2023 Changes (HB 2862) to Illinois Temporary Staffing Laws

Presented By:

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Requirements of IDTLSA Prior to HB 2862 Amendments

The Illinois Day and Temporary Labor Services Act ("IDTLSA") was originally enacted in 2006 to provide basic protections to regulate day and temporary workers. For example, the IDTLSA provides certain pay protections to day and temporary workers and requires that temporary staffing agencies register with the Illinois Department of Labor ("IDOL") to allow oversight. Since its enactment, the law has been amended every few years to provide further protections for temporary workers and to encourage the clients of temporary staffing agencies to transition temporary workers to regular employees.

The changes to the law through the HB 2862 amendments ("Amendment") brought drastic changes to the Act which make the use of long-term temporary workers extremely burdensome, more costly and may risk violations of the Act.

2023 Amendments to Illinois Day and Temporary Services Act, Effective August 4, 2023

The HB 2862 Amendments were passed by the legislature on June 16, 2023 and signed into law on August 4, 2023.

The Illinois Department of Labor issued emergency regulations providing some guidance under the new law on August 7, 2023 and has published FAQs for further guidance.

Legislature's Statement of Purpose

- Since the original passage of the Illinois Day and Temporary Services Act in 2006, **the number of day and temporary workers in Illinois has risen from 300,000 to over 650,000** and **the number of registered service agencies has risen from 150 with 600** branch offices to over 300 with over 800 branch offices.

- The Illinois Legislature cites the following as the basis for the HB 2862's substantial changes: "Recent studies and a survey of low-wage day or temporary laborers …have consistently found finds that as a group, they are particularly vulnerable to abuse of their labor rights, including unpaid wages, failure to pay for all hours worked, minimum wage and overtime violations, and unlawful deductions deduction from pay for meals, transportation, equipment, and other items."

Summary of Key Changes

1. After 90 days of work for a temporary agency's client, the temporary worker must:
   - Be paid at least the rate of the client's lowest paid similarly situated regular employees with the same level of seniority; and
   - Receive the same benefits or the cash equivalent of the client's similarly situated regular employees.
2. Temporary workers have the right to refuse to cross a picket line.
3. Substantial new safety and hazard assessments and training requirements for both the employer and client.
4. Higher penalties.
5. Third-party rights to file complaints and private lawsuits.

Are All Temporary Staffing Workers Covered?

Almost, but not all.

The IDTLSA does not cover professional or clerical employees.

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When Does the 90 Day Countdown Begin?

As drafted, the Amendment did not state whether the 90 days commenced upon the temporary worker's initial placement or upon the effective date of the law. The IDOL regulations clarified that the 90 days commenced on August 4, 2023 (when signed into law). However, after significant pressure and input from staffing agencies and organizations, the legislature enacted a modification to the Amendment which changed the implementation date of the statute from August 4, 2023 to April 1, 2024. Governor Pritzker signed the modification into law on November 17, 2023.

The delayed implementation date has provided agencies and their clients much needed time to find a way to try to meet the requirements of the new law. However, and as will be discussed shortly, the delay does not cure that fact that the equal pay and benefits provisions of the Amendment remain enormously unclear and burdensome and will substantially disrupt the temporary staffing industry as well as the clients that use their services.

How is the 90 Days Calculated?

- The Amendment provides that the 90 days are the "calendar days" that a temporary worker "is assigned to work at a [client]".   The Amendment did not state whether the 90 days is calculated based upon the period that a temporary worker is assigned to a particular client (*i.e.,* from the first day a worker is assigned to a client through the last day, including weekends and days not worked) or whether only the days that the individual is actually working are counted. Also unclear, was whether a break in an assignment would allow the 90 days to restart.
- The IDOL's emergency and proposed regulations clarified that the 90 days would be calculated based upon the calendar days worked by staffing employees for a client within a 12-month period, whether the days were worked consecutively or intermittently, which suggests that the days are days worked not the entire period of an assignment.
- The IDOL's FAQs further clarify that only days worked are to be counted toward the 90 days.

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After the 90 Day Trigger

The next step is to determine the temporary worker's comparator.

The Amendment defines a comparator as the *lowest paid* employee with the *same level of seniority* who performs ***the same or substantially similar work*** on jobs requiring ***substantially similar skill, effort, and responsibility*** which are ***performed under similar working conditions.***

- The IDOL Emergency/Proposed Regulations somewhat refine the definitions of "substantially similar work" and "similar working conditions" explaining that it is actual work performed rather than job title or classification that controls the comparison. The regulations also provide that jobs performed in different departments or locations may be comparable.

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[cont'd] "Similar Working Conditions"

- Remaining unclear and extremely problematic under the Amendment, is if no comparable employee exists, the temporary worker must be paid at least the same rate as the *lowest paid employee of the client* with the *closest level of seniority.* As drafted, this provision, which only looks at seniority, does not make sense and could potentially result in absurd rates of pay.

- For example, if an employer had only been using unskilled temporary workers, the pay rate of a newly placed skilled temporary worker who has no skilled comparator, would be based solely upon seniority which could result in their pay rate being matched to the most recently hired executive level employee. This language requires clarification.

Comparator Ambiguity

- Determinations based on a “same or substantially similar” analysis is always going to be the source of disputes and possibly litigation.

- The Amendment’s “same working conditions” is still unclear. Does this mean that hourly rates much match shift premiums for night or weekend shifts and how does that work if a temporary worker is assigned to different shifts?

- HB 2862 does not address discretionary, incentive or productivity bonuses. Does the pay rate that must be matched include discretionary or nondiscretionary performance/production-based bonuses?

Agency Clients Must Disclose Their Employees' Rate of Pay and Benefits

- There can be no pay and benefit parity without the agency knowing their clients' pay and benefits information so….

- The Amendment requires agency clients to disclose employee pay and benefit information upon their agency's request after a temporary worker has been assigned to a client for 90 days. A client's failure to disclose is a violation under the Amendment.

- ISSUE: Is there a continuing obligation to update compensation data and if so, how frequently and whose obligation is the updating?

What are “Equivalent Benefits”?

- The Amendment’s mandated compensation parity extends beyond hourly rate to **benefits**. The IDOL Proposed Regulations define “benefits,” rather unhelpfully, as, “health care, vision, dental, life insurance, retirement, leave (paid and unpaid), other similar employee benefits, and other employee benefits as required by State and federal law.”

  Issues:

- How can a temporary agency match the health insurance coverage of its clients when the clients don’t offer the same benefits without having ERISA discrimination and ACA issues? Practically speaking, the agency would have to match the benefits of its client with the best benefit package which would be a moving target.
- Not all employees who are offered group health insurance enroll, so agency clients do not pay for all of their eligible employee’s insurance costs. If agencies elect to pay the “cash equivalent” of their client’s group health insurance, unlike their clients, an agency will have to pay the benefit cost equivalent to all of its employees assigned to a client with benefits.

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Possible Preemption of Benefit Requirements?

Arguments of preemption by federal laws such as Employment Retirement Income Security Act ("ERISA") and the Affordable Care Act ("ACA") may be asserted.

- Is this law's mandate upon agencies to match the various health insurance benefits of its different clients preempted by ERISA?

- Is this law's mandate of providing additional coverage obligations upon a staffing agency already in compliance with the ACA preempted by the ACA?

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Labor Disputes

- At or before sending employees to a job, temporary agencies must provide ***written*** notice to their employees when their proposed assignment is with a client involved in "a strike, lockout, or [unexplained] ***other labor trouble***" (whatever that is) advising that:

  1. There is a labor dispute;
  2. They have the right to refuse the assignment; and
  3. If they refuse, they may do so "without prejudice to a receiving another assignment."

Every time an agency sends the worker to such site is a separate and distinct notice violation under the Act and the agency has the burden to show that the notice was provided to the worker every time!

Issue: Possible preemption under the National Labor Relations Act?

New Safety/Hazard Provisions– Agency Obligations

- Before any assignment to a site, the temporary agency must:
  - Inquire about its client’s safety and health practices and workplace hazards and assess those conditions and “may” (not explained when) need to visit the client company’s “actual worksite”;
  - Make the client aware of any safety hazards it finds and “urge” the client to correct those hazards and if not corrected, must remove its employees from the worksite;
  - Provide training, in preferred language of employee, including industrial hazard training and for the client’s workplace;
  - Create and maintain records of the above;
  - At the start of a contract, provide its client with a general description of its training program and topics covered; and
  - Provide the Illinois Department of Labor’s hotline number to temporary workers to report safety hazards and concerns.

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New Safety/Hazard Provisions – <u>Client</u> Obligations

Before a temporary employee can work at its site, the User Client must, among other requirements:

- Document and inform the Agency of anticipated job hazards “likely encountered” by the temporary worker;
- Review the Agency’s safety and health awareness training to see if it addresses the Client’s recognized hazards for its industry;
- Provide specific training tailored to the particular hazards in its worksite, document and retain the site-specific training and provide confirmation of training within 3 business days of the training to the agency;
- Advise the Agency and Temporary Worker of new job tasks or work locations where “new hazards may be encountered” that have not already been reviewed before the temporary worker starts the new work task;
- Update any personal protective equipment and training for the new tasks “if necessary”; and
- Must provide worksite specific instructions to the temporary employee and allow the Agency to visit any worksite where one of their temporary workers will be working to confirm safety, health and hazard information and practices.

New Safety/Hazard Provisions –Misc. Provisions to Note and Know

- A temporary worker may refuse any job or task when the job or task has not been reviewed or if they have not had adequate training.

- Clients must provide worksite specific training and must allow the temporary agency to visit and inspect/observe the work and confirm that adequate training and proper safety practices have been implemented.

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Increased Penalties

Penalties will increase, as follows:

- For each day that an agency client uses an unregistered agency, the client may be assessed a penalty increased from a maximum of $500 to $1,500 for each day.
- For other violations of the Act, the penalties assessed against an Agency or User Client from a first audit will be increased from a maximum of $6,000 to a maximum of $18,000. After a second violation, the penalty increases from a maximum violation of $2,500 to a maximum of $7,500 for each repeat violation for up to three years. Each violation is defined as: "Each Day" and for "Each Worker" is a separate violation.

Increased Registration Fees – Temporary Agency

- Not to exceed $3,000 (up from $1,000) for Annual IL Registration; and
- Not to exceed $750 (up from $250) for each Temporary Agency's office or branch in IL.

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IL Attorney General's Role Forward…

- The IL Attorney General's Office through the WORKER PROTECTION UNIT, will be able to file suit in state court seeking to suspend or revoke the registration of a Temporary Staffing Agency when warranted by a public health concern or violations of the Act.

“Interested Party: Standing to File Lawsuits Against Temporary Staffing Agencies and/or User Clients

- “Interested Party” means an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements.
- Before filing a lawsuit, an interested Party must first submit a complaint to the Illinois Department of Labor which much like the process before the Illinois Department of Human Rights , will trigger an investigation. If violations are found but not cured, if the Department finds that a Complaint is not justified or has concluded its enforcement proceeding, the IDOL will provide the Interested Party with a Right to Sue allowing the Interested Party to file a lawsuit in state court. The Interested Party may also file suit after 180 days from the time of filing its initial complaint with the IDOL and no action or decision has been made.
- Interested Party has the right to recover 10% of any and all statutory penalties recovered in any such civil action, plus fees/costs.
- 3 Year Statute of Limitation (plus, tolling while at the IDOL)

Recently Filed Litigation

- On November 22, 2023, a lawsuit was filed in the U.S. District Court in Chicago by the Staffing Services Association of Illinois and the American Staffing Association as well as 3 staffing agencies.

- The lawsuit argues preemption by ERISA, ACA and the NLRA and due process violations.

- The lawsuit seeks to enjoin implementation of the Amendments.

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What To Do

- Assess and re-evaluate all temporary agency contracts and if you have not already done so, initiate discussions with your agency/client regarding new responsibilities, costs and record keeping including:
  - Safety hazards information sharing and breakdown of safety training duties between the parties;
  - Discuss information sharing regarding client payroll and benefit information;
  - Determination of which/amount of new costs will be passed through from agency to clients; and
  - Reciprocal assurances.

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