A Midwest Law Firm

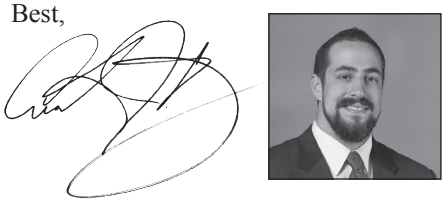
Heyl Royster Governmental Newsletter

 Summer 2019

Dear Friends:

Summertime is nearing and we look forward to cookouts with friends and family, baseball and summer vacations. This edition of the Governmental Newsletter features articles from two of our attorneys on an array of topics. First, Wade Blumenshine addresses the changes that have come (and are still to come) with the Prevailing Wage Act. The new changes give some relief to the public body's record-keeping obligations. Heather Mueller-Jones is the author of two articles – one on orders of protection in the work place and an update on liability for public property. Both are timely and important issues. As always, if you have any questions we stand ready to meet your legal needs. Have a great summer!

Best,



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Changes Are Coming To the Illinois Prevailing Wage Act

By: Wade Blumenshine
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On January 15, 2019, Governor Pritzker signed into law Public Act 100-1177, making significant changes to the Illinois Prevailing Wage Act (the Act). Beginning on June 1, 2019, a large part of the obligations previously imposed on Illinois counties will be alleviated or modified. Previously, Illinois counties were tasked with having to pass the annual ordinance determining the prevailing wages, and certain reporting and record retention obligations. The Act will alleviate select obligations when it is fully implemented. While the amendments are effective as of June 1, 2019, some changes will not be in effect immediately.

First, a few automatic requirements of Counties under Section 9 of the Act are being eliminated. Requirements which are being eliminated include those determining the prevailing wage, passing the June ordinance, and filing a certified copy of the determination with the Illinois Department of Labor (IDOL). 820 ILCS 130/9. Most public bodies adopted the prevailing wage as determined by IDOL and then passed an ordinance memorializing the adoption of the requisite prevailing wages. The amendments to Section 9 eliminates these requirements effective June 1, 2019, and instead, IDOL will be the sole body determining prevailing wages, with the prevailing wage rate being published on the IDOL website no later than the 15th of July every year. Accordingly, Counties will no longer have to undertake determining the prevailing wage, passing the June ordinance, or filing its determination with IDOL.

In addition to eliminating certain requirements the Act will also lessen the burden on public bodies. Public bodies will no longer be receiving objections to the prevailing wage

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schedule or be obligated to participate in a hearing, IDOL will hear all objections.

Every County officer that dealt with the Act recalls the recordkeeping and filing requirements related to the certified payroll provided by contractors. Previously public bodies were required to have contractors submit certified payroll records and to keep payroll records for a period of 5 years from the date of the last payment for work. Under the amendments, IDOL is to create an electronic database for certified payroll records "no later than April 1, 2020." 820 ILCS 130/5.1. While the amendments eliminate the need for the public body to receive and maintain the certified payroll records every month, the exact effective date of when this requirement will be eliminated is a moving target. Once IDOL "activates the database created under Section 5.1" the certified payroll records will then be submitted directly to IDOL to be maintained in their database. Until such time, the County will be responsible for receiving, maintaining, and submitting the certified payrolls to IDOL by the 15th of each month. As of the drafting of this article, the database was not yet active on the IDOL website. In fact, IDOL's website is yet to be updated with the latest changes to the Act.

If the County will no longer determine the prevailing wage, pass a June ordinance, or maintain/file the certified payrolls, what role will the Counties play in ensuring compliance with the Act? First, remember the certified payroll requirements are still the purview of the County until IDOL sets up its certified payroll database. Second, and most importantly, the requirement to pay the prevailing wage is not being eliminated. All fixed works projects will still be prevailing wage jobs. Also, the notice requirements of the Act will still be in effect – notifying the contractors or those bidding on contracts that the job is subject to payment of the prevailing wages as determined by IDOL.

Overall, the changes alleviate or eliminate certain administrative and recordkeeping obligations of counties as they relate to the Act. We will continue to monitor the IDOL website for when the certified payroll database becomes active. Until further notice, we suggest maintaining and filing certified payroll records as normal.

Wade Blumenshine focuses his practice is civil litigation, with a concentration on commercial litigation and toxic tort defense. Wade earned his B.A. from the University of Illinois and his law degree from Northern Illinois University College of Law, where he focused his studies on labor and employment, commercial litigation, and economic torts. During law school, he was a participant in the Lenny B. Mandell Moot Court Competition. Prior to law school, Wade worked at Heyl Royster as a summer associate at the firm where he gained valuable experience in a variety of matters and practice areas.

WORKING WITHOUT FEAR: ORDERS OF PROTECTION AVAILABLE IN THE WORKPLACE

By: Heather Mueller-Jones
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With the news riddled with violence in the workplace, the Illinois legislature has provided avenues for you to protect the workplace and your employees. Maybe an ex-husband is sending texts to his ex-wife or her co-workers, an individual stalking an employee, or someone is threatening your employees via social media. As of this January, you as an employer, can do something to protect your workplace, guests, customers, and employees.

The Illinois Stalking No Contact Order Act is now available to workplaces, schools, and churches to protect themselves, their guests/members/customers, and employees. 740 ILCS 21/1. The purpose of the Stalking No Contact Order Act, as stated by the legislature, is to protect individuals from stalking. The Act further states that "[s]talking behavior includes following a person, conducting surveillance of the person, appearing at the person's home, work or school, making unwanted phone calls, sending unwanted emails, unwanted messages via social media, or text messages, leaving objects for the person, vandalizing the person's property, or injuring a pet." 740 ILCS 21/5.

In order for a workplace, which would include governmental employers and workplaces, to obtain a Stalking No Contact Order, the workplace needs to show and prove that the

stalking individual, the respondent, has committed two or more acts "including but not limited to acts in which a respondent directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, or threatens a person, workplace, school, or place of worship, engages in other contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 740 ILCS 21/10.

If you have an individual who has committed two or more of the above courses of conduct, you as a workplace can file an emergency and/or plenary request for a Stalking No Contact Order. An emergency Stalking No Contact Order can be obtained after a hearing where no notice is given to the individual who has committed the stalking. An Emergency Order is granted if "there is good cause to grant remedy, regardless of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice was actually given, of the petitioner's efforts to obtain judicial relief." 740 ILCS 21/95.

An emergency order is only in place until the hearing on the plenary (2 year) request for Stalking No Contact Order. The respondent must receive notice of the plenary hearing and the Act has specific provisions for that. The plenary hearing is an evidentiary hearing where evidence and testimony are presented to establish that the respondent has committed two or more of the courses of conduct described above. If the plenary Stalking No Contact Order is granted, it will be in effect for two years.

In either an emergency or plenary Stalking No Contact Order, the respondent can be ordered to have no contact with employees in any form, to stay a certain amount of distance from the workplace and can even require the respondent to relinquish his or her guns. Once the Stalking No Contact Order is entered, the respondent may be arrested if any violation of the Order occurs, and charged with a misdemeanor.

If violence has been committed or threatened against your workplace or any of its employees, another way that employers can protect their employees and your workplace is through the Workplace Violence Prevention Act. 820 ILCS 275/1. The purpose of the Act is "to assist employers in protecting their workforces, customers, guests, and property by limiting access to workplace venues by potentially violent individuals." 820 ILCS 275/5.

An employer may seek a workplace protection restraining order to prohibit further violence or threats of violence by the respondent if: (1) an employee has suffered unlawful violence and the respondent has made a credible threat of violence to be carried out at the employee's workplace; (2) an employee believes that the respondent has made a credible threat of violence to be carried out at the employee's workplace; or (3) an unlawful act of violence has been carried out at the workplace or the respondent has made a credible threat of violence at the workplace.

This Act allows the workplace to obtain protection from individuals, including those domestically related to an employee. In essence, this protection can protect an abused employee from an abusive spouse, parent, or boyfriend/girlfriend. In order to use the Act in that manner, the employee involved must be given notice in writing by the employer and there must be a verbal consultation to determine whether any safety or well-being concerns exist in relation to the employer's pursuit of the order or whether seeking the order may interfere with the employee's own legal actions.

Like the Stalking No Contact Order, an employer can seek an emergency and/or plenary Order and this process involves the same criteria and hearings. The remedies include prohibiting violence, prohibiting contact, and requiring the respondent to stay a certain distance away from the workplace and employees. The remedies can also require the respondent to relinquish his or her guns and also pay for any property damage that may have occurred due to the respondent's actions.

Illinois has given you as an employer tools to protect your employees and guests when these type of stalking or violent situations occur. While we hope that you will never encounter these issues, these types of stalking behaviors have been on the rise. While there are forms available to you by the courts when filing these types of actions, there are intricacies involved and evidentiary hearings required. As such, we do recommend hiring an attorney to assist you in this process. If you or your workplace needs assistance in filing these types of orders, we have attorneys who have already represented employers in these actions and that can assist you.

When Is a Riding Trail Really a Riding Trail?

By: Heather Mueller-Jones
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This is a question many Park Districts, Transit Districts, and Municipalities in Illinois are asking. Under the Illinois Governmental and Governmental Employees Tort Immunity Act (hereinafter Tort Immunity Act), "Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreation, or scenic areas and which is not a (1) city, town or village street (2) county, state or federal highway or (3) a township or other road district. (b) Any hiking, riding, fishing or hunting trail." 745 ILCS 10/3-107.

This provision, if applicable would afford absolute immunity to claims of injuries on a riding trail. In the alternative, the riding trail would be afforded partial immunity under the recreational property immunity provision. The Tort Immunity Act states, "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106.

Over the years, the move toward a more active, healthy, and "green" society, along with a nationwide effort to convert abandoned railroad right-of-ways into trails, has created over 940 miles of trails in Illinois. http://www.railstotrails.org/our-work/united-states/illinois/#state and https://www.dnr.illinois.gov/publications/documents/00000642.pdf. The Tort Immunity Act grants immunity to local public entities for incidents that occur as a result of a condition of their riding trails. However, the Illinois Appellate courts have had a difference of opinion as to what type of immunity riding trails are afforded, absolute immunity as a riding trail or immunity from standard negligence under the recreational property immunity provision.

Envision a 15.5 mile asphalt trail that is used by bikers, skaters, walkers, and runners. The trail links with several others, affording the user access to over 100 miles of continuous trails. The 15.5 mile paved trail passes through and by old growth forests, a local park with a pond, neighborhoods, businesses, public roadways, and a State Park with a lake. Is this trail a riding trail under the Tort Immunity Act?

The Appellate Court Decisions

In *Goodwin v. Carbondale Park District*, the plaintiff was injured when his bicycle collided with a tree that had fallen across a paved bike path that went through a city park. *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489, 490 (5th Dist. 1994). The trial court dismissed his complaint, holding in part that the defendant was immune under section 3-107(b) of the Act because the path was a riding trail. *Goodwin*, 268 Ill. App. 3d at 490. However, the fifth district reversed the dismissal, holding that "the paved bike path located in a developed city park" was not a riding trail. *Id*. at 492. The court reasoned that section 3-107(b) was intended to apply to "unimproved property which is not maintained by the local governmental body and which is in its natural condition with obvious hazards as a result of that natural condition." *Id*. at 493. The court concluded that, given this reasoning, the legislature did not intend section 3-107(b) to include a paved bike path within a developed city park. *Id*. at 493-94.

The first district held in *Brown v. Cook County Forest Preserve* that section 3-107(b) immunized the defendant from liability for an injury that the plaintiff suffered when he hit a bump and fell while riding on a bicycle path in the Saulk Trail Woods Forest Preserve. *Brown v. Cook County Forest Preserve*, 284 Ill. App. 3d 1098, 1099 (1st Dist. 1996). The court relied on the dictionary definition of "trail" as "a 'marked path through a forest or mountainous region.'" *Brown*, 284 Ill. App. 3d at 1101 (quoting Webster's Third New International Dictionary 233 (1981)). It concluded that the bike path on which the plaintiff had been riding met this definition because it was "designed to provide access for bicyclists to the natural and scenic wooded areas around Saulk Lake." *Id*. It was not material to the court that the path was paved and the court was not persuaded to hold for the plaintiff merely because the path was adjacent to a highway. *Id*. at 1099. The court distinguished the case from *Goodwin* by explaining that the *Goodwin* court

had stressed that the bicycle path in question had traversed a developed city park. *Id*. at 1101.

Likewise, in *Mull v. Kane County Forest Preserve District*, the court held that the forest preserve was immune under section 3-107(b) when the plaintiff fell while riding on a 17 mile forest-preserve bicycle path. *Mull v. Kane County Forest Preserve District,* 337 Ill. App. 3d 589 (2d Dist. 2003). The fact that the bicycle path was adjacent to a road and that the entrance to a subdivision was near the path was not crucial to its decision. *Mull*, 337 Ill. App. 3d at 592-93. What was crucial to the court was that the path was "surrounded by wooded or undeveloped land and [ran] through a forest preserve." *Id*. at 592.

The second district has further departed from the *Goodwin* court's holding that a trail must be "unimproved" to qualify as a riding trail under section 3-107(b) and instead endorsed the dictionary definition of "trail" as cited in *Brown*. *McElroy v. Forest Preserve District of Lake County*, 384 Ill. App. 3d 662, 667 (2d Dist. 2008). The court reasoned that "rarely if ever is a 'riding trail' found in nature without any improvements to make the trail accessible and safe to the public." *McElroy*, 384 Ill. App. 3d at 667.

In a 2016 decision, the second district held that a trail need not be unpaved to qualify as a riding trail and that the character of a path as a riding trail is not automatically defeated by the existence of any development in the surrounding area. *Corbett v. County of Lake*, 2016 IL App (2d) 160035, ¶ 28. However, the court also held that because the riding trail at issue was surrounded by narrow bands of greenway, industrial development, residential neighborhoods, parking lots, railroad tracks and major vehicular thoroughfares, the trail did not qualify as a riding trail under section 3-107(b). *Corbett*, 2016 IL App (2d), 60035, ¶ 29.

Under these appellate court decisions, whether our hypothetical 15.5 mile paved trail is considered a riding trail under the Tort Immunity Act and is provided absolute immunity really depends on where in the state that trail is located and what type of land surrounds the trail.

Recent Illinois Supreme Court Decision

Corbett v. County of Lake was appealed to the Illinois Supreme Court. The Court issued its decision on November 30, 2017. *Corbett v. County of Lake*, 2017 IL 121536. As one local director of over 100 miles of shared-use trails told me, the decision was "the trail Grinch ruining Christmas."

In *Corbett v. County of Lake*, the Illinois Supreme Court resolved the differences between the appellate court decisions discussed above. The Court held that the inclusion of the words "hiking," "fishing," and "hunting" in the same sentence as "riding" indicated that the legislature intended to apply blanket immunity only to primitive, rustic, or unimproved trails. The court concluded that under the Tort Immunity Act, absolute immunity for "trails" applied only to rustic trails in their natural environment and did not include paved or otherwise finished trails, such as those designated for on-road bicycles. In other words, shared-use bike paths intended for bicycles, pedestrians, and in-line skaters are not considered riding trails under the Tort Immunity Act and are not afforded absolute immunity.

The Future of Litigation for Riding Trails

Although absolute immunity no longer applies to our hypothetical 15.5 mile trail, the recreational immunity provision of the Tort Immunity Act still applies. This means that a plaintiff will need to prove that the governmental entity was willfully and wantonly negligent and that this willful and wanton negligence was the proximate cause of plaintiff's damages

This was addressed by the Illinois Supreme Court in *Cohen v. Chicago Park District*. *Cohen v. Chicago Park District*, 2017 IL 121800. The plaintiff was riding his bicycle on the Lakefront Trail, a shared-use path that runs along the shore of Lake Michigan in Chicago, when his front wheel caught in a crack in the pavement and he fell. Plaintiff alleged that the Chicago Park District acted willfully and wantonly in failing to maintain the path and was therefore responsible for the injuries that resulted from his fall.

The Court held that the Chicago Park District was immune from suit under the recreational property provision of the Tort Immunity Act. While the park district was not afforded absolute immunity for conditions of the trail under the riding trail immunity provision, the park district's conduct in repairing the crack could not be deemed willful and wanton and there were no prior injuries involving the crack, which would have alerted the park district to any extraordinary risk or danger to the users of the path.

Conclusion

While unfortunately, the paved shared-use trails throughout the state are not protected with absolute immunity, they still are partially protected under the recreational property immunity provision of the Tort Immunity Act. Cases brought by those allegedly injured on these trails are still very defensible. However, based on the ruling in *Corbett v. County of Lake*, only an amendment to the Tort Immunity Act by the Illinois Legislature granting immunity to these shared-use paths will allow for the absolute immunity of the hundreds of miles of paved riding trails in the state of Illinois.

Heather Mueller-Jones concentrates her practice in civil litigation, trial as well as ADR settings, including personal injury, professional liability and product liability defense. Her focus includes representing individuals, business and governmental entities in the defense of civil litigation claims throughout Illinois and Missouri. Before joining Heyl Royster, Heather worked at a mid-sized defense firm in the St. Louis Metro East area where she represented clients, including governmental entities, in the defense of personal injury and product liability claims throughout Illinois and Missouri. Heather is an adjunct professor at Southwestern Illinois College in the Paralegal Studies Program. She also founded the Madison County Women Lawyers group.

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