

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

Darin Williams

01.28.2022

The Illinois legislature has been quite active, passing a number of bills which will affect Illinois workplaces. The following is a summary of recent legislation impacting Illinois employers in 2022.

Equal Pay Act:

- **Date:** Effective January 1, 2022.
- **Summary:** Illinois' **House Bill 1207** amends the state Equal Pay Act to specify that the act does not prevent employers and applicants from discussing unvested equity or deferred compensation that the applicant would forfeit due to resigning from their current employment. The bill further specifies that if an applicant voluntarily discloses that they will forfeit unvested equity or deferred compensation, employers may request that the applicant verify the aggregate amount of such compensation.
- **Application:** Though employers should generally refrain from asking applicants about their compensation, employers may discuss unvested equity and deferred compensation if an applicant voluntarily discloses that they would forfeit such compensation by resigning from their current employer.

Illinois Freedom to Work Act:

Attorneys

Darin M. Williams

Practice Areas

Counseling and
Transactional

EEO and Other Corporate
Investigations

Employee Handbooks,
Personnel Policies and
Procedures

Employment Counseling

Retirement Plans

Wage and Hour
Compliance and Audits

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

- **Date:** Effective January 1, 2022.
 - **Note:** This new law applies only to agreements (or amendments or renewals) containing restrictive covenants that are entered into **after** January 1, 2022.
- **Summary:** Illinois **Senate Bill 0672** amends the Illinois Freedom to Work Act by expanding limitations in restrictive covenants employers require of their employees, such as covenants not to compete and covenants not to solicit (which are defined by the bill).
 - For example, a covenant not to compete is void and unenforceable unless the employee's actual or expected annualized rate of **earnings** exceeds \$75,000 per year.
 - Similarly, a covenant not to solicit is void and unenforceable unless the employee's actual or expected annualized rate of **earnings** exceeds \$45,000 per year.
 - The bill defines "**earnings**" as "the compensation, including earned salary, earned bonuses, earned commissions, or any other form of taxable compensation, reflected or that is expected to be reflected as wages, tips, and other compensation on the employee's IRS Form W-2 plus any elective deferrals not reflected as wages, tips, and other compensation on the employee's IRS Form W-2, such as, without limitation, employee contributions to a 401(k) plan, a 403(b) plan, a flexible spending account, or a health savings account, or commuter benefit-related deductions."

The bill further provides that "[a] covenant not to compete or a covenant not to solicit is illegal and void unless (1) the employee receives **adequate consideration**, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a **legitimate business interest of the employer**, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public."

- Under the bill, "**adequate consideration**" means either
 - "(1) the employee worked for the employer for at least two years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit **or**
 - (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves."
- The bill also provides guidance as to what is a "**legitimate business interest of the employer**," noting that a totality of the circumstances must be considered, including but not limited to "the employee's exposure to the employer's customer relationships or other employees, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

through the employee's employment, the time restrictions, the place restrictions, and the scope of the activity restrictions.”

The bill further provides that a covenant not to compete or a covenant not to solicit is illegal and void unless (1) the employer advises the employee *in writing* to consult with an attorney before entering into the covenant **and** (2) the employer provides the employee 14 calendar days to review the covenant.

The bill also expands remedies available to employees, providing that “if an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit, the employee shall recover from the employer all costs and all reasonable attorney's fees regarding such claim to enforce a covenant not to compete or a covenant not to solicit, and the court or arbitrator may award appropriate relief.”

Finally, the Attorney General may initiate or intervene in a civil action whenever they have “reasonable cause to believe that any person or entity is engaged in a pattern and practice prohibited by this Act.”

- **Application:** Employers should review agreements that they use with employees that contain restrictive covenants. The language of restrictive covenant agreements with employees should be updated to ensure that any such agreements entered into, amended, or renewed after January 1, 2022, conforms to the new law.

Relatedly, employers should review the earnings levels of the positions with whom the employer currently uses restrictive covenants and, after January 1, 2022, discontinue entering into, amending, or renewing such agreements with employees whose earnings do not meet the minimum earnings thresholds described by the new law.

Personnel Record Review Act:

- **Date:** Effective January 1, 2022.
- **Summary:** Illinois **Senate Bill 2486** amends the Personnel Record Review Act. The amendment provides that an employee may file a complaint or commence an action alleging a disciplinary action disclosure violation (820 ILCS 40/7) within three years after the date of the disclosure of the report, letter, or other disciplinary action.
- **Application:** Employers should remain cognizant to not disclose disciplinary records of an employee to a third party without prior written notice, as required under the Illinois Personnel Record Review Act. Employees aggrieved by such disclosures have three years to file a lawsuit.

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

Prohibition Against Disability Association Discrimination:

- **Date:** Effective January 1, 2022.
- **Summary:** Illinois **House Bill 1838** amends the state's fair employment practices law to specify that discrimination based on disability includes unlawful discrimination against an individual because of their association with a person with a disability.
- **Application:** Employers should update their EEO trainings and policies to make clear that they do not tolerate discrimination on the basis of association with a person with a disability.

VESSA:

- **Date:** Effective January 1, 2022.
- **Summary:** Illinois **House Bill 3582** revises the Victims' Economic Security and Safety Act ("VESSA"), which provides leave to employees who are victims or whose family or household members are victims of certain types of violence, prohibits discrimination, harassment, or retaliation against those employees, and prohibits discrimination against applicants who are victims of such violence.

Specifically, the bill expands the definition of "family or household members" to include any "individual whose close association with the employee is the equivalent of a family relationship as determined by the employee."

The bill also extends the law's coverage to victims of any crime of violence, and revises the certification and confidentiality requirements.

- **Application:** This bill greatly expands the class of persons protected by VESSA, and employers should update their policies and ensure that their managers are trained accordingly.

Retirement Savings Program:

- **Date:** Effective January 1, 2022.
- **Summary:** Illinois' **House Bill 0117** revised the state's requirements for retirement savings programs to apply to small employers that do not offer a qualified retirement plan.

The law now requires employers to participate if they had at least five employees in the state during every quarter of the previous calendar year. Previously employers with fewer than 25 employees were exempted.

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

However, the law still does not apply to employers that offer a qualified retirement plan, “including, but not limited to, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408 (k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 in the preceding 2 years.”

The law also removes the requirement that employees be older than 18 to participate.

- **Application:** Employers with fewer than 25 employees and more than 15 employees will have until Sept. 1, 2022, to enroll employees, and employers with at least five employees but not more than 15 employees will have until Sept. 1, 2023.

Prohibition Against Work Authorization Status Discrimination:

- **Date:** Effective August 2, 2021.
- **Summary:** Illinois’ **House Bill 121** establishes that it is a civil rights violation for employers to discriminate on the basis of work authorization status, which is defined in the bill as the status of being a person born outside the U.S. who not a U.S. citizen and who is authorized by the federal government to work in the United States.
- **Application:** Employers should avoid gathering information about individuals’ specific work authorization status beyond what is needed to establish whether the individual has federal employment authorization. Employers should also update policies to clearly communicate a policy of non-discrimination against individuals based on work authorization status.

Equal Pay Compliance Reporting Requirements:

- **Date:** Effective June 25, 2021.
- **Summary:** Effective March 23, 2021, **Senate Bill 1480** requires employers with over 100 employees to obtain an equal pay certificate from the Illinois Department of Labor to certify that they are in compliance with state and federal equal pay laws.
 - To do so, employers are required to, among other things, submit their EEO-1 Report and “compile, from records maintained and available, a list of all employees during the past calendar year, separated by gender and the race and ethnicity categories as reported in the business’s most recently filed Employer Information Report EEO-1, and report the total wages . . . paid to each employee during the past calendar year, rounded to the nearest hundred dollar, to the Director.”

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

Illinois **Senate Bill 1847** amended the equal pay compliance certification provisions enacted Senate Bill 1480.

- **Application:** The amendments in Senate Bill 1847 provided, among other things, that
 - Employers with fewer than 100 employees must certify that they are exempt from the compliance certification requirements;
 - Covered employers must submit their certification application between March 24, 2022, and March 23, 2024;
 - Employees may obtain their employer's anonymized pay data; and
 - Employers have 30 days to correct inadvertent failures to file applications.

Increased Penalties Under the Illinois Wage Payment and Collection Act (IWPCA):

- **Date:** Effective July 9, 2021.
- **Summary:** Under Illinois **House Bill 118**, employees are entitled to recover damages of 5% of the amount of any underpayment of wages for each month after the date when the wages were due but remain unpaid. Previously, underpaid employees were entitled to recover damages of 2% of the underpaid amount.
- **Application:** The increased penalties under the IWPCA are substantial and provide one more reason for employers to ensure that employees are timely and accurately paid.

Expanded Use of Personal Sick Leave Benefits:

- **Date:** Effective April 27, 2021.
- **Summary:** Illinois **House Bill 158** allows employees to use personal sick leave benefits, if provided by their employer, to provide personal care to family members.

Personal care means ensuring that family members' basic medical, hygiene, nutritional, or safety needs are met or providing them with transportation to medical appointments, if they are unable to meet these needs; and being physically present to provide emotional support for family members who have a serious health condition and are receiving inpatient or home care.

- **Application:** Employers who provide sick leave benefits to their employees must ensure that employees can use those benefits to provide personal care to family members.

Illinois Employers Face Numerous Recent Laws Impacting Workplaces in 2022

Prohibition of Conviction Record Discrimination:

- **Date:** Effective March 23, 2021.
- **Summary:** Illinois' **Senate Bill 1480** amends the state fair employment practices law to add further provisions on employee conviction records.
- **Application:** Employers are prohibited from using employees' and applicants' conviction records as a basis for an adverse employment action, such as refusing to hire, promote, or renew employment, unless there is a substantial relationship between the criminal offense and the employment, or if hiring or continuing employment would involve an unreasonable safety or welfare risk.