THE INTERRELATIONSHIP OF ADAAA, LEAVES OF ABSENCE, AND WORKER'S COMPENSATION

Wisconsin Association of School Business Officials and CESA #4

August 23, 2018

Presented by:
Stephen L. Weld

Prepared by:
Mindy K. Dale
Jerilyn Jacobs
Melissa A. Kirschner
David A. Richie
Janet M. Starck
Walker Stutzman
Bryan T. Symes
Sven W. Strutz
Stephen L. Weld

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I. FAMILY AND MEDICAL LEAVE ACT

A. FMLA ENTITLEMENT

1. **Employers Covered.** Wisconsin FMLA (WFMLA) and Federal FMLA (FMLA) do not cover all employers:

   a. **Federal:** Those engaged in commerce who employ 50 or more employees (for each working day during each of 20 or more calendar work weeks in current or preceding calendar year). Public agencies are covered without regard to the number of employees employed. To be counted, an employee must be listed on employer's payroll, regardless of whether the employee is receiving pay on a given day.

   b. **Wisconsin:** Employers who do business in Wisconsin and employ at least 50 persons on a permanent basis (during at least 6 of the previous 12 calendar months, the employer treated at least 50 individuals as being permanent employees).

2. **Employees Covered.** WFMLA and FMLA do not cover all employees of employers covered under the FMLA:

   a. **Federal:** Under the FMLA an employee who has been employed for at least 12 months and worked at least 1,250 hours during the previous 12 month period preceding the leave. Employees of public agencies must meet all the same eligibility requirements.

      (1) The 12 months need not be consecutive. 29 C.F.R. § 825.110(b). An employee may use a period of previous employment up to seven years ago, coupled with present employment, to meet the 12-month eligibility requirement for leave under FMLA. § 825.110(b).

      Exceptions where an employer may be required to count breaks in service in excess of seven (7) years include:

      (a) USERRA-covered military service obligations, active duty and reserve. All period of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave, § 825.110(b)(2)(i), as amended; or

(b) A written agreement, including a collective bargaining agreement, concerning the employer's intention to rehire the employee after the break in service. § 825.110(b)(2)(ii).

NOTE: In situations where the employee has met the 1,250 hours worked requirement but not the 12 months of employment requirement prior to beginning their leave, the period of leave prior to meeting the statutory requirement is not FMLA leave and the period of leave after the statutory requirement is met counts as FMLA leave. The12-month requirement can be met while an employee is on non-FMLA leave. § 825.110(d).

(c) Wages v. Stuart Management Corp., 798 F.3d 675 (8th Cir., 8/10/15). The employee was a custodian/caretaker for a property management company who had requested intermittent FMLA leave in order to work a reduced schedule due to her high-risk pregnancy. One day before she would have had one year's service and become clearly eligible for FMLA coverage, the employer discharged her. The District Court granted summary judgment on the employee's claim of FMLA interference. In terms of leave eligibility, the DOL permits use of other leave, such as sick leave, personal leave, or vacation time to cover reduced time in order to reach eligibility. Employers may not terminate employees with impunity for seeking FMLA if those employees have been with the employer for less than 12 months.

In this case, the leave would have extended beyond her eligibility date. Pre-eligible employees have a cause of action if an employer terminates the employee in order to avoid having to accommodate the employee's leave request. In terms of leave entitlement, the employee had provided the employer with her physician's note regarding medical necessity. The employer admitted that the physician's hours restriction was the reason it terminated the employee (not because she could not perform the functions of her job). In terms of notice requirement, the employer argued that the employee failed to meet the notice requirement because she did not follow company

policy requiring a written application for FMLA leave.

The court ruled that company policy does not trump statutory language and since the employee's leave was unforeseeable, the employee was neither required nor able to complete FMLA paperwork in advance of her request. On appeal, the 8th Circuit Court of Appeals upheld the lower court's decision, noting that the company's actions in the case highlighted the very need for the FMLA. There was no dispute that the employee's restrictions were pregnancy-related and therefore temporary, not permanent, and the Court concluded: "The FMLA is designed specifically for situations like this, where a low-wage employee . . . needs temporary protection."

(2) Hours worked are determined according to the principles established under the Fair Labor Standards Act. § 825.110(c)(1).

(3) Spouses Employed by the Same Employer:

(a) Where a husband and a wife are employed by the same employer, the aggregate number of workweeks both may be entitled to may be limited to 12 workweeks if the leave is taken for either the birth/adoption/foster care of a healthy child; or for family leave to care for a sick parent. § 825.120(a)(3).

(b) If their newborn has a serious health condition, both spouses may each take 12 weeks of FMLA, provided they have not exhausted their entitlement during the applicable 12-month FMLA period. § 825.120(2)(6).

b. **Wisconsin:** Under the WFMLA, those employed in Wisconsin and who have been employed for more than 52 consecutive weeks and been paid for at least 1,000 hours within the 52 week period preceding the leave.

(1) "Been employed for more than 52 consecutive weeks" is defined as being treated as an employee according to usual personnel records. See DWD 225.01(3).

(2) "Worked at least 1,000 hours" is defined as "the number of hours paid pursuant to a regular policy of paid vacation leave, sick or other paid leave equals at least 1,000 hours." DWD 225.01(4).

B. DURATION OF LEAVE DEPENDS ON TYPE OF LEAVE TAKEN

1. **Wisconsin:** State annually provides specific leaves for specific periods: 6 weeks for birth/adoption, 6 weeks for donating an organ or bone marrow, 2 weeks for care for family member, and 2 weeks for care of self. **NOTE:** Employers generally may concurrently designate leaves as counting toward both WFLA and FMLA allotments. However, certain types of leave are available under one or the other – e.g., care for in-laws is available under the WFMLA. This could result in leave in excess of 12 months – e.g., 12 weeks for own serious health condition and 2 weeks of care for in-law.

   a. **Family leave for birth or adoption.**

   (1) The leave must be begun 16 weeks before or after the birth or adoption date.

   (2) Maximum of six (6) weeks available each calendar year for either or both leaves.

   (3) Family Leave in Noncontinuous Increments. The Wisconsin Court of Appeals concluded in Schwedt v. DILHR, 188 Wis.2d 500 (1994) that the Wisconsin FMLA limits the employee to six weeks of family leave within a 12-month period for the birth of a child and each increment of leave must begin within 16 weeks of the child's birth in order to balance the parent's need to care for the newborn child with the employer's need to know a reasonable time frame during which leave will be taken.

   (4) Intermittent Leave. Under the WFMLA, an employee may take leave as a partial absence from employment, but must schedule that leave so that it does not unduly disrupt the employer's operations. The last intermittent absence must start in the 16th week after birth. Statutory leaves may be taken in increments as short as the employer allows for any other non-emergency leave.

   (5) Placement for foster care independent of adoption may not be covered.

b. **Bone Marrow and Organ Donation.**

(1) Up to six weeks of leave for the purpose of donating an organ or bone marrow. The law is applicable to employers who are covered under Wisconsin's FMLA and allows employees to substitute any paid or unpaid leave that is provided by the employer.

(2) NOTE: The DWD has issued a new Wisconsin Bone Marrow and Organ Donation Leave Act workplace poster which employers covered by Wisconsin's FMLA are required to display (see http://dwd.wisconsin.gov/er/).

c. **Medical leave for care of self.**

(1) Sickness/injury must be a "serious health condition."

(2) Sickness/injury must render the employee unable to work.

(3) Maximum of two (2) weeks available each calendar year.

d. **Family leave for care of a sick or injured immediate family member.**

(1) **"Care"** is undefined, although medical certification requirements limit the type of information an employer may elicit from an employee to support a request for family leave. Whether other family members are available to provide care is not a permissible inquiry under the certification requirements.

(2) **"Immediate family member"** is defined as a spouse, child or parent. "Child" includes a son or daughter over 18 years of age who cannot care for themselves because of a serious health condition.

The WFMLA provides family leave for the care of a domestic partner or domestic partner's parent. "Domestic partner" applies to same or opposite sex domestic partners who submitted an affidavit of domestic partnership to the Wisconsin Department of Employee Trust Funds before September 23 2017, and same sex domestic partners who register as domestic partners prior to April 1, 2018.

2. **<u>Federal</u>:** Federal law provides 12 work weeks in a 12-month period for any one or a combination of the following reasons: birth/adoption/foster care, care for family member, or care of self or a qualifying exigency.

   a. **Calculations of leave in a week with a holiday.** (§ 825.200(h)). If an employee needs less than one full week of FMLA leave (is taking leave in less than one week increments), and a holiday falls within the partial week of FMLA leave, the holiday time cannot be counted against the employee leave entitlement if the employee would not otherwise have been required to report for work on the holiday. However, if an employee needs a full week of leave in a week with a holiday, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement.

   b. **Family leave for birth, or placement of a child for adoption or foster care.**

      (1) **Greater Right:** Leave must be concluded within 12-months of the birth/placement date.

      (2) When leave is for adoption or foster care, it may include: counseling; court appearances; medical or attorney appointments; and no maximum age limit.

      (3) When a foster child is subsequently adopted by the same family, a new period of FMLA leave is NOT triggered. DOL Opinion Letter FMLA2005-1-A.

   c. **Medical leave for care of self.**

      (1) Sickness/injury must be a "serious health condition."

      (2) Sickness/injury must render the employee unable to perform the "essential" functions of his/her position or to work at all.

   d. **Family leave for the care of an immediate family member of the employee who has a serious health condition.**

      (1) **"Care"** is defined to encompass both <u>physical</u> and <u>psychological</u> care (including comfort, reassurance and moral support) when, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic or nutritional needs or safety, or is unable

to transport himself or herself to the doctor, etc. Includes actual caregiving and making arrangements for caregiving.

(2) **"Immediate family member"** is defined as a spouse, child, or parent (it does not include a spouse's parent). "Child" includes a son or daughter who is 18 years or older if the child is incapable of self-care because of a physical or mental disability.

(a) Department of Labor (DOL) clarified the FMLA definition of "son or daughter" as it applies to individuals 18 years of age and older. The age of the son/daughter at the onset of disability is not relevant in determining a parent's entitlement to FMLA leave. In terms of adult children, ages 18 and older, an employee is entitled to take FMLA leave if the son/daughter: 1) has a disability as defined by the ADA; 2) is incapable of self-care due to that disability; 3) has a serious health condition; ***and*** 4) is in need of care due to the serious health condition.

(b) FMLA leave may be ***in addition to*** military caregiver leave for parents of children who become disabled during military service. A service member's injury may have impact that lasts beyond the single 12-month period covered by the military caregiver provision of FMLA, clarifying that the servicemember's parent may be eligible to take FMLA leave in *subsequent* years.

(c) Sickness/injury must be a "serious health condition."

(d) Broader definition of "health care provider."

(e) Maximum of twelve (12) work weeks available.

(f) "Spouse" is husband or wife as recognized by state law.

(g) Need to Care for Family Members (§825.124(b)). The employee seeking leave need not be the only individual or family member available to care for the qualified individual.

(3) Ballard v. Chicago Park District, 741 F. 3d 838 (7th Cir., 1/28/14). This case is about what qualifies as "caring for" a family member under the FMLA. In particular, this case addresses whether an employee qualifies for FMLA in order to provide physical and psychological care to a terminally ill parent while that parent is traveling away from home. The Court of Appeals decided that under such circumstances, the employee is seeking leave "to care for" a family member within the meaning of FMLA.

The employer terminated the employee for unauthorized absences during a trip to Las Vegas with her terminally-ill mother, arguing, in part, that the trip was not related to a continuing course of medical treatment for her mother. In this case, the employer had concern that the FMLA request constituted an abuse of FMLA leave; the employer variously referred to the trip as a "recreational trip" and a "non-medically related pleasure trip." The Court of Appeals decision reminds employers that under the FMLA, the employer retains the right to *require* that leave requests be certified by the family member's health care provider and that this is one way to help determine the reasonableness of a request under the FMLA. This 7th Circuit decision constitutes a split from First and Ninth Circuit decisions on the need for the employee to be involved in the ongoing medical treatment with the 7th Circuit stating, *"... so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition."*

e. **Expansion of FMLA Leave for Military Families - Qualifying Exigency Leave.** Eligible employees are entitled to take up to 12 weeks of FMLA leave "because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee" is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). § 825.126.

(1) **Caretaker Leave for Military Families.** Eligible employees can take up to 26 weeks of FMLA leave in a single 12-month period to care for a servicemember, including both current members of the Armed Forces with a "serious injury or illness" and covered veterans who are undergoing medical

treatment, recuperation, or therapy for a "serious injury or illness." **<u>NOTE</u>:** An eligible employee is limited to a combined total of 26 workweeks of leave for **<u>any</u>** FMLA-qualifying reasons. For example, if employee uses 10 weeks for his or her own serious health condition, the employee would have up to 16 weeks during the 12-month period for military caregiver leave. Also, "rolling" method is not applicable to military caregiver leave. This could also result in an employee being entitled to more than 26 weeks of leave if state law is used – e.g., for bone marrow donation.

3. **<u>Measuring Leave Duration</u>**

a. **Wisconsin:** Must use a calendar year.

b. **Federal:** A twelve (12) month period set by the employer. § 825.200. The twelve-month period may be set in any of the following ways:

(1) A fixed 12-month time frame (e.g., employee anniversary year, fiscal year);

(2) Calendar year;

(3) Rolling 12-month period measured forward from date FMLA begins, or a "rolling" 12-month period measured backward from date of FMLA use.

(a) An employee may be discharged for attendance issues when they use up the 12 weeks allotted to them under the FMLA in a "rolling calendar year" situation. DOL Opinion Letter FMLA2005-3-A.

(4) For caregiver leaves, the 26-week entitlement is measured on a rolling 12-month period beginning on the first day the eligible employee takes leave to care for an eligible servicemember and ends twelve (12) months after that date. § 825.127(c)(1).

4. **Concurrent Leaves**

a. Leaves run concurrently where an employee is entitled to both Wisconsin and federal FMLA leave. However, there can be situations when leave will not run concurrently, resulting in leave periods extending beyond a 12-week period.

5. **Intermittent Leave**

a. **Federal:**

(1) The FMLA permits leave for birth or placement for adoption or foster care to be taken intermittently – that is, in blocks of time or by reducing the normal weekly or daily work schedule – subject to approval by the employer.

(2) Leave for a serious health condition may be taken intermittently when "medically necessary."

(3) Sections 825.202 and 825.203 now require that an employee who wants to take intermittent leave has to make a "reasonable effort" to schedule leave so as not to unduly disrupt the employer's operations. Under the old regulations, an employee only had to "attempt" to schedule leave so as not to disrupt the employer's operations.

(4) Minimum Increments of Intermittent Leave (§ 825.205). Employers must account for the intermittent or reduced leave schedule by using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour. For example, if the employer accounts for vacation leave in one hour increments and sick leave in 30 minute increments, the employer cannot account for FMLA leave in an increment larger than 30 minutes. In no circumstances can the employer use increments greater than one hour. § 825.205(a).

NOTE: The new regulations now clarify that an employer may not require an employee to take more leave than necessary to address the circumstances that precipitated the need for leave. Further, the regulations now clarify that employees may not be charged FMLA leave for periods during which they are working. § 825.205(a).

(5) Physical Impossibility. Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, the entire period the employee is required to be absent is counted against the employee's FMLA leave entitlement. The new regulations clarify that the period of the "physical impossibility" is to be applied in only the most limited circumstances, during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to physical impossibility after a period of FMLA leave. § 825.205(a)(2).

b. **Calculating Intermittent Leave**

(1) When the employee does not have a normal week to week schedule, a 12-month period is used to calculate the average hours worked. § 825.205(b)(3).

(2) Hernandez v. Bridgestone Americas Tire Operations, LLC., 831 F.3d 940 (8th Cir., 8/4/16). Hernandez, a tire builder, was approved for intermittent FMLA to care for his asthmatic child. The employer frequently offered voluntary overtime shifts, but if an employee missed a voluntary overtime shift it counted as an absence under the employer's attendance policy. Occasionally Hernandez signed up for voluntary overtime shifts, but missed some of the shifts to care for his child.

The employer calculated Hernandez's FMLA leave entitlement (504 hours) based on his regular 42-hour workweek, without factoring in any overtime hours. Whenever he missed an overtime shift to care for his child, however, the employer "docked" him 12 hours of leave. After continuing to miss shifts to care for his child, eventually Hernandez exhausted his leave and was discharged pursuant to the employer's attendance policy. He then filed suit, alleging his FMLA rights were violated when the employer based his leave allotment on his scheduled hours rather than his actual hours worked.

The district court held that because Hernandez volunteered for the overtime work, missing the scheduled hours should not have reduced his FMLA entitlement. The employer appealed. The 8th Circuit ruled that, pursuant to DOL

regulations, the issue hinged on whether the overtime was voluntary or mandatory. Because the employer disciplined employees who missed voluntary overtime shifts, the shifts became mandatory and the missed overtime hours therefore were properly deducted from Hernandez's FMLA leave entitlement. However, because the overtime was mandatory, the hours also should have been included when the employer calculated his FMLA leave entitlement. In Hernandez's case, the overtime hours were not included in this calculation at all. Thus, the Court ruled that the employer had interfered with Hernandez's FMLA rights and improperly discharged him for unauthorized absenteeism.

c. **Wisconsin:**

(1) WFMLA permits partial absences from employment as long as it does not unduly disrupt the employer's operations. § 103.10(3) and (4).

(2) An employee may schedule medical leave as medically necessary.

(3) An employee may take intermittent leave in actual increments of less than a full workday if the employer allows any other leave to be taken in increments of less than a full workday. The duration of the shortest increment available to the employee under the Act shall be equal to the shortest increment the employer allows to be taken by the employee for any other non-emergency leave. DWD 225.02(1).

6. **Employer Notice Requirements - Federal and State**

a. **Employer postings have been updated within the past year.**

b. Employer notice must also be provided in an employee handbook.

7. **Employee Notice Requirements - Federal and State**

a. **Federal:**

(1) Employee Notice Requirements for Foreseeable FMLA Leave (§ 825.302).

(a) An employee must provide the employer with at least 30 days advance notice if the need is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment (self, family member, or covered servicemember).

(b) If an employee gives the employer less than thirty (30) days advance notice for the need of FMLA leave, the employee shall provide notice as soon as practicable and shall explain why it was not practicable to provide thirty (30) days notice upon a request from the employer for such information.

(c) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.

(d) Employees are required to respond to an employer's inquiries attempting to determine whether the leave is FMLA qualifying. If the employees do not respond, they risk losing FMLA protection if the employer is unable to make a determination of whether the leave is a qualifying FMLA leave.

(e) Absent unusual circumstances, employees may be required by the employer to follow an employer's established call-in procedures for absences when requesting leave. FMLA leave may be delayed or denied for failing to follow the procedures. An employer may not require more than a 30-day notice.

(f) The regulations eliminated the provision which prohibited employers from enforcing stricter FMLA notice requirements where the terms of the collective bargaining agreement, state law or employer leave policy allowed less advance notice to the employer [formerly § 825.302(g)]. However, nothing in FMLA supercedes any provision of State or local law that provides greater family or medical leave rights. § 825.701. An employer must continue to observe any employment benefit program or plan that provides greater leave rights. § 825.700.

(2) Employee Notice Requirements for Unforeseeable FMLA Leave (§ 825.303). Employees continue to be required to provide notice "as soon as practicable."

(a) The regulations require an employee to provide the employer with "sufficient information" to put the employer on notice that the absence may be an FMLA qualifying event.

(b) An employee calling with the simple statement that the employee or a family member is "sick" without providing additional information, will not be considered sufficient notice to trigger an employer's obligations under the FMLA.

(c) Absent unusual circumstances, employees must comply with the employer's usual procedures for calling in and requesting unforeseeable leave.

(3) NOTE: Employees who request FMLA leave are not required to expressly mention the Act when they notify their employer of their need for leave.

(4) Consequence of Employee's Failure to Provide Notice (§ 825.304). If it is clear that the employee had actual notice of the FMLA notice requirements, an employee's FMLA request or coverage may be delayed.

(5) The Federal regulations do not provide a sample form for employees to request FMLA leave.

b. **Wisconsin:** Employees are required to give notice of planned family or medical leave in a "reasonable and practicable manner."

(1) Employees are required to make a reasonable effort to schedule medical treatment or supervision so that it does not unduly disrupt the employer's operations.

8. **Rights and Responsibilities Notice (§ 825.300(c)).**

a. An employer must provide written notice detailing the specific expectations and obligations of the employee and the consequences of failing to meet those obligations. The notice must be provided each time the eligibility notice is provided - within five (5) business

days of the leave's commencement (see "Eligibility Notice" above). The notice must include the following:

(1) That leave could count against the employee's leave entitlement;

(2) Requirements for certification supporting leave and the consequences of failing to do so;

(3) Right to substitute paid leave; whether the employer will require the substitution of paid leave, the conditions related to the substitution, and employee's entitlement to take unpaid FMLA leave if unable to take paid leave;

(4) Any requirement to make premium payments to maintain health benefits, the arrangements for making such payments, and the consequences of failing to make payments in a timely fashion;

(5) Employee's status as a "key employee" and consequences of that status;

(6) Employee's right to maintenance of benefits during FMLA leave and the right to restoration to the same or equivalent job upon return from FMLA leave;

(7) Potential liability for premiums paid by employer if employee does not return to work after taking FMLA leave;

(8) Other notice may be included, e.g., whether periodic reports will be required and any required certification forms;

(9) If any information changes, the employer is to issue an updated notice within five (5) business days.

b. Brodzik v. Contractors Steel Co., 2015 WL 4715171 (N.D. Ind., 8/7/15). The employee began working for the company as an outside salesperson in 2010. In May of 2012 he applied for FMLA leave to undergo surgery. The company gave him a "Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)" form indicating he was eligible for FMLA leave. The company approved the leave and, in fact, extended it beyond the original leave request date, designating it specifically as FMLA leave. After returning to work, the employee was assigned to an inside sales position which he

believed was not an equivalent position. When he questioned the change, his supervisor became irate and verbally abusive, threatening to "kill somebody." The employee left the worksite and never returned. He filed a lawsuit alleging the company interfered with his FMLA rights and engaged in retaliation. The company countered with a motion for summary judgment, arguing it did not meet the FMLA requirement of having 50 employees and, therefore, the employee was not entitled to FMLA leave.

The Court denied the company's motion for summary judgment, stating that the company represented to the employee that he was eligible for FMLA leave when it gave him the "Notice of Eligibility and Rights & Responsibilities" form, which provides specific boxes for the employer to check as to whether the employee is eligible for leave and whether the employer does or does not have 50 employees. The company had checked the box indicating that the employee was eligible; thus, the company's evidence that it actually did not have 50 employees did not negate the evidence provided by the notice to the employee that he was eligible. Instead, it created a genuine dispute of fact to be resolved by a jury.

c. **Wisconsin:** No comparable provision for eligibility, designation or rights and responsibilities notice.

9. **Eligibility Notice (§ 825.300(b)).**

a. Absent extenuating circumstances, eligibility must be conveyed within five (5) business days after the employer acquires knowledge that the employee's leave may be for an FMLA qualifying reason or after the employee requests leave. § 825.300(b)(1).

(1) If the employee has no leave available or is not eligible, the notice must state at least one reason why leave is denied. For example, if an employee has not met the 12-month requirement, the notice should state that reason. § 825.300(b)(2).

(2) If the employee provides notice of a subsequent need for FMLA leave for a different reason during the 12-month period, the employer must provide notice of eligibility within five (5) days of the request only if the employee's eligibility has changed. § 825.300(b)(3).

10. **Designation of Leave as FMLA Leave (§§ 825.300(d) and 825.301).**

a. **Federal:** It is the employer's responsibility to designate leave as FMLA leave. This may be done in any of the following manners:

(1) The regulations require an employer to notify the employee within five (5) business days that leave is designated as FMLA leave once the employer has enough information to make the determination absent extenuating circumstances. If information in the designation changes (e.g., the employee has exhausted their leave entitlement), the employer must provide written notice to the employee within five (5) business days.

(a) One notice of designation is required for each FMLA-qualifying reason. However, if leave is taken on an intermittent or reduced leave schedule, only one designation is required as long as the reason for the leave is the same.

(b) The employer is also required to inform the employee, if the amount is known, of the number of hours, days or weeks that will be designated as FMLA leave. In the event the exact amount of leave required is unknown, the employer must inform the employee no more often than once in a thirty (30) day period if the employee requests, that the leave has been counted against the employee's FMLA entitlement.

(c) If there is insufficient information to make a determination as to whether the leave qualifies as FMLA leave, the employer will be required to inquire further of the employee or the employee's spokesperson to ascertain whether leave is potentially FMLA qualifying. § 825.300(d)(6).

(d) Employers are required to include a statement of the employee's essential functions with the designation notice if they will require that those functions be addressed in a fitness for duty certification before the employee returns from FMLA leave. §§ 825.300(d)(3); 823.312(b).

(2) Ragsdale v. Wolverine Worldwide, Inc., 122 S.Ct. 1155 (2002). The Department of Labor regulations [§ 825.700(a)] which provide that an employer's failure to notify an employee that leave taken pursuant to employer's leave policy is designated as FMLA leave will result in employee still retaining 12-week FMLA entitlement are invalid. Such regulations improperly convert the FMLA's minimum federally-mandated unpaid leave into entitlement an additional 12 weeks of leave. Twelve weeks is both the minimum that an employer must provide and a maximum that the Act requires. In order to be entitled to additional leave, the employee would have to show that they were prejudiced by the employer's failure to designate the leave as FMLA leave.

(3) Addressing Wolverine, the new Regulations provide that an employer may retroactively designate leave as FMLA leave, using appropriate notice, so long as such late designation does not cause harm or injury to the employee. §§ 825.300(d), 825.301(d) and (e).

(4) If there is a dispute whether leave qualifies as FMLA leave, "it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented." § 825.301(c) (emphasis added).

11. **Substitution**

a. **Federal:** The federal statute allows employees to substitute specific employer leaves in place of specific statutory leaves.

b. **Substitution of Paid Leave** (§ 825.207). The new regulations attempt to clarify when paid leave may be substituted for unpaid FMLA leave.

(1) The term "substitute" has been clarified to mean that the unpaid FMLA leave and any accrued paid leave provided by the employer run concurrently. This simply clarifies the existing standard practice.

(2) Unless the employer waives the requirements, the terms and conditions of the employer's normal paid leave policy must be followed to utilize accrued paid FMLA leave in substitution of unpaid leave.

(3) If an employee is on federal FMLA leave, the employer may force the employee to exhaust employee's accrued paid leaves balances.

NOTE: If an employee is receiving short-term disability (paid by an employer or a third-party plan) or worker's compensation benefits, the leave is not "unpaid" and the employer may NOT force an employee to substitute (exhaust) their paid leave. The absence, however, may still be counted towards an employee's FMLA leave entitlement. See Repa v. Roadway Express, 477 F.3d 938, 2007 WL 569852 (7th Cir. 2007); § 825.207(d) and (e). Where state law permits, an employee and employer may agree to supplement disability or worker's compensation benefits with paid leave. § 827.207(d) and (e).

(4) When providing notice of eligibility for FMLA leave, employers have the obligation to make employees aware of any requirements for the use of paid leave and must also inform employees of the right to take unpaid FMLA leave if the employee decides not to substitute the paid leave for unpaid FMLA leave or the employer does not require substitution.

(5) The regulations allow the use of compensatory time accrued by public agency employees under the FLSA to run concurrently with the unpaid FMLA leave. § 825.207(f).

(6) The FMLA does not allow employers to violate collectively bargained contractual obligations permitting employees, not employers, to control the right to substitute paid vacation and personal leave for unpaid FMLA leave. Brotherhood of Maintenance of Way Employees v. CSX Transportation, Inc., (7th Cir., 478 F.3d 814, 3/2/07).

c. **Wisconsin:** Statute provides that family and medical leaves are unpaid. However, an employee on statutory leave may substitute any type of leave provided by the employer for statutory leave. No requirement that employee be eligible for the employer leave.

C. MEDICAL CERTIFICATION RIGHTS AND RESPONSIBILITIES (FMLA)

1. **Federal:**

a. Employers may require employees to provide the following:

(1) Medical certification supporting the need for leave due to a serious health condition;

(2) Second or third medical opinions (at the employer's expense) and periodic recertification;

(3) Periodic reports during FMLA leave regarding the employee's status and intent to return to work. § 825.311.

b. Medical Certification - General Rules (§§ 825.305, 825.306 and 825.307). The regulations require medical certification be submitted by an employee within **fifteen (15)** days after an employer's request unless it is not practicable under the particular circumstances for the employee to do so despite the employee's diligent good faith efforts. This applies to both foreseeable and unforeseeable leave.

(1) Employers should request medical certification within five (5) business days of receiving notice from the employee, or at the time the employee gives notice of the need for leave. For unforeseeable leave, the request should occur within five (5) business days after the leave begins.

(2) "Insufficient certification" is defined as an application where the certification is "completed," but the information provided is "vague, ambiguous, or non-responsive."

(3) If an employer receives an incomplete or insufficient certification, the regulations require an employer to inform the employee in writing what additional information is necessary and then provide the employee with seven (7) calendar days to remedy the deficiency. A longer time must be granted if such time is not practicable and the employee made diligent, good faith efforts to comply. A failure to cure the deficiency allows the employer to deny FMLA leave, so long as the employer has advised the employee of the consequences of failing to provide adequate certification.

(4) An employer can contact the health care provider for purposes of clarification and authentication after the employee has had an opportunity to cure deficiencies. A health care provider, human resources director, leave administrator, or other management official can contact the provider, but under no circumstances can the employee's direct supervisor contact the provider. Also, if an employee does not provide the necessary authorizations to the employer so that they can clarify the certification with the health care provider, the employer may deny the FMLA leave if the certification is unclear. § 825.307(a).

(a) "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of the response. Employers may not ask for additional information beyond that required by the certification form.

(b) "Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

(5) An employer may require annual medical certification in situations where a "serious health condition" extends beyond a year. § 825.305(e).

(6) In situations where a serious health condition may also be a "disability," the regulations clarify that employers are not prevented from following the procedures under the ADAAA and WFEA for requesting medical information. Any information obtained under the ADA procedures can be considered in determining the employee's entitlement to FMLA leave. § 825.306(d).

(7) RECERTIFICATION. Generally, an employer may request recertification no more than every 30 days. § 825.308(a).

(a) If a medical certification indicates the duration of the condition is more than 30 days, the employer may not require recertification until that certification has expired.

(b) In <u>all</u> cases, an employer may request recertification every six (6) months in connection with an absence by the employee. § 825.308(b).

(c) Recertification may be requested in less than 30 days if the employee requests an extension, circumstances change, or the employer receives information casting doubt on the employee's need for leave. § 825.308(c).

(d) The employee must be given at least 15 calendar days to provide recertification. § 825.308(d).

NOTE: As part of the recertification process, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the health condition is consistent with such a pattern. § 825.308(e).

2. **<u>Wisconsin</u>:**

a. Medical certification is limited to the following facts:

(1) That the child, spouse, parent or employee has a serious health condition.

(2) The date the serious health condition commenced and its probable duration.

(3) The medical facts regarding the serious health condition.

(4) If the employee requests medical leave, an explanation of the extent to which the employee is unable to perform his or her employment duties.

b. An employer's requirement that an employee respond to a request for certification of a serious health condition within 15 days of the request was found to be a reasonable amount of time under the WFMLA. <u>Eberhardt v. Morningstar Foods</u>, (ALJ Dec., 2/7/03).

c. If an employer questions an employee's medical evidence of the existence of a serious health condition, the employer has the right to request a second medical opinion at its own cost. However, the employer cannot simply claim not to believe the medical evidence in the first opinion and deny the employee his or her rights under the WFMLA. Biscontine v. County of Milwaukee, (ALJ Dec., 10/7/04).

d. An employer's lay suspicions and opinions about the issue of medical necessity or a serious health condition cannot disregard competent medical evidence that substantiates entitlement to medical leave under the law. Harvot v. Hoffmaster Solo Cup, (ALJ Dec., 11/3/06).

D. REINSTATEMENT OBLIGATIONS

1. **Federal:** An employee returning from FMLA leave must be placed in the same job, or an equivalent position with equivalent benefits, pay and other terms and conditions of employment. A "virtually identical" standard is applied.

   a. Benefits reinstatement includes full coverage without pre-existing condition exclusions or waiting periods.

   b. Equivalent position includes:

      (1) same position, or

      (2) position with equivalent pay, benefits, working conditions, privileges, prerequisites and status, or

      (3) same work site or a geographically proximate work site, and

      (4) must involve substantially the same or similar duties and responsibilities, and entail substantially equivalent skill, effort, responsibility and authority.

   c. Must include any unconditional pay increases.

   d. May include benefits changed in the interim.

   e. If laid off in interim, return to "layoff" status. Note: Burden is on employer to prove that the employee would have been laid off had they remained in employment.

f. Under certain circumstances, "key" employees may not have to be restored. A "key" employee is one who is salaried and among the highest paid 10% of employees employed within a 75-mile work site radius.

g. Once the 12-workweek FMLA allowance has been exhausted, FMLA benefits and protections, including job restoration, cease.

h. An employer must return an employee to work in the same or equivalent position upon return from leave (i.e., within two business days of request for reinstatement).

(1) An employee does not have to be returned to work at the end of FMLA leave if they cannot perform the essential functions of the position and fail to provide a medical release. Bloom v. Metro Heart Group of St. Louis, Inc., 440 F.3d 1025 (8th Cir., 2006).

(2) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by worker's compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the ADA (e.g., "reasonable accommodation" obligation), state leave laws (e.g., "reasonable accommodation"), or worker's compensation laws (e.g., unreasonable refusal to rehire).

(3) An employer may require an employee to provide a fitness-for-duty certification before returning to work, if the employer has a uniformly-applied policy or practice that requires all similarly-situated employees to do so.

i. Fitness for Duty Certification (§ 825.312). The regulations allow the employer to contact the employee's health care provider for the purposes of authenticating and clarifying the fitness for duty statement if the employer follows the authentication and clarification procedures in § 825.307(a). In addition, the regulations provide that, upon request, an employee must obtain a certification from his/her health care provider that the employee is able to resume work. Employers are allowed to require an employee to furnish a fitness for duty certification every thirty (30) days if the employee has used intermittent leave during that period and the employer has reasonable

safety concerns. The employer can require the certification to specifically assess the employee's ability to perform the list of essential functions, so long as the employer provides the employee with those essential functions no later than the designation notice.

2. **Wisconsin:** Reinstatement to the same job, if available. If same job not available, reinstatement to an equivalent position with similar pay.

    a. Employer ordered to return employee to equivalent employment position when her former job was changed pursuant to a reorganization which occurred while the employee was on leave. Kelley Co. v. Marquardt and DILHR, 172 Wis.2d 234 (1992). The Court was very literal in its interpretation of "equivalent" and required equivalency in terms of compensation, benefits, working shift, hours of employment, authority, and responsibility.

    b. Hull v. PFS Corp., (ALJ Dec., 4/7/06). If an employer can successfully show that, for reasons wholly unrelated to family or medical leave, an employee's position or equivalent position no longer existed when that employee returned from WFMLA leave, the employer will not be in violation of the WFMLA's reinstatement requirements.

    c. Employee not entitled to restoration when FMLA leave extends beyond statutory limit, even though employer granted extensions to leave. Hromadka v. M.G. Industries, (ERD May 1993).

    d. The Wisconsin Act does not contain a "key employee" exception.

3. **Retaliation/Interference With Rights**

    a. **Federal:** Employers are prohibited from interfering with or restraining an employee's exercise of rights to leave under the law, and cannot discharge, discriminate or retaliate against employees who exercise these rights. § 825.220, § 825.400.

        (1) Potential damages include: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12

weeks of wages for the employee in a case involving leave for any other FMLA-qualifying reason.

(2) In addition, the employee may be entitled to interest on such sum.

(3) An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act.

(4) When appropriate, the employee may also obtain equitable relief such as employment (applicant), reinstatement, and promotion.

(5) When the employer is found in violation, the employee may recover reasonable attorney's fees, reasonable expert witness fees, and any other costs of the action from the employer, in addition to any judgment awarded by the court.

b. **Wisconsin:** No person may interfere with, restrain or deny the exercise of any right protected under the WFMLA, or discharge or in any other manner discriminate against, any individual for opposing a practice prohibited under the WFMLA.

(1) Opposing a discriminatory practice involves more than just requesting leave under the WFMLA. There has to be some decision or practice by the employer that is discriminatory, or that the Complainant reasonably believes is discriminatory. There must be evidence that the Complainant took some action to stand in opposition to that allegedly discriminatory practice. Frank v. US Bank, (ALJ Decision, 12/04/03).

(2) Hull v. PFS Corp., (ALJ Dec., 4/7/06). The WFMLA does not suggest that a violation can exist only if the person interfering with the leave acted on some improper motive. The employer's motive is irrelevant. To prevail, a complainant need only establish that he was entitled to a right under the Act, and that the employer interfered with or denied that right.

(3) Delaying the approval of FMLA leave and the right to substitution may, in some circumstances, result in a denial, restraint, or an interference with an employee's rights under the Wisconsin Family and Medical Leave Act. Burnick v. AT&T Serv., (ALJ Decision, 04/14/06).

(4) Under Wis. Stat. § 103.10(13), an employee or the Department may bring an action in civil court against an employer to recover any damages caused by a violation of the Act, such as reinstatement or an order to provide the leave illegally denied, lost wages for up to two years before the complaint was filed, interest and actual attorney's fees.

c. **Statute of Limitations**

(1) **Federal:** Two (2) year statute of limitations; three (3) years if the violation is found to be "willful."

(2) **Wisconsin:** Statute of limitations is 30 days from the date the violation occurred or when the employee should have known of the violation, whichever is later.

d. **Individual/Personal Liability of Managers**

Graziadio v. Culinary Institute of America, 817 F.3d 415 (2nd Cir., 3/17/16). The 2nd Circuit Court of Appeals held that human resources personnel and supervisors who handle the administration of leave requests under the FMLA may be personally liable for FMLA interference and retaliation claims. In this case, Cathleen Graziadio was fired from her position at the Culinary Institute of America shortly after she took leave to provide medical care for her sons. Graziadio informed her supervisor of her need for time off and sought to have her absences designated as leave under the FMLA. She asked the company HR director to provide her with any necessary FMLA paperwork. The Culinary Institute of America's HR director sent Graziadio a letter stating that her FMLA paperwork did not justify her absences from the workplace and that Graziadio must provide updated paperwork to her office before she was able to return to work. The HR director never clarified what additional information was needed or why Graziadio's original paperwork was deficient. Graziadio provided the HR director with updated medical information, and the HR director did not respond and ultimately terminated Graziadio for job abandonment.

The 2nd Circuit found that after applying the "economic realities test" there was sufficient evidence for Graziadio to advance her FMLA claim against the HR director individually as her employer. Specifically, the court held that a HR director may be personally liable for FMLA interference and retaliation claims, as a person who acts, directly or indirectly, in the interest of an employer toward an employee.

II. IS LEAVE A "REASONABLE ACCOMMODATION" UNDER THE WFEA OR ADAAA?

A. **GENERALLY.** "Reasonable accommodation" includes both physical modifications to existing facilities and job modifications. Are leaves a job modification?

1. Employers are required to make "reasonable accommodations" to known physical or mental limitations of an otherwise qualified individual (and cannot deny employment opportunities because a reasonable accommodation must be provided).

2. **Undue hardship.** An accommodation is not required if it would impose an "undue hardship" on the employer's business (meaning a significant difficulty or expense).

   a. Factors to be considered:

      (1) the nature and cost of the accommodation.

      (2) the size, type and financial resources of the specific facility where the accommodation would have to be made.

      (3) the overall size, type and financial resources of the covered employer.

      (4) the covered employer's type of operation, including:

         (a) the composition, structure and functions of its workforce.

         (b) the geographic separateness and administrative or fiscal relationship between the specific facility and the covered employer.

B. **FEDERAL:**

1. **<u>EEOC Guidance on Reasonable Accommodations Under the ADA</u>**

a. There are three categories of reasonable accommodations:

(1) Modifications or adjustments to the job application process that enables a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(2) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that job; or

(3) Modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

b. The guidance suggests that employers need to engage in a meaningful dialogue with employees and obtain appropriate documentation to make an informed decision on an accommodation request.

c. Undue hardship cannot be based on employees' fears or prejudices toward an individual's disability, nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Rather, undue hardship must be based on an individualized assessment of the current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

2. **<u>EEOC Guidance on Leave as a Reasonable Accommodation</u>**

a. The EEOC indicated that it has identified as problematic policies that deny or unlawfully restrict leaves as an accommodation to a disability. NO MAXIMUM LEAVE POLICIES.

b. The document provides guidance on six topics: Equal Access to Leave Under an Employer's Leave Policy; Granting Leave as a Reasonable Accommodation; Leave and the Interactive Process

Generally; Maximum Leave Policies; Return to Work and Reasonable Accommodation (Including Reassignment); and Undue Hardship.

c. The document addresses the amount and/or length of leave required, the frequency of leave, flexibility with respect to the days on which leave is taken, the predictability of intermittent leave, and the impact on the employer's operations and its ability to serve its customers in a timely manner. It provides guidance into what the EEOC considers a "reasonable accommodation" and an "undue hardship" in the context of:

(1) An employee who cannot say whether or when s/he will be able to return to work at all.

(2) An employee who requests leave beyond that which was originally granted. An employer may take into account leave already taken whether pursuant to worker's compensation, the Family and Medical Leave Act, or the employer's leave policy. But a leave of absence exhausting FMLA leave or other leaves alone is not sufficient to deny a request for additional time off.

3. **Cases on Whether Leave is a Reasonable Accommodation**

a. **Indefinite Leave/Employee Attendance**

(1) There is an inherent tension between an employer's right to have a "qualified" worker who can attend work regularly and employee's right to days off as a reasonable accommodation to a disability.

(a) On one hand:

An employee with a disability must be qualified to do the job with or without reasonable accommodation. A "qualified" individual will be able to perform all essential job functions, with or without reasonable accommodation. An employee who cannot attend work regularly may not be a "qualified" disabled person. Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998).

(b) On the other hand:

A leave of absence may be a reasonable accommodation.

Flexibility in an employer's attendance policy may also be a reasonable accommodation. A flexible attendance policy means that the employer may be required to provide "sick days" beyond what company policy usually provides for.

(2) Minter v. District of Columbia, 809 F.3d 66 (D.C. Cir., 12/29/15). An employee who had been out of work on leave due to a disability for three months had informed her employer that she might be able to return to work in a few more months. The employer requested medical documentation, but the employee did not respond. The employer eventually demanded medical documentation, return to work, or be terminated. The employee provided a doctor's note indicating she was totally disabled, and the employee added that she hoped she could return to work after another three months. The employer terminated the employee.

The employee sued under the ADA. The D.C. Circuit court held that the employer had engaged in the interactive process of identifying an accommodation, that the employee was not qualified for her job as being totally and indefinitely disabled, that the employee was terminated for job abandonment rather than for seeking an accommodation, and that a hope for a return to work in three months without elaboration or support did not constitute a request for a reasonable accommodation.

(3) Frazier-White v. Gee, 818 F.3d 1249 (11th Cir., 4/7/16). After a workplace injury, a county security officer exhausted the employer's cap of 270 days on light duty. She was unable to provide a timeline for returning to fulltime employment or for returning to her former security officer job. She asked to be assigned to another job or to have her light duty extended indefinitely. The employer declined her requests and terminated her employment. The 11th Circuit held that the employee's requests did not constitute "reasonable" accommodations under the law, and the employer had no duty to create a permanent light duty job for her. Thus, while

employers may not maintain inflexible light-duty policies in order to avoid their ADA obligations, this decision held that employees who exhaust light duty assignments and provide no time frame for a return to fulltime employment have no right to an indefinite extension of light duty under the ADA.

(4) EEOC v. United Parcel Serv., Inc., N.D. Ill., No. 1:09-CV-05291, proposed consent decree 7/28/17 United Parcel Service Inc. reached a $1.7 million agreement with the EEOC to settle a nationwide lawsuit challenging the delivery company's 12-month maximum leave policies. It discharged workers who could not return from medical leave after 12 months. We are seeing more and more a push for unpaid leave as an accommodation, but ....

(5) The Seventh Circuit issued a decision in Severson v. Heartland Woodcraft, Inc., No. 15-3754, 2017 WL 4160849 (7th Cir. Sept. 20, 2017), in which the court rejected the argument that an employer had to hold out a job for an employee for three months following the expiration of FMLA leave. In doing so, the Seventh Circuit rejected the EEOC's position that an extended leave of absence may be considered a reasonable accommodation under the ADA. The basis of the court's reasoning was that a reasonable accommodation is something that would allow the employee to perform his or her job, and if the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a "qualified individual" under the ADA. As the court stated, "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement." The court appeared to set the limit at two months, by holding that "[a] multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." The court went on to note that a "brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances," and the court noted in particular a case scenario where an employee might require intermittent leave.

Severson also reiterated that transfer to a vacant job could be a reasonable accommodation, but that it would be the employee's burden to prove that there was a vacant position available at the time of termination. And Severson also held that while an employer is not required to create a light-duty job, that if the employer has a policy of creating light-duty

positions for employees who are occupationally injured, they have to hold out that same benefit to employees with disabilities, unless the company can show an undue hardship.

(6) On October 17, 2017, in Golden v. Indianapolis Housing Authority, a non-precedential decision, the 7th Circuit reiterated its holding in Heartland Woodcraft that an employee "who needs long term medical leave cannot work and therefore is not a 'qualified individual' under the ADA."

(7) Sepulveda-Vargas v. Caribbean Restaurants, LLC, 888 F.3d 549, 1st Circuit Ct. App., 4/30/18 (ability to work rotating shifts was an essential function of the assistant manager job, and assistant manager did not suffer adverse employment actions as required to support ADA retaliation claim).

C. DIFFERENT STANDARD/BURDEN IN WISCONSIN

1. In Crystal Lake Cheese Factory v. Catlin, 664 N.W.2d 651 (2003), the Wisconsin Supreme Court concluded that employees with disabilities are afforded far greater rights under the WFEA than under the Americans with Disabilities Act (ADA). Under the ADA, an employer has no obligation to eliminate essential job duties or create new jobs for disabled employees. Wisconsin employers may have an obligation to create new jobs for disabled employees as a reasonable accommodation. See Cave v. Mil. Co., ERD Case No. CR200704118 (LIRC, Jan. 30, 2014) (suggesting creation of new position may not create a hardship).

2. If the complainant meets his or her burden (disability/adverse employment action), the respondent then has the burden of demonstrating that it did not "refuse to reasonably accommodate an employee's or prospective employee's disability or that the accommodation would pose a hardship on the employer's program, enterprise or business." (§ 111.34(1)(b), Wis. Stats.)

3. **Waiver and Release of Wisconsin Discrimination Claims**

   The Wisconsin Labor and Industry Review Commission issued a decision, Xu v. Epic Systems, Inc.,[1] which held that:

   a. Any employee cannot waive the right to file a discrimination complaint against her or his employer under the WFEA; and

[1]There was also an *Epic Systems* case decided argued in the U.S. Supreme Court regarding mandatory arbitration.

b. An employee may prosecute a WFEA claim on the merits against her or his former employer – and potentially receive a judgment against the former employer before the Wisconsin Equal Rights Division (ERD) – even if he or she had waived and released any and all such claims against his or her employer in a valid severance agreement.

The LIRC based it decision on the conclusion that the ERD is an agency comparable to the Equal Employment Opportunity Commission (EEOC) and that the "language used in the severance agreement .. . was intended to preserve the complainant's right to file a complaint with the ERD."

However, six months later, in Ionetz v. Menard, Inc., the LIRC reversed itself and held that the law is just the opposite. As declared in *Ionetz*, "[u]nlike the broad investigative, enforcement and prosecutorial authority granted to EEOC . . . ERD's statutory authority is limited to that of an adjudicative body charged with deciding particular disputes that are filed with it." Also, "unlike the EEOC . . . [ERD] has no independent ability to prosecute claims for violations of the WFEA."

"Consequently, where an employee has agreed to waive his or her discrimination claim against an employer, or to have it adjudicated in another forum [e.g., in arbitration], there remains no ancillary ERD authority that requires protection."

4. **Deferral to Agency Decisions**

a. DWD v. LIRC, 2018 WI 77, Wis. Sup. Ct. (6/26/18)

The employee was a registered nurse at a nursing home that had a policy allowing a probationary employee to be terminated for one instance of absenteeism if the employee failed to call in two hours prior to the shift start time. During her 90-day probationary period, the employee missed one day of work due to flu-like symptoms and failed to call in her absence ahead of time. After she was terminated, she filed for unemployment benefits.

Sec. 108.04(5)(e), Wis. Stat., states that the unemployment misconduct standard is met if an employee has more than two absences within the 120-day period preceding his/her termination unless the employer specifies a different absenteeism standard in an employment manual for which the employee has acknowledged receipt.

The DWD determined the employee's absence constituted misconduct because the employer had established a different absenteeism standard than that set forth in Sec. 108.04(5)(e). LIRC reversed, finding that the statute's "two absence" standard established a floor for misconduct; in addition, the employee missed work through no fault of her own (she had the flu). The Court of Appeals upheld LIRC's decision, stating that employers may discharge employees for violating zero tolerance attendance policies, but such discharges do not necessarily automatically qualify as misconduct for unemployment compensation purposes.

The case was appealed to the Wisconsin Supreme Court. On June 26, 2018, the Supreme Court held that Wis. Stat. 108.04(5)(e) allows employers to adopt their own written absenteeism policies which differs from the policy set forth in 108.04.(5)(e), and that violation of the employer's absenteeism policy does constitute misconduct that will result in disqualification from receiving unemployment compensation benefits, even if the employer's policy is more restrictive than the absenteeism policy set forth in the statute.

b. Wisconsin Bell, Inc. v. LIRC, 2018 WL 3122231, Wis. Sup.Ct. (6/26/18). A long-time customer service representative for Wisconsin Bell began treatment for bipolar disorder in 1997. Prior to transferring into a different position with the company, the employee told his supervisor about his condition and was granted various accommodations for stress-induced anxiety, including taking temporary breaks from answering calls, talking to his supervisor in a conference room, calling his therapist or leaving work altogether. When the employee moved into his current position, he did not inform his new supervisor because he thought the information had been passed along by management. In 2010 the employee was suspended. When the supervisor was later advised about the employee's status, the suspension was kept in place because the conduct triggering it (the employee had intentionally disconnected eight calls without explanation) would not have been accommodated in any case. Thereafter, the employee returned to work under a "back to work" agreement.

Ten days prior to the agreement's expiration, the employee activated a "health code" which allowed him to temporarily defer incoming customer calls. About 35 minutes later he left work due to illness. After a subsequent investigation, the company concluded the employee had not left work because of his medical condition, since he had been chatting socially with co-workers during the interim

between activating the code and leaving work. As the employer determined that the employee had not really been ill or experiencing anxiety at the time, it terminated his employment.

The ALJ held that the employee's conduct was caused by his condition and, therefore, the company had violated the Wisconsin Fair Employment Act (WFEA) in both his suspension and his termination. LIRC reversed the ALJ's decision regarding the suspension, ruling that the employee's supervisor at the time did not know about his disability. As for the termination, however, LIRC employed the "inference theory of causation" in ruling that the company had violated the WFEA, since the employee was terminated due to his conduct, and the conduct was, in turn, caused by his bipolar condition.

The company appealed, arguing that a reasonable interpretation of the WFEA does not allow application of the inference method of establishing causation. The inference method allows causation to be inferred based on the premise that an employee who is discharged because of unsatisfactory behavior which is a direct result of a disability is, in effect, discharged because of that disability. The Court of Appeals upheld LIRC's decision, finding that the employee had established an evidentiary link between his conduct and his condition, and the company's refusal to believe him was insufficient to contradict this evidence. In determining that the employee's conduct was *caused by* his illness and his termination was therefore *because of* his illness, LIRC made a reasonable inference based on the evidence and the language of the WFEA as applied to the facts of the case. In upholding the finding of discrimination, the Court of Appeals held that LIRC's interpretation of the WFEA was reasonable and was to be afforded great weight deference.

On June 26, 2018, the Supreme Court of Wisconsin concluded that LIRC's version of the"inference method" is inconsistent with Wis. Stat. § 11.322(1) because it excuses the employee from his burden of proving that the employer had discriminatory intent at or before termination and that the record lacks any substantial evidence that Wisconsin Bell terminated Mr. Carlson's employment because of his disability.

c. Tetra Tech EC, Inc. v. DOR (2018 WI 75, 6/26/18). The Court ended the practice of deferring to administrative agencies' conclusions of law while giving "due weight" to the experience, technical competence, and specialized knowledge of an administrative agency.

III. WORKER'S COMPENSATION

A. WORKER’S COMPENSATION LEAVES OF ABSENCE: GENERALLY

1. Worker's compensation has no limitations on leaves of absence.

2. A work injury or illness triggers a worker’s compensation leave of absence.

   a. Not all work injuries result in "lost time" (i.e., when the employee is taken off-work).

   b. Employee needs a physician's note taking the employee off-work.

   c. Leave can last for as long as the employee is convalescing from the work injury; there are no definite time periods or constraints on worker’s compensation leaves.

3. Worker’s compensation leaves are dictated by a physician recommending either return-to-work or remaining off-work.

   a. Following medical appointments for the work-related injury, the employee provides physician's off-work notes to the employer to maintain status on a worker’s compensation leave.

   b. It is the Employee's obligation to furnish those return-to-work/ off-work notes.

   c. Competing Medical Opinions: Contested worker’s compensation claims often involve differing medical opinions.

      (1) In contested claims, a physician for the employer/worker’s compensation carrier can provide return to work recommendations for the employee.

      (2) This does not require the employee to return to work; the employee can rely on his/her physician to remain off-work if that physician recommends as much.

4. Your worker’s compensation insurer is going to play an active role in when you to return the employee to work, even if part-time, even if employee is physically restricted.

B. WORKER'S COMPENSATION LEAVE COMPARED TO FMLA

1. The depth to which an employer can investigate an employee's medical history is much greater under worker's compensation than under the FMLA.

2. However, though an employer may have broad knowledge of an employee's medical history due to a workers' compensation claim, **denial of FMLA leave based on that information is a violation of federal law**.

3. An employee with a workers' compensation injury may also be entitled to FMLA leave.

    a. A health care provider may certify that the employee is eligible to return to work in a light-duty position.

    b. If the employer offers such a position and the employee does not accept the light-duty position, he may no longer qualify for worker's compensation benefits, but he is entitled to continue on FMLA leave until he can return to the same or equivalent job he had before the injury, or until the 12 weeks of FMLA leave is exhausted.

    c. Where workers' compensation has been denied, however, and the 12-week FMLA period expires, with the employee still healing from an alleged work–related injury, the employer may terminate the employee. But this can lead to additional liability for the employer.

4. There is no FMLA obligation to give an employee any right to another position with different job duties. Not true with worker's compensation.

    a. Under worker's compensation, an employee who is injured in the course of their employment must be rehired if suitable employment is available within the employee's physical and mental limitations, unless the employer has reasonable cause not to rehire.

    b. However, an employee is not entitled to unfettered job security. Business decisions often dictate whether an employee's pre-injury job can remain unfilled while the employee is on worker's compensation.

C. WORKER'S COMPENSATION LEAVES OF ABSENCE AND UNREASONABLE REFUSAL TO REHIRE

1. Worker's compensation provides an anti-discrimination policy pertaining to an "unreasonable refusal to rehire" or, essentially a termination, in connection with a work injury.

2. Wis. Stat. §102.35(3) creates a penalty for employers who terminate an employee because of a work injury, or "unreasonably refuses to rehire" the employee following a compensable work injury.

   a. Penalty is up to one year's wages.

   b. Penalty is assessed only after the employee can return to work without restrictions and is placed at end-of-healing.

3. To establish a wrongful termination or wrongful refusal to rehire, the employee must show:

   a. An employment relationship;

   b. A compensable (work-related) injury, and

   c. Subsequent denial by the employer of rehire or reinstatement of the injured employee.

   If the employee shows a, b, and c, the burden then shifts to employer to show some "good cause" not to rehire.

4. Note that an employer is under no duty to keep a job open for an injured worker, but if it has suitable employment when the employee reaches an "end of healing," that job (i.e., the suitable employment) should be provided.

   a. Good-cause termination focuses on the employer's decision at the time of the termination decision is made, and what impact the work injury had on that decision.

      (1) Employer must show some other cause unassociated with the work injury that justified its decision.

      (2) Unexcused absences *unrelated* to the work injury can provide good cause.

5. Other good-causes for refusal to rehire:

   a. Eliminating a position due to economic reasons;

   b. Maintaining (and not deviating from) a facially reasonable and uniformly applied policy such as a policy not to accommodate non-work or non-injury personal needs.

IV. INTERFERENCE/RETALIATION/WHISTLE-BLOWING – THE BEST DEFENSE IS A GOOD OFFENSE

Interference claims, which are common under the Family and Medical Leave Act and § 102.35, Wis. Stats., are rare under the discrimination laws. That changed in 2017.

A. **<u>Frakes v. Peoria Sch. Dist. No. 150</u>, 872 F.3d 545, 550 (7th Cir., 9/26/17)**

1. The Seventh Circuit laid out a test for analyzing disability-based interference claims under the ADA and Rehabilitation Act.

2. In this case, a special education teacher's employment was terminated. The teacher was part of a RIF, and she was included in the RIF because of an "unsatisfactory" rating she had received on her most recent performance rating. She claimed that her methods were better for her disabled students, and thus her termination illegally interfered with her teaching methods.

3. Frakes never mentioned to her school district's human resources department that she was motivated by concern for her disabled students' rights or otherwise complained about disability discrimination in objecting to criticisms of her job performance.

4. Therefore, Frakes couldn't show she engaged in the sort of "protected activity" needed to establish an interference claim under the Rehabilitation Act.

5. The Seventh Circuit held that, "Under the ADA anti-interference provision, it is unlawful to 'coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on the account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA].'"

6. The elements of an ADA interference claim are: (1) the employee engaged in an activity statutorily protected by the ADA; (2) the employee engaged in, aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) the employer coerced, threatened, intimidated, or interfered on account of her protected activity; and (4) the employer was motivated by an intent to discriminate.

B. **The Tenth Circuit, earlier in 2017, had held that a nonprofit college in Denver must face interference claims by the EEOC under the ADEA. Equal Employment Opportunity Comm'n v. CollegeAmerica Denver, Inc., 869 F.3d 1171, 1172 (10th Cir. 2017)**

1. A campus director of a private college had entered into a resignation agreement where she was paid a severance in exchange for a waiver of any claims, and refraining from disparaging the reputation of the college or personally contacting any governmental or regulatory agency for purposes of filing a complaint or grievance.

2. Thereafter, the employee sent online messages to former employees via LinkedIn that were critical of the college and its top executives.

3. The college believed that the employee had breached the resignation agreement, and it sued the former employee in state court for breach of the non-disparagement clause and return of the severance payment.

4. The EEOC then sued the college in federal court for retaliation and interference with the ADEA, alleging that the college's interpretation and enforcement of the settlement agreement was unlawfully interfering with the statutory rights of the former employee under the ADEA.

5. The college, in response to the EEOC's lawsuit agreed to abandon the position allegedly constituting an interference claim and made representations and assurances that it did not and would never assert a waiver of the former employee's rights via the agreement. The trial court dismissed the interference claim as moot, but the Tenth Circuit reversed.

C. **The EEOC recently settled, for $45,000, an interference case filed in federal district court in Connecticut. EEOC v. Day & Zimmerman NPS, Inc., 265 F.Supp.3d 179, U.S. Dist. Ct. D., Conn. (8/22/17)**

1. The employee filed a disability charge with the EEOC for termination of employment. He worked at the local nuclear power station, and he provided a doctor's note indicating that he could not work around radiation.

2. The EEOC commenced an investigation into the charge, and requested contact information for about 150 employees.

3. The company had in-house counsel who had often been contacted by employees during an investigation, asking questions about their role in the investigation (do they have to cooperate? Is their time compensable?)

4. In anticipation of such questions in this investigation, the attorney prepared a letter to these 150 employees informing them of the EEOC's request for their contact information, explaining the nature of the charge (including the employee's claim that he was medically prohibited from working near radiation), the potential for an EEOC investigator to contact them for information, and the availability of a company lawyer to be present during the interview.

5. The employee claimed that, by publicizing the charge, the employer retaliated as members of his union approached him and asked him about his medical condition.

6. The court ruled that a company could violate the ADA by sending a letter of this sort, because the letter could have constituted retaliation against the employee, and/or interference with an EEOC investigation by potentially coercing letter-recipients from participating in the investigation or exercising their own rights under the ADA.

D. **Compare with Seventh Circuit decision in Ferrill v. Oak Creek-Franklin Joint Sch. Dist., 860 F.3d 494 (7th Cir. 2017)**

1. A school district did not renew a principal of an elementary school, citing job performance issues (poor morale at school; staff complaints about management style as too confrontational and inconsistent; nonresponsiveness; prone toward hostility toward opposing viewpoints).

2. An independent consulting firm had been brought in to evaluate the situation and help the principal improve, and ultimately the consultant recommended that the only way to restore the school's deteriorating morale was to remove the principal.

3. The employee claimed that once she began raising issues of racism within the school the superintendent became intent on removing her for that reason.

4. She claimed retaliation under Title VI.

5. The Seventh Circuit held that the principal's efforts to raise awareness of racial issues at Edgewood focused almost entirely on behavior by the students and did not concern any employment practice by the school district. Student behavior falls outside the ambit of Title VII.

6. The Seventh Circuit went on to note that one comment made by the principal – about her belief that white faculty members were reluctant to take direction from a black principal – may have tenuously connected to an

employment practice by the district, and so the court assumed for the sake of argument that it was sufficient to qualify as opposition to a form of discrimination prohibited by Title VII.

7. Nevertheless, the court held that the principal's claim fails for lack of evidence of causation.

E. **Stein v. Atlas Enterprises, ___ F.3d ___ (6th Cir., 2018)**

1. Comments in newsletter regarding skyrocketing medical care costs.

F. **Owens v. Old Wisconsin Sausage Co., 870 F.3d 662, 7th Cir. (8/31/17)**

1. An HR manager hid her office romance with a co-worker.

2. The manager was asked about her relationship with the employee, and she adamantly denied it and then refused to answer further questions, declaring, "this is borderline sexual harassment."

3. She was terminated, and they cited the fact that she had hired her live-in boyfriend and had repeatedly denied the relationship.

4. She said she was fired in retaliation for her complaint.

5. Inquiry is not harassment.

6. Old Wisconsin had shown that it similarly questioned male managers when it believed they were in relationships like hers.

V. PRACTICE POINTERS FOR CONTROLLING ATTENDANCE PROBLEMS WITHOUT RUNNING AFOUL OF THE FMLA, ADAAA, AND WORKER'S COMPENSATION

A. Evaluate each situation on a case-by-case basis while acting as consistently as possible with past practice and in accordance with the employer's attendance policy.

B. Implement an attendance policy that balances the necessity of good attendance and disciplines offenders accordingly, but also provides the employer with the flexibility that it might need to accommodate a qualified disabled individual.

C. Require advance notice for all absences, including those covered by the ADAAA.

D. Require a doctor's excuse for absences related to medical problems and a doctor's statement that the employee can return to work.

E. When work restrictions can be accommodated, getting employees back to work in some capacity within restrictions can help facilitate a complete return to work.

F. Avoid having employees on temporary work duty for extended periods of time to prevent the creation of a permanent position under the ADAAA.

G. Maintain accurate records of all absences, including a separate and confidential file for any medical certifications or medical information relating to an employee's absence.

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