

Resources

Michigan Legislature Amends State Minimum Wage and Paid Sick Leave Acts

December 14, 2018

On December 4, 2018, the Michigan Legislature pared back the minimum wage and paid sick leave laws it passed last September in an effort to preclude those issues from being on the November ballot. Had the Legislature not adopted the language of the ballot initiatives legislation, the measures would have been on the November ballot and it would have needed a vote of three-fourths of each house to amend the law if adopted by the voters. By enacting the proposals directly, it only needed a simple majority to amend those laws. The strategy of using a lame-duck legislative session to amend the laws by a simple majority it passed just two months earlier has been viewed as controversial, but the outcome is welcomed by many in the business community.

These bills have just been signed by the Governor Snyder, who said in his signing message: "I look at legislation presented to me through a policy lens – is it the right policy for the state of Michigan and Michiganders as a whole? . . . That's what I did with these bills and have now signed them into law. I looked at what the potential impacts and benefits of the changes would be and decided that signing these bills was the appropriate action."

These revised minimum wage and paid sick leave laws will go into effect around March 21, 2019 (depending on the exact date the current legislative session ends). All Michigan employers must familiarize themselves with these new laws.

THE IMPROVED WORKFORCE OPPORTUNITY WAGE ACT

The changes to the Improved Workforce Opportunity Act—the Act controlling Michigan's minimum wage and overtime rules—relate to increases to the minimum wages paid to all workers, including those who receive tips.

For non-tipped employees, the minimum wage will gradually increase from the current rate of \$9.25 per hour to \$12.05 in 2030, as opposed to \$12.00 in 2022 as previously enacted. In addition, the amendments also eliminate the automatic increases to the minimum wage after 2022 based on increases to the CPI that was part of the previously adopted ballot initiative language.

Under the current law, tipped employees need to be paid a wage of at least \$3.52 per hour, provided the employees make up the difference between that rate and the regular minimum wage in tips. This offset is commonly known as the "tip credit." Under the original law passed last September, the tip credit would have been phased out in its entirety by 2024 and tipped employees would have been entitled to the same minimum wage that all other employees receive from that date onwards. That change was eliminated by the new law. Instead, the tipped minimum wage will be 38 percent of the minimum wage. (Click [here](#) for a table comparing the September version to the December version of the Act.)

THE PAID MEDICAL LEAVE ACT

The Legislature also passed the "Earned Sick Time Act" in September 2018, by adopting voter initiative petition language. This Act, for the first time, mandated the accrual of paid sick time for employers with more than 10 employees, and paid and unpaid sick time for smaller employers. The recent amendments significantly changed the amount of time eligible

employees may accrue, which employees and employers are to be subject to the Act, how the time may be used and carried over, and how the Act may be enforced. The Legislature also changed the Act's name to the "Paid Medical Leave Act." A summary of the changes and obligations are provided below. (Click [here](#) for a table comparing the original version of the Act to the version as amended in December.)

Who is Covered?

The recent amendments changed both which employers are covered by the Act, and which employers are eligible for leave.

- Instead of having virtually all Michigan employers subject to the Act as in the September legislation, the amended Act only applies to employers with 50 or more employees. Smaller employers will no longer be covered by the Act.
- Instead of making leave under the Act available to virtually all employees in the state, the amended Act applies to employees from whom the employer is required to withhold for federal income tax purposes. In addition, the amendments add several exemptions to the Act that were not in the September version. Most significant in this regard are:
 - White-collar employees who are exempt under the Fair Labor Standards Act;
 - Private sector employees covered by collective bargaining agreements; and
 - Employees working fewer than 25 weeks in a calendar year, or fewer than an average of 25 hours per week in the preceding calendar year.

How much leave must be provided and what are the other major requirements?

Under the Act as passed in September, employees of large employers (10+ employees) were to earn 1 hour of time off for every 30 hours worked, and employees of small employers would earn 1 hour of time off for every 40 hours worked. The new law significantly reduces the rate at which leave accrues. Now, employees of covered employers (i.e., those employing 50 or more employees), only, may earn paid time off under the Act and at the rate of at least 1 hour for every 35 hours worked. An employer may, however, limit the accrual to 1 hour for every calendar week worked, and further may limit total accrual to 40 hours for any benefit year. Employers also may limit the carryover of any accrued but unused hours to 40 hours, and employers may limit the total hours to be used in any benefit year to 40.

Further, the amendments more clearly provide for the right for employers to grant at least 40 hours of paid medical leave at the beginning of the year instead of using the accrual method. If the employer does so, there is no obligation to allow any of the hours to carryover from one year to the next.

Employers with paid leave plans, such as PTO, sick leave or vacation which provide for at least 40 hours of paid time off per benefit year, may count those days towards the hours required by the Act. Also, the amount to be paid to employees using paid hours under the Act need not include overtime, tips, commissions, bonuses, supplemental pay, or the like; only base pay is to be paid.

Leave accrued under the Act has no cash value upon termination unless otherwise provided by the employer.

Records regarding the administration of the Act will have to be retained for one year under the amended Act, versus the three years required by the September version. Posters will be required as well, but with less detail than those required under the September version. The requirement for providing a written notice of the employees' rights under the Act per the September version was removed in the December version.

For What Reasons and How Can an Employee Take Paid Medical Leave?

While the Michigan Legislature did not make substantial changes to the reasons an employee can cite for taking leave, it is worth reiterating what those reasons are. An eligible employee can take paid leave under the amended Act for: (1) their own mental or physical illness; (2) the mental or physical illness of their family member; (3) medical care, counseling, relocation, or court appearances relating to domestic violence or sexual assault against the employee or a family member; and (4) the closure of the employee's place of work or the employee's child's school due to a public health emergency. Notably, the only change the Michigan Legislature made here was to delete the provision that allowed an employee to take leave for a meeting at the employee's child's school regarding the child's health, disability, or effects of domestic violence or sexual

assault on the child.

The Legislature also changed the definition of “family member” which will narrow the scope of what an employee can use leave for. “Family member” no longer includes an employee’s domestic partner or an employee’s domestic partner’s children or parents.

Under the amended version, leaves must be taken in hourly increments, unless other increments are required or allowed in a handbook or other written benefit document, instead of increments of an hour or less, if allowed per the employer’s payroll system. Special documentation requirements apply to leaves related to domestic violence and sexual assaults.

And finally, under the September Act, employers could require no more than seven days’ notice of an employee’s desire to use paid sick time, if feasible. Under the amended law, employers may apply its usual notice, procedural and documentation requirements support paid leave requests.

Remedies

The new version of the Act removed the anti-retaliation and discrimination provisions of the September version. It also removed the right to a civil action to enforce the Act. Under the new Act, enforcement is accomplished vis-à-vis an employee filing a complaint with the Department of Licensing and Regulatory Affairs within six months of the alleged violation. That is substantially different from the Act that was passed in September which allowed for civil actions and had a statute of limitations of three years. Further, if the Department determines that the Act has been violated, it can award the employee payment of their paid medical leave that was improperly withheld as well as assess a \$1,000 administrative fine against the employer. No other damages are available.

THE LEGAL LANDSCAPE

The fact that these Acts are being amended during the same legislative session in which they were first enacted, questions have been raised (at least in some political camps) about the Legislature’s authority to make these amendments in light of the Constitutional process underlying their initial adoption, i.e., keeping the initiatives off last November’s ballot. The Michigan Legislature has never taken a similar action under these circumstances, and the Michigan Constitution does not explicitly address the issue of the Legislature’s authority to do so. Until December 4, 2018, the only legal authority suggesting that the Legislature may have lacked the authority to act as it did is a 1964 opinion of the Michigan Attorney General (Frank Kelley, D) that states “the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter” of the Michigan Constitution. That statement arguably was beyond the scope of the questions presented to the Attorney General at that time, and the opinion never has been tested in court. On December 4, the current Attorney General (Bill Schuette, R) issued his own opinion discrediting the 1964 opinion and concluding that there is no constitutional basis proscribing the Legislature from amending a law enacted earlier during the same legislative session per the ballot initiative process or otherwise. It is too early to tell whether legal action testing these opinions will occur in an effort to void the December bills.

TAKEAWAYS

For now, employers should begin preparing for the Acts to take effect in March. Employers who pay the minimum wage (including the modified minimum for tipped employees) should familiarize themselves with the new minimum wages and what the scheduled increases are, and consider if their pay structures need adjusting in light of any wage compression at stake. In addition, all employers with 50 or more employees should evaluate whether or not their current paid leave policies comply with the paid sick/medical leave act, and modify their policies to conform to the Act’s requirements. In this regard, it

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is anticipated that most employers will have to go to the policy drafting table and, in the process, they are advised to consult with counsel to address the nuances of the law.

For more information, please contact Rob Boonin (rboonin@dykema.com), James Hermon (jhermon@dykema.com), Andrea Frailey (afrailey@dykema.com), any of the Firm's other Labor & Employment attorneys in Michigan, or your Dykema relationship attorney.

Attorneys

Robert A. Boonin

Andrea M. Frailey

James F. Hermon

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