

GUIDELINES FOR DETERMINING EMPLOYEE RIGHTS UNDER FEDERAL AND STATE FAMILY AND MEDICAL LEAVE LAWS – COMMON SCENARIOS

Melissa A. Cherney, Legal Counsel, WEAC
January 2002

I. INTRODUCTION

This document is intended as an easy reference for determination of leave rights for employees for reasons related to their own health or the health of family members.

Initially, it is important to keep in mind that there are several sources of these leave rights. The most prominent are those discussed in this memo: the federal Family and Medical Leave Act (FFMLA), the Wisconsin Family and Medical Leave Act (WFMLA), and the collective bargaining agreement and policies of the employer.¹ A general principle is that the employee is entitled to whatever benefits are the most favorable to the employee.

Thus, in any given situation, the first inquiry is the employee's eligibility for leave under FFMLA, WFMLA, and the collective bargaining agreement. It is possible that the employee may be eligible under one law and not the other, due to the slight variances under each law. If the employee is eligible under more than one source, the next determination is which provides the employee with the greatest rights. These rights are applicable until leave under this law or plan is exhausted, after which you look to the next source of rights.

For example, generally the WFMLA will be viewed to provide the greatest rights, because leave taken under the WFMLA includes the provision of paid health insurance and the right to substitute other leave. However, leave under the WFMLA is of a more limited duration than that under the FFMLA. Thus the employee would probably utilize rights under the Wisconsin law for as long as it is available, after which they would turn to the federal law.

Another common general question that arises when an employee is eligible for leave under various sources is whether the leave may be taken consecutively, or whether it runs concurrent. Unfortunately, there is not one simple answer to this question. Federal law is clear that, if an employee is taking leave for a reason covered by the federal law (e.g., taking contractual sick leave for an illness that is a "serious health condition" within the meaning of the federal law), the employer may designate that time as federal leave, and deduct it from the amount of federal leave available to that employee, regardless of whether the employee has asked to take federal family or medical leave. The WFMLA has no such provision. However, the rules covering the WFMLA do provide that, if the employer already provides leave for an FMLA reason, and the leave is no more restrictive than the WFMLA, the employer-provided leave shall be "deemed" to be leave available under the WFMLA. So far, the courts have been somewhat hesitant to allow employers to deem leave, but this is an area that is still gray and situations may have to be evaluated on their specific facts.

II. COMMON SCENARIOS FOR EMPLOYEE USE OF FAMILY OR MEDICAL LEAVE

1. Leave to care for a seriously ill family member.

In evaluating leave for this purpose, one must first determine whether the situation is covered by one or both laws. There are slight differences. For example, state law covers in-laws, whereas federal law does not. If only one law is applicable, then only that law's provisions will apply and the leave will only count against the employee's annual allotment under that law. Also, check the relevant collective bargaining agreement, as many collective bargaining agreements have provisions for caring for family members.

Generally, the WFMLA is more favorable as to terms of the leave. For instance, the employee can substitute his or her own sick leave under Wisconsin law. Also, the requirements for certifying the situation as a serious health condition are less stringent under Wisconsin law.

Under federal law, however, the employee is entitled to a significantly longer leave -- up to twelve weeks. But under the federal law, the employer can require the employee to substitute other accrued leave and the employee must be eligible for other paid leave in order to substitute it. Also, if an employee takes leave intermittently under the federal law, the employer may have the option of temporarily transferring the employee to a different position that better accommodates intermittent leave. Under federal law, the employer can require the employee to have the ill family member's doctor certify that the employee is needed to care for the family member.

¹ This Memorandum does not cover the specifics of each law but rather how they interface. For eligibility requirements and other specifics of the WFMLA and FFMLA, go to www.dwd.state.wi.us/er/, and click on *Family and Medical Leave*, and then *Comparison of Federal and Wisconsin Family Leave Law*, or see accompanying handout.

Generally, when an employee needs time off to care for a seriously ill family member, the first two weeks will be under the WFMLA and the substitution and certification rules of the WFMLA will apply. If the employee needs additional time, federal law allows up to ten additional weeks, with the federal provisions for substitution and certification applying.

2. Leave for the employee's own serious health condition.

The analysis regarding leave for this purpose is very similar to that for leave for a family member with a serious health condition. Thus, the employee will take leave under the provisions of the WFMLA for the first two weeks and then will utilize the federal law for the remaining leave, up to a total of twelve weeks. Note that the federal law, unlike Wisconsin law, allows an employer to require an employee on leave to report periodically on the employee's status and intent to return to work and allows the employer to insist on a certification of ability to return to work. These provisions would only apply once the employee has gone beyond the two weeks allowed by state law.

(Note that the employee may also have rights under the Americans with Disabilities Act or Workers' Compensation laws for their own medical condition).

3. Leave for the adoption of a child.

I deal with this situation separately from birth leave because adoptive leave does not contain the complicating factor of childbirth disability.

The WFMLA provides for six weeks of leave for this purpose. Under Wisconsin law, the leave can be taken intermittently and the employee can substitute any other leave, including sick leave, to receive pay during this time.

The FFMLA provides for twelve weeks of leave for this purpose. The leave may not be taken intermittently unless the employer voluntarily agrees. Also, there is no substitution of sick leave. The employee may elect or the employer may require the employee to substitute accrued vacation, personal, or family leave.

Assuming the employee is eligible under both laws, the following will apply: The employee may take the first six weeks of leave under the Wisconsin law with its more beneficial provisions. If the employee wants another six weeks of leave, it will be taken under the federal law with those provisions being applicable.

4. Leave for the birth of a child -- mother.

This situation probably involves the most complicated analysis of the interaction of the two laws. The complication is due in large part to the fact that Wisconsin law separates out leave for childrearing (six weeks) from leave for a serious health condition (two weeks), while federal law simply provides twelve weeks for all.

Typically, a birthmother will be on leave for her own serious health condition for a period of six weeks, during which she would be utilizing sick leave and concurrently using her two weeks of Wisconsin leave for serious health condition. Following that, she would be entitled to six weeks of childrearing leave under Wisconsin law. That entire 12 weeks would also be considered federal family and medical leave, since both childrearing and serious health condition are covered under federal law.

If the birthmother's period of disability is longer than six weeks (for example, she is required to have bed rest before the birth, or complications entitle her to a longer disability period following the birth), the mother would still be entitled to six weeks of Wisconsin childrearing leave following the period of disability.

5. Birth of a child -- father.

I treat fathers separately because they do not have a personal disability from the birth. Thus, they are in a similar position to adoptive parents, dealt with above. However, a father may also be entitled to leave under Wisconsin or federal law for the serious health condition of his spouse. For example, a father may be able to take two weeks under Wisconsin law, with the right to substitute, for his wife's serious health condition, and follow that with six weeks of leave for the birth.

III. CONCLUSION

In summary, you first determine under what laws the employee is entitled to leave, and then take the most favorable approach to the employee. Some situations may still require legal assistance.