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Illinois Extends Employment Protections to Applicants and Employees With Prior Criminal Convictions

By: Michael D. Gifford | April 28, 2021

On March 23, 2021, Governor Pritzker signed Senate Bill 1480, which includes amendments to the Illinois Human Rights Act (IHRA). Previously, employers were free to decline the hiring of applicants with criminal convictions. The new law, effective with the governor's signature, alters that landscape.

Illinois adopted a "ban-the-box" law in 2014, restricting most employers from using employment application questions regarding criminal convictions. Since that time, many employers have run criminal background checks only after issuing a "conditional offer" of employment—offers which generally were contingent upon a criminal background check and drug screen. Employers remained free, however, to rescind the conditional offer if the criminal background check revealed prior convictions.

The IHRA amendment creates new protections for applicants with prior convictions. The IHRA has long banned use of arrest records in employment decisions, but the new IHRA amendment creates substantive and procedural protections for applicants with prior convictions as well.

It is now a civil rights violation for any employer, employment agency, or labor organization to use a conviction record, as defined under the Act, "as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges, or conditions of employment" unless:

1. there is a substantial relationship between the criminal offense(s) and the employment; or

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

"Substantial relationship" requires consideration of whether the employment offers the opportunity for the same or a similar offense to occur, *and* whether the circumstances leading to the conviction will recur in the employment position. The employer is required to consider the

length of time since the conviction; the number of convictions; the nature and severity of the conviction(s) and its relationship to the safety and security of others; the circumstances surrounding the conviction; the age of the employee at the time of the conviction; and evidence of rehabilitation efforts.

If after giving due weight to all of those factors the employer still determines to disqualify the applicant, the employer is required to give the applicant notice, identifying the disqualifying conviction, the employer's reasoning on disqualification, and must allow the applicant five (5) business days to respond before the decision is final.

The employer is required to consider the applicant's response, and if still determined to disqualify, to notify the applicant in writing of the disqualifying conviction(s) and the employer's reasoning; any existing procedure for the applicant to challenge the decision or request reconsideration; and the right to file a charge with the Department.

Employers should immediately modify their hiring practices to accommodate the new law. A procedural violation alone could trigger a charge of discrimination and the accompanying Department of Human Rights involvement. Job descriptions should also be reviewed and updated to clarify what prior offenses are disqualifying. Finally, employers who are subject to other laws requiring disqualification should document that in the job description.

Labor and employment attorney Michael Gifford is ready to help you with this new requirement.

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