

Management Alert



If Pain, Yes Gain—Part XXVIII: Cook County Releases Draft Sick Leave Regulations

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Seyfarth Synopsis: As the Cook County Earned Sick Leave Ordinance's July 1, 2017 effective date nears, the County has released draft regulations seeking to clarify and expand certain aspects of the Ordinance, including the complex year-end carryover and annual usage cap requirements.

On July 1, 2017, two municipal Illinois paid sick leave ordinances—one in [Chicago, IL](#) and the other in [Cook County, IL](#)—are scheduled to go into effect. The two ordinances are largely similar in their substantive requirements, although there are a few technical differences.

The city of Chicago has not yet published administrative guidance on its sick leave ordinance. However, on April 10, 2017, the Cook County Commission on Human Rights (the "Commission") released draft regulations on the Cook County Earned Sick Leave Ordinance ("CC ESLO"). The Commission notes that the regulations are subject to revision based on public comment and that it will publish final regulations by June 1, 2017. We, of course, will keep you posted on these future developments.

In the meantime, here are some of the highlights of the Cook County draft sick leave regulations:

- **Benefit Year:** The draft regulations state that the paid sick leave benefit year can be a calendar year, fiscal year, or any other established 12-month period. However, the draft regulations also define the term "accrual period" as being the 12 month period in which an employee accrues paid sick leave. This "accrual period" can be based on employees' anniversary dates or the employer's benefit year. However and notably, in order for employers to unify employees' "accrual period" with the company's "benefit year," certain criteria must be met.
- **Covered Employees:** The draft regulations state that an individual will be covered under the CC ESLO if he/she satisfies several standards, including, but not limited to, working for a covered employer for at least two hours in any two week period while physically located in the geographic boundaries of Cook County. Importantly, when discussing the "location of work" component, the draft regulations note that the "Commission will not consider work that an individual performs within the geographic boundaries of a municipality that has lawfully preempted the Ordinance." (emphasis added). This is significant given that several municipalities within Cook County have recently opted out of compliance with the Ordinance.
- **Covered Employers:** The draft regulations reiterate that to be a covered employer under the CC ESLO the employer must, among other things, have at least one place of business within Cook County. The draft regulations discuss this "place of business" requirement in detail and note that a residence may be a place of business. Notably, and as with

its analysis of covered employees, the draft regulations state that the “Commission will not consider an employer’s place or places of business that are within the geographic boundaries of a municipality that has lawfully preempted the Ordinance.”

- **Where Employees Can Use Earned Sick Leave:** The draft regulations state that once an employee is entitled to use earned paid sick leave (the CC ESLO allows employers to set a 180-day usage waiting period for new hires), the employee can use that sick leave “in any location (i.e., within or outside of Cook County).” (emphasis added). This would be a significant departure from many, if not all, existing paid sick leave laws, which only require employers to permit employees to use accrued paid sick leave when they are working within the specific paid sick leave jurisdiction.
- **When Employees Accrue Earned Sick Leave:** By comparison to the above “location of use” standard, the draft regulations state that employers are not required to provide employees with paid sick leave for work performed outside of Cook County (or within the geographic boundaries of a municipality that has lawfully preempted the Ordinance).
- **Accrual, Usage and Carryover Caps:** The CC ESLO provides that employers must allow employees to accrue up to at least 40 hours of paid sick leave in a given year at a rate of at least one hour for every 40 hours worked, and that employees must be allowed to carry over to the following 12-month accrual period half of their unused, accrued sick leave, up to a maximum of 20 hours. The CC ESLO also imposes a 40-hour annual usage cap on sick leave. Where an employer is subject to the Family Medical Leave Act (“FMLA”), employees are allowed to carry over up to 40 hours of additional unused, accrued sick leave, and then use an additional 20 hours of sick leave in the subsequent year (i.e., 60 total hours). There is language in the CC ESLO stating that certain amounts of this time must be used exclusively for FMLA-eligible purposes.
 - **Newly Defined Terms:** The draft regulations define new terms titled (a) “FMLA-Restricted Earned Sick Leave,” which refers to paid leave received by an employee that can be used for any purpose under the FMLA, (b) “Ordinance-Restricted Earned Sick Leave,” which refers to paid leave received by an employee that can be used for any reason under the CC ESLO, and (c) “Unrestricted Earned Sick Leave,” which refers to paid leave received by an employee that can be used both for reasons under the FMLA or the CC ESLO. While helpful, the latter term is **not** referred to in the draft regulations outside of the initial definition section.
 - **Frontloading Sick Leave and Impact on Accrual:** The draft regulations expressly state that employers can choose to frontload earned sick leave to employees, as opposed to using an accrual system. According to the draft regulations, employers will be deemed in compliance if they award each employee the maximum amount of paid sick leave the employee would have accrued during the benefit year. Any Covered Employee who will work at least 1,600 hours during the year would have to be awarded 40 hours of Earned Sick Leave under this methodology. Notably, the draft regulations state that employers who use a frontloading system will need to meet certain criteria in order to use a single, standardized 12-month accrual period for all employees.
 - **Year-End Carryover:** The draft regulations state that FMLA covered employers should calculate the amount of sick leave that must be carried over at year-end by following two steps. First, the employer must permit an employee to carry over half of his or her total unused accrued sick leave to the next accrual period, up to a maximum of 20 hours. This 20 hours is “Ordinance- Restricted Earned Sick Leave” as defined above. Second, if an employee has additional accrued, unused sick leave, the employer must permit up to 40 additional hours to carryover. This additional time, up to 40 hours, is “FMLA-Restricted Earned Sick Leave” as defined above. Despite discussing these separate buckets of paid leave for purposes of year-end carryover, the draft regulations note that during a current accrual period, FMLA covered employers are not required to track an employee’s use of sick leave as either Ordinance-Restricted or FMLA-Restricted as long as the time can be used for all reasons under the FMLA and CC ESLO.
 - **Frontloading Sick Leave and Impact on Year-End Carryover:** The draft regulations state that employers can avoid conducting individualized year-end carryover calculations if each employee receives a frontloaded lump grant of sick leave at the start of each accrual period that is equal to the maximum amount the employee

would have carried over. The draft regulations note that FMLA covered employers that award at least 20 hours of Ordinance-Restricted Earned Sick Leave and at least 40 hours of FMLA-Restricted Earned Sick Leave at the start of each accrual period typically do not need to carry over unused, accrued sick leave.

- **Note:** While the draft regulations do not expressly address whether an employer alternatively can provide a 60-hour annual lump grant of sick leave that can be used for reasons under both the FMLA or CC ESLO, they do state that the draft regulations should not be construed as prohibiting an employer from allowing an employee to use “Earned Sick Leave, Ordinance-Restricted Earned Sick Leave, and/or FMLA-Restricted Earned Sick Leave for purposes other than those described [in the draft regulations].”
- **Frontloading as an Alternative to Both Accrual and Year-End Carryover:** According to the draft regulations, an employer may choose, at the beginning of each accrual period, to immediately grant the maximum annual amount to which its employees could be entitled for both accrual during the current accrual period **and** carryover from the prior accrual period. Specifically, the draft regulations state that an FMLA covered employer may comply by awarding its employees 60 hours of Ordinance-Restricted Earned Sick Leave and 40 hours of FMLA-Restricted Earned Sick Leave at the start of the accrual period. While not expressly stated in the draft regulations, it appears that employers who opt for this approach still could apply the CC ESLO’s 60-hour annual usage cap.
- **Covered Family Members:** Like most existing paid sick leave laws, the CC ESLO allows employees to use sick leave for illnesses and injuries of certain family members. Among the CC ESLO’s covered family members is any other individual related by blood or whose close association with the employee is the equivalent of a family relationship. The draft regulations define “close association” and explain that the Commission will determine if such an association exists based on the length of time of a particular relationship and other factors, such as whether the employee provided personal care or financial support for or previously lived with the individual.

Given the complexity of the CC ESLO and draft regulations, Cook County employers should take steps now to ensure that they will be able to achieve full compliance with the CC ESLO by the July 1, 2017 effective date. These are among the actions to consider:

- Determine if the municipality in Cook County where you have operations has lawfully preempted (i.e., opted out of) the CC ESLO.
- If the CC ESLO applies to your municipality within the County, review existing policies and procedures immediately to ensure that they meet at least the minimum requirements or develop a new paid sick leave policy that complies with the CC ESLO.
- Review and, as necessary, revise anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking earned sick leave.
- Prepare to comply with the CC ESLO’s posting and notification requirements and monitor the Commission’s website for template notices and other guidance and updates on the CC ESLO.
- Train supervisory and managerial employees, as well as HR, on the CC ESLO requirements.
- Await further guidance, including final regulations, from the Commission and update policies and practices to comply with any finalized advice.

Illinois has been an hot bed of sick leave activity in recent months and the trend shows no signs of slowing down.

In January 2017, the [Illinois Employee Sick Leave Act](#) (“ESLA”) went into effect. While the title suggests that this is a statewide paid sick leave law, it does not actually mandate that employers provide paid sick leave. Instead, the ESLA requires employers that have sick pay policies or benefits to allow employees to use a portion of that time to cover family member illnesses — essentially establishing a “kin care” law as exists in certain other states.

The state legislature is currently considering an actual statewide sick leave mandate, titled the [Healthy Workplace Act](#) (House Bill 2771/Senate Bill 1296). While still in its early legislative stages, if passed, the proposed law would require that private employers provide employees with a minimum of five paid sick days each year.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list.

If you would like further information, please contact your Seyfarth attorney, [Joshua D. Seidman](#) at jseidman@seyfarth.com, or [Tracy M. Billows](#) at tbillows@seyfarth.com.

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