

SpecialAlert

Volume Fourteen, Issue Thirteen

December 2018

MICHIGAN PAID FAMILY LEAVE ACT (FORMERLY CALLED THE EARNED SICK TIME ACT)

In September 2018, the Michigan legislature passed the Earned Sick Time Act. The legislature took action to avoid having the Act placed on the ballot in November 2018. It was anticipated that the legislature would make significant changes to the rules after the November election.

Indeed, changes were made, beginning with the name of the Act. On December 13, 2018, Governor Snyder signed the Paid Family Leave Act (MI PFLA) into law. It replaces the Earned Sick Time Act, with critical differences.

The revised Act significantly curtailed some of the requirements of the Earned Sick Time Act. **Employers will be pleased to know that they will be in compliance if they provide at least 40 hours of paid leave to an eligible employee each benefit year.** Paid leave includes, but is not limited to, paid vacation days, paid personal days and paid time off.

An eligible employer is defined by the Family and Medical Leave Act (FMLA), as follows:

- Any organization engaged in commerce, or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year:
 - ii. includes -
 - I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
 - II) any successor in interest of an employer;
 - iii. includes any "public agency", as defined in section 203; and
 - iv. includes the General Accounting Office and the Library of Congress.



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Continued on Page 2

- Public agency - For purposes of subparagraph (A) (iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

However, the MI PFLA excludes the United States government, other states or a political subdivision of other states from the definition of “employer.”

An eligible employee is defined an individual engaged in service to the employer in the business of the employer, and for whom an employer must be required to withhold federal income taxes.

The following employees are excluded as ineligible under the MI PFLA:

- An individual who is exempt from overtime requirements under Section 13 (A) (1) of the Fair Labor Standards Act (FLSA). This includes the FLSA’s white collar exemptions (executive, administrative, professional, etc.).
- An individual who is not employed by a public agency and is covered by a collective bargaining agreement that is in effect.
- An individual employed by the United States government, another state or a political subdivision of another state.
- An individual employed by an air carrier as a flight deck or cabin crew member.
- An employee of an air carrier that is in engaged in interstate or foreign commerce, or that transports the mail.

- Individuals subject to certain sections of the Railroad Unemployment Insurance Act.
- An individual whose primary work location is not in this state.
- An employee whose minimum hour wage is determined under Section 4B of the Improved Workforce Opportunity Wage Act (i.e., younger workers to whom you are permitted to pay a training wage).
- An individual described in Section 29 (1) (I) of the Michigan Employment Security Act.
- An individual who worked, on average, fewer than 25 hours per week in the preceding calendar year.
- An individual employed for 25 weeks or less in a calendar year for a job scheduled to last fewer than 25 weeks (seasonal employees).
- A variable-hour employee as defined in 26 CFR 54.4980H-1. The term variable-hour employee is an employee that as of the start date an employer can’t determine if they will work 30 or more hours per week based on ACA rules. This is a facts and circumstance determination.



The benefit year is determined by the employer, and is any consecutive 12-month period that is used to calculate an eligible employee’s benefit.

Eligible employees will accrue one hour of paid family leave for every 35 hours worked, capped at 40 hours per benefit year. An employee will not accrue more than one hour per work week. An employer is not required to carry over

more than 40 hours of unused accrued paid medical leave from one benefit year to the next, nor is the employer required to allow an

eligible employee to use more than 40 hours of paid medical leave in a single benefit year. An employee begins accruing as of the first day worked or on the effective date of this law, whichever is later. An employer can require an employee to wait until the 90th calendar day of employment before using any accrued paid medical leave.

An eligible employer has the option to provide at least 40 hours of paid medical leave to an eligible employee at the beginning of the benefit year or as of the date the individual becomes an eligible employee. If the employer provides 40 hours upfront, not subject to accrual, then the employer is not required to allow the eligible employee to carry over any of that paid medical leave to another benefit year.

An employer must pay each eligible employee using paid medical leave at a pay rate equal to the greater of the normal hourly wage or the base wage for that eligible employee, or the applicable minimum wage rate established by the Improved Workforce Opportunity Wage Act. An employer is not required to include overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities in the calculation of an eligible employee's normal hourly wage or base wage.

An employer must allow an employee to take accrued paid medical leave in the following situations:

- For an employee's mental or physical illness, injury or health condition, treatment for these and for preventive medical care.
- For an eligible family member's mental or physical illness, a injury or health condition, treatment for these and for preventive medical care.
- If the eligible employee or family member is a victim of domestic violence or sexual assault.
- For the closure of the eligible employee's primary workplace by order of a public official due to a public health emergency, or if an employee needs to care for a child because the school or place of care has been closed due to a public health emergency.
- If an employee or family member contracts a communicable disease and must stay isolated to avoid jeopardizing the health of the community.

The definition of eligible family members has been changed. A family member will include all of the following:

- A biological, adopted or foster child, stepchild or legal ward, or a child to whom the employee stands in loco parentis.
- A biological parent, foster parent, step-parent, adoptive parent or legal guardian of an eligible employee or employee's spouse. It also includes 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.
- A biological, foster or adopted sibling.



To request paid leave, an employee must comply with the employer's usual call-in procedures and policies. The Act does not prohibit an employer from disciplining or discharging an employee for failing to comply with their stated policy when requesting paid medical leave. Paid medical leave must be used in one-hour increments unless the employer has a different increment stated in their policy which is included in the employee handbook or other benefit documents.

Employers can request documentation that paid family leave is being used for an eligible reason, including domestic violence or sexual assault. However, the employer cannot require the doc-

umentation to explain the details of any violence. The Paid Medical Leave Act **does not** include a requirement that employers pay any fee for an employee to secure documentation demonstrating that the leave is for an eligible reason. The employer may also require seven days' notice if the need for leave is foreseeable. If the leave is not foreseeable, then notice should be provided as soon as possible. Further, the MI PFLA **removed** the requirement that the employer cannot require the employee to find a replacement worker to take paid medical leave.

The employee must retain any paid family medical leave accrued if he or she is transferred to a

separate division, entity or location while remaining employed by the same employer. However, if the employee separates from employment and is

later rehired, the employer is not required to reinstate any accrued paid leave earned prior to the separation of employment.

An employer is not required to provide a reimbursement to an eligible employee for accrued paid medical leave that was not used before the end of the benefit year or before separation of employment.

The Michigan Department of Licensing and Regulatory Affairs (LARA) will be responsible for monitoring compliance with the MI PFLA. Employees have six months to file complaints related to an employer's violation of these rules. The Department will investigate any complaints and will attempt to resolve issues through mediation. They may require an employer to pay the employee for paid family leave improperly withheld, and may impose penalties for noncompliance. An employer that fails to comply with the MI PFLA is subject to an administrative fine of no more than \$1,000 for each separate violation.

The Department will require employers to display a poster, describing the MI PFLA provisions, in a conspicuous space that is accessible to employees. The Department will create and make posters available to employers for no cost. There is a \$100 per violation fine for failing to meet this posting requirement.

An employer must retain, for one year, records documenting hours worked and paid medical leave taken by eligible employees.

CONCLUDING THOUGHTS

The Michigan Paid Medical Leave Act significantly curtailed the benefits and provisions of the original Earned Sick Leave Act. Many employers already offer paid time off that will meet the requirements of this law.

In addition, the Act includes a more limited definition of eligible employers and eligible employees.

The Act includes a provision that it will no longer apply if the federal government passes a paid family medical leave mandate.

At this point, employers should start planning. It looks as though the Act will go into effect on April 1, 2019. Employers may want to consult with legal counsel to understand the best way to document accrued hours and payments made in compliance with this law's provisions. MMA



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