CLIENT ALERTS & INSIGHTS

Seventh Circuit, Illinois, and Chicago Updates: Employers Should Take Note of Recent Cases and Newly Enacted Laws in 2021

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With the new year, it is important for employers to keep in mind several laws that are newly applicable and a recent court opinion. Also, currently pending legislation, likely to be enacted soon, will create additional obligations for Illinois employers.

Illinois Senate Bill 1480 May Create New Obligations for Illinois Employers

We anticipate that Illinois Senate Bill 1480 ("the Bill") will be signed soon by Governor Pritzker and will likely impact employers as follows:

- Amendment to the Illinois Human Rights Act Regarding Employment Decisions Based on Criminal Convictions. The Bill amends the Illinois Human Rights Act to require that Illinois employers that seek to make employment decisions based on a criminal conviction record demonstrate the following: (i) a substantial relationship between the conviction and the position sought; or (ii) that the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The Bill sets forth several factors that employers must consider in making this determination:
  - The length of time since the conviction
  - The number of convictions that appear on the conviction record
  - The severity of the conviction
  - Circumstances surrounding the conviction
  - Age of employee at the time of the conviction
  - Evidence of rehabilitation

In the event an employer seeks to disqualify an applicant or makes the decision not to promote an employee based on criminal history, the employer must give notice to the affected applicant or employee and commence an interactive process. The employer must consider information provided by the applicant or employee about why the conviction should not be considered or determinative in the employment decision before the employer makes a decision to disqualify the applicant or to not promote the employee. In the event an employer decides to disqualify the applicant or to not

promote the employee, the employer must provide additional information to the applicant or employee. If an employer does not comply with these procedures, it can constitute a civil rights violation under the Illinois Human Rights Act for an employer to use criminal history as a reason to not hire an applicant or to not promote an employee.

- New Obligation to Report Equal Employment Opportunity Data in Annual Reports to Illinois Secretary of State. Under the Bill, corporations that are required to file an EEO-1 (a survey on company employment data by race, ethnicity, gender, and job category) with the federal Equal Employment Opportunity Commission must include in their annual corporate reports filed with the Illinois Secretary of State information that is substantially similar to the employment data required by Section D of the federal EEO-1 form. The equal employment opportunity data must be included in the corporation's annual reports filed with the Illinois Secretary of State on and after January 1, 2023. Such corporations will have their data published on the Illinois Secretary of State's website.
- New Obligation for Employers with More Than 100 Employees to Obtain an Equal Pay Certificate. The Bill requires employers with more than 100 employees in Illinois to obtain an "equal pay registration certificate." Existing corporations must obtain certificates within three years after the effective date of the new law. New corporations must obtain certificates within three years after commencing operations. Employers should compile a list of all employees during the past calendar year categorized by gender, race, ethnicity, and the total wages to each employee. "Wages" under the Bill refers to the definition of "wages" in the Illinois Wage Payment and Collection Act, which includes wages, salaries, earned commissions, and other forms of compensation. In order to obtain a certificate, an employer also must submit a statement signed by a corporate officer, legal counsel, or other authorized agent(s) of the business certifying the employer's compliance with certain federal and state laws as well as the employer's nondiscriminatory compensation practices. An employer that fails to obtain a certificate or that is subject to suspension of its certificate after an Illinois Department of Labor investigation is subject to a monetary penalty in an amount equal to 1% of the employer's gross profits.

Members of Benesch's Labor & Employment practice group are available to provide employers with counseling regarding the Bill's additional details and to provide assistance with compliance in the event the Bill becomes effective law.

Seventh Circuit Reaffirms that Lengthy Leaves of Absence May Not Be Reasonable Accommodations Under the ADA

On December 30, 2020, the U.S. Court of Appeals for the Seventh Circuit issued its opinion in *McAllister v. Innovation Ventures, LLC*, No. 20-1779 (7th Cir., Dec. 30 2020), affirming a lower court ruling that a woman fired from her job as a machine operator after a spinal injury sustained in a car accident was not a qualified individual under the Americans with Disabilities Act (ADA). The plaintiff began a medical leave of absence after suffering significant injuries in a car accident in June 2016. On her leave request forms, McAllister's doctor stated that she could not perform "any & all" job functions and that she was "totally disabled" but might be able to return to work in early September 2016. After this anticipated return to work date was extended multiple times, the employer terminated McAllister's employment in December 2016 upon learning that she would not be able to

return to work in any capacity until February 2017. In affirming the lower court's decision, the Seventh Circuit found that the plaintiff had failed to create a genuine issue of material fact to survive summary judgment that she could "perform the essential functions" of her job during August and September 2016, even with accommodations.

The Seventh Circuit's opinion in *McAllister* expanded on its previous holding in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), in which it held that a request for a two-to-three-month leave of absence following the expiration of the plaintiff's FMLA leave entitlement was not a reasonable accommodation under the ADA. The Seventh Circuit stated that the four months of leave requested by McAllister, on top of the two-and-a-half months she had previously been granted, was "plainly not a reasonable accommodation," as affording her such prolonged leave would have "effectively excuse[d] her inability to work, which the ADA does not require of employers." Employers should continue to evaluate leave requests on a case-by-case basis in light of the rulings in *McAllister* and *Severson*.

Mandatory Reporting Obligations to the Illinois Department of Human Rights

Before July 1, 2021, and before each subsequent July 1 thereafter, Illinois employers must report to the Illinois Department of Human Rights ("IDHR") all adverse judgments and administrative rulings from the preceding calendar year. An "adverse judgment or administrative ruling" is defined as any final and non-appealable judgment that finds harassment or unlawful discrimination, and where the ruling is in the employee's favor. If an employer has no adverse rulings or judgments in the prior calendar year, the IDHR will not require an employer to file a report noting the lack of adverse rulings or judgments, pursuant to guidance issued by the IDHR.

Chicago's Fair Workweek Ordinance Now Includes a Private Right of Action

As of January 1, 2021, Chicago's Fair Workweek scheduling ordinance allows covered employees to bring private lawsuits for violations of the scheduling rules set forth under the ordinance. The ordinance requires employees to first exhaust their administrative remedies with the City of Chicago Department of Business Affairs and Consumer Protection prior to initiating a civil action against an employer. An employee may file a civil action irrespective of the results of the City's investigation. A private cause of action under this ordinance must be filed within two years of the alleged conduct resulting in the complaint. An employee who prevails in a civil action is entitled to an award of compensatory damages resulting from a violation of the ordinance, including costs and reasonable attorneys' fees.

This ordinance generally requires covered employers to provide covered employees with notice of their work schedule at least ten days in advance. Schedule changes occurring after this ten-day period will require an employer to provide "predictability pay" to the impacted employee, which is an extra hour at their regular pay rate. Covered employees are also entitled to premium pay at 1.25 times their regular pay rate if they agree to work within 10 hours of a prior day's shift, and employers may not require employees to do so. Employers must also provide covered employees with a "good faith estimate" of their work schedule upon hire. Employers in the following covered industries are subject to the ordinance: (1) building services; (2) health care; (3) hotels; (4) manufacturing; (5) restaurants; (6) retail; and (7) warehouse services. The ordinance covers employers in these industries that have at least 100 employees globally, as long as such an employer has at least 50 "Covered Employees." These "Covered Employees" generally include those who earn less than $26

per hour or $50,000 annually, perform the majority of their work in the City of Chicago, and perform most of their work in one of the aforementioned covered industries.

Illinois employers should seek legal counsel to ensure compliance with current employment laws and to prepare for pending employment laws. For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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