

HEYL ROYSTER

GOVERNMENTAL

NEWSLETTER

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WELCOME LETTER

Dear Friends:

As another year has come and gone, it is worthwhile to review this year's developments in the law which affects your job. This newsletter and our upcoming seminars continue to address these issues.

We first would like to thank everyone who attended our last seminar (at locations throughout Illinois) on issues related to financial oversight and concerns related to corruption. If you were unable to join us, please do not hesitate to contact any of our offices to discuss those obligations which exist upon government officials to monitor and audit financial transactions within their government to assure that theft does not occur.

We are also very excited for our next two seminar opportunities. First, we invite all of you to attend the latest teleconference/webinar on Wednesday, March 20 at 12:00. Our topic will be construction and bid-related issues, both certainly timely topics for the spring construction schedule. Secondly, we cannot overlook that 2013 is an election year, and we are therefore going to offer an extended seminar in May related to general con-

siderations on governing your local body. We envision breakout sessions on numerous issues such as running meetings, answering FOIA requests, the budget and levy process, and countless other statutes which influence your day to day operations. Whether you are newly-elected or serving another term in office, we think you will benefit from this seminar, and we are prepared to offer it throughout the state of Illinois at our many offices based on demand. Please remember all of our seminars are free of charge.

In this addition of our quarterly newsletter, we address statutory changes effective in 2013. Our second article addresses the new regulations adopted for cemetery oversight. Finally, we take a closer look at two new Public Acts, one dealing with economic development/rebate agreements and one dealing with notification requirements under the Prevailing Wage Act.

Our governmental law team at Heyl Royster wishes all of you the best in the New Year.



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NEW LAWS FOR THE NEW YEAR

By: Stacy E. Crabtree

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In addition to those laws already discussed, there are a number of other laws effective January 1, 2013, that may affect you. The following serves as a summary of many of those laws, although it does not cover every law effective January 1, 2013. We are available to answer any specific questions you may have as to how these laws will impact you.

Open Meetings Act – P.A. 097-0827 amends the Open Meetings Act by requiring any agenda to set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting. Additionally, the notice and agenda must be continuously available for public viewing for at least 48 hours preceding the meeting, which can be accomplished by posting the agenda and notice on a website maintained by a public body. Failure of the public body to post the agenda and notice for the 48 hours due to reasons outside of the public body's control will not invalidate any action taken at the meeting.

Dept of Central Management Services Law of the Civil Administrative Code – P.A. 097-0744 requires townships, municipalities, and counties to submit their employees' job titles, current pay rate, and year-to-date pay to the Department of Central Management Services. The information will then be displayed on the Illinois Transparency and Accountability Portal (ITAP).

Prevailing Wage Act – P.A. 097-0964 amends the Prevailing Wage Act to require that public bodies notify contractors of revisions to the prevailing rate of hourly wages by inserting a written stipulation in all contracts which states the prevailing rate of hourly wages is revised by the Department of Labor and revisions are available on the Department's official website.

Illinois Police Training Act – P.A. 097-0815 amends the Police Training Act by requiring any law enforcement agency that investigates a crime committed in Illinois to provide written statements (content to be provided by the Attorney General) to crime victims explaining their rights within 48 hours of initial contact with the victims. The law enforcement officer must then get the victims'

signatures with dates as acknowledgement that they have been furnished with the information. Additionally, court clerks are to post information on the constitutional and statutory rights of crime victims within 3 feet of the door of each courtroom where criminal proceedings are held. Furthermore, victims may ask to be notified in the event of any type of release of their perpetrators, including supervised and unsupervised off-grounds passes, transfers to other facilities, escape, and death.

P.A. 097-1009 amends the Police Training Act to state that only coroners who successfully complete a training program approved or provided by the Illinois Law Enforcement Training and Standards Board in death and homicide investigation may be assigned as lead in coroner's investigations. Coroners may apply for a waiver of this requirement based on prior training and experience.

Illinois Vehicle Code – P.A. 097-1023 amends the Illinois Vehicle Code to allow pedestrians who are 18 or older wearing in-line speed skates to travel on roads with speed limits of less than 45mph during daylight hours, including travel in bicycle lanes, and be subject to the Vehicle Code.

Swimming Facility Act – P.A. 097-0957 amends the Swimming Facility Act in several ways and should be consulted if your locality has or is considering a "swimming facility," which is broadly defined under the Act and only expressly excludes a pool for family and guest use at a single-family residence. The amended Act now requires that a prequalified professional engineer designs, plans, or makes specifications for swimming facilities. Additionally, where a local health department is certified by the Illinois Department of Public Health for enforcing the Swimming Facility Act, the respective locality may choose by ordinance to have the health department enforce the Act, including licensing swimming facilities. Another change requires licensees under the Act to allow patrons the use of service animals provided the use of the animal does not pose a direct threat to the health and safety of other patrons, the functioning of the facility, or the sanitary conditions of the facility.

State Universities' Acts – P.A. 097-0814 amends each state university's respective Act to prohibit the state university from paying for search firms, unless it is for

the purpose of hiring a president or when the university's board demonstrates a need for expertise in the field in which a hiring is planned.

Fire Sprinkler Dormitory Act – P.A. 097-0899 extends the deadline by which all college dormitories must have fire sprinkler systems installed from January 1, 2013, to September 1, 2014, if a college submits a compliance plan and the Office of the State Fire Marshal approves that compliance plan by January 1, 2013.

School Code – P.A. 097-1104 provides that law enforcement agencies may share their records relating to minors arrested before their 17th birthday with the appropriate school official only if the agency believes there is an imminent threat of physical harm to students, school personnel, or others on school grounds. Information provided by a law enforcement agency must not be a public record and must be kept separate from the minor's official school record. Additionally, any information provided by a law enforcement agency related to a current police investigation shall consist of oral information only.

P.A. 097-1025 also amends the School Code to include new notice requirements. For example, school districts petitioning the State Board of Education for waiver or modification of School Code obligations must post on school district's website the time, date, place, and general subject matter of public hearing at least 14 days before the hearing on the petition. The School Code has been amended substantially as well with regard to drivers' education courses.

Health Care Services Lien Act – P.A. 097-1042 provides that any subrogation claim arising out of medical expense payments due to personal injury or death shall be reduced in the same proportion as the injured person's (or his estate's) recovery is reduced due to comparative fault or limited liability insurance coverage. This will not apply, however, to claims under the Workers' Compensation Act, the Workers' Occupational Diseases Act, the Health Care Services Lien Act, or uninsured or underinsured motorist coverage.

Right to Privacy in the Workplace Act – P.A. 097-0875 amends the Act by making it unlawful for any employer to request or require any employee or prospective employee to provide any social networking password or other related account information in order to gain access.

Election Code – P.A. 097-1044 amends the Code to provide that "two or more petitions [for candidacy] filed within the last hour of the filing deadline shall be deemed filed simultaneously."

Elder Abuse and Neglect Act – P.A. 097-0864 amends the Act by allowing "Provider Agencies" (as defined in the Act) to provide a list of all eligible adults who may be at imminent risk of elder abuse, neglect, financial exploitation, or self-neglect to a law enforcement or fire department agency, or fire protection district with jurisdiction pursuant to a written agreement with the Provider Agency.



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THE CEMETERY OVERSIGHT ACT: WHAT YOU NEED TO KNOW AT THE LOCAL LEVEL

By **Brett M. Mares**

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The fact that we have been burying our dead for well over 100,000 years might lead some to mistakenly conclude that cemetery law is a dead issue. However, problems surrounding burial have long been of concern to public officials, and attention is again on the topic because of public outcry resulting from mismanagement of several cemeteries in Illinois.

In the summer of 2009, for example, four employees of Burr Oak Cemetery in Alsip, Illinois were charged with felonies connected to re-selling occupied burial plots at the property. "Cook County Sheriff Tom Dart said the four would excavate the [occupied] graves, dump the remains and pocket the cash." Katherine Wojtecki and Taylor Gandossy, *4 Charged with Digging Up Graves, Reselling Plots*, CNN.COM (Jul. 9, 2009), <http://www.heyloyster.com>

cnn.com/2009/CRIME/07/09/illinois.cemetery.scheme/index.html?iref=mpstoryview. As a result, the Illinois General Assembly imposed strict regulations upon the funeral industry, including the creation of the Cemetery Oversight Database, a public collection of burial information for each of Illinois' non-exempt burial grounds. Though many in the Illinois General Assembly are now hoping to ease requirements imposed by the Cemetery Oversight Act, these regulations continue to affect local government officials and those in the funeral industry. Rachel Bogart, *Illinois Senate Reduces Strict Regulations on Small Illinois Cemeteries*, NEWS.YAHOO.COM (Apr. 23, 2011), <http://news.yahoo.com/illinois-senate-reduces-strict-regulations-small-illinois-cemeteries-194900555.html>. By staying up to date with recent changes to Illinois' cemetery laws, local officials can make sure that those they serve are protected.

The Cemetery Oversight Act ("Oversight Act") essentially operates as consumer protection legislation, while at the same time acknowledging the weight of the subject matter with which the law deals. "The citizens of Illinois have a compelling interest in the expectation that their loved ones will be treated with the same dignity and respect in death as they are entitled to be treated in life." 225 ILL. COMP. STAT. 411/5 (2010). Therefore, the state has put in place laws aimed at preserving the sanctity of human remains, while at the same time providing enough flexibility so as to preserve "family, ethnic, cultural, and religious traditions." *Id.* Though the Oversight Act does address public health concerns, it is largely geared toward maintaining public confidence in the funeral industry. Significantly, the Oversight Act does not apply to family, religious, or inactive burial grounds, and smaller burial grounds also fall outside of its scope. Other properties, such as publicly owned cemeteries, are partially exempt from the Oversight Act, but must still comply with the ethical guidelines and licensing process laid out by the legislation. Actions taken by the City of Chicago pursuant to the O'Hare Modernization Act are fully exempt.

The Oversight Act requires that a cemetery authority obtain a license in order to operate in Illinois. 225 ILL. COMP. STAT. 411/10 (2010). To qualify for licensure, an applicant must not have committed acts which would "constitute the basis for discipline" under the Oversight

Act. *Id.* Those convicted of a Class X felony or higher, or of a felony involving fraud or dishonesty, in the last ten years are also ineligible for licensure. An applicant must provide the Department of Financial and Professional Regulation ("Department") with a complete statement of assets and liabilities, as many of the problems that the Oversight Act seeks to address may stem from financial problems faced by the cemetery authority. Applicants must complete one of several certification programs, each of which focuses on a code of professional conduct and ethics put forth in this legislation.

Unfortunately, the Oversight Act adds to the cost of doing business in the funeral industry in several ways. First, fees must be paid in conjunction with attending the requisite classes and applying for licensure. Also, sale of cemetery assets, including undeveloped land, cannot be complete until the Department issues a license to the purchasing party. 225 ILL. COMP. STAT. 411/20 (2010). More significantly, the Oversight Act requires cemetery authorities to maintain impeccable records through a state database, including up-to-date information on the location of all plots on the property, an index of those interred, and personal information of those interred. Cemetery authorities typically have ten days to update the aforementioned information, and must make these records available for public inspection. Owners are also required to carry insurance coverage for problems like those encountered at Burr Oak, an expensive requirement due to the scarcity of insurance policies covering grave robbery. Zachary Colman, *Illinois Lawmakers Consider*

ELECTRONIC NEWSLETTERS

In keeping with our firm's Green Initiative – *Practicing Green* – we are attempting to support the green effort. As a part of this endeavor, we are making our newsletter available electronically. If you would like to receive our newsletter via e-mail, please send your request to newsletters@heyloyster.com.

Softening Cemetery Law, SJ-R.COM (Apr. 23, 2011), <http://www.sj-r.com/breaking/x1536001823/Illinois-lawmakers-consider-softening-cemetery-law>.

If a dispute arises between a cemetery authority and a customer, and the two parties are not able to resolve the dispute, the cemetery authority has an affirmative duty to inform the customer of their right to have the Department conduct an investigation and mediation. 225 ILL. COMP. STAT. 411/25 (2010). The Department may then revoke, suspend, or place on probation the cemetery authority's license, or may reprimand or fine the cemetery authority depending on the outcome of the Department's investigation.

With costs rising in the funeral industry, more local governments may be called upon to step in and "rehabilitate, recondition and restore any neglected or abandoned" cemeteries, and then provide for their maintenance pursuant to the Cemetery Maintenance District Act ("Maintenance District Act"). 70 ILL. COMP. STAT. 105/8 (2010). According to the Maintenance District Act, any area wholly within the boundaries of a single county may be incorporated as a Maintenance District if fifty or more voter-residents petition to propose the arrangement to voters in the proposed Maintenance District, and a majority of voters support the incorporation. 70 ILL. COMP. STAT. 105/1 (2010). A Maintenance District is to be governed by a three-member Board of Trustees, with each member serving three year terms. These Trustees are to be appointed by the representatives of the smallest governmental unit within which the Maintenance District is located. 70 ILL. COMP. STAT. 105/3 (2010). For example, if the Maintenance District is located wholly within a township, the board of trustees for that township are to appoint the Trustees for the Maintenance District, provided that none of the Maintenance District Trustees also serve as township trustees.

"Trustees shall exercise all of the powers and control all the affairs of such district." 70 ILL. COMP. STAT. 105/5 (2010). In order to do so, Trustees may "pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of the cemetery maintenance district for carrying into effect the objects for which the district was formed." *Id.* Trustees may also incur up to \$50,000 of total indebtedness in order to

acquire land for grave sites. Maintenance Districts may also levy limited taxes in order to finance the purposes of the Maintenance District Act.

The scandal surrounding Burr Oak Cemetery demonstrated that consumer protection issues dealing with a final resting place are emotionally charged. That is why it is vital that local officials understand not only the problems facing cemeteries today, but also the solutions available when those problems arise. By making sure those affected know their rights under Illinois law, and by stepping in where necessary, it is possible to assist constituents as they navigate trying times.



Brett Mares concentrates his practice in the areas of tort litigation and governmental affairs. His main focus is on toxic torts and product liability. In addition, he assists in the preparation and development of defenses to personal injury

lawsuits, drafting motions and supporting briefs. Brett also defends clients' interests at depositions of plaintiffs and their co-workers.

AMENDMENT TO PREVAILING WAGE ACT PROVIDES RELIEF TO GOVERNMENT BODIES WITH RESPECT TO NOTIFICATION REQUIREMENTS

By **Timothy L. Bertschy**
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One of the troubling aspects of the Prevailing Wage Act has been its requirement that the contracting governmental body is responsible to notify the contractor and each subcontractor of prevailing wage rates when revised during the term of the contract (805 ILCS 130/4(d)). Read literally, this requires the contracting governmental body to monitor changes in the Department of Labor website for wage rates on a monthly basis and to notify contractors of those changes. Failure to do so would result in potential civil or criminal penalties.

For several years, it has been suggested that the contractor and subcontractor, rather than the governmental body, should be put at this risk, or that at least the governmental body should be able to escape its responsibilities by pointing the contractor and subcontractor to the Department of Labor's website.

Public Act 97-0964 now provides relief to the public body. In relevant part, the Public Act states:

"The public body or entity shall discharge its duty to notify of the revised rates by inserting a written stipulation in all contracts or other written instruments that state the prevailing rate of wages are revised by the Department of Labor and are available on the Department's official website. This shall be deemed to be proper notification of any rate changes under this subsection."

Since the language of the Public Act is mandatory, we are recommending to clients that all contracts which involve the prevailing wage must state that the prevailing rate of wages are revised by the Department of Labor and are available on the Department's official website. In those situations where there is not a written contract, we strongly suggest that governmental bodies include this language with their Section 4(a-2) notice (requiring notice absent bidder contract).

We are happy to assist our clients with respect to appropriate language for contract or Section 4(a-2) notice.

The effective date of this statutory amendment is January 1, 2013.

NEW STATUTE REQUIRES GOVERNMENTAL BODIES TO PUBLICLY DISCLOSE TERMS OF ECONOMIC DEVELOPMENT/REBATE AGREEMENTS

By Timothy L. Bertschy

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It is not unexpected that tax payers will attempt to limit the amount of taxes they pay. However, one tax avoidance practice of recent years has come under significant scrutiny with the end result being a change in statute.

The practice in question involves a retailer which is physically located in a higher tax jurisdiction establishing a "sales office" in a lower tax jurisdiction. The retailer then arranges for "sales acceptance" to occur at the "sales office." This is purportedly accomplished by customers being directed to place their sales through the outlying "sales office." The retailer then asserts that the situs for taxation is the lower tax jurisdiction, thereby saving the tax rate differential on the sale.

One variation of this procedure is for a third party to set up the arrangement with the retailer and for the third party to establish and operate the "sales office" in the lower tax jurisdiction.

It is not unusual for this arrangement to be accompanied by an economic development/rebate agreement whereby the lower tax jurisdiction (which is itself now receiving the local portion of the sales tax) agrees to rebate to the retailer or third party a significant portion of the sales tax newly obtained by the lower tax jurisdiction. In the case of a third party arrangement, the third party may then share a portion of the rebate with the retailer.

The validity of this arrangement has been called into question in a number of suits in Illinois.

While one court has deemed one such arrangement legal based on very specific legal facts, that case is pres-

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ently on appeal. Other cases have been filed challenging this arrangement.

One of the many issues arising out of this sales tax practice is whether information relating to these economic development/rebate agreements is exempt from disclosure under the Freedom of Information Act. This position has been taken by a number of communities which have such agreements involved in litigation.

To address this question, the legislature passed PA 97-0976 this past year. It modifies the Freedom of Information Act, the Counties Code, and the Illinois Municipal Code. The statutory changes require that a city or county which enters into an agreement to share or rebate any portion of the retailer's occupation taxes must complete and submit a report by electronic filing to the Department of Revenue within 30 days after execution of the agreement. For agreements prior to the effective date (1/1/13), the reports are to be submitted within 90 days after the effective date of the statute.

The report is to contain the following information: the names of the county or city and business entering into the agreement; the locations of the business within the city or county; whether or not the company maintains additional places of business in the state and where; the terms of the agreement, including the manner in which the retailer's occupation tax is to be shared, rebated or refunded; the duration of the agreement; the name of any business which is not a party to the agreement but which directly or indirectly receives a portion of the rebate; and a copy of the agreement to share rebate a portion of the sales tax. Any amendment to the agreement is to be filed within 30 days after the execution of the amendment.

The actual sales figures, including the amount of sales tax collected and the amount of sales tax rebated, are to be redacted from public disclosure and are exempt from the provisions of the

Freedom of Information Act. Otherwise, the information is subject to FOIA.

All such reports required to be filed with the Department of Revenue are to be posted on the

Department's website within 6 months after the effective date of the Act. The website is to be updated on a monthly basis to include newly received reports.

This statutory change, in addition to other statutory changes from the past year, will be the topic of a discussion in an upcoming HRVA seminar. If you have questions about this statute, or any legal matter, please don't hesitate to contact us.

Help Decide Future Topics

Dear Friends:

As you know, we continue to monitor the landscape for legal issues and concerns that are likely to impact governmental units of all size. Once we've identified those issues and concerns, we work hard to ensure that you, your colleagues, and your unit of government are made aware of the information, how that information may affect you and your unit of government, and when it may be necessary to bring in professional legal assistance.

We value our clients and the feedback they provide us. If there is any general issue or concern that you recently stumbled across or have had your eye on for a while that you would like to learn more about, please let us know. If you have a list of general issues and concerns, please feel free to pass them along to any of our Government Law attorneys at the e-mail addresses below. We will take a look at your e-mail, along with all of the others that we receive, and determine whether there is a consensus of issues/concerns that we can address in an article in our future newsletters and/or during our future seminars.

Thank you in advance for your thoughts.

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The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted.

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