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Initiated Legislation (as enacted)

PUBLIC ACT 338 of 2018

Date Completed: 10-25-18

CONTENT

Public Act 338 of 2018, initiated by petition and adopted by the Legislature, enacts the "Earned Sick Time Act" to do the following:

- Require each employer to provide earned sick time to each of its employees in Michigan, as prescribed under the Act.
- Require an employer to allow an employee to use accrued time for the employee's or his or her family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of that individual's illness, injury, or health condition; or for other prescribed reasons.
- Allow an employer to require advance notice of up to seven days before earned sick time is to begin, of an employee's intention to use earned sick time.
- Allow an employer to require reasonable documentation that earned sick time has been used for a permitted purpose, for sick time of more than three consecutive days.
- Specify that if an employee is transferred to a separate division or location, but remains employed by the same employer, he or she will retain all sick time accrued at the prior division or location.
- Prohibit an employer or other person from interfering with, restraining, or denying the exercise of any right protected under the Act.
- Prohibit an employer from taking retaliatory personnel action or discriminating against an employee because he or she exercised a right protected under the Act.
- Allow an employee affected by a violation of the Act to bring a civil suit for appropriate relief and to file a claim with the Department of Licensing and Regulatory Affairs (LARA).
- Prescribe civil fines for violations of the Act.
- Require an employer to provide written notice to each employee at the time of hiring or by April 1, 2019, and require the notice to include certain information, such as amount of earned sick time provided and the terms under which the leave may be used.
- Require an employer to retain for at least three years records documenting the hours worked and sick time taken by employees.

The Act will take effect on the 91st day after the Legislature adjourns sine die.

Definitions

"Earned sick time" means time off from work that is provided by an employer to an employee, whether paid or unpaid, that can be used for the purposes described in the Act.

"Employee" means 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.

"Employer" means any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that employs one or more individuals, except that employer does not include the United States government.

"Small business" means an employer for which fewer than 10 individuals work for compensation during a given week. In determining the number of individuals performing work for compensation during a given week, all individuals performing work for compensation on a full-time, part-time, or temporary basis must be counted, including individuals made available to work through the services of a temporary services or staffing agency or similar entity. An employer is not a small business if it maintained 10 or more employees on its payroll during any 20 or more calendar work weeks in either the current or the preceding calendar year.

Accrual of Sick Time

An employee of a small business will accrue a minimum of one hour of earned sick time for every 30 hours worked, but will not be entitled to use more than 40 hours in a year unless the employer selects a higher limit. If the employee accrues more than 40 hours, he or she will be entitled to use an additional 32 hours of unpaid earned sick time in that year, unless the employer selects a higher limit. Employees of a small business will be entitled to use paid earned sick time before using unpaid earned sick time. All other employees will accrue a minimum of one hour of paid earned sick time for every 30 hours worked but will not be entitled to use more than 72 hours per year, unless the employer selects a higher limit.

"Year" means a regular and consecutive twelve-month period, as determined by an employer.

Earned sick time must carry over from year to year, but a small business is not required to allow an employee to use more than 40 hours of paid earned sick time and 32 hours of unpaid earned sick time in a single year, and other employers are not required to permit an employee to use more than 72 hours of paid earned sick time in a single year.

Earned sick time will begin to accrue on the Act's effective date, or after commencement of the employee's employment, whichever is later. An employee may use accrued earned sick time as it is accrued, except that an employer may require an employee hired after April 1, 2019, to wait until the 90th calendar day after commencing employment before using accrued earned sick time.

For purposes of earned sick time accrual, an employee who is exempt from overtime requirements is assumed to work 40 hours in each work week unless the employee's normal work week is less than 40 hours, in which case earned time accrues based on that normal work week.

An employer is in compliance with the law if it provides any paid leave in at least the same amounts as that provided under the Act that may be used for the same purposes and under the same conditions provided below and that is accrued at a rate equal to or greater than the rate described above. A small business also must allow its employees to use paid earned sick time before using unpaid earned sick time. "Paid leave" includes paid vacation days, personal days, and paid time off.

An employer must pay each employee using paid earned sick time at a pay rate equal to the greater of either the normal hourly wage for that employee or the minimum wage established

under the Workforce Opportunity Wage Act. For any employee whose hourly wage varies depending on the work performed, the "normal hourly wage" means the average hourly wage of the employee in the pay period immediately prior to the pay period in which the employee used paid earned sick time.

An employer may not require an employee to search for or secure a replacement worker as a condition for using earned sick time.

Use of Accrued Sick Time

An employer must allow an employee to use the earned sick time accrued for any of the following:

- The employee's or his or her family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of that individual's mental or physical illness, injury, or health condition; or preventative medical care for the employee or his or her 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.

"Sexual assault" means any act that constitutes a violation of Section 520b, 520c, 520d, 520e, 520f, or 520g of the Michigan Penal Code. (Those sections prohibit the following conduct, respectively: first-, second-, third-, and fourth-degree criminal sexual conduct (CSC); a second or subsequent first-, second-, or third-degree CSC offense; and assault with intent to commit CSC.)

The employer also must allow the employee to use accrued time for the closure of the employee's place of business by order of a public official due to a public health emergency; for an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or when it has been determined by the health authorities having jurisdiction or by a health care provider that the employee's or employee's family member's presence in the community would jeopardize the health of others because of the employee's or family member's exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

The time may be used in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

The Act does not require an employer to provide earned sick time for any purposes other than as described above.

Notice & Documentation

If the employee's need to use earned sick time is foreseeable, an employer may require advance notice, not to exceed seven days before the date the earned sick time is to begin, of the intention to use the earned sick time. If his or her need for the 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 time of more than three consecutive days, an employer may require reasonable documentation that the earned sick time has been used for a purpose described above. Upon the employer's request, the employee must provide the documentation to the employer in a timely manner. The employer may not delay the commencement of earned sick time on the basis that the employer has not yet received documentation. For the purposes of this provision, documentation signed by a health care professional indicating that earned sick time is necessary is reasonable documentation.

In a case of domestic violence or sexual assault, one of the following types of documentation selected by the employee is considered reasonable documentation:

- A police report indicating that the employee or his or her family member was a victim of domestic violence or sexual assault.
- A signed statement from a victim and witness advocate affirming that the employee or his or her family member is receiving services from a victim services organization.
- A court document indicating that the employee or his or her family member is involved in legal action related to domestic violence or sexual assault.

An employer may not require that the documentation explain the nature of the illness or the details of the violence. If an employer chooses to require documentation for earned sick time, the employer is responsible for paying all out-of-pocket expenses the employee incurs in obtaining it. If the employee does have health insurance, the employer is responsible for paying any costs charged to the employee by the health care provider for providing the specific documentation required.

An employer may not require disclosure of details relating to domestic violence or sexual assault or the details of an employee's or his or her family member's medical condition as a condition of providing earned sick time. If an employer possesses health information or information pertaining to domestic violence or sexual assault about an employee or his or her family member, the employer must treat that information as confidential and may not disclose that information except to the affected employee or with his or her permission.

Employee Transfers & Successive Employers

If an employee is transferred to a separate division, entity, or location, but remains employed by the same employer, he or she will retain all earned sick time that was accrued at the prior division, entity, or location and may use all accrued earned sick time as provided above. If an employee separates from employment and is rehired by the same employer within six months of the separation, the employer must reinstate previously accrued, unused earned sick time and must allow the reinstated employee to use that time and to accrue additional earned sick time after reinstatement.

If a different employer succeeds or takes the place of an existing employer, the successor employer will assume the responsibility for the earned sick time rights that employees who remain employed by the successor employer accrued under the original employer. Those employees are entitled to use earned sick time previously accrued on the terms described above.

The Act does not require an employer to provide financial or other reimbursement to an employee for accrued earned sick time that was not used as of his or her termination, resignation, retirement, or other separation from employment.

Prohibited Acts & Remedies

The Act prohibits an employer or any other person from interfering with, restraining, or denying the exercise of, or attempting to exercise, any right protected under the Act. An employer is prohibited from taking retaliatory personnel action or discriminating against an employee because he or she has exercised a right protected under the Act. Rights protected under the Act include the right to use earned sick time, the right to file a complaint or inform any person about any employer's alleged violation of the Act, the right to cooperate with LARA in its investigations of alleged violations, and the right to inform any person of his or her rights under the Act.

"Retaliatory personnel action" means any of the following: a) denial of any right guaranteed under the Act; b) a threat, discharge, suspension, demotion, reduction of hours, or other adverse action against an employee or former employee for exercise of a right guaranteed under the Act; c) sanctions against an employee who is a recipient of public benefits for exercise of a right guaranteed under the Act; or d) interference with, or punishment for, an individual's participation in any manner in an investigation, proceeding, or hearing under the Act.

An employer's absence control policy may not treat earned sick time taken under the Act as an absence that may lead to or result in retaliatory personnel action.

These protections apply to any person who mistakenly but in good faith alleges a violation of the Act.

There is a rebuttable presumption of a violation of the Act if an employer takes adverse personnel action against a person within 90 days after that person does any of the following:

- Files a complaint with LARA or a court alleging a violation of the Act.
- Informs any person about an employer's alleged violation of the Act.
- Cooperates with LARA or another person in the investigation or prosecution of any alleged violation of the Act.
- Opposes any policy, practice, or act that is prohibited under the Act.
- Informs any person of his or her rights under the Act.

If an employer violates the Act, the employee affected by the violation, at any time within three years after the violation or the date when the employee knew of the violation, whichever is later, may file a claim with LARA, which must investigate the claim. Filing a claim with LARA is neither a prerequisite nor a bar to bringing a civil action. The employee also may bring a civil action for appropriate relief, including 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 if he or she had not been subjected to retaliatory personnel action or discrimination; and an equal additional amount as liquidated damages together with costs and reasonable attorney fees as the court allows.

The Director of LARA must enforce the Act. In doing so, he or she must establish a system using multiple means of communication to receive complaints regarding noncompliance with the Act and investigate complaints received by the Department in a timely manner.

A person who alleges a violation of the Act must have the right to file a complaint with LARA. The Department must encourage reporting by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee or person reporting the violation, provided, however, that with the authorization of such person,

the Department may disclose his or her name and identifying information as necessary to enforce the Act or for other appropriate purposes.

After receiving a complaint alleging a violation, the Department must investigate it and attempt to resolve it through mediation between the complainant and the subject of the complaint, or through other means. The Department must keep complainants notified regarding the status of their complaint and any resultant investigation. If the Department believes that a violation has occurred, it will have to issue to the offending person or entity a notice of violation and the relief required of the offending person or entity. The Department must prescribe the form and wording of such notices of violation including any method of appealing its decision.

The Department will have the power to impose penalties and to grant an employee or former employee all appropriate relief including payment of all earned sick time improperly withheld, any and all damages incurred by the complainant as the result of the violation, back pay and reinstatement in the case of job loss.

If the Director determines that there is reasonable cause to believe that an employer violated the Act and LARA subsequently is unable to obtain voluntary compliance by the employer within a reasonable time, it will have to bring a civil action on behalf of the employee. The Department may investigate and file a civil action on behalf of all employees of that employer who are similarly situated at the same work site and who have not brought a civil action. A contract or agreement between the employer and the employee or any acceptance by the employee of a paid or unpaid leave policy that provides fewer rights or benefits than provided under the Act is void and unenforceable.

In addition to liability for civil remedies, an employer who fails to provide earned sick time or takes retaliatory personnel action against an employee or former employee will be subject to a civil fine of not more than \$1,000. An employer that willfully violates a notice or posting requirement will be subject to a civil fine of not more than \$100 for each violation.

Posting Requirements

An employer subject to the Act must provide written notice to each employee at the time of hiring or by April 1, 2019, whichever is later, that includes all of the following:

- The amount of earned sick time required to be provided to an employee.
- The employer's choice of how to calculate a "year".
- The terms under which earned sick time may be used.
- That retaliatory personnel action by the employer against an employee for requesting or using earned sick time for which the employee is eligible is prohibited.
- The employee's right to bring a civil action or file a complaint with LARA for any violation of the Act.

The notice must be in English, Spanish, and any language that is the first language spoken by at least 10% of the employer's workforce, as long as LARA has translated the notice into that language.

An employer must display a poster at its place of business, in a conspicuous place that is accessible to employees, that contains the required information. The poster should be in English, Spanish, and any language that is the first language spoken by at least 10% of the employer's workforce, as long as LARA has translated the poster into that language. The Department will have to create and provide to employers notices and posters including the

required information, in English, Spanish, and another language is considers appropriate, for employers' use in complying with the posting requirements.

Multilingual Outreach Program

The Department will have to develop and implement a multilingual outreach program to inform employees, parents, and individuals who are under the care of a health care provider about the availability of earned sick time. The program will have to include distribution of notices and other written materials in English and in other languages to child care and elder care providers, domestic violence shelters, schools, hospitals, community health centers, and other health care providers.

Recordkeeping Requirements

An employer must retain for at least three years records documenting the hours worked and earned sick time taken by employees. To monitor compliance with the Act's requirements, an employer must allow LARA access to those records, with appropriate notice and at a mutually agreeable time. If a question arises as to whether an employer has violated an employee's right to earned sick time and the employer does not maintain or retain adequate records documenting the hours worked and earned sick time taken by the employee or does not allow the Department reasonable access to those records, there is a presumption that the employer has violated the Act, which can be rebutted only by clear and convincing evidence.

Other Provisions

The Act provides minimum requirements pertaining to earned sick time and may not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard, including a collective bargaining agreement, that provides for greater accrual or use of time off, whether paid or unpaid, or that extends other protections to employees.

The Act also will not do any of the following:

- Prohibit an employer from providing more earned sick time than is required under the Act.
- Diminish any rights provided to an employee under a collective bargaining agreement.
- Preempt or override the terms of a collective bargaining agreement in effect before the Act's effective date.
- Prohibit an employer from establishing a policy that allows an employee to donate unused accrued earned sick time to another employee.

If an employer's employees are covered by a collective bargaining agreement in effect on the Act's effective date, the Act applies beginning on the stated expiration date in the collective bargaining agreement, notwithstanding any statement in the agreement that it continues in force until a future date or event or the execution of a new collective bargaining agreement.

The Act allows the Director to promulgate rules in accordance with the Administrative Procedures Act as necessary to administer the Act.

If any portion of the Act or its application to any person or circumstances is found to be invalid by a court, the invalidity does not affect, impair, or invalidate the other portions or applications of the Act that can be given effect without the invalid portion or application, and its provisions are declared to be severable.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The Act will have a significant negative fiscal impact on State government and an indeterminate negative fiscal impact on local government. Costs to State and local governments will include any additional expenses incurred because of the use of sick leave by employees beyond their current benefits.

The Act will result in a substantial increase in staffing, training, and administrative costs to the Department of Licensing and Regulatory Affairs (LARA). The Department will be responsible for monitoring employer compliance, receiving and administering complaints of potential violations, and completing investigatory activities. The Act requires LARA to establish a communications system for receiving complaints and to create a multilingual outreach program. In addition, the Department anticipates increased expenses associated with public outreach and updates to existing communications materials, including use of vendor translation services, to meet the Act's requirements.

An estimated eight to 15 FTEs may be required in the Wage and Hour Division, depending on the volume of inquiries and complaints received in connection to the Act. The estimated costs associated with these FTEs is between \$840,000 and \$1,575,000.

The Act also will impose civil fines for certain violations. An employer who does not provide earned sick time or who take retaliatory actions against employees may be fined up to \$1,000. A violation of notice or posting requirements may result in a fine of up to \$100 per violation. The Act does not specify where the fine revenue will be deposited.

Fiscal Analyst: Elizabeth Raczkowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.