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## BILL ANALYSIS



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Senate Bill 1175 (as enacted)  
Sponsor: Senator Mike Shirkey  
Senate Committee: Government Operations  
House Committee: Michigan Competitiveness

**PUBLIC ACT 369 of 2018**

Date Completed: 2-22-19

**CONTENT**

The bill amends the Earned Sick Time Act to rename it the "Paid Medical Leave Act" and to do the following:

- Modify, add, and eliminate various terms and definitions.
- Require an employer to provide an eligible employee paid medical leave at a rate of at least one hour for every 35, instead of 30, hours worked; allow an employer to limit an eligible employee's accrual of paid medical leave to 40 hours; and eliminate requirements for small businesses and all other employers.
- Specify that an employer would not have to allow an eligible employee to use more than 40, instead of 72, hours of earned sick time in a single benefit year.
- Allow an employer, as an alternative to hourly accrual, to provide at least 40 hours of paid medical leave to an employee at the beginning of a benefit year.
- Specify that there is a rebuttable presumption that an employer is in compliance with the Act if it provides 40 hours of paid leave to an eligible employer each benefit year.
- Eliminate a provision that prohibits an employer from requiring an employee to search or secure a replacement worker as a condition of using paid leave.
- Eliminate the Act's current documentation and notice requirements for employees, and require an eligible employee to comply with his or her employer's usual and customary notice, procedural, and documentation requirements for requesting paid leave.
- Eliminate a provision requiring an employer to pay out-of-pocket costs incurred by an employee for obtaining documentation requested by the employer.
- Eliminate a provision requiring an employer to reinstate an employee's previously accrued paid medical leave if he or she separates from employment but is rehired by the same employer within six months of separation.
- Eliminate a requirement for a different employer succeeding or taking the place of an existing employer to assume responsibility for its employees' accrued paid leave time.
- Specify that if an employer violated the Act, an eligible employee may file a claim with the Department of Licensing and Regulatory Affairs (LARA) within six months, instead of three years, after the violation.
- Allow LARA to grant an eligible employee or former eligible employee payment of all paid medical leave improperly withheld instead of that remedy and all damages incurred by the complainant because of the violation, and back pay and reinstatement in the event of a job loss.
- Eliminate a provision allowing an employee to bring a civil action for a violation.

- **Eliminate a provision authorizing LARA to bring a civil action against an employer.**
- **Require an employer to retain for at least one, instead of three, years of records documenting hours worked and paid medical leave taken by eligible employees.**
- **Eliminate a presumption that an employer violated the Act if a question arose as to an employer's violation of the Act and the employer did not maintain or retain adequate records.**

The bill also repeals Sections 6, 9, and 13 of the Act. (Section 6 prohibits an employee from interfering with or denying the exercise of rights protected under the Act, or from taking retaliatory personnel action or discriminating against an employee because he or she exercised a right protected under the Act. Section 9 requires LARA to develop and implement a multilingual outreach program to inform individual about the availability of earned sick time. Section 13 allows the Director of LARA to promulgate rules as necessary to administer the Act.)

The bill will take effect on March 29, 2019.

### 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. The bill eliminates this term and, instead, refers to "paid medical leave". "Paid medical leave" means time off from work that is provided by an employer to an eligible employee that can be used for the purposes described in the Act.

Under the Act, "family member" includes all of the following: a) a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, or a child to whom the employee stands in loco parentis; b) a biological parent, foster parent, stepparent, or adoptive parent or a legal guardian of an employee or an employee's spouse or domestic partner or a person who stood in loco parentis when the employee was a minor child; c) a person to whom the employee is legally married under the laws of any state or a domestic partner; d) a grandparent; e) a grandchild; f) a biological, foster, or adopted sibling; and g) any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. The bill eliminates g), refers to "eligible employee" instead of "employee", and deletes references to "domestic partner" and "a child of a domestic partner".

"Domestic partner" means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships. The bill eliminates this term and definition.

Under the bill, "benefit year" means any consecutive 12-month period used by an employer to calculate an eligible employee's benefit.

The bill eliminates the terms "retaliatory personnel action" and "small business", and their respective definitions.

### Eligible Employee

Under the Earned Sick Time Act, each employer must provide earned sick time to each of its employees in Michigan. Where the Act refers to "employee", the bill refers instead to "eligible employee", and requires an employer to provide paid medical leave to each of its eligible employees in Michigan.

Under the Act, "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. The bill defines "employer" as any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that employs 50 or more individuals. The term does not include the United States government, another state, or a political subdivision of another state.

"Eligible employee" means an individual engaged in service to an employer in the business of the employer and for whom an employer is required to withhold for Federal income tax purposes. The term does not include any of the following:

- An individual who is exempt from overtime requirements under Section 13(a)(1) of the Fair Labor Standards Act (i.e., an individual employed in a bona fide executive, administrative, or professional capacity, or outside salesperson).
- An individual who is not employed by a public agency, as that term is defined under the Fair Labor Standards Act, and who is covered by a collective bargaining agreement that is in effect.
- An individual employed by the United States 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 that is subject to Title II of the Railway Labor Act.
- An employee as described in Section 201 of the Railway Labor Act (i.e., every employee of an air carrier conducting interstate or foreign commerce).
- An employee as described in Section 1 of the Railroad Unemployment Insurance Act (an individual who, for compensation, is or has been in the service of one or more railroads subject to the jurisdiction of the Surface Transportation Board).
- An individual whose primary work location is not in Michigan.
- An individual whose minimum hourly wage rate is determined under Section 4b of the Improved Workforce Opportunity Wage Act (new employees under 20 years of age, or employees who are under 18).
- An individual described in Section 29(1)(l) of the Michigan Employment Security Act (an individual who is employed by a temporary help firm).
- An individual employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer.
- A variable hour employee as defined under Federal regulations.
- An individual who worked, on average, fewer than 25 hours per week during the immediately preceding calendar year.

#### Accrual of Paid Medical Leave

The Act prescribes the rate at which employees accrue earned sick time hours. Specifically, the employee of a small business accrues a minimum of one hour of earned sick time for every 30 hours worked, but is not 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 may use an additional 32 hours of unpaid earned sick time in that year, unless the employer selects a higher limit. All other employees accrue a minimum of one hour of paid earned sick time for every 30 hours worked but are not entitled to use more than 72 hours per year, unless the employer selects a higher limit. The bill eliminates these provisions.

Under the bill, except as otherwise provided, an eligible employee must accrue paid medical leave at a rate of at least one hour of paid medical leave for every 35 hours worked. An employer is not required to allow an eligible employee to accrue more than one hour of paid medical leave in a calendar week. An employer may limit an eligible employee's accrual of

paid medical leave to not less than 40 hours per benefit year. An employer is not required to allow an eligible employee to carry over more than 40 hours of unused accrued paid medical leave from one benefit year to another benefit year, or to use more than 40 hours of leave in a single benefit year.

"Hours worked" does not include, unless otherwise included by an employer, hours taken off from work by an eligible employee for paid leave.

Alternatively, an employer may provide at least 40 hours of paid medical leave to an eligible employee at the beginning of a benefit year. For eligible employees hired during a benefit year, an employer may prorate paid medical leave. If an employer elects to provide paid medical leave in this manner, the employer is not required to allow the eligible employee to carry over the leave to another benefit year.

The Act specifies that 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.

The bill eliminates these provisions, and specifies that there is a rebuttable presumption that an employer is complying with the Act if the employer provides at least 40 hours of paid leave to an eligible employee each benefit year.

The Act requires an employer to pay an 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. The bill eliminates the latter provision, and refers instead to the Improved Workforce Opportunity Wage Act. Also, the bill specifies that an employer is not required to include overtime pay, holiday pay, bonuses, commissions, supplemental pay, price-rate pay, or gratuities in the calculation of an eligible employee's normal hourly wage or base wage.

#### Use of Accrued Medical Leave

The Act prescribes the circumstances under which an employer must allow an employee to use earned sick time. Among other circumstances, an employer must allow an employee to use the time 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. The bill eliminates this provision from the list of circumstances.

The Act prohibits an employer from requiring an employee to search for or secure a replacement worker as a condition of using earned sick time. The bill eliminates this prohibition.

The Act specifies that 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. The employer may request that the employee provide

the documentation to the employer in a timely manner, but may not delay the commencement of earned sick time on the basis that it has not yet received documentation. The bill deletes these provisions.

Under the bill, instead, when requesting to use paid medical leave, an eligible employee must comply with his or her employer's usual and customary notice, procedural, and documentation requirements for those requests. An employer must give an eligible employee at least three days to provide it with that documentation. The bill does not prohibit an employer from disciplining or discharging an eligible employee for failing to comply with its requirements for requesting leave.

The Act lists types of documentation that are considered reasonable documentation in cases of domestic violence or sexual assault. If an employer chooses to require documentation for earned sick time, it is responsible for paying all out-of-pocket expenses the employee incurs in obtaining it. If the employee has health insurance, the employer is responsible for paying any costs charged to the employee by the health care provider for providing the documentation required.

Under the bill, an employer may require an eligible employee who is using paid medical leave because of domestic violence or sexual assault to provide documentation that the leave has been used for that purpose, and retains those types of documentation listed under the Act. The bill eliminates the provisions pertaining to the employer's responsibility to pay for the employee's costs to obtain documentation.

The Act allows accrued time to 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. Under the bill, paid medical leave must be used in one-hour increments unless the employer has a different increment policy and the policy is in writing in an employee handbook or other employee benefits document.

#### Employee Transfers & Successive Employers

Under the Act, if an employee is transferred to a separate division, entity, or location, but remains employed by the same employer, he or she retains all earned sick time that was accrued at the prior division, entity, or location and may use the 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 time after reinstatement.

The bill eliminates the latter requirement. Instead, if an eligible employee separates from employment and is rehired by the same employer, the employer is not required to allow the employee to retain any unused paid medical leave that he or she previously accumulated. The bill also eliminates a provision requiring a successor employer to assume the responsibility for earned sick time rights earned under while employed under the original employer.

#### Prohibited Acts & Remedies

Section 6 of 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. Section 6 also specifies that there is a rebuttable presumption of a violation if the employer takes

adverse personnel action against a person within 90 days after he or she takes certain actions. The bill repeals Section 6.

The Act specifies that if an employer violates the Act, the affected employee, at any time within three years after the violation or the date when he or she knew of the violation, whichever is later, may file a claim with LARA and bring a civil action for the relief listed. Under the bill, if an employer violates the Act, the eligible employee affected by the violation, at any time within six months after the violation may file a claim with LARA. The bill eliminates a provision requiring LARA to encourage reporting by keeping the employee identifying information confidential to the maximum extent permitted by law.

The Act authorizes the Department to impose penalties and to grant an employee or former employee all appropriate relief, including payment of all earned sick time improperly withheld, damages incurred by the complainant as the result of the violation, and back pay and reinstatement in the case of job loss. Under the bill, the Department may impose penalties and grant an eligible employee or former eligible employee payment of all paid medical leave improperly withheld. The Department is the trustee for the eligible employee or former eligible employee and must distribute and account for money collected.

The Act authorizes LARA to bring a civil action on behalf of the employee if the LARA Director determines that there is reasonable cause to believe that an employer violated the Act and subsequently is unable to obtain its voluntary compliance within a reasonable time. 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. The bill eliminates these provisions.

In addition to liability for civil remedies, an employer that fails to provide earned sick time or takes retaliatory personnel action against an employee or former employee is subject to a civil fine of not more than \$1,000. An employer that willfully violates a notice or posting requirement is subject to a civil fine of not more than \$100 for each violation. The bill eliminates the references to civil remedies and retaliatory personnel action, and refers to "administrative fine" instead of "civil fine".

#### Posting Requirements

The Act requires an employer subject to the Act to 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, provided 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, provided 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.

Under the bill, an employer must display a poster at its place of business, in a conspicuous place that is accessible to eligible employees, that contains the required information that contains all of the following information:

- The amount of paid medical leave required to be provided to an eligible employee.
- The terms under which paid medical leave may be used.
- The employee's right to file a complaint with LARA for any violation of the Act.

The bill eliminates the notice requirement, and the requirement for the poster to be displayed in English, Spanish, and any language that is the first language spoken by at least 10% of the employer's workforce.

Under the Act, 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. The bill requires the Department to create and make available to employers, at no cost, posters that contain the required information.

#### Recordkeeping Requirements

The Act requires an employer to retain for at least three years records documenting the hours worked and earned sick time taken by employees. The bill shortens this period to one year.

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. The bill eliminates the provision establishing the presumption of a violation, and requires records kept by an employer to be open to inspection by the Director at any reasonable time.

#### Other Provisions

The Act states that it provides minimum requirements pertaining to earned sick time and that it 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 bill eliminates this provision.

The Act also states that if any portion of it, 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. Under the bill, if a Federal paid medical leave mandate is enacted, the Act does not apply as of the mandate's effective date.

MCL 408.961 et al.

Legislative Analyst: Jeff Mann

## **FISCAL IMPACT**

The bill will have a negative fiscal impact on State government and an indeterminate negative fiscal impact on local government. Costs to State and local government include any additional expenses incurred due to the use of paid medical leave by employees beyond their current benefits. The Department of Licensing and Regulatory Affairs (LARA) also will incur significant costs due to the bill's provisions.

The bill will require LARA to establish a communications system for receiving complaints against employers. In addition, the Department will be responsible for monitoring employer compliance, investigating alleged violations, and processing appeals. The Department anticipates increased expenses associated with public outreach and the production of communications materials to meet the bill's requirements.

An estimated 8.0 to 14.0 FTEs may be required in the Wage and Hour Division, depending upon the volume of inquiries, complaints, and investigations initiated because of the bill. The addition of these FTEs will result in a cost of approximately \$840,000 to \$1,525,000. The Department also may incur additional, currently unknown, expenses related to the production and distribution of posters and other informational material.

Employers that do not provide paid medical leave may be charged an administrative fine of up to \$1,000. A violation of the posting requirements may result in an administrative fine of up to \$100. Revenue from these fines will be deposited into the General Fund in accordance with Michigan Compiled Laws 18.1443.

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.