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EMPLOYER LAW BLOG

New Illinois Law Significantly Restricts Ability of Employers to Use Criminal Convictions of Employees in Connection with Employment Decisions

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What is a "Conviction Record?" The new law defines "Conviction Record" as "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."

What employment activities are prohibited under this new law? The law prohibits use of Conviction Records of individuals to serve 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 or tenure, or otherwise related to the terms, privileges or conditions of employment.

What exceptions exist to the new law? First, some laws prohibit employers from hiring persons with specific conviction records. In those instances, the employer still needs to provide notice to the employee or applicant of their employment disqualification under the applicable law, and the employee or applicant has five (5) business days to respond and dispute the accuracy or application of the Conviction Record at issue. Employers are also granted limited exceptions to using Convictions Records as the basis for adverse employment actions in either of the following: 1) the employer can demonstrate the Conviction Record is 'substantially related" to employment; or 2) a Conviction Record poses an "unreasonable risk to property or the safety or welfare of individuals."

How do I take an adverse employment action based on a Conviction Record? Employers under the new law are required to initially determine whether the Conviction Record is either "substantially related" or poses an "unreasonable risk" while considering the following six articulated 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 employee at the time of the conviction; and 6) evidence of rehabilitation efforts. Employers seeking to utilize the "substantially related" exception must satisfy a two-pronged test under the new law, demonstrating both that the employment position offers the opportunity for the same or a similar offense to occur; as well as the circumstances leading to the conduct for which the person was convicted will recur in the employment position. The bar for application of this exception is expected to be high, limiting those situations in which employers can rely on this exception. For the "unreasonable risk" exception to apply, employers must assess the risk of the Conviction Record at issue in the workplace, and determine, after analyzing the six mitigating factors above, that in relation to the particular position at issue, the Conviction Record poses an unreasonable risk under the totality of the circumstances.

How do Employers communicate with Employees regarding Conviction Records? Employers are required under this new law to engage in an "interactive assessment" with employees. If an employer preliminarily decides the Conviction Record disqualifies the employee from employment, after considering the mitigating factors under either the "substantially related" or "unreasonable risk" exceptions, the employer is required to provide the employee with a Preliminary Decision Notice within three (3) days of making the decision, and provide written notice to the employee detailing a written explanation of the adverse employment action proposed to be taken, and addressing the following three requirements: 1) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision and the employer's reasoning for the disqualification; 2) a copy of the conviction history report, if any; and 3) an explanation of the employee's right to respond to the notice of the employer's preliminary decision before that decision becomes final, informing the employee their response may include submission of evidence challenging the accuracy of the conviction record that is the basis for the disqualification, or evidence in mitigation, such as rehabilitation. Employees have five (5) business days to respond to the employer's Preliminary Decision Notice. Employers are required to take into consideration any information provided by the employee in connection with a timely response to the Preliminary Decision Notice. If after taking into consideration the information received from the employee the employer makes a final decision to disqualify or otherwise take adverse action against the employee based solely or in part on the employee's Conviction Record, the employer must issue a Final Decision Notice to the Employee addressing the following: 1) providing notice of the disqualifying conviction or convictions that are the basis of the final decision and the employer's reasoning for the disqualification; 2) advising the employee of any existing procedure the employer has for the employee to challenge the decision or request reconsideration; and 3) the employee's right to file a charge claiming a civil rights violation with the Illinois Department of Human Rights.

What are the potential penalties to Employers who fail to comply with this law? Any employer that is found to have unlawfully discriminated against an employee on the basis of a Conviction Record may be subject to a variety of damages or relief, including: a cease-and-desist order; actual damages to compensate for loss of injury; hiring, reinstatement, or promotion with backpay and fringe benefits; an action to make the injured party whole; admission into or restoration of membership; and payment of the employee's attorneys' fees and costs.

In light of the potential damages to which employers are exposed for violations, as well as the fact employers are required to document in writing their application of the mitigating factors and all evidence considered in connection with any disqualification or adverse employment action, the law poses significant pitfalls for employers either not familiar with, or properly applying the requirements of this new law. The attorneys at Sandberg Phoenix are prepared to assist employers with navigating the extensive requirements imposed by this new law and other employment related considerations. For assistance with the new analysis required by this law, or with preparation of the required notices to employees herein, please contact the author.