

# SO, YOU THINK YOU CAN LEAVE? 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 give an employee.
- B. Understanding which laws apply to your business and when those laws are implicated by an employee's actions is critical to the health of your company and minimizing exposure to liability.
- 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 at the company?
  - 4. Use it or Lose it v. Paid Out
    - a. What happens to the leave at the end of the company's fiscal 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. This presentation will focus on the following broad topics:
  - 1. Navigating FMLA, ADA Requirements.

2. Workers' Compensation.
3. ESTA Issues as an Employer in 2025.

## II. ACRONYM HEAVEN

- A. For those of you thinking OMG, I'm just trying to be done with this lecture so I can get my credits and my boss won't be PO'd at me, listen up. You must understand the relevant acronyms in the world of Employee Leave so you can ensure your company is compliant.
- B. Deciphering the Letters:
  1. Family Medical Leave Act ("FMLA")
  2. Americans with Disabilities Act of 1990, as Amended ("ADA")
  3. Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA")
  4. Michigan's Earned Sick Time Act ("ESTA")
- C. 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, which brings us to the...
  3. The Family Medical Leave Act of 1993 ("FMLA")
    - a. A major pillar in President Bill Clinton's first term in office, the FMLA requires employers allow eligible employees up to twelve weeks of unpaid leave during any 12-month period.
    - 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.<sup>1</sup>

- 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
  - 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.<sup>2</sup>
- 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.

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

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

- 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 of 1990 (“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.
    - 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.<sup>3</sup>
    - 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. ADA Amendments Act of 2008 (“ADAAA”)
    - i. 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.
    - ii. 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.

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<sup>3</sup> 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).

- iii. 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.
- iv. 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.

D. 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—or effectuate—discharge or discipline of 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:
  - 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.

### 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.
4. Implementation set to take place on February 21, 2025.

#### B. [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:

1. **Waiting Period:** Anyone hired after February 21 can be required to wait 120 calendar days (was 90 days) to use accrued earned sick time.
2. **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.)
3. **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.
4. **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 US 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:
  - a. The policy allows individuals to schedule their own working hours; and

- b. 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.

C. Additional Points to be Aware of:

1. 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.
2. 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.

D. And more:

1. 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.
2. 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.
3. 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).
4. 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.
5. 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:

- a. The amount of sick time that must be provided to an employee under ESTA;
  - b. The employer's chosen benefit year (for example, anniversary, calendar, fiscal, etc.);
  - c. The terms under which earned sick time may be used;
  - d. That retaliation against eligible employees is prohibited for requesting or using earned sick time; and
  - e. The employee's right to file a complaint with LEO for any violation of ESTA.
6. 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.
  7. 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.
  8. Still No Replacement Requirements Allowed: Employers still cannot require an employee to find a replacement as a condition of using ESTA-covered leave.
  9. 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.



|                                   | <b>Paid Medical Leave Act</b>  | <b>Earned Sick Time Act</b>  |
|-----------------------------------|--|--|
| <b>Covered Employers</b>          | 50 or more employees   | Employers with at least one employee<br>“small business” means an employer for which fewer than 10 individuals work for compensation during a given week.  |
| <b>Eligible Employees</b>         | Non-exempt employees who worked an average of 25 hours per week in the previous calendar year.<br>Can require employee to wait 90 days before using. | All employees of a covered employer.<br>Can require employee to wait 90 days before using.   |
| <b>Amount of Leave</b>            | 40 hours of paid leave   | 72 hours of leave<br>Small businesses need only provide 40 hours of paid leave, and the additional 32 hours may be unpaid.<br>All other business must provide 72 hours of paid leave   |
| <b>Accrual</b>                    | 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.   |
| <b>Carry Over?</b>                | If lump sum, no carryover. 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.<br>Additionally, if an employee is rehired within 6 months of separation, accrued leave must be reinstated. |
| <b>Presumption of Compliance?</b> | 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.                                       |
| <b>Notice Requirements</b>        | 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.”   |
| <b>Use</b>                        | 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.   |
| <b>Documentation</b>              | Can require documentation prior to return to work.   | Can only require documentation if the employee is absent more than three consecutive days.   |

10. 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.
11. 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.
12. 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 whose close association with the employee is the equivalent of a family relationship.”
- d. 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.

E. 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:<sup>4</sup>

- 1. 28 million Americans do not have any paid vacation or holidays.

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

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 US 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 Survey<sup>5</sup>
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.

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<sup>5</sup> <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>

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 who 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 the “real” number of hours for leave, which can result in taking less time than if there was an accrued model.
      - ii. Hardworking employees are less likely to take leave → causes burnout, 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 workweek. 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.<sup>6</sup>
  - 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.<sup>7</sup>
  - a. In February 2023, Britain completed the world's largest trial of a four-day workweek 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.

VI. CONCLUSION

Questions?

Thank you!

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

<sup>7</sup> [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-](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-)