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Wisconsin Grants FMLA Rights to Domestic Partners

By Jill Pedigo Hall, Esq.

Under the new Wisconsin Budget, signed into law on June 29, 2009, many legal protections previously reserved for married couples have been extended to same-sex domestic partners. The law extended employee rights to domestic partners with respect to worker's compensation death benefits, wage and cash bond payments, and pension benefits under the Wisconsin Retirement System. In addition, the law amended the Wisconsin Family and Medical Leave Act ("WFMLA") to cover those individuals who qualify as domestic partners under the new law. Wisconsin employers having 50 or more employees will want to understand the changes and update their leave policies, forms and practices accordingly.

What WFMLA Rights Are Now Extended to Domestic Partners?

The WFMLA requires employers having 50 or more employees to provide qualifying leave on a calendar year basis to eligible employees as follows:

- Up to two workweeks of unpaid family leave to care for the employee's qualifying family members;

- Up to two workweeks of unpaid medical leave to care for the employee's own serious health condition; and
- Up to six workweeks of unpaid family leave related to the birth or adoption placement of the employee's child.

Amendment to the WFMLA expands the definition of who qualifies as a "family member." Previously, a qualifying family member was defined as a child (biological, adopted, foster, step-child, or legal ward), spouse, parent or parent-in-law. A domestic partner or parent of the domestic partner is now included in the definition of "family member." An eligible employee may now take leave to provide qualifying care for a domestic partner, or a parent of a domestic partner, who has a serious health condition. However, the child of a domestic partner is not a qualifying family member under the WFMLA. No matter whether the child is raised by the employee as the employee's own, an employee is not entitled to take WFMLA family leave to care for, or related to the birth or adoption of, the child unless the employee is also the child's legal parent. Please note: Under the federal FMLA, if the employee is considered to stand *in loco parentis* ("in the place of the parent") to the child, an employer may be required to grant qualifying leave. So while an employee may not be entitled to two weeks of WFMLA leave to care for the child of a domestic partner, an employer should not deny federal FMLA leave to an employee seeking to care for a domestic partner's child without considering whether the employee stands *in loco parentis* to the child.

Who Qualifies as a Domestic Partner?

This week, domestic partners can begin to register in all Wisconsin counties. WFMLA rights, however, extend to both registered same-sex domestic partners, and unregistered same-sex *and* opposite-sex domestic partners. To register as a domestic partnership, a couple applies with the clerk of the county in which they reside, and then when the application is granted, the couple files the declaration of domestic partnership with the register of deeds.

To qualify as *registered* domestic partners, a couple must show all of the following:

1. Each individual is at least 18 years of age and capable of consenting to the domestic partnership;
2. Neither individual is married to, or in a domestic partnership with, another individual;
3. They share a common residence;
4. They are not nearer of kin to each other than second cousins; and
5. They are of the same sex.

To exercise WFMLA rights as an individual in an *unregistered* domestic partnership, the employee, in addition to satisfying criteria 1-3

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above, must show that the partnership satisfies the following:

1. The two individuals are not related by blood in any way that would prohibit marriage under Wis. Stat. § 765.03.^[1]
2. They consider themselves to be members of each other's immediate family; and
3. They agree to be responsible for each other's basic living expenses.

The law does not provide guidance as to how individuals must demonstrate the last two criteria.

Unsettled Issues Presented and Possible Solutions

When an employer has to make a determination of whether an eligible employee may take WFMLA leave to care for a registered domestic partner, the employer need only momentarily consult the employee's certification of domestic partnership to establish that the qualifying family relationship exists. Because there is no statutory guidance regarding how individuals in an unregistered domestic partnership show that they "consider themselves to be members of each other's immediate family" and "agree to be responsible for each other's basic living expenses", an employer must create its own certification standards. As employers subject to the WFMLA update their policies, forms and internal procedures, it is advisable to incorporate a process whereby employees seeking leave relative to an unregistered domestic partner attest to all statutory criteria listed above and provide some physical proof of the required familial and financial commitments. This could include requiring the employee to provide documentary evidence showing joint ownership of residence, financial accounts or investments, and joint estate or medical planning documentation.

Employers should also update their Wisconsin employment posters to address the changes in the WFMLA. The Department of Workforce Development has issued a new poster, which is available at http://www.dwd.state.wi.us/dwd/publications/erd/pdf/erd_7983_p.pdf.

If you have questions or require assistance in updating your FMLA policy or forms, please contact us at sixtysecondmemo@gshllp.com or contact Ms. Hall at jill_hall@gshllp.com.

^[1]

Generally, Wis. Stat. § 765.03 prohibits marriage between people already married, when the couple is more closely related than second cousins (unless the woman is at least age 55 or either individual is certified as permanently sterile), when either individual is legally incompetent, or, when either individual received a final divorce judgment less than 6 months prior.

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