

Illinois Employers See Equal Pay Certification Looming on the Horizon

Last year, Illinois made sweeping amendments to its state Equal Pay Act (EPA). Governor J.B. Pritzker twice signed bills passed by the Illinois legislature — first on March 23, 2021, and then on June 25, 2021, (the EPA amendments) — the cumulative effect of which gives Illinois perhaps the most robust and onerous (for employers) equal pay law in the nation. In a nutshell, private employers in Illinois that (1) file an EEO-1 report with the Equal Employment Opportunity Commission and (2) have more than 100 employees in Illinois must apply for and obtain an equal pay registration certificate from the Illinois Department of Labor (IDOL). That means covered Illinois employers should re-examine their compensation practices to comply with the new amendments and prepare to submit the information needed to obtain an equal pay registration certificate.

Equal Pay Certification Timeline

The EPA amendments require the IDOL to collect contact information from existing and newly covered businesses, after which the IDOL will *assign each business a deadline* by which that business must apply for the equal pay registration certificate. Newly covered employers must submit their contact information to the IDOL by January 1 of the following year. For existing covered businesses, the deadline is arriving soon — between March 24, 2022, and March 23, 2024. Employers who meet coverage requirements after March 23, 2021 (because, for example, they grow above 100 employees) will be assigned a deadline no earlier than January 1, 2024.

Businesses must recertify every two years. The EPA amendments offer some leniency — albeit a brief one — a 30-day grace period to correct an inadvertent failure to timely file an application or cure deficiencies in applications.

New Reporting Requirements for Employee Demographics

The EPA amendments expand the scope of employee demographic information employers are required to disclose in applications for certification and gives the IDOL discretion to seek even more information. Covered employers must compile and submit to IDOL a list of employees organized by race, ethnicity, and gender and report the total wages paid to each employee (as defined by Section 2 of the Illinois Wage Payment and Collection Act) during the previous calendar year, rounded to the nearest \$100. In addition to the above information, employers also must include the county in which the employee works, the start date of each employee, and “any other information the Department deems necessary to determine if pay equity exists among employees.” Any business required to file an annual Employer Information Report EEO-1 with the EEOC must also submit a copy of the business’s most recently filed EEO-1 report.

Wage Comparison Factors

The list of wage comparison factors an employer must consider was also expanded by the EPA amendments. Covered employers must certify “that the average compensation for its female and minority employees is not consistently below the average compensation ... for its male and non-minority employees within each of the major job categories ... taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors.” The EPA amendments additionally include “education or training, job location, use of a collective bargaining agreement, and other mitigating factors.” The expansion of the list means that covered employers will have additional reasons to explain or justify wage differentials among employees and demonstrate such differences are not due to race or gender.



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Related Practice Areas

- Labor & Employment

Setting Compensation and Benefits

The requirements related to an employer's approach to setting compensation were simplified a bit as a result of the second amendment. The March 2021 amendment required employers to indicate whether they used:

1. A market pricing approach;
2. State prevailing wage or union contract requirements;
3. A performance pay system;
4. An internal analysis; or
5. An alternative approach along with a description.

Under the June amendment, though, the requirements are now more flexible. Employers are required to disclose "the approach the business takes in determining what level of wages and benefits to pay its employees." The employer could certainly explain that its approach includes one or more of the above list, but is not limited to the rigid application of that list. As we know, businesses come in many shapes and sizes and have a variety of legitimate reasons for their wage payment structure.

Data Protection

The EPA amendments also raise concerns about the availability of the data an employer submits to IDOL. The EPA amendments provide that "any identifiable information submitted to the Director within or related to an equal pay registration or otherwise provided by an employer in its equal pay compliance statement ... shall be considered confidential information and not subject to disclosure pursuant to the Illinois Freedom of Information Act." However, this does not impact recent amendments to the Illinois Business Corporation Act, which allow the Secretary of State to publish data on the gender, race, and ethnicity of each corporation's employees on the Secretary of State website within 90 days of a properly filed annual report. This does not specifically call for publication of individual wage data, but it will certainly impact the visibility of broader sets of employer pay data. Employers should consider any ramifications of employee data being publicly available. The IDOL may also share data and identifiable information with the Department of Human Rights or the Office of Attorney General.

Penalties and Appeals Procedure

The EPA amendments originally subjected employers to a 1 percent penalty of a business's gross profits for falsifying information on an application, failing to obtain an equal pay registration certificate, or suspension or revocation of certification. But, upon further reflection, the Illinois legislature decided to limit penalties so that any employer not in compliance with equal pay certification requirements will be fined up to \$10,000 per employee affected. That is certainly not an insignificant amount for a company with more than 100 employees.

Under the EPA amendments, an employer may correct any deficiencies in its application that led to a rejection of certification and resubmit a revised application to the IDOL within 30 calendar days of receiving the rejection. Employers may also appeal rejected applications before civil penalties are imposed in accordance with the Illinois Administrative Procedure Act. This grants employers an opportunity to seek administrative review of the IDOL's decision to impose penalties.

Recommendations for Employers Moving Forward

Covered Illinois employers should begin examining and potentially clarifying their compensation practices as soon as possible to comply with the EPA amendments and prepare for the process to obtain an equal pay registration certificate. It is important to note that the IDOL makes clear that its failure to notify an employer of its recertification deadline does not exempt a business from noncompliance, although it "may be a mitigating factor [for the Department] when making a determination of a violation" Nevertheless, employers should consult with legal counsel about their compensation programs to assure that they will be able to apply for the required equal pay registration certificate by the earliest potential date of March 24, 2022.
