Illinois Set to Enact New Law Limiting Criminal Convictions in Employment Decisions

Labor & Employment Law Update

By Jeffrey Risch on February 15, 2021

Illinois has long limited employers from considering the criminal history of an applicant or employee in making employment decisions. The Illinois Human Rights Act prohibits employers from considering an employee's arrest history, for example. In recent years, Illinois' "Ban the Box" law disallows employers from asking about criminal convictions prior to a job offer or before a candidate is selected for an interview and, therefore, assumed to be otherwise qualified for the position in question. Now, Illinois is poised to go a step further in banning the use of criminal history in employment decisions.

In January 2021, the Illinois legislature passed Senate Bill 1480, which, in relevant part, provides that unless otherwise authorized by law, an employer may only consider an individual's criminal conviction history if there is a substantial relationship between the criminal history and the position sought or held, or if the employer can show that the individual's employment raises an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. Governor Pritzker now has this legislation "on his desk" and is expected to sign this bill into law soon. Upon signing this legislation, the law will go into effect immediately. The law amends the Illinois Human Rights Act.

An employer may show that an individual's criminal conviction history has a substantial relationship to the position applied for, or currently held, if the position provides an opportunity for the individual to conduct the same or similar offenses. Six different factors guide this analysis: (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 employee at the time of the conviction, and (6)

evidence of rehabilitation efforts.

As to the phrase "unreasonable risk," it is not defined. However, this phrase certainly places the burden on the employer to establish that a risk exists that no reasonable employer in similar circumstances should incur.

If an employer denies employment to an applicant because of a conviction record, the employer must provide written notice to the applicant that specifically identifies the relevant conviction record underlying the decision and the employer's rationale for why the conviction disqualifies the individual from employment. The employer must then give the applicant at least five (5) business days to respond to the employer's notice and provide evidence to refute the employer's concern. If the employer still decides not to hire the individual, the employer must provide another written notice informing the candidate of their right to file a charge of discrimination with the Illinois Department of Human Rights. This same process must be used for employers taking adverse action against existing employees based on criminal convictions.

While this law would not restrict employers from running criminal background checks on applicants or employees, it clearly creates additional hurdles. In reviewing the laws created in other states, Illinois' new law would be the most restrictive in the country. Employers must not only justify any actions taken based on a criminal conviction under the Act's two exceptions, but must also comply with the written notification requirements.

Be assured that Amundsen Davis LLC's Labor & Employment Group is working with business groups to try and create better and clearer language relating to this legislation. We are intimately familiar with that process, and will report as soon as we learn more. In the meantime, all employers hiring or operating in Illinois must tread carefully in navigating all aspects of conducting a criminal background check.