

Illinois Paid Leave – The When, What, Who, and How that Every Employer Needs to Know

Labor & Employment Law Update

on February 22, 2023

It is almost certain that Governor Pritzker will sign the Paid Leave for All Workers Act (Act) passed on January 10, 2023. The Act is littered with potential pitfalls for employer policies and practices regarding attendance, evaluations/reviews and discipline.

When does it start and what does it require?

Once signed, effective January 1, 2024, almost all private and public employers will be required to provide Illinois employees “up to a minimum of 40 hours” of Paid Leave during a 12-month period. The 12-month period can be set by employers, but will initially start on January 1, 2024 for all employers. Paid Leave will be paid at the employee's hourly rate (or the minimum wage for the jurisdiction the employee is in, if the employee is paid less than minimum wage because of tips or commissions).

What Employers does it apply to?

All public and private employers in Illinois, except the following:

- School districts organized under the School Code.
- Park districts organized under the Park District Code.
- Employers covered by a municipal or county ordinance in effect on January 1, 2024 that requires any form of paid leave, including paid sick leave. However, if the ordinance is enacted or modified after January 1, 2024, those employers will have to comply with both the Act and ordinance.

What Employees are entitled to Paid Leave?

Full-time, part-time, seasonal and temporary employees must be provided Paid Leave, unless they fit within one of the following exceptions:

- Employees in the Construction Industry who are covered by a CBA.

- Employees covered by a CBA with an employer that provides services nationally and internationally of delivery, pickup, and transportation of parcels, documents, and freight.
- Employees subject to the Federal Railroad Unemployment Insurance Act or Railway Labor Act.
- Student-employees, employed part-time and on a temporary basis by their college or university.
- Short-term employees of an institution of higher learning employed for less than 2 consecutive quarters during a calendar year, who do not have a reasonable expectation of being rehired to provide the same service in a subsequent calendar year.

There is also a limited exception for all employees covered by a CBA in effect on January 1, 2024. Under this exception, CBAs do not have to be changed to comply with the Act. However, CBAs entered into after January 1, 2024, for employees not within another exception, will have to comply with the Act, unless the CBA explicitly states in clear and unambiguous terms that the Act's requirements are waived.

Remember, an employer who has exempt employees will likely also have employees who are not exempt that must be provided Paid Leave.

What are the methods of providing Paid Leave to Covered Employees?

There are two methods to provide Paid Leave: (1) accrual and carry over; or (2) frontloading.

Under the accrual and carryover method, employees start accruing Paid Leave on January 1, 2024 (or date of hire for employees hired after January 1, 2024). Under this method, an employee's unused Paid Leave must be carried over to the next 12-month period. While employees can carryover Paid Leave to the next 12-month period, they are limited to using 40 hours per 12-month period. Additionally, the law caps accrual at 40 hours, which means employees cannot accrue any more Paid Leave once they have accrued 40 hours, unless the employer chooses to allow a greater amount or employees decrease their balance by using Paid Leave time.

Under the frontloading method, on their first day, employees are provided the minimum amount of Paid Leave they would accrue during the 12-month period and are not allowed to carryover unused Paid Leave to the next period (full-time 40 hr/wk gets 40 hours Paid Leave; part-time 20 hr/wk gets 20 hours Paid Leave). Employers must still track the actual hours worked, because if an employee would have received more Paid Leave under the accrual method, the employer must provide that additional time.

Illinois Paid
Leave – The
When,
What, Who,
and How
that Every
Employer
Needs to
Know

Different methods can be used for different types of employees (e.g. frontload for full-time; accrual and carryover for part-time, seasonal and temporary).

How can Employees use Paid Leave?

Employees must wait 90 days before they can use Paid Leave (90 days from January 1, 2024 or date of hire if hired after January 1, 2024).

Employees can use Paid Leave for any reason in 2 hour increments (or less if the employee's scheduled workday is less than 2 hours). Employees can be required to provide up to 7 days' notice to use Paid Leave, unless the need for leave is not foreseeable, in which case the employee is to provide notice once the employee is aware of the need.

Employees cannot be required to disclose the reason for leave, documentation to support the need, or required to find another employee to cover the time. That said, employers can still inquire as to reason (just not require). Employers may also inquire as to whether the leave implicates ADA or FMLA obligations, and if so, may be able to ask for additional information and appropriate documentation.

Employees also have the ability to choose whether to use Paid Leave prior to using any other leave provided by the employer or state law. This creates questions regarding the ability to require Paid Leave to be used concurrently with other leaves under an employer's policies and state law, but not necessarily federal law, like FMLA leave.

Implications of Termination, Transfers and Rehiring

Paid Leave does not have to be paid out at termination, unlike PTO/vacation which has to be paid out at termination under the Illinois Wage Payment and Collection Act (IWPCA).

If an employee is transferred (even out of state), the employee must be able to use their accrued Paid Leave. Additionally, employees rehired within 12 months of their termination must have any forfeited or unpaid Paid leave reinstated and be allowed to use it immediately, without any waiting period – likely impacting the use of temporary and seasonal employees.

What about current PTO/vacation policies?

PTO/vacation policies that provide at least 40 hours of leave per year that can be taken at the employee's discretion for any reason are sufficient to comply with the Act. However, in such a case, the Paid Leave is considered PTO/vacation time that must be paid out at termination under the IWPCA.

Illinois Paid
Leave – The
When,
What, Who,
and How
that Every
Employer
Needs to
Know

What is not clear is whether a PTO/vacation policy must comply with the Act's other requirements regarding carryover, notice, inability to require reason/documentation for leave and 2 hour minimum increment. The Act's current language indicates that such compliance is not required, meaning an employer can use its PTO/vacation policy to comply with the Act without allowing carryover — while also setting a higher 4-8 hour minimum increment and requiring employees to provide reasons and documentation for requested leave.

Records and Posting Obligations

Employers must keep records of employees' hours worked and Paid Leave accrued and used for 3 years, which must be provided to the IDOL upon request. Employees who accrue Paid Leave must be provided the amount of Paid Leave they have accrued and used upon their request – with the best practice being to provide the same to those who are fronted Paid Leave.

The notice/poster to be provided by the Illinois Department of Labor (IDOL), must be displayed in the workplace and any employee handbook – and be in one or more other appropriate languages, if a significant portion of employees are not literate in English. Employees will be fined \$500 for the first violation and \$1,000 for any subsequent violation of the notice/poster requirement.

Violations and Remedies

The Act prohibits adverse actions against an employee for exercising their rights under the Act, opposing practices the employee believes to be a violation of the Act or supporting others in exercising rights under the Act. Employers are also prohibited from considering the use of Paid Leave as a negative factor in any evaluation, promotion, discipline or violation of an attendance policy, specifically including no-fault attendance policies.

The IDOL will be responsible for administering and enforcing the Act. Instead of a civil lawsuit, employees must file a charge with the IDOL within 3 years of an alleged violation. The IDOL will investigate and hold administrative hearings for charges.

For violations, employees can recover actual underpayment, compensatory damages, a penalty of not less than \$500 and no more than \$1,000 and equitable relief including attorneys' fees and costs, expert witness fees and other costs. The IDOL can also impose civil penalties/fines of \$2,500 for each separate offense (that is not related to posting requirements) to be paid to the IDOL.

Conclusion

While the legislature may have had good intentions, the language of the Act is not as straightforward or easy to understand as it may appear, and is drafted in a way that creates significant questions and pitfalls for employers. While the

Illinois Paid
Leave – The
When,
What, Who,
and How
that Every
Employer
Needs to
Know

January 1, 2024 effective date provides time for planning on how to implement, employers should also consider how it will impact their budget, operations and potentially their work needs.

In determining if they must provide Paid Leave, how to comply with the Act or implement a Paid Leave policy, and how to revise any policies and procedures that are affected by the Act, employers should use legal counsel familiar with labor and employment law issues. Employers should also train their human resources staff, managers and supervisors on the new Act—particularly with respect to the issues of dealing with Paid Leave absences, and how the Act affects attendance and other policies.

Illinois Paid Leave – The When, What, Who, and How that Every Employer Needs to Know