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Township Law *E-Letter*

New and Improved Paid Medical Leave: Rules to Live and Work By

*Michigan's Paid Medical Leave Act (the "PMLA") establishes eligible employees' rights to accrue and use paid leave for personal and family medical needs. The Michigan Legislature enacted the PMLA to amend and (in part) replace the prior legislation on the same topic: the Earned Sick Time Act, which we discussed in our October **E-Letter** in the Earned Sick Time Act ("ESTA"). The PMLA's requirements are less stringent than ESTA. Not all employers are subject to the Act's paid medical leave requirements; and, importantly, not everyone on a township's payroll will be eligible for the leave. However, townships that are subject to the PMLA must review and may potentially modify existing leave policies to meet its minimum requirements by March 29, 2019.*

Q: WHO IS IMPACTED?

Employers with 50 or more employees for whom they are required to withhold for federal income tax purposes (except the U.S. government or another state!) This includes public employers, like townships. Interestingly, while it is clear (as described below) that part-time, seasonal, and out-of-state employees are not entitled to take medical leave, the Act does not exclude them from the calculation. Until we have a definite answer, you should count such employees in your calculation. But you need not count independent contractors.

Q: WHAT IS "MEDICAL LEAVE" UNDER THE PMLA?

Leave taken for:

- Personal or family health needs (mental or physical illness, injury or health condition)
- Purposes related to domestic violence and sexual assault, including medical care, psychological care or counseling, victim services, relocation purposes, to obtain legal services, or to participate in civil or criminal proceedings
- Closure of employee's place of business (or child's school or place of care) by order of a public official due to public health emergency (or being ordered not to appear at work for contagion/exposure concerns)

Q: HOW IS “FAMILY MEMBER” DEFINED?

A “family member” under the PMLA includes:

- A child (whether biological, adopted, foster, stepchild, legal ward, or a child to whom the eligible employee stands in loco parentis)
- An individual to whom the eligible employee is legally married to under any state law
- A parent (whether biological, foster, stepparent, adoptive parent, a legal guardian of the employee or his/her spouse, or an individual who stood in loco parentis when the employee was a minor child)
- A sibling (whether biological, foster, or adopted)
- A grandparent
- A grandchild

Q: WAIT: WILL ALL EMPLOYEES ACCRUE PAID SICK LEAVE?

Not necessarily. If your township has 50 or more employees, you must provide employees with paid medical leave, unless they are:

- Exempt from Fair Labor Standards Act overtime requirements, like a Department Head, Township Manager or Township Superintendent
- Private sector employees covered by a collective bargaining agreement currently in effect
- Individuals whose primary work location is not in Michigan
- Employees who are less than 20 years old and paid a training wage as permitted under Michigan law
- Seasonal or temporary employees (who were employed for 25 weeks or less in a calendar year for a job scheduled for 25 weeks or less)
- Part-time employees who worked less than 25 hours per week on average the prior calendar year
- Certain variable employees (if at the employee’s start date, the township cannot determine whether the employee is reasonably expected to work at least 30 hours per week on average because the employee’s hours are “variable” or otherwise uncertain)

Q: HOW IS LEAVE MADE AVAILABLE AND USED?

	Option 1: Accrual of Leave	Option 2: Frontloading Leave
Requirements	Employees accrue 1 hour of leave for every 35 hours worked, but no more than 1 hour per calendar week if an employee works more than 35 hours in a week.	Provide (at least) 40 hours of paid medical leave at the <i>beginning of the benefit year</i>
Maximum Accrual	40 hours per benefit year	None
Carryover of Leave	40 hours	None

Your township must permit this leave to be used in at least hourly increments, unless your township has a different policy, in writing, in your employee handbook (or other employee benefits document). Some townships permit leave to be taken only in half-days or full-days, while others allow use by the quarter of the hour!

When processing payroll, note that the hourly rate for paid medical leave is equal to the greater of either the normal hourly wage, the base wage, or the applicable minimum wage rate (which will be \$9.45 per hour as of the Act's effective date). However, you are not required to calculate into any overtime pay (among other things generally inapplicable to public sector employers).

You may certainly provide more paid medical leave than required and, if the township so chooses, establish policies permitting eligible employees to donate unused paid medical leave to one another. (Check with your employment counsel if you seek to establish a donation policy, as there are special rules in play from a federal level!)

Special notes:

- “Benefit year” is defined as any consecutive 12-month period used to calculate benefits. Therefore, townships have flexibility to determine the definition of benefit year, whether it's a calendar year, fiscal year, or any other system.
- Under the accrual option, “hours worked” does not include paid vacation days, paid personal days, or paid sick days. If an employee takes paid leave for any of these reasons, those hours are not counted for purposes of accruing paid medical leave.
- If the township chooses to frontload leave instead, there is a rebuttable presumption of compliance with the Act. For employees hired during the year, the township may prorate the leave.

Q: WHEN DOES PAID MEDICAL LEAVE BEGIN TO ACCRUE?

Accrual of paid medical leave begins on the Act's effective date (March 29, 2019) or upon hire, whichever is later. Your township may impose a 90-calendar day waiting period before a new employee is permitted to use the paid medical leave, but it should accrue (or be frontloaded) immediately upon hire. Existing employees are permitted to use leave as it is accrued.

Q: CAN WE REQUIRE NOTICE AND DOCUMENTATION FOR PAID MEDICAL LEAVE?

The PMLA requires employees to comply with the township's “usual and customary” notice and documentation requirements. Townships must give the employee at least three (3) days to provide documentation.

Where paid medical leave is used for purposes related to domestic violence or sexual assault, the township can, but is not required to, request supporting documentation. However, the township cannot require an employee to disclose the details of the underlying violence. Acceptable documentation could include a

police report, court document, or a signed statement from a victim and witness advocate confirming that the eligible employee (or family member) is receiving services from a victims' service organization.

If an employee does not meet notice, procedure, and documentation requirements for requesting leave, the township may explore disciplinary responses.

Q: WE DON'T OFFER ANY LEAVE TIME—WHAT NOW?

Townships have some time yet to review and, if necessary, modify current policies to ensure compliance by the Act's effective date of March 29, 2019. First, evaluate whether you have 50 employees, then determine if you have any eligible employees, then work with your labor and employment counsel to develop a paid medical leave policy if needed!

Q: HOW DO WE EVALUATE EXISTING CURRENT LEAVE POLICIES?

1. Calculate whether your township has 50 or more employees. Townships with 50 or fewer employees are not required to provide paid medical leave.
2. Identify the amount and type of leave currently provided. If, for example, you provide more than 40 hours of PTO, you are already very close to compliance! But if you offer 20 hours of vacation and 20 hours of sick/personal time, you aren't!
3. Identify your accrual rate (if you opt to allow accrual and carryover rather than frontloading leave). If it is below the 1 hour per 35 hours / week, changes are needed.
4. Review and adjust minimum use requirements of the policy.
5. Review and adjust notice and documentation requirements of the policy.

Note: The Act defines "paid leave" to include vacation days, paid personal days, and paid time off. If all leave is banked together in a PTO bank or something similar, and that bank accrues at the minimum rate required by the Act (or more!), no further action is required. However, vacation time that is granted, accrued, or used separately from sick or personal leave **cannot** be used to meet the Act's accrual and use requirements. If you choose to combine paid medical leave with other types of leave in a PTO bank, you should update your current leave policy to specify that PTO includes paid medical leave for the reasons permitted under the PMLA.

Q: HOW DOES PMLA RELATE TO THE FAMILY AND MEDICAL LEAVE ACT (FMLA)?

Although they are certainly two separate laws, do not worry about any need to offer 40 hours of paid medical leave under the PMLA and 12 weeks off for FMLA, if your township's FMLA policy provides for substitution of paid leave. The FMLA provides that an employee may elect or the township may require an employee to "substitute" any paid leave for unpaid FMLA leave. Substitution means that the accrued paid leave (vacation, sick, PTO, or paid medical leave, at the employer's discretion) runs concurrently with the FMLA leave period. The Act does not change any of this.

Q: WHAT DO WE DO WITH ACCRUED BUT UNUSED PAID MEDICAL LEAVE?

Paid medical leave is transferrable, meaning that if an employee transfers (voluntarily or by assignment) within the township but is still employed by the township, he or she retains the leave. But if the employee resigns, retires or is terminated, and is subsequently reinstated or rehired, you are under no obligation to restore that banked leave. And employers are not required to pay out unused paid medical leave upon the employee's termination, resignation, or retirement because of this Act--although your policy or contracts may require it.

Q: HOW DOES THIS ACT IMPACT OR RELATE TO EXISTING COLLECTIVE BARGAINING AGREEMENTS (“CBAS”)?

The PMLA does not preempt or limit applicability of CBAs that provide for *greater* accrual or use of medical leave meeting the terms of the PMLA.

REQUIRED NOTICE TO EMPLOYEES

Your township must display a poster that contains:

- The amount of paid medical leave employees may receive under the Act;
- What paid medical leave may be used for; and
- The right to file a complaint with the Department for violations

This posting requirement is similar to other wage and hour issues for which you probably already have posters and forms (think: Minimum Wage, FMLA, OSHA, etc.). The Department of Licensing and Regulatory Affairs (the “Department”) created posters, which can be found [here](#). (While you're there, grab the updated minimum wage poster, too!)

Q: WHAT ARE THE POTENTIAL PENALTIES AND CONSEQUENCES FOR VIOLATING THE ACT?

- Investigation by the Department who may attempt to resolve the conflict through mediation or other means
- If the Department determines a violation has occurred, it may impose penalties and require payment of improperly withheld medical leave
- \$1,000 administrative fine for all violations, except the failure to display the required poster, which is an administrative fine of not more than \$100

If the township violates the Act, an employee may file a claim with the Department within six months. The Act, however, does not permit an employee to file a lawsuit against your township.

WANT TO LEARN MORE?

If you would like to read the new law, it can be found on the Michigan Legislature's website under [Public Act Number 369, Public Acts of 2018, MCL 408.961, amended](#).

If you have any questions about the new law or would like assistance reviewing and modifying your current policies to ensure compliance, please feel free to contact us.

-- Helen "Lizzie" Mills

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