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Dear Friends and Clients:

We hope all is going well with you and your business this summer. We are writing to inform you of a [July 19, 2022, decision](#) in Michigan's Court of Claims. The decision is already being challenged. If ultimately upheld, the ruling would greatly increase the cost of running a business in Michigan. We are monitoring the status of this far-reaching decision. For now, the following summary outlines the potential financial and administrative impact on Michigan businesses.

Because of this development, however, you may want to review your existing paid leave or PTO policy to determine your exposure in the event the existing law is overturned.

Executive Summary

At issue are two worker-friendly 2018 laws, the Earned Sick Time Act (later known as the Paid Medical Leave Act) and the Improved Workforce Opportunity Wage Act, both of which were approved citizen initiatives adopted, as written, by the Legislature in September 2018. Just three months later, however, a simple majority in the Legislature amended both laws, substantially watering down their provisions. The "adopt-and-amend" procedure allowed the Republican majority to keep the popular measures off the November 2018 ballot. If the initiatives had appeared on the ballot and won the majority vote of the citizenry, the citizen-approved laws could only have been amended by a super-majority, or the three-quarters of the Legislature.

The Court of Claims held the Legislature's procedure to pass and then change the laws was "legislative sleight-of-hand," preventing the approved ballot initiative, as it was originally drafted, from ever becoming law. The procedure, opined the Court, wrongfully denied Michiganders the opportunity to vote on the initiative as it was initially presented.

Under Michigan's Constitution, the Legislature has three options when it receives an approved citizen initiative: **(1)** It can adopt the initiative as presented; **(2)** reject it, and allow the initiative to appear on the ballot; or **(3)** reject it and propose an alternative law to appear on the ballot along with the initiative. The procedure used here, the Court said, "thwarted the power of the People to initiate laws and then vote on those same laws" and violated the Constitution. The Court's remedy was to void the amended versions of the initiatives, and give effect to the laws as approved before amendment in their original forms.

The Earned Sick Time Act versus the Paid Medical Leave Act

The Earned Sick Time Act, among other provisions, required all employers, regardless of size, to offer workers from 40 to 72 hours of paid sick time. The amended version applies only to employers with at least 50 employees, and requires a maximum of 40 hours paid medical leave.

The Improved Workforce Opportunity Wage Act

Under the [pre-amendment version](#) of the Improved Workforce Opportunity Wage Act, the minimum wage increases to \$12 per hour and tipped employees must be paid — in addition to tips — a minimum of \$9.60 per hour, rising to the minimum hourly wage of \$12 by 2024. Both the original and amended versions of the law require overtime pay and allow employers to elect to give compensatory time in lieu of overtime pay.

The chart below compares certain key provisions of the Earned Sick Time Act, the Paid Medical Leave Act, and the original and amended versions of the Improved Work Force Opportunity Wage Act.

<u>Original Voter Initiative:</u>	<u>Challenged Current Statute:</u>
Earned Sick Time Act	Paid Medical Leave Act
Applies to all employers (except the United States government) with at least one employee.	Applies only to employers with at least 50 or more employees.
Employees accrue sick time at a rate of 1 hour per every 30 hours worked, to a maximum of 72 hours per year.	Employees accrue “paid medical leave” at a rate of 1 hour for every 35 hours worked, to a maximum of 40 hours per year.
Employers with 10 or more employees must provide a maximum of 72 hours paid sick time per year. Small businesses, with fewer than 10 employees total (full-time and part-time) must provide up to 40 hours of paid sick time and up to an additional 32 hours of time off without pay.	
Exempt and non-exempt employees are entitled to accrue sick time. Exempt workers are presumed to work 40 hours per week.	Only non-exempt (hourly) employees accrue sick time.
Both full-time and part-time employees can accrue sick time.	Only employees who have worked at least an average of 25 hours per week in the previous calendar year may accrue paid medical leave.

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<p>Employees can carry over unused sick time from one year to the next, although small businesses would not be required to provide more than 40 hours paid sick time in one year, and other employers would not be required to provide more than 72 hours paid sick time in any one year.</p>	<p>Employers are not required to allow an employee to carry over more than 40 hours of unused paid medical leave. An employer is not required to provide more than 40 hours of paid medical leave in one year. The law also contains a provision that allows employers to avoid any carry-over of unused paid medical leave hours.</p>
<p>Explicitly forbids any retaliation against employees for using accrued sick time.</p>	<p>Does not contain any retaliation provision.</p>
<p>Sick time can be used in the “smallest increment that the employer’s payroll system uses to account for absences or use of other time.”</p>	<p>Leave must be used in increments of one hour, unless the employer has a different increment policy that is in writing.</p>
<p>An employer other than a small business is in compliance with the law if it “provides any paid leave in at least the same amounts as that provided under this act that may be used for the same purpose and under the same conditions provided in this act and that is accrued at a rate equal to or greater than the rates described.” A small business must provide leave, as above, but its employees must be “entitled to use paid earned sick time before using unpaid earned sick time.” Paid leave includes paid vacation days, personal days and paid time off.</p>	<p>There is a rebuttable presumption that an employer is in compliance with the act if it provides at least 40 hours of paid leave to an eligible employee. Paid leave includes vacation days, paid personal days, and paid time off.</p> <p>Substantially similar to the provisions of the original law.</p>
<p>Employee is not required to provide documentation of use of less than 3 consecutive days of sick time. An employee who needs more than 3 consecutive days may be asked to provide “reasonable documentation” (a health professional’s note indicating the sick time is necessary). If documentation is required, the employer is on the hook for “paying all out of pocket expenses the employee incurs in obtaining the documentation.”</p>	<p>Employee must comply with employer’s “usual and customary notice, procedural, and documentation requirements for requesting leave,” but must be given at least 3 days to provide an employer with documentation.</p>

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Penalties for violation of the law include those allowed in a civil lawsuit civil, including liquidated damages and attorneys' fees as well as a \$1,000 fine.	Penalties do not include liquidated damages. Employer may have to pay for leave withheld and up to \$1,000 fine.
<u>Improved Workforce Opportunity Wage Act (original)</u>	<u>Improved Workforce Opportunity Wage Act (amended)</u>
Beginning in 2018, increased the minimum wage by 60 to 75 cents each year until it reached \$12 per hour in 2022	Increased minimum wage by smaller increments, so that it would reach \$12.05 in 2030.
Tied minimum wage to inflation.	No adjustments for inflation.
Increased minimum wage for tipped employees from 38 percent of the minimum in 2018, to 48 percent in 2019, 60 percent in 2020, 70 percent in 2021, 80 percent in 2022, 90 percent in 2023 and 100 percent of the minimum wage in 2024.	Minimum hourly wage for tipped employees remained at 38 percent of minimum wage (\$3.75 per hour in 2022, based on minimum hourly wage of \$9.87 per hour).

Attorneys for the State of Michigan have [already asked](#) the Court of Appeals to delay enforcement of the 2018 laws and requested a decision from the Court of Appeals by August 2, 2022. Even without a stay, according to the state, the 2018 laws cannot go into effect until August 9, 2022.

We will update this issue either by letter or on our website at www.gwinnlegal.com.

We value our relationship with our clients, friends, and colleagues. As always, if you have any questions, please call.¹

Very truly yours,

GWINN LEGAL PLLC

Daniel A. Gwinn

¹ **This correspondence is being sent as a courtesy and is not a substitute for legal advice, nor does it establish an attorney-client relationship. Call us for professional recommendations regarding your specific situation. While the information included herein is deemed current at time of publication, laws and regulations are subject to change, as outlined in this correspondence.**