

# Labor and Employment Law

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## Employment Discrimination

### Illinois Forbids Discrimination Based On Sexual Orientation

In its typical flurry of activity at the end of the legislative session, the Illinois legislature passed a number of new laws and amendments to existing laws. One of the most controversial changes—passed on the last day of the legislative session—was a bill amending the Illinois Human Rights Act to prohibit discrimination on the basis of sexual orientation, in both employment and housing.

SB 3186, which has already been signed into law by Governor Blagojevich, adds a new category of “sexual orientation” to the IHRA. Sexual orientation is defined as:

Actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. “Sexual orientation” does not include a physical or sexual attraction to a minor by an adult.

This amendment to the IHRA specifically states that it does not require preferential treat-

ment or affirmative action, but simply requires employers to refrain from discrimination (including harassment) on the basis of sexual orientation.

It should be noted that Cook County, Chicago and a number of other Illinois cities already include sexual orientation in their discrimination laws. But

this new bill will cover *all* Illinois employers with 15 or more employees. Applicants and employees who believe that the law has been violated can file a

charge of discrimination with the Illinois Department of Human Rights, and it will be investigated in the same manner as charges alleging discrimination on the basis of other protected characteristics (e.g., race, sex, age, disability, etc.).

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## EEOC Issues Guidance On ADA And Foodborne Illnesses

On October 28, 2004, the EEOC issued a Guide for Restaurants and Other Food Service Employers on how to comply with the Americans with Disabilities Act (“ADA”). The Guide is divided into three parts:

- (1) basic ADA information;
- (2) an explanation of the interaction between the ADA and the FDA's Food Code; and
- (3) ADA rules preventing discrimination against persons with disabilities.

The first part of the guidance addresses the basic questions of who is covered by the ADA, how a disability is defined, what are the considerations in assessing reasonable accommodations, and the fact that an employer can deny employment to a person who would pose a “direct threat” to the health or safety of himself or others in the workplace.

The second part begins with an explanation of the fact that the FDA Food Code addresses the issue of employee health for those employ-

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# Court Finds That Drooling Cook Can Proceed With ADA Case

Those who might think that the EEOC's Guide on food handling and the ADA goes too far may want to read a recent Minnesota case involving a Fuddruckers restaurant. The restaurant terminated one of its cooks allegedly because she "drooled and spit into food that she prepared and served to customers." The employee, who suffers from a stuttering disorder that sometimes causes excessive salivation, sued for disability discrimination—and a federal district court decided that she has enough evidence to take her case to a jury. *Andresen v. Fuddruckers, Inc.*, No. 03-3294.

The plaintiff, Barbara Andresen, worked for Fuddruckers in a food service role for a total of 16 years. Andresen apparently suffered from a lifelong stuttering disorder. Up until 2001, she had no job performance issues. However, in 2001, Fuddruckers assigned two new managers to her location in order to improve a public image of the location

as being "unsanitary." The new managers began highlighting performance problems with Andresen, including reports that she sometimes drooled into the food. As part of their plan of corrective action, the managers required Andresen to wear a surgical mask while working in food preparation. Andresen

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and Fuddruckers disagreed as to whether she was in compliance with the performance plan. Andresen claimed to have complied with all of Fuddruckers' requests, but the restaurant contended that she failed to wear the surgical mask

and failed to meet other job performance requirements.

After Fuddruckers terminated her employment, Andresen sued under the Americans with Disabilities Act ("ADA"). She claimed that her termination was actually due to her stuttering disorder. Fuddruckers countered by arguing: (a) the stuttering was not an ADA-cognizable "disability;" and (b) Andresen was terminated because her drooling into food caused a health hazard. In denying summary judgment to the restaurant, the court first concluded that Andresen's stuttering was severe enough that it could substantially limit her ability to speak—and thus could be considered a disability under the ADA. It then considered whether the termination was due to Andresen creating a health hazard. In support of its position, Fuddruckers had cited sworn testimony that at least three customers had complained about Andresen's drooling,

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## Foodborne Illnesses - continued from page 1

ees who work around food, in an attempt to protect the public from diseases transmissible through food. The FDA Food Code discusses the following four pathogens (the "Big 4 pathogens") which are considered communicable diseases by the Center for Disease Control ("CDC"):

- (1) *Salmonella* Typhi;
- (2) *Shigella* spp;
- (3) Shiga toxin-producing *Escherichia coli*; and
- (4) Hepatitis A virus.

The FDA Food Code provides that employees who have been diagnosed with a disease due to one of the Big 4 pathogens should not work in food service. It also states that employees with certain symptoms (diarrhea, fever, vomiting, jaundice, or sore throat with fever) should be restricted from food handling duties. Not every person who has such symptoms is covered by the ADA, but, when a person is disabled by one of the diseases caused by a Big 4 pathogen, the employer must consider the ADA in addition to the provisions of the FDA Food Code. According to the Guide, this means that, if the employee is disabled by one of the diseases listed in the Food Code, the employee should be excluded from the food establishment only if the employer determines that:

- (1) there is no reasonable accommodation that would

eliminate the risk of transmitting the disease while allowing the employee to remain in her food handling position; or

- (2) all reasonable accommodations are too difficult or expensive and there is no vacant position not involving food handling to which the employee can be reassigned.

The third part of the EEOC's guidance notes that employers must also comply with ADA rules restricting medical inquiries to employees, including questions about diseases transmissible through food. For instance, employers may not ask medical questions of applicants until a conditional offer of employment has been made. Once a conditional job offer is made, they may ask medical questions and require medical exams, as long as they treat all applicants for the same type of job in the same way. According to the guidance, an employer may ask current employees medical questions only when there are concrete reasons to believe that the employee cannot perform the job or poses a risk to workplace safety due to a medical condition.

It is recommended that employers involved in the food industry review the Guide in its entirety. It is available at [http://www.eeoc.gov/facts/restaurant\\_guide.html](http://www.eeoc.gov/facts/restaurant_guide.html).

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