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Illinois Employment Law Update: Greater Scrutiny of Employer Pay Practices, Mandated Disclosure of Diversity Statistics, and Expanded Opportunities for People with Convictions

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On March 23, 2021, Governor Pritzker signed Illinois Public Act 101-0656, which will have significant impact on Illinois employers, particularly with regard to employer pay practices, disclosure of diversity data, and employment opportunities for people with convictions.

The new law requires most employers to obtain an Equal Pay Registration Certificate starting in 2024, mandates public disclosure of EEO-1 data, expands whistleblower protections for employees, and restricts employers' use of conviction records. The new law amends the Illinois Equal Pay Act, the Business Corporation Act, and the Human Rights Act. We summarize each of these changes below.

I. Equal Pay Act Amendments:

By March 23, 2024, all private employers with more than 100 Illinois employees must obtain an Equal Pay Registration Certificate from the Illinois Department of Labor and renew that certificate every two years thereafter. An employer that fails to obtain the certificate or whose certificate is revoked or suspended is subject to a substantial penalty: 1% of the employer's gross profits.

To procure the certificate, an employer must pay a filing fee, send its most recent EEO-1 report to IDOL for each county in which the employer has employees or facilities, and submit a statement signed by a corporate officer, legal counselor, or authorized agent, certifying the following:

1. The employer remains in compliance with Title VII of the Civil Rights Act of 1964, the federal Equal Pay Act (of 1963), the Illinois Human Rights Act, the Illinois Equal Wage Act, and the Illinois Equal Pay Act;

2. The employer ensures compliance with the above laws by correcting wage and benefit disparities when identified;

3. The employer makes retention and promotion decisions without regard to sex and does not restrict employees of one sex to certain job classifications;

4. How often wages and benefits are evaluated to ensure such compliance;

5. The approach the employer uses in setting wage and benefits: a market pricing, state prevailing wage or union contract requirements, performance pay, internal analysis, or some alternative approach, which must be explained to the IDOL; and

6. The "average compensation for its female and minority employees is not consistently below the average compensation, as determined by rule by the United States Department of Labor, for its for male and non-minority employees within each of the major job categories in [the employer's 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; . . .."

Significantly, the law requires employers to submit individual employee pay data with the written statement. This data must be organized by gender and the race and ethnicity categories used in most recently-filed EEO-1 report, and must include "the total wages . . . paid to each employee during the past calendar year[.]" The individual employee pay data submitted under this new law appears to be exempt from disclosure under the Illinois Freedom of Information Act as either "private" or "personal" information. The Equal Pay Act amendment identifies this information as "private data" and IFOIA explicitly exempts "private information . . . including personal financial information" and "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The Director of the Department of Labor is authorized to issue, revoke, and suspend the Equal Pay Registration Certificates. Significantly, the Director of Labor can also audit employer compliance with this new requirement. As part of an audit, an employer may be required to provide additional information including "other information *identified by the business or by the Director*, as needed, to determine compliance with the items specified" in the employer's certification enumerated above. This will permit the Director of Labor to audit an employer's certification, including the statements regarding the average compensation of female and minority employees, as compared to male and non-minority employees within the EEO-1 categories.

The Equal Pay Act Amendment also provides a new private cause of action to an extremely broad range of whistleblowers. Specifically, the amendment prohibits employers from retaliating against any employee who:

1. Discloses or threatens to disclose to a supervisor or public body any employer activity, inaction, policy, or practice that the employee reasonably believes is in violation of a law, rule, or regulation;

2. Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by a nursing home administrator; or

3. Assists or participates in a proceeding to enforce the Equal Pay Act.

II. Business Corporation Act Amendments:

The amendment to the Business Corporation Act applies to any entity who is already required to file an annual report with the secretary of state, which includes most employers other than banks, homestead associations, building and loan associations, insurers, and insurance underwriters. Starting January 1, 2023, covered employers must include with their annual report the employment data from Section D of

the EEO-1 report, in a form to be developed by the Illinois Secretary of State. The amendment also provides that the secretary of state will publish employer-specific data on its website.

III. Human Rights Act Amendments:

As of March 23, 2021, Illinois employers generally cannot use as a basis for an employment decision any "conviction record," which includes any information about felony convictions, misdemeanor convictions, probation, or imprisonment. Following numerous other states and localities, Illinois aims to lower recidivism rates by expanding opportunities for post-conviction employment for individuals with a criminal history. This supplements preexisting Illinois law barring the use of arrest records in employment decisions and limiting employers' ability to inquire about job applicants' criminal history.

The amendment provides two key exceptions. Employers may still rely on a conviction record where (1) there is a "substantial relationship" between the criminal offense and "the employment sought or held," or (2) the employment decision would otherwise "involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

To rely on either exception, employers must engage in a multi-factor analysis and an "interactive assessment." The multi-factor analysis mirrors the analysis required by EEOC guidance, which requires employers to consider the quantity, nature, severity, and context of the criminal conduct, along with any relevant evidence of rehabilitation.

The interactive assessment is similar to the process required under the federal Fair Credit Reporting Act (the "FCRA"), pursuant to which employers provide notice that they consider the criminal record disqualifying, an opportunity for the employee or applicant to challenge the record or provide mitigating evidence, and a subsequent notice that the employer has made a final decision to rely on the criminal record as a basis for its decision. Unlike the FCRA, however, the Illinois law applies regardless of whether employers utilize a third-party vendor and it imposes unique requirements related to the notices. For example, under the Illinois law, employers must identify in the notice the reason they consider the criminal record disqualifying and must inform the employee of their right to file a charge with IDHR.

The remedies for noncompliance are the same as for other violations of the Illinois Human Rights Act: orders to cease and desist or rehire, back pay, actual damages for injury/loss suffered, interest, costs, reasonable attorney's fees, and any other information that "may be necessary to make the complainant whole." In light of these new amendments, employers should revise their policies and re-assess their practices about the use of conviction records.

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