EPSTEIN BECKER GREEN

Roll With The Changes: An Update On Five New Employment Laws Enacted In Illinois In 2021

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ACC Association of Corporate Counsel CHICAGO

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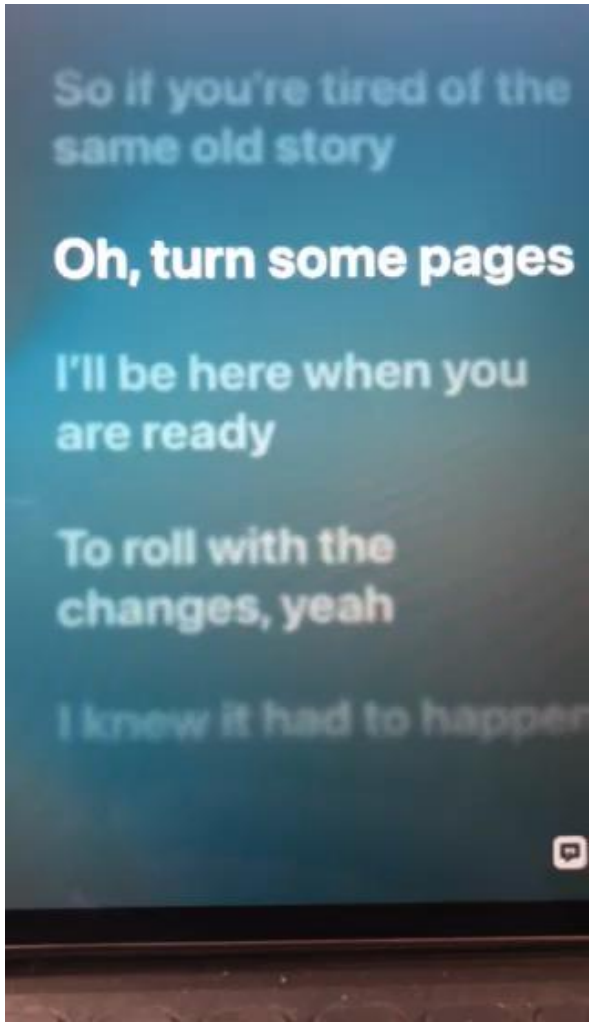

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Agenda

1. Non-Compete Agreements:

   Discussion of the recently enacted changes to the laws governing non-competition and non-solicitation agreements in Illinois and the steps employers should take to prepare for these changes.

2. EEO Reporting Under the Illinois Business Corporation Act:

   Discussion of the changes to the Business Corporation Act that will require certain employers to file a publicly available EEO report.

3. Criminal History In the Workplace:

   Discussion of the expansion of the Illinois “Ban the Box” law.

4. Changes to the Artificial Intelligence Video Interview Act

   Discussion of the new requirement that certain employers report demographic data with respect to the use of AI in the recruiting process.

5. Expansion of the Victims’ Economic Security and Safety Act (“VESSA”):

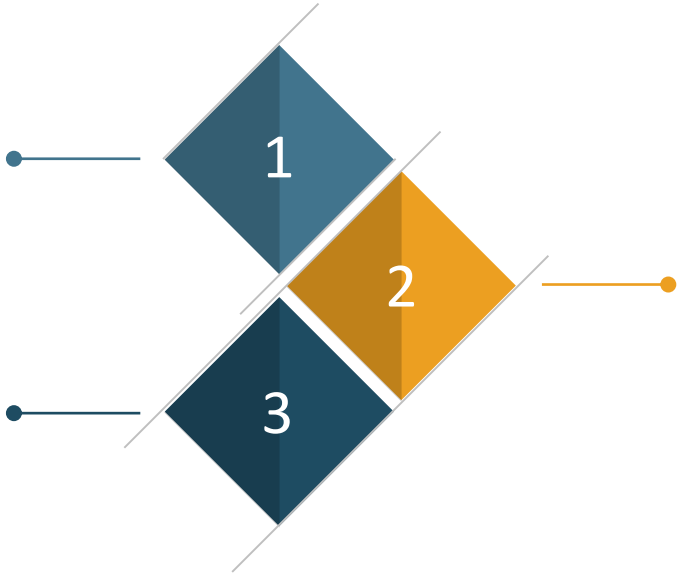
   Discussion of the expansion of VESSA and some of the additional restrictions placed on employers.

Amendments to the Illinois Freedom to Work Act

Coverage of the Illinois Freedom To Work Act Amendments

Amends the Illinois Freedom to Work Act to apply to all Illinois employees, not just low-wage employees.

Effective January 1, 2022 and does not apply retroactively – so existing agreements are not technically` affected.

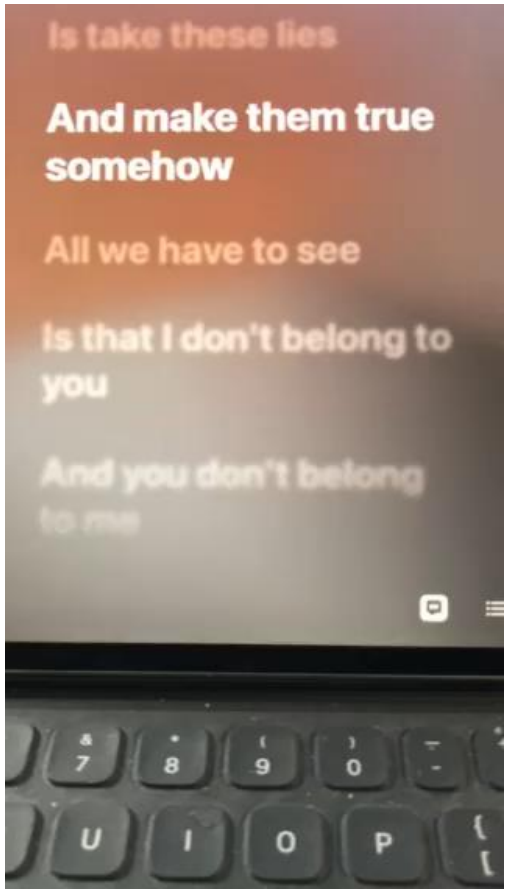


"Employer" has the same definition as in the Illinois Minimum Wage Law – "'Employer' includes any individual, partnership, association, corporation, limited liability company, business trust, governmental or quasi-governmental body, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons are gainfully employed on some day within a calendar year."

Employees Are Free To Move Unless …

Codifies Legal Standard for Enforceability of A Covenant Not To Compete Or To Solicit

A covenant not to compete or a covenant not to solicit is illegal and void **unless** (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.



Changes To The Law of Restrictive Covenants In IL

Minimum Annual Earnings Thresholds

1. **Non-Compete Covenants:** An employer "shall not enter into a" covenant not to compete unless the employee's actual or expected annualized rate of earnings exceeds: (1) $75,000 per year on the effective date of the amendatory Act [January 1, 2022], (2) $80,000 per year beginning on January 1, 2027, (3) $85,000 per year beginning on January 1, 2032, or (4) $90,000 per year beginning on January 1, 2037.
820 ILCS 10(a)

2. **Non-Solicitation Covenants:** An employer "shall not enter into a" a covenant not to solicit shall not be valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year.
820 ILCS 10(b)

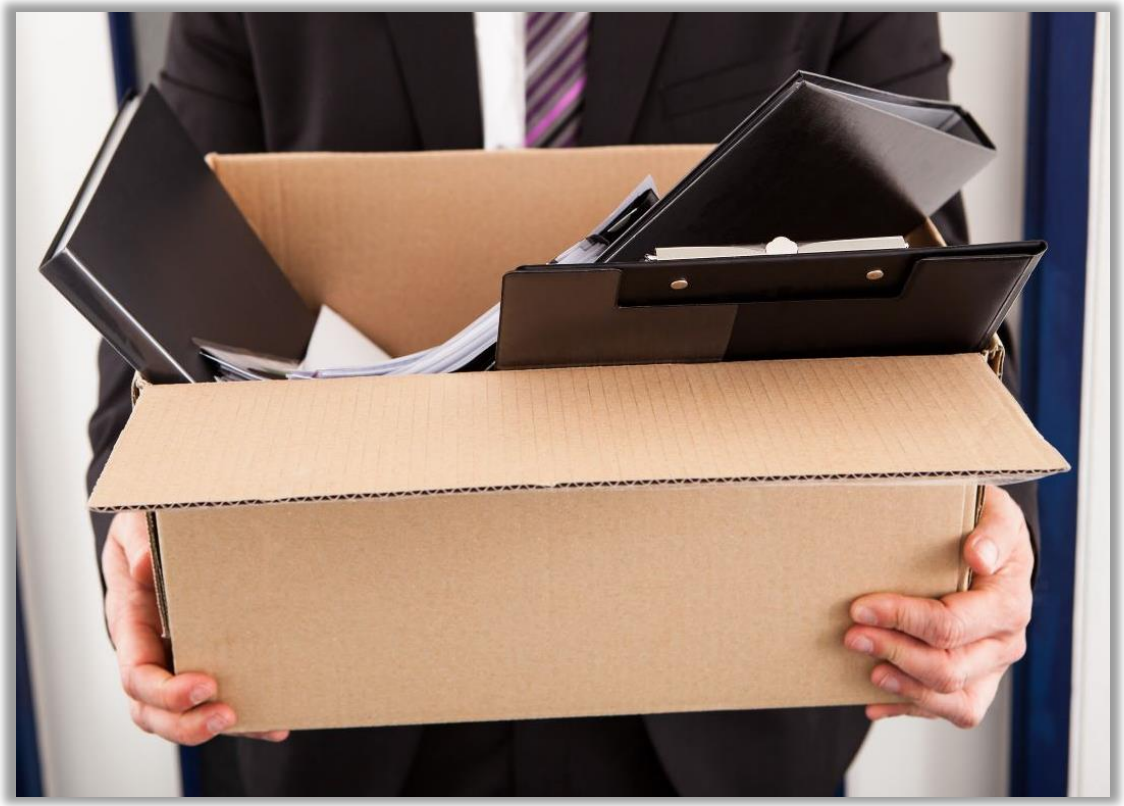
3. **Timing:** The actual or expected earnings are measured as of the time the contract is entered. But, a subsequent compensation reduction bringing the employee below the threshold might make the agreement subject to challenge.

COVID-related Changes

Cannot Enforce Restrictive Covenant Against Someone Laid-off Due to Covid

Provides that a covenant not to compete is void and illegal for any employee who an employer terminates or furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic, or under circumstances that are similar to the COVID-19 pandemic, unless enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.

820 ILCS 90/10(c)



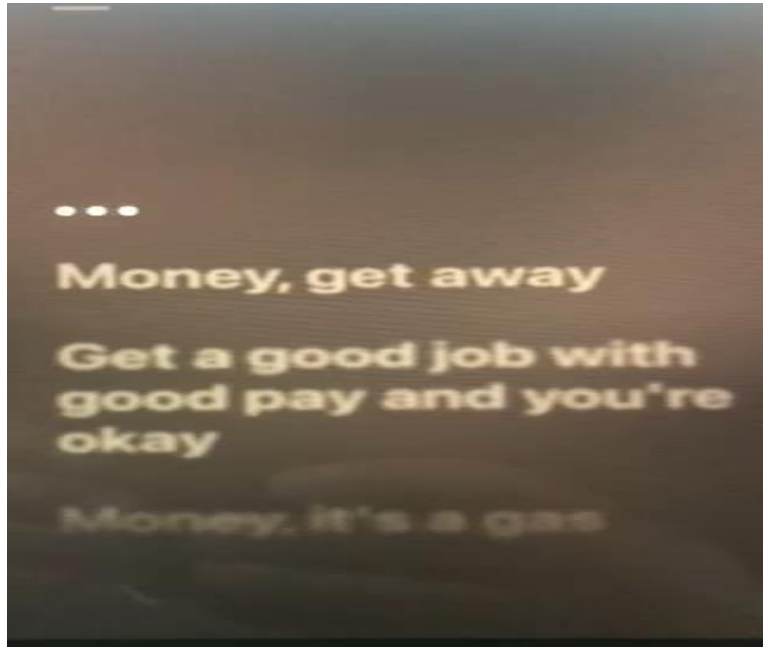
Changes to the Law of Restrictive Covenants in IL

Codifies and Slightly Clarifies Two-Year Rule of Thumb for Adequate Consideration

Defines "Adequate Consideration" to mean:

1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit or

2) the employer otherwise provided consideration adequate to support an agreement to not compete or to solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.



Changes to the Law of Restrictive Covenants in IL

Legitimate Business Interest: Sometimes You Will, Sometimes You Won't

Codifies totality of the circumstances analysis.

- Factors to consider include, but are not limited to, the employee's exposure to the employer's customer relationships or other employees, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, the time restrictions, the place restrictions, and the scope of the activity restrictions. No factor carries any more weight than any other.

"The same identical contract and restraint may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances."

Added “Due Process” Protections

Notice Must Be Given To Employees/New Hires

- A covenant not to compete or a covenant not to solicit is illegal and void unless:
  - (i) the employer advises the employee **in writing** to consult with an attorney before entering into the covenant; and
  - (ii) the employer provides the employee with a copy of the covenant at least 14 calendar days before the commencement of the employee's employment or the employer provides the employee with at least 14 calendar days to review the covenant.

  - An employer is in compliance with this Section even if the employee voluntarily elects to sign the covenant before the expiration of the 14-day period.

820 ILCS 90/20 (new)

FAILURE TO COMPLY WITH THESE NEW “DUE PROCESS” PROTECTIONS IS FATAL!

Changes

Statutory Fee Shifting and Attorney General Enforcement

1. If an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit brought by an employer, the employee shall recover from the employer all costs and all reasonable attorney's fees regarding such claim to enforce a covenant not to compete or a covenant not to solicit.

   820 ILCS 90/25 (new)

   NOTE: THE STATUTORY FEE SHIFTING ONLY APPLIES IF THE EMPLOYER SUES AND LOSES, AND THE SHIFTED FEES ARE ONLY THOSE PERTAINING TO THE ENFORCEABILITY OF THE COVENANT, AND NOT OTHER CLAIMS THAT MAY HAVE BEEN INCLUDED IN THE CASE.

2. Attorney General may initiate or intervene if has “reasonable cause” to believe that a person or entity is engaged in a “pattern and practice prohibited by this Act.”
   - This codifies its right to intervene, as the Attorney General has done in several high profile cases in recent years involving form agreements for low wage employees.

Changes

Codifies Judicial Power to Reform Of A Covenant

- Codifies the long standing line of cases to the effect that extensive judicial reformation of a covenant not to compete or a covenant not to solicit may be against the public policy of this State and a court may refrain from wholly rewriting contracts.

- Codifies that in some circumstances, a court may, in its discretion, choose to reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such covenant unenforceable. Factors which may be considered when deciding whether such reformation is appropriate include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of such reformation, and whether the parties included a clause authorizing such modifications in their agreement.

  820 ILCS 90/30 (new)

  NOTE: THIS SHOULD PROVIDE GREATER CLARITY AND CONSISTENCY WITH RESPECT TO JUDICIAL MODIFICATIONS.

Takeaways

You Have Three And A Half Months

- Amend your template restrictive covenant agreements:
  - Provide statutorily required notice to consult with an attorney and that the employee has 14 days to consider the agreement.
  - Include a clause that court may reform the contract.
  - Include in the agreement that the employee's annual earnings exceed the required thresholds.
  - Expressly recite the consideration being provided (e.g., employment, training, ability to participate in bonus or stock option or severance plan, a special payment, a promotion).
  - Consider adding the following provisions (if your template does not contain them already):
    - Identify in each contract the legitimate business interest that your company would try to protect by enforcing a restrictive covenant against that employee and that employee acknowledges the legitimacy of the business interest after consulting with an attorney.
    - A fee-shifting provision in favor of the employer.
  - Consider increasing salary to get over threshold before execution of agreement.

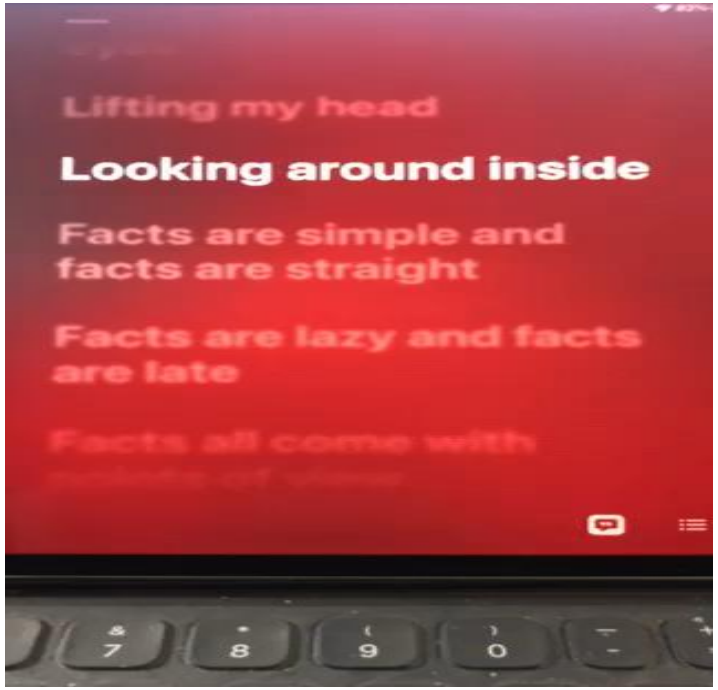
New EEO Reporting Requirements Under the Business Corporation Act

Reporting of Workforce Composition Under the Business Corporation Act

- One of the provisions in SB 1480 is an amendment to the Illinois Business Corporation Act ("IBCA") which imposes an EEO reporting requirement on certain Illinois employers.
- Starting on January 1, 2023, the IBCA now provides that corporations required to file an Employer Information Report EEO-1 with the Equal Employment Opportunity Commission, must file "information that is substantially similar to the employment data reported under Section D of the corporations EE0-1 in a format approved by the Secretary of State."
- Unlike EEO-1 reports, which are not made public, the IBCA provides that the Illinois Secretary of State shall publish the data on the gender, race, and ethnicity of each corporation's employees on the Secretary of State's official website. The Secretary of State shall publish such information within 90 days of receipt of a properly filed annual report or as soon thereafter as practicable.

Moving Forward

Covered employers should discuss with counsel the benefits and risks of conducting an EEO audit, bearing in mind that the demographic data in the report will be made public.



New “Ban the Box” Restrictions in Illinois

2021 Expansion of the “Ban the Box” Law

SB 1480 (officially titled “The Employee Background Fairness Act”), restricts how employers may use criminal history. It amends the Illinois Human Rights Act to make it a civil rights violation for any private employer to use a job applicant or current employee’s conviction record “as a basis to refuse to hire the applicant, deny a promotion to the current employee, or take any other adverse employment action against the individual,” unless the employer is expressly authorized by law to do so.

SB 1480 Exceptions

Two notable exceptions exist:

1. There is a “substantial relationship” between the offense and the employment sought or held; or
   a. For an offense to have a “substantial relationship” with the individual’s employment, the job position must offer “the opportunity for the same or a similar offense to occur” or contain “circumstances leading to the conduct for which the person was convicted” that will recur in the position.
2. Hiring or continuing to employ the individual would pose an “unreasonable risk” to property or the safety or welfare of specific individuals or the general public.

Factors to be used in making the above determinations :

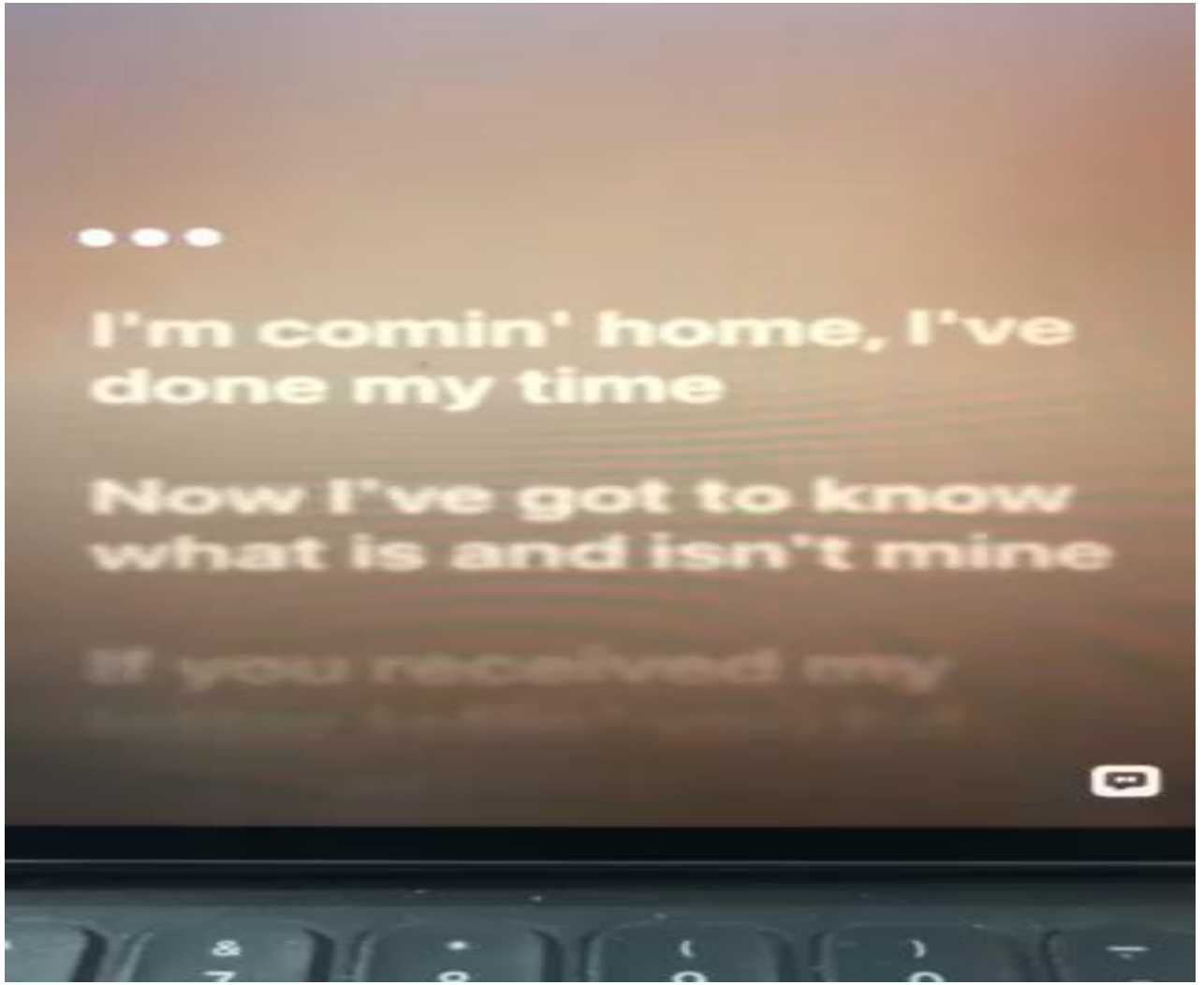
- how long ago the conviction(s) occurred;
- how many times the individual has been convicted of a crime;
- the nature and severity of the conviction(s) and their relationship to the safety and security of others;
- the facts or circumstances surrounding the conviction;
- the individual’s age at the time of the conviction; and
- rehabilitation efforts undertaken by the applicant or employee.

Interactive Assessment

Before making an adverse decision under one of the two exceptions, the employer must engage in an "interactive assessment." Under this assessment, the employer must:

1. **Notify the applicant or employee of its "preliminary decision" in writing;**
   - Notification must contain: notice of disqualifying conviction(s) that are the basis for the preliminary decision and the reason for the disqualification, copy of the conviction history report, explanation of the employee's right to respond to the notice of the employer's preliminary decision and of the individual's right to include in their response "evidence challenging the accuracy of the conviction record that is the basis for the disqualification, or evidence in mitigation, such as rehabilitation."
2. **Provide the applicant/employee with the opportunity to respond to the employer's preliminary decision before it becomes final;**
   - Employer must provide applicant or employee at least 5 business days to respond to employer's preliminary decision.
3. **Make the final decision; and**
   - Must take into consideration any information that the employee submitted in response to the preliminary decision notice before making its final decision.
4. **Notify the applicant or employee of its final decision.**
   - The specific disqualifying conviction(s) informing the employer's final decision and "the employer's reasoning for the disqualification," any existing company procedures that would allow the applicant or employee "to challenge the decision or request reconsideration," and the individual's right to file a charge with the Illinois Department of Human Rights.

I’m out. Do I have my old job back?



Penalties

Any person who has experienced adverse employment consequences because of their conviction record can now file a charge of discrimination with the Illinois Department of Human Rights.

Penalties under the Illinois Human Rights Act are significant, including uncapped compensatory damages, back pay, front pay, reinstatement, attorneys' fees and costs, and punitive damages.

Moving Forward

Employers should:

- Promptly review and consider whether and what revisions to current criminal background check policies may be needed to ensure compliance with SB 1480, as the Law is now in effect.
- Ensure that recruiters and other staff involved in the hiring process, as well as human resources personnel who handle promotions, lateral transfers, and the like, are trained on SB 1480 and any revised company policies adopted pursuant to the new Law.
- Consult with counsel before conducting criminal background checks or making any adverse employment decision based on an individual's criminal history.
- For employers that use third parties to conduct background checks pursuant to the federal Fair Credit Reporting Act ("FCRA"), be aware that SB 1480's notification requirements and other mandates ostensibly are in addition to those contained in the FCRA.

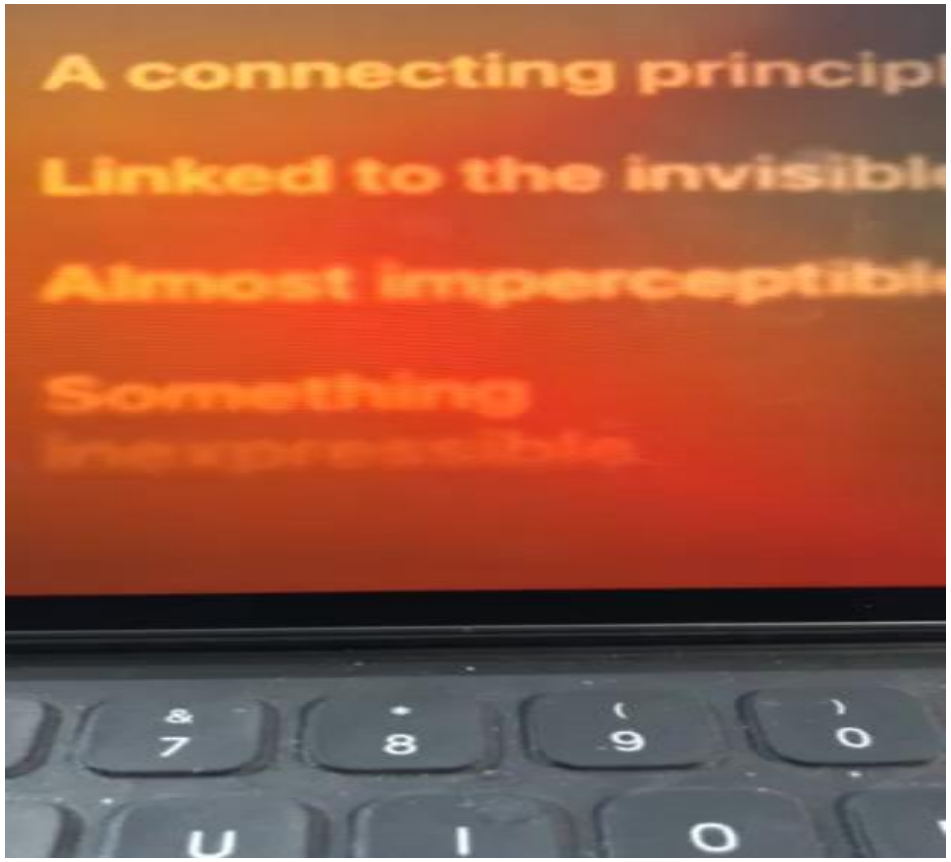
Changes to the IL Artificial Intelligence Video Interview Act

Changes to the Artificial Intelligence Video Interview Act

- Since 2020, the Artificial Intelligence Video Interview Act ("AIVIA") requires employers using artificial intelligence ("AI") enabled video interview technology during the hiring process to make certain disclosures to applicants about the AI and obtain their consent.
- The AIVIA has now been amended to include new provisions that require some employers using AI-analysis during the screening process to collect and report demographic data.
- Specifically, if an employer relies *solely* on AI analysis of a video interview to determine whether an applicant is selected for an in-person interview, the employer must track the race and ethnicity of:
  - Applicants who did and did not proceed to an in-person interview after the use of artificial intelligence analysis; and
  - Applicants who were ultimately hired.

Another Reporting Requirement

- Covered employers must submit an annual report of this demographic data by December 31 to the Illinois Department of Commerce and Economic Opportunity ("DCEO"),
- The DCEO must then analyze the data and report to the Governor and General Assembly by July 1 each year whether the data revealed a racial bias in the use of AI.
- It is important to note that this change affects only those employers who rely **solely** upon an AI-enabled analysis of a video interview to screen potential candidates for in-person interviews.
- The new provisions take effect January 1, 2022.



Expansion of the Victims' Economic Security and Safety Act (VESSA)

VESSA & Notable Amendments

Key Amendments Made to VESSA

- Refresher on VESSA:
  - VESSA previously required employers to provide **up to** 12 weeks of unpaid, job-protected leave to (1) employees who are victims of, and, experiencing **domestic**, **sexual**, or **gender violence**, or (2) who have a **family** or **household** member who is a victim of, and experiencing, domestic, sexual, or gender violence.
  - The leave is intended to help the employee to address the violence by (1) seeking medical attention to recover from physical or psychological injuries caused by the violence; (2) obtaining services from a victim services organization; (3) obtaining psychological or other counseling; (4) participating in safety planning, temporarily or permanently relocating, or taking other actions to protect their safety; or (5) seeking legal assistance or remedies to ensure their own or a family or household member's safety.
  - "Family or household member" was defined as "spouse, parent, other person related by blood or by present or prior marriage, other person who shares a relationship through a son or daughter, and persons jointly residing in the same household."
  - VESSA previously allowed employers to require employees to certify the need for the leave with a sworn statement and documentation such as: (a) documentation from a victim services organization, an attorney, a clergy member, or a medical or other professional from whom the employee or the employee's family or household member has sought assistance; (b) a police or court record; or (c) other corroborating evidence.

- On August 20, 2021, Governor Pritzker signed HB 3582 which amends VESSA. The new amendments are effective on January 1, 2022.

Expansion of Definition:

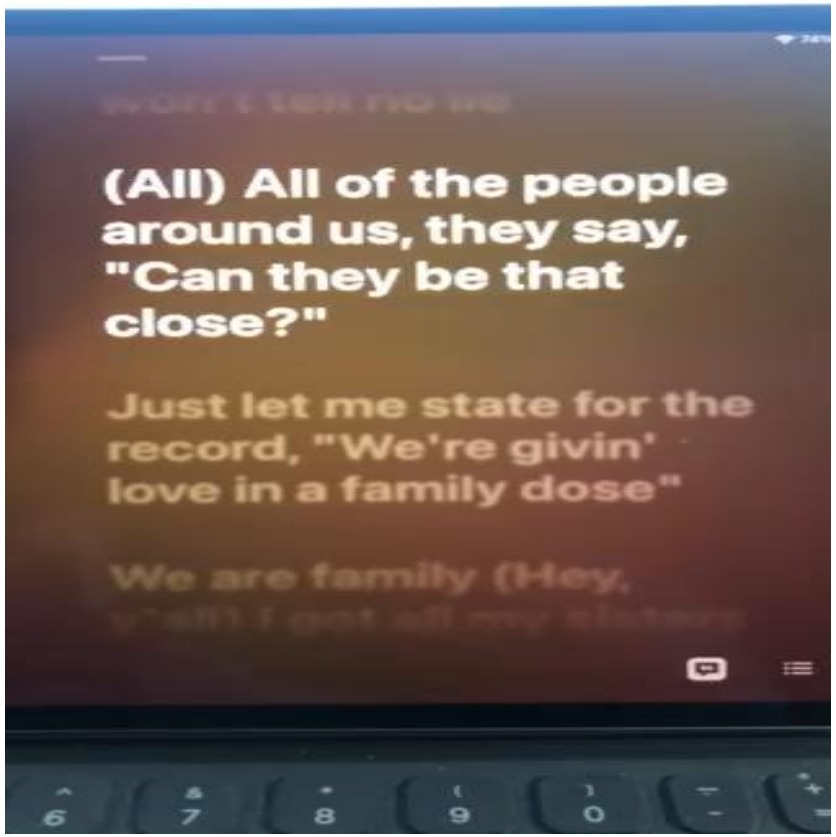
"Crime of Violence"

Effective January 1, 2022, VESSA now applies not just to victims of domestic violence, sexual violence, and gender violence, but also to victims of **other "crimes of violence**."

- "Crimes of violence", means any conduct proscribed by Articles 9, 11, 12, 26.5, 29D, and 33A of the Criminal Code of 2012 (or a similar provision of the Criminal Code of 1961).
- For example, sex offenses, bodily harm, harassing or obscene communications, and armed violence.

New Categories Added to the “Family Or Household Member”Definition

- Any party to a civil union;
- Grandparents;
- Children;
- Grandchildren;
- Siblings;
- Persons related by civil union (past or present);
- Persons sharing a relationship through a child; and
- Any other individual whose close association with the employee is the equivalent of a family relationship as determined by the employee

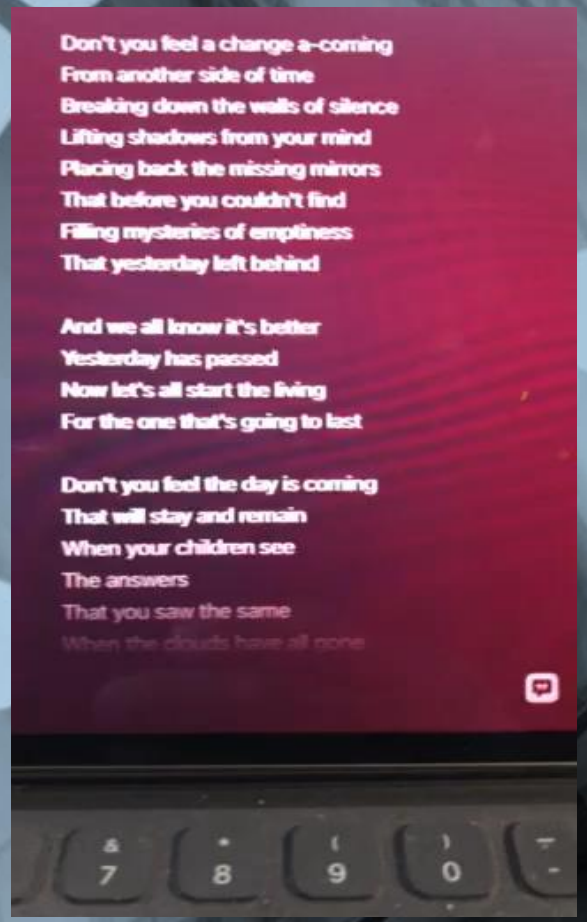


Clarification of:

Documentation Requests

VESSA now clarifies that the leave certification documentation may be required only if the employee possesses it, and the employee has the right to choose which form of documentation to submit.

An employer cannot request more than one document to be submitted during the same 12-month period leave is requested/taken if the reason for leave is related to the same incident(s) of violence or the same perpetrator(s) of the violence.



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Questions About These Changes?

Potential Changes to the Workplace Transparency Act

Changes Coming Down the Pipeline

- The IL Workplace Transparency Act already regulates confidentiality clauses in settlement agreements related to claims of harassment, discrimination, retaliation claims.
- House Bill 3418, which is making its way through the legislature, places further restrictions on settlement agreements involving claims of sexual harassment and sexual assault in the workplace.
- HB 3418 would amend the WTA to prohibit confidentiality clauses preventing an employee from disclosing a claim of sexual harassment or sexual assault that occurred in the workplace or at a work-related event coordinated by or through the employer.
    - Carve out: settlement agreements may contain a confidentiality provision pertaining to (1) the monetary amount of the settlement, and/or (2) (at the employee's request) disclosure of facts that could lead to the identification of the employee
- This is not yet law and still undergoing change, but certainly keep HB 3418 on your radar!