


Minimum Wage & Earned Sick Time Act (ESTA) Update



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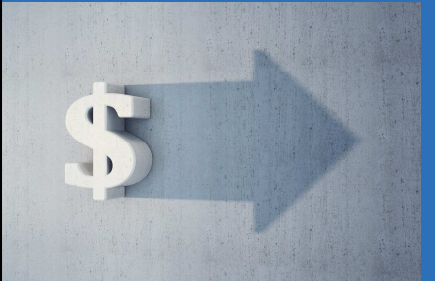
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Procedural Posture

- **Status:** approved on Sept. 5, 2018, by the Michigan Legislature
- **Effective date:** 90 days from when current legislative session ends (around 4/1/19)
- **Speculation:** Legislature may amend both measures in lame-duck session after November 2018 elections. Supporters have threatened legal action if Legislature amends laws in lame-duck session to reduce protections

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Improved Workforce Opportunity Wage Act



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Minimum Hourly Wage

The Improved Workforce Opportunity Act sets the minimum hourly wage as follows:

- January 1, 2019: \$10.00
- January 1, 2020: \$10.65
- January 1, 2021: \$11.35
- January 1, 2022: \$12.00
- January 1, 2023 and thereafter: minimum wage adjusted by increase in CPI-W.
 - No increase if prior year unemployment rate is 8.5% or higher

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Tipped Employees

Increases minimum hourly wage for tipped employees as follows:

- January 1, 2019: 48% of \$10.00 (\$4.80)
- January 1, 2020: 60% of \$10.65 (\$6.39)
- January 1, 2021: 70% of \$11.35 (\$7.95)
- January 1, 2022: 80% of \$12.00 (\$9.60)
- January 1, 2023: 90% of minimum wage
- January 1, 2024: 100% of minimum wage

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Minimum Hourly Wage

- Retains \$4.25/hour training wage for employees under 18 for first 90 days of employment.
- Thereafter, employees under 18 may be paid 85% of otherwise applicable minimum wage.

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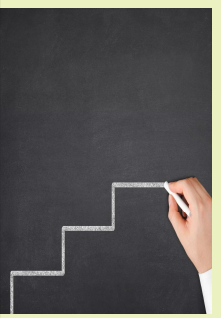
Earned Sick Time Act (ESTA)



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ESTA Basics

The goal of the ESTA is to allow employees to accrue and use paid sick time.



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Who is an employer under the ESTA?

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- An employer includes any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that employs at least one individual. Under the ESTA, the United States government does not qualify as an employer. § 2(g).
- If an employer had 10 or more employees working on its payroll for 20 or more work weeks in the current year or in the previous year, the employer is not a small business under the ESTA. § 2(l).

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What is the rate of accrual for sick time under the ESTA?

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- Employees (full or part time or temporary) accrue one hour of earned sick time for every 30 hours of work.
- **Employees hired prior to April 1, 2019:** sick time begins to accrue as soon as the ESTA takes effect. Those employees may use the earned sick time as it accrues.
- **Employees hired after April 1, 2019:** Sick time begins to accrue from the first date of employment, but employers may require that a new employee not use any accrued sick time until the 91st day after commencing employment.

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What should an employer do about employees who usually do not keep track of their hours (e.g., salaried employees and professionals)?

- These employees, and any similar employees exempt from overtime under § 13(a)(1) of the Fair Labor Standards Act, are assumed to work 40 hours a week and earned sick time is calculated accordingly.
- If an exempt employee normally works less than 40 hours a week, then earned sick time is accrued at the normal number of hours that employee works in a work week. § 3(4).

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How much paid sick time may an employee take?

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Depends on the size of the business...

- **Larger businesses:** an employee is guaranteed up to 72 hours of paid sick time in a year. § 3(1)(b).
- **Small businesses:** an employee is guaranteed up to 40 hours of paid earned sick time in a year. Additionally, if employee accrues more than 40 hours of earned sick time in a calendar year, the employee is entitled to an additional 32 hours of unpaid sick time in that year (unless employer allows more).

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- An employee's accrued sick time rolls over from year to year. However, an employee is not entitled to take more sick time off than the amounts allotted for a single year (i.e., subject to 40/32 and 72-hour limits). § 3(1)(c).
- A "year" is a regular and consecutive 12-month period defined by the employer.

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- Sick time may be used in the smaller of hourly increments or the smallest increment that the employer's payroll system allows to account for absences of use of other time. § 4(3).
- Employee allowed to use paid time before using unpaid sick time. § 3(1)(a).

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When may an employee use earned sick time?

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Permitted uses of earned sick time

- Mental or physical illness or injury of the employee or the employee's family member;
- Medical diagnosis or treatment of an illness or injury of the employee or the employee's family member;
- Preventative medical care for the employee or the employee's family member;
- For matters arising from the employee or the employee's family member being a victim of domestic violence or sexual assault;
- For meetings at a 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;

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Permitted uses of earned sick time (cont.)

- If the employee's 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 and the employee needs to care for the child; or
- If a public official or healthcare provider determines that the health of others may be jeopardized because of the employee or the employee's family member's exposure to a communicable disease.

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Family Member:

- Child (biological, step, foster, legal ward, child of domestic partner, in loco parentis)
- Grandchild
- Spouse or domestic partner
- An adult in a committed relationship with another adult, including same or opposite sex relationships
- Committed relationship means one where employee and other individual share responsibility for a significant measure of each other's common welfare

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Family Member:

- Parent (biological, foster, step, adoptive, legal guardian)
 - of employee, employee's spouse, or domestic partner (so "in-laws" are included)
- Person who stood in loco parentis to employee when s/he was a minor
- Grandparent
- Sibling (biological, foster or adopted)
- Any other individual related by blood or affinity whose close association with employee is equivalent to a family relationship

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Requiring evidence from employees that the sick time was used for the proper purpose

- For earned sick time of more than 3 consecutive calendar days, employer may require documentation (but employer cannot require documentation to describe the nature of the illness or the nature of the domestic violence).
- Employer must pay any costs incurred by employee in securing documentation.
 - May the employer select and pay for the medical provider?

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At what rate do employees need to be paid when taking earned paid sick time?

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- The ESTA requires that employees be paid either their normal hourly wage or the state minimum wage (for tipped employees paid less than minimum wage) for paid time off, whichever is higher. § 3(6).
- If an employer pays its employees at different rates depending on the work the employee is doing, the employee's normal hourly wage is the average hourly wage in the pay period prior to the employee using paid sick time. § 3(6).

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May an employer require advanced notice of an employee's intention to use sick leave?

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- If the employee's use of earned sick time is foreseeable, an employer may require up to 7 days of advanced notice.
- If the employee's use of the earned sick time is not foreseeable, then the employer may require the employee to give notice as soon as practicable. § 4(2).

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May an employer require an employee to search for a replacement worker when taking earned sick time?

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Hiring Replacement workers

- An employer cannot require an employee to search for a replacement worker when taking earned sick time. § 3(7).

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If an employee never uses the employee's accrued sick time, does the employer have to compensate the employee for that time?

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- No. § 5(3).
- “This act does not require an employer to provide financial or other reimbursement to an employee for accrued earned sick time that was not used upon the employee’s termination, resignation, retirement, or other separation from employment.” § 5(3).

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Does the ESTA apply to employees outside of the State of Michigan?

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- Likely no.
- “Each employer shall provide earned sick time to each of the employer’s employees in this state.” § 3(1)

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Are employers required to provide notice of an employee's rights under this Act?

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ESTA Notification Requirement

- Provide **written notice** to each employee by April 1, 2019, or on the employee's hiring date, whichever is later.
- Notice must include:
 - Amount of earned sick time provided to the employee under the ESTA;
 - How the employer calculates a "year" for the purposes of taking earned sick time (this may be any consecutive 12-month period);
 - Under what conditions an employee may use earned sick time under the ESTA;
 - That retaliatory action by the employer for exercising rights under the ESTA is prohibited; and
 - The employee's right to bring a civil action or file a complaint with the Department of Licensing and Regulatory Affairs against the employer. § 8(1).

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ESTA Notification Requirement (cont.)

- Employers must display posters in the employer's place of business containing the same information.
- Forms for the notices and copies of the posters will be made available by the Department of Licensing and Regulatory Affairs. §§ 8(3) and (4).
- The notice and posters must be in English, Spanish, and any other language spoken by 10% of the workforce as long as the Department has translated the posters and notices into those languages. §§ 8(2) and (3).
- A violation of these notice and posting requirements may result in a civil fine of up to \$100 per violation. § 7(5).

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How does the ESTA define “retaliatory” actions?

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Anti-Retaliation Policy

- ESTA requires employers not to interfere, restrain, take retaliatory actions, or discriminate against employees who use earned sick time or otherwise exercise rights under the ESTA. §§ 6(1)-(3).
- Any of the following are considered retaliatory actions under the ESTA:
 - Denying an employee a right guaranteed by the ESTA;
 - Threatening or actually discharging, suspending, demoting, reducing the hours of, or otherwise taking an adverse action against an employee for exercising rights under the ESTA;
 - Issuing sanctions against an employee who is a recipient of public benefits for exercising rights guaranteed by the ESTA; or
 - Interfering with or punishing a person's participation in an investigation, proceeding, or hearing under the ESTA. § 2(j).

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Anti-Retaliation Policy (cont.)

- In addition, there is a rebuttable presumption of retaliation if an employer takes adverse personal action against a person within 90 days after that person does any of the following:
 - Files a complaint with the department or a court alleging a violation of this act.
 - Informs any person about an employer's alleged violation of this act.
 - Cooperates with the department or another person in the investigation or prosecution of any alleged violation of this act.
 - Opposes any policy, practice, or act that is prohibited under the ESTA.
 - Informs any person of his or her rights under this act. § 6(5).

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What document retention policies are required by the ESTA?

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ESTA's document retention policy requirements

- Employers must retain the records documenting hours worked and earned sick time taken by employees for at least three years.
- Employers must allow the Department of Licensing and Regulatory Affairs to have access to these records with appropriate notice and at an agreeable time.
- If there is a question concerning violation of the ESTA and the employer has not maintained these records, it will be presumed that the employer violated the ESTA. § 10.

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What are the damages and fines for violating the ESTA?

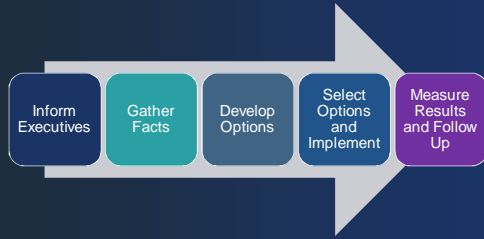
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Damages and Fines for violating ESTA

- Within three years of a violation, an employee may bring a civil action against the employer for damages and possible restitution and/or may file a claim with the Department of Licensing and Regulatory Affairs. § 7(1).
- The Department of Licensing and Regulatory Affairs will enforce, receive complaints, and investigate non-compliance with the ESTA. The Department may also act as a mediator between employees and employers in resolving disputes under the ESTA. §§ 2(a)-(c).
- The Department, after issuing a notice of violation to an employer, may impose penalties on the employer or grant relief to the employee. If the Department is unable to achieve voluntary compliance with its measures within a reasonable time, the Department shall bring a civil action on behalf of the affected employee(s) against the employer. Additionally, the employer may be liable for up to a \$1,000 civil fine for violating this act. §§ 2(d), 3, and 4.
- The director of the Department of Licensing and Regulatory Affairs may also pass regulations necessary to administer the ESTA under the Michigan Administrative Procedure Act, § 13.

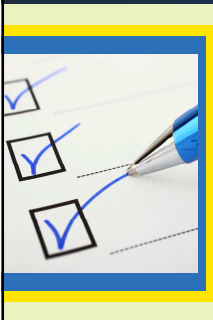
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Legal Counsel



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What do you do right now?



- Financial
- Record Keeping
- Timing
- Vacation/ PTO/ Paid Sick Time/ Bereavement/ Jury
- Attendance Policy
- Communication
- Employee Turnover and Engagement
- Union Contracts

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Financial

- Let your CFO and CEO know this is coming.
- This could increase your labor cost by 3.5%.

Record Keeping

- Explore your HRIS/Payroll systems.
- What are they capable of tracking?
- How are you going to mechanically keep track of this?
Especially in small increments of time.

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Timing

- Look at your benefit year for purposes of vacation/PTO/sick leave, attendance and FMLA.
- Are you calendar based?
- Do they roll with the employee's seniority date?
- You need to know this as you work through your options.

Vacation/PTO/Paid Sick Time/ Bereavement/ Jury

- Look at all your policies where you pay people to not be at work.
- Do you want to rob Peter to pay Paul?

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Coordinating Benefits

- What are your STD/LTD policies/practices right now?
- Start looking at how you might want to amend them to encourage employees to hang onto their 72 hours.

Attendance Policy

- What is your attendance policy?
- Is it points based?
- Should you amend it?
- This will force employees to use their ESTA benefits.

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Communication

- Do you want to let stakeholders know something is coming?
- Do you want to manage employee expectations?
- Do you want to tell employees right now what policies and practices may be impacted?
- What is your temporary employee agency going to do?
 - Who is paying for the sick time?

Employee Turnover and Engagement

- How is your turnover and engagement?
- Managing this based only on cost might result in increased turnover and decreased employee engagement.

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Union Contracts

- What effect does the ESTA have on Union Negotiated Contracts or Collective Bargaining Agreements (CBA)?
- If employees are covered by a CBA, the Act does not apply until expiration of the agreement (notwithstanding that the agreement is extended or continues in effect post-expiration).
- Develop a strategy now for when your CBA expires.

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Questions and Answers



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Thank You!

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