WINSTON & STRAWN LLP

CLIENT ALERT

Cook County and Chicago Sick Leave Ordinances Set to Take Effect: Uncertainty Remains

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Effective July 1, 2017, Chicago will require employers to provide paid sick leave to employees under the Chicago Minimum Wage and Paid Sick Leave Ordinance (City Ordinance). Also effective July 1, 2017, is the similar Cook County Earned Sick Leave Ordinance (County Ordinance). In general, these ordinances require employers to provide up to 40 hours of paid sick leave per year to eligible employees. Covered employers can choose to use an accrual system that provides for one hour of sick leave for every 40 hours worked, or they can provide a lump-sum (or front-loaded amount) of sick leave to employees at the start of each 12-month period. The Cook County Board of Commissioners has adopted final regulations and a model noticeto meet posting requirements under the County Ordinance. The city of Chicago has issued a notice and prepared, but not finalized, draft regulations. Although the County Ordinance and City Ordinance were drafted using similar language, differences between the county's final regulations and the city's draft regulations are creating confusion for employers covered by both ordinances. In addition, numerous municipalities in Cook County have opted out of the County Ordinance. With the July 1 effective date approaching, this briefing discusses some common concerns for Chicago and Cook County employers.

Differences Between the Chicago and Cook County Ordinances and Related Regulations

The following chart provides an overview of some of the differences between the Chicago and Cook County ordinances and related regulations.

	CHICAGO PROPOSED RULES	COOK COUNTY FINAL REGULATIONS

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Accrual Method and Accrual Period	Only accrues during hours worked in Chicago.Salaried exempt employees accrue one hour per week worked, up to cap. An employee hired during an employer's benefit year must be allowed to carry over all (rather than half) of any unused, accrued paid sick leave, up to 20 hours, to the following benefit year.	Only accrues during hours worked in Cook County, but not if work is performed in a municipality that opted out. Salaried exempt employees accrue one hour per week worked up to cap, unless they work less than 40 hours, then accrual is based on hours worked. The 12 month period to calculate accrual and use of paid sick leave is generally measured from the employee's date of hire. Employers may select a different 12 month period, however, employers must ensure employees are not shorted paid sick leave time in their first year of employment. Employers have at least two options to achieve that result: (1) front-load a greater amount of earned sick leave than that to which the covered employee is otherwise entitled for the year; or (2) at end of first accrual period, allow the employee to carry over all (rather than half) of any unused, accrued paid sick leave.

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Carryover for Accrual Method	At year end, employee designates whether to carry over unused leave as paid sick leave for FMLA or regular paid sick leave use, unless employer chooses to allow employees to use for either purpose.	If employee's leave qualifies as both ordinance-restricted sick leave and FMLA-restricted leave, employee can choose whether the sick leave he or she is taking should be considered ordinance- or FMLA-restricted. Employer may allow employees to take either FMLA- or ordinance-restricted sick leave for either type of absence in order to avoid tracking requirements.
Front-Loading Method	To avoid carry over and accrual tracking, employers front-load 40 hours within 180 days after hire date, and 60 hours at beginning of each subsequent year. It is unclear under the rules whether employer who grants 60 hours up front has to allow use of all 60 hours in one year, even if entirely for regular sick leave purposes, or whether Ordinance applies, which limits regular use to 40 hours, plus another 20 hours for FMLA purposes.	To avoid carry over and accrual tracking, employers front-load 40 hours of ordinance-restricted sick leave in first year and then "may" grant 60 hours of ordinance-restricted leave plus 40 hours of FMLA-restricted earned sick leave in subsequent years. It is unclear under the rules if this 100-hour total is a requirement or a safe-harbor. To avoid carry over only, employers front-load 20 hours of ordinance restricted leave and 40 hours of FMLA-restricted leave at the beginning of the second and all subsequent years of employment.
Recordkeeping Obligations	Employers must maintain records for five years.	Employers must maintain records for three years.

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Employee Break in Service	If a break in service is less than 12 months, employer may, but is not required, to make previous accrued but unused time available for use.	If a break in service is less than 120 days, then upon rehire, employer must count all previous employment toward eligibility for paid sick leave, but generally need not make previously accrued but unused time available for use.

Chicago has not yet adopted final regulations. Therefore, it remains unclear if and how the disparities between the County's final regulations and the City's draft regulations will be resolved. Some commentators have suggested that the City Ordinance will trump the County Ordinance to the extent there are any differences, even where the County Ordinance would be more protective. To support this position, commentators point to the home rule provision of the Illinois Constitution, as well as statements made by Cook County regulators that the county will defer to the Chicago regulations if any differences exist. However, this position is open to challenge.
First, the home rule provision arguably only applies where there is a true conflict of laws (i.e., where it would be impossible to comply with both ordinances simultaneously). Inconsistencies between Cook County's final regulations and the city of Chicago's draft regulations may not rise to this level of conflict. As a result, it may not be safe to assume the City Ordinance always trumps, especially where the County regulations offer greater protection for employees.

Second, employers may be justified in being wary of relying upon statements from Cook County regulators that they will not enforce the County Ordinance to the extent it differs from the City Ordinance. Suggestions made by the regulators are not legally binding, and there is nothing in the County Ordinance or related final regulations that expressly limits enforcement of the County Ordinance in this way.

Finally, even if Cook County regulators decline enforcement of the County Ordinance, the County Ordinance allows employees to pursue a private right of action. Employers found to violate the County Ordinance may be liable in a civil action for damages equal to three times the full amount of any sick leave denied or lost by reason of the violation, interest, other costs, and attorney's fees.

As a result, Chicago employers should consider complying with the County Ordinance to the extent it is more protective than the City Ordinance. After the city issues final regulations, employers should reassess the extent of disparities that remain unresolved, and how the County Ordinance might be enforced in light of those disparities.

Front-Loading for FMLA-Eligible Employers

Another area of confusion is how FMLA-eligible employers should go about front-loading sick leave. Under Section 600.300 (C) of Cook County's final regulations, FMLA-Eligible covered employers can comply with the County Ordinance by front-loading 100 total hours—60 hours of ordinance-restricted earned sick leave and 40 hours of FMLA-restricted earned sick leave.

A 100 hour requirement, however, is inconsistent with the plain language of the County ordinance, which allows employers to place a 60-hour per year cap on use of paid sick leave, regardless of carryover and accrual. The Cook County final regulations similarly acknowledge that there is no set of circumstances under which employers are required to make more than 60 hours of sick leave available to employees to use within a 12-month period.

Recently, Cook County regulators addressed this issue at a Chicago Bar Association Labor & Employment Law Committee meeting. During that meeting, regulators clarified that the 100 hour language under Section 600.300 (C) of Cook County's final regulations constitutes a "safe harbor," not a requirement, and that the test for compliance will involve whether an employee would be better off if sick leave were accrued and carried over instead of front-loaded.

Therefore, FMLA-eligible employers who want to use the front-loading method may comply with the County Ordinance by making sure employees receive a lump sum of at least 60 hours at the beginning of each year. Employers have the option of providing more leave, but such provision is not required by the Ordinance.

Coverage and Opting-Out

Coverage under the ordinances has also been a point of confusion. The City Ordinance generally applies to employers with a business facility in Chicago and who employ at least one eligible employee at that location. Coverage under the County Ordinance similarly applies with respect to Cook County, but with the added caveat that municipalities within Cook County can opt out of coverage.

Employers should be aware of the growing list of municipalities that have affirmatively opted out, including: Alsip, Arlington Heights, Barrington, Bartlett, Bedford Park, Bellwood, Berkeley, Bridgeview, Buffalo Grove, Burbank, Burr Ridge, Crestwood, East Hazel Crest, Elgin, Elk Grove, Elmwood Park, Evergreen Park, Forest Park, Glenview, Hanover Park, Harwood Heights, Hickory Hill, Hillside, Hinsdale, Hodgkins, Hoffman Estates, Homewood, Justice, La Grange Park, Lincolnwood, Lynwood, Maywood, Melrose Park, Midlothian, Morton Grove, Mount Prospect, Niles, Norridge, Northbrook, Northlake, Oak Forest, Oak Lawn, Orland Hills, Orland Park, Palatine, Palos Hills, Palos Heights, Palos Park, Prospect Heights, River Forest, River Grove, Riverside, Rolling Meadows, Rosemont, Schaumburg, South Barrington, Streamwood, Summit, Tinley Park, Western Springs, Wheeling, Wilmette, and Worth. Because this list may not be exhaustive, employers should check directly with their respective municipalities to determine opt-out status.

Employers who are located in municipalities that have opted out, however, should be cautious before assuming that they are fully exempt from coverage. Those employers may still be subject to the County Ordinance if, for example, the employer has employees who perform compensated work in a Cook County municipality that has not opted out. Similarly, an employer that does not operate within Cook County may be covered under the County Ordinance if any of its employees are required or permitted to work remotely from Cook County.

For covered employers who are located in municipalities that have not opted out and who choose to use the accrual method for awarding earned sick leave, those employers are not required to award earned sick leave based on hours of work performed outside of Cook County or within municipalities that have opted-out of the ordinance.

Employers with operations in Chicago and Cook County are encouraged to review the ordinances and related regulations and to consult with an attorney to ensure policies and procedures are in compliance by the effective date.

For more information about the County Ordinance, see our previous briefing Cook County Enacts Paid Sick Leave. For more information about the City Ordinance, see our previous briefing Paid Sick Leave Likely coming to Chicago Employees.

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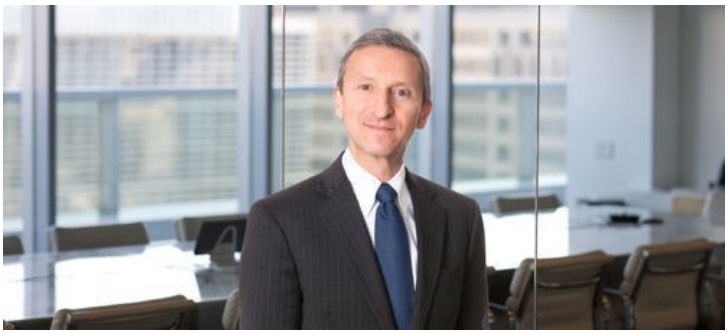

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