

# LEAVE LAWS: THE INTERSECTION BETWEEN PAID, SICK, AND LEGALLY REQUIRED LEAVES

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## I. Introduction

- A. Laws requiring or permitting employers to provide paid or unpaid leave to employees have several implications. They determine not just when an employee can take time off work but also address whether time must be paid or unpaid, is earned or accrued, can be used for any reason or general reasons, whether any unused time must be paid upon termination, and whether the leaves are used concurrently or in a certain priority before others.
- B. There are many different characteristics of leaves/time off provided to employees:
  - 1. Paid v. Unpaid
  - 2. Legally Required v. Discretionary
  - 3. Sick v. Personal/Vacation v. Paid Time Off
  - 4. Earned v. Accrued
  - 5. Accrued Over Time v. Lump Sum on Anniversary/Calendar/Other Date
  - 6. Unused Time Upon Separation: Payable v. Forfeited
- C. This presentation will focus on:
  - 1. Paid Leave
  - 2. Sick Leave
  - 3. Other Legally Required Leaves
- D. Why would you offer more than what is legally required?
  - 1. As the job market becomes increasingly competitive, we are seeing more employers revising their leave policies to entice talent to stay with their organization and to keep up with competitors in terms of the benefits offered.

- a. In 2021, Glassdoor surveyed companies to find the 25 highest rated companies for vacation and paid time off.<sup>1</sup> Among the common benefits:
  - i. Starting with three weeks' vacation (15 days) and increasing periodically
  - ii. Begin accruing PTO and vacation time on the first day of employment
  - iii. Ability to use time in one-hour increments (rather than 8 hours)
  - iv. 16 paid holidays
  - v. Unlimited sick leave
  - vi. Policies that permit "buying and selling" vacation days
2. Offering unlimited or flexible leave policies attracts employees with non-traditional schedules and prevents burnout.

## II. The Interplay Between Paid Time Off Policies and Statutorily Required Paid Sick Leave

### A. Paid Time Off

1. Employers are not required to give paid time off unless otherwise required by statute.<sup>2</sup>
  - a. Some jurisdictions require employers to provide paid leave that employees can use for any purpose (including vacation), sick leave, or family leave.<sup>3</sup>
  - b. If there is no statutorily mandated paid leave, the benefits are a matter of agreement or policy between an employer and an employee.<sup>4</sup>
2. Common Types of Paid Time Off Include:
  - a. Vacation Days
  - b. Personal Time
  - c. Sick/Medical Leave
  - d. Paid Time Off

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<sup>1</sup> <https://www.glassdoor.com/blog/25-highest-rated-companies-for-vacation-paid-time-off/>

<sup>2</sup> [https://www.dol.gov/general/topic/workhours/vacation\\_leave](https://www.dol.gov/general/topic/workhours/vacation_leave)

<sup>3</sup> <https://sbshrs.adpinfo.com/blog/paid-sick-leave-vs-vacation-vs-pto-what-you-need-to-know>

<sup>4</sup> [https://webapps.dol.gov/elaws/faq/esa/flsa/006.htm?\\_ga=2.80089872.609071588.1651771185-151571734.1649530573](https://webapps.dol.gov/elaws/faq/esa/flsa/006.htm?_ga=2.80089872.609071588.1651771185-151571734.1649530573)

- e. Holidays
  - f. Bereavement Leave
  - g. Parental Leave
3. Other Less Common Types of Paid Time Off Include:
- a. Jury Duty/Witness Leave
  - b. Caregiver Leave
  - c. Voting Time Off
  - d. Paid Leave for School Activities<sup>5</sup>

B. Statutorily Required Sick Leave

- 1. There is currently no federal law generally requiring private employers to provide paid sick leave.
  - a. Executive Order 13706 (President Obama): Required federal contractors to offer at least 7 days (56 hours) of paid sick leave per year to employees on an accrual basis. (signed in 2015 and effective January 1, 2017)<sup>6</sup>
- 2. Some state statutes and city ordinances dictate whether employers must provide paid sick/medical leave.<sup>7</sup> Several provide sick leave on an accrual basis of one hour for every 30-52 hours worked, up to 5-6 days (40-48 hours) per year, depending on the size of employer.
- 3. Michigan Paid Medical Leave Act (PMLA)<sup>8</sup>
  - a. Which employers are covered?
    - i. Employers with 50 or more employees must provide paid medical leave.
  - b. Which employees are entitled to leave?

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<sup>5</sup> [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=230.8&lawCode=LAB](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=230.8&lawCode=LAB) (California)

<sup>6</sup> <https://www.dol.gov/agencies/whd/government-contracts/sick-leave> and <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/PaidLeaveFS.pdf>

<sup>7</sup> <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>

<sup>8</sup> MCL 408.963

- i. Non-exempt employees who worked an average of 25 hours per week in the previous calendar year.
  - (A) Although the statute is silent on whether new employees are eligible when they have not worked in the prior calendar year, many employers are providing paid medical leave to new employees who are expected to and actually work an average of 25 hours per week
  
- c. Structure for granting paid medical leave – Two options for employers
  - i. Accrual: Employers can allow eligible employees to accrue paid medical leave at a rate of at least one hour of paid medical leave for every 35 hours worked.<sup>9</sup> If the accrual method is chosen, then:
    - (A) The employer is not required to allow an employee to accrue more than one hour of paid medical leave in a calendar week.
    - (B) The employer must allow the employee to carry over up to 40 hours of unused accrued paid medical leave from one year to the next.
    - (C) The employer is not required to allow an employee to use more than 40 hours of paid family medical leave in a single benefit year.
  - ii. Lump Sum: Alternatively, employers may provide at least 40 hours of paid medical leave to an eligible employee at the beginning of the benefit year. If the lump sum method is selected, then:
    - (A) If an employee is hired in the middle of a benefit year, an employer may prorate paid medical leave.
    - (B) The employer is not required to allow employees to carry over any of the paid medical leave to another benefit year.
  - iii. Presumption of compliance:
    - (A) Employers are presumed to be compliant with the Michigan Paid Medical Leave Act if they provide at least

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<sup>9</sup> MCL 408.963(2)

40 hours of paid leave (whether vacation, sick, paid time off) to all eligible employees.

- (B) This means that if employers may need to create a narrow policy to fill-in any gap between the paid leave granted to employees eligible for paid medical leave and the 40 hours required for a presumption of compliance.

d. Use of Paid Medical Leave

- i. Employers are permitted to require an employee to wait until the 90th calendar day after commencing employment before using accrued paid medical leave.
- ii. The leave must be used in one-hour increments unless a different policy is set forth in the handbook or other employee benefit document.
- iii. Employers may set forth notice, procedure, and documentation requirements in order to request leave; however, employee must be allowed at least 3 days to provide supportive documentation.
- iv. Leave may be used for any of the following:<sup>10</sup>
  - (A) Physical or mental illness, injury, or health condition of employee or family member;
  - (B) Medical diagnosis, care, or treatment of employee or family member;
  - (C) Closure of employee's primary workplace by order of public official due to public health emergency;
  - (D) Care of employee's child whose school or place of care has been closed by order of public official due to public health emergency;
  - (E) Employee or family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or a health care provider; and

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<sup>10</sup> MCL 408.964

- (F) For care, counseling, victim services, relocation, and/or participation in civil or criminal proceedings after domestic violence and sexual assault.

### III. Legal Obligations to Provide Unpaid Leave

#### A. Federally Mandated Unpaid Leave

##### 1. Family Medical Leave Act (FLMA)

- a. 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 employee meets the requirements of a covered employer, they are covered as long as it has 50 or more employers 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>11</sup>
- b. Eligible Employee: works for a covered employer, has worked 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.
  - i. Historically in Michigan courts have held that if an employer, regardless of whether it is covered under FMLA, offers FMLA benefits (*e.g.*, through a handbook policy or through its own internal procedures), it can be subject to FMLA job protection requirements and notification guidelines. This position may change with a recent DOL opinion holding an employee who does not meet FMLA requirements cannot be designated as receiving FMLA benefits.
- c. FMLA provides eligible employees up to 12 weeks of leave in a 12-month period for:

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

- 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 call to covered active duty status.<sup>12</sup>
  - d. FMLA also permits eligible employees to take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the service member.<sup>13</sup>
  - e. Coordination with Other Leaves:
    - 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 an 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 6 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 born child. Employers should be careful not to make assumptions of who is a primary caregiver, if the policy incorporates a distinction between primary/secondary caregiver.
2. Americans with Disabilities Act (ADA)
- a. Title I of ADA requires covered employer to provide reasonable accommodations to employees with disabilities unless the employer can demonstrate that doing so creates

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<sup>12</sup> <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

<sup>13</sup> <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

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>14</sup>
  - ii. Employers need to consider this interactive process after other leave, such as FMLA or PTO, has been exhausted.
- b. 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. If it would pose an undue hardship to keep the position open, then the employer must consider the employee for an open position for which the employee is qualified.

## B. State Mandated Unpaid Leave

### 1. Michigan Persons with Disabilities Civil Rights Act

- a. Applies to employers with one or more employees.
- b. 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 employees in Michigan must make such request within at least 182 days of having reason to know of the need for an accommodation.
- c. However, 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.<sup>15</sup> Additionally, “Job restructuring and altering the schedule of employees under this article applies only to minor or infrequent duties relating to the particular job held by the person with a disability.”

### 2. Crime Victim Leave

- a. In Michigan, employees who are victim to a crime are entitled to take an unpaid leave of absence to attend judicial proceedings related to a crime.<sup>16</sup> 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

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<sup>14</sup> <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>

<sup>15</sup> <https://www.michigan.gov/-/media/Project/Websites/mdcr/legal/pwdcra.pdf?rev=1b443a3e9bd14b0c90e1d05a6503110e> at MCL 37.1210(14, 15)

<sup>16</sup> [http://www.legislature.mi.gov/\(S\(erdo5c45pbrv0lfdxqrnlpna\)\)/documents/mcl/pdf/mcl-Act-87-of-1985.pdf](http://www.legislature.mi.gov/(S(erdo5c45pbrv0lfdxqrnlpna))/documents/mcl/pdf/mcl-Act-87-of-1985.pdf)



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. 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.
- b. This leave is different from paid medical leave, which may be used to attend civil or criminal proceedings arising out of domestic violence or sexual assault.

#### IV. Best Practices for Implementing and Managing Flexible or Unlimited Paid Time Off Policies

##### A. Flexible and Unlimited Paid Time Off Policies

###### 1. Pros:

- a. Removes an administrative burden involved in tracking time-off, including unused vacation, including any amounts carried over from year to year, caps throughout a year, or transfer of paid time from one employee to another.
- b. Entices top talent as unlimited policies are often seen as a way to manage their lives effectively. It also conveys a workplace culture with pervasive trust among employees.

###### 2. Cons:

- a. Employees may underutilize vacation time which can lead to burn out – employers want to make sure they create a culture where employees feel free to take leave (while still ensuring employees do not abuse the leave).
- b. Potential abuse of the policy, leading to staffing problems and low employee morale if not properly maintained with accountability structures.

##### B. WRITE. IT. DOWN.

1. Write and distribute a policy that is clear and accessible for employees.
2. Create a management checklist to ensure consistency and accountability for employees requesting and taking leave.
3. Create an open dialogue regarding the policies so that employees understand the expectations regarding the policy and work performance.

4. For states that have specific paid leave, like Michigan, make sure that any denial in use of leave does not result in denying employees the minimum leave to which they are statutorily entitled.
- C. Considerations when Drafting a Paid Time Off Policy:
1. Will vacation, personal, and sick time be in the same “bucket” (consider calling it paid time off or “PTO”) or will employees have to specify the type of leave they are using?
    - a. If looking to ease the administrative burden associated with attributing time to different categories, consider using PTO. This may result in employees having more paid time available for vacation if they are not sick.
    - b. If you are looking to manage the paid time granted and keep it to a minimum, then creating limited categories may have the effect of limiting use of paid time (*e.g.*, if an employee uses all vacation but never gets sick, then additional time for vacation would be unpaid). However, this can entice employees to be disingenuous in reporting the reason for their leave, if the applicable “bucket” of time has been exhausted and they have additional time in a different “bucket.”
  2. Which employees will be eligible?
    - a. Will paid leave be offered to full-time employees only? Will part-time employees receive a pro-rated portion of the leave offered to full-time employees?
    - b. Must employees work a certain duration of time to be eligible?
  3. Will employees accrue time or be granted it as a lump sum?
    - a. If accrual-based, then is there a cap on the amount of time that can be accrued at any given time?
  4. Will longevity be rewarded?
    - a. *E.g.*, will employees gain more time the longer they work at the company?
  5. Will the time be granted based on a calendar year, fiscal year, or anniversary date of employment?
    - a. If calendar year, then be sure to account for the first year as a pro-rated portion of the initial amount of time, and consider disparities between employees hired in January versus December?
  6. Will employees be able to carry time over from year to year? If so, how much time will employees be permitted to carry over?

7. What are the notice requirements for scheduling or using paid leave? Be sure to cover instances where advance notice is possible and those instances when advance notice is not possible.
8. Establish expectations upon return to work, especially if the leave is related to an illness/injury.
  - a. If an employee is out for a certain number of days, will a physician note be required prior to the employee returning to work?
  - b. Will an employee be considered to have voluntarily resigned after a certain number of days unless the employee reaches out to the employer? Consider incorporating the applicable state-law for when an employee is considered as having abandoned their job for purposes of unemployment benefits.
    - i. In Michigan, the unemployment insurance agency considers an employee as having abandoned the job upon three consecutive shifts of no-call, no-show.
9. What is the organization's policy upon termination, resignation, or separation from employment?
  - a. If employees have any remaining unused accrued PTO, vacation, or sick time, will the remaining time be paid out to the employee?
    - i. Look to state law requirements as to whether it must be paid or if it is payable at the discretion of the employer.
      - (A) In Michigan, your company policy will dictate whether paid leave must be paid out upon separation from employment. There is no obligation on employers to pay out unused paid leave unless the policy states that employees are entitled to such payment, in which case the employer must comply with the policy.
    - ii. If state law does not require paid leave to be paid out upon separation, then will it be paid out only if the employee provides a certain amount of advance notice of separation?
    - iii. Keep in mind that if the policy does not state that the employee is entitled to unused PTO, the employer may still offer to pay out unused PTO as an incentive in severance agreements.
  - b. Are employees permitted to use paid leave after providing notice of resignation from employment?
  - c. What happens if there is a negative balance of paid leave upon separation from employment (*i.e.*, the employee has used more time than accrued/granted)?

- i. Will the company obtain the employee's prior authorization to deduct such negative balance from the employee's final paycheck? Check applicable state laws to determine what is required for deductions from an employee's paycheck.
- ii. Is the company willing to forego recoupment of payments? If so, and particularly if documented as an advance of pay, then the company may forego this repayment as part of its consideration in exchange for a release agreement.

D. Additional Considerations when Drafting a Flexible/Unlimited Paid Time Off Policy

1. Eligibility:
  - a. Must employees be in good standing (without any disciplinary action for a finite period of time) to be eligible?
2. Use of Flexible PTO:
  - a. How will employees communicate and track the time they are taking off work?
  - b. What accountability structures have been put in place to reduce abuse of the policy?
3. Limits on Flexible PTO:
  - a. How is the flexible/unlimited paid time off curtailed when/if a disability or illness causes an extended absence? Are there short-term and long-term disability policies at play? If so, consider whether the paid leave is limited to the waiting period or supplementation of wages up to a finite period, to the extent permitted by the underlying short-term or long-term disability policy.
  - b. Abuse/excessive use of Flexible PTO.
4. Address what will happen to existing accrued time under former policies.
  - a. Consider any legal obligations for transitioning to a new flexible/unlimited system. If in a state where employers are required to pay out any accrued time, then designate that such paid leave must be exhausted before the new policy goes into effect for the employees with unused time remaining. If there is no obligation to pay out the time, then consider having the unused time forfeited without any monetary value.
5. Know your competitors and the expectations of talent you seek.
  - a. How will the business communicate and highlight this policy as an attractive workplace culture that will meet the business objectives (*e.g.*, of attracting top talent, being a competitive employer).