Noah Finley
Illinois State Director
NFIB
600 S. 2nd Street
Suite 101
Springfield, IL 62704

Illinois Department of Labor
Attn: Anna Koeppel
Legislative and Policy Director
524 South 2nd Street
Suite 400
Springfield, IL 62701

The National Federation of Independent Business (NFIB)—representing over 10,000 small and independent employers in Illinois—offers the enclosed comments on the proposed rules to implement Public Act 102-1143, the Paid Leave for All Workers Act (the Act). The Act was signed into law on March 13, 2023, and the proposed rules were published on November 3, 2023. The Act is set to go into effect on January 1, 2024.

During the floor debate in the House, the Act's sponsor noted that the bill was a result of a collaborative effort and stated the intent that all parties "continue to work together collectively" as the state moved "into the implementation side" of the legislation. (House Transcript for January 10, 2023)

In that spirit, NFIB is requesting that the Department review the following sections of the proposed rules.

Section 200.250

The Paid Leave for All Workers Act specifically outlines the manner in which an employer must record accrued leave under the Act. In Section 20, the Act specifies that:

> An employer that provides paid leave on an accrual basis pursuant to subsection (b) of Section 15 shall provide notice of the amount of paid leave accrued or used by an employee upon request by the employee in accordance with the employer's reasonable paid leave policy notification provisions. (820 ILCS 192/20 (a))

The Act does not provide for the listing of accrued paid leave on pay stubs. The proposed rules in Section 200.250 go above and beyond the statutory language, imposing an additional administrative burden on small businesses by requiring them to include an "employee's unused balance of paid leave time on each paystub or form that the employer normally furnishes to the employee to notify them of wage payments and deductions from wages." (Section 200.250 (a)) In a time when small business owners are already struggling with inflationary pressures and market uncertainty, an additional administrative requirement to change or modify their payroll programs would impose additional compliance costs. Since this clause (Section 200.250 (a)) goes beyond the statutory mandate, it should be removed from the proposed rules, or, at a minimum, exempt the smallest employers (based on the number of employees) from this requirement.

Section 200.320

The Paid Leave for All Workers Act provides for accrued paid leave under the Act to be carried over from one year to the next. It, however, provides limitations on the usage of such leave and indicates an intent to

limit such carryover. The Department, recognizing this intent, specifies in Section 200.320 that "[e]mployers may establish a reasonable policy consistent with Section 200.310 restricting employees' ability to carry over more than 80 hours of unused paid leave." (Section 200.320 (a))

The selection of "80 hours" appears to have no basis in either statute or intent. The statute, by specifying that "nothing in this Act shall be construed to require an employer to provide more than 40 hours of paid leave for an employee in the 12-month period unless the employer agrees to do so," indicates the legislative intent of setting the minimum carryover hours at 40 hours per 12-month period. (820 ILCS 192/15 (i)) This interpretation of the legislative intent was collaborated during the House floor debate on the Act, wherein the sponsor noted that: "[a]n employee is also entitled to carry up to 40 hours per 12-month period." (House Transcript for January 10, 2023)

Based upon the statutory language and expressed legislative intent, NFIB believes that Section 200.320 (a) should be modified to permit employers to limit an employee's ability to carry over more than 40 hours of unused paid leave.

Section 200.310 (a)

The Paid Leave for All Workers Act specifies that employers may put in place reasonable paid leave policies that govern an employee's requests for paid time off under the Act. The Act provides for an "oral or written request…in accordance with the employer's reasonable paid leave policy notification requirements…" (820 ILCS 192/15 (h)). Thus the employer, under the Act, may put in place policies governing whether leave is to be requested either in writing or orally.

The proposed rules are the reverse of the statutory language. They add an additional clause, with no basis in statute, stating that "[w]hether to make such a request orally or in writing is the employee's choice." (Section 200.310 (a)(4)) In doing so, the proposed rules stand in direct opposition to the statute's requirement that an employer's reasonable paid leave policy can specify notification requirements, including whether they are in done orally or in writing. This addition would interfere with a small business's ability to implement "reasonable paid leave policy notification requirements" as provided for by the Act.

Section 200.310 (c)

Section 200.310 (c) of the proposed rules outlines the conditions under which an employer may deny an employee's request for paid leave. It specifies that a paid leave request may be denied in "certain limited circumstances…in order to meet the employer's core operational needs for the requested time period." Under the proposed rules, one of the factors that must be considered when evaluating whether to deny a request is "[w]hether the employer provides a need or service critical to the health, safety, or welfare of the people of Illinois." (Section 200.310 (c)(2)(A)) NFIB believes this clause is unclear and could be interpreted too stringently. It is unclear what rises to a "critical" level of harm to the "health, safety, or welfare of the people of Illinois."[1] ("Critical," "health," "safety," and "welfare" are not defined in the rules, forcing small businesses to guess at what rises to that criteria.)

Unlike the closure of a large multinational corporation, the closure or reduction in operations of a small business due to inadequate staffing levels may not impose a "critical" level of harm to the "health, safety, or welfare of the people of Illinois," as determined by the state. Small businesses have less staffing flexibility and may suffer significant economic harm if forced to close or limit operations due to insufficient staffing during peak revenue-generating times (e.g. Valentines Day for florists, special holiday events for

[1] This clause does not mirror the legislative language expressed in 820 ILCS 192/5 (b)(3) that also includes the "prosperity" of the people of Illinois.

small retailers, a production deadline for a manufacturer that could forfeit bonuses or incur penalties if it fails to meet its production timeline, etc.). By imposing an unclear—and possibly extremely stringent—standard on all businesses, regardless of size, the proposed rules jeopardize the small-business model across the state. NFIB is concerned that the vagueness of these proposed rules could unduly restrict a business from implementing reasonable policies to govern the use of paid leave.

The Department's published FAQs indicate the Department shares NFIB's overarching concerns. In its FAQs, the Department states that "[t]he Act does not prohibit an employer from adopting an evenly applied paid leave policy to allow it to address operational issues and meet safety objectives." [Department of Labor's FAQs, accessed December 14, 2023) The FAQs go on to state that "[n]othing in the Act prohibits an employer from adopting a policy that establishes some parameters for taking leave, and limited reasons the employer may deny leave for operational necessity." [Department of Labor's FAQs, accessed December 14, 2023)

In line with the intent expressed in the Department's FAQs, NFIB believes the proposed rules should be clarified to specify that a paid leave policy may include reasonable restrictions on the use of paid leave if the unrestricted use of that paid leave would unduly harm the business' economic model, viability, or sustainability, especially in the case of the smallest employers (based on the number of employees).

Section 200.110

The definition of "regular rate of pay" lacks sufficient clarity. Some believe that it opens the door for overtime wages to be included in "an employee's average hourly rate of pay." (Section 200.110, "Regular Rate of Pay") NFIB believes such an interpretation would be contrary to the language and intent of the Act, which specifies that "[e]mployees shall be paid their hourly rate of pay for paid leave" under the Act. (820 ILCS 192/15 (f)) The Department should review the language to ensure that overtime pay is not included in the required "regular rate of pay" to ensure alignment between the administrative rules and the Act.

The definition of "regular rate of pay" also appears to contain a discrepancy. It addresses the regular rate of pay "[f]or an employee who customarily receives gratuities," noting that it shall be, in accordance with statute, "at least the full minimum wage in the jurisdiction where the employee is employed when paid leave is taken." (Section 200.110, "Regular Rate of Pay" & 820 ILCS 192/15 (f)) The definition omits, however, to address employees who receive commissions, despite the fact that the rate of pay of commissioned employees is included in the same statutory line as employees who receive gratuities:

> [E]mployees engaged in an occupation in which gratuities or commissions have customarily and usually constituted and have been recognized as part of the remuneration for hire purposes shall be paid by their employer at least the full minimum wage in the jurisdiction in which they are employed when paid leave is taken. This wage shall be treated as the employee's regular rate of pay for the purposes of this Act. (820 ILCS 192/15 (f))

The Department's FAQs recognize that "employees who are paid on a commission basis or similar to a commission structure" should be "paid by their employer at least the full minimum wage in the jurisdiction in which they are employed when paid leave is taken." [Department of Labor's FAQs, accessed December 14, 2023)

NFIB believes that the Department should modify the proposed rules in regard to employees who receive a commission to ensure they align with statute and its published FAQs.

Conclusion

NFIB appreciates the Department's review and consideration of these concerns and stands ready to work with the Department and General Assembly to address and resolve these and other concerns that may arise.

Respectfully submitted,

Noah Finley
Illinois State Director
National Federation of Independent Business