
FOR YOUR INFORMATION

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News For School and Municipal Clients

DOMESTIC PARTNERS AND THE WISCONSIN FAMILY AND MEDICAL LEAVE ACT

On June 29, 2009, Governor Doyle signed the Wisconsin State Budget Bill, 2009 Wisconsin Act 28, into law. Act 28 modifies a number of existing laws in order to establish rights for domestic partners. As a result of Act 28, protected leave under the Wisconsin Family and Medical Leave Act (WFMLA) has now been extended to domestic partners.

Under the WFMLA, employers with 50 or more permanent employees must allow eligible employees to take three types of protected leaves of absence. First, each eligible employee must be allowed up to 6 weeks of unpaid leave in a calendar year for the birth of the employee's natural child, or the placement of a child with the employee for adoption or as a precondition to adoption (but not both). Such leave must begin within 16 weeks of the child's birth or placement. Second, each eligible employee must be allowed up to 2 weeks of unpaid leave in a calendar year to care for certain immediate family members. Third and finally, each eligible employee must be allowed up to 2 weeks of unpaid leave in a calendar year related to the employee's serious health condition which renders the employee unable to perform his or her job.

Prior to June 30, 2009, an eligible employee could take WFMLA leave to care for the employee's child, spouse or parent with a serious health condition. The statute defines a spouse as the "employee's legal husband or

wife." As a result of Act 28, effective June 30, 2009, an eligible employee may now take leave to care for his or her domestic partner.

In order for the employee to be eligible for such leave, he or she must be in a domestic partnership, as that term is defined in the Wisconsin Statutes. The WFMLA utilizes two different definitions of "domestic partner." The employee can be a member of a "registered" or an "unregistered" domestic partnership.

For purposes of a "registered" domestic partnership under Wis. Stat. ch. 770, the two individuals must register with the Register of Deeds for the county in which they reside and certify as follows: (1) each individual is at least 18 years old and capable of consenting to the domestic partnership; (2) neither individual is married to, or in a domestic partnership with, another individual; (3) the two individuals share a common residence; (4) the two individuals are not nearer in kin to each other than second cousins, whether of the whole or half blood or by adoption; and (5) the two individuals are of the same sex. Each county's Register of Deeds will begin accepting domestic partnership registrations on Monday, August 3, 2009.

For purposes of an "unregistered" domestic partnership under Wis. Stat. § 40.02(21c) and (21d), the two individuals must satisfy all of the following criteria: (1) each individual is at

least 18 years old and otherwise competent to enter into a contract; (2) neither individual is married to, or in a domestic partnership, with another individual; (3) the two individuals are not related by blood in any way that would prohibit marriage under applicable law; (4) the two individuals consider themselves to be members of each other's immediate family; (5) the two individuals agree to be responsible for each other's basic living expenses; and (6) the two individuals share a common residence. Unregistered domestic partners are recognized, for purposes of the WFMLA on June 30, 2009.

Act 28 also expanded the definition of parent, so it allows an eligible employee to take WFMLA leave to care for the parent of his or her domestic partner. However, Act 28 did not expand the definition of child, so as to allow an eligible employee to take WFMLA leave to care for the child of his or her domestic partner. That said, the WFMLA clearly allows employers to offer more generous leave provisions to its employees through policy or collective bargaining agreement provisions.

Covered employers should review existing policies and collective bargaining agreement provisions to ensure compliance with the new leave rights for domestic partners established by Act 28. To assist employers, the Wisconsin Department of Workforce Development (DWD) has incorporated the changes to the WFMLA into a new WFMLA poster. Covered employers should replace the WFMLA employment workplace posting with the new poster, which can be found on the DWD's

website, at: http://www.dwd.state.wi.us/dwd/publications/erd/pdf/erd_7983_p.pdf.

There is some disagreement about whether local governments that do not employ at least 50 individuals on a permanent basis must comply with the WFMLA. The General Legal Counsel for the League of Wisconsin Municipalities (LWM) has opined that the WFMLA defines "employers" covered by the law as "person[s] engaging in any activity, enterprise or business in this state employing at least 50 individuals on a permanent basis... [and] includes the state and any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts"; but nowhere does the statute expressly refer to cities, villages, school districts, or other municipalities. As such, LWM has suggested that the WFMLA does not apply to municipalities employing less than 50 individuals on a permanent basis. However, when LWM posed this question to the staff at the DWD, the DWD explained that there is a division of opinion within the agency and DWD has declined to take an official position with regard to this issue. In light of this disagreement and the substantial penalties for failing to comply with the law, it may be beneficial for local governmental bodies, who do not employ at least 50 individuals on a permanent basis, to err on the side of caution and comply with the WFMLA.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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