ABSENCE DISABILITY & LIFE

Statutory Update

MarshMcLennan Agency

MMA-ADL.com/blog

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COVID-19 Legislation

State and Local

Emergency Paid Sick Leave

Cal/OSHA COVID-19 Prevention Non-Emergency Regulations

While California's COVID-19 Supplemental Paid Sick Leave (SPSL) law expired on December 31, 2022, the requirement to provide exclusion pay under Cal/OSHA's COVID-19 Prevention Emergency Temporary Standards remained in place. Effective February 3, 2023 the California Department of Industrial Relations (DIR) adopted COVID-19 Prevention Non-Emergency Regulations, which do not feature exclusion pay. Visit the DIR's dedicated webpage for more information on the new regulations.

San Francisco, CA Public Health Emergency Leave

On February 16 the San Francisco Department of Public Health announced that the city would end its COVID-19 public health emergency declaration on February 28, 2023, thus ending the requirement to provide public health emergency leave (PHEL) for reasons associated with COVID-19.

As a reminder, the San Francisco PHEL law is permanent. The requirement to provide paid leave may be triggered by a health emergency related to any contagious, infectious, or communicable disease, as declared by the City's or County's local health officer or the state health officer pursuant to the California Health and Safety Code, or by an Air Quality Emergency (*when the Bay Area Air Quality Management District issues a Spare the Air Alert*). For more information visit the San Francisco Office of Labor Standards Enforcement's dedicated PHEL webpage.

Colorado Public Health Emergency Leave

On January 8 the governor of Colorado signed Executive Order D 2023 001. The order (1) ended the applicability of public health emergency leave (PHEL) for the purposes of flu, respiratory syncytial virus (RSV), and similar respiratory illnesses (*noted in our December 22, 2022 Update*); and (2) extended the COVID-19 public health emergency declaration.

The extension of the state's PHE declaration, plus the Biden Administration's plan to continue the nationwide declaration until May 11, 2023, means that the requirement to provide COVID-related public health emergency leave (PHEL) in Colorado will likely be in effect at least into June 2023. Employees may utilize PHEL until four weeks after all applicable PHE declarations end or are suspended.

More information and guidance may be found on the Colorado Department of Labor and Employment's Healthy Families and Workplaces Act (HFWA) webpage and in the updated INFO #6B, located here.

Side-by-Side EPSL Summary

Non-COVID-19 Legislation

Federal

Anti-Discrimination and Accommodation

Protections for Pregnant and Nursing Employees

On December 29, 2022 President Biden signed the omnibus Consolidated Appropriations Act of 2023 (HR2617/Public Law No. 117-328), which includes protections for pregnant and nursing employees in the workplace:

Pregnant Workers Fairness Act

Effective June 27, 2023, the Pregnant Workers Fairness Act (PWFA) strengthens protections currently provided under the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act. The new law prohibits employers with 15 or more employees from:

1. failing to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;
    - "Reasonable accommodation" and "undue hardship" are as defined under the ADA (42 USC §12111), including with regard to the interactive process to be used to determine an appropriate reasonable accommodation.
    - "Known limitation" is defined as any physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability under the ADA (42 USC §12102(3)).
    - A "qualified employee" is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, *except that* an employee or applicant will be considered qualified if (A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated (*The highlighted section represents a distinction not found in the ADA's definition of "qualified individual"; additionally, the ADA's definition of disability excludes impairments with an expected duration of less than 6 months*).
2. requiring a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
3. denying employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;
4. requiring a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;
5. taking adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

PWFA does not preempt any state or local law providing greater protections.

For more information visit the EEOC's webpages Pregnancy Discrimination and Pregnancy-Related Disability Discrimination and What You Should Know About the Pregnant Workers Fairness Act.

Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

The "PUMP Act" immediately amended the Fair Labor and Standards Act (FLSA) by replacing the current 29 USC §207(r) (Break Time for Nursing Mothers) with a new §218d.

The Act maintains the requirement that employers provide reasonable break time and a private space (other than a restroom) for an employee to express breast milk, for up to one year from her child's birth, but makes two notable changes:

- Protections were extended to overtime-exempt employees effective December 29, 2022; and
- Beginning April 28, 2023, employers who violate an employee's rights under the law may be held liable for appropriate legal or equitable remedies under the FLSA. Remedies may include employment, reinstatement, promotion, payment of lost wages and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate. Prior to April 28, remedies for violations of the reasonable break time and space are limited to unpaid minimum or overtime wages; the full scope of remedies can be sought only if the employee also experienced retaliation.

  Employees must notify their employer of a violation and allow 10 days for the employer to comply before the employee may proceed with any legal action.

Break frequency and pay:

Per the Department of Labor (DOL)'s recently released Field Assistance Bulletin No. 2023-1 (*more on the FAB below*), the frequency and duration of the breaks that a nursing employee needs will vary depending on the individual situation. In most cases, an employer cannot deny the employee the right to take a needed break to pump breast milk.

Employers are not required under the FLSA to compensate nursing employees for breaks taken for the purpose of expressing milk. However, when an employer provides compensated breaks, an employee who uses that break time to express milk must be compensated for the break. In addition, consistent with the FLSA's general requirement, if an employee is not completely relieved from duty during these breaks, the time must be compensated as work time. If a remote employee chooses to attend a video meeting or conference call – even if off camera – generally the employee in that case is not relieved from duty and, therefore, must be paid for that time.

The PUMP Act contains exceptions for air carrier crewmembers and certain railroad and motorcoach carrier employees, as well as for employers with fewer than 50 employees who can demonstrate that the law's requirements would impose an undue hardship.

Like the PWFA, the PUMP Act does not preempt any state or local law providing greater protections.

More information on the PUMP Act's requirements may be found on the DOL's FLSA Protections to Pump at Work webpage, FAQ, and Fact Sheet #73.

Recent Guidance

Telework, the FLSA and the FMLA

On February 9 the Department of Labor (DOL) issued Field Assistance Bulletin No. 2023-1 to directors and administrators of its Wage and Hour Division providing guidance around certain aspects of the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) as they relate to telework. Below is a summary of the guidance; view the full Bulletin for additional references and examples.

The FLSA and Pay for Breaktimes

- The FLSA requires covered employers to pay non-exempt employees for all hours worked, including work performed in their home or otherwise away from the employer's premises or job site. However, FLSA regulations explain that "hours worked" is not limited solely to time spent on active productive labor but may, for instance, include time spent waiting or on break.

- Regarding breaks taken during the workday, the FLSA regulations explain that, regardless whether an employee's work is performed at home or at a worksite, short breaks of twenty minutes or less are generally counted as compensable hours worked. Breaks that are longer than 20 minutes and permit the employee to use the time effectively for their own purposes and during which the employee is completely relieved from duty are not hours worked. However, if the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.

  See also Fact Sheet #22: Hours Worked under the Fair Labor Standards Act and Field Assistance Bulletin No. 2020-5.

Employee Eligibility under the FMLA

- To take FMLA leave, an employee must work for a covered employer and be eligible for leave. Employees are eligible for FMLA leave when they have worked for the employer for at least 12 months, have at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave*, and work at a location where the employer has at least 50 employees within 75 miles. Employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job.

  * *A special rule applies to the hours-of-service requirement for airline flight crew employees, including pilots, co-pilots, flight attendants, and flight engineers; see 29 CFR §825.801 and Fact Sheet #28J.*

- Length of service and hours worked: The determination of whether an employee has been employed for at least 12 months and has at least the required hours of service is made as of the date FMLA leave is to start. For most employees, including employees who telework, the 1,250 hours of service requirement is determined according to the principles under the FLSA for determining compensable hours of work. If accurate records are not kept, the employer has the burden of showing that the employee has not met the hours-of-service requirement in order to claim the employee is not eligible for FMLA leave.
- Worksite: The determination of whether at least 50 employees are employed at the employee's worksite, or within 75 miles, is made when the employee gives notice of the need for leave. For FMLA eligibility purposes, the employee's personal residence is not a worksite. When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement. The count of employees within 75 miles of a worksite includes all employees whose worksite is within that area, including employees who telework and report to or receive assignments from that worksite.

State and Local

Paid Family and Medical Leave

Massachusetts Paid Family and Medical Leave (MA PFML) – Amended Regulations

On January 6 the Department of Family and Medical Leave released revised regulations (458 CMR 2), which expand the rules around the maintenance of health benefits while an employee is on paid leave.

Section 2(f) of the MA PFML law and prior versions of the regulations state that for the duration of an employee's family or medical leave the employer must provide for, contribute to or otherwise maintain the employee's employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously. The revised regulations clarify that an employer may "otherwise maintain" an employee's benefits in a variety of ways including, but not limited to, the following examples:

a. The employer continues to pay its portion of the health insurance premium for that employee for the duration of leave, and the employee portion of premium is remitted by the employee in accordance with the employer's uniformly applied policies or practices.

b. The employer reimburses the employee out of its general assets for both the monetary equivalent of the non-employee portion of the health insurance premium and any additional amount required to be paid

under the federal COBRA law or the Massachusetts Mini COBRA law that is in excess of the non-employee portion of the health insurance premium, so that the amount the employee pays toward health insurance remains unchanged, until the employee can resume regular employer-sponsored coverage.

c. An employer who participates in a plan* that establishes eligibility for coverage for a period of time based on hours worked or contributions made during an earlier qualifying period allows employees who have established eligibility for coverage prior to beginning leave to continue coverage while they are taking leave and while they remain eligible for coverage based on the earlier qualifying period, or allows them to use banked hours.

* *Such as a multi-employer health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers*.

d. An employer participates in a multi-employer plan that contains a provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

The regulations also state that employers are not required to provide for, contribute to, or otherwise maintain employment-related health insurance benefits for an employee who is not eligible for such benefits when the employee's leave begins. Nor are employers required to provide for, contribute to, or otherwise maintain health insurance benefits for covered individuals who resign during a leave or are former employees when the covered individual's leave commences.

Vermont Family and Medical Leave Insurance (VT FMLI)

Last July the State of Vermont released to various insurance carriers a Request for Proposal (RFP) for creating, implementing and administering a family and medical insurance program for employers and employees in the state. In December the governor announced The Hartford as the carrier selected to partner with the state for this purpose.

The Vermont Family and Medical Leave Insurance (VT FMLI) program will be voluntary for private employers and individuals and will be implemented in stages over the next two years:

July 1, 2023: Benefits begin for state employees

July 1, 2024: Expands to include private and non-state public employers with two or more employees

July 1, 2025: Expands to include employers with one employee, self-employed individuals, and individuals whose employers don't sponsor coverage

Reasons for Leave:

- A **serious health condition** that makes the employee unable to perform the essential functions of their job
- To **bond with a child** within one year of birth, adoption, or placement for foster care
- To **care for a family member** with a serious health condition

  Covered family members include the employee's spouse or civil union partner, child, stepchild, foster child, ward who lives with the employee, parent or parent of the employee's spouse.
- Any **qualifying exigency** arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty"
- To **care for a covered service-member** with a serious injury or illness if the eligible employee is the service-member's spouse, son, daughter, parent, or next of kin

Level of Benefit*:

- **Leave Entitlement:** Up to 6 weeks per 12-month period
- **Income Replacement:** 60% of the employee's average weekly wage. Wages used to determine the 60% benefit will be capped at the Social Security taxable wage maximum (*$160,200 in 2023*).

- **Elimination Period:** 7 calendar days for medical leave, no elimination period for family leave
- **Intermittent Leave:** An employee may work an intermittent or reduced schedule and receive claim payment; however, the combined total of earned wages and claim payments may not exceed 100% of pre-leave income.

** Reflects benefits available to state employees beginning July 1, 2023; plan design options may be available for individuals and for employers sponsoring programs for their employees.*

Interplay with Other Benefits**:

- **Accrued paid time off:** An employee who is on an active VT FMLI claim and is not working an intermittent or reduced schedule basis must either choose to receive the VT FMLI payment or be compensated by accrued paid time off. An employee will not receive both VT FMLI and paid time off if for the same hours.
- **Short-term disability:** VT FMLI will be the secondary insurance benefit for other non-work related disability insurance benefits, including any group short-term disability in place.

** *As indicated in the RFP document.*

More information about options for private employers and individuals will become available in the coming months. Visit The Hartford's Vermont Voluntary Paid Family and Medical Leave Insurance webpage for updates.

Reminders and Updated Resources

As a follow-up to the information provided in our December 22, 2022 Update, below are a few reminders and links to new or updated resources.

Colorado Family and Medical Leave Insurance (CO FAMLI)

- **Reminders:**
  - Premiums and reporting for the first quarter of 2023 will be due April 30, 2023; employers must register on the MyFAMLI+ Employer portal prior to that date.
  - Leave entitlement and benefits begin January 1, 2024.
- **Updated Resources:**
  - For employees:
    - FAMLI Premiums and Benefits Estimator
    - 2023 Employee Handbook to FAMLI (*v4*)
  - Private Plans webpage, including:
    - Employer Guide to Private Plans
    - MyFAMLI+ User Guide for Private Plans (*v1.0, February 2023*)
    - Surety Bond Guidance, Calculator and Form
    - Private Plan Template

New Hampshire Paid Family and Medical Leave (NH PFML)

- **Reminder:** The enrollment period for individuals wishing to purchase NH PFML policies ends March 2. Employers may purchase group policies at any time.
- **Updated resources:**
  - MetLife's 2023 NH PFML Employer Enrollment Handbook, posted on their NH PFML webpage.
  - New Hampshire's Employer Toolkit webpage, including the Employer Toolkit (*v18 2.26.23*), an Equivalent Plan Checklist, Quote Calculators and other resources.

Oregon Paid Family and Medical Leave (OR PFML)

- **Reminders:**
  - Premiums and reporting for the first quarter of 2023 will be due April 30, 2023; employers must register on Frances Online prior to that date.
  - Leave entitlement and benefits begin September 3, 2023.

- **Updated webpages:**
  - Resources, featuring the model notice, fact sheets and guidebooks.
  - Equivalent Plans, with information on when and how to apply for a private plan, including links to:
    - Equivalent Plan Guidebook (*09.2022*)
    - Equivalent Plans Checklist
    - Solvency Guide
    - Equivalent Plan Application (*For informational purposes; applications are submitted via Frances Online*)
  - A new Contributions Calculator to help employers and employees estimate contributions due toward the state program.
  - Common Questions about Paid Leave

Accrued Paid Leave

Illinois Paid Leave for All Workers Act

On January 10 the Illinois legislature passed the Paid Leave for All Workers Act (SB208), which will require that covered employees accrue paid leave beginning January 1, 2024. With this new law Illinois joins Maine, Nevada, and Bernalillo County, NM in providing accrued leave to be used for any reason. The bill is currently with the governor, who has voiced his support and is expected to sign.

Below is a summary of the law's provisions and requirements. The Illinois Department of Labor (IDOL) will be releasing rules that may assist in clarifying certain items.

Illinois Paid Leave for All Workers Act	
Effective Date	January 1, 2024
Covered Employers	All employers, including the State and units of local government, any political subdivision of the State or units of local government, or any State or local government agency. **Excludes** school districts organized under the School Code, park districts organized under the Park District Code, and the federal government. *See also Collective Bargaining Agreements below.* Note: This law's requirements do not apply to any employer covered by a municipal or county ordinance in effect on January 1, 2024 that requires employers to provide any form of paid leave to their employees, including paid sick leave. This would include employers subject to Chicago Paid Sick Leave, or those who have not opted out of Cook County Earned Sick Leave (*click here for the opt-out listing as of January 2023, as provided by the Cook County Commission on Human Rights – please note that the list may not be inclusive of all municipalities that have opted out, as changes occur often*).
Covered Employees	All employees who work in Illinois, including domestic workers. **Excludes:** • employees as defined in the federal Railroad Unemployment Insurance Act or the Railway Labor Act;

Illinois Paid Leave for All Workers Act	
	• a student enrolled in and regularly attending classes in a college or university that is also the student's employer, and who is employed on a temporary basis at less than full time at the college or university; • a short-term employee who is employed by an institution of higher education for less than two consecutive calendar quarters during a calendar year and who does not have a reasonable expectation that they will be rehired by the same employer of the same service in a subsequent calendar year. *See also Collective Bargaining Agreements below.*
Collective Bargaining Agreements	• The law does not affect the validity or change the terms of bona fide collective bargaining agreements (CBA) in effect on January 1, 2024. After that date, the law's requirements may be waived in a CBA, but only if the waiver is set forth explicitly in clear and unambiguous terms. • The law does not apply to any employee working in the construction industry (*as defined in the Act*) who is covered by a CBA, nor to any employee who is covered by a CBA with an employer that provides services nationally and internationally of delivery, pickup, and transportation of parcels, documents, and freight.
Interplay with Company Policies	• An employer who provides any type of paid leave policy that satisfies the minimum amount of leave required under this law is not required to modify the policy if the policy offers an employee the option, at the employee's discretion, to take paid leave for any reason. • Employees may choose whether to use paid leave provided under this law prior to using any other leave provided by the employer or state law.

Leave Entitlement	• Employees accrue a minimum of 1 hour of paid leave for every 40 hours worked, beginning the later of January 1, 2024 or date of hire.
	  • For purposes of accrual, employees exempt from overtime under the Fair Labor Standards Act (FLSA) are assumed to work 40 hours in each workweek unless their regular workweek is less than 40 hours, in which case paid leave accrues based on that regular workweek.
	• Employers may limit accrual of paid leave to 40 hours of paid leave in a 12-month period unless the employer agrees to a higher amount.
	  • The 12-month period may be any consecutive 12-month period designated by the employer and communicated to employees in writing.
	  • Changes to the 12-month period may be made if notice is given to employees in writing prior to the change and the change does not reduce the eligible accrual rate and paid leave available to the employee. If the employer changes the designated 12-month period, the employer must provide employees with documentation of the balance of hours worked, paid leave accrued and taken, and the remaining paid leave balance.
	• Frontloading: As an alternative to accrual, an employer may make available the minimum number of hours of paid leave (40) to an employee on the first day of employment or the first day of the designated 12-month period. Under no circumstances may an employee be credited with an amount of leave that

Illinois Paid Leave for All Workers Act	
	is less than what the employee would accrue based on their typical workweek.
Use	• Paid leave may be used by the employee "for any reason of the employee's choosing" as long as time is taken in accordance with the law. • Employees may use accrued leave beginning March 31, 2024 or 90 days after commencement of employment, whichever is later. • Employers may limit use of accrued leave to 40 hours per designated 12-month period, and may set a reasonable minimum increment for use not to exceed 2 hours per day. If an employee's scheduled workday is less than 2 hours, the employee's scheduled workday will be used to determine the amount of paid leave. • Leave may be requested verbally or in writing, including by electronic means. • If the need for leave is foreseeable, an employer may require advance notice, not to exceed 7 days. If the need is not foreseeable, an employer may require an employee to give notice of the need for leave as soon as is practicable. An employer that requires notice of paid leave when the leave is not foreseeable must provide a written policy that contains procedures for the employee to provide notice. • An employee is not required to provide an employer a reason for the leave and may not be required to provide documentation or certification as proof or in support of the leave. • During any period an employee takes accrued leave the employer must maintain coverage for the employee and any family member under any group health plan for the duration of leave at no less than the level and conditions of coverage that would have been provided if the employee had not taken the leave. The employer must notify the employee that the employee is still responsible for paying the employee's share of the cost of the health care coverage, if any. • An employer may not require that an employee search for or find a replacement worker to cover the hours during which the employee takes paid leave. • Employers are prohibited from interfering with, denying, or changing an employee's work days or hours to avoid providing eligible paid leave time.
Pay	• Paid leave must be paid at the employee's regular rate of pay, but at a rate no less than the minimum wage in the jurisdiction in which they are employed when paid leave is taken.
Carryover	• Carryover: Accrued but unused time must carry over into the following year. The law's text does not specify a carryover limit; however, an employer may still limit *use* to 40 hours per 12-month period. • Employers who frontload time are not required to carry over paid leave from one 12-month period to the next; employees may be required to use all accrued paid leave prior to the end of the benefit period or forfeit the unused time.

Illinois Paid Leave for All Workers Act	
Termination, Transfer and Rehire	• Employers are not required to provide financial or other reimbursement to an employee upon separation from employment for accrued leave that has not been used. *However*, if paid leave under this law is credited to an employee's paid time off bank or vacation account then any unused paid leave must be paid to the employee upon the employee's termination, resignation, retirement, or other separation to the same extent as vacation time under the Illinois Wage Payment and Collection Act (820 ILCS 115/5) and its rules. • An employee transferred to a separate division, entity, or location, but still employed by the same employer is entitled to all paid leave accrued at the prior division, entity, or location. • If an employee is rehired within 12 months of termination, previously accrued leave that had not been used or paid out upon separation from employment must be reinstated. The employee is entitled to use this leave at the commencement of employment.

Notice to Employees	• Employers must notify their employees of their rights and responsibilities under the law, as well as how to file a complaint. The notice must be:
	1. posted in a conspicuous place, in English and any language spoken by a significant portion of employees; and
	2. provided to each employee by the later of March 31, 2024 or an individual's commencement of employment. This notice may be standalone or incorporated into any written policy that the employer maintains, such as an employee handbook.
	IDOL will publish a model notice in several languages for employers to utilize for this purpose.
	• Upon an employee's request, an employer that provides paid leave on an accrual basis must provide notice of the amount of paid leave accrued or used by the employee in accordance with the employer's reasonable paid leave policy notification provisions.
	• Additional notification requirements:
	  • As noted in Leave Entitlement above, if an employer changes the 12-month period designated for accrual and use, the employer must notify employees in writing prior to the change, and provide documentation of the balance of hours worked, paid leave accrued and taken, and the remaining paid leave balance.
	  • Within 5 calendar days of any change to the employer's reasonable paid leave policy notification requirements, the employer must provide employees with written notice of the revised requirements in accordance with the notice and posting requirements above.

Recordkeeping	Records documenting hours worked, paid leave accrued and taken, and remaining paid leave balance for each employee must be maintained for a period of not less than 3 years. Employers must allow IDOL access to such records, at reasonable times during business hours, to monitor compliance with the law's requirements.

Michigan Paid Medical Leave Act – Status of Litigation

Our October 28, 2022 Update outlined potential changes to Michigan's accrued paid sick leave law as result of a 2021 lawsuit filed by multiple plaintiffs. The lawsuit called for a reversion of paid sick leave requirements to their original form as the Michigan Earned Sick Time Act (MI ESTA), stating that the method by which they were amended was unconstitutional. Last July the Michigan Court of Claims ruled in favor of the plaintiffs, but agreed to delay enforcement of the decision until February 20, 2023. In response to the State of Michigan's appeal the Michigan Court of Appeals overturned the Court of Claims' decision on January 26, issuing the opinion that it is the "authority of the Legislature to amend initiated laws enacted by that body".

While it is possible that the Court of Appeals' ruling may be appealed to the Michigan Supreme Court, for now there are no changes to the Michigan Paid Medical Leave Act.

Bloomington, MN Earned Sick and Safe Leave Amendments

On January 23, the mayor of Bloomington approved Ordinance No. 2023-1, making amendments to the city's Earned Sick and Safe Leave (ESSL) law in advance of its effective date of July 1, 2023. The amendments will be incorporated into Chapter 23 of the City Code and include:

- an added note that an employer may, but is not required to, permit ESSL time to accrue in increments smaller than one hour (*§23.06*);
- the requirement that the amount of ESSL an employee has (1) accrued and (2) used be reflected on employees' earnings statements each pay period, in accordance with MN Stat. §181.032. The original law required that this information only be provided upon an employee's request (*§23.10*); and
- a revised schedule for penalties associated with non-compliance (*§23.18; schedule will be added to Appendix A*).

For more information on Bloomington ESSL, visit the city's dedicated webpage. Updated resources, including FAQ, rules, and the model notice, are scheduled to be posted in the coming weeks. Additional details may found in our July 26, 2022 Update (*note that this summary does not include the amendments above*).

St. Paul, MN Earned Sick and Safe Time Amendments

On January 19 the mayor of St. Paul signed Ordinance No. 23-2, amending the city's Earned Sick and Safe Time (ESST) law (Leg. Code Ch, 233) effective February 18, 2023. The amendments do not make significant changes to the law's requirements, but rather clarify certain elements:

Method of Compliance:

- Accrual:
  - Employees accrue 1 hour of ESST for every 30 hours worked, beginning on date of hire. Accrual is based on the hours an employee works within the geographic boundaries of the city.
  - Employers may limit accrual to 48 hours per year*.
    - * *The amendment redefines "year" as a regular and consecutive 12-month period, either calendar or fiscal, as determined by the employer and clearly communicated to each employee.*
- Frontloading:
  - As an alternative to accrual, employers may "frontload" time as follows:
    a. at least 48 hours of ESST for use by the employee during the first year for use following the initial 90 days of employment; *and*
    b. at least 80 hours of ESST at the beginning of each subsequent year.
- *New* - Employers must establish the method of compliance (i.e., accrual or frontloading) at the beginning of the calendar or fiscal year, and may not change the method until the following reporting year.
- *New* - Employers who switch between one method of compliance to the other must ensure that employees have at least as many ESST hours available on the first day of the new reporting year as the employee had on the last day of the immediately preceding reporting year.

- For employers who switch from accrual to frontloading, the total ESST hours frontloaded on the first day of the reporting year must be at least 48 hours for employees in their first year of employment, but need not be greater than 80 hours for all other employees.
- For employers who switch from frontloading to accrual, the total balance available to the employee at the start of the first reporting year after the employer has modified the method of compliance must be at least equal to the frontloading balance remaining at the end of the immediately preceding reporting year.

Carryover:

- Employers must permit an employee *who has worked within the geographic boundaries of the city for more than one year* to carry over accrued but unused sick and safe time into the following year (*section in italics is new*).
- Time carried over is limited to, and employers must allow employees to (continue to) accrue up to, 80 hours of ESST, unless the employer agrees to a higher amount.
- Carryover is not required when time is frontloaded as described above.

Use:

- Employers are required to allow employees to use time accrued under the law during hours the employee is scheduled to work within the city, but may permit time to be used for work hours scheduled outside of the city.
- Employers may:
  - comply with ESST requirements with a paid-leave policy, including a policy made up of a combination of sick, personal, and vacation leave, that meets the law's accrual requirements and that may be used for the same purposes and under the same conditions;
  - adopt a more generous earned sick and safe time policy;
  - permit employees to voluntarily exchange hours or trade shifts;
  - permit employees to donate unused, earned sick and safe time to another employee;
  - advance sick and safe time to an employee prior to accrual.

The ordinance also expands the sections of the law relating to anti-retaliation protections and enforcement.

Further clarification may be provided by the city in the form of updated rules. Additional ESST information and resources may be found on the St. Paul Department of Human Rights & Equal Economic Opportunity's dedicated webpage.

Other News

California – Bereavement Leave Clarification

In our October 28, 2022 Update we summarized two changes in California law effective January 1, 2023: the enactment of bereavement leave and the addition of "designated person" to family members covered under the California Family Rights Act (CFRA). As the bereavement leave law borrows from CFRA for defining covered family members, and as both laws were enacted on the same day, there was question as to whether the expanded list of family members would also apply to bereavement leave.

We consulted with legal resources and with a member of California's Employment Development Department (CA EDD), and the opinion is that since the bereavement leave law text specifically identifies covered family members as the employee's spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law (*as defined under CFRA*) it is unlikely that the intention was to include designated persons as well.

San Francisco, CA – Military Leave Pay Protection Act

On January 20 the mayor of San Francisco approved Ordinance No. 008-23, adding Article 33Q to the city's Police Code effective February 19, 2023. The ordinance requires private employers to provide their San Francisco employees with "Supplemental Compensation" for up to 30 days of Military Duty per year. For purposes of the ordinance, the following definitions apply:

Employer: Any employer who regularly employs 100 or more employees, regardless of location, excluding the City or any other governmental entity.

Employee: Any employee who (1) works within the geographic boundaries of San Francisco, including but not limited to part-time and temporary employees, and (2) who is a member of the reserve corps of the United States Armed Forces, National Guard, or other uniformed service organization of the United States. Employees covered by a bona fide collective bargaining agreement that expressly waives the law's requirements in clear and unambiguous terms are excluded.

Military Duty: Active military service in response to the September 11, 2001 terrorist attacks, international terrorism, the conflict in Iraq, or related extraordinary circumstances, or military service to provide medical or logistical support to federal, state, or local government responses to the COVID-19 pandemic, natural disasters, or engagement in military duty ordered for the purposes of military training, drills, encampment, naval cruises, special exercises, Emergency State Active Duty, or like activity.

Supplemental Compensation: The difference between the amount of the employee's gross military pay and the amount of gross pay the employee would have received had the employee worked their regular work schedule, excluding overtime unless regularly scheduled as part of the employee's regular work schedule.

Leave for Military Duty with Supplemental Compensation may be taken in daily increments for one or more days at a time, for up to 30 days in any calendar year.

- The amounts of pay required may be offset by amounts required to be paid under another law or under an employer's military leave policy, so that the employee does not receive an amount greater than their regular pay.
- If an employee is able to return to their position with the employer but does not do so within 60 days of release from Military Duty may, at the employer's discretion, be required to pay back any Supplemental Compensation received, with interest.

New York – Electronic Access to Required Postings

On December 16, 2022 the governor of New York signed A7595, immediately amending Labor Law §201. The amendment adds the requirement that any notice required by state or federal law to be physically displayed in the workplace must also be made available on the employer's website or by email, and that employees be notified as to how to access.

New York – Lactation Accommodations

On December 9, 2022 the governor of New York signed S4844, which amends workplace accommodation requirements for nursing mothers (Labor Law §206-C) effective June 7, 2023. Current requirements state that an employer must provide reasonable break time for an employee to express breast milk for up to three years from her child's birth. The amendment adds the following:

- Upon request of an employee who chooses to express breast milk in the workplace an employer must designate a room or other location to be made available for use by the employee for this purpose. If the space is not solely dedicated for use by employees to express breast milk, it must be made available to the employee when needed and may not be used for any other purpose or function while in use by the employee. The space provided may not be a restroom or toilet stall. The employer must provide notice to all employees as soon as practicable when the space has been designated for use by employees to express breast milk.

  The designated space must be (1) in close proximity to the employee's work area; (2) well lit; (3) shielded from view; and (4) free from intrusion from other persons in the workplace or the public. Additionally, it

must include a chair, a working surface, nearby access to clean running water and, if the workplace is equipped, an electrical outlet and a refrigerator.

- If the specific requirements above would result in significant difficulty or expense when an employer's size, financial resources, nature, or structure are considered, the employer must make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breast milk in privacy.
- Employers must provide a written policy to each employee upon hire and annually thereafter, and to employees upon returning to work following the birth of a child, that informs them of their rights under the law, provides instruction as to how a request for accommodation may be submitted, and specifies that the employer is required to respond to such a request within five business days.
- No employer or their agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, may discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee for exercising their rights under the law.

More information and resources are available on the New York Department of Labor's Nursing Mothers in the Workplace webpage.

Please contact your MMA account team members with specific questions about this or other Updates. View past Updates on the Absence, Disability & Life blog at https://mma-adl.com/blog/.