

THE
NATIONAL LAW REVIEW

Paid Leave: Coming to a Michigan Workplace Near You

Friday, September 7, 2018

On September 5, 2018, the Michigan Senate and House of Representatives adopted a citizen-initiated paid leave ballot proposal that was supposed to be put to a vote in the November 2018 general elections. Unlike the ballot initiative, which would have had immediate effect, the adopted proposal will not go into effect until 90 days after the end of the current legislative session, on or about April 1, 2019. Without immediate effect, the legislature will have an opportunity to amend the proposal after the general election in what is commonly known as the lame duck session. The advantage to employers is that the legislature and Governor Rick Snyder have the ability to rewrite the adopted proposal with a simple majority rather than a supermajority of 75 percent of both chambers, which would have been required had the proposal been voted into law at the polls. Essentially, this means paid leave will be required in Michigan workplaces in the spring of 2019.

Whether the paid leave requirements will be as adopted on September 5, 2018, or revised in the final two months of 2018, many employers with Michigan operations will be required to provide their employees with annual paid time off for reasons that are currently permitted under the Family and Medical Leave Act (FMLA). In addition to FMLA-covered absences, the adopted proposal permits paid leave in cases of domestic violence and/or sexual assault, to attend meetings at a child's school or place of care, and in cases of school or business closures ordered by public officials. The adopted proposal provides employees of small businesses, defined as those with fewer than 10 employees, with up to 40 hours of annual paid leave and provides employees of businesses with 10 or more employees with up to 72 hours of annual paid leave. There may be some maneuvering to limit application to only larger employers (perhaps only those covered by the FMLA), to limit application to employees who are not exempt from the overtime provisions of the Fair Labor Standards Act, and to reduce the amount of annual paid leave for all covered businesses.

There is plenty more in the adopted proposal that employers will not like. For example, the definition of "family member" includes individuals related by affinity, which throws open the door to taking paid leave to care for a neighbor or friend. There is also a question about the provision prohibiting retaliatory action, which arguably restricts employer rights under existing attendance policies and the FMLA. None of these provisions are likely to survive legislative tinkering. Nor does it seem likely that the provision making employers responsible for the employee's out-of-pocket costs of obtaining a doctor's note will make the final cut. A similar fate can be expected for the provision that would allow employees to take paid leave in the smallest increment that the employer's payroll system uses to account for absences. Indeed, leaving this provision intact would be an administrative nightmare, encourage bad attendance, and possibly even mean that employees would seldom ever be disciplined for being late for work again. Finally, it is doubtful the legislature will leave the private cause of action provision in the final version of the adopted proposal.

Apart from these obvious concerns, the adopted proposal raises plenty of additional questions and creates doubt about employer obligations. It creates conflict with rights employers have come to rely upon under the Americans with Disabilities Act and the FMLA, like the ability to challenge doctor's notes through the medical



Article By
[Daniel G. Cohen](#)
[Ogletree, Deakins, Nash, Smoak & Stewart, P.C.](#)
[Our Insights](#) [Labor & Employment](#)
[Michigan](#)

certification and second medical opinion process, the right to 30 days' notice for foreseeable leave, and the right to require employees to exhaust available paid leave at the front end of a medical leave.

We know paid leave for Michigan will be here in the spring, but will it resemble the FMLA, applying only to businesses with 50 or more employees? And will employers be allowed to enforce their attendance policies and continue to administer their FMLA and ADA policies with minimal interruption? All eyes will be on Lansing after the November 2018 general elections.

© 2019, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

Source URL: <https://www.natlawreview.com/article/paid-leave-coming-to-michigan-workplace-near-you>