

I. Family and Medical Leave Act (FMLA)

A. Overview.

1. The Federal Family and Medical Leave Act (FMLA) provides eligible employees with the right to take job-protected leave with continued medical benefits when the employee needs time off from work to care for himself/herself or a family member who is seriously ill, to care for a newborn or newly adopted child or to attend to the affairs of a family member who is called to active duty in the military.
2. The FMLA requires covered employers to allow eligible employees to take up to a total of 12 weeks of unpaid leave during a 12-month period for a qualifying reason.
3. The 12 weeks of leave may be taken in a block or, under certain circumstances, intermittently or on a reduced schedule. Leave is generally unpaid, however in certain circumstances accrued paid leave may be substituted for FMLA leave.
4. The FMLA generally covers private sector employers with 50 or more employees and all public (government) employers, regardless of the number of employees.
5. To be eligible for FMLA leave, an employee must have worked for a covered employer for at least 12 months; and for at least 1,250 hours during the 12 months preceding the leave.
6. Qualifying Reasons for Leave under the FMLA.
 - a. Birth and care of a newborn child;
 - b. Adoption or foster care placement of a child¹;
 - c. Care for a family member with a serious health condition;
 - d. The employee's own serious health condition;
 - e. Qualifying exigency.

¹ Spouses employed by the same employer are jointly entitled to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

7. Length and Scheduling of Leave: An employer may choose one of the following methods for determining the 12-month period in which employees may take leave:
 - a. Calendar year;
 - b. Any fixed 12-month period, such as July 1 to June 30;
 - c. A variable 12-month period, measured forward from the date any employee's first FMLA leave begins, so an employee who takes leave beginning on July 1 would be eligible for 12 more weeks of leave any time after July 1 of the following year; or
 - d. A rolling 12-month period measured backward from the date the employee uses any FMLA leave, so that 12 months after the employee takes four weeks of leave, the employee is eligible for 4 more weeks of leave.

8. Intermittent and Reduced Leave Schedules.
 - a. Intermittent leave is leave taken sporadically in separate increments of time for a single qualifying reason. Such leave may be taken for a serious health condition that requires treatment by a health care provider periodically, rather than for one continuous block of time. For example, an employee who takes leave several days at a time spread over six months to receive chemotherapy would be taking intermittent leave.
 - b. Reduced schedule leave is leave that reduces the number of hours an employee works each workday or workweek. An employee might take reduced schedule leave while recovering from a serious health condition until that employee is strong enough to return to work.
 - c. There must be a medical necessity for intermittent leave or reduced schedule leave.
 - d. If an employee requests intermittent or reduced schedule leave to care for a family member with a serious health condition, for an employee's own serious health condition, or for military caregiver leave, that is based on foreseeable, planned medical treatment, the employer may require the employee to transfer temporarily to an available alternative position that has equivalent pay and benefits, and better accommodates recurring periods of leave than the regular employment position of the employee.

- e. The FMLA does not authorize intermittent or reduced schedule leave for the birth, adoption or placement of a child in foster care without the employer's specific approval.

9. Special Provisions for School Instructional Employees.

- a. For FMLA purposes, an academic term consists of either the semester or the end of the year transition. There may not be more than 2 terms per school year.
- b. Leave taken for a period that ends with the school year and begins the next semester is considered consecutive rather than intermittent leave. An employee on leave at the end of the school year is entitled to the same benefits over summer vacation that he or she would have received had the employee been working at the end of the term.
- c. If the leave extends over summer vacation, when an employee would not have been required to report for duty, that period is not counted against the FMLA leave entitlement.
- d. The employer may be able to require an employee to continue leave until the end of the term even if the employee wishes to return, when
 - i. The employee begins leave more than 5 weeks before the end of the term, the leave will last at least 3 weeks, and the employee would otherwise return to work during the last 3 weeks of the term;
 - ii. The employee begins leave during the last 5 weeks of the term, the leave is not for the employee's own serious health condition, the leave will last for more than 2 weeks, and the employee would otherwise return to work during the last 2 weeks of the term; or
 - iii. The employee begins leave during the last 3 weeks of the term, the leave is not for the employee's own serious health condition, and the leave will last more than 5 working days.

10. Compensation and Benefits During FMLA Leave

- a. Leave under the FMLA is generally unpaid. However, under certain circumstances an employee may elect (or an employer may require) to substitute accrued paid leave, such as vacation, personal, family, or sick leave, for any portion of what would otherwise be unpaid leave.
 - b. The FMLA requires an employer to continue an employee's group health and dental plan coverage during FMLA leave on the same terms and conditions as if the employee had continued to work.
- B. On November 17, 2008, the U.S. Department of Labor (DoL) issued final regulations governing the FMLA obligations and rights of employers and employees. These changes became effective on January 16, 2009.
1. According to the DoL, the amendments are designed to improve communication between employees, employers, and health care providers, and provide clarity to employees and employers regarding their responsibilities and rights under the FMLA.
 2. The new regulations were intended to respond to
 - a. The enactment of the military family leave provisions in the National Defense Authorization Act (NDAA);
 - b. The U.S. Supreme Court and lower courts invalidation of portions of the FMLA and its regulations;
 - c. The 15-years of experience of enforcing and administering the FMLA; and
 - d. Public Comments.
- C. On October 28, 2009, the National Defense Authorization Act was signed into law. These amendments expanded the military family leave provisions added to the FMLA in 2008, which provide qualifying exigency and military caregiver leave for employees with family members who are covered military members.

D. Highlights of the New Regulations

1. Employer Notice Obligations

a. General Notice.

- i. Generic posting that summarizes employees' rights under the FMLA, even if no employees are eligible.
- ii. Must be provided by appropriate postings visible to employees and applicants, and discussion of rights in employee handbooks or in a document provided to employees upon hiring.
- iii. May post or distribute electronically if all employees and applicants have ready access to it. This does not excuse the employer from posting notices to applicants. If the posting is on the intranet where applicants would not be able to access the information, the employer would not meet its statutory obligation.
- iv. Must post/distribute in a different language if a significant portion of employees are not literate in English.

b. Eligibility Notice.

- i. Must be provided once an employee requests FMLA leave or the employer has sufficient information to believe the employee is eligible for FMLA leave.
- ii. Must identify whether the employee is eligible, the amount of leave taken to date, and the amount of leave still available. If the employee is not eligible, the employer must list at least one reason why.
- iii. Must be issued within 5 business days of the date the employee requests FMLA leave or the date the employer becomes aware that the employee's leave may be eligible for FMLA.

- c. Rights and Responsibilities Notice.
 - i. Must be issued to the employee each time eligibility notice is provided.
 - ii. Must explain whether the leave is designated as FMLA leave, address substitution of pay leave, identify whether medical certification is required and include necessary forms for same, and address health insurance premium payment issues during leave.
- d. Designation Notice.
 - i. Must be issued within 5 days of receiving sufficient information to grant or deny FMLA leave.
 - ii. Must specify whether the leave counts against the employee's FMLA entitlement; include number of days, hours, or weeks which will be counted as FMLA leave; state whether paid leave will be substituted; notify employee if fitness to return to duty exam will be required; and provide a list of essential functions.

2. Employee Notice Obligations.

- a. An employee who requires FMLA leave must give notice of unforeseen leave as soon as practicable.
- b. For unforeseeable leave, employees must give notice according to the employer's usual call-in procedures, absent unusual circumstances.
- c. For foreseeable FMLA leave, employee must give 30 days notice to the employer. The new regulations also enumerates the consequence if an employee does not provide proper notice which is, that the employer may delay FMLA coverage until 30 days after the date the employee provides notice.

3. Serious Health Condition.

- a. The new regulations clarify the phrase "serious health condition involving continuing treatment."
 - i. The regulations now specify the time within which an employee seeking to establish a serious health condition by proof of a period of incapacity plus treatment must obtain that treatment.

- ii. Under the new regulations, proof of incapacity for a period of three or more full days now must be accompanied by proof of either two visits to a health care provider within 30 days of the first day of incapacity or at least one visit resulting in a plan of continued treatment.
 - iii. The first visit to the health care provider under either scenario must occur within 7 days of the first day of incapacity.
 - b. The new regulations also provide that, for the purpose of establishing that an employee with a chronic health condition is undergoing continuous treatment, the employee must visit a health care provider at least twice a year.
- 4. Ragsdale Decision/Penalties.
 - a. The U.S. Supreme Court decision *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), invalidated a penalty provision in the regulations.
 - b. The regulations remove the categorical penalty provisions. Rather than the mandatory penalties, the new regulations state that an employer may have to pay compensation or other relief for failing to follow the notification rules.
- 5. Light duty.
 - a. Voluntary and uncoerced acceptance of a “light duty” assignment while recovering from a serious health condition does not count as FMLA leave.
 - b. An employee’s acceptance of such “light duty” assignment does not constitute a waiver of the employee’s prospective rights, including the right to be restored to the same position the employee held at the time the employee’s FMLA leave commenced or to an equivalent position.
- 6. Perfect Attendance Bonuses. These awards are often used for purposes of bonuses. The rule allows employers to deny a perfect attendance award to an employee who does not have perfect attendance due to FMLA leave as long as it treats employees taking non-FMLA leave in an identical way. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the bonus, then the employee who used paid vacation leave for a protected purpose also must receive the bonus.

7. Medical Certification Process.

a. Fitness for Duty.

- i. The new regulations permit employers to obtain more information from an employee's health care provider in determining whether the employee is fit to return to duty.
- ii. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than the designation notice, and must indicate in the designation notice that the certification must address those essential functions.
- iii. An employer is entitled to a certification of fitness to return to duty for intermittent or reduced leaves up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.
 - Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others.
 - In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.
- iv. No Fitness for Duty form provided.

b. Incomplete or Insufficient Certification.

- i. The new regulations require the employer to state in writing what information the employee must provide to make an incomplete or insufficient certification complete or sufficient.
 - A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.

- A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.
 - ii. The employer must give the employee 7 days to cure the deficiency.
 - iii. If the employee fails to cure the deficiency, the employer may deny the FMLA leave.
- 8. Military Family Leave.
 - a. Qualifying Exigency Leave.
 - i. This applies to families of service members in the regular Armed Forces during deployment to a foreign country. It also applies to families of service members in the Reserve Armed Forces during deployment to a foreign country under a call to active duty in a contingency operation.
 - ii. Eligible employees may take up to 12 work weeks of FMLA leave when the employee's spouse, son, daughter, or parent is on active duty or call to active duty status for any of the following reasons:
 - Short notice deployment: which can be used for 7 calendar days beginning on the date the military member is notified. It can be used 7 or less calendar days prior to the date of deployment.
 - Military events and related activities: which includes any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status. Also, it can include family support or assistance programs and informational briefings through the military, military service organizations, or the American Red Cross.
 - Childcare and school activities.
 - to arrange alternative childcare arrangements for a biological, adopted, foster child, or a legal ward, who is under 18 years old, or is incapable of self-care due to a mental or physical disability, of the military servicemember;

- to provide childcare on an urgent, immediate basis due to the active duty status of the military member;
- to enroll the child in or transfer the child to a new school or daycare when necessitated by status of the military member; or
- to attend meetings with school or daycare staff when the meetings are necessary due to status of the military member
- Financial and legal arrangements: when it is necessary for the family member to make or update financial arrangements to address the military member's absence while on duty.
- Counseling: which must be provided by someone other than a healthcare provider for oneself, for the military member, or for the military member's child, provided that the need for counseling arises from the status of the military member.
- Rest and recuperation: which allows time to spend with the military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.
- Post-deployment activities: which allows leave for arrival ceremonies and any other official ceremony or program sponsored by the military for a period of 90 days after termination of the active duty. This also covers time taken off to address issues that arise from the death of the military member while on active duty status.
- Additional activities not encompassed in the other categories, but agreed to by the employer and employee.

- b. Military Caregiver Leave.
- i. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 work weeks of leave during a “single 12-month period” to care for the covered servicemember with a “serious injury or illness.”
 - ii. The definition of covered servicemember was expanded to include a veteran “who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness” if the veteran was a member of the Armed Forces “at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.”
 - iii. For a current member of the Armed Forces, “serious injury or illness” incurred in the line of duty on active duty, or a serious injury or illness that existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list.
 - iv. For a veteran, a serious injury or illness is defined as “a qualifying injury or illness that was incurred by the member in line of duty on active duty, or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty, and that manifested itself before or after the member became a veteran.”
 - v. The “serious injury or illness” may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.
 - vi. “Son or daughter” can be any age.

- vii. “Next of kin”: as the servicemember’s nearest blood relative, other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA.
- viii. The 12-month period begins on the first day of leave, and ends 12 months later.
- ix. This leave is provided on a per-covered servicemember, per-injury basis; that means it is possible for the employee to take leave for more than 26 weeks if the employee is caring for more than one covered servicemember, or the servicemember has a subsequent illness or injury.
- x. Time not used within the 12 month period is not permitted to be carried over.

II. Wisconsin Family and Medical Leave Act (WFMLA)

A. Overview.

1. Employers with 50 or more permanent employees² must allow eligible employees to take three types of protected leaves of absence:
 - a. Eligible employees 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.
 - b. Eligible employees must be allowed up to 2 weeks of unpaid leave in a calendar year to care for certain immediate family members.
 - c. Eligible employees 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.
2. To be eligible for WFMLA leave, an employee must have worked for a covered employer for at least 52 weeks; and been in paid status for at least 1,000 hours during the 52 weeks preceding the leave.
3. Under the WFMLA, an eligible employee may elect to substitute any type of employer-provided paid leave (vacation, sick leave, personal holiday...) during WFMLA-approved leave. The employer may not force substitution.
4. Intermittent leave is permitted for all types of family or medical leave.
 - a. May be taken in increments equal to the shortest increment permitted by the employer for any other non-emergency leave.

² It is unclear whether a municipality (including a school district) with fewer than 50 permanent employees would be covered by the WFMLA. Conflicting opinions exist.

- b. An employee may not schedule intermittent leave in a manner that unduly disrupts the employer's operations. An employee is deemed to have made a reasonable effort to schedule a leave so it does not unduly disrupt the employer's operations if:
 - i. The employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity of the leave; and
 - ii. Except where precluded by the need for health care consultation or treatment, the proposed schedule is sufficiently definite that the employer is able to schedule replacement employees, to the extent replacement employees need to be scheduled, to cover the absence of the employee taking the leave.
- 5. A covered employer is required to maintain group health insurance coverage for an employee on WFMLA leave when insurance was provided before the leave was taken and on the same terms as if the employee had continued to work.
- 6. Interaction Between the WFMLA and FMLA.
 - a. Nothing in the FMLA supersedes any provision of the WFMLA.
 - b. Where an employee is entitled to leave under both laws, the law which provides greater family and medical leave rights, i.e., the law that is most favorable to the employee, applies.
 - c. If an employee's leave extends beyond the period of coverage under one of the laws, an employer may require the employee to comply with only the requirements of the law governing the continuing leave.
 - d. In most cases it is only possible for an eligible employee to take a maximum of 12 weeks of qualifying leave during a 12 month period; however, in some unique circumstances, an employee may be able to take up to 16 weeks of leave during 12 month period.

- B. 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 WFMLA has now been extended to domestic partners.
1. 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.
 2. 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.
 - a. 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.
 - b. 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.

3. 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.
4. 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.
5. 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.
6. 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.