

Amendments to Illinois Human Rights Act Regulate Use of Criminal Records in Employment Decisions

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Illinois has enacted new limitations and procedural obligations on the use of criminal conviction records in employment decisions.

Governor J.B. Pritzker signed [the bill](#) amending the Illinois Human Rights Act (IHRA) on March 23, 2021, and the restrictions took effect immediately thereafter.

Latest Effort to Reduce Reliance on Criminal Records

In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated Criminal Background Guidance out of concern that African Americans and Hispanics are arrested at a rate that is two to three times their proportion of the general population. The EEOC's guidance stated that the over-reliance on criminal backgrounds have a disparate impact against African Americans and Hispanics. A central issue for the guidance was measuring how African Americans and Hispanics fared compared to other racial groups. Plaintiffs pursuing these disparate impact claims had some successes, but also notable failures.

While the federal government has sought to regulate the use of criminal backgrounds under a racial viewpoint, Illinois has pursued an across-the-board strategy. In 2015, the state "Banned the Box." In this legislation, the IHRA amendments substantively restricted the ability of employers to make employment decisions based on criminal records and added procedural requirements. The new amendments contain provisions that are similar to those under a New York City ordinance and likely will significantly impact hiring practices and policies regarding employing individuals with criminal backgrounds, as the Illinois Department of Human Rights has spelled out in its applicable [FAQs](#).

New Substantive Limitations on Use of Conviction Records

The new requirement that there be a "substantial relationship" between the criminal conviction being considered and the employment sought or held may prove challenging for employers given the restrictive definition of "substantial relationship." It is defined as "a consideration of 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." Alternatively, an employer may meet a different standard: "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.”

When assessing if either standard has been met, employers must consider several other factors related to the convictions and the surrounding circumstances (such as how long ago they occurred and the nature and gravity of the convictions), as under the EEOC’s individualized assessment standard.

Combining these standards, it appears that employers will not be able to base employment decisions on conviction records without, at the very least, considering whether there is an unreasonable risk that the employee or applicant will exhibit the same or similar behavior during the employment relationship. Moreover, employers will have less flexibility to make such decisions where nothing specific to the employment position itself adds to the likelihood of the employee or applicant repeating the conduct.

New Mandatory Procedures

Employers will need to comply with new procedural obligations that may present challenges as well:

- Employers must engage in an interactive assessment before taking an adverse job action, and may take an adverse action only if they conclude that the substantial relationship test or alternative test is passed, and after they have considered the requisite series of factors regarding the convictions and surrounding circumstances.
- Employers contemplating taking an adverse job action based on a criminal record must comply with the following notice procedure with requirements beyond those of the Fair Credit Reporting Act:
 - After making a preliminary decision, provide a written notice with the substantive basis for any disqualification decision, among other information.
 - Wait at least five business days to allow the individual to respond.
 - If an adverse action is taken, provide an additional written notice of the final decision containing: the disqualifying conviction(s), any procedure for the challenge or reconsideration of the decision, and, importantly, the individual’s right to file a charge with the Illinois Department of Human Rights.