

FLASHPOINTS (ARCHIVED 2023)

EMPLOYMENT & LABOR LAW FLASHPOINTS DECEMBER 2023

Thomas C. Garretson, [Robbins Schwartz](#), Chicago
312-332-7760 | [E-Mail Thomas C. Garretson](#)

IDOL Publishes Proposed Rules for the Illinois Paid Leave for All Workers Act

Last month, the Illinois Department of Labor (IDOL) published proposed rules regarding interpretation of the new Illinois Paid Leave for All Workers Act, 820 ILCS 192/1, *et seq.* 47 Ill.Reg. 15,309, 15,559 (Nov. 3, 2023). Effective January 1, 2024, the Act will require covered employers to provide up to 40 hours of paid leave each year to employees for any reason. Employers preparing for implementation of the new paid leave requirements have been eagerly awaiting regulations from IDOL in order to ensure accurate interpretation and implementation of the Act's provisions going into 2024. The following is a summary of the key areas addressed within the proposed regulations.

Overview of the Paid Leave for All Workers Act

Under the Act, most Illinois employers will be required to provide eligible employees with up to a minimum of 40 hours of paid leave during a 12-month period or a pro rata number of hours of paid leave based on the frequency of the employee's work hours. Specifically, paid leave is to accrue at the rate of 1 hour of paid leave for every 40 hours worked, up to a minimum of 40 hours. 47 Ill.Reg. at 15,570 – 15,571. Paid leave provided under the Act may be taken by an employee for any reason of his or her choosing. Employees are not required to provide a reason for their use of the leave, and employers may not require documentation or certification to support use of the leave.

Clarification on "Employee" Definition

The Act primarily defines an employee in the same manner as the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.*, but provided no clarity on the applicability of the Act's requirements on those employees who perform their work remotely or on a "hybrid" basis. IDOL's proposed rules have attempted to resolve this issue to expand the definition of an "employee" to include an individual permitted work part-time, full-time, or perform seasonal work and is permitted to work

1. for an employer whose base of operations, regional office, or headquarters is in Illinois and that employee's work is primarily performed in Illinois;
2. primarily 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
3. primarily and live in Illinois. 47 Ill.Reg. at 15,566.

When considering whether work is performed "primarily" in Illinois, the proposed regulations state that IDOL will consider the following factors:

1. the amount of work performed in Illinois compared to the amount of work performed outside of Illinois;
2. whether the work performed inside of Illinois is isolated, temporary, or transitory; and
3. whether the work performed outside of Illinois is of the same nature or has the same duties of the work performed in Illinois. *Id.*

Qualifying Leave Policies in Existence Prior to January 1, 2024

Pursuant to the Act, employers who currently provide paid leave to their employees in a manner that satisfies the minimum amount of leave now required under the Act will not be required to modify their policy if it allows employees, at their discretion, to take paid leave for any reason. IDOL's proposed rules confirm that employers who have a preexisting qualified paid leave policy in effect on January 1, 2024, are not required to modify their policy, but that if the policy is modified after January 1, 2024, in such a way that it does not provide 40 hours of paid leave to be used for any reason, the policy would no longer be qualified for the exemption.

Carryover and Frontloading of Paid Leave

The Act permits employers to elect whether their employees will receive the minimum number of paid leave hours at the beginning of the 12-month period (*i.e.*, "frontloading") or whether employees will accrue paid leave hours throughout the 12-month period based on hours worked. Notably, employees that accrue paid leave hours over the course of the 12-month period must be permitted to carry over any unused hours. 820 ILCS 192/15(i). However, IDOL's proposed regulations now provide that employers are permitted to establish a "reasonable policy" that restricts an employee's ability to carry over more than 80 hours of unused paid leave to the next 12-month period. 47 Ill.Reg. 15,580 – 15,581.

With respect to those employers that "frontload" paid leave hours at the time of an employee's hire and the beginning of each 12-month period, the Act does not require that the employer permit carryover of any unused paid leave hours to the next 12-month period. The proposed regulations state that if an employer "frontloads" the paid leave hours, the employer is required to give written notice to the employee informing them of how many paid leave hours the employee is receiving on or before the first day of employment or on or before the first day of the 12-month period. "Written" notice is defined as "a printed or printable communication in physical or electronic format, including a communication that is transmitted through electronic mail, text message, or a computer system otherwise sent or stored electronically." 820 ILCS 192/10; 47 Ill.Reg. at 15,569. The proposed regulations also confirm that an employer may not recoup or require an employee to repay any paid leave hours that were provided to the employee at the beginning of the 12-month period if their employment ends before the end of that same period.

Notably, the proposed regulations expressly allow employers to implement "mixed-earning policies" in which certain employees are provided paid leave hours via the "frontloading" method and others accrue hours over the course of the 12-month period. However, an employer is prohibited from violating state or federal law (*e.g.*, antidiscrimination statutes) when determining which employees qualify for "frontloading" or accrual.

Employer Notice Obligations

IDOL's proposed rules provide that employers imposing terms and conditions on employee use of paid leave time are required to adopt a reasonable, written paid leave policy consistent with the Act. The employer's paid leave policy must be provided to an employee prior to or effective upon employment or within 90 days after January 1, 2024, whichever is later. Employers who regularly communicate with employees electronically are also required to provide the notice via the employer's regular electronic communication method. Should the employer's paid leave policy be changed, an employee must be notified of the updated policy as soon as practical.

Under the Act, employers are also required to display a written notice summarizing the Act's requirements in a conspicuous location on the premises where notices to employees are customarily posted. 47 Ill.Reg. at 15,584. Per the proposed rules, in addition to a statement provided by IDOL related to the Act's requirements, the employer's notice is to include a statement prepared by the employer that summarizes any internal written paid leave manual, handbook, or policy (if the employer has one), as well as information as to how an employee can receive a copy of such a document. This notice is not to be obscured in any manner and shall be prominently visible in the location where notices to employees are customarily posted. In addition to a physical notice, employers who regularly communicate with employees via electronic means are also to provide the notice via

their regular electronic communication method. The required notice is to be posted in the languages commonly spoken in the workplace if there is a “significant percentage” of workers who are not literate in English. *Id.*

The proposed rules state that employers are required to provide an accounting of each employee’s unused balance of paid leave time on each paystub or form normally furnished by the employer to notify the employee of wage payments and deductions from wages.

Employer Discretion To Deny Leave Requests

Under the Act, employees are required to provide employers with seven calendar days’ advance notice of the use of foreseeable leave. In the case of unforeseeable leave, an employee is required to provide notice as soon as practicable after the employee becomes aware of the necessity of leave. IDOL’s proposed regulations, however, will provide employers with the discretion to deny a request for use of paid leave hours if (1) the employer’s policy for considering leave requests, including any basis for denial, is disclosed to the employee in writing and (2) the employer’s paid leave policy establishes certain “limited circumstances” in which paid leave requests may be denied in order to meet the employer’s “core operational needs” for the requested time period. 47 Ill.Reg. at 15,579. Relevant factors to review when considering whether leave may be denied based on operational needs include

A) whether the employer provides a need or service critical to the health, safety, or welfare of the people of Illinois; and

B) whether similarly situated employees are treated the same for the purposes of reviewing, approving, and denying paid leave; and

C) whether granting leave during a particular time period would significantly impact the business operations due to the employer’s size; and

D) whether the employee has adequate opportunity to use all paid leave time they are entitled to over a 12-month period. 47 Ill.Reg. at 15,579 – 15,580.

Employers must maintain and provide to an employee a record of each paid leave request that is denied and the reason for the denial.

Interaction with Local Paid Leave Ordinances

The Act clearly states that it does “not apply to any employer that is covered by a municipal or county ordinance that is in effect on the effective date of this Act that requires employers to give any form of paid leave to their employees, including paid sick leave or paid leave.” 820 ILCS 192/15(p). However, IDOL’s proposed regulations confirm that the Act does apply to those employers in municipalities or counties that have opted out of an overlapping jurisdiction’s paid leave law. 47 Ill.Reg. at 15,576. Moreover, the proposed regulations provide that if a municipality or county provides, enacts, or amends a local paid leave time law or ordinance to provide greater benefits than provided for under the Act, the employer is required to comply with the local law or ordinance. *Id.*

Takeaways

IDOL’s proposed regulations have a 45-day public comment period and at least a 90-day notice period will be required until these regulations can become final. However, employers preparing for implementation of the Act’s requirements on January 1, 2024, should closely assess how these proposed rules may impact any existing and/or newly created paid leave policies. Employers should also be prepared to further modify any existing and/or newly created paid leave policies after January 1, 2024, should additional revisions be made by IDOL to the proposed regulations after the Act’s effective date.

*For more information about employment and labor law, see **ELEMENTS OF ILLINOIS LAW: WORKERS' COMPENSATION** (IICLE®, 2023). Online Library subscribers can view it for free by clicking [here](#). If you don't currently subscribe to the Online Library, visit www.iicle.com/subscriptions.*

Copyright 2024 IICLE