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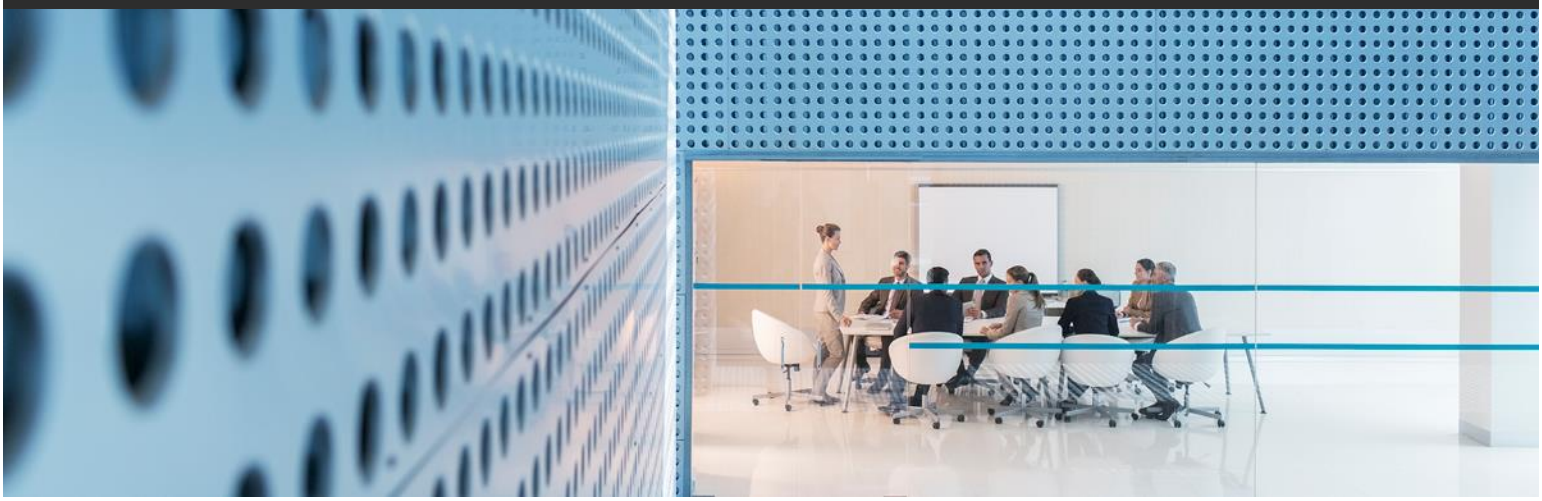

August 2019

Changes to Illinois Law Prohibit Salary History Inquiries and Impact Employer Drug Policies

Amendments to the Illinois Equal Pay Act

Several amendments to the Illinois Equal Pay Act (IEPA) will become effective Sept. 29, 2019. The most significant of these amendments is a ban that prohibits inquiry into and the use of a job applicant's pay history in making hiring and employment decisions. Illinois has now joined with 13 states that have imposed such a ban. This GT Alert summarizes the amendments that will take effect.

Pay History Ban

The amendments bar Illinois employers, employment agencies or their employees or agents from: (i) screening job applicants based on their current or prior wages or salary histories, including benefits or other compensation; (ii) requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria; and (iii) requesting or requiring a wage or salary history as a condition of being considered for employment, as a condition of being interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of an offer of employment or compensation; or (iv) requesting or requiring that an applicant disclose wage or salary history as a condition of employment.

Illinois employers will also be prohibited from seeking a job applicant's wage or salary history, including benefits or other compensation, from any current or former employer of the applicant, unless the applicant's wage or salary history is a matter of public record under the Freedom of Information Act or an equivalent state or federal law; is contained in a document made available to the public by an applicant's current or former employer; is submitted or posted by a current or former employer of the applicant to comply with state or federal law; or the applicant is a current employee and is applying for a new position with the current employer. The amendments do not prohibit an employer or employment agency or their employees or agents from disclosing wage or salary, benefit, and other compensation offered for a position, or from engaging in discussions with an applicant about the applicant's expectations in those regards. No violation of the ban on seeking wage or salary information arises if an applicant voluntarily and without prompting discloses salary information; however, the employer may not consider the volunteered information in deciding whether to offer the applicant employment, making a compensation offer or deciding future wages, salary benefits or other compensation. The amendments to the IEPA are silent as to whether an employer may consider an applicant's prior wage or salary history for compensation purposes if the applicant requests that the prospective employer consider the applicant's wage or salary history. It remains to be seen whether any parts of the amendments will be challenged on free speech or other grounds, but in the meantime the safer course is to fully comply, and GT's L&E Group in Chicago can help provide guidance in that effort.

Scope of the Act's Protection Broadened

Currently, the IEPA prohibits pay discrimination between employees of opposite sexes or between African American employees and non-African American employees for the same or substantially similar work that requires "equal" skill, effort, and responsibility under similar working conditions. There is an exception for differences in pay based on a seniority system, merit system, earnings measured by the quantity or quality of production, or a differential based on any other factor that would not constitute discrimination based on race, sex, or any other protected category under the Illinois Human Rights Act. These exceptions are affirmative defenses that an employer must establish to justify different pay for "equal" work.

The amendments replace "equal" skill, effort and responsibility with "substantially similar" skill, effort, and responsibility – a lower standard. In addition, the amendments modify the exceptions to add that the factor on which an exception may be based (i) must not be based on or derived from a differential in compensation based on sex or race, or other characteristics protected by the Human Rights Act, (ii) must be job-related with respect to the position and consistent with business necessity, and (iii) must account for the pay differential. These changes in the law will make it more difficult to defeat claims under the IEPA.

Employee Discussion of Salary Information

The Act already protects employees' right to discuss wages, salary, benefits, and other compensation among themselves. The amendments add a prohibition against requiring employees to sign any contract or waiver of these rights. However, human resources employees, supervisors, or any other employees whose job responsibilities require or allow them to have access to other employees' wage or salary information can be prohibited by the employer from disclosing such information without first obtaining written consent from the employee whose information has been sought.

Retaliation Prohibitions Extended

The IEPA's prohibitions against retaliating against applicants and employees for filing complaints under the Act, providing information concerning a proceeding or inquiry under the IEPA, and testifying in a proceeding under the Act are to be expanded to include protecting applicants and employees who fail to comply with any wage or salary history inquiry.

Enhanced Penalties

Prior to the amendments, an employee who suffered a violation of the IEPA could recover lost wages, attorney's fees and costs. The amendments will allow an employee to obtain (in addition to these existing remedies) compensatory damages, punitive damages, injunctive relief, and special damages in an amount not to exceed $10,000. Fines, already provided for in the Act, range from $500 for a first offense to $5,000 for a second or subsequent offense, depending on the size of the employer's workforce, for each affected employee.

Considerations for Employers

Employers subject to the IEPA should review job applications and related policies and procedures, make necessary changes to their applications, policies and procedures, orient their hiring managers and human resources personnel, and alert their hiring and staffing agencies to the IEPA's amendments. A complete review of an employer's compliance with the IEPA is not required to implement the changes required by the amendments. However, because the enhanced penalties and the amendments make it more difficult to defeat claims under the IPEA and significantly increase exposure for violations, a compliance review should be considered.

Employment Aspects of the Illinois Cannabis Regulation and Tax Act

The Illinois Cannabis Regulation and Tax Act (CRTA), the so-called "Recreational Marijuana Law," takes effect Jan. 1, 2020. Under the CRTA, Illinois residents 21 years of age and older will be able to possess 30 grams of marijuana flower and five grams of marijuana concentrate for their personal use. The CRTA contains many favorable protections for employers concerning marijuana in the workplace, but other provisions that may well require employers to modify their current drug use policies. This GT Alert summarizes those provisions of the CRTA and makes some suggestions that Illinois employers might want to consider in addressing this new law before it takes effect.

The following provisions of the CRTA are favorable to employers:

- Employers may adopt or maintain reasonable zero tolerance or drug-free workplace policies or employment policies concerning drug testing, smoking, consumption, storage, or use of marijuana while in the "workplace"[1] or while "on call"[2] provided the policies are applied in a nondiscriminatory manner.
- Employers are not required to permit an employee to use or be under the influence of marijuana in the workplace while performing job duties or while on call.

[1] The CRTA defines "workplace" broadly as the employer's premises, including any building, real property, and parking area controlled by the employer; any area used by an employee while performing job duties; vehicles; and as may be further defined by the employer's written employment policy, provided that the policy is consistent with the CRTA's definition.
[2] "On call" is when an employee is scheduled with at least 24-hours' notice by the employer to be on standby or otherwise be responsible for performing work either at the employer's premises or another previously designated location.

- The CRTA does not limit or prevent employers from disciplining or discharging an employee for violating the employer's employment policies or workplace drug policy.
- The CRTA does not interfere with any federal, state, or local law, or impact an employer's ability to comply with federal or state law, including the U.S. Department of Transportation's drug and alcohol testing regulations, or cause the employer to lose any federal or state contract or funding.
- The CRTA provides that it does not create or imply a cause of action for any person against an employer for: (i) subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including a refusal to be tested or to cooperate with testing procedures; (ii) disciplining or discharging an employee based on the employer's good faith belief that the employee used, possessed, or was impaired by or under the influence of marijuana while at the employer's workplace, performing job duties, or while on call in violation of the employer's workplace drug policy; or (iii) injury, loss, or liability to a third party if the employer neither knew nor had reason to know that an employee was impaired as result of marijuana use.

However, there are other CRTA employment provisions that may well cause employers to have to reevaluate aspects of their current drug policies. The CRTA requirement that an employer must have a "good faith belief" that an employee was impaired by or under the influence of marijuana in the workplace to discipline or discharge an employee is defined by identifying a number of specific, articulable symptoms of impairment. If an employer disciplines or discharges an employee for being impaired by or under the influence of marijuana in the workplace, the employer must afford the employee a reasonable opportunity to contest the basis of the employer's determination. The CRTA also amends the Illinois Right to Privacy in the Workplace Act to make marijuana use outside the workplace lawful, like the use of alcohol or tobacco products. Most drug tests cannot pinpoint when or where an employee used marijuana, and there is no definitive test for marijuana impairment. As a result, employers will likely not be able to rely on the results of testing alone to satisfy the good faith belief requirement, even in post-accident situations, if there is no reasonable suspicion that the employee was impaired by or under the influence of marijuana at the time of the accident.

The CRTA does not prohibit random testing for marijuana use. However, random testing by its nature is not based on individualized reasonable suspicion that an employee has used, was under the influence of, or was impaired by marijuana use in the workplace. Consequently, the results of random testing, like the results of post-accident testing, are alone unlikely to meet the good faith requirement for disciplining or discharging an employee for being impaired by or under the influence of marijuana in the workplace. Therefore, employers will likely need to train supervisors and managers to recognize the symptoms of marijuana impairment in order to satisfy the good faith belief test. Also, a decision not to hire an applicant will likely not be lawful if the applicant is rejected solely for testing positive for marijuana use, since urine testing and hair testing detects marijuana use going back over extended periods of time.

Despite the many provisions of the CRTA that are favorable for employers, there are several challenges presented by the law, particularly since employees will likely not be aware that their right to use marijuana can be lawfully restricted by their employers. Following are some suggestions for employers to consider: (i) address with your employees the impact of the CRTA in the workplace before it becomes effective; (ii) review and revise your current drug testing and disciplinary polices where necessary to comply with CRTA, and add a procedure for employees to contest an initial disciplinary or discharge decision based on suspected impairment by or being under the influence of marijuana; and (iii) provide training for supervisors and managers to recognize the symptoms of marijuana impairment.

Author

This GT Alert was prepared by **Howard L. Mocerf**. Questions about this information can be directed to:

- Howard L. Mocerf | +1 312.456.8407 | mocerfh@gtlaw.com
- Or your Greenberg Traurig attorney