



## Michigan Paid Sick Leave FAQs

On December 14, 2018, Michigan Governor Rick Snyder signed the [Michigan Paid Medical Leave Act](#) into law. SB 1175, now Public Act 369, will require eligible businesses to award workers one hour of paid sick leave for every 35 hours worked, with a cap of 40 hours annually. This law was passed to amend the proposed “Time to Care” ballot proposal which called for a cap of 72 hours and would have applied to all Michigan employers regardless of the number of employees they had. Furthermore, the bill has eliminated the private cause of action and retaliatory personnel action provisions and reduced the limitations period from three years to six months. Thus, an eligible employee who believes his or her rights have been violated must file an administrative complaint with the Michigan Department of Licensing and Regulatory Affairs within six months. Had the legislature not passed this law, the Michigan ballot proposal, if passed by voters, would have come into effect 10 days after the election. The law is effective as of March 29, 2019, the 91<sup>st</sup> day after signing of the law.

### Who is Covered

#### **Q: Which companies are covered by the act?**

Persons, firms, businesses, educational institutions, nonprofit agencies, corporations, limited liability companies, government entities, and other entities that employ 50 or more individuals are covered employers. The act does not apply to the United States government, other states, or political subdivisions of other states.

#### **Q: Which workers are eligible to use paid sick leave under the act?**

The act defines an eligible employee as "an individual engaged in service to an employer in the business of the employer from whom an employer is required to withhold for federal income tax purposes." As a practical matter, this excludes independent contractors from eligibility under the act.

#### **Q: Which workers are exempt from paid sick leave law?**

The law has 12 specific exemptions to eligibility under Paid Medical Leave. Generally, exempt employees under the FLSA and employees covered by a CBA are not eligible. Also, remote employees who are working out of state are also ineligible. In addition, a covered employer is not required to provide earned sick time law (ESTA) benefits to employees who either: (a) work on average less than 25 hours per week; and/or (b) fit within the “variable hour employee” definition.

The 12 exemptions are below:

1. An individual who is exempt from overtime requirements under section 13(a)(1) of the fair labor standards act, 29 USC 213(a)(1).
2. An individual who is not employed by a public agency, as that term is defined in section 3 of the fair labor standards act, 29 USC 203, and who is covered by a collective bargaining agreement that is in effect.
3. An individual employed by the United States government, another state, or a political subdivision of another state.
4. An individual employed by an air carrier as a flight deck or cabin crew member that is subject to title II of the railway labor act, 45 USC 151 to 188.

5. An employee as described in section 201 of the railway labor act, 45 USC 181.
6. An employee as defined in section 1 of the railroad unemployment insurance act, 45 USC 351.
7. An individual whose primary work location is not in this state.
8. An individual whose minimum hourly wage rate is determined under section 4b of the improved workforce opportunity wage act, 2018 PA 337, MCL 408.934b.
9. An individual described in section 29(1)(I) of the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.29.
10. An individual employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer.
11. A variable hour employee as defined in 26 CFR 54.4980H-1.
12. An individual who worked, on average, fewer than 25 hours per week during the immediately preceding calendar year.

**Q. At what point in time does a covered employer have to provide new hires paid leave?**

- **FOR NEW HIRES WITH PREDICTABLE WEEKLY HOURS:** Treat all new hires according to his/her expected weekly hours (i.e., if the job is expected to average 25 or more hours per week, treat them as eligible employees by allowing them to accrue from day one and use leave starting 90 days later).
- **FOR NEW HIRES WITH UNPREDICTABLE WEEKLY HOURS:** Use the 90-day waiting period as an eligibility determination period. If the employee averaged 25/hrs week during the 90 days, then retroactively provide them with the number of sick leave hours they accrued during the 90-day period and allow them to use immediately.
- **PT to FT ROLE:** When an employee moves from a statutory PT position (less than 25 hrs/wk) to one working 25+ hours a week, allow the employee to start accruing and using paid leave immediately.
- **FT to PT Role:** When an employee moves from a position working 25+ hours a week to a statutory PT position (less than 25 hrs/wk), treat the employee as an eligible employee for the rest of the calendar year.

**Q. How should eligibility reviews be handled?**

Employers should apply the same tactics it uses to comply with the ACA--i.e., EITHER--(a) "part-time" positions do not work more than 25 hours a week EVER; and/or (b) apply the yearly lookback period at the end of each calendar year to determine eligibility.

**Accrual of Hours**

**Q: When may an eligible employee start to accrue Paid Medical Leave under the act?**

"Paid Medical Leave . . . shall begin to accrue on the effective date of the act, or upon commencement of the employee's employment, whichever is later." The year is based on a benefit year, not calendar year, although the two may coincide. The act defines a benefit year as any 12-month period used by an employer to calculate an eligible employee's benefits.

**Q: How does Paid Medical Leave accrue?**

Employees will accrue Paid Medical Leave at a rate of one hour for every 35 hours **actually worked**. However, an employer is not required to allow an eligible employee to accrue more than one hour of Paid Medical Leave in a calendar week. An employer may limit an eligible employee's accrual of Paid Medical Leave to not less than 40 hours per benefit year. Hours worked does not include hours taken off work by an eligible employee for paid leave, including paid vacation days, paid personal days, and paid time off, unless the employer voluntarily chooses to include nonworking time in the accrual.

**Q: Can employees carry over unused paid sick days?**

Employees can carry over up to 40 hours of unused accrued Paid Medical Leave from one benefit year to another benefit year, but employees may not use more than 40 hours in a single benefit year.

**Q: To ease the administrative tracking burden can employers opt to front load sick leave?**

Yes, employers may opt to provide the required 40 hours of sick leave at the beginning of the employer's benefit year or on the date the individual becomes eligible during the benefit year on a pro-rated basis. If the employer opts for the front-load method, it does not have to permit employees to carryover their unused leave to the next benefit year. Under this methodology, employers can also delay the usage of the paid leave until the 90<sup>th</sup> calendar day following the date of hire for new or rehired employees.

**Q. What are the requirements for employers who front load on an employee's anniversary date?**

Frontloading employers who use an employee's work anniversary for the benefit year cannot prorate. Frontloading employers who use a fixed benefit year (e.g., calendar year, fiscal year, or March 1st for all employees) can prorate PMLA-qualifying paid leave based on when the new employee was hired during the benefit year. Accrual employers should not wait until an employee has worked their first 35 hours before changing the employee's paid leave amount from "0." After the employee works his/her first 17.5 hours, his/her paid leave bank should list "0.5 hours" or "1/2 hour." An employer who frontloads 100 hours needs to ensure the frontloaded PTO amount is in new hires' paid leave banks by their 90th day of employment.

**Q: Must an employer provide additional Paid Medical Leave if it already provides paid leave to employees?**

There is a *rebuttable* presumption (it will be assumed) that an employer is in compliance with the Paid Medical Leave 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. Separate banks (sick bank, vacation bank, etc.) can be combined to meet this obligation for calculation purposes. The employer does not have to provide the paid leave in the beginning of the year. However, over the 12-month benefit period (as long as the eligible employee has access to the accrued time over the benefit year) it accrues in the time frame and in the amount required by the law. The law is not requiring employers to change to a Paid Time Off (PTO) system to be in compliance, though it may be easier administratively for employers who are using a variety of time off banks to combine them into one PTO bank. If employers are keeping separate time off banks and are using the combined totals to meet the requirements of the law, a best practice recommendation is to update the employer's policy verbiage to indicate time off banks such as vacation, personal time, etc. should be used for sick leave. Information rebutting this presumption is yet to be determined (likely by the courts).

**Q. What are the requirements for rollovers if an employer uses an accrual method?**

An employee with an accrual employer must be allowed to accrue up to 40 hours of PMLA-qualifying paid leave each benefit year. An employee must also be able to use up to 40 hours of PMLA-qualifying leave each benefit year. Finally, an employee with an accrual employer must be allowed to carry-over up to 40 hours of accrued, but unused PMLA-qualifying paid leave from one benefit year to another benefit year. As a result, the PMLA requires the OVERALL employee paid leave bank cap/limit restriction to be no lower than 80 hours for accrual employers. Assuming an employer applies all three provisions strictly, an employee who earns 40 hours of paid leave in year one (for an accrual employer) without using any of the time will carry all 40 hours over to the next benefit year. In year two (a new benefit year) the employee must be permitted to accrue up to 40 hours of leave regardless of how many hours of paid leave are in the employee's paid leave bank. If the employee never uses any paid leave in year two, the employee will have 80 hours of paid leave in the employee's paid leave bank on the last day of year two. However, the employer is allowed to restrict the amount of accrued, but unused paid leave the employee can carry over to year three to 40 hours. Thus on day one of year three, the employee will only have 40 hours of paid leave in the employee's paid leave bank.

## Usage

### **Q: When may an eligible employee start to use Paid Medical Leave under the act?**

"An employee may use accrued Paid Medical Leave as it is accrued, except that an employer may require an employee to wait until the 90<sup>th</sup> calendar day after commencing employment before using accrued Paid Medical Leave." This is regardless of whether the employer uses the accrual method or the front-load method.

### **Q: For what can the Paid Medical Leave be used for?**

Paid Medical Leave can be used for the following:

- (a) The eligible employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee's mental or physical illness, injury, or health condition; or preventative medical care for the eligible employee.
- (b) The eligible employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee's family member's mental or physical illness, injury, or health condition; or preventative medical care for a family member of the eligible employee.
- (c) If the eligible employee or the eligible employee's family member is a victim of domestic violence or sexual assault, the medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to domestic violence or sexual assault; to obtain legal services; or to participate in any civil or criminal proceedings related to or resulting from the domestic violence or sexual assault.
- (d) For closure of the eligible employee's primary workplace by order of a public official due to a public health emergency; for an eligible employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or if it has been determined by the health authorities having jurisdiction or by a health care provider that the eligible employee's or eligible employee's family member's presence in the community would jeopardize the health of others because of the eligible employee's or family member's exposure to a communicable disease, whether or not the eligible employee or family member has actually contracted the communicable disease.

### **Q: Who is considered part of the employee's "family"?**

"Family member" includes all of the following:

- 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, or adoptive parent or a legal guardian of an eligible employee or 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
- Grandparent or grandchild
- A biological, foster, or adopted sibling

### **Q. Can the employer require the eligible employee to take Paid Medical Leave in increments of one hour or more?**

Yes and No. Paid Medical Leave must be used in one-hour increments unless the employer has a different increment policy for other forms of paid leave (such as vacation, sick leave, etc.) and the policy is in writing in an employee

handbook or other employee benefits document. For example, if an employer allows employees to take vacation in 15-minute increments under its existing policy, then Paid Medical Leave under the act can also be taken in 15-minute increments. It should be noted that Family Medical Leave Act (FMLA) requires eligible employers to use the lowest time increments for measuring FMLA time. Paid Medical Leave may run simultaneously with FMLA leave. However, the law does not provide that FMLA tracking directly applies to Paid Medical Leave tracking.

**Q. Does the FMLA smallest increment rule apply to Michigan Paid Medical Leave Law?**

Not as discussed previously. The smallest increment does not specifically rule. The listed increment within the paid leave policy used to cover the PMLA-qualifying absence controls. For example, assume an employer has a vacation policy (8-hour increments) that is strictly to be used only for vacation time, but also has a personal leave policy (4-hour increments) that can be used for any other reason. The 4-hour increment would apply for any PMLA-qualifying absence because that is the only policy an employee could take paid leave under for one of the PMLA-covered reasons. Employers could either move to a PTO policy or (if multiple paid leave policies are used) strictly define what each form of paid leave may be used for to avoid confusion.

**Notice to Employers**

**Q. What notice is an employee required to provide to employer to use Paid Medical Leave:**

An eligible employee shall, when requesting to use Paid Medical Leave, comply with his or her employer's usual and customary notice, procedural, and documentation requirements for requesting leave. An employer shall give an eligible employee at least three days to provide the employer with documentation.

**Q: What can an employer do if an employee does not provide sufficient notice?**

If sufficient notice is not provided, the employee can be denied leave. In addition, this act does not prohibit an employer from disciplining or discharging an eligible employee for failing to comply with the employer's usual and customary notice, procedural, and documentation requirements for requesting leave. However, employees may have protections under other laws like the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) that employers cannot ignore.

**Q: Who may provide medical documentation on behalf of an employee or an employee's family member?**

A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate). . .or any other person determined by the U.S. Secretary of Labor to be capable of providing healthcare services (as defined under the FMLA), including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, and physicians assistants.

**Documentation**

**Q: Are there restrictions on what type of information employers can require from employees when they request leave?**

An employer shall not require disclosure of details relating to domestic violence or sexual assault or the details of an eligible employee's or an eligible employee's family member's medical condition as a condition of providing Paid Medical Leave under this act.

**Q: Can an employer require documentation for an eligible employee if the eligible employee or the eligible employee's family member is a victim of domestic violence or sexual assault?**

Yes. An employer may require an eligible employee who is using Paid Medical Leave because of domestic violence or sexual assault to provide documentation that the Paid Medical Leave has been used for that purpose. The

documentation can be one of the following:

- (a) A police report indicating that the eligible employee or the eligible employee's family member was a victim of domestic violence or sexual assault
- (b) A signed statement from a victim and witness advocate affirming that the eligible employee or eligible employee's family member is receiving services from a victim services organization
- (c) A court document indicating that the eligible employee or eligible employee's family member is involved in legal action related to domestic violence or sexual assault
- (d) An employer shall not require that the documentation provided explain the details of the violence or sexual assault

**Q: Does the law impose recordkeeping requirements on employers?**

Yes. Employers shall retain, for not less than one year, records documenting the hours worked and Paid Medical Leave taken by employees. Medical and other records provided under this law should be maintained per normal recordkeeping requirements.

**Q: Are there any confidentiality requirements for leave documentation?**

Employers must keep health information or information pertaining to the domestic violence or sexual assault about an eligible employee or eligible employee's family member confidential. This information should not be disclosed except to the affected eligible employee or with the permission of the affected eligible employee.

**Rates of Pay**

**Q: Are there special rules as to amount of pay for accrued Paid Medical Leave?**

No. Employers must pay accrued leave at the employee's normal hourly rate of pay or base wage.

**Q. Does the rate include overtime and bonuses?**

No. Calculation of the normal hourly rate of pay does not include overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities.

**Payment at Time of Termination**

**Q. Does the employer have to payout the accrued Paid Medical Leave if an employee separates or is terminated?**

No. Employees need not be paid out at separation. The law does not require an employer to provide financial or other reimbursement to an eligible employee for accrued Paid Medical Leave that was not used before the end of a benefit year or before the eligible employee's termination, resignation, retirement, or other separation from employment.

**Q. If an eligible employee who terminated is rehired, is the employer required to reinstate any previous Paid Medical Leave accrual?**

No. If an eligible employee separates from employment and is rehired by the same employer, the employer is not required to allow the eligible employee to retain any unused Paid Medical Leave that the eligible employee previously accumulated while working for the employer.

## Notices and Postings

### **Q: Are there posting requirements under the law?**

Yes. Employers must display conspicuously at their places of business a poster that contains the amount of Paid Medical Leave required to be provided, the terms under which Paid Medical Leave may be used, and the employees' right to file a complaint with the Michigan Department of Licensing and Regulatory Affairs (LARA) for any violation of the act.

### **Q. What can employee do if an employer violates the law?**

Employees may file a claim with LARA within six months of the alleged violation.

### **Q: What can LARA do if it discovers violations of the act?**

LARA may recover payment of the improperly withheld Paid Medical Leave and may impose civil fines of not more than \$1,000. LARA may also impose civil fines of not more than \$100 for each willful violation of an employer's posting obligations.