

April 5, 2021 - Monthly Minute Memo No. 2021-2: *EEO-1 Reports and Amendments to the Illinois Business Corporation Act, Human Rights Act, and Equal Pay Act*

I. EEO-1 REPORTS

A. EEOC Announces Submission Dates for 2019 and 2020 EEO-1 Reports.

After delaying the deadline for filing of 2019 EEO-1 reports, the EEOC announced that employers with 100 or more employees may submit both their 2019 and 2020 EEO-1 reports during the period beginning on April 26, 2021 and ending on July 19, 2021.

B. EEO-1 Reports Must Also Be Submitted to The Illinois Secretary of State.

On March 23, 2021, Governor Pritzker signed Public Act 101-0656, which amended the Business Corporation Act. This Act now requires businesses mandated to file an EEO-1 Report with the EEOC, also file with the Illinois Secretary of State the employment data reported under Section D of the EEO-1 report. Within 90-days of receipt of this data, the Secretary of State will publish the submitted data on gender, race, and ethnicity on its official website. Additionally, a corporation must submit this information with its annual report filed on and after January 1, 2023.

II. Amendment to the Illinois Human Rights Act Affects the Use of Convictions In Employment Decisions.

Public Act 101-0656 also amended the Illinois Human Rights Act (“IHRA”) prohibiting employers from using conviction records as a basis for an employment action and in limited circumstances where the conviction may be used as a basis, such action is conditioned on following certain procedures. The EEOC previously issued guidance on using conviction records in employment decisions. Employers must also ensure that they are following any applicable federal Fair Credit Reporting Act requirements when obtaining a background check and/or taking action based on results. Given the state law changes, now is a good time for employers to review their background check policies and procedures for compliance with both state and federal law. The following provides some general Q & A to assist in understanding the changes to the Illinois Human Rights Act.

What is a conviction record?

Under the IHRA, a conviction record is “information indicating that a person has been convicted of a felony, misdemeanor or other criminal offense, placed on probation, fined, imprisoned, or paroled pursuant to any law enforcement or military authority.” Under the Illinois Department of Human Rights (“IDHR”) guidance, examples of conviction records are guilty pleas or court orders that show a person was convicted of any felonies, misdemeanors, or other criminal offenses.

Can an employer have a policy barring all individuals with conviction records from employment?

Employers may not have a blanket policy barring an individual with a conviction record from employment unless there is a specific law prohibiting individuals (i.e. police officer) with a conviction record from holding a particular position.

Under what circumstances may an employer disqualify an employee or applicant from employment due to a conviction record?

An employer may utilize a conviction record in an employment decision if: (1) there is a substantial relationship between one or more of the previous criminal offenses and the position sought or held; or (2) granting or continuation of employment involves an unreasonable risk to property or the safety of individuals or the public.

The Act defines “substantial relationship” as whether the position offers the opportunity for the same or similar offense to occur and whether the circumstances leading to the conviction could occur in the position. The IDHR guidance further provides the employer must demonstrate the position in question creates an opportunity for the employee to engage in the same or similar criminal offense or that circumstances leading to the convicted conduct could occur in their employment.

Before taking any adverse action against an employee or applicant based on a conviction record, employers should seek legal advice as there are numerous issues to address in evaluating the risk – including whether the background check was properly authorized at the outset.

What factors are employers required to consider in determining whether a “substantial relationship” exists?

To determine if a substantial relationship exists, employers must consider the following factors: (1) length of time since the conviction; (2) the number of convictions; (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.

What happens after the employer preliminarily decides an employee’s or applicant’s conviction record disqualifies him or her from employment?

The employer is required to engage in an interactive assessment with the employee that involves a written notification of the employer’s decision to disqualify and the specific reasons for the employer’s decision. Additionally, the employer must provide a copy of the conviction record and an explanation of the employee’s rights to respond and submit evidence challenging the accuracy of the conviction record or evidence of mitigation. The employer must give the employee at least

5 days to respond to the employer's preliminary decision. If the employer fails to engage in this interactive assessment, the employer may be liable for a civil rights violation under the IHRA. (It is also important to note that some of these procedures mirror requirements under the federal Fair Credit Reporting Act.)

Can an employer take an adverse employment action against an employee or applicant after receiving a response to the preliminary decision?

Possibly. This is a case-by-case situation. Although an employer is required to consider all the information and evidence provided by the employee, the employer may still decide to disqualify the employee. When issuing a written final decision to the employee, the employer must state: (1) the disqualifying conviction(s) and reasoning for the employer's final decision; (2) any existing procedure the employer has for the employee to challenge the decision or request reconsideration; and (3) the right to file a charge with the Illinois Department of Human Rights.

III. Illinois requires employers with more than 100 employees to obtain an "Equal Pay Registration Certificate."

In addition to the amendments to the Business Corporation Act and the IHRA, Public Act 101-0656 amended the Illinois Equal Pay Act of 2003. The amended Equal Pay Act now requires employers with more than 100 employees to obtain an equal pay registration certificate from the Illinois Department of Labor by March 23, 2024 and to recertify every 2 years.

An employer with employees in multiple locations or facilities in Illinois must submit a single application for all of its operations in Illinois. To obtain this certificate, an employer must do or submit the following:

- Pay a \$150 filing fee.
- Submit an equal pay compliance statement signed by a corporate officer, legal counsel or authorized agent. This statement must set forth whether the employer, in setting compensation and benefits, utilizes a market pricing approach, state prevailing wage or union contract requirements, a performance pay system, internal analysis or an alternative approach.
- A copy of the most recently filed EEO-1 report for each county where the employer has a facility or employees.
- A list of all employees, separated by gender, race and ethnicity during the past calendar year. It is unclear from the language of the statute if employee names are required to be included.
- Total wages paid to each employee during the past calendar year, rounded to the nearest dollar.

After receipt of the application, the Illinois Department of Labor will issue the certificate or a statement of any reason the application was rejected. The issuance of the certificate does not establish compliance with the Equal Pay Act and is not a defense against a violation under the Equal Pay Act. This certificate may be suspended or revoked when the employer fails to make a good faith effort to comply with the Act. If an employer fails to comply with the requirements of

the Act, including any business from which the certificate is revoked or suspended, the Department may impose a civil penalty equal to 1% of the business' gross profits.

KD recommends Illinois employers adopt new policies and procedures to ensure compliance with the new EEO-1 reporting requirements and federal and state law governing criminal convictions of applicants and employees. Employers in Illinois with 100 or more employees should also begin the application process for obtaining an Equal Pay Registration Certificate.

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