LEAVE AND DISABILITY REGULATORY COMPLIANCE

Summary of legislative and regulatory changes

Private employer sector | November 2023

© 2023 Sedgwick

TABLE OF CONTENTS

The information contained in this publication is prepared for Sedgwick by Jeff Nowak and his colleagues at Littler Mendelson, P.C. The summaries contained in this publication are for informational purposes only, not for the purpose of establishing an attorney-client relationship. Use of and access to this publication does not create an attorney-client relationship between Littler Mendelson, P.C., and the user.

Illinois: Chicago

Ordinance No. O2023-2980 (paid sick leave)

Enacted Nov. 9, 2023

Effective Jul. 1, 2024

Informational only – Sedgwick does not administer

Chicago has enacted a new paid leave ordinance that replaces its existing paid sick leave ordinance. Like the existing ordinance, employees will still be able to accrue up to 40 hours of paid sick leave per 12-month period. However, the new ordinance includes several important changes, including the introduction of 40 hours of annual paid leave accrual that may be used for any reason, which is in addition to the 40 hours of paid sick leave accrual. **The new ordinance** applies to all employers and covers employees who perform at least two hours of work in any two-week period while physically present in Chicago.

Beginning Jan. 1, 2024, employees will accrue one hour of paid sick leave and one hour of paid leave for every 35 hours worked and will accrue this time in whole-hour increments. Under the ordinance, exempt employees are presumed to work 40 hours per workweek, though an exempt employee with a regular workweek of less than 40 hours will accrue based on that regular workweek. Employees may accrue up to 40 hours of each type of leave in a 12-month accrual period and may carry over up to 80 hours of paid sick leave and up to 16 hours of paid leave into the next accrual period. If an employee is transferred to a separate division, entity or location but remains employed by the same employer, they remain entitled to their previously accrued leave and to the leave they accrue at their new workplace.

Employers may opt to frontload their employees with the full 40 hours of paid sick leave and 40 hours of paid leave on the first day of the accrual period. If an employer chooses this frontloading method, unused paid leave will not carry over from one 12-month period into the next and can be forfeited unless the employee is denied meaningful access to this paid time off. Importantly, frontloading this time off does not eliminate the employer's obligation to carry over up to 80 hours of unused paid sick leave from one 12-month period to the next.

Employees may use paid sick leave after 30 days of employment and paid leave after 90 days of employment. Employees must receive their regular rate of pay when using either form of paid leave under the ordinance. These wages do not include overtime or premium pay, tips or commissions, but an employee's rate must remain above the applicable minimum wage. Nonexempt employees' rate of pay can be calculated by dividing total wages by total hours worked in full pay periods or in the prior 90 days. Employees may choose to use paid sick leave or paid leave before using any other leave available to them.

Employers may set a "reasonable minimum increment" for using paid time off under the ordinance. This increment may not exceed two hours for paid sick leave and may not exceed four hours for paid leave. If employees work in shifts shorter than the employer's minimum increment, their minimum increment will be the length of their scheduled shift.

Paid leave may be used for any reason. Paid sick leave may be used for the same reasons available to employees under the city's prior ordinance. These include: (1) the employee is ill, injured or receiving professional care, including preventative care, diagnosis or treatment for medical, mental or behavioral issues, including substance use disorders; (2) the employee's family member is ill, injured or ordered to quarantine or the employee is caring for a family member receiving professional care; (3) the employee or family member is the victim of domestic violence, a sex offense or trafficking; (4) the employee's place of business or a family member's school, class or place of care is closed by order of a public official due to a public health emergency; (5) an order issued by the mayor, the governor of Illinois, the Chicago Department of Public Health or a treating health care provider, requires the employee to (a) stay at home to minimize transmission of a communicable disease, (b) remain at home while experiencing symptoms or sick with a communicable disease or (c) obey a quarantine order or isolation order.

Under the ordinance, employers may require up to seven days of notice for foreseeable leave or notice as soon as is practicable for unforeseeable paid sick leave. This notice requirement is waived if the employee is unconscious or medically incapacitated. Employers may not require documentation for use of paid leave. Documentation may be required for more than three consecutive workdays of paid sick leave. Reasonable documentation may include statements signed by a licensed health care provider, a police report, a court document, a signed statement from an attorney, clergy or victim services advocate or any other evidence, including a written statement from the employee. Employers may not require more than one document per incident or perpetrator of violence, and employers may not delay wages or use of paid sick leave because they have not received certification.

Employers with existing policies that grant paid leave or paid sick leave in accordance or excess of the ordinance's requirements are not required to provide additional paid leave. However, these existing policies must be modified to comply with all other aspects of the ordinance. If an employer's current policy does not comply with the new ordinance, any paid sick leave employees are entitled to roll over must be transferred to paid sick leave under the ordinance.

Employers with so-called "unlimited paid time off" policies, or those that provide unlimited paid time off beginning on the first day of employment, do not have to track any carryover time under the ordinance and may not require preapproval for this paid time off. These employers must pay employees the monetary equivalent of 40 hours of paid time off minus the hours of paid time off used by the employee in the prior 12-month accrual period if they are terminated, resign, retire, or are transferred outside of the city, unless otherwise provided in a CBA. Employees who used more than 40 hours of paid time off in the accrual period prior to their separation do not owe their employer compensation.

Upon an employee's termination, resignation, retirement, other separation, or transfer outside of the city, employers are required to pay out the monetary equivalent of all unused accrued paid leave at the following thresholds: (1) employers with 1-50 employees in Chicago will not be required to pay out unused paid leave; (2)

employers with 51-100 employees in Chicago will be required to pay out up to 16 hours of Paid Leave through Dec. 31, 2024, and required to pay out all unused paid leave beginning Jan. 1, 2025; or (3) employers with 100 or more employees in Chicago must pay out all unused paid leave.

If an employee has not been offered a work assignment for 60 days or more, the employer must notify the employee in writing that they are entitled to request a payout of their accrued paid leave. Importantly, employers are not required to pay out an employee's unused paid sick leave upon the end of their employment.

The ordinance requires employers to post a notice by the Department of Business Affairs and Consumer Protection in a conspicuous place at each of their Chicago facilities. This must be provided in English and in other languages if a significant portion of employees do not speak English. Employers must provide employees with a notice of their rights under the ordinance with their first paycheck and annually thereafter with a paycheck issued within 30 days of July 1. With each wage payment, employers must provide employees with written notification of their amounts of leave available for use, accrual rates for each and amount of each leave accrued and used since the last wage payment.

Employers must provide employees with written notification of their paid time off policy, including accrual rates and notification requirements at the start of employment. Any changes to this policy must be provided at least five days before their effective date and at least 14 days before if the change will affect an employee's compensation. Employers must retain all records including employee names, addresses, hours worked, pay rates, wage agreements, number of paid leave and paid sick leave hours accrued each year, dates on which this leave was used and paid and any other related records. These must be kept for five years or the duration of any claim or action under the ordinance, whichever is longer. Employers must provide employees with a copy of these records upon request.

Employers cannot use a policy that allows use of paid time off as an absence triggering any adverse employment action and cannot require employees to seek or find a replacement worker to cover hours during which they will be taking Paid Leave or Paid Sick Leave.

The department will administer and enforce the ordinance. The department may fine violating employers between $1,000 and $3,000 for each offense as well as $500 for first notice violations and $1,000 for subsequent notice violations. Each day a violation continues is a separate offense. Additionally, the ordinance includes a private right of action. Employers that violate the ordinance are liable to affected employees for damages, including three times the amount of leave denied or lost, interest, and attorneys' fees. This right of action for paid sick leave violations is available Dec. 31 and the right of action for paid leave violations is available Jan. 1, 2025.

Illinois: Cook County

Ordinance No. 23-5468 (paid leave ordinance)

Passed by Council Nov. 16, 2023

If enacted, effective Jan. 1, 2024

Informational only – Sedgwick does not administer

The Cook County Council has passed an amended ordinance that, if enacted, would repeal the county's paid sick and safe leave ordinance and allow an employee to accrue up to 40 hours of paid leave per 12-month period to be used for any purpose of the employee's choosing. **The proposed ordinance** would cover any employee in Cook County, eliminating the two-hour minimum contained in the current ordinance.

If enacted, among other provisions, employees could begin using paid leave 90 days from the date of employment or from the effective date of the proposed ordinance, whichever is later (rather than 180 days as specified in the current ordinance). No documentation or certification supporting the use of paid leave would be required by the proposed ordinance, though foreseeable leave would still require seven days of notice and unforeseeable leaves would require notice to the employer as soon as practicable. Employees would be allowed to use paid leave before using any other leave provided by the employer or state law. The proposed ordinance eliminates references to leave that may be available to an employee under the Family and Medical Leave Act as contained in the current ordinance.

If enacted, among other provisions, employers would be allowed to designate the 12-month period for accrual of paid leave, with certain requirements if the 12-month period is changed. Employers would be allowed to frontload the minimum allowable paid leave hours, and, if they do so, employers could require employees to use all paid leave within the benefit period or forfeit the unused balance. The proposed ordinance would require employers using the accrual method to allow employees to carryover unused paid leave to the next 12-month period; however, employers would not be required to provide more than 40 hours of paid leave unless the employer agrees to do so. The proposed ordinance also specifies how unused leave would be treated when employment ends or in the event an employee is transferred or rehired.

If enacted, the proposed ordinance would require employers to maintain records of hours worked, paid leave accrued and taken, and remaining paid leave balance for each employee for a minimum of three years or the duration of any pending claim. In addition, employers would be required to post in a conspicuous place and include in any written document or employee manual or policy a notice that would be prepared by the Cook County Commission on Human Rights.

New York: New York City

Int. No 0818-2022 (temporary schedule change act amendment)

Enacted Nov. 5, 2023

Effective Mar. 4, 2024

Informational only – Sedgwick does not administer

New York City has amended its Temporary Schedule Change Act. Under the act, employees have the right to temporary changes to their work schedule for certain qualifying personal events.

Under **the amendment**, the New York City Department of Consumer and Worker Protection will create written and electronic materials containing information about the act's provisions. The amendment requires employers to distribute these department-published materials to their employees in both electronic and print format. The department's materials will be made available in English and the top six limited English proficiency languages spoken by the population of the city.

North Carolina

HB 600 (Civil Air Patrol leave)

Enacted Oct. 10, 2023

Effective Dec. 1, 2023

Informational only – Sedgwick does not administer

North Carolina has enacted a law creating protections for employees who are members of the North Carolina Wing-Civil Air Patrol (Civil Air Patrol) who must be absent from work to perform their official duties. Specifically, **the new law** provides that an employer cannot discriminate against, discharge, demote or otherwise take an adverse employment action against any employee that is a member of the Civil Air Patrol because of that membership or due to any authorized absence required to perform the official duties associated with membership in the Civil Air Patrol. Because this is an anti-retaliation law and not a leave of absence, Sedgwick will not be administering this law.

An absence for Civil Air Patrol is considered an authorized absence if all of the following requirements are met: (1) the absence is necessary to perform duties related to a state-approved mission pursuant to state law or a mission authorized by the United States Air Force; (2) the absence is for no more than seven consecutive scheduled working days for that employee; and (3) the total absences in a calendar year do not exceed more than 14 scheduled working days for that employee.

If an employee seeks leave for an authorized absence due to their membership in the Civil Air Patrol, the employer can require the employee to provide a copy of the employee's mission order to verify that the absence is for a permissible purpose. The new law explicitly states that it does not require an employer to pay salary or wages to members of the Civil Air Patrol during an authorized absence, except when the employee chooses to use any paid leave that may be available to them through their employment.

Puerto Rico

PC 1651 (PC 1244, 3) (vacation and sick leave benefits calculations)

Passed House; Passed Senate Nov. 9, 2023

If enacted, effective 30 days after becoming a law.

Informational only – Sedgwick does not administer

If enacted, this amendment to Puerto Rico's law would restore the formula for calculating the accrual of vacation and sick leave for part-time and full-time employees.

If enacted, for employers with 12 or more employees, part-time employees (working more than 20 and or fewer than 115 hours per month) would accrue vacation leave and sick leave at a rate of one-half day per month for each type of leave. Full-time employees (working 115 hours or more) would accrue vacation leave at a rate of one and one-quarter days per month, and a minimum of one day per month for sick leave.

If enacted, for employers with fewer than 12 employees, part-time employees would accrue one-quarter of a day per month for vacation leave and one-half day per month for sick leave. For full-time employees, the minimum accrual of vacation leave would be one-half day per month and a minimum of one day per month for sick leave.

Washington

WAC 192-500-035 (final rule re paid FMLA and interested parties)

Adopted Nov. 14, 2023

Effective Jan. 1, 2024

Washington regulations provide that in all paid family and medical leave determinations related to an approved voluntary plan, the following interested parties are included: (1) the employer or former employer and (2) an employee or former employee. **The amended rule** includes an employer from whom leave is being taken as an interested party.

Washington

WAC 192-510-090 (final rule re paid FMLA and premium rate calculation)

Adopted Nov. 14, 2023

Effective Jan. 1, 2024

The State of Washington has amended its rules pertaining to the way the Employment Security Department will determine the premium rate for each calendar year with respect to paid family and medical leave insurance. For calendar years 2021, 2022 and 2023, the total premium rate was based on the family and medical leave insurance account balance ratio as of Sept. 30 of the previous year.

The amended rule provides the way the premium rates will be determined after 2023. For calendar years 2024 and beyond, the total premium rate will be based on the amount of each individual employee's wages, up to a maximum limit on the amount of wages subject to a premium assessment. The maximum limit on wages subject to the premium is equal to the maximum wages subject to taxation for social security as determined by the Social Security Administration.

The amended rule also specifies that, for purposes of the calculation to determine the premium rate for 2024 and beyond, a small business grant paid to an employer under Washington law will be considered a benefit paid. These small business grants are available to employers with 150 or fewer employees and employers with 50 or fewer employees who are assessed all premiums under the paid family and medical leave program. While employers with 50 or fewer employees are not required to pay the employer portion of the premiums for paid family and medical leave, those who elect to do so are eligible for assistance through a small business grant.

Washington

WAC 296-128 (final rules re paid sick leave)

Adopted Nov. 30, 2023

Effective Jan. 1, 2024

Informational only – Sedgwick does not administer

Washington has amended its rules relating to paid sick leave usage and payment calculation, recordkeeping and paid time off (PTO) programs. In addition, **the amended rules** provide specific direction on how paid sick leave applies to construction workers and construction workers covered by a collective bargaining agreement (CBA).

Washington law defines the purposes for which an employee may use paid sick leave. The amended rules clarify that an employee has the right to choose whether to use paid sick leave for a qualified purpose and the employer may not require the employee to use accrued, unused paid sick leave if the employee does not request to use paid sick leave to cover an absence.

The rules provide examples of reasonable payment calculations for various employees, including where an employee works a shift that is defined by business needs, rather than a specific number of hours. In that case, the rate of pay is determined by multiplying the employee's normal hourly compensation by the total hours worked by a replacement employee or a similarly situated employee who worked the same or similar shift. The amended rules clarify that where there is no replacement or similarly situated employee, the employer may use the average number of hours that the employee using paid sick leave typically works during a similar shift.

The amended rules define a PTO program as a program that combines more than one type of leave — including all paid sick leave — into one bank of leave (i.e., a program that combines vacation leave, or other discretionary forms of leave, and paid sick leave into one bank). A state-law compliant PTO program must meet several requirements, including under the amended rules, payment for PTO leave at a rate of either the minimum wage established by the state or the employee's normal hourly rate, whichever is greater; notification to the employee that the employer intends to use the program to satisfy the state requirements.

The amended rules add that an employer may include more generous PTO leave that will not be subject to the state requirements in the same bank as the state-law compliant leave, but only if: (1) the compliant sick leave meets all the state law requirements independently of the more generous leave; (2) the compliant leave is tracked separately; and (3) the employee is not required, and there is no policy encouraging the employee, to use their protected state-compliant leave for more generous purposes before accessing the more generous PTO leave for more generous purposes.

The amended rules specify that if an employer allows an employee to go into a negative balance in their paid sick leave bank (i.e., where paid sick leave has not accrued and the employer allows its use), the employer will be deemed to be frontloading paid sick leave to the employee and the rules related to frontloading paid sick leave will apply.

The rules require employers to keep and preserve certain information regarding employees entitled to paid sick leave. The amended rules add a requirement to track and maintain the dates of separation from employment for each employee.

The amended rules include within the definition of employee both construction workers and construction workers subject to a CBA (each is separately defined within the amended rules). Thus, the above rules apply to these workers, unless a more specific provision applies. Specific provisions within the amended rules include: (1) requirements when paid sick leave is paid out to construction workers upon separation from employment, including rules relating to rehire of construction workers; (2) requirements for paid sick leave payments to construction workers covered by a CBA before 90 days of employment; and (3) requirements for reinstatement and use of sick leave hours upon rehire for construction workers covered by CBA.

The Information contained within this document is intended to provide summary level information on proposed or enacted laws related to family and medical leave. It is not intended to provide guidance on the application of these legal requirements or as an update to your Company's attendance and/or leave policies. We recommend you consult with Legal Counsel to determine what changes, if any, should be applied to Company Policy.

800.625.6588
Sedgwick@sedgwick.com
SEDGWICK.COM

© 2023 Sedgwick