

How to Comply with Michigan's Reinstated Earned Sick Time Act

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Current Michigan Sick Leave Law

- Paid Medical Leave Act (PMLA)

<https://www.legislature.mi.gov/documents/2017-2018/publicact/htm/2018-PA-0369.htm>

- Covers employers that employ 50 or more individuals.
- Employees must accrue at least one hour of paid leave for every 35 hours of work, up to 40 hours annually.
 - Employees may roll over up to 40 hours of accrued, unused paid leave.
 - But if the employer front-loads at least 40 hours of paid leave, rollover is not required.
- Exclusions for seasonal workers, part time workers, and variable hour workers.

Michigan Sick Leave Law Changing February 21, 2025

- Earned Sick Time Act will replace the Paid Medical Leave Act effective February 21, 2025
- Same date applies to changes to Michigan's minimum wage under the Improved Workforce Opportunity Wage Act (IWOWA).
- Applies to all employers in Michigan with 1 or more employees, except for those employed by the U.S. government.
- Includes salaried (both exempt and non exempt) and full and part time hourly workers.

Proposed Bills Amending ESTA

- Senate Bill 15
 - “Small business” changed to 25 employees
 - May pay out unused time at end of year to avoid carryover and cap accrued hours
 - Carryover capped at 72 hours if using accrual method
 - 1 year statute of limitations
- House Bill 4002
 - Exemptions for independent contractors, seasonal workers, part time employees, variable hour workers
 - Exempts small businesses
 - Can payout unused time to avoid carryover
 - Frontload avoids- carryover
 - Defaults to one hour use increment

What employers are covered by the Act?

- All Michigan employers that have one or more employee(s), excluding employees of the United States Government.

Takeaway:

Michigan employers not currently subject to leave obligations under the PMLA will be covered by the ESTA.

What employees are eligible to receive earned sick time?

- “Employee” defined as “an individual engaged in service to an employer in the business of the employer, except that employee does not include an individual employed by the United States government.
- Excludes “true” independent contractors
- Applies to salary, hourly, temporary, seasonal employees

Takeaway:

Many Michigan employees who are not currently subject to paid leave obligations under the PMLA will be covered by the ESTA.

What is the accrual for employees?

- Small business employers:
 - Accrue 1 hour for every 30 hours
 - Employees shall not be entitled to use more than 40 hours of **paid** earned sick time in a calendar year unless the employer and 32 hours of **unpaid** earned sick time
- All other employers
 - Employees accrue 1 hour for every 30 hours worked
 - Employees shall not be entitled to use more than 72 hours of paid earned sick time per year, unless employer selects a higher limit
 - Salary employees, for purposes of earned sick time, an exempt employee is assumed to work 40 hours in each workweek unless the employee's normal work week is less than 40 hours

How to Determine if an employer is a “Small Business”?

- An employer is considered a “small business” if it employs nine or fewer employees and employed 10 or more employees in 19 or fewer workweeks in the current or previous calendar year. The workweeks with 10 or more employees need not be consecutive. This includes full-time, part-time, and temporary employees including those provided through a temporary service or staffing agency or similar entity
- Once an employer employs 10 or more employees for 20 or more workweeks in the current or prior calendar year, the employer cannot be a "small business" again until it meets the requirements above.

When does an eligible employee begin to accrue earned sick time?

- Accrual begins on **February 21, 2025**, or upon commencement of the employee's employment, whichever is later.

What is a benefit year?

- A benefit year is a regular and consecutive twelve-month period, as determined by the employer to calculate an employee's benefits.

Can an employee carry over unused earned sick time from one benefit year to the next?

- YES!
- All unused earned sick time carries over from year to year; however, an employer is not required to permit an employee to use more than the annual allowed maximum time (paid or unpaid) in a 12-month period.
- No cap on carry over.

Can an employer provide the total amount of sick time all at once, aka frontloading?

- Permitted, but still have to carryover unused time.
- LEO states “employers should evaluate employee’s accruals at least annually to ensure that accrued hours are balanced to hours worked and carryover any balance.”
 - Essentially, make sure employee did not accrue more than 72 hours in the benefit year

When does earned sick time become available for use by an eligible employee?

- An employer may require a new employee to wait until the 90th calendar day after commencing employment before using accrued earned sick time.
- Employees reemployed within the 6-month period are considered to have continued employment for purposes of ESTA and the 90-calendar-day waiting period. Otherwise, an employee may use earned sick time as it is accrued regardless of the pay period. Once 30 hours have been worked, an employee is entitled to use one hour of earned sick time for use under ESTA.

Reasons for Sick Leave Use

- An employer shall permit an employee to use the accrued earned sick time for any of the following:
 - The employee's or the employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's or the employee's family member's mental or physical illness, injury, or health condition; or preventative medical care for the employee or the employee's family member.
 - If the employee or the employee's family member is a victim of domestic violence or sexual assault, for 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;
 - 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; and
 - For closure of the employee's place of business by order of a public official due to a public health emergency;

Who is a Family Member?

- Family members include:
 - Biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, or a child to whom the employee stands in loco parentis.
 - Biological parent, foster parent, stepparent, or adoptive parent or a legal guardian of an employee or an employee's spouse or domestic partner or a person who stood in loco parentis when the employee was a minor child.
 - Grandparent.
 - Grandchild.
 - Biological, foster, or adopted sibling.
 - Any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Can you use a combined PTO policy?

- Yes, but...
 - An employer's paid time policy may be used so long as it provides at least the same benefits as provided in the ESTA, and may be used for the same purposes, under the same conditions, and accrued at a rate equal to or greater than the rate described in the ESTA.
 - Still have to comply with carryover obligations.

How does the ESTA affect a collective bargaining agreement?

- According to LEO:
- If CBA includes terms regarding sick time or sick leave benefits:
 - Provided that the collective bargaining agreement includes terms related to sick leave, sick time, PTO with uses for sick time, or a similar benefit, the collective bargaining agreement terms apply, even if the benefit is less than what is required by the ESTA, until the agreement expires or is renewed, extended, or otherwise renegotiated. The agreement also applies in situations where the agreement expressly excludes sick leave benefits
- If CBA is silent as it relates to sick time or sick leave benefits:
 - Employees covered by a collective bargaining agreement that is completely silent on sick leave, either for the entire unit or for specific classifications covered by the agreement, are covered by the ESTA and begin accruing benefits on Feb. 21, 2025

Can an employer require an employee to provide notice of the use of earned sick time?

- If the need for earned sick time is foreseeable, an employer may require advance notice not to exceed 7 days prior to the date the earned sick time is to begin, of the intention to use earned sick time.
- If the need for earned sick time is not foreseeable, an employer may require the employee to give notice of the intention as soon as practicable.
- For earned sick leave of more than three consecutive days, an employer may require reasonable documentation that the earned sick leave has been used for a permissible purpose. Upon request, the employee must provide this documentation in a timely manner.
 - If an employer requires documentation, the employer is responsible for paying all out-of-pocket expenses the employee incurs in obtaining the documentation.
 - Can't delay granting sick leave pending medical documentation
 - Documentation should not include a description of the illness or details of the violence

Can you ask questions about the need for using earned sick leave?

- LEO states, “When using leave under ESTA, employees should provide sufficient information for the employer to determine whether the leave meets the eligible uses under the ESTA.”
- If an employer is unsure, they can ask additional questions about the nature of the leave.
- **But...can't ask for medical documentation until employee uses 3 consecutive days of sick leave**

Does Unused Sick Time Have to be Paid Out Upon Termination?

- No, but be careful!
- The Payment of Wages and Fringe Benefit Act, may require payment upon termination pursuant to the employer's written policy or contract.

Can you payout in lieu of carrying over?

- Nope.
- The ESTA does not authorize an employer to pay out unused sick leave. Therefore, all accrued and unused sick leave would be carried over annually, and any balance upon separation would be reinstated if reemployment is within six months.

What is the required wage rate for earned sick time?

- Earned sick time must be paid at a pay rate equal to the greater of either (i) an employee's regular rate of pay, or (ii) the Michigan minimum wage rate then in effect under MCL 408.934 as amended.
- For any employee whose hourly rate varies depending on work performed, the “normal hourly wage” means:
 - The average hourly wage of an employee in the pay period immediately prior to the pay period in which the employee used paid earned sick time.

Does sick time have to be used in 1 hour increments?

- The Act provides that earned sick time may be used in the smaller of (i) one-hour increments, or (ii) the smallest increment of time used by the employer's payroll system for absences of use of other time.

Does an employer have a duty to maintain confidentiality?

- Yes, employers must maintain confidentiality of health, domestic violence, or sexual assault information about employee or his or her family member and cannot disclose information to others without employee's permission.

What are the record keeping requirements?

- Employers must retain records that document:
 - The hours worked and earned sick time taken by employees for not less than three years.
 - These records shall be available to the Wage and Hour Division with appropriate notice and at a mutually agreeable time.
 - Presumption of violation if a question arises as to whether employer violated ESTA and employer does not maintain adequate records.
- ESTA also has a Posting requirement – employers must provide written notice of an employee’s rights under the ESTA on February 21, 2025

Does the ESTA have a notice or posting requirement?

- Yes – employers must provide written notice of an employee’s rights under the ESTA at the time of hiring or on Feb. 21, 2025, whichever is later.
- Notice must include:
 - Amount of earned sick time required to be provided to an employee under the act.
 - Terms under which earned sick time may be used
 - Retaliation for requesting/using earned sick time is prohibited.

Retaliation

PMLA

- No express provisions.

ESTA

- Presumption of violation if employer takes adverse personnel action against person within 90 days after a person engages in protected activity under the Act.

Takeaway:

Employers face greater risk for unlawful retaliation based on their sick leave policy and practices under the ESTA.

Potential Penalties

- \$1,000 administrative fine for failing to provide earned sick time.
- \$100 administrative fine for failing to comply with Poster/Notice.
- Potential damages for violation of the ESTA include, but are not limited to:
 - Payment for used earned sick time
 - Rehiring or reinstatement to the employee's previous job
 - Payment of back wages
 - Reestablishment of employee benefits to which the employee otherwise would have been eligible had the employee not been subject to retaliation or discrimination
 - Equal additional amount of liquidated damages
 - Attorney fees
- Likely will be added to other employment claims because of presumption of retaliation
- Class Action Risk

Enforcement/Statute of Limitations

PMLA

- Does not provide for private civil cause of action and requires employees file a claim with LARA within 6 months after alleged violation.

ESTA

- Employee may file a civil action against an employer at any time within three years after the violation or the date when the employee knew of the violation.

Takeaway:

Greater risk of being sued or penalized for noncompliance with the ESTA.

How to Prepare

- REVIEW POLICIES!
 - Implement/revise sick leave policy to comply with ESTA
- Post the ESTA poster on February 21, 2025 (found on LEO's website)
- Train employees and HR on new paid sick leave requirements.
- Monitor any legislature changes prior to February 2025.



ANY
QUESTIONS

