STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

OCTOBER—DECEMBER

December 21, 2022

Inside this issue:

A Note from the Executive Director Tracey B. Fleming

Dear Friends,

By way of this last newsletter of 2022, I am delighted to share a few updates on recent activities at the Illinois Human Rights Commission ("Commission").

As regular readers of this newsletter will know, our Chicago office relocated from the James R. Thompson Center in May 2022 to new offices in the Michael A. Bilandic Building at 160 N. LaSalle. A period of physical transformation for the Commission was completed last month when our Springfield office moved to refurbished space closer to the State capitol. We are excited to continue to be available to provide excellent service to the public and litigants in matters before the Commission from both of our physical locations. We are grateful to our colleagues at the Illinois Department of Central Management Services for their excellent assistance in all aspects of preparing for and executing our office moves during calendar 2022.

The virtual presence of the Commission has changed dramatically and increased exponentially in importance in recent years, spurred in part by the COVID-19 pandemic. I'm excited to share that, with terrific assistance from our partners in the Illinois Department of Innovation and Technology, we have migrated our public website to a new management platform and address.

Our new website address is: https://hrc.illinois.gov.

All of the content you are accustomed to (information about legal proceedings at the Commission, past decisions, upcoming Panel and Commission meetings, our Lunch and Learns, annual reports, newsletters and other documents) is all there, hosted on a modern, stable technological platform. We hope it continues to be an accessible resource to all who have business with the Commission or are just curious about the Illinois Human Rights Act or what we do.

One of the first new documents we have added to our new website is the Commission's Fiscal Year 2022 Annual Report. In it, we highlight recent accomplishments, imminent changes to the Act, and our expected focus in the next twelve months.

As you read this newsletter, our annual report and our website, or when you come to visit our offices, I hope you will have increasing insights into the substantive and timely efforts of our Commissioners and Staff to protect the civil rights of all Illinoisians. We enthusiastically look forward to building on that work in the new year and in collaboration with our sister agency, the Illinois Department of Human Rights.

On behalf of the Commission, please accept our best wishes for 2023 and beyond.

Case Note: *Frey v. Hotel Coleman*, 903 F.3d 671 (7th Cir. 2018)

Kevin Scott, Coles Fellow

Under both Title VII of the Civil Rights Act of 1964 and the Illinois Human Rights Act (IHRA), it is possible for more than one business entity to be a plaintiff's employer under the statutory definitions. In *Frey v. Hotel Coleman*, 903 F.3d 671 (7th Cir. 2018), the Seventh Circuit had occasion to shed light on how to approach these "joint employer" scenarios, and it provided a test to determine which entity (or entities) is a worker's employer within the meaning of these statutes.

The plaintiff in *Frey* worked at a hotel owed by Hotel Coleman, Inc., which had hired Vaughn Hospitality to manage the hotel. The staff of the hotel were paid by Hotel Coleman, and the management agreement stated they were employees of Hotel Coleman. Apart from the management agreement, the two business entities were entirely distinct. Vaughn Hospitality assumed responsibility under the agreement for hiring, firing, and supervising staff, as well as setting their compensation and other terms of employment.

The plaintiff alleged that the owner of Vaughn Hospitality subjected her to frequent sexual comments and advances over the course of a year. The plaintiff complained to a manager, who talked to the owner, but he laughed it off and the behavior continued. After she became pregnant, the owner reduced her hours, rescinded a promise to promote her, and assigned duties which were difficult for her to perform while pregnant. The plaintiff filed a charge of discrimination while on maternity leave and, one week after returning, she was fired for allegedly stealing another employee's phone.

The plaintiff filed suit in the Circuit Court of Cook County, bringing claims of sexual harassment, hostile work environment, pregnancy discrimination, and retaliatory discharge in violation of Title VII and the IHRA. Hotel Coleman and Vaughn Hospitality were named as defendants, among others. After the case was successfully removed to federal court, the plaintiff moved for summary judgment against Hotel Coleman, which was granted. Vaughn Hospitality also moved for summary judgment, arguing that it was not the plaintiff's employer under either statute's definition. The district court granted Vaughn Hospitality's motion on all counts, except for her claim of retaliation under the IHRA (which does not require an employer-employee relationship in retaliation claims).

In deciding that Vaughn Hospitality was not the plaintiff's employer, the district court relied on *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006), in which the Seventh Circuit had to determine whether two managers should be counted as employees or employers for purposes of determining whether the employer had the necessary 15 or more employees to be covered by Title VII. The managers in *Smith* were ultimately found to be employees, with the court emphasizing their lack of ownership interest and the fact that while they exercised control over other employees, they only did so at the pleasure of the owners who retained ultimate control.

According to the Seventh Circuit, the district court in *Frey* erred by equating Vaughn Hospitality with the managers in *Smith*, which led to the district court finding that Vaughn Hospitality was not an employer of the hotel staff. The Seventh Circuit asserted "we cannot evaluate the status of the individual we are trying to sort into either the employer basket or employee basket in the case before us as there is no such individual; there is only a company—Vaughn Hospitality." Rather than asking who was an employee and who was an employer within the meaning of the statute, a task for which *Smith* is relevant, the court said the focus of the inquiry should be on the *relationship* between a particular employee and the entities she identifies as her joint employers.

Case Note: *Frey*, cont.

To analyze that relationship, the court looked to a prior Seventh Circuit case, *Knight v. United Farm Bureau Mutual Insurance Company*, 950 F.2d 377 (7th Cir. 1991), which laid out an "economic realities" test to determine whether an employer-employee relationship exists in the context of independent contractors. Under *Knight*, courts should look to five factors, drawn from common law agency principles: (1) the extent of the putative employer's control and supervision; (2) the nature of the occupation and skills required, including whether the employee acquires those skills on-the-job; (3) the responsibility for the costs of operation, such as equipment or supplies; (4) the method and form of payment and benefits; and (5) the length of job commitment and/or expectations. The court noted that, of the factors, the employer's right to control is the most heavily weighted, and it held that this test controlled the joint employer inquiry under Title VII.

With little discussion, the Seventh Circuit also found the *Knight* factors also controlled the joint employer inquiry under the IHRA, at least for purposes of the case before it. The court cited to *Mitchell v. Department of Corrections*, 367 Ill.App.3d 807 (1st Dist. 2006), which, like *Knight*, dealt with categorizing individuals as independent contractors or employees and looked to essentially the same factors, emphasizing the right to control. The Illinois Human Rights Commission has similarly looked to *Mitchell*'s factors in determining whether an entity is a joint employer. *See In re Barnwell v. Select Management Resources, LLC*, IHRC, ALS No. S-12080, 2006 ILHUM LEXIS 49 (Jan. 4, 2006).

Although it reversed the district court's decision to grant summary judgment and thus left the issue of whether Vaughn Hospitality was the plaintiff's employer to the district court, the court analyzed the *Knight* factors and asserted that it was likely that the district court, using the correct test, would conclude that Vaughn Hospitality was her employer. As to the right to control, the court found Vaughn Hospitality controlled virtually every aspect of the plaintiff's work environment—it could fire her, determine her compensation and benefits, set her schedule, and supervise her work. The management agreement even stated that Hotel Coleman would not "interfere with Vaughn Hospitality's control in all matters of import." Thus, the court found that the first factor pointed strongly towards an employment relationship.

The second factor tended to show the same, as Vaughn Hospitality trained the plaintiff and provided her with an employee handbook laying out its rules and procedures. The third and fourth factors weighed towards showing Hotel Coleman was her employer—it owned the property, paid her salary and benefits, and paid operating expenses. And the fifth factor pointed towards joint employer status because both entities had and expected to continue a long-term employment relationship with the plaintiff. The court concluded by emphasizing that every *Knight* factor does not need to weigh in favor of the plaintiff and that the right to control, which clearly pointed towards Vaughn Hospitality as the plaintiff's employer, is most important.

The clearest take away from *Frey*—if there is a joint employer issue, apply *Knight*—resolves a significant source of confusion for courts and litigants alike. And only a year later the Seventh Circuit applied the *Knight* analysis in *Levitin v. Northwest Community Hospital*, 923 F.3d 499 (7th Cir. 2019), where the court determined that an independent physician with admitting privileges at a hospital was not the hospital's employee. *Levitin* thus suggests a general principle that, even outside the joint employer context, where the issue is whether a worker and business entity had an employer-employee relationship, *Knight* applies. Less certain is whether the *Knight* factors control the IHRA employer-employee analysis identically, but at minimum the same underlying agency law

Case Note: *Frey,* cont.

principles have shaped the Commission's decisions regarding when an employer-employee relationship exists.

Frey is also a warning to business entities to be aware of their potential liability as joint employers. Put succinctly, an employer cannot escape liability simply because it does not cut the employee's paycheck. The facts matter, and if a business entity exercises significant control over an individual, it is likely to be their employer for purposes of employment discrimination laws.

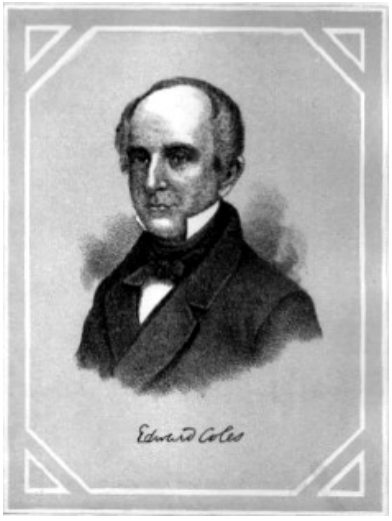
Legislative Update

In 2022, the Illinois General Assembly passed two acts changing important portions of the Illinois Human Rights Act, beginning on January 1, 2023.

Public Act 102-0896 prohibits discrimination in real estate transactions based on "source of income." "Source of income" is defined as the lawful manner by which an individual supports himself or herself and their dependents. The change was intended to protect potential tenants using government assistance to pay their rent. Similar protections already exist in several Illinois municipalities.

Public Act 102-1102 (the "CROWN Act") amends the Act to add a definition of race, which includes hair textures and protective hairstyles. The change was intended to protect employees, based on historic discrimination in the workplace against Black hair. Similar protections exist in at least 18 other states.

Edward Coles Fellowship



The Commission is reviving its Edward Coles Fellowship academic year internship program and warmly welcomes Samuel Richter and Adrienne Ou, both from Northwestern Pritzker School of Law.

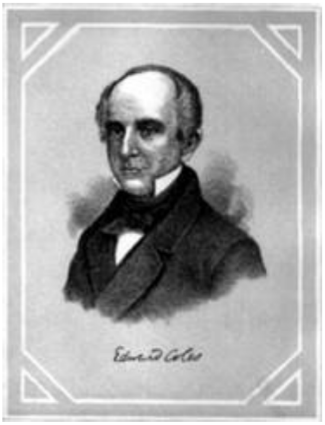
For more information on our Coles Fellowship program, please visit:

https://hrc.illinois.gov/about/coles.html

EDWARD COLES FELLOWSHIP

ILLINOIS HUMAN RIGHTS COMMISSION

SUMMER 2023



When

Begins June 5, 2023
8-10 weeks

Where

Hybrid— Remote and In-Person
Michael A. Bilandic Building, 160 N. LaSalle St., Chicago

Focusing primarily on employment discrimination cases, Coles Fellows will work under the supervision of the Office of the General Counsel and the Administrative Law Section.

Fellows will draft orders and present cases to the Commission panels; assist Administrative Law Judges in pending cases; and assist the General Counsel in outreach projects and compliance issues. Fellows will be exposed to all aspects of the Commission's work, and will receive feedback and mentorship from the attorneys in the Office of the General Counsel and the Administrative Law Judges.

We are a quasi-judicial state agency, hearing complaints and administrative appeals regarding discrimination and retaliation in employment, housing, financial credit, public accommodations, and education.

To apply for Summer 2023:

Sign up to interview at the Midwest Public Interest Law Career Conference— mpilcc.org

OR

Please email a resume, cover letter, transcript, and writing sample to: Erica Seyburn, Assistant General Counsel at HRC.internships@illinois.gov

Deadline: January 27, 2023

We are seeking law students with strong writing skills and a commitment to public service.

For more information, consult our website:
https://hrc.illinois.gov/about/coles.html

Outreach

Administrative Law Judge Azeema N. Akram has been busy with outreach and awareness this quarter! She was invited to speak to the Kane County Bar Association's Diversity Committee about litigating a case at the Illinois Human Rights Commission. For National Disability Employment Awareness Month (October), Judge Akram co-presented a CLE program with Rachel Weisberg, Staff Attorney at Equip for Equality, for the Women's Bar Association of Illinois. The presentation was titled "Disability Diversity in the Legal Profession." She discussed her experience as an attorney with a disability and the challenges she faces, and Ms. Weisberg shared strategies and accommodations that legal employers can implement to assist lawyers with disabilities. Finally, Judge Akram co-presented a session during the national Deaf and Hard of Hearing Bar Association's 2022 Conference with Taye Akinola, paralegal specialist in the Office of the General Counsel at the U.S. Securities & Exchange Commission. Their discussion, titled "How Legal Professionals Use Assistive Technology (or Reasonable Accommodations) in their Careers," shared their self-advocacy successes for the assistive technology they use to thrive as legal professionals.

Case Note: *Roberts v. Glenn Industrial Group, Inc.,* 998 F.3d 111 (4th Cir. 2021)

Cherie Zhang, Coles Fellow

In *Roberts v. Glenn Industrial Group, Inc.,* the Fourth Circuit vacated the grant of summary judgment against a worker's claim of same-sex sexual harassment against his employer. By reviving the claim, the Fourth Circuit held that a plaintiff could establish a sexual harassment claim under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) *et seq*., based on failure to conform to sex stereotypes.

Chazz Roberts was hired in July 2015 as a diver's assistant by Glenn Industrial Group, Inc. ("Glenn Industrial"), a North Carolina-based corporation that provides underwater inspection and repair services to utility companies. All of Glenn Industrial's non-office employees were male, including Roberts.

Throughout Roberts's employment, his supervisor, Andrew Rhyner, repeatedly called Roberts "gay" and made sexually explicit and derogatory remarks toward him. Rhyner also physically assaulted Roberts at least twice, even putting him in a choke-hold headlock. Roberts complained about Rhyner's conduct to two supervisors and the company's Human Resource Manager, Ana Glenn. Yet, despite his complaints, no action was taken to address the harassment. In fact, Rhyner's supervisor told Roberts to "suck it up."

In April 2016, Roberts was discharged on the basis of two safety incidents. He later sued Glenn Industrial, alleging, among other claims, same-sex sexual harassment in violation of Title VII.

Relying on *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81 (1998), the district court rejected Roberts's claim that the harassment by his supervisor was based on his sex. The district court found that *Oncale* identified three situations that support a claim of same-sex sexual harassment: 1) the alleged harasser is homosexual and made explicit or implicit proposals of sexual activity, 2) the alleged harasser was motivated by general hostility to the presence of members of the same sex in the workplace, and 3) the alleged harasser treated members of one sex worse than members of the other sex in a mixed-sex workplace. Because none of the situations identified in *Oncale* existed in this case, the district court granted summary judgment to the employer.

The Fourth Circuit, however, determined that the lower court erred in its interpretation of *Oncale*. The Fourth Circuit found that the three "*Oncale* situations" were illustrative rather than exhaustive because even the *Oncale* court had found a basis for same-sex sexual harassment claims beyond those three situations.

Moreover, the court looked to other circuits that have considered whether *Oncale*'s three examples were intended to serve as an exhaustive list. Most of them held that the three evidentiary routes listed in *Oncale* were not exhaustive. *See, e.g.*, *Bibby v. Phila. Coca Cola Bottling Co*., 260 F.3d 257 (3d Cir. 2001); *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999); *Pedroza v. Cintas Corp.*, 397 F.3d 1063 (8th Cir. 2005); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005). *See also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *but see Wasek v. Arrow Energy Servs., Inc*., 682 F.3d 463, 467–68 (6th Cir. 2012) (court treated the *Oncale* categories as exclusive, but did not expressly consider the issue because the plaintiff's claim fell into *Oncale*'s first category). Following the sister circuits, the court reasoned that the Supreme Court's language like "for example" and "[w]hatever evidentiary route the plaintiff chooses to follow" indicated the list is not exclusive. From there, it pointed out that nothing in *Oncale* upsets the Court's previous ruling that a plaintiff may establish a sexual harassment claim with evidence of sex stereotyping.

Case Note: *Roberts,* cont.

Furthermore, Glenn Industrial also argued that Roberts's claim should be viewed as discrimination against his perceived sexual orientation instead of his sex. The Fourth Circuit addressed this argument by citing the Supreme Court's June 2020 decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), noting that *Bostock* made it clear that discrimination based on sexual orientation or transgender status also violates Title VII.

Therefore, the court vacated the entry of summary judgment as to Roberts' same-sex harassment claim and remanded it for the lower court to re-examine the evidence based on a proper application of *Oncale*.

The *Roberts* court clarified that the Fourth Circuit will interpret Title VII's ban on sex discrimination as including failure to conform to gender stereotypes. Similarly, the Seventh Circuit has also held that prohibition against sex discrimination reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes, describing the line between a gender nonconformity claim and one based on sexual orientation as "gossamer-thin." *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

Helpful Links

Illinois Human Rights Act https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2266&ChapterID=64

IHRC Rules and Regulations https://www.ilga.gov/commission/jcar/admincode/056/05605300sections.html

IHRC website https://hrc.illinois.gov/

IHRC events (including Lunch and Learn) https://hrc.illinois.gov/about/events.html

Please visit our website for our filing procedures

hrc.illinois.gov

Case Note: *Salisbury v. City of Santa Monica*, 998 F.3d 852 (9th Cir. 2021)

Jake Marshall, Coles Fellow

In *Salisbury v. City of Santa Monica*, the Ninth Circuit held that the discrimination provisions of the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, only apply to cases involving a sale or rental in which the landlord received consideration in exchange for the right to occupy the premises. This was an issue of first impression for the Ninth Circuit, and the court's holding may have broad implications for anti-discrimination housing law.

The plaintiff, Lawrence Salisbury, who suffered from multiple spinal conditions that made it painful for him to walk, alleged that the City of Santa Monica discriminated against him based on his disability by refusing his request for parking accommodations at his City-owned mobile home spot.

Salisbury's father, James, purchased the mobile home and signed a lease for a spot at the Mountain View Mobilehome Park ("the Park") in 1974. In 2000, the City purchased the Park to operate it as an affordable housing project.

Salisbury claims to have continuously resided in the mobile home with his father since the 1970s. However, Salisbury never personally made a rent payment and his name never appeared on a lease. After James died in 2013, the City refused to accept rent from Salisbury and demanded that he vacate the land.

The City then began regularly citing Salisbury for parking his vehicle on neighboring spots and in common thoroughfares in violation of the Park's traffic rules. In turn, Salisbury requested a parking accommodation under the FHAA due to his spinal conditions, asking that the City allow him to park closer to his spot. The City ignored Salisbury's request until July 2018, when they sold the Park to another owner.

Salisbury filed suit shortly afterwards in the District Court of Central California. The district court granted the City's motion for summary judgment, holding that Salisbury had not established that he was residing in the spot legally under California law and so was not covered by the FHAA.

The Ninth Circuit affirmed the lower court's ruling but used a different reasoning by looking directly to the text of the FHAA. The statute makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap." 42 U.S.C. § 3604(f)(2). Following the basic canon that courts "must apply the statute according to its terms," *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009), the court held that the use of the word "in" limits the statute's scope such that, by its plain text, it applies only to "sellers and renters." The court rejected Salisbury's argument that the statute's reference to "any person" should be interpreted to cover him, holding that the plain meaning of the statute was beyond dispute and that his reading would improperly "devise alternative language" outside the scope of judicial power.

Case Note: *Salisbury,* cont.

Having determined that the FHAA only applies to "renters," the court then noted that the FHAA defines renting as "to lease . . . for a consideration the right to occupy premises." 42 U.S.C. § 3602(e). The court held this to mean that the FHAA applies only when the landlord "has received consideration in exchange for granting the right to occupy the premises." Because Salisbury had never paid rent, he had never provided consideration for his spot and therefore the City was not obligated to accommodate him under the FHAA.

Salisbury's holding has potentially significant implications for renters seeking disability accommodations under the FHAA. Under the holding, a tenant's co-resident family members, roommates, or caretakers may be found ineligible for FHAA protections if their name does not appear on a lease or rent payments. Even a primary tenant with an oral rental agreement who pays rent in cash may be uncovered if they are unable to produce written rent receipts. These types of informal tenancies and shared living arrangements, which already put renters in a "twilight of legality" more generally, are not uncommon in low-income housing, especially among immigrants and people of color. *See* Mekonnen Firew Ayano, *Tenants Without Rights: Situating the Experiences of New Immigrants in the U.S. Low-Income Housing Market*, 28 Geo. J. Poverty Law & Pol'y 159, 164 (2021).

In light of the Supreme Court's refusal to grant *certiorari* to Salisbury's appeal in January 2022, a significant number of informal renters in the Ninth Circuit (and potentially beyond, if other circuits follow suit) may find themselves uncovered by the FHAA's disability protections unless Congress chooses to amend the statute to widen its coverage.

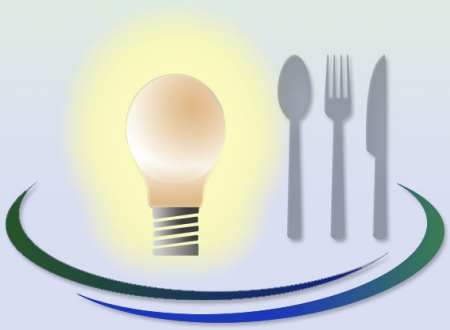
Lunch and Learn Series in Review

On October 25, 2022, the Commission hosted a Continuing Legal Education lecture during their Lunch and Learn Series. The Lunch and Learn topic for the month was, "Are My Remote Employees Covered by the FMLA? Adjusting to the New Normal." Attorney Michael K. Chropowicz of Michael Best & Friedrich LLP introduced the basic concepts of the Family Medical Leave Act (FMLA), the effects of COVID-19 on FMLA, and case studies on FMLA for remote employees, and offered tips on managing a remote workforce.

On November 15, 2022, the Lunch and Learn topic for the month was, "Diversity, Equity, and Inclusion in the Workplace: Growing Trends and Legal Considerations." Attorney Natalie C. Chan of Sidley Austin LLP led the presentation and discussion on the status and challenges to affirmative action, the best practices for diversity, and ideas for equity and inclusion programs. Additionally, Attorney Chan lectured on the impact of COVID-19 on DEI in the workplace, the growing trend on pay equity laws, and the legal framework of DEI issues in the workplace.

Illinois Human Rights Commission CLEs Presented in 2022

Date	Topic	Presenter
February 15, 2022	COVID-19 and Employment	Barry C. Taylor, Vice President for Civil Rights and Systemic Litigation Equip for Equality
March 17, 2022	Legal Movement for Reparation in Illinois	Joey L. Mogul, Partner People's Law Office
April 13, 2022	Workplace Bullying 2022: The Legal Impact of #BLM, COVID-19 DEI, Politics & More	Alisa Arnoff, Partner Scalambrino & Arnoff, LLP
May 3, 2022	Recent Updates in Employment Law	Rachel Bossard, Partner Burke, Warren, MacKay & Serritella, P.C.
June 14, 2022	An Update on the Law and Emerging Issues	Allison K. Bethel, Clinical Professor of Law and Director of the Fair Housing Legal Clinic University of Illinois Chicago School of Law
October 25, 2022	Are My Remote Employees Covered by the FMLA? Adjusting to the New Normal	Michael K. Chropowicz, Senior Associate Michael Best & Friedrich LLP
November 15, 2022	Diversity, Equity and Inclusion in the Workplace: Growing Trends and Legal Considerations	Natalie C. Chan, Senior Managing Associate Sidley Austin



LUNCH AND LEARN CLE

CLE Credit:

One hour of general CLE credit for Illinois attorneys

12:00 PM—1:00 PM

Lunch and Learn via Webex

https://hrc.illinois.gov/about/events.html

Upcoming Lunch and Learn CLEs

Date	Topic	Presenter
January 25, 2023	The Bermuda Triangle: FMLA, ADA, and Workers' Comp – in 60 minutes	Noah A. Frank, Associate General Counsel Enlivant
February 23, 2023	Source of Income Protection in Housing Law	Mary Rosenberg Access Living
March 2023	TBD	TBD

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