Maddin Hauser's Employment Law Symposium

SO, YOU THINK YOU CAN LEAVE?

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Overview

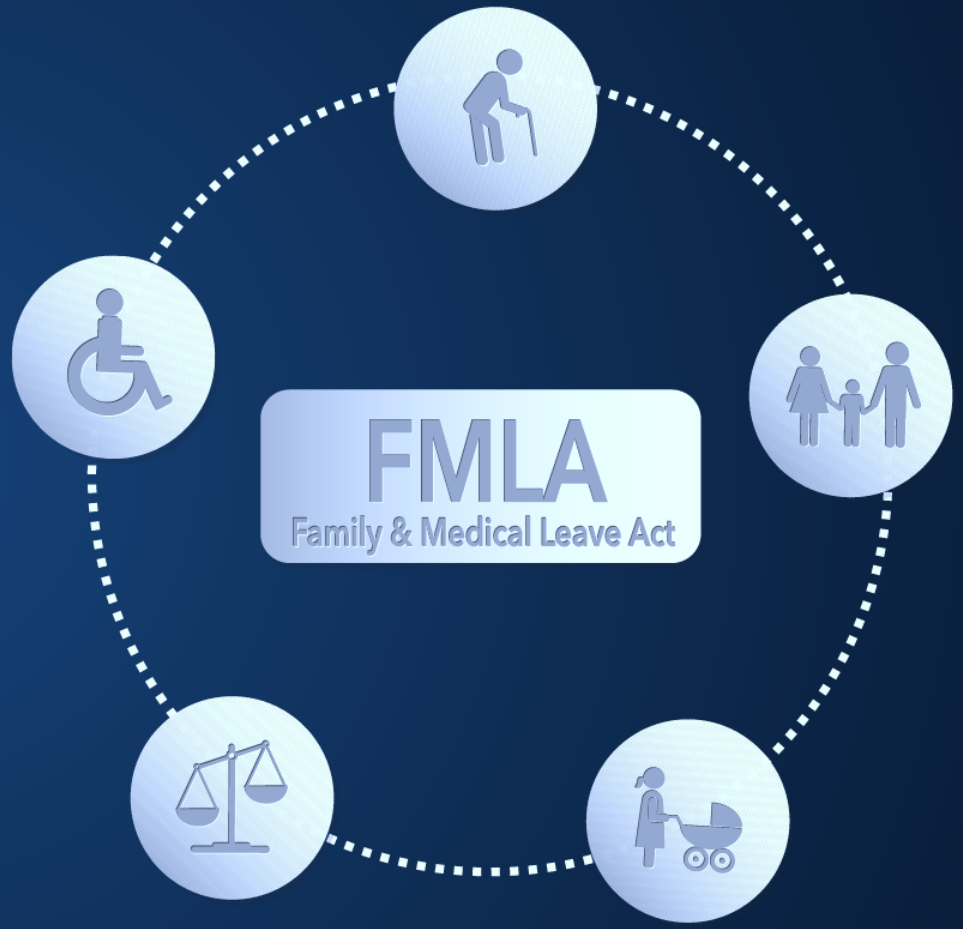
- Navigating FMLA, ADA Requirements
- Workers' Compensation
- ESTA Issues as an Employer in 2025

ACRONYM HEAVEN

Full Name	Acronym
Family Medical Leave Act	FMLA
Americans with Disabilities Act of 1990, as Amended	ADA
Pregnant Workers' Fairness Act	PWFA
Providing Urgent Maternal Protections for Nursing Mothers	PUMP Act
Michigan's Persons with Disabilities Civil Rights Act	PWDCRA
Michigan's Earned Sick Time Act	ESTA
Paid Time Off	PTO

FEDERALLY REQUIRED LEAVE – FMLA AND THE ADA

- Currently no federal law requires private employers to provide paid sick leave.
- However, certain employers are required to provide unpaid, job-protected leave, which brings us to….



FEDERALLY REQUIRED LEAVE – FMLA AND THE ADA

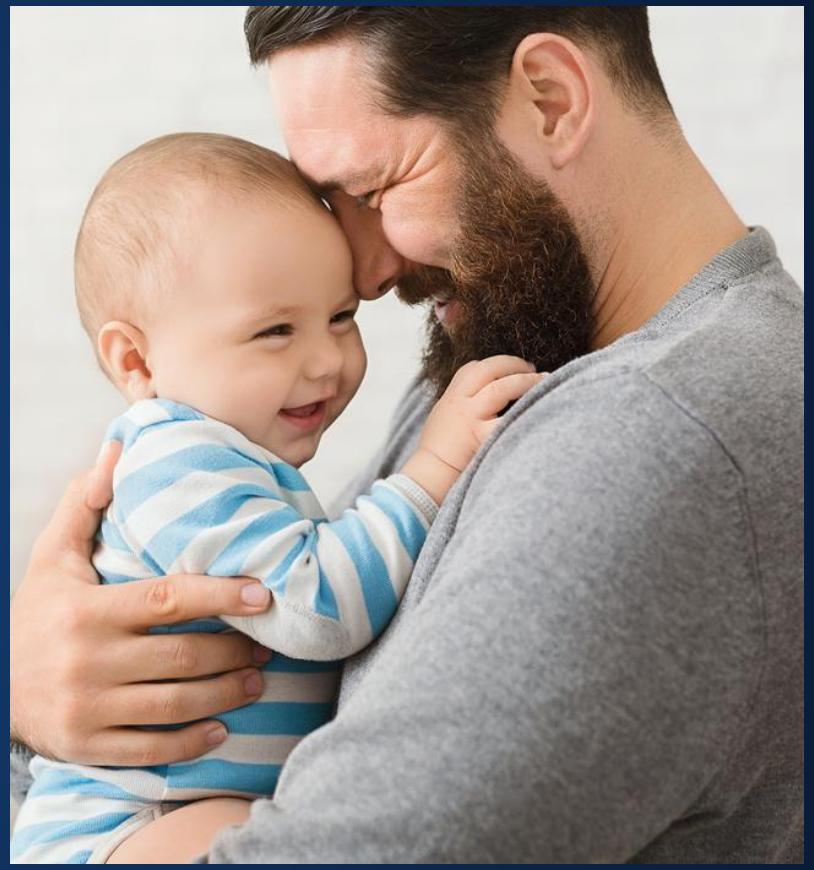
- The Family Medical Leave Act of 1993 ("FMLA")
  - A major pillar in President Bill Clinton's first term in office, the FMLA requires employers to allow eligible employees up to twelve weeks of unpaid leave during any 12-month period.
  - Covered Employer: 50 or more employees during a 20-week period of the calendar year or the previous calendar year
    - This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.
    - 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.
    - 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.

ELIGIBLE EMPLOYEE UNDER FMLA

- Eligible Employee: worked for the employer for at least 12 months (need not be consecutive), for at least 1,250 hours in the past year, and work at a location that employs at least 50 people within a 75-mile radius
- Requirements: eligible employees receive 12 weeks of leave in a 12-month period for:
  - Birth of child or placement of child with employee for adoption or foster child care, and to bond with newborn or newly-placed child;
  - Care for spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
  - 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
  - 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.
- How to count the 12 weeks?
- Calendar year, any fixed 12-month period (e.g., employee's anniversary date, fiscal year), first date employee takes FMLA leave, or "rolling" 12-month period.

COORDINATION WITH OTHER LEAVE

- 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.
- Employers may require other paid leave to run concurrently with FMLA.
- 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.

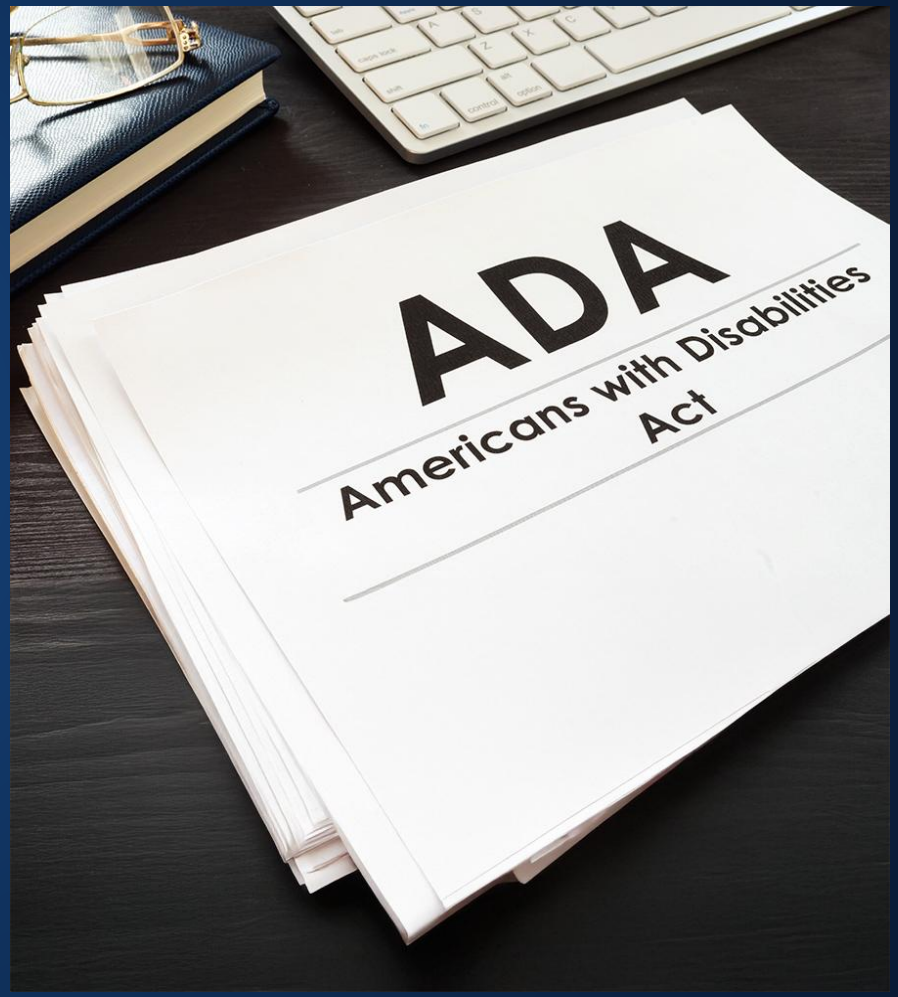


AMERICANS WITH DISABILITIES OF 1990 ("ADA")

- Covered Employers: employers with 15 or more employees.
- If you are a Covered Employer, you 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.
- 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.

AMERICANS WITH DISABILITIES OF 1990 ("ADA")

- 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.
- 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.
- Michigan law: 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).



ADA AMENDMENTS ACT OF 2008 ("ADAAA")

- Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute.
- Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of the protection for many individuals with impairments such as cancer, diabetes, and epilepsy.
- Regulations change how the phrase "substantially limits one or more major life activities" is interpreted.
  - For example, an impairment does not need to prevent or severely or significantly restrict a major life activity to be "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

WORKERS' COMPENSATION

- Workers' compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his or her employer for negligence.
- In Michigan, workers' compensation is governed by the Michigan Workers' Disability Compensation Act. The Worker's Disability Compensation Act (WDCA), MCL 418.101 et seq., requires that employers provide compensation to employees for injuries suffered in the course of an employee's employment, regardless of who is at fault. MCL 418.301(1); *ProStaffers, Inc v Premier Manufacturing Support Services, Inc*, 252 Mich App 318, 323; 651 NW2d 811 (2002).
- In return for this near strict liability, employees are limited in the amount of compensation they may collect and, except in limited circumstances, may not bring a tort action against their employer. MCL 418.131; *Pro-Staffers, Inc*, supra at 323.

WORKERS' COMPENSATION, RETALIATION

- The WDCA prevents retaliation against workers who file claims for worker's compensation benefits. MCL 418.301(14); *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). To establish retaliation, a plaintiff must show that: "(1) he asserted his right for workers' compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." *Id*. at 470. The plaintiff bears the burden of showing that a causal connection existed between the filing of a workers' compensation claim and the adverse employment action. *Id*.

- Under the WDCA, employers are not required to keep jobs open and can terminate employment at will. This is common if your work restrictions prevent return to work for an extended period of time. However, even if the state WDCA law does not provide for job restoration, if the employer is subject to the ADA, they may be required to grant leave as a reasonable accommodation.

EARNED SICK TIME ACT (ESTA)

Background

- In 2018, two ballot initiatives – the Improved Workforce Opportunity Wage Act (IWOWA) and the Earned Sick Time Act (ESTA) – secured enough signatures to go on the November ballot. Instead of letting the initiatives be voted on, however, Michigan lawmakers adopted both initiatives as proposed – and then made major changes to them within the same legislative session. The legislature took this approach because, if the ballot initiatives were passed by the voters, they could only be amended or repealed by the voters or by three-fourths of the legislature.
  - ESTA provided all Michigan employees with 72 hours of annual leave for numerous types of absences, except that for small businesses (fewer than 10 employees), only the first 40 hours of annual leave had to be paid (the remainder could be unpaid).

EARNED SICK TIME ACT (ESTA)

- But before either IWOWA or ESTA became effective, Michigan lawmakers significantly amended both laws. Among other changes, the amended ESTA – which was renamed as the Paid Medical Leave Act (PLMA):
  - applied only to employers with 50 or more employees;
  - required only 40 hours of annual paid leave;
  - allowed for employers to frontload the leave;
  - removed anti-retaliation provisions; and
  - removed an employee's right to bring a private civil suit for violations.

LAWYERS GET INVOLVED

Case gets litigated to death. The question being, can the Michigan Legislature change voter-initiated proposals without allowing voters to approve or reject them?

Procedural History:

- Michigan Court of Claims held that the “adopt and amend” strategy was unconstitutional
- Michigan Court of Appeals reversed the Court of Claims ruling the amended version of the statute was valid and enforceable
- Oral Arguments heard before the Michigan Supreme Court on December 7, 2023
- 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
- Implementation set to take place on February 21, 2025

MAJOR ESTA CHANGES

House Bill 4002, which was also signed into law on February 21, contains a number of notable changes from the original version of ESTA. Here are some of the bigger changes:

- Waiting Period: Anyone hired after February 21 can be required to wait 120 calendar days (was 90 days) to use accrued earned sick time.
- Small Business: An employer with 10 (was 9) or fewer paid workers during a given week is subject to certain lower requirements under ESTA. Notably, small businesses need only to allow employees to use up to 40 hours of paid sick time in a given year. (This was originally 40 hours paid and 32 hours unpaid.)
- Small Business Effective Date: Small businesses have until October 1 to start complying with ESTA. As such, there is no requirement yet for small businesses to allow accrual of earned sick time, provide paid sick time (aka-frontload), or calculate and track accrual of paid earned sick time.
- Covered Employee: A covered employee under ESTA remains anyone engaged in service to an employer in the business of an employer, but now excludes (in addition to U.S. government employees) any statutorily defined “unpaid trainee or unpaid intern,” employees subject to the Youth Employment Standards Act, as well as any individual who works in accordance with an employer policy if two conditions are met:
  - the policy allows individuals to schedule their own working hours; and
  - the policy prohibits the employer from taking adverse personnel action against the individual if the individual does not schedule a minimum number of working hours.

ADDITIONAL POINTS TO BE AWARE OF

- Earned Sick Time Increments: Employers now have the choice of using one-hour increments or the smallest increment the employer's payroll system uses for other absences. Practically speaking, this means non-FMLA employers may be able to require employees to use increments of two or more hours of leave at a time.
- Prorating is Explicitly Allowed: Employers that provide 72 hours (40 hours for small businesses) of earned sick time for immediate use at the beginning of the benefit year do not have to: (1) allow carryover of unused time; (2) calculate and track employees' accrual of paid earned sick time; or (3) pay out unused accrued paid earned sick time at the end of the year in which it was accrued.

AND MORE…

- Prorating Frontloaded Leave for Part-Time Employees: ESTA now allows an employer to essentially prorate the frontloaded 72 hours for part-time employees, but the administrative burden may be too onerous for some employers. In order to prorate less than 72 hours of paid sick time at the beginning of the benefit year, the employer must "at the time of hire" provide written notice to the employee of the expected number of hours worked for a year. Based on that written notice expectation, the employer must then provide a proportion of paid leave in line with those hours that meet the minimum accrual standard (one hour of leave per 30 hours worked) under ESTA. In other words, the employer takes the total number of expected work hours for the year and divides by 30 to get the minimum permissible amount of prorated earned sick time. Finally, the employer must evaluate if the employee worked more than expected at the end of the year and, if so, adjust the next year's allotment of earned sick time to align with the prior year's hours worked.

AND MORE….

- PTO Compliance: An employer can still rely on a PTO policy to comply with ESTA as long as the PTO policy provides at least 72 hours of time off for ESTA-covered reasons.
- No more right to file a private right of action: Employees can now only file an administrative complaint with the Department of Labor and Economic Opportunity (LEO).
- New Civil Fine for Failing to Provide Earned Sick Time to an Employee: Up to eight times the employee's normal hourly wage can now be levied on the employer as a fine in addition to other employer fines and remedies available to employees.

AND MORE….

- Notice Requirement: Employers previously had until February 21 to provide written notice of certain items to current employees and then upon hire for all new employees thereafter. Now, because of the late amendment, employers have until March 23 to provide employees with notice of all of the following:
  - the amount of sick time that must be provided to an employee under ESTA;
  - the employer's chosen benefit year (for example, anniversary, calendar, fiscal, etc.);
  - the terms under which earned sick time may be used;
  - that retaliation against eligible employees is prohibited for requesting or using earned sick time; and
  - the employee's right to file a complaint with LEO for any violation of ESTA.
- Adverse Action Allowed: Employers can take disciplinary action if the employee uses earned sick time for a purpose other than one covered by ESTA, or violates the notice requirements under ESTA.
- Rebuttable Presumption Gone: The latest changes eliminated the rebuttable presumption of an ESTA violation if an employer took an adverse personnel action within 90 days of exercising a right provided by ESTA. As such, employees will have the burden of proving any violation of ESTA.
- Still No Replacement Requirements Allowed: Employers still cannot require an employee to find a replacement as a condition of using ESTA-covered leave.
- Collective Bargaining Agreements: If a CBA is in effect on February 21 and it conflicts with ESTA, then ESTA does not apply to the employees subject to that agreement until the stated expiration of the agreement.

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QUESTIONS

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