

# Wisconsin Human Resources Handbook

## Chapter 724

### Family and Medical Leave

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#### Sec. 724.010 Introduction

This handbook chapter was developed to provide information about family and medical leave provisions under the Wisconsin Family and Medical Leave Act (WFMLA), as amended in June 2009, and the federal Family and Medical Leave Act of 1993 (FMLA) as amended in 2008 and in 2009. Application of these laws must be coordinated with leave benefits provided under administrative rule (or public safety collective bargaining agreement, if applicable). The provision of the WFMLA, FMLA, administrative rule, or collective bargaining agreement which provides the most generous benefit to the employee must be applied. If an employee meets the eligibility requirements for both the WFMLA and the FMLA, the employer must comply with both laws simultaneously. If an employee is eligible under only one law, then the employer needs only to comply with that one law (in addition to administrative rules and/or collective bargaining agreement). Agencies also must be mindful that the Americans with Disabilities Act and Wisconsin Fair Employment laws also may apply in a particular situation.

Employees who use leave benefits provided under the WFMLA and/or FMLA will simultaneously use leave benefits provided under the administrative rules or collective bargaining agreement wherever applicable. *All qualifying leave runs concurrently.*

The information provided in this handbook chapter should not serve as the sole family and medical leave resource. Refer to section 724.030 of this handbook chapter for a list of leave-related statutory and rule references. Cites for the corresponding federal regulation, statute, administrative rule, or court case have been provided in brackets to facilitate further research. As laws may change, always verify information with the corresponding regulations, statutes, etc., to confirm it is still current prior to making FMLA decisions.

An index has been provided as Attachment 5 for ease of reference.

**Note:** Hyperlinks are provided in Attachment 4 to all FMLA forms and posters referenced in this handbook chapter. These forms and posters may also be found in the [FMLA Toolkit](#) available on the Department of Administration, Division of Personnel Management (DPM) website.

## Sec. 724.020 Applicability of this Handbook Chapter

The WFMLA and the FMLA leave provisions as explained in this handbook chapter are applicable only to agencies as defined in s. 230.03(3), Stats., and individuals who meet the definition of “employee” under section 724.040 of this handbook chapter. This includes employees in the classified and unclassified civil service who are employed on a full-time, part-time, seasonal, or sessional basis in permanent, project, or limited term positions.

Other employers and agencies, and individuals who do *not* meet the definition of “employee” may be covered by WFMLA or FMLA provisions, but the Department of Administration, Division of Personnel Management (DPM) does not have the responsibility to oversee the administration of their leave benefits.

## Sec. 724.030 Statutory and Rule Authority

### 1. Wisconsin Family and Medical Leave Law

- a. Section 103.10, Wis. Stats., sets forth the state law provisions for granting family/medical leaves of absence to employees of the State of Wisconsin.
- b. Chapter DWD 225, Wis. Adm. Code, Rules of the Department of Workforce Development (DWD), sets forth the rules to be followed in the administration of the family/medical leave benefits under s. 103.10, Wis. Stats.

**Note:** Texts of the Wisconsin FMLA law and DWD rules may be accessed online through the Equal Rights Division of DWD.

### 2. Federal Family and Medical Leave Act of 1993 as amended

- a. Public Law 103-3, Family and Medical Leave Act of 1993, as amended, 29 U.S.C. ss. 2601, *et seq.*, sets forth the federal law provisions for granting family/medical leaves of absence to employees of the State of Wisconsin.
- b. Title 29, Chapter V, Part 825 of the Code of Federal Regulations (CFR), sets forth the policies to be followed in the administration of the family leave benefits under Public Law 103-3.

**Note:** Texts of the federal FMLA law and Department of Labor regulations may be accessed online through the Wage and Hour Division of the Department of Labor.

### 3. Related Statutes/Administrative Code

- a. Section 230.35, Wis. Stats., sets forth the provisions for granting annual leave, holiday, and sick leave benefits to classified and eligible unclassified employees.
- b. Chapter ER 18, Wis. Adm. Code, sets forth the rules to be followed in the administration of annual leave, holidays, and sick leave benefits under s. 230.35, Wis. Stats.
- c. Chapter ER-MRS 16, Wis. Adm. Code, sets forth the rules regarding restoration rights of employees upon return from approved leave without pay.

### 4. Other

- a. [Chapter 716](#) of the *Wisconsin Human Resources Handbook* provides more specific information regarding the annual leave and holiday policies applicable to employees covered by s. 230.35, Wis. Stats.

- b. The public safety collective bargaining agreement may contain provisions regarding the accrual and use of annual leave, holidays, and sick leave by represented employees and rights of represented employees upon return from approved leave without pay that will supersede statutory and rule provisions.

## Sec. 724.040 Definitions

For purposes of this chapter, the following definitions apply:

1. **Active duty:** See “Covered active duty.”

2. **Child** means:

- a. WFMLA [s. 103.10(1)(a), Wis. Stats.]

A natural, adopted, or foster child, a stepchild, or a legal ward to whom any of the following applies:

- 1) The individual is less than 18 years of age.
- 2) The individual is 18 years of age or older and cannot care for himself or herself because of a serious health condition.

- b. FMLA [29 USC s. 2611(12); 29 CFR s. 825.102, see “Son or daughter”]

A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

*Also see the DOL Administrator’s Interpretation No. 2010-3 regarding persons standing in loco parentis, and Interpretation No. 2013-1 regarding an individual 18 years of age or older and incapable of self-care because of a mental or physical disability. (Links to both of these DOL documents are provided in the FMLA Toolkit on the DOA/DPM website.)*

3. **Christian Science practitioner** means:

- a. WFMLA [s. 103.10(1)(am), Wis. Stats.]

A Christian Science practitioner residing in this state who is listed as a practitioner in the Christian Science journal.

- b. FMLA [29 CFR s. 825.102, see “health care provider”]

Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

4. **Continuing treatment by a health care provider** means:

- a. WFMLA [s. 103.10(1)(g)2., Wis. Stats.; MPI WI Machining Div. v. DILHR and Schimmel, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990)]

Direct, continuous and first-hand contact by a health care provider subsequent to the initial outpatient contact.

b. FMLA [29 CFR ss. 825.102, 825.113 & 825.115]

A serious health condition involving “continuing treatment by a health care provider” includes any one or more of the following:

- 1) Incapacity and treatment: A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - a) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
  - b) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. A regimen of continuing treatment includes, for example, a course of prescription medication (such as an antibiotic) or therapy requiring special equipment (such as oxygen).
  - c) The requirements in a. and b. for treatment by a health care provider mean an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity. The need for additional treatment visits or a regimen of continuing treatment shall be determined by the health care provider.
- 2) Pregnancy or prenatal care: Any period of incapacity due to pregnancy or for prenatal care.
- 3) Chronic conditions: Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
  - a) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider.
  - b) Continues over an extended period of time (including recurring episodes of a single underlying condition).
  - c) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
- 4) Permanent or long-term conditions: A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (e.g., Alzheimer’s, a severe stroke, or the terminal stages of a disease).
- 5) Conditions requiring multiple treatments: Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:
  - a) Restorative surgery after an accident or other injury; or
  - b) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

- 6) Absences attributable to incapacity under paragraphs 2 or 3 of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

5. **Covered active duty** means:

a. WFMLA

This term is not applicable to WFMLA.

b. FMLA [29 USC s. 2611(14); 29 CFR ss. 825.102 & 825.126] The CFR definition is given here, as it is much more detailed than the USC definition.

- 1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,
- 2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B).

6. **Covered servicemember / Covered veteran** means:

a. WFMLA

No definition. These terms are not applicable to WFMLA.

b. FMLA [29 USC s. 2611(15); 29 CFR ss. 825.102, 825.122(a) & 825.127(b)]

- 1) Covered servicemember means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

- 2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. The period between October 28, 2009 and March 8, 2013 (the effective date of the current federal regulations), shall not count towards the determination of the five-year period for covered veteran status.

7. **Domestic partner** means:

- a. WFMLA [s. 103.10(1)(ar), Wis. Stats.]

“Domestic partner” has the meaning given in s. 40.02(21c), *or* s. 770.01(1), Wis. Stats.

- 1) Criteria for a domestic partnership under s. 40.02(21d), Wis. Stats. (all must apply):
  - a) Each individual is at least 18 years old and otherwise competent to enter into a contract.
  - b) Neither individual is married to, or in a domestic partnership with, another individual.
  - c) The two individuals are not related by blood in any way that would prohibit marriage under s. 765.03, Wis. Stats.
  - d) The two individuals consider themselves to be members of each other’s immediate family.
  - e) The two individuals agree to be responsible for each other’s basic living expenses.
  - f) The two individuals share a common residence. Two individuals may share a common residence even if any of the following applies:
    - (1) Only one of the individuals has legal ownership of the residence.
    - (2) One or both of the individuals have one or more additional residences not shared with the other individual.
    - (3) One of the individuals leaves the common residence with the intent to return.
- 2) Under s. 770.01, Wis. Stats., a “domestic partner” means an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides. The criteria for a domestic partnership under s. 770.05, Wis Stats., are (all must apply):
  - a) The individuals are members of the same sex.
  - b) Each individual is at least 18 years old and capable of consenting to the domestic partnership.
  - c) Neither individual is married to, or in a domestic partnership with, another individual.
  - d) The two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption.
  - e) The two individuals share a common residence. Two individuals may share a common residence even if any of the following applies:

- (1) Only one of the individuals has legal ownership of the residence.
- (2) One or both of the individuals have one or more additional residences not shared with the other individual.
- (3) One of the individuals leaves the common residence with the intent to return.

b. FMLA

No definition. This term is not applicable to the FMLA.

8. **Employee** means:

a. WFMLA [s. 103.10(1)(b), Wis. Stats.,

“Employee” includes any individual employed in this state by the State of Wisconsin.

b. FMLA [29 USC s. 2611(3); 29 CFR s. 825.102. *See p. 8906, Federal Register Vol. 78, No. 25.*]

In the case of an individual employed by a public agency, “employee” includes any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

- 1) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and
- 2) Who—
  - a) Holds a public elective office of the State, political subdivision, or agency,
  - b) Is selected by the holder of such an office to be a member of his personal staff,
  - c) Is appointed by such an office holder to serve on a policy making level,
  - d) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or
  - e) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

c. For purposes of both WFMLA and FMLA, the policies of this chapter apply only to employees that meet the definitions in a., or b., above, respectively, and meet the definition of “employee” or “state employee” as defined at s. 230.03(10h), Stats.

9. **Employment status** means:

a. For purposes of both the WFMLA & FMLA [s. ER 18.01(3), Wis. Adm. Code]

The status of a person in the civil service under s. 230.08, Stats., while in pay status or on:

- 1) Approved leave of absence without pay;
- 2) Military leave;
- 3) Leave to serve in the unclassified service;
- 4) Leave of absence due to injury or illness arising out of state employment and covered by worker’s compensation under Ch. 102, Wis. Stats., or s. 230.36, Wis. Stats.;
- 5) Temporary layoff; or

- 6) Layoff and subsequent restoration within three years (or as specified in the applicable collective bargaining agreement).

10. **Equivalent position** means:

- a. WFMLA [s. 103.10(8)(a)2., Wis. Stats.]

A position having equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment.

- b. FMLA [29 CFR s. 825.215]

A position that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

11. **Family leave** means:

- a. WFMLA [s. 103.10(3)(b), Wis. Stats.]

Absence from employment due to the birth of the employee's natural child, the placement of a child with the employee for adoption or as a precondition to adoption under s. 48.90(2), Wis. Stats., but not both, or to care for the employee's child, spouse, domestic partner, or parent who has a serious health condition.

- b. FMLA [29 CFR s. 825.112(a)] *The FMLA does not distinguish between "family leave" and "medical leave."*

Absence from employment:

- 1) For birth of a son or daughter, and to care for the newborn child.
- 2) For placement with the employee of a son or daughter for adoption or foster care.
- 3) To care for the employee's spouse, son, daughter, or parent with a serious health condition.
- 4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.
- 5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or has been notified of an impending call or order to covered active duty status.
- 6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

12. **Family member** means:

- a. WFMLA [s. 103.10(1)(a), (ar), (f), (h) Wis. Stats.]

For purposes of this handbook chapter, "family member," with regard to the WFMLA, encompasses "spouse," "parent," "child," and "domestic partner" as each is separately defined under the WFMLA.

- b. FMLA [29 USC s. 2611(7), (12), (13); 29 CFR S. 825.102]

For purposes of this handbook chapter, “family member” with regard to the FMLA encompasses “spouse,” “parent,” and “son or daughter” as each is separately defined under the FMLA.

**Note.** The relationships considered as family members differ between the WFMLA and FMLA, and both are different from the definitions of “immediate family” found at s. ER 18.01(4), Wis. Adm. Code, and in the public safety collective bargaining agreement, which are not used for WFMLA or FMLA purposes.

13. **Health care provider** means:

a. WFMLA [s. 103.10(1)(e), Wis. Stats.]

A person described under s. 146.81(1) (a) to (p), Wis. Stats., except s. 146.81(1)(hp), Wis. Stats. Health care providers include:

- 1) Nurses licensed under Ch. 441, Wis. Stats.
- 2) Chiropractors licensed under Ch. 446, Wis. Stats.
- 3) Dentists licensed under Ch. 447, Wis. Stats.
- 4) Physicians, physician assistants, perfusionists, or respiratory care practitioners, licensed or certified under subch. II of Ch. 448, Wis. Stats.
- 5) Physical therapists licensed under subch. III of Ch. 448, Wis. Stats.
- 6) Podiatrists licensed under subch. IV of Ch. 448, Wis. Stats.
- 7) Dietitians certified under subch. V of Ch. 448, Wis. Stats.
- 8) Athletic trainers licensed under subch. VI of Ch. 448, Wis. Stats.
- 9) Occupational therapists or occupational therapy assistants licensed under subch. VII of Ch. 448, Wis. Stats.
- 10) Optometrists licensed under Ch. 449, Wis. Stats.
- 11) Pharmacists licensed under Ch. 450, Wis. Stats.
- 12) Acupuncturists certified under Ch. 451, Wis. Stats.
- 13) Psychologists licensed under Ch. 455, Wis. Stats.
- 14) Social workers, marriage and family therapists, or professional counselors certified or licensed under Ch. 457, Wis. Stats.
- 15) Speech-language pathologists or audiologists licensed under subch. II of Ch. 459, Wis. Stats., or speech and language pathologists licensed by the Department of Public Instruction.
- 16) A partnership of any providers specified under 1) to 15), above.
- 17) A corporation or limited liability company of any providers specified under 1) to 15), above, that provides health care services.

- 18) A cooperative health care association organized under s. 185.981, Wis. Stats., that directly provides services through salaried employees in its own facility.
  - 19) Hospices licensed under subch. IV of Ch. 50, Wis. Stats.
  - 20) Inpatient health care facilities, as defined in s. 50.135(1), Wis. Stats.
  - 21) Community-based residential facilities, as defined in s. 50.01(1g), Wis. Stats.
  - 22) Rural medical centers, as defined in s. 50.50(11), Wis. Stats.
- b. FMLA [29 USC s. 2611(6); 29 CFR s. 825.102]
- 1) Doctors of medicine or osteopathy licensed to practice medicine or surgery by the state in which the doctor practices.
  - 2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) licensed to practice in the state and performing within the scope of their practice as defined under state law.
  - 3) Nurse practitioners, nurse-midwives, physician assistants and clinical social workers who are authorized to practice in Wisconsin and who are performing within the scope of their practice as defined under state law.
  - 4) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Mass.
  - 5) Any health care provider from whom the employer or the employer's group health plan will accept certification of the existence of a serious health condition to substantiate a claim for benefits.
  - 6) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

14. ***In loco parentis*** means:

a. WFMLA

No definition. This term is not applicable to WFMLA.

b. FMLA [29 CFR s. 825.122(d)(3),]

Persons with day-to-day responsibilities to care for and financially support a child, or in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

*Also see the DOL Administrator's Interpretation No. 2010-3 regarding persons standing in loco parentis, concluding that "either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts."*

15. **Incapable of self-care** means:

a. WFMLA

No definition. This term is not applicable to WFMLA.

b. FMLA [29 CFR ss. 825.102 & 825.122(d)(1)]

The individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

16. **Intermittent leave** means:

a. WFMLA [s. 103.10(3)(d), Wis. Stats., s. DWD 225.02(1)]

While the WFMLA does not use the term “intermittent leave,” it allows “partial absence from employment.” The Administrative Code provides that medical or family leave may be taken in non-continuous increments if the employer allows any other leave to be taken in increments of less than a full workday.

b. FMLA [29 USC s. 2612(b); 29 CFR ss. 825.102, 825.202(a)]

Leave taken in separate blocks of time due to a single qualifying reason or on a reduced leave schedule. (See definition of “reduced leave schedule.”)

17. **Medical leave** means:

a. WFMLA [s. 103.10(4)(a), Wis. Stats.]

Absence from employment due to a serious personal health condition which makes the employee unable to perform his or her employment duties.

b. FMLA [29 USC s. 2612(a)(1)(d)]

The FMLA does not distinguish between “family leave” and “medical leave” for purposes of leave allotment, but provides leave for an employee to care for his or her own serious health condition.

18. **Parent** means:

a. WFMLA [s. 103.10(1)(f), Wis. Stats.]

A natural parent, foster parent, adoptive parent, stepparent, or legal guardian of an employee or of an employee’s spouse or domestic partner.

b. FMLA [29 USC s. 2611(7); 29 CFR s. 825.102] *Also see the DOL Administrator’s Interpretation No. 2010-3 regarding persons standing in loco parentis.*

A biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to an employee when the employee was a child. This term does **not** include parents “in-law.”

19. **Parent of a covered servicemember** means:

a. WFMLA

No definition. This term is not applicable to WFMLA.

b. FMLA [29 CFR s. 825.102, 825.122(j)]

A covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. This term does not include parents "in-law."

20. **Qualifying exigency** means:

a. WFMLA

No definition. This term is not applicable to the WFMLA.

b. FMLA [29 CFR s. 825.126]

Generally, an urgent requirement or pressing need for which FMLA leave may be taken, arising out of the fact that an eligible employee's spouse, son, daughter, or parent is a military member on covered active duty or has been notified of an impending call or order to covered active duty. A qualifying exigency may be any of the following:

- 1) To address any issue arising from a short-notice deployment (seven days' notice or less).
- 2) To attend any official ceremony or event sponsored by the military related to the covered active duty or call to covered active duty.
- 3) To attend family support programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member.
- 4) To change childcare arrangements for the child(ren) of the military member.
- 5) To provide childcare on a short-term, urgent basis for the child(ren) of the military member.
- 6) To enroll in or transfer to a new school or daycare the child(ren) of the military member.
- 7) To attend meetings with school or daycare staff regarding discipline, parent-teacher conferences, or counselors regarding the child(ren) of the military member.
- 8) To make or update financial or legal arrangements related to the deployment of the military member.
- 9) To act as the military member's representative for obtaining, arranging, or appealing military service benefits; the period of eligibility extends 90 days past the termination of the military member's covered active duty status.
- 10) To attend counseling for the employee, military member, or child(ren) of the military member.
- 11) To spend time with a military member who is on temporary rest and recuperation leave; limit of fifteen calendar days of leave for each instance of rest and recuperation leave.

- 12) To attend arrival ceremonies, reintegration briefings and events, and any other official military ceremony or program for a period of 90 days following the termination of the military member's covered active duty status.
- 13) To address issues that arise from the death of the military member while on covered active duty status.
- 14) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care.
- 15) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care.
- 16) To admit to or transfer to a care facility a parent of the military member.
- 17) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty (but not for routine or regular meetings).
- 18) By mutual agreement of the employer and employee, any other event arising out of the covered active duty or call to covered active duty status of the military member.

21. **Reduced leave schedule** means:

a. WFMLA

No definition. See the definition of "intermittent leave" for information about employees taking leave in non-continuous increments under the WFMLA.

b. FMLA [29 CFR ss. 825.102 & 825.202(a) ]

A leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

22. **Serious health condition** means:

a. WFMLA [s. 103.10(1)(g), Wis. Stats.]

A disabling physical or mental illness, injury, impairment or condition involving any of the following:

- 1) Inpatient care in a hospital, as defined in s. 50.33(2), Wis. Stats., nursing home, as defined in s. 50.01(3), Wis. Stats., or hospice.
- 2) Outpatient care that requires continuing treatment or supervision by a health care provider.

b. FMLA [29 USC s. 2611(11); 29 CFR ss. 825.102, 825.113-.115 & 825.119]

An illness, injury, impairment, or physical or mental condition that involves:

- 1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom), or any subsequent treatment in connection with such inpatient care.

- 2) Continuing treatment by a health care provider, including any one or more of the following:
- a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
- (1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist (beyond the employee's control), by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
  - (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. A regimen of continuing treatment includes, for example, a course of prescription medication, or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). However, continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

The requirement for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

- b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy (e.g., severe morning sickness), or for prenatal care. The employee or covered family member does not need to receive treatment from a health care provider during the absence.
- c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
- (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
  - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
  - (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
- d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.
- e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:
- (1) Restorative surgery after an accident or other injury; or
  - (2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment,

such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

- 3) Treatment for purposes of 1) and 2), above, (inpatient care and continuing treatment by a health care provider, respectively), includes, but is not limited to, examination to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical exams, eye exams, or dental exams.
- 4) Substance abuse may be a serious health condition if the conditions in 1) or 2), above, are met. Leave may be taken only for treatment for substance abuse and not because of the employee's use of the substance.
- 5) Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions if the conditions in 1) or 2), above, are met.
- 6) Mental illness or allergies may be serious health conditions if the conditions in 1) or 2), above, are met.
- 7) Absences attributable to pregnancy or to a chronic serious health condition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days.
- 8) Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition.
- 9) Conditions for which cosmetic treatments are administered (e.g., most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop.

23. **Serious injury or illness** means:

a. WFMLA

No definition. This term is not applicable to WFMLA.

b. FMLA [ 29 U.S.C. s. 2611(18); 29 CFR ss. 825.102 & 825.127(c)]

- 1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and
- 2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:
  - a) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

- b) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- c) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- d) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

24. **Son or daughter**

- a. WFMLA

See the definition of "child."

- b. FMLA [29 USC s. 2611(12); 29 CFR s. 825.102]

A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence.

*Also see the DOL Administrator's Interpretation No. 2010-3 regarding persons standing in loco parentis, and Interpretation No. 2013-1 regarding an individual 18 years of age or older and incapable of self-care because of a mental or physical disability. (Links to both of these DOL documents are provided in the FMLA Toolkit on the DOA/DPM website.)*

25. **Son or daughter of a covered servicemember** means:

- a. WFMLA

No definition. This term is not applicable to WFMLA.

- b. FMLA [29 CFR ss. 825.102 & 825.127(d)(1)]

A covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood *in loco parentis*, and who is of any age.

26. **Son or daughter on covered active duty or call to covered active duty status** means:

- a. WFMLA

No definition. This term is not applicable to WFMLA.

- b. FMLA [29 CFR ss. 825.102, 825.126(a)(5)]

The employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered employee stood *in loco parentis*, who is on covered active duty or call to covered active duty status, and who is of any age.

27. **Spouse** means:

- a. WFMLA [s. 103.10(1)(h), Wis. Stats.]

An employee's legal husband or wife.

- b. FMLA [29 USC s. 2611(13); 29 CFR ss. 825.102, 825.122(b)]

*Spouse*, as defined in the statute, means a husband or wife. For purposes of this definition, effective beginning March 27, 2015, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

- 1) Was entered into in a State that recognizes such marriages; or
- 2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

**Note.** WFMLA and FMLA: As of October 6, 2014, the State of Wisconsin recognizes same-sex marriages, including same-sex marriages validly entered into in other states or countries, and same-sex marriages conducted in Wisconsin on or after October 6, 2014, or during the period from June 6 to June 13, 2014.

28. **Twelve (12)-month period** means:

- a. WFMLA [s. DWD 225.01(1)(m), Wis. Adm. Code]

A calendar year commencing immediately after midnight on January 1 and ending at midnight on December 31 each year (for the purpose of delineating the period in which an employee may use his or her annual allotment of family or medical leave)..

- b. FMLA [29 CFR ss. 825.127(e)(1) & 825.200(b)(1)]

By policy choice, the calendar year. However, for the sole purpose of defining the "single 12-month period" during which up to 26 workweeks of leave may be taken to care for a servicemember, the 12-month period begins on the first day the employee takes FMLA leave to care for the servicemember and ends 12 months after that date.

The special single 12-month period will usually overlap with the preceding and subsequent regular 12-month periods, and in certain circumstances may overlap with another single 12-month period. Regardless of overlapping, each regular 12-month period and special single 12-month period is considered independently for determining FMLA leave eligibility and counting FMLA leave used within the applicable 12-month period.

29. **Veteran:** *See the definition for Covered servicemember / Covered veteran*

30. **Week** means:

- a. WFMLA [s. DWD 225.01(1)(o), 225.02(2), Wis. Adm. Code]

"Week" means 7 consecutive calendar days for the purpose of establishing whether an employee has been employed for more than 52 consecutive weeks and worked at least 1,000 hours during the preceding 52-week period.

For purposes of partial absence leave, “week” means 5 days of leave which would otherwise be workdays for the requesting employee. For administrative purposes, this is interpreted to mean the number of hours in the employee’s regularly scheduled workweek. For full-time employees on standard work schedules, this means 40 hours.

- 1) For part-time employees and employees on flexible schedules such that the number of hours varies from week to week, week normally means the employee’s budgeted percentage of full-time equivalency (FTE) times 40 hours. For employees who are regularly scheduled in advance to work more than 80 hours in a two-week pay period, a week equals the typical number of hours scheduled in each two-week pay period divided by two.
- 2) For seasonal, sessional, and school year employees, week means the projected average number of hours the employee is scheduled to work each calendar week of the current period of appointment.

**Note.** An FMLA week and a WFMLA week will typically equal the same number of hours.

- b. FMLA [29 CFR s. 825.205(b)]

The employee’s normally scheduled workweek. If an employee’s schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a week is calculated as the weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type).

## Sec. 724.050 Eligibility Requirements

### 1. Eligibility for leave:

- a. WFMLA [s. 103.10(2)(c), Wis. Stats.; DWD 225.01(3)-(4)]

Employees are eligible for leave provided the employee:

- 1) Has been employed by the State for more than 52 consecutive weeks (see 2., below); **and**
- 2) Has worked for the State for at least 1,000 hours (*including* paid leave) during the preceding 52 week period.

- b. FMLA [29 USC s. 2611(2); 29 CFR ss. 825.102, 825.110]

1) Employees are eligible for leave provided the employee:

- a) Has been employed by the State for at least 12 months (which need not be 12 consecutive months). However, employment periods prior to a break in service of seven years or more need not be counted, except as set forth under 2), below; **and**
- b) Has worked for the State at least 1,250 hours (*not including* paid leave) during the 12 months immediately preceding the beginning of the requested leave; **and**
- c) Is employed at a worksite where 50 or more employees, employed with any state agency, are employed within 75 miles of that worksite.

**Note:** Pursuant to the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), an employee returning from fulfilling his or her National Guard or Reserve military

obligation shall be credited with the hours of service that would have been performed *but for* the period of military service. The employee's pre-service work schedule can generally be used for calculations.

- 2) Employment periods preceding a break in service seven years or more need not be counted in determining whether the employee has been employed by the state for at least 12 months, except:
  - a) Preceding service must be counted if the break in service was caused by the employee fulfilling his or her military service obligation covered under the Uniformed Services Employment and Reemployment Rights Act (USERRA).
  - b) Preceding service must be counted if a written agreement exists concerning the state's intention to rehire the employee after the break in service.
- 3) Determination of whether an employee has worked for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences.
- 4) Determination of whether 50 state employees are employed within 75 miles is based on the date when the employee gives notice of the need for leave.
- 5) The employee must be informed of his/her eligibility within five business days of when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, absent extenuating circumstances.
- 6) If an employee is on non-FMLA leave at the time he or she meets the eligibility requirements, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement is FMLA leave.

2. "Employed by" means to be in "employment status," as defined in section 724.040 of this handbook chapter.

- a. WFMLA [s. DWD 225.01(3), Wis. Adm. Code]

An employee is deemed to have been employed by the State for more than 52 consecutive weeks if the employee has been in employment status with the State during each of those 52 weeks, irrespective of the number of hours worked in each week. The 52 weeks do not necessarily have to be the 52 weeks immediately preceding the requested leave.

- b. FMLA [29 USC s. 2611(3); 29 CFR ss. 825.102, 825.110(b)]

An employee is deemed to have been employed by the State for at least 12 months if the employee has been in employment status with the State during each of those 12 months, irrespective of the number of hours worked in each month. The 12 months do not have to be consecutive months nor do they necessarily have to be the 12 months immediately preceding the requested leave., except that employment periods prior to a break in service of seven years or more need not be counted except in limited circumstances noted in 1./b.(2), above.

3. Minimum number of required hours worked in the preceding 12 months:

- a. WFMLA [s. DWD 225.01(4), Wis. Adm. Code]

*1,000 Hours.* A person shall be deemed to have "worked for the employer for at least 1,000 hours during the preceding 52-week period" if the number of hours actually *worked* in that period *plus* the number of hours for which the employee was paid for accrued leave (i.e., sick leave, annual leave, personal/legal holiday, etc.) equals at least 1,000 hours.

- b. FMLA [29 USC s. 2611(2)(A)(ii); 29 CFR s. 825.110(c)]

*1,250 Hours.* A person shall be deemed to have “worked for the employer for at least 1,250 hours in the 12-month period immediately preceding the beginning of the requested leave” if the number of hours actually *worked* in that period, *not including* hours for which paid leave was used, equals at least 1,250 hours. An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed *but for* the period of military service.

4. Other leave benefits:

WFMLA & FMLA [WFMLA: s. 103.10(2)(a)-(b); FMLA: 29 CFR ss. 825.700-702]

Employees who do not meet these eligibility requirements may be eligible for other leave benefits under s. 230.35, Wis. Stats., Ch. ER 18, Wis. Adm. Code, or the public safety collective bargaining agreement.

## Sec. 724.060 Leave Entitlements—Reasons and Duration

1. Reasons for leave:

- a. WFMLA [ss. 103.10(3)&(4), Wis. Stats.]

Eligible employees are entitled to use leave under WFMLA when taken for the following purposes:

- 1) *Family leave* may be taken for the birth of the employee’s natural child, if the leave begins within 16 weeks before or after the child’s birth.
- 2) *Family leave* may be taken for the placement of a child with the employee for adoption or as a precondition to adoption, but not both, if the leave begins within 16 weeks before or after the child’s placement.
- 3) *Family leave* may be taken to care for the employee’s child, spouse, domestic partner, or parent (including parent in-law or domestic partner’s parent) with a serious health condition.
- 4) *Medical leave* may be taken for the serious health condition of the employee that makes the employee unable to perform the functions of his or her position.

For 1) and 2), above, see section 724.070 1.f., of this handbook chapter, for further explanation of the 16-week requirement.

- b. FMLA [29 USC s. 2612(a)(1), (3); 29 CFR ss. 825.112(a), 825.120 and 825.121]

Eligible employees may use leave under FMLA when taken for the following purposes:

- 1) For the birth of the employee’s child *and* to care for the newborn child. Leave to bond with the healthy newborn child may be taken starting with the date of birth but must conclude within 12 months following birth.
- 2) For placement of a child with the employee for adoption or foster care. Leave may begin before the placement as needed for the placement process to proceed, but must be concluded within 12 months following placement.

- 3) To care for the employee's child, spouse, or parent (*not* including parent in-law) with a serious health condition, including both physical care and psychological comfort and reassurance. This also includes situations where the employee may be needed to fill in for others who are caring for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home.
- 4) For the serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of the employee's position. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.
- 5) An expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.
- 6) For any qualifying exigency arising from the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or has been notified of an impending call or order to covered active duty. Refer to the definition of "qualifying exigency" in section 724.040 of this handbook chapter and the federal regulations at s. 825.126 for more information on the following types of qualifying exigencies.
  - a) Short-notice deployment of seven days or less.
  - b) Military events and related activities.
  - c) Childcare and school activities.
  - d) Financial and legal arrangements.
  - e) Counseling.
  - f) Rest and recuperation, with a limit of 15 calendar days of leave for each instance.
  - g) Post-deployment activities within 90 days after the termination of covered active duty.
  - h) Parental care.
  - i) Additional activities by mutual agreement of the agency and employee.
- 7) To care for a covered servicemember (which includes certain veterans – see the definition of "covered servicemember" in section 724.040) with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

2. Length of leave:

- a. WFMLA [ss. 103.10(3)&(4), Wis. Stats., s. DWD 225.02, Wis. Adm. Code]

During a calendar year, eligible employees may not take more than:

- 1) Six weeks of family leave for birth or placement of a child, as specified under 1.a.1) and 2), above. An employee is limited to a total of six weeks of leave for each birth or placement, even if the eligibility period extends across two calendar years.

- 2) Two weeks of family leave to care for a family member, as specified under 1.a.3), above.
- 3) Two weeks of medical leave for the employee's own serious health condition, as specified in 1.a.4), above.

**Note:** Because the WFMLA specifies different leave entitlements for different purposes, an employee may have WFMLA leave available even after exhausting all FMLA leave. For example, if an employee has a serious illness which causes the employee to be absent from work for 12 weeks in one year, thereby using up all 12 weeks of FMLA leave, this employee has used only the 2 weeks of WFMLA leave specified for the employee's own serious health condition. The employee has not used any of the WFMLA 2 weeks of family leave to care for a family member with a serious health condition, or any of the WFMLA 6 weeks of family leave for birth or placement of a child.

b. FMLA [29 USC s. 2612(a)(1), (3)-(4); 29 CFR ss. 825.200 & 825.127(e)]

- 1) Eligible employees are entitled to use 12 workweeks of unpaid leave for FMLA-qualifying purposes during each calendar year, except in the special case of leave to care for a covered servicemember with a serious injury or illness. See 2), below.

**Note:** Federal regulations provide that spouses who are both eligible for FMLA leave and are both employed with the same employer, are permitted to take only a combined total of 12 weeks of leave during a calendar year under certain circumstances. However, denying married state employees their full 12-week FMLA leave entitlement would be a violation of Wisconsin's Fair Employment Law, therefore, this spousal restriction is unavailable to state agencies.

- 2) Eligible employees are entitled to use 26 workweeks of unpaid leave during a "single 12-month period" to care for a covered servicemember (including a covered veteran) with a serious injury or illness. This single 12-month period begins on the first day the employee takes FMLA leave to care for the servicemember and ends 12 months after that date.

During this single 12-month period, an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. However, during this single 12-month period, no more than 12 weeks of leave may be taken for any FMLA-qualifying reason(s) other than to care for a covered service member.

**EXAMPLE #1:** If an employee takes five weeks to care for a servicemember, the employee remains limited to 12 weeks for all other FMLA-qualifying reasons during the special single 12-month period, for a total of up to 17 weeks of FMLA leave used.

**EXAMPLE #2:** If an employee takes 20 weeks to care for a servicemember, the employee is limited to six more weeks for all other FMLA-qualifying reasons during the special single 12-month period, for a total of 26 weeks of FMLA used.

- 3) Multiple or overlapping single 12-month periods: The 26-workweek leave entitlement is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for a different covered servicemember or to care for the same servicemember with a subsequent serious injury or illness. If one single 12-month period overlaps with another, the employee is limited to 26 workweeks of FMLA leave in each single 12-month period considered independently.
- 4) Interaction of special single 12-month period with regular calendar year FMLA entitlement: State employees receive the regular 12-workweek FMLA entitlement on a per-calendar-year

basis. The special single 12-month period to care for a covered servicemember will rarely coincide with the calendar year, and therefore creates a situation where the single 12-month period overlaps with both the previous and the subsequent calendar year FMLA periods. Agencies should consider each single 12-month period and calendar year period independently for counting FMLA leave. For regular calendar year periods, leave to care for a covered servicemember that occurred during the special single 12-month period should not be counted against the employee's regular 12-week entitlement for the calendar year. Leave taken after the single 12-month period to care for the servicemember who is the employee's son or daughter, spouse, or parent, may be counted toward the 12-weeks of FMLA leave in the calendar year.

**EXAMPLE:** An employee takes intermittent leave to care for a servicemember starting on October 1, 2008. Thus, from October 1, 2008, through September 30, 2009, the employee may take up to 26 weeks of FMLA leave, but no more than 12 weeks for reasons other than to care for the servicemember. During this time, the employee also needs leave for the employee's own serious health condition and takes six weeks for this reason at the end of 2008 and another six weeks at the start of 2009. Because of this, the employee has used up all 12 weeks of FMLA leave for reasons other than to care for a servicemember during the special 12-month period. The employee also takes four weeks of servicemember leave in calendar year 2009. After the special single 12-month period expires September 30, 2009, the 12-month period of reference reverts back to the calendar year and the regular 12-week entitlement applies. The leave to care for the covered servicemember during the special single 12-month period is ignored, and the employee has six weeks of FMLA leave eligibility remaining in 2009 because the employee has only used six weeks of leave for reasons other than to care for a covered servicemember in calendar year 2009.

#### Sec. 724.070 Leave Request, Scheduling and Approval Process

**Note:** See Attachment 4 for a listing and hyperlinks to all FMLA and WFMLA forms and posters. Alternatively, see the [FMLA Toolkit](#) on the DOA/DPM website.

When an employee requests leave for the first time in a calendar year for a purpose that may be covered under the WFMLA or FMLA, agencies should start the administrative process by asking the employee to complete the form [Family and Medical Leave-Employee Request](#) (DOA-15322). Agencies may require this form again if an employee's leave request changes substantially from an earlier request within the same year.

1. WFMLA [ss. 103.10(4) & (6), Wis. Stats., ss. DWD 225.02(1), (3), (4), (6), (7) & (8), Wis. Adm. Code]
  - a. If an employee intends to take family leave for the birth or adoption of a child, the employee shall, in a reasonable and practicable manner, give the employing agency advance notice of the expected birth or placement.
  - b. If an employee intends to take family leave because of the planned medical treatment or supervision of a family member, or medical leave for the planned medical treatment of the employee, the employee shall do all of the following:
    - 1) Make a reasonable effort to schedule the medical treatment or supervision so that it does not unduly disrupt the agency's operation, subject to the approval of the health care provider of the family member.
      - a) The employee shall provide the employing agency with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity of the leave.
      - b) Except where precluded by the need for health care consultation or treatment, the proposed schedule shall be sufficiently definite so that the employing agency 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.

- 2) Give the employing agency advance notice of the medical treatment or supervision in a reasonable and practicable manner. The notice shall:
  - a) Identify the planned dates of the leave.
  - b) Be given to the employing agency by the employee with reasonable promptness after the employee learns of the probable necessity of the leave.
- c. An employing agency may require that notice of leave be in writing if the requirement is a written policy, if it governs all employees of the employing agency, and if the employee has been made aware of the policy.
- d. Family leave requested by an employee may be denied by the employing agency if the employee substantially fails to provide the employing agency with proper notice of that leave.
- e. An employee may schedule medical leave (leave due to the employee's own serious health condition) as medically necessary.
- f. An employee may begin family leave for birth or placement no earlier than 16 weeks before the estimated date of birth of a natural child or placement of an adoptive child and no later than 16 weeks after the actual date of birth or placement. If leave for these purposes is taken incrementally in accordance with 4), below, all non-continuous increments must begin within 16 weeks of the actual birth or placement.

<p><b>EXAMPLE:</b> If the actual or expected date of birth of an employee's child (or placement in the home, in the case of adoption) is April 1, 2008, the employee is eligible to use six weeks of family leave beginning between December 10, 2007, (16 weeks prior to the expected date of birth or placement) and July 22, 2008 (16 weeks after the actual date of birth or placement). If the employee chooses to take family leave intermittently, the last non-continuous increment of leave must begin on or before July 22, 2008.</p>
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- g. Leave available during a calendar year shall be used within that calendar year. No more than six weeks of leave may be used by an employee for the birth or adoption of any one child, even if eligibility for leave extends into another calendar year. Birth or adoption of more than one child at the same time is considered a single event. When this occurs, an employee does not receive an additional six weeks of leave for each additional child.
  - h. An employee may take family or medical leave in non-continuous increments (i.e., partial absence from employment). A partial absence must be in a time increment which is compatible with DPM and agency policies governing absences from employment for purposes other than WFMLA leave. The shortest increment permissible is the shortest increment the employing agency allows to be taken by that employee for any other type of non-emergency leave.
  - i. Conclusion of Leave: Family or medical leave available during the calendar year must be used within that calendar year. If not used, the employee's entitlement to the leave expires at the end of the calendar year in which the leave was earned.
2. FMLA [29 USC s. 2612(e); 29 CFR ss. 825.127(e)(4) & 825.300-825.304]
    - a. Employees are required to provide agencies at least 30 days' advance notice of the need to take leave if the need for leave is foreseeable (e.g., birth of a child, planned medical treatment). If 30 days' notice is not practicable, the employee must provide notice as soon as practicable. If an employee fails to provide timely notice as required, the agency may deny the leave request until up to 30 days after the

date notice is actually provided, based on the amount of additional notice the employee could reasonably have provided.

- b. Employees are required to comply with agency and/or workplace usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances, such as in the case of a medical emergency. If an employee does not comply with the agency/workplace usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.
- c. When the need for leave is foreseeable for the planned medical treatment of the employee, a family member, or a covered servicemember, the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the family member or servicemember.
- d. Upon receipt of the employee's request for leave, the agency must provide the employee with a copy of the [Notice of Eligibility and Rights & Responsibilities](#) within five business days.

**Note:** See section 724.110 of this handbook chapter regarding Recordkeeping. Agencies must keep copies of records related to FMLA leave for three years.

**Note:** The FMLA regulations require three types of notice to an employee taking leave that may qualify as FMLA leave: notice of eligibility, notice of rights and responsibilities, and notice of designation. Since the notice of eligibility and the notice of rights and responsibilities are to be provided to the employee at the same time, they are combined here into a single step, and included as Parts A and B on a single form, [Notice of Eligibility and Rights & Responsibilities](#) (DOA-15325). The final required notice, notice of designation, may be given to the employee at the same time as the notices of eligibility and rights & responsibilities if the agency has sufficient information at that time to designate leave as FMLA leave.

- e. Notice to employee of eligibility and rights & responsibilities: Agencies should use the *FMLA Notice of Eligibility and Rights & Responsibilities* form, which satisfies the information requirements of the FMLA regulations and is also compatible with WFMLA leave administration. Agencies must provide notice of eligibility and notice of rights and responsibilities within five days of an employee request for leave that may qualify as FMLA leave, or within five days from when the agency acquires knowledge that an employee's leave may be for an FMLA qualifying reason.
  - 1) The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason the employee is not eligible. Notification of eligibility may be oral or in writing, and must be in a language understood by the employee.
  - 2) All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period. No further notice to the employee of FMLA eligibility during the applicable 12-month period is required unless both the following are true: the employee provides notice of a subsequent need for FMLA leave due to a different FMLA-qualifying reason; and the employee's eligibility status has changed.
  - 3) The notices of eligibility and rights and responsibilities must be in a language understood by the employee.
  - 4) The rights and responsibilities notice must detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations.

- 5) The rights and responsibilities notice must be accompanied by any medical certification form or other certification form the agency will require.
- f. Designation notice: Agencies should use the [Designation Notice](#) form ( DOA-15324), which satisfies the information requirements of the FMLA regulations and is also compatible with WFMLA leave administration.

**Note:** In all circumstances, it is the agency’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. Therefore, agencies must obtain enough information from the employee or the employee’s spokesperson to determine if leave should be considered leave under FMLA. Refer to section 724.130 of this handbook chapter, entitled “Certification” for information detailing employer rights and employee obligations regarding certification of leave as FMLA leave.

- 1) When the agency has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the agency must notify the employee in writing whether or not the leave will be designated and counted as FMLA leave within five business days, absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period.
  - 2) If the agency will require the employee to present a fitness-for-duty certification to be restored to employment, the agency must provide notice of such requirement with the designation notice. Refer to Section 724.150 2./f. for details on the process and requirements for fitness-for-duty certification.
  - 3) If the information provided by the agency to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the agency shall provide written notice of the change within five business days of receipt of the employee’s first notice of need for leave subsequent to any change.
  - 4) The agency must notify the employee of the amount of leave counted against the employee’s FMLA leave entitlement. If it is not possible in advance to determine the amount of leave, then the agency must provide notice of the amount of leave counted against the employee’s FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period in which leave was taken. The notice of the amount of FMLA leave taken may be oral or in writing. If oral, it shall be confirmed in writing, no later than the next payday which occurs at least one week later. Written notice may be in any form.
  - 5) If leave would qualify as both leave to care for a covered servicemember during a single 12-month period and leave to care for a family member with a serious health condition, the leave shall be designated and counted as leave to care for a covered servicemember, and not as leave to care for a family member with a serious health condition.
- g. Retroactive designation: If an agency does not designate leave in a timely manner, the agency may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the employer’s failure to timely designate leave does not cause harm or injury to the employee. In all cases, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.
  - h. Dispute Resolution: If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.
  - i. Conclusion of Leave: Leave available during the calendar year must be used within that calendar year. Leave available during a single 12-month period to care for a covered servicemember must be used

within that single 12-month period. If not used, the employee's entitlement to the leave expires at the end of the 12-month period in which the leave was earned. An employee's entitlement to leave for birth or adoption expires 12 months after the date of birth or placement for adoption.

**Sec. 724.080 Intermittent Leave**

1. WFMLA [s. 103.10(3)(d), (4), (6), Wis. Stats., s. DWD 225.02(3)-(5), Wis. Adm. Code]

a. An employee who takes intermittent family or medical leave shall attempt to schedule all absences so as not to unduly disrupt the employing agency's operation.

1) An employee is deemed to have scheduled intermittent leave for birth or adoption in a manner that does not unduly disrupt the employing agency's operations if:

- a) The employee provides the employing agency with notice of the employee's proposed schedule of intermittent leave which is at least as much notice as the shortest notice that the employee is required to give the employing agency for the taking of any other non-emergency or non-medical leave, *and*
- b) The schedule is sufficiently definite for the employing agency to be able to schedule replacement employees, to the extent replacement employees are required, to cover for the absences.

<b>Note:</b> Any period of WFMLA leave for the birth of a child or placement of a child for adoption must begin within 16 weeks before or after the birth or placement.
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2) An employee is deemed to have made a reasonable effort to schedule intermittent leave for purposes other than birth or adoption in a manner that does not unduly disrupt the employing agency operations if:

- a) The employee provides the employing agency with a proposed schedule for the intermittent leave with reasonable promptness after the employee learns of the probable necessity for the leave, *and*
- b) Except where precluded by the need for health care consultation or treatment, if that proposed schedule is sufficiently definite that the employing agency 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.

b. An employing agency may require an employee to provide written notice of scheduled leave if the requirement is a written policy, it governs all employees of the employing agency and the employee has been made aware of the policy.

2. FMLA [29 USC s. 2611(9), s. 2612(b); 29 CFR ss. 825.202-.206]

a. Intermittent leave or leave on a reduced work schedule:

- 1) *Must* be granted when medically necessary to care for, or to provide psychological comfort to, a family member with a serious health condition or a covered servicemember with a serious injury or illness.
- 2) *Must* be granted when medically necessary for the employee's own serious health condition.
- 3) *Must* be granted when necessary because of a qualifying exigency.

- 4) *May* be granted, at the discretion of the appointing authority, when taken as bonding leave for the birth of the employee's healthy child or placement of a healthy child with the employee for adoption or foster care. Employees must be informed of the agency's policy regarding intermittent leave at the time FMLA leave is requested.
- b. An employee needing an intermittent or reduced leave schedule for planned medical treatment must make a reasonable effort to schedule the treatment so as not to unduly disrupt the agency's operations.
- c. Only the amount of leave actually taken may be counted toward the 12 workweeks of leave. For example, if an employee who normally works five eight-hour days per week takes one day off, the employee would use eight hours of FMLA entitlement.
- d. For less than full-time employees, the amount of leave to which they are entitled is determined on a proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week now works 20 hours per week under a reduced work schedule, the employee would use one-third of a week of FMLA leave (ten hours) per week. The normal workweek of an employee whose schedule varies shall be based on a weekly average of the hours scheduled, including any leave hours, over the 12 months prior to the beginning of the leave period.
- e. When an employee takes intermittent leave or a reduced leave schedule, the agency must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.
- f. Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift and there is no equivalent position available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave.
- g. Leave without pay for any number of hours taken as intermittent leave for documented FMLA-qualifying purposes **will not** affect an eligible employee's FLSA exempt status.
- h. In certain circumstances (*see Section 724.100—Alternative Employment*) an employee requesting intermittent or reduced schedule leave may be required temporarily to transfer to a position with equivalent pay and benefits which better accommodates recurring periods of leave.

## Sec. 724.090 Overtime Hours

1. WFMLA (no cite)

- a. An employee may have a WFMLA medical certification restricting the employee from working more than a certain number of hours on a shift, in a day, or in a week. If an employee would be required to work additional hours, but does not work them due to the employee's WFMLA medical restriction, the number of hours not worked should be counted as WFMLA time used. For example, if an employee would have been required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of WFMLA leave out of the 48-hour workweek ( $8/48 = 1/6$  workweek).
- b. The employee may not substitute paid leave for WFMLA unpaid leave for required overtime hours not worked except to the extent that such use of paid leave in lieu of working the required overtime hours would be available to a similarly situated employee without a medical restriction on working additional hours.

**Note:** Medical restrictions on working overtime do not seem to have been contemplated in the WFMLA statute and administrative code, and there has been no case law on this topic. DPM adopts the interpretations given above because it believes the WFMLA intended that all leave granted under the WFMLA would be counted as WFMLA leave, and that the WFMLA did not intend to give WFMLA-eligible employees an advantage over other employees to receive overtime pay for hours not worked.

2. FMLA (29 CFR s. 825.205(c))

- a. If an employee normally would be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case the employee is using an intermittent or reduced leave schedule. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA leave out of the 48-hour workweek ( $8/48 = 1/6$  workweek).
- b. Voluntary overtime hours that an employee does not work due to a FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.
- c. The employee may not substitute paid leave for FMLA unpaid leave for required overtime hours not worked except to the extent that such paid leave would be available to the employee in lieu of working the required overtime hours regardless of FMLA eligibility.

**Sec. 724.100 Alternative Employment**

1. WFMLA [s. 103.10(10), Wis. Stats.]

The employing agency and an employee with a serious health condition are not prohibited from mutually agreeing to alternative employment for the employee while the serious health condition lasts. No period of alternative employment with the State reduces the employee's right to family or medical leave.

2. FMLA [29 CFR s. 825.204]

- a. If an employee requests intermittent leave or leave on a reduced schedule that is foreseeable based on planned medical treatment or if the agency has approved use of intermittent bonding leave for birth or adoption, the agency may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. The alternative position must have equivalent pay and

benefits but it need not have equivalent duties. The employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee.

- b. Transfer to an alternative position may require compliance with the Americans with Disabilities Act, other Federal or State law, or the public safety collective bargaining agreement.
- c. When the employee no longer needs to continue on intermittent or a reduced leave schedule, he or she must be placed in the same or equivalent job as the job held at the time the leave commenced.

## Sec. 724.110 Recordkeeping

### 1. WFMLA

No requirements.

### 2. FMLA [29 USC s. 2616(b); 29 CFR s. 825.500]

FMLA provides that agencies shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with Department of Labor regulations. Agencies are required to keep records for at least three years of all leave taken under FMLA. These records must disclose the following:

- a. Basic payroll and identifying employee data, including name, address, and occupation; rate of pay and terms of compensation (i.e., salary vs. hourly); daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
- b. Dates FMLA leave is taken by employees. Leave must be designated in records as FMLA leave; leave so designated may not include other leave provided under state law or by collective bargaining agreement or administrative code which does not simultaneously qualify as leave under FMLA.
- c. The hours of the leave, if FMLA leave is taken in increments of less than one full day.
- d. Copies of employee notices of leave furnished to the agency under FMLA and copies of all notices given to employees as required under FMLA. These copies may be maintained in the employee's personnel file.
- e. Any documents (including written and electronic records) describing employee benefits or agency policies and practices regarding the taking of paid and unpaid leave.
- f. Premium payments of employee benefits.
- g. Records of any dispute between the agency and an employee regarding designation of leave as FMLA leave, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.
- h. Records and documents relating to medical certification, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If

the ADA, as amended, is also applicable, such records must be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

- 1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- 2) First aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment.
- 3) Government officials investigating compliance with FMLA shall be provided relevant information upon request.

### Sec. 724.120 Substitution of Paid Leave

1. WFMLA [s. 103.10(5)(b), Wis. Stats.; ss. DWD 225.03 & 225.031, Wis. Adm. Code]

- a. At the employee's option, an employee may substitute, for portions of family leave or medical leave, accrued paid or unpaid leave of any other type provided by the employer. However, an employee may not substitute paid leave for required overtime hours not worked due to a medical restriction on working such additional hours, except to the extent a similarly situated employee without a medical restriction would be allowed to substitute paid leave in lieu of working the overtime hours. See section 724.090 of this handbook chapter for more information on overtime hours and the WFMLA.
- b. Employees may use accrued sick leave during absences for which accrued sick leave is otherwise unavailable. For example, an employee's absence due to paternity may result in simultaneous use of family leave and sick leave, to the extent to which the employee chooses to use accrued sick leave.
- c. An employee's use of family leave for purposes of birth or adoption shall result in simultaneous use of parental leave granted under s. ER 18.14(2)(d) and (e), Wis. Adm. Code, or the applicable collective bargaining agreement.

**EXAMPLE:** An employee may not extend a six-month paternity leave to seven and one-half months by adding six weeks of family leave to the end of the six month paternity leave. The employee's first six weeks of absence for paternity purposes are counted against the employee's family leave entitlement (i.e., the leaves run concurrently). The employee's total absence from employment for paternity purposes is limited to six months, unless an extension is approved by the appointing authority in accordance with the applicable provisions of the Wis. Adm. Code or a collective bargaining agreement.

- d. An employee is eligible to continue using accrued sick leave as long as the employee meets the eligibility requirements of s. ER 18.03(4), Wis. Adm. Code, or the applicable collective bargaining agreement.

**EXAMPLE:** During a six-month maternity leave, an employee may take a two-week medical leave following the birth of a child (during which the employee uses accrued sick leave). The employee may then continue using sick leave, in accordance with the provisions of s. ER 18.03(4), Wis. Adm. Code, or the applicable collective bargaining agreement, for that period during which the employee is physically unable to work. Upon recovery (and within 16 weeks of the birth), the employee may begin up to six weeks of family leave, during which the employee may choose to use accrued sick leave.

- e. The employing agency *may not require* an employee to substitute sick leave, annual leave, personal or legal holidays, or compensatory time off credits for unpaid family/medical leave.

- f. An employee who uses accrued sick leave credits in accordance with s. ER 18.03(4), Wis. Adm. Code, or the applicable collective bargaining agreement, for a purpose that would qualify for leave under the WFMLA shall be deemed to have used WFMLA leave.
- g. Any period that an employee is absent from work while on worker's compensation leave or s. 230.36, Wis. Stats., hazardous duty disability paid leave should not be counted as time used under the WFMLA (though it may be counted under the federal FMLA).

2. FMLA [29 CFR s. 825.207]

- a. Generally, FMLA leave is unpaid. However, FMLA permits employees to request the use of accumulated annual leave, personal/legal holidays, compensatory time, or a combination thereof, during all or part of unpaid FMLA leave. Such substitution of paid leave during a period of FMLA leave may be subject to the terms and conditions of the agency's normal leave policy and an applicable labor agreement, and the employee must then satisfy any requirements of the paid leave policy or labor agreement to substitute any such paid leave. If an employee does not comply with the requirements in the agency's paid leave policy or applicable labor agreement, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave.
- b. Employees may substitute sick leave in addition to the leave noted in a., above, for all or any part of unpaid FMLA leave needed to care for a family member with a serious health condition or for the employee's own serious health condition. Use of sick leave is allowed only to the extent the circumstances meet the requirements for use of sick leave under s. ER 18.03, Wis. Adm. Code, or the applicable collective bargaining agreement, and the employee complies with agency and labor agreement procedures for requesting and using sick leave.
- c. When an employee chooses to substitute accrued paid leave, the agency must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with receipt of such payment. This may be accomplished in the rights and responsibilities notice provided to the employee along with the FMLA eligibility notice.
- d. Agencies may not discriminate against employees on FMLA leave in the administration of their paid leave policies.
- e. Agencies may not require the use of unused accumulated annual leave, personal/legal holidays, sick leave, or a combination thereof, for portions of unpaid FMLA leave prior to use of leave without pay.

**Note:** Although FMLA law allows employers to require that employees use accrued paid leave during FMLA leave, state agencies may not require state employees to substitute accrued paid leave.

- f. Under no circumstances will employees be entitled to additional family and/or medical leave as a result of the substitution of paid leave for unpaid leave under FMLA.
- g. Any leave, with or without pay, designated as leave under FMLA will count against the employee's FMLA entitlement.
- h. Use of paid leave under circumstances which do *not* qualify as FMLA leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.
- i. Worker's compensation. When a serious health condition results from injury to an employee while on the job, the employee's FMLA entitlement will run concurrently with any worker's compensation benefits. If the health care provider treating the employee for the worker's compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or

- equivalent job, the employee may decline the offer of a light duty job. As a result, the employee may lose worker's compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. The employee may substitute accrued paid leave for unpaid FMLA leave in accordance with section 724.120 of this handbook chapter.
- j. Section 230.36, Wis. Stats., hazardous duty disability leave: When a serious health condition results from injury to an employee while on the job that is covered under s. 230.36, Wis. Stats., the employee's FMLA entitlement will run concurrently with any paid disability leave.

#### **Examples of Substitution of Paid Leave for Unpaid Family & Medical Leave**

The following pages provide examples of family and medical leave requests and how paid leave could be substituted under the described circumstances. These examples assume that employees have followed paid leave policies and procedures to use accrued paid leave during FMLA-protected leave.

**Examples 1 and 2** demonstrate how the substitution provisions apply for state employees who have requested leave for the birth of a child. Examples of both maternity and paternity leave are included to illustrate the differences in qualifying for use of paid leave when taking all leave benefit provisions into consideration (e.g., WFMLA, FMLA, administrative rules or a collective bargaining agreement).

**Example 3** demonstrates a situation in which an employee has requested leave to care for a spouse with a serious health condition.

**Example 4** demonstrates a situation which does not qualify for use of family and medical leave.

**Example 1:** An employee requests maternity leave for six months. She is eligible for leave under both the WFMLA and the FMLA. She has accumulated at least six weeks of annual leave and holiday leave, and at least six weeks of sick leave. The employee wishes to maximize use of paid leave.

What paid leave may the employee take for maternity leave? If the employee uses 12 weeks of paid leave for maternity, this would exhaust her FMLA leave entitlement for the entire calendar year, as well as her family leave for birth and medical leave under WFMLA. The paid and unpaid portions of her leave would all run concurrently and would be taken as follows:

1. First six weeks (recovery from birth): Employee would use six weeks of paid sick leave accrued under administrative rule or collective bargaining agreement.

Explanation: This first six-week period qualifies as and counts against the employee's entitlement to all of the following:

- a. Six weeks FMLA leave (for which the employee may substitute accrued annual leave, personal leave, or sick leave).
- b. Two weeks WFMLA medical leave (for which the employee may substitute accrued leave of any type, including sick leave).
- c.\* Six weeks of sick leave accrued under state administrative rule (or collective bargaining agreement).

\*Since option "c" is the most generous to the employee, it is the leave the employee must be granted.

Note. Six weeks is considered the normal recovery time from childbirth; however, for a caesarean birth eight weeks is considered the normal recovery time.

2. Second six weeks (caring for newborn child): Employee would receive six weeks of WFMLA family leave (for which the employee may substitute any type of accrued paid leave, including sick leave).

Explanation: This second six-week period qualifies as and counts against the employee's entitlement to all of the following:

- a. Six weeks FMLA leave (for which the employee may substitute accrued annual leave or personal leave, but *not* sick leave).
- b.\* Six weeks WFMLA family leave (for which the employee may substitute accrued leave of any type, including sick leave).
- c. Six months unpaid leave of absence for maternity under state administrative rule (or collective bargaining agreement).

\*Since option "b" is the most generous to the employee, it is the leave the employee must be granted.

3. Remaining three months of maternity leave: Employee would receive three months of unpaid maternity leave under state administrative rule or collective bargaining agreement (assuming employee has used all her accumulated paid leave during the first 12 weeks).

**Example 2:** An employee requests paternity leave for six months. He is eligible for leave under both the WFMLA and the FMLA. He has accumulated at least six weeks of annual leave and holiday leave, and at least six weeks of sick leave. The employee wishes to maximize use of paid leave.

What paid leave may the employee take for paternity leave? If the employee uses 12 weeks of paid leave for paternity, this would exhaust his FMLA leave entitlement for the entire calendar year, as well as his family leave for birth under WFMLA. The paid and unpaid portions of his leave would all run concurrently and would be taken as follows:

1. First six weeks (caring for newborn child): Employee would receive six weeks of WFMLA family leave (for which the employee may substitute any type of accrued paid leave, including sick leave).

Explanation: This first six-week period qualifies as and counts against the employee's entitlement to all of the following:

- a. Six weeks FMLA leave (for which the employee may substitute accrued annual leave or personal leave, but *not* sick leave).
- b.\* Six weeks WFMLA family leave (for which the employee may substitute accrued leave of any type, including sick leave).
- c. Six months unpaid leave of absence for paternity under state administrative rule (or collective bargaining agreement).

\*Since option "b" is the most generous to the employee, it is the leave the employee must be granted.

2. Second six weeks (caring for newborn child): Employee would receive six weeks of FMLA family leave (for which the employee may substitute accrued annual leave or personal leave, but *not* sick leave).

This second six-week period qualifies as and counts against the employee's entitlement to all of the following:

- a.\* Six weeks' FMLA leave (for which the employee may substitute accrued annual leave or personal leave, but not sick leave);
- b. Six months' unpaid leave of absence for paternity under state administrative rule (or collective bargaining agreement).

\*Since option "a" is the most generous to the employee, it is the leave the employee must be granted.

3. Remaining three months of paternity leave: Employee would receive three months of unpaid paternity leave under state administrative rule or collective bargaining agreement (assuming employee has used all his accumulated paid leave during the first 12 weeks).

**Example 3:** An employee requests and has approval for a six-month leave of absence to care for the employee's spouse who has a serious health condition. The employee is eligible for leave under both the WFMLA and the FMLA. The employee has accumulated at least four weeks of annual leave and eight weeks of sick leave and wishes to maximize the use of paid leave.

What paid leave may the employee take for this purpose? If the employee uses 12 weeks of paid leave for this purpose, this would exhaust the employee's FMLA leave entitlement for the entire calendar year, as well as the employee's family leave to care for a family member under WFMLA. The paid and unpaid portions of leave run concurrently and would be taken as follows:

1. First two weeks: Employee would receive two weeks of WFMLA family leave (for which the employee may substitute any type of accrued paid leave including sick leave).

This first two-week period qualifies and counts against the employee's entitlement to all of the following:

- a. Two weeks FMLA leave (for which the employee may substitute accrued annual leave, personal leave, or sick leave, to the extent sick leave is available for this purpose under state administrative rule or collective bargaining agreement); \*\*
- b.\* Two weeks of WFMLA family leave (for which the employee may substitute accrued leave of any type, including sick leave);
- c. Six months unpaid leave of absence under state administrative rule or collective bargaining agreement.

\*Since option "b" is the most generous to the employee, it is the leave the employee must be granted.

2. Next Ten weeks: Employee would receive 10 weeks of FMLA family leave (for which the employee may substitute accrued annual leave, personal leave, or sick leave, to the extent sick leave is available for this purpose under state administrative rule or collective bargaining agreement). \*\*

This ten-week period qualifies and counts against the employee's entitlement to all of the following:

- a.\* Ten weeks FMLA leave (for which the employee may substitute accrued annual leave, holidays, or sick leave, to the extent sick leave is available for this purpose under state administrative rule or collective bargaining agreement). \*\*
- b. Six months unpaid leave of absence under state administrative rule or collective bargaining agreement.

\*Since option "a" is the most generous to the employee, it is the leave the employee must be granted.

3. Remaining three months leave of absence: Employee would receive three months of unpaid leave of absence under state administrative rule or collective bargaining agreement (assuming employee has used all accumulated paid leave during the first 12 weeks).

\*\* Under state administrative rule, use of sick leave for temporary emergency care of an ill family member is limited to five workdays for any one illness or injury. However, with prior approval from the appointing authority, use of sick leave may be extended under unusual circumstances. These provisions may be superseded by a collective bargaining agreement.

**Example 4:** An employee requests three days of sick leave to stay home with her/his child who has a common cold. Since a common cold is not a "serious health condition" under the FMLA or the WFMLA, this leave *cannot* be counted against the employee's 12-week FMLA leave entitlement or the two-week WFMLA family leave entitlement. However, the employee may be eligible, by contract or administrative code, to use paid sick leave for the temporary emergency care of the child.

**Sec. 724.130 Certification**

1. WFMLA [ss. 103.10(7) & (12)(c), Wis. Stats., s. DWD 225.02(9), Wis. Adm. Code]
  - a. The employing agency may require an employee to provide certification if the employee requests medical leave, or requests family leave to care for a family member because the family member has a serious health condition.
  - b. The required certification shall be issued by the health care provider or Christian Science practitioner of the employee or family member, whichever is appropriate.
  - c. No employing agency may require certification stating more than the following:
    - 1) That the employee or family member has a serious health condition.
    - 2) The date the serious health condition commenced and its probable duration.
    - 3) Within the knowledge of the health care provider or Christian Science practitioner, the medical facts regarding the serious health condition.
    - 4) If the employee requests medical leave, an explanation of the extent to which the employee is unable to perform his or her employment duties.
  - d. The employing agency may require the employee to obtain the opinion of a second health care provider, chosen and paid for by the employing agency, concerning any information certified under c., above.
  - e. If two or more health care providers disagree about any of the information required to be certified, DWD may appoint another health care provider to examine the employee or family member. DWD shall notify the employee and the employing agency of the appointment. The employing agency and the employee shall each pay 50 percent of the cost of the examination and opinion.
  - f. Except where emergency health care consultation or treatment is required, an employing agency may deny a requested leave where the agency has made a proper request for certification as to that leave, and the employee fails or refuses to provide the requested certification.

**Note:** The DPM form [Certification by Health Provider for Family or Medical Leave](#) (DOA-15323) is modeled on the medical certification form provided by the Equal Rights Division of the Wisconsin Department of Workforce Development for use under the WFMLA. Agencies may use the DPM-approved medical certification form for any FMLA or WFMLA leave. However, the federal Department of Labor (DOL) provides longer, more detailed medical certification forms for use under the federal FMLA. One form is for the employee's serious health condition (WH-380-E) and another form is for a family member's serious health condition (WH-380-F). (The DOL has additional certification forms to certify the serious injury or illness of a current servicemember or covered veteran, and for qualifying exigencies related to the foreign deployment of a military servicemember.) Although the WFMLA restricts employers from requiring information beyond the subjects listed in 1.c., above, the detailed questions on the federal FMLA medical certification forms solicit information that remains within the permissible subjects under the WFMLA. Therefore agencies may use the federal FMLA forms for leave covered under both the WFMLA and FMLA. Agencies may also use another medical certification form design that likewise limits requested medical information to the subjects permitted under the WFMLA.

2. FMLA [29 USC s. 2613; 29 CFR ss. 825.305-825.313]
  - a. Certification—General Rules

- 1) Medical certification may be required when leave under FMLA is requested for the serious health condition of the employee or the employee's family member, or to care for a covered servicemember with a serious illness or injury. Also, certification (non-medical) may be required for FMLA leave because of a qualifying exigency. If the agency is requiring medical certification, or certification of the need for leave for a qualifying exigency, the employee must be provided with written notice that such certification is required as part of the rights and responsibilities notice. For subsequent certifications in the same calendar year where it is not necessary to provide a rights and responsibilities notice to the employee, an oral request to an employee is sufficient. The agency has the option, in requiring certification of the employee's own serious health condition, to provide a statement of the essential functions of the employee's position for the health care provider to review.
  - 2) The agency should request certification within five business days after the employee provides notice of the need for leave, or, in the case of unforeseen leave, within five business days after the leave commences. The agency may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.
  - 3) At the time the agency requests certification, the agency must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification, including the denial of FMLA leave.
  - 4) Employees must be allowed at least 15 calendar days to return the certification unless it is not practicable under the particular circumstances despite the employee's diligent, good faith efforts. The agency must advise the employee of the possible consequences of failure to provide adequate certification. Should an employee fail to provide timely certification, leave may be denied until the required certification is provided.
  - 5) The employee must provide a complete and sufficient certification, if required by the agency. A certification is considered incomplete if the agency receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the agency receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.
  - 6) The agency shall advise an employee whenever it finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. The agency must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies are not cured, the agency may deny the taking of FMLA leave.
  - 7) The agency may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.
  - 8) Where the employee's need for leave due to a serious health condition lasts beyond a single leave year, the agency may require the employee to provide a new medical certification in each subsequent leave year.
- b. Medical certification
- 1) Medical certification for leave relating to a serious health condition may require the following:
    - Contact information for the health care provider and the provider's type of medical practice/specialization,
    - The approximate date on which the serious health condition commenced, and its probable duration,
    - Sufficient medical facts to support the need for requested leave,

- If the employee is the patient, sufficient information to establish that the employee cannot perform essential functions of the job, the nature of any other work restrictions, and the likely duration of the incapacity,
- If the patient is a covered family member with a serious health condition, sufficient information to show the family member is in need of care, and an estimate of the frequency and duration of leave needed to provide care, including the medical necessity for any requested intermittent or reduced schedule leave.
- If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

Agencies should provide to the employee or health care provider a standard federal, state, or agency form to collect the medical certification information.

- 2) An employee may choose to comply with the certification requirement by providing the agency with an authorization, release, or waiver allowing the agency to communicate directly with the health care provider of the employee or the employee's covered family member. However, the employee *may not be required* to provide such an authorization, release, or waiver. In all cases in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.
- 3) Medical records are strictly confidential and **must** be kept separate from personnel files.
- 4) If an employee submits a complete and sufficient certification signed by the health care provider, the agency may not request additional information from the employee's health care provider. However, the agency may contact the employee's health care provider for purposes of *clarification* and *authentication* of the medical certification (or recertification) after the agency has given the employee an opportunity to cure any deficiencies, as set forth in a.4), above. To make such contact, the agency must use a health care provider, a human resources professional, a leave administrator, or a management official of the agency. *Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.* "**Authentication**" means providing the health care provider with a copy of the certification and requesting verification it was completed and/or authorized by the health care provider who signed the document. "**Clarification**" means contacting the health care provider, with the employee's permission per Health Insurance Portability and Accountability Act privacy rules, to understand the handwriting on the medical certification or to understand the meaning of a response. Agencies may not ask health care providers for additional information beyond that required by the certification form. If an employee chooses not to provide the employer with authorization allowing the agency to clarify the certification with the health care provider, and does not otherwise clarify the certification, the agency may deny FMLA leave.
- 5) The appointing authority, at the agency's expense, may request a second opinion by a health care provider who is designated by the appointing authority. The agency may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion, unless located in an area where access to health care is extremely limited. FMLA leave may be denied if the employee or employee's family member fails to authorize his or her health care provider to release all relevant medical information if requested by the health care provider designated to provide a second (or third) opinion.
- 6) Pending receipt of the second (or third) opinion, the employee is provisionally entitled to FMLA benefits.

- 7) In the event that the two medical opinions differ, a third opinion by a health care provider mutually agreed upon by the employee and the appointing authority will be final and binding. The third opinion will also be at the agency's expense.
  - 8) The agency is required to provide the employee with a copy of the second and third opinions, if requested by the employee. Absent extenuating circumstances, the requested copies are to be provided within five business days.
  - 9) When an employee's need for leave for the employee's own serious health condition or for the serious health condition of a family member lasts beyond the end of the leave year, the agency may require the employee to provide a new medical certification in each subsequent leave year.
- c. Medical recertification
- 1) Recertification may be requested as specified in 2) through 4), below. The employee must provide the recertification within the time-frame requested by the agency, which must allow at least 15 calendar days unless it is not practicable under the particular circumstances to do so despite the employee's good faith efforts. Any recertification will be at the employee's expense unless the agency provides otherwise. No second or third opinion on recertification may be required.
  - 2) Recertification may be requested no more often than every 30 days in connection with an absence for a serious health condition, except that an agency may request recertification in less than 30 days if:
    - a) The employee requests an extension of leave.
    - b) Circumstances described by the previous certification have changed significantly.
    - c) The agency receives information that casts doubt upon the employee's stated reason for the absence.
  - 3) If the minimum duration of the period of incapacity specified on a certification furnished by a health care provider is more than 30 days, recertification may not be requested until that minimum duration has passed or six months have passed, unless one of the conditions set forth in 2), above, is met.
  - 4) For FMLA leave taken intermittently or on a reduced leave schedule basis, recertification may not be requested in less than the minimum period specified on the certification as necessary for the leave (including treatment) or until six months have passed, unless one of the conditions set forth in 2), above, is met.
  - 5) When requiring recertification for a serious health condition, the agency may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.
- d. Certification for leave taken to care for a covered servicemember (military caregiver leave)
- 1) When leave is taken to care for a covered servicemember with a serious injury or illness (which may be a current servicemember or covered veteran), an agency may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember (except as noted in 3) and 4), following). The federal Department of Labor provides optional forms for this purpose:
    - WH-385 - [\*Certification for Serious Injury or Illness of Current Servicemember\*](#)

- WH-385-V - [Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave](#)

For purposes of leave to care for a covered servicemember, any one of the following health care providers may complete such a certification:

- a) A United States Department of Defense (“DOD”) health care provider;
- b) A United States Department of Veterans Affairs (“VA”) health care provider;
- c) A DOD TRICARE network authorized private health care provider;
- d) A DOD non-network TRICARE authorized private health care provider; or
- e) Any health care provider authorized for FMLA leave generally.

If an agency uses a certification form other than WH-385 or WH-385-V, the form must comply with the requirements and limitations covered in s. 825.310, Title 29, CFR. In any case, an agency may seek authentication and/or clarification of the medical certification.

- 2) For military caregiver leave, an agency is not allowed to seek second and third medical opinions if the health care provider is one of those listed in 1) a) to d), above.
  - 3) In lieu of federal form WH-385, WH-385-V, or other certification form, an agency must accept as sufficient certification “invitational travel orders” (ITOs) or “invitational travel authorizations” (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An ITO or ITA is sufficient certification regardless of whether the employee is named in the order or authorization. An agency may seek authentication and/or clarification of the ITO or ITA.
  - 4) In lieu of federal form WH-385, WH-385-V, or other certification form, an agency must accept as sufficient certification of the servicemember’s serious injury or illness documentation indicating the servicemember’s enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification to support the employee’s request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation. An agency may seek authentication and/or clarification of this enrollment documentation.
  - 5) An agency may not request recertification of leave to care for a covered servicemember.
  - 6) An agency may require the employee to provide reasonable documentation or statement of family relationship to the covered servicemember, such as a birth certificate, court document, or a signed statement from the employee.
  - 7) An agency may require an employee to provide documentation, such as a veteran’s Form DD-214, showing that the discharge was other than dishonorable and the date of the veteran’s discharge.
- e. Certification for leave taken because of a qualifying exigency
- 1) The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member, an agency may require the employee to provide a copy of the active duty orders or other documentation issued by the military indicating the covered active duty or call to covered active duty status, and the dates of active duty service. This information needs to be provided to the employer only once, except when leave is needed due to a different, later covered active duty or call to covered active duty status. An agency may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

- 2) The agency may require that leave for any qualifying exigency be supported by a certification from the employee. The federal Department of Labor provides an optional form for this purpose, WH-384 [Certification of Qualifying Exigency for Military Family Leave](#). If an agency wishes to use a different form, the form must comply with the requirements and limitations set forth in the federal regulations in 29 CFR s. 825.309.
- 3) The general rules for certification described in a., above, apply for leave taken because of a qualifying exigency. If the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting to verify the meeting or appointment schedule and its purpose.

### 3. **WFMLA and FMLA**

A Genetic Information Nondiscrimination Act (GINA) notice should be included with all requests to health care providers for medical information. The statement may be included on the medical certification form and fitness-for-duty form, or it may be provided in a letter or memo that accompanies the request for medical information. Providing a GINA notice gives a “safe harbor” when genetic information is inadvertently acquired that may not be necessary for a complete medical certification under the FMLA.

Starting in May 2015, federal FMLA medical certification forms include a concise GINA notice. Where a federal medical certification form is not being used by an agency, the following language should be included in agency requests for medical information related to administration of the federal and/or WI FMLA.

#### **Genetic Information Nondiscrimination Act of 2008 Notification**

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law including, but not limited, to when the employee requests leave for a family member’s health condition to (1) document appropriate use of sick leave; and (2) where “family medical history” is required to the extent necessary to make the medical certification complete and sufficient under the FMLA and WFMLA.*

*To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information unless it meets the family member exceptions noted above.*

*‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

### **Sec. 724.140 Continuation of Benefits**

1. Continuation of group health insurance. Agency questions regarding health insurance coverage and premium payment for employees while on FMLA leave should be directed to the Department of Employee Trust Funds, Employer Communications Center, at (608) 266-3285, or toll-free 1-877-533-5020.

**Note:** Section 40.05(4)(a), Wis. Stats., provides that the State will continue to pay a portion of the employee’s health insurance premium for not more than the first three months of an *unpaid* leave of absence. This three-month period would normally be equal to or longer than an employee’s family/medical leave. Consequently, an employee’s group health insurance coverage will normally be maintained under Ch. 40, Wis. Stats., regardless of WFMLA or FMLA provisions, although the employee remains responsible for the employee share of monthly premiums.

a. WFMLA [s. 103.10(9)(b), Wis. Stats.]

An employee's group health insurance coverage must be maintained under the conditions that applied immediately before the FMLA leave began.

b. FMLA [29 USC s. 2614(a)(2), (c); 29 CFR ss. 825.209 - 825.213]

- 1) An employee's coverage under any group health plan must be maintained under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire FMLA leave period.
- 2) If leave under FMLA is taken in part or in whole without pay, the agency must advise the employee of eligibility for group health insurance continuation under the provisions of FMLA, the cost of coverage, and when and where to send the premium payments, if applicable.
- 3) Employees will be subject to any change in group health insurance plans or benefits that affects all employees.
- 4) Employees must be given notice of any opportunity for any change in plans or benefits that is available to all employees.
- 5) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from FMLA leave, the employee is entitled to be restored on the same terms as prior to taking the leave, including family coverage, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc.

2. Continuous service:

WFMLA & FMLA [s. 103.10(9)(a), Wis. Stats.; 29 USC s. 2614(a)(3); 29 CFR s. 825.215(d)(2)]

Employees are not *entitled* under WFMLA or FMLA to accrue continuous service (seniority) while on unpaid leave. Therefore, the following will apply:

- a. Employees Other Than Public Safety. In accordance with s. ER 18.02(2)(b)1., Wis. Adm. Code, the continuous service of an employee shall not be interrupted if the employee was on an approved leave of absence. Since WFMLA and/or FMLA leave is approved leave of absence, it does not interrupt continuous service.
- b. Represented Public Safety Employees. Refer to the provisions of the public safety collective bargaining agreement for information regarding the continuous service of an employee upon return from approved leave of absence without pay.

3. Creditable Service:

WFMLA & FMLA [s. 103.10(9), Wis. Stats.; 29 USC s. 2614(3); 29 CFR s. 825.215(d)(4)]

In accordance with s. 40.02(17), Wis Stats., creditable service for retirement purposes will *not* continue to accrue while the employee is on unpaid leave.

4. Benefits accrued prior to leave:

a. WFMLA [s. 103.10(8)(b), Wis. Stats.]

No employer may, because an employee received family leave or medical leave, reduce or deny an employment benefit which accrued to the employee before his or her leave began or, consistent with s. 103.10(9), Wis. Stats., accrued after his or her leave began.

- b. FMLA [29 USC s. 2614(2); 29 CFR s. 825.215(d)(2)]

Although employees will not accrue additional benefits during leave without pay under FMLA, benefits accrued prior to leave will be restored at the same levels upon return to work. For example, paid annual leave, sick leave, or personal holidays which are not substituted for FMLA leave must be available to the employee upon return from leave.

## Sec. 724.150 Return from Leave

1. WFMLA [s. 103.10(8) & (9), Wis. Stats.]

- a. An employee returning from WFMLA leave shall be immediately placed in a position as follows:
- 1) If the position which the employee held immediately before the leave began is vacant when the employee returns, the employee will be placed in that position.
  - 2) If the position which the employee held immediately before the leave began is not vacant when the employee returns, the employee will be placed in an equivalent position having equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment.
  - 3) Project, Limited Term, and Unclassified Employees: When a project, limited term, or unclassified employee returns from leave, the employee shall immediately be placed in a position pursuant to 1) or 2), above. If the appointment period for the position which the employee held immediately before the WFMLA leave began has expired, the employee shall have no right to reemployment.
- b. If an employee wishes to return to work before the end of the scheduled leave, the agency will place the employee as specified in 1.a., above, within a reasonable time not exceeding the duration of the leave as scheduled.
- c. An employee returning from WFMLA leave is not entitled to any right, employment benefit, or employment position to which the employee would not have been entitled had the employee not taken leave.

2. FMLA [29 USC s. 2614; 29 CFR ss. 825.214 - 825.216, 825.311(c), 825.312]

- a. An employee returning from FMLA leave is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such placement even if the employee has been replaced or the position has been restructured to accommodate the employee's absence.
- b. It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the agency may require that the employee provide the agency reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The agency may also obtain information on such changed circumstances through requested status reports.

- c. An employee has no greater right to restoration or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. To deny restoration to an employee returning from FMLA leave, the agency must be able to show that the employee would not otherwise have been employed if leave had not been taken, e.g., that the employee would have been laid off.

**Note:** In the event of a layoff, ER-MRS 22.06(3), Wis. Adm. Code indicates that employees who are on an approved leave of absence shall be included in the layoff group. As a result, an employee that is out on FMLA leave would be afforded the same rights and eligibility that they would have received if the leave had not been taken.

- d. If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. However, Americans with Disabilities Act (ADA) requirements may apply.
- e. Project, Limited Term, and Unclassified Employees: If an employee was hired for a specific term or only to perform work on a discrete project, the agency has no obligation to restore the employee if the employment term or project is over and the agency would not otherwise have continued to employ the employee.
- f. Fitness for Duty Certification:
  - 1) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an agency may have a uniformly applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.
  - 2) An agency may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an agency 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 agency must provide the employee with a list of the essential functions of the employee's job no later than with the FMLA designation notice, and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the agency satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job.
  - 3) The FMLA designation notice shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.
  - 4) The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the agency) in the fitness-for-duty certification process as in the initial certification process.
  - 5) An agency may contact the employee's health care provider for purposes of clarifying and authenticating the fitness for duty certification in the same manner as for medical certifications. (See section 724.130, 2.b.4 of this handbook chapter.) Clarification may be requested only for

the serious health condition for which FMLA leave was taken. The employee's return to work may not be delayed while contact with the health care provider is being made. No second or third opinions on a fitness for duty certification may be required.

- 6) An agency may not require a fitness for duty certification for absences taken on an intermittent or reduced leave schedule, except if reasonable safety concerns exist the agency may require fitness for duty certification up to once every 30 days.
  - 7) The cost of the certification is to be paid by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. *Caution: If the employee's serious health condition also qualifies as a disability under the ADA, the ADA may require that the cost of any medical examination be paid by the agency.*
  - 8) Provided that proper notice to the employee was given of the need for a fitness-for-duty certification, agencies may deny restoration to employees who fail to provide fitness for duty certification until such time as that certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.
  - 9) If Wisconsin law, Administrative Code, or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.
- g. An employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA if and when the employment relationship terminates (e.g., layoff or resignation).
  - h. See s. ER-MRS. 16.03(6), Wis. Adm. Code, or the applicable collective bargaining agreement for additional information regarding the restoration rights of employees upon return from a leave of absence without pay.
  - i. Questions regarding the restoration rights of employees under the administrative rules may be directed to the Department of Administration, Bureau of Merit Recruitment and Selection, . Questions regarding the restoration rights of represented public safety employees may be directed to the Bureau of Compensation and Labor Relations.

## Sec. 724.160 Prohibited Acts

1. WFMLA [s. 103.10(11), (12), (13), Wis. Stats.; DWD s. 225.05-.27, Wis. Adm. Code]

- a. No person may:
  - 1) Interfere with, restrain or deny the exercise of any right provided under s. 103.10, Wis. Stats. (*the WFMLA leave law*).
  - 2) Discharge or in any other manner discriminate against any individual for opposing a prohibited practice under 1), above.
- b. The Equal Rights Division (ERD) of the Department of Workforce Development is charged with responsibility for handling complaints charging violation of the rights of state employees under WFMLA leave provisions.
  - 1) An employee who believes that the employee's agency has violated the provisions of the WFMLA may, within 30 days after the violation occurs or the employee should reasonably have known that the violation occurred, whichever is later, file a complaint with ERD alleging the violation.

- 2) ERD shall investigate the complaint and shall attempt to resolve the complaint by conference, conciliation, or persuasion. If the complaint is not resolved and ERD finds probable cause to believe a violation has occurred, ERD shall proceed with notice and a hearing on the complaint. The hearing shall be held within 60 days after ERD receives the complaint.
  - 3) ERD shall issue its decision and order within 30 days after the hearing. If ERD finds that an employing agency has violated the provisions of the WFMLA, it may order the employing agency to take action to remedy the violation, including providing requested WFMLA leave, restoring an employee, providing back pay accrued not more than two years before the complaint was filed, and paying reasonable actual attorney fees to the complainant.
2. FMLA [29 USC ss. 2615-2616; 29 CFR ss. 825.220; 825.400-.401]
- a. Interference with an employee's rights under the FMLA is prohibited.
    - 1) The agency is prohibited from:
      - a) Interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided under the FMLA.
      - b) Discharging or in any other way discriminating against any person for opposing or complaining about any unlawful practice under the FMLA.
      - c) Discharging or in any other way discriminating against any person (whether or not an employee) because that person has:
        - filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA,
        - given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, or
        - testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA.
      - d) Discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights.
    - b. Employees cannot waive their prospective rights under the FMLA. However, this does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.
    - c. The Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor is charged with responsibility for handling complaints charging violation of the rights of state employees under FMLA leave provisions.
      - 1) An employee who believes that his or her employing agency has violated the provisions of the FMLA may file a complaint with the Secretary of the U.S. DOL within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.
      - 2) The complaint must be in writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

**Sec. 724.170 Civil Action**

1. WFMLA [s. 103.10(13), Wis. Stats.]

An employee may bring an action in circuit court against the State to recover damages caused by violation of employee rights under the WFMLA after the completion of an administrative proceeding. The action must be initiated within the later of the following periods:

- a. Sixty days from the completion of an administrative proceeding, including judicial review, concerning the same violation.
- b. Twelve months after the violation occurred, or the employee should reasonably have known that the violation occurred.

2. FMLA [29 USC s. 2617; 29 CFR s. 825.400-.401]

An employee who feels that his or her rights under FMLA have been violated may in some circumstances file a private lawsuit against the State. The lawsuit must be filed within:

- a. Two years after the last action which the employee contends was in violation of the FMLA.
- b. Three years if the violation was willful.

**Sec. 724.180 Posting Notice/Notice to Employees**

1. WFMLA [s. 103.10(14), Wis. Stats.]

- a. Each employing agency shall post, in one or more conspicuous places where notices to employees are customarily posted, a notice in the form approved by DWD setting forth state employees' rights under the WFMLA. The DWD has a [Family and Medical Leave Law poster](#) and one in [Spanish](#).
- b. Any employing agency who fails to post the required notice shall forfeit not more than \$100 for each offense.

2. FMLA [29 USC s. 2619; 29 CFR ss. 825.300, 825.402]

- a. A notice providing FMLA information for employees must be posted prominently where it can be readily seen and easily read by employees and applicants for employment. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the other requirements. Any employing agency that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$110 for each separate offense.
- b. If an agency has any FMLA-eligible employees, it shall also provide general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically. To meet this requirement of general notice to each employee, agencies may duplicate the text of the DOL's prototype notice ([WHD Publication 1420](#)) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. DPM provides a [document](#) for this purpose which contains all the required information and provides additional explanatory information to employees and reference to the WI FMLA.
- c. Where an agency's workforce is comprised of a significant portion of workers who are not literate in English, the agency shall provide the general notice in a language in which the employees are literate. (Prototypes are available from the nearest office of the Wage and Hour Division or online through the

Department of Labor.) Agencies furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

- d. Agencies must provide the document *Notice of Eligibility and Rights & Responsibilities* (DOA-15325, or other FMLA-compliant form) to employees who request FMLA leave or when an agency acquires knowledge that leave may be for an FMLA-qualifying purpose. The document should be provided within five business days, if feasible. This document must be provided to an employee the first time in each 12-month period that an employee takes FMLA leave. The document does not need to be provided again within the same year unless leave is requested for a different reason within the same year **and** the eligibility status of the employee has changed. (See section 724.070 2.d. and e. of this handbook chapter for more detail.)
- e. If the agency fails to provide the documents specified under d. and e., above, the agency may not take action against an employee for failure to comply with any provision contained in the documents.
- f. When the agency has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g., after receiving a certification), the agency must notify the employee whether the leave will be counted as FMLA leave within five business days absent extenuating circumstances. If the agency will require the employee to present a fitness-for-duty certification to be restored to employment, the agency must provide notice of such requirement with the designation notice, including providing a list of the essential functions of the employee's position if needed for the fitness-for-duty certification. Agencies may use the form *Designation Notice* (DOA-15324, for this purpose. (See section 724.070 2.f. of this handbook chapter for more detail.)

## Sec. 724.190 Administrative Information

This chapter was originally published March 1, 1990, as Chapter 724 of the *Wisconsin Personnel Manual*. It was revised in April 1995, via replacement pages attached to DER bulletin CC-POL-17/CBB-3, to incorporate a new legal interpretation of the WI FMLA provision that family leave must commence within 16 weeks before or after the birth or placement of a child. It was republished as Chapter 724 in the *Wisconsin Human Resources Handbook* in August of 1999. Information on the federal Family & Medical Leave Act of 1993 was added.

The chapter was updated in April 2010 to incorporate the military-related additions and revisions to the federal Family & Medical Leave Act and to reflect numerous revisions to the federal FMLA regulations, and also to incorporate changes to the Wisconsin Family and Medical Leave Act under 2009 Wisconsin Act 28 (state budget bill), most notably authorizing leave to care for domestic partners.

This chapter was updated in February 2014 to reflect new U.S. Department of Labor regulations effective March 8, 2013. The new regulations principally addressed the expansion of military caregiver leave to include certain veterans, and expansion of leave due to a qualifying exigency arising from the deployment of a family member in the armed services. In addition, the definition of "spouse" under the federal FMLA was clarified in accordance with the U.S. Supreme Court's decision in *UNITED STATES v. WINDSOR, EXECUTOR OF THE ESTATE OF SPYER, ET AL.*, which held certain provisions in the Defense of Marriage Act (DOMA) to be unconstitutional. Other revisions were made for completeness and clarification, including the addition of more statutory and regulatory references.

This chapter was updated in March 2015 to reflect the recognition of same-sex marriage by the State of Wisconsin, effective October 6, 2014, including recognition of same-sex marriages entered into in Wisconsin from June 6 to June 13, 2014, and to incorporate new U.S. Department of Labor regulations, effective March 27, 2015, which modifies the definition of spouse to include all legally married couples according to the law of the place of celebration.

This handbook chapter was revised February 2016 for minor technical clarifications, to remove excess references to represented employees, and to modify the scope of agencies covered by this chapter in accordance with changes to

Chapter 230, Stats. Pursuant to the changes introduced by 2015 Wisconsin Act 55, in July 2015, the Office of State Employment Relations was eliminated and the functions were transferred into the newly created Department of Administration, Division of Personnel Management. This chapter was updated to reflect the changes in terminology that resulted from the organizational restructuring.

ATTACHMENT #1

**SIMULTANEOUS USE OF LEAVE BENEFITS**

The following information applies to employees (as defined in Wisconsin Human Resources Handbook Chapter 724.040 8.) who are eligible for leave under the state and/or federal family and medical leave laws, and where the reason for the leave is consistent with the FMLA and/or WFMLA, as applicable.

Type of Leave Used →	WFMLA FAMILY LEAVE Parental (6 weeks)	WFMLA FAMILY LEAVE Other (2 weeks)	WFMLA MEDICAL LEAVE (2 weeks)	FMLA LEAVE (12 weeks – or 26 weeks for military caregiver)	ACCRUED SICK LEAVE (Varies)	PARENTAL LEAVE OF ABSENCE (6 months)
Reason for Leave ↓						
<b>A. PERSONAL ILLNESS</b>	---	---	Yes	Yes	Yes	---
<b>B. FAMILY ILLNESS</b>						
1. ≤ 5 days	---	Yes	---	Yes	Yes	---
2. > 5 days & ≤ 10 days	---	Yes	---	Yes	Maybe*	---
3. > 10 days	---	---	---	Yes	Per Contract or Rule	---
<b>C. MATERNITY</b>						
1. Physically Unable to Work						
a. ≤ 2 weeks	---	---	Yes	Yes	Yes	Yes
b. > 2 weeks	---	---	---	Yes	Yes	Yes
2. Care for Child						
a. ≤ 6 weeks	Yes	---	---	Yes	Yes	Yes
b. > 6 weeks	---	---	---	Yes	No	Yes
<b>D. PATERNITY &amp; ADOPTION</b>						
a. ≤ 6 weeks	Yes	---	---	Yes	Maybe*	Yes
b. > 6 weeks	---	---	---	Yes	No	Yes
<b>E. MILITARY QUALIFYING EXIGENCY</b>	---	---	---	Yes	No	---
<b>F. MILITARY CAREGIVER</b>	---	---	---	Yes	Per administrative rule for family illness	---

\*Sick leave may be used, at the discretion of the employee, in any situation where the WFMLA also applies. If the WFMLA does not apply, sick leave may be used only per administrative rule, or labor contract if applicable.

ATTACHMENT #2

**GUIDE TO DETERMINING EMPLOYEE COVERAGE UNDER  
FAMILY & MEDICAL LEAVE & RELATED LEAVE BENEFITS**

Type of Leave Used →  Employee Type ↓	WFMLA FAMILY/ MEDICAL LEAVE § 103.10	FMLA FAMILY/ MEDICAL LEAVE	SICK LEAVE		LEAVES OF ABSENCE	
			§§ 230.35(2) & ER 18.03	Coll. Barg. Agreement	§ ER 18.14	Coll. Barg. Agreement
<b>CLASSIFIED- Executive Branch</b>						
All employees except represented public safety:						
Permanent	Yes	Yes	Yes	---	Yes	---
Project	Yes	Yes	Yes	---	---	---
LTE	Yes	Yes	---	---	---	---
Represented Public Safety	Yes	Yes	---	Yes	---	Yes
<b>UNCLASSIFIED</b>						
Executive Branch §§ 20.923(4), (8) & (9) indefinite term	Yes	Yes	Yes	---	---	---
Executive Branch §§ 20.923(2) & (4) Fixed term	Yes	Yes	Yes	---	---	---
Executive Branch Other Unclassified Except UW	Yes	Yes	Yes	---	---	---

ATTACHMENT #3

*Note. The FMLA and WI FMLA provisions included in this attachment are short summaries for purposes of comparison and may not include important administrative details. This attachment is not intended to provide complete administrative guidance but rather the Chapter itself should be referenced for that purpose.*

COMPARISON OF FEDERAL FAMILY & MEDICAL LEAVE ACT  
AND WISCONSIN FAMILY & MEDICAL LEAVE ACT

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Employer Applicability	Employers with 50 or more employees for each working day in 20 or more (nonconsecutive) workweeks of the preceding or current calendar year. Public agencies and private elementary and secondary schools are covered employers without regard to the number of employees employed.	Public and private employers (in Wisconsin) who employ 50 or more "permanent" employees during at least six of the preceding 12 months. Any business entity employing at least 50 workers overall, but as few as one in Wisconsin, is covered.	Varies with circumstances; WFMLA counts partial months as full months, which may or may not exceed 20 weeks.
Employee Eligibility	A person employed by the employer for at least 12 months (need not be consecutive) and employed at least 1,250 hours during the previous 12 months (determination made as of date leave begins). Excludes employees employed at a worksite with fewer than 50 employees, if the employer employs fewer than 50 workers total within 75 miles of that worksite.	A person employed by an employer at least 52 consecutive weeks and who worked at least 1,000 hours during the preceding 52 weeks.  No 75-mile requirement	<ul style="list-style-type: none"> <li>• WFMLA for purposes of fewer total hours worked necessary for eligibility.</li> <li>• Federal law does not require 12 months employment to be consecutive, Wisconsin requires 52 consecutive weeks.</li> </ul>
Reasons for Leave	Birth of a child or the placement of a child for adoption or foster care, to care for a child, spouse or parent ( <i>not</i> "in-law") experiencing a serious health condition, or because the employee's own serious health condition renders employee unable to perform job duties.	Same as FMLA <i>except</i> : <ul style="list-style-type: none"> <li>• WMLA does not include leave in connection with placement of a child for foster care.</li> <li>• WFMLA provides for leave for a "parent-in-law."</li> <li>• WFMLA provides leave for the serious health condition of a domestic partner or parent of a domestic partner.</li> </ul>	WFMLA, for "in-law" and domestic partner provisions; FMLA for foster care placement provision.
Military Family Leave	<ul style="list-style-type: none"> <li>• For any "qualifying exigency" when the employee's spouse, son, daughter, or parent is deployed to a foreign country as a member of the regular or reserve armed forces or called to such foreign deployment.</li> <li>• To care for a servicemember (currently in the military or a veteran discharged within the last 5 years) with a duty-related serious</li> </ul>	WFMLA has no military-specific family leave provisions. However, caring for a servicemember or veteran may qualify as WFMLA family leave.	FMLA

	injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember or veteran.		
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PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Length of Leave	<ul style="list-style-type: none"> <li>• Twelve weeks in a 12-month period for the birth or placement of a child for adoption or foster care, to care for a spouse, child or parent (but not parent-in-law) with a serious health condition, or for an employee's own serious health condition</li> <li>• Where leave is to care for a servicemember, a total of 26 weeks may be taken in a single 12-month period that begins on the first day of leave to care for the servicemember. An employee remains limited to 12 weeks total leave for any other reason(s) within any 12-month period.</li> <li>• Spouses employed by the same employer are limited to a combined total of 12 weeks of leave for the birth or placement of a child, or for the care of a sick parent, in a 12-month period. The spousal limit is 26 weeks total in a single 12-month period when military caregiver leave is involved. <b>(Note: It is DPM's position that the spousal limits are deemed to be a violation of WI Fair Employment law and therefore will not be applied to state employees.)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Within a calendar year, six weeks of family leave for the birth or placement for adoption of a child (which must begin within 16 weeks before or after the event), two weeks to care for a seriously ill child, spouse, domestic partner, parent, parent-in-law, or domestic partner's parent, and two weeks for an employee's own serious health condition</li> <li>• WFMLA has no such military caregiver provision, though servicemembers and veterans may qualify as family members under the WFMLA.</li> <li>• No spousal limits under the WFMLA</li> </ul>	<ul style="list-style-type: none"> <li>• FMLA for length of leave, WFMLA for covering domestic partners and parents-in-law</li> <li>• FMLA</li> <li>• No difference for state agencies, because the FMLA spousal leave limits are not applied to state employees</li> </ul>
Determination of "12-month" Period for Other than Military Caregiver Leave	<p>An employer is entitled to choose any one of the following methods for determining the 12-month period:</p> <ol style="list-style-type: none"> <li>(1) the calendar year;</li> <li>(2) any fixed 12-month "leave year," such as the fiscal year, a year required by state law, or a year starting on employee's anniversary date;</li> <li>(3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or</li> <li>(4) a "rolling" 12-month period measured backward from the date any employee uses any FMLA leave.</li> </ol>	An employer is required to use the calendar year.	<p>No difference for state agencies, as state agencies subject to DPM policies are required to use the calendar year as the 12-month period under FMLA</p> <p>Note. UW employees are not covered under DPM FMLA policies and may be subject to a different FMLA year.</p>
Determination of "single 12-month period" for military caregiver leave	Begins on the first day the employee takes FMLA leave to care for a servicemember or veteran and ends 12 months after that date.	No similar WFMLA provision	FMLA

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Definition of "Parent"	Biological, adoptive, step, or foster parent <i>or</i> individual who stood <i>in loco parentis</i> to an employee when that employee was a child. Specifically <i>excludes</i> parents "in-law."	Natural parent, foster parent, adoptive parent, stepparent or legal guardian of employee, employee's spouse, <i>or</i> employee's domestic partner	Varies. WFMLA includes "in-laws" and parents of domestic partners. FMLA includes individuals who stood <i>in loco parentis</i> .
Definition of "Child"	Biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing <i>in loco parentis</i> , who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability	Natural, adopted or foster child, a stepchild or a legal ward who is under age 18, or age 18 or older but cannot care for self because of a serious health condition. (Does not include child of a domestic partner.)	FMLA
Definition of "Spouse"	Spouse means a partner in marriage as defined or recognized under state law in the state of celebration, including common law marriage or same-sex marriage in states where either is recognized. Effective October 6, 2014, same-sex marriage is recognized in Wisconsin, including same-sex marriages entered into in WI from June 6 and June 13, 2014.	An employee's legal husband or wife (domestic partners are not spouses but are covered separately under the WFMLA). Effective October 6, 2014, same sex marriages are treated the same as opposite-sex marriages, including same-sex marriages entered into in WI from June 6 to June 13, 2014.	The WFMLA, which covers domestic partners as defined in WI law.
Serious Health Condition	Illness, injury, impairment or physical or mental condition involving inpatient care in hospital, hospice or residential medical facility; or continuing treatment or supervision by a health care provider. Where continuing outpatient treatment is involved, "serious health condition" involves any period of incapacity of more than three consecutive, full calendar days, or a chronic or long-term health condition that is incurable or serious.	Disabling physical or mental illness, injury, impairment or condition involving inpatient care in hospital, nursing home or hospice; or outpatient care that requires treatment or supervision by a health care provider	Comparable
Health Care Provider	Doctors of medicine or osteopathy licensed to practice in the state; podiatrists, dentists, clinical psychologists, optometrists, chiropractors (for manual manipulation of spine to correct subluxation demonstrated by X-ray), nurse practitioners, nurse-midwives, physician assistants and clinical social workers, if authorized to practice under state law; or Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; any health care provider from whom a certification of the existence of a serious health condition would be accepted; any health care provider listed above who is authorized to practice in a country outside of the U.S.	Licensed physician, nurse, dentist, chiropractor, podiatrist, physical therapist, optometrist, pharmacist, psychologist; athletic trainer, certified occupational therapist, occupational therapy assistant, physician assistant, perfusionist, respiratory care practitioner, dietitian, acupuncturist, social worker, marriage and family therapist, professional counselor, speech-language pathologist or audiologist; a partnership of any of the above-listed providers, hospices, inpatient health care facility, community-based residential facility, rural medical center, and Christian Science practitioner.	Varies, as FMLA and WFMLA each include several different types of health care providers

<b>PROVISION</b>	<b>FEDERAL LAW (FMLA)</b>	<b>WISCONSIN LAW (WFMLA)</b>	<b>MOST FAVORABLE TO EMPLOYEES</b>
Intermittent and Reduced Schedule Leave	<ul style="list-style-type: none"> <li>• An employer may approve an employee's taking intermittent or reduced leave in connection with the birth of a child or placement of child for adoption or foster care. An employee must be allowed to take intermittent or reduced leave in connection with a "qualifying exigency," and when medically necessary to care for an injured or ill servicemember or veteran, for the employee's own serious health condition, or that of the employee's child, spouse or parent.</li> <li>• Where recurring periods of leave are foreseeable, an employer may require the employee to transfer temporarily to an alternative position that better accommodates recurring periods of leave.</li> </ul>	<ul style="list-style-type: none"> <li>• An employee must be allowed to take partial absence leave for any statutory purpose, in increments equal to the shortest increment permitted by the employer for any other non-emergency leave, as long as such leave does not unduly disrupt the employer's operations.</li> <li>• WFMLA has no such provision; however, such an accommodation would be possible with the employee's approval.</li> </ul>	<ul style="list-style-type: none"> <li>• WFMLA for right to take partial absence leave; FMLA for providing leave to care for injured service members or for a "qualifying exigency" resulting from military active duty.</li> <li>• WFMLA</li> </ul>
Timing of Family Leave Associated with Birth, Adoption, or Foster Care	An employee may begin family leave before the birth or placement, and the leave must conclude within one year after the birth or placement.	Leave must begin within 16 weeks before or after birth or placement.	FMLA
Employee Notice to Employer	At least 30 days' notice if the need for leave is foreseeable. If leave is not foreseeable, the employee shall provide notice as soon as practicable under the facts and circumstances.	For family leave or planned medical leave, employee must give advance notice in a reasonable and practicable manner. When employee requests partial absence leave in connection with childbirth or adoption, the employee must provide at least as much notice as the shortest notice the employer requires for any other non-emergency or non-medical leave. For medical leave or leave associated with the care of an ill family member or domestic partner or domestic partner's parent, employee must notify employer with "reasonable promptness" after employee learns of necessity for leave.	WFMLA

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Certification of Illness	<ul style="list-style-type: none"> <li>• - Date serious illness commenced</li> <li>- Probable duration</li> <li>- Appropriate medical facts regarding condition</li>   <li>• <u>Own Illness</u>: Employee unable to perform functions of job</li>   <li>• <u>To Care for Seriously Ill Child, Spouse, Parent, Servicemember or Veteran</u>: <ul style="list-style-type: none"> <li>- Certification that employee is needed to care for ill family member</li> <li>- Estimated time for such care</li> </ul> </li>   <li>• <u>Intermittent or Reduced Schedule Leave</u>: <ul style="list-style-type: none"> <li>- Dates and duration of treatment</li> <li>- Statement that such leave is medically necessary</li> </ul> </li>   <li>• <u>Recertification</u>: May be required as frequently as every 30 days in certain circumstances. In some cases, recert may not be requested if leave is to care for a covered servicemember or veteran.</li>   <li>• <u>Periodic reports</u> may be required by the employer concerning employee's status and intention to return to work.</li>   <li>• <u>Ability to return to work</u>: Employer can require certification of employee's ability to resume work.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as FMLA</li>   <li>• <u>Own Illness</u>: Same as FMLA</li>   <li>• <u>To Care for Seriously Ill Child, Spouse, Parent, Domestic Partner, Domestic Partner's Parent</u>: <ul style="list-style-type: none"> <li>- Date illness commenced</li> <li>- Probable duration</li> <li>- Appropriate medical facts regarding condition</li> </ul> </li>   <li>• <u>Partial Absence Leave</u>: For medical leave, an explanation of the extent to which the employee is unable to perform his or her duties</li>   <li>• <u>Recertification</u>: WFMLA has no such provision</li>   <li>• WFMLA has no such provision</li>   <li>• WFMLA has no such provision</li> </ul>	<ul style="list-style-type: none"> <li>• Comparable</li>   <li>• Comparable</li>   <li>• Comparable</li>   <li>• WFMLA</li>   <li>• WFMLA</li>   <li>• WFMLA</li>   <li>• WFMLA</li> </ul>
Certification of "Qualifying Exigency"	<ul style="list-style-type: none"> <li>- Copy of active duty orders</li> <li>- Type of exigency and documentation as reasonable</li> <li>- Date(s)</li> </ul>	WFMLA has no military family leave provisions	<ul style="list-style-type: none"> <li>• FMLA</li> </ul>
Second and Third Medical Opinions	<ul style="list-style-type: none"> <li>• Second medical opinion allowed, chosen and paid for by employer. The second health care provider cannot be employed by the employer on a regular basis. Employer may not request 2nd opinion for leave to care for a servicemember.</li>   <li>• If two opinions conflict, the employer can require third opinion, at employer's expense. Employer and employee must agree on third health care provider, whose opinion is considered binding.</li> </ul>	<ul style="list-style-type: none"> <li>• Second medical opinion allowed, chosen and paid for by employer.</li>   <li>• If first two health care providers disagree, the DWD may appoint a 3rd health care provider at the shared expense of the agency &amp; employee.</li> </ul>	<ul style="list-style-type: none"> <li>• Comparable</li>   <li>• FMLA</li> </ul>

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Executive, Administrative and Professional Employees	Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 19 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the “salary basis” requirements for FLSA’s exemption extends only to “eligible” employees’ use of leave required by FMLA.	Unpaid leave would not result in loss of exempt status under State minimum wage and overtime law (per DILHR verbal interpretation).	Comparable
Substitution of Paid Leave	Employee may elect accrued paid leave to be substituted in some cases. Substitution of paid vacation or personal leave may be subject to established workplace policies and procedures for use of such leave. Employees may <i>not</i> substitute paid sick leave for any situation not covered by employer's sick leave plan.	Employee may elect to substitute accrued paid or unpaid leave of any type provided by employer. Employers may not force substitution.	WFMLA
Maintenance of Employee Benefits	<ul style="list-style-type: none"> <li>• <b>Group Health Insurance:</b> Must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period</li> <li>• <b>Seniority:</b> <ul style="list-style-type: none"> <li>Not entitled to accrue seniority while on leave</li> <li>Cannot lose benefits accrued before leave commenced</li> <li>Not entitled to any right, benefit or position to which employee would not have been entitled had s/he not taken leave</li> </ul> </li> <li>• <b>Retirement System:</b> <ul style="list-style-type: none"> <li>Entitled to accrue continuous service for purposes of vesting and eligibility to participate in retirement plan</li> <li>Not entitled to accrue creditable service while on leave</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Group Health Insurance:</b> Same, except employer may require employee to escrow amount equal to premium for 8 weeks of employee's group health coverage</li> <li>• <b>Seniority:</b> <ul style="list-style-type: none"> <li>Same as FMLA</li> <li>Same as FMLA</li> <li>Same as FMLA</li> </ul> </li> <li>• <b>Retirement System:</b> <ul style="list-style-type: none"> <li>WFMLA contains no provisions related to the retirement system</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• FMLA</li> <li>• Comparable</li> <li>• FMLA</li> </ul>

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Restoration to Same or Equivalent Position	<ul style="list-style-type: none"> <li>Restoration to the same position, or an equivalent position with equivalent benefits, pay and other terms and conditions of employment</li> </ul>	<ul style="list-style-type: none"> <li>Essentially same as FMLA</li> </ul>	<ul style="list-style-type: none"> <li>Comparable</li> </ul>
Prohibited Acts	<ul style="list-style-type: none"> <li>An employer is prohibited from interfering with, denying or restraining any employee from exercising any statutory right. An employer is prohibited from discharging or otherwise discriminating against an employee for opposing a practice made unlawful under the statute, or for participating in any inquiry or proceeding relating to rights established under the statute.</li> <li>An employee cannot prospectively waive rights under the FMLA.</li> </ul>	<ul style="list-style-type: none"> <li>Same as FMLA</li> <li>WFMLA has no such provision, however, s. 111.91(2)(f), Wis. Stats., states that the employer is prohibited from bargaining family and medical leave rights below the minimum afforded under WFMLA.</li> </ul>	<ul style="list-style-type: none"> <li>Comparable</li> <li>FMLA</li> </ul>
Enforcement	<ul style="list-style-type: none"> <li>Employee can file a claim with the Secretary of Labor, or with limitations, bring a civil action in state or federal court</li> <li><u>Statute of Limitations:</u> Two years after alleged violation, and up to three years if violation is “willful”</li> </ul>	<ul style="list-style-type: none"> <li>State employees must file a complaint with the Equal Rights Division of DWD</li> <li><u>Statute of Limitations:</u> Within 30 days after alleged violation</li> </ul>	<ul style="list-style-type: none"> <li>FMLA</li> <li>FMLA</li> </ul>

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Remedies	<ul style="list-style-type: none"> <li>• Lost wages, benefits or other compensation, or recovery of monetary losses due to denial of FMLA leave, and interest calculated at the prevailing rate. An employee may also seek equitable relief including employment, reinstatement or promotion. Employer required to pay prevailing employee's reasonable attorney's fees, reasonable expert fees, and other costs.</li> <li>• Employer may be liable for liquidated damages if violation is found to be "willful"</li> </ul>	<ul style="list-style-type: none"> <li>• Reinstatement, back pay accrued not more than two years before complaint filed, reasonable actual attorney's fees and interest at 12%</li> <li>• WFMLA does not provide liquidated damages</li> </ul>	<ul style="list-style-type: none"> <li>• FMLA</li> <li>• FMLA</li> </ul>
Investigative Authority and Recordkeeping Requirements	<ul style="list-style-type: none"> <li>• <u>Investigative</u>: Secretary of Labor is given investigative authority</li> <li>• <u>Recordkeeping</u>: Employer must keep specified records for at least three years. The Dept of Labor may request review of these records.</li> </ul>	<ul style="list-style-type: none"> <li>• The Equal Rights Division of DWD can investigate only after employee files a complaint.</li> <li>• No such requirement under WFMLA</li> </ul>	N/A
Posting and Notice Requirements	<ul style="list-style-type: none"> <li>• Post notices containing information about law and how to file complaint</li> <li>• \$110 fine for each offense</li> <li>• Must include information about FMLA in employee handbook or other written materials if employer supplies these, or else provide information to employees upon hiring</li> <li>• When employee requests leave, employer must provide employee written notice of employee's eligibility, rights and obligations, and the consequences of failing to meet these obligations</li> <li>• The employer must either provide written notice to the employee that leave has been designated as FMLA leave, including additional information such as whether a fitness for duty certification will be required to return to work, or that the requested leave is not approved as FMLA leave</li> </ul>	<ul style="list-style-type: none"> <li>• Same as FMLA.</li> <li>• \$100 fine for each offense</li> <li>• WFMLA has no such provision</li> <li>• WFMLA has no such requirement</li> <li>• WFMLA has no such requirement</li> </ul>	N/A

ATTACHMENT #4

**LINKS TO FMLA FORMS AND POSTERS**

All of the Wisconsin and federal FMLA forms and documents referenced in this handbook chapter may be accessed online via the hyperlinks listed below. Alternatively, you may find these forms and documents within the FMLA Toolkit accessible on the Department of Administration, Division of Personnel Management website home page at <http://oser.state.wi.us>.

**FORMS**

[DOA-15322 Family and Medical Leave – Employee Request](#)

[DOA-15325 Notice of Eligibility and Rights & Responsibilities](#) (two forms combined)

[DOA-15324 Designation Notice](#)

[DOA-15323 Certification by Health Provider for Family or Medical Leave](#) (short form)

[WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition \(PDF\)](#) (federal DOL form)

[WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition \(PDF\)](#) (federal DOL form)

[WH-384 Certification of Qualifying Exigency For Military Family Leave \(PDF\)](#) (federal DOL form)

[WH-385 Certification for Serious Injury or Illness of Current Servicemember -- for Military Family Leave \(PDF\)](#) (federal DOL form)

[WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave](#) (federal DOL form)

[Genetic Information Nondiscrimination Act \(GINA\) notification](#) – document containing “safe harbor” language that should be submitted to health care providers with every request for medical information if not using the federal WH-380 forms which now include a GINA notification.

**POSTERS / NOTICES**

[WFMLA Poster](#) (for posting in the workplace – Spanish and Hmong versions are also available through the DWD Equal Rights Division)

[FMLA poster](#) (for posting in the workplace - federal DOL model – WHD Publication 1420)

ATTACHMENT #5

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