



Marijuana & Paid Medical Leave Act: The Top Ten Things Employers Should Know

Presented By: Brett A. Rendeiro

NUMBER ONE: **MICHIGAN RECREATIONAL MARIJUANA LAW**

“This act does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marihuana.”

NUMBER TWO: HOW DO YOU KNOW??



NUMBER THREE: UNEMPLOYMENT BENEFITS?

“Now, and solely in the context of unemployment benefits, claimants will be disqualified from receiving unemployment benefits if the claimant’s: (1) positive drug test for marijuana was caused by the ingestion of marijuana at the workplace; (2) discharge is based on the fact that the claimant was under the influence of marijuana at the workplace; or **(3) inability to demonstrate that he or she is a qualifying patient who has been issued and possesses a registry identification card under the Michigan Medical Marijuana Act.**”

NUMBER FOUR: **The Other New Law**



MICHIGAN PAID MEDICAL LEAVE ACT

The Earned Sick Time Act (which never became effective) has been amended and renamed the Michigan Paid Medical Leave Act.



© 2019 Butzel Long

NUMBER FOUR: **(continued)**

- The law requires some employers in Michigan to provide eligible employees with accrued paid medical leave to use for their own or their family members' medical needs and for purposes related to domestic violence and sexual assault.
- An employer's paid time off (PTO) policy may satisfy the Act's paid medical leave requirements;
- There are posting and record retention requirements; and
- Paid medical leave begins to accrue when the law becomes effective (March 29, 2019) or on the commencement of the employee's employment, whichever is later.



© 2019 Butzel Long

NUMBER FIVE: THE LAW DOES NOT APPLY TO EVERYONE

- The law covers only employers with at least 50 employees (the original law had a 1 employee threshold).
- Employer does NOT include the United States government, another state, or a political subdivision of another state.

NUMBER FIVE: (continued)

- The law specifically includes any:
 - Person
 - Firm
 - Business
 - Educational Institution
 - Nonprofit Agency
 - Corporation
 - Limited Liability Company



so long as the Employer has at least 50 employees.

NUMBER FIVE: **(continued)**

- “Employee” is specifically defined to include individuals for whom the employer is required to withhold federal income tax (in other words W-2 workers)but...
- the exclusions almost overtake the rule (see next 4 slides).



B BUTZEL LONG

© 2019 Butzel Long

Exclusions on who constitutes an “eligible employee” include:

- Employees who fall under the overtime exemptions of executive, administrative, or professional capacity, or in the capacity of an outside salesman under Fair Labor Standards Act,
- worked an average of fewer than 25 hours during the previous calendar year,
- employed for 25 weeks or fewer in a calendar year,



B BUTZEL LONG

© 2019 Butzel Long

Exclusions on who constitutes an “eligible employee” include:

- An individual who is not employed by a public agency and is covered by a collective bargaining agreement *that is in effect*,
- are employees federal, state, or political subdivision of a state (other than Michigan),
- An employee employed by a public agency and is covered by a collective bargaining agreement that is in effect during (the initial term only),

Exclusions on who constitutes an “eligible employee” include:

- an individual whose primary work location is not this 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, 45 USC 181.



Exclusions on who constitutes an “eligible employee” include:

- individuals covered under Michigan's improved workforce opportunity act (training employees under age 20 for the first ninety days and employees under the age of 18);
- employed by a temporary help firm meeting the conditions of the Michigan Employment Security Act, MCL 421.29(1)(l);
- a variable hour employee under the Affordable Care Act.

NUMBER SIX: THE REQUIRED AMOUNT OF LEAVE AND FOR WHAT PURPOSES

- **How much time is required?**
 - 40 hours paid medical leave to an eligible employee per year.
- **What is “Paid Leave”?**
 - Paid leave is not limited to only sick time. It also includes:
 - paid vacation days,
 - paid personal days, and
 - paid time off.

NUMBER SIX: (continued)

PERMISSIBLE USES

An eligible employee may use paid medical leave accrued for any of the following:

(a) The eligible employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee's mental or physical illness, injury, or health condition; or preventative medical care for the eligible employee.

(b) The eligible employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee's family member's mental or physical illness, injury, or health condition; or preventative medical care for a family member of the eligible employee.

NUMBER SIX: (continued)

PERMISSIBLE USES

An eligible employee may use paid medical leave accrued for any of the following:

(c) If the eligible employee or the eligible employee's family member is a **victim of domestic violence or sexual assault**, the 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**.

(d) For closure of the eligible employee's primary workplace by order of a public official due to a **public health emergency**; for an eligible 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 if it has been determined by the health authorities having jurisdiction or by a health care provider that the eligible employee's or eligible employee's family member's presence in the community would jeopardize the health of others because of the eligible employee's or family member's exposure to a communicable disease, whether or not the eligible employee or family member has actually contracted the communicable disease.

NUMBER SEVEN: **TWO OPTIONS FOR PROVIDING PAID MEDICAL LEAVE AND THE CONSEQUENCES**

Option 1: Accrual Method

- Employees accrue one hour of paid leave for every 35 “hours worked”, for a maximum of one hour per calendar week and 40 hours in a “benefit year”.
- An employer is not required to allow an employee to carry over more than 40 hours of accrued leave per year, or allow employees to use more than 40 hours per year.

NUMBER SEVEN: **(continued)**

Option 2: Frontloading

- An alternative to accrual, the law adopts “frontloading”. Employers may “frontload” 40 hours of paid medical leave to employees at the beginning of the benefit year.
- If an employer frontloads, then it is not required to allow an employee to carry any paid medical leave to another year.

NUMBER SEVEN: (continued)

KEY DEFINITIONS FOR ACCRUAL AND FRONTLOADING METHODS

- “**Hours worked**” does not include, unless otherwise included by an employer, hours taken off from work by an eligible employee for paid leave.
- “**Benefit Year**” means any consecutive 12-month period used by an employer to calculate an eligible employee’s benefits. This applies to when you need to provide the paid leave.

NUMBER SEVEN: (continued)

SUMMARY OF KEY DIFFERENCES

- When the employee is eligible to take the time:
 - **Accrual:** after time is accrued (1 hour for every 35 hours)
 - **Frontloading:** at the beginning of the benefit year
- Whether any used paid leave time be carried over to the next year:
 - **Accrual:** 40 hours
 - **Frontloading:** not required to allow carryover to next year

NUMBER EIGHT: **RATE OF PAY, TIME INCREMENTS AND NOTICE FROM EMPLOYEE**

What is the pay rate?

- An amount equal to the greater of either the normal hourly wage or base wage for that eligible employee (no less than minimum wage).

Must you include other compensation received by the employee?

- No. An employer is not required to include overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities in the calculation of an eligible employee's normal hourly wage or base wage.



© 2019 Butzel Long

NUMBER EIGHT: **(continued)**

What is the smallest increment of time that can be used under the Paid Medical Leave Act?

- Paid leave must be used in one-hour increments, unless the employer has a different increment policy in writing.



© 2019 Butzel Long

NUMBER EIGHT: **(continued)**

How much notice is required?

- An employee must comply with his or her employer's usual and customary notice, procedural, and documentation requirements for requesting leave.
- An employer shall give an eligible employee at least 3 days to provide the employer with documentation.
- The Act does not prohibit an employer from disciplining or discharging an eligible employee for failing to comply with the employer's usual and customary notice, procedural, and documentation requirements for requesting leave.

NUMBER NINE: **DOCUMENTATION, POSTING REQUIREMENTS** **AND RECORD RETENTION**

- An employer may require an eligible employee who is using paid medical leave because of domestic violence or sexual assault for supporting documentation. Examples include:
 - A police report indicating that the eligible employee or the eligible employee's family member was a victim of domestic violence or sexual assault
 - A signed statement from a victim and witness advocate affirming that the eligible employee or eligible employee's family member is receiving services from a victim services organization.
 - A court document indicating that the eligible employee or eligible employee's family member is involved in legal action related to domestic violence or sexual assault.

NUMBER NINE: **(continued)**

Privacy Considerations:

- An employer shall not require that the documentation explain the details of the violence.
- An employer shall not require disclosure of details relating to domestic violence or sexual assault or the details of an eligible employee's or an eligible employee's family member's medical condition as a condition of providing paid medical leave under this act.

Maintain Confidentiality of Medical Information:

- If an employer possesses health information or information pertaining to domestic violence or sexual assault about an eligible employee or eligible employee's family member, the employer shall treat that information as confidential and shall not disclose that information except to the affected eligible employee or with the permission of the affected eligible employee.

NUMBER NINE: **(continued)**

Posting Requirements

(1) An employer shall display a poster at the employer's place of business, in a conspicuous place that is accessible to eligible employees, that contains all of the following information:

- (a) The amount of paid medical leave required to be provided to an eligible employee under this act.
- (b) The terms under which paid medical leave may be used.
- (c) The eligible employee's right to file a complaint with the department for any violation of this act.

(2) The department shall create and make available to employers, at no cost, posters that contain the information required under subsection (1) for employers' use in complying with this section.

NUMBER NINE: **(continued)**

Record Keeping Requirements

- An employer shall retain for not less than 1 year records documenting the hours worked and paid medical leave taken by eligible employees. Those records shall be open to inspection by the director at any reasonable time.



NUMBER TEN: **POTENTIAL LIABILITY FOR NON-COMPLIANCE**

The Act creates a rebuttable presumption that an employer is in compliance with the act if it provides 40 hours of paid leave to eligible employees each benefit year.

The department may impose penalties and grant an eligible employee or former eligible employee payment of all paid medical leave improperly withheld. Penalties may include:

- An employer that fails to provide paid medical leave in violation of this act is subject to an administrative fine of not more than \$1,000.00.
- An employer that willfully violates the posting requirement of section 8 is subject to an administrative fine of not more than \$100.00 for each separate violation.

NUMBER TEN: **(continued)**

Relatively Short Statute of Limitations:

- The statute of limitations to bring a claim has been shortened from three years to six months.

No Private Right of Action:

- Importantly, the Act has eliminated the private cause of action and retaliatory personnel action provisions.
- Any claim alleging a violation of the Act must be made as an administrative complaint, rather than as a lawsuit in court. Thus, an eligible employee who believes his or her rights have been violated must file an administrative complaint with the Michigan Department of Licensing and Regulatory Affairs within six months.

NUMBER TEN: **(continued)**

Changes May Be Coming:

- It's rumored that one or more lawsuits may be filed alleging that the Legislature's amendments to the PMLA were unconstitutional.
- The groups involved with the original ballot initiative reportedly intend to pursue additional ballot initiatives to undo the recent amendments

FAQs

Does the Michigan Paid Medical Leave Act require any other types of leave?

- No, the Act does not require an employer to provide paid leave for any purposes other than as described in the law.

FAQs

What happens if an eligible employee is transferred to a separate division, entity, or location, but remains employed by the same employer?

- The eligible employee retains all paid medical leave that was accrued at the prior division, entity, or location and may use the accrued paid medical leave so long as the employee remains employed in Michigan.

What if an eligible employee separates from employment and is rehired by the same employer?

- The employer is not required to allow the eligible employee to retain any unused paid medical leave that the eligible employee previously accumulated while working for the employer.

FAQs

What happens if the employee is terminated or voluntarily leaves?

- The Act does not require an employer to provide financial or other reimbursement to an eligible employee for accrued paid medical leave that was not used before the end of a benefit year or before the eligible employee's termination, resignation, retirement, or other separation from employment.



FAQs

Can an employer provide more paid medical leave than required by the Act?

- Certainly.

Does this Act override my current CBA?

- No, this law does not preempt or override the terms of any collective bargaining agreement in effect prior to the effective date of this act.

But what about future CBAs?

FAQs

How does the Paid Medical Leave Act Affect leave under the FMLA, ADA or PWDCRA?

- The short answer is that the PMLA does not alter an employer's obligations under the FMLA, ADA or PWDCRA, except that an eligible employee may use the paid medical leave available under the law.

How does the Paid Medical Leave Act affect point-based attendance systems?

- This is an interesting question. The PMLA does not address this question directly, so we will not have a definitive answer until a court interprets the law. However, employers cannot count FMLA leave under a point-based attendance system.

FAQs

Can an employee donate to another employee his/her accrued medical leave?

- The Act does not prohibit an employer from establishing a policy that permits an eligible employee to donate unused accrued paid medical leave to another eligible employee.



Key Areas: Examining Your Policy

- Scope/Type of Allowable Leave
- Amount of Leave
- Rate of Pay
- When Leave Can be Taken
 - Accrual Method
 - Frontload Method
- Carry Over Allowance
- Call-In Procedures
- Documentation Requirements
- Notice Requirements
- Payment/Nonpayment at Termination
- Absenteeism Policies
- Coordination with other leave policies (FMLA/ADA/Your Policy)



© 2019 Butzel Long

Questions?

Brett Rendeiro

248.258.1312

rendeiro@butzel.com



© 2019 Butzel Long

Disclaimer: These materials and presentations are intended and designed for informational purposes only and reflect the current state of the law – they do not provide legal advice and no attorney-client relationship is created. No liability is assumed in connection with the use of these materials. Legal counsel should be consulted regarding how applicable law impacts your situation.



© 2019 Butzel Long