

# FLASHPOINTS (ARCHIVED 2023)

## EMPLOYMENT & LABOR LAW FLASHPOINTS FEBRUARY 2023

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### Mandatory Paid Leave for Employees Coming to Illinois in 2024

On January 10, 2023, the Illinois legislature passed [the Paid Leave for All Workers Act, S.B. 208, 95th Gen.Assem. \(2023\)](#). The Act, effective January 1, 2024, will require most Illinois employers to provide their employees with up to 40 hours of paid leave per year to be used for any reason of an employee's choosing. Immediately following its passage, Governor J.B. Pritzker announced that he was "looking forward to signing this legislation and giving a safety net to hardworking Illinoisans." [Press Release, State of Illinois, Gov. Pritzker Issues Statement on the Passage of Paid Leave for All Workers Act \(Jan. 11, 2023\)](#). The implementation of mandated paid leave will be a significant change for many employers and will require advance planning over the next year.

#### *Who Is Covered Under the Act?*

Under the Act, all employers in the State of Illinois who employ one or more persons are subject to the new requirements, including units of state and local government or any government agency. However, the Act does not cover school districts organized under the School Code, 105 ILCS 5/1-1, *et seq.*, or park districts organized under the Park District Code, 70 ILCS 1205/1-1, *et seq.* The Act's requirements also do not apply to any employer covered by a municipal or county ordinance in effect on January 1, 2024, which requires any form of paid leave to be provided to their employees, including paid sick leave (*e.g.*, the City of Chicago's Paid Sick Leave Ordinance).

The Act generally applies to all employees, broadly defining the term "employee" as "any individual permitted to work by an employer in an occupation" (language as used in §2 of the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.*) as well as any domestic workers. However, the Act specifically exempts the following individuals from its coverage:

1. an employee as defined in the federal Railroad Unemployment Insurance Act, ch. 680, 52 Stat. 1094 (1938), or the Railway Labor Act, ch. 347, 44 Stat. 577 (1926);
2. a student enrolled in and regularly attending classes in a college or university, which is also the student's employer, and is employed on a temporary basis at less than full time at the college or university (this exclusion applies only to work performed for that college or university);
3. a short-term employee who is employed by an institution of higher education for less than two consecutive calendar quarters during a calendar year and who does not have a reasonable expectation that they will be rehired by the same employer of the same service in a subsequent calendar year;
4. an employee working in the construction industry who is covered by a bona fide collective-bargaining agreement; or
5. an employee covered by a bona fide collective-bargaining agreement with an employer that provides services nationally and internationally of delivery, pickup, and transportation of parcels, documents, and freight.

#### *How Much Paid Leave Is Required?*

Under the Act, eligible employees will be entitled to earn and use 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 one hour of paid leave for every 40 hours worked, up to a minimum of 40 hours. Employees considered exempt from the overtime provisions of the Fair Labor Standards Act shall be deemed to work 40 hours in each workweek for purposes of leave accrual, unless their regular workweek is less than 40 hours, in which case the leave will accrue based on that regular workweek. When considering its obligations, employers should take note that the Act expressly states that its provisions are to be "liberally construed in favor of providing workers with the greatest amount of paid time off from work and employment security."

The 12-month period for purposes of leave accrual may be any consecutive 12-month period designated in writing by the employer at the time of an employee's hire. An employer can make changes to the 12-month period if written notice is given to employees prior to the change and the change does not reduce the eligible accrual rate and paid leave available. If the designated 12-month period is changed, the employer must provide the employee with documentation of the balance of their hours worked, paid leave accrued and taken, and the remaining paid leave balance.

Employees must be paid their hourly rate of pay for any paid leave provided under the Act. However, for any employees engaged in an occupation in which gratuities and commissions have customarily and usually constituted and been recognized as part of their compensation, the employer shall pay at least the full minimum wage in the jurisdiction in which they are employed when the paid leave is taken.

During any period of paid leave under the Act, the employer is required to continue to maintain any insurance coverage for the employee in the same manner as if the employee had not taken leave. The employer is required to notify the employee that they are still responsible for paying their share of the cost of the coverage, if applicable.

#### *How Can the Paid Leave Be Utilized?*

Eligible employees are entitled to begin using the paid leave after 90 days of starting employment or 90 days after the effective date of the Act (*i.e.*, March 31, 2024), whichever is later. An employer may make available the minimum number of hours of paid leave required to an employee on their first day of work or the first day of the 12-month period. However, employers who do not make available the minimum number of hours of paid leave to an employee on their first day of work or the first day of the 12-month period are required to permit paid leave to carry over annually to the extent not used by the employee, whereas those employers that do provide the paid leave "up front" can require use by the employee during the 12-month period or it will be forfeited.

Paid leave provided under the Act may be taken by an employee for any reason of their choosing. An employee is not required to provide a reason for their use of the leave and may not be required by their employer to provide documentation or certification to support the leave. An employee can choose whether they wish to use paid leave provided under the Act before using any other leave provided by the employer or other State law. Employees shall determine how much paid leave they need to use, but the employer is able to set a "reasonable" minimum increment for the use of paid leave not to exceed two hours per day.

Paid leave is to be provided to an employee upon their oral or written request in accordance with the employer's reasonable paid leave policy notification requirements, which may include the following:

1. If use of paid leave is foreseeable, the employee may be required to provide seven calendar days' notice before the date the leave is to begin.
2. If use of paid leave is not foreseeable, the employee must provide notice as soon as practicable after becoming aware of the necessity of the leave. Employers that require notice of paid leave when such leave is not foreseeable must provide a written policy containing procedures for the employee to provide notice.

Any changes to an employer's paid leave notice requirements must be provided to employees in writing within five calendar days of any change. An employer may not require, as a condition of providing paid leave under the Act, that the employee search for or find a replacement worker to cover his or her missed work hours.

The Act does not require employers to pay employees for any unused accrued paid leave upon separation from employment, nor are any unused paid leave days required to be paid out at the end of the benefit year in which they were accrued. However, if an employee separates and is rehired within 12 months, any previously accrued but unused paid leave must be reinstated, and the employee shall be entitled to use paid leave at the start of their employment following rehire.

### *Impact on Existing Agreements and Policies?*

Nothing within the Act diminishes the right of employees to bargain collectively through union representatives in order to establish conditions in excess of the Act's minimum standards. The Act's requirements may be waived in a bona fide collective-bargaining agreement entered into after January 1, 2024, but only if the waiver is set forth explicitly in the agreement in clear and unambiguous terms. Nothing in the Act is deemed to affect the validity or change the terms of a bona fide collective-bargaining agreement in effect on January 1, 2024.

Employers who currently provide to their employees paid leave that satisfies the minimum amount of leave required under the Act are not required to modify their policy if the policy allows employees, at their discretion, to take paid leave for any reason. Paid leave under the Act shall not be charged or otherwise credited to an employee's paid time off bank unless the employer's policy permits such a credit. If paid leave under the Act is credited to an employee's leave bank, then any unused paid leave shall be paid to the employee upon separation to the same extent as vacation time under existing Illinois law.

### *Additional Employer Responsibilities*

Employers must make and preserve records documenting (1) hours worked, (2) paid leave accrued and taken, and (3) remaining paid leave balance for each employee for a period of not less than three years, and they must also allow the Illinois Department of Labor (IDOL) access to such records in order to monitor compliance with the Act. In addition, employers that provide paid leave on an accrual basis must provide notice of the amount of paid leave accrued or used by an employee upon request by the employee, in accordance with the employer's reasonable paid leave policy notifications. Finally, employers will be required to post a notice in a conspicuous place on their premises, to be prepared by IDOL, summarizing the Act's requirements and information pertaining to the filing of a charge, and include such in any written employee manual or policy. Failure to provide employees with the requisite notice under the Act will subject an employer to civil penalties.

### *IDOL's Enforcement Responsibilities*

IDOL is tasked with administering and enforcing the Act and may conduct investigations in connection with such, including the power to conduct depositions and discovery and to issue subpoenas. IDOL is authorized to impose civil penalties for any violations of the Act and is authorized to collect and supervise the payment of any damages awarded to affected employees. Finally, IDOL shall adopt rules necessary to administer and enforce the Act.

The Act provides an anti-retaliation provision, which states it is unlawful for any employer to take or to threaten to take any adverse action against an employee for exercising rights under the Act, opposing practices the employee believes to violate the Act, or supporting the exercise of another's rights under the Act. It is also unlawful for an employer to consider use of paid leave under the Act as a negative factor in any employment action. Such retaliation shall subject an employer to civil penalties, and an employee may be entitled to recover all legal and equitable relief as may be appropriate through a claim filed with IDOL.

Employees may file complaints with IDOL alleging violations of the Act within three years of the alleged violation. Notably, employees do not appear to have the right to file a private cause of action against an employer for any alleged violations. An employer found to be in violation of the Act is liable to any affected

employee for damages in the form of the actual underpayment, compensatory damages, and a penalty of not less than \$500 but no more than \$1,000. Employees shall also be entitled to any such equitable relief as may be appropriate, in addition to reasonable attorneys' fees, reasonable expert witness fees, and other costs of the action.

An employer that violates the Act or its rules shall be subject to a civil penalty of \$2,500 for each separate offense, with any collected penalties being deposited into the Paid Leave for All Workers Fund, a special fund dedicated to enforcing the Act.

### *Key Takeaway*

The statutory text of the Act itself has led to a number of questions regarding implementation of its requirements, which presumably should be clarified once IDOL provides additional guidance and adopts administrative rules prior to the Act's effective date. In the meantime, covered employers, particularly those who employ individuals not currently eligible for paid leave under existing policies, should begin planning how to adjust its policies to ensure compliance with the Act when it becomes effective on January 1, 2024.

*For more information about employment and labor law, see EMPLOYMENT TERMINATION: EMPLOYER OBLIGATIONS AND WORKPLACE CONSIDERATIONS (IICLE®, 2022). 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](http://www.iicle.com/subscriptions).*

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