

The University of Wisconsin System

UPS OPERATIONAL POLICY: BN 4



SUBJECT: Wisconsin and Federal Family and Medical Leave Acts

Original Issuance Date: July 1, 2015

Last Revision Date:

1. POLICY PURPOSE:

This policy outlines the provisions of the federal and Wisconsin Family and Medical Leave Acts and the rights and obligations of employees and the employer under both laws.

The information provided in this policy should not serve as the sole family and medical leave resource. As laws may change, always verify information with the corresponding regulations, statutes, etc., to confirm it is still current prior to making Family and Medical Leave Act decisions.

2. POLICY BACKGROUND:

The federal Family and Medical Leave Act became effective for most employers on August 5, 1993. The Wisconsin Family and Medical Leave Act became effective on April 26, 1988.

The Wisconsin Family and Medical Leave (WFMLA) Act provisions are set forth in [Wis. Stat. § 103.10](#) and [Wis. Admin. Code § DWD 225](#).

The federal Family and Medical Leave (FMLA) Act provisions are set forth in [29 U.S.C. 2601, et seq.](#) and [29 CFR Part 825](#).

3. POLICY DEFINITIONS:

Please see UPS Operational Policy [GEN 0: General Terms and Definitions](#) for a list of general terms and definitions.

Definitions specific to this policy:

“Child” includes all individuals encompassed by both the WFMLA definition outlined in [Wis. Stat §103.10\(1\)\(a\)](#) and the federal FMLA definition outlined in [29 C.F.R. § 825.122](#), (See “Son or daughter”). See the [U.S. Dept. of Labor administrator’s interpretation \(No. 2013-1\)](#) about FMLA leave to care for an adult child (age 18 or older).

Under this policy, any employee who stands *in loco parentis*, as defined by [29 C.F.R. § 825.122](#) and [U.S. Department of Labor Wage and Hour Division Fact Sheet #28C](#), to a child will be granted the same rights under both FMLA and WFMLA as a biological, adoptive or step-parent.

“Federal Family and Medical Leave (FMLA)” means all of the provisions set forth in the Family and Medical Leave Act under [29 U.S.C. 2601, et seq.](#) and [29 C.F.R. Part 825](#).

“Paid leave” means sick leave, vacation, vacation carryover, personal holiday, legal holiday, compensatory time, and leave in a paid leave bank.

“Serious health condition” is defined in [Wis. Stat. § 103.10\(1\)\(g\)](#) for the purposes of the WFMLA and defined in 29 §§ [C.F.R. 825.113-.115](#), [825.119](#), and [825.113](#) for the purposes of the FMLA.

“Wisconsin Family and Medical Leave (WFMLA)” means all of the provisions set forth in the Wisconsin Family Leave act under [Wis. Stat. § 103.10](#) and [Wis. Admin. Code § DWD 225](#).

4. POLICY:

The Wisconsin and federal Family and Medical Leave Acts (W/FMLA) grant eligible employees the right to job-protected leave due to the serious illness of an employee or employee’s family member and the birth, adoption or placement of a child. The FMLA also provides for a job-protected leave due to a qualifying exigency that results when a family member is a current servicemember or covered veteran who is seriously ill or injured and requires care.

University of Wisconsin System institutions must comply with all applicable state and federal laws relating to family and medical leave, and must not discriminate against or interfere with the right of an employee to take such leave. Application of these laws must be coordinated with other UW System leave benefits. The Americans with Disability Act (ADA) and Wisconsin Fair Employment law may also apply in a particular situation.

Employees who use leave benefits provided under the W/FMLA will simultaneously use leave benefits provided under UW System leave policies. *All qualifying leave runs concurrently* and may be taken in one continuous increment, intermittently or on a reduced work schedule for certain situations. It is the responsibility of the UW System institution to designate qualifying leave as W/FMLA leave. The institution may NOT, upon request of an employee, refrain from designating a qualifying leave as W/FMLA leave.

If an employee meets the eligibility requirements for both the WFMLA and the FMLA, the employer must comply with both laws simultaneously. The provision of the WFMLA, FMLA, or University of Wisconsin leave policy that provides the most generous benefit to the employee must be applied. If an employee is eligible under only one law, then the employer needs only to comply with that one law.

A. Employer Coverage

Each UW System institution is an employer within the meaning of both the Wisconsin and Federal Family and Medical Leave Acts.

B. Employee Eligibility

When an institution determines whether or not an employee has worked both the requisite number of hours and time to be eligible for WFMLA or FMLA, all institutions within UW System as well as all State of Wisconsin agencies are considered one employer. All hours and time worked for any institutions or state agencies must be combined to establish eligibility.

Eligibility for WFMLA and FMLA is determined as of the first day of requested leave.

(1) **Wisconsin FMLA:** in accordance with [Wis. Stat. § 103.10\(2\)\(c\)](#), an employee is eligible for WFMLA leave if the employee:

- Has been employed by any UW institution or State of Wisconsin agency for more than 52 consecutive weeks; *and*
- Has worked for any UW System institution or State of Wisconsin agency for at least 1,000 hours (*paid leave used counts towards the 1,000 hours worked*) during the preceding 52-week period.

The employee is still considered “employed” even if an employee is on an approved leave of absence, military leave, worker’s compensation, temporary disability, temporary layoff, or permanent layoff if the employee is reinstated.

(2) **Federal FMLA:** In accordance with [29 C.F.R. §825.110](#), an employee is eligible for FMLA leave if the employee:

- Has been employed by any UW System institution or State of Wisconsin agency for at least 12 months (the 12 months do not need to be consecutive and the summer months count for academic year employees); *and*
- Has worked for any UW System institution or State of Wisconsin agency at least 1,250 hours (*paid leave used does not count towards the 1,250 hours worked*) during the 12 months immediately preceding the beginning of the requested leave.
 - Full-time academic year employees are assumed to meet the 1,250-hour standard unless proven otherwise.
 - If an employee is on a military leave of absence from the UW covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), that period of time will count towards both the time worked for an employer and the number of hours worked requirements.

C. Reasons for Leave and Duration of Covered Leaves

(1) **Wisconsin FMLA:** Eligible employees are entitled to use WFMLA-covered leave during each calendar year for the reasons and durations provided in [Wis. Stat. §§ 103.10\(3\) and \(4\)](#). For more information see the State of Wisconsin Department of Workforce Development Equal Rights Division (ERD) [Comparison of Federal and Wisconsin Family and Medical](#)

[Leave Laws](#) and [publication ERD-7983-P](#), a poster that must be displayed by all UW System institutions.

- (2) **Federal FMLA:** Eligible employees are entitled to use up to a total of 12 weeks of unpaid FMLA-covered leave during each calendar year for the reasons provided in 29 U.S.C. § 2612, [29 C.F.R. § 825.112\(a\)](#), and [29 C.F.R. §§ 825.200](#). For more information on the reasons for covered leave, see Department of Labor's Wage and Hour Division [Fact Sheet 28F](#).
- (3) **Note regarding leave for birth and adoption:** No more than six weeks of WFMLA leave and no more than twelve weeks of FMLA leave may be used by an employee for the birth or adoption of any one child, even if eligibility for leave extends into another calendar year. Birth or adoption of more than one child at the same time is considered a single event. When this occurs, an employee does not receive an additional twelve weeks of leave for each additional child. WFMLA does not include leave in connection with the placement of child for foster care.

D. Intermittent/Partial Leave

- (1) An employee may take family or medical leave in non-continuous increments (i.e., partial absence from employment). A partial absence must be in increments equal to the shortest increment permitted by the institution for any other non-emergency leave, as long as such leave does not unduly disrupt the employer's operations.

When an employee takes intermittent leave or a reduced leave schedule, the institution must account for the leave 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 that it is not greater than one hour. The institution may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer

Intermittent leave for all UW System employees will be tracked in 15-minute increments.

- (2) Leave without pay for any number of hours taken as intermittent leave for documented FMLA-qualifying purposes **will not** affect an eligible employee's FLSA exempt status.
- (3) Only the amount of leave actually taken (with or without pay) may be counted toward annual WFMLA or FMLA allocation. For example, if an employee who normally works five eight-hour days per week takes one day off, the employee would use eight hours of W/FMLA entitlement.
- (4) For less than full-time employees, the amount of leave to which they are entitled is determined on a proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week now works 20 hours per week under a reduced work schedule, the employee would use ten hours of FMLA leave per week. The normal workweek of an employee whose schedule varies shall be based on a weekly average of the hours scheduled, including any leave hours, over the 12 months prior to the beginning of the leave period.

- (5) 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 that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

E. Use and Substitution of Paid Leave

All qualifying leave, with or without pay, must be designated by the institution as leave under W/FMLA and it will count against the employee's W/FMLA entitlement. Employees are entitled to use any available paid leave during a qualifying W/FMLA leave. However, UW institutions must designate all qualifying paid leave as W/FMLA leave. Employees may also choose to use unpaid leave if they are taking W/FMLA leave, rather than use their paid leave.

During leave that qualifies only as WFMLA leave or that qualifies as concurrent WFMLA and FMLA leave, employees may substitute any and all available paid leave, including sick leave, regardless of UW System and institutional policies about that paid leave. However, if a paid leave does not qualify as WFMLA leave, the employee must comply with all UW System and UW institution policies regarding that paid leave. If an employee is entitled to take FMLA leave but not WFMLA leave and the employee has no qualifying paid leave available, the employee may only take unpaid leave.

F. Continuation of Employee Benefits

All employee benefits may be maintained during an unpaid or paid WFMLA and/or FMLA-covered leave. The employee must continue to pay any employee-required premium in a timely manner to maintain benefits.

State Group Health Insurance coverage must be maintained under the conditions that applied immediately before the W/FMLA leave began. The employee must continue to pay the employee contribution and is entitled to the employer contribution towards the premium for the duration of the W/FMLA-covered leave.

G. WFMLA and FMLA Administrative Process

It is the responsibility of the UW System institution to ensure that employees submit and receive the appropriate WFMLA and/or FMLA forms on a timely basis.

(1) Employee's Request for Leave

- (a) Employees must provide 30 days' advance notice of the need to take W/FMLA leave when the need is foreseeable. When 30 days' notice is not possible, the employee must provide notice as soon as practicable and must generally comply with the UW institution's usual and customary notice and procedural requirements for requesting leave. If an employee does not comply with the usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.
- (b) Employees are encouraged to use the [Employee Request for Family and/or Medical Leave \(UWS 80\)](#) form to request a W/FMLA-covered leave from the institution. An employee who requests a WFMLA leave to care for a domestic partner or a domestic

partner's parent must complete this form in order to certify the domestic partnership for WFMLA purposes.

(2) Employee Certification Forms

- (a) Any health care provider certification form must comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). See Appendix A for the information that must be included with all requests to health care providers for medical information.
- (b) An employee, or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc.) must provide sufficient information regarding the reason for an employee's leave request in order for the UW institution to determine if W/FMLA leave is appropriate.
- (c) An institution may require an employee to provide a certification and periodic recertification supporting the need for leave.

If medical certification is required, the employee must submit the medical certification to the institution designee within 15 calendar days after the leave is requested unless it is not practical under the circumstances. Approval is granted pending receipt of medical certification, if required. (Note: if the medical certification is inadequate, the employee has 7 days to provide additional clarifying medical documentation).

- (d) If a certification form is required, it is recommended that one of the following certification forms, or equivalent, be completed by the employee or employee's spokesperson.
 - [Certification of Health Care Provider for Employee's Serious Health Condition \(DOL WH-380-E\)](#)

Note regarding employees who take a WFMLA leave only - If an employee is taking a WFMLA only leave (employee does not qualify for federal FMLA), the employee should use the WFMLA compliant form, [UWS 82a](#), to certify his or her own serious health condition.
 - [Certification of Health Care Provider for Family Member's Serious Health Condition \(DOL WH-380-F\)](#)

Note regarding employees who take a WFMLA leave only - If an employee is taking a WFMLA only leave (employee does not qualify for federal FMLA and/or the employee is taking a leave to care for a domestic partner or a domestic partner's parent), the employee should use the WFMLA compliant form, [UWS 83a](#), to certify a family member's serious health condition.
 - [Certification of Qualifying Exigency for Military Family Leave \(DOL WH-384\)](#)
 - [Certification for Serious Injury or Illness of Current Servicemember - for Military Family Leave \(DOL WH-385\)](#) - an employee must complete this form if the employee wants FMLA-protected leave to care for a current military servicemember

who is a family member or next of kin and who is seriously ill or injured due to military service.

- [Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave \(DOL WH-385-V\)](#) - an employee must complete this form if the employee wants FMLA-protected leave to care for a military veteran who is a family member or next of kin and who is seriously ill or injured due to military service.

(3) UW Institution Responsibilities

(a) Rights & Responsibilities Notice

The UW institution must provide the Notice of Eligibility and Rights & Responsibilities ([UWS 81](#)) form, or equivalent, to an employee within five business days (when feasible) of an employee's request for leave that may be covered under WFMLA and/or FMLA. If employee request was not submitted prior to the leave being taken, the form must be provided within five days of the date the WFMLA and/or FMLA-qualifying leave was first taken (See Retroactive Designation below).

(b) Designation Notice

The UW institution must provide a [Designation Notice \(UWS 86\)](#), or equivalent, to the employee who has requested a W/FMLA-protected leave to let the employee know if the leave is approved and/or if the employee needs to submit any additional information before the leave can be approved.

If the UW institution requires the employee to present a fitness-for-duty certification to be restored to employment, the institution must provide notice of such requirement with the designation notice. The UW institution must include a list of the essential functions of the employee's position and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.

If the information provided by the institution to the employee in the designation notice changes (e.g., the employee exhausts the W/FMLA leave entitlement), the agency shall provide written notice of the change **within five business days** of receipt of the employee's first notice of need for leave subsequent to any change.

The institution must notify the employee of the amount of leave counted against the employee's W/FMLA leave entitlement. If it is not possible in advance to determine the amount of leave, then the agency must provide notice of the amount of leave counted against the employee's W/FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period in which leave was taken. The notice of the amount of W/FMLA leave taken may be oral or in writing. If oral, it shall be confirmed in writing, no later than the next payday which occurs at least one week later. Written notice may be in any form.

If leave would qualify as both leave to care for a current servicemember or veteran during a single 12-month period and leave to care for a family member with a serious health condition, the leave shall be designated and counted as leave to care for a

current servicemember, and not as leave to care for a family member with a serious health condition.

Retroactive designation: If the institution does not designate leave in a timely manner, the institution must retroactively designate leave as W/FMLA leave with appropriate notice to the employee UNLESS the employer's failure to timely designate leave causes harm or injury to the employee. In all cases, an employer and an employee may mutually agree that leave be retroactively designated as W/FMLA leave.

H. Conclusion of Leave

Leave available during the calendar year must be used within that calendar year. Leave available during a single 12-month period to care for a current servicemember or veteran must be used within that single 12-month period. If not used, the employee's entitlement to the leave expires at the end of the 12-month period in which the leave was earned. An employee's entitlement to leave for birth or adoption expires 12 months after the date of birth or placement for adoption.

If an employee was hired for a specific term or only to perform work on a discrete project, the institution has no obligation to restore the employee if the employment term or project is over and the agency would not otherwise have continued to employ the employee.

I. FMLA and Worker's Compensation

When a serious health condition results from injury to an employee while on the job, the employee's FMLA entitlement will run concurrently with any worker's compensation benefits. If the health care provider treating the employee for the worker's compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the offer of a light duty job. As a result, the employee may lose worker's compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted.

Any period that an employee is absent from work while on worker's compensation leave should not be counted as time used under the WFMLA.

J. Employee Right to Reinstatement

On return from W/FMLA leave, an employee is generally entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. An employee, however, has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

K. WFMLA and FMLA Required Posted Notices

(1) WFMLA

In accordance with [Wis. Stat. § 103.10\(14\)](#), each UW institution must post in one or more conspicuous places where notices to employees are customarily posted a notice in the [form approved by DWD](#) setting forth state employees' rights under the WFMLA.

(2) FMLA

In accordance with [29 C.F.R. § 825.300](#), each UW institution must post in one or more conspicuous places where notices to employees are customarily posted a notice setting forth employees' rights under the FMLA. This notice should be posted in both [English](#) and [Spanish](#).

L. Recordkeeping

UW institutions must keep records for at least three years of all leave taken under WFMLA and FMLA. Records that must be maintained include:

- Basic payroll and identifying employee data, including name, address, and occupation; rate of pay and terms of compensation (i.e., salary vs. hourly); daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
- Dates FMLA leave is taken by employees. Leave must be designated in records as FMLA leave
- The hours of the leave, if FMLA leave is taken in increments of less than one full day.
- Copies of employee notices of leave furnished to the agency under FMLA and copies of all notices given to employees as required under FMLA. These copies may be maintained in the employee's personnel file.
- Any documents (including written and electronic records) describing employee benefits or agency policies and practices regarding the taking of paid and unpaid leave.
- Premium payments of employee benefits.
- Records of any dispute between the agency and an employee regarding designation of leave as FMLA leave, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.
- Records and documents relating to medical certification, recertification's, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA confidentiality requirements, except that:
 - Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.

- First aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment.
- Government officials investigating compliance with FMLA shall be provided relevant information upon request.

5. RELATED DOCUMENTS

Employee Forms

[Employee Request for Family and/or Medical Leave \(UWS 80\)](#)

[Certification of Health Care Provider for Employee's Serious Health Condition \(DOL WH-380-E\)](#)

[Certification by a Health Care Provider for Employee's Serious Health Condition - WFMLA only \(UWS 82a\)](#)

[Certification of Health Care Provider for Family Member's Serious Health Condition \(DOL WH-380-E\)](#)

[Certification by Health Care Provider for Family Member's Serious Health Condition – WFMLA only \(UWS 83a\)](#)

[Certification of Qualifying Exigency for Military Family Leave \(DOL WH-384\)](#)

[Certification for Serious Injury or Illness of Current Servicemember - for Military Family Leave \(DOL WH-385\)](#)

[Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave \(DOL WH-385-V\)](#)

Employer Forms

[Notice of Eligibility and Rights & Responsibilities \(UWS 81\)](#)

[Designation Notice \(UWS 86\)](#)

UW System Documents

[UPS Operational Policy BN 1: Vacation, Paid Leave Banks, and Vacation Cash Payouts](#)

[UPS Operational Policy BN 2: Personal Holiday & Legal Holiday Administration](#)

[UPS Operational Policy BN 3: Sick Leave](#)

[UPS Operational Policy BN 5: Catastrophic Leave Program](#)

[UPS Operational Policy BN 6: Bone Marrow & Human Organ Donation](#)

State WFMLA and Federal FMLA Information

[Comparison of Federal and Wisconsin Family and Medical Leave Laws](#)

[Department of Labor – Family and Medical Leave](#)

[Wisconsin HR Handbook Chapter 724 – Family and Medical Leave](#)

6. POLICY HISTORY:

Reviewed by the Board of Regents, April 10, 2015

Notice to FMLA Administrators at UW Institutions

The Genetic Information Nondiscrimination Act (GINA) notice shown below should be included with all requests to health care providers for medical information. The statement may be included on the medical certification form or fitness-for-duty form, or it may be provided in a letter or memo that accompanies the request for medical information.

Providing a GINA notice gives a “safe harbor” when genetic information is inadvertently acquired that may not be necessary for a complete medical certification under the FMLA.

Genetic Information Nondiscrimination Act of 2008 Notification

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law including, but not limited, to when the employee requests leave for a family member’s health condition to (1) document appropriate use of sick leave; and (2) where "family medical history" is required to the extent necessary to make the medical certification complete and sufficient under the FMLA and WFMLA.

To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information unless it meets the family member exceptions noted above.

‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.