

## Publication

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### Client Alert: Don't Forget! Important New Laws and Year-End Requirements for Illinois Employers

While employers were busy figuring out how to comply with the patchwork of laws stemming from the ongoing pandemic, the state of Illinois passed a number of new and amended laws impacting Illinois workplaces. As the year comes to a close, it's important for Illinois employers to become well-versed in these new laws, as well as ensure their compliance with existing annual requirements.

#### Changes to Laws Surrounding the Use of Restrictive Covenant Agreements

On August 13, 2021, Governor Pritzker signed into law an amendment to the Illinois Freedom to Work Act. Per the extended version of the Act, **beginning January 1, 2022**, employers will be prohibited from entering into non-competition agreements with Illinois-based employees who earn less than \$75,000 a year, with this salary threshold increasing by \$5,000 every five years. Additionally, employers will be prohibited from entering into non-solicitation covenants with Illinois-based employees who earn less than \$45,000 a year, with this salary threshold set to increase by \$2,500 every five years.

Furthermore, the amendment codified that in order for these restrictive covenant agreements to be enforceable, there must be "adequate consideration," which requires

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that: (i) the employee have worked for the employer for at least two years, or (ii) the employer otherwise provides “adequate” consideration, separate from continued employment, to render a non-competition or non-solicitation agreement enforceable. Additional information about this amendment can be found in our June 2021 client alert.

### Restrictions on the Use of Artificial Intelligence in Employee Interviews

As of January 1, 2020, the Artificial Intelligence Video Interview Act has regulated the use of artificial intelligence (“AI”) in interviews for Illinois-based positions by requiring employers to: (i) notify applicants prior to their interview that AI may be used to analyze their video interview and consider their fitness for the position; (ii) provide each applicant with information explaining how the applicable AI works and evaluates candidates; and (iii) obtain consent from the applicant to be evaluated by the AI, prior to the interview. However, **beginning January 1, 2022**, the Act will also require some employers to collect and report demographic data to the Department of Commerce and Economic Opportunity (“DCEO”) on an annual basis. More specifically, if an employer relies solely on an AI analysis to determine whether an applicant will be selected for an in-person interview, then the employer must collect: (i) the race and ethnicity of applicants who are and are not given an in-person interview after the use of AI analysis; and (ii) the race and ethnicity of those applicants who are ultimately hired. Beginning as of December 31, 2022, and continuing each calendar year thereafter, covered employers must report this data, collected during the 12-month period ending on November 30<sup>th</sup>, to the DCEO.

### Restrictions on the Use of Criminal Conviction Records

On March 23, 2021, the Illinois Human Rights Act (“IHRA”) was amended to make it a civil rights violation for an

employer to use a conviction record as a basis to refuse to hire, or otherwise act with respect to recruitment, promotion, and affordance of other terms, conditions and privileges of employment unless: (i) there is a substantial relationship between the conviction and the position sought; or (ii) granting or continuing employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public. While employers have had to comply with notice requirements set forth by the Fair Credit Reporting Act prior to taking adverse action based on the results of a background check, the amendments to the IHRA impose heightened obligations on Illinois employers.

Namely, prior to making a final employment decision, employers are required to conduct a multi-step assessment of the individual's criminal conviction history as weighed against the job in question. In making this determination, employers **must** consider the following six factors: (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.

If, after considering the above factors, the employer makes a preliminary decision that the individual's conviction record disqualifies them from the position, the employer must notify the employee of its preliminary decision, in writing, and provide the individual with at least five (5) business days to respond before making a final decision. In making its final decision, the employer must consider any evidence submitted by the employee and, if an adverse determination is made, the employer must notify the individual, in writing, of the following: the reason underlying the decision, any existing procedures the individual has to challenge the decision; and the right

to file a charge of discrimination with the Illinois Department of Human Rights.

### Demographic Information and Equal Pay Reporting Requirement

The Illinois Business Corporation Act has been amended to require certain corporations to report information concerning employee demographics to the State of Illinois. Specifically, **beginning January 1, 2023**, Illinois corporations that also are required to file an EEO-1 report with the Equal Employment Opportunity Commission (i.e., employers with 100 or more employees nationally and employers with 50 or more employees nationally and a government contract worth at least \$50,000) will be required to include in their annual Illinois report "information that is substantially similar to the employment data reported under Section D of the corporation's EEO-1 in a format approved by the Secretary of State." The Secretary of State will then compile the information submitted by employers and publish on its website a report containing data on the gender, race, and ethnicity of each corporation's employees, which will be accessible to the general public.

In addition, all employers with 100 or more employees in Illinois will be required to apply for an "equal pay registration certificate" from the Illinois Department of Labor ("IDOL") **between March 24, 2022 and March 24, 2024**. The specific deadline for each employer to file such an application will fall within this window and will be assigned by the IDOL, at its discretion.

To apply for this certificate, employers will need to provide: (1) a \$150 filing fee; (2) a copy of the employer's most recently filed EEO-1 report; (3) a list of the total wages paid to each employee during the previous calendar year, broken down by employees' gender, race, and ethnicity; (4) details about the county in which each

employee works and the employee's start date; and (5) any other information the Department deems necessary to determine if pay equity exists among employees. Additionally, employers will be required to disclose the approach the employer takes in determining the level of wages and benefits paid to employees, and certify that the average compensation paid to female and minority employees was not consistently below the average compensation paid to male and non-minority employees in comparable positions. Within 45 calendar days of receipt of this information, the Director of the IDOL will issue an equal pay registration certificate, or a statement explaining why the application was rejected. If rejected, applicants will have 30 calendar days to cure any deficiencies and resubmit their application prior to incurring any penalties.

### **Annual Harassment Training Requirement**

Finally, pursuant to the Illinois Workplace Transparency Act, all Illinois employers must provide annual training to employees concerning the prevention of workplace sexual harassment, to be completed no later than December 31<sup>st</sup> of each calendar year. As detailed in the Act, the training must, at a minimum, contain the following elements: (1) an explanation of sexual harassment consistent with the definition provided by the Illinois Human Rights Act; (2) examples of conduct that constitutes unlawful sexual harassment; (3) a summary of relevant federal and State statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and (4) a summary of employers' responsibilities to prevent, investigate, and take corrective measures against sexual harassment in the workplace. Additional content is required for employers in the restaurant and bar industries.



Employers must implement training and use training materials meeting the requirements proscribed by the Illinois Department of Human Rights.

## Conclusion

Illinois employers should immediately review their existing agreements and workplace policies, and complete annual harassment training to ensure compliance with applicable Illinois law. If you have any questions regarding these obligations or any other labor and employment issues, please contact Bill Tarnow, Corey Biller, Alissa Griffin, or your Neal Gerber Eisenberg attorney.

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