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November 14, 2023

### Chicago Passes Sweeping Paid Leave Ordinance



The city of Chicago approved the Chicago Paid Leave and Paid Sick and Safe Leave Ordinance (the ordinance) on November 9, 2023, providing all employees working in the city with up to five annual days of paid leave that can be used for any purpose (paid leave) and five annual days of paid sick leave that can be used for specified purposes (paid sick leave).

The ordinance, which takes effect on December 31, 2023, significantly expands paid leave requirements for Chicago employers and includes some of the harshest penalties in the country for violations of paid leave provisions. This Update provides a synopsis of the new ordinance's stringent requirements.

#### **Who Is Covered?**

As a threshold matter, the ordinance broadly defines "Employer" as "*a person who gainfully employs at least one*" employee (emphasis added). The ordinance applies to any "Covered Employee," defined as any employee who, *during "any particular two-week period, performs at least two hours of work while ... physically present within the geographic boundaries"* of Chicago, including compensated travel time (emphasis added).

#### **Accrual or Frontloading**

Starting January 1, 2024, employees are entitled to accrue one hour of paid leave and one hour of paid sick leave each for every 35 hours worked, for a total of up to 40 hours of paid leave and 40 hours of paid sick leave per year. Exempt employees are treated as working 40 hours per week. Although the ordinance allows employers to provide a greater accrual rate than the minimum rate set out under the ordinance, both paid leave and paid sick leave must only accrue in hourly increments unless an employer provides more than 40 hours of each type of leave. Employers that offer more than 40 hours each of paid leave and paid sick leave may instead credit all leave hours under the ordinance on a monthly basis. Alternatively, employers may opt to frontload paid leave

and paid sick leave, providing access to each leave on the employee's first day of employment and/or the first day of a designated 12-month accrual period. Unlimited or flexible paid time off (PTO) policies that grant immediate access to PTO are also allowed under the ordinance.

### **Uses of Paid Leave and Paid Sick Leave**

Employees may use paid leave for any reason of the employee's choosing in minimum increments of four hours (or less, as set by employer policy), and employers may not require the employee to provide a reason for taking paid leave. Employers may, however, implement reasonable policies for the use of paid leave to:

- Require employees to give reasonable notice (which may not exceed seven days).
- Require employees to obtain reasonable preapproval prior to using paid leave for the purpose of maintaining continuity of operations.
- Adopt rules specific to interns and certain city-employed staff, which are classes of employees the ordinance specifically excludes from coverage.

For the use of paid sick leave, employers may require up to seven days' notice if the need for such leave is reasonably foreseeable, or as soon as practicable when the need for such leave is not foreseeable. However, for paid sick leave purposes, any notice requirement imposed by an employer is waived when the employee is unconscious or otherwise medically incapacitated.

Employees may use paid sick leave in minimum increments of two hours (or less, as set by employer policy) when:

- The employee is ill or injured, or for the purpose of receiving professional care, treatment, diagnosis, or preventive medical care.
- The employee's family member (defined expansively) is ill, injured, or ordered to quarantine, or the family member is in need of medical care, treatment, diagnosis, or preventive medical care.
- The employee or the employee's family member is the victim of domestic violence or a sex offense.
- The employee's place of business is closed by order of a public official due to a public health emergency, or the employee must care for his or her child due to the child's school or place of care being closed by order of a public health official due to a public health emergency.
- The employee obeys an order issued by the mayor, governor of Illinois, the Chicago Department of Public Health, or a treating healthcare provider requiring the employee to remain at home to minimize the transmission or symptoms of a communicable disease or to obey a quarantine order.

Employers may require certification that paid sick leave falls within one of the above authorized reasons only when an employee's absence exceeds three consecutive workdays. Records of leave use, which must include certain employee identification information, must be maintained by employers for five years.

### **Payout**

The new ordinance includes a series of strict payout requirements. Under the ordinance, at the time of termination, resignation, retirement, or separation from employment, employees must be paid out for all accrued but unused paid leave (but not paid sick leave) to which they are entitled. Employees may also demand payout of accrued but unused paid leave after not receiving a work assignment for 60 days. Due to the carryover requirements set out under the ordinance, which are discussed below, minimum paid leave payout may reach seven days for large employers (defined as employers with over 100 employees). The payout requirements under the ordinance are delayed until January 1, 2025, for medium employers (defined as employers with 51 to 100 employees). Small employers (defined as employers with 50 or fewer employees) are exempt from the payout

requirements. Additionally, employers offering unlimited PTO must pay the monetary equivalent of 40 hours of paid time off (minus the number of hours of PTO used by an employee within the accrual year at separation).

Many Chicago employers will also be surprised by a novel payout requirement embedded within the ordinance. In addition to the separation payout requirements, Chicago employers will also be required to pay out employees for accrued, unused paid leave when "a Covered Employee ceases to meet the definition Covered Employee as a result of *transferal outside of the geographic boundaries of the City*" (emphasis added). This provision will significantly increase the costs of remote work for covered employees. In addition, it is not clear how the ordinance will affect hybrid workers who arguably "transfer" between the city of Chicago and their home jurisdiction regularly.

## **Carryover**

Carryover under the ordinance will also present compliance difficulties. At the end of each 12-month accrual period, employees may carry over up to 16 hours of accrued, unused paid leave and 80 hours of accrued, unused paid sick leave. Employers do not need to pay employees for paid leave or paid sick leave lost as a result of not being carried over due to exceeding the 16 hours and 80 hours, respectively. However, if an employee who has complied with an employer's leave policies is denied from "meaningfully having access" to paid leave or paid sick leave, then the employee's carryover must increase to include any such denied leave. It remains to be seen what constitutes an employee being denied "meaningful access" to paid leave or paid sick leave. The requirement to carry over accrued but unused paid leave does not apply to employers who use an unlimited PTO system.

## **Employer Notice Requirements**

Beginning December 31, 2023, employers will be required to provide postings and reminders that advise employees of their rights to paid time off under the ordinance. Employers must provide conspicuous postings at each work site that explain the rights provided under the ordinance. The commissioner of business affairs and consumer protection will soon develop a posting for these purposes. Employers must also provide employees with an individualized notice of their rights under the ordinance in the employee's first paycheck and annually with a paycheck issued within 30 days of July 1. Additionally, employers must provide new hires with written notice of the employer's paid time off policy at the time of hiring and provide existing employees with notice of changes to an employer's paid time off policy "within five calendar days before any change to the Employer's paid time off policy requirements." If an employer's changes to its paid time off policies modify an employee's entitlement to final compensation for such leave, the employer must provide "14-day written notice."

The ordinance's requirements for notifying employees of accrued but unused paid leave and paid sick leave are another significant change. Employers must provide employees with their balance of accrued but unused paid leave and paid sick leave, in addition to a reminder of the accrual rates "[e]ach time wages are paid." Employers entitled to use a monthly accrual system will be able to provide this balance update on a monthly basis instead.

## **Penalties**

The ordinance contains harsh penalties for violations, including the potential for businesses to become ineligible to operate in the city of Chicago.

Not only does the ordinance grant employees a private right of action, but it also includes mandated fines between \$500 and \$1,000 for violations of the notice requirements and between \$1,000 and \$3,000 for each other offense under the ordinance, with each day that a violation continues counting as a separate, distinct

offense. Employees are additionally entitled to treble damages for leave that was denied in violation of the ordinance, in addition to interest, attorneys' fees, and costs.

For many employers, one of the most concerning penalty provisions may be the ordinance's settlement clause. Under the ordinance, if the city of Chicago discovers that an employer has entered into two or more settlements with the U.S. Department of Labor or the Illinois Department of Labor within a year prior to being charged with wage rate, paid leave, or paid sick leave violations, the city of Chicago is authorized to conduct an investigation into the facts behind the settlements to determine if they show "culpability that merits ineligibility under Section 1-23-020 or revocation under Section 4-4-280." Sections 1-23-020 and 4-4-280 cover the licensing requirements for businesses to be able to operate in Chicago, meaning that mere settlements of *alleged* violations of the ordinance can be considered when the city is evaluating whether to revoke an employer's license to do business in Chicago.

## **Next Steps for Employers**

Given the approaching December 31, 2023, effective date, Chicago employers must take immediate steps to ensure that applicable leave policies are in compliance with the new paid leave and paid sick leave requirements. Chicago employers will need to review their employee handbooks and workplace policies, update wage payment notices, and train applicable staff regarding the new requirements. In light of the new risks presented by the ordinance, the assistance of outside counsel is highly recommended.

Perkins Coie will continue to monitor this topic and provide additional guidance as developments occur, including whether any of the most expansive aspects of the ordinance are challenged in litigation on constitutional grounds.

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