax returns to offset ordinary income and/or capital gain.[257] Coe and his wife Jacqueline established GFLIRB, LLC, DBICHA, LLC and ALAKE, LLC, as part of the distressed debt strategy. BDO entered into a consulting agreement to implement the strategy.[258] Within the consulting agreement, the language stated that BDO was not in the business of providing investment or legal advice or related services and therefore should not be considered legal advice.[259] Furthermore, it provided that BDO disclaimed any

249. *Id.* at ¶ 23.
250. *Id.* at ¶ 24 (citing Jackson v. Bailey, 384 Ill. App. 3d 546, 549 (1st Dist. 2008)).
251. *Id.* at ¶ 27.
252. *Id.* at ¶ 36.
253. *Id.* at ¶ 32.
254. *Id.*
255. Coe v. BDO Seidman, L.L.P., 2015 IL App (1st) 142215.
256. *Id.* at ¶ 5.
257. *Id.*
258. *Id.*
259. *Id.* at ¶ 6.

warranties under the agreement.[260] The agreement also consisted of an arbitration clause.[261]

In accordance with the consulting agreement, Coe claimed deductions on his tax returns for several years.[262] Coe was eventually audited by the Internal Revenue Service (IRS) and accused of employing an illegal strategy, which acted as a tax shelter. Coe settled with the IRS and filed a complaint against BDO alleging that BDO conspired to design, market, sell and implement improper investment strategies and requested damages in the amount of the IRS settlement plus $805,000 paid to BDO as fees.[263] In addition, Coe requested that the arbitration provision contained in the agreement be considered null and void because it was procured by fraud.[264] The circuit court granted BDO's motion to stay the action in favor of arbitration pursuant to section 3 of the Federal Arbitration Act,[265] and denied Coe's motion for partial summary judgment.[266] Coe, his wife Jacqueline, GFLIRB, LLC, DBICHA, LLC and ALAKE, LLC (collectively, the plaintiffs) appealed.[267]

On appeal, the plaintiffs argued that the circuit court erred in granting the motion to stay the pending arbitration because it was unenforceable as part of BDO's conspiracy to commit fraud.[268] In analyzing this issue, the First District first determined that federal arbitration law, rather than New York state law, applied.[269] The court then determined that while the plaintiffs' question related to the enforceability of an arbitration provision contained within a contract induced by fraud, such issues are to be considered by an arbitrator.[270] In doing so, plaintiffs must allege with specificity the nature of the misrepresentation when making a claim for fraud.[271] However, here, Coe failed to argue that he would not have agreed to the arbitration provision without BDO's representations.[272] Furthermore, there was no evidence that BDO coerced Coe into agreeing to the provisions contained in the agreement.[273] Therefore, plaintiffs' claims of fraud relating to the arbitration

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260. *Id.*
261. *Id.*
262. *Id.* at ¶ 8.
263. *Id.*
264. *Id.* at ¶ 9.
265. 9 U.S.C. § 1, et seq.
266. *Coe,* 2015 IL App (1st) 142215, ¶ 10.
267. *Id.*
268. *Id.* at ¶¶ 12–13.
269. *Id.* at ¶ 13.
270. *Id.* at ¶ 19.
271. *Id.* at ¶ 20 (citing Grenadyor v. Ukranian VillageVill.Village Pharmacy, Inc., 772 F.3d 1102, 1105–06 (7th Cir. 2014)).
272. *Id.* at ¶ 21.
273. *Id.*

provisions were insufficient to enable the First District to consider the issue.[274]

Plaintiffs' next argument was that the circuit court erred in granting the motion to stay arbitration because their claims arose from BDO's investment and legal advice.[275] The court disagreed and held that the services provided by BDO that were subject to the arbitration clause did not include legal or tax opinions expressed in the preparation of tax forms or in investment planning.[276] Unlike the facts in *Khan v. BDO Seidman, LLP,*[277] which the circuit court heavily relied, the First District noted that the consulting agreement in this case contained plain and clear language outlining BDO's services, and therefore, plaintiffs' claims fell within the arbitration provision of the agreement.[278]

In their final argument, plaintiffs maintained that even if their claims fell within the scope of the agreement's arbitration clause, the clause itself was unenforceable because it was unconscionable.[279] The court again disagreed, holding that Coe was a sophisticated and successful businessperson who sought the services of BDO, and that the arbitration provision as plainly visible in the agreement and its terms were clear.[280] For the reasons outlined above, the court affirmed the circuit court's ruling.[281]

E. *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380

In a Fifth District arbitration case, *Sturgill v. Santander Consumer USA, Inc.,*[282] the court considered whether additional information, rather than just the complaint itself, was necessary to compel arbitration.

Plaintiff Franklin Sturgill (Sturgill) purchased a pickup truck from Tri Ford Mercury, Inc., (Tri Ford) pursuant to an installment contract, which was financed by and assigned to Triad Financial Corporation (Triad).[283] Neither the installment contract with Tri Ford nor the assignment to Triad contained an arbitration clause.[284] However, Sturgill and Triad later entered into a "Modification and Extension Agreement" (Extension Agreement) whereby

274. *Id.*
275. *Id.* at ¶ 22.
276. *Id.* at ¶ 23.
277. 404 Ill. App. 3d 892, 912, 935 N.E.2d 1174, 1191 (4th Dist. 2010).
278. *Coe,* 2015 IL App (1st) 142215, ¶ 26.
279. *Id.* at ¶ 29.
280. *Id.* at ¶ 31.
281. *Id.* at ¶¶ 35–36.
282. 2016 IL App (5th) 140380.
283. *Id.* at ¶ 2.
284. *Id.* at ¶¶ 3–4.

Triad agreed to extend the payment schedule.[285] The Extension Agreement contained an arbitration clause requiring arbitration of certain disputes with Triad.[286] It also prohibited class action arbitration and joinder of parties.[287]

Shortly thereafter, defendant Santander entered into an "Interest Purchase Agreement" (Purchase Agreement) with Triad when it purchased certain membership interests in Triad.[288] The Purchase Agreement did not specifically identify any installment contracts as among the assets being purchased, however, Sturgill mistakenly made his installment payments to Santander rather than Triad.[289]

Years later, Sturgill and Santander allegedly reached an agreement to settle the balance of Sturgill's Purchase Agreement for less than was owed, and Sturgill produced a one-page "Settled in Full" letter from Santander acknowledging the agreement.[290] However, when Sturgill did not receive the title to his vehicle, he filed a class action complaint under section 3-205 of the Illinois Vehicle Code,[291] for failing to deliver the certificate of title to his vehicle within 21 days after the lien was satisfied.[292] Santander moved to compel arbitration under the Extension Agreement disputing the authenticity and validity of the alleged settlement agreement.[293]

In response, Sturgill argued, *inter alia*, that he had no agreement with Santander to arbitrate any claim and that the settlement with Santander caused arbitration to become moot.[294] The circuit court considered whether there was an enforceable arbitration clause, but denied the motion to compel arbitration without expressly ruling upon that issue.[295]

The Fifth District reviewed the appeal *de novo*, noting that because the arbitration clause expressly stated that the rules governing the arbitration were controlled by the Federal Arbitration Act (FAA), therefore the question of arbitratability would be decided "under the substantive law of the FAA."[296] The Fifth District also noted that in this case, the circuit court was asked to alleviate the complicated controversy under substantive federal law under the

285. *Id.* at ¶ 4.
286. *Id.* at ¶¶ 4–5.
287. *Id.* at ¶ 6.
288. *Id.* at ¶ 7.
289. *Id.*
290. *Id.* at ¶ 8.
291. 625 ILL. COMP. STAT. ANN. 5/3-205 (West 2010).
292. *Id.* at ¶¶ 9–10.
293. *Id.* at ¶ 11.
294. *Id.* at ¶ 12.
295. *Id.* at ¶ 13.
296. *Id.* at ¶ 23.

FAA without ruling on the potential merits of the underlying claim.[297] However, the circuit court was at a disadvantage because the parties did not define the issues.[298] The discovery was insufficient and the pleadings failed to identify issues to be decided by the court pursuant to the FAA.[299] Because the circuit court had identified fact questions that were important to the question of arbitrability, but had not resolved them through any summary proceeding, the Fifth District reversed and remanded the case with instructions to resolve factual disputes.[300]

F. *Memberselect Insurance Company v. Luz*, 2016 IL App (1st) 141947

In *MemberSelect Ins. Co v. Luz*,[301] the First District considered whether a letter sent by defendant, Ferdinand Luz (Luz), to the plaintiff, MemberSelect Insurance Company (MemberSelect), was a sufficient demand for arbitration under the underinsured motorist provision of Luz's automobile insurance policy with MemberSelect.

Luz was injured in an automobile collision where the driver of the other vehicle only had an insurance policy with a limit of $20,000 per person.[302] Fortunately, Luz's automobile insurance policy with MemberSelect contained a provision which provided him with coverage against underinsured drivers.[303] However, the policy also contained a provision compelling arbitration in the case of a dispute regarding the ability to recover damages from the underinsured driver.[304] In addition, the policy contained a limitations provision, barring any action or arbitration against MemberSelect unless commenced within three years of the date of the accident.[305]

Luz immediately sent MemberSelect a letter requesting arbitration.[306] Luz sent MemberSelect a request to pay medical damages totaling approximately $15,000, but MemberSelect paid Luz the limits of the medical payment coverage under the policy of $1,000.[307] After settling his claim against the other driver, Luz filed a demand for arbitration against MemberSelect for arbitration of the underinsured motor claim with the

297. *Id.* at ¶ 28.
298. *Id.*
299. *Id.*
300. *Id.* at ¶¶ 28–30.
301. 2016 IL App (1st) 141947.
302. *Id.* at ¶ 4.
303. *Id.* at ¶ 5.
304. *Id.*
305. *Id.*
306. *Id.* at ¶ 6.
307. *Id.* at ¶ 7.

American Arbitration Association. MemberSelect denied the request, claiming that the limitations period barred the action.[308] MemberSelect filed a complaint for declaratory judgment, alleging it was not compelled to cover Luz's underinsured motor claim because the limitations provision of the policy barred coverage.[309] The circuit court granted MemberSelect's motion for summary judgment; Luz timely appealed.[310]

Luz made three arguments to the Illinois Appellate Court, First District: (1) that his letter was sufficient to demand arbitration under the policy and was therefore within the limitations period on his underinsured motorist claim, (2) MemberSelect was estopped from asserting the limitations period as a defense; and (3) section 143.1 of the Illinois Insurance Code tolled the limitations period when Luz filed his proof of loss with MemberSelect.[311]

The court first observed that in considering these arguments, the question is what did the insured have to do in this case to "commence" arbitration?[312] In response, MemberSelect claimed that to commence arbitration, Luz was required to both demand arbitration and select an arbitrator, because both are mentioned in the arbitration provisions.[313] The court agreed that a demand for arbitration was required to commence the arbitration.[314] The court held that Luz made a proper demand for the purpose of arbitration.[315]

Next, the court determined whether Luz was required to select an arbitrator to commence the arbitration.[316] In interpreting the language in the policy, the court held that they did not believe that a reasonable person reading the insurance policy provision would understand that the selection of the arbitrator was part of the commencement of the arbitration.[317] Rather, the arbitration language made it clear that the selection of an arbitrator was not mandatory.[318] Because Luz properly demanded arbitration and nothing else was required of him to commence the arbitration, Luz's right of arbitration was not barred by the three-year limitations provision.[319] Therefore, the trial

308. *Id.* at ¶¶ 9–12.
309. *Id.* at ¶ 13.
310. *Id.* at ¶ 16.
311. *Id.* at ¶ 19.
312. *Id.*
313. *Id.* at ¶ 26.
314. *Id.* at ¶ 28.
315. *Id.* at ¶ 31.
316. *Id.* at ¶ 40.
317. *Id.* at ¶ 43.
318. *Id.* at ¶ 52.
319. *Id.* at ¶ 54.

court erred in awarding summary judgment to MemberSelect and denying Luz's motion for summary judgment.[320]

G. *Watkins v. Mellen*, 2016 IL App (3d) 140570

In *Watkins v. Mellen*, the Illinois Appellate Court, Third District, ruled that where a party raises a substantive "arbitral" issue in a motion to dismiss,[321] it effectively submits to the jurisdiction of the court and waives its right to compel arbitration.[322]

Robert Watkins (Watkins), as trustee of the Watkins Enterprises Land Trust and Partnership, brought an action for declaratory judgment in the circuit court seeking authority to sell real estate at auction, which partially formed the trust.[323] The Watkins Enterprises Land Trust/Partnership Agreement (Partnership Agreement) between Albert and Rose Watkins established a management committee to handle the daily management and ministerial acts of the partnership.[324] At the time that the claims were brought, the partnership consisted of twenty-six beneficiaries/partners.[325] Watkins served as trustee and filed a complaint for declaratory judgment seeking an authorization for the court to sell the assets of the trust at auction, naming three shareholders who objected to the sale as defendants.[326]

In considering the motion to strike, the circuit court held that Watkins had standing to seek declaratory relief and that the arbitration clause did not impair his standing to pursue declaratory relief.[327] After additional defendants were added to the complaint, the defendants raised the argument that Watkins' filing of the complaint violated the arbitration clause of the Partnership Agreement.[328] In response, Watkins argued that the defendants waived enforcement of the arbitration clause by filing a previous motion to dismiss.[329] The court rejected Watkins' waiver argument and denied the defendants' motion to compel arbitration. The defendants appealed.[330]

The Third District noted that the question on appeal differed between the parties—while the defendants maintained that the issue related to whether the

320. *Id.*
321. 735 ILL. COMP. STAT. § 5/2-619(a)(2).
322. Watkins v. Mellen, 2016 IL App (3d) 140570, ¶ 17.
323. *Id.* at ¶ 6.
324. *Id.* at ¶ 3.
325. *Id.* at ¶ 6.
326. *Id.*
327. *Id.* at ¶ 7.
328. *Id.* at ¶ 8.
329. *Id.*
330. *Id.*

Partnership Agreement required Watkins to submit to arbitration, Watkins maintained that the circuit court should have denied the motion to compel arbitration on the basis of waiver.[331]

The Third District court agreed the defendants waived their right to file a subsequent motion to compel arbitration when they filed their motion to dismiss, reasoning that the "crucial inquiry" is whether that party acted inconsistently with its right to arbitrate.[332] The court explained that a party waives its right to arbitrate if it submits issues to the court, which are "arbitral under the contract."[333] The court gave examples of incidents in which courts have held a party waived its right to arbitrate by filing: such motions for summary judgment; an answer that fails to assert the right to arbitration, and; a motion to dismiss without mentioning the arbitration clause.[334] The court noted that the "operative distinction" between filings that constitute waiver and those that do not is whether the party seeking to compel arbitration "has placed substantive issues before the court."[335]

The court therefore concluded that the defendants waived their right to compel arbitration by filing and litigating their motion to dismiss and affirmed and remanded the decision for further proceedings.[336]

H. *International Association of Firefighters Local 49 v. City of Bloomington*, 2016 IL App (4th) 150573

In *Int'l Ass'n of Firefighters Local 49 v. City of Bloomington*,[337] the parties were referred to arbitration after failing to resolve a union dispute. The plaintiff, International Association of Firefighters Local 49 (Union), and the defendant, the City of Bloomington (City), began renegotiating their collective bargaining agreement, which was set to soon expire.[338] The dispute revolved around a sick leave "buyback" provision, whereby the City would compensate retiring firefighters for unused sick leave time.[339] The City proposed reducing the breadth of the buyback provision.[340] Because the parties could not agree on a final provision, they referred the issue to arbitration and waived their

331. *Id.* at ¶ 11.
332. *Id* at ¶¶ 11, 14.
333. *Id.* at ¶ 14.
334. *Id.*
335. *Id.* at ¶ 15.
336. *Id.* at ¶¶ 18, 20.
337. 2016 IL App (4th) 150573.
338. *Id.* at ¶ 6.
339. *Id.* at ¶¶ 7, 8.
340. *Id.* at ¶ 8.

rights to a tripartite arbitration panel under section 14(b) of the Illinois Public Relations Act[341] (Act).[342]

The arbitrator entered a written arbitration award, and observed that the City entered nine other collective bargaining agreements, seven of which agreed to reduce their sick leave buyback plans.[343] The arbitrator considered the City's pension obligations and shortfall when deciding the buyback issue, and explained that one method of decreasing expenditures was to modify the buyback provision.[344] Therefore, the arbitrator concluded that the City's proposal was reasonable and ordered that the City's final offer be selected and incorporated into the parties' collective bargaining agreement.[345]

Given the arbitrator's award, the Union petitioned for review pursuant to section 14(k) of the Act.[346] Both parties filed motions for summary judgment, and the circuit court granted the City's motion.[347] The Union appealed.[348]

The Fourth District rejected both of the Union's arguments: (1) that the arbitrator improperly considered the City's pension obligations in reaching its decision; and (2) the circuit court erred by failing to award the Union statutory interest on the $1,000 payout.[349] The court explained that the arbitrator did not make pension funding an issue of arbitration.[350] The issue before the arbitrator was the sick leave buyback program, not the level of pension funding. The arbitrator considered the City's pension obligations and financial ability to meet those obligations, which was what was required of it under the Act.[351] The court also concluded that statutory interest was not warranted.[352] In interpreting the Act, the last sentence of 14(k) allows an award of interest if "said" court affirms an award of money.[353] The Fourth District held that "said" referenced a court that found that a party's appeal was frivolous, which was not the circumstance in this case.[354] Section 14(k) does not allow an

341. 5 Ill. Comp. Stat. 315/14(b) (West 2012).
342. *Local 49*, 2016 IL App (4th) 150573, ¶ 9.
343. *Id.* at ¶ 11.
344. *Id.* at ¶¶ 12–13.
345. *Id.* at ¶ 14.
346. *Id.* at ¶ 16.
347. *Id.* at ¶¶ 16–17.
348. *Id.* at ¶ 18.
349. *Id.* at ¶ 20.
350. *Id.* at ¶ 30.
351. *Id.*
352. *Id.* at ¶ 38.
353. *Id.* at ¶ 37.
354. *Id.* at ¶¶ 37–38.

award of interest to the losing party on appeal, and therefore, the court's decision to deny the Union's request for interest was affirmed.[355]

I. *Wheaton Firefighters Union v. Illinois Labor Relations Board*, 2016 IL App (2d) 160105

In another firefighter union case, the Second District also considered whether failed negotiations in collective bargaining, which would reduce the health insurance benefits, required an arbitrator.[356] In that case, the Wheaton Firefighters Union (Union) and the City of Wheaton (City) were parties to a collective bargaining agreement. Similar to *Int'l Ass'n of Firefighters Local 49 v. City of Bloomington*,[357] failed negotiations resulted in the Union invoking interest arbitration pursuant to section 14 of the Illinois Public Labor Relations Act (Act).[358] During interest arbitration, the City proposed modifications to the part of the agreement pertaining to health insurance, which would reduce benefits.[359] The Union argued that the arbitrator did not have jurisdiction to resolve the issue pertaining to health insurance because it was a permissive subject of bargaining.[360] The arbitrator issued an award and resolved all disputed issues with the exception of the health insurance issue.[361]

In response to the award, the Union filed an unfair labor practice charge with the Illinois Labor Relations Board (Board) reasoning that the City submitted its healthcare proposal, a permissive subject of bargaining, to the interest arbitrator in violation of section 10(a)(4) and (a)(1) of the Act.[362] After investigation of the charge, the Board's Executive Director filed a complaint to the administrative law judge (ALJ).[363] "The ALJ concluded that the healthcare proposal was a permissive subject of bargaining because it would give the City broad discretion to make midterm changes to Union members' healthcare benefits and would require the Union to waive its statutory right to midterm bargaining on those issues."[364] The ALJ recommended dismissal of

355. *Id.* at ¶ 38.
356. Wheaton Firefighters Union, Local 3706 v. Illinois Labor Rels. Bd., 2016 IL App (2d) 160105.
357. *Local 49*, 2016 IL App (4th) 150573.
358. *Local 3706,* 2016 IL App (2d) 160105, ¶ 1.
359. *Id.* at ¶ 4.
360. *Id.*
361. The arbitrator did not resolve another issue pertaining to the collective bargaining agreement, which was not subject to the appeal. *Id.* at ¶ 5.
362. *Id.* at ¶ 6.
363. *Id.* at ¶¶ 6–7.
364. *Id.* at ¶ 7.

the complaint and the Board followed the recommendation.[365] The Union filed an appeal.[366]

The Illinois Appellate Court, Second District, first considered whether the Union's appeal was moot given the City's argument that there was no longer a controversy between the parties since they agreed to settle and execute the collective bargaining agreement during the interest arbitration.[367] However, the court noted that the United States Supreme Court has consistently rejected such argument and, accordingly, declined to dismiss the Union's appeal as moot.[368]

The court next determined "whether a party's mere submission of a new proposal for the first time in front of an interest arbitrator can constitute an act of bargaining in bad faith."[369] The court agreed that the holding in *Village of Bensenville*,[370] which stood "for the proposition that a party does not act in bad faith merely because it submits a proposal pertaining to a permissive subject of bargaining to an interest arbitrator," was dispositive of the appeal.[371] The court agreed with the Illinois Labor Relations Board that *Bensenville* was the appropriate precedent and therefore, the Union was not prejudiced.[372]

The court was "also not persuaded by the Union's argument that a Board's remedy for the City's allegedly improper proposal" was sufficient.[373] The court noted that the Union ignored the fact that the remedy— a party's ability to prevent an arbitrator from considering an issue by objecting under section 1230.90(k) of the Board's rules—was effective in this case.[374] Therefore, the judgment of the Illinois Labor Relations Board was affirmed.[375]

J. *Country Preferred Insurance Co. v. Whitehead*, 2016 IL App (3d) 150080

Like *MemberSelect Ins. Co v. Luz*,[376] the Third District also considered an issue related to a written demand for arbitration pursuant to uninsured

365. *Id.* at ¶¶ 8–9.
366. *Id.* at ¶ 10.
367. *Id.* at ¶ 12.
368. *Id.* at ¶ 13.
369. *Id.* at ¶ 19.
370. 14 PERI ¶ 2042 (ILLRBILLRBISLRBILLRB 1998).
371. *Local 3706,* 2016 IL App (2d) 160105, ¶ 22.
372. *Id.* at ¶ 23.
373. *Id.* at ¶ 25.
374. *Id.*
375. *Id.* at ¶ 28.
376. 2016 IL App (1st) 141947.

motorist coverage in *Country Preferred Ins. Co. v. Whitehead*.[377] In *Country Preferred*, defendant Terri Whitehead (Whitehead) was involved in a motor vehicle accident with an uninsured driver.[378] Whitehead sent a written demand for arbitration to her insurer, the plaintiff, Country Preferred Insurance Company (Country).[379] Whitehead did not provide the name of an arbitrator. Country denied the request for arbitration claiming it was not filed within the two-year limitation provision and filed a declaratory judgment action against her.[380] The parties filed cross motions for summary judgment and the circuit court granted Whitehead's motion, ruling that her arbitration demand was in fact timely because the policy's two-year limitation provision had been tolled.[381]

On Appeal, the Third District noted that an insured's completion of a sworn proof of loss begins tolling under section 143.1 of the Insurance Code, and ends when the insurer denies the claim.[382] Until the insurer denies a claim, there is no reason for an insured to file a demand for arbitration because there is nothing to arbitrate.[383] In this case, Whitehead's insurance policy with Country required her to submit a sworn proof of loss.[384] The court noted that this obligation was fulfilled when Whitehead returned the signed and notarized "Notice of Claim Uninsured Motorist Coverage Uninsured" form provided to her by Country, which contained information about the accident and her lost income claim.[385] Therefore, the tolling of the two-year limitations period began when Country received the form, which was just after four months after the automobile accident, and continued until Country rejected the arbitration demand.[386] Because Whitehead made her arbitration demand within the policy's two-year provision, the Third District concluded that the circuit court properly granted her summary judgment motion and the judgment was affirmed.[387]

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377. 2016 IL App (3d) 150080.
378. *Id.* at ¶ 1.
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.* at ¶ 17.
383. *Id.*
384. *Id.* at ¶ 18.
385. *Id.*
386. *Id.*
387. *Id.* at ¶¶ 20–21.

K. *MHR Estate Plan, LLC v. K&G Partnership*, 2016 IL App (3d) 150744

In *MHR Estate Plan, LLC v. K&G Partnership*,[388] the Third District considered a contract for the sale of a partnership. The respondent, K & G Partnership (K&G), entered into a restated partnership agreement (agreement) for the purpose of developing a mobile home park, called Gateway.[389] The partnership was a continuation of a prior partnership between John Kumicich (Kumicich), Edward Glavin (Glavin), and Donald Kreger (Kreger), and added partner/third-party defendant, Michael Rose (Rose).[390] Following the re-formation of the partnership, "Kumicich transferred 50% of his interest in K&G to two trusts, the R.J.K 1993 Trust and the J.A.K. 1993 Trust."[391] Glavin transferred his 18.75% interest to the Edward A. Glavin Trust.[392] The three trustees and their trusts were named as respondents in this suit.[393] The petitioner, MHR Estate Plan (MHR), sought a judicial dissolution of K&G as well as the appointment of a receiver to oversee the dissolution.[394]

The respondents filed a motion to dismiss and argued that the arbitration clause in the agreement controlled.[395] The circuit court denied the motion and held that there was only a dispute as to the termination of the partnership.[396] The court appointed CR Realty Advisors, LLC (CR) to act as the receiver/liquidator of the assets of K&G.[397] CR advised that an orderly sale was more appropriate than liquidation or auction.[398] The respondents objected to the findings claiming that CR failed to value K&G's assets, and filed a motion to remove CR as receiver. The court denied the motion.[399] The court found that counts II and III of respondents' third-party complaint were subject to the arbitration clause in the partnership agreement and stayed the case pending arbitration.[400] The court also "entered an order directing CR to proceed with the planning of a private sale of K&G's assets."[401] CR

388. MHR Estate Plan, LLC v. K&G Partnership, 2016 IL App (3d) 150744.
389. *Id.* at ¶ 3.
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.* at ¶ 4.
396. *Id.*
397. *Id.* at ¶ 5.
398. *Id.*
399. *Id.*
400. *Id.* at ¶ 6.
401. *Id.* at ¶ 7.

determined that the offer of $12.6 million from bidder Olympia Acquisitions (Olympia) was acceptable; the court agreed and ordered the acceptance of Olympia's Acquisitions contract and authorized CR to execute the contract.[402] "The respondents objected, arguing that Olympia Acquisitions' offer was to purchase K&G's partnership interests rather than an offer to purchase K&G Partnership's assets, it was not the best and highest bid, and their own offer was the only real one."[403] In response, the court ruled that Olympia was the high bidder and could restructure its offer into a proposal to purchase K&G's assets for the same contract price of $12.6 million.[404] After the bid was restructured, the court approved the bid.[405]

The respondents appealed, arguing that the circuit court erred in failing to send MHR's petition to binding arbitration and that the partnership agreement was unambiguous and required the dispute to be sent to arbitration.[406]

The Illinois Appellate Court, Third District, first noted that section 2.4 of the K&G Partnership agreement provided that the partnership "shall continue until December 31, 2010, unless sooner terminated as provided in Article IX of this Agreement."[407] Furthermore, the arbitration clause in section 12.1 of the K&G Partnership agreement provided,

> *The Partners agree to submit all disputes arising under this Agreement to binding arbitration. If a dispute arises, the Partners shall agree upon a place at which the arbitration will be conducted. The arbitration proceedings will be conducted in accordance with the rules of the American Arbitration Association*.[408]

The court noted that the arbitration clause in this case was broad, providing that all disputes arising the agreement were subject to arbitration.[409] Because the dissolution and liquidation provisions were in dispute, under the broad arbitration clause, those issues were subject to arbitration so that the meaning of the arbitration clause should have been determined by the arbitrators.[410] Therefore, the Third District reversed the circuit court's order,

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402. *Id.* at ¶ 8.
403. *Id.* at ¶ 9.
404. *Id.*
405. *Id.* at ¶ 10.
406. *Id.* at ¶ 13.
407. *Id.* at ¶ 18.
408. *Id.* at ¶ 19.
409. *Id.* at ¶ 21.
410. *Id.*

which denied the respondent's motion to dismiss based on the arbitration clause.[411]

L. *Weiss v. Fischl*, 2016 IL App (1st) 152446

In *Weiss v. Fischl*,[412] another case involving a partnership agreement, dentists Paul Fischl (Fischl) and Brad Weiss (Weiss) combined their dental practices and entered into a Stock Acquisition Agreement (Stock Agreement) which provided that Weiss would purchase a 50% interest in Fischl's existing dental practice and that the name would be changed to Fischl & Weiss Dental Associates, P.C. Incorporated (FWDA).[413] In addition to the Stock Agreement, Fischl and Weiss entered into an employment agreement and a stock purchase agreement.[414] The Stock Agreement and the employment agreement both contained an arbitration clause providing that all disagreements arising out of the agreement shall be resolved by arbitration.[415] In addition, the employment agreement contained a provision which stated that if Weiss's employment was terminated for any reason, FWDA was required to pay him severance pay.[416] The stock purchase agreement provided that if Weiss terminated his employment within eighty-four months after the date of the agreement, Fischl and/or FWDA had an option to purchase Weiss's share of stock.[417]

After practicing together for approximately six years, Weiss's employment by FWDA was terminated due to irreconcilable differences.[418] Fischl and Weiss hired consultants to assist in the dissolution of the practice.[419] Fischl and Weiss executed a corporate resolution, which allowed Weiss to investigate and negotiate to join, acquire or establish a dental practice. The resolution would, in effect, be in violation of the employment agreement.[420] Fischl and Weiss signed a temporary work agreement, which allowed them to operate their separate practices at FWDA's offices.[421] Weiss filed a demand for arbitration with the American Arbitration Association and tendered his

411. *Id.*
412. 2016 IL App (1st) 152446.
413. *Id.* at ¶ 2.
414. *Id.*
415. *Id.* at ¶¶ 2–3.
416. *Id.* at ¶ 3.
417. *Id.* at ¶ 4.
418. *Id.* at ¶ 5.
419. *Id.*
420. *Id.* at ¶ 6.
421. *Id.* at ¶ 9.

resignation as an officer and director of FWDA.[422] Weiss claimed he was terminated for cause, requested severance pay and requested that he be paid $410,199 for his shares of stock.[423] Fischl and FWDA filed an answer to the demand for arbitration, denying Weiss's right to the relief and argued in the counter-claim that Weiss was liable for overpayment of compensation and 50% of the liabilities of FWDA unless or until his shares of stock were transferred.[424]

The arbitrator found that Fischl and FWDA terminated Weiss's employment for cause and that he was entitled to severance pay as provided for in the employment agreement.[425] The arbitrator also agreed that the entire amount was the stock purchase price.[426] Fischl refused to pay the entire award and, along with FWDA, filed a motion to reconsider, modify, or vacate.[427] The circuit court denied the motion and an appeal followed.[428] Fischl and FWDA argued that the circuit court erred in confirming the arbitration award and that the arbitrator exceeded his authority by requiring them to purchase Weiss's shares in FWDA.[429] Fischl and FWDA based their argument on the fact that the arbitrator ignored the plain language of the stock purchase agreement.[430] In response, Weiss argued that the arbitrator had the authority to determine whether Fischl exercised the option to purchase his shares in FWDA and to fix the purchase price.[431] Furthermore, Weiss claimed that Fischl and FWDA forfeited the argument that the arbitrator lacked authority to resolve the issue because the argument was not raised before the arbitrator.[432]

The First District agreed that Fischl and FWDA forfeited the issue by not raising it before the arbitrator.[433] The court then noted that the arbitrator found that under the parties' agreements, Fischl and FWDA were not obligated to purchase Weiss's shares in FWDA. However, Fischl demanded a return of those shares. Because there was no agreement, the option to demand the return of the shares was triggered by the provision in the stock purchase agreement.[434] The stock purchase agreement provided that if Weiss's

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422. *Id.* at ¶ 10.
423. *Id.* at ¶ 11.
424. *Id.*
425. *Id.* at ¶ 13.
426. *Id.*
427. *Id.* at ¶ 14.
428. *Id.*
429. *Id.* at ¶ 15.
430. *Id.*
431. *Id.* at ¶ 16.
432. *Id.*
433. *Id.* at ¶ 17.
434. *Id.*

employment with FWDA was terminated for any reason within the specific period after the date of the agreement, Fischl and/or FWDA had the option to purchase Weiss's stock at a specific price.[435] Therefore, it was reasonable to conclude that the arbitrator determined that Fischl exercised the opinion in the stock purchase agreement.[436] Thus, the First District determined that it was unable to conclude that the arbitration award was the result of gross mistake of fact and the circuit court's judgment, which granted Weiss's application to confirm the arbitration award, was affirmed.[437]

VII. UNEMPLOYMENT COMPENSATION

A. *Weinberg v. Department of Employment Security*, 2015 IL App (1st) 140490

The court in *Weinberg v. Dep't of Empl. Sec.*[438] considered whether compensation to a partner constitutes wages under the Unemployment Insurance Act (Act).[439] Weinberg was an equity sales representative and became one of 170 principals or partners in the company, William Blair and Company (WBC).[440] He filed for unemployment compensation. The Illinois Department of Employment Security (IDES) found Weinberg eligible for benefits, because he received remuneration for services he performed.[441] WBC requested reconsideration.[442] The IDES reversed its decision and denied benefits.[443] Weinberg appealed that decision with the IDES.[444] An IDES referee held a telephone hearing and found Weinberg ineligible for benefits.[445] Weinberg appealed to the IDES Board of Review, which affirmed the ineligibility determination.[446] Weinberg then filed a complaint in the circuit court for administrative review of the IDES Board's decision.[447] The circuit court remanded the complaint to the IDES Board to determine if certain

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435. *Id.*
436. *Id.*
437. *Id.* at ¶ 21.
438. 2015 IL App (1st) 140490.
439. 820 ILL. COMP. STAT. ANN. 405/500(E) (West 2010); *see also Weinberg*, 2015 IL App (1st) 140490, ¶ 1.
440. *Id.* at ¶ 2.
441. *Id.* at ¶ 3.
442. *Id.* at ¶ 4.
443. *Id.*
444. *Id.*
445. *Id.* at ¶¶ 5–12.
446. *Id.* at ¶¶ 12–13.
447. *Id.* at ¶ 18.

exhibits should have been admitted into evidence.[448] The IDES Board determined Weinberg did not receive wages and thus was ineligible for unemployment benefits.[449] Weinberg filed another complaint in the circuit court. The court circuit found Weinberg's income counted as both commissions and company profits, and further, the court found that the commissions were wages under Section 234 of the Act making Weinberg eligible for unemployment compensation benefits.[450] The IDES appealed the circuit court decision. This was a a mixed question of law and fact, thus, the appellate court reviewed the IDES Board's decision under the clearly erroneous standard.[451] To be eligible under the Act, Weinberg must have received wages during a base period.[452] The Act defines wages as "remuneration for personal services, including salaries, commission, bonuses, and the reasonable money value of all remuneration in any medium other than cash."[453] The Act also defines an employing unit to include a partnership.[454] Partners are not employees of the partnership.[455] Weinberg was guaranteed a payment from partnership profits based on his client base and was reported on Schedule K-1 pertaining to partners.[456] The appellate court ruled the IDES Board decision which stated Weinberg was ineligible for unemployment compensation benefits was not clearly erroneous, and, therefore, reversed the circuit court and affirmed the IDES determination.[457]

B. *L.A. McMahon Building Maintenance, Inc. v. Department of Employment Security*, 2015 IL App (1st) 133227

In *L.A. McMahon Bldg. Maint., Inc. v. Dept. of Empl. Sec.*,[458] the court again reviewed the IDES focus on Section 212 of the Unemployment Insurance Act[459] in determining whether individuals are employees rather than independent contractors. L.A. McMahon Bldg. Maint., Inc. (McMahon) provided window washing services to its clients.[460] The Illinois Department

448. *Id.* at ¶ 13.
449. *Id.* at ¶ 16.
450. *Id.* at ¶ 18; 820 ILL. COMP. STAT. ANN. 405/234 (West 2010).
451. *Weinberg,* 2015 IL App (1st) 140490, ¶ 21.
452. *Id.* at ¶ 22.
453. *Id.,* 820 ILL. COMP. STAT. ANN. 405/234.
454. *Weinberg,* 2015 IL App (1st) 140490, ¶ 23; *see also* 820 ILL. COMP. STAT. ANN. 405/204.
455. *Weinberg,* 2015 IL App (1st) 140490 ¶ 23; *see also* Donaldson v. Gordon, 397 Ill. 488, 495 (1947).
456. *Weinberg,* 2015 IL App (1st) 140490 ¶ 24.
457. *Id.* at ¶ 30.
458. 2015 IL App (1st) 133227.
459. 820 ILL. COMP. STAT. ANN. 405/212 (West 2010).
460. *McMahon,* 2015 IL App (1st) 133227, ¶ 3.

of Employment Security (IDES) determined the window washers were employees and assessed $64,051 in unpaid employer contributions and $35,773 in unpaid interest.[461] McMahon filed a protest with the IDES.[462] McMahon asserted the window washers were independent contractors with contracts.[463] The window washers contacted McMahon to see if there were any appointments set and to solicit work.[464] Workers were free to decline the work.[465] If they agreed to work, the worker traveled to the customer's home, utilizing their own transportation and supplies.[466] McMahon provided no supervision or training.[467] The window washers did not receive benefits, were required to carry their own insurance policies and were issued 1099s for the income they received.[468] McMahon had five employees, who received benefits and were issued W2s.[469] The window washers carried a McMahon business card with the price list on the back.[470] If the window washer noticed other work was needed, such as gutters needing cleaning, the customers called McMahon and it was added to the work and customer's bill.[471] McMahon provided t-shirts, but the window washers were not required to wear them.[472] The services were invoiced by McMahon and the window washers were paid fifty percent of the total biweekly.[473] If customers were unhappy with services, the window washers could redo it, but if the customers did not pay, McMahon did not pay the window washers.[474] Window washers were free to procure other window washing jobs, but could not solicit McMahon customers whom the window washers met.[475] Window washers could hire their own assistants, but were responsible for paying them.[476] Some window washers had their own established businesses.[477] The IDES determined the window washers were employees. The circuit court affirmed. McMahon sought administrative review of the circuit court. The burden was on McMahon, since it was the one

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461. *Id.*
462. *Id.* at ¶ 4.
463. *Id.*
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.* at ¶ 7.
469. *Id.*
470. *Id.* at ¶ 9.
471. *Id.* at ¶ 10.
472. *Id.* at ¶ 12.
473. *Id.* at ¶ 15.
474. *Id.* at ¶ 16.
475. *Id.* at ¶ 19.
476. *Id.* at ¶ 21.
477. *Id.* at ¶ 23.

seeking exemption for the window washers as independent contractors. The court noted that the independent contractor relationship is dictated by section 212 of the Act, not the contract.[478] The case hinged on the conjunctive provisions of section 212 and namely section 212(B). There are two alternative parts of section 212(B).[479] The service performed by an individual is deemed employment, unless (1) "such service is either outside the usual course of the business for which such service is performed" or (2) "that such service is performed outside of all the places of business of the enterprise for which such service is performed."[480] Window washers were not outside of McMahon's usual course of business.[481] McMahon's business would not exist without the window washers, so it was unable to fall within that exemption.[482] Following *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*,[483] the court noted that an employing unit's place of business extends to any location where workers regularly represent its interests.[484] The appellate court was not left with a definite and firm conviction that the IDES was clearly erroneous that the window washers were not representing the interests of McMahon based on the business cards, providing services to McMahon's specifications, and not paying the window washer unless the customer was satisfied.[485] The court declined the IDES attempt to get the court to hold that "any time workers for a business travel to perform services, the travelling workers are always representing the company's interests under section 212(B) of the Act and, therefore, are automatically employees rather than independent contractors."[486] The IDES determination that the window washers were employees was affirmed due to the failure of McMahon to satisfy the burden of section 212(B).[487]

C. *Petrovic v. Department of Employment Security*, 2016 IL 118562

Petrovic v. Dep't of Empl. Sec.[488] examined the definition of misconduct under the Unemployment Insurance Act.[489] Zlata Petrovic (Petrovic) had a

478. *Id.* at ¶ 41.
479. *Id.* at ¶ 44.
480. *Id.* at ¶ 44; 820 ILL. COMP. STAT. ANN. 405/212(B).
481. *McMahon,* 2015 IL App (1st) 133227, ¶ 45.
482. *Id.*
483. 201 Ill. 2d 351 at 391.
484. *McMahon,* 2015 IL App (1st) 133227, ¶ 46.
485. *Id.* at ¶ 49.
486. *Id.* at ¶ 51.
487. *Id.* at ¶ 52.
488. 2016 IL 118562.
489. 820 ILL. COMP. STAT. ANN. 405/100, *et seq.* (West 2010).

friend ask if she could do something for a passenger.[490] Petrovic acquiesced and asked the catering department to deliver a bottle of champagne to the passenger and asked the flight attendant to upgrade the passenger to first class.[491] Both were done. Petrovic was terminated for violation of two express policies.[492] The rules were:

> Rule #16: 'Misrepresentation of facts or falsification of records is prohibited.'
>
> Rule #34: 'Dishonesty of any kind in relations [*sic*] to the Company, such as theft or pilferage of Company property, the property of other employees or property of others entrusted to the Company, or misrepresentation in obtaining employee benefits or privileges will be grounds for dismissal and where the facts warrant, prosecution to the fullest extent of the law. Employees charged with a criminal offense on or off duty may be immediately withheld from service. Any action constituting a criminal offense, whether committed on or off duty, will be grounds for dismissal.'[493]

Petrovic applied for unemployment compensation benefits.[494] American protested, asserting she was terminated for misconduct and therefore was ineligible. Specifically, American discharged her because she left her work area without approval to secure an undocumented upgrade for a friend of a friend.[495] The IDES denied benefits because she was discharged for misconduct.[496] Petrovic appealed. An IDES referee held a telephone hearing. American described Petrovic's conduct as circumventing policy and procedures without approval and costing American $7,100.[497] Petrovic testified that she asked catering for the champagne and asked the flight attendant for the upgrade.[498] Neither said no. Petrovic was unaware of any policy requiring a manager to approve her requests.[499] The IDES referee affirmed denial of the benefits based on the opinion that some misconduct is

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490. *Petrovic*, 2016 IL 118562, ¶ 4.
491. *Id.*
492. *Id.* at ¶ 5.
493. *Id.*
494. *Id.* at ¶ 6.
495. *Id.*
496. *Id.* at ¶ 7.
497. *Id.*
498. *Id.* at ¶ 8.
499. *Id.*

so serious and commonly known as wrong that the employer does not need a specific rule and American was harmed financially.[500] Petrovic appealed to the IDES Board of Review, which affirmed the ineligibility.[501] The circuit court reversed and found Petrovic was eligible for benefits, because there was no express rule or policy, so there was no misconduct.[502] The IDES appealed. The appellate court reversed the circuit court and affirmed the Board's decision that Petrovic was terminated for misconduct and was therefore ineligible for benefits.[503] Petrovic petitioned the Illinois Supreme Court for leave to appeal, which was granted. The definition of misconduct required (1) a deliberate and willful violation, (2) of a reasonable rule or policy of the employer governing their behavior in the performance of work that (3) either (a) harmed the employer or (b) was repeated despite a warning or explicit instruction by the employer.[504] The court reasoned that it required an employee to be aware that her conduct was prohibited.[505] It continued that there was no rule prohibiting Petrovic from requesting champagne or an upgrade. Rule #16 and #34 were in the termination letter, but were not entered into evidence and testimony at the hearing was vague and conclusory. The court also pointed out that Petrovic requested the champagne and upgrade, but other employees actually provided the champagne and upgrade.[506] There are cases holding a court may infer a rule violation by commonsense that certain conduct disregards the employer's interest, such as assault, stealing, throwing a folder at a supervisor, or sexually harassing a coworker.[507] However, the court agreed with Petrovic that the judicially created commonsense exception cannot be reconciled with Section 602(A) of the Unemployment Insurance Act.[508] Reviewing the Board's decision under the clearly erroneous standard, the court held the Board's decision was clearly erroneous because American failed to present evidence of a deliberate rule violation.[509] The court held that absent "an express rule violation, an employee is only disqualified for misconduct if her conduct was otherwise illegal or would constitute a *prima facie* intentional tort."[510]

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500. *Id.* at ¶ 9.
501. *Id.* at ¶ 10.
502. *Id.*
503. *Id.* at ¶ 11.
504. *Id.* at ¶ 26.
505. *Id.* at ¶ 30.
506. *Id.* at ¶ 34.
507. *Id.* at ¶ 35.
508. *Id.* at ¶ 36.
509. *Id.* at ¶ 37.
510. *Id.* at ¶ 36.

D. *E-Z Movers, Inc. v. Rowell and Dept. Of Empl. Security*, 2016 IL App (1st) 150435

Another case reviewing a determination by the Illinois Department of Employment Security (IDES) that individuals were employees and not independent contractors is *E-Z Movers, Inc. v. Rowell*.[511]

E-Z Movers hired drivers and helpers to perform physical labor for its furniture moving company.[512] After one of the workers filed for unemployment compensation benefits, the IDES realized E-Z Movers had not reported workers' wages.[513] An IDES auditor determined that ninety-two individuals in 2008 and eighty-nine individuals in 2007 should have been reported as employees, because the primary function of the business was moving furniture and those were the services these individuals performed for the company.[514] While the IDES auditor stated the 1099 recipients were not independently established in their own business, other cases tend to show that that factor may still not necessarily be enough to overcome a determination the individuals were employees. E-Z Movers provided information and testimony that the drivers and helpers were independent contractors, but to no avail.[515] The IDES determined E-Z Movers failed to satisfy all of the requirements of Section 212 of the Unemployment Insurance Act, so the drivers and helpers were employees.[516] E-Z Movers filed objections, but the IDES Director issued a final administrative determination upholding its own Department's decision.[517] E-Z Movers filed a complaint in the circuit court for administration review, which reversed the Director's decision.[518] The IDES appealed.

The appellate court reviewed this matter under the clearly erroneous standard, because the question posed under Section 212 of the Act is both of law and fact.[519] If the appellate court is not left with a "definite and firm conviction that a mistake" was made, it will not disturb the IDES ruling. In reviewing Section 212(A), the court referred to the 25 factors that the IDES examines to determine whether director or control exists.[520] E-Z Movers

511. 2016 IL App (1st) 150435.
512. *Id.* at ¶ 4.
513. *Id.*
514. *Id.* at ¶ 5.
515. *Id.* at ¶¶ 7–11.
516. *Id.* at ¶ 12, 820 ILL. COMP. STAT. ANN. 405/212.
517. *E-Z Movers,* 2016 IL App (1st) 150435, ¶ 12.
518. *Id.* at ¶ 13.
519. *Id.* at ¶ 16.
520. *Id.* at ¶¶ 16–23.

attempted to attack the IDES consideration of the twenty-five factors, but since the court does not reweigh the evidence, and E-Z Movers did not contend a mistake had been made, the determination was not clearly erroneous.[521] Further, not all factors are relevant.[522] This is the frustrating part for those facing the IDES in this situation. The IDES does not publish its decisions as the courts do, nor does it explain how it analyzes and weighs the factors. Instead, the IDES bases its determinations on "the totality of the circumstances," which makes it nearly impossible to successfully argue a mistake was made. In this case, the Director focused on the factors he deemed most relevant.[523] Those were (a) E-Z Movers had the right to hire and fire the drivers and helpers, (b) provided the trucks, (c) scheduled the jobs with customers, (d) limited the workers' use of the trucks, and (e) the drivers and helpers could not assign their obligations without approval.[524]

Even though failing to satisfy the requirement under Section 212(A), the court continued to analyze Sections 212(B) and (C). Section 212(B) provides:

> B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed;[525]

The key is whether the services being performed by the drivers and helpers were necessary to the business of E-Z Movers or merely incidental.[526] The IDES Director determined the drivers and helpers provided the physical side of the business while E-Z Movers provided the marketing for the business.[527] The appellate found it was not a clear error for the IDES to determine that the moving company would not exist without the drivers and helpers.[528] E-Z Movers waived the argument of the second alternative part of Section 212(B), because it was not timely raised at any of the proceedings below.

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521. *Id.* at ¶¶ 24–25.
522. *Id.* at ¶ 25.
523. *Id.* at ¶¶ 26–29.
524. *Id.*
525. 820 ILL. COMP. STAT. ANN. 405/212(B).
526. *E-Z Movers,* 2016 IL App (1st) 150435, ¶ 32.
527. *Id.* at ¶ 33.
528. *Id.* at ¶ 34.

Last, Section 212(C) provides:

> C. Such individual is engaged in an independently established trade, occupation, profession, or business.[529]

There are 13 factors to assist with this determination. However, no one factor is dispositive and the IDES relies on the "totality of [the] circumstances." E-Z Movers provided no evidence that the drivers or helpers owned their own trucks, had been granted their own licenses, or could operate without one.[530] The argument that the drivers and helpers could work for others failed.[531] One of the key points was that E-Z Movers did not present evidence that the drivers and helpers could operate in the absence of E-Z Movers or that a similar company would furnish them with a moving truck and procure the customers.[532]

The appellate court affirmed the IDES determination that the drivers and helpers were employees.[533]

VIII. UNIONS AND COLLECTIVE BARGAINING AGREEMENTS

A. *International Union of Operating Engineers Local 965 Illinois Labor Relations Board*, 2015 IL App (4th) 140352

In a case involving a collective bargaining dispute, *International Union of Operating Engineers Local 965 v. Illinois Labor Relations Board*,[534] the Fourth District affirmed the administrative law judge's ruling, which granted a unit-clarification petition for the Illinois Labor Relations Board (Board).

In *International Union*, International Union of Operating Engineers Local 965 (Union) and the Office of the Comptroller (Comptroller) entered into two collective bargaining agreements (CBA).[535] Each bargaining agreement included Comptroller employees who held the title of public service administrator (PSA).[536] The Comptroller analyzed the amendment in section 3(n) of the Illinois Public Labor Relations Act[537] (Act), which defines a public

529. 820 ILL. COMP. STAT. ANN. 212(C) (West 2010).
530. *E-Z Movers,* 2016 IL App (1st) 150435, ¶¶ 38–39.
531. *Id.* at ¶ 41.
532. *Id.*
533. *Id.* at ¶ 44.
534. 2015 IL App (4th) 140352.
535. *Id.* at ¶ 4.
536. *Id.*
537. 5 ILL. COMP. STAT. 315/3(n.).

employee, and interpreted the language to indicate that PSAs employed by the Comptroller did not enjoy the rights associated with collective bargaining.[538] The Union took the position that the statutory amendment was not applicable to the parties' existing contracts and would not affect any bargaining-unit employees until after the CBA expired.[539] The Union filed a grievance on the Comptroller, alleging that the Comptroller's removal of the PSA classification from both bargaining units violated the parties' CBAs.[540] The Comptroller refused to recognize the grievance because the PSAs were excluded from collective bargaining and could no longer file a grievance or be represented by the Union.[541] In response, the Comptroller filed a unit-clarification petition with the Board requesting that PSAs under the jurisdiction of the Comptroller be excluded from collective bargaining.[542]

The circuit court dismissed the Union's Petitions.[543] The Union then filed a request to intervene and motion to stay the unit-clarification petition.[544] In response, the Comptroller argued that intervention should be denied because the PSAs were excluded from collective bargaining.[545]

The administrative law judge (ALJ) issued an order and "stated that, while section 3(n) 'unambiguously declares that, as of the effective date of the amendment, the [Comptroller's] PSAs are not public employees,' the Comptroller was still required to file a unit-classification petition with the Board."[546] "The ALJ recommended denying the Union's request to stay the Board's proceedings until the petitions to compel processing of grievances and compel arbitration could be ruled on by the circuit court…" because the issues were ". . .for the Board to decide."[547] "[T]he Union filed exceptions to the ALJ's recommended decision and order."[548] "The Board granted the unit-clarification petition and directed its executive director to issue a certification excluding the PSAs employed by the Comptroller from the existing bargaining units."[549] "[T]he Union filed a petition for direct administrative review of the Board's decision with the court."[550] The ". . . court affirmed the dismissal of

538. *International Union*, 2015 IL App (4th) 104352, ¶¶ 5–6.
539. *Id.* at ¶ 6.
540. *Id.* at ¶ 7.
541. *Id.*
542. *Id.* at ¶ 8.
543. *Id.* at ¶ 9.
544. *Id.* at ¶ 10.
545. *Id.* at ¶ 11.
546. *Id.* at ¶ 12.
547. *Id.* at ¶ 13.
548. *Id.* at ¶ 14.
549. *Id.* at ¶ 15.
550. *Id.* at ¶ 16.

the Union's petitions to compel processing of grievances and to compel arbitration."[551]

On appeal, ". . . [t]he Union argue[d] that the ALJ failed to timely rule on its petition to intervene, thereby deprived it of due process."[552] However, the Fourth District determined that the Union did not meaningfully raise the issue of due process before the Board and therefore, the issue was forfeited.[553]

The Union also argued that "the Board erred in granting the Comptroller's unit-clarification petition" by claiming that "the PSAs were not affected by [the amendment] of the Act until the expiration of the CBAs."[554] The court disagreed, observing that "substantive amendment[s] will not be given retroactive effect."[555] The court noted that in this case, the Comptroller conceded that the amendment was "substantive in nature."[556] Therefore, the amendment did "not have a retroactive impact on the parties" and its requirements could not be imposed in the present, future or past.[557] The court held that "the PSAs were not entitled to a continuation of the Act as it existed before the amendment, and the General Assembly had the right to remove them from the purview of the Act at any time."[558] Therefore, "the Board properly excluded the PSAs from the existing bargaining units" and the Board's judgment was affirmed.[559]

B. *AFSCME Council 31 v. State of Illinois*, 2015 IL App (1st) 133454

In *AFSCME v. State*,[560] the court analyzed constitutional arguments relating to the reduction of "collective bargaining unit membership among management-level state employees." In that case, "the Department of Central Management Services [(CMS)], on behalf of the Governor, filed petitions with the Illinois Labor Relations Board [(Board)] seeking to exclude certain public employment positions from collective bargaining units" consistent with the procedures set forth in the Illinois Public Labor Relations Act (Act).[561]

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551. *Id.*
552. *Id.* at ¶ 19.
553. *Id.* at ¶ 21.
554. *Id.* at ¶ 23.
555. *Id.* at ¶ 27 (citing White v. Retirement Board of the Policemen's Annuity & Benefit Fund, 2014 IL App (1st) 132315, ¶ 32).
556. *Id.* at ¶ 28.
557. *Id.* at ¶¶ 29–30 (citing Hayashi v. Illinois Department of Financial & Professional Regulation, 2014 IL 116023, ¶ 23).
558. *Id.* at ¶ 31.
559. *Id.* at ¶¶ 32, 34.
560. AFSCME v. State, 2015 IL App (1st) 133454.
561. 5 ILL. COMP. STAT. 315/6.1.

"AFSCME, on behalf of individuals, contested their removal from their collective bargaining units and filed objections to the petitions."[562] The Board agreed with CMS and removed the individuals' collective bargaining rights.[563]

At issue in this case was the section of the Act titled "Gubernatorial designation of certain public employment positions as excluded from collective bargaining."[564] The section provides that: (1) the Governor is authorized to designate employment positions to be excluded from the self-organization and collective bargaining provisions of the Act; (2) the "metrics to instruct the Governor as to which positions qualify for designation;" and (3) "that the Governor only has 365 days to designate the positions."[565] "AFSCME argued that section 6.1: (1) is an unconstitutional delegation of legislative authority to the executive branch; (2) is an unconstitutional violation of the individuals' equal protection rights; (3) constitutes unconstitutional special legislation; and (4) unconstitutionally deprives the individuals of due process of law."[566]

In responding to AFSCME's constitutional claims, the First District noted that "a prerequisite to a procedural due process challenge is that the challenger possesses a constitutionally protected right which has been threatened."[567] However, in this case, "AFSCME made no showing that the individuals had such a right" and there was "nothing in the record that [demonstrated] that it was impossible . . . to comply with the time restraints set forth in the statute."[568] Therefore, AFSCME "failed to demonstrate that procedural due process concerns rendered the statute unconstitutional."[569]

Next, the court considered AFSCME's argument "that the delegation of powers [was] improper because it [gave] the Governor legislative authority by authorizing him to determine classifications of employees under the Act without sufficient guiding principles."[570] AFSCME further argued that since a future governor cannot reverse the designations, "they have the effect of law."[571] The court noted that "section 6.1 barely delegate[d] any authority to the Governor that he did not already possess."[572] Rather, the statute simply "defers to the Governor's knowledge and experience" in terms of the

562. *AFSCME*, 2015 IL App (1st) 133454, ¶ 5.
563. *Id.*
564. *Id.* at ¶ 6 (quoting 5 ILL. COMP. STAT. 515/6.1).
565. *Id.* at ¶ 6.
566. *Id.* at ¶ 7.
567. *Id.* at ¶ 14.
568. *Id.*
569. *Id.*
570. *Id.* at ¶ 22.
571. *Id.*
572. *Id.* at ¶ 25.

employment positions.[573] The court recognized that the Governor had a "unique position as the chief executive charged with managing the workers covered in section 6.1, [and] the General Assembly sought to solve the broader efficiency problem by giving the Governor the authority to expediently exclude top-level managers from their collective bargaining units."[574]

In considering the equal protection argument, the court noted that "the statute [did] not aim to strip [anyone] of their collective bargaining rights, but instead focused on those persons' employment positions."[575] The court concluded that while section 6.1 permitted "certain employees to be treated differently than others," it did not do so in a constitutional manner because "there is no constitutional right to public sector bargaining."[576]

"AFSCME also argue[d] that the legislation was unconstitutional because the General Assembly limited designations to newer entrants to collective bargaining units and because it passed a second public act that added specific exceptions concerning which positions could be designated."[577] However, the court held that the State had "a legitimate interest in the efficiency of state government and a rational basis for treating some top-level managers differently than other managerial-type workers", and therefore, "the statute did not violate the individuals' equal protection rights."[578]

Given the rationale above, the First District affirmed the Board's decisions, concluding that section 6.1 "does not violate the individuals' constitutional rights."[579]

C. *Lindorff v. Department of Central Management Services,* 2015 Il App (4th) 131025

The Fourth District also considered section 6.1 of the Illinois Public Relations Act[580] (Act) in *Lindorff v. Department of Central Management Services*.[581] In *Lindorff*, the Department of Central Management Services (CMS) "filed a gubernatorial designation of exclusion petition under section 6.1 of the Act, seeking to exclude . . . three health care unit administrators in

573. *Id.*
574. *Id.* at ¶ 26.
575. *Id.* at ¶ 33.
576. *Id.*
577. *Id.* at ¶ 36.
578. *Id.* at ¶ 39.
579. *Id.* at ¶ 48.
580. 5 ILL. COMP. STAT. 315/6.1.
581. Lindorff v. Department of Cent. Management Services, 2015 IL App (4th) 131025.

the [Department of Corrections] DOC" from collective bargaining.[582] Petitioners Lois Lindorff (Lindorff) and Deborah Fuqua (Fuqua), along with AFSCME and Mary Miller (Miller), the respondents, filed objections to the petition and argued that the gubernatorial designation did not meet the requirements of section 6.1(b)(5) of the Act.[583] "The administrative law judge (ALJ) held an evidentiary hearing . . . [to] establish the structure of medical services within the DOC."[584] Fuqua testified that federal and state laws, including administrative and institutional directives, governed the operation of the health care unit but she did not have authority to deviate from them or play any role in creating them.[585] "Miller and Lindorff also testified their correctional centers were run the same way Fuqua's did."[586] "The ALJ issued a recommended decision and order", and determined that "the gubernatorial designations were properly made.[587] "Miller and AFSCME filed objections to the ALJ's recommended decision and order."[588] The Illinois Labor Relations Board (Board) "accepted the ALJ's decision and certified the gubernatorial designation of the three health-care-unit-administrator positions."[589] The petitioners "filed their petition for direct administrative review."[590]

The court noted that "this case involved the relatively new statute," section 6.1(a) of the Act, which authorizes the Governor to designate State employment positions to be excluded from the self-organization and collective bargaining provisions of the Act.[591] The parties disputed the "two different ways in which an employee is authorized to exercise 'significant and independent discretionary authority'" under section 6.1(c)(i) and how those two different ways are defined.[592] The Fourth District noted that an employee meets the definition of section 6.1(b)(5) in two situations: "(1) the employee 'is [(a)] engaged in executive and management functions of a State agency *and* [(b)] charged with the effectuation of the management policies and practices of a State agency' *or* (2) the employee 'represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.'"[593] Petitioners asserted that an

582. *Id.* at ¶ 4.
583. *Id.*
584. *Id.* at ¶ 5.
585. *Id.* at ¶ 7.
586. *Id.* at ¶ 9.
587. *Id.* at ¶ 12.
588. *Id.*
589. *Id.*
590. *Id.* at ¶ 13 (citing 5 ILL. COMP. STAT. 315/6.1(c)(i)).
591. *Id.* at ¶ 19.
592. *Id.* at ¶ 20.
593. *Id.* at ¶ 22 (emphasis added) (quoting 5 ILL. COMP. STAT. 315/6.1(c)(i)).

employee must be "engaged in executive and management functions of a State agency" and meet one of the phrases joined by the "or."[594] However, the Board interpreted the section as all of the language preceding the "or" is one way to the meet the definition, and the language after the "or" is the second way.[595] The court agreed with the Board and noted that the language was not ambiguous.[596]

The petitioners also asserted that the court should interpret the managerial authority definition of section 6.1(c)(i) the same as section 3(j) of the Act, which provided that "'[m]anagerial employee' means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices."[597] The court noted that the Board ruled that the managerial authority language of section 6.1(c)(i) tracks the language of section 3(j), but it found the managerial-authority provision did not have the same meaning.[598] The court noted that section 6.1(c)(i) of the Act did not define "executive and management functions" and the court has generally interpreted the language to mean duties related to the running of a department.[599] The court held that section 6.1(c)(i) lacked the "predominantly" language, which narrows section 3(j)'s definition of "managerial employee."[600] Rather, "predominantly" generally means "for the most part."[601] Unlike section 3(j), the "executive and management functions" do not have to compromise most of the employee's work for the employee to meet the first part of the managerial-authority test.[602] Under the second part of the managerial-authority test, the employee would need to effectuate management policies and practices.[603] "Effectuate," as it relates to the managerial-authority test, means "to put into operation."[604]

The court concluded that the Board's finding that the objectors failed to prove the health care unit administrators did not engage in management and executive functions was not clearly erroneous because the objectors failed to show the health care unit administrators did not effectuate DOC policies and

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594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.* at ¶ 24 (quoting 5 ILL. COMP. STAT. 315/3(j)).
598. *Id.*
599. *Id.* at ¶ 25 (citing Department of Cent. Mgmt. Servs. Pollution Control Bd. v. Illinois Labor Relations Bd, State Panel, 2013 IL App (4th) 110877, ¶ 25).
600. *Id.* at ¶ 25.
601. *Id.*
602. *Id.*
603. *Id.* at ¶ 26.
604. *Id.*

practices.[605] Therefore, the Board properly certified the positions at issue as excluded from collective bargaining under 6.1 of the Act and the decision was affirmed.[606]

D. *Health and Hospital Systems of the County of Cook v. Illinois Labor Relations Board*, 2015 IL App (1st) 150794

In *Health & Hospital Systems of the County of Cook v. Illinois Labor Relations Board*,[607] the court analyzed two tests to determine whether employees were considered "confidential." The Health & Hospital System of Cook County (Cook County), appealed from the order of the Illinois Labor Relation Board (Board), which granted the petition of Local 200, Chicago Joint Board, Retail, Wholesale and Department Store Union, AFL-CIO (Union) to add ten recruiting positions to the existing bargaining unit.[608] The issue on appeal related to the Illinois Public Relations Act[609] (Act), which permits public employees to organize but excludes confidential employees within the collective bargaining unit.[610] Specifically, the issue involved whether ten recruitment and selection analysts (RSA) employed by a county hospital system were "confidential employees," defined in section 3(c) of the Act.[611]

The Union filed a petition with the Board, and Cook County filed a response, arguing that RSAs were prohibited by statute from joining the Union as "confidential employees" or "supervisors" under the Act.[612] The administrative law judge (ALJ) issued a recommended decision and determined that Cook County failed to establish that the labor team "formulates, determines, and effectuates labor relations policies."[613] Furthermore, Cook County failed to establish that the RSAs assist the labor team in a confidential capacity in the regular course of their duties; rather, their work with grievances is only tenuously related to the labor relations' policies.[614] The Board adopted the ALJ's decision, granting the Union's petition.[615]

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605. *Id.* at ¶¶ 35–36.
606. *Id.* at ¶ 37.
607. Health & Hosp. Sys. Of Cook v. Illinois Labor Relations Bd., 2015 IL App (1st) 150794.
608. *Id.*
609. 5 ILL. COMP. STAT. 315.
610. *Health & Hospital Systems*, 2015 IL App (1st) 150794, ¶ 2.
611. *Id.*
612. *Id.* at ¶ 6.
613. *Id.* at ¶ 41.
614. *Id.*
615. *Id.* at ¶ 6.

On appeal, the First District noted that to be considered "confidential," the employee's position must qualify under either one of two tests: (1) the labor nexus test, or (2) the authorized access test.[616] Under the labor nexus test, an employee is "confidential" if he or she "in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations."[617] The Board found that, based on the ALJ's decision, the RSAs were not confidential employees under the labor nexus test.[618] The First District found no error in the Board's decision and affirmed the ruling that RSAs are not confidential employees under the labor nexus test.[619] Next, the court considered whether the labor team might have a role in "formulating, determining, and effectuating labor relations policies," noting that the record failed to establish such a claim.[620] The court explained that the record simply detailed the labor team's role in addressing individual labor grievances, and there was no evidence to support the proposition that the labor team developed or implemented collective bargaining policies for the human resources department.[621] The court concluded that Cook County could not establish that the labor team's policies were directly tied to the department's bargaining policies and therefore failed to prove that RSAs were confidential employees under the Act.[622]

In analyzing the authorized access test, the First District noted that an employee is a "confidential employee," if "in the regular course of his or her duties, [he or she] has access to information relating to the effectuation or review of the employer's collective bargaining policies."[623] The access must be authorized, and the information must relate specifically to collective bargaining between labor and management.[624] The ALJ found that although Cook County demonstrated that RSAs had access to information "possibly sensitive or of interest to a union," that information was "not shown to be specifically pertinent to the Employer's collective bargaining strategy."[625] Agreeing again the with the Board's decision, the court found that the Board did not err in finding that the RSAs were not confidential employees under the

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616. *Id.* at ¶ 55 (citing Support Council of Dist. 39, Wilmette Local 1274 v. Educ. Labor Relations Bd, 366 Ill. App. 3d 830, 833 (1st Dist. 2006)).
617. *Health & Hospital Systems*, 2015 IL App (1st) 150794, ¶ 58 (citing 5 ILL. COMP. STAT. 315/3(c)).
618. *Id.* at ¶ 60.
619. *Id.*
620. *Id.* at ¶ 63.
621. *Id.*
622. *Id.* at ¶ 64.
623. *Id.* at ¶ 67 (citing 5 ILL. COMP. STAT. 315/3(c)).
624. *Id.* (citing *Wilmette*, 366 Ill. App. 3d at 837).
625. *Id.* at ¶ 69.

authorized access test.[626] The court reasoned that the facts, as compared to Illinois case law, did not support Cook County's position that RSAs were confidential employees under the authorized access test.[627] Furthermore, any information that RSAs could access relating to grievances would be available to the Union, and was therefore not confidential.[628]

Rather than adopting Cook County's view that the information RSAs may access demonstrates the Board's clear error, the court affirmed the Board's finding that, while the information is potentially of interest to the Union as it approaches the negotiating table, it does not provide RSAs with genuine insights to the collective bargaining strategy of Health & Hospital Systems.[629]

E. *Board of Education of the City of Chicago v. Illinois Educational Labor Relations Board*, 2015 IL 118043

In the sole labor ruling by the Illinois Supreme Court, the court analyzed an unfair labor practice charge under the Illinois Educational Labor Relations Act (Act), 115 ILCS 5/14(a)(1).[630] The Board of Education of the City of Chicago (Board) and the Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO (Union) were parties to a collective bargaining agreement (CBA), which resulted in binding arbitration.[631] During this time, the Board notified the Union of a new policy, whereby non-renewed probationary appointed teachers (PATs) would be declared ineligible for rehire if they were non-renewed twice or who were non-renewed with an unsatisfactory performance rating.[632] The Board placed a "Do Not Hire" designation in these teachers' personnel files.[633]

The Union filed grievances regarding the new "Do Not Hire" policy.[634] The Union requested the Board cease the "Do Not Hire" designations in Union members' files if the terminations were not for cause.[635] Furthermore, the Union requested that Union members be able to seek employment within the

626. *Id.* at ¶ 70.
627. *Id.* at ¶ 71.
628. *Id.* at ¶ 73.
629. *Id.* at ¶ 75.
630. *Bd. of.Educ. of Chi.*, 2015 IL 118043.
631. *Id.* at ¶ 4.
632. *Id.* at ¶ 5.
633. *Id.*
634. *Id.* at ¶ 6.
635. *Id.* at ¶ 7.

Chicago Public Schools.[636] The Board refused to arbitrate the grievances, arguing that hiring decisions were exclusive management rights.[637]

"The Union filed an unfair labor practice charge . . . against the Board . . . and alleged that [it] violated . . . the Act by refusing to arbitrate the grievances."[638] The Board was granted the right to arbitrate the grievances.[639] The First District concluded that the Board was not obligated to arbitrate the grievances and both the Union and Board filed a petition for leave to appeal.[640]

The issue on appeal was whether the Board was contractually and statutorily excluded from arbitration because it had a managerial right over hiring decisions and could designate a probationary appointed teacher as ineligible for re-hire.[641] The Illinois Supreme Court examined section 14(a)(1) of the Act, which provided that a school district's refusal to submit an employee grievance to binding arbitration under a collective bargaining agreement is usually a violation of the Act.[642] However, the court noted that a school district may refuse to arbitrate a grievance when "(1) there is no contractual agreement to arbitrate" or (2) the dispute is not subject to arbitration "because the subject matter of the dispute conflicts with Illinois law."[643]

The court considered whether there was a contractual agreement to arbitrate grievances concerning the "Do Not Hire" designation policy.[644] The CBA stated that a grievance, defined as a complaint involving a work situation, was subject to binding arbitration.[645] Although the CBA broadly defined a grievance, the definition did not include the Board's ability to make hiring decisions.[646]

In addition, the agreement involved a provision stating that the Board was not required to bargain over "matters of inherent managerial policy."[647] To solve this dilemma, the Court considered if the dispute involved wages, hours, and terms and conditions of employment.[648] A term and condition of employment directly affects the welfare and work of employees and can

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636. *Id.*
637. *Id.* at ¶ 8.
638. *Id.* at ¶ 9.
639. *Id.*
640. *Id.* at ¶ 10.
641. *Id.* at ¶ 12.
642. *Id.* at ¶ 20.
643. *Id.*
644. *Id.* at ¶ 22.
645. *Id.* at ¶ 23.
646. *Id.* at ¶ 24.
647. *Id.* at ¶ 25.
648. *Id*. (citing Cent. City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 599 N.E.2d 892, 897 (1992)).

include health insurance and pension contributions.[649] The Court concluded that the "Do Not Hire" policy did not relate to terms and conditions of employment, but instead, related to the Board's ability to initiate employment.[650]

F. *Illinois State Toll Highway Authority v. International Brotherhood of Teamsters*, Local 700, 2015 IL App (2d) 141060

In *Ill. State Toll Highway Auth. v. Int'l Brotherhood of Teamsters, Local 700*, the International Brotherhood of Teamsters, Local 700 (Union) filed a grievance against the Illinois State Toll Highway Authority (Tollway).[651] The Second District reviewed the arbitrator's decision which held that the Tollway required that an employee, who was absent due to an illness for two or fewer days, present medical documentation or other proof, which certified the employee's ability to return to work and explained the reasons for the absence.[652] The Union filed a grievance contending that the medical documentation requirement violated the parties' collective bargaining agreement (CBA).[653]

During the arbitration hearing, the relevant issues included "(1) whether the Union's grievance was arbitrable; and (2) if so, whether it was meritorious."[654] The arbitrator first addressed whether the grievance was subject to arbitration.[655] The Second District noted that article XI, section 2(A) of the CBA stated that arbitration shall "provide an orderly method of handling and disposing of **all** disputes, misunderstandings, differences, or grievances arising between the Employer **and the Union or** the employees covered by this Agreement as to the meaning, interpretation, and application of the provisions of this Agreement."[656]

In reviewing the merits of the grievance, the arbitrator noted the Tollway's argument as to why the parties did not intend to establish an automatic two-day grace period.[657] The Tollway previously maintained that there had been a "sick-leave bank" that encouraged employees not to take

649. *City of Chi.*, 2015 IL 118043, ¶ 26 (citing Vienna School Dist. No. 55 v. Illinois Educ. Labor Relations Bd., 162 Ill. App. 3d 503, 507 (4th Dist. 1987)).
650. *Id* at ¶ 27.
651. 2015 IL App (2d) 1410600, ¶ 1.
652. *Id.* at ¶ 2.
653. *Id.*
654. *Id.* at ¶ 5.
655. *Id.* at ¶ 7.
656. *Id.* (emphasis in original).
657. *Id.* at ¶ 9.

medical leave without good cause.[658] "However, the CBA had eliminated the sick-leave bank, and now, without a documentation requirement, employees could 'game the system' by taking sick leave for one or two days without being sick and with no way for the Tollway to stop them."[659] The arbitrator noted that the Tollway had a legitimate interest in deterring the use of sick days for improper purposes and held that the Tollway may not require documentation certifying that an employee is able to return to work and explaining the absence for absences of two days or fewer.[660]

The Tollway applied for judicial review under the Uniform Arbitration Act (Act).[661] The Tollway expressed three arguments in the application: "(1) the arbitrator erred in finding that the grievance was subject to arbitration; (2) the arbitrator exceeded authority by revising the CBA; and (3) the arbitrator's construction of the CBA violated public policy."[662]

The circuit court agreed with the Union that the dispute involving employee absences was subject to arbitration.[663] However, as it related to the merits of the arbitration, the arbitrator had exceeded his authority in finding that the CBA barred the Tollway from giving its supervisors any discretion to require employees to document sick-leave absences of two days or fewer because it "could not substitute [the] construction of the CBA for the arbitrator's honest judgment."[664] The court also held that the arbitrator's construction of the CBA violated "a strong public policy in Illinois to keep roadways safe and ensure [that] unsafe motorists are not operating vehicles in ways [by which] they could injure themselves or others."[665] This was because at times "it may be necessary for the Tollway to seek a doctor's note from an employee before permitting them to return to work on the Illinois roadways."[666] "The court vacated the blanket prohibition portion of the award, and the Union appealed."[667]

The Union argued to the Second District that the trial court erred by "(1) substituting its construction of the CBA for that of the arbitrator; and (2) holding that the arbitrator's construction of the CBA violated public policy."[668] The court held that "the trial court erred in vacating the arbitrator's

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658. *Id.*
659. *Id.*
660. *Id.* at ¶¶ 6,10.
661. 710 ILL. COMP. STAT. 5/1.
662. *Ill. State Toll Highway Auth.*, 2015 IL App (2d) 1410600, ¶ 11.
663. *Id.* at ¶ 16.
664. *Id.* at ¶ 17.
665. *Id.* at ¶ 19.
666. *Id.*
667. *Id.* at ¶ 20.
668. *Id.* at ¶ 21.

construction of the CBA," however, "the arbitrator's conclusion that the CBA prohibited the Tollway from imposing any documentation requirement for sick-leave absences within the grace period" was upheld.[669] As to whether the arbitrator's award violated public policy, the court agreed with the arbitrator's interpretation of the CBA and determined that the grace period did not violate public policy.[670] The court explained that "[e]liminating supervisors' discretion to require explanations and clearances after short sick leaves is far from tantamount to condoning or making inevitable violations of the traffic laws."[671] "A short leave of absence does not create a presumption that the returning employee is medically unfit to fulfill his duties."[672] The judgment of the circuit court was reversed and the arbitrator's award was reinstated.[673]

G. *Clerk of the Circuit Court of Lake County v. Illinois Labor Relations Board*, 2016 IL App (2d) 150849

In *Clerk of the Circuit Court of Lake County v. Ill. Labor Rels. Bd.*, the Clerk of the Circuit Court of Lake County (Clerk) appealed the final decision and order of the Illinois Labor Relations Board (Board), which certified the American Federation of State, County, and Municipal Employees, Council 31 (Union), as the exclusive representative of a bargaining unit composed of some of the Clerk's employees.[674]

In this case, the Union filed a majority-interest petition pursuant to section 9(a-5) of the Illinois Public Labor Relations Act (Act).[675] In response, the Clerk filed a response to the petition and "alleged that the Union had used fraudulent information and [] threatened employees in an effort to coerce them into signing dues-deduction cards."[676] After considering two affidavits, the case was assigned to an administrative law judge (ALJ), who ordered the clerk to provide clear and convincing evidence that the Union used information in a fraudulent manner.[677] The Clerk responded with two additional affidavits.[678] The ALJ recommended that the employer provide clear and convincing evidence of fraud or coercion in obtaining majority support, but if the

669. *Id.* at ¶ 37.
670. *Id.* at ¶ 64.
671. *Id.*
672. *Id.*
673. *Id.* at ¶ 66.
674. 2016 IL App (2d) 150849, ¶ 1.
675. 5 ILL. COMP. STAT. 315/9(a-5).
676. *Lake County,* 2016 IL App (2d) 150849, ¶ 4.
677. *Id.* at ¶ 12.
678. *Id.* at ¶ 13.

employer failed to do so, the Board would certify the Union as the unit's exclusive representative.[679] The Clerk filed exceptions to the ALJ's decision which focused solely on the ALJ's finding that the Clerk did not present clear and convincing evidence that would raise issues of fact for hearing on the Union's alleged fraud or coercion in obtaining a majority support.[680] The Board determined that the ALJ's decision would stand as a non-precedential ruling because the Board could not reach a majority decision.[681]

On appeal, the Clerk argued, *inter alia*, that the Board relinquished its responsibility because it entered an order that did not contain any reviewable findings.[682] Furthermore, the Clerk argued that "the ALJ's determination that it had not demonstrated a material issue of fraud or coercion was erroneous."[683] The Second District held that the ALJ's recommended decision and order provided a sufficient basis for review and was therefore not arbitrary and capricious for not addressing the substance of the Clerk's exceptions.[684] The court also rejected the Clerk's argument that the Board and ALJ erroneously placed a higher burden on the Clerk than required by the Act or Board's rules.[685] As it related to the sufficiency of evidence demonstrating fraud or coercion, the court held that the ALJ's decision and Board's determination was not clearly erroneous when it held that the affidavits were not objectively coercive.[686] Therefore, the court concluded that "the Board and ALJ properly determined that the evidence did not rise to the necessary quantum because the Clerk did not present evidence of threats, retaliation, or other adverse consequences that the affiants would experience unless they signed the dues-deduction cards."[687] Thus, the Board's decision was confirmed.[688]

679. *Id.* at ¶ 17.
680. *Id.* at ¶ 20.
681. *Id.*
682. *Id.* at ¶ 23.
683. *Id.*
684. *Id.* at ¶ 33.
685. *Id.* at ¶ 48.
686. *Id.* at ¶ 61.
687. *Id.*
688. *Id.* at ¶ 63.

IX. MISCELLANEOUS

A. Illinois Wage Payment and Collection Act

i. Eakins v. Hanna Cylinders*, 2015 IL App (2d) 140944*

In *Eakins v. Hanna Cylinders, LLC,*[689] the court reviewed a claim for a guaranteed minimum salary amount. David Eakins (Eakins) was employed as an at-will employee by Hanna Cylinders, LLC (Hanna) as its plant manager.[690] When Eakins tendered his resignation, Hanna offered him a 24-month minimum term of employment to stay with Hanna.[691] Fourteen months later, Eakins was terminated.[692] Eakins filed a complaint alleging violation of the Wage Payment and Collection Act (Act)[693] and breach of contract.[694] Cross Motions for Summary Judgment were filed. Eakins' was denied. Hanna's motion for a special finding under Illinois Supreme Court Rule 304(a) was granted.[695] Eakins appealed.

The court noted that the contract had a 24-month duration.[696] Hanna maintained Eakins breached the contract by his poor performance, and, therefore, it had a right to discharge him for cause.[697] Eakins asserted there was no performance requirement, but there was a guaranteed payment for twenty-four months.[698]

There are two cases on point, *Pokora v. Warehouse Direct, Inc.*[699] and *Berutti v. Dierks Foods, Inc.,*[700], to support Eakins' position.[701] Eakins' contract guaranteed a salary for twenty-four months. The court notes that the contract failed to provide any performance level required by Eakins.[702] Hanna raised various arguments to convince the court it had a right to terminate Eakins' employment, but the court remained steadfast in its position that there were no performance standards and the agreement clearly specified duration

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689. 2015 IL App (2d) 140944.
690. *Eakins,* 2015 IL App (2d) 140944, ¶ 3.
691. *Id.*
692. *Id.*
693. *Id.* at ¶ 4.
694. *Id.*
695. *Id.* at ¶ 9.
696. *Id.* at ¶ 17.
697. *Id.*
698. *Id.*
699. 322 Ill. App. 3d 870, 751 N.E. 2d 1204 (2nd Dist. 2001).
700. 145 Ill. App. 3d. 931, 496 N.E. 2d 350 (2nd Dist. 1986).
701. *Eakins,* 2015 IL App 2d 140944, ¶ 18.
702. *Id.* at ¶¶ 21, 23.

of twenty-four months. The court held the trial court did not err in granting Hanna's motion for summary judgment arguing that the Act did not apply to unpaid future compensation due under a terminated contract.[703] The trial court was reversed on granting Hanna's motion for summary judgment for the breach of contract claim, and the cause was remanded for the trial court to enter summary judgment for Eakins and for further proceeding concerning damages.[704]

B. Trade Secrets

i. Destiny Health, Inc. v. Connecticut General Life Insurance Company, *2015 IL App (1st) 142530*

In the sole case involving trade secrets, *Destiny Health, Inc. v. Connecticut General Life Ins. Co.*,[705] the First District considered whether the defendants violated the Trade Secrets Act.[706] In that case, the plaintiff, Destiny Health, Inc. (Destiny), a company that develops products for the health insurance industry, filed a lawsuit against the defendants, Connecticut General Life Insurance Company and Cigna Corporation (collectively, Cigna), which provides health insurance to employers around the world.[707] Destiny alleged that Cigna violated the Illinois Trade Secrets Act and breached a confidentially agreement.[708]

Cigna and Destiny executed an amendment to an existing confidentiality agreement in an effort to combine Cigna's existing wellness program with a points-based program, using a third-party vendor.[709] Following the execution of the amendment, Cigna sent several representatives to Destiny's office to discuss and evaluate Destiny's Vitality program.[710] However, Cigna informed Destiny that it could not move forward with the project due to "system challenges."[711] Cigna withdrew from negotiations because the program failed to fit Cigna's needs and was too costly, among other reasons.[712] Thereafter, Cigna explored the possibility of partnering with other vendors and developed

703. *Id.* at ¶ 33.
704. *Id.* at ¶ 42.
705. 2015 IL App (1st) 142530.
706. *Id.* at ¶ 1.
707. *Destiny*, 2015 IL App (1st) 154530, ¶¶ 1–4.
708. *Id.* at ¶ 1.
709. *Id.* at ¶ 5.
710. *Id.* at ¶ 7.
711. *Id.* at ¶ 8.
712. *Id.*

its own wellness-based incentive health program entitled IncentOne-Cigna Program.[713] Upon the announcement of the program, Destiny filed a complaint alleging that Cigna never intended to enter into a business relationship and that Cigna's participation in their negotiations was simply a ruse to view its confidential information.[714]

Cigna moved for summary judgment, arguing that Destiny failed to raise a genuine issue of material fact as to whether Cigna violated the Trade Secrets Act or breached the confidentiality agreement.[715] Cigna claimed that Destiny provided certain information on a non-confidential basis to prospective customers and gave presentations at trade shows.[716] Furthermore, the facts proved that Cigna did not use or misappropriate Destiny's trade secrets.[717] In its response, Destiny argued that a question of fact was created based upon undisputed evidence that Cigna acquired Destiny's actuarial data and it improperly used that data by developing its own points-based wellness program.[718] The circuit court granted Cigna's motion, concluding that Destiny failed to present any evidence that Cigna used Destiny's confidential information.[719]

The First District noted that Destiny failed to specifically identify the alleged trade secrets or confidential information that Cigna allegedly used in the development of its incentive-points program.[720] The court also agreed with Cigna's contention that Destiny failed to present evidence to establish the Trade Secret's second element—misappropriation.[721] Under the Illinois Trade Secrets Act, misappropriation can be shown in one of three ways: (1) improper acquisition, (2) unauthorized disclosure; (3) unauthorized use.[722] In this case, Cigna offered the deposition testimony of three individuals that stated that Cigna and IncentOne worked together over many months to develop Cigna's incentive-points program.[723] Furthermore, the circumstantial evidence offered by Destiny was insufficient.[724] Therefore, the court concluded that the pleadings, depositions, and affidavits of record establish the absence of a genuine issue of fact on the question of Cigna's use of Destiny's trade secrets

713. *Id.* at ¶¶ 10, 13.
714. *Id.* at ¶ 15.
715. *Id.* at ¶ 17.
716. *Id.*
717. *Id.*
718. *Id.* at ¶ 18.
719. *Id.* at ¶ 19.
720. *Id.* at ¶ 27.
721. *Id.*
722. *Id.* at ¶ 28; 765 ILL. COMP. STAT. ANN. 1065/2(b) (West 2008).
723. *Destiny,* 2015 IL App (1st) 154530, ¶ 29.
724. *Id.* at ¶ 35.

in the development of Cigna's incentive-points program.[725] Therefore, summary judgment was affirmed as it related to the Trade Secrets Act.[726] Because the court determined that no genuine issue of fact existed on the question of Cigna's misappropriation, the court did not address the other arguments.[727]

C. Whistleblower Act

i. Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887*

The Illinois Whistleblower Act was analyzed by the First District in *Young v. Alden Gardens of Waterford, LLC*.[728] Alden Gardens of Waterford, LLC (Alden Gardens) was a licensed longer-term care facility which employed Bethany Young (Young) as a registered nurse.[729] According to the Amended Complaint, Young and co-plaintiff, Patricia McCormick (McCormick),[730] witnessed several instances of staff errors that jeopardized resident safety and constituted abuse or neglect.[731] One such instance involved Young's supervisor who allegedly directed Young to falsify residents' medication administration records.[732] Young refused and later claimed that, as a result of her refusal, her hours were reduced and her performance evaluation ratings declined.[733] Young resigned and filed a complaint against Alden Gardens and its holding company, The Alden Group, Ltd. (Alden Group), alleging retaliation in violation of the Nursing Home Care Act,[734] the Whistleblower Act[735] and common retaliatory discharge.[736]

The circuit court dismissed the claims on a directed verdict, reasoningthat Young did not establish sufficient evidence under the Whistleblower Act.[737] Despite the directed verdict, the jury returned a unanimous verdict in favor of Young and against Alden Gardens for her retaliation claim under Section 20

725. *Id.* at ¶ 44.
726. *Id.*
727. *Id.* at ¶ 46.
728. Young v. Alden Gardens of Waterford, LLC., 2015 IL App (1st) 131887.
729. *Id.* at ¶ 3.
730. McCormick did not appeal the adverse jury verdict and is therefore not a party to the instant action in the Court of Appeals. *Id.*
731. *Id.* at ¶ 6.
732. *Id.*
733. *Id.* at ¶ 7.
734. 210 ILL. COMP. STAT. 45/3-810.
735. 740 ILL. COMP. STAT. 174/30.
736. *Young*, 2015 IL App (1st) 131887, ¶ 3.
737. *Id.* at ¶ 27.

of the Whistleblower Act. They awarded Young $48,725 for lost income, emotional distress and mental anguish.[738] Alden Gardens appealed, and Young cross-appealed the award of fees, due to her original request for attorney fees and costs, pursuant to Section 30 of the Whistleblower Act.[739]

On appeal, the Illinois Appellate Court, First District, first noted that to prevail on a claim under Section 20 of the Whistleblower Act, a plaintiff must establish that (1) she refused to participate in an activity that would result in a violation of state or federal law, rule, or regulation and (2) her employer retaliated against her because of the refusal.[740] Alden Gardens' arguments related to the first factor.[741] The First District noted that Young testified in her deposition and at trial that falsifying a resident's medical records was against the law and that assisting in that effort could jeopardize her nursing license.[742] The court noted that Young was correct on this point, and she is supported by both law and common sense.[743] The court also held that a reasonable jury could have concluded that Alden Gardens retaliated against Young for her refusal to engage in the unlawful activity because Young testified that her hours decreased.[744] There was no testimony of other nurses who worked fewer hours during that time.[745] There was, however, testimony from another nurse who stated that she observed Young treated differently by her supervisor.[746] Young was also no longer asked to train staff and received less favorable performance evaluations.[747] Therefore, the court held that a reasonable jury could have concluded that Alden Gardens retaliated against Young for her refusal to participate in unlawful activity, and the testimony supported the jury's conclusion.[748]

As it relates to Young's fee petition seeking fees and costs, the court noted that the petition suffered from a number of substantial defects, such as: (1) the failure to keep contemporaneous time records; (2) the time spent litigating McCormick's claim was essential to Young's case; and (3) the affidavits from Young's counsel in support of the petition contained little

738. *Id.* at ¶ 33.
739. *Id.* at ¶¶ 35–36.
740. *Id.* at ¶ 48; 740 ILL. COMP. STAT. 174/20; Sardiga v. Northern Trust Co., 409 Ill. App. 3d 56, 61 (1st Dist. 2011).
741. *Young*, 2015 IL App (1st) 131887, ¶ 48.
742. *Id.* at ¶ 49.
743. *Id.*
744. *Id.* at ¶ 60.
745. *Id.*
746. *Id.* at ¶ 61.
747. *Id.* at ¶ 62.
748. *Id.* at ¶ 63.

detail to support the hourly rates charged by Young's lawyers.[749] Based on those defects, the court found no basis to reverse or modify the award.[750] Thus, the circuit court's judgment was affirmed on all issues.[751]

D. Employee Classification Act

i. Gajada v. Steel Solutions Firm, Inc.*, 2015 IL App (1st) 142219*

Mark Gajda and Tomasz Stankiewicz (plaintiffs) filed a complaint against their employer, Steel Solutions Firm, Inc. (Steel Solutions), and Mariola Barabas (defendants) under the Illinois Employee Classification Act.[752] The plaintiffs were independent contractors and performed metal fabrication work for the defendants. The plaintiffs alleged that Teofil Barabas, the sole shareholder and owner/operator of Barabas Steel Co., and Mariola Barabas, the sole shareholder and owner/operator of Steel Solutions, did not abide by corporate formalities and operated all three corporations as their alter egos.[753] In other counts of the complaint, the plaintiffs sought recovery for statutory violations based on misclassification and retaliation.[754] The plaintiffs alleged that work was performed under Steel Solution's name and did not share in the profits or bear the losses of Steel Solutions.[755] Therefore, according to the plaintiffs' theory, they were employees of Steel Solutions and its predecessor corporations, not independent contractors. As a result of the misclassification, the plaintiffs claimed that they were entitled to lost wages, salary and other compensation.[756]

In response to the allegations, the defendants argued that plaintiffs were employed by Barabas Co. and Barabas Steel Co., which were owned by Teofil Barabas, Mariola's husband.[757] Thus, Teofil was the proper defendant, but plaintiffs did not name him as a party because he had filed for bankruptcy.[758] Considering all arguments, the circuit court dismissed count one as well as counts two through five of the complaint with prejudice. The plaintiffs appealed.[759]

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749. *Id.* at ¶¶ 87–89.
750. *Id.* at ¶ 94.
751. *Id.* at ¶ 118.
752. 820 ILL. COMP. STAT. 185/60; Gajda v. Steel Solutions Firm, Inc., 2015 IL App (1st) 142219.
753. *Gajda*, 2015 IL App (1st) 142219, ¶ 4.
754. *Id.* at ¶ 5.
755. *Id.* at ¶ 6.
756. *Id.*
757. *Id.* at ¶ 9.
758. *Id.*
759. *Id.* at ¶ 11.

On appeal, the First District held that the court erred when it dismissed counts two through five with prejudice.[760] The plaintiffs in this case alleged that Steel Solutions operated out of the same location as Barabas Co. and Barabas Steel Co. and used much of the same equipment.[761] Furthermore, the plaintiffs claimed that Mariola and Teofil used the corporations as their alter egos and treated them as one single entity because there was comingling of funds and equipment, and there were improper loans or sales of assets from one corporation to another.[762] The plaintiffs additionally alleged that Steel Solutions was the successor corporation of Barabas Co. and Barabas Steel Co.[763] Given these facts, the court held that, while the plaintiffs did not explicitly allege all the elements of successor corporation liability, they did allege sufficient facts to allege veil piercing.[764]

The case was affirmed in part and reversed in part, with the cause remanded for further ruling.[765]

E. Disability Benefits

i. Swoboda v. Board of Trustees of the Village of Sugar Grove Police Pension Fund*, 2015 IL App (2d) 150265*

The Appellate Court, Second District analyzed whether Thomas Swoboda (plaintiff) should have been denied line-of-duty disability benefits by the Board of Trustees of the Village of Sugar Grove Police Pension Fund (Board).[766]

In *Swoboda*, plaintiff participated in the Sugar Grove police department (Department) physical-fitness testing.[767] While bench pressing weights, he felt a "pull or strain" in his shoulder.[768] Plaintiff sought treatment for his shoulder, including physical therapy and two surgical procedures, but there was no improvement.[769] Plaintiff requested disability benefits after learning that he would be unable to return to work as a police officer.[770] The Board, however,

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760. *Id.* at ¶ 21.
761. *Id.* at ¶ 25.
762. *Id.*
763. *Id.* at ¶ 26.
764. *Id.* at ¶ 34.
765. *Id.* at ¶ 40.
766. Swoboda v. Bd. of Trustees of Sugar Grove Police Pension Fund, 2015 IL App (2d) 150265.
767. *Id* at ¶ 2.
768. *Id.* at ¶ 3.
769. *Id.*
770. *Id.* at ¶¶ 3, 6.

found that plaintiff was only entitled to a non-duty disability pension. Plaintiff appealed.[771]

The appellate court reviewed the Board's decision to deny the plaintiff's application for disability benefits. The court first noted that pursuant to section 3-114.2 of the Illinois Pension Code[772] (Pension Code), a police officer who becomes disabled as a result of any cause other than an action of duty is entitled to a pension equal to 50% of the salary attached to the officer's rank at the date of suspension of duty or retirement.[773] The court also noted the Board's conclusion that the risk of injury while lifting weights is not unique to police work and that civilians share the same risk.[774] To that point, plaintiff argued that the injury did not turn on whether civilians assume the risk of weightlifting injuries, but whether they assume that risk in *their occupations*.[775] Therefore, the court looked to the meaning of the phrase "ordinarily assumed by a citizen in the ordinary walks of life" as noted in the Pension Code.[776]

The Second District ruled that whether a risk encountered in civilian life is occupational or non-occupational has little bearing on whether it approximates the types of dangers for which an officer should receive an increased disability benefit.[777] The court cited two cases which supported their analysis, *Byrnes v. Retirement Board of Policemen's Annuity & Benefit Fund of City of Chicago*[778] and *Alm v. Lincolnshire Police Pension Board*.[779] Furthermore, the court noted that in prior cases where line-of-duty disability pensions have been awarded, the officers were injured while engaged in activities involving the protection of public safety.[780] Thus, the court affirmed the judgment of the circuit court.[781]

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771. *Id.* at ¶ 6.
772. 40 ILL. COMP. STAT. 5/3-114.2.
773. *Id.; see also Swoboda*, 2015 IL App (2d) 150265, ¶ 8.
774. *Swoboda*, 2015 IL App (2d) 150265, ¶ 15.
775. *Id.* (emphasis in original).
776. *Id.* at ¶ 16.
777. *Id.* at ¶ 19.
778. Byrnes v. Retirement Bd. of Policemen's Annuity & Benefit Fund of City of Chi., 339 Ill. App. 55, 89 N.E.2d 59 (1st Dist. 1949).
779. Alm v. Lincolnshire Police Pension Bd., 352 Ill.App.3d 595, 599, 816 N.E.2d 389, 393 (2d Dist. 2004).
780. *Swoboda*, 2015 IL App (2d) 150265, ¶ 19 (citing Summers v. Retirement Bd. of the Policemen's Annuity & Benefit Fund, 2013 IL App (1st) 121345, ¶ 44).
781. *Id.* at ¶ 20.

F. Public Safety Employee Benefits Act

i. Village of Vernon Hills v. Heelan*, 2015 IL App (1st) 150877*

The Illinois Supreme Court analyzed a single case involving the Illinois Public Safety Employee Benefits Act[782] (Act) in late 2015.[783] In *Heelan*, the plaintiff, the Village of Vernon Hills (Village), filed a complaint for declaratory relief against the defendant, William Heelan (Heelan), after he was awarded a line-of-duty disability pension by the Board of Trustees of the Vernon Hills Police Pension Fund (Board).[784] The circuit court entered judgment in favor of Heelan, despite the Village's contention that it was not obligated to pay the health insurance premium for Heelan and his family pursuant to Section 10 of the Act.[785]

Heelan was a police officer for the Village for approximately twenty years.[786] While responding to an emergency call, Heelan slipped on ice and fell on his right side.[787] He was diagnosed with a back spasm, shoulder sprain, and a hip contusion.[788] While pursuing a workers' compensation claim, an independent medical evaluation was conducted.[789] The physician concluded that Heelan had preexisting, significant osteoarthritis and opined that the fall aggravated the preexisting right hip osteoarthritis.[790] Heelan underwent a right hip replacement and continued working light duty.[791] Further testing revealed long-standing left hip osteoarthritis and the physician concluded that Heelan's left hip osteoarthritis was aggravated by his right hip replacement.[792] Heelan underwent a second hip replacement for his left side and did not return to work.[793]

Heelen applied for a line-of-duty disability pension pursuant to section 3-114.1 of the Pension Code.[794] After conducting a hearing, the Board adopted its written findings and granted Heelan a line-of-duty disability pension.[795]

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782. 820 ILL. COMP. STAT. 320/10.
783. Village of Vernon Hills v. Heelan, 2015 IL 118170.
784. *Id.* at ¶ 1.
785. *Id.*
786. *Id.* at ¶ 4.
787. *Id.*
788. *Id.*
789. *Id.* at ¶ 5.
790. *Id.*
791. *Id.*
792. *Id.*
793. *Id.*
794. *Id.* at ¶ 7.
795. *Id.*

The Village did not object to the Board's decision until Heelan requested the payment of his health insurance premium for himself and his dependents based on the disability pension award.[796]

The Village filed a complaint seeking a declaratory judgment which declared that it was not responsible for paying the health insurance premium for Heelan and his family pursuant to the Act.[797] The Village argued that Heelan did not meet the statutory requirements of suffering a catastrophic injury nor did he receive the injury in response to an emergency.[798] After stipulating that Heelan was in fact responding to an emergency, the circuit court ruled in Heelan's favor and reasoned that Heelan was catastrophically injured for purposes of section 10(a) because the Board awarded him a line-of-duty pension.[799]

The Second District agreed with the circuit court's analysis, noting that Heelan was awarded a line-of-duty disability pension, so "[n]othing remained to be litigated under section 10(a)."[800] The Village appealed, disagreeing with the court's interpretation of "catastrophic injury" pursuant to section 10(a).[801]

In analyzing the meaning of "catastrophic injury," the Illinois Supreme Court first looked to legislative history and debates in ascertaining the intent of the phrase.[802] In doing so, it noted that the phrase was synonymous with an injury resulting in a line-of-duty disability, and cited to several supporting Illinois cases.[803] The court noted that it declined to depart from precedent and held that Heelan's award of a line-of-duty disability pension establishes that he suffered a catastrophic injury as a matter of law.[804] The appellate court's ruling was therefore affirmed.[805]

G. *Respondeat Superior* Liability

i. Hoy v. Great Lakes Retail Services, Inc*., 2016 Il App (1st) 150877*

The First District analyzed *respondeat superior* liability in the employment context in *Hoy v. Great Lakes Retail Services*.[806] In that case, the

796. *Id.*
797. *Id.* at ¶ 9.
798. *Id.*
799. *Id.* at ¶ 12.
800. *Id.* at ¶ 13 (citing Village of Vernon Hills v. Heelan, 2014 IL App (2d) 130823, ¶¶ 31–33).
801. *Id.* at ¶ 16.
802. *Id.* at ¶ 21.
803. *Id.* at ¶ 23.
804. *Id.* at ¶ 27.
805. *Id.* at ¶¶ 35, 40.
806. Hoy v. Great Lakes Retail Services, 2016 IL App (1st) 150877.

question was whether Kurt Woltmann (Woltmann), an employee of Great Lakes Retail Services, Inc. (Great Lakes), was acting in the scope of his employment when he rear-ended a car driven by Thomas Hoy (plaintiff).[807]

The circuit court granted summary judgment in favor of Great Lakes, noting that Woltmann's "trip to Great Lakes was personal, not job-related, and after his work was completed."[808] The court noted that Woltmann testified that he could not remember the purpose of the meeting, except that it was a personal matter and not about the job itself.[809] Plaintiff appealed, arguing that a question of material fact existed as to whether the subject matter of the conversation was related to Woltmann's employment.[810]

The First District analyzed whether summary judgment was properly granted.[811] Plaintiff argued that the trial court erred in awarding Great Lakes summary judgment because a reasonable juror could conclude that Woltmann was acting in the scope of employment due to the fact that he was driving back to the Great Lakes office to speak to his boss.[812] Great Lakes, however, maintained that the conversation with his boss was about a personal matter rather than a matter that would serve Great Lakes' business.[813] The First District agreed with Hoy that Woltmann's reference to "personal stuff" did not automatically mean that the conversation was unrelated to his employment.[814] The court noted that in his boss's testimony, it was suggested that the two did not have a social or friendly relationship.[815] They rarely spoke and when they did, the conversation was about work or just a routine social greeting.[816] Therefore, the conversation was most likely work-related.[817]

The court also determined that even if Woltmann was returning to talk to his boss about a topic related to work, that assumption would not place Woltmann's trip to Great Lakes' office within the scope of his employment.[818] "The focus is not on what the employee did at work once he or she arrived, or whether the employer asked the employee to come to work."[819] Rather, "the

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807. *Id.* at ¶ 1.
808. *Id.*
809. *Id.*
810. *Id.* at ¶ 2.
811. *Id.* at ¶ 22.
812. *Id.*
813. *Id.*
814. *Id.* at ¶ 28.
815. *Id.*
816. *Id.*
817. *Id.*
818. *Id.* at ¶ 30.
819. *Id.* at ¶ 37.

focus is on the travel itself."[820] "There was nothing about Woltmann's travel" that uniquely served his employer's purpose, beyond simply "transporting Woltmann to the company office."[821] The fact that his boss requested him to come to the office was irrelevant.[822] The court therefore concluded that "Woltmann was not acting within the scope of his employment with Great Lakes when he drove himself to a regular workplace to attend a meeting with his employer."[823] Thus, "there was no question of material fact regarding the scope of employment" and summary judgment was affirmed.[824]

H. Duty of Care

i. Doe v. Sanchez*, 2016 IL App (2d) 150554*

Doe v. Sanchez[825] presented two certified questions to the Second District: (1) whether a duty was owed to a private contractor when it transported students and (2) whether it was liable for misconduct of an employee that occurred outside the scope of employment.[826]

In that case, Jane Doe (the plaintiff) filed a six-count complaint against Peter Sanchez (Sanchez), "alleging that Sanchez inappropriately touched her daughter, J.D., a minor, during the course of his duty" as a school bus driver for his employer, First Student, Inc. (First Student).[827] First Student filed a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure[828] arguing that sexual assault is personally motivated and outside the scope of Sanchez's employment.[829] Therefore, First Student maintained that it could not be vicariously liable for Sanchez's alleged misconduct.[830] First Student also argued that it was not acting as a common carrier because it transported students rather than members of the general public.[831]

The circuit court denied First Student's motion to dismiss and held that "First Student owed J.D. a standard of care as if it were acting as a common

820. *Id.*
821. *Id.* at ¶ 40.
822. *Id.*
823. *Id.* at ¶ 41.
824. *Id.*
825. 2016 IL App (2d) 150554.
826. *Id.* at ¶ 1.
827. *Doe*, 2016 IL App (2d) 150554, ¶¶ 2, 7.
828. 735 ILL. COMP. STAT. 5/2-615, 2-619.
829. *Doe*, 2016 IL App (2d) 150554, ¶ 8.
830. *Id.*
831. *Id.* at. ¶ 9.

carrier and that it could be vicariously liable for the misconduct of Sanchez . . . ".[832] Thereafter, "First Student filed a motion to certify [the above] two questions for appeal pursuant to Illinois Supreme Court Rule 308," which was granted.[833]

The Second District first analyzed whether a common-carrier standard of care was applicable in this case.[834] Specifically, it considered "whether a private contractor providing student busing services owes the students it buses a standard of care commensurate with that of a common carrier."[835] Plaintiff argued that First Student should be held to the same standard of care as in *Green v. Carlinville Community Unit School District*[836] and *Garrett v. Grant School District. No. 124*,[837] where the court in both cases held that a school district engaged in the transportation of students would be held to the same standard of care as a private party operating as a common carrier.[838] The court agreed with the plaintiff and concluded that "a private contractor providing student transportation services owes the students it transports the same duty of care imposed on a common carrier. . ."[839]

Under the second certified question, the court analyzed whether a private contractor providing student transportation services may be liable for the misconduct of an employee who was acting outside the scope of employment.[840] First Student argued that it may not be held vicariously liable because sexual assault was outside the scope of employment.[841] Additionally, "Illinois case law and the Restatement (Second) of Agency . . . disfavor vicarious liability of an employer for a sexual assault by its employee."[842] The plaintiff argued "that Illinois courts have long held that a common carrier is liable for the acts of its employees even if those acts are outside the scope of employment."[843] The court agreed with the plaintiff, noting that a private contractor may be liable for the sexual assault of a student by its employee who is transporting that student despite the assault being outside the scope of employment.[844] Although the liability functions as vicarious liability, the court

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832. *Id.* at ¶ 3.
833. *Id.*
834. *Id.* at ¶ 22.
835. *Id.* at ¶ 23.
836. 381 Ill. App .3d 207, 887 N.E.2d 451 (4th Dist. 2008).
837. 139 Ill. App. 3d 569, 487 N.E.2d 699 (2d Dist.1985).
838. *Doe*, 2016 IL App (2d) 150554, ¶ 25.
839. *Id.* ¶ 27 (citing Krywin v. Chicago Transit Authority, 238 Ill. 2d 215 (2010)).
840. *Id.* at ¶ 42.
841. *Id.* at ¶ 43.
842. *Id.* at ¶ 44.
843. *Id.* at ¶ 45 (citing Chicago & Eastern R.R. Co. v. Flexman, 103 Ill. 546 (1882)).
844. *Id* at ¶ 46.

did not rely on *respondeat superior*. Rather, the court observed that "Illinois courts recognize that a common carrier's high duty of care is a nondelegable duty."[845] Thus, the court answered both certified questions in the affirmative.[846]

I. Employment Contracts

The Illinois Appellate Court, First District, analyzed three cases involving employment contracts in 2016. In the first case, the court held that a corporate defendant waived its right to enforce an arbitration clause in an employment agreement when it asserted an affirmative defense to a complaint that was unrelated to arbitration.[847]

i. Koehler v. Packer Group, Inc*., 2016 IL App (1st) 142767*

In *Koehler v. The Packer Group, Inc.*,[848] the First District affirmed a $2.4 million jury verdict in a lawsuit for breach of an employment agreement and tortious interference with the agreement.[849] The plaintiff was Dr. Michael Koehler (Koehler), CEO of a subsidiary of The Packer Group called Packer Engineering.[850] Koehler was an at-will employee for The Packer Group.[851] He entered into an employment agreement which was memorialized in a letter.[852] The agreement also contained an arbitration clause, which stated that any breach, dispute, or claim resulting from the agreement must be settled by binding arbitration.[853]

In his complaint, Koehler alleged that he was demoted and then discharged after revealing financial improprieties by its founder and chairman, Dr. Packer, to The Packer Group's board of directors.[854] Koehler claimed that in reviewing financial records for The Packer Group, he learned that Dr. Packer was diverting money from the Packer Group to an independent company purchased by Dr. Packer without board authorization.[855] Koehler filed suit against The Packer Group and Packer Engineering for breach of his

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845. *Id.* at ¶ 52.
846. *Id.* at ¶ 59.
847. Koehler v. The Packer Group, Inc., 2016 IL App (1st) 142767.
848. *Id.*
849. *Id.* at ¶¶ 1–3.
850. *Id.* at ¶ 1.
851. *Id.* at ¶ 5
852. *Id.*
853. *Id.* at ¶ 6.
854. *Id.* at ¶ 1.
855. *Id.*

employment agreement, and Dr. Packer and various other individuals for tortious interference.[856] After a three-week trial, the jury returned a verdict for Koehler. The court concluded that the contractual right to arbitrate was waived when Koehler's complaint was answered without asserting the right.[857]

The defendants argued on appeal that Koehler's claims should have been resolved by binding arbitration.[858] Koehler agreed that his breach of contract claim was subject to the arbitration agreement, but that the company waived it by "participating in this litigation" by way of filing an answer and responding to discovery.[859] Koehler cross-appealed and argued that the circuit court improperly limited his damages for breach of contract to severance pay, improperly admitted evidence of his post-termination earnings, and failed to award him the full amount of costs he requested as a prevailing party.[860]

The First District agreed that The Packer Group's compliance with court discovery orders did not amount to a waiver of arbitration rights.[861] The court further noted that Koehler's "claim against the individual defendants was based on allegations that they acted outside the scope of the agency to advance their own interests at the company's expense."[862]

The court also denied the defendants' request to extend the protection of the arbitration provision to them as agents of the signatory, because Koehler claimed that the defendants acted outside the scope of their agency to advance their own interests at the company's expense.[863] The court concluded that just because the defendant was acting as a corporate officer, it "will not render the defendant and corporation identical."[864] The officers in this case were not immunized from individual liability because Koehler presented sufficient evidence they had acted in their own self-interest, which was "outside the scope of their duties, and to the detriment of plaintiff and the corporate defendants."[865] Therefore, the judgment of the circuit court was affirmed.[866]

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856. *Id.* at ¶ 8.
857. *Id.* at ¶ 10.
858. *Id.* at ¶ 2.
859. *Id.* at ¶ 20.
860. *Id.* at ¶ 3.
861. *Id.* at ¶ 24.
862. *Id.* at ¶ 33.
863. *Id.*
864. *Id.* at ¶ 43.
865. *Id.* at ¶ 44.
866. *Id.* at ¶ 134.

ii. Jackson v. Mount Pisgah Missionary Baptist Church Deacon Board, *2016 IL App (1st) 143045*

The next case, *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Bd.*,[867] involved a jurisdictional question regarding an employment law dispute between a pastor and church.

In *Jackson*, the plaintiff, Joseph Jackson (Jackson), was a former pastor with the defendant, Mount Pisgah Missionary Baptist Church (Church).[868] The plaintiff entered into an oral agreement with the Church and its board of deacons (Defendants).[869] The parties agreed that the plaintiff's employment would be governed by the Church's bylaws.[870] However, after the plaintiff's employment was terminated, he filed a one-count complaint for breach of contract. Jackson alleged that the defendants breached the oral contract because they did not follow the procedural steps required by the bylaws for terminating him.[871] According to the bylaws, "there must be a written notice of dissatisfaction from the Church, a Special Meeting of the Deacon Board called and held with the Pastor presiding, proper notice to the congregation membership regarding a special meeting to vote on any dissatisfaction, and a proper membership vote."[872] Jackson alleged that the defendants moved to have a vote of dissatisfaction after the plaintiff delivered a signed medical letter stating that he was temporarily unable to attend certain church meetings.[873] Jackson alleged that the vote of dissatisfaction was held without proper notice to him or the congregation and without any prior special meeting explaining the dissatisfaction.[874]

The circuit court entered a written order finding in favor of the church.[875] On appeal, plaintiff argued that the circuit court erred in concluding that defendants did not violate the bylaws when they terminated him.[876]

In analyzing the various sections of the bylaws, the court first noted that Part 2 of subsection D states that the pastor may be terminated by a "one month's written notice from the church."[877] Because there was testimony from

867. 2016 IL App (1st) 143045.
868. *Id.* at ¶ 1.
869. *Id.*
870. *Id.*
871. *Id.*
872. *Id.* at ¶ 6.
873. *Id.* at ¶ 7.
874. *Id.*
875. *Id.* at ¶ 45.
876. *Id.* at ¶ 47.
877. *Id.* at ¶ 73.

the Board that it presented the Plaintiff with the letter of dissatisfaction within the one-month requirement, the court determined that defendants complied with Part 2 by giving plaintiff proper notice.[878]

The court also held that despite the plaintiff's argument, Part 3 of the bylaws did not require the Board to have a vote of dissatisfaction, nor did it require a vote on issuing a letter of dissatisfaction.[879] In fact, Part 3 was silent as to any action required to occur prior to the issuance of a notice of dissatisfaction; it only required that the pastor must respond to a special meeting after receiving one.[880] Therefore, the circuit court did not err in finding that the defendants acted in compliance with that part of the bylaws when they attempted to deliver the notice of dissatisfaction to plaintiff but plaintiff refused to accept the notice.[881]

Finally, the court observed that Part 4 of subsection D provided that if the Church wanted to dismiss the pastor, then the chairman of the Board may call a special meeting to terminate the pastor.[882] The special meeting was placed in a document and a notice of the meeting was placed in the church bulletin.[883] Furthermore, plaintiff was given a copy of the document and admitted that he ordered the congregation to not attend the meeting.[884] Therefore, the court concluded that sufficient notice was given.[885]

Therefore, the court affirmed the circuit court's judgment in favor of the defendants, and the circuit court's conclusion that the defendants complied with the Church's bylaws when terminating the plaintiff's employment was not against the manifest weight of evidence.[886]

iii. Reed v. Getco, LLC*, 2016 IL App (1st) 151801*

In *Reed v. Getco, LLC*,[887] another employment contract dispute, the plaintiff, Zachariah Reed, was a former employee of the defendant, Getco, LLC (Getco), a proprietary trading and financial services firm. Pursuant to an employment agreement (initial agreement), the plaintiff was employed as a developer/technical trader for Getco.[888] Approximately fifteen months after

878. *Id.*
879. *Id.* at ¶ 74.
880. *Id.*
881. *Id.*
882. *Id.* at ¶ 75.
883. *Id.*
884. *Id.*
885. *Id.* at ¶ 76.
886. *Id.* at ¶ 78.
887. 2016 IL App (1st) 151801.
888. *Id.* at ¶ 3.

plaintiff began employment, Getco requested that its employees sign a new employment agreement.[889] The new agreement included new terms and conditions, including an exclusivity clause, restrictive covenants, ownership of intellectual property developments, mandatory alternative dispute resolution procedures, and indemnification conditions.[890] Six years later, the plaintiff resigned and immediately received offers of employment from Getco's competitors.[891] Plaintiff however did not accept any offers until the restricted period ended.[892]

Plaintiff filed a three-count complaint against Getco for breach of contract, alleging that Getco breached the noncompete provision in the agreement in its failure to pay him $1 million.[893] The circuit court entered an order finding in his favor.[894]

On appeal, Getco argued that the circuit court erred by: (1) finding that Getco did not properly waive the noncompete provision in the agreement; (2) interpreting the language in subsection 6(d) of the agreement; and (3) concluding that the plaintiff did not have a duty to mitigate damages.[895]

Getco first asserted that the circuit court erred in finding that it did not properly waive the noncompete provision in the agreement.[896] In response to Getco's waiver issue, the plaintiff argued that the noncompete provision was for the benefit of both parties to the contract.[897] Furthermore, the noncompete restrictions in the agreement were effective immediately when the agreement was executed.[898] The court noted that subsection 13(j) of the agreement governed all waivers and modifications of any provision in the agreement and rejected defendant's argument that it could waive the noncompete in provision in the agreement because it was provided for its sole benefit.[899] Rather, the court held that subjection 13(j) precluded such a waiver and expressly provided that all waivers and modifications required a writing signed by the party against whom the waiver or modification was enforced.[900] The court

889. *Id.*
890. *Id.*
891. *Id.* at ¶ 5.
892. *Id.*
893. *Id.* at ¶ 6.
894. *Id.* at ¶ 10.
895. *Id.* at ¶ 14.
896. *Id.* at ¶ 18.
897. *Id.* at ¶ 19.
898. *Id.*
899. *Id.* at ¶¶ 21–22.
900. *Id.* at ¶ 22.

also rejected defendant's claim that its waiver complied with the terms in subsection 13(j).[901]

Additionally, the court held that there was no language in the agreement to indicate the defendant's decision to enforce the noncompete restrictions was a condition precedent to the payment under subsection 6(b).[902] The court noted that the only conditions that would result in excusing defendant from making the payment were the two conditions set forth in subsection 6(b): (1)defendant determines that plaintiff has violated any provision in the agreement; or (2) a court determines that any noncompete provision in section 6 is unenforceable.[903]

The court also considered Getco's argument that it had the sole and absolute discretion to modify all of plaintiff's noncompete restrictions in section 6 of the agreement.[904] Defendant relied on the sentence in subsection 6(d) that stated, "[defendant] shall be under no obligation to modify the restrictions in this Section 6, but may do so in its sole and absolute discretion."[905] On the other hand, plaintiff claimed that the court did not err in rejecting the defendant's argument because subsection 6(d) was not a general mechanism for defendant to unilaterally rewrite section 6.[906] The First District rejected defendant's argument.[907] The court agreed that the parties' intent was to provide plaintiff with a mechanism to request that his noncompete restrictions be modified in the event that plaintiff was offered other employment he believed would violate his noncompete restrictions.[908]

Finally, the First District determined whether the plaintiff had a duty to mitigate his damages.[909] The defendants argued that the non-breaching party always has a duty to mitigate.[910] However, the plaintiff claimed that the doctrine of mitigation of damages did not apply.[911] The First District concluded that the parties exchanged promises in subsections 6(a) and 6(b) of the agreement.[912] The plaintiff promised not to engage in competitive activity for six months after his departure and in exchange, the defendant promised to

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901. *Id.* at ¶ 23.
902. *Id.* at ¶ 24.
903. *Id.* at ¶ 25.
904. *Id.* at ¶ 27.
905. *Id.*
906. *Id.* at ¶ 28.
907. *Id.* at ¶ 31.
908. *Id.*
909. *Id.* at ¶ 35.
910. *Id.*
911. *Id.* at ¶ 36.
912. *Id.* at ¶ 39.

pay plaintiff a sum of money pursuant to subsection 6(b).[913] Therefore, the court concluded that the defendant failed to demonstrate that plaintiff had a duty to mitigate his damages and affirmed the judgment of the circuit court.[914]

XI. CONCLUSION

The appellate courts and Illinois Supreme Court consistently evaluate cases dealing with employment-related issues. The authors of this Survey have only examined the cases of the past year and a half. It is anticipated that the courts will continue to analyze cases relating to the most popular employment-related issues, such as restrictive covenants, arbitration provisions, unemployment compensation and collective bargaining agreements. Attorneys are advised to stay apprised of these emerging topics in preparation for future litigation.

913. *Id.*
914. *Id.* at ¶¶ 44–46.