

Clash of the States: Illinois & Indiana Wages & Benefits

In a new column, two members of our Workers' Compensation team compare how Illinois & Indiana handle major workers' compensation issues. This month, associates [Daniel Flores](#) & [Jennifer Meyer](#) square off on **wages & benefits**.



ILLINOIS

1. Petitioner's average weekly wage (AWW) represents their average earnings in the 52 weeks preceding a work accident
2. Holiday pay and vacation pay are included in the AWW calculation
3. Overtime **is not included** in the AWW unless it was consistent **and** mandatory
4. If Petitioner is concurrently employed and their employer is aware of their other job before the injury, those wages are also included in the AWW
5. When Petitioner is temporary totally disabled, they are entitled to 66 2/3rds of AWW during their period of disability
6. When Petitioner has permanent partial disability (PPD) due to their injury, they are entitled to 60% of their AWW for a period statutorily determined by the Illinois PPD Benefits Schedule



INDIANA

1. Claimant's AWW is calculated on the immediate 52-week period before the injury occurred
2. Overtime, bonuses, holiday pay and paid vacation days are included when calculating claimant's AWW
3. Temporary Total Disability (TTD) is calculated as 66 and 2/3rds of the claimant's gross (pre-tax) AWW. TTD benefits can last up to 500 weeks
4. Temporary Partial Disability (TPD) benefits cover the difference between pre- and post-injury wages up to maximum for TTD and may last up to 300 weeks
5. Claimant cannot receive concurrent benefits such as Social Security Disability (SSD) or unemployment benefits as well as Indiana Workers' Compensation benefits. SSD benefits may be "offset" by any work comp benefits received, meaning claimant may only receive partial disability benefits from other sources
6. When claimant has PPD due to their compensable injury, they must be assessed a permanent partial impairment (PPI) rating under Indiana Act and a specific benefit amount corresponds with that PPI rating according to the benefit schedule

Workers' Compensation Law Does Not Bar Biometric Privacy Claims

By [Marcy E. Bennett](#)

Income Member



In *McDonald v. Symphony Bronzeville, Park, LLC* (2022 IL 126511), the Supreme Court of The State of Illinois found that the exclusivity provisions of the Illinois Workers' Compensation Act (Act) did not bar Plaintiff from bringing suit against an employer under the Biometric Information Privacy Act (BIPA).

Plaintiff filed a putative class action alleging that her employer collected and maintained her fingerprint scan improperly and that her employer's actions were in violation of the BIPA. Plaintiff claimed that she should be able to file suit against her employer outside of the Act. Employer argued that Plaintiff's injury arose out of and in the course of her employment and that her recovery was limited to remedies under the Act.

The BIPA governs the collection, retention, use, disclosure and destruction of biometric data by employers including retina/iris scan, fingerprints, voice prints, or scans of the hand or face. It is well established that the Act provides an exclusive remedy for injuries arising out of and in the course of employment in Illinois. The court here differentiated under the Act and under the BIPA and allowed Plaintiff to proceed with her case against her employer.

The court noted that the overall purpose of the Act is to give physically or mentally injured workers the proper financial support to return to the workforce. In this matter, Plaintiff's "injury" was based on a violation under the BIPA, not a claim of mental or physical injury. The court determined Plaintiff's claim was not covered under the Act and thus the exclusive remedy provision did not apply.

Practice Tip:

The collection and storage of personal information (biometrics) is a highly sensitive process. You should consider the risks and rewards of biometric uses before incorporating it into your employee handbook.

Holiday Party Accident Not Compensable

By [Rich Lenkov](#)

Capital Member



In *Parts v. Hyvee*, 29 ILWCLB 180 (Ill. WC Comm. 2021), Petitioner sustained a knee injury when he slipped on a floor drain indentation while playing a game at Respondent's holiday party. The accident at Respondent's holiday party did not arise out of and in the course of Petitioner's employment.

Section 11 of the IL Workers' Compensation Act states:

- Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof
- This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program

Petitioner testified that he felt pressured by his supervisor to attend the party and feared he'd be scheduled to work fewer hours if he failed to attend. Respondent established:

1. Attendance at the holiday party was voluntary;
2. Petitioner did not attend the prior holiday party and was not subject to any adverse actions;
3. All employees received a gift or prize regardless of whether they attended the party;
4. Employees were not paid to attend the party.

The Arbitrator held that Petitioner's attendance was voluntary and that his accident failed to arise out of and in the course of his employment. All compensation was denied.

Practice Tip:

Exhaust your investigation when defending a case involving company parties and social events. Confirm whether attendance is mandatory and if there are any ramifications for not attending. Present testimony that establishes the basis for enforcement of Section 11.

Personal Coworker Altercation Does Not Arise Out of Employment

By [Natalie Christian](#)

Associate



In *Miller v. Illinois, State of/Dept. of Transportation*, 29 ILWCLB 178 (Ill. W.C. Comm. 2021), the Commission held that Petitioner's injuries sustained when a coworker attempted to get Petitioner out of a chair at work did not arise out of his employment.

Petitioner worked as an engineering technician in the bridge department. He and a coworker were working outside of the office and stopped at a field office to use a restroom. He had previously visited this office and had been assigned to the office for a few months. Petitioner testified that after using the restroom, he sat at a desk that he normally uses when assigned to that field office. A few coworkers were gathered and talking, and Petitioner joined the conversation. He was sitting at the desk with a few others, waiting for their shift to end. Another coworker arrived and demanded that Petitioner get out of his chair. Petitioner refused. After a third request, the coworker grabbed the arm of the wheeled chair and pushed Petitioner out. Petitioner stood up and sat in a different chair. He developed back symptoms later in the day. The Arbitrator awarded benefits, finding that Petitioner's injuries arose from a dispute over a work chair.

The Commission reversed and found that Petitioner's injuries were the result of a purely personal confrontation. Petitioner admittedly was not performing any work duties, but rather, was running out the clock on the last 20 minutes of his workday. The coworkers were doing the same—nothing regarding the altercation related to either the coworkers' or Petitioner's performance of work duties. There was no evidence that either person wanted or needed to sit in that specific chair or at that particular desk to complete their work. Petitioner failed to prove that the altercation arose out of his employment.

Practice Tip:

Always obtain witness statements to establish the circumstances and context of an employee altercation.

Firm News

Kirsten K. Kus & Michael Milstein Named Capital Members

We are thrilled to announce the elevation of [Kirsten Kaiser Kus](#) and [Michael Milstein](#) to Capital Members.

Both Kirsten and Michael have played an integral part in growing the firm and have exemplified the highest standards of professionalism, dedication, quality work and integrity. They are joining Jeanne Hoffmann, Storrs Downey and Rich Lenkov, who have proudly led the firm together for over 20 years.



Kirsten concentrates her practice in workers' compensation and general liability defense, representing a wide variety of employers and corporations across Indiana. She frequently lends her expertise and lectures on unique claim handling techniques for the Workers' Compensation Defense Institute and Claims and Litigation Management

Alliance, among other leading organizations. Outside of work, Kirsten enjoys traveling, hiking with her family and dogs, attending concerts and cheering on her beloved Green Bay Packers.



Michael concentrates his practice in workers' compensation defense, seamlessly guiding clients through all phases of complex litigation matters from inception to trial. He has been a valuable resource, actively providing clients Illinois legislative update alerts throughout the pandemic. Outside of work, Michael enjoys playing with his children, rooting on the

Cubs, Bulls, Bears, Blackhawks, and Illini sports teams, and taking an active role in his community.

Please join us in congratulating Kirsten and Michael.

[Read the full press release.](#)

Bryce Downey & Lenkov Attorneys Selected to Super Lawyers & Leading Lawyers

Eleven attorneys at Bryce Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their field across both Illinois and Indiana. Nine attorneys have also been selected to Leading Lawyers' 2022 rankings.

Super Lawyers recognizes attorneys who exhibit excellence in their practice based on professional achievement and peer recognition. Leading Lawyers provides rankings of the most respected and experienced attorneys nationwide. No more than 5% of all attorneys in each state are selected for either distinction.

[Rich Lenkov](#), [Michael Milstein](#), [Margery Newman](#), [Brian Rosenblatt](#) and [Samuel Levine](#) have been selected to both exclusive lists. Please join us in congratulating our selected attorneys!

[Read the full press release here.](#)

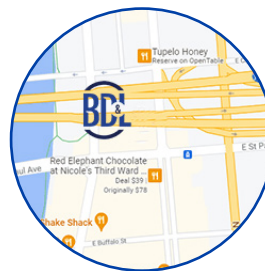


Bryce Downey & Lenkov Launches Milwaukee and Indianapolis Office

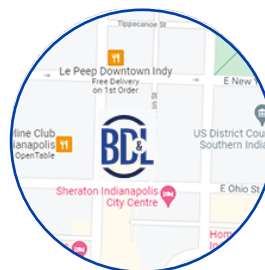
We are thrilled to announce the opening of two new offices located in Milwaukee, Wisconsin and Indianapolis, Indiana.

We look forward to expanding our services and are fully committed to assisting clients, from small businesses to Fortune 500 companies, in the Wisconsin and Indiana community through all phases of complex litigation matters and developing their businesses further.

Our firm has experienced remarkable growth in recent years and we'd like to take the time to thank you for your continued support. We are eager to provide Wisconsin with the same exceptional service as our Illinois and Indiana clients.



**342 North Water Street
Suite 600
Milwaukee, Wisconsin 53202**



**201 North Illinois Street
16th Floor, South Tower
Indianapolis, Indiana 46204**

Rich Lenkov Joins WGN Radio's John Williams

Capital member [Rich Lenkov](#) joined WGN Radio's The John Williams Show on 3/7 to discuss stories of the week: the arrest of WNBA Star Brittney Griner, the Boston marathon bomber's death sentence and the latest on Bill Cosby's sexual assault conviction.



Black Women And The Law

Capital member [Rich Lenkov](#) will moderate "Black Women and the Law," a live roundtable discussion brought to you by [WGN Radio's Legal Face-Off podcast](#). The special event will be held at FAME on March 22 and sponsored by Black Women Lawyers' Association of Greater Chicago, Inc. and Northern Illinois University College of Law.

The incredible all-star panel of legal professionals will hold a candid discussion on the unique challenges facing underrepresented women of color, the significance of the Supreme Court nomination of Judge Ketanji Brown Jackson, personal experiences within corporate America and more.

Limited in-person audience seating available.

[RSVP to secure your spot today!](#)

WGN RADIO'S LEGAL FACE-OFF PRESENTS

LIVE BLACK WOMEN AND THE LAW

TUE. MARCH 22 | 5-6:30PM CST
FAME | 157 W ONTARIO, CHICAGO IL 60654

CASSANDRA L. HILL
Dean of NIU College of Law

HON. SHARON J. COLEMAN
Judge of the U.S. District Court

NAKHIA C. CROSSLEY
President of Black Women Lawyers' Association of Greater Chicago, Inc.

TOI W. HUTCHINSON
President & CEO of Marijuana Policy Project

KORI S. CAREW
Chief Inclusion & Diversity Officer of Seyfarth Shaw LLP

LEGAL FACE-OFF

Moderated by Rich Lenkov & Tina Martini

Sponsors:

LIMITED IN-PERSON AUDIENCE | RSVP TO: RSVP@BDFIRM.COM

New Sports & Entertainment Risk Management Organization

Capital member [Rich Lenkov](#) is proud to announce the launch of the [Sports and Entertainment Risk Management Alliance \(SERMA\)](#), the first-ever association devoted entirely to the sports and entertainment risk, claims and legal community. SERMA brings together the best and brightest in their fields to share best practices, common solutions and industry trends. We will explore issues like criminal events at sporting events and concerts, premises liability at large venues, sexual abuse allegations, Name Image and License agreements, cyber risks, intellectual property issues, business interruption coverage and professional athlete and performer injuries.

We are fortunate to have assembled an Advisory Board that is made up of some of our industries' most dynamic and engaging leaders, view Advisory Board [here](#).

SERMA will be the premier networking organization of its kind. Through webinars, our blog and in-person events, we will provide an informative, enriching and entertaining environment where industry colleagues learn from each other and socialize.



Why SERMA? While there are a number of excellent organizations with a wide range of services in our community, there isn't one specifically dealing with the issues that we face in handling sports and entertainment claims and risk management. SERMA will fill that void by providing compelling and interesting programming in an exciting and interactive environment. – Founder & CEO Rich Lenkov

[Learn more about SERMA and join today.](#)



BDL Is Growing

Please join us in welcoming [Marcy Bennett](#), [Ryan Danahey](#), [Michael Taden](#), [Kristin Lechowicz](#) and [Kristy Sigler](#) to the firm's Chicago office, as well as [Jennifer Meyer](#) and [Abigail Illovici](#) to our Indianapolis and Crown Point offices.



Marcy concentrates in workers' compensation defense. She provides an aggressive and thorough approach to each claim, working closely with insurance companies, third-party administrators and employers alike to achieve positive results in the most cost-efficient manner.



Ryan handles a broad spectrum of defense litigation, including general & professional liability, insurance coverage and labor & employment. He successfully represents various corporations and entrepreneurial clients throughout Illinois and Wisconsin. He previously served as in-house counsel for two major national corporations.



Kristy specializes in general defense litigation matters involving personal injury, medical malpractice, employment and contract disputes. With over 20 years of trial experience, she is especially noted for her due diligence and close collaboration with clients from pre-litigation through verdict to manage risk and obtain positive results.



Michael joins the firm with over 40 years of experience in workers' compensation litigation defense. He has extensive knowledge on claims pertaining to permanent total disability, temporary partial disability, wage differential benefits, utilization review and penalty avoidance.



Kristen joins our workers' compensation and general liability practice teams. She has considerable experience litigating cases on behalf of both parties, giving her a unique advantage when counseling, evaluating and developing practical and effective defense strategies.



Jennifer concentrates in workers' compensation defense representing employers, insurance companies and third-party administrators throughout Indiana. She has extensive experience working with hospitals and physician groups in civil litigation, contract review, subrogation and privacy & security compliance matters.



Abigail focuses on general liability and workers' compensation defense and effectively handles all aspects of litigation before the Indiana Workers' Compensation Board, as well as both jury and bench trials. She previously served as an Associate Editor for the Valparaiso Law Review.

BDL Webinars

Illinois Workers' Compensation Forms You Need To Know

3/29/22

[Michael Milstein](#) & [Natalie Christian](#)



[REGISTER NOW!](#)

Watch our latest webinar:

[Indiana Forms: Taking A Claim From Start To Finish](#)



[Click
to
View](#)

Legal Face-Off

Legal Face-Off is a fast paced, high energy legal podcast dealing with the hottest issues of the day. Rich Lenkov and Christina Martini provide a point/counterpoint perspective on a variety of breaking legal news topics.



"It's [a decision] of judgement, because you can investigate these cases to death. They could investigate the threads of this for another 5 years. Clearly, the Commonwealth Edison scheme could've been indicted 2 years ago because they indicted Commonwealth Edison and they could've indicted Madigan in that. But they wanted to get the other pieces of this puzzle squared away first. They felt that they had enough of those done so they can move forward and pull the trigger."

– Ronald Safer on Michael Madigan's federal indictment
Former U.S. Attorney's Office's Chief of the Criminal Division

[Listen to the full episode here](#)

Want to be a guest on a future episode? [Contact us.](#)

Recent Topics

- SCOTUS appointments
- Brian Flores NFL lawsuit
- Ottawa protests
- Oxford school shooting
- Ahmaud Arbery case
- 'Rust' shooting lawsuit

Recent Guests

- Elie Honig
- Whitney Reynolds
- Amanda Vinicky
- Lisa Bloom
- Alicia Jessop
- Adam Skaggs

[Sandy Hook settlement panel, Williams on Canadian protests, Honig on new documentary, and much more](#)

[McGrath and Melaku on Justice Breyer's retirement, Jessop on Flores' NFL lawsuit, Pryor on Jason Van Dyke's prison release, and much more](#)

[SCOTUS panel, Merritt on Arbery verdict, Dr. Littrice on Van Dyke release, and much more](#)

[Bloom on Ghislaine Maxwell and Prince Andrew, Olson on Chicago Crime, Vinicky on 2022 Illinois Laws, and much more](#)

[Alexander on Potter, Bernick on the Crumbleys, Fisher on Astroworld lawsuit and much more](#)



Legal Face-Off's Legal Grab Bag

CONNECT WITH US

Please Like Us on **Facebook**, **Twitter**, **Instagram** and **Subscribe on Apple Podcasts**. Send us your questions and we will answer them on air — **nothing is off-limits**.