Cooley

Some Illinois Employers Face New Equal Pay Act Reporting, Certification Obligations Beginning in 2022

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Momentum has grown across the United States to adopt stricter pay equity laws and to increase enforcement of efforts to combat pay inequities for women, people of color and other protected classes. At the federal level, the US Congress has introduced legislation focused on pay equity issues, and the Biden administration has expressed support for plans to strengthen pay equity between men and women. Many states have prioritized pay equity and related issues, including passing laws designed to reduce wage gaps, such as salary history bans. Some states, including California, New York and Illinois, have passed broader pay equity initiatives.

In June 2021, Illinois updated its equal pay reporting and compliance requirements, only a few months after the requirements were previously amended. Illinois Senate Bill 1847, signed into law and effective June 25, 2021, amended the Illinois Equal Pay Act (IEPA) by expanding certain reporting requirements and by potentially accelerating deadlines to certify compliance by up to two years. However, the June 2021 amendments to the IEPA clarify some ambiguities in reporting requirements, which existed previously, and revise the IEPA's controversial penalty provision. For some Illinois employers, reporting and certification obligations under the IEPA will begin in 2022.

While this alert focuses on the current state of pay equity requirements in Illinois, we expect that legislation and litigation related to pay equity and related issues will increase in Illinois and nationally. As a result, employers are taking note, and in certain circumstances, reconsidering or revising their pay practices.

Reporting obligations under the IEPA

With the June 2021 amendments to the IEPA, covered employers in Illinois will be required to regularly:

1. Apply for an "equal pay registration certificate" from the Illinois Department of Labor (IDOL).
2. Submit a statement certifying their compliance with various equal pay and discrimination laws, among other things.
3. Submit their most recent Employer Information Report EEO-1.
4. Compile and submit demographic data and wage records.

Explained in more detail below, these requirements cover any private employer that has more than 100 employees in Illinois and that is required to file an annual EEO-1 with the Equal Employment Opportunity Commission.

Equal pay registration certificate

Covered employers must apply for an equal pay registration certificate. If authorized to do business in Illinois on March 23, 2021, employers must apply to obtain an equal pay registration certificate between March 24, 2022, and March 23, 2024, and must recertify every two years thereafter. If authorized to do business in Illinois after March 23, 2021, employers must apply to obtain an equal pay registration certificate within three years of commencing business operations, but not before January 1, 2024, and must recertify every two years thereafter.

The IDOL will assign each business a date by which it must apply to obtain an equal pay registration certificate, and the business must recertify every two years at a date to be determined by the IDOL. If the business receives notice to recertify, but has fewer than 100 employees, the business must certify in writing to the IDOL that it is exempt. Any business that subsequently becomes subject to the certification requirements must submit its contact information to the IDOL by January 1 of the following year and will be assigned a date by which it must apply to obtain an equal pay registration certificate. Employers should be vigilant in ensuring that they have

obtained a submission deadline from the IDOL. While the IDOL's failure to notify any business of its certification or recertification deadline may be a mitigating factor when deciding if a violation of the IEPA occurred, the IDOL's failure to assign a registration date does not exempt the business from compliance.

Equal pay compliance statement

When applying for or recertifying an equal pay registration certificate, covered employers must submit a statement certifying:

- That the business complies with the IEPA and "other relevant laws," including Title VII of the Civil Rights Act of 1964, the federal Equal Pay Act of 1963, the Illinois Human Rights Act and the Illinois Equal Wage Act.
- That the average compensation for female and minority employees is not consistently below the average compensation (as determined by the US Department of Labor) for its male and nonminority employees within each of the major job categories in the EEO-1 for which an employee is expected to perform work.
- That the business does not restrict employees of one sex to certain job classifications, and makes retention and promotion decisions without regard to sex.
- That wage and benefit disparities are corrected when identified to ensure compliance with the equal pay and discrimination laws.
- How often wages and benefits are evaluated.
- The approach the business takes in determining the level of wages and benefits to pay its employees.

An employer failing to make a good faith effort to comply with, or engaging in multiple violations of, the laws identified in the compliance certification are among the grounds for suspension or revocation of an equal pay registration certification, as well as related penalties.

The statement on the average compensation for female and minority employees compared to male and nonminority employees considers factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions, education or training, job location, use of a collective bargaining agreement or other mitigating factors.

EEO-1

When applying or recertifying for an equal pay registration certificate, covered employers must submit a copy of the business's most recently filed EEO-1 to the IDOL.

Demographic data and wage records

When applying or recertifying for an equal pay registration certificate, covered employersmust compile a list of all employees during the past calendar year, separated by gender and the race and ethnicity categories as reported in the business's most recently filed EEO-1, as well as the county in which the employee works, the date the employee started working for the business, and any other information the IDOL deems necessary to determine if pay equity exists among employees, and report the total wages paid to each employee during the past calendar year, rounded to the nearest $100.

Penalties

Violations of the IEPA's reporting and certification requirements can cost a business up to $10,000. The IEPA is unclear whether this fine is for any violation or if an employer may be fined up to $10,000 for each violation of the reporting and certification requirements.

Access to information

Any individually identifiable information submitted to the IDOL within or related to an equal pay registration application or otherwise provided by an employer as part of its equal pay compliance statement will be considered confidential information and not subject to disclosure pursuant to the Illinois Freedom of Information Act.

Aggregate data or reports that are reasonably calculated to prevent the association of any data with any individual business or person are not confidential information under the IEPA. Aggregate data includes the job category and the average hourly wage by county for each gender, race and ethnicity category on the registration certificate applications. The IDOL may compile aggregate data from registration certificate applications.

A current employee of a covered business may request anonymized data regarding their job classification or title and the pay for that classification. No individually identifiable information may be provided to an employee making this request.

The IDOL may share data and identifiable information with the Illinois Department of Human Rights or the attorney general's office.

Material changes to the IEPA since the March 2021 amendments

The March 2021 amendments, which came through Senate Bill 1480, left several ambiguities and created a controversial penalty for certification-related noncompliance. Many employers may have been gearing up to comply with the IEPA's previous requirements and may need to modify their approach to proper reporting and compliance.

First and most importantly, the June 2021 amendments have potentially accelerated the deadline for initial certification. Previously, the deadline for equal pay certification was March 23, 2024, for existing employers. Now, as stated above, the certification deadline will be individually set by the IDOL and will fall on a date between March 2022 and March 23, 2024. Therefore, some employers may need to be prepared to submit their certification much earlier than previously anticipated.

The June 2021 amendments also broadened the scope of information that must be disclosed and, potentially, the scope of compliance. Previously, employers did not need to disclose the county in which employees worked or the date employees started working for the business, and they were not subject to disclosing "any other information" that the IDOL may request to assess pay equity. The scope of compliance has been enhanced, as employers previously were confined in scope to compliance with specifically listed statutes, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the IEPA, the Illinois Human Rights Act and the Illinois Equal Wage Act. However, employers may now be asked to certify their compliance with an undefined set of "other relevant laws." The June 2021 amendments to the IEPA have created an all-encompassing reporting and compliance environment for Illinois employers.

On the other hand, the June 2021 amendments created some flexibility for Illinois employers in their reporting and compliance requirements. They have expanded the list of factors that an employer may consider when certifying that average compensation for its female and minority employees is not consistently below the average compensation to include education or training, job location, and use of a collective bargaining agreement, which complements the previously provided factors of length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions or other mitigating factors.

The June 2021 amendments also provided employers with flexibility in their disclosure of approach to setting compensation. Previously, employers were required to indicate whether, in setting compensation and benefits, they utilized: a market pricing approach, a state prevailing wage approach, union contract requirements, a performance pay system, an internal analysis or an alternative approach with a description. However, the June 2021 amendments removed all rigidity in this requirement by simply requiring employers to describe their approach, generally, in setting compensation and benefits. And the amendments left some room for forgiveness by creating a 30-day grace period to correct a failure to file an application or to cure deficiencies, as well as the ability to appeal rejected applications.

In addition, the June 2021 amendments removed the whistleblower protection provisions contained in the March 2021 amendments. Previously, employers were prohibited from retaliating against any employee who assisted or participated in a proceeding to enforce the IEPA. However, employers should not take this eliminated whistleblower provision as permission to engage in retaliatory acts against potential whistleblowers. It remains possible that retaliation against IEPA whistleblowers may run afoul of other discrimination laws.

The June 2021 amendments also removed a controversial penalty provision created by the March 2021 amendments. Previously, if a covered employer's certification was revoked or suspended, or if a business did not attempt to obtain an equal pay registration certification, the IDOL was required to issue a civil penalty equal to 1% of the business's "gross profits." This term was undefined, which led to uncertainty among Illinois employers. However, this penalty provision was replaced with a fine of up to $10,000 for violations of the IEPA's reporting and disclosure requirements, as described above.

Finally, the June 2021 amendments resolved certain ambiguities created by the March 2021 amendments, and they provide clarity on access to application data and information submitted in attempts to obtain an equal pay registration certificate, as detailed above. The IEPA still contains some ambiguities, and it is possible that later guidance from the IDOL may work to clear up any remaining confusion.

Reporting demographic data under the Illinois Business Corporation Act

The IEPA equal pay reporting requirements are not the only place Illinois businesses will have to report demographic data going forward. Starting with annual reports filed on and after January 1, 2023, the Illinois Business Corporation Act (IBCA) requires Illinois businesses to report information that is substantially similar to the employment data reported under Section D of the corporation's EEO-1 (i.e., basic counts of race, ethnicity and gender data for employees by job category) in a format approved by the Illinois secretary of state. Currently, it is unclear whether Illinois will require data for an employer's national workforce or Illinois workforce only in the annual report. This may be clarified when the Illinois secretary of state confirms the format of the information. These reporting requirements under the IBCA remained unchanged, however, following the June 2021 amendments.

The amendments to the IBCA for the collection of EEO-1 type data apply to domestic corporations organized under any general law or special act in Illinois authorizing the corporation to issue shares, as well as foreign corporations authorized to transact business in the state of Illinois, who are also required to file a federal EEO-1 report. The Illinois secretary of state will publish data on the gender, race and ethnicity of each corporation's employees on the secretary of state's official website.

Penalties are unclear for a failure to report the required demographic data to the Illinois secretary of state, but it likely will be considered a failure to file an annual report, which would result in a penalty equal to 10% of a corporation's franchise tax per month.

Practical considerations for employers

The IEPA as it currently stands adds substantial reporting requirements for Illinois employers going forward. While the June 2021 amendments clarified many ambiguities created by the March 2021 amendments, some ambiguity remains. It is possible that the IDOL will publish guidance in coming months to clarify any ambiguities that remain unresolved by the June 2021 amendments. Cooley will stay on top of any developments or guidelines in this area.

Because certification will require a large compilation of data, employers should begin collecting this data as soon as possible to ensure that they will be able to apply for their equal pay registration certificate on the deadline set by the IDOL, which could be as early as March 24, 2022. Employers should also be proactive in obtaining a deadline from the IDOL if they do not receive one. Additionally, employers should actively evaluate and assess any pay equity issues as required by federal, state and local law. Finally, as aggregate data is not considered confidential under the June 2021 amendments, employers should be cognizant of any potential ramifications that may result from the publication of EEO-1 employee composition data.

If you have any questions about or related to the IEPA, please reach out to a member of the Cooley employment team.

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