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Navigating Freedom of Expression in a Time of Social Unrest

September 25th, 2020

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Navigating Free Expression in a Time of Social Unrest

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September 11, 2020

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What Else
Could Possibly
Happen in
2020?

Don't Ask...

A Turbulent Time

- The Pandemic
- The Return to School Debate
- Equity issues
- The 2020 election

Forms of Speech

- Social media posts
- Classroom (virtual and in person) commentary and Displays
- Shirts and Masks
- School Grounds

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

FOX 32
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'Let us play!': Illinois high school athletes rally for fall sports in Chicago

Parents and players protested Saturday, September 19, outside a state building in Chicago, pleading with Gov. J.B. Pritzker to lift his fall ban on some popular high school sports.

- In response to the coronavirus, Pritzker won't allow games in football, hockey, lacrosse, rugby, wrestling, competitive cheer and dance.
- The Illinois High School Association moved football and a few other sports to spring, although the group might be having second thoughts after seeing other states play fall sports.

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ARLINGTON HEIGHTS POST

Shared by: **Chicago Tribune**

DID YOU SEE THIS? The Arlington Heights Post SAYS:

ARLINGTON HEIGHTS
SUBURBS

Arlington Heights families call for return to classrooms and parental choice in District 25: 'This is not learning'

- Families of students enrolled in Arlington Heights SD 25 became one of the latest Thursday, September 17 to hold a rally and call for a return to in-person instruction.
- Many parents and children who participated said they want choices and demanded that classrooms be opened immediately for onsite learning.
 - While some of the parents filed into the administrative building to attend the meeting, most were there only to protest.
- A proposal for a hybrid combination of remote learning and in-building instruction is being studied by the district, officials said.

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Making Headlines... FOX Illinois reports:

Athens community reacts to a controversial school assignment

- The reaction to the controversial survey for a school assignment is sending ripples through the community.
- Students had to submit the survey to the teacher and then surveys went out to classmates. One student chose to do a BLM survey that asked sensitive questions.
- Most people sided with the frustration of parents who saw their child's school assignment; some people saying this should not be addressed at school.
- Comments like "this is awful" and "opinions on this matter shouldn't be surveyed in schools" flooded the post. However, not all opinions are the same.
- The AHS principal and the school district's superintendent are investigating and looking into this situation.

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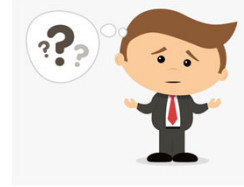
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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What the H*** Does That Mean?



- The First Amendment protects speech and expression from governmental interference.
- However, not all speech is protected.

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Overview of Free Speech Basic Principles

- What is First Amendment Protected Expression?
- Why is there Expression that is Not Protected?
- Can Protected Expression and Speech be Regulated by the District?
- Employee Expression and Speech Rights
- Can Districts Regulate Employee Speech?
- Social Media "Speech"
- Tips and Best Practices

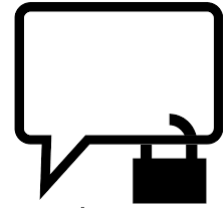
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Protected Speech & Expression

General Principles

- Public School districts may not regulate speech, expression, or assembly based on the content of the speech
- Public School districts can place reasonable time, place, and manner restrictions on speech, expression, and assembly



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Protected Expression

- Expressive activity on a variety of subjects is protected, including current events and critique of the District
- The First Amendment allows speech that many may find extreme and hateful.

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Speech & Expression Not Protected by the First Amendment



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Speech & Expression Not Afforded First Amendment Protection

- Courts have interpreted the First Amendment as not protecting the following speech or expression:
 - Obscenity
 - **Fighting Words**
 - Child Pornography
 - Defamation
 - Perjury/Blackmail/Fraud
 - **True Threats**
 - **Incitement to imminent lawless action**
 - Solicitations to commit crimes

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Speech & Expression Not Afforded First Amendment Protection

- True Threats:
 - Communication of a serious expression of intent to commit an act of unlawful violence against a particular individual or group of individuals.
- Incitement:
 - Speech that is intended to provoke imminent lawless action and be likely to cause such action.
- Fighting Words:
 - Generally refers to direct, face-to-face personal insults that would likely lead the recipient to respond with violence

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Regulation of Protected Speech and Expression: "Forum Analysis"



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Regulation of Protected Speech and Expression: "Forum Analysis"

- Limiting speech is dependent on what forum has been created by the use of school property.
- Forum is not just physical space, but also internet and social media platforms.

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Regulation of Protected Speech and Expression: "Forum Analysis"

- Generally, courts look to:
 - The property's traditional use;
 - The physical characteristics and location;
 - Actual uses made and purposes of the space or communications; and
 - The government's intent and policy regarding use of the space in question.

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Supreme Court's "Forum Analysis"

Least
Restricted
Forum

- **Traditional & Designated Public Forums**
- Traditionally open to public speech (i.e. streets, parks); Somewhere government has opened to the public by policy or practice
- Restrictions must pass "Strict Scrutiny" analysis

• **Limited Public Forums**

- Not a public forum by tradition or designation
- May restrict communication to exclude anything beyond property's intended purpose

Most
Restricted
Forum

- **Non-Public Forums**
- Not open for expressive activity by tradition or designation

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Supreme Court's "Forum Analysis"

- Facilities' use policies are often determinative of whether the forum is open or closed.



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School Employees' First Amendment Speech Rights



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District Employees' First Amendment Speech Rights

- Public employee speech is subject to First Amendment protection.
- "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
 - *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503 (1969).

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Speech Rights are Limited



- The level of First Amendment protection for public employee speech will depend on whether the employee is speaking:
 - Pursuant to their official duties; or
 - As a private citizen on a matter of public concern.

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Employee Speech: Classroom Scenario

- Some of the teachers in the District incorporate a lesson on racial inequities into their social studies curriculum.
- This year, the teachers have decided to include a classroom discussion on the recent BLM protests and subsequent rioting and looting on Michigan Avenue.
- One teacher tells her students, "I don't condone doing anything illegal, but I would be lying if I said I had never attended a BLM protest. Lots of your teachers have! You should participate too."

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Employee Speech: Classroom Scenario

"I don't condone doing anything illegal, but I would be lying if I said I had never attended a BLM protest. Lots of your teachers have! You should participate too.."

- Can the District prohibit the teacher from making such expressions? Why or why not?

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Employee Speech: Analysis

- What if the teacher in this scenario made these comments outside of the classroom but on school grounds during a staff and student impromptu rally?
 - What if the teacher makes these comments on a Saturday at a community march and rally in the local park?
 - What if the teacher posts the comments on a District sponsored intranet "safe space" made available to all staff and students.

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Employee Speech: Analysis

- If the employee is commenting in their capacity as an employee for the District, then the communication is unlikely to be protected under the First Amendment.

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Employee Speech: Analysis

- If the employee is speaking as a private citizen on a matter of public concern, use the *Pickering* balancing test.

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The *Pickering* Balancing Test

For the *Pickering* test to apply:

- 1 The employee must be addressing a matter of public concern;
- 2 The speech cannot interfere with the employee's job duties; and
- 3 The employee must be speaking as a private citizen.

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The *Pickering* Balancing Test

- Courts balance:
- The employee's interest as a citizen speaking on matters of public concern
- The government employer's interest in providing the particular public service efficiently.



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The *Pickering* Balancing Test

- If the government employer's interest outweighs the employee's interest, then the speech can be regulated or addressed by the employer.



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The *Pickering* Balancing Test

- Certain employee speech is not First Amendment protected, i.e.:
 - Comments disruptive to work environment;
 - Speech which diminishes the teacher's effectiveness in the classroom;
 - An employee's public airing of his or her own private dispute with her public employer

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Petition Scenario

- A petition begins circulating in the community, demanding that an administrator resign because he has allegedly made racist comments.
- The petition is circulated by two teachers, Alex Smith and Adam Jones.

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Petition Scenario

In circulating the petition, Alex Smith comments :
"I work here & hate him.
He wrote me up for no reason!
He should be fired!"

Adam Jones:
has complained of prior discrimination by the administrator.

- Can the District discipline the teachers for circulating the petition?
- Can the District discipline Smith for his comment?

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Regulation of Student Speech



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Regulation of Student Speech

- While Districts can regulate certain student speech, the threshold for demonstrating that speech falls outside constitutional protection and/or is likely to cause a substantial and material disruption is high.
- *Remember the Supreme Court decision in Tinker v. Des Moines School District*

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Regulation of Student Speech



- In general, courts will uphold a prohibition of a student's speech activity only if the school or district can show that the speech:
 - (a) caused (or would cause) a substantial and material disruption to the work and discipline of the school, and/or
 - (b) falls under another category of speech that is unprotected by the First Amendment.

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Regulation of Student Speech

- Educational authorities are **not** required to wait for harm or material disruption to occur before taking appropriate action.
- However, "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or "an urgent wish to avoid the controversy which might result from the expression" are not sufficient to justify banning student speech."

• See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 509–10 (1969).

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Regulation of Student Speech: Best Practices

- Develop a factual record that clearly demonstrates why it was reasonable to forecast a material disruption.
- Courts are less likely to second guess school- or district-imposed restrictions on the expressive activity where there is a factual record
- Judicial deference is even more likely if the record also shows that censorship was not the first resort.

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Regulation of Student Speech: Scenario

- In the wake of recent protests of the shooting of Jacob Blake, a high school student uses their school-provided email to post the following message on a public forum:

“Looking 4 fire stik – gunna go 2 protest, gotta b prepared.”

From:
student@district.com

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Regulation of Student Speech: Scenario

- What, if anything, can the District do about the student's post?

"Looking 4 fire stik – gunna go 2 protest, gotta b prepared."

From:
student@district.com



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Regulation of Student Speech/ Expressive Activity: Crossing the Line

- When does speech or a demonstration on campus cross the line and require intervention from the staff or administrators?
 - Disruptive conduct
 - Safety concerns
 - Known threats
- Focus on the conduct, not the message



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Regulation of Student Speech/ Expressive Activity

- If the expressive activity at issue is not constitutionally protected, a District may disallow the speech and, if necessary or appropriate, discipline the speaker(s) consistent with the provisions of the District's Board policies.

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Student & Employee Social Media Use



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Employee Speech on Social Media

- The District may be able to address an employee's inappropriate social media if:
 - It is disruptive to the school or District's operations;
 - It compromises student privacy rights;
 - It violates their acceptable use policy; or
 - It otherwise adversely affects the academic or work environment.

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Employee Speech on Social Media

- If there is a nexus between the social media activity and the District, they may have the authority to address even off-campus activity
- The District's policies or lack thereof will be an important factor in addressing employees' social media posts and activity.

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Employee Speech on Social Media



- Evidence of nexus may include:
 - Student, employees, and community complaints about the social media that places the District in a bad light and/or impacts the educational environment;
 - The employee's inability to perform assigned duties due to the impact of the offensive posting; and
 - Disruption to the District's operations.

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Employee Speech on Social Media

- Additional key considerations:
 - Does the social media activity identify the employee as a District employee?
 - Can the speech at issue cause confusion as to whether the employee is representing the District's viewpoint or their own personal viewpoint?

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Employee Use of Social Media: Scenarios

Custodian
Rachel

Posts a photo of herself at an Anti-Semitism rally, wearing her school t-shirt.

Rachel does not come into contact with students often, as her shift starts in the evening.

Receptionist
Jim

Shares a post from a white supremacist Facebook group, adds the caption, "We're being overrun!"

Jim works in the Nurse's Office. He regularly works with a diverse range of students.

- Both posts were created off-duty, on the employees' personal devices
- Can the District address either post?

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Tips & Best Practices



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Social Media: Privacy Considerations

- An employer may not request, require, or coerce an employee/applicant to:
 - Provide a username, password or other related account information.
 - Authenticate or access a personal online account in the presence of the employer.
 - Invite the employer to join a group affiliated with any personal online account of the employee or applicant.
 - Join an online account established by the employer, or add the employer to the employee's or applicant's list of contacts.

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Social Media: Privacy Considerations

- An employer may:
 - Maintain a lawful workplace policy governing the use of the employer's electronic equipment.
 - Monitor usage of the employer's electronic equipment and the employer's electronic mail.
 - Obtain information about a prospective employee or current employee that is in the public domain.
 - Request or require an employee or applicant to share specific content that has been reported to the employer.



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Tips & Best Practices: Social Media

- Make clear that employees have no expectation of privacy while using District equipment.
- Remind employees that their social media activity may be viewed by colleagues, students, and community members.
- Develop policies addressing employee social media use.

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Tips & Best Practices: Social Media Policy

Social Media Policies may include:

- Acknowledgement of employees' right to comment on matters of public concern
- Cautioning against certain speech
- A reminder that, if an employee chooses to share their personal views as a private citizen, the employee should be clear that they are not acting as a representative of the District.
- But must avoid overbreadth which has the effect of "chilling" employees' potential speech

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Questions?



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AWARDS

Illinois Super Lawyers, 2008-2020

RECENT PUBLICATIONS

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations*, IICLE (2017)

Contribution author, "Labor Relations: Contract Administration Including Unfair Labor Practices," *Illinois School Law: Personnel and Student Issues*, IICLE (2010, 2012, and 2015)

"Finding a New Way: Subcontracting Revisited," *UPDATE Magazine*, Illinois ASBO (2011)

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law – Transaction Practice*, IICLE (2010)

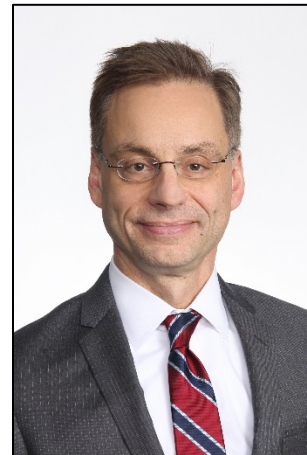
RECENT PRESENTATIONS

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

Court Cases and Other Legal Updates for the Higher Education Workplace, Illinois CUPA-HR Spring Conference (May 2019)

Legal Update, ICCCFQ Spring Conference (April 2019)

Bargaining Updates, 3%, and Q & A, Northwest Personnel Administrators (October 2018)



PRACTICE AREAS

Education Law
Employee Benefits
Labor & Employment
Litigation
Municipal Law
Student Discipline

EDUCATION

J.D., The Ohio State
University, The Mortiz
College of Law

M.A., The Ohio State
University

B.A., *with honors*, The
Ohio State University

ADMITTED TO PRACTICE

U.S. Court of Appeals for
the Seventh Circuit

U.S. District Court for the
Northern District of Illinois

U.S. District Court for the
Eastern District of
Wisconsin

U.S. District Court for the
Western District of
Wisconsin

Recent Amendments and Changes to State and Federal Employment Laws,
Illinois CUPA-HR Spring Conference (May 2018)

SURS Legislation Update, ICCCFD Spring Conference (April 2018)

Supreme Court of Illinois

Supreme Court of
Wisconsin

Superior Court for the
District of Columbia

ORGANIZATIONS

American Bar Association

Associated Colleges of
Illinois, Trustee

Council of School
Attorneys

Federal Bar Association

Illinois Association of
School Business Officials

Illinois Bar Association

National School Boards
Association

Wisconsin Bar Association

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Frank B. Garrett III represents school districts, community colleges, local governmental bodies and public and private companies in all aspects of employment law, including complaints and charges of unlawful discrimination, wrongful termination, sexual harassment, civil rights violations, employee discipline and termination. Frank also counsels and provides training to employers in the following areas: ADA and FMLA compliance, avoiding claims of unlawful discrimination and harassment in the workplace: evaluation and discipline of employees, and diversity in the workplace.

Frank represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. He is an active member of the American Bar Association and Illinois Council of School Attorneys.

AWARDS

Illinois Leading Lawyer, Government and Regulatory-Related
Illinois Leading Lawyer, Employment and School Law
Illinois Super Lawyers

RECENT PUBLICATIONS

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit,"
Chicago Daily Law Bulletin (2017)

"First Amendment Protections Get Broader for Government Employees,"
Chicago Daily Law Bulletin (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims,"
Chicago Daily Law Bulletin (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision,"
Chicago Daily Law Bulletin (2015)



PRACTICE AREAS

Education Law
Labor & Employment
Litigation

EDUCATION

J.D., DePaul University
College of Law

B.A., Oberlin College

ADMITTED TO PRACTICE

Supreme Court of the
United States

U.S. Court of Appeals for
the Seventh Circuit

Trial Bar of the U.S.
District Court for the
Northern District of Illinois

U.S. District Court for the
Northern District of Illinois

U.S. District Court for the
Central District of Illinois

U.S. District Court for the
Southern District of Illinois

Supreme Court of Illinois

"Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution," *Inquiry & Analysis*, National School Boards Association's Council of School Attorneys (2013)

Contributing author, "Employment Discrimination," *ILLINOIS SCHOOL LAW*, IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

RECENT PRESENTATIONS

Debunking Some Common Employee FMLA Leave Myths, IASPA Annual Conference (January 2020)

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes, Illinois GFOA Annual Conference (September 2019)

Navigating the Legal Liability Minefield in the Recruitment, Interview and Selection of Qualified Applicants, AASPA Personnel Administrator Boot Camp (June 2018)

The Ever-Changing Landscape Under Title IX, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)

Practical Guidance on Employee Misconduct Investigations and Discipline, Illinois Association of School Personnel Administrators, Tenth Annual State Conference (January 2017)

ORGANIZATIONS

American Bar Association,
Section on Labor and
Employment

Chicago Bar Association

Cook County Bar
Association

Illinois Council of School
Attorneys