

# Illinois Implements Substantial New Employer Obligations

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In response to public demands for greater equity and inclusion in the workplace, on March 23, 2021, Governor J.B. Pritzker approved extensive changes to the Illinois Humans Rights Act, the Illinois Equal Pay Act and the Business Corporation Act. The measures place new limits on employers' use of conviction records when making employment decisions. They also require larger employers to obtain an "equal pay registration certificate" and submit diversity data to the State for publication. Illinois employers must act quickly to comply with the new conviction record requirements, and larger employers should begin preparing now for the new reporting requirements. Below are some key takeaways for employers regarding these sweeping new measures.

## Illinois Human Rights Act Expanded to Limit Consideration of Conviction Records

Illinois law already prohibits employers from inquiring about or using an *arrest record* in making employment decisions, although employers may consider other information indicating that the person actually engaged in the conduct for which he or she was arrested. 775 ILCS 5/2-103(A). The new law, which takes effect immediately, builds on these requirements by prohibiting employers from using an individual's *conviction record* as a basis for an employment action unless:

- there is a substantial relationship between one or more of the previous criminal offenses and the employment sought or held;
- the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public; or
- use of the conviction record is otherwise authorized by law.

P.A. 101-656; 775 ILCS 5/2-103.1(A). The law applies broadly to all terms and conditions of employment, including but not limited to decisions to recruit, hire, promote, discipline, discharge and train employees and applicants; and it defines "conviction record" expansively to include "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 enforcement or military authority." *Id.*; 775 ILCS 5/1-103(G-5).

When making an employment decision that involves the use of a conviction record, the employer must determine whether there is a "substantial relationship" between the criminal offense(s) and the employment sought or held by considering whether the position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the criminal conduct will recur in the position. The law lists six specific factors that the employer must consider when determining whether there is a "substantial relationship" or "unreasonable risk," as set forth above, including for example, the length of time since the conviction, the nature and severity of the conviction and its relationship to the safety and security of others, and evidence of rehabilitation efforts. 775 ILCS 5/2-103.1(B).

If, after considering these six factors, the employer preliminarily determines that the individual's conviction record disqualifies him or her from the employment position or benefit, the employer must engage in an "interactive assessment" with the employee or applicant. 775 ILCS 5/2-103.1(C). As part of this process the employer must notify the employee or applicant in writing of the potential disqualification and give him or her at least five business days to respond. This notice must (i) identify the disqualifying conviction(s) and provide the employer's reasoning for the disqualification; (ii) include a copy of the employee's or applicant's conviction history report (if any); and (iii) provide information concerning the

employee's right to respond to the preliminary decision before it becomes final. The employer is required to consider any information the individual submits in response before proceeding with the disqualification.

If, after considering any submitted information, the employer makes a final decision to disqualify the employee or applicant, or to take some other adverse action based solely or in part on the employee's conviction record, the employer must provide the individual with a final written notification of disqualification. This final notice must (i) identify the disqualifying conviction(s) and the employer's reasoning for the disqualification; (ii) explain any existing employer procedures that the employee or applicant may use to challenge the decision or request reconsideration; and (iii) inform the individual of the right to file a charge with the Illinois Department of Human Rights.

Employers must act quickly to ensure their current background check practices comply with this new law. Employers should also implement policies and training to ensure that disqualification decisions are made consistently across the business, and that individuals are provided with proper notice. Additionally, most employment agreements provide for the employee to be terminated "for cause" if the employee is convicted of a felony or other similar offense. In such cases, before proceeding with such a "for cause" termination, employers should ensure that they conduct the proper legal analysis and provide the required notices under the new law.

### Illinois Equal Pay Act Amended to Require "Equal Pay Registration Certificates" for Employers with More Than 100 Employees

Responding to the demands of the #MeToo movement, the new law amends the Illinois Equal Pay Act to require larger employers to obtain what is called an "equal pay registration certificate" from the Illinois Department of Labor by March 23, 2024 and to recertify every two years thereafter. Employers must pay a \$150 registration fee and submit an equal pay compliance statement to the Department affirming:

- the employer is in compliance with Title VII of the Civil Rights Act of 1964; the Equal Pay Act of 1963; the Illinois Human Rights Act; the Equal Wage Act; and the Equal Pay Act of 2003;
- the average compensation for the employer's female and minority employees is not consistently below the average compensation, as determined by rule by the U.S. Department of Labor, for its 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 various factors such as length of service, experience, skill, effort and responsibility;
- the employer does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex;
- that wage and benefit disparities are corrected when identified to ensure compliance with the first and second bullet points above;
- the frequency with which wages and benefits are evaluated to ensure compliance; and
- the method used by the employer in setting wages.

P.A. 101-656; 820 ILCS 112/11(c). The employer also must submit its most recently filed EEO-1 report for each county in which it has a facility or employees, and it must compile a list of all employees, separated by the gender, race and ethnicity categories reported on the EEO-1 report, and provide the total wages paid to each employee during the past calendar year. "Wages" is defined broadly to include wages, salaries, earned commissions and other forms of compensation. *Id.* Importantly, employers who fail to obtain an equal pay registration certificate, or whose certificate is suspended, are *subject to a civil penalty equal to 1% of the business's gross profits*. P.A. 101-656; 820 ILCS 112/11(j).

The law allows the Department to undertake investigations and compliance audits, and it prohibits retaliation against those who disclose or threaten to disclose a violation of the law or assist or participate in a proceeding to enforce it.

Although businesses have until March 23, 2024 to obtain a certificate, employers should begin preparing now by evaluating their pay practices and promptly remedying any wage inequities. An employer may choose to engage a third-party statistician to assist in this analysis. Any such engagement should be done with the assistance of counsel to ensure that the statistician's findings remain protected by the attorney-client privilege. Employers who proactively address wage inequities now will be well-positioned to satisfy the law's reporting requirements by 2024.

### Business Corporation Act Now Requires Public Disclosure of EEO-1-Type Data

Finally, the new law amends the Business Corporation Act to require employers that are required to file an annual EEO-1 report with the Equal Employment Opportunity Commission to submit information substantially similar to the employment data reported under Section D of the EEO-1 report as part of their annual reporting requirements to the State. The Illinois Secretary of State will then publish data related to the gender, race and ethnicity of the employer's employees on its

website. This new information must be included in annual reports filed with the State on or after January 1, 2023.

If you have any questions regarding the topics discussed in this article, please contact **Elizabeth N. Hall** at +1 (312) 609 7795, **Michelle T. Olson** at +1 (312) 609 7569 or any Vedder Price attorney with whom you have worked.

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