

COOK COUNTY EARNED SICK LEAVE ORDINANCE

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AGENDA

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- Who is a covered employer?
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- Accrual: Carry over (FMLA Employer)
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WHO IS A COVERED EMPLOYEE?

- An individual who meets the following criteria is a “covered employee:”
 - The individual is compensated for the work he/she performs
 - No volunteers or unpaid interns
 - The work is performed for a “covered employer”
 - The individual works a minimum of two hours in any two week period
 - The work is performed while physically present in Cook County
 - Commission will not consider work that an individual performs within the boundaries of a municipality that has opted out of the Ordinance

WHO IS A COVERED EMPLOYEE?

- Employers within municipalities that do not take action or do not have home-rule authority will be required to follow Cook County laws on minimum wage and sick leave.
- As of June 1, 2017, the following municipalities have opted out of the Ordinance:
 - Arlington Heights, Barrington, Berkeley, Bedford Park, Berkley, Burr Ridge, Elk Grove Village, Elmwood Park, Evergreen Park, Hanover Park, Harwood Heights, Hickory Hills, Hoffman Estates, Lynwood, Mount Prospect, Morton Grove, Mt. Prospect, Niles, Norridge, Northbrook, Oak Forest, Oak Lawn, Park Ridge, Palatine, Palos Heights, Palos Park, River Forest, Riverside, Rolling Meadows, Rosemont, Schaumburg, South Barrington, Streamwood, Summit, Tinley Park, Western Springs and Wheeling.

WHO IS A COVERED EMPLOYEE?

- The Commission will NOT consider the following to constitute compensated work while present in Cook County:
 - Traveling through Cook County without stopping for a work purpose
 - “Work purpose” would include making deliveries or sales calls
 - Stopping for a work related purpose would not include making only incidental stops (e.g. gas or buy food)
- The Commission will consider the following to be compensated work while physically present in Cook County:
 - Traveling into Cook County for a work purpose, including but not limited to deliveries, sales calls, and travel related to other business activity for a covered employer that is taking place in Cook County
 - Telecommuting **BEWARE**: If an individual performs work at his/her personal residence and/or any other location that is physically in Cook County, and the Employer **requires** this, it will count as work performed in Cook County

WHO IS A COVERED EMPLOYEE?

- A covered employee can be full-time, part-time, temporary, or seasonal
- The Commission will consider a covered employee who is rehired by the same covered employer after more than 120 days have passed since the separation to have commenced new employment for purposes of accruing sick leave
- If rehired before 120 have passed and the employer does not restore any accrued but unused sick leave when the employee is rehired, the Commission will not consider this to be a violation under the Ordinance, unless it appears the employer initially terminated the employee to prevent him/her from using sick leave
- Unused earned sick leave does not have to be paid out at the time of an employee's separation

WHO IS A COVERED EMPLOYEE?

- Exempt employees:
 - Employees in the construction industry who are covered by a collective bargaining agreement
 - Employees covered by a collective bargaining that was entered into **prior** to July 1, 2017 and remains in effect **after** July 1, 2017
 - Employees who have waived their rights under the Ordinance in a collective bargaining agreement that was entered into **after** July 1, 2017
 - Federal or state employees
 - Independent contractors

WHO IS A COVERED EMPLOYER?

- A “covered employer” is considered to be the following:
 - Employs at least one “covered employee”
 - Has at least one “place of business” within Cook County
 - Corporate headquarters and primary place of business do NOT have to be in Cook County
 - Any fixed location where the employer transacts business may be considered a “place of business”
 - Examples include stores, restaurants, offices, factories and storage facilities

WHO IS A COVERED EMPLOYER?

- Commission will consider any place of business within Cook County for the purpose of determining whether the employer is a covered employer, even if located in a municipality that has opted out
- The Commission will consider a location in Cook County to be an employer's place of business if an employer explicitly **requires** an employee to telecommute from that location
- Joint employers – all “joint employers” are responsible for compliance with the Ordinance
- Successor employers – responsible for compliance if successor employer meets the definition of a covered employer
- Exempt employers
 - Federal, state and local government entities
 - Exclusively employ employees who are exempt under the Ordinance

ACCRUAL: WHEN AND HOW MUCH?

- A covered employee begins to accrue earned paid sick leave on the “date of initial accrual,” which is the later of: (a) July 1, 2017; (b) the first calendar day after the start of his/her employment; or (c) the covered employee’s date of coverage.
 - *E.g.* Employee began work on January 1, 2017 (before effective date of the Ordinance) and worked 80 hours over the next 120 days, then the employee’s earned leave would start to accrue on July 1, 2017.
 - *E.g.* Employee begins working on July 20, 2017, and works at least 80 hours over the next 120 days, then the employee’s earned leave would start to accrue as of July 21, 2017 (*i.e.* the first calendar day after the start of employment).
 - *E.g.* Employee starts on July 2, 2017, but first performs 2 hours of work in Cook County on September 5, 2017, that employee will begin to accrue sick leave on September 5, 2017 (*i.e.* September 5, 2017 will be both the employee’s date of initial accrual and date of coverage).

ACCRUAL: WHEN AND HOW MUCH?

- A covered employee earns one hour of paid sick leave for every 40 hours of work that he/she performs *in Cook County*
- A covered employee is entitled to accrue up to a maximum of 40 hours of earned sick leave in any 12-month period
- Non-Exempt Employees – earns paid sick leave based on actual hours worked
- Exempt Employees – assumed they work 40-hour work weeks
 - If more than 40 hours a week, an employer only has to provide one hour for 40 hours worked, without regard to additional hours over 40
 - If less than 40 hours a week, an employer may award sick leave based on the actual number of hours worked
- *E.g.*, A part-time exempt/non-exempt employee works 10 hours per week. The employee will earn one full hour of earned sick leave after four weeks' of work.
- Employers may also “front-load” the hours in lieu of using this accrual method
- Employers may set a higher cap or an unlimited cap other than the 40 hours

ACCRUAL: CARRY OVER (NON-FMLA EMPLOYER)

- The limit on the amount of unused paid sick leave that may be carried over to the next 12-month period and how that amount is calculated varies depending on whether the employer is a FMLA-covered employer
- **Non-FMLA covered employers** must permit their employees to carry over **half** of his/her total unused but accrued paid sick leave into the next 12-month period, up to a maximum of 20 hours
- If when calculating the amount of carry over hours, that number is a half, then you round up to the next whole number (e.g. 5.5; round up to 6)
- All carry over hours must be in hourly increments and not fractional

ACCRUAL: CARRY OVER (NON-FMLA EMPLOYER)

- Employee of a Non-FMLA Employer has 20 hours of unused sick leave at the end of the accrual period, he/she can carry over only 10 of those hours into the next accrual period (*i.e.* half of 20 is 10)
- Employee of a Non-FMLA Employer has 9 hours of unused sick leave at the end of the accrual period, he/she can carry over 5 of those hours into the next accrual period (*i.e.* half of 9 is 4.5, rounding to the next whole hour increment is 5)
- Employee of a non-FMLA employer has 44 hours of unused sick leave at the end of the accrual period, he/she can carry over 20 of those hours into the next accrual period (*i.e.* half of 44 is 22, there is a 20 hour maximum)

ACCRUAL: CARRY OVER (FMLA EMPLOYER)

- **FMLA Employer** is a two step process:
 - First, an FMLA-employer, like a non-FMLA eligible employer must permit the employee to carry over **half** of his/her accrued but unused paid sick leave, up to a maximum of 20 hours. These 20 hours can be used for any purpose permissible under the Ordinance.
 - Second, if the employee has any *additional* unused but accrued sick leave that was not carried over, then the employer must permit the employee to carry over any such remaining paid sick leave up to a maximum of 40 hours. These hours can only be used for FMLA-related absences.
 - If, however, the employee already has exhausted his/her FMLA leave, and won't be eligible for FMLA leave (e.g. won't work the required hours to be FMLA eligible) at any time during the following 12-month period, an employer does not have to permit the employee to carry over these FMLA hours

ACCRUAL: CARRY OVER (FMLA EMPLOYER)

- Employee of an FMLA-Employer has 30 hours of unused sick leave at the end of the accrual period, he/she can carry over 15 “Ordinance restricted” hours and another 15 “FMLA restricted” hours into the next 12-month accrual period
- Employee of an FMLA-Employer has 70 hours of unused sick leave at the end of the accrual period, he/she can carry over 20 “Ordinance restricted” hours (max. carry over is 20) and another 40 “FMLA restricted” hours (max. carry over is 40) into the next 12-month accrual period
- A covered employee’s use of earned sick leave runs concurrently with his/her use of leave under the FMLA, and does not reduce or extend the number of hours/days of FMLA leave to which a covered employee may be entitled under FMLA

ACCRUAL: INCREMENTS OF USE

- An employer can establish the minimum increment in which paid sick leave can be used, provided that the minimum increment is no greater than four hours. However, if there is no written policy in place, the Commission will assume earned sick leave can be taken in one whole hour increments.
- Even if this means that the employee will have to use more leave than is necessary for any particular absence
- For example, an employee is scheduled to work from 8:00 a.m. to 4:00 p.m. and he/she has a doctor's appointment at 8:00 a.m. and could be back at work at 10:00 a.m. If your policy requires use of paid sick leave in four hour increments, he/she will not be required to return work until 12:00 p.m. that day. Alternatively, if the employee only has two hours of accrued sick leave remaining, the employee would not be able to use that remaining sick leave to attend the appointment.

PERMISSIBLE USES

- Employees may take leave in the following circumstances:
 - For an illness or injury of the employee or the employee's family member, including receiving medical care, treatment, diagnosis, or preventive medical care
 - Where the employee or the employee's family member is a victim of domestic violence or a sex offense
 - When the employee's place of business is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care is closed due to a public health emergency

PERMISSIBLE USES

- The term “family member” is broadly defined to include a child, legal guardian or ward, spouse under the laws of any state, domestic partner, parent, parent of a spouse or domestic partner, sibling, grandparent, step and foster relationships, or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship
- Employers may lawfully discipline an employee who uses sick leave for an impermissible purpose (FMLA-restricted hours to extend vacation)
- Employees cannot use paid sick leave during a suspension or unpaid disciplinary leave

NOTICE OF USE OF PAID SICK LEAVE

- Employers can and should have a written policy in place instructing employees regarding its call-in/notification procedures when he/she will be absent and using paid sick leave
- If an employer has a written policy and the employee fails to follow that policy, the employer may discipline the employee
- Policy **MUST** be in writing, otherwise it will be deemed unreasonable
- In the absence of a written policy, the Commission will presume that no such policy exists and that employees can use earned sick leave without providing any prior notification and will not be subject to any discipline

NOTICE OF USE OF PAID SICK LEAVE

- Ordinance makes a distinction between foreseeable and unforeseeable absences with respect to an employee's obligation to provide notice of use
 - If leave is *foreseeable*, such as for court dates or medical appointments, employees must provide up to seven days' notice
 - If the need for leave is *unforeseeable*, employees must provide as much notice as is practical
- Notice can be provided by phone, email, or text message, or however you instruct, if you have it memorialized in a written policy
- Employers must post notice of employees' rights under this Ordinance in a conspicuous location at each facility where any employees work within Cook County. Commission has a model posting on its website.
- Notice about the Ordinance also must be provided to new hires by the later of each employee's date of coverage or date of eligibility, AND at least once per calendar year thereafter. Commission has a model notice on its website.

DOCUMENTATION SUPPORTING PAID SICK LEAVE

- Employers may require employees using paid sick leave for more than **three consecutive workdays** to provide certification that the leave was taken for a permissible purpose under the Ordinance
 - If the employee uses the sick leave to care for an illness or injury of the employee or the employee's family member, employers may require that the employee to provide a note signed by a licensed health care provider
 - If the employee uses the sick leave for a domestic violence or a sex offense matter, an employer may require that the employee provide a police report, a court document, a signed statement from an attorney, a member of the clergy, a victim services advocate, or a sworn declaration or signed affidavit from the employee or anyone with knowledge of the circumstances
 - If the employee uses the sick leave for FMLA purposes, an employer may require the employee to provide the type of notification that is required under the employer's FMLA policy or which is required under the FMLA

DOCUMENTATION SUPPORTING PAID SICK LEAVE

- For all absences in which an employee has used paid sick leave, an employer can use any evidence or documentation to prove that an employee has misused sick leave
- An employer cannot prohibit someone from using paid sick leave or delay payment of wages earned during sick leave because the employer has not received the required documentation
- Wages earned during sick leave must be paid no later than the next regular payroll period after the sick leave was used

RECORDKEEPING

- Employers are not required to retain records of an employee's use of earned sick leave under the Ordinance
- HOWEVER, if an employee files a complaint with the Commission and the employer has no records of the employee's use of earned sick leave, the employee's testimony will take precedence
- At a minimum, records should contain the following information for the past 5 years:
 - Name, contact information, job title, hire date
 - Hours worked each pay period, hours of paid sick leave earned/accumulated, hours of paid sick leave used and the dates of use

ENFORCEMENT

- Three year statute of limitations for an employee to file a complaint. The three year SOL is extended to when an employee knew or should have known if the employee can prove that his/her employer concealed the violation.
- Employee can file a complaint with the Commission or the Court. Do not have to first bring a claim with the Commission.
- Commission will provide a form for employees to use on its website. However, after its review, Commission may choose to draft a complaint with it as the complaining party. No requirement that the Commission disclose the name of the complaining party and it may allege violations broader than what the complaining party initially alleged.
- 30 days to file a written response to the a complaint filed with the Commission.
- If the Commission deems the employer's response to be "sufficient," it will dismiss the complaint. If its deems it to be "insufficient," it will proceed with discovery and the lawsuit.

ENFORCEMENT

- Commission may request an “evidentiary conference” to resolve simple factual disputes that are relevant to determining whether a violation has occurred
- Commission has subpoena power to obtain witnesses and documents
- Commission may render a finding of “no-violation.” This finding is based on the merits and should preclude an employee from subsequently filing the same complaint with the Court.
- If the Commission finds that a violation has occurred, it will order remedies and/or sanctions
 - Commission may impose fines payable to Cook County for any violation of the Ordinance. The amount of the fine will not exceed \$500.00 per violation, per employee and per day.
 - Commission may order the employer to pay lost wages for any violation of the Ordinance

PROHIBITED PRACTICES

- Requiring an employee to find coverage as a condition of using earned sick leave
- Retaliating against an employee for exercising his/her rights under the Ordinance or participating as a witness in a proceeding before the Commission
- Counting absences from the use of properly noticed sick leave as an absence that triggers discipline
- Switching an employee's schedule after the employee provides notice of his/her intent to use sick leave to avoid paying the employee during his/her absence
- Requiring or forbidding an employee to take earned sick leave (but you can do so in lieu of the employee taking an unpaid leave of absence)
- Paying a covered employee to not take earned sick leave

BEST PRACTICES

- Review and revise sick leave policies, PTO policies, family leave policies, and domestic violence leave policies to make sure the policies comply with these new leave laws to the extent the employer is covered by them
- If these leave policies grant employees paid time off in an amount that meets or exceeds what is provided under the Ordinance, employers are not required to provide any additional sick or paid leave or change their policies
- Employers can structure their policy as they see fit, so long as the amount of leave provided to employees meets or exceeds what is required under the Ordinance
 - *E.g.* Frontloading in lieu of accrual
 - A non-FMLA employer may comply by granting its employees 60 hours of earned sick leave (*i.e.* 40 hours required plus 20 carry over)
 - An FMLA-employer may comply by granting its employees 60 hours of earned sick leave and 40 hours of FMLA paid leave. (*i.e.* 40 hours required plus 20 carry over plus 40 FMLA carry over hours)

BEST PRACTICES

- Revise existing sick leave or PTO policies if they do not already allow leave for care of a family member
- Consider revising "use it or lose it" sick leave and PTO policies to allow employees to carry over up to 20 (or as many as 60 FMLA-eligible) hours of paid leave into subsequent years
- Consider revising leave policies that "cap" or place a maximum on the amount of sick leave or PTO that employees can accrue or accumulate each year to make sure that eligible employees will, once the Ordinance goes into effect next July 1, 2017, be able to accrue at least 40 hours of paid sick leave each year
- Alter how sick leave or PTO is tracked and administered to make sure that eligible employees are allowed to accumulate, use, and carry over appropriate amounts of 20 or 40 hours paid sick leave or PTO in accordance with the Ordinance

CHICAGO PAID SICK LEAVE

- On June 22, 2016, the City of Chicago passed a virtually identical sick leave ordinance that also will go into effect on July 1, 2017
- Just recently, the City of Chicago issued draft regulations and is accepting public comment through June 16, 2017 at 9:00 a.m. The regulations can be found on the City of Chicago's website at <https://www.cityofchicago.org/city/en.html>.
- There are inconsistencies between the final Cook County regulations and the draft City regulations and it remains to be seen whether the City will resolve those disparities in its final regulations
- Among the issues is how frontloading of paid sick leave for FMLA-covered employers should be calculated, as well as the rounding up of carried over sick leave under the two ordinances

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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