

# MICHIGAN'S PAID MEDICAL LEAVE ACT: HOW IT AFFECTS TRUCKING INDUSTRY EMPLOYERS

In late December, 2018, the Michigan Legislature passed the Paid Medical Leave Act (PMLA), after a similar ballot proposal on the same issue was approved for the November, 2018 election. There has been considerable confusion among trucking industry employers about how the PMLA affects them. Here are some key points about how the PMLA affects trucking companies.

- **The PMLA Covers Employers With 50 or More Employees**

If your company employs fewer than 50 persons, it is not covered by the PMLA. To make this determination, all full-time, part-time and temporary employees are counted, whether or not they work in Michigan. Also, because the PMLA treats a person as an employee if the IRS requires him/her to be treated as a W-2 employee, a person who is a "leased employee" or an owner-operator may also count as an employee if he/she would be classified by the IRS as your employee rather than an independent contractor.

- **Some Kinds of Employees Are Not Eligible For PMLA Leave**

There are several exclusions from the PMLA's definition of "Eligible Employee". For example, employees who are exempt from the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) because they satisfy the requirements to be exempt professional, managerial, administrative or outside sales employees are not eligible for PMLA leave. Even though truck drivers that are subject to the Federal Motor Carrier Safety Act (FMCSA) are also exempt from the FLSA's overtime pay requirement, they have not been excluded from the PMLA's "Eligible Employee" definition.

An employee whose primary work location is outside of Michigan is also not eligible for PMLA leave. That said, the Act does not explain how to determine an employee's primary work location. You might assume that a truck driver's "primary work location" is the driver's truck and that, if the driver's duties require him/her to spend more time outside of Michigan than within Michigan, the driver is not an "Eligible Employee" under the PMLA. Under this theory, at least some interstate drivers could be carved out from the employer's PMLA obligations. Nonetheless, an employer who wants to make this argument will need to maintain detailed records of the employee's activities and calculate the percentage of each driver's time spent outside of Michigan. Employers should keep also in mind that a different method of determining an employee's primary work location may ultimately be adopted by the Michigan Department of Labor, such as the location of the employee's "home base", reporting location or "domicile". Thus, employers should contact their labor counsel if there is any doubt about whether an employee's "primary work location" is in Michigan.

Also, certain temporary and part-time employees are not eligible for leave under the PMLA. For example, employees who worked, on average, less than 25 hours per week during the calendar year before the year for which PMLA leave eligibility is determined are not considered PMLA "Eligible Employees". For example, an employee who worked fewer than 25 hours per week, on average, during 2018, would not be eligible for PMLA leave in 2018.

Similarly, employees who the employer has classified as “variable hour employees” for the purpose of the coverage and contribution mandates of the Affordable Care Act (ACA) are not PMLA Eligible Employees. Also, employees who were employed for 25 weeks or less in a calendar year in a job scheduled for 25 weeks or less are also not eligible for PMLA leave.

Finally, employees who are employed by a private employer and who are covered by a union contract that is in effect are not considered PMLA “Eligible Employees”. Thus, employees of private trucking companies who are covered by a collective bargaining agreement that has not expired are not entitled to PMLA leave.

- **The Reasons an Employee May Take PMLA Leave Are Broader Than Those For Which FMLA Leave Must Be Allowed**

Although the title of the PMLA implies that applies only to medical leave or that it covers leave for the same reasons for which leave may be taken under the federal Family and Medical Leave Act (FMLA) the PMLA allows leave to be taken for many more (and different) reasons. For example, while FMLA leave based upon the medical reasons may only be taken for a “serious medical condition”, PMLA leave may be taken for preventative care, such as an annual physical or medical screening test, as well as any mental or physical illness, injury or health condition (or the diagnosis, treatment or care of such a condition). Thus, an employee may take PMLA leave because he/she has a common cold. PMLA leave may be taken for the same medical reasons involving the employee’s family member.

PMLA leave may also be taken due to certain non-medical reasons. If an employee or his/her family member is a victim of domestic violence or sexual assault, PMLA leave may be taken for medical care or psychological or other counselling, to obtain services from a victim services organization, to relocate due to domestic violence or sexual assault, to obtain legal services or to participate in any legal proceeding relating to or resulting from the domestic violence or sexual assault. Also, PMLA leave may be taken for certain reasons related to a public health emergency or exposure to a communicable disease affecting the employee or his/her family member.

- **The PMLA Has Complex Leave Accrual and Availability Requirements, Which May be Satisfied by Some Employer Paid Leave Policies**

The Paid Medical Leave Act requires an employer to accrue one hour of PMLA leave for every 35 hours worked by a covered employee. An employer is not required to accrue more than 1 hour of PMLA leave per calendar week. Also, the employer may limit an employee’s PMLA leave accrual to 40 hours per “benefit” year (which can be any consecutive 12 month period).

The employer has two options to make accrued PMLA leave available to an employee. First, the employer may elect to make PMLA leave available to an employee only as it accrues, however, the employer must allow the employee to carry over any accrued, but unused PMLA leave up to 40 hours from one benefit year to the next benefit year. Nonetheless, the employer is not required to permit the employee to use more than 40 hours of PMLA leave in a single benefit year. Under the second option, the employer may refuse to allow an employee to carry over any unused PMLA leave to the next benefit year, but it must “front load” 40 hours of accrued PMLA leave for the employee at the start of each benefit year. Regardless of which option is chosen, an employer may require that a newly-hired covered employee wait up to 90 calendar days after starting employment to begin using accrued PMLA leave.

The PMLA states that if the employer provides at least 40 hours of “paid leave” to an employee each benefit year, there is a rebuttable presumption that it has complied with the PMLA’s leave requirements. “Paid leave” includes paid vacation, paid personal days and paid time off that can be used for any of the purposes permitted by the

PMLA. Thus, paid sick days do not count as “paid leave” for the purpose of the PMLA. Because the PMLA does not state what may be enough to rebut the presumption that providing 40 hours of paid leave satisfies the PMLA leave requirements, employers should be careful to confirm that none of the employer’s rules regarding the use of “paid leave” are contrary to the PMLA’s specific requirements, such as the notice requirements described below.

- **The PMLA’s Not so Simple Notice and Documentation Requirements**

The PMLA requires that an Eligible Employee comply with his/her employer’s “usual and customary” notice, procedural and documentation requirements when requesting PMLA leave. Nonetheless, regardless of those requirements, the employer must give the employee no less than 3 days to provide the required documentation. The PMLA also limits the nature of the documentation that may be required if the leave is requested based upon domestic violence or sexual assault committed against the employee or his/her family member. The Act also requires that the employer treat as confidential any information that it possesses regarding the domestic assault or sexual abuse of an employee (or his/her family member) and not disclose it other than to the affected employee or with the permission of the affected employee. **The PMLA Has Its Own Poster and Record Retention Requirements**

The Michigan Department of Labor has published its own PMLA poster, which must be posted in conspicuous places accessible to all employees covered by the PMLA. Also, the PMLA requires that an employer keep for at least 1 year records documenting the hours worked and paid medical leave used by its employees.

The Michigan Department of Labor has issued FAQs about the PMLA. We anticipate more guidance, including regulations, will be published in the future. The D&F Transportation and Logistics Law Group are ready to answer your questions about complying with the Michigan Paid Medical Leave Act.

## **PRACTICE AREAS**

- Transportation and Logistics Law