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Illinois Department of Labor Publishes Proposed Rules Implementing the Illinois Paid Leave for All Workers Act

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On November 3, 2023, the Illinois Department of Labor ("IDOL") published proposed rules implementing the Illinois Paid Leave for All Workers Act ("PLAWA"). While the proposed rules will not be finalized until after the PLAWA takes effect on January 1, 2024, they provide additional guidance employers should consider when reviewing their leave policies for compliance with the Act.

Covered Employees

The proposed rules provide that a covered employee is an individual who works part-time, full-time, or performs seasonal work and is:

1. Permitted to work by an employer whose base of operations, regional office, or headquarters is in Illinois and that employee's work is primarily performed in Illinois, or;

- Permitted to work by an employer if either of the following is true:

a. The work is primarily performed in Illinois for an employer that performs substantial business in the State, markets its services in the State, or maintains a registered agent within the State; or

- The work is primarily performed in Illinois and the individual is domiciled in Illinois.

Under the proposed rules, the IDOL will consider the following factors when determining whether work is "primarily performed in Illinois:"

1. The amount of work performed in Illinois compared to the amount of work performed outside Illinois;

- Whether the work performed inside of Illinois is isolated, temporary, or transitory; and
- Whether the work performed outside of Illinois is of the same nature or has the same duties of the work performed in Illinois.

Independent Contractor Test

The proposed rules provide that the same independent contractor test used under the Illinois Wage Payment and Collection Act ("IWPCA") will apply to the PLAWA. Under this test, the Act will not apply to bona fide independent contractors, who meet all of the following requirements:

1. Is free from control and direction over the performance of his or her work; and

- Performs work that is either outside the usual course of business or is performed outside all of the employer's places of business, unless the employer is in the business of contracting with third parties for the placement of employees;

and

- Is in an independently established trade, occupation, profession, or business.

Frontloading Paid Leave

Under the Act, an employer may choose to frontload paid leave at the beginning of a 12-month period rather than provide paid leave via an accrual system. The proposed rules provide that if an employer chooses to frontload paid leave, the employer must give written notice to the employee stating how many paid leave hours are available to them on or before the first day of employment or on or before the first day of the 12-month period. If an employer chooses a fixed date for the beginning of the 12-month period, the employer may prorate the amount of frontloaded leave available to an employee who begins employment in the middle of that 12-month period. An employer may also choose to use each employee's employment start date as the start of the employee's 12-month period. Importantly, the proposed rules provide that an employer may not retroactively diminish benefits that the employer has already provided to the employee. Therefore, an employer may not recoup or require an employee to repay paid leave that was frontloaded at the beginning of the 12-month period if the employee's employment ends before the end of the 12-month period.

The proposed rules also provide that employers may frontload paid leave for part-time employees at a pro rata amount consistent with the employee's anticipated work schedule for the 12-month period. However, if the part-time employee works more hours than anticipated, the employee is entitled to accrue additional hours at a rate of 1 hour of paid leave for every 40 hours worked. If a part-time employee works fewer hours in the 12-month period than

anticipated, the employer may not diminish or recoup used or unused frontloaded paid leave.

Mixed-Earning Policies

Under the proposed rules, an employer may provide some of its employees paid leave in the form of frontloading and other employees paid leave via accrual. However, an employer cannot illegally discriminate or otherwise violate state or federal law when determining which employees qualify for frontloading or accrual.

"Qualifying Pre-Existing Paid Leave Policy"

The proposed rules provide that an employer who has a "qualifying pre-existing paid leave policy" in effect on January 1, 2024 is not required to modify the pre-existing paid leave policy. "Qualifying pre-existing paid leave policy" is defined as "a bona fide paid leave policy that an employer has enacted prior to January 1, 2024, that, in practice, allows all employees to take at least 40 hours of paid leave for any reason of the employee's choosing." Neither the text of the Act nor the proposed rules state that an employers' qualifying pre-existing paid leave policy must be modified to comply with all provisions of the Act or the proposed rules.

Denial of PLAWA Leave

While Section 15(h) of the Act permits employers to implement prior notification requirements for employees requesting paid leave based on whether the need for leave is foreseeable or unforeseeable, the proposed rules provide that an employer cannot deny an employee's request to use paid leave solely because the employee's request does not meet the employer's foreseeability requirements. They also state that an employer may restrict an

employee’s use of paid leave to the employee’s regular workweek.

The proposed rules provide that the following factors are relevant when considering whether an employee’s request for paid leave may be denied based on operational needs:

1. Whether the employer provides a need or service critical to the health, safety, or welfare of the people of Illinois;

- Whether similarly situated employees are treated the same for the purposes of reviewing, approving, and denying paid leave;
- Whether granting leave during a particular time period would significantly impact the business operations due to the employer’s size; and
- Whether the employee has adequate opportunity to use all paid leave time they are entitled to over a 12-month period.

Carry Over of PLAWA Leave

Under the Act, if an employer provides paid leave via an accrual system, it must allow employees to carry over any unused leave annually from one 12-month period to the next 12-month period. Though the text of the Act is silent on whether employers are allowed to place a cap on the amount of leave that carries over annually, the proposed rules state that employers “may establish a reasonable policy . . . restricting employees’ ability to carry over more than 80 hours of unused paid leave.”

Payment of Paid Leave Upon Separation from Employment

Per the proposed rules, employees’ existing time off allowance banks must be kept separate from the accounting of employees’ paid leave under PLAWA, unless the employer’s written policy or

practice is to combine the leave. If an employer chooses to credit PLAWA leave to an existing paid leave allowance, such policy must be communicated to the employer's employees within 30 days after the start of an employee's employment or of the effective date of the policy. Under PLAWA, if an employer chooses to credit PLAWA leave to an existing paid leave allowance, any unused PLAWA leave must be paid to the employee upon their separation from employment just as vacation time is paid out under the IWPCA. However, an employer is not required to pay out unused PLAWA leave upon the employee's separation from employment if the employer does not provide an additional form of paid leave allowance and does not choose to combine or credit the multiple forms of leave together.

Reinstatement of Leave Upon Rehire

The PLAWA requires that unused earned or accrued paid leave must be reinstated to the employee if he or she is rehired within 12 months of their separation or termination. The proposed rules clarify that employees are entitled to reinstatement of any unused frontloaded paid time off unless it was paid out upon separation.

Notice and Accounting

The proposed rules state that employers shall provide an accounting of the employee's unused balance of paid leave on each paystub or form that the employer normally furnishes to the employee to notify them of wage payments and deductions from wages. They also require employers to post a notice in a conspicuous location, including a statement provided by the IDOL summarizing the requirements of the Act and a statement written by the employer summarizing the employer's policy. Under the proposed rules, an employer must also provide to the employee

and maintain a record of each request that is denied and the reason for the denial.

Local Paid Leave Ordinances

The PLAWA does not apply to any employer located in a municipality or county where the employer is required by local law or ordinance to provide paid leave, including paid sick leave, to its employees. The proposed rules state that the PLAWA applies to employers located in a municipality or county where the employer is not required by local law or ordinance to provide paid leave, including paid sick leave. This includes employers located in municipalities or counties that have opted out of an overlapping jurisdiction's paid leave law. Under the proposed rules, if a municipality or county enacts a local law or ordinance after January 1, 2024 that provides paid leave, the employer must comply with the local law or ordinance if it requires greater paid leave benefits than the PLAWA, but must comply with the PLAWA if the local law or ordinance requires less paid leave benefits than the PLAWA. The City of Chicago recently passed an amendment to its paid sick leave ordinance that will take effect on December 31, 2023, and will require employers to provide at least 40 hours of paid sick leave and 40 hours of paid leave for any reason per year.

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The IDOL has announced that it will hold a public hearing on its proposed rules to implement the PLAWA on November 29, 2023, and it will accept written comments through December 18, 2023. Given the Act's January 1, 2024 effective date, Illinois employers should plan for compliance with the requirements of the Act with the understanding that the rules will not be finalized until early 2024.

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