

LEAVE IT TO US: EMPLOYER'S GUIDE TO LEAVE LAWS

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I. INTRODUCTION

- A. There are a number of laws that govern when, how much, and what kind of leave an employer is required to given an employee.
- B. It can be difficult to understand which laws apply to your business and when those laws are implicated by an employee's actions.
- C. Characteristics of Leave/Time Off and Questions to Ask Yourself:
 - 1. Paid v. Unpaid
 - a. Do you offer all employees paid leave? If so, do you offer unpaid leave upon the exhaustion of paid leave? If not, do you offer unpaid leave for those employees who are not eligible for paid leave?
 - 2. Legally Required v. Discretionary
 - a. Are you up to date on all legally required leave? Do you offer more than what is required?
 - 3. Earned v. Accrued
 - a. Is the leave earned in one lump-sum on an anniversary? If so, is the anniversary the date of the employee's hire, the first of the calendar year, or some other date applicable to all employees?
 - b. Or is the leave accrued by the employee over time?
 - 4. Use it or Lose it v. Paid Out
 - a. What happens to the leave at the end of the year or separation? Does the employee lose the leave if it is not used? Do you offer to pay for any unused leave?
 - b. Under the Earned Sick Time Act ("ESTA"), employers must permit a carryover of unused benefits.
- D. These materials focus on the following:
 - 1. The various types of leave that are required or optional.

2. Recent developments in federal and Michigan leave laws and how these developments may impact your existing policies.
3. Trends we are seeing from employers.

II. THE ALPHABET SOUP

A. Deciphering the Letters:

1. Family Medical Leave Act (“FMLA”)
2. Americans with Disabilities Act of 1990, as Amended (“ADA”)
3. Pregnant Workers’ Fairness Act (“PWFA”)
4. Providing Urgent Maternal Protections for Nursing Mothers (“PUMP Act”)
5. Michigan’s Persons with Disabilities Civil Rights Act (“PWDCRA”)
6. Michigan’s Earned Sick Time Act (“ESTA”)
7. Paid Time Off (“PTO”), which can include any of the following:
 - a. Vacation days
 - b. Personal time
 - c. Sick/medical leave
 - d. Holidays
 - e. Bereavement leave
 - f. Parental leave
 - g. Jury duty/witness leave
 - h. Caregiver leave
 - i. Voting time off
 - j. Paid leave for school activities

B. Federally Required Leave – FMLA and the ADA

1. There is currently no federal law generally requiring private employers to provide paid sick leave.

2. However, certain employers are required to provide unpaid, job-protected leave.
3. Family Medical Leave Act
 - a. Unpaid, legally required
 - b. Covered Employer: 50 or more employees during a 20-week period of the calendar year or the previous calendar year
 - i. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.
 - ii. Once an employer meets the requirements of a Covered Employer, it is covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.
 - iii. Integrated Employer Test: Employers with common management, interrelation between operations, a centralized control of labor relations, and degree of common ownership/financial control will be treated as a single employer. This means that for FMLA purposes, the employees of all integrated employer entities must be counted to determine whether the employer is covered under FMLA.¹
 - c. Eligible Employee: worked for the employer for at least 12 months (need not be consecutive), for at least 1250 hours in the past year, and work at a location that employs at least 50 people within a 75-mile radius.
 - d. Requirements: eligible employees receive 12 weeks of leave in a 12-month period for:
 - i. Birth of child or placement of child with employee for adoption or foster child care, and to bond with newborn or newly-placed child;
 - ii. Care for spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
 - iii. Serious health condition that makes employee unable to perform the essential functions of the job, including incapacity due to pregnancy and for prenatal medical care; or

¹ <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf> at pg. 11.

- iv. Any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or called to covered activity duty status.²
 - e. How to count the 12 weeks:
 - i. Calendar Year
 - ii. Any fixed 12-month period (e.g., employee’s anniversary date, fiscal year)
 - iii. First date employee takes FMLA leave
 - iv. “Rolling” 12-month period
 - f. Coordination with Other Leave:
 - i. FMLA is not required to be paid; however, employers may be more generous than the minimum requirement of the law and pay employees for some or all of FMLA leave.
 - ii. Employers may require other paid leave to run concurrently with FMLA.
 - iii. The standard should be applied uniformly to avoid a claim of unlawful discrimination. For example, if a female employee receives six weeks of paid FMLA leave to bond with her child, the employer should extend the same benefit to a male employee who is using FMLA to bond with a new child. Employers should be careful not to make assumptions about who is a primary caregiver, if the policy incorporates a distinction between primary/secondary caregiver.
- 4. Americans with Disabilities Act (“ADA”)
 - a. Covered Employers: employers with 15 or more employees.
 - b. Covered Employers must provide reasonable accommodations to employees with disabilities unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

² <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/employerguide.pdf> at pg. 11

- i. Unpaid leave can be considered a “reasonable accommodation” consistent with the ADA’s purpose to require employers to change the way things are customarily done to enable employees with disabilities to work.³
- ii. If leave is required as a reasonable accommodation, the employer generally must welcome the employee back to the individual’s former position at the same rate of pay.
 - (A) However, if leaving the position open would cause an undue hardship, the employer must consider the employee for an open position for which the employee is qualified.

C. State Mandated Leave

1. Michigan Persons With Disabilities Civil Rights Act (“PWDCRA”)
 - a. Unpaid, mandated.
 - b. Applies to employers with one or more employees.
 - c. An employer may be obligated to provide unpaid leave where the employee has a disability that requires leave, the leave does not pose an undue hardship on the employer, ***and the employee in Michigan makes the request within at least 182 days of having reason to know of the need for an accommodation.***
 - d. Employers with fewer than 15 employees are generally not required to restructure a job or alter the schedule of employees as an accommodation under this Act.
2. Crime Victim Leave
 - a. Unpaid, mandatory
 - b. Employees in Michigan who are victim to a crime are entitled to take an unpaid leave of absence to attend judicial proceedings related to a crime. Employers may not threaten to discharge or discipline – or actually discharge or discipline – an employee who is a victim subpoenaed by a prosecuting attorney to attend court for the purpose of giving testimony or if they are a victim’s representative who attends or desires to attend court to be present during the testimony of the victim.
 - c. Employees are considered a victim representative of a crime victim if they are:

³ MCL 1210(14). Furthermore, job restructuring only applies to an employee’s minor or infrequent duties relating to a particular job held by the person with a disability. MCL 37.1210(15).

- i. The guardian or custodian of a deceased victim's child;
 - ii. The parent, custodian, or guardian of an assault victim under the age of 18; or
 - iii. Designated to act for an assault victim suffering from physical or emotional disabilities.
 - d. This leave is different from ESTA, which may be used to attend civil or criminal proceedings arising out of domestic violence or sexual assault.
- D. Other Common Types of Paid Time Off ("PTO")
 - 1. Note: these can be offered to employees as unpaid time off. Additionally, other states may require some of these leaves.
 - a. Vacation days
 - b. Personal time
 - c. Sick/medical leave
 - d. Holidays
 - e. Bereavement leave
 - f. Parental leave
 - g. Jury duty/witness leave
 - h. Caregiver leave
 - i. Voting time off
 - j. Paid leave for school activities

III. RECENT DEVELOPMENTS IN MICHIGAN AND FEDERAL LAW

- A. Earned Sick Time Act ("ESTA") v. Paid Medical Leave Act
 - 1. ESTA was adopted by the legislature and subsequently amended in December 2018 by passage of the PMLA
 - a. Michigan Court of Claims held that the "adopt and amend" strategy was unconstitutional
 - b. Michigan Court of Appeals reversed the Court of Claims ruling the amended version of the statute was valid and enforceable

2. Oral Arguments heard before the Michigan Supreme Court on December 7, 2023
3. On July 31, 2024, the Michigan Supreme Court reversed the Court of Appeals decision and held that the adopt-and-amend approach violated the Michigan Constitution

	Paid Medical Leave Act	Earned Sick Time Act
Covered Employers	50 or more employees	Employers with at least 1 employee “small business” means an employer for which fewer than 10 individuals work for compensation during a given week
Eligible Employees	Non-exempt employees who worked an average of 25 hours per week in the previous calendar year. Can require employee to wait 90 days before using.	All employees of a covered employer. Can require employee to wait 90 days before using.
Amount of Leave	40 hours of paid leave	72 hours of leave Small businesses need only provide 40 hours of paid leave, and the additional 32 hours may be unpaid. All other business must provide 72 hours of paid leave
Accrual	Can be offered in a lump sum at the beginning of the year OR accrual at one hour for every 35 hours worked	Accrues at a rate of one hour for every 30 hours worked.
Carry Over?	If lump sum, no carry over. If accrual, employer is not required to allow more than 40 hours carried over.	Cannot cap accrual and must permit carry out. However, employer can limit amount of leave used per year to 72 hours. No requirement to pay out unused leave upon separation from employment. Additionally, if an employee is re-hired within 6 months of separation, accrued leave must be reinstated.

Presumption of Compliance?	Yes – as long as employers offer 40 hours of paid leave.	Yes – as long as the employer provides any paid leave in at least the same amounts, that may be used for the same purposes, and under the same conditions provided in this act that is accrued at a rate equal to or greater than the rate required under the act.
Notice Requirements	Use employer’s usual and customary notice requirement.	If leave is foreseeable, cannot require notice more than 7 days in advance. If unforeseeable, can require notice “as soon as practicable.”
Use	1-hour increments, unless the employer has a different policy.	The smaller of one-hour increments, or the smallest increment that the employer’s payroll system uses to account for absences.
Documentation	Can require documentation prior to return to work.	Can only require documentation if the employee is absent more than 3 consecutive days.

4. **Uses:**

- a. The employee’s physical or mental illness, injury, or health condition; medical diagnosis, care, or treatment of the employee’s mental or physical illness, injury, or health condition; or preventative medical care for the employee.
- b. For the employee’s family member’s mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee’s family member’s mental or physical illness, injury, or health condition; or preventative medical care for a family member of the employee.
- c. 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.
- d. **NEW:** 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.
- e. For 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 disease.

5. Penalties and Remedies for Violations:
 - a. 3-year statute of limitation
 - b. Private civil action for damages including payment for used, earned sick time; rehiring or reinstatement; payment of back wages; reestablishment of employee benefits; and an equal additional amount of liquidated damages together with costs and reasonable attorney fees as the court allows.
 - c. File a claim with the Michigan Department of Licensing and Regulatory Affairs – this is not a prerequisite or a bar to bringing a civil action.
 6. Other Key Provisions
 - a. Employers must conspicuously display a poster at the place of business in English, Spanish, and any language that is the first language of at least 10% of the workforce.
 - b. Employers can decide how they want to define “year.”
 - c. The definition of “Family” includes “any other individuals related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”
 - d. The ESTA is silent as to whether an employer can frontload the paid leave rather than use an accrual method.
 - e. The ESTA is also silent as to whether there is an accrual cap, although there is a cap on the number of hours that may be used in a year.
- B. Providing Urgent Maternal Protections for Nursing Mothers Act (“PUMP Act”)
1. Effective December 29, 2023, with changes to the remedies effective April 28, 2023.
 2. Amends the Fair Labor Standards Act (“FLSA”) by expanding workplace protections for all new mothers, not just non-exempt employees (those eligible for overtime). Requires employers to provide all nursing employees with a private space (other than a restroom) and a reasonable amount of time to express breast milk for up to one year after a child's birth.
 - a. Employers are not required to compensate the employees during these breaks as long as the employee is not performing any work.

- i. miscarriage or stillbirth
 - ii. migraines
 - iii. pregnancy-related conditions that are episodic – e.g., morning sickness
- c. Documentation:
- i. Encourages employers to minimize documentation.
 - ii. Self-confirmation – an informal process in which the employee provides the employer information about their pregnancy.
 - (A) An employer must accept as sufficient an employee’s self-confirmation when: (1) the pregnancy is obvious; or (2) an employee seeks a “predictable assessment” accommodation
 - iii. “Predictable assessment” – four assessments that will not impose an undue hardship in ‘virtually all cases’
 - (A) Allowing an employee to carry or keep water near to enable them to drink;
 - (B) Permitting an employee to take additional restroom breaks as needed;
 - (C) Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed;
 - (D) Allowing an employee to take breaks to eat and drink as needed.
 - iv. It is not reasonable to seek supporting documentation where:
 - (A) The limitation/adjustment/change is obvious and employee provides self-confirmation;
 - (1) e.g., an employee needs a bigger uniform
 - (B) Employer has sufficient information to determine whether employee has a qualifying limitation and needs an adjustment or change due to limitation;
 - (1) e.g., employer is aware of employee’s morning sickness. The employer cannot ask for medical documentation each time the employee is sick due to morning sickness

- (C) Employee is pregnant and requests a “predicable assessment”;
- (D) Reasonable accommodation relates to time and/or place to pump/nurse during work hours and employee provides self-confirmation; or
- (E) Requested accommodation is available to employees without known limitations under PWFA pursuant to a policy or practice without submitting supporting documentation.
 - (1) E.g., employer does not seek medical documentation unless an employee is absent for three or more days; therefore, the employer cannot seek documentation from a pregnant employee who is only absent for one day
- v. However, if an employer asks for documentation other than self-confirmation, employers cannot ask for a specific form.
- vi. Employers can still seek reasonable documentation to:
 - (A) Confirm the physical or medical condition.
 - (B) confirm the condition is related to, affected by or arising out of pregnancy, child birth or related medical condition.
 - (C) Describe the adjustment/change needed due to limitation.
- vii. Definition of “undue hardship” – when an employee can perform all of their essential job functions, undue hardship has the same meaning as under the ADA (significant difficulty or expense for the employer’s operation)
 - (A) If cannot perform all essential functions and accommodation is temporary suspension of an essential job function, the employer must consider the ADA definition of undue hardship AND the following relevant factors:
 - (1) Length of time employee or applicant will be unable to perform the essential function(s);
 - (2) Whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise;
 - (3) The nature of the essential function, including its frequency;

- (4) Whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions;
- (5) Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and
- (6) Whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.

D. Post-COVID – Remote Employees

1. Many states require you to comply with their leave laws regardless of whether the employer is located in a different state and even if you have only one employee working in that state.
2. Counting for FMLA purposes:
 - a. Counted based on the office or workplace to which they reported or, if none, where their work assignments are generated.
 - i. E.g., if a remote employee receives assignments from a worksite that has at least 49 on-site employees, the remote employee will be eligible for FMLA leave, provided they have worked the requisite time periods.
 - ii. Ideally, employers should designate the worksite of a remote employee at the time of hire so this can be factored into evaluating an FMLA leave request.

IV. IMPACTS ON YOUR EXISTING LEAVE POLICIES

A. Updates to your Handbooks

1. Have you tripped the 50-employee wire?
2. Do you have a policy that complies with the PWFA? With the PUMP Act?

B. Do you need to create a sick leave policy or are you presumed compliant?

C. Do you have employees working in a different state?

V. TRENDS OBSERVED IN PRACTICE

- A. Forbes Advisor published its 2024 statistics for paid leave in the United States:⁴
1. 28 million Americans do not have any paid vacation or holidays
 2. 31% (almost one third) of US employees do not have access to PTO
 3. 52% of employees work even when using PTO
 4. Average Number of Days:
 - a. 11 paid vacation days
 - i. Private sector: 15 days after 5 years of service; 17 days after 10 years of service; 20 days after 20 years of service
 - b. 8 sick days
 - i. Generally, the longer an employee has been employed, the more sick days the employee has to use
 - ii. 8 days for full-time; 6 days for part-time
 - c. 7.6 paid holidays
 - i. Even though there are 11 federal holidays, the national average is 7.6, with 21% of employees receiving only 6 holidays per year.
 5. Parental Leave:
 - a. 2018 U.S. Bureau of Labor Statistics:
 - i. 17% of companies offered paid parental leave
 - ii. 89% offered unpaid parental leave
 - iii. New York is the most generous state with a program allowing parents to take up to 12 weeks of Paid Family Leave at 67% of their pay
- B. WTW 2023 Leave, Disability and Time-off Trends Survey⁵

⁴ <https://www.forbes.com/advisor/business/pto-statistics/>

⁵ <https://www.wtwco.com/en-us/news/2024/01/majority-of-employers-will-change-their-leave-programs-in-the-next-two-years-wtw-survey-finds>

1. Employers choosing to modify paid leave, time off, or disability programs to support attraction and retention strategies
 2. Enhanced parental leave, bereavement leave, and caregiver leave.
 3. Unlimited leave: 12% have a policy, up from 9% two years ago. 16% anticipate offering unlimited PTO to exempt employees in the next two years
 - a. 31% of companies reporting this type of program for directors and executives; 9% considering it over the next two years
- C. Increase in use of “Paid Time Off” rather than separate vacation and sick leave policies.
- D. The rise and fall of unlimited leave policies
1. Pros
 - a. ESTA – possible “presumed compliance”
 - b. no need for “separate buckets of leave”
 - c. reduces HR hours
 - d. Attractive benefit for top talent
 2. Cons
 - a. Abuse?
 - i. Although statistics show that most employees do not abuse unlimited PTO, there are those that will
 - (A) This can put stress on the team
 - b. Can encourage anxiety and burnout
 - i. Not all employees like the ambiguity of unlimited leave, especially your best employees - Employees will try to guess what the “real” number of hours for leave, which can result in taking less time than if there was an accrued model
 - ii. Hard working employees are less likely to take leave → causes burn out and they leave
 - c. Not all managers will apply the policy equally
 - i. Some managers may be less willing to accept the unlimited PTO policies for their employees

E. Flex Time

1. This is often seen used as a four-day work week. Employers can also offer flex time to permit an employee to make up time taken for an appointment rather than requiring the employee to use PTO.
2. Flexibility in a job has become the primary driver for individuals switching from typical office hours to a flexible gig.⁶
 - a. 63% of individuals say that setting their own schedule makes gig work more attractive.
 - b. 44% of US respondents say they would consider leaving a full-time role for contingent work if it permitted a four-day workweek.
 - c. 53% of individuals who already made the switch attribute it to interest in flexibility and work/life balance.
3. Data indicates that employers are already moving in this direction.⁷
 - a. In February 2023, Britain completed the world's largest trial of a four-day work week with a 92% success rate.
 - b. Q4 of 2023 saw a 400% increase in jobs offering a 4-day workweek, 4.5-day week, or a 9-day fortnight compared to Q4 2022.

⁶ <https://www.forbes.com/sites/bryanrobinson/2024/02/06/new-flexible-jobs-making-a-2024-comeback-what-that-means-for-your-career/?sh=21490f9e3a39>

⁷ https://finance.yahoo.com/news/rise-little-flex-time-shorter-093000418.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAKYrrDE240L3XbJmWy5sGbJuBkHTusHHM17kxCWndU9qQhRun5BT3u7o3VRol3irFEpegDlvEVAcsIKOngc4smiY9atfcW2UBunHhCSF-HJdj6PI-Uu2fEo_6lhQpVjUKDdzKQZYWarzoC-Y2TW4CCxyLMCiy4WtZueUHoXOUIo-