A Timely Analysis of Legal Developments

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Changes in Illinois Labor and Employment Law Coming in 2011

By Amanda Inskeep

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Big News

Employee Credit Privacy Act, Illinois HB 4658; Public Act 96-1426.

Effective January 1, 2011, employers may no longer ask any applicant for his or her credit history as part of the hiring process unless it is a bona fide occupational requirement. The Illinois legislature has passed a bill that prohibits an employer from discriminating against an employee or applicant based on his or her credit history. An employer may not "fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment" based on a credit report or credit history.

To prevent discrimination based on credit reports, the Act prohibits inquiring into an individual's credit history or requiring a credit report from a current or prospective employee unless it is a bona fide occupational requirement. Fiduciary positions or those with access to financial assets or confidential information would generally have a bona fide occupational necessity to require credit checks.

This Act also provides a private right of action for discrimination and contains an anti-retaliation provision; it also covers any entity that employs at least one person or conducts interviews and accepts applications. It does not, however, apply to financial, insurance, law enforcement, government, or debt collection entities, who would generally have a bona fide need to ensure financial responsibility.

Even employers outside of Illinois may want to reconsider their reliance on credit scores during the application process. States like Hawaii, Washington and Oregon have also limited the use of credit scores in hiring. Furthermore, the use of credit scores in hiring decisions could lead to liability for discrimination suits.

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Amendments to Illinois Equal Pay Act Regulations, (Title 56, Part 320, Sections 320.140 through 320.74). Effective 12/3/2010.

Illinois' equal pay regulations were amended to expand the time period in which complaints can be filed with the Department of Labor under the Equal Pay Act. Last year the federal government passed the Lilly Ledbetter Fair Pay Act of 2009, which re-introduced the paycheck rule – so that each payment made pursuant to a discriminatory policy is a separate, actionable occurrence. In keeping with the Ledbetter Act, complainants in Illinois may now file a complaint within one year of any alleged underpayment. Prior to the amendments, the Illinois Act only allowed complainants to file complaints within 180 days of learning of the discriminatory practice.

In another broad change to the regulations, a complainant's identity will now be kept confidential during the administrative phase unless the alleged violation is retaliatory in nature. Previously, the Department informed the complainant of the process's lack of confidentiality and allowed him or her to withdraw the complaint if confidentiality was imperative.

The investigative process has changed as well. Employers will no longer receive a copy of the complaint, nor will they be required to prepare an official response. Employers will receive notice of the substance of the alleged violation and will have an opportunity to present any information the employer wishes the Department to consider in reaching its determination. This change, coupled with the added element of confidentiality, will put employers in the tricky situation of trying to defend themselves against vague charges without disclosing more information than necessary.

Also, employers should know that they are now required to maintain the employee records required by the Act for five years. These records include all personnel and payroll records that could be relevant to a claim of unfair pay practices, such as those relating to hiring, employee qualifications, promotion decisions, and explanations for differential pay.

New Class Action Vehicle

Illinois Wage Payment and Collection Act, 820 ILCS 115/11.

Beginning in 2011, employers in Illinois will be subject to yet another type of class action. The Illinois Wage Payment and Collection Act was amended this year to allow employees to bring class action suits for non-payment of wages. An aggrieved individual may file suit in circuit court, without exhausting administrative remedies, on behalf of himself or "other employees similarly situated." The amendment also authorizes the Illinois Department of Labor to establish an administrative procedure for adjudicating claims for $3,000 or less per employee, which could prove a useful avenue for employees wishing to avoid the courts.

Employers should also be aware that the criminal penalties have increased for willfully refusing to pay owed wages. The criminal penalties for intentional deprivation of wages now range from a Class B misdemeanor to a Class 4 felony.

Expanding the Scope

Amendment to the Family Military Leave Act, 820 ILCS 151/5. Effective June 1, 2011.

Employers must now allow employees who are the children or grandparents of a person called to extended military service (longer than 30 days) to take unpaid leave during the time the deployment orders are in effect. Before the amendment, employers were only required to provide such leave to spouses and parents of service members.

The amendment also modifies the amount of leave required by employers with more than 50 employees. An employer of more than 50 employees must provide up to 30 days of unpaid leave during the deployment period. This leave is offset by any leave taken under the federal Family and Medical Leave Act for deployment,[1] preventing employees from receiving leave under both laws. Employers with 15-50 employees are not affected by this section and need only provide 15 days of unpaid leave.

Victims' Economic Security and Safety Act 820 ILCS 180, Title 56, part 280, Sec. 280.110. Effective 12/3/2010.

Employers with 15 or more employees are now subject to the Victims' Economic Security and Safety Act. The Act provides for leave for and prohibits discrimination against victims of domestic or sexual violence. This amendment extends the law's coverage, which previously only applied to employers with 50 or more employees.

Clarifications

Amending the Child Labor Law, 820 ILCS 205/8 and 205/11.

When an in-state minor wishes to obtain an Illinois employment certificate, the City or Regional Superintendent of Schools, or the State Superintendent of Education, or his or her duly authorized agents, issues the certificate. Effective July 23, 2010, when an out-of-state minor seeks to obtain a certificate, the Illinois Department of Labor shall work with the Superintendents or their agents to issue the certificate, but the Superintendent may waive the requirement that an out-of-state minor submit his or her application in person.

Amendment to the Employment Security Act Regulations, 56 Ill. Adm. Code 2840. Effective 6/16/2010.

The amendment explains and gives examples of circumstances where an individual is deemed to have left employment voluntarily, left for good cause, or left for a reason attributable to the employer. An employee who voluntarily leaves employment is not eligible to receive unemployment benefits under Section 601 of the Employment Security Act, 820 ILCS 405/601. This amendment should clarify the circumstances under which there is a responsibility to provide unemployment benefits.

Bookkeeping

Amendment to the Illinois Income Tax Act, Section 704A. 35 ILCS 5/704A.

Beginning with calendar year 2011, for semiweekly withholding tax payments, each employer that withheld or was required to withhold more than $12,000 during the one-year period ending on June 30 of the preceding calendar year must make payments by electronic funds transfer.

Amendment to the Personnel Record Review Act, 820 ILCS 40/7. Effective July 22, 2010.

This amendment provides that an employer who receives a request for records of a disciplinary report, letter of reprimand, or other disciplinary action in relation to an employee under the Freedom of Information Act may provide notification to the employee in written form or through electronic mail, if available. Under Section 7 of the Personnel Record Review Act, an employer is required to give an employee notice before divulging employee records to a third party. This amendment simplifies the employer's requirement under this section. An employer who fails to provide notice or who otherwise violates the Act may be subject to investigation by the Director of Labor, or may be sued by the Director or the allegedly aggrieved employee.

Amendment to the Illinois Insurance Code, 215 ILCS 5/367e. Effective May 17, 2010.

This amendment ties the requirements of the state insurance code to the federal American Recovery and Reinvestment Act of 2009 (ARRA). Under the Illinois Insurance Code, involuntarily terminated employees are entitled to continue group hospital, surgical, and major medical coverage and group HMO coverage. This entitlement applies to employees involuntarily terminated between September 1, 2008 and May 31, 2010. The entitlement period previously ended on December 31, 2009, but now the cut-off date in the Illinois Insurance Code coincides with that used in the ARRA. Employers should verify that they are in compliance with this law.

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[1] 29 U.S.C. § 2654(a)(1)(E) (allowing for leave relating to exigencies caused by the deployment or call to duty of a child, spouse, or parent).