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Labor & Employment | Alert

December 2016

Illinois Employment & Benefits Update for 2017

The Illinois General Assembly, the Cook County Board of Commissioners, and the Chicago City Council have been very busy this year enacting employment laws going into effect in 2017. New legislation was passed in 2016 relating to mandatory paid sick leave, child bereavement leave, and new restrictions on employee covenants not to compete. Below is an overview of the changes to help you prepare for 2017.

Chicago and Cook County Sick Leave Ordinances

On June 22, 2016, the Chicago City Council passed the Chicago Minimum Wage and Paid Sick Leave Ordinance. Thereafter, on October 5, 2016, the Cook County Board of Commissioners passed the Cook County Earned Sick Leave Ordinance. The Ordinances provide for mandatory paid sick leave benefits ("Benefits") for the majority of employees who work within Cook County or Chicago. The two Ordinances are nearly identical, and both take effect on July 1, 2017.

Employers are free to provide greater Benefits than those outlined below. However, these are the minimum Benefits that covered Cook County and Chicago employers are required to provide to their employees.

Who is Covered by the Sick Leave Ordinances?

The Ordinances are broad and cover most employees who perform at least two hours of work for an employer while physically present within the geographic boundaries of Cook County or Chicago; and who work at least 80 hours for a covered employer within any 120-day period. The term "work" includes deliveries, sales calls, and other travel related to business activity (other than commuting).

The definition of an "employer" is equally broad, and applies to employers who employ at least one covered employee (defined above); and who maintain a place of business in either Cook County or Chicago. The Chicago Ordinance also applies to employers who are subject to one or more licensing requirements in Title 4 of the Chicago Municipal Code.

Thus, an employer headquartered outside of, but who maintains a place of business within, Chicago or Cook County may need to provide Benefits to some employees, but not others, who spend more than two hours in Chicago or Cook County within any 120-day period. These roles may include delivery drivers or sales people who are called on periodically to work in Cook County or Chicago. In addition, employers with no physical presence in Chicago, but who are required to obtain a city license, may need to provide Benefits to their employees as well.

Expressly excluded from coverage are public employers, Indian tribes, and construction industry employees who are covered by a collective bargaining agreement. Other unionized employees are permitted to waive their rights under the Ordinances in a collective bargaining agreement, but only if the waiver is set forth explicitly in the agreement in clear and unambiguous terms. The Ordinances do not affect the validity, or change the terms, of any collective bargaining agreement entered into before July 1, 2017.

Existing Paid Time Off Policies

An employer that has a policy granting covered employees paid time off for sick days in an amount and manner that satisfies the Ordinances does not have to provide additional paid leave, or otherwise change its policy. However, it is important to scrutinize existing policies carefully to make sure that they satisfy all aspects of the Ordinances.

Uses of Sick Leave Benefits

An employee may use Benefits to address:

- the employee's illness or injury, or for the purpose of receiving medical care, treatment, diagnosis, or preventive medical care;
- the employee's family member's illness or injury, or to care for a family member. Family members include the employee's child, guardian, 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 employee is the equivalent of a family relationship;
- most issues arising from the employee or the employee's family member being a victim of stalking or domestic violence;
- when the employee's place of business is closed due to a public health emergency; or
- when the employee needs to care for a child whose school or place of care has been closed due to a public health emergency.

Employers may impose an initial six-month probationary period before employees are permitted to use their Benefits. Furthermore, employers may not require employees to find a replacement worker in order to use Benefits.

Employers may set a policy requiring that Benefits be taken in minimum increments of four hours.

Annual Accrual

The Ordinances allow employees to accrue and use up to five earned-sick-days over the course of one year. Benefits begin to accrue on the latter of the first calendar day after the commencement of employment or July 1, 2017.

Benefits accrue in hourly increments, at a rate of one hour of sick leave for every 40 hours worked. An employee who is exempt from overtime requirements shall be assumed to work 40 hours in each work week for purposes of Benefits accrual, unless his or her normal work week is less than 40 hours. In that case, the Benefits shall accrue based upon that normal work week. For all covered employees, there is a cap of 40 hours of Benefits accrued per 12-month period.

Alternatively, employers can forego the per hour accrual process by awarding the full complement of Benefits immediately upon the date of eligibility in one lump sum. Employers who utilize this lump sum method must award each covered employee 40 hours of Benefits on the first date of eligibility and at the beginning of each subsequent 12-month period. The lump sum method has the advantage of decreasing the administrative burden of calculating the number of Benefit hours accrued. However, it also could result in some employees being granted more Benefits than they would otherwise be eligible for under the hourly accrual method.

Employers are not obligated to pay out unused, accrued Benefits upon the employee's separation from employment. However, those employers who merge sick leave with other paid time off benefits, like vacation time, may be required to pay out unused, accrued time at separation.

Carryover of Benefits

Employees are permitted to carry over up to 20 hours of unused, accrued Benefits to the following year. Additionally, if an employer is covered by the federal Family and Medical Leave Act ("FMLA"), each of the employer's employees are permitted, at the end of their 12-month accrual period, to carry over up to 40 additional hours of their unused Benefits to use exclusively for FMLA eligible purposes, increasing the total carry over obligation to 60 hours. The Ordinances do not specify whether these FMLA accruals are limited to FMLA eligible employees, leaving an open question regarding whether any employee covered under the Ordinances, regardless of the employee's FMLA eligibility, is entitled to these additional carry overs.

For example, an employee who accrues, but does not use, 40 hours of benefits in 2017 may carryover 20 hours into 2018 under normal circumstances. If, however, in 2018 an employee experiences a serious health condition as defined by the FMLA, then the employee could carry over up to 40 hours of Benefits to be used exclusively for FMLA purposes.

The Ordinances do not specify if an employer may require, or an employee may choose, to run the FMLA eligible Benefits concurrently with other FMLA leave. However, applicable FMLA regulations and cases from this jurisdiction indicate that FMLA leave and Benefits may run concurrently. Employers should consider specifying when leaves run concurrently in their Handbooks.

Employee Notice Requirements

If an employee's need to utilize Benefits is reasonably foreseeable (*e.g.*, a doctor's appointment, a scheduled medical procedure, or court date), an employer may require the employee to provide notice at least seven days in advance of the need to utilize the Benefits. If the need is not reasonably foreseeable (*e.g.,* a child becomes ill suddenly or the employee requires an emergency procedure), the employee must give notice as soon as is practicable via telephone, e-mail, or text message.

Employers who are covered only by the Cook County Ordinance (and not the Chicago Ordinance), face an additional hurdle to the notification requirement. Under the Cook County Ordinance, an employer may only set a notification policy if the employer previously has notified its employees in writing of the notification policy, and that policy is not unreasonably burdensome. Furthermore, the Cook County Ordinance provides that any paid sick leave that also is covered under the FMLA is subject to the FMLA's notice requirements.

When an employee is absent for more than three consecutive work days, the employer may require certification that the use of Benefits was authorized. Documentation signed by a licensed health care provider is one way to satisfy this requirement. The employee may choose which document to submit to prove authorization, and the employer may not require that the certification specify the nature of the injury, illness, or condition. An employer may take disciplinary action against an employee who uses Benefits for purposes other than those described in the Ordinances.

Employers' Notice Requirements

Every employer must post a notice advising employees of their rights to Benefits. This notice must be in a conspicuous place at each facility located within the geographic boundaries of Cook County or Chicago.

In addition to posting requirements, the Chicago Ordinance also requires employers to provide with the first paycheck issued to an employee a notice advising the employee of his or her rights under the Chicago Ordinance.

Employers covered under the Cook County Ordinance must send to each employee a written notice advising the employee of his or her rights.

Anti-Retaliation Provisions

The Ordinances prohibit employers from discriminating in any manner, or from taking adverse action, against any employee in retaliation for exercising, or attempting in good faith to exercise, any right under the Ordinances. These rights include disclosing, reporting, or testifying about any violation of the Ordinances. Adverse actions can include unjustified termination, denial of promotion, negative evaluations, punitive schedule changes, punitive decreases in the desirability of work assignments, and other acts of harassment shown to be linked to such exercise of rights. An employer may not count the use of Benefits as an absence that triggers discipline, discharge, demotion, suspension, or any other adverse action.

Penalties for Failure to Comply with the Ordinances

The Chicago Ordinance designates the Department of Business Affairs and Consumer Protections as the enforcement agency, and authorizes the Commissioner to adopt regulations for the administration and enforcement of its provisions. The Cook County Ordinance, on the other hand, designates the Cook County Commission on Human Rights to administer and enforce the Cook County Ordinance. It is anticipated that the Chicago Department of Business Affairs and Consumer Protections will have sole jurisdiction over violations of both Ordinances that occur within the city.

If an employer violates any of the provisions of the Ordinances, the affected employee may recover in a civil action damages equal to three times the full amount of any Benefits denied or lost because of the violation, interest on that amount calculated at the prevailing rate, costs, and attorneys' fees.

Illinois Employee Sick Leave Act

Not to be outdone, the state of Illinois also has entered the arena of paid sick leave, albeit in a less intrusive manner. On August 19, 2016, the Illinois General Assembly enacted the Employee Sick Leave Act (the "Act"). As a state law, it reaches beyond Chicago and Cook County, and applies to a larger swath of Illinois employers. In summary, Illinois requires employers who provide sick leave to also allow employees to use sick leave benefits for "kin care" in order to address the needs of family members. The Act goes into effect January 1, 2017.

The Act only applies to employers with existing personal sick leave policies, and does not create an affirmative obligation for employers to institute sick leave policies. Employers whose sick leave policies already conform to the Act are not required to modify their policies. Of course, Illinois employers covered by the Chicago or Cook County Ordinances still have such an obligation.

Definition of Family Member Under the Act

Family member is defined as the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.

Restrictions on Use

Employers are permitted to limit the use of personal sick leave benefits for the care of a family member to the amount of personal sick leave an employee would accrue over six months. Furthermore, the Act does not extend the maximum period of leave to which an employee is entitled under the FMLA, and "kin care" leave can run concurrently with FMLA leave. Thus, an employee who has exhausted his or her rights under the FMLA by taking 12 weeks of medical leave is not eligible for additional leave under the Act.

Anti-Retaliation Provisions

Employers may not retaliate against employees for exercising their rights under the Act, including by denying employees the use of sick leave benefits or by discharging, demoting, or suspending them.

An employee exercises rights under the Act by attempting to use personal sick leave benefits, filing a complaint with the Illinois Department of Labor ("IDOL"), alleging a violation of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any policy or practice that is prohibited by the Act. Unlike the Chicago and Cook County Ordinances, the Act does not provide a path for a prevailing employee who enforces his or her rights under the Act to recover attorneys' fees.

Child Bereavement Leave Act

On July 29, 2016, the Illinois General Assembly passed the Child Bereavement Leave Act (the "Bereavement Act").

Use of Leave Under the Bereavement Act

The Bereavement Act creates a right for eligible employees to take unpaid leave to attend the funeral, or similar ceremony, of a child; make arrangements necessitated by the death of a child; or grieve the death of a child.

The Bereavement Act defines child to include a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*. An employee who is otherwise entitled to take paid leave (including family, medical, sick, annual, or personal leave) may choose to substitute such paid leave relating to the death of a child. Employers, however, may not force employees to substitute paid leave while the employee is using Bereavement Leave. Employers should update employee handbooks and related policies to expressly reflect that FMLA and Bereavement Act leave run concurrently.

Eligibility Requirements

The Bereavement Act defines eligible employers and employees in an identical manner as the FMLA. Thus, employers are defined as persons or entities that employ 50 or more full-time employees during each of 20 or more calendar workweeks in the current or preceding calendar year. Also, like the FMLA, to be eligible for leave under the Bereavement Act, an employee must work at a location that has 50 or more employees within a 75-mile radius. Additionally, the employee must have worked for the employer for at least 12 months, and must have at least 1,250 hours of service for the employer during the preceding 12-month period.

Amount of Leave

An employee who suffers the death of one child may take up to 10 days of leave during the 60-day period following the date on which the employee receives notice of the death of the child. An employee who suffers the death of more than one child during a 12-month period may take up to six weeks of bereavement leave during the 12-month period.

The Bereavement Act does not permit employees to take Bereavement Leave that exceeds leave available under the FMLA. Thus, an employee who has exhausted his or her rights under the FMLA by taking 12 weeks of medical leave is not eligible for additional leave under the Bereavement Act.

Employee Notice Requirements

Employees are obligated to provide their employers with at least 48 hours' advance notice of taking leave under the Bereavement Act, unless providing such notice is impracticable.

Furthermore, an employer may require that its employees provide it with reasonable documentation supporting that the leave is being taken for valid reasons. Examples of such documentation are a death certificate; a published obituary; or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

Anti-Retaliation Provisions

Employers may not retaliate against employees who exercise rights or attempt to exercise rights under the Bereavement Act; oppose practices which the employee believes to be in violation of the Bereavement Act; or who support the exercise of rights of another employee under the Bereavement Act.

Exercising rights under the Bereavement Act includes filing an action or instituting any proceeding relating to the Bereavement Act, providing or agreeing to provide any information in connection with an inquiry or proceeding related to any right provided under the Bereavement Act, or testifying or agreeing to testify in an inquiry or proceeding related to any right provided under the Bereavement Act.

Enforcement Mechanisms and Penalties

The IDOL is charged with administering and enforcing the Bereavement Act. The IDOL's enforcement powers include conducting investigations, imposing civil penalties, and enacting regulations. Employees may file complaints with the IDOL or initiate a civil action in Circuit Court within 60 days of the alleged violation.

Employers who violate the Bereavement Act may be subject to administrative fines of up to $500 for the first offense and $1,000 for subsequent offenses by the IDOL.

Illinois Freedom to Work Act

On August 19, 2016, the Illinois General Assembly enacted the Illinois Freedom to Work Act (the "IFWA"). The IFWA prohibits all private Illinois employers from entering into non-compete agreements with "low-wage employees," and declares such agreements illegal and void. The passage of the IFWA follows high profile investigations by several Attorney Generals' offices around the country that recently have been scrutinizing what they view to be overuse of restrictive covenant agreements.

The IFWA takes effect, and applies to agreements entered into after, January 1, 2017.

Definition of Low-Wage Employee

The IFWA only applies to agreements between employers and low-wage employees, defined as those earning less than the greater of $13.00 per hour or the applicable federal, state, or local minimum wage. The Chicago Minimum Wage Ordinance will raise the city-wide minimum wage to $13.00 per hour by July 1, 2019, with annual increases thereafter that match the percentile increase in the Consumer Price Index. Therefore, until at least July 1, 2020, the IFWA is likely to apply to covenants with employees who earn $13.00 per hour or less.

The IFWA's Effect on Other Restrictive Covenants

The IFWA declares illegal and void agreements that restrict an employee from performing any work for another employer for a specified period of time; any work in a specified geographical area; or work for another employer that is similar to such low-wage employee's work for the employer included as a party to the agreement.

The IFWA is silent as to the impact on other types of restrictive covenant agreements such as non-solicitation agreements and confidentiality agreements. It is likely that the plaintiffs' bar will push for a more expansive interpretation, while the defense bar will argue that the plain language of the IFWA makes clear that it applies only to non-competes.

Penalties and Enforcement

The IFWA does not specify an enforcement mechanism or penalties for violations. Earlier versions of the bill included sections empowering the IDOL to enforce the IFWA and detailing criminal and monetary sanctions for violations. These sections were removed in committee prior to the IFWA's passage. Their removal suggests that lawmakers did not intend for there to be a statutory penalty for violating the IFWA.

Notwithstanding the IFWA, employers are still obligated to ensure that their non-competes otherwise comply with applicable law, regardless of the annual compensation of an employee. For example, non-competes in Illinois should be no more restrictive than necessary to protect a legitimate business interest, and must be reasonable in geographic and temporal scope. In addition, several courts in Illinois (particularly Illinois state courts) also require that if the only consideration an employee receives for a non-compete is at-will employment or continued at-will employment, the employee must remain employed for at least two years in order for the consideration to be sufficient. These, and other, requirements remain necessary in an employer's analysis of the enforceability of a non-compete.

Chicago Minimum Wage Ordinance

The 2017 Increase in the Minimum Wage.

The minimum wage for non-tipped employees in Chicago will increase to $11.00 per hour on July 1, 2017, pursuant to the Chicago Minimum Wage Ordinance (the "Minimum Wage Ordinance").

The Minimum Wage Ordinance sets forth a schedule of increases to Chicago's minimum wage rate. In addition to the 2017 increase, the Chicago minimum wage will increase to $12.00 per hour on July 1, 2018, and $13.00 per hour on July 1, 2019. Thereafter, the minimum wage will increase on July 1 of every subsequent year by a percentile amount equal to the increase in the Consumer Price Index ("CPI"), provided that the minimum wage will not increase by more than 2.5%. The minimum wage will not increase if the city unemployment rate is greater than 8.5%.

The minimum wage for tipped employees (defined as employees who customarily and regularly receive more than $30 per month in tips) is likewise set to increase on July 1 of every year, to the greater of:

- Chicago's minimum wage for tipped workers for the previous year plus a percentile increase equal to the increase in the CPI (provided that the tipped employee minimum wage will not increase by more than 2.5% and that it will not increase if the city unemployment rate is greater than 8.5%);
- the minimum hourly wage set forth under the Fair Labor Standards Act for tipped workers; or
- the minimum hourly wage set by the Illinois Minimum Wage Law for tipped workers.

To Whom Does the Minimum Wage Ordinance Apply?

The Minimum Wage Ordinance covers most employees who perform at least two hours of work within a two-week period for an employer while physically present in the geographic boundaries of Chicago. The Minimum Wage Ordinance does not apply to certain categories of employees, including employees below the age of 18, probationary employees, and employees taking part in certain government-subsidized employment programs.

Conclusions

With all of the changes that 2017 will bring, Illinois employers should consider auditing their paid time off, sick leave, bereavement leave, and compensation policies and practices to ensure compliance with these new laws. In addition, any changes made also should be reflected in amended Employee Handbooks and other applicable personnel policies, so that employees have the most up-to-date information. Moreover, Illinois employers should obtain amended posters for break rooms in light of new posting and notice requirements.

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