

FMLA & ADA: Managing Leaves of Absence

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Disclaimer and Tips



- FMLA and ADA considerations are exceptionally fact-specific and dependent on the individual facts and circumstances in any given situation.
 - As always, please consult with your legal counsel when these situations arise.
- Tips Navigating Legal Considerations Related to Leave:
 - Determine which law(s) apply
 - Apply the law(s) consistently
 - Document, document, document!

Leaves of Absence Under the FMLA



FMLA

The Basics



- The federal and state Family and Medical Leave Acts (FMLA/WFMLA) are a set of laws that allows qualified employees to take a specific amount of leave with job protection for certain circumstances.
- Remember that the Wisconsin and federal FMLA laws are different – you have to know how to apply both to every situation.
 - WFMLA may run concurrently with FMLA, if both apply.

FMLA

The Basics



Amount of Leave:

- FMLA
 - 12 weeks during a 12-month period
 - Spouses working for the same employer:
 - Share the 12 weeks if the leave for birth, adoption, or to care for sick parent/child
- WFMLA: 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

FMLA – Simplified Steps

1. Determine if the Employee is Eligible
2. Provide notice and eligibility of rights
3. Determine the type of leave and send the appropriate documentation form
4. Review the returned documentation form and determine if the employee qualifies for the leave
5. Determine how much FMLA has been used by the employee previously and how much leave is now available
6. Send designation notice
7. Keep everyone in the loop
8. Track used FMLA time and obtain return to work form



Step 1 – Determine Eligibility

- Federal FMLA
 - Counties are a “covered employer,” regardless of number of employees
 - Employee must:
 - Have worked for at least 12 months for the employer (includes paid and unpaid leave time) and
 - Have worked at least 1,250 hours during the last 12 months
- Wisconsin FMLA
 - Counties are a “covered employer,” regardless of number of employees
 - Employee must:
 - Have been employed by the county for at least 52 consecutive weeks; and
 - Have been paid for at least 1,000 hours during the last 52 weeks



Step 2 – Provide Notice of Eligibility and Rights – General Requirements

- Written guidance must be given to employees
 - Typically done through policy and/or Employee Handbook
- Employers must post, in one or more conspicuous places where notices to employees are customarily posted, a statutory notice detailing employee rights under the federal FMLA and WFMLA
 - www.dol.gov/agencies/whd/fmla/forms
 - <http://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-7983-p.pdf>



Step 2 – Provide Notice of Eligibility and Rights – Upon Receipt of a Request For Leave

- Employers must provide written notice outlining specific obligations of the employee and explaining any consequences of not meeting the requirements
 - Template Form WH-381 from US DOL – WHD
 - <http://www.dol.gov/whd/forms/WH-381.pdf>
 - This is the individual notice form to send after each request
- For Wisconsin:
 - No template form available from DWD, so:
 - Provide notice linked on prior page; or
 - Create your own notice form (some employers prefer a combo FMLA/WFMLA form)



Step 3 – Determine Type of Leave and Send Appropriate Documentation Form

- The birth of a child and to bond with the newborn child within one year of birth
- The placement with the employee of a child for adoption or foster care and to bond with the newly placed child within one year of placement
- An employee's own serious health condition that makes the employee unable to perform the functions of their job, including incapacity due to pregnancy and for prenatal medical care
- To care for the employee's spouse, child, or parent who has a serious health condition (including incapacity due to pregnancy and for prenatal medical care)
- To care for the employee's domestic partner or parent-in-law who has a serious health condition (WI only)
- Reasons related to a family member's military service (federal only)



Types of Leave – Serious Health Condition



- Many of the leaves under FMLA are dependent upon the employee, or a family member of the employee, having a serious health condition
- Employers need to be sure that the serious health condition definition (see next slides) is being met in order to determine the correct course of action
- Remember that Wisconsin and federal law have different definitions for a serious health condition

Types of Leave – Serious Health Condition - FMLA



- “Serious Health Condition” under the FMLA = an illness, injury, impairment, or physical or mental condition that involves either:
 - 1) Inpatient care; or
 - 2) Continuing treatment by a healthcare provider for a condition that either prevents the employee from performing the functions of the employee’s job or prevents that qualified family member from participating in school or other daily activities.
 - 5 ways to qualify:
 - Period of incapacity of more than 3 days
 - Pregnancy
 - Period of incapacity due to chronic, serious condition
 - Permanent period of incapacity
 - Absence to receive treatments

Serious Health Condition - WFMLA



- “Serious Health Condition” under the WFMLA = a disabling physical or mental illness, injury, impairment, or condition involving:
 - Inpatient care in a hospital, nursing home or hospice; OR
 - Outpatient care that requires continuing treatment or supervision by a healthcare provider.
- Leave would be for a serious health condition which makes the employee unable to perform his or her employment duties
- A “disabling” serious health condition includes incapacitation or the inability to perform services for wages because of physical or mental impairment
- Note: More than a 3 day period of incapacity is NOT required (like under FMLA)



Types of Leave – Birth and Adoption or Foster Care

- Birth and bonding
 - FMLA: Leave must be within 12-month period beginning on date of birth
 - WFMLA: Leave must begin within 16 weeks of the child's birth
 - Applies to any parent, regardless of gender
- Placement of child for adoption or foster care
 - FMLA: Must be within 12-month period beginning on date of placement
 - WFMLA: Must begin within 16 weeks of the date of placement
 - *May also use leave before the placement to attend counseling sessions, appear in court, consult with attorney/doctor representing birth parent, submit to physical exam, or travel to another country to complete an adoption.



Types of Leave – Military Leave (Federal Only)

- Qualifying Exigency Leave (up to 12 weeks)
 - Because of a qualifying exigency arising out of the fact that the employee's spouse, child, or parent is on active duty or called to active duty status in support of a contingency operation as a member of the National Guard, Reserves or Regular Armed Forces (must be deployed to a foreign country) Used for deployment-related issues: making alternative child care arrangements, attending military events, spending time with military member while on rest or recuperation, etc.
- Military Caregiver Leave (up to 26 weeks)
 - The employee's spouse, child, parent or next of kin (*i.e.*, nearest blood relative) is a covered servicemember or veteran with a serious injury or illness
- USERRA
 - Federal military leave law – NOT FMLA!
 - Leave for an employee's own military service (*e.g.*, deployment, training)



Employee Notice

- Federal FMLA Notice
 - If the leave is foreseeable, employee needs to provide a 30-day notice. The employee must also make an effort to schedule the treatment so as not to unduly disrupt the employer's operations.
 - For medical emergency, as soon as practicable.
 - Notice can be verbal or written.
- Wisconsin FMLA Notice
 - For scheduled appointments, the notice must be given in a “reasonable and practicable” manner. Again, must try to not unduly disrupt the employer's operations.
 - For medical emergency, no clear direction in the law.
 - Notice can be verbal or written.

Medical Certification of a Serious Health Condition

- **Federal FMLA**
 - The district may require medical certification for the employee or family member who is claiming the serious health condition
 - Employee must have at least 15 calendar days to return the medical certification
 - Go to the DOL website to obtain the forms <http://www.dol.gov/agencies/whd/fmla/forms>
- **Wisconsin FMLA**
 - The suggested form has limited information that you can request (same form is used for employee and family member):
 - Asks if the patient has a serious health condition, date condition began, probable duration, medical facts regarding serious health condition (diagnosis is NOT required), extent to which employee is unable to perform employment duties.
 - Go to <https://dwd.wisconsin.gov/dwd/forms/erd/erd-10111-e.htm>

Step 4 – Review Returned Documentation Form and Determine if Employee Qualifies for Leave

- Consistency is key!
 - Follow the same routines, give the same paperwork, and treat people in similar situations the same. This will help keep you out of sticky situations.
- Must know the definitions and how to apply so you can be consistent.
- Also helps enforce policies for employees with attendance concerns.
- If the FMLA request is for a family leave, the employer needs to determine if the family member meets the definition of spouse, child or parent (or next of kin for some military leave)
 - Be aware of the various definitions of who qualifies as family
 - Tricky situations – adult children, domestic partners (WFMLA), legal ward, etc.



Step 5 – Determine How Much FMLA Has Been Used By The Employee Previously and How Much Leave Is Now Available

- Federal FMLA: Employer gets to decide – Rolling year, fiscal year, calendar year, or some other 12-month period?
 - Calendar year/fiscal/other pros/cons: Employees could take 12 weeks of FMLA during last 12 weeks of calendar year and if issue continues could take another 12 weeks of FMLA during the first 12 years of the calendar year; all employees on same cycle
 - Rolling year pros/cons: Will never be able to “double up” on the 12 week FMLA time; the year will be different for everybody; don’t forget the state rules
- WFMLA: Always calendar year
- Run state and federal FMLA time concurrently
- Look to see if eligible for more time due to calendar year issues



Substitution of Paid Leave

- FMLA:
 - Employer may require the use of paid leave (done through policy)
 - If the employer does not require – the employee may choose to use paid leave; however, employer can deny paid leave.
- WFMLA:
 - Employee may choose to use paid leave
 - Employer may NOT require the use of paid leave
- Under any scenario, the employee may only use as much paid leave as currently accrued.
- Health insurance payments continue as if an active employee during FMLA time (and employee must continue paying for their share of the premium payments).

Intermittent Leave

- Intermittent Leave = Leave occurring in smaller blocks of time – the smallest block is the shortest period of time the payroll system uses to account for time (i.e. the same time increment used by employer for other types of leave, but no more than 1 hour).
- FMLA:
 - Employer required to allow intermittent leave for “serious health condition” when the intermittent leave is “medically necessary”
 - Employer may request additional documentation to show it is medically necessary to have intermittent, as well as dates if known or frequency of time off if unknown.
 - Employer discretion to decide if you want to allow intermittent for birth/adoption/bonding
 - Be consistent - either allow for all or consistently deny
- WFMLA: Intermittent leave allowed for all types of leave requests
- The employee is required to work with the employer to determine the best time
 - The time must be scheduled so it does not “unduly disrupt the employer’s operations”
- Only the time taken counts as time off (so if take off a portion of each day for one week, it is not a full week of FMLA leave).

Step 6 – Send Designation Notice

- Once the employer has enough information to know whether the requested leave qualifies as FMLA leave, this notice must be provided.
 - Notifies the employee whether it will be designated as FMLA and specify the amount of time that will count toward the entitlement.
- Federal:
 - Use Standard Form – WH-382
 - Create your own
- Wisconsin:
 - Use Standard Form – DOA-15324
 - Create your own
- Combine:
 - Use a Summary of FMLA Leave Notice to combine designation under both laws



Step 7 – Keep Everyone in the Loop

- Keep everyone in the loop!
 - Those who can receive information, for example, may be supervisors, secretaries, absence management, human resources.
- Determine who needs which copies and when.
- Consistently follow your procedure.



Step 8 – Track Used FMLA Time and Obtain Return to Work Form

- Track the used FMLA time once return to work.
- Be sure to obtain a “return to work” form, if needed, due to a medical leave for the employee.
- If an employee fails to return:
 - In certain circumstances, an employer *may* recover from employee its share of health plan premiums paid during unpaid FMLA time.
 - Cannot do this when the individual is not returning because of a serious health condition or other circumstances out of the employee’s control.
 - If returns for 30 calendar days, considered to have “returned to work.”



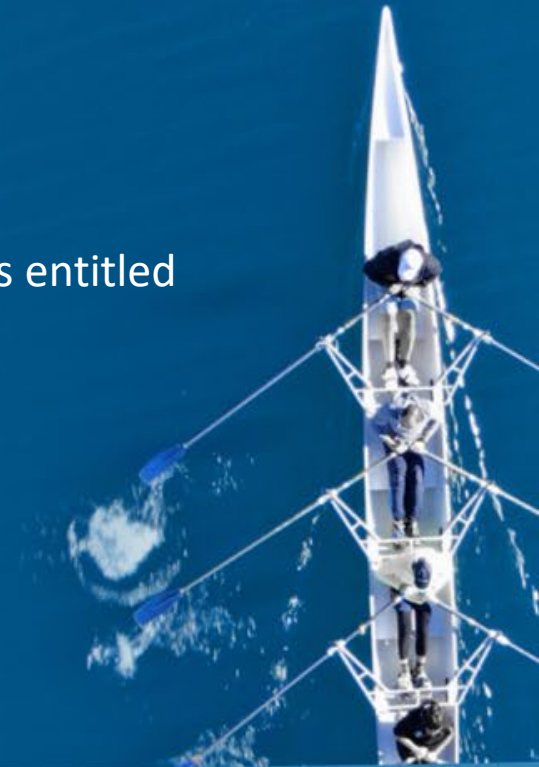
Additional Pointers

- Continuation of benefits:
 - Must continue benefits the same as would have offered if working in same position
 - Employee must continue making premium payments
- Right to return/Reinstatement Rights
 - Employee must be restored to the same or equivalent position
 - For all terms and conditions of employment
- Recordkeeping
 - Keep all medical records and medical related correspondence in a separate file from the personnel files or business files.
 - Be sure access to the medical records is limited (locked files or room).



Legal Challenges

- Interference Claims – Elements
 - (1) Employee is eligible for protection under FMLA
 - (2) Employer is covered by FMLA
 - (3) Employee is entitled to take leave
 - (4) Sufficient notice was provided
 - (5) Employer interfered with, restrained, or denied FMLA benefits to which employee was entitled
- Interference Claims – For County to Prevail
 - Employees are not insulated from discipline for abuse of leave
 - “Honest suspicion” of using leave for impermissible purpose
 - Discipline applied even handedly, in keeping with policy



Leaves of Absence Under the ADA



ADA

The Basics



- The federal Americans with Disabilities Act (“ADA”) and the parallel state law, Wisconsin Fair Employment Act (“WFEA”), are a set of laws that prohibit unlawful discrimination against a qualified individual on the basis of disability in the employment context.
- Failure to provide reasonable accommodations, which might include leave(s) of absence, is a violation.

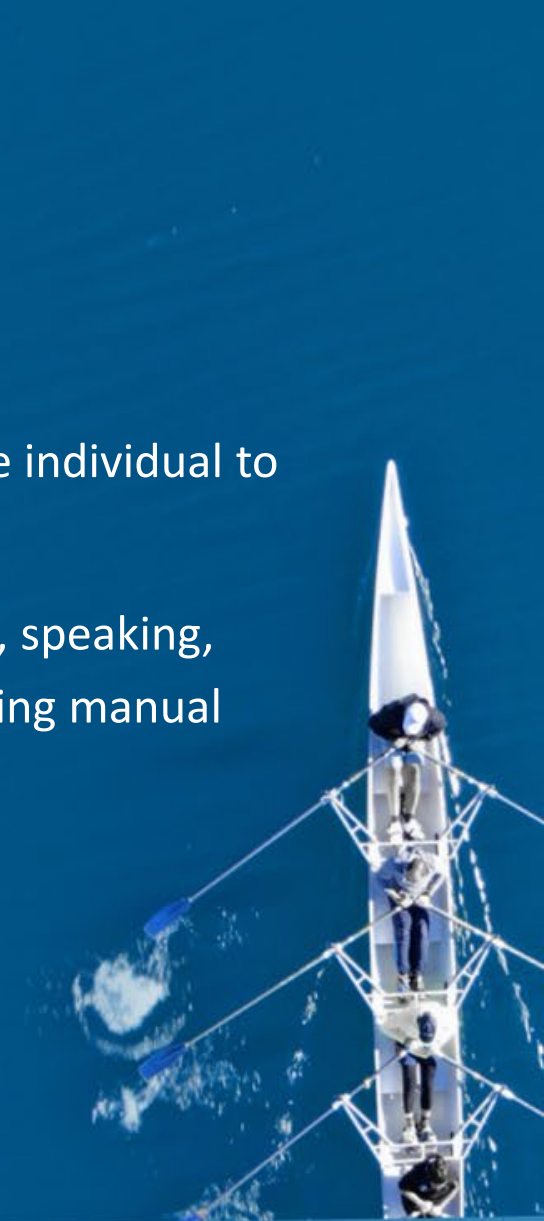
ADA Basics – Qualified Individual

- What does it mean to be qualified?
 - Must have the requisite skill, experience, and education to perform the essential job functions with or without reasonable accommodation.
 - An essential function is, essentially, the job duties. Evidence of which can be shown:
 - Based on the employer's judgment
 - Pre-interview job descriptions
 - Time spent performing the function, etc.
 - DAY ONE ELIGIBILITY!



ADA Basics – Disability

- ADA applies only to the employee's own disability
- Definition of disability:
 - A physical or mental impairment that substantially limits or restricts the ability of the individual to perform one or more major life activities
 - Major life activities: caring for oneself, walking, seeing, running, eating, hearing, speaking, learning, working, concentrating, breathing, standing, bending, sitting, performing manual tasks.
 - Having a record of impairment
 - *i.e.*, has a history of or has been misclassified as having such impairment
 - Being regarded as having such an impairment
 - *i.e.*, the employer perceives the employee has such impairment



ADA: When Does the Duty to Accommodate Arise?

- Must be a qualified individual with a disability
- Employer must have knowledge of the disability (no need for formal diagnosis or medical documentation at this time, just sufficient facts that would reasonably lead the employer to recognize the employee likely has a disability)
- The person seeks accommodation
 - Employee must request an accommodation
 - Need only use plain English – the employee need not mention any “magic words”
 - Caution: Certain situations where the district should discuss whether an accommodation is needed
 - Administrator says performance problems are occurring and links these problems to physical or mental impairment
 - Administrator complains about abuse of sick leave
 - Employee returns to work from leave with restrictions
- Accommodation is necessary for the person to perform the essential functions of the job
- Accommodation is reasonable and does not create undue hardship
- Employee must cooperate



WARNING!

This triggers the duty for an interactive process of determining what, if any, accommodation must be made.

ADA: Interactive Process

- The goal is to gather information (through dialogue) to understand the nature of the disability, how it impacts the ability to perform their job duties, and to assess reasonable accommodations.
 - Required by the ADA's good faith obligation – focused on collaboration, not one-sided decision-making.
- Typical Process (document throughout!)
 - Usually advisable to obtain medical documentation.
 - Identify essential job functions (use job description, supervisor input, actual duties).
 - Engage in dialogue with the employee about limitations and potential accommodations.
 - Explore reasonable options that enable performance (e.g., modified schedule, reassignment, equipment, leave).
 - Assess undue hardship (cost, resources, disruption).
 - Implement and monitor the chosen accommodation; adjust as needed.



Reasonable Accommodations

- Any change or adjustment to the job, work environment, or the way things usually are done that would allow an individual to apply for a job, perform job functions, or enjoy equal access to benefits and/or privileges available to other individuals in the workplace.
- An unpaid leave of absence is one such reasonable accommodation.
 - **This is true even if FMLA leave has been exhausted!**
 - Terminating an employee automatically at FMLA/WFMLA exhaustion without considering ADA obligations may violate the ADA.



Leave as an Accommodation

- Leave may be a reasonable accommodation unless the leave will cause an undue hardship on the employer.
 - Undue Hardship: Any action that is too costly, substantial or disruptive, or that fundamentally alters the nature of the employer's business.
- Engage in the interactive process with the individual to determine whether leave is a reasonable accommodation.
 - Get more information about the reason for leave, including appropriate medical documentation which should provide more information about how long and/or how often the leave will occur.
- Note that while there is no limit on the amount of leave that may be taken, leave typically may not be for an indefinite period.
 - Conflict between decisions in the Seventh Circuit (ADA) and Wisconsin (WFEA)



The Interplay Between FMLA and ADA



Interplay Between FMLA & ADA

- Not all employees are protected under both the FMLA and the ADA
 - FMLA “serious health condition” versus ADA “disability”
 - While some FMLA serious health conditions may be ADA disabilities, not all are (*e.g.*, pregnancy or a broken leg that is not substantially limiting)
 - May not meet the FMLA eligibility criteria
 - ADA has no tenure requirement
 - ADA does not apply to a family member’s serious health condition



HR's Role in Managing the Interplay

- Key Responsibilities
 - Monitor Leave Periods – Track concurrent FMLA/WFMLA leave and anticipate transition points.
 - Engage in the Interactive Process – Begin dialogue before the end of FMLA if the employee indicates continued medical issues.
 - Communicate Clearly – Maintain written communication with the employee throughout.
- Common Mistakes to Avoid
 - Automatic termination after FMLA leave.
 - Failure to consider a leave of absence, intermittent leave, or reduced schedule accommodations.
 - Ignoring the ADA if the employee is not yet FMLA eligible.
 - Not continuously reviewing job descriptions.
- **Consult legal counsel for complex cases!**



Helpful Tips

- Carefully review certification and questionnaire paperwork to determine whether you have enough information to make appropriate decisions under the applicable law.
- Consistency is key!
- Follow the same routines, give the same paperwork, and treat people in similar situations the same.
- Routinely review your leave policies – so you are an expert and to determine if revisions need to be made.
- Example: Does the district really need a general unpaid leave of absence policy that is not FMLA or ADA related?
- Train appropriate staff (principals, supervisors, etc.) on when they need to let HR know of possible FMLA/ADA situations.



Scenarios



Scenario 1 – An employee exhausts his FMLA leave for surgery recovery but submits a doctor's note requesting 3 additional weeks before returning.



Scenario 2 – Same fact pattern, but after the 3 additional weeks, the employee’s provider provides information that states the employee will need an additional week of leave due to medical complications.



Scenario 3 – After exhausting FMLA, you request additional information from an employee’s provider, and the provider states they are “unable to provide a definite return date.”



Scenario 4 – An employee exhausts their FMLA leave due to chronic mental health episodes. The employee's supervisor is frustrated because this employee's attendance is continuously unpredictable due to these episodes. After returning from FMLA leave, the employee continues to call out of work multiple times per week.





Q&A

Thank You!



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