
DEEP DIVE INTO FMLA

Melissa Beck, School District of
Menomonee Falls and Mary L. Hubacher,
Buelow Vetter Buikema Olson & Vliet,
LLC

WASBO/WASPA
SCHOOL PERSONNEL ACADEMY

December 3, 2020


Buelow Vetter
Buikema Olson & Vliet, LLC

20855 Watertown Road • Suite 200 • Waukesha, WI 53186 • Phone: (262) 364-0300 • www.buelowvetter.com

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EMPLOYEE LEAVES


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Buikema Olson & Vliet, LLC

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Employee Leaves

- ❖ When an employer receives a request for leave or accommodations for a reason related to COVID-19 or a medical condition, employers need to look at the possible application of the following three different legal areas:
 - ❖ Paid emergency sick leave (EPSL) and expanded family and medical leave act (EFMLA) under the Families First Coronavirus Response Act (FFCRA)
 - ❖ Traditional Family and Medical Leave Act (FMLA)
 - ❖ The Americans With Disabilities Act (ADA) and the Wisconsin Fair Employment Act (WFEA)


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Employee Leaves

- ❖ Paid Leave Under the FFCRA
 - ❖ Emergency Paid Sick Leave (EPSL)
 - ❖ EPSL provides up to two weeks (80 hours) of paid leave for any one of six (6) qualifying reasons to all employees of a public employer, between April 1 and December 31, 2020:
 - ❖ Subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - ❖ Has been advised by a health care provider to self-quarantine related to COVID-19;
 - ❖ Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 - ❖ Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
 - ❖ Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
 - ❖ Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services.



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Employee Leaves

- ❖ Paid Leave Under the FFCRA (cont.)
 - ❖ Emergency Paid Sick Leave (EPSL)
 - ❖ EPSL applies immediately for all employees (no 30 day waiting period).
 - ❖ Employees cannot take EPSL intermittently if they are working at their regular work site unless they are using it for child care (reason No. 5) and receive employer approval. If employees are working remotely for any reason or using it to care for a child under reason No. 5, they may use the leave intermittently with employer approval.



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Employee Leaves

- ❖ Expanded Family and Medical Leave Act (EFMLA)
 - ❖ The expanded FMLA leave only applies to allow a new basis for FMLA leave and require it be paid for employees who cannot be available for work because they are caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.
 - ❖ An employee is eligible if they have been employed for 30 days.
 - ❖ The EFML provides up to 12 weeks of leave, the first 2 weeks (10 days) are not paid, and the subsequent 10 weeks are paid at two-thirds (2/3) of the employee's regular rate, but no more than \$200 per day.
 - ❖ Employees may use the leave intermittently with employer approval, but such approval should be given consistently to avoid discrimination claims.



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Employee Leaves

❖ **Expanded Family and Medical Leave Act (EFMLA) (cont.)**

- ❖ During the first two weeks of expanded FMLA employees are unpaid, except an employee may elect (but are not required) to use EPSL (which the employer may agree to allow to be supplemented with the use of other accrued leaves in order to receive full pay), or employees may elect to use other regular accrued leaves they are allowed to use under employer policies (i.e. sick, vacation, PTO) in order to receive compensation during this unpaid period.
- ❖ During any period of expanded FMLA after the first two weeks, employees may elect to supplement the 2/3 pay with time from accrued leave or employees may be required by their employer to use accrued leave time concurrently, based on what they qualify to use under their employer's leave policies, at the same time as the expanded FMLA. However, if the employer does so, the employer must pay them their full compensation.



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Employee Leaves

❖ **The Department of Labor issued revised regulations clarifying that employees with children who are attending school under a hybrid model are able to take EPSL/EFMLA leave, notwithstanding the rule that requires employer consent to take intermittent leave.**

- ❖ For example, an employee with a child whose school is open each day, but students alternate between days attending school in person and days participating in remote learning is eligible for leave on days when the child is attending virtually.
- ❖ However, an employee who voluntarily chooses to have her/his child attend school virtually is not eligible for EPSL/EFMLA leave.



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FAMILY MEDICAL LEAVE



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Family Medical Leave (FML)

- ❖ The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19, or who are needed to care for covered family members *who are incapacitated by a serious health condition*.
- ❖ The leave request should be processed the same as any other FMLA request.



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FML (cont.)

❖ What is a Serious Health Condition:

| FEDERAL | STATE |
|--|--|
| An illness, injury, impairment, or physical or mental condition that involves: | An illness, injury, impairment, or physical or mental condition that involves: |
| (1) Inpatient care; OR | (1) Inpatient care; OR |
| (1) Absence from work, school or other regular activities, of <u>more than three consecutive calendar days</u> , and continuing treatment by (or under the supervision of) a health care provider; OR | (1) Outpatient care that requires continuing treatment or supervision by a health care provider. |
| (1) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is <u>permanent or long-term and for which treatment may be ineffective or which is so serious that, if not treated, would likely result in a period of incapacity or more than three calendar days</u> ; OR | Can be less than 3 consecutive days. State law is more inclusive. |
| (1) Prenatal care; OR | |
| (1) Conditions which require multiple treatments such as chemotherapy and kidney dialysis. | |



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FML (cont.)

- ❖ “Needed to Care For”
 - ❖ An employee requesting leave due to the serious health condition of a family member must actually be needed to care for that family member.
 - ❖ The law does not permit an employer to obtain certification that other caregivers are not available to assist the family member.
 - ❖ The leave must be provided to offer psychological comfort and care, which includes medical, hygienic or nutritional needs, transportation and reassurance.



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FML (cont.)

- ❖ Leave to Care for Adult Child:
 - ❖ **Federal:** Must be disabled as defined by the Americans with Disabilities Act and incapable of self-care.
 - ❖ **State:** Must be incapable of self-care.



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FML (cont.)

- ❖ If the FMLA standards are met because an employee or family member has COVID-19, the leave would be approved just as any other FMLA qualifying leave.
- ❖ Likewise, if the medical provider certifies that an employee or family member has a serious health condition which, because of COVID-19, incapacitates the employee or the family member, then the employee would be eligible for FMLA.
- ❖ For example, if a medical provider certifies that an employee has asthma and states that the individual cannot engage in normal life activities (whether that is going out where the individual could be exposed to COVID-19 or going out during a heat wave) the employee would likely be eligible for FMLA.
- ❖ Leave taken by an employee for the purpose of avoiding exposure to COVID-19 for either the employee or family member would not be protected under the FMLA, unless the need to avoid exposure is required because of an underlying health condition as discussed above.
- ❖ The potential danger of a possible contagious illness, by itself, does not qualify as a serious health condition.



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FML (cont.)

- ❖ Notice and/or Certification:

| FEDERAL | STATE |
|--|--|
| NOTICE | |
| Foreseeable = 30 days | Reasonable and practicable |
| Unforeseeable = Practicable | |
| CERTIFICATION | |
| <ul style="list-style-type: none"> ■ Written Policy ■ 15 Calendar Days ■ Reasonable | <ul style="list-style-type: none"> ■ Written Policy ■ Reasonable |



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FML (cont.)

- ❖ Has the Employee Asked for Leave?
 - ❖ Employee does not have to mention FMLA.
 - ❖ Any mention of the need for time off for any covered condition should trigger FMLA notices.

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FML (cont.)

- ❖ Seeking Medical Certification:
 - ❖ An employer must know the timelines and procedures for seeking both the initial and follow-up medical information.

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FML (cont.)

- ❖ Intermittent Leave:

| FEDERAL | STATE |
|--|--|
| Family leave for the birth or placement may not be taken on an intermittent basis unless agreed to by the employer and employee. | Family leave may be taken on an intermittent basis if the leave is scheduled to not unduly disrupt operations. |
| Leave involving a serious health condition may be taken intermittently or on a reduced schedule as "medically necessary". | Leave involving a serious health condition may be taken intermittently or on a reduced schedule as "medically necessary" |
| Employer can require temporary transfer. | Employer and employee can agree to a temporary transfer. |

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FML (cont.)

❖ Employer Must Monitor FMLA Use to Control Attendance:

❖ Audit Process:

- ❖ Will review time records weekly to ensure FMLA recorded time matches approved time.
- ❖ Meet with employee to clarify discrepancies.
- ❖ Non-FMLA time must be accounted for or will be subject to discipline process.



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FML (cont.)

❖ Discipline of Employees for Attendance:

- ❖ An employer must exclude any leave qualifying under the FMLA from its attendance policy.
- ❖ It is important to designate leave as FMLA leave at the time it is taken.



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FML (cont.)

❖ Substitution of Paid Leave:

| FEDERAL | STATE |
|--------------------------------|--|
| Employee elects | Employee elects whether to substitute accrued paid leaves. |
| OR | |
| Employer requires substitution | |
| <u>Non-Medical</u> | |
| ■ Vacation | |
| ■ Family | |
| ■ Personal | |
| <u>Medical</u> | |
| ■ Sick Leave | |



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FML (cont.)

- ❖ Jobs and Benefit Protection:
 - ❖ An employee must be restored to original or equivalent positions with equivalent pay, benefits, and other employment terms.
 - ❖ Employer must maintain employee's medical insurance coverage under any "group health plan," under same conditions as if employee had continued working.
 - ❖ Employer may recover premiums paid only if employee fails to return from family and medical leave.



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FML (cont.)

- ❖ Prohibited Acts:
 - ❖ Interference, restraint or denial of exercise of any right under FMLA.
 - ❖ Cannot force an employee to work while on FMLA leave.
 - ❖ Cannot discourage employees from taking FMLA leave when eligible.



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FML (cont.)

- ❖ Prohibited Acts (cont.):
 - ❖ No Retaliation Prohibited:
 - ❖ Cannot be forced to complete full-time/unreasonably heavy work load when on part-time schedule.
 - ❖ Cannot be demoted.
 - ❖ Cannot lose seniority.
 - ❖ Must remain eligible for promotion the employee is qualified for.
 - ❖ Cannot be kept off prestigious assignments.



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FML (cont.)

- ❖ Prohibited Acts (cont.):
 - ❖ Discharge or discriminate for opposing any practice made unlawful by the FMLA.
 - ❖ Discharge or discriminate for:
 - ❖ Filing a charge.
 - ❖ Giving information.
 - ❖ Testifying.



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ACCOMMODATIONS UNDER ADA/WFEA



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ADA

- ❖ ADA Defined
 - ❖ The Americans With Disabilities Act is a federal law which prohibits discrimination against an employee with a disability.
 - ❖ Requires reasonable accommodation.
 - ❖ Prohibits Retaliation.
 - ❖ Wisconsin Fair Employment Act provides similar protections.



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ADA (cont.)

- ❖ Disability Defined
 - ❖ A physical/mental impairment that substantially limits one or more major life activities;
 - ❖ A record of such impairment; or
 - ❖ Being regarded as having such an impairment.

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WFEA

- ❖ State definition.
 - ❖ An individual with a disability is a person who:
 - ❖ has a physical or mental impairment that makes achievement unusually difficult or limits the capacity to work;
 - ❖ has a **record** of such an impairment, or
 - ❖ is **perceived** as having such impairment

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ADA (cont.)

- ❖ Substantially Limits
 - ❖ Broadly interpreted.
 - ❖ If it limits activities beyond non-disabled individuals.

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ADA (cont.)

- ❖ Major Life Activity
 - ❖ Walking, standing, eating, sleeping, lifting, bending, reading, concentrating, thinking.
 - ❖ Major bodily function—immune system, cellular system, circulatory system, reproductive functions, etc.

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Accommodations

- ❖ ADA / WFEA
 - ❖ The ADA and the WFEA require covered employers to provide reasonable accommodations in the work environment to allow an individual to perform the essential functions of a job without an undue risk of harm to the employee or others or without an undue hardship on the employer.
 - ❖ There is no requirement under the ADA/WFEA to provide an accommodation when a family member is in a high risk group or if a family member has a disability. (Though a person may qualify for FMLA with proper medical certification as previously noted).

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Accommodations

- ❖ ADA / WFEA (cont.)
 - ❖ In general, an employer must first request an accommodation.
 - ❖ If an employer knows that an employee has one of the medical conditions that the CDC says may put the employee at higher risk for severe illness from COVID-19, but the employee does not request an accommodation, the EEOC advises that the ADA does not mandate any action on the part of the employer.
 - ❖ Employers can request medical documentation in connection with a request for an accommodation.
 - ❖ Determining whether a reasonable accommodation is available must occur through an interactive process, such as sitting down with the employee (the sit down may be by video conference these days) and discussing the options that may be available.

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Accommodations

- ❖ ADA / WFEA (cont.)
 - ❖ Reasonable accommodations can take many forms.
 - ❖ It is not considered a reasonable accommodation for the employer to lower work standards, allow unreported absences, eliminate substantial parts of a job or to grant indefinite leave time.
 - ❖ The EEOC warns employers that they are not allowed to exclude employees from the workplace, or take any other adverse action, solely because the employee has a disability that potentially places the employee at higher risk of severe illness from COVID-19. Employers may exclude those employees from the workplace only when the employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation.
 - ❖ Accommodations related to the face mask order or employer policies follow the ADA/WFEA process.



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Accommodations

- ❖ Types of Reasonable Accommodation
 - ❖ Enables employee to perform a job's essential functions.
 - ❖ Leave of absence.
 - ❖ Reassignment to vacancy.
 - ❖ Modified schedule.
 - ❖ Assistive devices, equipment.
 - ❖ Job modification.
 - ❖ Remote Work?



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Accommodations

- ❖ Process
 - ❖ Possible disability identified.
 - ❖ Does not need to specifically request accommodation.



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Accommodations

- ❖ Duty to accommodate triggered if employee asks for an accommodation OR if employer:
 1. Knows employee has a disability;
 2. Knows or has reason to know that workplace problems employee is experiencing is because of a disability; and
 3. Knows or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.



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Accommodations

- ❖ After receiving a request for an accommodation, engage in an informal process as quickly as possible to; talk with HR:
 - ❖ clarify what the individual needs; and
 - ❖ identify the appropriate reasonable accommodation.
- ❖ Ensure that the employer communicates with **the employee** as part of this process, and not just internally with the employee's supervisor, manager, or human resources department.
- ❖ Ask the individual relevant questions to help the employer make an informed decision about the request.



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Accommodations

If the disability or need for accommodation is not obvious, consider asking for reasonable records about the individual's disability and functional limitations to verify that the individual has a covered disability that needs a reasonable accommodation (medical certification provided by HR to employee to be completed by their treating physician).



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Accommodations

- ❖ Evaluate available accommodations.
 - ❖ Analyze current and vacant jobs.
 - ❖ Interactive discussion.
- ❖ Evaluate undue hardship and direct threat.



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FMLA v. ADA

- ❖ Eligibility.
 - ❖ ADA: All employees from date of hire.
 - ❖ FMLA: 12 months / 1,250 / 1,050 hours
- ❖ Benefit.
 - ❖ FMLA: Leave.
 - ❖ ADA / WFEA: Reasonable accommodation which can include leave.
- ❖ Serious Health Condition vs. Disability
 - ❖ FMLA: Serious health condition not always a disability; often short-term; covers other than employee's own condition.
 - ❖ ADA: Must be a qualified disabled individual; usually long-term condition; covers only the employee's condition.



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Accommodations

- ❖ Pregnant or Older Employees
 - ❖ The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on age, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.
 - ❖ However, older workers may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. Age alone does not qualify someone for an accommodation under the ADA. As such, they may request reasonable accommodation for their disability as opposed to their age.
 - ❖ An employer may not exclude an employee from the workplace involuntarily due to pregnancy. Pregnant employees may have a right to an accommodation based on a pregnancy-related condition during the pandemic. Pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability.



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WORKER'S COMPENSATION



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Worker's Compensation

- ❖ Employer is liable when an employee sustains an injury in the course of performing services "growing out of and incidental to his or her employment."
- ❖ An employee can sustain a compensable work related injury while working at home, just as if the employee were at an employer's facility, but the injury must still arise out of and in the course of employment.
- ❖ The "Personal Comfort Doctrine" versus "Deviation from Employment."
- ❖ Potential for ergonomic-related injury claims, as many employees are not set up to work long term at home.



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Worker's Compensation

- ❖ Limit possible fraudulent or unsubstantiated worker's compensation claims by:
 - ❖ Restricting remote work authorization to employees who can work without in-person supervision.
 - ❖ Requiring that employees who work remotely have a designated home office or workspace, and provide training and information about workstation setup and ergonomics.
 - ❖ Requiring strict time reporting, even for salaried employees, which creates a record of when the employee is working or taking a break. Such reporting may help if a remote worker is injured remotely and there is a dispute over whether the injury took place during working time or a break.



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QUESTIONS?



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