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New Illinois Employment Law: Restricting Use of Conviction Records



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Earlier this week, Illinois Gov. J.B. Pritzker signed into law SB1480, which amended the Illinois Human Rights Act (the Act) in a way that will significantly affect how employers deal with employee conviction records.

What is Prohibited?

Under the amended Act, which takes effect immediately, it is a “civil rights violation” for an employer to use a “conviction record” as a basis for adverse employment decisions, 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 the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

What is a Conviction Record?

Under the Act, 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.

When is there a Substantial Relationship to a Conviction Record?

The Act provides that there is a “substantial relationship” between a criminal offense and the employment sought or held if the specific position would offer the applicant or employee an opportunity to commit the same or a similar offense again, and whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position.

To make the assessment of whether there is such a substantial relationship (or to assess the alternative standard that granting or continuing the employment would involve an unreasonable risk to property or to the safety or welfare of others), there are six factors employers must consider:

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. The evidence of rehabilitation efforts.

If, after taking into account these “mitigating factors,” the employer believes the conviction record disqualifies the applicant or employee from the position, then it now must go through an “interactive assessment” before it can disqualify the applicant or employee.

When is there an Unreasonable Risk to Property, the Safety or Welfare of Specific Individuals or the General Public?

The Illinois Department of Human Rights [has issued FAQs](#) concerning the conviction record protection under the Act. As it relates to showing that a *conviction record* poses an “unreasonable risk to property or the safety or welfare of individuals,” the FAQs provide that an employer must assess the risk that the employee or applicant poses to the workplace in the particular position and weigh factors such as the severity of the offense, the length of time since the offense occurred, evidence of rehabilitation, and the likelihood of reoccurrence of the same or similar offenses at the employer.

What is the Interactive Assessment Process?

First, the employer must notify the employee or applicant of the preliminary decision in writing, which must contain:

- notice of the disqualifying conviction(s) that are the basis of 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 employee’s right to respond before the decision becomes final, including the right to (1) contest the accuracy of the conviction record or (2) to submit evidence as to any of the six mitigating factors noted above.

Second, the employer must allow the employee with at least five business days to respond before it can make a final decision as to disqualification. If the employee does submit clarifying or mitigating evidence, the employer must consider it.

Third, if the employer makes a final decision to take adverse action solely or in part because of the employee’s conviction record, the employer must notify the employee, in writing, of the following:

- the disqualifying conviction(s) that are the basis for the final decision and the employer’s reasoning for the disqualification;
- any existing procedure the employer has for the employee to challenge the decision or request reconsideration; and
- the right to file a charge with the Illinois Department of Human Rights.

Similarities to FCRA Requirements and the EEOC’s Green Factors

The amendments to the Act codify into state law certain steps that the EEOC has long required in order to protect qualified applicants from hiring policies that may disparately impact groups protected by Title VII. Under its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act, the EEOC requires that employers who collect such information show that it is a business necessity to do so by assessing what are commonly referred to as the *Green* factors:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

Under the EEOC’s Guidance, employers are required to engage in an “individualized assessment” similar to the steps required under the amendments.

In addition to adopting (and expanding) upon the *Green* factors, the amendments also borrow from (and expand upon) the requirements of the Fair Credit Reporting Act (FCRA). FCRA requires that employers who reject an applicant or take any adverse action based upon information received from a “consumer report” provided by a consumer reporting agency first provide that individual with a “pre-adverse action letter” which states that employment may be denied based upon a consumer report (which it must attach). The employer must then allow the opportunity for the employee or applicant to dispute incomplete or inaccurate

information contained in the consumer report. And finally, the employer is required to issue a final "adverse action letter" if it denies employment based upon the consumer report.

Employers using criminal records as part of the employment decision-making process should examine their existing policies and processes to ensure compliance with these new legal requirements. If you have questions regarding these changes to the Illinois Human Rights Act, or any issues discussed in this article, please contact a member of Gould & Ratner's [Human Resources and Employment Law Practice](#).