

ATTACHMENT #3

COMPARISON OF FEDERAL FAMILY & MEDICAL LEAVE ACT
AND WISCONSIN FAMILY & MEDICAL LEAVE ACT

PROVISION	FEDERAL LAW (FMLA)	WISCONSIN LAW (WFMLA)	MOST FAVORABLE TO EMPLOYEES
Employer Applicability	Employers with 50 or more employees for each working day in 20 or more (nonconsecutive) workweeks of the preceding or current calendar year. Public agencies and private elementary and secondary schools are covered employers without regard to the number of employees employed.	Public and private employers (in Wisconsin) who employ 50 or more “permanent” employees during at least six of the preceding 12 months. Any business entity employing at least 50 workers overall, but as few as one in Wisconsin, is covered.	Varies with circumstances; WFMLA counts partial months as full months, which may or may not exceed 20 weeks.
Employee Eligibility	A person employed by the employer for at least 12 months (need not be consecutive) and employed at least 1,250 hours during the previous 12 months (determination made as of date leave begins). Excludes employees employed at a worksite with fewer than 50 employees, if the employer employs fewer than 50 workers total within 75 miles of that worksite.	A person employed by an employer at least 52 consecutive weeks and who worked at least 1,000 hours during the preceding 52 weeks. No 75-mile requirement	<ul style="list-style-type: none"> • WFMLA for purposes of fewer total hours worked necessary for eligibility. • Federal law does not require 12 months employment to be consecutive, Wisconsin requires 52 consecutive weeks.
Reasons for Leave	Birth of a child or the placement of a child for adoption or foster care, to care for a child, spouse or parent (<i>not</i> “in-law”) experiencing a serious health condition, or because the employee’s own serious health condition renders employee unable to perform job duties.	Same as FMLA <i>except</i> : <ul style="list-style-type: none"> • WMLA does not include leave in connection with placement of a child for foster care. • WFMLA provides for leave for a “parent-in-law.” • WFMLA provides leave for the serious health condition of a domestic partner or parent of a domestic partner. 	WFMLA, for “in-law” and domestic partner provisions; FMLA for foster care placement provision.
Military Family Leave	<ul style="list-style-type: none"> • For any “qualifying exigency” when the employee’s spouse, son, daughter, or parent is deployed to a foreign country as a member of the regular or reserve armed forces or called to such foreign deployment. • To care for a servicemember (may be currently in the military or a veteran within last 5 years) with a duty-related serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. 	WFMLA has no military-specific family leave provisions, though caring for a servicemember may qualify as WFMLA family leave.	FMLA

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Length of Leave	<ul style="list-style-type: none"> • Twelve weeks in a 12-month period for the birth or placement of a child for adoption or foster care, to care for a spouse, child or parent (but not parent-in-law) with a serious health condition, or for an employee's own serious health condition • Where leave is to care for a servicemember, a total of 26 weeks may be taken in a single 12-month period that begins on the first day of leave to care for the servicemember. An employee remains limited to 12 weeks total leave for any other reason(s) within any 12-month period. • Spouses employed by the same employer are limited to a combined total of 12 weeks of leave for the birth or placement of a child, or for the care of a sick parent, in a 12-month period. The spousal limit is 26 weeks total in a single 12-month period when military caregiver leave is involved. (Note: It's OSER's position that the spousal limits are deemed to be a violation of WI Fair Employment law and therefore will <i>not</i> be applied to state employees.) 	<ul style="list-style-type: none"> • Within a calendar year, six weeks of family leave for the birth or placement for adoption of a child (which must begin within 16 weeks before or after the event), two weeks to care for a seriously ill child, spouse, domestic partner, parent, parent-in-law, or domestic partner's parent, and two weeks for an employee's own serious health condition • WFMLA has no such military caregiver provision, though servicemembers may qualify as family members under the WFMLA. • No spousal limits under the WFMLA 	<ul style="list-style-type: none"> • FMLA for length of leave, WFMLA for covering domestic partners and parents-in-law • FMLA • No difference for state agencies, because the FMLA spousal leave limits are not applied to state employees
Determination of "12-month" Period for Other than Military Caregiver Leave	<p>An employer is entitled to choose any one of the following methods for determining the 12-month period:</p> <ol style="list-style-type: none"> (1) the calendar year; (2) any fixed 12-month "leave year," such as the fiscal year, a year required by state law, or a year starting on employee's anniversary date; (3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or (4) a "rolling" 12-month period measured backward from the date any employee uses any FMLA leave. 	<p>An employer is required to use the calendar year.</p>	<p>No difference for state agencies, as state agencies are required to use the calendar year as the 12-month period under FMLA</p> <p>Note. UW faculty and academic staff are not covered under this handbook chapter and may be subject to a different FMLA year.</p>

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Determination of “single 12-month period” for military caregiver leave	Begins on the first day the employee takes FMLA leave to care for a servicemember and ends 12 months after that date	No similar WFMLA provision	FMLA
Definition of “Parent”	Biological parent <i>or</i> individual who stood <i>in loco parentis</i> to an employee when that employee was a child. Specifically <i>excludes</i> parents “in-law.”	Natural parent, foster parent, adoptive parent, stepparent or legal guardian of employee, employee’s spouse, <i>or</i> employee’s domestic partner	Varies. WFMLA includes “in-laws” and parents of domestic partners. FMLA includes individuals who stood <i>in loco parentis</i> to employee as a child.
Definition of “Child”	Biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing <i>in loco parentis</i> , who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability	Natural, adopted or foster child, a stepchild or a legal ward who is under age 18, or age 18 or older but cannot care for self because of a serious health condition. (Does not include child of a domestic partner.)	FMLA
Definition of “Spouse”	Spouse means a husband or wife as defined or recognized under state law for purposes of marriage, including common law marriage in states where it is recognized.	An employee’s legal husband or wife (domestic partners are not spouses and are covered separately)	Comparable
Serious Health Condition	Illness, injury, impairment or physical or mental condition involving inpatient care in hospital, hospice or residential medical facility; or continuing treatment or supervision by a health care provider. Where continuing outpatient treatment is involved, “serious health condition” involves any period of incapacity requiring more than three days absence from work, or a chronic or long-term health condition that is incurable or serious.	Disabling physical or mental illness, injury, impairment or condition involving inpatient care in hospital, nursing home or hospice; or outpatient care that requires treatment or supervision by a health care provider	Comparable

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Health Care Provider	Doctors of medicine or osteopathy licensed to practice in the state; podiatrists, dentists, clinical psychologists, optometrists, chiropractors (for manual manipulation of spine to correct subluxation demonstrated by X-ray), nurse practitioners, nurse-midwives, physician assistants and clinical social workers, if authorized to practice under state law; or Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; any health care provider from whom a certification of the existence of a serious health condition would be accepted; any health care provider listed above who is authorized to practice in a country outside of the U.S.	Licensed physician, nurse, chiropractor, dentist, podiatrist, physical therapist, optometrist, pharmacist, psychologist; athletic trainer, certified occupational therapist, occupational therapy assistant, physician assistant, perfusionist, respiratory care practitioner, dietitian, acupuncturist, social worker, marriage and family therapist, professional counselor, speech-language pathologist or audiologist; a partnership of any of the above-listed providers, hospices, inpatient health care facility, community-based residential facility, rural medical center, and Christian Science practitioner.	Varies, as FMLA and WFMLA each include several different types of health care providers
Intermittent and Reduced Leave Schedule	<ul style="list-style-type: none"> • An employer may approve an employee's taking intermittent or reduced leave in connection with the birth of a child or placement of child for adoption or foster care. An employee must be allowed to take intermittent or reduced leave in connection with a "qualifying exigency," and when medically necessary to care for an injured or ill servicemember, for the employee's own serious health condition, or that of the employee's child, spouse or parent. • An employer may require the employee to transfer temporarily to an alternative position that better accommodates recurring periods of leave. 	<ul style="list-style-type: none"> • An employee must be allowed to take partial absence leave for any statutory purpose, in increments equal to the shortest increment permitted by the employer for any other non-emergency leave, as long as such leave does not unduly disrupt the employer's operations. • WFMLA has no such provision; however, such an accommodation would be possible with the employee's approval. 	<ul style="list-style-type: none"> • WFMLA for right to take partial absence leave; FMLA for providing leave to care for injured service members or for a "qualifying exigency" resulting from military active duty. • WFMLA
Timing of Family Leave Associated with Birth, Adoption, or Foster Care	An employee may begin family leave before the birth or placement, and the leave must conclude within one year after the birth or placement.	Leave must begin within 16 weeks before or after birth or placement.	FMLA

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Employee Notice to Employer	At least 30 days' notice if the need for leave is foreseeable. If leave is not foreseeable, the employee shall provide notice as soon as practicable under the facts and circumstances.	For family leave or planned medical leave, employee must give advance notice in a reasonable and practicable manner. When employee requests partial absence leave in connection with childbirth or adoption, the employee must provide at least as much notice as the shortest notice the employer requires for any other non-emergency or non-medical leave. For medical leave or leave associated with the care of an ill family member or domestic partner or domestic partner's parent, employee must notify employer with "reasonable promptness" after employee learns of necessity for leave.	WFMLA
Certification of Illness	<ul style="list-style-type: none"> • - Date serious illness commenced - Probable duration - Appropriate medical facts regarding condition • Own Illness: Employee unable to perform functions of job • To Care for Seriously Ill Child, Spouse, Parent, or Servicemember: <ul style="list-style-type: none"> - Certification that employee is needed to care for ill family member - Estimated time for such care • Intermittent or Reduced Leave Schedule: <ul style="list-style-type: none"> - Dates and duration of treatment - Statement that such leave is medically necessary • Recertification: May be required as frequently as every 30 days in certain circumstances. Recertification may not be requested for leave to care for a covered servicemember. • Periodic reports may be required by the employer concerning employee's status and intention to return to work. • Ability to return to work: Employer can require certification of employee's ability to resume work. 	<ul style="list-style-type: none"> • Same as FMLA • Own Illness: Same as FMLA • To Care for Seriously Ill Child, Spouse, Parent, Domestic Partner, Domestic Partner's Parent: <ul style="list-style-type: none"> - Date illness commenced - Probable duration - Appropriate medical facts regarding condition • Partial Absence Leave: For medical leave, an explanation of the extent to which the employee is unable to perform his or her duties • Recertification: WFMLA has no such provision • WFMLA has no such provision • WFMLA has no such provision 	<ul style="list-style-type: none"> • Comparable • Comparable • Comparable • WFMLA • WFMLA • WFMLA • WFMLA

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Certification of "Qualifying Exigency"	<ul style="list-style-type: none"> - Copy of active duty orders - Type of exigency and documentation as reasonable - Date(s) 	WFMLA has no military family leave provisions	<ul style="list-style-type: none"> • FMLA
Second and Third Medical Opinions	<ul style="list-style-type: none"> • Second medical opinion allowed, chosen and paid for by employer. The second health care provider cannot be employed by the employer on a regular basis. Employer may not request 2nd opinion for leave to care for a servicemember. • If two opinions conflict, the employer can require third opinion, at employer's expense. Employer and employee must agree on third health care provider, whose opinion is considered binding. 	<ul style="list-style-type: none"> • Second medical opinion allowed, chosen and paid for by employer. • If first two health care providers disagree, the DWD may appoint a 3rd health care provider at the shared expense of the agency & employee. 	<ul style="list-style-type: none"> • Comparable • FMLA
Executive, Administrative and Professional Employees	Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 19 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.	Unpaid leave would not result in loss of exempt status under State minimum wage and overtime law (per DILHR verbal interpretation).	Comparable
Substitution of Paid Leave	Employee may elect accrued paid leave to be substituted in some cases. Substitution of paid vacation or personal leave may be subject to established workplace policies and procedures for use of such leave. Employees may <i>not</i> substitute paid sick leave for any situation not covered by employer's sick leave plan.	Employee may elect to substitute accrued paid or unpaid leave of any type provided by employer. Employers may not force substitution.	WFMLA

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Maintenance of Employee Benefits	<ul style="list-style-type: none"> • <u>Group Health Insurance</u>: Must maintain at the same level and under same conditions that applied immediately prior to leave • <u>Seniority</u>: <ul style="list-style-type: none"> - Not entitled to accrue seniority while on leave - Cannot lose benefits accrued before leave commenced - Not entitled to any right, benefit or position to which employee would not have been entitled had s/he not taken leave • <u>Retirement System</u>: <ul style="list-style-type: none"> - Entitled to accrue continuous service for purposes of vesting and eligibility to participate in retirement plan - Not entitled to accrue creditable service while on leave 	<ul style="list-style-type: none"> • <u>Group Health Insurance</u>: Same, except employer may require employee to escrow amount equal to premium for 8 weeks of employee's group health coverage • <u>Seniority</u>: <ul style="list-style-type: none"> Same as FMLA Same as FMLA Same as FMLA • <u>Retirement System</u>: <ul style="list-style-type: none"> WFMLA contains no provisions related to the retirement system 	<ul style="list-style-type: none"> • FMLA • Comparable • FMLA
Restoration to Same or Equivalent Position and Key Employee Exception	<ul style="list-style-type: none"> • Restoration to the same position, or an equivalent position with equivalent benefits, pay and other terms and conditions of employment • Employer can deny restoration to salaried employees if among highest paid 10% and if restoration would lead to grievous economic harm to employer 	<ul style="list-style-type: none"> • Essentially same as FMLA • WFMLA has no such provision 	<ul style="list-style-type: none"> • Comparable • WFMLA (Probably never applicable for state employees due to unlikelihood of "grievous economic harm.")

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Prohibited Acts	<ul style="list-style-type: none"> • An employer is prohibited from interfering with, denying or restraining any employee from exercising any statutory right. An employer is prohibited from discharging or otherwise discriminating against an employee for opposing a practice made unlawful under the statute, or for participating in any inquiry or proceeding relating to rights established under the statute. • An employee cannot prospectively waive rights under the FMLA. 	<ul style="list-style-type: none"> • Same as FMLA • WFMLA has no such provision, however, s. 111.91(2)(f), Wis. Stats., states that the employer is prohibited from bargaining family and medical leave rights below the minimum afforded under WFMLA. 	<ul style="list-style-type: none"> • Comparable • FMLA
Enforcement	<ul style="list-style-type: none"> • Employee can bring a civil action in state or federal court or file a claim with the Secretary of Labor • <u>Statute of Limitations:</u> Two years after alleged violation, and up to three years if violation is “willful” 	<ul style="list-style-type: none"> • State employees must file a complaint with the Equal Rights Division of DWD • <u>Statute of Limitations:</u> Within 30 days after alleged violation 	<ul style="list-style-type: none"> • FMLA • FMLA

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Remedies	<ul style="list-style-type: none"> • Lost wages, benefits or other compensation, or recovery of monetary losses due to denial of FMLA leave, and interest calculated at the prevailing rate. An employee may also seek equitable relief including employment, reinstatement or promotion. Employer required to pay prevailing employee's reasonable attorney's fees, reasonable expert fees, and other costs. • Employer may be liable for liquidated damages if violation is found to be "willful" 	<ul style="list-style-type: none"> • Reinstatement, back pay accrued not more than two years before complaint filed, reasonable actual attorney's fees and interest at 12% • WFMLA does not provide liquidated damages 	<ul style="list-style-type: none"> • FMLA • FMLA
Investigative Authority and Recordkeeping Requirements	<ul style="list-style-type: none"> • <u>Investigative</u>: Secretary of Labor is given investigative authority • <u>Recordkeeping</u>: Employer must keep specified records for at least three years. The Dept of Labor may request review of these records. 	<ul style="list-style-type: none"> • The Equal Rights Division of DWD can investigate only after employee files a complaint. • No such requirement under WFMLA 	N/A
Posting Requirements	<ul style="list-style-type: none"> • Post notices containing information about law and how to file complaint • \$110 fine for each offense • Must include information about FMLA in employee handbook or other written materials if employer supplies these, or else provide information to employees upon hiring • When employee requests leave, employer must provide employee written notice of employee's eligibility, rights and obligations, and the consequences of failing to meet these obligations 	<ul style="list-style-type: none"> • Same as FMLA. • \$100 fine for each offense • WFMLA has no such provision • WFMLA has no such requirement 	N/A