

COMPARISON OF FEDERAL AND WISCONSIN FAMILY AND MEDICAL LEAVE LAWS

The following comparison of federal and state Family and Medical Leave Acts (FMLA) presumes, in comparing any two provisions, that employer coverage and employee eligibility requirements have been met for both jurisdictions. In addition, commonly asked questions and answers are included.

Employers must comply with any provisions of state or local law that provide greater family or medical leave rights than the rights established by the federal FMLA. The U.S. Department of Labor will not enforce state family and medical leave laws, and states may not enforce federal family and medical leave laws. Employees have no obligation to designate whether the leave they are taking is federal or state FMLA leave. Thus, employers covered by both federal and state FMLA must comply with the provisions of both.

Further information on federal FMLA may be obtained by contacting the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration.

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MAJOR PROVISIONS OF FEDERAL AND STATE FAMILY AND MEDICAL LEAVE LAWS

Issues	Federal Enforced by the U. S. Department of Labor.	Wisconsin Enforced by the Department of Workforce Development	Most Favorable to Employees.
Employers Covered	Employers of 50 or more employees in at least 20 weeks of current or preceding year.	Employers of at least 50 permanent employees during at least 6 of the preceding 12 calendar months.	See attached Questions and Answers.
Employees Eligible	Have worked for employer at least 1,250 hours in preceding 12 months and employed for at least 12 months and employed at worksite by employer with 50 or more employees within 75 miles of that worksite.	Have worked for employer at least 1,000 hours in preceding 52 weeks and for at least 52 consecutive weeks.	See attached Questions and Answers.
Amount of Leave	12 weeks during a 12 month period. Leave for birth, adoption, or to care for sick parent must be shared by spouses working for same employer.	During a 12 month period. * 6 weeks for birth or adoption * 2 weeks for serious health condition of parent, child or spouse. * 2 weeks for employee's own serious health condition.	See attached Questions and Answers.
Type of Leave	Birth, placement of child for adoption or foster care, to provide care for parent, child or spouse with serious health condition, or employee's own serious health condition.	See Wisconsin entry for amount of leave.	Federal
Serious Health	(1). Illness, injury, impairment, or physical or mental condition involving incapacity or treatment connected with inpatient care in hospital, hospice. (2). Residential medical-care in hospital, hospice, or residential medical-care facility. (3). continuing treatment by a health care provider involving: (a). Incapacity or absence of more than 3 days from work, school, or other activities. (b). Chronic or long term condition incurable or so serious if not treated would result in incapacity of more than 3 days. (c). Prenatal care.	Means a disabling physical or mental illness, injury, impairment or condition involving inpatient care in a hospital, nursing home or hospice, or out-patient care that requires continuing treatment or supervision by a health care provider.	Comparable

Issues	Federal Enforced by the U. S. Department of Labor.	Wisconsin Enforced by the Department of Workforce Development	Most Favorable to Employees.
Health Care Provider	(1). doctors of medicine or osteopathy authorized to practice medicine or surgery in the State; (2). podiatrists, dentists, clinical psychologists, optometrists, chiropractors (for manual manipulation of spine to correct subluxation demonstrated by X-ray) (3). nurse practitioners, and nurse-midwives, if authorized to practice under State law; or, (4). Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts.	Means: licensed physician, nurse, chiropractor, dentist, podiatrist, physical therapist, optometrist, psychologist; certified occupational therapist, occupational therapy assistant, respiratory care practitioner, acupuncturist, social worker, marriage and family therapist, professional counselor, speech-language pathologist or audiologist; and Christian Science practitioner.	Varies, as Federal and State laws each include several different types of health care providers.
Intermittent Leave	Permitted for serious health condition when medically necessary. Not permitted for birth or adoption unless employer agrees.	Permitted for all family and medical leaves in increments equal to the shortest increment permitted by employer for any other non-emergency leave	Wisconsin
Substitution of Paid Leave	Employee may elect or employer may require accrued paid leave to be substituted in some cases. No limits on substituting paid vacation or personal leave. Employee may not substitute paid sick leave, medical, or family leave for any situation not covered by employer's leave plan.	Employee may elect to substitute accrued paid or unpaid leave of any other type provided by employer.	Wisconsin
Reinstatement Rights	Must be restored to same or equivalent position in all terms and conditions.	Similar Provision	Comparable
Key Employee Exception	Exempts salaried employees if among highest paid 10% and if restoration would lead to grievous economic harm to employer.	No Similar Provision	Wisconsin
Maintenance of Health Benefits During Leave	Health insurance must be continued under same conditions as prior to leave.	Similar Provision	Comparable
Leave Requests	Made by employee 30 days in advance or as soon as practicable.	Made by employee in advance in a reasonable and practicable manner.	Wisconsin
Medical Certification May be Required By Employer to Support	Request for leave because of serious health condition. Employee's fitness to return to work from medical leave.	Similar Provision No Specific Provision	Comparable Wisconsin

Issues	Federal Enforced by the U. S. Department of Labor.	Wisconsin Enforced by the Department of Workforce Development	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 Regulation 29 CFR part 541, do not lose their FLSA-exempt Status by using any unpaid FMLA leave. This special exception to the “salary basis” requirement 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.	Comparable

QUESTIONS AND ANSWERS ABOUT THE INTERFACE OF WISCONSIN AND FEDERAL LEAVE

The enactment of the Federal Family and Medical Leave Act of 1993 has raised questions about the coordination of rights and responsibilities of employers and employees under the Wisconsin law and the new federal law. These questions and answers are intended to provide users with information on the coordination of leave entitlement. These questions and answers are intended to provide general advice. For advice on specific situations involving entitlement of Wisconsin Family and Medical Leave, please contact the **State of Wisconsin, Department of Workforce Development, Equal Rights Division** at (608) 266-6860 – Madison or (414) 227-7384 – Milwaukee. **US Department of Labor's** telephone number is (608) 264-5221– Madison.

1. What are an employee's leave entitlements under the federal law?

Answer: The federal Family and Medical Leave Act of 1993 entitles employees who have worked 12 months for an employer and at least 1,250 hours in the 12 month period prior to leave up to 12 weeks of leave. This leave may be taken on the birth or placement for adoption or foster care of a son or daughter, the serious health condition of the employee's parent, son, daughter or spouse or on the serious health condition of the employee. An employee is not entitled to 12 weeks for each of these reasons within a 12-month period. Questions concerning entitlement to federal leave should be addressed to the United States Department of Labor.

2. What are an employee's leave entitlements under the Wisconsin Family and Medical Leave Law?

Answer: The Wisconsin Family and Medical Leave Law entitles employees who have worked for an employer for 52 consecutive weeks and at least 1,000 hours in the 12 months prior to leave, up to six (6) weeks of leave on the birth or adoption of a child. Two (2) weeks to care for a parent, child or spouse of the employee with a serious health condition and two (2) weeks for the serious health condition of the employee. Unlike leave under the federal law, entitlement under the Wisconsin Family and Medical Leave Law are specific to the category of leave requested.

3. Does an employee's pay continue during a period of leave?

Answer: Leave under both state and federal law is unpaid. However, under the state law, an employee may substitute paid or unpaid leave. Under federal law, an employer may require or an employee may elect to substitute paid leave for the otherwise unpaid leave.

4. Do employee's health benefits continue during a period of leave?

Answer: If the leave is covered by either state or federal law, the employee's health insurance shall continue, under the same conditions as comparable active employees.

5. What is the 12-month period within which an employee's leave is to be taken?

Answer: For Wisconsin leave purposes, the 12 month period during which leave must be taken is based on a calendar year. The federal 12-month period during which leave may be taken is based on the period selected by the employer who may be either a rolling or fixed year. The year may be based on a calendar year, fiscal year or the employee's anniversary date.

6. If an employee qualifies for leave under one of the laws, does the employee automatically qualify for leave under the other law?

Answer: An employee must qualify under the federal law to be entitled to the 12 weeks of leave. The employee must qualify under Wisconsin law to be eligible for the Wisconsin leave entitlement. Satisfaction of one law's eligibility requirements does not necessarily mean the employee has satisfied the requirements of the other. However, an employer may use the lower of the federal and state requirements for purposes of leave administration. In such a case, the satisfaction of the lower thresholds for federal and Wisconsin leave will result in employee entitlement to such leaves.

7. If an employee is entitled to leave under both laws, how is his or her leave charged against the entitlement?

Answer: If an employee qualifies for federal family and medical leave and for leave under state law, leave used counts against the employee's entitlement under both laws.

8. If an employee is entitled to leave under only one law, how is his or her leave accounted for?

Answer: If an employee is entitled to leave under only one law, his or her leave used counts against the entitlement under that law.

9. If an employee is entitled to leave under both laws, which requirements for notice, certification, substitution and intermittent leave apply?

Answer: Nothing in the Federal Family and Medical Leave Act supersedes any provision of state or local law which provides greater family and medical leave rights than those provided by the federal law. Therefore, where an employee is entitled to leave under both laws, the notice, certification, substitution and intermittent leave requirements which provide the greater leave rights apply. However, if an employee's leave extends beyond the period of coverage under one of the laws, an employer may require the employee to comply with the requirements of the continuing law.

10. If an employee is entitled to leave under only Wisconsin law, what rules apply as to notice, certification and intermittent leave.

Answer: When an employee is entitled only to leave under Wisconsin law, then only the Wisconsin rules regarding notice, certification and intermittent leave apply.

11. If an employee is only entitled to leave under the federal law, what rules apply concerning notice, certification, substitution and intermittent leave?

Answer: If an employee is only entitled to leave under the federal law, then the federal rules concerning notice, certification, substitution and intermittent leave apply.

12. If an employer's policy and/or collective bargaining agreement provides greater family and medical leave rights than are provided by either federal or state law, which rules apply?

Answer: To the extent that an employer's policy and/or collective bargaining agreement provides leave rights in addition to or greater than those provided by state or federal law, the employer's policy and/or collective bargaining agreement shall apply to the extent they are more generous.

13. If an employee takes leave for the birth or adoption of a child and is eligible for leave under Wisconsin and federal formats, how are the leaves coordinated?

Answer: For an employee who qualifies under both the federal and Wisconsin laws for leave on a birth or adoption, the six weeks of Wisconsin and federal leave may commence prior to, on or after the birth or adoption. Wisconsin law provides that the six weeks of leave must commence within 16 weeks before or after the birth or adoption. Under federal law, up to 12 weeks of leave is available for the birth or placement for adoption provided the leave is concluded no later than 12 months after the birth or placement. The federal and Wisconsin leaves will run concurrently where an employee is entitled to both.

Example: Following the birth of a child, mother desires to take off 12 weeks and father six weeks. Mother will be on leave for her own serious health condition for a period of six weeks, under her employer's disability plan, concurrently using two weeks of Wisconsin leave for her serious health condition and six weeks of federal leave for her serious health condition. At the end of the six weeks of disability, she may take an additional six weeks of leave for the birth of the child under Wisconsin law, concurrently utilizing the remaining six weeks of her federal leave. The father will take six weeks of leave for the birth of a child. Concurrently using his six weeks for the birth of a child under Wisconsin law and six weeks of his federal entitlement, leaving six weeks of leave under the federal law which may be used for other qualifying purposes later in the year.

14. Is placement for foster care covered?

Answer: Placement for foster care is covered only under federal law but not under state law.

15. If an employee is eligible for leave to care for a family member with a serious health condition under Wisconsin and federal law, how are the leaves coordinated?

Answer: Under Wisconsin law, an employee is entitled to take up to two weeks per year to care for a parent (including parent-in-laws), child or spouse with a serious health condition. Federal law allows an employee up to 12 weeks per year to care for a parent, child or spouse with a serious health condition. If the requirements for leave under both laws are met, the leave under both laws run concurrently.

Example: The child of an employee experiences a serious health condition, which has a duration of 12 weeks. The first two weeks are covered by both laws with the next 10 weeks of leave covered only by federal law. If the employee's need for leave should extend beyond the 12 weeks, the availability of additional weeks will be governed by the employer's leave policies.

16. If an employee experiences a serious health condition, how are his or her leave entitlement coordinated under Wisconsin and federal law?

Answer: An employee will be entitled to up to two weeks of leave under Wisconsin's law for his or her own serious health condition, and up to 12 weeks of leave under federal law, provided the leave has not been utilized for other purposes. If the employee is entitled to leave under both laws, then leave use will be counted against both entitlements concurrently.

Example: An employee experiences a serious health condition which renders him or her unable to perform the functions of his or her position. The first weeks of leave are covered by both the Wisconsin and federal laws, concurrently, with any additional leave covered and charged only against the employee's federal entitlement, up to 10 additional weeks. If the employee's need for leave extends beyond 12 weeks from its commencement, the availability of leave from work will be governed by the employer's leave policies.