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A Differential Diagnosis of Implementing Rules

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Chicago and Cook County Paid Sick Leave Ordinances: A Differential Diagnosis of Implementing Rules

As most employers in the "Chicagoland" area are hopefully already aware, both Chicago and Cook County have enacted paid sick leave ordinances that go into effect July 1, 2017 (The Chicago Minimum Wage and Paid Sick Leave Ordinance and Cook County Earned Sick Leave Ordinance). Although the two ordinances are remarkably similar as written, the two jurisdictions have set forth rules that interpret the ordinances that are remarkably different. Cook County's Interpretative and Procedural Rules went into effect on May 25, 2017. Chicago's Minimum Wage and Paid Sick Leave Rules are still in draft form and were open to public comment until June 16, 2017 (and although the date for final rules is unknown, attorneys with the City have indicated **that the final rules will be published before July 1, 2017**). Based on comments made by the attorneys charged with drafting the City's rules, we are expecting some changes to be made to the final rules, some possibly significant. **We will amend this article as soon as the final rules have been published.** This, of course, is of no comfort to Chicago employers attempting to comply with the new ordinance by updating or drafting new paid sick leave policies. Moreover, given how many employers operate both in Cook County and in Chicago, having two completely different sets of rules to interpret virtually the same ordinances would be extraordinarily cumbersome and burdensome. It should also be noted that as of June 22, 2017, 66 municipalities in Cook County have opted out of the earned sick leave ordinance, noted here, and several more are considering opting out as of the time this article was drafted.

This article will provide some of the main points in the two ordinances that employers need to know. We have also prepared a chart that compares the two jurisdictions' rules interpreting the two ordinances (again, Chicago's are not final and therefore, we will be updating it after the final rules go into effect), focusing on the most important differences for employers to be aware of now. We have previously prepared more detailed articles on both ordinances, which can be found here for Chicago and here for Cook County. This article is intended to provide an overview of each ordinance and its respective rules and is not intended to cover every aspect of the ordinances. Employers located or doing business in either Cook County or Chicago are urged to contact their employment counsel to determine whether their current policies comply with the ordinances' requirements, or whether they will need to draft entirely new policies.

The Basics

Accrual Rate and Cap

Both ordinances require employers to provide certain employees with one hour of paid sick leave for every 40 hours worked. (Cook County's ordinance refers to the leave as "earned sick leave" but for the sake of consistency, we will simply refer to both as "paid sick leave" or "PSL." Note that both sets of rules further identify and attempt to define types of PSL, which is noted in the comparison chart.) Both ordinances set an earning cap of 40 hours in a year unless the employer chooses to provide more.

Location Where Work Performed

Chicago's Ordinance applies to employers who maintain a business facility in Chicago and/or who are required to obtain a business license to operate in the City. Cook County's ordinance applies to employers that "gainfully" employ "at least one Covered Employee with their principal place of business within Cook County." A "Covered Employee" is one who performs at least two hours of work in a two-week period for an employer while physically present within Cook County. For employees to be eligible under both ordinances, they must work at least 80 hours for an employer in any 120-day period of time; thus most part-time, non-seasonal workers will qualify. Only the work performed in these jurisdictions counts toward PSL accrual.

Accrual and Accrual Period

We will refer to the accrual period as "the year" throughout this article; however, employers can designate the "year" as either an anniversary year, calendar year, fiscal year, or any other one-year period. If the employer chooses, however, to calculate based on anything other than an anniversary year, it must make sure to initially provide enough hours so that the employee is not worse off than if the employer calculated only by an employee's anniversary in terms of accrual, carryover, and the time in which the employee may use the earned leave. Chicago's draft rules provide that if an employer's benefit year begins after an employee's start date, the employer shall allow the employee to carry over all of the accrued paid sick leave, up to 20 hours, to the benefit year. Cook County's rules provide two possible ways to move an employee to a different accrual period than based on an anniversary. First, the employer can frontload a greater amount of earned sick leave than that to which the covered employee is otherwise entitled. Second, at the end of the first accrual period, the employer can allow the employee to carry over all of his unused earned sick leave rather than just half. Thus, unlike Chicago, which would limit the carry over to 20 hours, Cook County's would require carry over of up to 40 hours. Ultimately, Employers will need to do so at their own risk, and err on the side of caution, particularly as it relates to carryover and the time in which an employee has to use up the earned PSL.

Under both ordinances, employees begin to accrue PSL on their first day of employment, and both allow for an employer to require a waiting period of 180 days before taking the leave. Neither ordinance requires employers to pay out unused PSL upon termination.

Usage of Sick Leave

Both ordinances allow for the use of paid sick leave for the same reasons: 1) for an employee's illness or injury (including medical care, treatment and diagnosis) and preventative medical care; 2) if an employee needs to care for an ill or injured family member or if a family member is receiving preventative care; 3) if an employee or family member is victim of domestic violence or a sex offense; 4) for an employee's need to care for a child whose school has been closed due to a public health emergency; or 5) if the employee's place of business has been closed for the same reason. Cook County would refer to these five categories of use of leave as "Ordinance-Restricted Earned Sick Leave," while Chicago refers to it as "regular use Paid Sick Leave." These terms are meant to distinguish between sick leave under the ordinances and leave being taken under the Family and Medical Leave Act (FMLA).

"Family members" under both ordinances are defined broadly, and include the employee's child (biological, adopted, step, and foster), spouse, domestic partner, parent (including biological, foster, stepparent, or adoptive parent), sibling, grandparent, grandchild or other blood relative, or any person whose close association with the employee is the equivalent of a family relationship. (The Chicago draft rules also include "godchild," "godparent," or "co-parent," though this likely would also be included in the catch-all definition of those with a "close association" under both ordinances.)

Paid Time Off Policies

Employers in both jurisdictions who already provide time off for employees may not have to provide separate PSL in certain circumstances. If the employer's current policy provides at least as much PSL as the ordinances require, allows the accrual to begin on the first day of employment, allows employees to begin taking PSL no more than 180 days into employment, allows employees to take the time off for at least the same reasons as required in the ordinances, and allows carryover at least to the extent allowed under the ordinances, then the employer will not have to alter its current paid time off policy. If all of these requirements are not met, then employers will need to choose whether to alter their current PTO policies, or whether to separate out their vacation and other personal leave from paid sick leave.

Union Employees and Other Exclusions

Both ordinances and rules provide that employees covered by a collective bargaining agreement (CBA) entered into before July 1, 2017 are not entitled to PSL; however, employees covered by CBAs entered into after July 1, 2017 are entitled to PSL, unless otherwise waived in the CBA in "clear and unambiguous" terms.

Both ordinances exempt employees working in the construction industry who are covered by a bona fide CBA. Although Cook County's rules also discuss this exemption, Chicago's rules do not mention the exemption for construction industry workers who are covered by a CBA and instead only discuss the exemption for all workers covered by a CBA, but only if the CBA provides for the waiver. Thus, it is unclear whether Chicago's ordinance will actually apply to construction workers covered by a CBA (regardless of whether the CBA provides a waiver of PSL). Cook County also exempts employees as

defined in Section 1(d) of the Railroad Unemployment Insurance Act.

Notice and Recordkeeping

Employers in Chicago and Cook County (in municipalities that have not opted out) must post notices to all employees in the same location as they are required to post state and federal laws (i.e. in a conspicuous place at each facility, usually a breakroom or lunchroom), which notify employees of their rights under the respective ordinances. Employers must also provide a written notice (or electronic for employees who receive direct deposit) to employees on their first paycheck after hire (or after July 1, 2017). Cook County requires employers to provide the notice of rights at least once a year. Both entities have drafted notices that can be posted.

The draft Chicago rules require employers to keep records of the name, address, occupation, social security number, and hire date of each covered employee, as well as the date each employee was eligible to use paid sick leave, the dates and number of hours each employee used paid sick leave, the rates of pay of each employee, the hours worked each day and each workweek by each employee, the type of payment (hourly rate, salary, commission, etc.), straight time and overtime pay, and total wages paid to each employee in each pay period, and additions and deductions from each covered employee's wages for each pay period and an explanation of the additions and deductions. Note that although most of this information is also required under the Illinois Wage Payment and Collection Act, the length of time (five years) is longer than the IWPCA, which is only three years. Cook County's rules regarding recordkeeping are similar, though it only requires records to be maintained for three years, which is consistent with the IWPCA and Cook County's three-year statute of limitations.

Carryover

Where perhaps the most crucial differences come into play in terms of interpreting nearly identical ordinances relates to the concept of carryover. Both ordinances require employers to allow employees to carry over at least some of their unused PSL to the next year, but the rules differ on how to do so. Both ordinances state that an employer must allow an employee to carry over half, up to 20 hours, of unused PSL into the next year. Both ordinances also state that if an employer is subject to FMLA (i.e. has 50 or more employees), then it must also allow its FMLA eligible employees to carry over up to 40 hours to be used exclusively for FMLA purposes. (For employers not subject to FMLA, the carryover under both sets of rules is the same, which is that an employee may simply carry over half of unused PSL up to 20 hours. The confusion and difficulty comes into play with FMLA-eligible employers.)

Cook County's rules provide that the employee can carry over half, up to 20 hours of unused PSL for Ordinance-Restricted Earned Sick Leave (i.e. for the five categories of use stated in the ordinance). Then, the employee is allowed to carry over the remaining hours into the next year for use only if the employee requires FMLA leave. For instance, if an employee earns 40 hours of paid sick leave and uses 11 hours, he has 29 left at the end of the year. The 29 is divided in half, which is 14.5, and Cook County requires rounding up to the next whole number, so this means the employee can carry over 15 hours into the next year as Ordinance-Restricted Earned Sick Leave. The other 14 hours get carried over as FMLA-Restricted Earned Sick leave and can only be used if the employee qualifies for an FMLA leave in the next year. (The linked chart provides further examples, including how the hours can get carried over into subsequent years.)

On the other hand, Chicago's draft rules provide that the employee must choose at the end of the year how he or she wishes to designate the leave, either as "regular use Paid Sick Leave," which can be used for any of the five categories listed in the ordinance, or as "Paid Sick Leave for FMLA," which can only be used for an FMLA leave. Thus, if the employee earns 40 hours and uses none in a year, at the end of the year, he can either choose to carry 20 hours over into the next year to be used for one of the reasons listed in the ordinance, or he can choose to carry over 40 hours to be used exclusively for FMLA leave. Once the leave has been designated as one or the other, it can only be used for that purpose (unless the employer chooses to include in its policy the ability to carry over for either type of use). Therefore, if an employee knows he will be requiring FMLA leave in the next year, he may be better off designating the leave as FMLA leave because then he can carry over all of the unused leave accrued in the prior year (up to 40 hours). On the other hand, if the employee does not anticipate an FMLA leave, he may wish to choose to designate it as "regular" leave, even though he will only carry over half from the prior year, because otherwise, he will not have access to the carried over

hours if he does not end up needing FMLA leave. Chicago's draft rules provide several illustrations on how this is intended to work, and we have incorporated a few of them into our attached chart. Based on public comment, the City has indicated that the requirement for employees to select how they would like their leave to carry over is likely to change in the final rules; however, the City has not yet indicated what the final rule on this topic will look like.

Avoiding Tracking of Accrued Time or Carrying Over

Obviously, with different methods of calculating carryover, this will cause accounting and tracking headaches for employers (with 50 or more employees) who either have locations in both jurisdictions or who have employees performing work in both (even if they are based out of one). Unfortunately, another area which is significantly different between the two sets of rules is in how an employer might avoid having to calculate accrual or carry over anything. In Cook County, an employer may avoid having to track the accrual of PSL **and** avoid having to carry over any unused PSL to the next year if it grants at the beginning of the first year of employment 40 hours of Ordinance-Restricted Earned Sick Leave, and then in each subsequent year, 60 hours of Ordinance-Restricted Earned Sick Leave **plus** 40 hours of FMLA-Restricted Earned Sick Leave (for a total of 100 hours). If an employer wishes to only avoid having to carry over unused sick leave from one year to the next, but still have to track PSL as it is being earned, then at the beginning of the second and all subsequent years of employment, it would need to provide an immediate grant of at least 20 hours of Ordinance-Restricted Earned Sick Leave and 40 hours of FMLA-Restricted Earned Sick Leave.

In Chicago, however, under the draft rules, an employer need only grant 40 hours of PSL within the first 180 days after hire, and then 60 hours at the beginning of each subsequent year, and allow the employee to use the leave for any of the reasons listed in the ordinance, in order to avoid both having to track accrual of PSL **or** carrying over unused PSL into the next year. (MW 3.05)

Limits on Use

In Cook County, an employer can limit use of PSL to 40 hours in a year without regard to whether the sick leave was carried over from the prior year or whether it is earned in the current year. However, in one circumstance, an employee has the right to use up to 60 hours, which is when he carries over 40 hours from the prior period that is designated as FMLA-Restricted Earned Sick Leave, and then uses all 40 hours. At that point, he can use up to an additional 20 hours of Ordinance-Restricted Earned Sick Leave.

Under the Chicago Ordinance, (1-24-045(c)(1)), an employer can limit use of PSL to 40 hours per year of "regular use" paid sick leave, plus 20 hours of PSL for FMLA use (thus opposite of Cook County's allowance of use of 40 hours for FMLA and 20 for "regular" paid sick leave). It is unclear, however, whether the Chicago draft rules on immediate grant/frontloading intend to change this limit and allow an employee to use all 60 hours in a year for regular sick leave purposes, or whether the language of the Ordinance will still be in effect, limiting the total hours of use in a year to 40 for regular sick leave purposes and another 20 if the employee also needs FMLA leave. In draft form, the rules on usage state in MW 3.08(c) that a covered employee may use a maximum of 60 hours of accrued paid sick leave during a benefit year, without specifying any breakdown between the two types of leave (regular and FMLA). Although some of the examples talk about the breakdown, none of the examples involve a frontloading scenario. The draft rules on the subject of immediate grant (MW 3.05) state that an employer can avoid having to carry over unused hours if it grants 60 hours of paid time off (in the second and subsequent years of employment) "that may be used in the manner at least as set forth in the Ordinance." It is unknown whether this quoted language is meant to eliminate the 40 hour regular use limit and instead allow for the use of 60 hours regardless of type. Therefore, until or unless Chicago addresses this in its final rules, employers will be left to guess whether the usage limit in the Ordinance still applies in an immediate grant/frontloading scenario.

Both ordinances allow an employer to require use in hourly increments (which is presumed unless there are written

policies to the contrary), and both sets of rules allow an employer to set a minimum increment of use of no greater than 4 hours.

Other Differences between Cook County and Chicago (Draft) Rules

There are several other differences between the two sets of rules interpreting the ordinances, though admittedly less significant in terms of the differences in tracking and carryover.

Notice to Employer

Both ordinances allow an employer to require certification after three or more days of absence. Both sets of rules are silent on whether it would still be permissible to have a policy that requires documentation of the use of three or less sick days. Both allow an employer to require notice of absences, but differ on the amount. In Chicago, an employee must give at least seven days of notice for foreseeable leave. Cook County only allows employers to require "reasonable" notice to for foreseeable leave, without defining what "reasonable" is.

Break in Service

In Cook County, if an employee has a break in service of less than 120 days, then upon rehire, the employer must count all previous employment towards eligibility for PSL, but need not make previously accrued but unused time available for use. In Chicago, if the break in service is less than 12 months, an employer may but is not required to make previous accrued but unused time available for use.

Procedures for Enforcement and Remedies

The remedies and procedures for enforcement are also different. Although both rules state that a private right of action is available, the methods of enforcement and potential damages are different. Under Cook County's rules, an employee may initiate a claim with the Cook County Commission on Human Rights, who will consider any claim filed within three years of the violation. The Commission can issue records subpoenas, subpoenas for witness testimony, and hold evidentiary hearings. The Commission may order fines (payable to the County) of up to $500 per violation per day, back pay (to the complaining employee and possibly to any other employees if a violation occurred), and appropriate injunctive relief. An employer's only recourse upon the finding of a violation is to either pay, or seek administrative review of the Commission's decision in the Circuit Court of Cook County within 30 days of the finding. An employee may also choose to file suit in the Circuit Court of Cook County instead of filing with the Commission, with the potential damages being three times the full amount of any unpaid sick leave denied or lost by reason of the violation, plus interest, and reasonable attorneys' fees.

Chicago's Ordinance provides that an employee has a right to bring a private cause of action in court, and that an employee successful in a civil action can recover damages equal to three times the full amount of unpaid sick time, and the interest on that amount calculated at the prevailing rate, together with costs and such reasonable attorneys' fees as the court allows. The draft rules, however, do not refer to a private cause of action or any action in court and instead discuss an employee's right to initiate a claim with the Chicago Department of Business Affairs and Consumer Protection (BACP), who can issue a subpoena to the employer for records (records must be maintained for five years). If the employer is not in compliance, the City can seek "restitution" to the covered employee, fines payable to the City, and license suspension (none of which is specifically defined). Thus, it is not specifically known whether the employee can still file an action in court as stated in the ordinance, or whether the draft rules are intended to limit an employee to an action filed with the BACP. Neither Chicago's Ordinance nor the draft rules provide for any specific statute of limitations for bringing a claim for unpaid sick leave, though Draft Rule MW 4.01 provides that BACP has the discretion not to accept a complaint more than three years after the disputed wages were due or sick time not granted.

Conclusion

At this point, unless Chicago amends its draft rules to be more consistent with Cook County, employers with employees in both locations are stuck trying to comply with the ordinances and rules to the best of their ability. Erring on the side of caution will seemingly go a long way in both jurisdictions, as both rules discuss the concept of evaluating how significant and intentional the violations are when deciding on damages and fines. For now, employers with any employees in these jurisdictions are strongly encouraged to review their current policies and determine whether they comply with the ordinances and rules, whether the policies need amending, or whether they need new policies altogether. We are available to consult on all of these issues.