

Time for Illinois Employers to Review Their Handbooks and Policies

By Julieta Kosiba on November 9, 2023
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The Takeaway

Private employers in Illinois may be impacted by several major developments in employment law this year. Therefore, all Illinois employers should review their handbooks and policies to make sure they comply with

- mandated paid and unpaid leaves of absence,
- liability for gender-related violence,
- commuter benefits,
- access to personnel records, and
- limitations on rules restricting employees' activities.

Paid Leave for All Workers Act

Most notably, Illinois enacted the Paid Leave for All Workers Act earlier this year. This Act requires all private Illinois employers to provide employees with up to 40 hours of paid leave in each 12-month period. Employers who already give all employees paid leave that satisfies the minimum amount of leave required by the Act are not required to modify their policy if it offers an employee the option, at the employee's discretion, to take paid leave for any reason. Otherwise, employers must change their paid leave policies to comply with the Act or adopt a new policy to provide time off pursuant to the statute. Employers who wish to charge or credit leave under the Act to an employee's existing paid time-off bank will need to revise their policy to permit such a credit in accordance with the law. (A separate blog post with more information about the Act is available on our website.)

Employers should prepare to comply with the Act by the current January 1, 2024, effective date. However, that date may be extended until July 1, 2024, if a bill (HB 4190) introduced in October is enacted.

In early November, the Illinois Department of Labor published proposed rules for comment and adoption as regulations under the Act. Those rules are available on pages 15559 through 15588 of the Illinois Register.

Child Extended Bereavement Leave Act

On January 1, 2024, private employers in Illinois with at least 50 full-time employees must provide those employees who have been employed for at least two weeks with unpaid time off for the loss of a child by suicide or homicide. The amount of time off varies by the number of employees an employer has. Illinois employers with 250 or more full-time employees must provide up to 12 weeks of unpaid leave. All other employers subject to the statute must give a maximum of six weeks of unpaid leave.

Employees will be entitled to take time off in a single, continuous period or intermittently, but the leave must be completed within one year of the date the employee notifies the employer of the loss. Employers may require that leave be used in increments of no less than four hours. Employers may also require reasonable documentation and advance notice unless providing such notice isn't reasonable nor practicable.

Employees may substitute other paid or unpaid leave for leave under the Act. The statute does not extend the maximum amount of leave to which an employee is entitled under the federal Family Medical Leave Act of 1993 (FMLA) or under any other paid or unpaid leave provided by federal, state, or local law; a collective bargaining agreement; or an employment benefits program or plan. In particular, a person who uses leave under the Child Extended Bereavement Leave Act is not entitled to take leave under the Child Bereavement Leave Act for the death of the same child.

Gender Violence Act

The Gender Violence Act also goes into effect on January 1, 2024. This new statute creates liability for all private employers in Illinois for gender-related violence. Gender-related violence is described as a form of sex discrimination and is defined as any of the following:

- one or more acts of violence or physical aggression that qualify as battery under Illinois law and that are committed, at least in part, based on a person's sex.
- a physical intrusion or physical invasion of a sexual nature that qualifies as battery under Illinois law.
- a threat of any such act that causes a realistic apprehension that the act will be committed.

The violent acts need not result in criminal charges, prosecution, or conviction.

An employer will only be liable for gender-related violence committed in the workplace by an employee or agent of the employer when that interaction arises out of and in the course of the employee's employment. Liability will not exist unless the employer failed to:

- supervise, train, or monitor the employee who engaged in the gender-related violence; or
- investigate complaints or reports of similar conduct directly provided to a supervisor, manager, owner, or another person designated by the employer and take remedial measures in response to those complaints/reports.

Employers who provide adequate sexual harassment prevention training required by the Illinois Human Rights Act may use that as an affirmative defense to a claim under the Act.

Transportation Benefits Program Act

Beginning January 1, 2024, employers in specified counties or townships^[1] will need to provide covered employees with a pre-tax commuter benefit plan if they employ 50 or more covered employees within one mile of a fixed-route transit system. Covered employees will be those working at least 35 hours per week on a full-time basis.

This benefit will allow employees to purchase a transit pass^[2] via payroll deduction using pre-tax dollars (up to the maximum amount permitted by federal tax law). It must be offered on an employee's first full pay period after 120 days of employment.

Employee Blood and Organ Donation Leave Act

In August 2023, the Illinois legislature enacted an amendment to the Employee Blood Donation Leave Act that becomes effective January 1, 2024. requires private employers with more than 50 employees to provide full-time employees employed for at least six months with paid time off to donate blood. Covered employees are entitled to take off one hour (or more if authorized by the employer or a collective bargaining agreement) every 56 days for blood donation.

The amendment renames the statute the Employee Blood and Organ Donation Leave Act and expands its application to also provide time off for the donation of organs. Covered employees will be entitled to take off up to 10 days during any 12-month period for the donation of organs.

Victims' Economic Security and Safety Act Amendment

The already existing Victims' Economic Security and Safety Act (VESSA) requires all private Illinois employers to provide unpaid leave for victims of domestic, sexual, gender, or criminal violence or for employees with family or household members who are victims of such violence. The amount of leave that must be provided in a 12-month period depends on the size of the employer: 12 workweeks for employers with 50 or more employees; 8 workweeks for employers with 15-49 employees; and 4 workweeks for employers with less than 15 employees. Through the amendment that becomes effective on January 1, 2024, the Illinois legislature expanded the purposes for which VESSA leave may be used. Those will include:

- attending the funeral or its alternative for a family or household member killed in a crime of violence;
- making arrangements necessitated by the death of a family or household member killed in a crime of violence; or
- grieving the death of a family or household member killed in a crime of violence.

If an employer requires certification, the employee must provide one of the following if it's in the employee's possession: a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency that documents that a victim was killed in a crime of violence.

Employees will be entitled to use no more than two workweeks of leave for the purposes provided by the amendment. Additionally, such leave must be completed within 60 days after the date on which the employee received notice of the death of the victim.

If as a result of the death of the victim, the employee is entitled to leave under Illinois' Family Bereavement Leave Act (FBLA) (which only applies to employers with 50 or more employees who are subject to the FMLA), time taken for a purpose provided by the amendment will be in addition to the 4, 8, or 12 workweeks employers are currently required to provide. However, an employee who is entitled to leave under the FBLA won't have the right to take bereavement leave that exceeds or is in addition to leave under the FBLA. If an employee is not entitled to leave under the FBLA, then leave taken for a purpose provided by the amendment won't be in addition to the 4, 8, or 12 workweeks that employers are currently required to provide but rather will be deducted from it.

Personnel Record Review Act Amendment

Illinois' Personnel Record Review Act generally allows employees to inspect their personnel file upon request. Effective January 1, 2024, employees will be allowed to obtain a copy of their personnel record by email or mail for such inspection. Employers may continue to charge a fee for the actual cost of the copy.

National Labor Relations Board's *Stericycle, Inc.* Decision

In issuing its August 2023 Decision and Order in *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113, the National Labor Relations Board (NLRB) adopted a new, strict "legal standard to decide whether an employer's work rule that does not expressly restrict employee's protected concerted activity under Section 7 of the National Labor Relations Act [(NLRA)] is facially unlawful." *Id.* at 1. The NLRA applies to most private employers—even non-union shops—and provides workers with the right to engage in protected, concerted activities to address or improve working conditions pursuant to Section 7 of the NLRA. An employer may violate that right through a rule that would reasonably tend to chill employees in the exercise of such rights.

The standard to determine whether any such violation has occurred has been in flux. In *Stericycle, Inc.*, the NLRB overturned the *Boeing Co.* standard adopted during the Trump administration and adopted a modified version of the standard set in its 2004 Lutheran Heritage Village-Livonia decision.

Under the new *Stericycle, Inc.* standard, "if an employee could reasonably interpret the rule to restrict or prohibit [protected concerted activity]," the General Counsel will satisfy the burden of establishing a violation, "even if a contrary, noncoercive interpretation of the rules is also reasonable." *Id.* at 3, 15. Then, the employer will be given the opportunity to rebut the presumption by showing that "the rule

advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.” *Id.* at 3. The work rule is to be viewed from the perspective of the economically dependent “employee who contemplates engaging in [protected concerted] activity” but “wishes to avoid the risk of being disciplined or discharged for violating the rule.” *Id.* at 3, 14.

The *Stericycle, Inc.* standard impacts the lawfulness of previously adopted work rules, such as those concerning civility, confidentiality, social media conduct, and conflicts of interest. Illinois employers who haven’t already considered the effect of the *Stericycle, Inc.* decision should do so when reviewing their handbooks and policies for compliance with the above statutory changes. In particular, employers should consider whether their work rules need to be drafted with greater specificity to narrowly tailor the rules and avoid overly broad rules that could be reasonably interpreted by economically dependent employees to restrict or prohibit protected concerted activities.

This article does not constitute legal advice and is provided for informational purposes only. For legal advice and assistance in crafting your company’s employee handbook and policies, contact HeplerBroom Employment and Labor attorney Julieta A. Kosiba.

[1] The statute applies to employers in: Cook County; Warren Township in Lake County; Grant Township in Lake County; Frankfort Township in Will County; Wheatland Township in Will County; Addison Township; Bloomingdale Township; York Township; Milton Township; Winfield Township; Downers Grove Township; Lisle Township; Naperville Township; Dundee Township; Elgin Township; St. Charles Township; Geneva Township; Batavia Township; Aurora Township; Zion Township; Benton Township; Waukegan Township; Avon Township; Libertyville Township; Shields Township; Vernon Township; West Deerfield Township; Deerfield Township; McHenry Township; Nunda Township; Algonquin Township; DuPage Township; Homer Township; Lockport Township; Plainfield Township; New Lenox Township; Joliet Township; and Troy Township.

[2] A transit pass is any pass, token, fare card, voucher, or similar item that entitles a person to transportation on public transit.

Tags: Illinois Blood and Organ Donation Leave Act, Illinois Child Extended Bereavement Act, Illinois Employment Acts, Illinois Gender Violence Act, Illinois Paid Leave for All Workers Act, Illinois Personnel Record Review Act, Illinois Transportation Benefits Program Act, Illinois Victims’ Economic Security and Safety Act, Stericycle Inc.