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What all Illinois employers need to know about Illinois' new background check law

By Sarah E. Flotte, Esq., and Sara W. Davey, Esq., *Perkins Coie

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On March 23, 2021, Governor J.B. Pritzker signed Senate Bill 1480[1] (SB 1480), which amends the Illinois Human Rights Act to impose robust new restrictions and obligations on employers' use of background checks in Illinois.[2] The new law, which applies to both applicants and employees, takes effect immediately.

ILLINOIS EMPLOYERS MAY CONSIDER CONVICTION HISTORY ONLY IN LIMITED CIRCUMSTANCES AND IN THE CONTEXT OF EXPLICIT MITIGATING FACTORS

While the Illinois Human Rights Act (IHRA) previously prohibited employers from making adverse employment decisions based on an individual's *arrest record*, SB 1480 amends the IHRA to prohibit employers from making adverse employment decisions based on an individual's *conviction record* except in two circumstances.

> The consideration of mitigating circumstances is now a statutory requirement in Illinois, as opposed to recommended practice in line with EEOC enforcement guidance.

Specifically, to legally consider an employee or applicant's conviction record under the new law, one of the following two conditions must be met:

(1) there must be 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 must involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

To determine whether a "substantial relationship" exists, the new law and the answers to FAQs from the Illinois Department of Human Rights[3] require employers to determine "whether the employment position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the conduct for which the person was convicted will recur in the employment position."

In conducting this analysis, employers must consider the following six mitigating 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 individual at the time of the conviction; and

(6) evidence of rehabilitation efforts.

PRE-ADVERSE AND POST-ADVERSE ACTION LETTERS REQUIRED BY ILLINOIS LAW

If, after considering mitigating factors, an employer preliminarily decides that the individual's conviction record disqualifies them from employment, SB 1480 institutes procedural requirements similar (though not identical) to those under the Fair Credit Reporting Act (FCRA).

Prior to making a final decision, employers must first send the individual a written notification of the preliminary decision that contains the following information:

- Notice of the disqualifying conviction and the employer's reason for the disqualification;
- A copy of the conviction report, if any; and
- An explanation of the individual's right to respond before the decision becomes final.

An individual then has five (5) business days following the preliminary notice to respond and provide evidence challenging the accuracy of the conviction record or evidence of mitigation, such as rehabilitation.

Employers must consider any information submitted by the individual prior to making a final employment decision. If proceeding with a final decision to take an adverse action solely or

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in part because of an individual's conviction record, employers are required to send the individual a written notification of the final decision that contains the following information:

- Notice of the disqualifying conviction(s) and the employer's reasoning of the disqualification;
- Any existing procedure 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.

SB 1480 broadly defines a "conviction record" as any "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."

DIFFERENCES FROM THE FCRA'S BACKGROUND CHECK REQUIREMENTS AND EEOC GUIDANCE

Employer use of background checks has long been the subject of legal oversight. Even before SB 1480, Illinois employers conducting background checks were subject to the FCRA disclosure and notice requirements, ban-the-box legislation, the IHRA's restriction against the use of arrest records, and the EEOC's Enforcement Guidance.

> Employers must meet a high bar prior to excluding individuals from employment based on conviction records.

However, there are key differences that likely will require policy and practice changes for many employers in Illinois; most notably:

- The consideration of mitigating circumstances is now a statutory requirement in Illinois, as opposed to recommended practice in line with EEOC enforcement guidance[4] (EEOC Guidance). The list of mitigating factors in Illinois also varies slightly from those outlined by the EEOC.
- Employers must meet a high bar prior to excluding individuals from employment based on conviction records. SB 1480 places the burden on employers to demonstrate either (1) a substantial relationship or (2) an unreasonable risk. Again, this determination is now a statutory requirement and varies from the EEOC Guidance on the same topic.
- The timeframe for allowing employees to contest the accuracy of the conviction record or provide other relevant evidence is mandated at five (5) business days, as opposed to a timeline set out by employers.
- The contents of the pre-adverse and post-adverse action letters required under SB 1480 are more robust than what is required under the FCRA.

Failure to comply with any of the new requirements noted above constitutes a state civil rights violation, and stringent penalties apply. In particular, the IHRA allows uncapped compensatory damages, back pay, front pay, reinstatement, attorneys' fees and costs, and punitive damages.

To ensure compliance with Illinois' new employee background check law, employers in Illinois should consult with experienced employment counsel.

Notes

[1] https://bit.ly/3fOml1V

[2] While SB 1480 mandates other noteworthy changes for Illinois employers, this alert focuses on those related to background checks.

[3] https://bit.ly/3mnIhSW

[4] https://bit.ly/3uG4nmP

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ABOUT THE AUTHORS

Sarah E. Flotte (L) provides advice and training, as well as first-chair litigation counsel, to **Perkins Coie** clients. She advises business executives and general counsel in areas including discrimination and harassment, accommodations, discipline and termination, defamation, wage and hour matters, workforce reduction, and noncompete enforcement and defense. She is based in Chicago and can be reached at SFlotte@perkinscoie.com. **Sara W. Davey** (R) advises employers on workplace issues such as employee discipline and termination, disability accommodation requirements, requests for leave, employment and severance agreements, and discrimination and harassment investigations. Her guidance to employers also encompasses wage and commission structure implementation, hidden liabilities of temporary workers and independent contractors, and legal developments relating to cannabis. She is also based in Chicago and can be reached at SDavey@perkinscoie.com. This article was originally published March 30, 2021, on the firm's website. Republished with permission.

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