

Legislative Analysis



EARNED SICK TIME INITIATIVE

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**Proposed Initiated Law
Placed before the Legislature by Petition
By MI Time to Care**

Analysis available at
<http://www.legislature.mi.gov>

Complete to 8-28-18

(Enacted as Public Act 338 of 2018)

ISSUE BEFORE THE LEGISLATURE:

On July 27, 2018, the Michigan Board of Canvassers certified that an initiative petition filed by the ballot question committee MI Time to Care had an adequate number of signatures for it to move forward. The legislature received the initiative, which is named the Earned Sick Time Act, on July 30.

Under Section 9 of Article II of the State Constitution of 1963, “Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature.” In the case of the MI Time to Care petition, the legislature has through September 7 to act.

If the legislature enacts the initiative, it becomes law. If the legislature rejects (or does not act on) the initiative, it goes before the voters on the November 2018 ballot. The legislature also has the option of proposing a different law on the same subject (an “alternative measure”), which, if approved by roll call vote, would appear on the November ballot alongside the MI Time to Care initiative. (In this circumstance, if both measures were approved by the voters, the one with the most votes would become law.)

An initiative submitted to and approved by the voters takes effect 10 days after the official declaration of the vote. It is not subject to veto by the governor, and it cannot be amended or repealed by the legislature without a three-fourths majority in each house.

THE CONTENT OF THE PROPOSED INITIATED LAW:

The MI Time to Care initiative would create a new act, entitled the “Earned Sick Time Act.” Broadly speaking, the new act would require employers to provide paid sick time to their employees, prescribe circumstances in which an employee’s use of sick time must be allowed, prohibit retaliation against employees for exercising their rights under the act, and charge the Department of Licensing and Regulatory Affairs (LARA) with certain implementation and enforcement responsibilities. A more detailed description of the proposed initiated law follows.

Earned sick time and its accrual

The initiative would require an *employer* to provide earned sick time to each of its employees in this state at the rate of one hour of paid sick time for every 30 hours worked.¹

Employer would mean any person, firm, business, corporation, limited liability company, nonprofit agency, educational institution, or government entity (except for the federal government) that employs one or more individuals.

In general, employees could not use more than 72 hours of paid sick time in a year unless allowed to use more by their employer.

However, employees of a *small business* could not use more than 40 hours of paid sick time in a year unless allowed to use more by their employer. If a small business employee had accrued over 40 hours of earned sick time in a calendar year, he or she could use an additional 32 hours of unpaid sick time after reaching the annual 40-hour cap on paid sick time use. The employee must be able to use paid sick time before unpaid time.

Small business would mean an employer that has no more than nine employees (including part-time, temporary, and leased employees) in a given week and that did not have more than nine employees during any 20 or more calendar workweeks in the current or prior calendar year.

An employer could not require an employee to find a replacement worker as a condition for using sick time.

Earned sick time would be paid at an employee's normal hourly wage. If an employee's wages vary, then his or her "normal hourly wage" would be averaged from his or her wages from the pay period just before the one in which the sick time is used.

Sick time could be used as it accrues; however, employers could require new employees hired after April 1, 2019 to wait until the ninetieth calendar day after their hire date before using it.

Sick time earned by an employee would carry forward from year to year. An employee who changed jobs with the same employer would retain the sick time he or she had previously accrued, as would a retained employee of an employer that is succeeded, bought, or taken over by a successor employer. An employee who leaves an employer but is rehired within six months would be credited with the sick time he or she had accrued before leaving.

Employers that provide paid leave (e.g., vacation days, personal days, or other paid time off) that is accrued at the same rate and in at least the same amounts, and that may be used for the same purposes, as required for earned sick time under the initiative would be considered to be in compliance with the requirements described above.

¹ For instance, an employee who worked a 40-hour week for all 52 weeks of the year would accrue about 69 hours of sick time—a little less than nine 8-hour days.

Using earned sick time

An employer would be required to allow the use of earned sick time for any of the following:

- A mental or physical illness, injury, or condition of an employee or his or her *family member*.
- The medical diagnosis, care, or treatment of an employee or family member.
- Preventative medical care for an employee or family member.
- If an employee or his or her family member is a victim of domestic violence or sexual assault:
 - Medical care or counseling for physical or psychological injury or disability.
 - To relocate due to the domestic violence or sexual assault.
 - To obtain services from a victim services organization.
 - To obtain legal services or to participate in any criminal or civil proceedings related to the domestic violence or sexual assault.
- Meetings at a child's school or place of care regarding the child's health or the effects of domestic violence or sexual assault on the child.
- Cases in which an employee's place of work or a child's school or place of care is closed due to a public health emergency.
- Cases in which a public health authority or health care provider has determined that an employee or family member could pose a health threat to others due to his or her exposure to a communicable disease.

Family member would mean an employee's spouse, *domestic partner*, child, ward, parent, guardian, sibling, grandparent, or grandchild or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. It would include a domestic partner's parent or child.

Domestic partner would mean an adult in a committed relationship with an adult employee such that the two individuals share responsibility for a significant measure of each other's common welfare. A relationship given legal recognition in the United States as a marriage or analogous relationship, such as a civil union, would be considered a committed relationship for purposes of this definition.

An employer could require an employee to provide up to 7 days' advance notice of the need to use sick time if that need is foreseeable. In cases where the need to use sick time is not foreseeable, an employer could require that notice be given as soon as is practicable.

For sick time use of more than three days in a row, an employer could require *reasonable documentation* that the use was for an allowable purpose as described above, but could not hold up any sick time on the basis of waiting for documentation. The employer would be responsible for any costs incurred by the employee in obtaining the documentation. An employer could not require that the documentation explain the nature of the illness or the details of any domestic violence or sexual assault, beyond verifying that the sick time use was for a purpose allowed above. An employer would also have to keep confidential any

health information or information pertaining to domestic violence or sexual assault conveyed in the documentation.

Reasonable documentation, for the purposes described above, could include an indication signed by a health care professional, such as a nurse, doctor, or certified midwife, that earned sick time use is or was necessary for the employee or for his or her family member. In cases of domestic violence or sexual assault, reasonable documentation could include a police report, a signed statement from an advocate indicating that the employee or his or her family member is receiving services from a victim services organization, or a court document indicating that the employee or family member is involved in a legal action related to domestic violence or sexual assault.

Retaliatory personnel action

The act would prohibit a person from interfering with, restraining, or denying the exercise or attempted exercise of any right protected under the act, such as the right to use earned sick time under the act; the right to file a complaint or inform another person regarding an employer's alleged violation of the act; the right to cooperate with LARA in its investigation of an alleged violation of the act; and the right to inform others of their rights under the act.

An employer would also be prohibited from taking ***retaliatory personnel action*** or discriminating against an employee because the employee exercised a right protected under the act.

Retaliatory personnel action would include a threat, discharge, suspension, demotion, reduction of hours, or other adverse action against an employee or former employee; sanctions against an employee who is a recipient of public benefits; or interference with, or punishment for, an individual's participation in an investigation, proceeding, or hearing under the act.

The protections described above would extend to an individual who alleges a violation of the act mistakenly but in good faith.

The act would establish a rebuttable presumption of a violation of the above prohibitions if an employer takes adverse personnel action against an individual within 90 days after that individual does any of the following:

- Files a complaint with LARA or with a court alleging a violation of the act.
- Informs another person about an employer's alleged violation of the act.
- Cooperates with LARA or another person in investigating or prosecuting an alleged violation of the act.
- Opposes a policy, practice, or act that is prohibited under the act.
- Informs another individual of his or her rights under the act.

Employer records

An employer would have to retain, for at least three years, records documenting the hours worked and earned sick time taken by its employees. Employers would be required to allow LARA access to these records, with appropriate notice and at a mutually agreeable time, so that LARA can monitor compliance with the act.

In a dispute as to whether an employer has violated an employee's right to earned sick time under the act, if the employer either does not maintain or retain adequate records documenting the employee's hours worked and sick time taken or does not allow LARA reasonable access to those records, then there would be a presumption that the employer has violated the act. This presumption could be rebutted only by clear and convincing evidence.

Violations and remedies

An employee affected by an employer's violation of the act could do either of the following within three years after the date of the violation or the date the employee learned of the violation, whichever is later:

- File a claim with LARA. LARA would be required to investigate a claim filed with it under this provision.
- Bring a civil action for appropriate relief, such as payment for used earned sick time, rehiring or reinstatement to his or her previous job, payment of back wages, or reestablishment of wrongly denied benefits, as well as damages, costs, and attorney fees as allowed by the court.

The director of LARA would be responsible for enforcing the provisions of the act, and to that end would have to establish a system for receiving and investigating complaints in a timely manner. Any person alleging a violation of the act would have the right to file a complaint with LARA. LARA would have to take the greatest care possible to keep confidential the name and other identifying information of the employee or other individual reporting a violation of the act.

Upon receiving a complaint alleging a violation of the act, LARA would have to investigate the complaint and attempt to resolve it through mediation or other means. LARA would have to keep complainants notified as to the status of their complaint and any investigation resulting from it.

If LARA determined that a violation had occurred, it would have to issue to the violator a notice of violation and the relief required. Notices of violation would have to be in a form prescribed by LARA and include any method of appealing LARA's decision.

LARA would have the power to impose penalties and to grant an employee or former employee appropriate relief, including payment of sick time improperly withheld, payment of damages, payment of back pay, and reinstatement in the case of job loss.

In cases where the director of LARA has determined that there is reasonable cause to believe that an employer violated the act and LARA is unable to obtain the employer's

voluntary compliance within a reasonable time, LARA would have to bring a civil action for appropriate relief, as described above, on behalf of the employee. LARA could investigate and file a civil action on behalf of all employees of an employer who are similarly situated at the same work site and who have not themselves brought a civil action.

An employer that failed to provide earned sick time in violation of the act or that took retaliatory personnel action against an employee or former employee would be subject to a civil fine of up to \$1,000 in addition to liability for civil remedies as described above.

Notices and informational outreach

By April 1, 2019, or at the time of hiring for employees hired after that date, an employer subject to the act would have to provide to each of its employees written notice including at least all of the following:

- The amount of earned sick time required to be provided to an employee under the act.
- The terms under which earned sick time may be used.
- The dates on which the employer's year, for purposes of managing sick time, begins and ends.
- That the employer is prohibited from engaging in retaliatory personnel action against an employee for requesting or using earned sick time for which he or she is eligible.
- That the employee has the right to bring a civil action or file a complaint with LARA for any violation of the act.

The employer would also have to display a poster containing the information described above at its place of business in a conspicuous place accessible to employees.

The notice and the poster would have to be in both English and Spanish. If LARA has translated the notice or poster into another language and that language is the first language spoken by 10% or more of the employer's workforce, then the notice or poster used by that employer would have to be in that language as well.

An employer that willfully violated a notice or posting requirement described above would be subject to a civil fine of not more than \$100 for each violation.

LARA would have to create and make available to employers notices and posters that contain the information described above, in English, Spanish, and any other language that LARA determines to be appropriate.

LARA would also have to develop and implement a multilingual outreach program to inform employees, parents, and patients in this state about the availability of earned sick time under the act. The program would include distributing notices and other written material in English and in other languages to child care providers, schools, community health centers, domestic violence shelters, hospitals, elder care providers, and other health care providers.

Other provisions

The initiative expressly states that it would not do any of the following:

- Require an employer to pay out for unused sick time when an employee leaves employment.
- Require an employer to allow sick time use for reasons beyond those required by the act.
- Prohibit an employer from providing more sick time, or more permissible reasons for its use, than required by the act.
- Prohibit an employer from establishing a policy that allows employees to donate sick time to one another.

The initiative stipulates that its provisions would be minimal requirements regarding earned sick time; it would not preempt, limit, or affect the applicability of another law, regulation, or policy that provides for greater accrual or use of time off work or that extends other protections to employees.

The initiative stipulates that it would not diminish any rights provided to an employee under a collective bargaining agreement and does not preempt or override the terms of a collective bargaining agreement in effect prior to the effective date of the act. For an employer whose employees are covered by a collective bargaining agreement in effect on the effective date of the act, the act would apply beginning on the stated expiration date in the collective bargaining agreement, regardless of whether the agreement says that it continues in force until some future date or event or the execution of a new collective bargaining agreement.

The director of LARA, or his or her designee, could promulgate rules as necessary to administer the act.

FISCAL IMPACT:

The initiative would create additional state costs and could increase costs for local units of government to the extent that their leave time benefits do not meet the proposed requirements.

Under the initiative, LARA would have several responsibilities related to the administration of the Earned Sick Time Act, causing an increase in costs of indeterminate magnitude. LARA would be responsible for overseeing employer compliance with the act, which would involve several distinct but interrelated tasks. Based on the scope of the initiative, it is probable that LARA would require additional staff to fulfill its obligations. It is unclear how additional costs associated with this initiative would be supported.

LARA would have to establish a system for receiving complaints regarding noncompliance and subsequently investigate and attempt to resolve such complaints via mediation between the complainant and the subject of the complaint. Throughout this process, LARA would be responsible for communicating with parties involved in complaints, specifically notifying complainants of their complaint status and any subsequent investigations and

issuing violators a notice of violation and required relief. The initiative would provide LARA with the power to impose penalties and to grant all appropriate relief. If LARA determines that there is reasonable cause to believe that an employer violated the act, and the employer fails to voluntarily comply, LARA could initiate a civil action.

The initiative would establish two specific civil fines:

- \$1,000 for employers who fail to provide earned sick time or who take retaliatory personnel actions against employees.
- \$100 for each violation of notice or posting requirements.

The initiative does not indicate where revenue from these fines would be deposited or how it would be used.

LARA would also be required to create and translate notices and posters to be provided by employers. Lastly, LARA would have to develop and implement a multilingual outreach program to inform people of the availability of earned sick time under the act.

POSITIONS:

The sponsor of the initiative is MI Time to Care.

The Michigan Chamber of Commerce opposes the initiative.

The National Federation of Independent Business opposes the initiative.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.