

# Insight

## IN-DEPTH DISCUSSION

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### **Chicago to Become the Second City in the Midwest to Mandate Paid Sick Leave in 2016**

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On June 22, 2016, the Chicago City Council unanimously passed the Chicago Minimum Wage and Paid Sick Leave Ordinance (the “Ordinance”). Chicago is the second city in the Midwest this year to pass a law granting employees paid sick leave. Chicago Mayor Rahm Emanuel is expected to sign the Ordinance into law. He emphasized his support for the Ordinance after its passage. The Ordinance will take effect on July 1, 2017, and will allow employees to accrue up to 40 hours of paid sick leave in a 12-month period that is based on the date the employee begins to accrue sick leave.

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

With limited exceptions, the Ordinance applies to all employers that employ at least one “covered employee” in Chicago and: (1) maintain a business facility within the geographic boundaries of the city; or (2) are subject to at least one of the city’s license requirements. A covered employee includes any part-time or full-time employee, including a domestic worker, who works within Chicago’s city limits 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. Employers may need to offer paid sick leave to a covered employee who works in Chicago, even if the employer’s remaining workforce works exclusively outside the city.

The Ordinance does not apply to construction industry employees covered by a collective bargaining agreement. For other unionized employees, the Ordinance will not change or otherwise affect the validity of a collective bargaining agreement in force on the date the Ordinance goes into effect. Beyond that date, employees may waive the Ordinance’s requirements in a collective bargaining agreement as long as the waiver is explicit, and in clear and unambiguous terms.

## Accrual, Carryover and Frontloading

Under the Ordinance, covered employees will accrue one hour of paid sick leave for every 40 hours worked, beginning 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 the amount of paid sick leave an employee may accrue 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 his or her unused accrued paid sick leave to the following 12-month period, up to a maximum of 20 hours. Currently, the ordinance does not appear to allow use of alternative years, such as calendar, anniversary or fiscal. If an employer is subject to the federal Family and Medical Leave Act ("FMLA"), an employee 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 carry over obligation to 60 hours. However, 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 establish a method for tracking that leave separately from the paid sick leave an employee may use for broader purposes under the Ordinance.

Employers may also 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, rather than using an accrual method.

## Paid Sick Leave Usage

The Ordinance provides that 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. Nonetheless, an employee generally may not use more than 40 paid sick leave hours per 12-month period, unless the employer sets a higher limit. But if an employee carries over 40 hours of FMLA-eligible paid 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 employees 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 violence or a sex offense; and
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.

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.

### **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. Needs for paid sick leave that are "reasonably foreseeable" include, but are not limited to, prescheduled appointments with a health care provider or a court date for a domestic violence case. Absent a reasonably foreseeable need for paid sick leave, an employer may require the employee to provide notice as soon as practicable via phone, email, or text message. However, an employer must waive its notice requirements for an employee who cannot provide notice because he or she is unconscious or otherwise incapacitated.

Only when an employee is absent for more than three consecutive work days may an employer require certification that the employee used paid sick leave for a reason covered by the Ordinance. 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 may not require documentation to specify the nature of an injury, illness, or condition, except as required by law.

When an employee's need for paid sick leave is because he or she (or the employee's family member) is a victim of domestic violence or a sex offense, 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.

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 may require only one document to satisfy the Ordinance's certification requirement. An employer may not 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. Accordingly, 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. The Ordinance does not provide guidance regarding 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 grants employees paid time off in an amount and manner that meets the Ordinance's paid sick leave requirements. Thus, an employer's existing leave policies may satisfy the Ordinance's requirements.

## Notice 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 Chicago facilities. Employers that do not maintain a facility in Chicago, and households that serve as the worksite for domestic workers, are exempt from the posting requirement.

All covered employers, however, must provide employees notice of their rights to paid sick leave with their first paychecks. The Commissioner for Chicago's Department of Business Affairs and Consumer Protection will prepare a form notice and make it available to employers.

## Retaliation and Private Cause of Action

Employers are prohibited from discriminating or retaliating against employees for exercising, or attempting in good faith to exercise, their rights protected under the Ordinance. Those rights include, but are not limited to, disclosing, reporting or testifying about any violation of the Ordinance or related regulations. The Ordinance also prohibits employers from using 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.

If an employer violates the Ordinance, an employee may initiate a civil action against the employer. The employee can recover damages equal to triple the full amount of unpaid sick leave lost or denied because of the employer's violation, the interest on that amount, costs and attorneys' fees.

## Employer Recommendations

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

- Review and revise, if necessary, paid sick time and/or paid time off (PTO) policies and procedures to meet the Ordinance's requirements, including those pertaining to accrual, use, carryover, and all other provisions.
- Determine whether to use an accrual or lump-sum method, or to comply through the use of another PTO policy.
- Review and revise, if necessary, attendance policies to ensure that an employee does not suffer an adverse action for using paid sick leave.
- Audit timekeeping, payroll, and benefits systems to ensure proper tracking of leave usage, accrual, cap, and carryover.
- Determine whether to track FMLA-eligible paid leave separately from other unused accrued paid sick leave.
- Post proper notice at each work location within Chicago and prepare to send notices to each impacted employee.