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Cook County, Illinois Sick Leave Rules Create Thorny Landscape for Employers

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The Cook County Earned Sick Leave Ordinance (the “Ordinance”) goes into effect on July 1, 2017.¹ On May 25, 2017, the Cook County Commission on Human Rights (the “Commission”) approved Interpretive and Procedural Rules (the “Rules”) which set forth in greater detail employers’ rights and obligations and provide for an administrative enforcement system. This Insight provides an overview of the Rules.²

Employers with at least one employee who works in Cook County should be prepared to comply with the Ordinance. As of the date of publication, fewer than half of Cook County’s 135 municipalities have opted out of the Ordinance.³

Covered Employers and Employees

Covered Employers

The Ordinance applies to employers with at least one Covered Employee and at least one place of business in Cook County, unless specifically exempted.⁴ Any fixed location where an employer’s business is transacted will be considered a “place of business” for determining coverage. A location in Cook County from which an employee telecommutes will be considered to be an employer’s place of business if the employer requires that the employee work from that location.

1 The City of Chicago, which is a municipality within Cook County, has its own Paid Sick Leave Ordinance also going into effect July 1, 2017. See Chicago Municipal Code Chapter 1-24.

2 See Larry Robertson, [Cook County, Illinois Becomes First in the Midwest to Mandate Countywide Paid Sick Leave](#), Littler Insight (Oct. 18, 2016).

3 The validity and enforceability of the municipal opt-out ordinances is likely to be the subject of litigation. Employers with employees working in municipalities that have opted out of the Ordinance are encouraged to consult with legal counsel about this issue.

4 Cook County will exempt an employer from compliance with the Ordinance if: (1) federal or state law preempts the employer from being covered by the Ordinance; (2) the employer exclusively employs employees who are exempt from the Ordinance (as described below); or (3) the employer is a government employer (including counties, municipalities, townships, special districts, and school districts).

A temporary staffing firm will continue to be considered an employee's employer even after it places one of its employees in a temporary position at another entity or organization.

The Rules contemplate that two or more employers with control over the work or working conditions of an employee, such as a staffing firm and the organization with which the person is placed, may be "joint employers" of that employee. Joint employers are responsible, individually and jointly, for compliance with the Ordinance.

Covered Employees

To be a Covered Employee under the Ordinance, an employee must perform paid, not volunteer, work for a minimum of two hours in any two-week period while being physically present in Cook County. Work performed within a municipality that has lawfully preempted the Ordinance will not be considered when determining whether an employee is covered.

All employees who meet these criteria will be covered, regardless of whether they are full-time, part-time, temporary, seasonal, occasional, long-term, new or re-hired employees. An employee's immigration status does not impact his or her coverage under the Ordinance.

Employees are not covered by the Ordinance under the following conditions:

- They work in the construction industry and are covered by a bona fide collective bargaining agreement ("CBA");
- Their work is covered by a *bona fide* CBA that was entered into prior to July 1, 2017 and remains in effect after July 1, 2017;
- They waived their rights under the Ordinance pursuant to a bona fide CBA entered into after July 1, 2017;
- They are "employees" under the Railroad Unemployment Insurance Act;
- Federal or state law preempts the individual from being covered by the Ordinance; or
- They are independent contractors.

Accrual of Earned Sick Leave

Current employees will begin to accrue Earned Sick Leave on July 1, 2017. Employees hired on or after July 1 will begin to accrue Earned Sick Leave on either the first calendar day after they begin employment or the date they become covered under the Ordinance, whichever is later.

Employees accrue one full hour of Earned Sick Leave for every 40 hours that they work in Cook County. Employees do not accrue Earned Sick Leave for work outside of Cook County. Exempt employees are assumed to work 40 hours per week, but employers may award Earned Sick Leave based on the actual number of hours worked if exempt employees work fewer than 40 hours per week. Employers are not required to award exempt employees more than one hour of Earned Sick Leave per week, even if they work more than 40 hours per week. Employers are only required to award Earned Sick Leave in hourly (i.e., not fractional) increments.

Generally, employees will accrue Earned Sick Leave during a 12-month accrual period that starts on the date that an employee begins to accrue Earned Sick Leave. For employees who are employed before July 1, 2017 and work in Cook County, the first standard accrual period will run from July 1, 2017 through June 30, 2018. For both employees hired after July 1 and employees who worked for the company before July 1, but do not work in Cook County until after July 1, the 12-month accrual period does not start until they work at least two hours in Cook County. Employers are permitted to modify employees' accrual periods, so that it

coincides with an employee's benefit year or a calendar year, so long as the modification does not make the employee worse off with respect to the accrual, carryover or use of Earned Sick Leave.

Instead of awarding Earned Sick Leave based on an accrual method, employers may frontload Earned Sick Leave and award it all at the start of the year. Under this approach, employers must award the maximum amount of Earned Sick Leave that employees could have accrued in that year, which employers are permitted to cap at 40 hours.

Carryover

Employees must be permitted to carry over up to half of their total unused, accrued Earned Sick Leave to the next year, up to a maximum of 20 hours.

Employers covered by the Family and Medical Leave Act ("FMLA") must permit FMLA-eligible employees to carry over any remaining accrued, unused Earned Sick Leave up to a maximum of 40 hours, solely to use for FMLA-qualifying reasons. Thus, in total, employers covered by the FMLA are required to permit employees to carry over up to 60 hours of an employee's accrued unused Earned Sick Leave to the next year.

Rather than permitting employees to carryover Earned Sick Leave from one year to the next, employers may instead frontload employees' Earned Sick Leave by awarding each employee at the start of each year the maximum amount of Earned Sick Leave he or she could have carried over from the prior year. In other words, if an employer wishes to avoid tracking the accrual or carryover of Earned Sick Leave, employers covered by FMLA-covered employers may frontload 100 hours of Earned Sick Leave to employees. Non-FMLA-covered employers may frontload 60 hours to employees. Since the Ordinance permits employers to limit the amount of Earned Sick Leave that can be used during a 12-month accrual period to 40 hours (if the employee is not FMLA-eligible) or 60 hours (if the employee is FMLA-eligible), a substantial amount of this frontloaded Earned Sick Leave could go unused.

Use of Earned Sick Leave

Once a Covered Employee has worked 80 hours in any 120-day period for his or her employer, that employee is eligible to begin using his or her accrued Earned Sick Leave, even if most of those 80 hours were spent working outside of Cook County. An employee is not entitled to use Earned Sick Leave before it is accrued.

Earned Sick Leave can be used for any of the following reasons:

- The employee, or the employee's family member, is physically or mentally ill or injured, is receiving medical care, treatment, diagnosis or preventative medical care, or recuperating from the same;
- Closure of the employee's place of business and/or the employee's child's school or place of care due to an order of a public official for a health emergency;
- The employee, or the employee's family member, is a victim of domestic violence, sexual violence, or stalking; or
- FMLA-qualifying reasons, including parental bonding related to the birth or adoption of a child.

The use of Earned Sick Leave for FMLA-qualifying reasons is limited to FMLA-eligible employees who have carried over Earned Sick Leave restricted in use for FMLA-qualifying reasons.

Employers may delay the use (but not accrual) of Earned Sick Leave for new employees until the employees have worked 180 days. Employers also are permitted to require that Earned Sick Leave be taken in increments of up to four hours. If an employer does not have a written policy that defines the minimum increment, the default presumption is that employees can use Earned Sick Leave in one-hour increments.

Employers may require employees to use accrued Earned Sick Leave in lieu of taking an unpaid absence from work.

Employee Notice & Documentation Requirements

Employers are permitted to impose reasonable notice requirements on employees intending to use Earned Sick Leave if those notice requirements are in writing and communicated to employees. For foreseeable absences, e.g., non-emergency, prescheduled appointments or court dates, employers can require up to seven days' notice. For unforeseeable absences, employers may require employees to give notice no later than the day of the absence, but employees must be permitted to give notice by phone, email, or text message. Persons other than the employee must be permitted to provide the required notice on the employee's behalf.

Employers may require that the employees provide a certification demonstrating that they took leave for a covered purpose only if an employee is absent from scheduled work for more than three consecutive work days. If the absence is for general "sick time" purposes, documentation signed by a licensed health care provider would satisfy the certification requirement. However, employers cannot require the documentation to specify the nature of any injury, illness, or condition, except as required by law. If leave is taken for an FMLA-covered purpose, the FMLA's documentation standards apply.

If an employee takes Earned Sick Leave for domestic violence, sexual assault, or stalking, the following types of documentation would satisfy the certification requirement: a police report; court document; a signed statement from an attorney, a clergy member, or a victim services advocate; and any other evidence that supports the employee's absence.

Employers must maintain the confidentiality of the documentation provided.

Payment / Compensation & Benefits

Earned Sick Leave must be paid at the same hourly rate an employee would have earned had he or she not been absent from work. However, if a non-exempt employee uses Earned Sick Leave during hours that would otherwise have been designated as overtime hours, employees are to be paid their regular rate of pay, not their overtime rate. Employees must also receive any additional benefits they normally receive when performing work (such as accruing paid leave, seniority or health benefits). Special rules apply to employees who receive tips, commissions, or are paid by the piece when they use their Earned Sick Leave:

- Tipped employees are not entitled to compensation for lost tips or gratuities, but they must be paid no less than the applicable minimum wage.
- Employees paid on a commission basis must be paid the greater of their base wage or the applicable minimum wage.
- Employees paid on a piecework basis must be paid the equivalent of their hourly rate of pay based on the most recent workweek they worked in which they did not use Earned Sick Time.

An employee is not entitled to be compensated at more than 100 percent of his or her normal rate of pay while using Earned Sick Leave. For example, if an employee is being fully compensated through workers' compensation payments or disability leave benefits, the employee is not entitled to receive additional payment for the use of Earned Sick Leave.

When employees use Earned Sick Leave, the pay for the leave must be included in their pay in the next regular payroll period.

Separation of Service & Rehiring

Employers are not required to pay out accrued, unused Earned Sick Leave when employment ends.

If an employer rehires an employee within 120 days of separation, the previous period of employment is considered for coverage, eligibility, and waiting-period purposes. However, employers are not required to reinstate any accrued, unused Earned Sick Leave the employee had at separation.

If an employer rehires an employee after more than 120 days of separation, the employee is considered a new employee and must satisfy coverage, eligibility, and waiting period requirements before he or she can accrue or use Earned Sick Leave.

Compliance through Equivalent Practices

Employers can comply with the Ordinance through their existing multi-purpose paid time off (“PTO”) policies if those policies comply with all aspects of the Ordinance. Under this approach, employees not FMLA-eligible must be provided at least five days (40 hours) of PTO and FMLA-eligible employees must be provided at least 7.5 days (60 hours) of PTO. Employees must be able to use PTO for any reason permitted by the Ordinance or other leave purposes (e.g., vacation), at their option. The employer cannot require notice or documentation more burdensome than what is permitted by the Rules.

Recordkeeping Requirements

While the Ordinance does not impose recordkeeping requirements on employers, the Commission expects that employers who do business in any corporate form or who employ more than four employees will have personnel and payroll records to demonstrate over the course of the three most recent years:

- Each covered employee’s name, mailing address, telephone number, and/or email address;
- Each covered employee’s occupation/job title and hire date;
- The number of hours that each covered employee worked each workweek or pay period;
- The number of hours of Earned Sick Leave awarded to each covered employee;
- The number of hours of Earned Sick Leave each covered employee used; and
- The date upon which each covered employee used Earned Sick Leave.

An employer’s inability to produce these records upon request from the Commission may result in an adverse presumption against the employer and in favor of the employee.

Notice Requirements

Employers must post a notice advising employees of their rights under the Ordinance. Employers must also provide to each employee a notice of his or her rights under the Ordinance no later than the date he or she becomes covered by the Ordinance. Notably, the Rules also impose a continuing requirement that employers provide this notice to employees at least once per calendar year. A model notice is available on the Commission’s website (<https://www.cookcountyil.gov/service/earned-sick-leave-ordinance-0>).

Prohibited & Permitted Practices

Employers are prohibited from engaging in the following conduct:

- Retaliating against employees for exercising their rights under the Ordinance or participating in an investigation of an alleged violation of the Ordinance.

- Requiring that an employee find someone to cover his or her work as a condition for using Earned Sick Leave.
- Counting Earned Sick Leave as an absence that triggers discipline, demotion, suspension or any other adverse employment action.
- Switching an employee's schedule to avoid paying Earned Sick Leave during the employee's absence.
- Forbidding or requiring employees to take Earned Sick Leave (except the employer can require an employee to use available, accrued Earned Sick Leave instead of taking an unpaid leave of absence).
- Paying employees not to take Earned Sick Leave.
- Delaying the use of Earned Sick Leave or the payment of wages because an employee's documentation has not been received.

However, employers are permitted to:

- Deny an employee's request to use Earned Sick Leave for a foreseeable purpose when the employee fails to provide reasonable notice.
- Discipline an employee who fails to provide reasonable notice in accordance with the employer's written reasonable notice provisions.
- Discipline an employee for abusing Earned Sick Leave, e.g., a proven use of non-covered Earned Sick Leave.

Administrative Complaints & Penalties

Employees who believe that their employer has violated the Ordinance have three years from the date of the alleged violation in which to file a written complaint with the Commission, or file a lawsuit. 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. The Commission can fine employers for any violation of the Ordinance, up to \$500 per violation per employee affected per day. In the event of a violation, the Commission may also order, among other things, an employer to pay employees' lost wages.

Conclusion & 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.