

EMPLOYER'S QUICK GUIDE TO ILLINOIS' NEW LAW PROHIBITING THE USE OF CRIMINAL CONVICTIONS FOR EMPLOYMENT PURPOSES

Under the newly amended Illinois Human Rights Act (“IHRA”), absent certain exceptions and utilizing specific procedures identified below, employers are now prohibited in considering an individual’s conviction history in making employment decisions. **This new law is now in effect as of March 23, 2021. The new law covers ALL Illinois employers concerning all employment related decisions impacting any individual within Illinois --- unless otherwise authorized or regulated by a state or federal legal mandate.**

What counts as a “conviction record?” Any indication that a person has been convicted of a felony, misdemeanor, or other criminal offense, or placed on probation, fined, imprisoned, or paroled pursuant to any law enforcement or military authority.

What employment decisions fall within this new law? Any decision relating to the terms, privileges or conditions of employment, including but not necessarily limited to, decisions relating to hiring, segregating, recruiting, promoting, renewing employment, selecting for training, discharging, disciplining, or granting tenure.

Under what circumstances can you take an employment action against an individual based on their conviction history? The IHRA allows for two (2) exceptions where you can make an employment decision based on conviction history.

#1 - The first exception is satisfied if there is a “substantial relationship” between the previous criminal offense(s) and the job position sought or held. A “substantial relationship” exists if the employment position creates an opportunity for the individual to conduct the same or similar offense for which the person was convicted and whether the circumstances leading to the conduct that resulted in the conviction *will recur* in the position. In light of this definition, employers will likely rely on the second exception.

#2 - The second exception is satisfied if granting or continuing an individual’s employment creates an “unreasonable risk” to property or to the safety or welfare of others. An “unreasonable risk” is not defined in the law and will likely be evaluated under the totality of the circumstances at issue; a risk exists that no reasonable employer in similar circumstances is expected to incur.

What factors are used to determine if either of these exceptions are satisfied? The following factors must be considered by the employer when considering the two noted exceptions:

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- (1) duration of time that has passed since the conviction;
- (2) the number of convictions on the record;
- (3) the nature and severity of the conviction and its relationship to the safety and security of others;
- (4) the facts and circumstances surrounding the conviction;
- (5) the age of the individual at the time of the conviction; and
- (6) any evidence of rehabilitation efforts.

This new law requires an “interactive assessment” with the individual in writing before making an employment decision based on a conviction history. What does that mean? Before making an employment decision based on a conviction history, considering all six (6) factors identified above, you must send a Preliminary Decision Notice (See Preliminary Decision Sample, attached) to the individual that includes notice of the conviction(s) the employer is considering, a copy of the conviction record/report and an explanation of the employer’s reasoning for disqualification. The Preliminary Decision Notice must also state that the individual has at least five (5) business days in order to provide evidence to refute the accuracy of the conviction, demonstrate any rehabilitation/mitigation and/or otherwise address the employer’s concerns. Upon considering what the individual submits, the employer still decides to take adverse action, then it must send a Final Decision Notice to the individual (See Final Decision Notice Sample, attached here). This Final Decision Notice must include notice of the conviction(s) deemed disqualifying and the employer’s reasoning, and identifying any procedures the employer has in place to challenge such adverse action, as well as notice of the individual’s right to file a charge of discrimination with the Illinois Department of Human Rights.

This interactive assessment and formal process applies to each and every adverse employment decision based on a conviction history. While the Sample Forms provided here apply to decisions not to further consider applicants for hire, the forms can be modified to fit any fact pattern and adverse action.

Do the new changes impact Illinois’ “Ban the Box” law? No. Illinois’ “Ban the Box” law disallows employers from asking about criminal convictions prior to a job offer or before a candidate is selected for an interview. This means that employers hiring in Illinois must remove any such inquiry in their employment applications. Of course, there are limited occupational exceptions to “Ban the Box,” including positions from which federal or state laws require the exclusion of applicants with certain criminal convictions. Finally, employers should continue to recognize Illinois’ general prohibitions on the use of or inquiry into an arrest record not resulting in an actual conviction, as well as any conviction otherwise ordered sealed or expunged.

Do I still have to comply with the federal Fair Credit Reporting Act (FCRA)? Yes. Any employer who uses a third party to obtain a conviction history must continue to strictly comply with its FCRA obligations (*i.e.*, obtaining written consent, providing pre-adverse action written

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notice -- including "Summary of Rights," and providing post-adverse action written notice if any adverse actions are taken based on the conviction history report). The new Illinois procedures do not track the FCRA mandates. Compliance with one will not result in compliance with the other (at least, not at this time).

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**PRELIMINARY DECISION NOTICE
FOR NEW HIRES
(SAMPLE LETTER)**

[DATE]

[APPLICANT NAME]

[ADDRESS]

Dear [APPLICANT NAME]:

[COMPANY NAME] has reviewed your conviction history in connection with your application for employment to work at [COMPANY NAME]. Copies of the reviewed conviction history records are enclosed with this letter. Please note [COMPANY NAME] has preliminarily decided not to consider you further for employment based at least in part on your [DATE AND DESCRIPTION OF RELEVANT CONVICTION(S) RELIED ON].

[SELECT ONE OF THE TWO FOLLOWING PARAGRAPHS DEPENDING ON WHICH EXCEPTION YOU ARE RELYING ON]

Given the *[length of time since the conviction, the number of convictions that appear on the conviction 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 the evidence of rehabilitation efforts]*—**INCLUDE ALL FACTORS THAT APPLY**, [COMPANY NAME] has determined that employing you may create an unreasonable risk to the property or to the safety or welfare of others.

Given the *[length of time since the conviction, the number of convictions that appear on the conviction 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 the evidence of rehabilitation efforts]*—**INCLUDE ALL FACTORS THAT APPLY**, [COMPANY NAME] has determined that there is a substantial relationship between your conviction history and the employment position for which you have applied, and that granting employment would provide an opportunity for the same or similar offense to recur.

The Illinois Human Rights Act gives you the right to respond to this Preliminary Decision Notice. Your response may include, but need not be limited to, evidence challenging the accuracy of the conviction records that form the basis for your preliminary disqualification, or evidence of mitigation, such as rehabilitation efforts. You have **five (5) business days** to respond to this

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Preliminary Decision Notice before [COMPANY NAME] will make its final decision whether to further consider your application or not. You may send your response to:

[EMPLOYEE NAME AND TITLE]
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
[PHONE NUMBER]
[EMAIL]

Sincerely,

[NAME]
[TITLE]

Enclosures:
Conviction History Record

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FINAL DECISION NOTICE FOR NEW HIRES (SAMPLE LETTER)

[DATE]

[APPLICANT NAME]

[ADDRESS]

Dear [APPLICANT NAME]:

We regret to inform you that your application for employment with [COMPANY NAME] is no longer being considered. This decision was based in whole or in part on the information in your conviction history record that [COMPANY NAME] sent to you on [DATE] as part of its Preliminary Decision Notice.

In accordance with the Illinois Human Rights Act, this letter shall constitute [COMPANY NAME]'s Notice of Final Decision. [COMPANY NAME] carefully reviewed all information that you included in your response to the Preliminary Decision Notice before making this final decision. [OR INSERT [COMPANY NAME] *did not receive any response from you following delivery of its Preliminary Decision Notice.*]

[SELECT ONE OF THE TWO FOLLOWING PARAGRAPHS DEPENDING ON WHICH EXCEPTION YOU ARE RELYING ON]

Given the *[length of time since the conviction, the number of convictions that appear on the conviction 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 the evidence of rehabilitation efforts—INCLUDE ALL FACTORS THAT APPLY]*, [COMPANY NAME] has determined that employing you creates an unreasonable risk to the property or to the safety or welfare of others.

Given the *[length of time since the conviction, the number of convictions that appear on the conviction 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 the evidence of rehabilitation efforts—INCLUDE ALL FACTORS THAT APPLY]*, [COMPANY NAME] has determined that there is a substantial relationship between your conviction history and the employment position for which you have

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applied, and that granting you employment would provide an opportunity for the same or similar offense to occur again.

[COMPANY NAME] is committed to following the Illinois Human Rights Act. If you wish to challenge this decision directly with [COMPANY NAME], please bring your concerns to:

[EMPLOYEE NAME AND TITLE]
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
[PHONE NUMBER]
[EMAIL]

You also have the right to file a charge with the Illinois Department of Human Rights.

Thank you for your interest in [COMPANY NAME].

Sincerely,

[NAME]
[TITLE]

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