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Doubling Down in the Second City, Part Two: Chicago Department of Business Affairs and Consumer Protection Issues Final Rules Interpreting the City's Paid Leave and Paid Sick and Safe Leave Ordinance

Article By:

Zachary T. Sikora

On July 1, 2024, the Chicago Paid Leave and Paid Sick and Safe Leave Ordinance (PLO or the "Ordinance") took effect. We previously reported on the Ordinance when it was announced in November 2023 noting that, as written, it lacked some crucial details. Fortunately, the Chicago Department of Business Affairs and Consumer Protection (BACP) published the final rules (the "Rules") interpreting the PLO in May 2024. Although they provide some clarity in terms of compliance obligations, the Rules are, overall, a bit of a mixed bag for employers. This article provides a brief recap of the Ordinance itself and breaks down how the BACP's new Rules impact compliance obligations.

Chicago's PLO: A Quick Refresher

The PLO requires most Chicago employers to provide covered employees with at least 40 hours of Paid Leave (PL) in addition to 40 hours of Paid Sick Leave (PSL). Employees are "covered," and thus eligible to accrue PL and PSL, if they work at least 80 hours for an employer in any 120-day period while physically present within the geographic boundaries of Chicago. If an employee meets this threshold, they must accrue one (1) hour of PL and one (1) hour of PSL for every 35 hours worked. Employers may exceed the Ordinance's minimum standards, so long as their policies meet the main requirements regarding accrual, carryover, and usage.

BACP's New Rules

Remote Workers

Remote workers are covered by the Ordinance if they meet the above definition of a "covered employee." Thus, no leave accrues for employees who do not physically work within Chicago, even if the employer is located there. However, remote workers who physically work within the city must accrue PL and PSL, even if the employer is located outside of Chicago (or in a different state).

Frontloading Versus Accrual

The Rules confirm that, for employers with accrual-based leave policies, employees must be allowed to carryover up to 80 hours of unused, accrued PSL and 16 hours of accrued, unused PL from one benefit year to the next. The upside for employers who "frontload" leave — providing all PL and PSL hours at the start of employment or when employees begin employment rather than following an accrual-based model — is that they need not follow the PLO's carryover provisions with respect to PL. However, the Rules clarify that frontloading does not alleviate an employer's PSL carryover obligations. In other words, up to 80 hours of unused PSL must carryover, regardless of whether it is accrued or frontloaded. If frontloaded, these 80 hours carryover on top of the 40 PSL hours provided to employees at the start of the benefit year or at the start of employment. Therefore, it is possible for some employees to start the year with 120 hours (or 15 days) of PSL if leave is frontloaded.

PTO Policies: Carryover and Waiting Periods

Given that the 80-hour PSL carryover rule applies regardless of whether leave is frontloaded, frontloading employers who use a single bank of paid time off (PTO) instead of two separate banks of PL and PSL are in a tough spot. Because the Ordinance lacks exemptions for pre-existing PTO policies, employers with such policies could run into issues in terms of staffing as those policies must comply with the Ordinance in its entirety — including the 80-hour PSL carryover provision. Thus, if employers frontload 80 hours of PTO (to account for 40 hours of PL and 40 hours of PSL), some employees could start the year with 160 hours (or 20 days) of PTO.

PTO policies are also more limited in terms of establishing waiting periods for using PTO. The Ordinance requires that employees be allowed to use PL beginning on the 90th calendar day of employment. PSL, however, may be used after the 30th calendar day. For employers with PTO policies, the more generous 30-day waiting period must apply.

Restricting Usage

In terms of usage, the Ordinance was silent as to how or when employers may restrict employees' use of PL aside from requiring "reasonable pre-approval," but the Rules lay out a balancing test for determining when employers may deny requests for using PL based on "operational needs."

Factors employers should consider if denying PL requests on this basis include whether:

1. Granting Pl during a particular time period would significantly impact business operations;
2. The employer provides a need or service critical to the health, safety, or welfare of the people of Chicago;
3. Similarly situated employees are treated the same for the purposes of reviewing, approving, and denying PL; and
4. The employee has "meaningful access" to use all PL to which the employee is entitled over the established benefit year. "Meaningful access" in this context means that the employee has a reasonable ability to use accrued PL and PSL.

Providing some additional guidance, the Rules include a few helpful examples of whether PL usage restrictions are reasonable. A reasonable policy is one that allows employees to take PL on a Friday seven days from the request. However, the Rules indicate that a leave policy can have a "blackout" period. For instance, an employer may prohibit taking PL on a specific Friday if it is the busiest day of the employer's year. An example of an overly restrictive policy is one that prohibits using PL on Mondays and Fridays.

Defining 12 Month Period – Benefit Year

From an administrative standpoint, the Rules allow more flexibility for employers to determine the 12-month period or "benefit year." The benefit year can be based on, for example, the calendar year, the fiscal year, or the employee's work anniversary. In other words, employers can set different dates for each covered employee or choose to grant benefits to all covered employees at the same time.

Notice Requirements

In addition to guidance on frontloading, carryover, and usage, the new Rules specify how employers must comply with the PLO's different notice requirements. The main two notices employers must provide include (1) a notice of their rights under the PLO ("Rights Notice"); and (2) a notice of the updated amounts of PL and PSL available for their use ("Amounts Notice"). There are several different requirements for providing the Rights Notice, but the main two include posting it in a conspicuous location and including it with the employee's first paycheck and annually with a paycheck issued within 30 days of July 1. There are also multiple ways through which employers can provide the Amounts Notice, including — but not limited to — on pay stubs, through an online system, or by hand-written record.

Takeaways

Now that the Ordinance is in effect, employers should review their paid leave, paid sick leave, or PTO policies to ensure compliance with the both the PLO and the BACP's new Rules. The Ordinance does permit employers to alter their policies, but they must provide employees with written notice within five days before any change (note that this notice period increases if the change affects compensation).

Employers who are unsure as to whether their policies are PLO-compliant — whether in terms of accrual, usage, carryover, or the notice requirements — should consult with counsel to determine the best way to implement any necessary updates.

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Read Part 1 here

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