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Insights

Illinois Expands Equal Pay Act Provisions and Prohibits Employers from Asking Applicants' Wage and Salary History

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Illinois enacted its Equal Pay Act in 2003 (the "Act") to prohibit employers from engaging in discriminatory payment practices based on an employee's sex or race. Amendments recently took effect on September 29, 2019, that (1) expand the scope of the equal pay provisions and (2) prohibit employers from asking job applicants about their wage or salary history (the "Amendment").

Equal Pay is Now Required for "Substantially Similar" Work. The Amendment requires equal pay to employees performing similar work on jobs requiring "*substantially similar* skill, effort, and responsibility," rather than the original "*equal* skill." While Illinois courts are left to determine what constitutes "substantially similar," the new standard will clearly cover a broader group of employees.

Under the Act's catchall exception, an employer may pay employees of the opposite sex differently only when the pay is based on a factor other than sex or other protected characteristic. The Amendment now requires employers to bear the burden to demonstrate that the other factor, on which the difference in pay is based, (a) is not derived from a differential in compensation based on sex or another protected characteristic; (b) is job-related with respect to the position and consistent with a business necessity; and (c) accounts for the entire differential.

Don't Ask About Wage and Salary History. The Amendment prohibits employers from:

- screening job applicants based on their wage or salary histories, including benefits or other compensation;
- requesting wage or salary history as a condition of being considered for employment;
- requesting as a condition of employment;
- asking former employers for the applicant's wage or salary history, including benefits or other compensation; [1]
- discharging or discriminating against an individual for failing to comply with a wage or salary history inquiry.

Not All Discussions on Wage/Salary are Prohibited. The Amendment does not prohibit an employer from:

- providing information about the wages, benefits, compensation, or salary offered in relation to a position; or
- engaging in discussions with a job applicant about the applicant's expectations with respect to wage or salary, benefits, and other compensation.

If a job applicant voluntarily and without prompting discloses prior pay history, the employer does not violate the Act so long as the employer does not consider the voluntary disclosure in making an employment decision.

The Risks of Noncompliance. Damages for violations of the Equal Pay Act, in addition to any underpayment, costs, and attorney's fees, may include:

- compensatory damages if the employer acted with malice or reckless indifference,
- punitive damages, and
- injunctive relief

Next Steps for Illinois Employers. Illinois employers are advised to review their current practices to ensure they comply with the Act, which took effect on September 29, 2019. This may include examining current pay and interviewing practices, revising job applications and interview questions, and retraining hiring professionals to assure compliant with the Act.

[1]This prohibition does not apply if the job applicant's wages are a matter of public record or the job applicant is a current employee applying for a position with the same current employer.