

Management Alert



If Pain, Yes Gain—Part XXV: Midwest Still Sick with Sick Leave Laws

By Anne R. Dana, Joshua D. Seidman, and Tracy M. Billows

Seyfarth Synopsis: Minneapolis, MN made four key amendments to its Sick and Safe Time Ordinance and Cook County, IL passed the Earned Sick Leave Ordinance.

Minneapolis Sick and Safe Time Ordinance Updated

Nearly four months after enacting the midwest's first paid sick leave law, Minneapolis has published an amended Sick and Safe Time Ordinance. The amendments come less than a month after neighboring city, Saint Paul, passed its paid sick and safe time ordinance as we [previously reported](#). The changes will become effective the same time the law is slated to be effective—July 1, 2017. Certain of the amendments adopt language from the Saint Paul law, as noted below. There are four key changes in the ordinance involving the following provisions: (i) regular rate of pay; (ii) frontloading; (iii) accrual rate and tracking of accrued sick and safe time; and (iv) recordkeeping requirements.¹

First, Minneapolis added a definition for "regular rate of pay." Specifically, the definition requires employers with six or more employees to pay an employee for leave at his or her "regular rate of pay," which is the employee's hourly rate, including payments for shift differentials, or an equivalent rate for an exempt employee. The definition explicitly excludes from "regular rate of pay" the following: (1) tips; (2) commissions; (3) reimbursement for expenses incurred on the employer's behalf; (4) premium payments for overtime, weekend, holiday or scheduled days off;² (5) bonuses; (6) cash or other valuables in the nature of gifts on special occasions; (7) payments made pursuant to a bona fide profit-sharing plan, trust, thrift or savings plan; and (8) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. Some of these exclusions may be preempted by the terms of the governing plan documents, and should be read carefully.

Second, Minneapolis adopted Saint Paul's provision allowing frontloading of sick time. Employers who provide covered employees with a lump sum grant of 48 sick time hours in their first year of employment and 80 hours in each subsequent year are excused from year-end carryover and accrual obligations. This creates little incentive for employers to adopt a frontloading standard. If employers opt-out of frontloading, they may cap employees' annual accrual at 48 hours, and limit the amount of sick leave available for use to employees at any particular point in time to 80 hours.³

¹ Please see our earlier [client alert](#) for more information on the Minneapolis Sick and Safe Time Ordinance.

² This requires that the premium rate is at least one and one-half times the normal pay rate.

³ The Minneapolis Sick and Safe Time Ordinance currently is silent on whether there is an annual cap on how much paid sick time employees can ultimately use in a single year.

Third, Minneapolis followed Saint Paul's lead and added a provision that sick and safe time only accrues in hour-unit increments — prohibiting accrual of fractions of an hour. The amendments also note that employers must record accrued sick and safe time no less frequently than on a monthly basis.

Fourth, Minneapolis added additional recordkeeping obligations that will require employers' records to show: (1) hours worked for non-exempt employees; (2) hours of leave available for sick and safe time purposes; and (3) hours of leave used for sick and safe time purposes.⁴ Minneapolis also removed the requirement that employers with employees who occasionally perform work in the city track the hours each employee worked in the city.

On October 13, the Minnesota Chamber of Commerce filed a lawsuit against the city of Minneapolis over the Sick and Safe Time Ordinance. The Chamber challenges the Minneapolis Ordinance on the basis that it conflicts with state law and is "unworkable" for Minnesota businesses, particularly for those with employees in multiple cities. The suit also requests a temporary injunction to prevent the city from enforcing the sick time rules. We will be sure to keep you posted as the lawsuit progresses.

Cook County, IL Passed an Earned Sick Leave Law

On October 5, 2016, the Cook County, Illinois Board of Commissioners passed the "Earned Sick Leave Ordinance" (the "Ordinance"), the second such law in the state.⁵ For employers with a place of business within Cook County, that employ at least one Covered Employee — meaning any employee who, in any particular two-week period, performs at least two hours of work for an employer while physically present within the geographic boundaries of Cook County⁶ — the Ordinance is scheduled to become effective on July 1, 2017. The Cook County Commission on Human Rights (the "Agency") will enforce the Ordinance.

- **Which Employers Are Covered Under the Ordinance?**

The Ordinance defines "employer" as any individual, partnership, association, corporation, limited liability company, business trust, or any person or group of persons that gainfully employs at least one Covered Employee *with a place of business within Cook County*. Excluded from employers are: (1) the U.S. government or government owned corporations; (2) Indian tribes or a corporations owned by an Indian tribe; (3) the Chicago government or any agency or department thereof; and (4) local government. The Ordinance does not differentiate between employers based on size.

The Ordinance expressly states that if employers have an existing policy that grants Covered Employees with paid time off in an amount and a manner that meets the requirements for Earned Sick Leave ("ESL") under the Ordinance, the Employer is not required to provide additional paid leave. However, if the Employer's existing policy awards the full amount of paid time off immediately as opposed to using an accrual model, the Employer must award each Covered Employee 40 hours of paid time off within one calendar year of his or her date of eligibility.

- **Which Employees Are Covered by the Ordinance?**

The Ordinance defines "Covered Employee" broadly. Specifically, as explained above, a Covered Employee means any employee who, in any particular two-week period, performs at least two hours of work for an Employer while physically present within the geographic boundaries of Cook County. A Covered Employee must also work at least 80 hours for an Employer within any 120-day period to be eligible for ESL. Although the Ordinance is silent as to whether part-time or temporary employees qualify, presumably if they meet the requirements, they would be covered. Unlike other municipal ordinances that expressly exclude independent contractors, the Ordinance is silent as to whether they are covered.

⁴ Saint Paul's law currently requires "records documenting hours worked by employees and earned sick and safe time taken by employees". As such, Saint Paul's law does not explicitly require employers to keep records of earned sick and safe time — only time taken. Given the Minneapolis amendment, we may see a similar revision come out of Saint Paul.

⁵ Cook County, IL joins a growing list of states and municipalities that impose paid sick leave ("PSL") obligations on employers. Currently there are five statewide PSL laws and 34 municipal PSL laws, including Chicago, IL, in the country. Please see our earlier [client alert](#) for more information on the Chicago sick time law.

⁶ The law explicitly provides that "work" includes time spent traveling in Cook County that is compensated time, such as making deliveries, sales calls, or travel related to business activities, however time spent traveling in Cook County that is uncompensated commuting time is excluded.

- **How Much Sick Time Can Employees Accrue, Use, and Carryover?**

Employees begin earning sick leave at the commencement of employment or on July 1, 2017, whichever is later. Employers must allow a Covered Employee to begin using ESL no later than 180 calendar days following the commencement of his or her employment. However, the law is silent on whether this 180-day waiting period applies to employees who work for the Employer on July 1, 2017.

Employers must allow Covered Employees to accrue ESL at least as fast as one hour for every 40 hours worked. ESL shall accrue only in hourly increments; fractional accruals are prohibited. Covered Employees who are exempt from overtime requirements are assumed to work a 40 hour workweek (unless the employee's normal work week is less than 40 hours, in which case ESL accrues based on that employee's normal work week).

The Ordinance provides a cap of 40 hours of ESL accruable in any 12-month period (although the law does not prohibit Employers from setting a higher limit). The 12-month period is calculated from the date the Covered Employee begins to accrue ESL. At the end of a Covered Employee's 12-month accrual period, he or she must be allowed to carry over to the following 12-month accrual period half of his or her unused accrued ESL — up to a maximum of 20 hours.

However, and like the Chicago sick leave ordinance, the Cook County law adds a unique twist: if an Employer is subject to the Family Medical Leave Act ("FMLA"), the Employer's Covered Employees are allowed to carry over up to 40 hours of additional unused accrued ESL, to be used exclusively for FMLA eligible purposes. As such, under the Ordinance, a Covered Employee working for an Employer who is not subject to the FMLA can have, at most, 60 hours of combined accrued and carried over ESL. Covered Employees working for an Employer who is subject to the FMLA can have, at most, 100 hours of combined accrued and carried over ESL in a 12-month period.

However, the Ordinance also states that a Covered Employee is not entitled to use more than 40 hours of ESL in a 12-month period, unless the Employer sets a higher limit. The only exception to this is if a Covered Employee carries over 40 hours of FMLA leave and uses that leave, the employee is entitled to use up to 20 additional hours of ESL in the same 12-month period, unless the Employer sets a higher limit.

The Ordinance is silent on front-loading.

- **Under What Circumstances May Employees Use Sick Leave?**

A Covered Employee may use ESL when: (a) he or she is ill or injured, or for the purpose of receiving medical care, treatment, diagnosis or preventative medical care; (b) a member of his or her family is ill or injured, or to care for a family member receiving medical care, treatment, diagnosis or preventative medical care; (c) he or she or a member of his or her family is the victim of domestic violence, sexual violence, or stalking; or (d) his or her business is closed due to a public health emergency or to care for a child whose school or place of care is closed due to a public health emergency.

The Ordinance defines "family member" to include a Covered Employee's child, legal guardian or ward, spouse, domestic partner, parent, spouse or domestic partner's parent, sibling, grandparent, grandchild, or any other individual related by blood or whose close association with the Covered Employee is the equivalent of a family relationship.

Employers may set a reasonable minimum increment for use of ESL as long as it does not exceed four hours per day.

- **What is the Rate of Pay for Sick Leave?**

Employers must compensate an employee who uses ESL at the same rate and with the same benefits, including health care benefits, that the Covered Employee regularly earns during hours worked. The law is silent on whether this includes tips or commissions.

- **What Notice Must Employees Provide When Using a Sick Day?**

The Ordinance provides that if use of ESL is reasonably foreseeable, an Employer may require up to seven (7) days' notice before leave is taken. If the need for ESL is not reasonably foreseeable, an Employer may require a Covered Employee to give notice as soon as is practicable on the day the ESL is to be taken by notifying the Employer via phone, e-mail,

or text message. However, in order to require Covered Employees to provide notification, the Employer must notify Covered Employees in writing of the policy and the policy cannot be unreasonably burdensome.

- **Can Employers Require Employees to Provide a Medical or Other Documentation?**

Employers can require certification that the employee used ESL for a permitted purpose only when the employee is absent for more than three consecutive workdays. The Ordinance sets out the types of documents that satisfy this requirement.⁷ Nothing in the Ordinance prohibits Employers from taking disciplinary action against a Covered Employee who uses ESL for other purposes than those permitted, although policing may be difficult with this constraint.

- **What Notice Must Employers Provide?**

Employers must post a notice in a conspicuous place at each facility that is located within Cook County where any Covered Employee works advising of the right to ESL. In addition, at the commencement of employment, every Employer must provide a Covered Employee with a written notice advising of his or her rights to ESL. The Agency will prepare and make available model notices that satisfy these requirements.

- **What Records Must Employers Maintain?**

The Ordinance is silent regarding what records an employer must maintain. Illinois employers generally have recordkeeping requirements regarding wages, hours worked, overtime, etc., and thus best practice would be to include recordkeeping for ESL as well. We will advise you on any updates.

- **What Can Employers Not Do?**

Employers cannot: (a) require a Covered Employee taking ESL to search for or find a replacement worker; (b) determine how much ESL a Covered Employee needs to use; (c) require medical documentation to specify the nature of the injury, illness, or condition; or (d) discriminate or retaliate against any Covered Employee for exercising or attempting in good faith to exercise any right under the Ordinance, including but not limited to using an absence-control policy to count ESL as an absence that triggers discipline, discharge, demotion, suspension or other adverse action.

- **Must Unused Sick Time Be Paid Upon Employment Separation?**

The Ordinance does not require Employers to cash out an employee's accrued, unused ESL upon termination, resignation, retirement or other separation from employment.

- **What Should Employers Do Now?**

Cook County employers should take steps now to ensure that they will be able to achieve full compliance with the Ordinance by the July 1, 2017 effective date. These are among the actions to consider:

- o Review existing policies and procedures immediately to ensure that they meet at least the minimum requirements for Covered Employees or develop a new paid sick leave policy that complies with the Ordinance.
- o Review and, as necessary, revise anti-retaliation, attendance, conduct, and discipline policies to prevent retaliation against employees for taking ESL.
- o Prepare to comply with the Ordinance's posting and notification requirements and monitor the [Agency's website](#) for template notices and other guidance and updates on the Ordinance.
- o Train supervisory and managerial employees, as well as HR, on the Ordinance's requirements.

⁷ For ESL used pursuant to Section 42-3(c)(2)(a)-(b), documentation signed by a licensed health care provider is sufficient and an Employer cannot require that this specify the nature of the injury, illness, or condition, except as required by law. For ESL used pursuant to Section 42-3(c)(2)(c), a police report, court document, signed statement from an attorney, a member of the clergy or a victim services advocate, or any other evidence that supports the claim, including written statement from the Covered Employee or any other person who has knowledge of the circumstances, is sufficient.

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.

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

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