

Illinois Issues Emergency and Proposed Rules to Implement Day and Temporary Labor Services Act Amendments

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The Illinois General Assembly, in May 2023, [passed substantial amendments](#) to the Day and Temporary Labor Services Act (DTLSA). On August 4, 2023, Governor J.B. Pritzker signed House Bill (HB) 2862, and the amendments became effective immediately.

On August 7, 2023, the Illinois Department of Labor (IDOL) filed emergency rules and proposed permanent rules to implement HB2862.

Quick Hits

- ▶ On August 7, 2023, the IDOL filed emergency rules and proposed permanent rules to implement HB2862 (Public Act 103-0437), which amended the Day and Temporary Labor Services Act.
- ▶ The emergency rules and proposed permanent rules reiterate the statutory requirements and clarify several areas of the law.
- ▶ The emergency rules took effect on August 7, 2023.

The [emergency rules](#) took effect on August 7, 2023, and are set to expire at the end of a 150-day period or upon adoption of permanent rules, whichever comes first. The [proposed permanent rules](#) are substantially similar to the emergency rules. The IDOL's website notes that the secretary of state's Index Department has indicated the proposed permanent rules [will be published on August 18, 2023](#), which means the forty-five-day minimum public comment period for the proposed permanent rules will run through October 2, 2023.

The emergency rules and proposed permanent rules largely reiterate the [statutory requirements](#) but provide clarifications in several areas. Here are some of the key highlights.

Key Highlights

When must a temporary laborer receive equivalent pay and benefits?

The amendments to the DTLSA provide that labor service agencies must pay temporary laborers assigned to a third-party client for more than ninety calendar days at least the rate of pay and equivalent benefits as the lowest-paid directly hired employee of the third-party client performing at the same level of seniority and the same or substantially similar work. If there is not a directly hired comparative

employee of the third-party client, the agency must pay the worker at the rate of pay and equivalent benefits of the lowest-paid directly hired employee of the third-party client with the closest level of seniority. Equivalent benefits may be compensated by the labor service agency paying the worker the hourly cash equivalent of the third-party client's actual cost of the comparator's benefits.

Notably, the rules address potential breaks in service by a temporary laborer to a third-party client. The rules clarify that *after* August 4, 2023, if a day or temporary laborer is assigned to work for a third-party client for more than ninety calendar days *within any twelve-month period, whether consecutively or intermittently, the temporary laborer* must receive the equal pay and benefits. This rule also clarifies that temporary laborers who had already been working at a third-party client for more than ninety days when the law became effective will not automatically receive increased pay and benefits. The ninety days of service for such laborers began on August 4.

The rules further clarify that increased pay and benefits are effective as of the temporary laborer's ninety-first day of performing work for the third-party client.

What is the definition of "benefits"?

The amendments did not define "benefits," and thus left open a key question of what was to be included. The rules define benefits to mean "health care, vision, dental, life insurance, retirement, leave (paid and unpaid), other similar employee benefits, and other employee benefits as required by State or federal law."

While this definition leaves some open questions, it does clarify what types of benefits are to be included when determining equivalent benefits. The definition and rules do not clarify the question of what equivalent benefits may be if a third-party client provides directly hired employees multiple options for health care, vision, dental (e.g., employee-only coverage versus family coverage, low- versus high-deductible plans) or how to calculate a cash equivalent for such benefits. The rules also do not address whether a day and temporary labor service agency must provide a temporary laborer with the cash equivalent for the difference between benefits already offered by the agency and increased benefits offered by the third-party client.

What are the definitions addressing comparative work?

When determining whether a temporary laborer is performing "substantially similar work" on the job, one looks to whether the job performance required includes "substantially similar skill, effort, and responsibility ... performed under similar working conditions." The rules provide further definition to these terms.

The rules define "effort:" as "the physical or mental exertion needed for the performance of a job. Job factors that cause mental fatigue and stress, as well as those factors that alleviate fatigue, are to be considered in determining the effort required for the job. Effort encompasses the total requirements of the job. Occasional or sporadic performance of an activity that may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal or equal effort."

"Responsibility" is defined as "the degree of accountability required in the performance of a job. Minor or occasional responsibility added to an employee's duties that are not of significant consequence or importance will not justify a finding of unequal or equal responsibility."

"Seniority" is defined as "the number of days a directly hired employee has been working for the third party client."

"Similar Working Conditions" is defined as "the surroundings and hazards, including the frequency and intensity of such conditions. Surroundings measure the elements, such as toxic chemicals or fumes, regularly encountered by an employee. Hazards take into account the physical hazards regularly encountered by an employee. Slight or inconsequential differences in working conditions that are not usually taken into account by employers or in collective bargaining in setting wage rates do not justify a differential in pay. The method used for testing this requirement is flexible. The mere fact that jobs are in different departments of a workplace or performed in different locations will not necessarily mean that the jobs are performed under dissimilar working conditions."

"Skill" is defined as "experience, training, education and ability. Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill."

"Substantially Similar Work" is defined as "comparable work on jobs with comparable requirements. Substantially similar is not dependent on a job classification or title but depends rather on actual job requirements and genuine differences in how work is performed."

Training

The amendments require labor service agencies to provide to a temporary laborer general awareness safety training for recognized industry hazards the worker may encounter at a third-party client's worksite. The rules clarify that training must be provided on or before the temporary laborer's first day working at a client company each year. The rules further clarify that the training must include all existing job hazards known to the client company or labor service agency, and such training "must include, but is not limited to, any of the following types of hazards which are present on the job site":

1. hazards which necessitate the use of personal protective equipment;
2. fall hazards;
3. electrocution hazards;
4. hazards of being struck by objects;
5. getting caught or between hazards;
6. machinery-related hazards;
7. chemical or other substance-related hazards;
8. repetitive-motion hazards; and
9. emergency action plans.

"The training shall also include information regarding actions taken by the third party client to eliminate, control, or otherwise mitigate or protect workers from the hazards, as well as what steps workers should take to avoid or control the hazards. This must include emergency evacuation and shelter-in-place procedures."

What penalties do the rules impose?

The amendments substantially increased penalties that may be assessed for violations of the DTLSA. The rules clarify that in determining penalties, the director of the IDOL “shall consider the following factors”:

1. The seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation, including probability that death or serious physical or mental harm to a laborer will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;
2. The economic harm to the laborer caused by the violation;
3. The history of previous violations;
4. The amount necessary to deter a future violation;
5. Efforts by the day and temporary labor service agency or third party client to correct the violation; and
6. Any other matter that justice may require.

Key Takeaways

While the emergency rules provide helpful guidance, some questions remain. Given that Illinois law requires that the proposed permanent rules undergo a forty-five-day comment period, which will be followed by internal review before the rules become final, there may be additional changes before the proposed rules become final. However, in light of the fact that the amendments are now law, if labor service agencies and third-party clients that use them have not taken steps to address compliance, they may want to do so.

Ogletree Deakins' [Chicago office](#) will continue to monitor developments and provide updates on the [Illinois, Pay Equity](#), and [Workplace Safety and Health](#) blogs as additional information becomes available.

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