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## Township Law **E-Letter**

### **Mandatory Sick Leave: The Future!**

*The Michigan Legislature adopted a proposed ballot measure, Michigan's Earned Sick Time Act (the "Act"), as law on September 5, 2018. Under the Act, employers big and small, public and private are required to provide employees with paid and unpaid sick leave. Townships that already offer sick (or other) leave would be wise to review and potentially modify existing leave policies to ensure compliance, and townships that do not offer such leave must find a means of meeting at least the Act's minimum requirements by the Act's effective date (which will depend on when the Michigan Legislature adjourns the 2018 session). This **E-Letter** examines the Act and the areas townships must watch carefully as the matter is considered in the upcoming lame duck session of our Legislature.*

#### **Q: WHAT IS THE PURPOSE OF THE ACT?**

To establish employees' rights to accrue and use paid (and unpaid) leave without interference or retaliation by the employer for requesting, exercising, or enforcing the right to take sick time granted under the Act.

#### **Q: WHO IS IMPACTED?**

All employers, in some degree or another (except the U.S. government!) This includes public employers, like townships.

#### **Q: FOR WHAT MAY MANDATORY SICK LEAVE BE USED?**

- 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
- School meetings needed as the result of a child's disability or effects of domestic violence or sexual assault
- Closure of employee's place of business (or the child's school or place of care) due to public health emergency

The Act does not require townships to provide earned sick time for any purposes other than those described in the Act.

Leave may be used in hourly increments or the smallest increment your payroll system can use to account for time—whichever is smaller.

If the leave is foreseeable, townships may implement certain notice requirements.

If the leave stretches to three (3) or more consecutive days, townships may certainly request reasonable documentation to support the eligibility for the leave. But where there is a cost to obtaining that documentation, the township will likely be required to pay to receive it—think office visit or other insurance copays or coinsurance amounts. And the documentation standard is fairly low: the physician need only certify that "earned sick time is necessary."

### **Q: HOW LONG DO WE HAVE TO ENSURE WE COMPLY WITH THE ACT?**

The Act is *not* effective immediately, which provides your township with additional time to review and potentially modify current policies to ensure compliance. However, your township must comply by the Act's effective date. The legislation will take effect 91 days after adjournment of the 2018 regular session. Therefore, the effective date depends on the date the Michigan Legislature adjourns for 2018. The effective date will likely be mid-March 2019, but the latest potential effective date is April 1, 2019. That could all change dramatically, depending on what the Legislature does in its lame duck session after the upcoming election, of course!

	<b>Small Employers (less than 10 employees)</b>	<b>Large Employers (10 or more employees)</b>
<b>Accrual Rate:</b>	At least one (1) hour for every 30 hours worked	At least one (1) hour for every 30 hours worked
<b>Minimum Amount of <u>Paid</u> Sick Leave:</b>	40 hours per year	72 hours per year
<b>Minimum Amount of <u>Unpaid</u> Sick Leave:</b>	If an employee accrues more than 40 hours sick leave per year, the employee is entitled to use an additional 32 hours of <b>unpaid</b> sick leave per year	The Act does not set requirements or limit unpaid sick leave for large employers
<b>Total Minimum Sick Leave:</b>	72 hours per year (40 hours paid and 32 unpaid)  Employees must be allowed to use paid sick leave before unpaid sick leave	72 hours paid

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

Yes. There is no threshold number of hours worked or exception for part-time or temporary employees.

**Q: DOES UNUSED SICK LEAVE CARRYOVER FROM YEAR TO YEAR?**

- Yes, but the 40 and 72 hours of sick leave are the maximum amounts of paid sick leave an employee must be allowed to use per year. You, as the township, could of course permit employees to use more under your own policy.
- Accrual of sick leave must begin by the Act's effective date or the beginning of employee's service to you, whichever is later.
- An employee may use accrued earned sick time as it is accrued, except the township may require an employee hired after April 1, 2019 to wait until the 19th calendar day after commencing employment before using accrued earned sick time.

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

Your township must establish a policy to provide employees with at least the minimum accrual required by the Act.

**Q: HOW DO WE EVALUATE EXISTING CURRENT LEAVE POLICIES?**

- Provide the minimum required leave time to all employees. Many townships do not provide leave time for part-time or temporary employees.
- Check the accrual rate.
  - a. If it is equal to or higher than the Act's accrual rate, no changes are needed!
  - b. If it is not, the accrual rate must be increased.
- Review and adjust minimum and maximum use requirements of the policy.
- Review and adjust notice and documentation requirements of the policy.
- Be mindful of the carryover/rollover requirements: the minimum sick leave provided by the Act cannot be forfeited at the end of the year in a traditional "use it or lose it" policy.
- Consider converting existing sick, personal, and vacation time into one PTO bank to meet the minimum sick leave requirements.

Note: 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 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.

**Q: DOES LEAVE PROVIDED PURSUANT TO THE FAMILY AND MEDICAL LEAVE ACT (FMLA) RUN CONCURRENTLY WITH THIS LEAVE?**

Yes, 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 runs concurrently with the FMLA leave period. The Act does not change any of this.

**Q: WHAT DO WE DO WITH ACCRUED BUT UNUSED SICK LEAVE IF THE EMPLOYEE TRANSFERS OR TERMINATES EMPLOYMENT?**

Sick leave is transferrable, meaning that if an employee transfers (voluntarily or by assignment) positions within the township but is still employed by the township, he or she must be permitted to retain accrued sick leave.

You are not generally required to pay unused sick leave upon the employee's termination, resignation, or retirement because of this Act (although your policy may require it). However, if an employee resigns, and then returns to the township within six months, the unused sick leave must be reinstated.

**Q: HOW DOES THIS ACT IMPACT OR RELATE TO EXISTING COLLECTIVE BARGAINING AGREEMENTS?**

First, understand that the Act does not preempt or limit applicability of collective bargaining agreements ("CBAs") that provide for greater accrual or use of sick leave.

But a contract or agreement between the township and employees that provides fewer rights or benefits than provided by the Act is void and unenforceable.

The Act does not preempt or override the terms of any CBA that is currently in effect or in effect prior to the effective date of the Act. If employees are covered by a CBA on the Act's effective date, the Act's requirements apply on the date that the CBA expires (regardless of any statement that the CBA will continue in full force until a future date or event or the execution of a new CBA).

**CONSEQUENCES OF NONCOMPLIANCE & TRAPS FOR THE UNWARY**

**Q: WHAT CAN'T (OR SHOULDN'T) WE DO IN RESPONSE TO THIS ACT OR AN EMPLOYEE'S USE OF SICK LEAVE GRANTED BY THIS ACT?**

DO NOT:

- Interfere with, restrain, or deny the exercise of any right under the Act
- Take retaliatory personnel action or discriminate against an employee because the employee has exercised their rights under the Act (watch out for that rebuttable presumption...)
- Require an employee using sick leave to search and secure their own replacement for that shift

**Q: WHAT REBUTTABLE PRESUMPTION?**

A presumption of retaliation arises if the township takes adverse personnel action (discipline, termination, layoff, transfer, etc.) against an employee within 90 days after the employee:

- Files a complaint alleging violation of the Act
- Informs any person about the township's alleged violation of the Act

- Cooperates with the Department or another person in the investigation or prosecution of alleged violations
- Opposes any policy, practice, or act prohibited under the Act
- Informs any person of his or her rights under the Act

If the township cannot rebut this presumption with a legitimate and lawful reason for the action, the employee is likely to prevail in legal action.

There is a lot of chatter about potential changes coming through the lame duck session that would impact the presumption.

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

- Civil lawsuit for:
  - payment of used sick leave
  - reinstatement to the employee's previous job
  - payment of back wages
  - reestablishment of employee benefits
  - liquidated damages
  - reasonable attorney fees
- Investigation by the Department, who may impose penalties, require payment of improperly withheld sick leave, back pay, and reinstatement of a lost job
- \$1,000 civil fine for all violations, except the failure to provide proper notice, which is a civil fine of not more than \$100

### **NOTICE TO EMPLOYEES**

Once effective, and as currently enacted, your township must provide employees with written notice of:

- The amount of sick leave employees may receive under the Act;
- How you will calculate a "year" (a regular and consecutive 12-month period);
- What sick leave may be used for;
- The prohibition against retaliatory personnel action by the township; and
- The right to bring a civil action or file a complaint with the Department of Licensing and Regulatory Affairs (the "Department") for violations

You must also display a poster that contains all this information and retain records documenting the hours worked and earned sick time used by employees for at least three years.

This posting and notice 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 will provide such notices and posters by the Act's effective date.

## **WANT TO LEARN MORE?**

On September 5, 2018, the Michigan Legislature adopted the ballot initiative as it was proposed by the Michigan Time to Care Committee. If you would like to read the new law, it can be found under [Public Act Number 338, Public Acts of 2018](#).

There has been speculation that the Legislature adopted this proposal to keep it off the November ballot. By doing so, the Legislature may amend the law by a simple majority vote in the future (if the proposal went to the ballot and was passed by the voters, it would have required a three-fourths vote to amend). However, as of right now, the law has been passed as proposed by the ballot initiative and is scheduled to take effect by April 1, 2019 (at the latest). You should begin reviewing your current sick (or other) leave and potentially modify existing leave policies to ensure compliance with the Act. If you do not offer such leave, you still must ensure you meet the Act's minimum requirements by the effective date.

If you have any questions about the new law, please feel free to contact us. And watch for news of any potential changes from the lame duck session!

### **-- Helen "Lizzie" Mills**

*Fahey Schultz Burzych Rhodes PLC, Your Township Attorneys, is a Michigan law firm specializing in the representation of Michigan townships. Our lawyers have more than 150 years of experience in township law and have represented more than 150 townships across the state of Michigan. This publication is intended for our clients and friends. This communication highlights specific areas of law and is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.*

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