

# Management Alert



## If Pain, Yes Gain—Part XXXII: Cook County Releases Final Sick Leave Rules and Model Notice

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**Seyfarth Synopsis:** The Cook County Earned Sick Leave Ordinance is one of several paid sick leave laws going into effect on July 1, 2017. In advance of the effective date, Cook County recently published its final paid sick leave rules and model notice.

On May 25, 2017, Cook County released a copy of its approved paid sick leave “Interpretative and Procedural Rules” (the “Final Rules”). The Final Rules were issued after the conclusion of a public comment period on the County’s draft sick leave rules. Employers should assess and take the Final Rules into account as they prepare for the County’s Earned Sick Leave Ordinance’s (“ESLO”) July 1, 2017 effective date.

On July 1, Cook County will join Chicago as the only municipalities in the state of Illinois with paid sick leave ordinances that are in effect. Chicago has - released its own [draft paid sick leave rules](#), which are open for public comment until June 16, 2017. Consequently, Chicago employers will be waiting until at least June 16 for the City’s final paid sick leave rules. We, of course, will keep you posted on any developments.

Cook County also recently published a [model notice](#) that employers can use to satisfy the ESLO’s posting and notice requirements. As described in more detail below, the ESLO requires employers to provide employees with individualized notice of certain sick leave rights at various times, including upon commencement of employment, and post the model notice in a conspicuous place at their Cook County business facilities.

Here are some of the main requirements of the ESLO’s Final Rules:

- **Benefit Year:** Unlike the County’s draft sick leave rules, the Final Rules opted to remove a definition of “benefit year” that expressly allowed employers to set their sick leave benefit year as a calendar or fiscal year. The Final Rules do maintain a definition of the term “accrual period,” although it is directly tied to the 12-month period in which an employee accrues paid sick leave and is based on an employee’s date of initial accrual.<sup>1</sup> Recognizing that certain employers will not want (or be able to follow) such a rigid accrual period, the Final Rules added a section discussing how employers can transition employees from the above standard “accrual period” to one that is based on calendar year, fiscal year, anniversary date, etc. The procedure focuses on ensuring that the employees’ sick leave benefits are not worse off than they were prior to the transition.
- **Covered Employees:** The Final Rules state that an individual will be covered under the ESLO if he or she meets certain criteria, including, but not limited to, working for a covered employer for at least two hours in any two week period while physically present in the geographic boundaries of Cook County. Importantly, and as was noted in the County’s

<sup>1</sup> An employee’s “date of initial accrual” is the later of (a) July 1, 2017, (b) the first calendar day after his or her start of employment, or (c) when the employee first becomes a “covered employee” as set forth in the ESLO and Final Rules.

draft sick leave rules, the Final Rules confirm that the County “will not consider work that an individual performs within the geographic boundaries of a municipality that has lawfully preempted the Ordinance” when determining employee coverage. (emphasis added).<sup>2</sup>

- **Covered Employers:** According to the Final Rules, a covered employer under the ESLO must, among other things, have at least one place of business within Cook County. Interestingly, in a departure from the County’s draft sick leave rules, the Final Rules removed a sentence expressly stating 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” when assessing coverage. Despite this deletion, Cook County employers with operations in a municipality that has opted out of complying with the ESLO remain shielded from the ESLO based on Article VII, Section 6(c) of the [Illinois Constitution](#)<sup>3</sup> and the Final Rules’ provision stating that “the Commission will not consider an employer to be a Covered Employer if...federal or state law preempts the employer from being covered by the Ordinance.”
- **Where Employees Can Use Earned Sick Leave:** A unique component of the Final Rules that was previewed in the County’s draft sick leave rules is the mandate impacting where covered employees can use accrued paid sick leave. Unlike most, if not all, existing paid sick leave laws, the Final Rules state that once an employee is entitled to use earned paid sick leave, the employee can use that sick leave while working “in any location (i.e., within or outside of Cook County).” (emphasis added).
- **When Employees Accrue Earned Sick Leave:** The Final Rules confirm that employers are not required to allow employees to accrue paid sick leave for work performed outside of Cook County (or within the geographic boundaries of a municipality that has lawfully preempted the Ordinance). Despite this provision, it likely will be very difficult for certain employers to parse accrual based on where an employee is working during a given workweek.
- **Accrual, Usage and Carryover Caps:** The Final Rules maintain many of the County’s draft sick leave rules’ new terms and provisions related to accrual, use and carryover of paid sick leave.<sup>4</sup>
  - **Newly Defined Terms:** Like the draft rules, the Final Rules define several terms related to the ESLO’s complicated carry over and annual usage requirements for employers covered by the Family and Medical Leave Act (“FMLA”). These terms include (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, and (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. The Final Rules removed a stray definition titled “Unrestricted Earned Sick Leave” that existed in the County’s draft sick leave rules.
  - **Frontloading Sick Leave:** The Final Rules confirm that employers can choose to frontload earned sick leave to employees, as opposed to using an accrual system. To avoid tracking accrual, an employer must award an employee the maximum amount of sick leave the employee could accrue during the accrual period (this amount will be 40 hours for any employee who works at least 1,600 hours during the year in Cook County). Similarly, to avoid year-end carryover, the Final Rules note that FMLA covered employers must 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. Therefore, and as confirmed by the Final Rules, to avoid both accrual and year-end carryover, an FMLA covered employer must award its employees 60 hours of Ordinance-Restricted Earned Sick Leave and 40 hours of FMLA-Restricted Earned Sick Leave, or a total of 100 total hours of paid leave at the start of each accrual period/year.

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<sup>2</sup> A growing number of municipalities within Cook County have opted out of compliance with the ESLO in recent months.

<sup>3</sup> Article VII, Section 6(c) of the Illinois Constitution states that “if a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.”

<sup>4</sup> A more detailed discussion of the ESLO’s accrual, usage and carryover requirements can be found [here](#) and [here](#).

- **Year-End Carryover:** The Final Rules contain instructions for employers to follow in complying with the ESLO's complex year-end carryover requirements involving "Ordinance- Restricted Earned Sick Leave" and "FMLA- Restricted Earned Sick Leave" as defined above.<sup>5</sup> One provision employers must adhere to is that at the end of each accrual period, an FMLA covered employer should calculate the number of hours available for Ordinance- Restricted Earned Sick Leave carryover before calculating the carryover hours for FMLA-Restricted Earned Sick Leave.
- **Existing Paid Leave Policy:** A key update in the Final Rules compared to the County's draft sick leave rules is a provision dealing with "multi-purpose paid time off." The Final Rules reiterate that FMLA covered employers are only required to allow employees to use up to 60 hours of earned sick leave in a year. As a result, the Final Rules indicate that the County typically will consider a PTO policy that provides employees with at least 7.5 days (i.e., 60 hours) of PTO each accrual period that can be used for the purposes under the ESLO, FMLA, or for other leave purposes (e.g., vacation), and that satisfies the ESLO's substantive, technical standards (e.g., increment use, notice obligations, documentation requirements, etc.), to be compliant.
- **Covered Family Members:** The ESLO allows employees to use available sick leave to care for an individual related by blood or whose close association with the employee is the equivalent of a family relationship. The Final Rules list several factors to be considered when evaluating if such an association exists. These factors include: (a) whether, for some significant period of time, the employee provided uncompensated personal care for the individual; (b) the individual provided such care for the employee; (c) the employee and the individual lived together and shared financial and household responsibilities or one provided financial support for the other; and/or (d) whether the employee and the individual would be considered "Family member[s]" as that term is used in federal sick leave regulations (e.g., 5 C.F.R. § 630.201(b)).
- **Increments of Use:** The ESLO states that employers can set a reasonable minimum increment for using paid sick leave, not to exceed four hours per day. Significantly, the Final Rules appear to clarify that if an employee has less than four hours of accrued sick leave and the employer has established a minimum use increment of four hours, then the employee will not be able to use earned sick leave at that time. However, if an employer has not established a written policy stating a minimum increment for its employees' use of paid sick leave, it will be presumed that paid sick leave can be used in one-hour increments.
- **Employee Notice of Foreseeable and Unforeseeable Absences:** The Final Rules state that an employer's policy regarding the amount and type of notice employees must provide when using available sick leave for foreseeable and unforeseeable absences will be deemed unreasonable if, among other things, it is not in writing.
- **Notice and Posting Requirements:** As noted above, the ESLO comes with both notice and posting obligations. Importantly, the Final Rules state that, in addition to providing employees with notice of certain sick leave rights upon commencement of employment, employers also must provide covered employees with the same notice at least once per calendar year thereafter.
- **Recordkeeping Requirement:** The Final Rules impose recordkeeping obligations on "moderately sophisticated" covered employers.<sup>6</sup> In particular, such employers must maintain records demonstrating, among other things, (1) the number of hours of paid sick leave each covered employee was awarded, (2) the number of hours of paid sick leave each covered employee used, and (3) the date upon which the sick leave was used. Employers must maintain these records for at least three years.
- **Employer Rights to Enforce Sick Leave Policy:** The Final Rules contain several provisions that explicitly acknowledge certain employer rights when it comes to enforcing their sick leave policies. For instance, the Final Rules explain that the ESLO does not shield a covered employee from adverse employment actions that are unrelated to the exercise of rights established or protected by the ESLO, including poor work performance, unexcused absenteeism and other failures to

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<sup>5</sup> The Final Rules' provisions on year-end carryover largely track those from the County's draft sick leave rules. A more detailed examination of these requirements can be found [here](#).

<sup>6</sup> It is presumed that any covered employer who does business in any corporate form or any natural person who employs more than four covered employees is moderately sophisticated.

meet an employer's reasonable expectations. Additionally, the Final Rules state that an employer will not be in violation of the ESLO if it (a) denies a covered employee's request to use sick leave for a foreseeable absence where the employee failed to provide reasonable notice, or (b) disciplines an employee for using sick leave for an unprotected purpose.

- **Separation of Employment:** While employers are not required to compensate employees for any earned, unused paid sick leave upon separation of employment, the Final Rules discuss how employers should treat unused sick leave benefits when an employee is rehired after separation. Specifically and unlike many existing paid sick leave laws, the Final Rules state that employers are not required to restore unused sick leave when an employee is rehired within 120 days from separation of employment, unless it appears that the employer separated the employee to prevent him or her from using accrued paid sick leave.<sup>7</sup>

Cook County employers should take steps now to ensure that they will be able to achieve full compliance with the Cook County ESLO and Final Rules 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 ESLO.
- If the 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 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 ESLO's posting and notice requirements.
- Train supervisory and managerial employees, as well as HR, on the ESLO's requirements.

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 [Joshua D. Seidman](mailto:jseidman@seyfarth.com) at [jseidman@seyfarth.com](mailto:jseidman@seyfarth.com), or [Tracy M. Billows](mailto:tbillows@seyfarth.com) at [tbillows@seyfarth.com](mailto:tbillows@seyfarth.com).

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<sup>7</sup> By comparison, the Final Rules state that an employee who is rehired by the same employer within 120 days since his or her separation from service will be considered to have continued his or her employment with that employer for purposes of coverage, eligibility, and usage waiting period.

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