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In the States

Michigan Court Says Employers Must Pay \$12 (or More) an Hour and Provide Expanded Sick Leave Rights Starting in February 2023: 3 Steps to Prepare

By Stephen R. Gee

In this article, the author discusses a new development in Michigan regarding payment to employees of the minimum wage and sick leave.

Michigan employers will have to pay a minimum wage of at least \$12 an hour and provide expanded sick leave rights to all employees starting February 19, 2023, since the Michigan Court of Claims said it would delay enforcement of a recent ruling that is currently being appealed. The court recently held that the Michigan legislature improperly usurped a voter initiative that was slated for the 2018 ballot – which led the court to reinstate the 2018 voter-initiated versions of the state’s minimum wage law and paid sick leave law. What actions led to this decision and what does it mean for employers?

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STATE LEGISLATURE ADOPTED AND AMENDED INITIATIVES

Two ballot initiatives – the Improved Workforce Opportunity Act (IWOWA) and the Earned Sick Time Act (ESTA) – secured enough signatures to go on the November 2018 ballot. Instead of letting the initiatives be voted on, however, the Michigan Legislature decided to adopt both initiatives as proposed. 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took this approach because, if the ballot initiatives were passed by the voters, they could only be amended or repealed by the voters or by three-fourths of the legislature.

The ballot initiative version of IWOWA raised the minimum wage to \$12 an hour by 2022 with yearly increases thereafter based on inflation. ESTA provided all Michigan employees with 72 hours of annual leave for numerous types of absences. ESTA gave small businesses – with fewer than 10 employees – a small break by requiring that only the first 40 hours of annual leave be paid. The remainder could be unpaid, whereas larger employers would have to provide paid leave for all 72 hours.

Before either IWOWA or ESTA became effective, however, the Michigan Legislature significantly amended both laws. Among other changes, the amended ESTA:

- 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.

The amended ESTA was also renamed the Paid Medical Leave Act (PMLA). As for the amended IWOWA, it stretched out the wage hikes to reach \$12 an hour by 2030 and removed the provision for yearly increases based on inflation.

COURT OF CLAIMS DECISION

In May 2021, Mothering Justice – an advocacy group for mothers – and certain other plaintiffs filed a lawsuit in the Michigan Court of Claims to invalidate the PMLA and amended IWOWA.

Now, the Court of Claims ruled in Mothering Justice's favor, holding that the Michigan Constitution prohibited the state legislature's "adopt-and-amend" strategy used in 2018. The court explained that the Michigan legislature had only three choices when faced with ballot initiatives:

1. Enact them without change prior to the election;
2. Let the voters decide through the ballot box; or
3. Propose an alternative prior to the election and have voters decide on the ballot initiative and the legislature's proposed alternative.

The State of Michigan has appealed the decision and asked the Court of Claims to delay enforcement of its ruling pending a decision on the appeal. Thereafter, the Court of Claims ruled that it would delay enforcement of its ruling until February 19, 2023, at which point the voter-initiated versions of IWOWA and ESTA will be enforceable.

3 STEPS EMPLOYERS SHOULD CONSIDER TAKING NOW

Be aware that an employee or former employee can bring a private civil claim for any ESTA violations for damages incurred by the violation, as well as liquidated damages, back pay, reinstatement, and attorneys' fees. In light of the looming compliance deadline and uncertainty of the appeal, consider preparing now by taking the following three steps:

1. You may want to examine your leave policies and work with your employment counsel to ensure your policies comply with ESTA. Some, but not all, of the key items to look for to comply with ESTA are as follows:
 - The leave accrual rate is at least one hour of leave for every 30 hours worked (was 35 under PMLA);
 - The yearly accrual allowance is at least 72 hours (was 40 under PMLA);
 - The leave increment is the smaller of one hour or the smallest increment used by your payroll system; and

- All employees, including FLSA exempt employees, are covered by the policy regardless of hours worked.
2. You should also check to see if you have a no-fault attendance policy, as it likely runs afoul of Section 6(3) of ESTA, which states that “an employer’s absence control policy shall not treat earned sick time pursuant to [ESTA] as an absence that may lead to or result in retaliatory personnel action.”
 3. Finally, you should be prepared to pay employees over \$12 an hour by no later than February 19, 2023, in case the ruling is upheld. Under original IWOWA the \$12 minimum wage is set to increase in 2023 based on inflation unless the unemployment rate in Michigan is 8.5% for the year preceding the potential increase. If you rely on the tip credit to comply with IWOWA, you will need to pay 90% of the inflation-impacted minimum wage to tipped employees. Further, if the original IWOWA is still in place in 2024, tipped employees will be entitled to the full 100% minimum wage.

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