

Illinois Equal Pay Law Changes Complicate Compliance

By **Jeremy Glenn, Brittany Green and Sydney Holman** (February 9, 2022)

The state of Illinois took bold legislative action toward employee pay equality with sweeping amendments in 2021 to the state Equal Pay Act.

Gov. J.B. Pritzker twice signed bills passed by the Illinois Legislature — first on March 23, 2021, and then on June 25, 2021 — the cumulative effect of which gives Illinois perhaps the most robust and arduous equal pay law in the nation — for employers.

The time has arrived for covered employers to pay close attention, if they have not been doing so, in anticipation of the March 24, 2022, launch date.

In a nutshell, private employers in Illinois that (1) file an EEO-1 report with the U.S. Equal Employment Opportunity Commission, and (2) have more than 100 employees in Illinois, must apply for and obtain an equal pay registration certificate from the Illinois Department of Labor, or IDOL.

Applying for the certificate means compiling employee wage and demographic information and certifying in writing there are no pay disparities for female and minority employees. That means covered Illinois employers should reexamine their compensation practices to comply with the new amendments and prepare to submit the information needed to obtain the certificate.

Legislative Background of the Illinois EPA Amendments

The General Assembly passed S.B. 1480 and S.B. 1847 in 2021 to ensure compensation is distributed equitably among people of color in the workplace. The Equal Pay Act certificates revisions were championed by the Illinois Legislative Black Caucus in January 2021 to rectify decades of discriminatory salary practices against women and minorities. The legislation requires companies to review compensation metrics for evidence of inequity among minorities and make efforts to resolve the disparities.

S.B. 1480 was the original legislation signed into law and was followed by S.B. 1847 as the trailer bill to address technical concerns from the business community and the IDOL. Companies must submit equal pay certificates to the IDOL between March 24, 2022, and March 24, 2024.

The IDOL is responsible for implementing laws passed by the General Assembly and signed by the governor. The department is working to maintain the spirit of the legislative intent by making internal programmatic changes. Given the high volume of businesses that are affected by the law, the department divided business deadlines into eight quarters over the submission two-year period.

The first notice has recently been sent to the first 625 businesses and training was scheduled for Feb. 7. The department will continue to send guidance to companies every quarter. However, some companies may not hear from the department for at least a year if



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their assigned business deadline is further out.

The biggest hurdle for the department is obtaining contact information for the applicable businesses. If employers do not have any contact from the department, they are asked to complete the IDOL form.

Proactive Equal Pay Audits

Covered Illinois employers should begin examining and potentially clarifying their compensation practices as soon as possible to comply with the EPA amendments and prepare for the process to obtain the certificate.

An initial step an employer can take to come into compliance is to conduct a proactive pay audit. Pay audits are a great tool to help employers discern whether pay disparities exist while accounting for wage comparison factors required under the EPA. If pay differences cannot be explained by neutral, job-related factors, then more scrutiny is required to determine the reason.

Of course, employers should be aware of both the benefits and potential pitfalls of conducting pay equity audits. One of the benefits of conducting a pay audit is that an employer can examine and modify their compensation practices to proactively come into compliance with the EPA amendments and avoid the possibility of being fined for failing to comply with the EPA, or worse, exposed to a lawsuit for discriminatory pay practices.

Although employers are advised to conduct the audit under the attorney-client privilege, the results of the audit may be useful if an employer needs to demonstrate that no pay disparities exist or explain why they exist based on nondiscriminatory factors.

One potential drawback may occur if an audit is not conducted under the attorney-client privilege or is not handled in a confidential manner. It is important for companies that choose to conduct pay equity audits to: (1) limit an audit team to necessary personnel, legal counsel, and audit experts or consultants, and (2) establish a plan to preserve attorney-client privilege and work-product both during and after the audit. Third-party consultants should also sign nondisclosure agreements.

Another potential mistake for which an employer should remain cautious is conducting an audit that yields unfavorable results but failing to take the necessary steps to come into compliance with the law after discovering disparities in its compensation practices. When an audit reveals disparities, but a company fails to bring itself into compliance, the audit may actually be damaging evidence of an employer's knowledge that they were not in compliance with the law.

In structuring an equal pay audit, an employer should carefully consider the amendments made to the Illinois EPA to fully identify the factors an employer needs to consider for compliance. Each of these factors are further detailed below.

Equal Pay Certification Timeline

The EPA amendments require the IDOL to collect contact information from existing and newly covered businesses, after which the IDOL will assign each business a deadline by which that business must apply for the equal pay registration certificate.

Newly covered employers must submit their contact information to the IDOL by Jan. 1 of

the following year. For existing covered businesses, the deadline is arriving soon — between March 24, 2022, and March 23, 2024. Employers who meet coverage requirements after March 23, 2021 — because, for example, they grow above 100 employees — will be assigned a deadline no earlier than Jan. 1, 2024.

Businesses must recertify every two years. The EPA amendments offer some deadline forgiveness: a 30-day grace period to correct an inadvertent failure to timely file an application or cure deficiencies in applications.

New Reporting Requirements for Employee Demographics

The EPA amendments expand the scope of employee demographic information employers are required to disclose in applications for certification and give the IDOL discretion to seek additional information. Covered employers must compile and submit to IDOL a list of employees organized by race, ethnicity and gender, and report the total wages paid to each employee — as defined by Section 2 of the Illinois Wage Payment and Collection Act — during the previous calendar year, rounded to the nearest \$100.

In addition to the above information, employers also must include the county in which the employee works, the start date of each employee, and "any other information the department deems necessary to determine if pay equity exists among employees." [1]

Any business required to file an annual EEO-1 report with the EEOC must also submit a copy of the business's most recently filed EEO-1 report.

Wage Comparison Factors

The list of wage comparison factors an employer must consider was also expanded by the EPA amendments. Covered employers must certify

that the average compensation for its female and minority employees is not consistently below the average compensation ... for its male and non-minority employees within each of the major job categories ... taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job ... or other mitigating factors. [2]

The EPA amendments additionally include "education or training, job location, use of a collective bargaining agreement and other mitigating factors." [3]

The expansion of the list means that covered employers will have additional reasons to explain or justify wage differentials among employees and demonstrate such differences are not due to race or gender. These same factors should also be considered in the event that employers conduct equal pay audits and decide on remedial measures.

Setting Compensation and Benefits

The requirements related to an employer's approach to setting compensation were simplified a bit as a result of the second EPA amendment. The March 2021 bill required employers to indicate whether they used:

- A market pricing approach;
- State prevailing wage or union contract requirements;
- A performance pay system;

- An internal analysis; or
- An alternative approach along with a description.

Under the S.B. 1847, the requirements are now more flexible. Employers are required to disclose "the approach the business takes in determining what level of wages and benefits to pay its employees." [4] The employer could certainly explain that its approach includes one or more of the above list, but is not limited to the rigid application of that list.

Clearly, businesses come in many shapes and sizes and have a variety of legitimate reasons for their wage payment structure. If an employer conducts an equal pay audit, an employer can easily indicate that an internal analysis was used as the approach to setting compensation.

Penalties and Appeals Procedure

The EPA amendments originally subjected employers to a 1% penalty of a business's gross profits for falsifying information on an application, failing to obtain an equal pay registration certificate, or suspension or revocation of certification.

But, upon further reflection, the Illinois Legislature decided to limit penalties so that any employer not in compliance with equal pay certification requirements can be fined up to \$10,000 per employee affected.

That is certainly not an insignificant amount for a company with more than 100 employees. An employer has a better chance of avoiding these fines by proactively performing an equal pay audit to identify any disparities and taking remedial measures prior to EPA certification.

Recommendations for Employers Moving Forward

Covered Illinois employers should begin examining and potentially clarifying their compensation practices as soon as possible to comply with the EPA amendments and prepare for the process to obtain an equal pay registration certificate.

It is important to note that the IDOL makes clear that its failure to notify an employer of its recertification deadline does not exempt a business from noncompliance, although it "may be a mitigating factor [for the department] when making a determination of a violation." [5]

Nevertheless, employers should review their compensation programs and determine whether a pay audit is necessary to assure that they will be able to apply for the required equal pay registration certificate by the earliest potential date of March 24.

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Disclosure: As former deputy director for legislative affairs and house liaison for Gov. Pritzker, Holman contributed to the implementation of S.B. 1480 and S.B.

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[1] 820 ILCS 112/11(c)(1)(A).

[2] 820 ILCS 112/11(c)(1)(B)(ii).

[3] 820 ILCS 112/11(c)(1)(B)(ii).

[4] 820 ILCS 112/11(c)(1)(B)(vi).

[5] 820 ILCS 112/11(b).