



ALERTS

Illinois Bars Questions Of Wage History And Expands Equal Pay Act Protections

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Perhaps less splashy than the recently announced legalization of recreational marijuana, but no less impactful on employers, Illinois recently amended the Illinois Equal Pay Act of 2003 to prohibit employers from inquiring about an applicant's current or past compensation. The stated goals of the amendment are to promote equal pay, and to close the gender wage gap.

The amendment, which Gov. J.B. Pritzker signed into law on July 31, 2019, takes effect on Sept. 29, 2019. Illinois joins the growing list of municipalities and states, including California, Washington, and Massachusetts, among others that prohibit these inquiries.

Compensation History Prohibitions

In particular, the amendment prohibits employers, including employment agencies, from:

- Screening job applicants based on their current or prior wages or salary history, including benefits or other compensation, by requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria
- Requesting or requiring a wage or salary history as a condition of being considered for employment, as condition of being interviewed, as a condition of continuing to be considered for an offer of employment, as a condition of an

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offer of employment or an offer of compensation

- Requesting or requiring that an applicant disclose wage or salary history as a condition of employment

Closing off a potential loophole, the amendment also bars an employer from seeking such compensation information from the applicant's current or former employer(s).

The amendment provides several notable exceptions. For example, the law does not apply if the applicant's wages are a matter of public record, or the applicant is a current employee applying for a position with the same employer. The amendment does not prevent engaging in discussions concerning the applicant's compensation expectations, nor does it prohibit the employer from providing the applicant with compensation information related to the position. In addition, an employer does not violate the new law when an applicant voluntarily discloses his or her current or prior wage or salary history – provided that the employer does not consider or rely on such disclosure in determining whether to offer the applicant employment, in making an offer of compensation, or in determining future compensation.

An employer who violates these provisions may be liable to the employee in a civil action for monetary damages, as well as special damages of up to \$10,000, a penalty of up to \$5,000 for each violation, injunctive relief, and attorneys' fees and costs. The amendment notes that if special damages are available, an employee may also recover compensatory damages up to the amount of the special damages. Any action under these new provision must be brought within five years of the date of the violation.

Expansion of Equal Pay Act Protections

The amendment also expands the protections afforded by the Illinois Equal Pay Act. The Act previously barred discrimination on the basis of sex and race where employees were paid less for the same or substantially similar work on jobs that required "equal skill, effort, and responsibility." The amendment now dictates that the job skill required need only be "substantially similar," rather than "equal." What "substantially similar" means will be left for the courts to decide, but one thing is clear – it does not mean equal, which has been the standard under both federal and state law for decades.

The Act previously made exceptions for pay differentials that were based on a seniority system, a merit system, or a system that measures earnings by quantity or quality of production, or any other factor provided it would not constitute unlawful discrimination under the Illinois Human Rights Act (the catchall exception). Now, as amended, employers can only use the catchall exception if it:

- Is not based on or derived from a differential in compensation based on a another protected characteristic;
- Is job-related with respect to the position and consistent with business necessity; and,
- Accounts for the differential in pay.

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Employer Takeaways

The Equal Pay Act amendment creates many potential pitfalls for unsuspecting employers in Illinois, and a very short runway to ensure compliance. Employers should consider reviewing and revising employment applications, background check processes, and interview questions to confirm that these materials do not violate the amendment. Employers may also want to train hiring personnel on what is and is not permissible, to be sure that hiring procedures are compliant.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Mark W. Wallin at 312-214-4591 or mark.wallin@btlaw.com; Peter J. Wozniak at 312-214-2113 or peter.wozniak@btlaw.com; or Norma W. Zeitler at 312-214-8312 or norma.zeitler@btlaw.com.

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