

# Management Alert



## If Pain, Yes Gain—Part 52: Michigan Legislature Adopts Earned Sick Time Initiative

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**Seyfarth Synopsis:** Last week, the Michigan Senate and House of Representatives voted to approve a paid sick leave ballot initiative requiring employers to provide employees with earned sick time for certain covered reasons. The legislature's action not only makes Michigan the first state in the Midwest to pass a statewide paid sick leave law, but it also prevents the sick time initiative from appearing on the November 2018 ballot.

On September 5, 2018, the Michigan Senate and House of Representatives voted to approve the Time to Care ballot initiative requiring employers to provide employees with earned sick time for certain covered reasons. If the legislature had failed to adopt the initiative, which can be referred to as the Michigan Earned Sick Time Act ("MI ESTA" or the "Act"), it would have appeared on the state's ballot in the November 6, 2018 general election.<sup>1</sup> By avoiding the November ballot and the possibility of the initiative passing by public vote, the Michigan legislature reserved the right to amend the initiative with a simple majority vote as opposed to a three-fourths (i.e., 75%) supermajority vote of both houses.

There is a decent, if not strong, chance that the Michigan legislature will use this procedural avenue to amend the Act before it goes into effect, which is expected to occur on or about April 1, 2019. If and when the adopted initiative goes into effect, Michigan would become the eleventh state in the country with a statewide paid sick leave mandate.<sup>2</sup> Whether the Act goes into effect as is or it undergoes a makeover in the coming months, Michigan employers should prepare for some form of sick time bug to begin in 2019.

Here are the highlights of the current MI ESTA:

The Act defines employer and employee very broadly, only excluding the United States government and its employees. Under the Act, employees are entitled to accrue earned sick time at the rate of one hour of sick time for every 30 hours worked. As currently worded, the Act does not contain any express cap on how much sick time employees can accrue. However, the Act does provide caps on the amount of earned sick time employees can use in a year. The specific annual usage cap varies depending on the size of the employer.

Employees of "small employers," defined as employers with fewer than 10 employees, may use up to 40 hours of paid earned sick time and, if the employee accrues more than 40 hours of earned sick time in the calendar year, up to an additional 32 hours of unpaid earned sick time per year. Such employers must permit their employees to use paid earned sick time before unpaid earned sick time. All other employers, which the Act states are those who maintain 10 or more employees on their payroll during at least 20 calendar workweeks in either the current or preceding calendar year, must permit employees to use up to 72 hours of paid earned sick time per year.

<sup>1</sup> Also on September 5, the Michigan legislature voted and approved a ballot initiative to increase the state's minimum wage over the next several years.

<sup>2</sup> The existing statewide paid sick leave laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; (5) Vermont; (6) Arizona; (7) Washington; (8) Maryland; (9) Rhode Island; and (10) New Jersey. [The New Jersey paid sick leave law](#) goes into effect on October 29, 2018. All other statewide paid sick leave laws are currently in effect.

Employees can carry over accrued, unused earned sick time from year to year. However, regardless of carryover balances, employers can enforce the above annual usage thresholds.

Employees must be permitted to use available earned sick time for the following reasons:

- 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, injury, or health condition; or preventative medical care for the employee or covered family member;
- Certain absences where the employee or covered family member is a victim of domestic violence or sexual assault;
- 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; or
- Absences due to certain public health emergencies.

In addition to a 72-hour annual usage cap and current apparent prohibitions on employers from setting any cap on earned sick time accrual and carryover, other substantive aspects of the MI ESTA that could come under scrutiny in the coming months include, but are not limited to, the following:

- **Definition of "Small Business":** As noted above, when determining how much earned sick time an employer must allow employees to use in a benefit year, the Act defines "small business" as a business that has less than 10 individuals working for compensation in a given week. The Act expressly states that to determine an employer's size, all individuals performing work for compensation on a full-time, part-time, or temporary basis must be counted.
- **Covered Family Members:** The Act defines "family member" to include not only an employee's child, parent, spouse, domestic partner, grandparent, grandchild and sibling, but also "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."<sup>3</sup>
- **Employee Notice to the Employer:** For foreseeable sick time absences, employers cannot require that employees provide more than seven days' advance notice. For unforeseeable sick time absences, employers can only require that employees provide notice "as soon as practicable."
- **Increments of Use:** Employers must allow employees to use available earned sick time in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.<sup>4</sup>
- **Documentation:** An employer must wait for an employee to be absent for more than three consecutive days before it can require the employee to provide reasonable documentation justifying that earned sick time was used for a proper reason. In addition and notably, if an employer chooses to require documentation for earned sick time, the employer is responsible for paying all out-of-pocket expenses the employee incurs in obtaining the documentation.
- **Notice and Posting:** Employers must both **(1)** provide notice of certain provisions under the Act to employees by the later of April 1, 2019 or their date of hire, and **(2)** display a poster regarding certain provisions under the Act in a conspicuous place in the workplace that is accessible to employees.
- **Statute of Limitations and Private Right of Action:** An employee who believes an employer has violated the Act may file a civil action against the employer at any time within three years after the violation or the date when the employee knew of the violation. Filing a claim with the Michigan Department of Licensing and Regulatory Affairs is neither a prerequisite nor a bar to bringing a civil action.

Michigan employers should stay tuned for possible and perhaps even probable amendments to the MI ESTA in the coming months as they prepare for the Act's likely effective date on or around April 1, 2019.

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<sup>3</sup> Many recent paid sick leave laws and ordinances, including those in Arizona, New Jersey, Chicago, Los Angeles, Austin, and New York City ([as amended earlier this year](#)), include a similar category of covered family member.

<sup>4</sup> Certain paid sick leave laws and ordinances, including those in Arizona, Washington, Philadelphia and Seattle, impose a similar minimum increment of use standard.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list. Companies interested in Seyfarth's paid sick leave laws survey should reach out to [sickleave@seyfarth.com](mailto:sickleave@seyfarth.com).

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