

KNOW YOUR

FMLA RIGHTS

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QUICK SUMMARY OF FMLA RIGHTS

Federal FMLA

You are eligible if your employer employs **50 employees** within **75 miles** of your work location, you have worked there **at least 12 months**, and you have **actually worked at least 1,250 hours** in the **last 12 months**.

You are entitled to a **total of 12 workweeks of leave** in a uniform **12-month period** for:

- a. **Birth, adoption or foster placement** of a child (new child leave) (must end within one year after the birth, adoption or placement);
- b. **Family member serious health condition(s)** (family care leave);
- c. **Your own serious health condition(s)** (medical leave); or
- d. **“Qualifying exigency(ies)”** related to a family member’s military deployment during wartime, if he or she is in the Reserve or National Guard (qualifying exigency leave).

You may take up to **26 workweeks of “military caregiver” leave** (including the 12 weeks of other FMLA leave) in a **single 12-month period** to care for a family member in the military who is recovering from a **service-connected serious injury or illness**.

Federal FMLA leave is **unpaid, but:**

1. Your employer must maintain your **health insurance coverage** on the same basis as if you were working.
2. **You or your employer may substitute paid vacation, holiday pay, or other personal leave for any FMLA leave;**
3. **You may substitute sick leave for medical leave, family care leave and military caregiver leave**, if the policy allows for such use, but **not for new child or qualifying exigency leave**.
4. **Your employer may substitute sick leave for medical leave, family care leave and military caregiver leave**, but **not for new child or qualifying exigency leave**.
5. If you do substitute, you must comply with the normal procedural rules applicable to the paid leave, unless your employer waives them.

Wisconsin FMLA

You are eligible if your employer employs **50 employees anywhere** in Wisconsin, you have worked there **at least 52 consecutive weeks**, and you have **worked or been paid for at least 1,000 hours** in the **last 52 weeks**.

Unlike leave under the federal law, the Wisconsin law gives you **3 separate FMLA leave banks**. During a **calendar year**, you are entitled to up to:

- a. **Six workweeks** of leave for **birth or adoption** of a child (new child leave) (must begin within 16 weeks of the birth or adoption) ;

- b. *Two workweeks* of leave for *family member's(s)' serious health condition(s)* (family care leave); *and*
- c. *Two workweeks* of leave for *your own serious health condition* (medical leave).

Wisconsin FMLA leave is *unpaid, but:*

1. Your employer must maintain your *health insurance coverage* on the same basis as if you were working; and
2. *You (but not your employer) may substitute any type of accrued paid leave for any type of FMLA leave.*

Under the *Greater Benefit Rule*, you may choose which type of *FMLA* you want to use for particular leave – *State or Federal.*

INTRODUCTION - WHAT IS FMLA LEAVE?

The *Federal Family and Medical Leave Act (Federal FMLA)* and the *Wisconsin Family and Medical Leave Act (Wisconsin FMLA)* are laws that entitle you to be absent from work for particular purposes without fear of reprisal from your employer. Under both laws, you may take FMLA leave for:

- the *birth or adoption* of a child (new child leave);
- to take care of a *family member* with a *serious health condition* (family care leave); or
- because of *your own serious health condition* (medical leave).

The *Federal FMLA* also lets you take new child leave for the *foster placement* of a child.

In 2008, Congress added two more types of *Federal FMLA leave* for employees with a *family member* on *active military duty*:

- *“qualifying exigency” leave* to attend to various needs arising from the *wartime deployment* of a family member in the *Military Reserve or National Guard* (e.g., short-notice deployment, military events, childcare and school activities, financial and legal arrangements, service member’s rest and recuperation, post-deployment activities); and
- *“military caregiver” leave* to care for a family member on active duty who is recovering from a *service-connected serious injury or illness* that renders him or her *medically unfit to perform his or her military duties*. Unlike “qualifying exigency” leave, which only applies to members of the Reserve or National Guard, *“military caregiver” leave applies to any service member.*

THE “GREATER BENEFIT RULE”

Although many FMLA rights are the same under both the Federal FMLA and the Wisconsin FMLA, others are different. Some Federal FMLA rights are more generous to employees than the comparable Wisconsin FMLA rights. In other situations, the Wisconsin FMLA provides more generous leave rights.

Under the Federal FMLA’s “greater benefit rule,” you, as the employee, may choose *whichever FMLA provides you with the rights that work best for you during your leave*. When you do, make sure you *tell your employer which FMLA you are using*.

Example: You want to take 8 weeks of FMLA leave for the birth of your child. You want to substitute paid sick leave so you can save up paid vacation. Under *Wisconsin FMLA* you can substitute sick leave for childbirth leave, but under *Federal FMLA* you can’t. Not only that, under *Federal FMLA*, your employer can make you substitute paid vacation for FMLA leave, even if you don’t want to. *Wisconsin FMLA* leaves the substitution choice to you, but lets you take only 6 weeks off for childbirth. *Federal FMLA* lets you take up to 12 weeks.

Exercising the “greater benefit rule,” *you should tell your employer you are using Wisconsin FMLA for the first 6 weeks, enabling you to substitute sick leave*. That way, the employer can use Federal FMLA to make you substitute vacation only during the last 2 weeks.

COVERAGE - WHO IS ELIGIBLE

❖ How do I know if I am eligible for FMLA leave?

You are eligible for *Federal FMLA* leave if:

1. You have worked for your employer *at least a total of 12 months* before the leave (as long as no part of the 12 months occurred prior to a 7-year break in service);

2. You *actually worked at least 1,250 hours in the last 12 months* before the leave (average 25 hours per week for 50 weeks; but *paid time off* for vacation, sick leave or previous FMLA leave *doesn’t count*); and
3. Your employer employs at least *50 employees within 75 miles* of your worksite.

You are eligible for *Wisconsin FMLA* leave if:

1. You have worked for your employer for *at least 52 consecutive weeks* before the leave;
2. You have *worked or been paid for at least 1,000 hours in the last 52 weeks* before the leave (average 20 hours per week for 50 weeks; and *paid time off* for vacation, sick leave, etc., *does count*); and
3. Your employer employs at least *50 employees anywhere* in the State.

❖ Is FMLA only for mothers, or can fathers take FMLA leave, too?

FMLA is for *both mothers and fathers*. FMLA entitles both parents to take time off from work because of the arrival of a new child into the family, to take care of a loved one, and to deal with their own serious health conditions.

BASIC FMLA LEAVE RIGHTS

❖ What leave can I take for the birth, adoption or foster placement of a child?

Under *Federal FMLA* you may take a total of *12 weeks* off for *all qualifying reasons*, except military caregiver leave, in a 52-week period. You may elect to use as many of those weeks as you want for the birth, adoption or foster placement of a child. However, all such leave *must be completed within one year* of the birth, adoption or placement.

Under *Wisconsin FMLA* you may take a total of *6 weeks* of leave for the *birth or adoption* of a child. You must *begin your leave within 16 weeks* of your child's birth or placement for adoption.

Note: Wisconsin FMLA leave is *not available for foster placement* of a child.

❖ When I take FMLA new child leave, can I take part of my leave now and the rest at a later time?

Only under Wisconsin FMLA. You may take your new child leave on an intermittent basis, dividing it into segments. *However, the last segment must begin within 16 weeks after the birth or adoption.* If you take intermittent leave, you must comply with the notice requirements discussed below and schedule your absences so that they do not "unduly disrupt" your employer's operations.

You can't split up new child leave under Federal FMLA unless your employer agrees to it. You have to take it all at once.

❖ When can I take FMLA leave to care for a family member?

Under *both Federal and Wisconsin FMLA*, you may take *family care leave* to care for a *family member who has a "serious health condition"* as long as the health care provider agrees that you are needed for the family member's care, including psychological comfort.

❖ What family members can I take FMLA leave to care for?

Under *Federal FMLA*, your qualifying family members are *your son, daughter, spouse, or parent.*

Under the *Wisconsin FMLA*, you can take family care leave to care for your *child*, your *spouse*, your *parent*, or your *spouse's parent*. You can take family care leave to care for your *parents-in-law only under the Wisconsin FMLA*. Starting July 1, 2009, you can also use *Wisconsin* family care leave to care for your *domestic partner* or your *domestic partner's parents*.

Under *Federal FMLA*, you can take *military caregiver leave* as long as you are the service member's *spouse, son, daughter, parent or "next of kin"* (nearest blood relative unless the service member has designated another one).

❖ **Does my child have to be a biological child?**

No. Your son or daughter can be a *biological, adopted or foster child, a stepchild, or legal ward.* Under *Federal FMLA only*, he or she can also be a child with whom you stand “*in loco parentis*,” taking day-to-day responsibility for his or her care and support. A *child of your domestic partner* does *not qualify* under *either Federal or Wisconsin FMLA.*

❖ **Can I still take FMLA leave to care for my child if he or she is an adult?**

Under *Wisconsin FMLA*, if your child is *18 years of age* or older, you can take FMLA leave to care for your child only if he or she is *unable to care for himself or herself because of a serious health condition.* You can take *Federal FMLA* family care leave to care for your adult child *only* if the child’s inability to care for himself or herself is due to a *disability* that “substantially limits one or more of his or her major life activities.” It is much easier to prove “serious health condition” than “disability.”

There is *no age limit* for either *qualifying exigency or military caregiver leave.*

❖ **Does my parent have to be my biological parent?**

No. Under *Federal FMLA*, your parent may be either *your biological parent or someone who stood “in loco parentis” to you when you were a child,* taking day-to-day responsibility for

your care and support. That would certainly cover your adoptive and foster parent and probably your stepparent.

Under *Wisconsin FMLA*, your “parent” may be *your or your spouse’s biological or natural parent, adoptive parent, foster parent, stepparent, or legal guardian.* Starting July 1, 2009, your “parent” may include anyone who stands in such a relationship with *your domestic partner* under *Wisconsin FMLA.*

❖ **Can I take family leave to take care of my grandmother or grandfather?**

Not under Wisconsin FMLA at all, and *usually not* under *Federal FMLA.* You could take family care leave under *Federal FMLA* to care for your grandparent *only if your grandparent stood “in loco parentis” to you when you were a child,* taking day-to-day responsibility for your care and support.

❖ **What is a “serious health condition”?**

A serious health condition is a disabling illness, injury or impairment that involves either:

- *inpatient hospitalization* or
- *continuous outpatient treatment or supervision* by a health care provider.

❖ **What is continuing outpatient treatment or supervision?**

Under the *Federal FMLA*, serious health conditions requiring “continuing outpatient treatment or supervision” include

pregnancy, chronic, permanent or long-term illnesses. They also include any condition that requires *either*:

- *two or more visits* to a health care provider, as long as the *first* visit occurs within *seven days* of the onset and the *second* one occurs within *30 days* of onset, absent “extenuating circumstances”; *or*
- *one visit* to a health care provider (within *seven days* of the onset) followed by a *regimen of continuing care* under his or her *supervision*, such as *prescription medication*.

However, the last two situations qualify *only* if the condition *incapacitates* the individual for *more than three consecutive calendar days*.

A qualifying *chronic* condition must require at least *two treatment visits per year*. It does *not* require three days of incapacity.

Under the *Wisconsin FMLA*, an illness qualifies as a serious health condition requiring “continuing outpatient treatment or supervision” *only if* it necessitates *two or more visits* to a health care provider. As long as that requirement is satisfied, there is *no minimum period of disability*.

❖ **What kind of care do I need to provide to my family member to qualify for family leave?**

Whatever care your family member’s doctor believes is *medically necessary* for his or her care or treatment, *both*

physical and psychological. It includes situations where the family member is unable to care for or transport himself or herself. It also includes providing *psychological comfort* to the family member. As long as your presence is needed for the person’s care, it does not matter if other family members are also present or available.

❖ **Can I take FMLA leave if I am sick?**

Yes, you can take *medical leave* under FMLA for *your own serious health condition*.

CAUTION: WHAT ABOUT CHICKEN POX OR A COLD?

We all know what happens when a child has chicken pox. He or she usually has to stay home for a week - away from other children in school, day care, etc. This often means that a parent must stay at home with the child.

We also know what the treatment is - plenty of liquids and plenty of rest at home. Most children with chicken pox don’t need to see the doctor at all. If the child does need to see the doctor, it is usually not more than once.

The same rules apply. *Unless your child needs to see the doctor at least twice or be admitted to the hospital as an in-patient*, he or she does *not* have a “serious health condition” under the *Wisconsin FMLA*. This means that, even though you may have to stay home with your child for a week, you cannot claim the time as Wisconsin FMLA leave.

If your child only needs to *see the doctor once*, it might count under *Federal FMLA*, if the doctor *prescribes medication* or some other *regimen of treatment* under his or her *supervision*, and the illness *disables* your child for *more than 3 days*.

The same rules also apply if you are unable to go to work for several days because of a severe cold. *If you don't meet at least one of the above criteria*, your cold is *not* a "serious health condition" for which you could claim FMLA leave.

❖ **How much FMLA leave may I take for my own or a family member's serious health condition?**

As stated earlier, under *Federal FMLA*, you get a total of *12 weeks* in a *52-week period* for *all qualifying reasons* except military caregiver leave. If you need to use all 12 weeks for family care leave, you may. You may also use all 12 weeks as medical leave for your own serious health condition. You may "*mix and match*" by dividing your 12 weeks among new child leave, family care leave, your own medical leave, and qualifying exigency leave. However, you may not use more than a total of 12 weeks for any combination of these reasons in the appropriate 52-week period.

Under *Wisconsin FMLA*, you can use:

- up to *2 weeks* of family care leave a year to care for *family members* with serious health conditions, and
- up to *2 weeks* of medical leave a year for *your own* serious health conditions.

These are separate leave allowances. *You may not "mix and match"* under the Wisconsin FMLA. You may not take unused family care leave and add it to medical leave to give yourself 4 weeks of leave for your own serious health condition rather than 2 weeks.

❖ **If two or more members of my family have serious health conditions in the same year, how much FMLA leave may I take to care for them?**

Your family care leave allowance is the *total* amount you may take in a year. If several family members have serious health conditions during the year, you can only take up to a *total of two weeks* under *Wisconsin FMLA* to care for *all* of them. You may use your *entire 12 weeks* of *Federal FMLA* leave to care for *all* of them.

❖ **Do I have to use both Wisconsin and Federal FMLA at the same time, or can I take one and then the other?**

It depends *on whether they are for* the same or different categories of leave.

If the leave you are taking under the Wisconsin and Federal FMLA is for *the same category* of leave, you have to take both at the *same time (concurrently)*.

Example 1: If you take 6 weeks of *Wisconsin FMLA* leave for the birth of a child, then that will also count as 6 weeks of *Federal FMLA* leave. You cannot claim 18 weeks of new child leave by taking 12 weeks of Federal

FMLA leave followed by 6 more weeks of Wisconsin FMLA leave, or vice versa.

However, your use of **Federal FMLA** leave for **one category** of leave **will not affect** the availability of the **other categories** of **Wisconsin FMLA**. Remember, Wisconsin FMLA provides you with **3 separate leave banks** – 6 weeks for new child leave and 2 weeks each for family and medical leave. Leave taken for one reason under the Federal FMLA (even all 12 weeks) **does not use up any of your Wisconsin FMLA leave available for a different reason**.

Example 2: You take 12 weeks of leave for your own serious health condition. This exhausts **all of your available Federal FMLA leave** and your **2 weeks of Wisconsin medical leave**. It **does not affect** your **Wisconsin new child and family care leave banks**. Later in the same year your child has a serious health condition requiring your care. Even though you have no more Federal leave available, you are still entitled to take **2 weeks of Wisconsin family care leave** to care for your child.

Example 3: As a result of complications during childbirth, you remain on bed-rest under your doctor's care for 8 weeks. Even though your serious health condition was precipitated by childbirth, your absence from work during these 8 weeks is **medical leave, not new child leave**. During that time you exhaust **8 weeks of Federal FMLA leave, but only your 2 weeks of Wisconsin medical leave**.

You are still **entitled to 6 more weeks of Wisconsin new child leave**, as long as you begin it within 16 weeks after birth and you gave your employer proper notice. Four of those 6 weeks will also count as your remaining Federal FMLA leave.

Example 4: You use **all 12 weeks** of your **Federal FMLA** leave for **qualifying exigency** leaves necessitated by your National Guard husband's deployment to a war zone. Since **Wisconsin FMLA is not available for such qualifying exigencies**, the exhaustion of your Federal FMLA allotment **will not affect any of your available Wisconsin FMLA leave**.

❖ **If I am taking FMLA leave due to my own or a family member's serious health condition, do I have to take all of the time off at once?**

No. You do not need to take any more time off at any one time than is medically necessary. **You may split up the leave** necessitated by a particular serious health condition and take it on an **intermittent basis**, whether it is your own or a family member's. If the serious health condition requires you to **reduce your hours**, you may take FMLA leave on a **reduced leave basis**. However, the **Federal FMLA** requires that you provide **reasonable notice** to your employer of any **planned or anticipated absences**, as discussed below. **Wisconsin FMLA** requires you to **schedule** your "partial leave" absences so that they **do not "unduly disrupt"** your employer's operations.

❖ **Can I use FMLA leave to cover periodic doctor visits or treatment or therapy sessions?**

Yes, as long as the absence is *related to a serious health condition*. Continuing treatment or therapy for a particular condition will generally qualify. However, routine physical or dental exams will not.

❖ **If I need to take part of a day off for treatment or therapy under FMLA, can my employer require me to remain off the rest of the day?**

Not if you are using Federal FMLA leave. Your employer may not require you to take any more FMLA leave than is medically necessary. However, your employer may require you to be off work up to the shortest period of time that its payroll system uses to account for absences or use of leave, provided it is *one hour or less*.

Exception: If it is *physically impossible* for you to begin or leave work midway through your shift (e.g. if you are a flight attendant and have to miss your crew's transcontinental flight due to a one-hour medical procedure), then the employer may charge the *entire day as FMLA leave*.

If you are using *Wisconsin FMLA leave*, your employer may require you to be off up to the *shortest increment of a day* it would allow you to take off for any other *non-emergency leave*.

If it does not allow non-emergency leaves of less than a day, then it *could require you to remain out the whole day* for *Wisconsin FMLA leave*.

❖ **How do I know how much FMLA leave I still have available if I have used intermittent, reduced or partial leave?**

Under *Federal FMLA*, since the *actual workweek is the basis of leave entitlement*, the amount of FMLA leave taken is *measured in fractions of weeks*. For any week in which the employee took FMLA leave, the amount of *time actually worked* is *compared with* the amount of *time the employee would otherwise have worked*.

Example: If an employee, who is scheduled to work 30 hours in a particular week, has to be absent for 10 hours due to a serious health condition, he has used 1/3 of a week of FMLA leave. On the other hand, if he had been scheduled to work 40 hours, he would have used only 1/4 of a week.

If an employee, whose schedule varies from week to week, takes FMLA leave in a particular week, the employer may employ a *weekly average* of the employee's hours, based on the previous 12 months, *only if it is unable to determine with any certainty* how many hours the employee would have worked if he or she hadn't taken the leave.

Under *Wisconsin FMLA*, a "week" of partial leave means leave totaling *5 days that would otherwise have been workdays* for the employee.

SPECIAL PROBLEM: FIREFIGHTER SCHEDULES

Most Wisconsin firefighters work three 24-hour duty days in a 9-day period under either a “Chicago schedule” or a “California schedule.” Firefighters working a Chicago schedule work every third day. Those working a California schedule work every other day, with the third work day followed by four days off. These work schedules, especially the California plan, do not fit neatly into the FMLA leave allotments, which are measured in weeks.

When a firefighter takes his or her full allotment of leave at once, **Federal FMLA** measure the leave entitlement by the number of days the employee *would have actually worked* during the applicable 12- or 26-week period. *So does Wisconsin* during the applicable 2- or 6-week period.

This means, for example, that, if a firefighter needs 2 weeks of family care leave to care for his wife, **Wisconsin FMLA will cover his absence for the entire 2-week period, regardless of how many days he was scheduled to work during that time.** If he is on a California schedule and starts his leave on the first day of a duty cycle, FMLA would protect 6 days of absence; if he starts on the second day, it protects 5; and if he starts on the third day, it protects only 4.

If a firefighter takes his or her FMLA leave in *increments*, how much total leave does he or she use each time? Under the **Federal FMLA**, the usual *fractional-week method* should be employed. Even though the number of days a firefighter will

work in any particular week may vary, especially on the California schedule, the chief can determine with reasonable certainty how many hours the firefighter is otherwise scheduled to work, so averaging would not be appropriate.

Under the **Wisconsin FMLA**, firefighters’ partial FMLA leave usage is calculated on the basis of a **56-hour average workweek**. That is, whenever the firefighter has used 56 hours, he has used one of his Wisconsin FMLA weeks.

❖ **How much qualifying exigency leave can I take?**

Qualifying exigency leave is available on the same basis as other Federal FMLA: **12 weeks** in a **12-month period**.

❖ **How much military caregiver leave can I take?**

An employee may take **up to 26 weeks** in a **single 12-month period** to care for a military family member with a service-connected injury or illness. The 12-month period begins when the employee *first takes leave*. The 26-week allotment **includes any other FMLA leave the employee may use** during that 12-month period. The 12-month period is **not renewable**. However, military caregiver leave is available on a **per service member, per injury basis**.

Example: An employee has both a husband and a son in a war zone. Her husband is wounded, and she first leaves work to care for him on March 1, 2009. She will have until February 28, 2010, to use 26 weeks of leave to care for him. The following fall her son is wounded. Her first

absence to care for him occurs on December 1, 2009. She is entitled to another 26 weeks of leave to care for him, which she must use by November 30, 2010.

❖ **After I have used FMLA leave, when is it restored to me so that I can use it again?**

Remember that you can use **12 weeks** of **Federal FMLA** leave in a 12-month period. **Your employer gets to choose the 12-month period** applicable to all of its employees. It may choose a calendar year or a fiscal year. Most employers, however, choose a **“rolling 12-month”** FMLA year, looking back 12 months from any date that you want to take FMLA leave.

Example 1: You are scheduled for surgery on February 2, 2010. You ask for 2 weeks of FMLA leave beginning February 1, 2010. However, you took 12 weeks of **Federal FMLA** leave during the summer of 2009 when your child was born. Since the employer can look back to any leave taken since February 1, 2009, you do not have any Federal FMLA leave available to cover your absence.

Example 2: Same situation, but this time your 12 weeks of **Federal FMLA** leave for the birth of your child began in January 2009 and ended 9 weeks after February 1, 2009. Since you have taken only 9 weeks of FMLA leave since February 1, 2009, you have 3 weeks available - enough to cover your 2 weeks of requested medical leave.

Exception: Remember that **military caregiver** leave is **non-renewable**.

All leave under the **Wisconsin FMLA** must be measured on a **calendar year** basis.

Example 3: You are scheduled for surgery on February 2, 2010. You ask for 2 weeks of FMLA medical leave beginning February 1, 2010. However, you took 2 weeks of FMLA medical leave in December 2009 when you had pneumonia. Since your employer must measure your use of medical leave on a calendar year basis, your full bank was restored on January 1, 2010. Therefore, your use of medical leave in December 2009 has no effect on the amount of medical leave that you can take in February 2010. You can take the full two weeks.

Exception: Under the **Wisconsin FMLA**, you can only take a **total of 6 weeks** of family care leave for the **birth or adoption of any one child**. Consequently, even if your child is born near the end of a calendar year, you **cannot “double up”** 2 periods of 6-week family care leave from the 2 successive calendar years to get 12 weeks of childbirth leave under the Wisconsin FMLA

SUMMARY - HOW MUCH FMLA LEAVE YOU CAN TAKE

Under the **Federal FMLA**, you can take a total **12 weeks** of leave for **any or all** FMLA reasons in a 12-month period. It is a **“mix and match”** policy. The 12 months may be a “rolling 12 months”, if the employer uses that for all of its employees. You may take **26 weeks** of military caregiver leave in a single 12-

month period, but that 26 weeks has to include any other FMLA leave taken during that 12-month period.

Under the *Wisconsin FMLA* you can take any of the following in any calendar year:

- **6 weeks** of new child leave for birth or adoption of a child, but no more than a **total of 6 weeks** for any one child
- **2 weeks** of family care leave to care for family members with serious health conditions
- **2 weeks** of medical leave because of your own serious health conditions

This is *not* “mix and match.” You can’t move weeks from birth and adoption leave to cover medical leave simply because you are out with a serious health condition longer than 2 weeks and you are not bringing a new child into the family in the same year. By the same token, your use of Federal FMLA (even all 12 weeks of it) for one category of leave does not affect your Wisconsin FMLA entitlements for the other categories of leave.

❖ **If my spouse and I work for the same employer, can we both take FMLA leave?**

Under *Wisconsin FMLA*, you are *both* entitled to take your *full allotment* of FMLA leave each year, regardless of the reason for taking the leave.

- You may *each* take up to 6 weeks of family care leave for the birth, or adoption of a child.

You may *each* take up to 2 weeks of family care leave to care for a sick family member, including each other.

- You may *each* take up to 2 weeks of medical leave for your own serious health condition.

Under *Federal FMLA*, it depends on the reason for the FMLA leave.

- You may *each* take **12 weeks** of FMLA leave for:
 - The serious health condition of *either spouse*;
 - Your *child’s* serious health condition; or
 - **Qualifying exigencies** related to your Reserve or National Guard family member’s **deployment**.
- You may take a **total of 12 weeks between you** for:
 - The **birth, adoption or placement** of a child, or
 - A **parent’s** serious health condition.

Example 1: You and your spouse work for the same employer. You each use 4 weeks of *Federal FMLA* leave in connection with the birth of your child. Later in the same year, your spouse’s father gets sick. Since you and your spouse used a total of 8 weeks of childbirth leave, *your spouse* can only use up to **4 weeks** of FMLA leave to care for his or her father, since the leave is **subject to the combined 12-week maximum**. **You cannot take Federal FMLA leave to care for your father-in-law**. However, *you* could take **2 weeks** under *Wisconsin FMLA* to care for him.

Example 2: Same facts, except this time your infant child, rather than your spouse's father, gets very sick later in the year. Since you and your spouse each took 4 weeks of childbirth leave, you may *each* take up to **8 weeks** of leave to care for the sick child since a *child's* serious health condition is **not subject to the combined 12-week maximum**.

You may take a **total of 26 weeks between you** for *military caregiver* leave.

YOUR EMPLOYER'S NOTICE OBLIGATIONS

❖ **What general information does an employer have to give its employees about their FMLA rights and responsibilities?**

Both *Federal and Wisconsin FMLAs* require an employer to *post* government-approved **notices of employee FMLA rights and responsibilities**. Under the *Federal FMLA*, such notice should also be **included in any employee handbook**.

❖ **Does my employer have to give me any information about my FMLA rights and responsibilities when I request FMLA leave?**

Under *Federal FMLA*, within **5 business days after** it learns of an employee's need for leave, the **employer must provide** the employee with:

- **Oral or written "eligibility" notice** as to whether the employee meets the FMLA eligibility requirements; and
- **Written "rights and responsibilities" notice** informing the employee of certification requirements, substitution rights, whether the employer will require substitution, health insurance maintenance and other pertinent information; and
- **Any medical certification forms** that the employer will require for a serious health condition.

In addition, within **5 business days after** the employer receives enough information to decide whether the leave qualifies for FMLA (e.g. medical certification), the employer must provide the employee with:

- **Written "designation" notice** informing the employee whether the employer will count the leave as FMLA leave and, if denied, the **reason for denial** (e.g., not for a qualifying reason, FMLA already exhausted, etc.)

GIVING NOTICE TO YOUR EMPLOYER

❖ **Do I have to give my employer advance notice if I want to take FMLA leave?**

Yes, if the need for the leave is **foreseeable** (for example in cases of birth or adoption or planned medical treatment), you must give **reasonable advance notice**. If it is **not foreseeable**

(for example, if you become suddenly ill or are in an emergency), then you need to notify the employer *as soon as practicable under the circumstances*. Under *Federal FMLA*, if the need for leave is foreseeable more than 30 days in advance, then you must give the employer *at least 30 days' notice*. If it becomes foreseeable less than 30 days in advance, then you need to notify the employer "*as soon as practicable*," which usually means *the same or the next business day*.

❖ **What notice do I need to give for intermittent FMLA leave?**

If intermittent leave is planned (say for periodic doctor visits or therapy), you must give the employer *reasonable advance notice* of the *days or times* when you expect to be absent from work, and schedule your leave so as *not to unduly disrupt* the employer's operations.

❖ **What are the consequences if I don't give proper notice?**

If you do not provide proper notice, the employer may *delay* your FMLA leave. If you are absent without proper notice, your absence is *unprotected* and subject to the employer's usual absenteeism rules.

GETTING A DOCTOR'S CERTIFICATE

❖ **Can my employer require a doctor's certificate?**

Yes, your employer may require a health care provider's certificate of your or your family member's *serious health*

condition. However, FMLA limits the amount of information that has to be provided.

❖ **What information can my employer demand from my doctor?**

Your employer is *only* entitled to the following information:

1. That you or your family member *have a "serious health condition"*;
2. The *date it commenced* and its *probable duration*;
3. The *medical facts* about the serious health condition;
4. If you are requesting medical leave for *your own* serious health condition, the *extent of your inability to work* or perform the *essential functions* of your job.

The *Federal FMLA* allows your employer to ask for the following *additional information*:

5. Whether you will need to take *intermittent leave* or *reduce your hours*;
6. Information about *additional treatments*; and
7. The *reasons* why you need to be off *to care for your family member*.

Your employer cannot require a release of your medical records as a condition for granting FMLA leave. However, it is your responsibility to provide your employer with a complete and sufficient medical certification. If you don't, your employer may deny the FMLA leave.

❖ **How quickly do I have to return the certification to my employer?**

Your employer may require you to return the completed certification *in 15 calendar days*. However, it must give you additional time if, during that 15-day period, you inform the employer that you will be unable to comply despite your own *diligent, good faith efforts*.

❖ **What if my employer doesn't consider the certification sufficient?**

If your employer claims your certification is incomplete or insufficient, it must state in writing what information is missing and give you an *additional 7 days* within which to provide it.

❖ **How often can my employer require a doctor's certificate for the same serious health condition?**

Generally, not more often than *every 30 days*. If the *original certificate* shows a duration of *longer than 30 days*, then your employer cannot require a new certificate until the *end of that time period*. Under the *Federal FMLA*, if you are *absent for 6 months or longer*, then the employer may require *recertification every 6 months*. Also, the employer may require a new certification of a *chronic* serious health condition *annually*.

There are also *exceptions* if you request an *extension*, or if there has been a *significant change* in the serious health condition.

❖ **What happens if my employer doesn't agree with my doctor?**

If your employer is not satisfied with your doctor's certification, it may require you to obtain a *second opinion* from a doctor *chosen and paid for by the employer*. It may not do this with a 6-month recertification.

❖ **What happens if my doctor and the "second opinion" doctor chosen by my employer don't agree?**

The Wisconsin FMLA doesn't say. Under the *Federal FMLA*, you and your employer then *jointly select a third doctor, paid for by the employer*. The third doctor's opinion is *final and binding*. Both of you have to attempt to agree on the third doctor in good faith.

SUBSTITUTION RIGHTS – GETTING PAID DURING FMLA LEAVE

❖ **Can I get paid while I'm on FMLA leave?**

Yes, if you have accrued paid leave available in a leave bank at work. *FMLA leave itself is unpaid*. However, both FMLAs provide for the *substitution of accrued paid leave* for otherwise unpaid FMLA leave.

❖ **What do you mean by “accrued paid leave”?**

Accrued paid leave is *paid leave that you have earned*, such as vacation, holiday pay, compensatory paid time off, and sick leave. It is leave you have *“in your bank.”*

❖ **How do I substitute?**

Tell your employer that you want to substitute paid leave for FMLA leave. If you have a choice of different kinds of paid leave available for substitution, tell your employer *which types* of leave you want to substitute *and in what order.*

❖ **Can I substitute vacation or holiday pay for any type of FMLA leave?**

Yes, under Wisconsin FMLA. You can substitute any accrued vacation, holiday pay, compensatory time off, or other types of paid personal leave for *any type of unpaid Wisconsin FMLA leave.*

The *Federal FMLA* itself says the employee may substitute any accrued vacation, holiday pay, compensatory time off, or other types of paid personal leave for *any type of unpaid Federal FMLA leave.* However, under recently adopted *Department of Labor regulations*, your employer can insist that you *satisfy any procedural requirements of the paid leave policy* as a pre-condition to receiving payment.

❖ **Can I substitute sick leave for any kind of FMLA leave?**

Only under the Wisconsin FMLA. Under the Wisconsin FMLA, you can substitute paid sick leave for *any* type of FMLA leave *even if the sick leave plan otherwise forbids it.*

Under *Federal FMLA* you can substitute paid sick leave *only* for:

- Medical leave for *your own* serious health condition *if the sick leave plan would otherwise cover the absence;*
- Family care leave to care for a *family member* with a serious health condition *if the sick leave plan would otherwise cover the absence;* or
- *Military caregiver* leave *if the sick leave plan would otherwise cover the absence.*

You would also have to *satisfy any procedural requirements of the paid leave policy* as a pre-condition to receiving payment.

Under the *Federal FMLA*, you can *never* substitute paid *sick leave* for *new child or qualifying exigency* leave.

Example 1: You are taking FMLA leave because you and your spouse are *adopting a child.* You want to substitute paid sick leave for the FMLA leave. The employer’s sick leave plan says it can be used only in cases of the employee’s own illness. If you request *Federal FMLA*, you *cannot substitute sick leave*, since sick leave cannot be substituted for birth or adoption leave. If you request *Wisconsin FMLA* leave, you *can substitute sick leave*

even though the sick leave plan says it can only be used in case of your own illness.

Example 2: You are taking time off to *care for your spouse*, who is suffering from a serious health condition. You want to substitute paid sick leave for the FMLA leave. Once again, the employer's sick leave plan says it can be used only in cases of the employee's own illness. If you request *Federal FMLA* leave, you *cannot substitute sick leave*, because the sick leave plan would not otherwise cover the absence for a family member's illness. If you request *Wisconsin FMLA*, you *can substitute sick leave*, since it is accrued paid leave.

❖ **Can my employer make me substitute paid leave that I have in the bank for FMLA leave?**

Not if you are taking Wisconsin FMLA leave. The Wisconsin FMLA gives the right of substitution *only to the employee*.

However, if you are taking *Federal FMLA leave*, your employer has even greater substitution rights than you have. Even if you would prefer to take FMLA leave unpaid and leave your leave banks untouched, your employer can *require you to substitute anyway*. Your employer may require you to substitute *paid vacation* for *any type of FMLA leave*. It can also require you to substitute *paid sick leave* whenever you are out due to your own or a family member's *serious health condition*. However, *your employer cannot require you to substitute sick leave for new child or qualifying exigency leave*.

❖ **If I go out on sick leave, can my employer treat my absence as FMLA leave even if I don't want it counted as FMLA leave?**

Your employer *can* treat it as *Federal FMLA leave* and count it against your 12 weeks, as long as your illness qualifies as a serious health condition.

Example: You are injured at work and require 12 weeks of worker's compensation leave. During those 12 weeks, you see your doctor every week for treatment of the injury. Your injury qualifies as a "serious health condition" under FMLA, and your employer may treat all of your worker's compensation leave as Federal FMLA leave.

In some cases, your employer may also be able to treat your absence as *Wisconsin FMLA leave*. State regulations *permit an employer to "deem"* as Wisconsin FMLA leave any otherwise qualifying leave that is granted to an employee under terms that are *no less restrictive than FMLA leave*.

❖ **If I'm out on worker's compensation, can my employer count that as FMLA leave?**

Yes, as long as your injury otherwise qualifies as a "serious health condition."

SUMMARY - SUBSTITUTION OF PAID LEAVE

You can get paid during FMLA leave only if you substitute other accrued paid leave that you have "in the bank."

Under *Wisconsin FMLA*, you - and you alone - can substitute any kind of accrued paid leave for any kind of FMLA leave, even if the sick leave plan forbids it.

Under *Federal FMLA*, your employer has even greater substitution rights than you do:

- Both you and your employer may substitute accrued paid vacation, holiday pay or other types of personal leave for any type of FMLA leave.
- Neither you nor your employer may substitute sick leave for new child or qualifying exigency leave under Federal FMLA leave.
- Both you and your employer may substitute accrued paid sick leave for FMLA leave due to your own or a family member's serious health condition if the sick leave plan provides for it.

Under Federal FMLA, your employer may treat any absence due to an FMLA-qualifying reason as FMLA leave even if you don't want it counted as FMLA leave.

Your substitution rights are much better under Wisconsin FMLA than under Federal FMLA.

BENEFITS DURING FMLA LEAVE

❖ What benefits do I get while I am on FMLA leave?

Even if you take FMLA leave unpaid, your employer *must continue your health insurance* coverage exactly *as though*

you were still actively employed. FMLA does *not require* the employer to maintain any *other benefits* for you during your FMLA leave. Of course, if you substitute paid leave so that you remain on pay status during your FMLA leave, you may be entitled to continue receiving benefits under the terms of your collective bargaining agreement or your employment.

❖ Do I have to pay for my health insurance while I'm on FMLA leave?

You only have to pay *whatever portion of the premium you would have had to pay* if you had not taken the leave, as long as you return to work following the leave. If your employer pays the entire premium when you are working, it must continue to do so during your FMLA leave. If your employer pays 80%, and you pay 20%, then that arrangement must continue during the leave.

❖ Can my employer require me to prepay health insurance premiums before going on FMLA leave?

Not under the Federal FMLA.

Under the *Wisconsin FMLA*, your employer may require you to deposit *8 weeks worth of premiums in an escrow account* from which it can recover the premiums it paid if you do not return from leave. The employer has to give its employees at least *12 months to make the escrow deposits* in regular, equal installments and must place the deposits in an *interest-bearing account*. The employer must return any remaining balance, including interest, to the employee.

❖ **If I decide not to return to work after my FMLA leave, can my employer come after me for health insurance premiums?**

Yes. If you don't return to work after your FMLA leave has expired, the employer is entitled to recover the premiums that it paid for your health insurance coverage during your leave. It can deduct those premiums from any money still owed to you or it can sue you for them. It can also collect those premiums from any escrow account the employee set up under the Wisconsin FMLA.

Exception: Your employer *cannot* recover health insurance premiums from you if you did not return to work because of:

- the continuation, recurrence or onset of a serious health condition (either your own or a family member's) that would qualify for FMLA leave, or
- other circumstances beyond your control, such as a layoff, your spouse's unexpected transfer to a new job location more than 75 miles away, or a non-qualifying relative's serious health condition (such as your grandparent, your sibling, or an in-law).

❖ **What if I return to work and then quit?**

If you remain at work for *at least 30 calendar days*, the employer *cannot recover health insurance premiums* from you. If you leave before the 31st day, the employer can come after you for them.

❖ **Can I receive unemployment compensation while on FMLA leave?**

No, you can not receive unemployment while on FMLA leave.

RETURNING TO WORK FROM FMLA LEAVE

❖ **Am I entitled to go back to the same job I had when I went out on FMLA leave?**

Under the *Wisconsin FMLA*, the answer is *yes, if* your old position is *vacant*. If it is *not vacant*, then your employer must place you in an *equivalent position*. To be "equivalent," the new position must have *equivalent compensation, benefits, shift, hours and other terms and conditions* of employment, including *equivalent job status, duties, responsibilities, and authority*.

Under the *Federal FMLA*, your employer *must* place you in *either the same position* you held before your leave *or* in an *equivalent position*. The employer gets to choose. To be "equivalent," the new position must be *virtually identical* in terms of *pay, benefits, and working conditions*, including *privileges and status*. It must involve *the same or substantially similar duties and responsibilities* and entail *substantially equivalent skill, effort, responsibility, and authority*. Ordinarily, it also means the *same shift* and *same or equivalent work schedule*.

There are some *exceptions* to the general requirement that the employee be returned to the *same or equivalent position*:

- If you will require *intermittent or reduced leave* under the *Federal FMLA*, your employer may place you in an “*alternative position*” that better *accommodates your leave requirements*. It must have *equivalent pay and benefits*, but *not necessarily equivalent duties*.
- If you *would have lost your job anyway*, for reasons unrelated to your FMLA leave, the employer does not have to take you back.

Example 1: Just before you started an FMLA leave, your employer informed you that it was investigating charges that you had engaged in some misconduct at work. While you are on your FMLA leave, the employer completes its investigation, concludes you were guilty, and decides to terminate your employment over the misconduct. *FMLA will not require the employer to take you back simply because you are returning from an FMLA leave.*

Example 2: While you are on FMLA leave, all the employees in your department are laid off for lack of work. You would have been laid off at the same time if you had not been on FMLA leave. If the layoff is still in effect when your FMLA leave ends, *FMLA will not require the employer to put you back to work.*

- If the serious health condition for which you required FMLA leave renders you *unable to perform* one or more *essential functions of your job*, the employer does not have to take you back.

❖ **Are there any different rules if I am a school teacher?**

Not under the Wisconsin FMLA.

Under the *Federal FMLA*, if you *teach* in a *public or private elementary or secondary school*, there are some special rules designed to minimize the impact of your FMLA leave on the education of your students:

- The school may *require* you to *continue federal FMLA leave* to the *end of the current academic term* if your leave *starts more than 5 weeks before* the end of the term, will *last at least 3 weeks*, and would *end during the last 3 weeks* of the term.
- The school may *require* you to *continue new-child, family care leave or military caregiver leave (but not medical leave)* if:
 1. Your leave *starts during the last 5 weeks* of the term, will *last more than 2 weeks*, and would *end during the last 2 weeks* of the term; *or*
 2. Your leave *starts during the last 3 weeks* of the term and will *last more than 5 days*.

- If you will need to take *intermittent or reduced family or medical leave* during a particular period of time for *planned medical treatment*, and the treatment will require you to be *absent more than 20 percent* of the total number of *working days during the period of treatment*, the school may *require you to choose between*:

1. Taking *the entire period of treatment off* as FMLA leave; *or*
2. Transferring to an *available alternate position* with *equivalent pay and benefits during the period of treatment*.

Example 1: You teach school Monday through Friday. In January, your doctor schedules you for weekly medical treatments that will require your absence from school every Thursday during March and April. Since one day each week is not “more than 20 percent of the total number of working days” during the period of treatment, the school may not require you to make the above election for March and April.

Example 2: Same situation, but your scheduled medical treatments will require your absence every Tuesday and Thursday during March and April. This time your employer may require you to make the election for March and April, because you will be absent “more than 20 percent

of the total number of working days” during the period of treatment

❖ **Can my employer require me to bring a return-to-work certification from my doctor after I have been out on medical leave for my own serious health condition?**

Yes. Under the *Federal FMLA*, when you return from medical leave, your employer may require you to present a *written fitness-for-duty certification* from *your doctor*, if the employer imposes the *same* requirement on *all similarly situated employees* (same occupation, same serious health condition). The fitness-for duty certification may *only* relate to the *serious health condition that necessitated the leave*.

Your employer *must inform you* that it will require fitness-for-duty certification *with the “designation” notice*.

- The notice of the need for fitness-for-duty certification must be *in writing*, *unless* the requirement is *clearly stated* in an *employee handbook* or other written documents distributed to employees, in which case the notice given with the “designation” notice need only be given *orally*.
- If your employer requires that the fitness-for-duty certification address your ability to perform the *essential functions* of your job, it must *so indicate in the “designation” notice and include a list of the essential functions*.

If your employer *provides a list* of the essential functions, your doctor must certify *your ability to perform those functions*. If it does *not* provide such a list, your doctor must certify only that *you are able to return to work*.

Your employer may generally *not require* a fitness-for-duty certification if you are on an *intermittent or reduced leave schedule*.

Exception: If your employer has *reasonable safety concerns* about your ability to perform your duties, based on your serious health conditions, it can require periodic certifications, but no more frequently than once *every 30 days*.

The *Wisconsin FMLA* is silent on the whole question of fitness-for-duty certification.

❖ **Can my employer make me see its own doctor for a fitness-for-duty evaluation when I return from FMLA leave?**

No. Under the *Federal FMLA*, your employer *may not* require you to submit to a *fitness-for-duty evaluation by its doctor*. Your employer may only seek *clarification from your doctor* about the certification, *with your permission*. Your employer also *may not delay your return to work* while it is seeking clarification from your doctor.

The *Wisconsin FMLA* is silent on this question.

PROTECTING YOUR FMLA RIGHTS

❖ **What happens to my job while I'm on FMLA leave?**

When your FMLA leave is finished, your employer must *return you* to your position or to an *equivalent position* with equivalent pay, benefits, and conditions.

The *Federal FMLA* also has special rules for school employees.

❖ **Can my employer count FMLA leave against me under its absenteeism policy?**

No. Your employer may not penalize you for taking FMLA leave. This means that FMLA leave *cannot be counted as an occurrence* under an absenteeism policy.

❖ **If I am on medical leave for my own serious health condition, can my employer require me to return to light duty before my doctor releases me?**

No. Your employer *cannot require* you to cut short your FMLA leave to work *light duty*, even if it is within your medical restrictions. However, if your leave is due to a work-related injury or illness, you may forfeit certain worker's compensation benefits by refusing light-duty work.

Note: If you do accept light duty work, your employer has to count that as work. *It cannot count light duty as FMLA leave.*

❖ **If I am still not able to return to work after I have used all of my available FMLA leave, can my employer subject me to its absenteeism policy or even terminate me?**

Unfortunately, *FMLA only protects your absence during the statutory leave period*. Once that expires, FMLA no longer restricts your employer's right to apply its attendance and discipline policies to your continued absence.

❖ **What can I do if my employer violates my FMLA rights?**

If you believe your employer has violated your rights under the *Wisconsin FMLA*, you must file a complaint with the *Wisconsin Equal Rights Division* within **30 days** after you *learn of the violation*.

Example: On June 1, you tell your employer you wish to take 6 weeks of adoption leave under FMLA beginning October 1. On June 15, your employer says no. **On June 15 you have notice of the violation of your Wisconsin FMLA rights. You have to file your complaint within 30 days of June 15.** If you wait until after October 1, when you were going to start the leave, your complaint would be too late.

The *Equal Rights Division* has offices at the following locations:

Madison

201 E. Washington Ave.,
Room A300
P.O. Box 8928
Madison, WI 53708-8928
(608) 266-6860

Milwaukee

819 North Sixth St.,
Room 255
Milwaukee, WI 53203
(414) 227-4384

Eau Claire

221 W. Madison Street
Eau Claire, WI 54703
(715) 836-5153

Menasha

1802 Appleton Road
Menasha, WI 54952
(920) 832-5302

If you believe your employer has violated your rights under the *Federal FMLA*, either *you or the U. S. Department of Labor* may file a lawsuit in *federal court* within **2 years** after you learn of the violation (3 years if the employer willfully violated the FMLA). ***If the State of Wisconsin is your employer, only the Department of Labor may file such a lawsuit if your claim relates to any type of Federal FMLA leave other than new child leave.***

The U. S. Department of Labor, Wage, and Hour Division has offices in Madison and Milwaukee, located at:

Madison

740 Regent St., Ste 102
Madison, WI 53715-1233
(608) 441-5221
(866) 4-USWAGE (487-9243)

Milwaukee

310 W. Wisconsin Ave.
Milwaukee, WI 53203
(414) 297-1590, Ext. 308

If you have any questions about FMLA, call Attorney Jeff Sweetland at (414) 271-8650 or at (800) 236-3348.

This information is provided for educational purposes only and is not to be construed as legal advice in any particular situation.

9/8/09