

LEGAL, LEGISLATIVE, & ETHICS UPDATE

PRESENTED FOR
THE ILLINOIS COMMUNITY COLLEGE
TRUSTEES ASSOCIATION

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ETHICAL REQUIREMENTS FOR ELECTED OFFICIALS

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PROHIBITED INTERESTS IN CONTRACTS

- Public Officer Prohibited Activities Act, 50 ILCS 105/3(a).
- Common law

EXCEPTIONS ALLOWING INTERESTS IN CONTRACTS

- ❑ Interested members may contract with an entity in which the interested member has less than a 7 ½ % share in the ownership.
- ❑ Interested member may contract when the amount of the contract does not exceed \$2,000 and the total amount of all contracts is not over \$4,000.
- ❑ Any contract where interested member has less than a 1 % share in the ownership.
- ❑ See statute for other specific exceptions.

EXCEPTIONS ALLOWING INTERESTS IN CONTRACTS

- For each exception:
 - ▣ The member must publicly disclose the nature and extent of the interest prior to or during the deliberations concerning the proposed award of the contract
 - ▣ Must abstain from voting on the award of the contract
 - ▣ The award of the contract must be approved by a majority vote of the governing body of the municipality

COMMON LAW CONFLICTS OF INTEREST

- Faithful performance of official duties is best secured if governmental officers, like any other persons holding fiduciary positions, are not called upon to make decisions that could result in a personal advantage or disadvantage to their individual interests.

COMMON LAW CONFLICTS OF INTEREST

- Direct conflict of interest cases. Public officers may not have an interest directly in their own names in any contract work, or business of the public body, with a few limited exceptions. The following cases deal with direct conflicts of interest:
 - ▣ Croissant v. Joliet Park District, 141 Ill. 2d 449 (1990).
 - ▣ Brown v. Kirk, 64 Ill. 2d 144 (1976).
 - ▣ People v. Scharlau, 141 Ill. 2d 180 (1990).
 - ▣ Mulligan v. Bradley, 131 Ill. App. 3d 513 (3rd Dist. 1985).

DECISIONS INTERPRETING THE CONFLICT OF INTEREST STATUTES

- Direct Conflict of Interest
- Conflicts of Interest Where No Contract Is Executed
- Indirect Conflicts of Interest
- Public Officers as Employees of Parties Awarded Contracts
- Common Law Conflict of Interest

THE STATE OFFICIALS AND EMPLOYEES ETHICS ACT (5 ILCS 430/1 *et seq.*)

- The State Ethics Act governs:

- ▣ Prohibited Political Activity

- ▣ Gift Ban.

STATE ETHICS ACT – PROHIBITED POLITICAL ACTIVITY

- Prohibited Political Activity:
 - ▣ During compensated time
 - ▣ Includes use of government property or resources

STATE ETHICS ACT – GIFT BAN

□ Gift Ban

- Employees, their spouses and family members living at home may not intentionally solicit or accept gifts from prohibited sources. Employees who receive gifts in violation of the ban should attempt to return them or donate an amount equal to the value of the gift to an appropriate charity. 5 ILCS 430/10-30.
- The Act contains a specific definition of a “gift.”
 - A “gift” is defined as “any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or the official position of an employee, member, or officer.”

STATE ETHICS ACT – GIFT BAN

- 5 ILCS 430/1-5. - A “prohibited source” includes any person or entity:
 - ▣ Who is seeking official action by the officer or employee who does business or seeks to do business with an officer or employee
 - ▣ Who conducts activities regulated by an officer or employee
 - ▣ Who has interests that may be substantially affected by the performance of the official duties of the officer or employee
 - ▣ Is registered under the Lobbyist Registration Act
 - ▣ A person who is living with a “prohibited source”

EXCEPTIONS TO THE GIFT BAN

- Gifts available on the same conditions to the general public
- Anything for which market value is paid
- Lawfully made campaign contributions
- Educational material or missions
- Travel expenses for a meeting to discuss business

EXCEPTIONS TO THE GIFT BAN

- Gifts from a relative
- Gifts given on the basis of personal friendship, unless the recipient has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the recipient or his or her spouse and not because of the personal friendship
- Food or refreshments not exceeding \$75 per person in value on a single calendar day; provided that the food or refreshments are (i) consumed on the premises from which they were purchased or prepared, or (ii) catered

EXCEPTIONS TO THE GIFT BAN

- Food, lodging, transportation or other benefits related to outside business or employment activities
- Intra-governmental and inter-governmental gifts
- Bequests, inheritances, and other transferances at death
- Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than \$100.00
- These exceptions are mutually exclusive and independent of each other. For example, if you receive a dinner of less than \$75, you can also receive a gift of less than \$100.00

GIFT BAN ACT CLEMENCY CLAUSE

- Sec. 10-30. Gift ban; disposition of gifts. A member, officer, or employee does not violate this Act if the member, officer, or employee promptly takes reasonable action to return the prohibited gift to its source or gives the gift or an amount equal to its value to an appropriate charity that is exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as now or hereafter amended, renumbered, or succeeded.

CRIMINAL OFFENSES

- **Official Misconduct - 720 ILCS 5/33-3**
- A public officer or employee commits misconduct when, in his official capacity he commits any of the following acts:
 - ▣ **Intentionally or recklessly fails to perform any mandatory duty as required by law; or**
 - ▣ **Knowingly performs an act which he knows he is forbidden by law to perform; or**
 - ▣ **With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or**
 - ▣ **Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.**

CRIMINAL OFFENSES

- **A public officer or employee or special government agent convicted of violating any provision of this Section forfeits his office or employment or position as a special government agent. In addition, he commits a Class 3 felony.**
 - **Penalties of a Class 3 felony:**
 - Prison – not less than 2 years, not more than 5 years. 730 ILCS 5/5-4.5-40(a). If an extended term based on aggravating factors, then sentence shall not be less than 5 years and not more than 10 years. See 730 ILCS 5/5-8-2.
 - Probation – not exceeding 30 months. 730 ILCS 5/5-4.5-40(d).
 - Fine – not to exceed \$25,000 or the amount specified in the offense, whatever is greatest. 730 ILCS 5/5-4.5-50.
 - Misc. – home detention, concurrent sentences, impact sentencing, parole and restitution are all possible sentences with judicial discretion.

PUBLIC CONTRACTS (BID RIGGING)

- The statute prohibits public officials from:
 - ▣ Knowingly disclosing to any interested person any information related to the terms of a sealed bid, unless such disclosure is also made generally available to the public.
 - ▣ Knowingly conveying, either directly or indirectly, outside of the publicly available information, to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors, when inclusion of such information concerning the specifications or contractors in the bid or offer would influence the likelihood of acceptance of such bid or offer
 - ▣ Either directly or indirectly, knowingly informing a bidder or offeror that the bid or offer will be accepted or executed only if specified individuals are included as subcontractors, unless following procedures established (i) by federal, State or local minority or female owned business enterprise programs or (ii) pursuant to Section 45-57 of the Illinois Procurement Code.

PUBLIC CONTRACTS (BID RIGGING)

- The statute prohibits public officials from (continued):
 - Knowingly awarding a contract based on criteria which were not publicly disseminated via the invitation to bid, when such invitation to bid is required by law or ordinance, the pre-bid conference, or any solicitation for contracts procedure or such procedure used in any sheltered market procurement procedure adopted pursuant to statute or ordinance
 - Knowingly either:
 - Providing, attempting to provide or offering to provide any kickback;
 - Soliciting, accepting or attempting to accept any kickback; or
 - Including, directly or indirectly, the amount of any kickback prohibited by paragraphs (1) or (2) of this subsection (a) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to any unit of State or local government for a public contract.
 - Receiving an offer of a kickback, or has been solicited to make a kickback, and failing to report it to law enforcement officials, including but not limited to the Attorney General or the State's Attorney for the county in which the contract is to be performed.
 - Participating, sharing in, or receiving directly or indirectly any money, profit, property, or benefit through any contract with the village, with the intent to defraud the village

PENALTIES

- Violations are Class 3 and Class 4 felonies.
 - **Penalties of a Class 3 felony:**
 - Prison – not less than 2 years, not more than 5 years. 730 ILCS 5/5-4.5-40(a). If an extended term based on aggravating factors, then sentence shall not be less than 5 years and not more than 10 years. See 730 ILCS 5/5-8-2.
 - Probation – not exceeding 30 months. 730 ILCS 5/5-4.5-40(d).
 - Fine – not to exceed \$25,000 or the amount specified in the offense, whatever is greatest. 730 ILCS 5/5-4.5-50.
 - Misc. – home detention, concurrent sentences, impact sentencing, parole and restitution are all possible sentences with judicial discretion.
 - **Penalties of a Class 4 felony**
 - Prison – not less than 1 years, not more than 3 years. 730 ILCS 5/5-4.5-40(a). If an extended term based on aggravating factors, then sentence shall not be less than 3 years and not more than 6 years. See 730 ILCS 5/5-8-2.
 - Probation – not exceeding 30 months. 730 ILCS 5/5-4.5-40(d).
 - Fine – not to exceed \$25,000 or the amount specified in the offense, whatever is greatest. 730 ILCS 5/5-4.5-50.
 - Misc. – home detention, concurrent sentences, impact sentencing, parole and restitution are all possible sentences with judicial discretion.
- The governmental body may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct which violates the kickback provision in twice the amount of each kickback involved in the violation. This does not limit the ability of the village to recover monies or damages regarding public contracts under any other law or ordinance.

CONCLUSION

- Public officers must be aware that their actions and relationships may constitute conflicts of interest.
- With a few, limited exceptions, being financially interested, either directly or indirectly, in any contract, work, or business of the public body they serve is a violation of the Illinois conflict of interest statutes and long-standing common law principles against self-dealing by public officers.
- Because predicting what particular set of facts will constitute a prohibited conflict of interest is difficult, the public officer should seek legal advice to determine if a conflict of interest exists.

QUESTIONS?

FOIA, OMA, AND COLLEGE
COMMUNICATIONS:
BACKGROUND AND IMPACT
OF RECENT LEGAL DECISIONS

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FOIA and Related Legal Issues For College Administrators and Trustees

FOIA Presumption Regarding Governmental Records

- All records in the custody or possession of a public body are presumed to be open to public inspection and copying.
- Public body asserting that a record is exempt from disclosure has the burden of proving a specific statutory exemption applies by clear and convincing evidence.

Definition of A Public Record Under FOIA

- All records, reports, forms, writings, letters, memoranda, and all other documentary materials pertaining to the transaction of public business. 5 ILCS 140/2.
- FOIA was expressly amended to include:
 - ▣ Electronic communications, recorded information and all other documentary materials regardless of physical form or characteristics.
 - ▣ All records having been prepared by or for, or having been used or being used by, received by, in the possession of, or under the control of any public body.

Whose Communications Are Considered Public Records?

- Communications and records of elected and appointed local government officials, as well as administrators and other employees, that pertain to the business of the public body are public records subject to FOIA.
- Electronic communications of administrators and public officials that “pertain to the transaction of public business” are public records subject to FOIA regardless of whether the communication was sent or received via a personal email account, on a personal computer, cell phone or other personal electronic device.

The *City of Champaign* Case

□ Facts

- The *News Gazette* asked the City for all electronic communications sent and received by city council members and the mayor during council meetings, including records from “both city-issued and personal cell phones, city-issued or personal email addresses and Twitter accounts.”
- The City provided records, but excluded communications made via private email accounts or cell phones.
- The denial was referred to the Illinois Attorney General and then appealed to the Illinois appellate court.

The *City of Champaign* Case

□ Decision

- Appellate Court held that communications via text message and email between board members during a board meeting are subject to FOIA. *City of Champaign v. Madigan*, 2013 IL App. (4th) 120662.
- Once board members convene a public meeting, they collectively become a public body. Any communication that pertains to public business and is sent or received by board members when the public meeting is in session is a public record subject to FOIA.
- The court required the city to disclose text messages and emails that were on the city council members' private computers and cell phones that were sent or received while the city council was in session.

Key Take Aways from this Decision

- Text messages and email communications sent or received by Board members while the Board is in session, regardless if received on a personal device or through a private email account, are subject to public review through FOIA.
- Electronic communications are likely to be exempt from FOIA so long as the communications remain in private control, are not communicated to the public body, and the communications are not sent or received while a public meeting is in session.

Ten FOIA Exemptions of Particular Interest to Community College Districts

1. Information prohibited from disclosure by other state or federal laws or regulations. FOIA §7(1)(a)
2. Private information – unique identifiers. FOIA §7(1)(b)
3. Personal information the disclosure of which would constitute an unwarranted invasion of personal privacy. FOIA §7(1)(c)
4. Preliminary drafts – documents generated by public officials in which opinions are expressed or policies or actions are formulated. FOIA §7(1)(f)
5. Trade secrets and commercial or financial information obtained from a person or business under claim that the information is proprietary, privileged or confidential. FOIA §7(1)(g)

Ten FOIA Exemptions of Particular Interest to Community College Districts

6. Test questions, scoring keys and other examination data. FOIA §7(1)(i)(i)
7. Peer review information received by the College under its procedures for evaluation of faculty members by their academic peers. FOIA §7(1)(i)(ii)
8. Communications between the College and an attorney or auditor representing the College. FOIA §7(1)(m)
9. Grievance/discipline records relating to the College's adjudication of employee grievances or disciplinary cases, except final outcome of cases where discipline is imposed. FOIA §7(1)(n)
10. Records relating to collective negotiating matters. FOIA §7(1)(p)

Recent FOIA Amendment

- Settlement and severance agreements entered into by the public body are expressly subject to disclosure under FOIA.

Recent Decision Finds Governor's Calendar is Public Record Subject to Disclosure under FOIA.

□ Facts

- Newspaper reporter requests documents showing Governor Rauner's appointments from April 1 – May 14, 2015 including times and dates of all meetings and functions attended, and names and titles of all meeting attendees.
- Governor's office provided his calendar with redactions of identities of persons who attended the meetings with the Governor.
- Newspaper appealed redactions to Attorney General Public Access Counselor.

□ Exemptions Asserted

- 7(1)(f) for deliberative privilege claiming identity of persons Governor met with could reveal his thought process and direction of his judgment.
- 7(1)(m) because many meetings included legal counsel.
- Also claimed Governor's calendar was not a public record under FOIA.

▣ Decision

- ▣ Governor's calendar is public record under FOIA because pertains to public business.
- ▣ Calendar is prepared and maintained by Governor's assistant, a State employer;
- ▣ Used for scheduling official meetings and other governmental events;
- ▣ Circulated to senior staff members.

□ Decision

- No redactions under 7(1)(f) because no evidence that redacted identities would reveal predecisional deliberative material.
- No redactions permissible under 7(1)(m) because no evidence that redacted identities would reveal substance of confidential attorney-client discussions.
- Ordered full disclosure subject only to redaction of home or personal telephone numbers under 7(1)(b) for private information.

Village of Rosemont Binding Opinion

□ Facts

- Chicago Tribune requests all contracts and related correspondence between Village and third parties related to Garth Brooks appearance at Allstate Arena.
- Village withholds e-mails in which ticket pricing was discussed under 7(1)(f) for deliberative process.
- Village redacts information on rental fees and promotional rebates under 7(1)(g) as trade secrets.

□ Decision

- No exemption under 7(1)(f) because correspondence between Village Executive Director and third party concert promoter not part of internal deliberative process.
- No exemption under 7(1)(g) because negotiated terms of a contract are not trade secrets.



Open Meetings Act Q&As and Impact of Recent Legal Decisions

What is a “Meeting” Under the OMA?

- Any gathering of a majority of a quorum of members of the public body to discuss public business.
- Meeting includes any gathering whether in person, by telephone, audio or video conference or electronic means, including email, chat rooms and texting.
- If no public business discussed, it is not a “meeting.”

Are Committee Meetings Subject to the OMA?

- College Board committees as “advisory bodies” are subject to the OMA.
- Some committees are not subject to the OMA where the committee does not include trustees and lacks features of an “advisory body.”
- For example, when:
 - Committee members are volunteers and not appointed by the Board
 - Duties or function not prescribed by Board by-laws or rules
 - Board has no control over the committee
 - Committee has no budget and is solely advisory

Must a Topic be on the Agenda to be Discussed at a Board Meeting?

- No. The OMA states that “the requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda.”
- Items not specifically listed on the agenda may be deliberated and discussed by the Board but not acted upon at the meeting.

New Requirement for Public Disclosure of Community College Employment Contracts

- All college contracts are subject to approval at an open meeting of the Board of Trustees.
- New language. Public notice “must be given of an employment contract entered into, amended, renewed, or extended and must include a complete description of the action to be taken, as well as the contract itself, including any addendum or any other documents that change an initial contract.” (110 ILCS 805/3-65)

What Procedure is Required to go into Closed Session?

- A motion to go into closed session must cite the specific OMA exemptions which authorize the subjects to be discussed.
- The motion must be approved by majority roll call vote.
- The open and closed session minutes should record citation to the specific statutory exception.

What Topics May the Board Discuss in Closed Session?

- Exceptions for closed sessions of particular interest to Colleges include, among others:
 - Appointment, employment, compensation, discipline, performance, or dismissal of specific employee(s) of the public body or its legal counsel. OMA §2(c)(1).
 - Collective negotiating matters between the College and its employees or their representatives. OMA §2(c)(2).
 - Selection of a person to fill a public office, as defined in the Open Meetings Act, or to fill a vacancy. OMA §2(c)(3).

- Purchase or lease of real property for use by the College, including to discuss whether a particular parcel should be acquired. OMA §2(c)(5).
- Setting a price for the sale or lease of property owned by the College. OMA §2(c)(6).
- Security procedures, school building safety and security, or use of personnel and equipment to respond to an actual, threatened, or reasonably potential danger to students, employees, the public, or public property. §2(c)(8).
- Litigation, when an action against, affecting or on behalf of the College is pending, or when the College finds that an action is probable or imminent. OMA §2(c)(11).

- Self evaluation when meeting with a representative of a statewide association of which the College is a member. §2(c)(16).
- Review of minutes of closed session meetings for purpose of approval or semi-annual review. OMA §2(c)(21).
- Meeting with internal or external auditors, finance committees or their equivalent, involving control weaknesses or potential fraud risk. §2(c)(29).

Binding Opinion in Knox County Board Case Finds Improper Use of Exception 2(c)(1)

□ Facts

- The Knox County Board went into closed session to discuss implementing a hiring freeze and eliminating a job position for budgetary reasons.
- Newspaper reporter claimed this was an improper closed meeting.
- The Board relied on OMA exceptions 2(c)(1) and 2(c)(2) for the closed session.

- 2(c)(1) authorizes closed session to consider the “appointment, employment, compensation, discipline, performance, or dismissal of specific employees.
- 2(c)(2) authorizes closed session to discuss collective negotiating matters between the public body and its employees or their representatives.
- The Board argued that a majority of its employees who could be affected by a hiring freeze are in collective bargaining units.

□ Decision

- Elimination of a job position, even if currently held by a single employee, related to a budget decision and not performance or employment of a specific employee. No exception under 2(c)(1).
- Discussing the possibility of a hiring freeze is not a discussion of collective negotiation matters. No collective negotiations in process or being planned at the time. No exception under 2(c)(2).
- The Board did not cite the specific statutory exceptions to go into closed session.
- Board committee ordered to disclose closed session minutes to reporter.

Binding Opinion in Community College Case Finds Improper Use of Exceptions 2(c)(1) and 2(c)(5)

□ Facts

- College trustees went into closed session under OMA exceptions 2(c)(1) and 2(c)(5).
- Reporter saw through a window certain slides projected during the closed meeting related to financial forecasts, tuition rate projections, and other financial topics, and alleged improper discussion of budgetary matters in closed session.
- College argued exception 2(c)(1) for appointment and employment of personnel because financial discussion could lead to a decision affecting employees.

□ Decision

- 2(c)(1) not applicable because it does not authorize budgetary discussions even if the financial matters might ultimately impact employment or compensation of personnel.
- 2(c)(5) not applicable because exception is to discuss the purchase or lease of property by a public body, and Board discussed disposal of public property related to the financial matters.
- College ordered to disclose the closed session minutes and verbatim recording, together with copies of the slide projections that were referred to during the discussion.

Binding Opinion in Village of Blue Mound Case Finds Improper Use of Exception 2(c)(1) and Failure to List Action Item on Agenda

□ Facts

- Village Board went into closed session to discuss proposal to contract with Macon County Sheriff to provide full-time police officer to the Village. No specific exception was cited.
- Village Board returned to open meeting and voted to approve the contract with the County. No related action item was listed on the meeting agenda.
- Complainant filed Request for Review alleging improper closed session.
- The Village Board asserted that it went into closed session to discuss “personnel.”

□ Decision

- Violation of OMA because no specific exception for closed session cited by the Board.
- Violation because no agenda item listed that “set forth the general subject matter of any resolution that will be the subject of final action at the meeting.”
- Even if the contract may have affected employment status of some employees, Board did not discuss the performance or conduct of any specific employee.
- Village Board ordered to make public the closed session minutes and verbatim recording, and reconsider and re-vote on final contract action at open meeting with proper agenda item.

How Can Board Members Communicate by E-Mail Consistent with OMA Requirements?

- E-mail communications should be analyzed for OMA purposes the same way as for other types of potential “meetings.”
- Simultaneous e-mail communication between three or more Board members would constitute illegal “meeting” for purposes of the OMA.

Do's (Permitted E-mail Communications)

- E-mail communication involving only two Board members who do not discuss any confidential information.
- E-mail message sent to all Board members for which no response is required.
- E-mail communication soliciting a response but directing the response be made only to the original sender and not copied to the other Board members.
- E-mail communications to trustees for procedural matter only (such as to confirm location of a Board retreat).

Don'ts (Prohibited or Inadvisable E-mail Communications)

- Three or more Board members included on an email or participating in an online chat room for the purposes of discussing public business.
- E-mail messages sent to all Board members for the purpose of discussing public business and which solicit responses.
- Discussion of any confidential information.

QUESTIONS?

EMPLOYMENT/LABOR LAW UPDATE

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The New Law

- On September 22, 2015, Governor Rauner signed House Bill 3593 into law as Public Act 99-0482. The Act adds a new section to *The Public Community College Act* (110 ILCS 805/3-65), and establishes significant limitations on community college employment contracts.

Applicability

- The law applies to employment contracts which are entered into, amended, renewed or extended after September 22, 2015 (the effective date of the law).
 - ▣ Employment contracts entered into prior to September 22, 2015 are effectively grandfathered. However, any extensions or amendments of a grandfathered contract would be subject to the law.
 - ▣ Collective bargaining agreements are excluded from the Act.

The Limitations on Employment Contracts

- Public Act 99-0482 mandates the following limitations on community college employment contracts.
 - ▣ Any severance payable under the contract may not exceed one (1) year's worth of salary and applicable benefits;
 - ▣ The duration of an employment contract may not exceed four (4) years; and
 - ▣ Employment contracts may no longer contain automatic rollover clauses.

New Notice Requirements

- Approval of an employment contract, contract renewals or contract extensions must be made during an open meeting of a board of trustees.
- Public notice must be given of an employment contract entered into, amended, renewed, or extended after September 22, 2015. The form of the public notice is to be determined Illinois Community College Board (ICCB), but must at least include:
 - ▣ A complete description of the action to be taken; and
 - ▣ The contract itself, including all addendums or any other documents that change an employee's initial contract.

Relationship to the OMA

- The new notice requirements clearly expand the requirements of the Illinois Open Meetings Act (OMA) as to the posted agenda and intended action items.
 - ▣ Consider the agenda wording
 - ▣ Consider the wording of the Motion.

Impact of Law on Multi-Year Contracts

- The Act may have inadvertently affirmed the long practice of a colleges engaging in multi-year employment contracts beyond the term of a current sitting board of trustees.
- The ability of a college to engage in an employment contract for a period which exceeds the current board of trustees' term has come under fire as of late.
 - The Illinois School Code provides for Superintendent and other administration contracts that continue up to a five year term.
 - Prior to Public Act 0099-0482 there was no similar provisions in the Illinois Public Community College Act.
 - Courts have recognized a community college board of trustees authority to establish tenure of faculty and administrators prior to the Act.

Challenges as a Result of the Act

- What do you do with a grandfathered contract with a roll over clause?
- Can a severance agreement provide a non-salary payment to address an employment grievance?

Additional Contract “Reform” – New IDOL regulation: Vacation policies

- “An employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice of the employer.” 56 Ill. Adm. Code 300.520.
- There has been some debate on whether this means employers can no longer have “use it or lose it” vacation provision in contract or policy.
- Note Inconsistency in Regulations
- “Use it or Lose it” and accrual caps provisions are still permissible provided no forfeiture upon termination of employment and no forfeiture based on impossibility of taking vacation days.

New IDOL regulation: IDOL will enforce all wage-related “agreements” which may exist despite the employer’s best efforts to prevent them.
56 Ill. Adm. Code 300.450.

- An “agreement” is not a “contract.” It is “broader” than a contract.
 - ▣ An agreement is any language – verbal or written – that makes a wage-related commitment.
 - ▣ “Agreements” will grow out of discussions about wages and bonuses, offer letters, policies, goal documents, bonus structures, among other places.
- IDOL states that disclaimers (“this is not a contract”) will not prevent policy language from creating an enforceable “agreement” as to any wage related matter.

New Illinois Department of Labor (IDOL) Regulation: An employer cannot require employees to accept wages through direct deposit or payroll cards. 56 Ill. Adm. Code 300.600

- Employees have the right to demand wages via check or cash.
- Where the CBA requires that wages are paid via direct deposit or payroll card, the employer may continue to do so. Section 4 of the IWPCA, which requires regular pay days and that wages are paid in “lawful money of the United States, by check...by deposit of funds in an account in a bank...,or by a payroll card” permits other arrangements pursuant to “a valid collective bargaining agreement which provides for a different date or for different arrangements for the payment of wages.”

New regulation: Instructions for employers to use to create an enforceable “written agreement authorizing deductions.” 56 Ill. Adm. Code 200.720.

- **What is required:** When a deduction is to continue over a period of time and the written agreement provides for that period of time, provides for the same amount of deduction each period and allows for voluntary withdrawal for the deduction, the agreement shall be considered to be given freely at the time the deduction is made.
- This is greater clarity than the prior version of the regulation which required that the “written agreement” was “given freely” when the “deduction [was] made.”

New regulation: Instructions for employers to use to create an enforceable “written agreement authorizing deductions.” 56 Ill. Adm. Code 200.720.

- This covers overpayments of wages, and recovery of those overpayments from employees by employers through a repeated wage deduction over a series of paydays.
- This may also govern employee repayment of advances and loans from the employer, and certain education expenses advanced to employees

New regulation: IDOL will only help employees recover non-discretionary, earned bonuses. 56 Ill. Adm. Code 200.720.

- The new regulations provided that: “In order to receive compensation under the Act, the bonus must be earned.” This is based on the rationale that IDOL “does not maintain jurisdiction over discretionary or gratuitous bonuses.”

Budget Crises, Navigating Reduction in Force

- The Age Discrimination Employment Act (ADEA) waivers
 - ▣ If considering a reduction in force impacting two or more employees consider use of age discrimination waivers.

Required Disclosures

- A valid and enforceable waiver includes a written agreement between the employer and the employee and additional written disclosures provided to employees subject to the RIF decision who are asked to sign a waiver.
- The ADEA identifies two (2) types of “programs”, “exit incentive programs” and “other employment termination programs,” under which employers seeking waivers must make written disclosures:
 - A voluntary program for a group or class of employees who are offered consideration in exchange for their decision to resign voluntarily and sign a waiver.
 - A group or class of employees who will be involuntarily terminated and who are offered consideration in return for signing a waiver (e.g., a RIF).

The Mechanics

- As such, the college must first identify the scope of the class, unit, group, job classification of the RIF by examining the “decisional unit” at issue.
 - ▣ A decisional unit is that portion of the of a college’s organizational structure from which the college selects the employees that will be offered consideration for signing a waiver and those who will not.
 - ▣ The college should act on a case-by-case basis and, thus, the determination of the appropriate class, unit, group or job classification must also be made on a case-by-case basis.

Examples of Typical Involuntary Terminations

- College-wide. 10% of employees will be terminated within the next 10 days. The Decisional Unit is The College.
- Division-wide. 15 of the employees in the College's Arts and Science Division will be terminated in December. The Decisional Unit is The Arts and Science Division.
- Department-wide. Half of the employees in the College's Math Department or the Arts and Sciences Division will be terminated in December. The Decisional Unit is the Math Department.

Examples of Typical Involuntary Terminations

- Reporting. 10% of the employees who report to the employer's Vice President, where ever the employees are located, will be terminated immediately. The Decisional Unit is all employees reporting to the Vice President.
- Job Category. 10% of all Campus Police Officers, wherever the employees are located, will be terminated next week. The Decisional Unit is all Campus Police Officers.

QUESTIONS?

THE BUSINESS ENTERPRISE FOR MINORITIES, FEMALES, AND PERSONS WITH DISABILITIES ACT

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What is the Business Enterprise Act?

- The Business Enterprise for Minorities, Females, and Persons with Disabilities Act (“the Act”), 30 ILCS 575/1, *et seq.* is a law requiring state agencies and public institutions of higher education to set aspirational goals to increase the participation of businesses owned by minorities, females, and persons with disabilities in contracts awarded by the State.
- The Act was amended this year and is now applicable to community colleges, effective August 25, 2015.

What types of contracts are applicable to the Act and what are their aspirational goals?

- State Contracts – “all contracts entered into by ... any public institution of higher education including community college districts, regardless of the source of the funds with which the contracts are paid.” Is this a catchall?
- Construction Contracts – “all State contracts entered into by a ... public institution of higher education for the repair, remodeling, renovation or construction of a building or structure.”
- Professional Service Contracts – contracts for insurance services, investment services, information technology services, accounting services, architectural and engineering services, and legal services.

What types of contracts are applicable to the Act and what are their aspirational goals?

Aspirational Goals:

Type of Contracts	Total %	Minority %	Female %	Disability %
State of Contracts	20%	11%	7%	2%
Construction Contracts	20%		At Least 10%	0%
Professional Services Contracts	20% (collectively)			

Act's requirements for community college compliance?

- Adoption of policies identifying college's plan and implementation procedures for increasing use of firms owned by minorities, females, and persons with disabilities.
- Appointment of liaison to Business Enterprise Council.
- File annual compliance plans with the Business Enterprise Council.
- File annual report with the Business Enterprise Council.
- Notice to the Business Enterprise Council of proposed contracts for professional and artistic services.
- Use of bid forms identifying the bidder's percentage of disadvantaged business utilization plans and percentage of business enterprise program utilization plan.

What is the Business Enterprise Council and what is the role of the college liaison?

- The Business Enterprise Council was created by this Act to help implement, monitor and enforce the goals of the Act. It is comprised of representatives from various state agencies.
- The college liaison is appointed by the chief executive officer of each college and is responsible for submitting any reports and documents necessary under the Act.

What is included in a college compliance plan?

- An outline of the college's goals for contracting with businesses owned by minorities, females, and persons with disabilities for the current fiscal year.
- The college's policy statements, one of which must express a commitment to encourage the program.
- Designation of the liaison officer.
- The college's procedures to distribute lists of applicable vendors in compliance with the Act, to set goals on specific prime contracts, to assure that contractors and vendors make good faith efforts to meet the contract goals, and to define contract goal exemptions, modifications, and waivers.

What is included in the college's annual report to the Business Enterprise Council?

- Report on the college's utilization of businesses owned by minorities, females, and persons with disabilities during the preceding fiscal year, as well as a mid-fiscal year report on the utilization to date for the current fiscal year.
- A self-evaluation of the college's efforts to meet its goals.

Can a college request exemptions?

- Yes. The Business Enterprise Council, on its own initiative or at the request of a college, may permit individual contracts or classes of contracts be wholly or partially exempt from the contracting goals of the Act.
- The exemption must be made in writing and must be based on a determination that there are insufficient numbers of businesses owned by minorities, females, and persons with disabilities to ensure adequate competition and an expectation of reasonable prices on bids or proposals for said contracts.
- For individual contracts, this determination must be made prior to the advertisement for bids or solicitation for proposals.
- The Business Enterprise Council can also grant waivers to contractors if contractors demonstrates that it made a good faith effort to comply with the goals.

How is this Act enforced?

- The Act gives the Business Enterprise Council the authority to establish enforcement procedures that allow a college to initiate legal or administrative remedies against contractors who fail to comply with the Act.
- The Act also allows the Business Enterprise Council to make recommendations to college compliance plans if the Council determines that the plan is unlikely to produce the participation goals.

Are colleges' goals and compliance reported to the public?

- Yes. The Act requires the Business Enterprise Council to file an annual report summarizing each college's goals, expenditures subject to the goals, and goals attained.

QUESTIONS?