

STATE OF MICHIGAN AMENDS PAID SICK LEAVE LAW

As explained in our [previous post](#), on September 5, 2018, the Michigan Legislature voted to approve the Earned Sick Time Act (“ESTA”), a citizen petition-initiated measure that was due to go into effect in March of 2019. However, before the ESTA could go into effect, in December of 2018, it was renamed as the Paid Medical Leave Act (“PMLA”) with significant changes. This was the first time the Michigan Legislature has modified a citizen-initiated measure in the same session it was adopted. The amendments contained in the new PMLA overhauled major substantive provisions of the law. Like the old ESTA, the PMLA is still due to go into effect March 29, 2019.

THE BASICS — REWRITTEN

I. Which employers are subject to the law’s requirements?

Any employer with 50 or more employees - a big change from any employer with more than one employee.

II. Who is considered an employee for purposes of the law?

Whereas the old ESTA only excluded employees of the U.S. government, the new PMLA significantly narrows the definition of employee to individuals working an average of 25 hours per week based on the previous calendar year and whose primary work location is Michigan. In addition, among other exceptions, the PMLA does not apply to:

- Employees exempt from overtime requirements under the FLSA’s section 13(a)(1);
- Private sector employees covered by a collective bargaining agreement;
- Certain temporary employees hired by a temporary help firm ineligible to receive benefits under the Michigan Employment Security Act;
- Variable hour employees as defined by federal regulations governing the Affordable Care Act;
- Individuals employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer; or
- Employees whose minimum wages are determined under Section 4b of Michigan’s Improved Workforce Opportunity Act (currently referencing employees less than 20 years of age on training with an hourly minimum wage of \$4.25).

III. How do employees accrue paid sick leave?

All employees accrue at least one hour of paid leave for every 35 hours worked with the ability to accrue a minimum of 40 hours. An employer is not required to allow an eligible employee to carry over more than 40 hours of unused leave from one benefit year to the next (notably different from the older ESTA, which required all hours accrued to be rolled over indefinitely). An employer is not required to allow an eligible employee to accrue more than one hour of paid medical leave in a calendar week or use more than 40 hours of accrued leave in a single benefit year.

Alternatively, an employer can also choose to provide every eligible employee 40 hours of paid time off at the beginning of the year (pro-rated for new hires); this creates a rebuttable presumption of compliance. These 40 hours can include paid vacation days and paid personal days. In opting for the latter option, the employer will not be required to roll over any unused time to the next benefit year.

Significantly, unlike the old ESTA, the new PMLA does not create a distinction between small businesses and other employers – the standard for all covered employers is the same. Also, distinct from the older law, the new PMLA specifically makes clear that employees will not accrue paid medical leave hours on hours taken off for paid personal days, paid vacation days and paid time off. Eligible employees must actually work for the hours on which they are accruing paid medical leave.

IV. What can leave be used for?

Among other things, leave can be used for the employee’s or the covered family member’s mental or physical illness, injury or health condition, medical diagnosis, care or treatment of the employee’s or covered family member’s mental or physical illness, and injury or health

condition. Leave may also be used for preventative medical care for the employee or covered family member, for care of the employee's child due to closure of school or place of care due to a public health emergency and absences where the employee or covered family member is a victim of domestic violence or sexual assault. Unlike the old ESTA, the PMLA no longer covers leave for meetings at the employee's child's school or place of care related to the child's health or disability or the effects of domestic violence or sexual assault on the child.

V. How is leave used?

Leave is used in one hour increments, unless the employer has another published policy.

VI. Who is a covered family member?

All of the following are considered family members for the purposes of the law:

- A biological, adopted or foster child, stepchild or legal ward, or a child to whom the eligible employee stands in loco parentis;
- A biological parent, foster parent, stepparent, adoptive parent, legal guardian of an eligible employee, an eligible employee's spouse or an individual who stood in loco parentis when the eligible employee was a minor child;
- An individual to whom the eligible employee is legally married under the laws of any state;
- A grandparent;
- A grandchild; and
- A biological, foster or adopted sibling.

Notably, the new PMLA no longer includes domestic partner, child of domestic partner or "individual...whose close association with the employee is the equivalent of a family relationship."

VII. What procedures do employees have to follow for taking leave?

Employees are required to comply with employer's usual and customary policy; however, if the employer policy requires documentation, then the policy must allow the employee three days to produce documentation. In contrast with the old ESTA, the PMLA does not state who is responsible for costs of documentation but explicitly states the employer can discipline employees for failure to comply with their policy.

VIII. Who can provide documentation?

A "Healthcare Provider" as defined by the FMLA.

IX. What remedies are available against an employer who violates the law?

Employees who believe a violation has occurred may file a complaint with the Department of Licensing and Regulatory Affairs ("LARA") within 6 months of alleged violation of the law. If a violation is found, the remedy is limited to recovering "all paid medical leave improperly withheld" (markedly different from the older ESTA, which created a civil cause of action for violation of the law). In addition, LARA may issue an administrative fine of not more than \$1,000.

X. What obligations does an employer have under the law?

An employer must publish a government provided poster¹ with the basic features of the law in English. There is an obligation to retain records "documenting the hours worked and paid medical leave taken" by eligible employees for a period of one year.

PRACTICAL TAKEAWAYS

The amendments embodied in the PMLA create a landscape that is almost entirely different from the law as it was initially passed - one that is far less burdensome to employers. Nevertheless, some issues remain unresolved, including how to determine whether an employee's "primary work location" is in Michigan.

Touted by some members of Michigan's Legislature as a political "maneuver," just a few days ago, the Michigan Legislature requested the

Michigan Supreme Court to review the constitutionality of the changes in the PMLA. A significant decision in this regard may be on the horizon. Employers should remain on the lookout for further amendments or regulatory guidance issued under the law.

If you have any questions, or would like additional information about this topic, please contact:

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¹ The poster is available for download [here](#).