

LEGAL UPDATES

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# Employer Compliance: Illinois Issues Proposed Regulations Regarding Equal Pay Registration Certificate

On May 20, 2022, the Illinois Department of Labor released the anticipated proposed administrative rules to implement Section 11 of the Illinois Equal Pay Act (IL EPA) requiring businesses of 100 or more employees to file an application for an Equal Pay Registration Certificate (EPRC). As we discussed in our previous commentary, the IL EPA was amended in June 2021 to require covered employers to apply for an EPRC by reporting employee level payroll and demographic information and to affirm compliance with equal pay and anti-discrimination laws beginning in 2022. The proposed regulations provide clarification of some of the ambiguities surrounding data submissions. The most significant provisions of the proposed regulations are summarized below:

## The definition of employees

For the purposes of counting employees employed by the business and for reporting payroll data, the term “employee” includes: any person performing a service for a business under the IL EPA: 1) whose base of operations is located in Illinois; or 2) if there is no base of operations, the place from which the service is directed or controlled is located within the State of Illinois; or 3) whose base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual’s residence is in Illinois.

## The obligation to enroll or register with the Illinois Department of Labor (IDOL)

The regulations now clarify that all businesses that are authorized to transact business in Illinois on or before March 23, 2021 must submit their contact information to the IDOL in the enrollment form via the IDOL portal at

<http://labor.illinois.gov> confirming that they either are or are not subject to the EPRC. Although the IDOL FAQs previously had encouraged registration by businesses, the proposed regulations clarify that registration was required by March 31, 2022.

## **The definition of an authorized agent**

Section 11 of the IL EPA requires covered businesses to execute an Equal Pay Compliance Statement that is signed by a corporate officer, legal counsel employed by the business or authorized agent employed by the business. The proposed regulations define an “authorized agent” as “an employee of a business with knowledge of pay practices and who has been designated by the corporate officers of the business to submit information to the Department as required by the Act. Authorized agent does not include any outside or third-party consultant or vendor who serves the business.”

## **Applicability of a bona-fide occupational qualification (BFOQ) exception**

As part of the compliance statement, businesses must certify that they do not restrict employees of one sex to certain job classifications and make retention and promotion decisions without regard to sex. The proposed regulations provide a BFOQ exception (as defined in 29 C.F.R. 1604.2) for businesses with positions for which consideration of sex, a protected characteristic, is necessary with respect to an essential job duty. For each such position, the business must provide a short explanation of the reason that sex is a BFOQ.

## **An affirmative duty to correct errors in data submissions**

A business is required to revise its EPRC application in the event it discovers that it provided incorrect or incomplete information to the IDOL, as well as a letter identifying the changes. The proposed regulations provide a safe harbor for businesses that make corrections provided that the incorrect or incomplete information was provided in good faith and without knowledge that such information was incorrect or incomplete.

## **The significance of good faith efforts of compliance**

Employers that make a good faith effort to comply with Section 11 of the IL EPA and federal civil rights acts may avoid suspension or revocation by the IDOL. A “good faith” effort is defined in the proposed regulations as “demonstrable efforts by the business to promote pay equity and combat employment discrimination, including but not limited to conducting internal compensation review, staff training, adoption of equal opportunity policies, and evidence that such policies were enforced through evaluation, investigation and personnel action.”

## **Employee requests for payroll data**

The proposed regulations provide additional information regarding employees' ability to obtain information concerning compensation for their job classification or title. According to the proposed regulations, only a current employee of a business can request anonymized data relating to their job title or classification, including the pay for their job title or classification. The IDOL may provide current data as well as historical data going back for up to 10 years prior to the date of the request by the employee. The data provided is limited to data of employees working in the same county and from the same business as the individual requesting the data. An individual requesting data must provide their name, date of hire, job title or classification, the dates for which the data is being requested, a signed affidavit attesting that they hold the specified job title at the business, and evidence of their current position with the business. Evidence includes pay stubs, work schedules, hire letters, work ID cards, business cards, and company website listings.

## **What this means to you**

Employers should be prepared for the proposed regulations to be adopted. Under the Illinois Administrative Procedure Act, the IDOL must provide a 45-day notice and comment period from the date of publication of the proposed rule in the Illinois Register during which stakeholders can submit comments relating to the proposed rule. A public hearing may be held depending on requests made within 14 days after publication. The agency is further required to provide a second notice of the proposed rulemaking before the regulations can be finalized. As the rulemaking process continues, we will continue to monitor and report on further legal developments.

## **Contact us**

For questions related to the Illinois Equal Pay Act and payroll reporting compliance obligations, contact Anne Mayette, Tracey O'Brien, Karen Courtheoux, Jillian Molz or your Husch Blackwell attorney.