



## WISCONSIN FMLA LEAVE RIGHTS EXPANDED TO INCLUDE DOMESTIC PARTNERSHIPS

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On June 29, 2009, Governor Doyle signed Wisconsin's budget bill which included a new law regarding Domestic Partnerships. The Domestic Partnership law is an historic piece of legislation that for the first time recognizes domestic partnerships across the state. Among other benefits for domestic partners, this new legislation amended the Wisconsin Family and Medical Leave Act ("WFMLA") to provide leave benefits to domestic partners, whether they are same-sex or opposite-sex domestic partners. All employers with at least 50 employees should become familiar with the changes and revise their FMLA policies accordingly.

### Background on FMLA Leave Benefits

Before the Domestic Partnership law was passed, the WFMLA limited an employee's ability to take leave for a family member to parents, parents-in-law, spouses and children (including stepchildren, adopted children, foster children and legal wards). The new provision greatly expands the scope of who will be considered a "family member" for purposes of the WFMLA.

It should be noted that the federal Family and Medical Leave Act (FMLA) still has no provision allowing unmarried partners to take time off to care for each other. Domestic partnerships – whether between a man and a woman, two men, or two women, have no legal status, generally, under federal law.

### Definition of "Domestic Partner"

The Domestic Partnership law added a definition of "domestic partner" to the WFMLA. The legislation defines domestic partner to include (a) same-sex couples who register with the register of deeds in their county of residence, and (b) same-sex and opposite-sex couples who are not required to register. Individuals who choose to register their domestic partnership must meet the following criteria:

1. They must be at least 18 years of age and capable of consenting to the relationship;
2. They may not be married to, or in a domestic partnership with, another individual;
3. They must share a common residence;
4. They must not be more closely related than second cousins — whether of the whole or half blood or by adoption; and
5. They must be members of the same sex.

Alternatively, an individual can be in an unregistered domestic partnership, which is a relationship between two (2) individuals (not necessarily of the same sex) who satisfy the following requirements:

1. They must be at least 18 years of age and capable of consenting to the relationship;
2. They may not be married to, or in a domestic partnership with, another individual;
3. They must share a common residence;

4. They must not be related by blood in a way that would prohibit marriage under Wisconsin statutes;
5. They must consider themselves to be members of each other's immediate family; and
6. They must agree to be responsible for each other's basic living expenses.

#### **Summary of Leave Rights under the Amended WFMLA**

Wisconsin joins a short list of states with "mini-FMLA" laws that now offer leave rights to employees to care for domestic partners or their children. These include California, Connecticut, Maine, New Jersey, Oregon and Vermont.

Employees are now able to take WFMLA leave for the serious health condition of his or her domestic partner, or the domestic partner's parent. However, the Domestic Partnership law does not extend the definition of "child" to include a domestic partner's child. Therefore, an employee remains unable to take WFMLA leave for purposes of caring for a domestic partner's child with a serious health condition, as well as for purposes of "bonding" with the domestic partner's child following the birth of a child or the placement of a child for adoption or foster care if the child is not also the employee's "child" as defined by statute.

Thus, under the amended Wisconsin FMLA, Wisconsin employers with 50 or more employees must provide the following family leave:

1. Up to six (6) weeks of unpaid leave to an eligible employee for the birth of his or her child or placement of an adopted child;
2. Up to two (2) weeks of leave for an eligible employee's own serious health condition; and
3. Up to two (2) weeks of leave for an eligible employee to care for the employee's child, spouse, *domestic partner*, *domestic partner's parent* or his or her own parent who has a serious health condition.

#### **Potential Challenges to Employers**

The competing definitions of "domestic partners" may present challenges to employers when determining an employee's eligibility for WFMLA leave. While there are significant similarities between the two standards, the additional factors required of an unregistered domestic partnership will be difficult for an employer to substantiate. For example, how should an employer determine whether the parties consider themselves to be members of each other's immediate family? How will an employer establish that the individuals agree to be responsible for each other's basic living expenses?

#### **Next Steps**

The Wisconsin Department of Workforce Development ("DWD"), which administers the Wisconsin FMLA, has not yet issued a new poster, although one is expected. Covered employers should immediately begin allowing leave in compliance with these new requirements as the legislation became effective as of June 30, 2009. Once DWD has issued a new poster, employers will need to update their Wisconsin posters.

Employers should also update their policies to reflect the extended leave rights. Employers must consider how they will deal with the substantiation of registered and unregistered domestic partnerships and build such procedures into their policies and internal procedures for administering FMLA leave.

Questions on the expansion of the Wisconsin Family and Medical Leave Act should be directed to Greg Grobe at [grobe@lcojlaw.com](mailto:grobe@lcojlaw.com), Jodi Arndt at [ja@lcojlaw.com](mailto:ja@lcojlaw.com), Ross Townsend at [rwt@lcojlaw.com](mailto:rwt@lcojlaw.com) or Dawn Korver at [dmk@lcojlaw.com](mailto:dmk@lcojlaw.com). You can also reach any member of the employment team at (920) 437-0476.