

NEW IDOL REGULATIONS REGARDING THE ILLINOIS WAGE PAYMENT AND COLLECTION ACT

The Illinois Department of Labor ("IDOL") promulgated new regulations under the Illinois Wage Payment and Collection Act ("IWPCA"), which are currently in effect. As background, the IWPCA governs the payment of wages, deduction from wages, and payment of vacation and bonuses. Below is a summary of what we believe to be the most important amendments to the IDOL regulations. If you have any questions or concerns regarding any of these changes, please let us know.

Enforceable Agreements

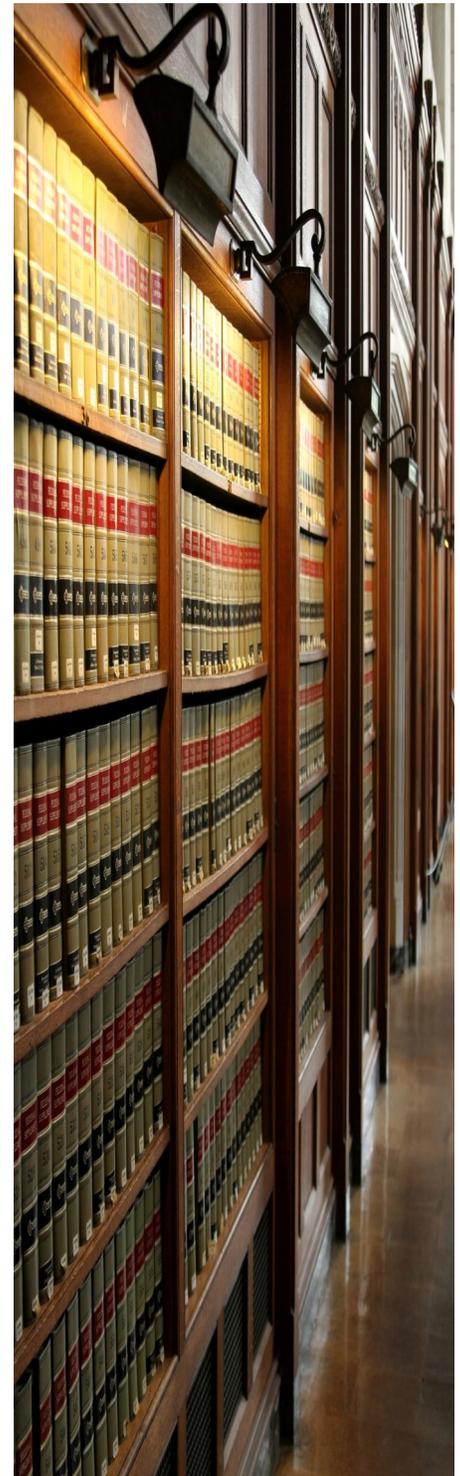
Perhaps the most significant change in the IDOL regulations is the newly created definition for the term "agreement." Although a seemingly minor change, the amendment appears to give IDOL unprecedented power to deem an employee handbook, policy or "any other conduct, such as a past practice" to be an "agreement," subject to the requirements of the IWPCA.

The law in Illinois has long been that a disclaimer in a policy manual or employee handbook is sufficient to eliminate the possibility that such language creates an enforceable agreement. The amendment not only changes this principle, but signals that IDOL intends to enforce employee handbooks and past practices as "agreements" between employees and employers, regardless of whether the terms are set forth in a signed contract.

The regulations define the term "agreement" broadly to mean:

"Agreement" means the manifestation of mutual assent on the part of two or more persons. An agreement is broader than a contract, and an exchange of promises . . . is not required. . . . An agreement may be reached by the parties without the formalities . . . of a contract and may be manifested by words or . . . conduct, such as past practice. Company policies and policies in a handbook create an agreement even when the handbook or policy contains a . . . provision disclaiming the handbook from being an employment contract . . . or an enforceable contract.

While a disclaimer may preclude a contract . . . it does not preclude an agreement . . . relating to compensation. . . . An agreement exists even if it does not include a specific



guarantee as to the duration of the agreement or even if one or either party reserves the right to change the terms of the agreement. 56 Ill. Admin. Code §300.450.

Two notable consequences result from this amendment. First, if a provision in the policy manual creates an agreement, that provision will likely be deemed enforceable, regardless of whether the policy includes blanket disclaimer language. Second, if an employer has a past practice of offering certain benefits to employees despite not having a contractual obligation to provide them, this past practice may create a duty to continue the practice.

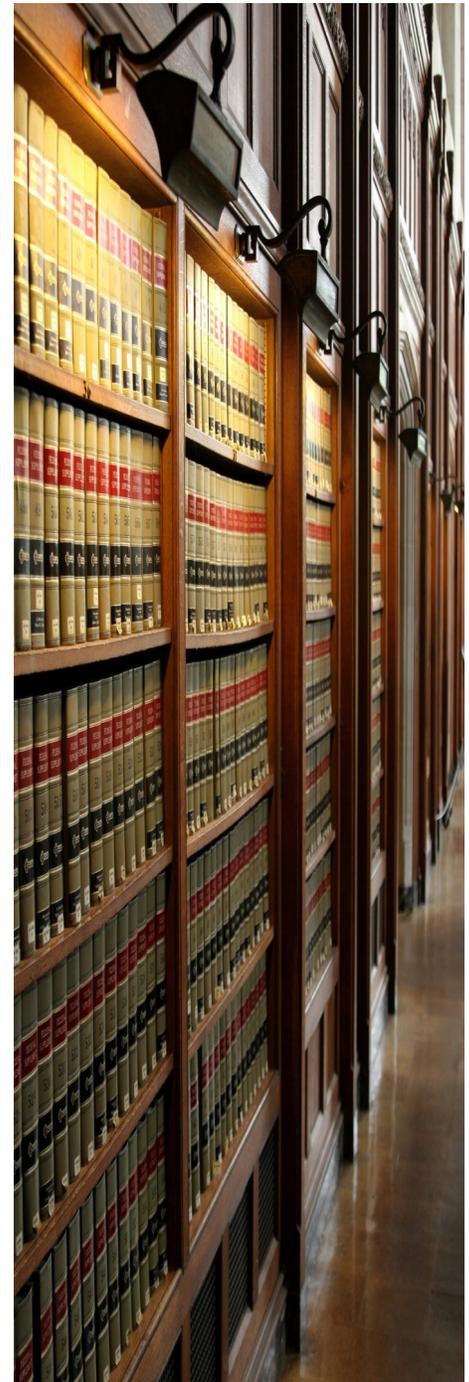
Notwithstanding, the regulations include a new provision specifying that “[s]everance is a payment that an employee is entitled to be paid upon separation from employment pursuant to an agreement between the parties or established practice of the employer.” 56 Ill. Admin. Code 300.540. This amendment signifies that severance pay will be one of the foreseeable targets of IDOL's new regime.

Accordingly, we strongly recommend that employers review their personnel manuals with the new understanding that any contractual language within has the potential to create an enforceable “agreement.” We further recommend keeping any disclaimer language due to the fact that this new provision has not yet been fully vetted or tested by the courts. Finally, we caution employers who are engaging in conduct that is not required by contract or policy, as this conduct may be precedent-setting, and any future deviation from that conduct may be viewed by IDOL as a deviation from "past practice" and, therefore, a violation of the IWPCA.

Vacation Policies

The new amendments suggest that a "use it or lose it" vacation policy may be held invalid under the IWPCA. A new provision was included in the regulations, which provides that "[a]n employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice of the employer." 56 Ill. Admin. Code §300.520(h).

However, an existing part of the same section of the regulations explains that "an employment contract or an employer's policy may re-



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quire an employee to take vacation by a certain date or lose the vacation, provided that the employee is given a reasonable opportunity to take the vacation." 56 Ill.Admin. Code §300.520. The fact that this provision was not removed or modified suggests that the new provision does not ban employers from enforcing a "use it or lose it" vacation policy, but rather (1) prohibits employers from forcing employees to forfeit accrued vacation time upon separation of employment and (2) prevents employers from changing their policies in an attempt to strip existing employees of accrued paid vacation without either paying employees for time previously accrued or giving employees a reasonable opportunity to use previously accrued vacation time.

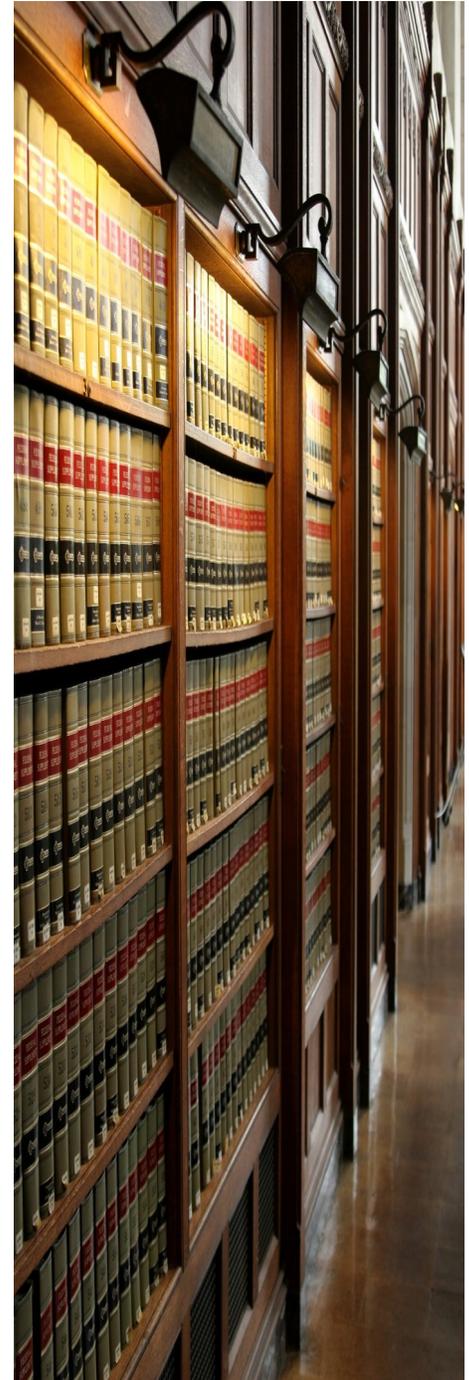
Because IDOL has yet to issue any interpretative guidance on this change, employers may respond to the regulation change by implementing one of the following approaches:

1. Pay all accrued vacation time regardless of a "use it or lose it" policy. Although this approach would cause the employer to incur additional costs, it would eliminate the risk of employees filing claims for unpaid vacation time.
2. Revise the vacation policy to impose a vacation accrual limit on the front end. Under this approach, vacation policies in which employees lose unused vacation at a certain point must be revised to reflect that vacation ceases to be earned after an employee's unused days reach a certain level.
3. Continue to administer a "use it or lose it" policy. Risk tolerant employers implementing this approach should provide employees with advance notice of the policy's requirements. Employees must be made aware that they may receive payment for time earned, and that they will be given a reasonable opportunity to take paid vacation time before they lose it.

Payroll Procedures

The new regulations also proscribe a variety of payroll procedures that employers must follow:

1. All wages must be paid by cash, check, direct deposit, or payroll card, provided however, that (a) direct deposit and payroll cards



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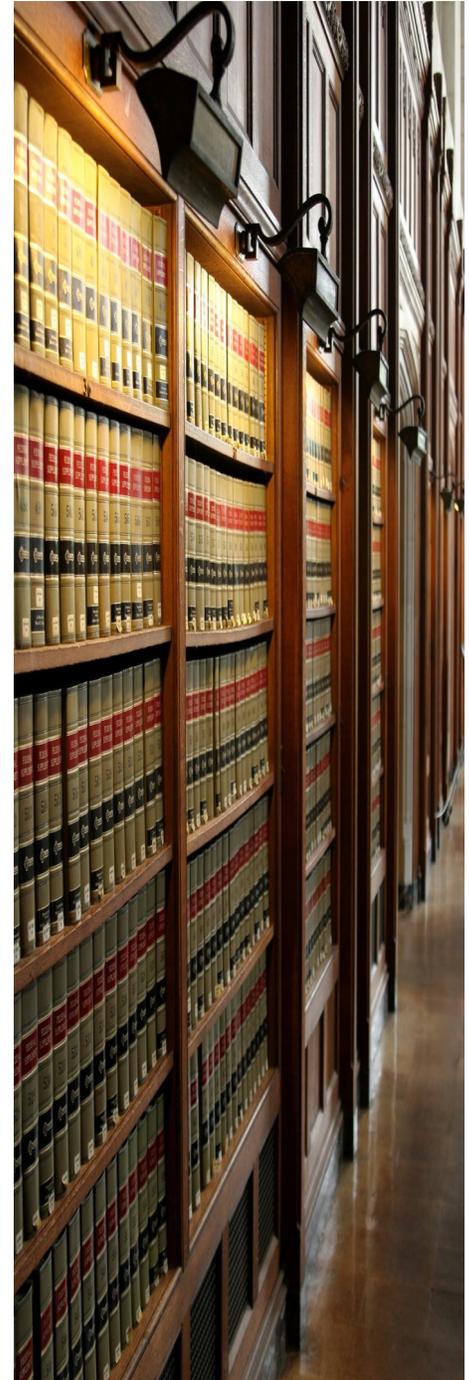
may only be offered as an option, and cannot be made mandatory and (b) employers must always offer cash or check as an available payroll method. 56 Ill. Admin. Code 300.600(a), (b), (c).

2. Employers must provide a written statement to all employees that shows (a) the hours worked, (b) the rate of pay, (c) overtime hours and pay, (d) gross wages, and (e) an itemization of all deductions, wages, and deductions year to date. 56 Ill. Admin. Code 300.600 (a).
3. If an employer offers alternative options for how wages are paid, all employees must be given the same options. 56 Ill. Admin. Code 300.600(a).
4. Employers must notify employees, at the time of hiring, of their rate of pay. Additionally, employers must receive "mutual assent" from new employees regarding rate of pay. 56 Ill. Admin. Code 300.630(d). We recommend providing all new employees with a letter informing them of their rate of pay and obtaining a counter-signed copy of the same.
5. When changing an employee's rate of pay, an employer must (a) notify the employee prior to the effective date of the change and (b) provide a written statement of the change to the employee at the time the change is made. 56 Ill. Admin. Code 300.630(d).

Many employers will already be in compliance with these changes, because some of them are explicit statements of what was already required, all employers should consult with the payroll personnel to ensure that they are in compliance.

Tracking Hours Worked by Exempt Employees

IDOL has further changed the records and notice requirements under the IWPCA by amending the provision regarding tracking hours worked by employees. Previously, employers were not required to track the hours worked by exempt employees. Now, however, employers must track the hours worked by employees "regardless of an employee's status as either an exempt administrative employee, executive, or professional. Additionally, these records must be kept for three (3) years. 56 Ill. Admin. Code 300.630.



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Although there is no penalty for failing to track hours of exempt employees, failing to do so will mean that an employer will not be able to rebut an employee's allegation regarding the number of hours worked in any wage claim. Additionally, the regulations provide that if an employer has not kept required records, which now includes tracking hours worked for exempt employees, an employee may not be denied recovery of wages or final compensation due to an inability to prove the exact amount of uncompensated work or final compensation. 56 Ill. Admin. Code 300.630(b).

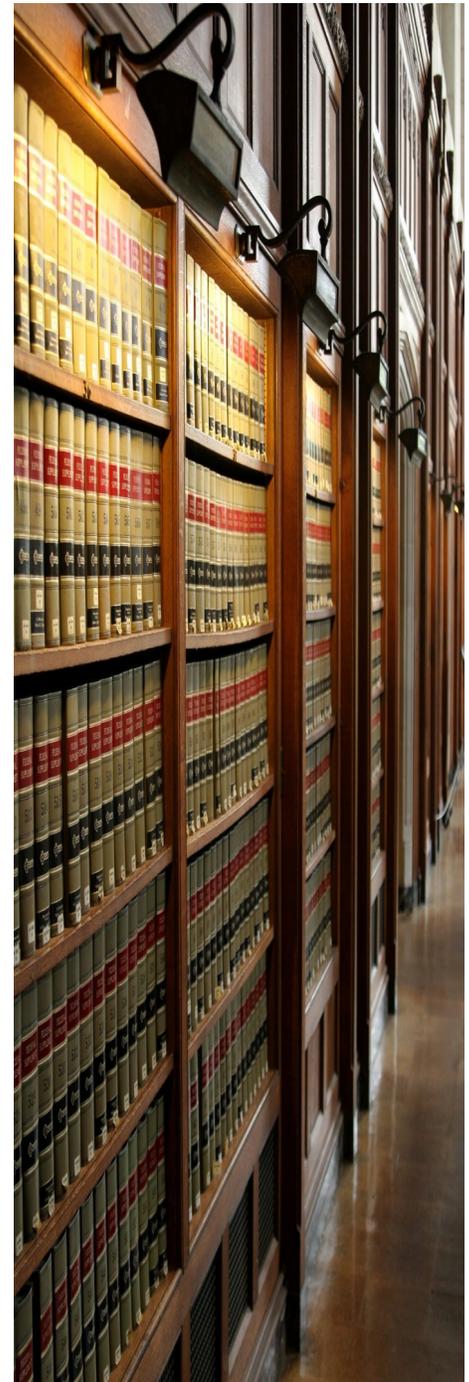
Personal Liability

The regulations now provide that any person who "acts directly or indirectly in the interest of an employer in relation to an employee" is personally liable for wages and final compensation in an IWPCA action. 56 Ill. Admin. Code 300.620. Previously, only officers and agents who knowingly permitted an employer to violate the IWPCA could be held personally liable. This new, broad provision will make it imperative that all employees involved with employment matters be trained regarding the requirements of the IWPCA.

Enforcement of the IWPCA

The amended regulations make several changes to IDOL's enforcement powers. First, the regulations now permit class action claims. Specifically, the amended regulations authorize IDOL to "assist a class of employees and process cases on those employees' behalf in a class action" either "on its own [request] or at the request of a party" when "it believes a common question of law or fact is involved, consolidation will expedite the hearings, and no . . . party will be prejudiced." 56 Ill. Admin. Code §300.1030. This change essentially enables IDOL to transform a single employee claim into a class action on behalf of all employees subject to the same policy or practice.

Additionally, the regulations were amended to provide for a new class of "retaliation" claims. This amendment is the first effort by IDOL to implement Section 14(c) of the IWPCA, which prohibits "discriminat[ion] against any employee because that employee has made a complaint to his employer [or IDOL] . . . that he or she has not been paid in accordance with the [IWPCA]." 820 ILCS 115/14(c).



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Pursuant to this amendment, employees may now file a complaint with IDOL alleging unlawful retaliation, which IDOL will investigate and then hold a hearing. Notably, the regulations provide that retaliation claims must be brought within one (1) year from the date of the alleged discrimination.

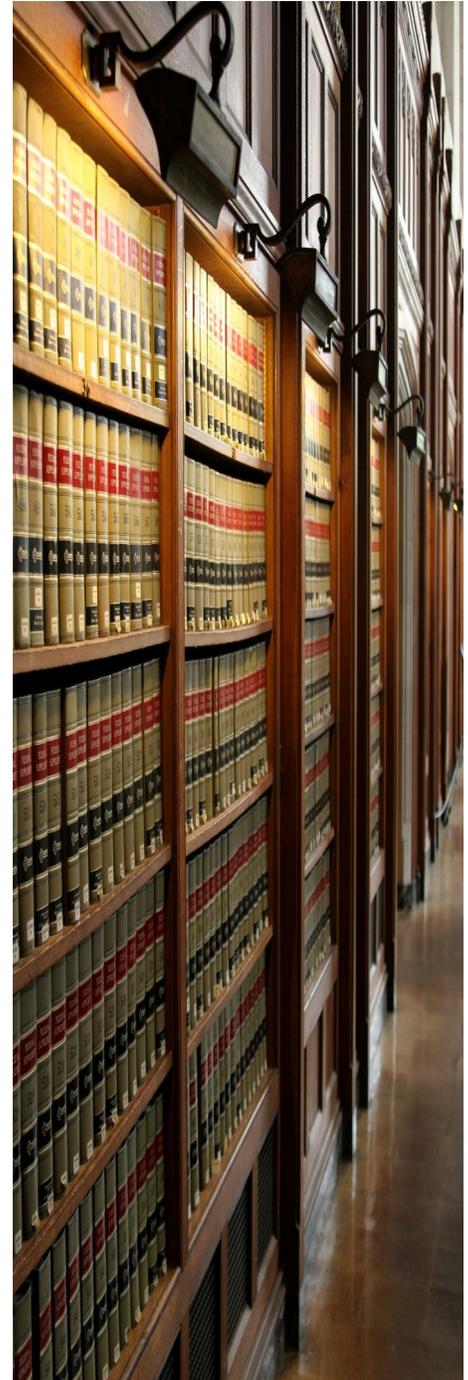
The regulations further clarify that any expenses incurred by an employee not yet reimbursed as of the employer's separation date must be paid as part of the employee's final compensation (i.e. upon separation or no later than the employer's next regularly scheduled pay date following an employee's separation.) 56 Ill. Admin. Code 300.530.

Finally, the new regulations penalize employers who fail to respond when notified of a wage claim. Under the new regulations, an employer's failure to "answer the claim" or "answer all material allegations contained in the claim" within twenty (20) days of receipt of IDOL's notice of a wage claim will cause "all material allegations" in the claim to be "deemed admitted to be true." 56 Ill. Admin. Code §300.941. The new regulations have also expanded IDOL's authority to compel documents by specifying that IDOL may issue subpoenas for documents and testimony. 56 Ill. Admin. Code §300.1110.

Next Steps

It is important to remind employers that the Federal District Court for the Northern District of Illinois has opined that rights under the IWP-CA are non-waivable. *See Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2001 WL 1403007, at *3-4 (N.D. Ill. 2001.) Accordingly, employers will need to work with their human resources department to ensure compliance with IDOL's new regulations. Payroll, time-keeping, vacation policies, and new hire procedures will need particular focus. Additionally, we recommend all employers review their employee handbooks with their attorneys, given the increased likelihood that such handbooks could be construed as an employment agreement subject to the IWPCA.

Finally, we recommend employers who receive notice from IDOL of a wage claim to contact their attorney in order to timely and strategically respond to the claim. We further urge employers to maintain strong documentation of legitimate business reasons for taking adverse em-



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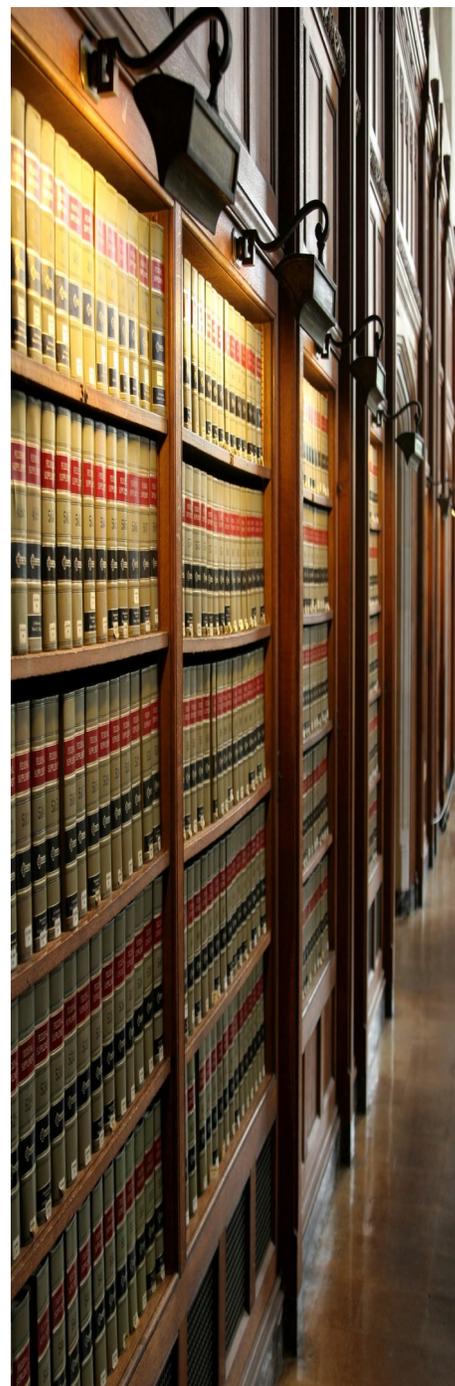
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ployment action, especially with regard to employees who have raised concerns covered by the IWPCA.

Please contact your Klein, Thorpe & Jenkins, Ltd. attorney with any questions or concerns you have regarding general compliance with the new IDOL rules.



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