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Michigan Department of Labor and Economic Opportunity Publishes New Earned Sick Time Act FAQs

Client Alert

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Michigan employers have been grappling with the Michigan Supreme Court's decision in *Mothering Justice v. Attorney General*, which reinstated the Earned Sick Time Act (ESTA) in Michigan. As covered in a previous client alert, the ESTA was a significant departure from the now existing Paid Medical Leave Act. Even more troubling, employers only have until February 21, 2025, to prepare for the ESTA. Michigan's Department of Labor and Economic Opportunity (LEO) previously published some limited FAQs in October 2024. On November 21, 2024, LEO published updated FAQs that answered a number of questions that were nagging employers.

Payment of Sick Time in Lieu of Carryover: Since it was determined that the ESTA would take effect on February 21, 2025, employers have been asking if they can still use their policies where unused sick time is paid out at year end. LEO has answered that question with a resounding no. According to LEO, all unused sick time must be carried over to the following year.

Accrual Begins on February 21, 2025: Another concerning addition is LEO's answer that "[a]ccrual begins on Feb. 21, 2025" to the inquiry "when does an eligible employee begin to accrue earned sick time?". At this time, it is unclear how this would impact a company whose benefit year begins on January 1st.

Employee Threshold: The FAQs clarify that when determining whether an employer exceeds the ten employee threshold, employers must count all employees in the United States. For example, if an employer has five employees in Michigan, but 10 employees elsewhere in the US, that employer is a large employer for ESTA purposes. Meaning, those five Michigan employees are entitled to 72 hours of paid ESTA time rather than 40 hours of paid ESTA time and 32 hours of unpaid ESTA time.

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Application to Unionized Workplaces: The ESTA states, “[i]f an employer’s employees are covered by a collective bargaining agreement in effect on the effective date of this act, this act applies beginning on the stated expiration date in the collective bargaining agreement . . .” Despite this clear language, the new FAQs take the position that if a CBA is silent on sick time, then the ESTA applies to the employees covered by the CBA as of February 21, 2025, regardless of the CBA’s expiration date.

Front Loading Method: Prior LEO guidance indicated that employers could front load sick time under the Act. However, the newest FAQs clarified that even when front loading ESTA time, employers should evaluate employee accruals at least annually to ensure that accrued hours are balanced to hours worked. Employers must allow employees to carryover all accrued but unused sick time from year to year regardless of front loading. Notably, if an employee separates from the company an employer may recoup the leave the employee has used that exceeds the amount they earned. Thus, an employer must determine the amount of earned sick time accrued as of the date of separation before recouping the value.

Use of Sick Time: 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 or use of other time. The new guidance provides an example to illustrate how this works in practice for employers. According to LEO, if an employer uses 1/10th of an hour (six minutes) for tracking attendance/absences, then this would be the incremental use allowed for earned sick time. If an employer uses 1/2 (thirty minutes) of an hour for tracking attendance/absences, then this would be the incremental use allowed for earned sick time.

Asking Questions of Employees Using ESTA Time: The FAQs provide guidance on employer’s ability to verify that ESTA time is being used for a permissible purpose. According to the agency, employers may ask employees questions about the nature of the leave to determine if the leave meets the eligible uses under the ESTA.

Concurrent FMLA & ESTA Time: Many employers already provide sick leave time, which often runs concurrently with an employee’s use of Family and Medical Leave Act (FMLA) time. LEO confirmed that this is true for ESTA time as well, it can run concurrently to FMLA time. However, the FAQs suggest that when ESTA time is being used in conjunction with FMLA time, employers cannot ask for the documentation traditionally associated with using FMLA. Only after ESTA is exhausted will FMLA provisions apply.

Board Positions: LEO also adds that “publicly elected officials, members of publicly appointed boards and commissions, and similar public office holders are not considered employees for purposes of ESTA, even if paid or receiving some form compensation, unless the governing entity treats these individuals as employees.”

It also remains to be seen if LEO will answer any of the outstanding questions employers may have. For example, the statute indicates that sick time should be paid at the higher of the employee’s “normal hourly wage” or the Michigan minimum wage. Yet, LEO FAQs use the term “regular rate of pay” when discussing the rate of sick time pay. It is unclear how LEO is defining regular rate of pay and how that

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term is different than the language in the statute. Alternatively, do employers need to restore unused sick time to a rehired employee even if that sick time was already paid out at termination? These are just a few of the many unanswered questions plaguing employers ahead of February 21st.

Butzel's Labor and Employment Team stands ready to answer all your ESTA questions. We will be monitoring potential amendments to the ESTA as well as any additional guidance published by the Department of Labor and Economic Opportunity. Contact the authors of this article or your Butzel Labor and Employment attorney for further guidance as you amend your policies to comply with the ESTA in advance of the February 21, 2025 deadline.

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