Important New Changes to Michigan Paid Sick Leave Law Requirements

12.17.2018

Overview

On September 5, 2018, the Michigan Legislature enacted the initiative called the "Earned Sick Time Act," which generally required employers to provide paid sick leave to employees.

After the election, the Legislature substantially amended the initiative and renamed it the "Paid Sick Leave Act" (the "Act"). The Act reduces employers' paid sick leave obligations, completely exempted employers with less than 50 employees from the Act altogether, and eliminated the anti-retaliation provisions of the initiative act.

The Act 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 response to the amended Act, employers may need to change their leave of absence policies and procedures, their employee handbooks, and their employment contracts in order to ensure they comply with the law.

What is Required Under the Michigan Paid Medical Leave Act?

The Act provides that an employee can use paid sick leave for the employee's personal health needs, a family member's health needs, for purposes arising out of domestic violence or sexual assault, or during closure of the employee's primary worksite by order of a public official due to a public health emergency.

The Act now caps the required annual paid medical leave at 40 hours per year.

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The Act now excludes certain employees from those "eligible" for paid medical leave:: employees exempt from FLSA overtime requirements; collectively bargained employees; employees whose primary work location is not in Michigan; temporary employees (meaning, those hired to work 25 weeks or less); employees who averaged fewer than 25 hours per week in the prior year; employees of the U.S. Government or another state or a political subdivision of another state; certain airline and other employees subject to the Railway Labor Act; and "variable hour" employees, as defined under the Affordable Care Act.

An employer subject to the Act may now choose one of two alternatives for accruing paid medical leave to eligible employees:

> **Alternative 1**: permitting accrual of paid medical leave at the rate of at least 1 hour of paid leave for every 35 hours worked, but capped at no more than one hour of accrual per calendar week or more than 40 hours of accrual per benefit year.
>
> **Alternative 2:** "front-loading" 40 hours of accrued medical leave at the beginning of the benefit year.

Under Alternative 1, unused accrued paid medical leave is carried over to the next year, but the employer can limit the actual use of accrued paid medical leave to 40 hours per year. Under Alternative 2, there is no carryover.

The new law allows the employer to impose a 90-day waiting period for employees before they can take any accrued paid medical leave.

When medical leave is used, it must be paid at the employee's rate of pay but does not have to include overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities.

Employers may impose request and documentation requirements on the use of accrued sick time as long as those requirements are the employer's standard requirements, such as requiring the employee to apply for or request medical leave in advance, to use a minimum number of accrued hours per request, and requiring the employee to provide medical or other documentation. However, the employer must give employees at least 3 days to submit any documentation the employer requires.

An employee who separates from employment and then returns to work does not have to be reinstated in forfeited accrued paid medical leave, regardless of the brevity of the separation.

Records of sick leave use now need only be retained for one (1) year.

In the event a federal paid medical leave mandate is enacted, the Act "will no longer apply as of the effective date of the mandate."

What Penalties May Result From Noncompliance?

The Act includes a rebuttal presumption that an employer is in compliance with the Act if the employer provides 40 hours of paid leave to an eligible employee each year.

Once the Department of Licensing and Regulatory Affairs (Department) creates a new poster explaining medical leave rights, employers will be required to post it in the workplace or face a fine of $100.

The Act provides that an eligible employee may report a violation of the medical leave requirements to the Department within 6 months of the violation. While the September 5 Act provided for a civil action and "civil" fines, the Legislature eliminated the civil action and provided only for "administrative" fines. The Department may impose penalties on the employer, requiring the payment of all improperly withheld paid medical leave, as well as an administrative penalty of up to $1,000.

What Should Employer Do Next?

There is no "one-size fits all" solution to meet the requirements under the Act. At a minimum, however, covered employers should adopt a paid medical leave policy for eligible employees that complies with the law's new requirements.

Paid medical leave policies may be included in a stand-alone policy, an employee handbook, or in a written employment contract: covered employers should review and may need to revise a number of documents before the late March or early April 2019 effective date in order to become compliant. The Act does not prohibit employers from providing a paid-time-off (PTO) bank that can be used for purposes other than for a qualifying paid medical leave. However, given the absence as yet of issued guidance on this question, employers should proceed with caution.

Supporters of the original Earned Sick Time Act contend that the Paid Medical Leave Act is unconstitutional and are threatening to challenge the new law in court and to seek an injunction to keep the revisions adopted on December 4 from going into effect, and/or to begin referendum (or other) efforts. Stay tuned for updates, and in the meantime, contact a Butzel Long Labor and Employment attorney for assistance in ensuring your leave policies, employee handbooks, employment agreements, and employee communications are properly revised in light of these new and evolving legal requirements.

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