LEGAL UPDATES UPDATED: MAY 18, 2022 PUBLISHED: APRIL 6, 2022

Employer Compliance Guidance: New Payroll Reporting Obligations Under the IL Equal Pay Act Have Begun

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Beginning March 24, 2022 through March 23, 2024, the new payroll reporting obligations under the Illinois Equal Pay Act (IEPA) require private employers in Illinois with 100 or more employees to register and report extensive payroll information to the Illinois Department of Labor (IDOL), to certify compliance with pay equity and anti-discrimination laws in order to comply with the IEPA, and to receive an equal pay registration certificate (EPRC). The law's requirements are stringent, requiring employee level payroll information; providing the IDOL with the authority to audit a business's compliance with the law; authorizing the IDOL to launch investigations and issue subpoenas in the event of non-compliance; and engaging in information sharing with the Illinois Human Rights Commission to improve enforcement of civil rights laws. Civil penalties of up to $10,000 may be imposed upon a finding of non-compliance with the new payroll reporting obligations.

As of this writing, however, the IDOL has not published administrative regulations or FAQs to assist employers' compliance efforts. The IDOL has begun to issue notices by email to covered employers on a rolling basis to register and report the required information. The initial cohort of approximately 600 employers have already received notices and must comply with an EPRC application deadline by May 25, 2022. Given the novelty of the law and the extensive information requested for individual employees, this post will provide guidance to employers on steps they should take now to prepare for compliance obligations.

Covered employers

All private employers with 100 or more employees who are required to file an EEO-1 report with the U.S. Equal Employment Opportunity Commission are

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required to obtain an equal pay registration certificate from the IDOL. The employee threshold is determined for each legal entity based on the EIN number of the entity.

It has been reported (but not yet confirmed) that with respect to remote employees, employees reporting to an Illinois location are included, but remote employees reporting to an out-of-state location are excluded from the employee count.

Filing deadlines, notifications to register and penalties

The new law became effective on March 23, 2021 and obligates covered private employers to obtain an equal pay registration certificate within three years of the effective date and to recertify the business(es) every two years thereafter. According to an IDOL press release dated January 24, 2022, for the first filing deadline only, the IDOL anticipates sending a registration notice to covered employers. The notice will provide employers with at least 120 days to submit the first EPRC application. Employers also are able to provide the contact information for their businesses prior to receiving an IDOL notice by using the IDOL online form. It has been reported (but not yet confirmed) that employers that do not receive a registration notice from the IDOL are required to file their EPRC application and should use the IDOL online form to submit their contact information. The IDOL is required to either reject the EPRC application or approve and issue an EPRC within 45 days of receipt of the EPRC application. Employers receiving a rejected EPRC application have 30 days to cure any deficiencies in their application.

Employers should note that receipt of an EPRC represents *an acknowledgement* by the IDOL that a business 1) has submitted the equal pay information as required by the IEPA and 2) has certified that the company is in compliance with the anti-discrimination and equal pay laws. Good faith compliance prevents the imposition of civil penalties. The issuance of an EPRC, though, will not constitute a defense against any IEPA violation found by the IDOL nor be a basis for mitigation of damages.

An employer's obligation to file an EPRC application is ongoing such that covered employers who either commence business after the effective date or expand a business and satisfy the 100-employee threshold will also be required to obtain an EPRC and recertify compliance with the IDOL every two years.

EPRC application requirements

To complete the application for an EPRC, employers are required to create an IL Public ID account and to access the Equal Pay Act registration portal to provide the following information:

1. A $150 filing fee for each business entity with a separate EIN that meets the employee threshold requirements, as discussed above;

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2. A list of all employees employed at any time during the preceding calendar year, including their gender, race, ethnicity; as reported in the most recently filed EEO-1 Report, wages paid and other data as specified below;

3. An equal pay compliance statement; and

4. A copy of the employer's most recently filed annual EEO-1 Report filed with the Equal Employment Opportunity Commission limited to information *for each county* in which the business has a facility or employees *in Illinois*.

Employee data

To report employee data, IDOL has provided an Equal Pay Act Registration Certificate Template in Excel format that requires employers to provide 10 categories of data for each employee who was employed during any part of the prior year:

1. Personal identifying information - the employee's first and last name and the last four digits of their Social Security number;

2. Gender designation – options are listed as either M, F or X for nonbinary gender identity;

3. Race designation – limited to the following category options: American Indian or Alaska Native alone, Asian alone, Black or African American alone, Hispanic or Latino of any race, Native Hawaiian or other Pacific Islander alone, White alone, some other race alone, or two or more races;

4. Ethnicity of each employee – identified as either: 1) Hispanic or Latino or 2) Not Hispanic or Latino;

5. Wages – wages paid in the previous calendar year rounded to the nearest $100;

6. Hire date – the date the employee started in a specified position;

7. Termination date – the date the employee stopped working in the specified position for any reason (resignation, promotion, etc.);

8. Job Classification for the employee's position – job classifications are limited to the following options: Executive/Senior Level Official or Manager; First/Mid-Level Official or Manager; Professional; Technician; Sales Worker; Office or Clerical Worker; Craft Worker (skilled); Operative (semi-skilled); Laborer (unskilled); and Service Worker;

9. Job title – payroll title for the employee's position; and

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10. County – the Illinois county in which the employee performs the majority of his or her work.

With regard to wages, total wages are defined as wages, salaries, earned commissions, earned bonuses, the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee pursuant to an employment or other agreement. Although unconfirmed yet, IDOL may permit employers to use the total wages reported in Box 5 of employees' W-2 forms to report the amount of an employee's total wages.

IEPA compliance statement

A corporate officer, legal counsel or authorized agent of the business must sign a statement providing the following assurances or information:

1. That the business is in compliance with Title VII of the Civil Rights Act of 1964, the federal Equal Pay Act of 1963, the Illinois Human Rights Act, the Equal Wage Act and the IL Equal Pay Act of 2003;

2. That the average compensation for its female and minority employees is not consistently below the average compensation, as determined by the U.S. Department of Labor, for its male and non-minority employees within each of the major job categories in the employer EEO-1 Report for which an employee is expected to perform work under the contract. (The law *does* allow for compensation differentials attributable to job related factors such as: length of service, specific job requirements, experience, skill, effort, responsibility, working conditions of the job, education or training, job location, use of a collective bargaining agreement "or other mitigating factors.")

3. That the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex;

4. That wage and benefit disparities are corrected when identified; and

5. Define the frequency with which wages and benefits are evaluated to assure compliance with the four previous compliance assurances.

The June 2021 amendments provide that businesses may use a wage and salary survey to determine wage and benefits levels, although other approaches such as a market pricing approach, a state prevailing wage or a union contract requirement, and a performance pay system can also be acceptable.

Audit and investigative authority

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The amendments to the Equal Pay Act also vest the IDOL with audit and investigative authority. Employers subjected to an audit are required to provide IDOL with information regarding the number of male and female employees; average annualized salaries paid to male and female employees for each job category; information requested regarding other elements of compensation; the average length of service for male and female employees in each job category; as well as other information deemed relevant *by the business* or the IDOL.

The IDOL is authorized to investigate businesses that fail to comply with their obligation to submit an EPRC application and compliance statement or that have multiple violations with regard to the anti-discrimination laws referenced in the equal pay registration certificate. The law provides broad investigatory power to the IDOL including the issuance of subpoenas to compel testimony or to acquire other evidence regarding pay and benefits paid to employees.

The IDOL must attempt conciliation with employers regarding disparities in wages and benefits paid to employees prior to revoking or suspending an EPRC. Employers also may seek an administrative hearing prior to suspension or revocation of an EPRC or imposition of civil penalties.

Access to data and sharing data with other agencies

The June 2021 amendments to the IEPA provide greater protection and clarity with regard to confidentiality of individually identifiable data provided by employers. The June amendments provide that "individually identifiable information" provided in conjunction with an EPRC application is confidential and not subject to disclosure under the Illinois Freedom of Information Act. The IDOL is permitted, however, to aggregate data and compile reports without divulging information related to any specific individual or business.

A decision by the IDOL to approve or revoke an EPRC, however, is public information. Current employees have the right to request anonymized data for their job classification, including pay data. But "no individually identifiable information" may be provided to an employee making such a request. IDOL is authorized to share individually identifiable information with the Illinois Human Rights Commission or the office of the Attorney General. The enforcement cooperation among government agencies is part of a larger trend playing out at the federal level among agencies charged with investigative and enforcement authority.

What you need to know

Whether or not an employer has received a notice to file an EPRC from IDOL, employers should prepare for their compliance obligation. To begin, designate an individual to compile data in the IDOL required format by Illinois county, and alert department heads of the forthcoming notice for registration from the IDOL.

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Employers should conduct an analysis of employee pay and benefits, identify disparities and be prepared to provide an explanation of the lawful reasons that support pay and benefit disparities.

The method by which the IDOL anonymizes data for small employers with a limited number of employees in each job category remains to be seen in the event of a request by a current employee of data relating to their job classification. Employers should be prepared with a response to employees who do obtain information from the IDOL and seek further information regarding wage and compensation information from their employer.

Are you prepared?

Complete the questions in our checklist to help assess the status of your preparations for compliance with the new obligations of the IEPA regarding employee level payroll information and certification of compliance with anti-discrimination and pay equity laws.

Complete Checklist

Contact us

The Husch Blackwell Labor and Employment team has extensive expertise in analyzing wage and compensation data for compliance with EEO laws. If you would like assistance with wage and benefit analysis, preparation of the Illinois EPRC application, or other guidance related to the employer obligations under the IEPA, contact Karen Courtheoux, Tracey O'Brien, Jackie Coffman or your Husch Blackwell attorney.

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