Frequently Asked Questions

(*last updated January 18, 2018*)

The text of the Cook County Earned Sick Leave Ordinance ("Ordinance") and the Interpretative and Procedural Rules ("ESL Regulations") adopted by the Cook County Commission on Human Rights ("Commission") provide detailed guidance for employers. The staff of the Commission does not have the authority to give individual legal advice or render advisory opinions to individual employers. However, in an effort to facilitate broad compliance, the staff of the Commission will gather and attempt to answer frequently asked questions. These responses are not binding on the Commission in an enforcement action related to the Ordinance. To the extent that these responses conflict with the Ordinance or the ESL Regulations, the Ordinance and the ESL Regulations are more authoritative and will prevail.

This list of FAQs will be updated from time to time with newer FAQs appearing at the bottom.

[June 30, 2017]

Enforcement Priorities

Q1: What are the Commission's enforcement priorities with respect to the Ordinance?

A1: The Commission will investigate all filed complaints alleging a colorable violation of the Ordinance. That said, the Commission has limited resources to dedicate to enforcement of the Ordinance and must establish priorities. The Commission will prioritize those cases brought by working people, who on June 30, 2017, received no paid leave of any kind from their employer. The Commission seeks to prevent those working people from ever having to choose again between caring for themselves – or a sick family member – today and having a job to return to tomorrow.

Employers with generous preexisting paid leave programs who have made a good faith effort to ensure that such programs are compliant with the Ordinance will find the Commission's approach to enforcement to be reasonable. The Commission's ESL Regulations explicitly provide that during the first year of the Commission's enforcement after the effective date of the Ordinance, if such an employer is the target of an enforcement action by the Commission and if the employer works with the Commission to quickly understand its obligations under the Ordinance and meet those obligations, then the Commission will drop the enforcement action without protracted litigation or issuing fines. *See* ESL Regulations, § 1020.800. The Commission's goal is to reward responsible employers who quickly come into compliance with the Ordinance when they make reasonable mistakes so that limited resources can be re-focused on employers who are intentionally violating the Ordinance or otherwise acting in bad faith.

Coverage in the City of Chicago

Q2: Does the Ordinance apply to employers and employees working in the City of Chicago?

A2: To the extent that an employee and employer are both located in the City of Chicago, enforcement of earned sick leave obligations lies with the City of Chicago's Department of Business Affairs and Consumer Protection ("BACP") under the City of Chicago's Paid Sick Leave Ordinance. *See* ESL Regulations, § 1010.100.

There are some limited circumstances in which BACP may not have jurisdiction to hear a claim by employees working in the City of Chicago under the City's Ordinance, but the Commission will have jurisdiction to hear the claim under the County's Ordinance (*e.g.*, an employer in suburban Cook County that sends its employees into the City of Chicago to work or an employer in the City of Chicago that sends its employees into suburban Cook County to work). In those instances, an employer who can demonstrate that its treatment of its employees complies with the City's Paid Sick Leave Ordinance (and/or any interpretative rules issued by BACP) has an absolute defense against the Commission finding a violation of the County's Ordinance.

In other words, the Commission will generally not find that an employer who is complying with the City's substantially similar Paid Sick Leave Ordinance has violated the County's Ordinance.

Posting Notice at Places of Business in Chicago

Q3: Do employers in the City of Chicago need to post both the City and the County's notice of rights?

A3: If an employer in the City of Chicago does not have employees who work in suburban Cook County, it is not necessary to provide a separate notice of rights under the County's Ordinance to employees. If, on the other hand, employees may work in suburban Cook County, a Chicago-based employer should notify employees about how to contact the Commission to file a complaint under the County's Ordinance. *See* ESL Regulations, § 700.100.

A Chicago-based employer can achieve this by posting a separate notice of rights related to the County's Ordinance or can take the opportunity to draft a single notice that references both the County Ordinance and the City's Paid Sick Leave Ordinance.

Coverage in "Opt Out" Suburban Municipalities

Q4: Does the Ordinance apply to employers and employees working in "opt out" suburban municipalities?

A4: To the extent that an employee and employer are both located in a suburban municipality that has lawfully preempted the Ordinance, the employer has no earned sick leave obligations for the Commission to enforce. *See* ESL Regulations, §§ 310.100(C), 310.300(A), 320.100(B), 400.200(C).

There are some limited circumstances, however, in which an employer in a suburban municipality that has lawfully preempted the Ordinance may have obligations under the County Ordinance. For example, an employer in such a jurisdiction may send its

employees to another municipality or unincorporated area in Cook County where the County's Ordinance applies. Such employees could become covered by the Ordinance and entitled to accrue and use earned sick leave on the basis of this work outside of the "opt out" municipality. Such employees can seek enforcement of those rights by the Commission even though the employer is located in a suburban municipality that has otherwise lawfully preempted the Ordinance.

In addition, not every community that has purported to opt out of the Ordinance has lawfully preempted the Ordinance. For example, non-home rule municipalities may lack the authority to pass a sick leave ordinance that would preempt the County's Ordinance. The Commission urges employers who are relying on legislation from a suburban municipality to relieve them of any obligations under the Ordinance to consult with an attorney.

Suburban municipalities that have purported to opt out of the Ordinance are not required to notify the Commission of this decision. The Commission will instead rely on employers located in these municipalities to raise the existence of such legislation as an affirmative defense to any enforcement action by the Commission, as appropriate.

Use-or-Lose Carried Over Sick Leave

Q5: Can an employer require that an employee use time carried over from the prior accrual period by the end of the current accrual period or otherwise forfeit these carried over hours?

A5: No. An employer may not require that an employee forfeit accrued earned sick leave if it is not used other than by operation of the carryover rules described in ESL Regulations, § 400.600. Note that while the Ordinance does not have an explicit cap on the size an employee's earned sick leave bank, the most a Non-FMLA-Eligible employee can ever have available to her at any time is 60 hours (*i.e.* maximum carryover of 20 hours, plus 40 hours accrued in any given year). The most an FMLA-Eligible employee can ever have available to her at any time is 100 hours (*i.e.* maximum carryover of 60 hours, plus 40 hours accrued in any given year). Accrued earned sick leave that is unused and carried over from accrual period to accrual period will eventually bump up against these mathematical caps and be forfeit as a result of the operation of the Ordinance's exact procedure for carryover.

Available Accrued or Carried Over Sick Leave versus Maximum Use Per Accrual Period

Q6: If an employee has more than 40 hours of sick leave available to her because she has carried over accrued sick leave from a prior accrual period, can the employee use more than 40 hours of sick leave during the current accrual period?

A6: Generally not. The design of the Ordinance is that under some circumstances an employee may have more earned sick leave available to her than she can use during the current year. This generally occurs when an employee carries over a large amount of unused accrued sick leave from a prior accrual period and then does not use this leave

while continuing to accrue additional earned sick leave in the current accrual period. Unused (or unusable) sick leave is carried over to the next accrual period.

There are two possible exceptions to this. First, the Ordinance sets the maximum use per accrual period at 40 hours, but an employer is free to increase this maximum use cutoff to a higher number if it is concerned about employees banking more sick leave than they can use in a year. *See* ESL Regulations, §§ 500.300, 600.100(5). Second, there is one circumstance in which an employer must allow an employee to use more than 40 hours of sick leave in a single year. This situation involves an FMLA-Eligible employee who has conserved her sick leave in the prior accrual period and who then needs to use 40 hours of sick leave for an FMLA purpose. An employer must allow such an employee to be able to use an additional 20 hours of paid sick leave. Note that if an FMLA-Eligible employee needs to use less than 40 hours of sick leave for FMLA purposes, the maximum use per accrual period would remain 40 hours.

Occasional Employees: Using Earned Sick Leave

Q7: Many employers that require complete coverage, such as hospitals or daycare centers, use a pool of occasional employees to provide coverage when regular employees are unavailable due to, for example, illness. If these substitute or back-up employees have earned sick leave by virtue of prior work for the employer, can they use earned sick leave when they are called in to provide coverage – necessitating that the employer find coverage elsewhere and compensate both its regular employee and its occasional employee for a sick day?

A7: Occasional employees who meet the criteria for coverage set out in the Ordinance (*e.g.*, work for a Covered Employer for at least 80 hours in any 120-day period and work for the Covered Employer in Cook County for at least 2 hours in any 2-week period) are eligible to accrue and use earned sick leave like any other covered employee.

That said, whether an occasional employee can use sick leave to be compensated for an absence from work depends on whether the occasional employee was actually scheduled to work in the first place. An occasional employee who is on the employer's schedule (to provide coverage for another employee or otherwise) is entitled to compensation if she becomes ill and needs to use her accrued sick leave. An occasional employee who is not on the employer's schedule, however, cannot force the employer to compensate her when the employer offers to schedule her and the occasional employee indicates that she is too ill to accept.

Existing Employees: Use Waiting Period

Q8: Can an employer make employees who are already employed in Cook County on July 1, 2017 (and who begin to accrue sick leave immediately under the Ordinance) wait 180 days before they can use any of that accrued sick leave?

A8: The Ordinance gives employers the ability to establish a use waiting period of no more than 180 days from the start of the employee's employment. *See* ESL Regulations, § 500.200. That means that an employer can make a new employee hired after July 1, 2017

wait up to 6 months before she can use any of her accrued sick leave. It also means that if an existing employee was hired prior to January 2, 2017, she will be able to use any sick leave that she accrues under the Ordinance immediately after July 1, 2017, even if the employer has adopted a 180-day Use Waiting Period.

Using Earned Sick Leave Accrued in Cook County, Outside of Cook County

Q9: If an employee, who works for an employer in Cook County and has accrued sick leave under the Ordinance, is permanently transferred to a job site outside of Cook County by the same employer, can the employee continue to use sick leave and carryover unused sick leave from one accrual period to the next?

A9: Yes. Once an employee has accrued sick leave under the Ordinance, she can use that sick leave while working for the same employer anywhere, including outside of Cook County or within the borders of a municipality that has lawfully preempted the Ordinance. *See* ESL Regulations, § 310.300(C). If such an employee does not use her earned sick leave, her employer should allow unused earned sick leave to continue to rollover pursuant to the Ordinance's carryover rules (*i.e.* halve the unused bank of sick leave each year) even though the employee no longer accrues new sick leave on the basis of work outside of Cook County.

Collective Bargaining Agreements That Contain Sick Leave Provisions

Q10: If a collective bargaining agreement entered into prior to July 1, 2017 contains provisions that address paid sick leave, but does so in a manner that is less generous than the Ordinance, does the Ordinance apply to the employees covered by the collective bargaining agreement to bring them up to the statutory minimum?

A10: No. The Ordinance does not apply to employees whose employment relationship is governed by a *bona fide* collective bargaining agreement as of July 1, 2017, even if that agreement does not include paid sick leave provisions or provides paid sick leave benefits that are less generous than those established by the Ordinance.

When bargaining re-opens after July 1, 2017, the Ordinance will then apply to raise the contractual sick leave benefits up to the floor established by the Ordinance unless the parties to the collective bargaining explicitly include language opting out of the protections of the Ordinance into the collective bargaining agreement. *See* ESL Regulations, § 330.100.

Employer's Ability to Require Documentation

Q11: What documentation is an employer allowed to require from an employee when they use their earned sick leave benefits under the Ordinance?

A11: An employer may require the following documentation to verify that earned sick leave is being used for permissible purposes *only* when an employee is absent for *more* than three consecutive workdays:

- For time used in connection with an injury, illness or other health condition, an employer may require that an employee provide a note signed by a licensed health care provider; however, the employer may not require that such a note specify the nature of the employee's or his or her family member's injury, illness, or condition, except as required by law;

- For time used in connection with domestic or sexual violence, an employer may require that an employee provide a police report, court document, a signed statement from an attorney, a member of the clergy, or a victim services advocate, or any other evidence that supports the employee's claim, including a sworn declaration or affidavit from him or her or any other person who has knowledge of the circumstances; and

- For time used in connection with the federal Family and Medical Leave Act ("FMLA"), a Covered Employer may require a Covered Employee to provide the type of documentation that is required for leave under the FMLA.

An employer cannot delay the use of earned sick leave or delay the payment of wages due during an absence allotted by the Ordinance on the basis that the employer has not yet received required documentation. The Commission, however, will not protect an employee from discipline, including termination, for failure to provide requested documentation where the employer has given the employee a reasonable period of time to produce any requested documentation.

Although an employer cannot *require* documentation from an employee to prove that earned sick leave was used for a proper purpose for absences of three consecutive workdays or less, an employer may demonstrate that an employee has misused earned sick leave by referencing any other documentation obtained from any other source that is not the employee. Moreover, the Commission encourages employees to document the appropriateness of earned sick leave used. *See* ESL Regulations, § 500.700.

Equivalent Alternatives Not Mentioned in the ESL Regulations

Q12: Are the "equivalent alternatives" described in Rule 600.300 of the Commission's ESL Regulations, the only ways in which an employer can deviate from the accrual, carryover and use rules set out in the Ordinance without actually violating the Ordinance?

A12: During public rulemaking, the Commission was asked to opine on the permissibility of a number of specific alternative procedures for ensuring that covered employees received earned sick leave. These procedures are set out in Rule 600.300 of the Commission's ESL Regulations. But the Commission did not intend Rule 600.300 to be exclusive or exhaustive such that any other methodology is *per se* impermissible simply because it is not mentioned explicitly in that section.

Instead, it is the Commission's position that employers are free to adopt other alternative practices. The Commission will treat those alternative practices as permissible so long as

such an employer's employees are not worse off than they would be had the employer followed the accrual and carryover procedures exactly as those procedures are laid out in Ordinance.

For example, if an FMLA-Eligible Covered Employee can only use a maximum of 60 hours of Earned Sick Leave in a year, such an employee is not worse off than she would be under the exact procedures for accrual, carryover and use set out in the Ordinance if her employer provides 60 hours of earned sick leave at the start of each year that can be used for both FMLA and non-FMLA purposes. Such an employer could forgo, without violating the Ordinance, awarding employees additional paid leave based on the number of hours the employee works during the year, carryover of unused sick time at the end of the year and tracking of whether hours available to such an employee can be used for FMLA or non-FMLA purposes.

The Commission also suggests that if an employer is using an equivalent alternative practice to meet its obligations under the Ordinance, then the employer should explain this practice on the notice of rights and posting made available to its covered employees. Doing so in advance will reduce the likelihood of unnecessary litigation.

PTO Policies

Q13: May a Covered Employer meet its obligations under the Ordinance by providing Covered Employees with Paid Time Off ("PTO") that can be used for any purpose instead of creating a separate category of paid leave that can only be used when an employee is sick?

A13: Covered Employees may continue to use (or implement) PTO policies in lieu of dedicated sick leave. *See* ESL Regulations, § 600.300(D). Such employers should carefully review these policies, however, to ensure that employees receive a number of hours of PTO sufficient to meet the employer's obligations under the Ordinance and that the policy does not impose burdens on the use of an employee's PTO (at least when it is being used in lieu of sick leave) that are greater than those allowed under the Ordinance. For example, an employer may need to adjust its PTO policy to eliminate the requirement that an employee provide advanced notice of an unforeseeable leave, provide documentation of brief illness absences or find coverage when taking PTO in lieu of sick leave. *See* ESL Regulations, §§ 500.600, 500.700, 900.100.

Q14: Would an unlimited PTO policy be compliant with the Ordinance?

A14: An employer that allows employees to use an unlimited number of hours of PTO in a year would satisfy its obligation under the Ordinance to ensure that employees receive a sufficient number of hours of earned sick leave, but such an employer would still have to review that PTO policy to ensure that that the policy does not impose burdens on the use of an employee's PTO (at least when it is being used in lieu of sick leave) that are greater than those allowed under the Ordinance as described in the response above. In addition, the Commission would prosecute a violation of the Ordinance where an unlimited PTO

policy was unlimited in name only and the employer made it difficult for employees to actually take paid time off for the purposes described in the Ordinance.

Q15: If an employer frontloads 80 hours of PTO that can be used for both vacation and sick leave purposes during the year and the employee uses all 80 hours for vacation by mid-year and then falls ill, must the employer provide the employee with additional PTO?

A15: No. The Ordinance does not require an employer who has provided sufficient time that could be taken as sick leave with additional time if the employee does not conserve this time and instead uses it for some purpose other than sick leave.

No-Fault Attendance Policies

Q16: Can a no-fault attendance policy be made compliant with the Ordinance?

A16: The Commission would examine a no-fault attendance policy to determine whether an employee is worse off under the particular policy than she would be under the exact procedures for accrual, carry over and use under the Ordinance. Such a policy could be compliant if employees received pay and did not receive "points" when they took off time for being sick.

Like a PTO program, the employer would have to pay attention to both the number of full pay/no points days employees received under a modified no-fault attendance policy, but would also have to modify the policy to the extent that it imposed burdens on employees that are impermissible under the Ordinance, such as excessive advance notice of foreseeable absences, documentation of the reason for the absence and/or a requirement that an employee find coverage for herself when she was taking sick leave pursuant to the Ordinance.

Adjusting Benefit Years

Q17: Can an employer use the same standard 12-month accrual period for all of its employees (*e.g.*, all employees cycling through their Earned Sick Leave Accrual Periods on the same calendar year or a fiscal year)?

A17: The Commission recognizes that some employers may prefer to use (or to continue to use) the same standard accrual period for all its employees. Employers may do so without violating the Ordinance so long as their employees are not made worse off than they would be had the employer followed the exact procedures in the Ordinance that create an individualized 12-month accrual period for each individual employee. *See* ESL Regulations, § 600.300(E). This may require the employer to provide an individual employee greater benefits than the employee would otherwise be entitled to under the exact procedures of the Ordinance.

To illustrate, if an employer uses a standard benefit year of January 1 to December 31, a full-time employee who is hired on June 1, 2018 will be worse off on the employer's standard benefit year than she would be under the exact procedures in the Ordinance. That is because on December 31, 2018, she will have accrued 26 hours of sick leave

based on 1,040 hours of work. Under the Ordinance procedures, she would continue to accrue sick leave (up to 40 hours) until May 31, 2019, but if the employer ends her accrual period on December 31, 2018, she will only have 13 hours of earned sick leave on January 1, 2019. If the employee then fell ill for three days (*i.e.* 24 hours of leave) in January under the Ordinance procedures, she would have sufficient earned sick leave banked. Under the employer's standard year, she would not.

One solution (there may be others) to making the employee at least as well off on a standard benefit year as she is under the Ordinance's individualized accrual periods is to let the employee, in her first year of employment, carryover all of her unused sick leave from one benefit year to the next. Thus, in the example, above an employee who did not lose half of her unused earned sick leave on December 31, 2018 does not have a basis to complain about her employer's use of a calendar year to standardize all employees' earned sick leave accrual periods. In subsequent years of employment, the employee would carryover unused sick leave under the ordinary carryover rules (*e.g.*, halve the unused earned sick leave bank).

Q18: May an employer use an individualized 12-month accrual period for its existing employees, rather than use the Ordinance method of putting all existing employees on the effective date of the Ordinance on an accrual period that runs from July 1 to June 30?

A18: Yes. An employer may do so using the same standard and equivalent practices described in the response above.

<u>Cannot Trade Off Minimal Characteristics of Earned Sick Leave</u>

Q19: Is an employer who provides one hour of earned sick leave for every 45 hours worked (instead of every 40 hours) compliant with the Ordinance, if the employer also allows employees to accrue 45 hours of paid sick leave each year (instead of 40 hours)?

A19: The Commission's approach to alternative practices is to consider whether at any given time an employee is worse off under the procedures adopted by the employer than she would be under the exact procedures for accrual, carryover and use under the Ordinance. Here, an employee may be better off if the Commission only considers the employee's position at the end of the accrual period because the employer has adopted a higher annual accrual cap. But earlier in the year (*e.g.*, after the first week), the employee would be worse off because the employer is using a lower rate of accrual. As such, the Commission would find that this employer's alternative practice violates the Ordinance.

Generally speaking, an employer cannot trade off the minimal characteristics of earned sick leave under the Ordinance (*e.g.*, accrual rate, maximum use per accrual period, accrual cap, *etc.*) against each other. Whatever alternative practice an employer adopts must be at least as good as earned sick leave under the Ordinance in all ways that may be relevant to an employee at any given time.

[July 10, 2017]

Re-Hired Employees

Q20: If an employer re-hires a former employee, is that employer responsible for providing the employee with any hours of earned sick leave that the employee accrued during her previous stint with the employer, but did not use?

A20: No. An employer does not have any obligation under the County Ordinance to compensate a departing employee for unused accrued sick leave. *See* ESL Regulations, § 200.200.

In addition, if an employer re-hires an employee, the employer is not obligated to restore unused accrued sick leave to the employee from her first stint so that it is available to the employee for use in her second.

Note that the Commission does require that if an employer re-hires an employee *within 120 days* of that employee's date of separation from service, the employer cannot require that the re-hired employee re-establish her eligibility to accrue sick leave under the Ordinance or impose a new use waiting period on the employee. *See* ESL Regulations, § 310.400. The Commission will treat as a violation of the Ordinance any attempt by an employer to terminate and re-hire employees as a way of preventing employees from exercising their rights under the Ordinance.

Q21: If an employer typically frontloads earned sick leave benefits for the entire benefit year, must an employer re-frontload the entire complement of hours for the year if an employee quits and is then re-hired in the same benefit year?

A21: No. An employer who frontloads all sick leave benefits for employees at the start of each benefit year is not required to frontload a full year's worth of sick leave benefits for employees who are hired or re-hired in the middle of the benefit year. Instead, the employer can frontload fewer hours or have these employees earn sick leave on an accrual basis (accruing at least one hour of leave for every 40 hours worked in Cook County).

The Commission considers an employee who separates from service and is rehired by the same employer within 120 days to be continuing her original employment for the employer. *See* ESL Regulations, § 310.400. As such, an employer is not required to allow an employee re-hired within 120 days of separation from service in the same accrual period to use additional sick leave in her second stint if she already used the maximum amount of sick leave for the accrual period during her initial employment. *See* ESL Regulations, § 500.300.

Similarly, an employer is not required to allow an employee re-hired within 120 days of separation from service in the same accrual period to accrue additional sick leave if she already accrued the maximum amount of sick leave for the accrual period during her first stint. *See* ESL Regulations, § 400.500.

Again, the Commission may take a different approach in any particular case if there is evidence that the employer separated the employee from service as a way of preventing the employee from exercising her rights under the Ordinance.

Fractional Accrual of Earned Sick Leave

Q22: Can an employee who has only worked 39 hours in a week require her employer to award her 0.975 hours of earned sick leave?

A22: No. The Ordinance does not require an employer to award sick leave to an employee in less than whole hour increments. *See* ESL Regulations, § 400.200(E). An employee who worked 39 hours in a week would not be entitled to any sick leave until she worked at least one additional hour for her employer in Cook County.

Covered Employees

Q23: Is an employee covered by the Ordinance when she works for her employer in Cook County for at least 2 hours during any two-week period or when she works for her employer anywhere for at least 80 hours in any 120-day period?

A23: An employee is covered by the Ordinance for the purpose of being able to accrue sick leave after working for her employer in Cook County for at least 2 hours during any two-week period. *See* ESL Regulations, § 310.100. But such an employee cannot use any of the sick leave she accrues by virtue of being covered by the Ordinance unless she has also worked for her employer for at least 80 hours during any 120-day period. *See* ESL Regulations, § 310.300(B).

Annual Use of Earned Sick Leave Hours

Q24: Under the Ordinance, what is the maximum number of hours of earned sick leave an employee can use during a single year?

A24: Employers can set the maximum number of hours of earned sick leave that their employees can use each year so long as the employer sets that number higher than the floor established for annual use by the Ordinance. *See* ESL Regulations, § 600.100. The floor is 40 hours per year for non-FMLA-eligible employees. *See* ESL Regulations, § 500.300(A)-(B).

The floor is the same for FMLA-eligible employees, except in one circumstance. That one circumstance is that if an FMLA-eligible employee carried over 40 hours of unused FMLA-Restricted Earned Sick Leave from the previous accrual period and used all 40 hours of FMLA-Restricted Earned Sick Leave in the current accrual period, then the Ordinance requires that an employer let that employee use up to an additional 20 hours of sick leave in the current accrual period. *See* ESL Regulations, § 500.300(C).

To illustrate this exception to the typical 40-hour annual use cap: (1) if an FMLA-eligible employee uses 35 hours of FMLA-Restricted Earned Sick Leave, she can only use an additional 5 hours of Ordinance-Restricted Earned Sick Leave in the same year;

(2) if an FMLA-eligible employee uses 35 hours of FMLA-Restricted Earned Sick Leave and then uses an additional 5 hours of FMLA-Restricted Earned Sick Leave, she can then use up to 20 hours of additional Ordinance-Restricted Earned Sick Leave in the same year, if she has it to use.

An employee is unlikely to know in advance how much sick leave she will use in a year and may take Ordinance-Restricted Sick Leave before taking FMLA-Restricted Sick Leave. Once an FMLA-eligible employee uses more than 20 hours of Ordinance-Restricted Sick Leave in a year, her maximum annual use will be capped under the Ordinance at 40 hours (unless the employer chooses to be more generous than the Ordinance). So long as an FMLA-eligible employee has not yet used 20 hours of Ordinance-Restricted Sick Leave in a year, an employer should let an FMLA-eligible employee who has carried over 40 hours of unused FMLA-Restricted Sick Leave from the previous accrual period use up to 40 hours of this time in the current year (in addition to any Ordinance-Restricted Sick Leave already used).

[September 28, 2017]

Employees Exempt from Coverage Under the Cook County Minimum Wage Ordinance

Q25: Are all employees who are exempt from coverage under the Cook County Minimum Wage Ordinance also exempt from coverage under the Cook County Earned Sick Leave Ordinance?

A25: No. There are a number of employees (*e.g.*, employees under the age of 18, employees in their first 90 days of employment, persons employed as members of a religious organization) who are exempt from coverage under the Cook County Minimum Wage Ordinance, but remain eligible for coverage under the Cook County Earned Sick Leave Ordinance. *Compare* ESL Regulations, § 310.100(D) *with* MW Rule 3.05.

Babysitters and Childcare Providers

Q26: Would an occasional babysitter be covered as an employee under the Ordinance or exempt as an independent contractor?

A26: Independent contractors are not covered by the Ordinance, but whether someone is an employee or independent contractor depends on the application of a multi-factor, fact-intensive legal test. The primary consideration is whether the would-be employer has the right to control and supervise the work, not just as to the end result, but as to the means and manner of achieving that result. In most cases where a parent explicitly or implicitly maintains the right to provide detailed instructions for childcare to the babysitter (*e.g.*, when the sitter will put the children to bed, what the children can and cannot eat, what activities the children are and are not allowed to participate in), the babysitter would be considered an employee. In order to be eligible to accrue and use Earned Sick Leave benefits under the Ordinance, such an employee would have to meet the other criteria for coverage set out in ESL Regulations, §§ 310.100, 400.100, 500.200.

Interns

Q27: Are interns considered employees for the purpose of coverage by the Ordinance?

A27: In making the determination of whether an intern is an employee for the purpose of the Ordinance, the Commission would follow the guidance set out by the U.S. Department of Labor for determining whether interns are entitled to the federal minimum wage. The U.S. Department of Labor considers all facts and circumstances in making this determination, but focuses particularly on six criteria:

1. Whether the internship is similar to training which would be given in an educational environment;

2. Whether the internship experience is primarily for the benefit of the intern or the employer;

3. Whether the intern displaced regular employees or worked under the close supervision of existing staff;

4. Whether the employer derived an immediate advantage from the activities of the intern or, on occasion, the employer's operations may have actually been impeded by the intern;

5. Whether the intern is entitled to a job at the conclusion of the internship; and

6. Whether the employer and the intern understood that the intern was not entitled to wages or other employee benefits for the time spent in the internship.

The federal government views the intern exception to be relatively narrow. Additional information about the federal approach can be found on the U.S. Department of Labor website: https://www.dol.gov/whd/regs/compliance/whdfs71.htm.

Telecommuting

Q28: Would an employee's home office count as his or her employer's place of business for the purpose of determining eligibility and accrual of Earned Sick Leave if the employee works from home for an out-of-state employer?

A28: The location from which an employee is telecommuting can be considered an employer's place of business if the employer requires the employee to telecommute from that location. *See* ESL Regulations, § 320.100(A). The Commission draws a distinction between circumstances when an employer without another physical place of business in Cook County *requires* an employee to telecommute from Cook County and circumstances when such an employer *permits* an employee to telecommute from Cook County. In the latter case, being in Cook County may be a benefit to the employee and

the employer may not even be aware of the employee's location. In the former case, however, the employer is purposefully availing itself of Cook County in the same manner as employers who have opened physical locations in the County.

Temporary Workers and Staffing Firms

Q29: Do temporary workers keep accruing earned sick leave hours when they go from assignment to assignment or do they start over each time they are assigned to new job location or company? What if a temporary worker is employed by a staffing firm located in a municipality that has lawfully preempted the Ordinance but is assigned to a job location or company in a municipality that has not lawfully preempted the Ordinance? Or vice versa?

A29: The answer depends on who employs the temporary workers. There are two likely scenarios: one is that a temporary worker works for a temporary staffing firm and is assigned out to various job sites but remains an employee of the temporary staffing firm as she moves from assignment to assignment; the other is that the temporary worker works directly as an employee of the employer on the job site and changes employers as she changes job sites. In the former case, the temporary employee is likely to be with one employer long enough to receive Earned Sick Leave benefits. *See* ESL Regulations, § 320.200. In the latter case, she might not. Under the Ordinance, employers can adopt a written rule that employees have to wait up to 180 days after the start of their employment before they can use accrued sick leave. If the temporary worker works directly for employers who have this rule and never holds a job longer than six months, then it is likely that even if the employee is accruing sick leave, she will not, as a practical matter, ever be able to use it.

As to the location of the temporary staffing firm, under the Commission's interpretative regulations, the location of *an employer* in a municipality that has lawfully pre-empted the Ordinance is irrelevant. What matters is whether *the employee* is working in a municipality that has lawfully pre-empted the Ordinance. So as long as the temporary staffing company has a facility anywhere in Cook County, its employee-temporary workers will accrue sick leave when they are working in parts of the County where the Ordinance is in effect and they will not when they are working in parts of the County where a municipality has lawfully preempted the County Ordinance.

In addition to the possibilities of a temporary worker being an employee of the temporary staffing agency or the on-premises employer, there is a third possibility: the temporary staffing agency and the on-premises employer may be joint employers. Whether that is the case is a fact-intensive inquiry that depends on the degree of control both potential employers exercise over the employee. If both employers are joint employers then both the temporary staffing agency and the on-premises employer are responsible for meeting the duties of a covered employer under the Ordinance with respect to the temporary worker. *See* ESL Regulations, § 320.300.

School Closures Due to Inclement Weather

Q30: Would a school closure due to bad weather be considered a "public health emergency" within the scope of the scope of the Ordinance's list of permissible uses of Earned Sick Leave?

A30: Section 42-3(c) of the Ordinance states that an employee may use Earned Sick Leave when she or a member of her family "is ill or injured, or for the purpose of receiving medical care, treatment, diagnosis or preventative medical care;" when she or a member of her family "is the victim of domestic violence . . . or is the victim of sexual violence or stalking;" and when "her place of place of business is closed by order of a public official due to a public health emergency" or when she "needs to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency." The Ordinance defines a "public health emergency" as "an event that is defined as such by a Federal, State or Local government, including a school district."

Typically, the closure of a school for a "snow day" would not qualify as a "public health emergency." The Illinois Emergency Management Act, for example, limits the definition of a "public health emergency" to bioterrorism, "the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin," a chemical attack or accidental release, a nuclear attack or accident, or a natural disaster. 20 ILCS 3305/4. The Commission, however, will defer to the characterization of the public official who orders the school closure. If, in the estimation of the government represented by that public official, the school is being closed for a "public health emergency," the Commission will treat the event as such for the purpose of enforcing the Ordinance.

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Minimum Increments of Usage

Q31: If an employer has set the minimum increment for using Earned Sick Leave at 4 hours and an employee works an 8-hour shift each day from 8:00 a.m. to 4:00 p.m., what can the employer do that is compliant with the Ordinance if the employee needs to go home sick at 2:00 p.m.?

A31: The Ordinance allows an employer to establish the minimum increment in which Earned Sick Leave can be used, provided that the minimum increment is no greater than four hours, even if this minimum requirement requires a Covered Employee to sometimes use more Earned Sick Leave at a time than he or she would otherwise prefer. *See* ESL Regulation 500.400. In this example, the employer has at least two options if the employer does not wish to simply waive its 4-hour minimum increment requirement and allow the employee to use just the amount of Earned Sick Leave necessary to cover the remainder of her shift from 2:00 p.m. to 4:00 p.m. The employer could, for example, pay the employee for the 6 hours that she worked and then pay her for the additional 4 hours of Earned Sick Leave used (*i.e.* for 10 total hours on the day of the absence). Alternatively, the employer could pay the employee for the 6 hours that she worked and for the 2 hours of Earned Sick Leave used on the day of the absence, provided that the

employer excused the employee from, and paid the employee for, the first two hours of her next shift (*i.e.* for a 8 total hours on the day of the absence and 2 hours of Earned Sick Leave on the day of the employee's next shift). In other words, if the employee in the example went home sick at 2:00 p.m., she would not be expected to return until 10:00 a.m. the next day.