

Legislation Creates New Obligations for Illinois Employers

Amber Lukowicz
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Governor Pritzker signed Public Act 101-656 into law, amending the Illinois Human Rights Act (IHRA), the Business Corporation Act of 1983, and the Illinois Equal Pay Act of 2003. The Public Act became effective when signed on March 23, 2021. The amendments represent lawmakers' attempt to eliminate racial inequalities caused by conviction records and address pay inequalities across gender and race. The amendments to the IHRA impact all employers who use criminal records in making employment decisions. The other amendments in this Public Act create further obligations for private employers relating to: (1) for employers with at least 100 employees, new state reporting requirements on the demographics of an employer's workforce; and (2) for employers with more than 100 employees, significant new obligations to obtain an Equal Pay Registration Certificate relating to ensuring equities in employee compensation systems.

In this Fast Laner article, we focus exclusively on the IHRA amendments relating to consideration of criminal convictions. Be on the lookout for a follow-up Fast Laner article, when we will address the other two changes included in this new law with amendments to the Business Corporation Act and the Illinois Equal Pay Act, which have later compliance requirement dates.

Conviction Records in Employment Decisions

Practice Areas

Employee Handbooks,
Personnel Policies and
Procedures

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As of March 23, 2021, the IHRA now prohibits the use of conviction records to disqualify a candidate for employment or promotion, or to make other employment-related decisions, except in limited circumstances. Moreover, the IHRA now mandates employers to comply with new procedural obligations when a conviction record is considered and will be used to disqualify an applicant or employee from employment or subject a person to other adverse job actions. Specifically:

- Employers must engage in an interactive assessment before taking an adverse job action, and may take an adverse action only if they conclude that the “substantial relationship” test or, alternatively, the “unreasonable risk” test between the conviction and the job position, disqualifies the individual. The “substantial relationship test” compares whether the job at issue offers the opportunity for the same or a similar criminal offense to occur, and whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position. In the alternative, an individual with a conviction record may be disqualified for employment if employment of the individual would create an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- As part of the interactive assessment, employers must consider the following factors regarding the conviction and surrounding circumstances:
 - the length of time that has passed since the conviction;
 - the number of convictions that appear on the individual’s 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.
- Before taking any an adverse job action based on a conviction record, employers must comply with the following notice requirements:
 - After making a preliminary decision, provide a written notice with the substantive basis for any disqualification decision, among other information, including that the individual has at least five business days to respond (an employer may grant the individual a longer period of time to respond).
 - Wait at least five business days to allow the individual to respond with evidence regarding the circumstances surrounding the conviction or remediation.
 - If an adverse action is taken, provide an additional written notice of the final decision containing: the disqualifying conviction(s); any procedure for the challenge or reconsideration of the decision; and, importantly, that the individual has the right to file a charge with the Illinois Department of Human

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Rights if he or she disagrees with the basis for disqualification.

The new IHRA Amendment acknowledges that some laws prohibit employers from hiring persons with specific conviction records. In those instances, the employer still must notify the employee or applicant of their employment disqualification pursuant to law. The employee then has at least five business days to respond where the employee can dispute the accuracy of the relevant conviction record disqualifying their employment.

For additional information please click on FAQ for this amendment, which also can be found on the Illinois Department of Human Rights Website.

The bottom line is that Illinois employers must now proceed even more cautiously in making any adverse employment decision based on an individual's criminal background. If you have questions regarding these amendments to the IHRA or related issues, contact any Laner Muchin Attorney.