

# Illinois Paid Leave/Sick Leave Mandates March, 2024 - Q&A

## Jurisdiction

### **1. What if employees work in Cook County, Chicago and other parts of IL in various days/ weeks?**

The employee is covered by the Cook County ordinance for any work performed in Cook County (unless the exception set forth in Section 310.100 (B) of the final rules applies. If the employee primarily works outside of Cook County, but in Illinois, they are covered by PLAWA. However, the employee would be covered by the Chicago ordinance if they work over 80 hours in any 120 day period. So, the employee may technically be covered by more than one ordinance. It does not matter where the employer is located – it matters where the employee is performing work. Of course, applying the most generous protections will save employers from an administrative headache.

### **2. Our Company is located in Cook County but we have remote employees in other states, what do we do?**

The Cook County paid leave ordinance only covers employees working in Cook County. If your remote employee never comes to Cook County to work, the only sick or paid leave policy that would be applicable would be the ones required in the state(s) they work, if any.

### **3. Does the Cook County rule kick in for Chicago employers that employ 4 or less? Also, does owner count as employee?**

The amended Chicago Paid Leave and Paid Sick and Safe Leave Ordinance indicates that *prior* to 7/1/2024, any employee is a *Covered Employee* regardless of how many persons the Employer employs. However, *on 7/1/2024 and after*, employees who work for employers that employ less than four employees (except for Domestic Workers and a handful of other limited exceptions) are *not covered* by the Ordinance. Therefore, as of 7/1/24, an employer with less than 4 employees is *not* subject to the Chicago ordinance and those employees will be covered by either the Illinois PLAWA or Cook County ordinance. Whether an owner is an employee is a fact-specific analysis. If the owner is paid on the payroll, they would be an employee under the applicable laws.

### **4. Did Cook County paid sick leave go away?**

The *amended* Cook County leave ordinance that went into effect on December 31, 2023, now requires that employees provide covered employees with paid leave *for any* reason, as opposed to only for sick leave reasons. However, if an employee still has accrued, unused Paid Sick Leave that they earned under the original Cook County leave ordinance, the employee should be allowed to continue to use their available sick leave bank until it is exhausted.

## Pre-Existing Policies

### **5. What are the rules that need to be followed by pre-existing PTO policies under PLAWA and the Cook County Ordinance?**

A pre-existing PTO policy does not need to follow all the rules of PLAWA and Cook County, only the following must be followed to comply:

- i. It allows the employee to use the PTO/Vacation for any reason;
- ii. It states that it complies with the paid leave entitlement under the Illinois Paid Leave for All Workers Act/Cook County and will be credited against any paid leave entitlement the employee may have under the PLAWA/Cook County;
- iii. It identifies the 12-month period;
- iv. It provides that accrued and unused PTO/Vacation will be paid out under the IWPCA; AND
- v. It cannot penalize employees for taking such leave in accordance with the policy --- provided the policy allows for reasonable usage and permits employees to utilize such leave in circumstances whereby advance notice to the employer is not practical under the circumstances.

### **6. Do pre-existing PTO policies under PLAWA and the Cook County Ordinance need to meet the 2 hour increment requirement?**

No, so long as it meets the requirements outlined in Question #5 above.

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### 7. Can an employer still have sick and vacation separated out?

Yes, but neither a sick or vacation exclusive policy is likely going to meet the requirements of the Chicago, Cook or IL paid leave ordinances. Thus, you will likely either need to add an additional paid leave policy or you need to create a PTO policy that covers all bases.

### 8. If we already allot 40 hours vacation and 40 hours of personal time, are we ok?

As discussed, for Cook County and PLAWA, you can have a pre-existing policy which can be used for any reason but a pure vacation policy would likely not be compliant. Under the Chicago ordinance, this will not be compliant. Thus, you should review your leave policy further with counsel and determine the applicable jurisdictions to determine the best manner to coordinate your leave.

### Attendance and Disciplinary Action

### 9. Given that the Illinois Paid Leave for All Workers Act (PLAWA) requires an employer to allow an employee to use PTO for any reason, is it still possible to require the employee to give a reason? Or is the employer prohibited from even asking what the reason is?

The proposed rules for PLAWA indicate that “an employer shall not require an employee to provide a reason for taking paid leave time.” Generally, if the leave that falls under PLAWA is available to the employee, asking the reason for the leave is not productive and can expose the employer to claims of a violation of the law. If the issue is tied to notice, see the answer to Question 11 below. However, if applicable, an employer can inquire into reasons why the employee did not provide adequate advance notice.

### 10. How does the employer keep track in an HRIS system if they can't ask the reason for the leave under paid leave laws?

Under PLAWA and the Cook County Ordinance, if you are utilizing existing paid leave policies (e.g., PTO, Vacation) that would require you track accrual and use, there should be no difference in how you track. Your policy should indicate that it is being credited against their leave entitlement under the applicable paid leave law.

Under the Chicago Ordinance, employers are required to provide notification of availability and use of paid leave and paid sick leave. The proposed rules indicate that this can be done by including the updated amount of each leave available to each employee on pay stubs, providing an online system where they can access that information, or providing a hand-written record of available time (as long as copies of the records are maintained in compliance with the ordinance). In terms of tracking each type of leave, it may require an adjustment to your HRIS system.

At a minimum, however, you can ask an employee to indicate what type of leave they are using and track use/balances based on the employee's designation.

### 11. If an employee takes unforeseeable leave, can the employer discipline the employee?

Under proposed PLAWA rules and the final rules for the Cook County Ordinance, an “employer cannot deny an employee's request to use paid leave even if the employee's request does not meet the employer's foreseeability requirements” unless (i) the employer's policy for considering leave requests, including basis for denial, like impact on business operations, is disclosed to the employee in writing; and (ii) the employer provides the reason for denial to the employee. However, in most cases, absent an impact on business operations, an employer should strongly consider allowing available leave and not deny the request based on foreseeability. Notably, the final rules for the Cook County ordinance indicate that a policy that “requires an employee to provide notice prior to the day of the [unforeseeable] absence” is unreasonable. However, employers can implement reasonable notice requirements for foreseeable leave. Also, employers can implement reasonable notice requirements for unforeseeable leave so long as they allow employees to utilize leave under circumstances that precluded the employee from complying with such notice requirements. Again, it is critical that employers work with competent legal counsel to ensure their policies are compliant while providing employers with the best possible opportunity to manage their operations.

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### **12. In Chicago, if an employee calls in right before their shift, what can we ask them to determine if the need is foreseeable? Can we ask them the reason to determine whether they followed the company's notification policies (and issue corrective action if they didn't), as long as we still pay them the PTO regardless?**

An Employer may not require a Covered Employee to provide a reason for the use of Paid Leave. But, once again, nothing precludes the employer to inquire as to why the employee did not provide proper advance notice. However, the proposed rules indicate that an employer may establish reasonable methods for the employee to notify the employer of the need for Paid Leave or Paid Sick Leave, including requiring an employee to give reasonable notice, which may not exceed seven days before using such Paid Leave or to obtain reasonable pre-approval from the Employer before using Paid Leave for the purposes of maintaining continuity of Employer operations. So long as those requirements set forth reasonable methods requiring the employee to notify the employer of the need to use paid leave or paid sick leave (e.g., notifying their immediate supervisor in writing or verbally, calling a designated call-off line, sending an email to a designated email address, etc.), discipline for failure to follow those reasonable notification requirements may be legally compliant.

### **13. If we have an existing Attendance/Disciplinary policy with a "points" system, will this policy be valid under these ordinances?**

Under PLAWA, the proposed rules indicate that it is unlawful for an employer to take adverse employment action, including but not limited to, penalizing or disciplining an employee under an attendance point system or equivalent attendance scoring or tracking system when an employee exercises their rights under the Act. Similarly, the Cook County Ordinance prohibits counting absences arising from the use of properly noticed Paid Leave as an absence that triggers discipline, demotion, suspension or any other adverse employment action. The Chicago ordinance prohibits retaliation, but does not specifically prohibit an employer from using an absence control policy to count paid leave/paid sick leave as an absence that could trigger discipline. Nonetheless, assessment of points for use of paid leave or paid sick leave will likely make an employer vulnerable to a claim of retaliation.

However, note that these laws do recognize that an employer can impose reasonable notification requirements. So long as those requirements set forth reasonable methods requiring the employee to notify the employer of the need to use paid leave or paid sick leave (e.g., notifying their immediate supervisor in writing or verbally, calling a designated call-off line, sending an email to a designated email address, etc.), discipline for failure to follow those reasonable notification requirements may be legally compliant – but this will have to be assessed on a case-by-case basis under carefully worded policies.

### **14. Can you add a blackout period to any of these policies -- IL PLAWA, Cook County and Chicago Paid Leave/Paid Sick Leave?**

Yes. All three laws recognize that an employer can deny paid leave requests in order to meet the employer's core operational needs. It seems that so long as (i) similarly situated employees are treated the same for purposes of denying paid leave for that particular blackout period; (ii) granting leave during that blackout period would significantly impact the business operations; (iii) employees are given adequate opportunity to otherwise use all of their paid leave over the 12-month period; and (iv) proper notice of the blackout period is provided as required by each law – a reasonable blackout period for paid leave (not paid sick leave under the Chicago Ordinance) would be legally compliant --- so long as employees have a reasonable opportunity to exhaust/use their allotted minimum amount of paid leave.

### **15. If we have PTO that gives minimum of 120 hours per year and employee uses time to go on vacation, but then has an emergency come up and they do not have any hours left can we deny?**

Yes, under PLAWA and the Cook County Ordinance, you can deny the leave if your policy could be used for any reason and the employee has already used up their PTO. You can also deny the leave in this scenario under the Chicago Ordinance – but **only if you are frontloading the 120 hours of PTO.**

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However, if you are not frontloading the 120 hours of PTO under the Chicago Ordinance, and you are using the PTO policy to cover both the paid sick leave and paid leave requirements, the total amount of PTO would need to be modified.

The Chicago Ordinance provides that an employee can accrue up to 40 hours of sick leave and 40 hours of paid leave which is a total of 80 hours of leave. The Ordinance requires carryover of up to 80 hours of accrued sick leave and 16 hours of accrued paid leave. The combined ordinances amount to a total potential accrual of 80 hours of leave each 12-month period, and up to 96 hours of carryover. So, if your employee has 120 hours of PTO available in 12-month period and doesn't use any, then they must be allowed to carryover up to 96 hours of unused PTO into the next benefit year. Then, they can accrue another 80 hours before you can cap their accrual. Thus, their maximum bucket (including carryover) could reach 176 hours in a 12-month period.

### Accrual and Carryover

#### **16. Is the renewal of PLAWA and Sick Leave till January 1st or is it based on 7/1/2024 when it goes into effect?**

The question refers to dates in two different laws. PLAWA went into effect on 1/1/24. An employee must begin to accrue paid leave hours at the beginning of their employment with the employer or on January 1, 2024, whichever is later. Under the Chicago ordinance, accrual for paid leave and paid sick leave starts July 1, 2024 or the start of employment, whichever is later.

#### **17. Is there a timeframe that the 16 hours carryover under the Chicago Ordinance has to be used? We currently allow 40 hours carryover but it has to be used by 3/31.**

It is not clear that a use cutoff date will be compliant. The proposed rules for the Chicago Ordinance indicate that if an employee carries over unused accrued paid leave to the following year, "accrual of Paid Leave in the subsequent year shall be in addition to the hours accrued in the previous year and carried over." The proposed rules also indicate that denials of paid leave requests in consideration of operation needs will be evaluated under a number of factors, including whether the employee "has adequate opportunity to use all Paid Leave time the Covered Employee is entitled to over a 12-month period."

#### **18. Accrual Chicago: Your slides said MAY carryover, not MUST. Can you clarify?**

Unless an Employer frontloads, the Employer MUST allow the covered employee up to 80 hours of unused paid Sick Leave into the next benefit year. Unless an Employer frontloads, the Employer MUST carry over up to 16 hours of unused accrued Paid Leave to the next benefit year.

### Payout

#### **19. Does the payout upon termination have to be 100%?**

Under Cook County and PLAWA there is no required payout of Paid Leave. Employers are not required to pay for accrued, unused time that is not credited to a vacation bank or paid time off (PTO) bank.

However, if you have a pre-existing or blended PTO policy that you are using to satisfy PLAWA and/or Cook County, all accrued but unused PTO must be paid out at termination.

In Chicago, however, paid leave (not sick leave) pay out under the ordinance may be required based on the size of the company. Large employer (101+ covered employees) full payout, Medium Employer (between 51 and 100 covered employees) must payout a maximum of 16 hours until 7/1/2025, unless employer sets higher limit and after 7/1/2025, must pay out full amount of unused, accrued leave and a Small employer (less than 50 covered employees) does not require pay out of the Chicago paid leave. The "covered employees" are the employees the employer has that are covered under the Chicago ordinance.

#### **20. We have PTO and vacation; do we have to pay out both?**

All accrued but unused vacation must be paid out at termination of employment pursuant to the Illinois Wage Payment and Collection Act. If you have a separate PTO policy that is intended to comply with one of the paid leave mandates, then payout upon termination is required.

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### **21. Does the Carryover time need to be paid out at time of separation?**

It depends on the ordinance at issue. If it is under a pre-existing or combined PTO policy governed by the IWPCA, then yes. If it is a Chicago paid leave policy it follows the Chicago payout rules. If it is a PLAWA or Cook County paid leave policy, then under those laws payout is not required.

### **22. We had a pre-existing policy that we have continued to use. It excludes part-time employees from PTO. Is this still valid?**

You are permitted to maintain your pre-existing PTO policy for full-time employees only but you must create a separate policy for part-time employees applicable to the jurisdiction in which they work. Part-time employees must be afforded the protections of the new mandates, as applicable.

### **23. If we frontloaded 40 hours for all employees on January 1st. I thought we did not need to pay out the PLA which we keep separate from their vacation pay which we do pay out. We're located in Cook County.**

If you frontloaded 40 hours of Paid Leave in strict accordance with the Cook County Ordinance on 1/1/24 and kept a separate vacation policy that is fine. The Cook County Ordinance Paid Leave bucket, on its own, does not need to be paid out at termination of employment. The accrued but unused vacation bucket would need to be paid out at termination of employment.

### **24. How does pay out work with employees that are paid on a fee for service basis in Chicago?**

For Chicago, if an employee is paid on commission or fee basis the company must pay Paid Leave and Paid Sick Leave at the hourly rate of pay based on the base wage or the applicable minimum hourly Wage, whichever is greater. This pay is in addition to the service/commission fee paid.

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### **COOK COUNTY COMMISSION ON HUMAN RIGHTS ISSUED FINAL PROCEDURAL RULES ON MARCH 14, 2024**

After our webinar, Cook County issued [FINAL paid leave procedural rules](#). Some of the substantive changes include:

- To determine whether or not the exemption from the ordinance for work that an individual performs within a municipality that has preempted the Cook County ordinance applies, the Commission will consider whether the compensated work that the individual performs within the geographic boundaries of Cook County “is equal or greater than 50% of their total compensated work.” **Section 310.100 (B).**
- For accrual purposes, “employment training is considered employment” and should be credited towards the Employee’s hours worked. **Section 400.200.**
- Employers must provide Employees a copy of written policies outlining the method(s) used and which applies to various groups of Employees (full-time, parttime, seasonal, etc.). **Section 400.600.**
- Confirmation that Employers who use a frontload method may require Employees to use all Paid Leave before the end of a 12-month period and are not required to carryover Paid Leave from one 12-month period to the next 12-month period.” **Section 400.800.**
- Regarding use:
  - Employees should consult with their Employer to determine the duration (i.e. number of days and/or hours) of Paid Leave available for use; “however, in the event of a disagreement as to the duration of Paid Leave, the Employee’s preference is determinative provided it stays within the Employer’s minimum increment policy. An Employer may set minimum increments for use of Paid Leave, provided that the minimum increment is no greater than two hours, even if this minimum requirement requires an Employee to use more Paid Leave than they would prefer.” **Section 500.200.**
  - Confirmation that if an Employee has only one hour of accrued Paid Leave and the Employer has established a minimum use increment of two hours, then the Employee would need to accrue one more hour to use the Paid Leave. **Section 500.200.**
- Foreseeability:
  - A foreseeable absence includes any leave that is planned, routine, or easily foreseen.
  - An unforeseeable absence includes leave that is unplanned, non-routine, or not easily foreseen.
  - In ascertaining whether an absence was unforeseeable, the Commission will consider foreseeability from an objective perspective of whether a reasonable person under the same circumstances would have foreseen the absence. **Section 500.300 (D) and (E).**
- Clarification that FMLA rules and regulations, including notification requirements, take precedence over this Ordinance, the Rules promulgated hereunder, and an Employer’s Paid Leave Policy when an eligible FMLA employee uses FMLA leave. **500.300(H).**
- Any person who, with intent to avoid compliance with the Ordinance or the Rules hereunder by labelling an Employee as an Independent Contractor, shall be subject to double the penalties and damages listed in this section. **Section 1030.100.**
- An Employer may be ordered by the Commission to pay lost wages if it required an Employee to take unpaid leave when the employee had accrued and requested Paid Leave but was denied in violation of the Ordinance and these Rules. The Commission may also impose compensatory damages and a penalty amount in addition to the affected Employee’s lost wages. **Section 1030.100.**

**NOTE: We are still waiting for FINAL rules to be published by the IL Department of Labor and the City of Chicago.**