

Management Alert



If Pain, Yes Gain — Part 60: Michigan Amends State Paid Sick Leave Law

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Seyfarth Synopsis: On December 13, 2018, outgoing Michigan Governor Rick Snyder approved a bill that substantially amends various aspects of Michigan's paid sick leave mandate. Although not a complete cure to the State's paid sick leave bug, when the amendments go into effect – currently expected in late-March 2019 – they will impose a strain of paid sick leave that is much less burdensome than what employers would have faced under the paid sick leave ballot initiative that was passed by the Michigan state legislature earlier this year.

On September 5, 2018, the Michigan Legislature voted on and approved a ballot initiative, known as the Earned Sick Time Act (“ESTA”) – a statewide mandate that would have required employers to provide employees with earned sick time for certain covered absences.¹ As discussed in more detail in our [prior alert](#), by avoiding the possibility that the ESTA would pass by public vote in the November 2018 election, the state legislature reserved the right to amend it by a simple majority vote before the ESTA's expected effective date of on or about April 1, 2019.²

As expected, the Michigan legislature exercised its right to amend the ESTA by adopting [Senate Bill No. 1175](#), now known as the Paid Medical Leave Act (“PMLA”), on December 5, 2018.³ Eight days later Governor Rick Snyder approved the PMLA, thereby solidifying the major overhaul of the sick leave standards set forth in the ESTA. The PMLA is expected to go into effect in late-March 2019 and will make Michigan the eleventh state in the country with a statewide sick leave mandate.⁴

Here are some of the PMLA's highlights:

- **Eligible Employees:** Notably, the PMLA narrows the definition of covered employee. Unlike the ESTA, which defined employee broadly, the PMLA specifies 12 exclusions from its definition of “eligible employee.” To be eligible under the PMLA, employees must have **(a)** worked an average of 25 or more hours per week in the immediately preceding calendar year, and **(b)** their primary work location be in Michigan.⁵

¹ 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.

² The April 1, 2019 effective date was based on, among other things, language that was found in the ESTA regarding the usage waiting period for newly hired employees. The ESTA provided that “an employer may require an employee hired after April 1, 2019, to wait until the ninetieth calendar day after commencing employment before using accrued earned sick time.” The PMLA does not reference April 1, 2019.

³ Like the ESTA, the September 5 minimum wage ballot initiative was also amended and approved by the state Governor on December 13.

⁴ 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](#).

⁵ The PMLA does not include guidance on how employers should determine whether an employee's primary work location is Michigan.

- The PMLA's protections also would not extend to a number of other individuals, including, but not limited to, the following: **(i)** employees exempt from overtime under the FLSA; **(ii)** private sector employees covered by a CBA; **(iii)** certain temporary help service firm employees disqualified from receiving benefits under the Michigan Employment Security Act; **(iv)** variable hour employees as defined by federal regulations governing the Affordable Care Act; and **(v)** individuals employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer.
- **Covered Employers:** While the ESTA created distinct paid sick leave obligations for "small employers," only employers with 50 or more individuals are subject to paid sick leave obligations under the PMLA.⁶
- **Accrual, Usage, and Carryover**
 - **Start of Accrual:** As with the ESTA, under the PMLA eligible employees must be able to accrue paid medical leave as of the effective date of the act or the start of their employment, whichever is later.
 - **Accrual Rate and Cap:** Under the PMLA, employees accrue paid medical leave at the rate of one hour for every 35 hours worked, a slower rate than the ESTA. In addition, an employer is not required to allow an eligible employee to accrue more than one hour of paid medical leave in a calendar week. Further and significantly, while the ESTA did not contain an express cap on how much sick time eligible employees could accrue, the PMLA explicitly allows employers to cap employees' paid medical leave accrual at a maximum of 40 hours per benefit year.
 - **Usage Waiting Period:** The PMLA, allows employers to implement a usage waiting period of 90 calendar days for new hires.
 - **Usage and Carryover Caps:** Two major pro-employer aspects of the PMLA are its annual usage and year-end carryover caps. Unlike the ESTA, which set a 72-hour annual usage cap (for large employers) and provided no year-end carryover cap, the PMLA caps annual paid medical leave usage and year-end carryover at 40 hours.
 - **Frontloading:** Under the PMLA, employers that provide eligible employees with a frontloaded grant of at least 40 hours of paid medical leave at the start of a benefit year can avoid the law's accrual and year-end carryover obligations. This represents another major success for employers compared to the ESTA, which lacked a frontloading provision.
 - **Proration for New Hires:** The PMLA expressly permits proration of paid medical leave for employees hired during a benefit year.
 - **Presumption of Compliance for Paid Leave:** Among the PMLA's many noteworthy provisions is language establishing a rebuttable presumption of compliance for employers that provide employees with at least 40 hours of paid leave each benefit year. Under the PMLA, "paid leave" includes, but is not limited to, paid vacation days, paid personal days, and paid time off (i.e., PTO). This standard is a significant departure from the ESTA, which stated that to use PTO for sick leave law compliance the PTO must be available in at least the same amounts, for the same purposes, and under the same conditions as paid sick leave.
 - **Reasons for Use:** For the most part, the PMLA does not change the permissible reasons for use of paid medical leave as provided by the ESTA. However, unlike the ESTA, under the PMLA, absences "for meetings at a 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" are not protected.
 - **Covered Family Members:** The PMLA significantly reduces the number of covered family members by, among other things, removing "domestic partner" and "[a]ny other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" from the definition of "family member."
 - **Increments of Use:** The PMLA requires that paid medical leave be used in one hour increments, unless the employer has a different increment policy and the policy is in writing in an employee handbook or other employee benefits document.
 - **Notice to Employer:** Instead of establishing employee notice procedures for foreseeable and unforeseeable sick leave absences as was the case under the ESTA, the PMLA simply states that when requesting to use paid medical leave, employees must comply with their employer's usual and customary notice and procedural requirements for such requests. In addition, under the PMLA, employers can discipline or discharge employees who do not comply with their usual and customary notice standards.

⁶ As of now, the PMLA is silent on whether the "50 or more individuals" threshold is determined based on the size of an employer's Michigan-only workforce or its total workforce, regardless of whether the individuals work in Michigan. We expect this uncertainty will be resolved in forthcoming guidance from the state.

- **Documentation:** Unlike the ESTA, the PMLA does not restrict employers' ability to require reasonable documentation following a paid medical leave absence of less than three consecutive days. Instead, employees must comply with their employer's usual and customary documentation requirements for requesting leave when using paid medical leave. In addition, under the ESTA there was no standard governing when employees must provide reasonable documentation to their employer. By comparison, the PMLA requires employers to give employees at least three days to provide the documentation.⁷
- **Retaliation/Interference:** Notably, the PMLA has repealed the ESTA's anti-retaliation and anti-interference provisions.
- **Remedies and Statute of Limitations:** Unlike the ESTA, the PMLA does not provide a private civil cause of action to aggrieved employees. In addition, instead of a three-year statute of limitations, the PMLA requires aggrieved employees to file a claim with the Michigan Department of Licensing and Regulatory Affairs (the "Department") within six months after the alleged violation.
- **Notice and Posting:** The PMLA does not require an employer to provide written notice to current and newly hired employees of certain sick leave rights. However, under the PMLA employers must still display a poster in a conspicuous place regarding the PMLA. Notably, the PMLA lacks the language requirements provided as part of the ESTA's posting standard.
- **Recordkeeping:** The PMLA reduces the ESTA's three-year recordkeeping requirement to a one-year requirement.
- **Termination of Employment:** Unlike the ESTA, under the PMLA employers are not required to reinstate accrued, unused paid medical leave to employees rehired after separation from employment.
- **Preemption:** The PMLA effectively repeals Section 11(1) of the ESTA, which provided that the statewide mandate shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, or requirement that provides for greater accrual or use of time off, or that extends other protections to employees. The PMLA's omission of this language makes it likely that Michigan's political subdivisions are preempted from regulating paid sick leave.⁸ In addition the PMLA provides that in the event a federal paid medical leave mandate is enacted, the PMLA would not apply as of the effective date of the federal mandate.

Michigan employers should begin preparations to comply with the PMLA's expected effective date in late-March 2019. These are among the actions to consider:

- Review existing sick leave policies and either implement new policies or revise existing policies to satisfy the PMLA.
- Develop a new paid sick leave policy that complies with the PMLA for any employees who are not covered under existing paid sick leave or PTO policies.
- Monitor the Department's website for further information on the PMLA, including regulations, model poster, etc.

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.

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⁷ The PMLA provides specific guidelines pertaining to reasonable documents for covered absences relating to domestic violence and sexual assault. In addition, the PMLA removed the ESTA's provision requiring employers to pay all out-of-pocket expenses an employee incurs in obtaining the required reasonable documentation.

⁸ See Mich. Comp. Laws § 123.1388 ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to provide to an employee paid or unpaid leave time.").

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