

# Insight

## IN-DEPTH DISCUSSION

OCTOBER 18, 2016

### **Cook County, Illinois Becomes First in the Midwest to Mandate Countywide Paid Sick Leave**

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On October 5, 2016, the Cook County Board of Commissioners passed the Cook County Earned Sick Leave Ordinance (the “Ordinance”). Notably, Cook County, Illinois encompasses the City of Chicago, which passed its own paid sick leave ordinance earlier this year.<sup>1</sup> The Ordinance is nearly a carbon copy of Chicago’s paid sick leave law, and is slated to take effect on July 1, 2017, allowing employees to accrue up to 40 hours of paid sick leave in a 12-month period.

#### **Covered Employers and Employees**

With a few exceptions, the Ordinance applies to employers who employ at least one “covered employee” and maintain a place of business within Cook County. A covered employee includes any part-time or full-time employee who works within Cook County at least two hours in any two-week period. To be eligible for paid sick leave, an employee must work at least 80 hours for an employer within any 120-day period. An employer may need to offer paid sick leave to a covered employee who works in Cook County, even if the employer’s remaining workforce works exclusively outside the County.

The Ordinance does not apply to construction industry employees who are covered by a collective bargaining agreement.<sup>2</sup> For other unionized employees, the Ordinance will not change or otherwise affect the validity of a collective bargaining agreement in force on July 1, 2017. After that date, employees may waive the Ordinance’s requirements in a collective bargaining agreement as long as the waiver is explicit, and is expressed in clear and unambiguous terms.

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1 See Sarah J. Gorajski and Larry D. Robertson, [Chicago to Become the Second City in the Midwest to Mandate Paid Sick Leave in 2016](#), Littler Insight (June 24, 2016).

2 An employee, as defined by the Railroad Unemployment Insurance Act (45 U.S.C. § 351(d)), is also excluded from coverage under the Ordinance.

## Accrual, Carryover and Frontloading

Under the Ordinance, covered employees accrue one hour of paid sick leave for every 40 hours worked, which will begin on the first calendar day after commencement of employment or July 1, 2017, whichever is later. Overtime-exempt employees generally accrue paid sick leave based on a 40-hour workweek. If an overtime-exempt employee's normal workweek is less than 40 hours, paid sick leave accrues based on the employee's normal workweek. The Ordinance permits paid sick leave to accrue only in hourly increments.

Employers may limit paid sick leave accrual to 40 hours in a 12-month period. An employee's 12-month accrual period begins the date he or she starts accruing paid sick leave. At the end of the 12-month accrual period, the employee may carry over half of his or her unused accrued paid sick leave to the following 12-month period, up to a maximum of 20 hours, for use in the next 12-month period. The Ordinance is silent about the use of calendar, anniversary, fiscal or other alternative leave years.

In addition to the 20 hours that may be carried over and used for sick leave purposes, an employee, whose employer is subject to the federal Family and Medical Leave Act ("FMLA"), may carry over up to an additional 40 hours of his or her unused accrued paid sick leave to the following 12-month period ("FMLA-eligible paid leave"), increasing the total carryover obligation to 60 hours.<sup>3</sup> The employee may use the FMLA-eligible paid leave only for FMLA-eligible purposes. Accordingly, employers that want to limit an employee's carryover and use of FMLA-eligible paid leave will likely need to track that leave separately from the paid sick leave an employee may use for broader purposes under the Ordinance.

Rather than using an accrual method, employers may satisfy the Ordinance's requirements by awarding the entire 40 hours of paid sick leave immediately upon the date of eligibility and at the beginning of each subsequent 12-month period.

## Paid Sick Leave Use

An employer must permit an employee to begin using paid sick leave no later than 180 days after he or she commences employment. An employer must allow an employee to determine how much accrued paid sick leave he or she needs to use, but the employer may require an employee to use a "reasonable minimum increment" of four hours or less per day. Further, an employee generally may not use more than 40 paid sick leave hours per 12-month period, unless the employer sets a higher limit. However, if an employee carries over 40 hours of FMLA-eligible earned sick leave to the following 12-month period and uses that leave, the employee may use up to an additional 20 hours of accrued paid sick leave in the 12-month period.

The Ordinance entitles an employee to use accrued paid sick leave for any of the following reasons:

1. The employee, or the employee's family member, is ill, injured, or is receiving medical care, treatment, diagnosis or preventive medical care.
2. The employee, or the employee's family member, is the victim of domestic or sexual violence, including stalking.
3. A public official closes the employee's place of business because of a public health emergency, or the employee needs to care for a child after a public official has closed the child's school or place of care because of a public health emergency.

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<sup>3</sup> Though annual accrual of paid sick leave is limited to 40 hours per year, it is possible that a covered employee could accrue 40 hour of paid sick leave and not use any of it. This would result in 20 hours being carried over for use exclusively as paid sick leave and 20 hours being carried over for use as FMLA-eligible paid leave. Thereafter, if the covered employee again does not use any of his/her paid sick leave accrual (whether for paid sick leave purposes or FMLA-eligible paid sick leave), the covered employee would be able to carry over 20 hours for use exclusively as paid sick leave and 40 hours for use as FMLA-eligible paid leave.

The Ordinance defines “family member” to mean the employee’s child, adopted child, step-child, foster child, child to whom the employee stands in loco parentis, legal guardian or ward, spouse, domestic partner, parent, foster parent, step-parent, adoptive parent, legal guardian of the employee, a person who stood in loco parentis when the employee was a minor child, spouse or domestic partner’s parent, sibling, grandparent, grandchild, or any other individual related by blood or whose close association with the employee equates to a family relationship.

An employer cannot require an employee to find a replacement worker to cover the hours during which he or she is using paid sick leave under the Ordinance.

### **Paid Sick Leave Requests and Certification**

When the need for paid sick leave is reasonably foreseeable, an employer may require the employee to provide up to seven days’ advance notice. Reasonably foreseeable needs for paid sick leave include, but are not limited to, prescheduled appointments with a health care provider or court dates for domestic violence cases. Absent a reasonably foreseeable need for paid sick leave, an employer may require the employee to provide notice via phone, email, or text message as soon as practicable on the day the employee intends to use leave. An employer may also establish a notification policy if: (1) it notifies the employee of the policy in writing; and (2) the policy is not unreasonably burdensome. An employer must waive its notice requirements for an employee who cannot provide notice because he or she is unconscious or otherwise incapacitated. If the FMLA also covers the paid sick leave, employee notice must comply with FMLA requirements.

If an employee is absent for more than three consecutive work days, an employer may require certification that the employee used paid sick leave for a reason the Ordinance covers. When the employee’s reason for paid sick leave is because of illness, injury, or medical care, signed documentation from a licensed health care provider will satisfy the Ordinance’s certification requirement. An employer cannot require that documentation specify the nature of an injury, illness, or condition, except as the law requires.

When an employee’s need for paid sick leave is because he or she (or the employee’s family member) is a victim of stalking, or domestic and sexual violence, the employee satisfies the Ordinance’s certification requirement by providing a copy of any of the following documents:

1. Police report;
2. Court document;
3. Signed statement from an attorney, clergy, or victim services advocate;
4. The employee’s own written statement;
5. The written statement of any person with knowledge of the circumstances; or
6. Any other evidence that supports the employee’s reason for taking paid sick leave.

An employee may choose which document to submit to his or her employer. Further, if the reasons for the employee’s use of paid sick leave relate to the same incident of violence or the same perpetrator, an employer can require only one document to satisfy the Ordinance’s certification requirement. An employer cannot delay an employee’s commencement of paid sick leave or payment of wages because it has not yet received the required certification. However, employers may take disciplinary action, up to and including termination, if an employee used paid sick leave for purposes other than those the Ordinance covers.

The Ordinance does not likely require employers to provide an employee an indefinite amount of time to establish that he or she took the paid sick leave for a covered reason. However, the Ordinance does not provide guidance on how long an employer must wait before taking disciplinary action when an employee fails to provide documentation or other evidence supporting the need for paid sick leave.

## Existing Paid Leave Policies

An employer need not provide employees with additional paid leave if it has a policy that meets or exceeds the Ordinance's requirements. Accordingly, an employer's existing leave policies may already comply with the Ordinance.

## Notice and Posting Requirements

The Ordinance requires employers to post a notice advising employees of their right to paid sick leave. The posted notice must be in a conspicuous place at each of the employer's Cook County facilities. Employers that do not maintain a facility in Cook County are exempt from the posting requirement.

All employers, however, must provide employees notice of their right to paid sick leave at the commencement of their employment. The Cook County Commission on Human Rights ("Human Rights Commission") will prepare a form notice and make it available to employers.

## Retaliation and Enforcement

The Ordinance prohibits employers from discriminating or retaliating against employees for exercising, or attempting in good faith to exercise, their rights under the Ordinance. Those rights include, but are not limited to, disclosing, reporting or testifying about any violation of the Ordinance or related regulations. Prohibited adverse employment actions include, but are not limited to, unjustified termination, unjustified denial of promotion, unjustified negative evaluations, punitive schedule changes, punitive decreases in the desirability of work assignments, and other acts of harassment linked to the employee's exercise of his or her rights under the Ordinance. Additionally, employers may not use an absence-control policy to count paid sick leave as an absence that triggers discipline, discharge, demotion, or any other adverse action against the employee.

The County's Human Rights Commission will administer and enforce the Ordinance in accordance with the Cook County Human Rights Ordinance. If an employer violates the Ordinance, an employee may initiate a civil action against the employer without first filing an administrative complaint with the Human Rights Commission. The statute of limitations for a civil action under the Ordinance is three years from the date of the last event constituting the alleged violation.

The Ordinance permits an employee to recover damages equal to triple the full amount of unpaid sick leave lost or denied because of the employer's violation, including interest calculated at the prevailing rate, together with costs and attorneys' fees.

## Cook County State's Attorney's Views

On August 7, 2015 and July 22, 2016, the Cook County State's Attorney's Office concluded that "Cook County lacks the home rule authority to enact a paid leave mandate for employers" in unincorporated and incorporated areas of Cook County. On July 22, 2016, the State's Attorney's Office also concluded that the Cook County Ordinance would apply countywide unless it "conflicted with the ordinance of a municipality, home rule or otherwise, in which case the municipal ordinance would prevail within the municipality's jurisdiction." Thereafter, on October 4, 2016, the State's Attorney's Office concluded that it could defend the Ordinance on grounds that: (1) the Ordinance is lawful because it provides more protections to workers than state law; and (2) the Ordinance is lawful because it arises from the County's ability to regulate in the interest of public health.

Absent a legal challenge, there is not a clear answer as to whether Cook County has the authority to enact its Ordinance. Similarly, while a "conflicting" municipal ordinance may control over Cook County's Ordinance,

there is also no clear answer on what constitutes a “conflict”. Accordingly, it remains uncertain whether any passed municipal ordinances will prevail over the Cook County paid sick leave mandate.

### **Employer Recommendations**

Employers with employees who perform work in Cook County should consider one or more of the following actions:

- Review and revise paid sick time and/or paid time off (PTO) policies and procedures to satisfy the Ordinance’s requirements, including those pertaining to accrual, use, carryover, and all other provisions.
- Determine whether to use an accrual or frontloading method, or to comply through an existing PTO policy.
- Review and revise attendance and progressive disciplinary policies to ensure that an employee does not suffer an adverse action for using paid sick leave.
- Audit timekeeping, payroll, and benefits systems to properly track leave usage, accrual, cap, and carryover.
- Determine whether to track FMLA-eligible paid leave separately from other unused earned paid sick leave.
- Prepare to post proper notice at each work location within Cook County and to send notices to each affected employee.