

Locke Lord QuickStudy: Illinois Enacts Sweeping Changes Impacting Employer Use of Criminal Conviction Records with Respect to Applicants and Employees

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On March 23, 2021, Illinois Governor J.B. Pritzker signed [amendments to the Illinois Human Rights Act](#) (“IHRA”) that are effective immediately and that will impose significant compliance burdens on Illinois employers who conduct criminal background checks of applicants and employees. The new law limits the extent to which employers can use criminal convictions in hiring and other employment decisions with respect to Illinois employees and requires a multi-step communication process with the applicant or employee before a criminal conviction can be used as the basis for an adverse employment action.

Substantive Requirements

Under the new law, employers in Illinois are now prohibited from taking any adverse action against an applicant or employee (e.g., refusing to hire, denying a promotion, etc.) based on a criminal conviction record unless either one of two things is true:

- There is a substantial relationship between one or more of the previous criminal offenses and the employment sought or held; or
- 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.

To establish that there is a substantial relationship between a criminal offense and the employment position, an employer must consider 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. Furthermore, in evaluating a criminal conviction—i.e., whether it meets one of the two permissible circumstances in which criminal convictions can be used in making employment decisions—an employer must consider six factors:

- The length of time since the conviction;
- The total number of convictions;
- The nature and severity of the conviction and its relationship to the safety and security of others;
- The facts and circumstances surrounding the conviction;
- The age of the employee at the time of the conviction; and

- Evidence of rehabilitation efforts.

Procedural Requirements

In addition to the fact that Illinois employers are now required to engage in a detailed substantive analysis regarding an applicant or employee's criminal conviction history before making any decisions using that conviction history, Illinois employers must now follow a two-step communication process with the individual in question.

Step 1 – Communication of Preliminary Decision

If, after evaluating the required factors, an employer decides that the individual's criminal history makes the individual unsuitable for the position in question, the employer must provide written notification to the individual containing the following:

- Notice of the disqualifying conviction and the employer's reason for believing that the conviction is disqualifying;
- A copy of the criminal conviction report (e.g., a background report from a consumer reporting agency); and
- An explanation of the individual's right to respond to the preliminary decision before it becomes final with information challenging the accuracy of the conviction record or providing other relevant evidence, such as the individual's efforts at rehabilitation since the conviction.

The employer must provide the individual with at least five business days to respond to the preliminary notice and must consider any information supplied by the individual in response.

Step 2 – Communication of Final Decision

If the employer, after considering any information supplied by the individual in response to the preliminary notice, intends to proceed with disqualifying the individual based on the criminal conviction, the employer must provide a second written notice to the individual containing the following:

- Notice of the disqualifying conviction and the employer's reasoning for disqualifying the employee based on the conviction;
- Information regarding any procedures the employer has for challenging the decision; and
- Information regarding the individual's right to file a charge with the Illinois Department of Human Rights contesting the decision.

Practical Impacts

Illinois employers that conduct criminal background checks as part of their hiring process will need to ensure that they have protocols in place to comply with both the substantive and procedural requirements of the new law. Employers will need to take particular care with respect to the requirement that they provide a written explanation of the basis for the decision to disqualify an individual based on a criminal conviction. Because this written explanation can be challenged by the individual through a charge of discrimination under the IHRA, poorly-

drafted or incomplete explanations could come back to haunt employers. Employers will also need to ensure that the multi-step procedural communication process that is required with respect to criminal convictions is coordinated with their existing processes for pre- and post-adverse action notices under the Fair Credit Reporting Act (“FCRA”).

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