KRIEG DEVAULT

Insights

Changes to Illinois' Background Check Compliance: What Happens When an Applicant Fails their Background Check?

April 5, 2021

By: Elizabeth M. Roberson

The laws regarding pre-employment background checks are complicated and Illinois' new amendments to the Illinois Human Rights Act has just added to background check requirements. On March 23, 2021, Governor Pritzker signed into **law** new requirements for background checks in Illinois that take effect immediately. Overall, the changes made impose many new requirements on employers if they decide to take adverse action due to an employee's background check. Those new requirements can be categorized into three areas: (1) adverse action requirements; (2) pre-adverse action notice requirements; and (3) post-adverse action notice requirements.

1. Adverse Action Requirements

If an employee has a criminal record, an Illinois employer cannot take adverse action based on that record unless (1) there is a substantial relationship between the prior criminal offense and the employment sought or held, or (2) granting or continuing employment would involve an unreasonable risk to property or to the safety of specific individuals or the general public.

Prior to concluding that there is a "substantial relationship", an employer must consider two things: (1) whether the position offers the opportunity to commit the same or a similar offense, and (2) whether the circumstances leading to the conduct that the person was convicted to will recur in the new/current employment position. In order to determine if a "substantial relationship" exists, the employer should consider the following factors:

- the length of time since conviction;
- the number of convictions on his/her record;
- the nature and severity of the conviction and its relationship to the safety and security of others;
- the facts and circumstances surrounding the conviction;
- the age of the employee at the time of the conviction; and
- any evidence of rehabilitation.

It is important that an employer is consistent in making this determination for every potential employee that has a criminal record. Detailed documentation regarding this determination will assist in establishing the employer's compliance.

2. Pre-Adverse Action Notice Requirements

After an employer determines that the conviction disqualifies the employee for the position, the employer must follow new pre-adverse action notice requirements that are in addition to the Fair Credit Reporting Act ("FCRA") notice requirements. This new notice to the employee must include:

- notice of the disqualifying conviction(s) that are the basis for the decision and the employer's reason for disqualification;
- a copy of the conviction history report (if one exists); and
- an explanation of the employee's right to respond to the notice before the decision becomes final.

The notice must inform employees that their response may include, but is not limited to, the following: submission of evidence challenging the accuracy of the conviction record, or evidence of mitigation including rehabilitation. The employer must provide the individual at least five business days to respond and must consider any response before such decision becomes final.

3. Post-Adverse Action Notice Requirements

The new law also adds a post-adverse action notice requirement, which again is in addition to the FCRA requirements. Following any final decision disqualifying an employee the employer must notify the employee, in writing, of the following:

- the disqualifying conviction(s) that are the basis for the final decision and the employer's reasoning for disqualification;
- any existing procedure for the employee to challenge the decision or request reconsideration; and
- that the employee has a right to file a charge with the Illinois Department of Human Rights.

Employers should be prepared to send such notice without delay as soon as a final decision is made.

***

As with any new legal changes, employers should review their handbook and procedures to ensure both are compliant and should reach out to counsel to determine if changes need to be made. Further, it is important that employers are prepared to send these pre- and post- adverse action notices and ensure that such notices are complaint with the Illinois Human Rights Act. If you need assistance in reviewing or adapting your policies/notices, please contact **Elizabeth M. Roberson** or a member of our **Labor and Employment Law Team** for assistance.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.