



## NEW MANDATORY SICK LEAVE RESPONSIBILITIES

In a landmark July 31, 2024 decision, the Michigan Supreme Court approved significant changes to Michigan employment law, reinstating to 2018 ballot initiatives as law.

The Earned Sick Time Act (“ESTA”) is one of those and it is set to be effective February 21, 2025. Briefly, the ESTA will require **all employers (regardless of employee count)** to provide paid sick time to **all employees (regardless of part-time, seasonal, or temporary status)**. The Supreme Court’s decision also reinstated the Improved Workforce Opportunity Wage Act (“Wage Act”) for the same effective date.

*Unfortunately, the Wage Act and ESTA are imprecisely drafted and lack clear answers to some important questions business owners will have. These laws set the minimum legal requirements and employers are always permitted to do more than is required, if your business can support that.*

*While we are all awaiting further guidance and interpretations from the State, the MRLA is actively working with the State legislature to identify legislative fixes to avoid business ending changes to the industry as a result of the Supreme Court’s action. The FAQ below is based on the interpretations of MRLA’s labor and employment counsel as of the date of publication.*

### **Q#1: WHICH EMPLOYERS WILL BE REQUIRED TO PROVIDE PAID SICK TIME?**

A: All Michigan employers with no exceptions. Unlike the Paid Medical Leave Act (adopted initially to replace the ESTA and which will be void if the ESTA becomes effective) and most other employment laws, the ESTA has no employee threshold and applies to any business that employs one or more individuals. The number of employees will determine the amount of sick time an employer must permit an employee to use.

### **Q#2: WHO IS ENTITLED TO PAID SICK TIME?**

A: All employees, regardless of their status, are entitled to accrue and use paid sick time. That means all full-time, part-time, seasonal, and temporary staff are included. The law, as it is drafted, makes no exceptions whatsoever in the private sector.

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**Q#3: ARE 1099 CONTRACTORS ENTITLED TO PAID SICK TIME?**

A: No. A properly classified independent contractor is not an employee and cannot receive employment benefits. Check with employment counsel to ensure that you have properly classified someone as an independent contractor to avoid liability for misclassification.

**Q#4: HOW MUCH SICK TIME WILL EMPLOYEES ACCRUE?**

A: The answer to this depends on how many employees you have!

	<u>Accrual Rate</u>	<u>Paid Hours Employees May Use Each Year</u>	<u>Unpaid Hours Employees May Use Each Year</u>
<b>10 or more employees</b>	1 hour of paid sick time for every 30 hours worked	72 hours	N/A
<b>Less than 10 employees</b>	1 hour of paid sick time for every 30 hours worked	40 hours	32 hours

Employers can always allow employees to use more sick time than the thresholds found in the ESTA, but an employer cannot limit an employee’s use of sick time to less than the figures in the chart above. For example, if you have 10 or more employees and Employee ABC has already used 72 hours of paid sick time, your business can deny Employee ABC’s use of additional sick time even if they sick time hours available in their bank.

Regardless of how many employees are on payroll, the *accrual* rate is the same, no matter how long it takes an employee to work 30 hours. Employees will accrue paid sick time even if they never work 30 hours in a single workweek. Some employees may earn an hour of sick time in less than a workweek, others may take multiple weeks or even months to hit the 30-hour threshold. No matter the time frame, they are still entitled to paid sick time accrual.

**Q#5: HOW DO OVERTIME-EXEMPT, SALARIED EMPLOYEES ACCRUE PAID SICK TIME IF THEY DO NOT WORK A SET SCHEDULE OR ARE NOT REQUIRED TO TRACK THEIR TIME?**

A: The ESTA says that properly classified exempt employees will be assumed to work 40 hours per week unless the ordinary schedule is less than 40 hours. If a salaried exempt employee ordinarily works more than 40 hours per workweek, they will still accrue based on a 40-hour schedule.

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**Q#6: WHEN DOES THIS ALL TAKE EFFECT?**

A: On February 21, 2025, current employees will begin accruing paid sick time under the ESTA immediately. Employees hired after ESTA goes into effect will begin to accrue immediately, but you may prohibit them from using paid sick time for the first 90 days of employment.

**Q#7: IF AN EMPLOYEE CALLS IN SICK FOR THE DAY, HOW MANY HOURS OF SICK TIME DO THEY TAKE?**

A: The employee should be charged for the number of hours that they were scheduled to work (even if employees are sometimes asked to stay over or to come in early). Otherwise, employees must be permitted to use sick time in at least one-hour increments. However, if your payroll software utilizes partial hours, employees are entitled to use the smallest you use to track time in the payroll software.

**Q#8: DO PAID SICK TIME HOURS CARRY OVER FROM YEAR TO YEAR?**

A: Yes. The ESTA requires carryover of accrued but unused paid sick time hours. An employer cannot limit the number of hours carried over from year to year.

However, there is a limit to how many hours an employee can use in a single year. For employers with ten or more employees, an employer can limit paid sick time to 72 hours in a single year even if the employee has more than 72 hours in their bank. For smaller employers, the limit can be 40 hours of paid time and 32 of unpaid time.

**Q#9: ARE EMPLOYEES ENTITLED TO BE PAID FOR ACCRUED BUT UNUSED SICK TIME WHEN THEY TIME OUR EMPLOY?**

A: No. The ESTA does not require that employers pay out any paid sick time no matter the reason someone separates from employment.

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**Q#10: HOW MUCH IS AN EMPLOYEE PAID WHEN THEY TAKE PAID SICK TIME?**

A: For non-tipped employees, the answer is simply: their ordinary hourly wage.

For tipped employees, however, there is much less certainty about how to answer this question..

One argument is that tipped employees are only entitled to be paid at minimum wage rates for any sick time they take under this Act. There is another, more industry-damaging interpretation that tipped employees would receive their base (cash wage) plus their average tips for the previous pay period. MRLA is looking forward to clarification from Treasury as soon as possible

**Q#11: ARE EMPLOYERS REQUIRED TO CREATE A SEPARATE SICK TIME BANK?**

A: No. The ESTA allows any paid time to fulfill the requirements so long as the time can be used for the purposes permitted by the ESTA. (See Question 12) Vacation, personal time, and an all-purpose PTO bank can all count towards the 72-hour requirement for larger employers or the 40-hour requirement for smaller employers.

**Q#12: IN WHAT SITUATIONS CAN AN EMPLOYEE USE PAID SICK TIME?**

A: For their own or a family member's illness, injury, medical appointment, care, or preventative care.

If the employee or a family member is the victim of domestic violence or sexual assault for medical or psychological care, victim's services or to relocate due to the domestic violence or sexual assault.

To attend a meeting at the employee's 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.

If your place of business is closed due to a public health emergency, if the employee's child's school or place of care is closed due to a public health emergency, or if a health care provider determines that the employee or a family member is a risk to the health of others due to contact with a communicable disease.

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### **Q#13: CAN I REQUIRE DOCUMENTATION WHEN AN EMPLOYEE CALLS IN SICK?**

A: You can only require documentation if an employee uses sick time for three or more consecutive days. If an employee is absent for one or two consecutive days, the ESTA does not allow an employer to request documentation. The employee must provide the documentation in a “timely manner” but you cannot deny the use of sick time while waiting on that documentation. You must pay all out-of-pocket costs associated with obtaining the documentation.

The ESTA does not specify how often an employer may request documentation if sick leave extends for more than three consecutive days, but we urge you to exercise caution: only request as much information as you need to substantiate the absences. For instance, if the initial documentation indicates that an extended absence may be needed, another request for documentation three days later is unnecessary and should be avoided. On the other hand, if initial documentation suggests an employee should return within a few days and the employee misses that anticipated return date, your interest in requesting additional documentation becomes stronger. Keep in mind that the ESTA is plainly a pro-employee statute and, therefore, repeated or unnecessary requests for documentation may be treated as retaliation or harassment if they cannot be justified by a legitimate business need.

### **Q#14: WHAT IF I SUSPECT MY EMPLOYEES ARE USING SICK TIME FOR UNAUTHORIZED PURPOSES?**

A: Given the ESTA’s tight restrictions on requesting any information about sick time, you should tread carefully if you suspect abuse of sick time. That said, if you have strong, objective reasons to think sick time is being abused, you can investigate and potentially discipline employees. For example, if an employee calls in sick for a Saturday night shift and you later see photos of that employee at a concert that took place Saturday night, you have an objective basis to question the use of the sick time. On the other hand, if your suspicion is based on a hunch or based on rumors from other employees, you should steer clear of any adverse employment action to avoid a retaliation claim.

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**Q#15: CAN I REQUIRE ADVANCE NOTICE OF SICK TIME ABSENCES?**

A: Yes. You can require notice up to 7 days in advance of a sick time that is foreseeable (like for a pre-scheduled appointment). If the sick time is not foreseeable (like for a sudden illness), the employee must give notice “as soon as practicable.”

**Q#16: ARE THERE DIFFERENT SICK TIME REQUIREMENTS FOR BUSINESSES THAT ARE ONLY OPEN SEASONALLY?**

A: None. The sick time requirements have no exceptions for employers who operate seasonally and all employees (including seasonal employees) are entitled to accrue and use paid sick time.

**Q#17: WHAT IF MY BUSINESS DOES NOT COMPLY WITH THE ESTA’S REQUIREMENTS, BECAUSE IT IS COST-PROHIBITIVE?**

A: Employees who believe their employer violated the ESTA can bring a civil lawsuit within 3 years of the alleged violation seeking: backpay for the missed sick time, rehiring or reinstatement with backpay, reestablishment of employment benefits, attorneys fees, and an equal amount of those combined damages as a penalty (essentially a double penalty for violation).

An employee can also make a complaint with the State Wage and Hour Division seeking those same remedies, though a complaint of this type is not required before a lawsuit can commence.

In addition, the Wage and Hour Division may impose fines up to \$1,000 for violations of the sick time provisions and up to \$100 per occurrence for violations of notice obligations.

Remember, any employee who makes a complaint to the State or who files a lawsuit is protected from retaliation for having done so. There are special protections for an employee who makes a complaint, files suit, informs someone (internally or externally) of a potential ESTA violation, opposes any potential violation of the ESTA, or informs any coworkers about their rights under the ESTA. Any adverse employment action taken within 90 days of any of those protected activities is presumed to be retaliatory unless the employer can demonstrate that it has a legitimate basis to take action against the employee separate from the protected activity.

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