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Michigan Amends Recently Enacted Paid Sick Leave Law

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On December 14, 2018, Michigan Governor Rick Snyder signed into law the [Paid Medical Leave Act](#) (“PMLA” or “Act”), which substantially amends the Earned Sick Time Act that had passed the legislature in September 2018. The revisions contained in the new Act will please many Michigan employers, as they restrict the paid leave mandate to significantly fewer employers than were subject to the original law, and they greatly reduce the number of paid leave hours an eligible employee can accrue. The PMLA is expected to take effect in late March or early April of 2019 (*i.e.*, on the 91st day after the final adjournment of the 2018 legislative session).

In brief, the Act requires public and private employers with 50 or more individuals to allow eligible employees to accrue one hour of paid leave for every 35 hours worked, up to at least 40 hours per year of paid time off. This paid leave may be used only for specified purposes, such as the employee’s or a family member’s illness or injury, to attend to various matters pertaining to domestic abuse or sexual violence, and for certain public health emergencies. As discussed below, eligible employees primarily are *non-exempt* employees who work a minimum number of hours per week and weeks per year.

Eligible Employees

As noted, only certain employees are eligible for paid leave under the PMLA. The numerous categories of workers *excluded* from the Act’s coverage include employees who:

- are exempt from overtime requirements under the federal Fair Labor Standards Act;
- worked, on average, fewer than 25 hours per week during the immediately preceding calendar year;

- are employed by an employer for 25 weeks or fewer in a calendar year “for a job scheduled for 25 weeks or fewer;”
- are covered by a collective bargaining agreement;
- are deemed “variable” employees, *i.e.*, at hire, the employer cannot determine that they are reasonably expected to be employed on average at least 30 hours per week;¹
- primarily work at a location outside Michigan;
- are under 20 years of age and in a training program, pursuant to section 4b of the Improved Workforce Opportunity Wage Act;² or
- are employed by a temporary help firm.

The Act also excludes U.S. government workers and certain air carrier and railroad employees.

Accrual and Carryover of Paid Leave Time

The PMLA requires that eligible employees accrue paid leave time at a rate of at least one hour for every 35 hours worked, up to 40 hours in a benefit year.³ An employer, however, need not allow an eligible employee to accrue more than one hour of paid leave in a calendar week, regardless of the number of hours worked. The term “hours worked” does not include PMLA time off unless the employer wants to include it.⁴

Further, unless employers adopt the “frontloading” practice described below, they must allow employees to carry over up to 40 hours of unused accrued PMLA time to the next benefit year, but they may limit an employee’s *use* of accrued and carried over leave time to a maximum of 40 hours in a single benefit year.

To “frontload” the benefit, an employer may instead provide at least 40 hours of PMLA leave to eligible employees at the beginning of a benefit year as an alternative to the carryover system. For eligible employees hired during a benefit year, an employer may prorate paid leave.

Under either process, employers need not pay employees for unused accrued PMLA leave time at the end of the benefit year or upon termination of employment (voluntary or involuntary). Employees who transfer to another division or location of the employer’s business, however, retain their accrued PMLA leave. Michigan’s Wage and Fringe Benefits Act generally requires employers to make clear in a written policy whether paid benefits are cashed out upon termination, so any employers providing paid leave time under the PMLA as a part of a general paid time off policy should clarify in their written policies whether such time will be paid.

¹ See [26 CFR 54.4980H-1](#).

² See [MCL 408.934b](#).

³ “Benefit year” means any consecutive 12-month period used by an employer to calculate an eligible employee’s benefits.

⁴ The law does not specify whether “hours worked” includes any other paid time provided by the employer, such as holiday or vacation pay.

Accrual starts for current employees on the day the Act goes into effect. Accrual begins for new hires upon commencement of employment, but an employer may require new employees to wait until 90 days after commencing employment before using accrued leave time. Further, the Act permits an employer to establish a policy that allows an employee to donate unused accrued PMLA leave to another eligible employee.

Permissible Uses of PMLA Leave

Eligible employees may use PMLA for any of the following purposes:

- The employee's or a family member's⁵ mental or physical illness, injury, or health condition, medical diagnosis, care, or treatment, or preventative medical care;
- If the employee or the employee's family member is a victim of domestic violence or sexual assault,
 - for medical or psychological care for a physical or psychological injury or disability;
 - to obtain services from a victim services organization;
 - to relocate due to domestic violence or sexual assault; or
 - to obtain legal services or to participate in a civil or criminal proceeding related to or resulting from the domestic violence or sexual assault.
- A public health emergency that results in the closure of the employee's primary place of employment or that requires an employee to care for a child whose school or care center closed due to such an emergency; or
- If health authorities or a health care provider has determined that the employee or a family member presents a risk to the community because of that person's exposure to a communicable disease.

Calculation of PMLA Rate of Pay

Employers must pay employees using PMLA leave at a pay rate equal to the greater of either the normal hourly or base wage rate for that employee or the minimum wage rate. An employer, however, need not include "overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities" when calculating an employee's normal hourly wage or base wage rate.

The Act provides that PMLA leave must be used in one-hour increments unless the employer has a different increment policy, which is in writing and contained in an employee handbook "or other employee benefits document."

⁵ A "family member" includes (i) a biological, adopted or foster child, stepchild or legal ward, or a child to whom the employee stands in *loco parentis*; (ii) a biological parent, foster parent, stepparent, or adoptive parent or a legal guardian of an employee or the employee's spouse, or an individual who stood in *loco parentis* when the employee was a minor child; (iii) an individual to whom the employee is "legally married under the laws of any state;" (iv) a grandparent or grandchild; and (v) a biological, foster, or adopted sibling.

Notice of Leave and Documentation Rules

Employees requesting PMLA leave must comply with their employer's "usual and customary notice, procedural, and documentation requirements for requesting leave," except that employers must allow employees at least three days to respond to a request for documentation of the need for PMLA leave. An employer may discipline or discharge an employee who fails to comply with such policies, pursuant to its established practice.

An employer may seek documentation with respect to leave taken due to a domestic violence or sexual assault matter, but it may not require documentation that discloses details of the domestic violence or sexual assault. Further, an employer in possession of any information pertaining to a health or domestic violence/sexual assault matter must ensure that such information is kept confidential and only disclosed to the affected employee or with his or her permission.

Notice Posting, Recordkeeping and Violations

The PMLA requires employers to post a notice in a conspicuous place that is accessible to eligible employees and advises them of all their rights under the Act. The state Department of Licensing and Regulatory Affairs ("LARA") will provide, free of cost, an appropriate poster for employers' use.

The PMLA further requires that employers maintain records for at least one year of the hours worked and the paid leave taken by all eligible employees.

Employees can file complaints of alleged violations of the Act with the LARA and potentially recover any leave payment wrongfully denied. The LARA can also assess penalties for such violations (up to \$1,000 per violation), as well as for "willful" failure to post the required notice (up to \$100 for each violation).

"Rebuttable Presumption" of Compliance

Notably, the PMLA contains a rebuttable presumption that an employer is in compliance with the Act if the employer provides at least 40 hours of "paid leave" to an eligible employee each benefit year, including paid vacation days, paid personal days, and other paid time off ("PTO"). The Act, however, does not expressly require that a PTO plan or other paid leave policy also meet the PMLA's other mandates, such as permitting leave to attend to a domestic abuse matter or allowing employees three days to provide documentation of the need for the leave. It is hoped that the LARA will provide guidance on this issue, as well as on other matters not addressed by the legislation, such as the coverage question discussed below.

What Employers Should Do Now

As the PMLA will take effect in a few months, employers should promptly take the following actions:

- Determine if your employees are covered by the PMLA. This may be difficult for some employers because the Act is silent with respect to which employees should be counted towards the 50-employee threshold. For instance, the Act excludes exempt employees from coverage, but an employer may need to include them when assessing whether the 50-employee requirement is met. Unless and until the LARA provides guidance on this issue, employers may want to err on the side of caution and include otherwise ineligible employees for purposes of deciding this threshold question.
- Employers that meet the 50-employee threshold should:
 - if they currently have a paid leave policy, decide if their current practices meet or exceed the PMLA's requirements or if the policy can be made compliant. As discussed above, employers will need guidance from the state on the precise criteria, if any, an alternative plan must meet to be deemed compliant with the Act;
 - employers that do not currently have a paid leave policy should begin developing one. Under the PMLA structure, they will need to decide, among other issues, which employees are eligible and whether to implement the carryover process or frontload paid leave; and
 - properly train all relevant staff on the PMLA's mandates and any new or revised company policies and procedures. Also, ensure that all applicable policies and procedures (such as employee notice) are clearly communicated to employees in writing.

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