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ILLINOIS TIGHTENS RESTRICTIONS ON USE OF CRIMINAL CONVICTION INFORMATION

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Restrictions on inquiring into, or using, criminal history information are not new to Illinois employers. For years, Illinois employers been precluded from using an applicant's arrest history when making hiring or other employment decisions. And, in 2015, Illinois joined the list of "ban the box" states by precluding employers with 15+ employees from inquiring into or considering the criminal record or criminal history of an applicant until after the applicant was selected for an interview or had received a conditional offer of employment.

Effective March 23, 2021, the restrictions have tightened again, through amendments to the Illinois Human Rights Act ("IHRA"), which borrow concepts from the Equal Employment Opportunity Commission ("EEOC") and the Fair Credit Reporting Act ("FCRA").

Restricted Use of Conviction Records

The new IHRA provisions make it a civil rights violation for an employer to use a "conviction record" as the basis for any employment decision, including hiring, promotion, discipline and discharge, unless:

1. There is a "substantial relationship" between one or more of the previous criminal offenses and the employment sought or held; OR

2. The granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

A "conviction record" is broadly defined to mean "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."

Required Analysis

With respect to #1 above, employers should consider whether the employment position "offers the opportunity for the same or a similar offense to occur" as well as whether the circumstances leading to the conduct for which the person was convicted "will recur in the employment position."

When making a determination under either #1 or #2 above, employers are directed to consider a number of "mitigating factors," much like the EEOC advises employers to consider various factors when evaluating arrest and conviction information in order to reduce the potential for race and national origin discrimination in violation of Title VII. The factors to be considered under the IHRA are:

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.

Required Notices

The IHRA amendments further impose "notice" requirements on employers, similar to those imposed by the FCRA when an applicant's credit information may be used against the applicant with respect to a hiring decision. Specifically, if an employer preliminarily decides, after conducted the required analysis described above, that the individual's conviction record is disqualifying, the employer must notify the individual in writing of this preliminary decision, providing:

- notice of the disqualifying conviction or convictions that are the basis for the preliminary decision and the employer's reasoning for the disqualification;
- a copy of the conviction history report, if any; and
- an explanation of the individual's right to respond to the notice of the employer's preliminary decision before that decision becomes final, including submitting evidence challenging the accuracy of the conviction record that is the basis for the disqualification, or evidence in mitigation, such as rehabilitation.

The individual must be given at least 5 business days to respond, and then the employer must consider any information submitted by the individual before making a final decision. If the employer makes a final decision to disqualify (or take adverse action with respect to) the individual, whether that decision is solely or in part because of the conviction record, the employer must provide another written notification to the individual, providing notice of:

- the disqualifying conviction(s) and the employer's reasoning;

- any procedures the employer has for the individual to challenge the decision or request reconsideration; and
- the right to file a charge with the Illinois Department of Human Rights concerning the decision.

Recommended Action Steps

Because the new requirements are already in effect in Illinois, employers should take immediate steps to ensure compliance, including reviewing and revising as necessary their procedures relating to the consideration of conviction records, training personnel with respect to the new procedures, and preparing forms for preliminary and final disqualification notices.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on any state-specific laws or any other employment issue, please contact an attorney in the Employment and Labor practice group.

RELATED PRACTICE AREAS

- Employment & Labor

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