

PAID MEDICAL LEAVE ACT

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Senate Bill 1175 as enacted
Public Act 369 of 2018
Sponsor: Sen. Mike Shirkey
House Committee: Michigan Competitiveness
Senate Committee: Government Operations
Complete to 2-25-19

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: The legislature adopted an initiative petition creating the Earned Sick Time Act on September 5, 2018, enacting it as Public Act 338 of 2018.¹ Senate Bill 1175, enacted as Public Act 369 of 2018, amends the Earned Sick Time Act to do, among other things, the following:

- Rename the Act the Paid Medical Leave Act.
- Replace the term *employee* with *eligible employee* and limit the individuals to whom the Act would apply.
- Exempt from the Act employers with fewer than 50 employees.
- Lower the minimum number of hours that can generally be used in a year from 72 to 40, and provide that an eligible employee may accrue one hour for every 35 hours worked, instead of one for every 30.
- Repeal the section prohibiting *retaliatory personnel actions* by employers against employees exercising a right under the Act.
- Remove references to a *domestic partner* throughout the Act and eliminate relatives of a domestic partner from the list of qualifying family members for whom an employee may use paid medical leave time.

Public Act 338 of 2018, as amended by Public Act 369, will take effect March 29, 2019.

FISCAL IMPACT: House Bill 1175 would have a modest fiscal impact on the Department of Licensing and Regulatory Affairs (LARA). LARA estimates that the bill would result in a \$250,000 reduction in expected costs, as the department would not require an additional FTE and materials that were anticipated under Public Act 338 of 2018.

BACKGROUND INFORMATION:

Initially, the ballot question committee MI Time to Care proposed a law requiring employers to provide paid sick time to their employees in Michigan. On July 27, 2018, the Michigan Board of Canvassers certified that the initiative petition filed by the ballot question committee had an adequate number of signatures for it to move forward. The legislature received the initiative, which is named the Earned Sick Time Act, on July 30.

¹ See the House Fiscal Agency analysis for a detailed description of the Earned Sick Time Act (PA 338 of 2018):
<http://legislature.mi.gov/documents/2017-2018/initiative/pdf/SickTimeInitiativeHouseAnalysis.pdf>

The Michigan Constitution of 1963 requires that the legislature either enact or reject an initiative without amendment within 40 days of receipt, meaning in this case that the legislature had until September 7 to act. The Constitution also allows the legislature to propose a different measure on the same subject if it rejects the proposal before it. If the legislature had rejected or failed to pass the initiative, it would have gone before the voters on the November 2018 ballot. If the legislature had rejected the initiative and proposed an alternate measure, both measures would have gone before the voters. Instead, on September 5, the legislature approved the Earned Sick Time Act as written. An enacted initiative is not subject to veto by the governor.²

THE CONTENT OF THE BILL:

Earned sick time and its accrual

Generally under the Earned Sick Time Act, employees accrue an hour of earned sick time (EST) for every 30 hours worked, up to a maximum of 72 hours per year, and EST can carry over from year to year (but employers may limit the hours used in a calendar year). The bill increases the hours to be worked for each hour of paid medical leave to 35. The bill also allows employers to limit the accrual of paid medical leave to one hour per week, limit its accrual to 40 hours per year, limit to 40 the number of hours an employee may use in a single benefit year, and limit to 40 the number of hours that may be carried over from year to year. (Alternatively, the bill allows an employer to provide at least 40 hours to an eligible employee at the beginning of the year—or prorated accordingly for employees hired mid-year—and then prohibit the employee from carrying over any hours.)

However, under the Earned Sick Time Act, an employee at a *small business* (one with fewer than 10 employees) accrues an hour of EST for every 30 hours worked up to a maximum of 40 hours of paid EST in a calendar year (and up to 32 hours of unpaid sick time). The bill removes the separate category for small businesses. (The bill only applies to entities with 50 or more employees, as described below.)

Paid medical leave, under the bill, begins to accrue when the bill takes effect or when employment begins.

The bill also allows an employer to exclude overtime, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities from the calculation of an eligible employee's normal hourly wage or base wage.

Under the Earned Sick Time Act, an employer cannot require an employee to find a replacement worker as a condition for using sick time. The bill removes that provision.

Exemption for small business owners

The Earned Sick Time Act applies to a person or entity that employs one or more individuals. The bill exempts those employing fewer than 50 individuals.

² See <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-Article-II-9.pdf>

Eligible employee

The bill replaces the term previously used in the Earned Sick Time Act, *employee*, with the term *eligible employee*. It retains the same general definition, but specifies that *eligible employees* are those for whom an employer must withhold for federal income tax purposes. Under the bill, an *eligible employee* does not include any of the following:

- An individual who is exempt from overtime under 29 USC 213(a)(1), which generally applies to employees in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman.
- An individual covered by a current collective bargaining agreement who is not employed by the federal or state government, a political subdivision of the state, or any interstate governmental agency.
- An individual employed by the U.S. government, another state, or a political subdivision of another state.
- An individual employed by an air carrier as a flight deck or cabin crew member.
- An employee of an air carrier that is engaged in interstate or foreign commerce or that transports mail.
- Certain employees under the Railroad Unemployment Insurance Act.
- An individual whose primary work location is not in Michigan.
- A new employee under 20 years old working as a trainee, or an employee under 18 years old.
- An individual employed by a temporary help firm who has provided certain notice.
- Certain short-term employees for short-term jobs.
- A variable hour employee.
- An individual who worked, on average, fewer than 25 hours per week in the preceding calendar year.

Using earned sick time

The bill retains most of the categories for which an employee may use EST or paid medical leave, but limits them to eligible employees and amends the definitions for terms used in the descriptions. For instance, domestic partners and individuals with whom the employee had the equivalent of a family relationship are removed from the definition of a *family member* (for whose needs an employee could take EST/paid medical leave). The bill also removes meetings at a child's school or care facility or dealing with the effects of domestic violence or sexual assault on the child from the list of qualifying uses for EST/paid medical leave.

The Earned Sick Time Act allows an employer to require that an employee must provide up to seven days' advance notice of the need to use sick time if that need is foreseeable. In cases where the need to use sick time is not foreseeable, an employer can require that notice be given as soon as is practicable. Under the bill, in all cases an eligible employee must comply with the normal notice, procedural, and documentation requirements for requesting leave, and an employer may discipline or discharge an eligible employee for failure to do so. However, an employer must give an eligible employee at least three days to provide documentation.

Under the Earned Sick Time Act, an employee retains his or her time when transferred to a separate division, entity, or division. Additionally, if the employee separates from employment and is rehired by the same employer within six months, the time is reinstated. The bill retains the first provision but removes the requirement that the employer must reinstate the time upon rehiring. It also removes the requirement that time be carried over if one employer succeeds another and the employee is retained.

Employer records

Under the Earned Sick Time Act, an employer must retain records documenting the hours worked and EST taken by its employees for at least three years. The bill lowers that requirement to one year. It also removes a provision that, in the case of an alleged violation, if the employer has not retained these records adequately or does not allow LARA reasonable access to them, there is a rebuttable presumption that the employer has violated the Act. However, the records must be open to inspection by the LARA director at any reasonable time.

Violations and remedies

Under the Earned Sick Time Act, an employee affected by an employer's violation of the Act may file a claim with LARA, which is required to investigate it, or bring a civil suit against the employer within three years after the date of the violation or learning of the violation. Under the bill, the employee may file a claim with LARA.

The bill removes language stating that any person alleging a violation under Chapter 408 (Labor) of the Michigan Compiled Laws has the right to file a complaint with LARA and that LARA will ensure confidentiality as much as possible. Additionally, it allows LARA to grant an eligible employee all paid medical leave improperly withheld, but removes language stating that LARA may grant the eligible employee damages incurred as a result of the violation, back pay, and reinstatement in case of job loss. It also removes language requiring LARA to bring a civil action against an employer on behalf of the employee (and all similarly situated employees) when LARA believes that the employer is in violation of the Act and is unable to obtain voluntary compliance.

Notices and informational outreach

The bill amends the notice requirements under the Earned Sick Time Act, so that an employer still must display a poster with information about the Act in a conspicuous place in the business, but does not have to give employees written notice by April 1, 2019. The notice still must indicate the amount of time that has to be provided to eligible employees as well as the purposes for which it may be used. The bill removes inclusion of notice of an employee's right to bring a civil suit against the employer, as well as notice of the prohibition on retaliatory personnel action by an employer because an employee has used or requested to use EST. The bill also removes a requirement that the notice be given in Spanish as well as other languages, if appropriate.

Collective bargaining

The bill removes a provision of the Earned Sick Time Act stipulating that it does not diminish any rights provided to an employee under a collective bargaining agreement and

does not preempt or override the terms of a collective bargaining agreement in effect prior to the effective date of the Act.

Repealers

Finally, the bill repeals sections 6, 9, and 13 of the Earned Sick Time Act. Section 6 prohibits retaliatory personnel action or discrimination by an employer against an employee for exercising a right protected under the Act. Section 9 requires LARA to develop a multilingual outreach program to inform people about the availability of EST under the Act. Section 13 allows the director of LARA to promulgate the rules needed to administer the Act.

MCL 408.961 et seq.

ARGUMENTS:

For:

Proponents argued that the bill would retain the fundamentals of the initiative approved by the voters, but make it more workable for employers. Many employers would have found the original mandate impossible to comply with, they argued, and the bill would bring it in line with the ten states (and Washington, D.C.) that currently require paid sick leave.³ Further, according to supporters, the exemption for businesses with fewer than 50 employees would bring the bill in line with the federal Family and Medical Leave Act.

Against:

Critics argued that the bill would effectively gut an initiative supported overwhelmingly by voters. While the initial initiative was intended to cover the majority of Michiganders, opponents argued that the amendments would leave 55% of workers—or 1.7 million people in the state—without guaranteed access to sick time.

In explanations of their “no” votes on the bill, several opponents made the following statement on the House floor:

The people of the state of Michigan have, through our Constitution, reserved to themselves the power to initiate and enact laws. Over 380,000 of our fellow citizens exercised that constitutional right when they signed an initiative petition to enact the Earned Sick Time Act and ensure no Michigander is forced to choose between their job and their health or the health of their family. Those same citizens were wrongly denied the right to vote on this initiated law by a cynical, political act of the Legislature earlier this year. Today, the House compounds that injury by reducing the Earned Sick Time Act to little more than an empty promise, accessible to fewer Michiganders and worth even less to far more.

³ Arizona (2016), California (2014), Connecticut (2011), Maryland (2018), Massachusetts (2014), New Jersey (2018), Oregon (2015), Rhode Island (2017), Vermont (2016), Washington (2016) and Washington D.C. (2008).
<http://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>

Against:

Opponents also argued that Senate Bill 1175 is unconstitutional because it seeks to amend an initiated law in the same legislative session in which it was adopted by the Legislature. In 1964, Attorney General Frank Kelley wrote that “the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963.”⁴

Response:

On December 3, 2018, Attorney General Bill Schuette reversed the earlier opinion, finding that the Michigan Constitution does not prohibit the legislature from adopting and then amending a legislatively enacted initiated law during the same legislative session.⁵ While Kelley stated that such an act would violate the “spirit and letter” of the initiative process, Schuette found that the absence of an express prohibition leads to the logical conclusion that it is permitted.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

⁴ OAG, 1964, No. 4303, p 311 (March 6, 1964). <http://www.ag.state.mi.us/opinion/datafiles/1960s/op03082.pdf>

⁵ OAG, 2018, No. 7306 (December 3, 2018).

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