FUNKHOUSER VEGOSEN LIEBMAN & DUNN LTD.

Legal Update

April 7, 2021

Big Changes to Illinois Laws Affecting Employers: Criminal Background Checks and Reporting

By Jon Vegosen

On March 23, 2021, Governor Pritzker signed Senate Bill 1480 into law. SB 1480 amends the Illinois Human Rights Act (the "IHRA") to constrain employers' use of criminal background checks. It also amends the Illinois Business Corporation Act (the "IBCA") to require those Illinois employers obligated to file EEO-1 reports to include in their annual corporate reports information that is substantially similar to employment data reported under Section D of the corporation's EEO-1 form. Through an amendment to the Illinois Equal Pay Act (the "EPA"), SB 1480 further mandates that employers report EEO-1 and pay data to the Illinois Secretary of State. Illinois employers that fail to abide by these changes may suffer substantial penalties. This newsletter provides an overview of the foregoing changes.

The IHRA and Criminal Background Checks

Illinois already has in place laws limiting an employer's ability to inquire about criminal histories. For example, under the IHRA, it is a civil rights violation for an employer to take action against an applicant or employee because the individual has been arrested for a crime. Likewise, an employer may not ask about a sealed or expunged criminal record. Under Illinois' "ban the box" law (the Job Opportunities for Qualified Applicants Act), employers may not inquire about an applicant's criminal background until after an interview or a conditional employment offer has been made.

Under SB 1480's amendment to the IHRA, it is a civil rights violation for an employer to use a "conviction record" to disqualify or take adverse action against a person in a hiring or employment context unless either:

i. there is a substantial relationship between the criminal offense or offenses and the employment position; or

ii. there would be an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

A "substantial relationship" means "a consideration of whether the employment position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position."

In making a determination, an employer shall consider the following six factors (the "Mitigating Factors"):

1. the length of time since the conviction;
2. the number of convictions that appear on the conviction record;
3. the nature and severity of the conviction and its relationship to the safety and security of others;
4. the facts or circumstances surrounding the conviction;
5. the age of the individual at the time of the conviction; and
6. evidence of rehabilitation efforts.

Before an employer may disqualify or take adverse against an individual, however, it must undertake an interactive assessment. If, after considering the Mitigating Factors, the employer makes a preliminary decision that the individual's conviction record disqualifies the individual, the employer must notify the person in writing of the following:

a. the disqualifying conviction or convictions that are the basis of the preliminary decision and the employer's reasoning for the disqualification;

b. a copy of the conviction history report, if any; and

c. an explanation of the right to respond to the employer's preliminary decision before the decision becomes final. The explanation must inform the individual that the response may include, but is not limited to, submission of evidence challenging the accuracy of the conviction that is the basis for the disqualification or evidence in mitigation, such as rehabilitation.

The employer must give the individual at least five business days to respond to the notification before making a final decision. The employer is required to consider the information the individual submits before making a final decision. If the employer decides to disqualify or take adverse action solely or partially because of the conviction record, the law requires the employer to notify the person in writing of the following:

- notice of the disqualifying conviction or convictions that are the basis for the final decision and the employer's reasoning for the disqualification;
- any existing procedure the employer has for the individual to challenge the decision or request reconsideration; and
- the right to file a charge with the Illinois Department of Human Rights (the "IDHR").

An employer, employment agency, or a labor organization that unlawfully discriminates because of a conviction record may be liable for extensive relief. This includes a cease-and-desist order; actual damages to compensate for loss or injury; hiring, reinstatement, or promotion with back pay and fringe benefits; action to make the injured party whole; admission into or restoration of membership; and attorneys' fees and costs.

The amendments became effective immediately. For more information, contact your legal counsel or visit the FAQ that the IDHR has published on its website.

EEO-1 and Employment Data Reporting

SB 1480 also amends the IBCA. It mandates that, beginning with annual reports filed on or after January 1, 2023, those corporations required to file an EEO-1 report with the Equal Employment Opportunity Commission include some of the same information in the corporation's annual reports filed with the Illinois Secretary of State. Within 90 days of receiving a properly filed annual report, the Secretary of State will publish the data on the gender, race and ethnicity of each corporation's employees on the Secretary of State's website.

Amendments to the EPA

SB 1480 also amends the EPA by requiring private employers with more than 100 employees in Illinois to "obtain an equal pay registration certificate from the Illinois Department of Labor within 3 years after the effective date of" SB 1480 and recertify every two years thereafter. In order to obtain the certificate, an employer must pay a $150 filing fee and submit an equal pay compliance statement.

FVLD

In addition, the business must furnish a copy of its most recently filed EEO-1 report for each county in which it has a facility or employees, along with proof of total wages that it paid to each employee in Illinois during the preceding calendar year (grouped according to gender, race, and ethnicity). The data needs to show there is not a pattern of relative underpayment by gender or race or explain with nondiscriminatory factors any pattern that is contained in the data.

The amendment to the EPA also contains audit provisions and whistleblower and retaliation protections. It authorizes civil penalties against employers who do not comply with the law, including up to one percent of the business's gross revenue for the year of the violation. It also provides a variety of remedies for employees against whom an employer retaliates, including payment of attorneys' fees.

It behooves covered employers to review their EEO-1 payroll records to make sure they will be able to comply with the EPA and to determine whether they should revise their employment practices and policies.

Conclusion

The amendments to the IHRA and the EPA are substantial. Employers that fail to abide by them run the risk of audits, penalties, and lawsuits, as well as adverse publicity.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen at 312.701.6860 or jvegosen@fvldlaw.com, or your regular FVLD contact.

FVLD