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Legal Update

New Requirements for Illinois Employers: Criminal Records, Equal Pay Certifications and Workforce Data

Illinois Governor J.B. Pritzker recently signed into law Senate Bill 1480 (Illinois Public Act 101-0656), which took effect immediately. In three important respects, the Bill introduced new requirements for Illinois employers. First, the law amends the Illinois Human Rights Act to impose immediate restrictions on employers who seek to consider criminal convictions when making employment decisions. Second, the law amends the Illinois Equal Pay Act to establish equal pay certification procedures for private employers with more than 100 employees in Illinois. Third, the law amends the Illinois Business Corporation Act to mandate that certain employers report workforce demographic data for publication by the Illinois Secretary of State. Illinois employers should evaluate and update their employment policies and decision-making processes to ensure compliance with these enactments.

Below, we provide an overview of key components of this legislation as well as recommended steps for employers to comply with these new requirements.

1. Restrictions on an Employer's Use of Criminal Conviction Records

Overview. As amended by Senate Bill 1480, the Illinois Human Rights Act (IHRA), 775 ILCS 5, now makes it more difficult for Illinois employers to base an adverse employment decision on the criminal history of an applicant or employee. Going beyond the IHRA's existing, general prohibition of the use of arrest records in employment decisions, an employer now faces stringent limits on its ability to consider conviction records. A "conviction record" is defined as any "information indicating that a person has been convicted of a felony, misdemeanor or other criminal offense, placed on probation, fined, imprisoned, or paroled pursuant to any law."[1]

Under the amendment, reliance by an employer on a conviction record in hiring, firing, promoting or a variety of other employment decisions is a civil rights violation, with three specific exceptions.[2] First, the amendment permits reliance on conviction records where such reliance is "authorized by law."[3] Second, an employer may use a conviction record as a basis for its decision if a "substantial relationship" exists between the conviction and the employment position sought or held.[4] A substantial relationship means consideration of whether the employment position will offer an

opportunity for "the same or a similar offense to occur" and whether the "circumstances" that led to the conviction "will recur in the employment position."[5] Third, an employer may rely on a conviction record if employing or continuing to employ the individual would pose an "unreasonable risk" to property or to the safety or welfare of specific individuals or the general public.[6]

In assessing whether the second and/or third exception referenced above applies, an employer cannot reflexively reject the applicant or employee. Instead, the IHRA now requires the employer to consider the following mitigating factors *before* disqualifying an employee based on a conviction record:

- "the length of time since the conviction";
- "the number of convictions that appear on the conviction record";
- "the nature and severity of the conviction and its relationship to the safety and security of others";
- "the facts or circumstances surrounding the conviction";
- "the age of the employee at the time of the conviction"; and
- "evidence of rehabilitation efforts."[7]

The statute does not provide additional guidance, however, as to how employers should prioritize or balance these various factors.

In addition, the IHRA now includes notice requirements once an employer has made an initial determination to disqualify an applicant or employee based on a conviction. Specifically, an employer must provide written notice of its reasoning to the employee along with a copy of any conviction history report and information on how the employee can challenge any of the grounds for its decision. The applicant or employee then has five business days to respond with evidence contesting the accuracy of the information or other mitigating evidence, such as evidence of rehabilitation. If the employer subsequently reaffirms its reliance on the conviction record, it must provide the employee with a second written notice that sets forth its reasoning, any existing procedure the employer has for an employee to request reconsideration and informs the applicant or employee of the right to file a charge of discrimination with the Illinois Department of Human Rights (IDHR).[8]

The IDHR has provided further details on the IHRA's criminal conviction record protections in a series of Frequently Asked Questions.

Recommendations for Employers. Employers who conduct criminal background checks on job applicants or employees should exercise care and revisit their procedures if they wish to continue conducting such background checks. Specifically, employers should review and revise their policies and procedures to ensure that they do not automatically or broadly disqualify an applicant or employee based only on the existence of a criminal conviction. Instead, an employer should implement a robust process to determine whether one or more of the statutory exceptions may permit the employer to consider a specific criminal conviction for a particular job—i.e., the consideration is authorized by law, the conviction is substantially related to the job or the conviction poses an unreasonable safety or welfare risk for the job—and whether any mitigating factors apply. Employers should also build in time to accommodate the required five-business-day period for an applicant or employee to respond to a preliminary, adverse employment decision that is based on the conviction record. Throughout their decision-making processes, employers should document their interactive assessment with the applicant or employee. Documenting that process, as well as the

employer's business rationale for relying on the conviction record, may strengthen the defenses to potential employment-related claims by applicants or employees.

In addition, employers should review and update any recruitment and application materials to account for the impact of Senate Bill 1480 on the IHRA. For example, written notice of an employer's decision to decline to offer an applicant a position on the basis of a conviction record should contain information regarding the employer's reasoning, the right to submit evidence challenging the employer's conclusions and the right to file a charge of discrimination with the IDHR.

Finally, an employer should ensure that human resources personnel, interviewers, hiring managers and any other relevant decision-makers are trained on these new IHRA requirements and any protocols that an employer develops to ensure compliance with them.

2. Pay Equity Certification and Whistleblower Protections

Overview. Senate Bill 1480 added several new sections to the Illinois Equal Pay Act (IEPA), codified at 820 ILCS 112/11. Under the amendments, private employers with more than 100 employees in the State of Illinois must obtain an "equal pay registration certificate" from the Illinois Department of Labor (IDOL) beginning on the later of March 23, 2024, or three years after the employer commences operations. Covered employers who have multiple locations or facilities in Illinois must make a single submission for all of their operations in Illinois. In addition, all covered employers must recertify with the IDOL every two years.

The IDOL will issue an equal pay registration certificate to a covered employer if the employer pays a $150 filing fee and submits a signed equal pay compliance statement to the IDOL regarding its operations in Illinois. The statement must indicate:

- The employer complies with Title VII of the Civil Rights Act of 1964, the federal Equal Pay Act of 1963, the IHRA, the Illinois Equal Wage Act and the Illinois Equal Pay Act of 2003;
- The average compensation—as determined by US Department of Labor rules—for the employer's female and minority employees "is not consistently below" the average compensation for male and non-minority employees within each of the major job categories in the Employer Information Report EEO-1 ("EEO-1 Report"), taking into account factors such as "length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors";
- The employer does not limit certain job classifications to one sex and retains and promotes employees without regard to sex;
- The employer corrects "wage and benefit disparities" when identified;
- The employer identifies the frequency with which it evaluates wages and benefits to ensure compliance with the federal and state anti-discrimination and equal pay statutes referenced above; and
- Whether the employer, in setting compensation and benefits, uses market pricing, state prevailing wage or union contract requirements, a performance pay system, an "internal analysis," or an alternative approach (which the employer is required to describe).[9]

If the covered employer is required to file an EEO-1 Report with the US Equal Employment Opportunity Commission (EEOC), the employer must also submit a copy of the most recent EEO-1 Report for each Illinois county in which it has a facility or employees, in addition to reporting the total

wages (as defined in Section 2 of the Illinois Wage Payment and Collection Act) for each employee during the past calendar year.

As a tool to ensure an employer's compliance with equal pay certification requirements, the IDOL may conduct audits. It has broad authority to request a breakdown, by gender, of the number of employees; their salaries, benefits and other elements of compensation; and their average length of service within each major job category in the EEO-1 Report, as well as any other information needed to determine whether the employer is in compliance with the law.[10]

Furthermore, the IDOL can suspend or revoke a certificate if it finds that an employer has not made "a good faith effort" to comply with, or has committed multiple violations of, certification requirements or the federal and state anti-discrimination and equal pay statutes referenced above.[11] But the IDOL must first "conciliate with the business regarding wages and benefits due to employees" before it can suspend or revoke a certificate.[12] The amendment also specifies that the IDOL, in determining whether to suspend or revoke a certificate, has the authority to interview or depose witnesses and issue subpoenas for documents or other records, and can compel production via a circuit court contempt proceeding.[13]

The amendments to the IEPA also establish additional statutory whistleblower protections for Illinois employees. Specifically, employers may not retaliate against an employee who:

- Discloses or threatens to disclose to a supervisor or to a public body an "activity, inaction, policy or practice" that the employee "reasonably believes is in violation of a law, rule, or regulation";
- Provides information to or testifies before a public body conducting an investigation, hearing or inquiry into "any violation of a law, rule, or regulation by a nursing home administrator"; or
- Assists or participates in a proceeding to enforce the provisions of the IEPA.[14]

An employer violates these whistleblower provisions if an employee's protected activity was a "contributing factor" in the retaliatory conduct against the employee.[15] But an employer does not violate the whistleblower provisions if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action even in the absence of the employee's protected activity.[16]

Recommendations for Employers. Covered employers should be mindful of the IEPA's new equal pay registration certificate requirements, because the failure to comply may result in significant penalties. Upon a finding that a covered employer has not obtained a certificate as required, or upon suspension or revocation of an employer's certificate, the IDOL "shall impose" on the employer "a civil penalty in an amount equal to 1% of the business's gross profits."[17] To reduce its potential legal exposure and other risks, a covered employer should conduct a detailed examination of its pay practices. While the initial deadline to obtain an equal pay registration certificate is not until March 23, 2024, employers should begin this assessment now to ensure that they can implement new procedures or make other changes as may be necessary to be in a position to become certified by the IDOL by that date. For example, employers should determine how to gather and assess the data needed to compare compensation of their female and minority employees against compensation of their male and non-minority employees, including any changes over time. Going forward, employers should create a means of tracking this data. Employers whose compensation data suggests that they may not (or will not) meet certification requirements should consider introducing new evaluation methods and safeguards for their pay practices, and making any corresponding adjustments in compensation, to ensure compliance with the IEPA's pay equity requirements.

The risks to employers for failing to assess their pay equity data go beyond civil penalties from the IDOL. In addition to the explicit statutory framework for assessing whistleblower claims discussed above, the IEPA also provides that, with respect to whistleblowers, courts have broad authority to award "all remedies necessary to make the employee whole and to prevent future violations of this Section," such as reinstatement of the employee along with full fringe benefits and seniority rights; twice the amount of the back pay, plus interest; and reasonable costs and attorneys' fees.[18] To minimize the risk of violations, employers should provide training to supervisors, human resources personnel and other employees on the new compliance obligations and prohibitions on retaliation. Employers should also review their employee handbooks and other policies to ensure that IEPA rights and whistleblower protections are addressed specifically.

Moreover, the IEPA amendments underscore the importance of properly documenting the non-discriminatory and non-retaliatory reasons for an employer's personnel decisions. The new equal pay registration certificate provisions may subject an employer's pay practices to greater scrutiny in several respects—by the IDOL through its expansive audit and subpoena power, by employees and their counsel, and potentially even by the general public.[19]

3. Disclosure of Employment Demographic Data

Overview. Senate Bill 1480 amends Section 14.05 of the Illinois Business Corporation Act (IBCA), 805 ILCS 5/14.05, to mandate that, beginning on January 1, 2023, employers who are required to file an EEO-1 Report must include in their annual report to the Illinois Secretary of State data on the gender, race and ethnicity of their workforce that is "substantially similar" to the data contained in Section D of the EEO-1 Report.[20] The specific details required of employers will be based on a format approved by the Illinois Secretary of State.[21] An employer's omission of this data in its annual report may be treated as a failure to file the report and thus subject the employer to fines and dissolution of the corporation.

Importantly, while the EEO-1 Report data is not publicly reported, the amendment to the IBCA provides that the Illinois Secretary of State "shall publish the data on the gender, race, and ethnicity of each corporation's employees on the Secretary of State's official website."[22]

Recommendations for Employers. As detailed workforce demographic data for many employers will be publicly available for the first time, those employers may face greater scrutiny of their diversity metrics and any changes over time. As a result, employers should consider conducting an in-depth review of their demographic data to identify potential legal risks, such as lawsuits alleging employment discrimination. While the demographic data will not become public until 2023, employers should begin conducting their review now so that they have time to take other actions, if needed, to reduce potential risks.

In addition, the Illinois Secretary of State has not yet released its guidance, such as a sample form, that will shed light on what exactly an employer needs to include in its required annual report as of 2023. Employers should monitor developments and follow the forthcoming guidance.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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Endnotes

[1] 775 ILCS 5/1-103(G-5).

[2] Adverse employment decisions include "refus[ing] to hire, . . . segregat[ing], or . . . act[ing] with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment." 775 ILCS 5/2-103.1(A).

[3] *See* 775 ILCS 5/2-103.1(A). For example, Section 19 of the Federal Deposit Insurance Act prohibits financial institutions from employing a person "convicted of any criminal offense involving dishonesty or a breach of trust or money laundering," absent "prior written consent" of the Federal Deposit Insurance Corporation. 12 U.S.C. § 1829(a)(1). The IHRA amendment likely permits consideration of a conviction record in such an instance.

[4] 775 ILCS 5/2-103.1(A)(1).

[5] 775 ILCS 5/2-103.1(A).

[6] 775 ILCS 5/2-103.1(A)(2).

[7] 775 ILCS 5/2-103.1(B).

[8] 775 ILCS 5/2-103.1(C)(3).

[9] 820 ILCS 112/11(c)(1)-(2).

[10] 820 ILCS 112/11(h).

[11] 820 ILCS 112/11(e).

[12] *Id.*

[13] If the IDOL notifies an employer of its intent to issue a suspension or revocation, the employer may obtain an administrative review in accordance with the Illinois Administrative Procedure Act by filing a "written request" within 20 days of the notice. 820 ILCS 112/11(f).

[14] 820 ILCS 112/11(k)(1).

[15] 820 ILCS 112/11(k)(2).

[16] *Id.*

[17] 820 ILCS 112/11(j).

[18] 820 ILCS 112/11(k)(3).

[19] While data submitted to the IDOL relating to equal pay certification are generally "private data," the amendment specifies that whether the IDOL issues, suspends or revokes a certificate is "public data." 820 ILCS 112/11(i).

[20] 805 ILCS 5/14.05(m).

[21] *Id.*

[22] *Id.*

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