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Earned Sick Time and Improved Workforce Opportunity Wage Act Reinstated

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- A labor and employment attorney who provides counseling and litigation services for employers.
- Advises on civil rights law, disability and leave issues, wage and hour compliance and labor relations.
- Drafts employee handbooks and employment-related agreements.



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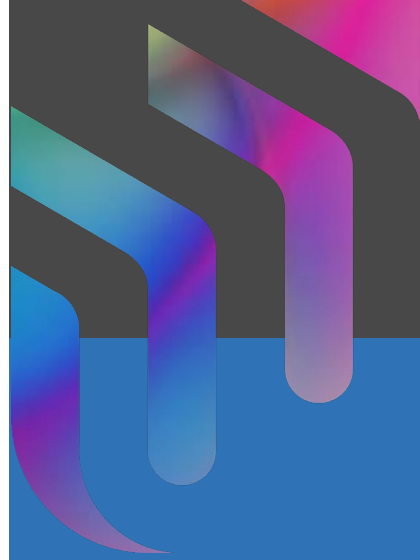
Introduction

- How we got here.
- What to expect.
- Paid sick leave.
- Next steps.



How We Got Here

- Earned Sick Time Act (ESTA) and Improved Workforce Opportunity Wage Act (IWOWA) began as ballot initiatives in 2018.
- Supporters gathered the required 252,000+ valid signatures in a 180-day period to get measure on ballot.
- Board of Canvassers approved initiative, giving Legislature 40 days to either adopt the measure as written or it would go on the ballot.



How We Got Here

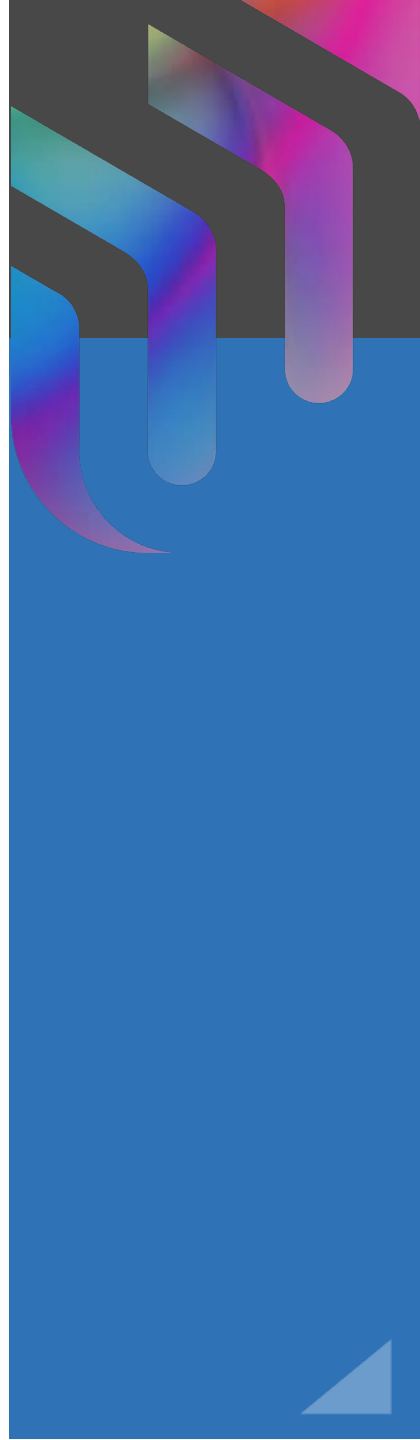
Under Article 2 Section 9:

- If voters adopt ballot measure, then Legislature can only amend with a 75% super-majority vote.
- If Legislature adopts measure:
 - It becomes law without Governor's signature.
 - Silent on whether, how, or when Legislature can amend.



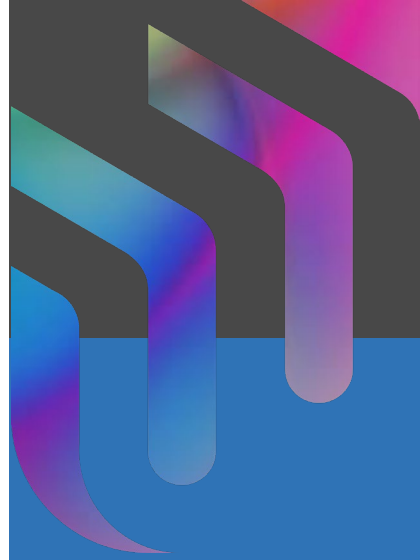
How We Got Here

- Legislature adopted both ESTA and IWOWA on September 5, 2018.
- Laws were scheduled to take effect 90 days from when the then-current legislative session ended (around 4/1/19).
- Before that effective date, Legislature amended both laws, reducing employee entitlements.
- Governor Snyder signed the amended laws on December 14, 2018.



How We Got Here

- Employee advocacy groups challenged constitutionality of this “adopt-and-amend” strategy.
- **July 19, 2022**, Court of Claims rules adopt-and-amend unconstitutional.
 - ESTA and IWOWA in effect as if never amended.
 - 10 days later, order staying effect of judgment until February 19, 2023.
 - Is there backpay/pre-earned benefits back to 2019?
- **January 26, 2023**, Court of Appeals reverses.
 - Adopt and amend not prohibited expressly; therefore permitted.
- **June 21, 2023**, Michigan Supreme Court grants review.





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Where Are We Now?



Where We Are Now

On **July 31, 2024**, the Supreme Court reversed the Court of Appeals, voiding the amended laws and reinstating the ESTA and IWOWA but NOT retroactive and with adjusted wage increase schedule.

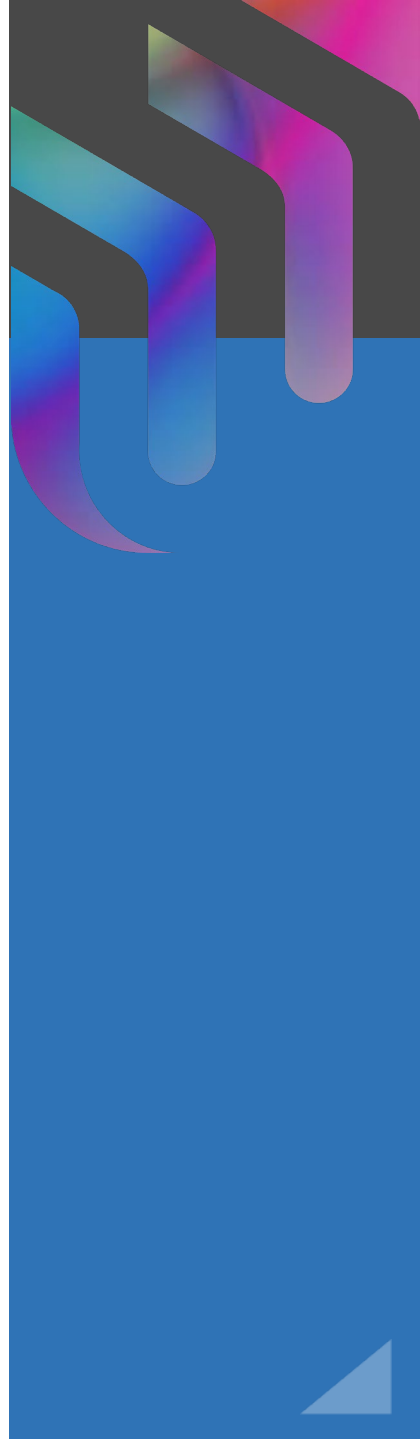
Employers have 205 days – or until **February 21, 2025** – to comply with the ESTA and the original IWOWA requirements.

- No backpay; wages won't change until February 1.
- No increase in sick time benefits until February 1.
- No penalty/liability for employers who complied with invalid amendments.



Could Things Change Again?

- End of the line for appeals, but:
 - State could file a motion for rehearing.
 - Current legislature could seek to amend the ESTA or IWOWA.





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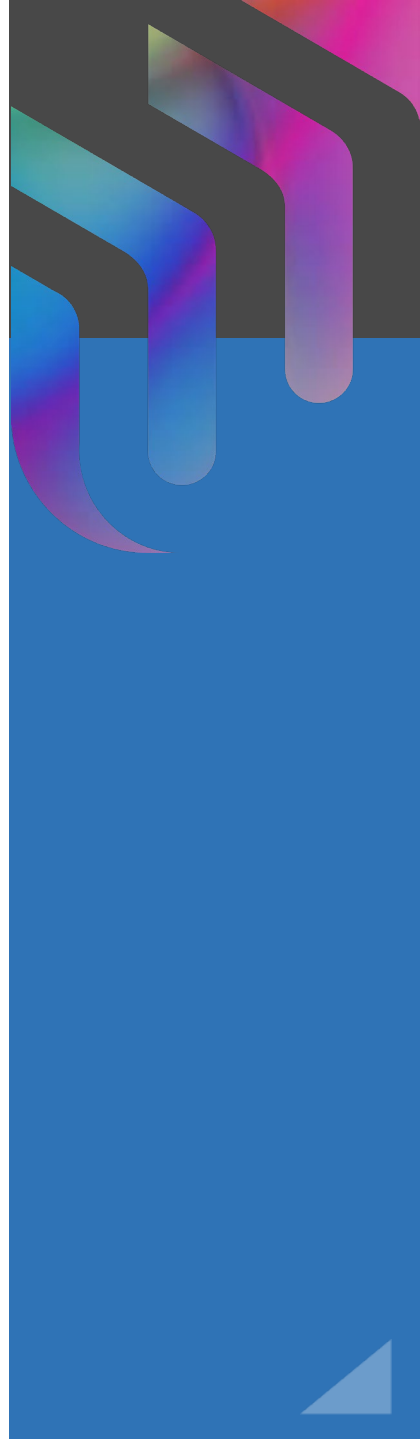
What Are the Consequences of the MSC's July 21, 2024 Decision?

1. Earned Sick Time Act (ESTA)
2. Improved Workforce Opportunity Wage Act (IWOWA) as originally adopted.



IWOWA – A Quick Overview

- Acceleration of increase to minimum wage.
- Increases to minimum wages for tipped employees.
- Compensatory time in lieu of overtime.
- Changes to wages for minors.



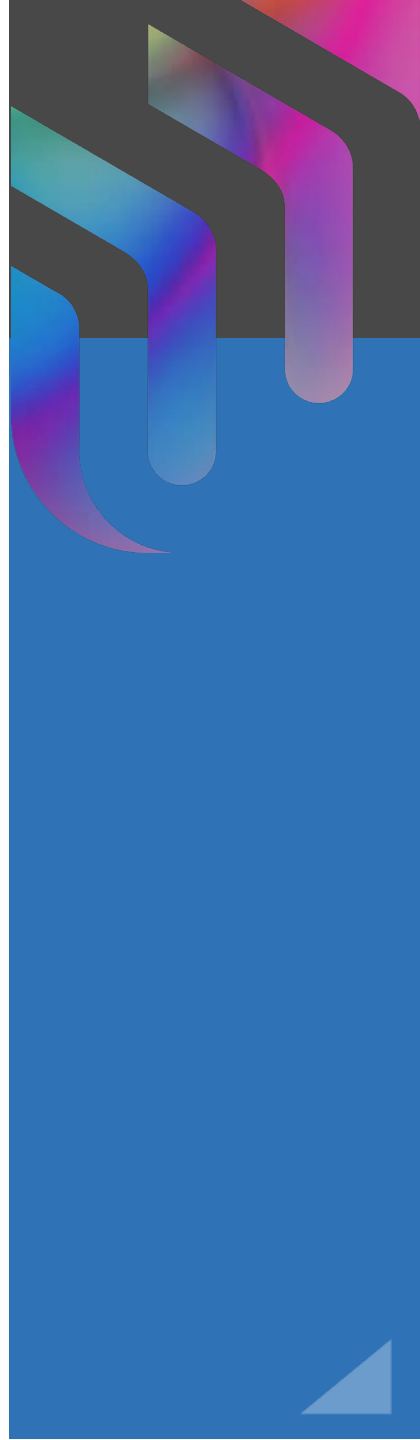
IWOWA – Updated Schedule

- **February 21, 2025** (originally 2019): The minimum hourly wage will be \$10.00 plus the state treasurer's inflation adjustment, using July 31, 2024, as the endpoint for that calculation. The tip credit will be 48% of minimum wage.
- **February 21, 2026** (originally 2020): The minimum hourly wage will be \$10.65 plus the state treasurer's inflation adjustment, using July 31, 2024, as the endpoint for that calculation. The tip credit will be 60% of minimum wage.
- **February 21, 2027** (originally 2021): The minimum hourly wage will be \$11.35 plus the state treasurer's inflation adjustment, using July 31, 2024, as the endpoint for that calculation. The tip credit will be 70% of minimum wage.
- **February 21, 2028** (originally 2022): The minimum hourly wage will be \$12.00 plus the state treasurer's inflation adjustment, using July 31, 2024, as the endpoint for that calculation. The tip credit will be 80% of minimum wage.
- **February 21, 2029** (originally 2023 and after): The state treasurer shall calculate the inflation-adjusted minimum wage as set forth in 2018 PA 337, § 4(2). The tip credit will no longer exist.



Compensatory Time in Lieu of Overtime

- IWOWA permits voluntary agreements between employers and employees to use compensatory time in lieu of overtime.
- **BUT** this is not permitted for private employers covered by the FLSA.



Paid Sick Leave

**What we must have by
February 21, 2025:**
ESTA as Adopted





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Who is Covered by the ESTA?

- Small employers?
- Out of state employees?
- Part-time employees?
- Unions?
- Exempt employees?



Employer Coverage

ESTA

Person, firm, business, educational institution, nonprofit agency, corporation, LLC, government entity or other entity that employs 1 or more individuals.



Ineligible Employees

ESTA

Individual whose primary work location is not in Michigan (though not explicit).



Rehired Employees

ESTA

Employee retains all unused paid sick time if rehired within 6 months.





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What Does the ESTA Say about Leave Accrual, Carryover, and Usage?



Leave Accrual

ESTA

- 1 hour for every 30 hours worked.
- No accrual limits.

- Frontloading likely (but not explicitly) permitted.
- Again, no accrual limits.

Leave Carryover

ESTA

- No carryover limits (only usage limits).



Leave Usage

ESTA

- May limit usage:
 - Large employers (10+ employees): **72** hours of **paid** sick time per benefit year.
 - Small employers (1-9 employees): **40** hours of **paid** sick time, plus **32** hours of **unpaid** sick time, per benefit year.
- Benefit year is any consecutive 12-month period used by an employer (e.g., calendar year, employment year, etc.).
- May be used in smallest increment that payroll system allows, but not greater than hourly increments.
- 90 day waiting period for new hires.

Qualifying Reasons

ESTA

- Mental or physical illness or injury of employee or employee's family member.
- Medical diagnosis or treatment of illness or injury of employee or employee's family member.
- Preventative medical care for employee or employee's family member.
- Matters arising from employee or employee's family member being a victim of domestic violence or sexual assault.
- If employee's place of business is closed due to public health emergency.
- If employee's child's school or place of care is closed due to public health emergency and employee needs to care for child.
- If public official or healthcare provider determines that the health of others may be jeopardized because of employee or employee's family member's exposure to a communicable disease.
- Meetings at child's school or place of care related to child's health or disability, or the effects of domestic violence or sexual assault on child.

Family Members

ESTA

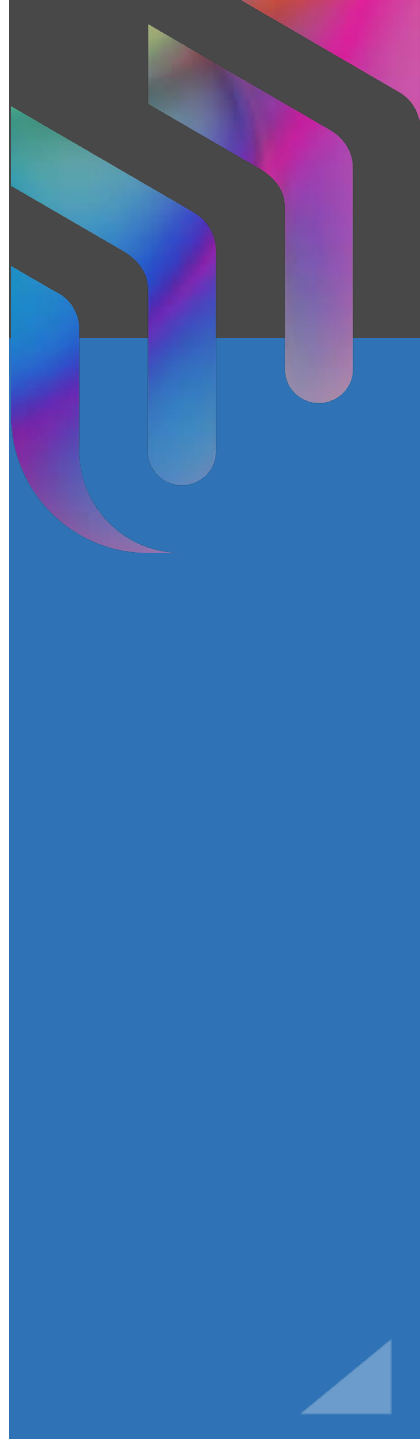
- Child (biological, step, foster, legal ward, in loco parentis, child of domestic partner)
- Grandchild
- Spouse / Domestic Partner
- Parent (biological, foster, step, adoptive, legal guardian)
- Grandparent
- Sibling (biological, foster, step-sibling)
- Any other individual related by blood or affinity whose close association with employee is equivalent to a family relationship



Supporting Documentation

ESTA

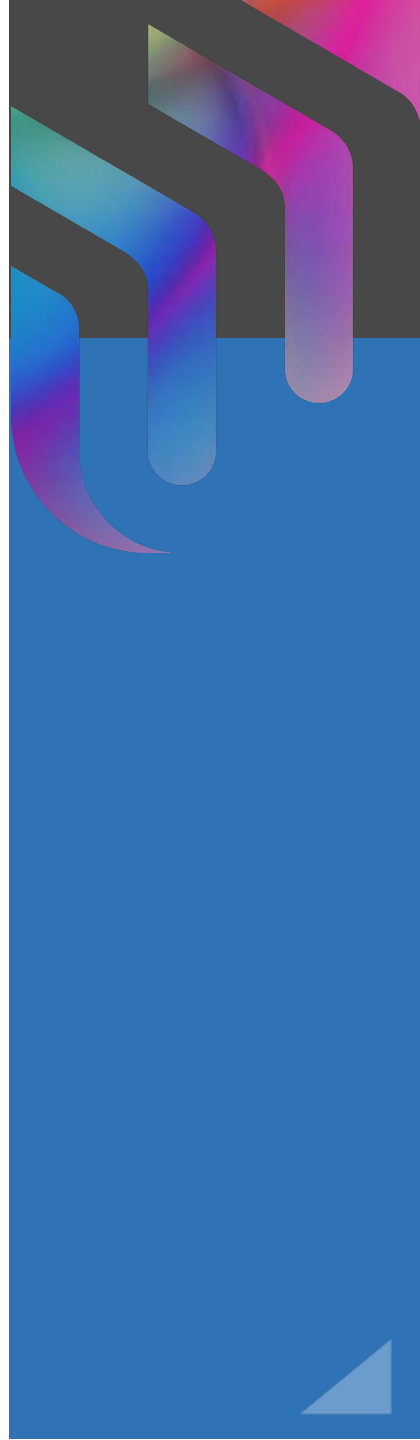
- May require supporting documentation be provided in a timely manner **only if employee uses more than 3 consecutive days of paid sick time.**
- Employer must pay **any out-of-pocket costs** incurred by employee in securing documentation.
- May not require that documentation explain the nature of the illness or details of violence.



Employer Notice

ESTA

- Posters
- Written notice at hire
- Notice and posters must be in English, Spanish and any other language spoken by 10% of the workforce if LEO has translated the posters and notices into those languages.



Recordkeeping

ESTA

- Must retain records for 3 years.
- Failure to maintain records creates **presumption** that the employer violated ESTA.



Enforcement

ESTA

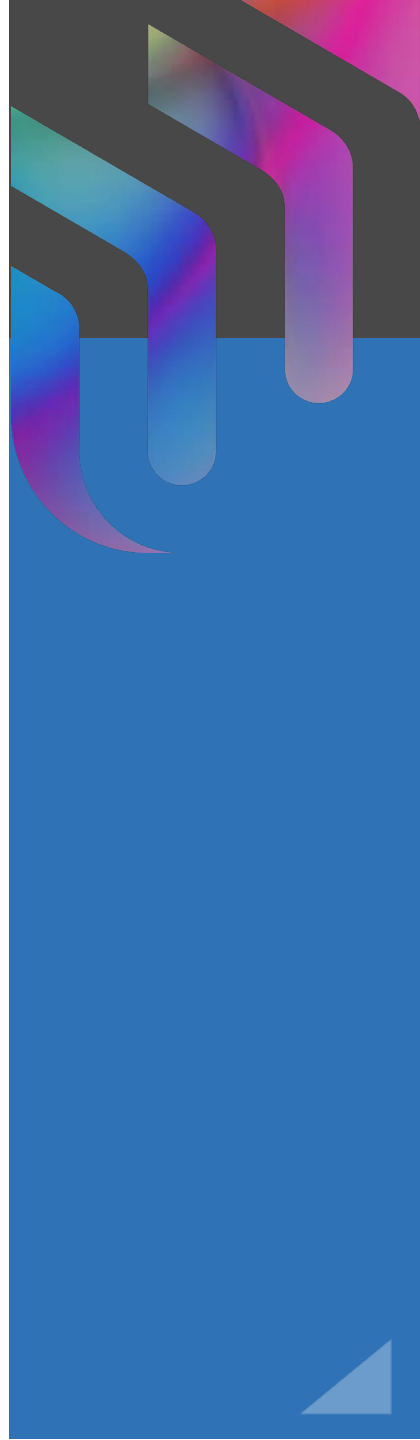
- File a claim with LEO
- File a civil action in court.
- Statute of limitations: 3 years.



Retaliation

ESTA

- Specifically prohibits and defines retaliation.
- Creates rebuttable presumption of retaliation if an employer takes adverse personnel action against a person within **90 days** after that person:
 - Files a complaint with LEO or in court alleging an ESTA violation.
 - Informs any person about an employer's alleged ESTA violation.
 - Cooperates with LEO or another person in the investigation or prosecution of any alleged ESTA violation.
 - Opposes any policy, practice, or act that prohibited by ESTA.
 - Informs any person of their ESTA rights.



Other

- No payout of unused paid sick leave at year-end or termination.
- Employer does not have to count paid time off (vacation, personal, PTO) as hours worked.
- Employer can count other paid time off (e.g., vacation, personal, PTO) toward leave entitlements under the act.





Some Questions About Existing PTO Policies

- If we currently have a PTO policy, with an accrual of greater than 72 hours, is this sufficient?
- If we currently have PTO can we reduce it by the number of hours required under the ESTA and classify those for the ESTA absences?

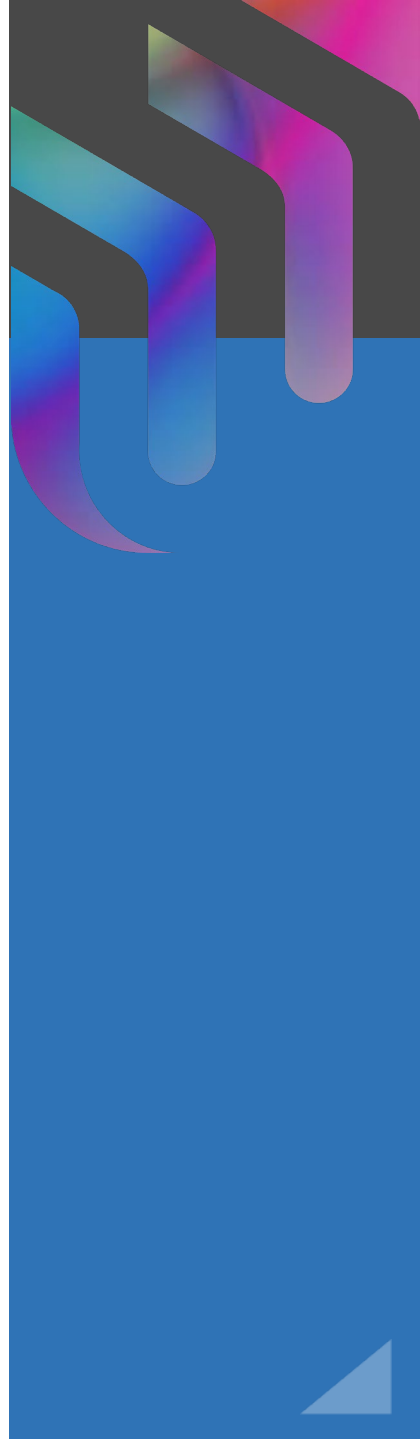


What About Union Contracts?

- ESTA and IWOWA are floors, and your CBA cannot go below them.
- Timing?
 - “If an employer’s employees are covered by a [CBA] in effect on the effective date of this act, this act applies beginning on the stated expiration date in the collective bargaining agreement, notwithstanding any statement in the agreement that it continues in force until a future date or event or the execution of a new collective bargaining agreement.”
- When negotiating next CBA -- can current PTO or sick time be used for ESTA compliance?
 - If not, develop your plan, communicate it to the union, and be prepared to bargain
 - Don’t have to agree, but must bargain upon request and be prepared to press to impasse

Next Steps

- Wage Scales and PTO Policies
- Financial + Operational Impact
- Timing
- Coordinating Benefits
- Communication
- Recordkeeping
- Union Contracts






- **Review Wage Scales + Time Off Policies**

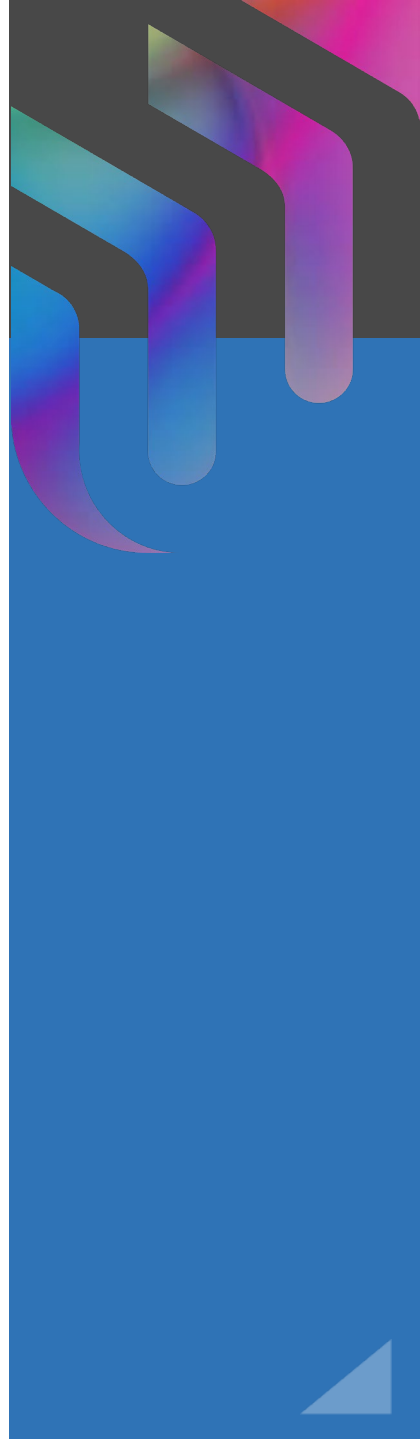
- Do your wages or time off policies need to be increased to comply with the new minimums? What about CBAs? What are their expiration dates?

- **Financial + Operational Impact**

- How could these laws increase your labor costs?
 - How is potentially more (or easier to use) paid time off going to impact you operationally and from a staffing standpoint?
 - Temporary employees?
 - How to structure and administer attendance policies (and discipline) going forward?
- 

• **Timing**

- Look at your benefit year for purposes of vacation/PTO/sick leave, attendance and FMLA.
- What benefit year will you use for employees who did not previously receive paid sick leave?





- **Coordinating Benefits**

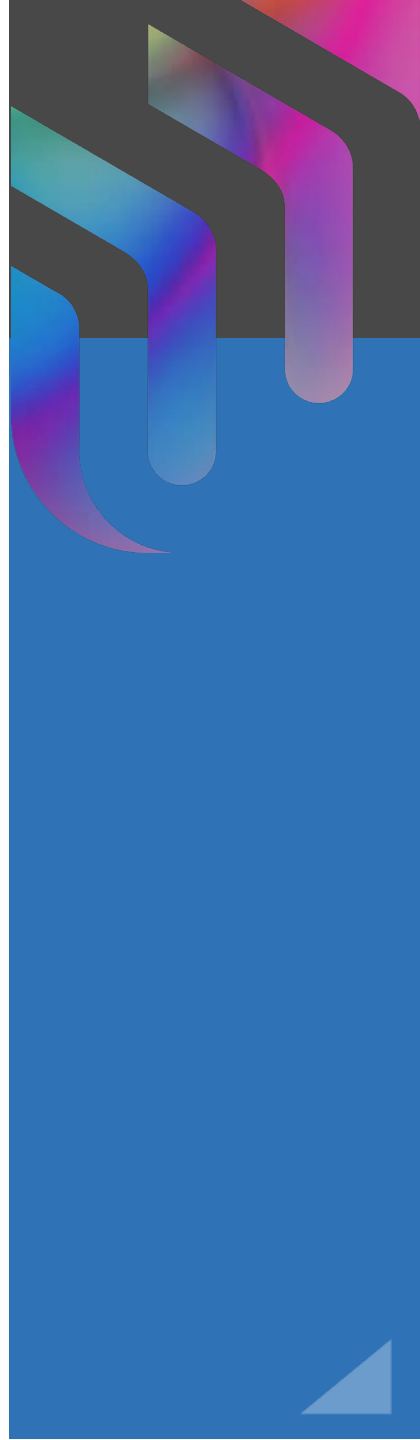
- Do you want to rob Peter to pay Paul (i.e., integrate ESTA with vacation or go to a PTO-type policy)?
- Do you want or need to coordinate ESTA time with your other sick time, STD or salary-continuation policies/practices? Also, FMLA.

- **Communication**

- Develop written ESTA policy for employees; how to otherwise manage employee expectations?
- Are there other stakeholders who need to know?
- Will your temp agency comply with ESTA and indemnify you if they drop the ball?

• **Recordkeeping**

- What are your HRIS and payroll systems capable of tracking for ESTA compliance?
- If you use a third-party payroll provider or leave administrator, will they be keeping records and how will you access them if/when you discontinue that relationship?





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ESTA Policies

- Warner has model policies available for sale for large and small employers.
- \$400
- Reach out to your Warner attorney or Liz Burnson, eburnson@wnj.com, for additional information.





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Thank you!

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