



Now What!? Mid-West State of Employment - What's In Store in 2021?

Ashley Cano

Alex Oxyer

Uma Chandrasekaran

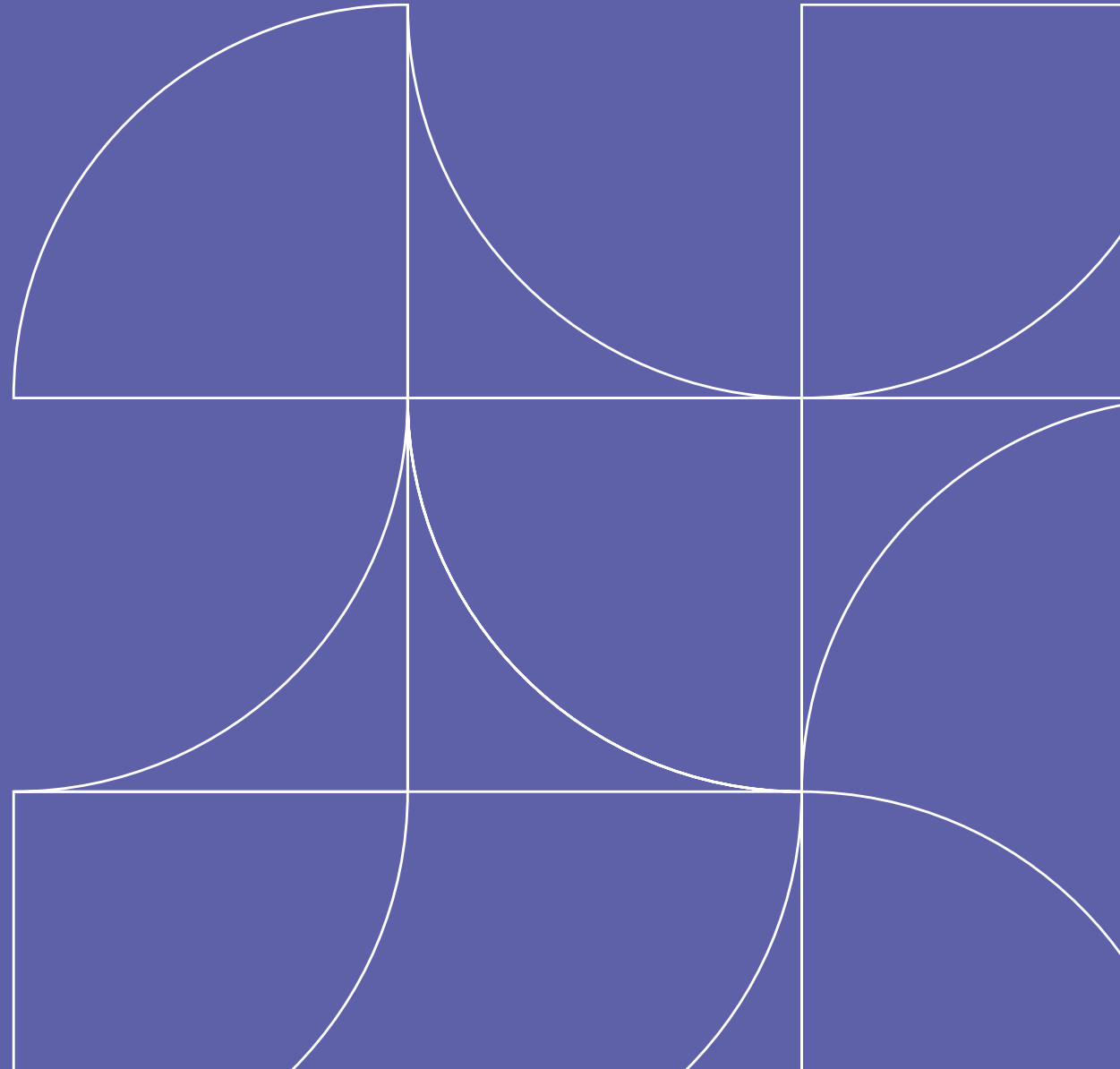
Megan Toth

Christine Hendrickson

March 16, 2021

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers



Megan Toth
Associate
mtoth@seyfarth.com



Ashley Cano
Partner
acano@seyfarth.com



Alex Oxyer
Associate
aoxyer@seyfarth.com



Uma Chandrasekaran
Partner
uchandrasekaran@seyfarth.com

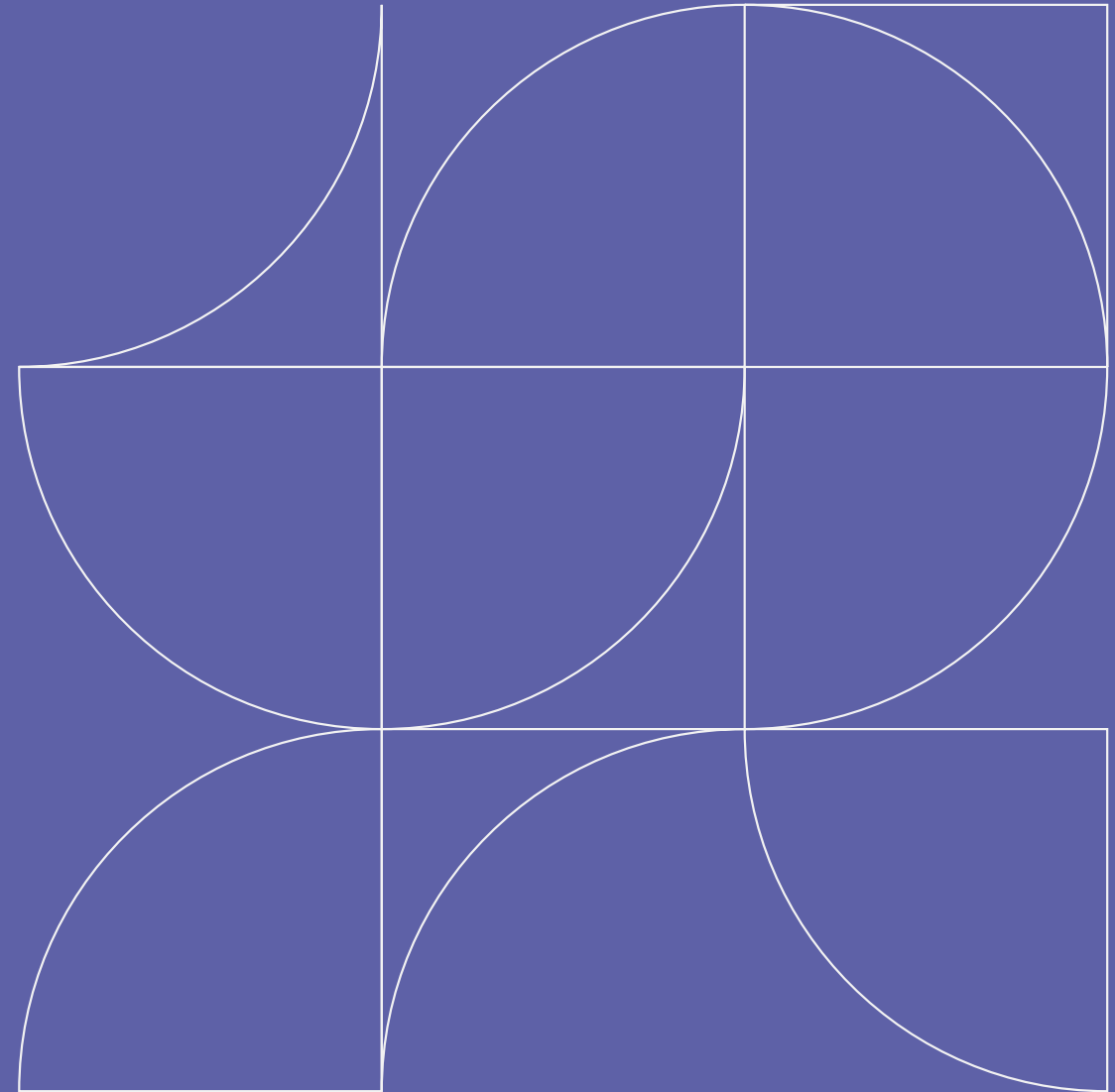


Christine Hendrickson
Partner
chendrickson@seyfarth.com

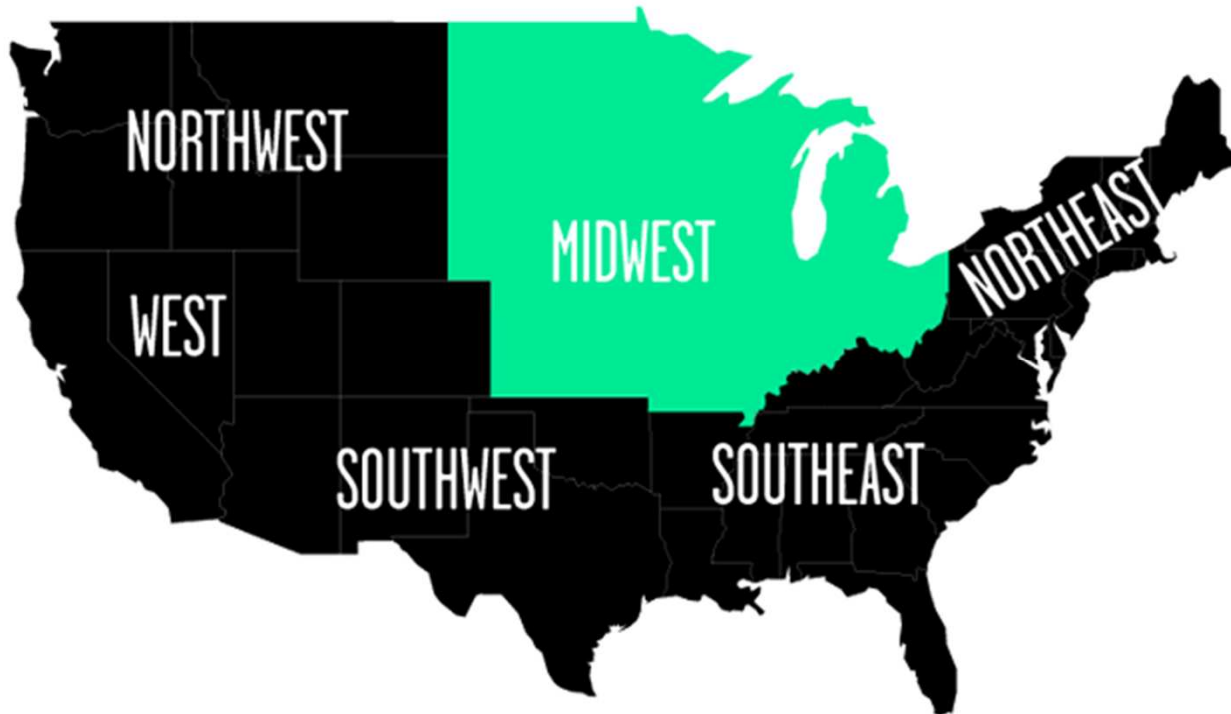
Agenda

- 01** Important Midwest Employment Law Updates 2021 and Beyond
- 02** The Latest on Return-to-Work Issues Surrounding COVID-19
- 03** What to Know About the Illinois Biometric Information Privacy Act (“BIPA”) in 2021
- 04** Diversity, Equity, and Inclusion Actions – From Trump to Biden

Important Midwest Employment Law Updates 2021 and Beyond



What's going on in the Midwest?



- 1 Sexual Harassment Training and Reporting Requirements ([Illinois](#))
- 2 New Discrimination Law ([Ohio](#))
3. Predictive Scheduling Laws ([Chicago/Illinois](#))
4. Ban the Box Laws ([St. Louis, MO](#) / [Waterloo, IA](#) / [Illinois](#))
5. Pay Reporting Requirements (*likely coming soon - Illinois*)

Illinois Sexual Harassment Training and Reporting

- Sexual Harassment Training Required
 - To complete by December 31, 2020 and each calendar year
 - All employees – short term, part-time and interns (not ICs)
 - Training Content/Model Training
- Reporting of Adverse Judgment or Administrative Rulings
 - Total number of adverse judgments or administrative rulings finding sexual harassment/unlawful discrimination the preceding year
 - October 31, 2020 then July 1 of each year thereafter
 - Private employers who employ 1+ employee in IL
 - Includes adverse judgments/rulings entered into outside of IL
 - Form found online

New Ohio Discrimination Law

- Employment Law Uniformity Act (HB 352)
- Effective April 15, 2021
- **Important Provisions**
 - 2 year SOL to bring discrimination claims
 - Must now exhaust administrative remedies with the OCRC
 - No manager/supervisor personal liability unless act outside of scope of employment
 - Codifies various affirmative defenses for HWE claims
 - Streamlines age discrimination claim filing process
 - New Damages Caps

- Effective July 2020
- Covered Employer
 - 100+ employees, globally (250 for non-profits)
 - 50 must be “Covered Employees”
 - Must be “primarily engaged in a Covered Industry”
- Covered Employee
 - Not IC
 - Majority of work physically performed in Chicago
 - Majority of work performed in a Covered Industry
 - Earn less than or equal to \$50,000/year or \$26/hour
- Covered Industry
 - Restaurants
 - Building Services
 - Warehouse Service
 - Manufacturing

Chicago Predictive Scheduling Law – Coverage

- Initial Estimate of Work Schedule
- Advance Notice of Work Schedule
- Predictability Pay
 - Exceptions
- Offer Work to Existing Employees
- Right to Rest
- Right to Request Flexible Work Arrangement

Chicago Predictive Scheduling Law – The Basics

Illinois “Fair Work Week Act”

– Pending Legislation

- Introduced in the IL House on February 19, 2021
- Coverage:
 - Non-salaried employees in the retail, hospitality, or food services industries, who work for employers with 500 or more employees worldwide.

Illinois “Fair Work Week Act”

- Pending Legislation, Cont.

- **Important Provisions**
 - Good faith, written estimate of employee’s work schedule at the time of hire and whether on-call shifts are expected;
 - Employees can identify limitations or changes to work availability
 - 14 days advance notice of work schedules required
 - Predictability pay and exceptions
 - Right to rest
 - Voluntary standby list
- Does not address **preemption** of Chicago law

Ban the Box Laws – St. Louis, Waterloo and Illinois

- St. Louis, MO

- Effective January 1, 2021
- Applies if 10+ employees
- Cannot ask about criminal history until after determined applicant qualified for job

- Waterloo, IA

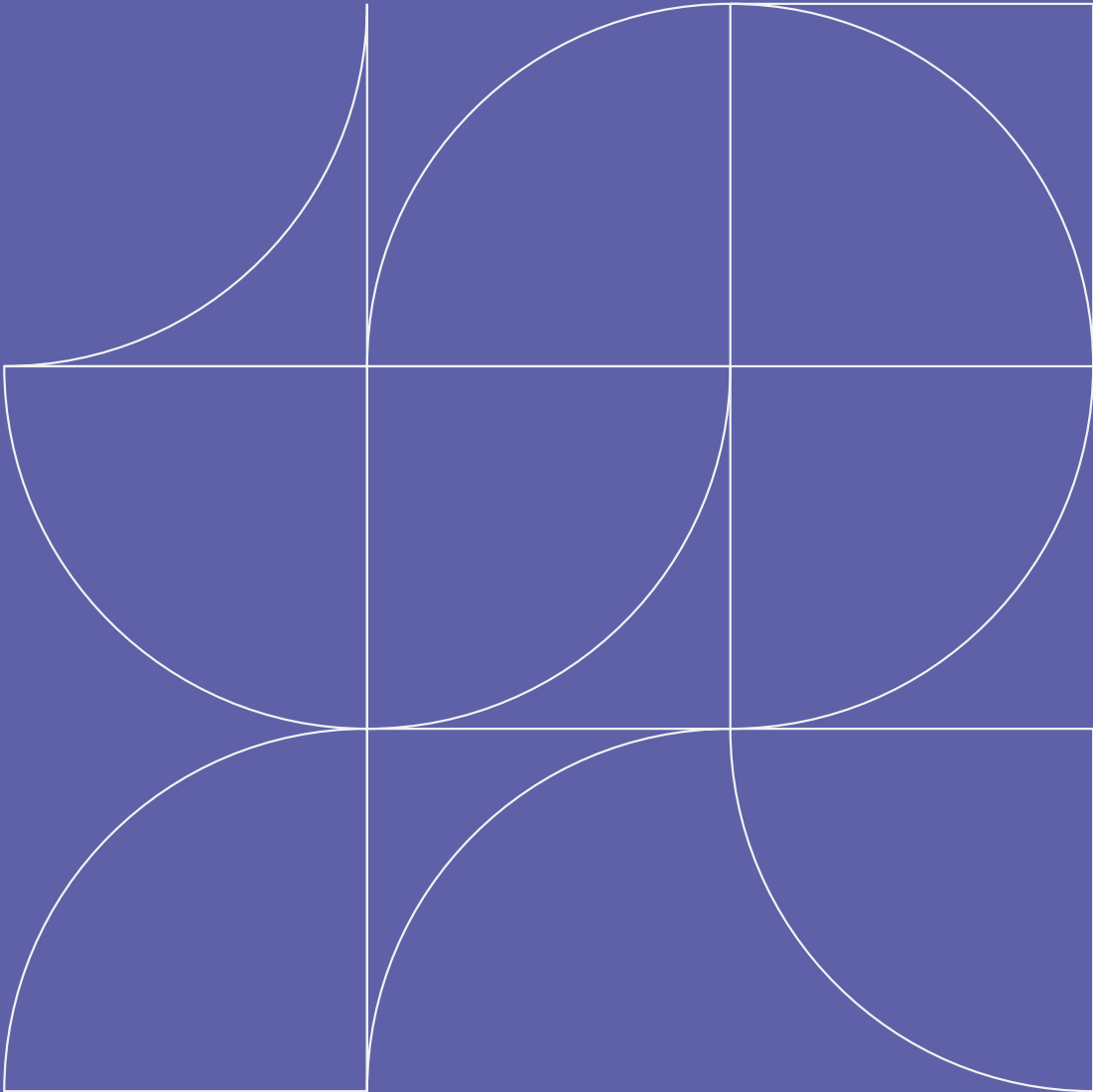
- Effective July 1, 2020
- Applies if 15+ employees
- Cannot inquire about criminal history until conditional offer of employment

- Illinois – Potential Amendment to Existing Law

- Heightened standard

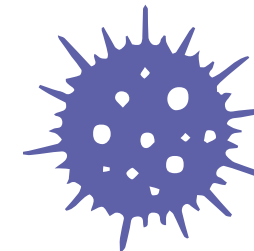


The Latest on Return-to-Work Issues Surrounding COVID-19



The Vaccine: Mandatory or Voluntary?

- This is one of the biggest questions that employers are struggling with right now
- There are **employment law** considerations to take into account, and there may also be **labor law** considerations
- On the employment law front, consider both the **ADA** and **Title VII**
- On the labor law front, consider the **NLRA**



What The EEOC Has to Say

- December 16, 2020: EEOC updated COVID-19 technical assistance guide to address vaccines
- Employers are always **free to encourage voluntary vaccination**
- Asking whether someone has been vaccinated is **not** a disability-related inquiry under the ADA
 - But if employees say they have not, no questions about why, unless the standard for job-related and consistent with business necessity is met (see next slide)
- Vaccines are **not** medical examinations for purposes of the ADA

What The EEOC Has to Say

- Employers can **require** employees to be vaccinated **IF**:
 - The employees receive the vaccine from a pharmacy or health care provider that is not under a contract with the employer
 - The employer handles requests for accommodations consistent with applicable law
- If an employer wants to administer the vaccine or contract with a pharmacy or health care provider to administer the vaccine (and therefore ask medical pre-screening questions), **THEN**:
 - The employer must show that the questions are job-related and consistent with business necessity, and that refusal to answer the questions and get the vaccine poses a direct threat to health and safety
- Responses to pre-screening questions must be kept **confidential** as required by the ADA

Handling Accommodation Requests

- If denying an accommodation request, must show that the unvaccinated employee would present a “direct threat”
- This involves **individualized assessments** of:
 - Duration of risk
 - Nature and severity of potential harm
 - Likelihood that potential harm will occur
 - Imminence of potential harm
- Even if direct threat is found, employee cannot be excluded from the workplace unless there is no reasonable accommodation
- This does not necessarily mean termination

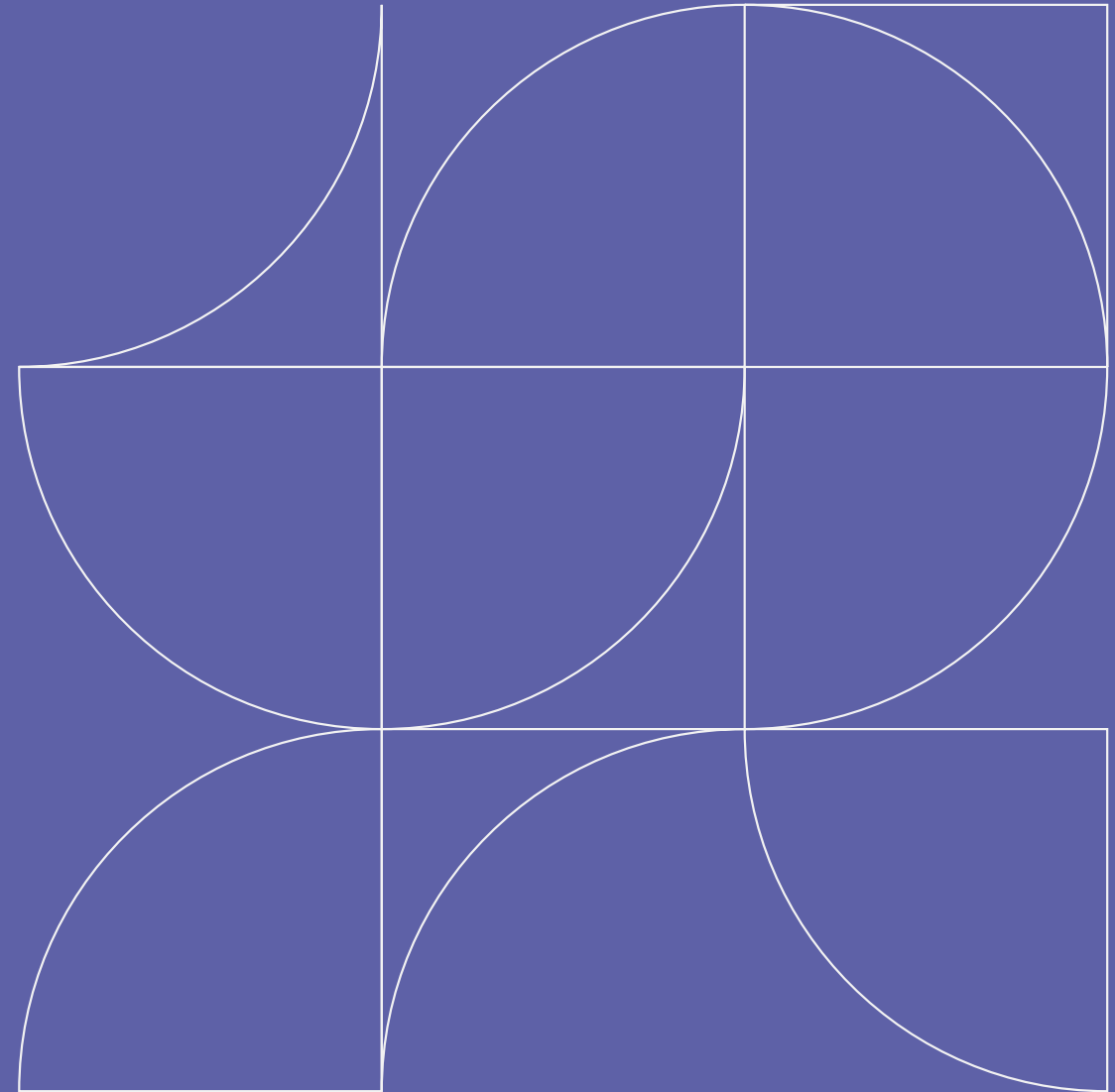
Handling Accommodation Requests

- Employers need to have an **accommodation process** for disability-related or religious objections to the vaccine
- Must provide reasonable accommodations unless undue hardship
- **Potential accommodations:** masks, testing, social distancing, staggering schedules, working remotely, transfer to a non-public facing role
- **Undue hardship:** ADA vs. Title VII
 - Consider the prevalence of employees who have been vaccinated
 - Consider the amount of contact the person would have with those whose vaccination status is unknown
- **Documentation:** from medical provider on medical necessity to be excused from vaccine; from employee/clergy related to objection to vaccine

Labor Law Considerations

- Employers whose workforces are unionized will almost certainly need to **bargain with the union** over any vaccine program (voluntary program or mandatory)
- Employers whose workforces are not unionized should consider potential labor and employee relations issues when deciding whether to mandate the COVID vaccine, and how this might affect any **union avoidance strategy**
- Both unionized and non-unionized employers should be mindful of **Section 7 of the NLRA**

What to Know About the Illinois Biometric Information Privacy Act (“BIPA”) in 2021



Where Did It Come From?

- The legislative history surrounding the bill suggests that the statute was implemented to protect consumers.
- Originally enacted in 2008, motivated by the bankruptcy of Pay by Touch (largest fingerprint scan system in Illinois)
- Regulates the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and biometric information.
- Because it has only recently generated litigation, courts are still interpreting BIPA (and there are still many gaps).

The Rise in BIPA Litigation

- Uptick began in 2017 – approximately 1,076 cases filed in last two years
- All Industries
 - Hospitality/Service
 - Manufacturing
 - HealthCare
 - Retail
- BIPA provides for possibly significant penalties (and attorneys' fees)
- Also suing the manufacturer and/or provider of the Biometric System at issue



Who Is Covered?

- **"Private entity"** means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.
- Section 25 of the statute exempts:
 - Certain financial institutions
 - A contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government

What is a “Biometric Identifier”?

- "**Biometric identifier**" appears to squarely include:
 - a retina or iris scan,
 - fingerprint,
 - voiceprint, or
 - scan of hand or face geometry.
- There are many enumerated examples of information that *do not* qualify as a “biometric identifier” (e.g., writing samples; written signatures; photographs (note: face scans created from photographs have been held to be biometric information); human biological samples used for valid scientific testing or screening; demographic data; tattoo descriptions; physical descriptions such as height, weight, hair color, or eye color; etc.)
- BUT – there is a catch-all in the statute: any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual.

How to Comply?

- Section 15(a): A private entity in possession of biometric identifiers or biometric information must:
 - Develop a **written policy** that establishes a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first; and
 - Make the policy available to the public; and
 - Comply with the retention schedule and destruction guidelines absent a valid warrant or subpoena.

How to Comply?

- Section 15(b): No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
 - (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
 - (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
 - (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

How to Comply?

- **Written Release** means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

How to Comply?

- Section 15(c): No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.
- Section 15(d): No private entity in possession of a biometric identifier or biometric information may disseminate a person's or a customer's biometric identifier or biometric information unless:
 - The subject or their legally authorized representative consents to the disclosure;
 - The disclosure completes a financial transaction requested by the subject;
 - The disclosure is required by State or federal law or municipal ordinance; or
 - The disclosure is required pursuant to a valid warrant or subpoena.

How to Comply?

- Section 15(e): Private entities must:
 - store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and
 - store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

Why Does This Matter?

- BIPA provides a private right of action allowing plaintiffs to recover liquidated damages and attorneys' fees.
- BIPA Statutory Penalties
 - Authorizes \$1,000 or actual damages (whichever is greater) for negligent violations.
 - Authorizes \$5,000 or actual damages (whichever is greater) for intentional or reckless violations.
 - Authorizes injunctive relief and reasonable attorneys' fees (including for expert witnesses) and costs to a “prevailing party.”

BIPA in the COVID Era

- As discussed previously, biometric identifier has a specific definition under the statute.
- Companies need to keep a watchful eye on any temperature-taking technologies or other new technology related to COVID-19 or working from home.
- Therefore, if the technology conducts a scan of any of these areas directly or incidentally, we advise erring on the side of compliance:
 - a retina or iris scan,
 - fingerprint,
 - voiceprint, or
 - scan of hand or face geometry.
- We recommend doing due diligence before implementing *any* new technology for employees, customers, etc. (understand its capabilities and how it works; ask the vendor re: BIPA; insurance coverage for BIPA; etc.)

What are the Defenses?

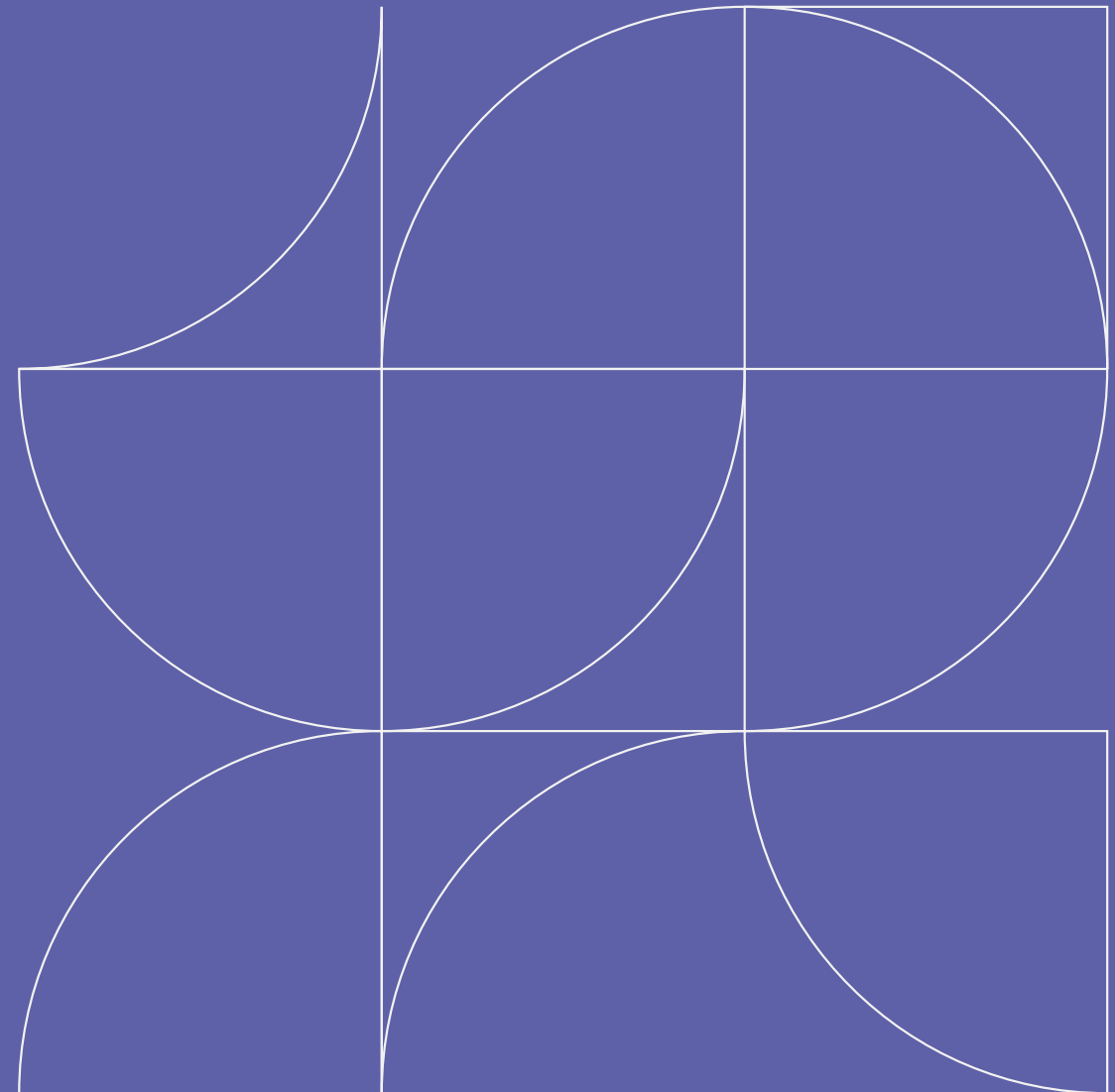
- There are myriad defenses and defense strategies to BIPA claims, but the top four are the following:
 1. Compliance
 2. Arbitration
 3. Collective Bargaining Agreements
 4. Possibly Workers' Compensation Preemption
- Case law is still being developed in this area and there are still many open questions. However, robust compliance is always the best strategy.

What's Next?

- Proposed changes to BIPA
- Case law will continue to develop this year in some key areas.
- Many other states (and cities) are now considering similar laws to BIPA: Maryland just proposed such a law in the last two weeks. There has also been a push for federal legislation.
- Portland, OR and New York City have also passed biometric privacy laws in the last few weeks with a private right of action.
- BIPA's cousin - GIPA

Diversity, Equity, and Inclusion Actions

From Trump to Biden



- Trump- OMB Memorandum- September 4, 2020
 - Federal Training which discusses “white privilege” or states that there is embedded racism is Un American
 - Cannot be part of Training
- Trump- Executive Order 13950- September 25, 2020
 - Government Contractors and Federal Agencies cannot use race or sex stereotyping as basis for training or policy
 - Justice Department will interpret Title VII in accordance with this policy

Trump Administration

Biden Administration

- Biden - Executive Order 13985 - January 20, 2021- Advancing Racial Equity
 - Rescind Trump Order 13950
 - FAQs – Withdrawn
 - Hotline Number – Disconnected
 - Filed Complaints – Dismissed
- Biden - Executive Order 13988- January 20, 2021 - Prohibit Discrimination on basis of Sexual Identity and Orientation
 - Directs all federal agency to examine all policies, and regulations to prohibit and discrimination on basis of sex orientation and Identity
- Biden - Executive Order Establishing the White House Gender Policy Council

Executive and Legislative Paths to the \$15 Minimum Wage

Executive Orders

vs.

Congressional Action

- EO 14003 requires the Director of OPM to provide a report with recommendations to promote a \$15/hour minimum wage for Federal employees.
- As part of his efforts to protect and empower federal workers and contractors, President Biden directed his Administration “to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a \$15 minimum wage and provide emergency paid leave to workers.”
- President Obama’s EO 13658 established a minimum wage of \$10.95 for federal contractors, applicable to contracts entered into after January 1, 2015.

- Democrats sought to double the minimum wage to \$15/hour as part of the \$1.9 Trillion COVID-19 stimulus package, but Senate parliamentarian ruled that the wage hike does not meet the criteria to be included in the bill under the special reconciliation process.
- Apart from the stimulus package, House and Senate Democrats have introduced stand-alone legislation called the “Raise the Wage Act of 2021” to increase the federal minimum wage to \$15 by 2025.
- The number might change, but employers should expect some kind of increase in the federal minimum wage.

OFCCP



- New Director Jenny Yang
- DOL will be “Engine of Change” for Biden Administration’s policies
- Emphasis on:
 - AI in Recruiting
 - Compensation Data Transparency
 - Focus on Systemic Pay Analyses
 - Shift in Emphasis and Audit Strategy from Education and Compliance to Enforcement

The Yale Lawsuit

- Trump - Sues Yale and Princeton challenging admissions which might favor minorities (Yale) and investigates Princeton diversity in initiatives
- Biden - Dismisses Yale lawsuit and drops Princeton investigation



Questions?



Megan Toth
Associate
mtoth@seyfarth.com



Ashley Cano
Partner
acano@seyfarth.com



Alex Oxyer
Associate
aoxyer@seyfarth.com



Uma Chandrasekaran
Partner
uchandrasekaran@seyfarth.com



Christine Hendrickson
Partner
chendrickson@seyfarth.com

Thank You!

