

# Will Employers Have to Give 1% of their Total Gross Profits to the State of Illinois? Gov. Pritzker Signs into Law Unprecedented Changes to IL Equal Pay and Corporate Laws

## Labor & Employment Law Update

By Jeffrey Risch on March 23, 2021



Private employers in Illinois now have more landmines to navigate as the state's legislature pushed through SB1480 during its most recent "lame duck" session.

**Gov. Pritzker just signed the legislation into law today!** While there are many substantive provisions and amendments to various laws contained in SB1480

(including new restrictions on the use of criminal convictions as we blogged about previously), the law also amends the Illinois Business Corporation Act (IBCA) and the Illinois Equal Pay Act (IEPA); resulting in unprecedented compulsory reporting of race, gender and ethnicity statistics and related pay data. These changes are part of a new national trend (see our previous blog on CA's new law), while the Biden Administration begins to review similar pay data reporting mandates.

### **Amendments to the IBCA**

Under the IBCA, private corporations who are required to file an Employer Information Report EEO-1 with the Equal Employment Opportunity Commission (EEOC) will have to submit substantially similar data they report under Section D of the EEO-1 report — in a format to be approved by the IL Secretary of State (SOS) — as part of their annual corporate filing with the SOS. For any corporation

that must submit EEO-1 related data to the state, the SOS will then publish the corporation's data on gender, race and ethnicity on the SOS's official website. This new mandate is set to be in place for any and all annual corporate filings with the State of Illinois beginning on and after January 1, 2023. Employers who fail to comply with the new IBCA mandates will not be authorized to conduct business in Illinois and/or will have their status as a corporation involuntarily dissolved.

### **Amendments to the IEPA**

The changes to the IEPA are much more complex and employers who are not intimately familiar with Illinois' unique Equal Pay Act law are playing with fire. Private employers with 100+ employees within the State of Illinois must certify their equal pay compliance (including, demonstrating how they actually comply) and provide pay data information to the IDOL. Employers who fail to comply with the IEPA certification mandates or provide false information to the IDOL **will result in a non-discretionary fine of 1% of their annual gross profits.**

As a reminder, the IEPA generally applies to all employers with employees working in the state. The state law is also materially different than the federal law in many aspects, including, but not limited to: the fact that any pay disparity is reviewed on a county level (not facility); encompasses African American status in addition to gender; limits the defenses available to employers trying to justify pay disparities; broadens what "equal" means by utilizing a "substantially similar" standard; and prohibits inquiry into salary/wage history.

The amendments under SB1480 applies to any PRIVATE employer with more than 100 employees in the state. These employers will have to obtain an Equal Pay Registration Certificate from the IDOL within 3 years from the effective date of the new law (today, March 23, 2021) and must recertify every 2 years thereafter. These businesses will be required to apply for an equal pay registration certificate by paying a \$150 filing fee and submitting an equal pay compliance statement to the IDOL. In addition to submitting their most recently filed EEO-1 report for each county in which the business has a facility or employees, they will also need to compile a list of all employees during the past calendar year (separated by gender and the race and ethnicity categories), and report the total wages paid to each employee during the past calendar year. The IDOL will then issue an equal pay registration certificate to these employers, who must also submit a statement signed by a corporate officer, legal counsel, or authorized agent of the business that confirms the following:

- that the business is in compliance with the 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;
- that the average compensation for its female and minority employees is not consistently below the average compensation for its male and non-minority employees within each of the major job categories in the Employer

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Information Report EEO-1;

- that the business 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 applicable anti-discrimination laws; and
- that the business identifies how often wages and benefits are evaluated to ensure such compliance.

The equal pay compliance statement must also indicate whether the business, in setting compensation and benefits, utilizes:

- a market pricing approach;
- state prevailing wage or union contract requirements;
- a performance pay system;
- an internal analysis; or
- an alternative approach to determine what level of wages and benefits to pay its employees. If the business uses an alternative approach, the business must provide a description of its approach.

The issuance of a registration certificate will not serve as a defense against any IEPA violation found by the IDOL, nor a basis for mitigation of damages. The certification can also be suspended or revoked by the IDOL at any time.

While the pay data submitted to the IDOL will be considered private for the IDOL's eyes-only, the IDOL's decision to issue, not issue, revoke, or suspend an equal pay registration certificate will be public information.

There are also new anti-retaliation provisions in the amendments that make it financially painful for any employer found to have taken adverse action against an employee for engaging in protected activities under the IEPA. *But, that's not all...* the legal burden is now placed on the employer to prove, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of any protected conduct.

#### **What Employers Must Do Moving Forward:**

- Review and, if necessary, modify equal pay policies that demonstrate a commitment to IEPA compliance.
- Audit equal pay compliance annually. This includes creating strong/reliable compensation systems that are in line with the law (base wage, benefits, commission programs and bonus opportunities).
- Update job descriptions annually. Focus not only on job titles, but the actual duties, responsibilities and qualifications of the position.

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- Evaluate performance reviews. \*\*\*These continue to be the “kiss of death” for many employers since very few evaluators are willing to be honest and direct.
- Consider partnering with credible 3<sup>rd</sup> parties to help design and implement compensation systems in order to comply with all applicable anti-discrimination laws.

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