Employment Law

Highlights From 2017 And Beyond

Presented By:
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September 27, 2017

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ARONBERG GOLDGEHN

Employment Law Highlights From 2017 and Beyond

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MEMBER

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Appellate Litigation
Business Litigation
Labor and Employment

EDUCATION

IIT CHICAGO-KENT COLLEGE OF LAW, J.D., 2007
DEPAUL UNIVERSITY, B.S., FINANCE, *WITH HONORS*, 2004

ADMISSIONS

ILLINOIS
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, TRIAL BAR
U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS
U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ACKNOWLEDGEMENTS

INCLUDED IN THE MOST INFLUENTIAL WOMEN LAWYERS IN CHICAGO LIST PUBLISHED BY CRAIN'S (2017)
RECOGNIZED AS AN EMERGING LAWYER IN COMMERCIAL LITIGATION BY ILLINOIS LEADING LAWYERS (2015, 2016, 2017)
NAMED A RISING STAR IN BUSINESS LITIGATION BY ILLINOIS SUPER LAWYERS (2010-2017)
CALI AWARD FOR TRIAL ADVOCACY (2007)
CALI AWARD FOR LEGAL WRITING (2006)

MEMBERSHIPS

AMERICAN BAR ASSOCIATION
CHICAGO BAR ASSOCIATION
ILLINOIS STATE BAR ASSOCIATION

Amy is Co-Chair of Aronberg Goldgehn's Commercial Litigation Practice Group. She focuses her practice on complex commercial litigation, including claims involving shareholder disputes, fraud, consumer fraud, breach of contract, and real estate.

She also defends local and national employers in litigation and administrative proceedings involving claims by employees for discrimination, retaliation, violation of state and federal wage and hour laws, and worker misclassification. Amy's employment practice encompasses assisting businesses with the protection of their assets and trade secrets by pursuing claims against former employees for breach of fiduciary duty, misappropriation of trade secrets, and breach of non-competition agreements. Amy counsels employers on a wide-range of employment matters, such as employment policies, compliance with state and federal employment laws, internal investigations, terminations, and classification of independent contractors/employees.

Amy has been instrumental in the firm's growth of its labor and employment practice. She makes it a priority to stay current on changes in the law, emerging trends in the employment context, and how those changes and trends impact her clients.

Amy represents a broad range of clients, including restaurants, banks, national non-profit organizations, closely-held businesses, physicians and medical groups, general contractors, energy companies, manufacturers, distributors, real estate developers and retailers.

SPEECHES AND PUBLICATIONS

Recently Amy presented on the Cook County Earned Sick Leave Ordinance and Chicago Paid Sick Leave Ordinance, and completed a thorough guide to both.

- Speaker, "The Cure to All of Your Paid Sick Leave Ordinance Aches and Pains," at a Chicago Chapter of the Association of Legal Administrators seminar, August 1, 2017.
- Author, "Is Your Business Prepared to Comply with the Cook County and City of Chicago Paid Sick Leave Ordinances That Become Effective July 1, 2017?", June 8, 2017.

She also represented the firm at an event hosted by the Association of Corporate Counsel in 2012 at which time she spoke on a panel discussing the differences between arbitration and litigation. Amy co-authored the white paper for that event titled "Arbitration v. Litigation: A True Hobson's Choice."

In addition, Amy has been invited on several occasions to be a guest lecturer at Chicago-Kent College of law to discuss the topics of attorney billing and discovery in the Illinois court system.

PROFESSIONAL BACKGROUND

Amy joined Aronberg Goldgehn as a law clerk in 2006 and, upon graduation from law school, as an associate in 2007. She became a Member/Partner in the firm in January 2015.

In July 2017 she was listed in *Crain's Custom Media's* inaugural edition of The Most Influential Women Lawyers in Chicago.

From 2015-2017, Amy has been recognized annually as an Emerging Lawyer in Commercial Litigation by Illinois Leading Lawyers, and for 2010 through 2017 as a Rising Star in Business Litigation by Illinois Super Lawyers.

Amy is well traveled, having been to Greece, Israel, Italy, Spain, Argentina, Chile, Australia, Croatia and the Czech Republic, among other places. In her free time, she enjoys spending time with family (including her husband and young daughter), working out, snow skiing, ice skating, and hiking. She is also a self-described 'foodie' and enjoys trying new restaurants, cooking and baking.

COMMUNITY INVOLVEMENT

- Chicago-Kent College of Law (Student Mentor)

LEADERSHIP ROLES

- Co-Chair, Commercial Litigation Group

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Appellate Litigation
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EDUCATION

THE JOHN MARSHALL LAW SCHOOL, MASTER OF LAWS IN TAXATION, *CUM LAUDE*, 1983
DEPAUL UNIVERSITY COLLEGE OF LAW, J.D., *CUM LAUDE*, 1977
NORTHWESTERN UNIVERSITY, B.A., 1974

ADMISSIONS

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U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT
UNITED STATES TAX COURT

ACKNOWLEDGEMENTS

HOLDS THE AV PEER REVIEW RATING FROM MARTINDALE-HUBBELL, ITS HIGHEST RATING FOR ETHICS AND LEGAL ABILITY
RECOGNIZED AS AN ILLINOIS LEADING LAWYER IN COMMERCIAL LITIGATION (SINCE 2010)
NAMED A SUPER LAWYER IN BUSINESS LITIGATION BY ILLINOIS SUPER LAWYERS (2005)

MEMBERSHIPS

DECALOGUE SOCIETY OF LAWYERS
ILLINOIS STATE BAR ASSOCIATION

Nathan H. Lichtenstein is Co-Chair of the firm's Commercial Litigation Group. He focuses his practice on complex commercial litigation, including Uniform Commercial Code matters, breach of contract claims, fraud and consumer fraud actions, trademark and copyright infringement cases, shareholder derivative suits, federal tax litigation, employment matters and unfair competition claims.

He has extensive experience in banking, insurance, real estate, employment, viaticals and life settlements, as well as corporate matters.

In the course of his practice, Nate has represented a broad range of business and commercial clients, including financial institutions, title insurance companies, advertising agencies, viatical and life settlement providers and brokers, and companies in the manufacturing and service industries. He has tried cases throughout the United States in state and federal courts, has argued cases before state and federal appellate courts, and has represented numerous clients in domestic and international arbitration hearings.

REPRESENTATIVE MATTERS

- Successfully defending a former corporate officer in an emergency injunction hearing involving non-solicitation and trade secret issues
- Obtaining a verdict against a developer for rescission of an agreement to purchase property
- Successfully defending a corporation against claims for phantom stock rights brought by a former employee
- Resolving claims brought by a governmental agency against a telemarketing firm for violation of state regulations
- Negotiating a settlement of RICO and fraud claims against an insurance company on behalf of a group of insureds
- Successfully representing a computer software company in a copyright infringement action brought against a major university
- Obtaining a favorable decision in an international arbitration against a German investment fund for breach of contract
- Successfully defending a national bank in a class action lawsuit seeking damages for alleged violation of the Consumer Fraud Act and the Illinois Interest Act

Nate joined Aronberg Goldgehn as a member in August 1983.

He holds the AV®Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability. Also among his accolades, since 2010 he has been recognized annually as a Leading Lawyer in Commercial Litigation by Illinois Leading Lawyers. He was also named a Super Lawyer in Business Litigation by Illinois Super Lawyers, a designation awarded by peers to only 5 percent of Illinois attorneys.

PRESENTATIONS

Nate has lectured before professional groups on a variety of topics, including arbitration, mediation and legal ethics. Recently, he presented:

- "Tips & Techniques to Defend Your Position" at the American Business Appraisers National Network's Annual Conference, May 12, 2016.
- "Employment Status and Liabilities" at the 2017 AKO Conference in Oxnard, California.

COMMUNITY INVOLVEMENT

- Past President, Ida Crown Jewish Academy
- Member, Community Building and Jewish Continuity Commission of the Jewish Federation of Metropolitan Chicago.

LEADERSHIP ROLES

- Co-Chair, Commercial Litigation Group
- Chairman, Alternative Dispute Resolution Subcommittee of the Decalogue Society of Lawyer

When he's not representing clients, or keeping up with the demands of his book club, he is likely to be traveling or enjoying the company of his grandchildren.

Worker Classifications
Independent Contractor or Employee?

I. Problem

Is a worker an independent contractor or an employee?

II. Why Is It Important?

(a) They are treated differently

- benefits (insurance, pension, workers compensation, unemployment)
- tax/withholding (FICA, FUTA, state and local income and unemployment taxes)
- employee rights

(b) Companies prefer independent contractor status

- less costly
- more flexible

III. Who Cares?

- IRS (payroll taxes/withholding/FICA)
- DOL/FLSA (minimum wage and overtime laws)
- NLRB
- State agencies
    - Unemployment compensation (employers not contributing to UI fund)
    - Workers compensation (worker not protected/employer not contributing to WC fund)

All have expressed concern about misclassification

IV. Who Makes the Determination?

- IRS
- DOL
- NLRB
- State agencies

V. How Do They Make the Determination?

- The distinction between independent contractor and employee is often not an easy one to make
- Each of the government agencies utilize different criteria
- No agency has a precise definition – the totality of the circumstances must be analyzed
- Highly fact-based determinations

VI. Classifying Independent Contractors and Employees Often Turns on Small Differences

Rev. Rule 57-79 vs. Rev. Rule 57-80

Aurora Packing Co. v. NLRB, 904 F.2d 73 (D.C. Cir. 1990) vs.
Jack Bradley v. Department of Employment Security, 204 Ill.App. 3rd 708 (3rd Dist. 1990)

VII. Although Not Possible to Predict How Different the Federal and State Agencies Would Construed Relationship, There Are Some General Rules

VIII. Primary Consideration: The Degree of Control Over the Worker and the Degree of Independence Exhibited By the Worker

IX. IRS (Rev. Rule 87-41) and DOL Previously Utilized a 20-Factor Test

X. The Current IRS 3-Factor Test for Control:

- Behavioral
- Financial

- Relationship

XI. Factors Supporting "Employee" Status

- personnel files
- performance evaluations
- employee handbook
- benefits (sick days, vacation, etc.)
- company equipment (computer, phone, e-mail address)
- business cards
- how paid (invoice)

XII. State Laws:

Illinois Unemployment Insurance Act – presumption of employee status (Section 212)

New Jersey Unemployment Standards – "ABC Test"

California Division of Labor – 11 factors

Kansas – 2 part common law test: *Milano's Inc v. Kansas Dept. of Labor,* 293 P.3d 707 (Kan. S.Ct. 2017)

XIII. IRS Section 530 "Safe Harbor" Protection

To qualify, an employer must have:

(a) Consistently treated similar workers as independent contractors

(b) Complied with Form 1099 reporting requirements for the past 3 years

(c) Had a reasonable basis for treating its workers as independent contractors

- court decision(s)
- IRS ruling
- advice of attorney or CPA

XIV. IRS Voluntary Classification Settlement Program ("VCSP")

- Began in 2011
- Cannot be under audit or in dispute with by IRS, DOL or state agency regarding workers' status
- Employer agrees to prospectively treat workers as employees
- No interest or penalties on liability

XV. Closing Thoughts/Avoiding Litigation

- review all written agreements
- permit worker right to set hours and schedule
- do not restrict worker's ability to work on other projects
- require insurance and indemnification
- if possible, contract with corporation or entity
- do not compensate as an employee (weekly, bi-weekly payments)
- require worker to seek reimbursement for expenses

The Cure to All of Your Paid Sick Leave Ordinance Aches and Pains

A Discussion of the Cook County Earned Sick Leave Ordinance and Chicago Paid Sick Leave Ordinance, Effective July 1, 2017

September 27, 2017

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Today's Prescription

- General Overview of Paid Sick Leave Ordinances
- Q&A and Examples

When Must an Employer Comply With the Ordinances?

- 1 covered employee who works in Cook County/Chicago
- Might apply even if employer is not located in Cook County/Chicago…HUH?!

Employees Covered By the Ordinances

- Employees who work for a minimum of 2 hours in any 2-week period within Cook County/Chicago
- This includes full-time, part-time, exempt, non-exempt and temporary/seasonal workers

Accrual of Paid Sick Leave

- 1 hour of paid sick leave per 40 hours worked
- Maximum accrual: 40 hours per year (unless the employer allows more)
- Accrual starts on day 1 of employment (but the right to use paid sick leave may be delayed)

Maximum Annual Use

- For non-FMLA: 40 hours
- For FMLA: up to 60 hours
- Unless the employer allows for more

Carryover

- For non-FMLA →1/2 of accrued and unused paid sick leave (up to 20 hours)
- For FMLA → 1/2 of accrued and unused paid sick leave (up to 20 hours) + 40 hours to be used for FMLA sick leave

Alternatives to Tracking Accrual and Carryover

1. Frontloading the accrual of paid sick leave (40 hours; same for FMLA/Non-FMLA)
2. Frontloading the carryover
   - Non-FMLA: 20 hours
   - FMLA: 60 hours (20 hours of ordinance restricted paid sick leave + 40 hours of FMLA leave or vice versa)
3. Frontloading BOTH the accrual and the carryover (could be as much as 100 hours)
4. Other alternatives? YES

Paid Sick Leave
Q & A and Examples

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Which Ordinance Applies?

Question: Can Bryzzo Souvenir Co., which is located in Chicago, be subject to the Cook County Ordinance?

- General rule:
  - Chicago employer = Chicago Ordinance
  - Employer in Cook County, not Chicago = Cook County Ordinance

- Possible Exceptions:
  - Employer has employees who work outside the home city of the employer (i.e. a truck driver delivering souvenirs to the SOX memorabilia store in Cicero)
  - Municipalities that have opted out of Cook County Ordinance

Which Ordinance Applies, Con't?

Question: Wonka Industries is located in Des Plaines, which has opted out of the Cook County Ordinance. Does it still need to comply with the Cook County Ordinance?

- Maybe
  - If the Oompa Loompas also work in Des Plaines (or another city that has opted out of the Cook County Ordinance), then no.
  - If, however, the Oompa Loompas perform work for Wonka at its candy factory in another municipality that has not opted out, then Wonka may be subject to the Ordinance

Alternatives to Accrual/Carryover

Question: If an employer chooses to frontload paid sick leave at the beginning of the benefit period, how many hours need to be frontloaded?

- 40 hours (same for FMLA/non-FMLA eligible)

Practice Note: An employer that frontloads the accrual may still be required to allow a carryover

Alternatives to Accrual/Carryover

Question: Anthony Weiner, who works at the Wiener Circle, has unused paid sick leave at the end of the year. How many hours does the Wiener Circle have to allow Anthony to carry over into the next year (assuming no frontloading)?

- For non-FMLA eligible, ½ of the unused paid sick leave at the end of the year (up to 20 hours)
- For FMLA eligible, ½ of the remaining paid sick leave at the end of the year (up to 20 hours) + up to 40 hours that may be used exclusively for FMLA leave

Alternatives to Accrual/Carryover

Question: If an employer, which is not covered by FMLA, frontloads 40 hours of paid sick leave, must it allow an employee to carry over any remaining hours at the end of the benefit year?

- Yes. The employee must be allowed to carryover ½ of accrued but unused paid sick time, up to 20 hours

Alternatives to Accrual/Carryover

Question: Is the following PTO plan for an employer that is not covered by FMLA in compliance with the Ordinances?

- Employed for 0-5 years, PTO of 15 days, accruing 1/12 per month
- Employed 5 or more years, PTO of 20 days, accruing 1/12 per month
- No carryover allowed

- Answer: *Let's break this down on the next slide*

Alternatives to Accrual/Carryover

1. Is the rate of accrual in compliance with the Ordinances?
   - Yes. The Ordinances require 1 hour per 40 hours worked
2. Does the total amount of PTO comply?
   - 15 and 20 days of PTO far exceeds the 40 hour requirement of the Ordinances
3. Is the prohibition of carryover compliant?
   - NO.
   - Under this policy, at the beginning of the benefit year, the employee will have 0 hours to use.
   - If the Ordinances were strictly followed, the employee could have up to 20 hours at the beginning of the benefit year.

Practice Note: This policy would comply with the Ordinances if the employer simply frontloaded the PTO (or at least 60 hours of it), instead of having the employee accrue time. That way, the employee would have available for use on Jan 1 at least 60 hours of PTO. No carryover would be required.

Maximum Use

Question: Ron Emanuel, who works for Divvy, got run over by Bruce Rounder while on his bicycle. At the beginning of the benefit period, Ron had 60 hours of paid sick leave: 20 hours carried over from the prior year and 40 frontloaded hours for the new year. Must Divvy (which is not FMLA eligible) allow Ron to use all 60 hours during the new year to recover from his injuries?

- No. 40-hour maximum use (unless employer is more generous)

Maximum Use

Question: At the beginning of the benefit period, an employee has 20 hours of paid sick leave that were carried over from the prior year. She is also accruing 1 hour of paid sick leave per week, up to 40 hours. Can the employee use the 20 hours that were carried over from the prior year on Jan 1?

Yes

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Payment for Accrued But Unused Paid Sick Leave

Question: Flo quits her job with Progressive because she's tired of making terrible commercials. Does Progressive need to pay her for earned, but unused sick time at the time of termination?

- No

Practice Note: If an employer has a general PTO policy that lumps paid sick leave with other types of paid time off, such as personal days and vacation days, the employer may be required to pay out unused and accrued PTO upon separation.

Different Treatment of FT/PT Employees

Question: If an employer grants 45 hours of paid sick leave to FT employees, does the employer have to grant the same 45 hours to PT employees?

- No
  - The employer can use the accrual method for PT employees as long as they accrue at least 1 hour for every 40 hours worked
  - The employer could also frontload the PT employees a lesser amount than FT employees, but that can be risky if the PT employees' hours are unpredictable/fluctuate and they end up accruing more time than was frontloaded

Paid Time Off ("PTO")

Question: Are general PTO policies permitted, or does an employer need a separate sick leave policy?

- PTO policies are ok, as long as they provide sufficient paid time off and do not impose restrictions on the use of paid sick leave that would violate the Ordinances, such as:
  - Requiring an employee to find coverage for their absence
  - Requiring an employee to provide a certain amount of notice prior to being able to use sick leave
  - Use it or lose it policies. These may need to be modified depending on the amount of PTO granted and if the PTO is frontloaded.

PTO con't

Question: How does one determine the sick time carryover if the employer does not distinguish between sick and vacation time in a PTO policy?

- The employer may have to calculate the appropriate carryover based on the total bank of PTO

Practice Note: Most PTO policies provide more paid time off than is required by the Ordinances. So, as long as the employer frontloads at least 60 hours of PTO, the employer does not need to allow any carryover

Cashing Out an Employee's Paid Sick Leave at the End of the Year

- The Ordinances state that employers cannot pay an employee not to take earned sick leave. Arguably, this could prevent an employer from cashing out an employee's earned sick leave in certain circumstances.
- Examples:

  1. Employees accrue 1 hour per week, up to 40 hours. At the end of the year, the employee has 10 hours of unused paid sick leave. Can the employer cash out those hours?

  2. Employer frontloads its employees 100 hours of PTO at the beginning of the year. At the end of the year, the employee has 30 hours of unused PTO. Can the employer cash out the employee's 30 hours?

- Practice Note: If employees want to cash-out their hours, consider including in your policy a provision stating that any cashed out hours will be deemed vacation time

Granting/Managing Paid Sick Leave For Employees Who Start Mid-Year

Question: Anthony Scaramucci started working for the Trump in July 2017. How should Trump grant and manage paid sick leave for employees like Anthony who start mid-year?

- Track the accrual and allow the employee to carry over up to 20 hours into the next year (without first dividing the accrued and unused hours in half); OR
- Frontload a greater amount of paid sick leave than the amount an employee would be entitled.

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Breaks in Service

Question: Elaine Benes resigned from her employment at J. Peterman Catalog to become a professional dancer. That did not work out well for her so she re-applied for her old job and was re-hired. What happens to Elaine's unused paid sick leave that she accrued before she resigned?

- Practice Note:
  - If the employee returns in ≤ 120 days, she must return to her same level of eligibility (i.e. the employer cannot impose another use waiting period).
  - If the employee returns in ≥ 120 days, the employee will need to reestablish eligibility/be subject to the use waiting period

Key Takeaways

- While the Ordinances may seem rigid and burdensome, they are written to provide employers with some flexibility
- Guiding principle → Employee must be as good or better off under the employer's alternative policy
- As long as the employer has made a reasonable, good faith attempt to comply, it should not be subjected to prolonged litigation with the City/County

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Key Provisions of the Cook County Earned Sick Leave Ordinance and City of Chicago Minimum Wage and Paid Sick Leave Ordinance, current as of July 16, 2017[1]

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Covered employer	Employs at least 1 covered employee who works in Cook County (which could include the employee's home if, among other things, the employee is *required* to telecommute). *See* Ordinance, 42-2; Rules, 320.100. For exempt employers, such as federal, state, and local governments, *see* Ordinance, 42-2, Rules, 320.100(C)	Same as ← but, the employer must employ at least 1 covered employee who works in the City of Chicago (note that this could arguably include work from the employee's home if the employee is *permitted* to telecommute) (*See* Ordinance, 1-24-010, "employee"; Rules, Article 1, Section 1, "covered employee"). Exempt employers are not discussed or defined by the Ordinance or Rules.
Covered employee	Covered employee: Employee who works for a minimum of 2 hours in any two-week period in Cook County (note that uncompensated commuting or traveling through Cook County without stopping for a work purpose do not count; However, compensated commuting or travel, or work from home in Cook County does count if *required* by the employer. *See* Ordinance 42-2; Rules, 310.100 Exempt employees: Certain employees subject to a collective bargaining agreement and independent contractors. *See* Rules, 310.100(D)	Same as ← for covered employees but, the employee must work in Chicago (note that work from home in Chicago may count if such work is *permitted* by the employer. *See* Rules, Article 1, Section 1 Exempt employees (among others): Certain employees subject to various subsections of the Illinois Minimum Wage Law, employees of any subsidized temporary youth program, employees of any governmental entity other than the City of Chicago, certain employees covered by a collective bargaining agreement. *See* Rule MW 1.05.

[1] The chart is intended to highlight some of the key provisions of the Cook County Earned Sick Leave Ordinance No. 16-4229, effective July 1, 2017 ("Cook County Ordinance"), the Interpretative and Procedural Rules governing the Cook County Ordinance, approved May 25, 2017 (the "Cook County Rules"), the City of Chicago Minimum Wage and Paid Sick Leave Ordinance, Chapter 1-24 of the Municipal Code of Chicago, effective July 1, 2017 (the "Chicago Ordinance"), and the rules interpreting the Chicago Ordinance dated June 28, 2017 (the "Chicago Rules"). The chart is not intended to include all provisions and terms of the Cook County and Chicago Ordinances (collectively the "Ordinances"), or their corresponding rules. Users should review the full text of the Ordinances and corresponding rules to confirm the scope and applicability of the Ordinances. This document shall in no way constitute legal advice or form any attorney-client relationship.

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Eligibility to use paid sick leave	Employee must work 80 hours within any 120-day period. *See* Ordinance, 42-3(a)(1); Rules 310.300(B). However, the employer may establish a use waiting period prohibiting the employee from using paid sick leave until as late as 180 days after the start of employment. *See* Rules, 500.200	Same as ← *See* Ordinance, 1-24-045(a)(1), (c)(1); Rules MW 3.03, 3.08
Rate of accrual of paid sick leave	(a) 1 hour of paid sick leave per 40 hours worked in Cook County. (b) Overtime exempt employees are assumed to work 40 hours per week, unless their normal workweek is less than 40 hours, in which case paid sick leave shall accrue based upon that normal work week. *See* Ordinance, 42-3(b)(3) (c) If non-exempt from overtime, an employee may earn more than 1 hour per week depending on the number of hours actually worked. *See* Ordinance, 42-3(b)(2)-(3); Rules, 400.200 (d) Employers need not award paid sick leave in fractional increments. *See* Rules, 400.200(E) (e) Employers may front load paid sick leave to avoid having to track accrual. *See* Ordinance, 42-3(b)(7); Rules, 400.200(G)	Same as ← (a) but, hours must be worked in Chicago. Ordinance, 1-24-045(b)(2); Rule MW 3.04(b) Same as ← (b), (d), (e) (*See* Ordinance, 1-024-045(b)(2)-(3); Rule MW 3.04(c), (e); Rule MW 3.05 Silent as to (c)
Date of initial accrual	The later of July 1, 2017 or the first calendar day after the start of employment in Cook County (so if an employee worked for a covered employer prior to July 1, 2017, but worked for the employer in another county, the date of initial accrual would not begin until the employee worked for the employer in Cook County for 2 hours in a two-week period). *See* Ordinance, 42-3(b)(1); Rules, 400.100	Same as ← except work must be in Chicago. *See* Ordinance, 1-24-045(b)(1); Rule MW 3.04(a)
Maximum accrual per year	40 hours per 12-month period (with some exceptions). *See* Ordinance, 42-3(b)(4); Rules, 400.500	Same as ← *See* Ordinance, 1-24-045(b)(4); Rule MW 3.08(c), (d)

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Carryover of unused and accrued paid sick leave	Depends on whether covered employer is FMLA eligible: (a) For non-FMLA eligible: Half of unused hours may be carried over into the following year, up to 20 hours. *See* Ordinance 42-3(b)(5); Rules, 400.600(A) (b) For FMLA eligible: the employee may carry over up to 40 hours of accrued and unused paid sick leave to be used exclusively for FMLA purposes. This is in addition to the carryover of a maximum of 20 hours of regular paid sick leave. *See* Ordinance, 42-3(b)(6); Rules, 400.600(B) (c) the carryover must be in hourly increments, and may not be fractional. Therefore, if the employee has an odd number of accrued and unused sick leave hours, that amount should be rounded up before calculating the carryover. *See* Rules, 400.600 (d) employers may front load carryover to avoid individualized calculations of the amount of unused earned sick leave to be carried over from one accrual period to the next. *See* Rules, 400.600(C). If the benefit year begins after an employee's start date, the employer may frontload a greater amount of paid sick leave than the amount to which the employee is entitled OR allow the employee to carry over up to 20 hours of any accrued paid sick leave without first dividing in half the accrued and unused paid sick leave hours. Rules, 600.300(E) Note that frontloading the accrual and carryover are not the only alternatives to tracking accrual. Employers are free to adopt other alternative practices as long as those practices do not treat employees worse than if the employer followed the accrual and carryover procedures.	Same as ← (a), (b), (c), (d) *See* Ordinance, 1-24-045(b)(5), (6); Rule MW 3.06(a), (d) If the employer frontloads 40 hours of paid sick leave for non-FMLA eligible and 60 hours for FMLA eligible (40 hours for FMLA leave and 20 hours for ordinance paid sick leave, or 40 hours for ordinance paid sick leave and 20 hours for FMLA leave) at the beginning of the covered employee's 12-month benefit period, the employer is not required to carryover hours from one year to the next. *See* Rule MW 3.05 If the benefit year begins after an employee start date, up to 20 hours of any accrued paid sick leave shall be carried over. Unlike normal carryover, where the figure gets halved, all of the unused accrued paid sick leave, up to 20 hours, is carried over. Rule MW 3.06(b)

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Permissible uses for accrued paid sick leave	When the employee or a family member is ill, injured, seeking medical care, treatment, or diagnosis, the victim of domestic violence or stalking, or when the employee's child's school or daycare or the employee's place of business is closed by order of federal, state or local government for a public health emergency. *See* Ordinance, 42-3(c)(2); Rules, 500.500	Same as ← *See* Ordinance, 1-24-045(c)(2)
Maximum use of accrued paid sick leave per accrual period	Maximum of 40 hours, unless the employer allows for more. Also, if the employer/employee are FMLA eligible, the maximum use could be as high as 60 hours. *See* Ordinance, 42-3(c)(1); Rules, 500.300(C) Note that the employee's sick leave bank could be greater than what they are actually entitled to use.	Same as ← *See* Ordinance, 1-24-045(c)(1); Rule MW 3.08(c), (d)
Increments of use	Minimum of 1 hour; But the employer may provide a policy requiring employees to take leave in up to 4-hour increments. *See* Rules, 500.400	Same as ← BUT, the minimum use policy is not capped at 4-hour increments. Leave can be taken in hourly increments unless the employer establishes a written minimum use policy. *See* Rule MW 3.08(b)
Remuneration for unused sick pay	Employer is not required to compensate employee for unused sick leave upon separation from employment, unless a collective bargaining agreement provides otherwise. *See* Rules, Section 200.200	Same as ← *See* Ordinance, 1-24-045(a)(3); Rule MW 3.11(c)

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Breaks in service	(a) When a covered employee is rehired by the same employer within 120 days of his separation, he is considered to have continued his employment during the 120-day period for purposes of being eligible for paid sick leave and surpassing any applicable use waiting period. *See* Rules, 310.400. (b) When a covered employee is rehired by the same employer more than 120 days after separation, the employee must reestablish eligibility for coverage and use of paid sick leave. Rules, Section 310.400. (c) If a covered employee has separated from service with unused paid sick leave, the employer does not need to restore this leave when the employee is rehired. Rules, Section 310.400.	Same as (c) ← Rule MW 3.10 Silent as to (a) and (b)
Notice and documentation from covered employee relating to use of paid leave	Employer may establish reasonable notice requirements for covered employees using earned sick leave for both foreseeable and unforeseeable absences from work. *See* Rules, Section 500.600 Employer may require certain documentation when employee is absent for more than 3 consecutive work days. *See* Ordinance, 42-3(c)(5); Rules, Section 500.700	Same as ← *See* Rule MW 3.12 Same as ← except a special rule exists for employees of a common carrier regulated by the railway Labor Act. *See* Ordinance, 1-24-045(c)(5); Rule MW 3.14
Notification of employee's rights under the Ordinances	Employer is required to post a notice of employee's rights under the Ordinance as well as provide each covered employee with a notice of rights. *See* Ordinance, 42-6; Rules, 700.100-200	Same as ← except the posting and notice to be provided to covered employees may be in the form provided by the Commissioner and the employer shall provide notice with the first paycheck. *See* Ordinance, 1-24-070; Rule MW, 1.04.

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Required recordkeeping of covered employer	Technically, none, until the covered employer is named as a respondent in a claim filed under the Ordinance; However, the Rules anticipate that moderately sophisticated employers will keep certain employment records for the most recent 3 years and if they don't maintain certain information, there may be an adverse presumption in a later filed claim by an employee. *See* Rules, 800.100	Employer must maintain, at a minimum, 12 different types of records relating to a covered employee for a period of not less than 5 years. *See* Rule MW 1.06
Prohibited acts under the Ordinance (these lists should not be read as exhaustive)	• (a) requiring a covered employee to find coverage as a condition of using earned sick leave. *See* Ordinance, 42-3(c)(3) • (b) retaliating against a covered employee for exercising his rights under the Ordinance. *See* Ordinance, 42-7 • (c) counting absences arising from the use of properly noticed earned sick leave that triggers any adverse employment action. • (d) switching the employee's schedule after he provides notice of intent to use earned sick leave to avoid paying him during his absence. • (e) paying a covered employee not to take earned sick leave. *See* Rules. 900.100	Same as ← (a), (b), (e) *See* Ordinance, 1-24-045(c)(3), 1-24-080; Rule MW 3.11(b)
Successor employer	Not mentioned in the Ordinance	Unused paid sick leave shall be retained by the covered employee if the employer sells, transfers, or otherwise assigns the business to another employer and the covered employee continues to work in the City of Chicago. *See* Rule MW 3.13
Ordinance enforced by:	Cook County Commission on Human Rights	City of Chicago's Department of Business Affairs and Consumer Protection

Subject	Cook County Ordinance & Rules	Chicago Ordinance & Rules
Administrative process: Time limit for filing a complaint	Within 3 years of the alleged violation of the Ordinance. BUT, if there is evidence that the employer concealed the violation, then the covered employee may file the complaint within 3 years after the covered employee discovered, or reasonably should have discovered, the violation. Ordinance, 42-8(b); Rules, 1020.100. Even if a claim is time-barred before the Commission, it may not preclude a covered employee from filing a claim in court. Such a claim may be filed without the covered employee's exhaustion of its administrative rights. Ordinance, 1040.100	The Commissioner of the City of Chicago's Department of Business Affairs and Consumer Protection has discretion whether or not to accept a complaint filed more than 3 years after the disputed wages were due or the sick time was not granted. Rule MW 4.01(c) This does not alter a covered employee's ability to file a civil action. Ordinance, 1-24-110; Rule MW 4.01(c)
Administrative remedies	Fines (not to exceed $500 per violation per covered employee per day); Lost wages; injunctive relief. *See* Rules, 1030	Fines, license suspension or revocation, restitution to the covered employees and former covered employees. *See* Rules MW 4.02(d)
Damages in civil action	Damages up to 3 times the full amount of any unpaid sick leave denied or lost, plus interest, attorney's fees and costs. *See* Ordinance 42-8(b)	Same as ← *See* Ordinance 1-24-110

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List of Municipalities - Indicating Whether They Have or Have Not Opted Out of the New Cook County Sick-Leave Ordinance (as of 9-22-17)

Municipality	Has Not Opted Out	Opted Out
Alsip		X
Arlington Heights		X
Barrington		X
Barrington Hills (partly in Kane, Lake and McHenry counties)	X	
Bartlett (partly in DuPage County)		X
Bedford Park		X
Bellwood		X
Bensenville (partly in DuPage County)		X
Berkeley		X
Berwyn	X	
Blue Island		X
Bridgeview		X
Broadview		X
Brookfield		X
Buffalo Grove		X
Burbank		X
Burnham		X
Burr Ridge		X
Calumet City		X
Calumet Park		X
Chicago Heights		X
Chicago Ridge		X
Cicero	X	
Country Club Hills		X
Countryside	X	
Crestwood		X
Deer Park (partly in Lake County)		X
Deerfield (partly in Lake County)	X	
Des Plaines		X
Dixmoor	X	
Dolton	X	
East Dundee (partly in Kane County)		X
East Hazel Crest		X
Elgin		X
Elk Grove Village		X
Elmhurst (partly in DuPage County)	X	
Elmwood Park		X
Evanston	X	
Evergreen Park		X
Flossmoor		X
Ford Heights	X	
Forest Park		X

List of Municipalities - Indicating Whether They Have or Have Not Opted Out of the New Cook County Sick-Leave Ordinance (as of 9-22-17)

Municipality	Has Not Opted Out	Opted Out
Forest View		X
Frankfort (partly in Will County)	X	
Franklin Park		X
Glencoe	X	
Glenview		X
Glenwood		X
Golf		X
Hanover Park		X
Harvey		X
Harwood Heights		X
Hazel Crest		X
Hickory Hills		X
Hillside		X
Hinsdale		X
Hodgkins		X
Hoffman Estates		X
Hometown		X
Homewood		X
Indian Head Park		X
Inverness		X
Justice		X
Kenilworth	X	
La Grange		X
La Grange Park		X
Lansing		X
Lemont (partly in DuPage and Will counties)		X
Lincolnwood		X
Lynwood		X
Lyons		X
Markham		X
Matteson (partly in Will County)		X
Maywood		X
McCook	X	
Melrose Park		X
Merrionette Park		X
Midlothian		X
Morton Grove		X
Mt. Prospect		X
Niles		X
Norridge		X
North Riverside		X
Northbrook		X
Northfield	X	

List of Municipalities - Indicating Whether They Have or Have Not Opted Out of the New Cook County Sick-Leave Ordinance (as of 9-22-17)

Municipality	Has Not Opted Out	Opted Out
Northlake		X
Oak Brook (partly in DuPage County)	X	
Oak Forest		X
Oak Lawn		X
Oak Park	X	
Olympia Fields	X	
Orland Hills		X
Orland Park		X
Palatine		X
Palos Heights		X
Palos Hills		X
Palos Park		X
Park Forest		X
Park Ridge		X
Phoenix	X	
Posen		X
Prospect Heights		X
Richton Park		X
River Forest		X
River Grove		X
Riverdale		X
Riverside		X
Robbins	X	
Rolling Meadows		X
Roselle (partly in DuPage County)		X
Rosemont		X
Sauk Village (partly in Will County)		X
Schaumburg		X
Schiller Park		X
Skokie	X	
South Barrington		X
South Chicago Heights		X
South Holland		X
Steger		X
Stickney		X
Stone Park		X
Streamwood		X
Summit		X
Thornton		X
Tinley Park		X
University Park (partly in Will County)	X	
Westchester		X
Western Springs		X

List of Municipalities - Indicating Whether They Have or Have Not Opted Out of the New Cook County Sick-Leave Ordinance (as of 9-22-17)

Municipality	Has Not Opted Out	Opted Out
Wheeling		X
Willow Springs (partly in DuPage County)		X
Wilmette		X
Winnetka	X	
Worth		X

Frequently Asked Questions

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 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).

Is Your Former Employee Violating a Non-Solicitation Agreement Through Social Media Activity?

What is the Purpose of a Non-Solicitation Agreement?

Non-solicitation agreements are a common tool used by employers to prevent employees from engaging in certain conduct for a specified period of time after resignation or termination. Those prohibited activities typically include soliciting the employer's customers, clients, trade partners, or other employees.

What Types of Communications Are Typically Precluded By a Non-Solicitation Agreement?

When drafting a non-solicitation agreement, most employers undoubtedly intend to preclude a former employee from communicating through traditional modes of communication, such as through in-person meetings, telephone calls, letters, e-mails or even text messages. With the ever-increasing popularity of social media, such as LinkedIn, Facebook, Instagram, Twitter, Snapchat, and blogs, many employers are left wondering whether their non-solicitation agreement prevents solicitation through social media.

Does Your Non-Solicitation Agreement Prevent Solicitation Through Social Media?

The wording of a non-solicitation agreement is crucial and it necessarily depends on the nature of the employer's business and the interest it is seeking to protect. Many standard non-solicitation agreements generally preclude a former employee from "communicating" with an employer's customers or employees post-termination. This could leave open for the court's interpretation whether social media activity was contemplated as a type of prohibited communication by the employer and employee when they entered into the non-solicitation agreement.

To avoid any ambiguity, and to minimize the risk that a court might interpret the non-solicitation agreement in a manner that an employer did not intend, employers should consider:

- Expressly prohibiting communications through social media.
- Providing specific examples of social media activity that would be considered a violation of the non-solicitation agreement, such as:
    - Encouraging current employees to leave the employer and join a different company through a LinkedIn post;
    - Sending a current or former customer a message through Facebook enclosing a brochure for a product sold by a competitor; or
    - Sending a tweet that an employee left the employer to start a competing business and inviting followers to tweet back for a price quote.

Is Your Former Employee's Social Media Activity Violating a Non-Solicitation Agreement?

Determining whether a former employee's use of social media is in violation of a non-solicitation agreement, is highly fact-based. It depends not only on the language of the non-solicitation agreement (as discussed above), but also on the nature and content of the former employee's social media activity.

Untargeted v. Targeted Social Media Activity

Recent case law has suggested that passive or non-targeted social media activity by a former employee – such as updating an employer or job description on LinkedIn, announcing a new position on Twitter, or "friending" a former client on Facebook – does not violate a non-solicitation agreement.

- *Bankers Life & Casualty v. American Senior Benefits, LLC*, 2017 IL App (1st) 160687-U: Held that emails containing invitations to connect on LinkedIn sent by a former employee to employees of his former employer and a posting on LinkedIn about a job opening, did not constitute an unlawful attempt to solicit employees. In so holding, the court noted that the LinkedIn invitations were generic, and they did not contain a discussion of the former employer or the new employer, suggest that the recipient view a job description on the former employee's page, or encourage the recipient to leave their place of employment. *Id.* at ¶23
- *Arthur J. Gallagher & Co. v. Anthony*, No. 16-284, 2016 WL 4523104, at *15 (N.D. Ohio Aug. 30, 2016): Press release posted on LinkedIn and Twitter announcing that an employer had hired a new employee was not a solicitation
- *BTS, USA, Inc. v. Executive Perspectives, LLC*, 2014 WL 6804545 (Conn. Super. Oct. 16, 2014): Update to LinkedIn account with new position and post encouraging contacts to "check out" a website he designed for his new company (a competitor), was not a violation of the non-solicitation agreement
- *Prepaid Legal Servs. V. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla. 2013): Employee's posting on Facebook which touted his new employer's product and which was viewed by former colleagues did not violate agreement to not recruit employees from former employer
- *Invidia v. DeFonzo*, 2012 WL 5576406 (Mass. Super. Oct. 22, 2012): Becoming "friends" with former clients on Facebook did not, in and of itself, violate a non-compete clause
- *Enhanced Network Solutions Grp. v. Hypersonic Techs.,* 951 N.E.2d 265 (Ind. Ct. App. 2011): Posting a job opportunity on LinkedIn page was not a solicitation

Other recent cases have suggested that active or targeted social media activity by a former employee – such as posts inviting contacts to call for a quote, or a tweet encouraging customers or employees to leave a company – does violate a non-solicitation agreement.

- *Mobile Mini, Inc. v. Vevea*, No. 17-1684, 2017 WL 3172712 (D. Minn. July 25, 2017): Enjoining former employee from posting on social media as prior posts on LinkedIn relating to the former employee's new position at a competitor were likely in violation of the non-solicitation agreement. The LinkedIn posts invited the former employee's contacts to "give [her] a call today for a quote" for her new employer's product. *Id.* at *2. The court found that these posts were blatant sales pitches, the purpose of which was to entice members of the former employee's network to call to make a purchase from her new employer, in direct violation of the non-solicitation provision. *Id.* at *6
- *Coface Collections North America, Inc. v. Newton*, 430 F. App'x 162 (3d Cir. 2011): Enjoining social media activity of former employee. Former employee's posting on Facebook 8 months before his noncompete was set to expire stating that his "non-compete ends on 12/31/2010 & [he has] decided that the USA needs another excellent, employee-oriented Commercial Collection Agency." The posts encouraged professionals to contact him to apply for a position with his new company. The former employee also sent friend requests on Facebook to current employees of his former company.
- *Amway Global v. Woodward*, 744 F. Supp. 2d 657, 673-74 (E.D. Mich. 2010): A blog entry in which a former independent owner of plaintiff announced his decision to join a competitor and

stated “[i]f you knew what I knew, you would do what I do,” the court finding that this statement was readily characterized as an invitation for the reader to follow his lead and join the competitor.

What Employers Should Know

1. If an employer intends to prohibit solicitation through social media, it is important that the employer implement a clearly worded non-solicitation agreement with explicit language prohibiting solicitation through social media.
2. In determining whether a former employee has violated a non-solicitation agreement, the focus should be on the content and substance of the social media activity. If the activity is passive in nature, the activity is unlikely to constitute a breach of the agreement. If, on the other hand, the activity is active or targeted in nature, it is more likely to be deemed a breach.

ADA Accessible Websites

September 27, 2017

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Title III of the ADA - Who Is Covered?

- Governs places of public accommodation
  - Own, operate, control, lessor/lessee
  - Joint and several liability
- Places of public accommodation include:
  - inns, hotels, motels, or other places of lodging
  - restaurants, bars, or other establishment serving food or drink
  - a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment
  - an auditorium, convention center, lecture hall, or other place of public gathering
  - a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment

Continued…

Title III of the ADA - Who Is Covered?

Continued

- a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment
- a terminal, depot, or other station used for specified public transportation
- a museum, library, gallery, or other place of public display or collection
- a park, zoo, amusement park, or other place of recreation
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation

Title III of the ADA - A Civil Rights Law

- Title III guarantees individuals with disabilities the "**full and equal enjoyment** of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation"(42 U.S.C. §12182(a))
- Key Types of Disabilities/Impairments
  - Visual (blind/low vision)
  - Aural (deaf/hard of hearing)
  - Physical (e.g., can't use hands)
  - Cognitive (e.g., learning disability)
- General Prohibitions
  - Denying participation or the opportunity to participate
  - Providing unequal benefits
  - Providing separate benefits
    - Not having an integrated setting
  - Discrimination because of a relationship or association with an individual with a disability

Title III of the ADA – Specific Prohibitions/Obligations

- **Cannot utilize eligibility criteria that screen out** individuals with disabilities;
- Requires **Modification of policies, Practices and Procedures** – unless doing so fundamentally alters goods and services provided;
- Requires provision of **Auxiliary Aids and Services** to the extent necessary to achieve **effective communication**; and
- Requires **Barrier Removal**.

State and Local Laws

Most states and many localities have human rights/anti-discrimination laws prohibiting discrimination on the basis of disability and requiring accessibility in various public entities

Sources of Website Accessibility Obligations - Background

- Title III of the ADA:
  - Prohibits places of public accommodation from discriminating on the basis of disability
  - Requires "full and equal enjoyment"
  - Does not explicitly define whether a place of public accommodation must be a physical place or facility, nor does it directly address whether it could be read or interpreted to apply to a non-physical place or facility
  - Currently, tension exists regarding whether Title III applies to websites
    - Court decisions on the issue – both generally and specific to websites – have been decided both ways

Other Sources

- Title II of the ADA
- Section 508 of Rehabilitation Act
- Air Carrier Access Act
- 21st Century Communications and Video Accessibility Act

Scope of Coverage: The Current Judicial Landscape

- **Strict construction**: holding "Places of Accommodation" are limited to physical places so Title III does not apply
- **Nexus:** holding that Title III applies when there is a sufficient connection between the goods and services of traditional "Places of Accommodation" (e.g., a restaurant or hotel) and the alternative consideration (e.g., website)
- **Spirit of the law:** holding that "Places of Accommodation" are not limited to physical places so Title III does apply

Key Decisions Directly Addressing Title III's Applicability to Websites

- ***Nat'l Federation of the Blind vs. Target Corp.*** (N.D. Cal. 2006)
  - Addressed whether Title III covers only physical "brick and mortar" structures or does it also cover the internet
  - NFB alleged that Target violated Title III, California's Unruh Act, and California's Disabled Persons Act because Target.com – which offered a variety of store-related services – was inaccessible to the blind and thus Plaintiffs were denied full and equal access to Target stores
  - Target asserted that the ADA and California state laws only cover access to physical spaces, such as Target's brick-and-mortar stores, and that Target.com is not a physical space and thus not a "place of public accommodation"
    - Also asserted that Plaintiffs were not denied full and equal access to the Target stores because the services were provided via alternative means

Key Decisions - *Target*

- The Court held that Title III covers websites in situations where a nexus exists between the website and a physical place of public accommodation
  - "The statute applies to the services of a place of public accommodation, not services in a place of public accommodation"
- Many of the benefits and privileges of Target's website – such as online information about store locations and hours and printable coupons that are redeemed in the stores – were "heavily integrated with the brick-and-mortar stores"
  - Did not rule on whether alternative measures provided by Target (e.g., telephone line, in-store assistance) were effective alternatives
- Regarding the state law claims, the Court found that, since the plaintiffs stated a claim under the ADA and ADA claims are per se claims under the Unruh Act and the DPA, it would not reach Target's challenges to the plaintiffs' state law claims
  - Nevertheless, the Court stated in dicta that part of plaintiffs' claim was "that Target.com is a service of a business establishment, and therefore defendant's argument that a website cannot be a business establishment is unavailing"

Key Decisions - *Target*

- Ultimately resulted in a court approved class settlement agreement in which Target agreed to:
  - Establish a $6 million fund from which members of the state settlement class could make claims;
  - Take the steps necessary to make its website accessible to the blind by early 2009 and obtain "certification" from NFB;
  - Pay NFB to train all its employees who work on its website; and
  - Pay attorneys' fees and costs

Key Decisions – The Post-*Target* Landscape

- Increased (threats of) litigation on this issue
- Significant number of settlements and "cooperative agreements" (e.g., via structured negotiations") between advocacy groups and/or state and/or federal government agencies and major companies regarding website accessibility
- Increased attention from DOJ and other Regulators
- Movement to adopt the World Wide Web Consortium/Website Accessibility Initiative's Web Content Accessibility Guidelines 2.0

Key Decisions – The Post-*Target* Landscape

- ***Ouellette v. Viacom* (D. Mont. Mar. 31, 2011):** the court dismissed claims against Google.com, YouTube.com and MySpace.com on the grounds that, "[n]either a website nor its servers are 'actual, physical places where goods or services are open to the public,' putting them within the ambit of the ADA"

- ***Young v. Facebook, Inc.* (N.D. Cal. May 17, 2011):** the court restated that websites on their own do not constitute places of public accommodation under Title III and, therefore, a "nexus" must exist between a website's services and a physical place of public accommodation for Title III obligations to apply to the website; **"Facebook operates only in cyberspace, and is thus is [sic] not a 'place of public accommodation;'** as construed by the Ninth Circuit. While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which Young claims she was denied access are offered to the public"

- ***Earll v. eBay, Inc*. (N.D. Cal. Sept. 7, 2011):** the ADA could not afford a remedy to plaintiff because its definition of "places of public accommodation" is limited to actual physical spaces, plaintiff could assert an independent Unruh Act claim because **"[b]oth the Unruh Act and the [Disabled Persons Act] apply to websites 'as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively**. No nexus to . . . physical [places] need be shown'"

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Key Decisions – The Post-*Target* Landscape

- ***Jancik v. Redbox Automated Retail, LLC* (C.D. Cal. May 2014):** the Court granted Defendant's motion to dismiss and held, among other things, that Redbox did not have to caption its library of web-based videos because a website is not a place of public accommodation under Title III

- ***National Federation of the Blind et al. v. Scribd* (D. Vermont, March 2015):** the Court rejected Defendant's motion to dismiss finding that the language of Title III, the ADA's legislative history (embracing a "liberal approach"), and DOJ's interpretation of the ADA all suggest that it can apply to establishments that offer goods and services to the public even if they do not have a physical location

Key Decisions – The Post-*Target* Landscape

- ***National Association of the Deaf v. Harvard University; M.I.T.* (D. Mass. 2015 -): Ongoing** – In February 2016, in a case in which DOJ filed Statements of Interest, ALJ denied Defendants' motion to dismiss for various technical/procedural grounds (e.g., primary jurisdiction doctrine).
- **Various (2015 -):** Upon learning the Title III DOJ regulations would be delayed beyond the 25th Anniversary of the ADA, hundreds of demand letters have been sent and multiple website accessibility litigations commenced on behalf of private individuals (some as class actions) by a handful of Plaintiff-side law firms.

Common Website Accessibility Issues

- Alt Attributes/Accurate Descriptions
- Skip Navigation/By-Pass Blocks
- Methods of Navigation
- Focus
- Order of Content
- Forms/Tables
- Resizing Text
- Contrast
- PDFs
- Captioning/Narrative Description
- Language
- Control of Moving Content

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Website Design Adjustments to Consider

- Add text to images
- Don’t use PDFs
- Allow for adjustments in color and font size
- Enhance multimedia

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Lessons Learned From Litigation

- It doesn’t matter if you do not have a brick and mortar equivalent
- State regulations must be considered as well
- Apps need to be compliant too

What is the Future of the Obama Administration's Overtime Rule?

The Obama Administration's Overtime Rule

Late in its last term, the Obama administration revised the Fair Labor Standards Act's ("FLSA") executive, administrative, and professional exemption, often referred to as the "white collar" exemption. The intent of the revisions was to make more than 4 million Americans eligible for overtime pay and to restore the protections intended by the FLSA. The revised rule (the "OT Rule") increased the 2004 rule's salary level threshold for white collar employees by more than double.

2004 Threshold	2016 Threshold
$455 per week (or $23,660 per year)	$913 per week (or $47,476 per year)

The OT Rule was slated to become effective on December 1, 2016.

The Court's Invalidation of the OT Rule and The New Trump Administration

Just prior to the OT Rule's effective date, several states and business groups filed lawsuits seeking to enjoin the OT Rule. A district judge in the Federal District Court for the Eastern District of Texas granted the injunction. The Obama Department of Labor ("DOL") filed an appeal to the Fifth Circuit. Briefing in the appeal was delayed due the election of Trump. Trump's DOL filed a brief advising the Fifth Circuit that it would not seek to reinstate the OT Rule.

On August 31, 2017, the district judge invalidated the OT Rule. In making this ruling, the court determined that the DOL exceeded its authority by setting a salary level test that in effect eliminated the need to consider whether employees performed duties in a "bona fide executive, administrative, or professional capacity." Notably, however, the court did not rule on the general lawfulness of a salary level test or whether the DOL has authority to set any salary level for the white collar exemption.

The Future of the OT Rule

The future of the OT Rule is unknown, but there are some indications as to where the rule might be heading. Alexander Acosta ("Acosta"), Trump's appointee as Labor Secretary of the DOL, told congressional lawmakers on several occasions that the DOL would be seeking to revise the OT Rule, setting the salary threshold somewhere between the 2004 and proposed 2016 level. Acosta criticized the Obama administration's proposed salary level as being too burdensome on employers. The DOL subsequently issued a request for information seeking public feedback on ways to revise the OT Rule. However the DOL chooses to proceed with the information received through its request for information, it is expected that a revised OT Rule would not come out until late 2018, at the earliest.

What Employers Should Know

- Given the court's finding that the OT Rule is invalid, the DOL's 2004 rule and the salary threshold it implemented remains in effect.
- In light of the uncertainty of the future of the OT Rule, employers should wait to make any specific changes to their overtime policies and practices until the future of the OT Rule becomes more clear
- If the salary threshold is ultimately increased, employers may want to consider the following to minimize the expense of complying with the new OT Rule:
    1. Capping employees hours to ensure that they do not work more than 40 hours in any given week; and

2. Increasing certain employees' salaries so that they exceed the salary threshold and the employees will not be entitled to overtime.

- If employers reclassified employees or made other changes to their overtime policies or to employees' salaries in anticipation of the OT Rule becoming effective, the employers may revert back to their prior policies, procedures, classifications and salary levels. However, employers may not want to change course at this time given that an increase in the salary level threshold is expected (not to mention the fact that a reversal may not be good for employee morale). If there is an increase to the salary threshold, it is possible that these employers will not have to do much to comply with the new OT Rule.