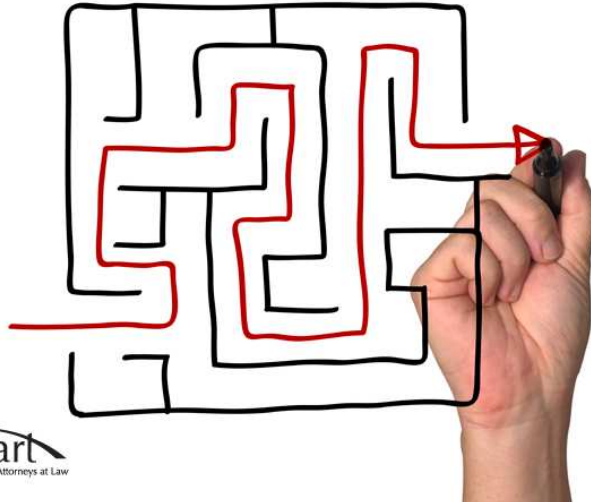


# NAVIGATING FMLA

*Federal vs. Wisconsin:*  
Similarities, Differences and How to Ensure Compliance



Reinhart  
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**Katie D. Triska** is a shareholder in the firm's Labor and Employment Practice. She routinely advises employers on a wide range of employment issues, including successful hiring, employee performance management and termination strategies; development and implementation of anti-harassment and other personnel policies; evaluating reasonable accommodation obligations under the Americans with Disabilities Act (ADA) and state disability laws; and achieving compliance with the Family and Medical Leave Act (FMLA) and state leave laws.



## AGENDA

- 7:45am CT Registration, Networking and Continental Breakfast for in-person attendees; Webinar attendees may begin to log on
- 8:00am CT Webinar
- 8:50am CT Questions and Answers



### Asking Questions

Throughout the webinar, type your questions using the "QUESTIONS" section in the webinar panel. We will answer as many questions as possible during our Q & A session at the end of the webinar.

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### Information

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# NAVIGATING FMLA

## Federal vs. Wisconsin:

Similarities, Differences and How to Ensure Compliance

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## Current Hot Issues

- Increase in on-site audits
- Performing work while on FMLA

## More Generous Rule Applies

- As a general rule, when there is a conflict between WFMLA and FMLA, the rule that is more generous to the employee applies

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## Eligibility

- Wisconsin
  - Employed for more than 52 consecutive weeks;
  - Received pay for at least 1,000 hours during the *preceding* 52-week period; and
  - Employer employs at least 50 employees—*anywhere*

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## Eligibility (cont.)

- Federal
  - Employed for at least 12 months;
  - Worked at least 1,250 hours over the previous 12 months; and
  - Employed at a facility where at least 50 employees are employed within a 75-mile radius

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## Leave Availability

- Wisconsin
  - Up to two weeks due to your own serious health condition
  - Up to two weeks to care for your spouse, domestic partner, parent or your child with a serious health condition
  - Up to six weeks for the birth of your child, or the placement of a child with you for adoption

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## Leave Availability (cont.)

- Federal
  - Up to 12 weeks of leave for any one or more of the following reasons:
    - Your own serious health condition
    - To care for your spouse, parent or child with a serious health condition

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## Leave Availability (cont.)

- To care for your child after birth, or to care for a child placed with you for adoption or foster care
- For incapacity due to pregnancy or for prenatal care

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## Leave Availability (cont.)

- Qualifying exigencies
  - Parental care
- Care for ill or injured servicemember
  - 26 weeks of leave during a single 12-month period to care for a spouse, child, parent or next-of-kin who is a covered servicemember with a serious illness or injury

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## Leave Availability (cont.)

- What does this mean?
  - Use of federal FMLA for one reason does not affect the employee's eligibility for WFMLA leave for *other* reasons
  - An employee may be entitled to more than 12 weeks of leave per year

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## Leave Availability (cont.)

- Example #1 (assume calendar leave year)
  - Eligible employee takes 12 weeks of FMLA leave beginning February 1 following the birth of his child. This would be counted against the employee's 12 weeks of federal FMLA leave *and* the employee's 6 weeks of WFMLA leave.

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## Leave Availability (cont.)

- In July, the employee requests two weeks of leave to care for his mother due to her serious health condition. Is he entitled to it?
- In October, the employee requests two more weeks of leave due to his own serious health condition. Is he entitled to it?

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## Leave Availability (cont.)

- Example #2
  - In March, an employee requests FMLA leave due to his own serious health condition, but he has only worked 1,100 hours, so he does not qualify for federal FMLA. The employer approves two weeks of WFMLA leave.
  - In September, the employee again requests FMLA leave due to his own serious health condition, and has now worked in excess of 1,250 hours. Is he entitled to more leave?

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## Leave Availability (cont.)

- Assume the employee took 12 weeks of leave beginning on September 1 due to his own serious health condition. In mid-December, the employee requests leave to care for a spouse with a serious health condition. Is he entitled to it?

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## Birth, Adoption or Foster of a Child

- Wisconsin
  - Leave for birth or adoption placement must commence within 16 weeks of the birth or placement, and only 6 weeks of leave may be taken with respect to any birth or placement for adoption
  - Does not cover placement for foster care

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## Birth, Adoption or Foster of a Child (cont.)

- Parents working for the same employer are each entitled to the full six weeks
- Intermittent: Employees have the *right* to take WFMLA to "bond" with their new child on an intermittent basis

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## Birth, Adoption or Foster of a Child (cont.)

- Federal
  - Up to 12 weeks of leave per leave year is available for birth or adoption and foster care placement
  - Leave must be concluded no later than 12 months after the birth or adoption or foster care placement

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## Birth, Adoption or Foster of a Child (cont.)

- Parents working for the same employer are entitled to a combined total of 12 weeks of leave for "bonding" purposes (assuming no serious health condition) if they are married. If they are *not* married, they would each be entitled to the full 12 weeks.
- Intermittent: Employees are not *entitled* to take "bonding" leave on an intermittent basis and may do so only if their employer agrees to it

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## Birth, Adoption or Foster of a Child (cont.)

- What to do?
  - For the first six weeks of "bonding" leave, employers must allow employees to use their leave on an intermittent basis. After they have exhausted their six-week WFMLA leave, employers are not *required* to grant this leave on an intermittent basis under federal FMLA, but may do so.

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## Serious Health Condition

- Wisconsin
  - Means a disabling physical or mental illness, injury, impairment or condition involving:
    - Inpatient care in a hospital, nursing home or hospice; or
    - Outpatient care that requires continuing treatment or supervision by a health care provider

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## Serious Health Condition (cont.)

- "Continuing treatment" means direct, continuous and first-hand contact by a health care provider subsequent to the initial outpatient contact
- In other words, outpatient care that requires direct follow-up care by a health care provider
- No period of incapacity required

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## Serious Health Condition (cont.)

- Federal
  - Inpatient care: Illness, injury, impairment, or physical or mental condition that involves inpatient care (*i.e.*, overnight stay in a hospital, hospice or residential medical care facility, including any period of incapacity or any subsequent treatment)

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## Serious Health Condition (cont.)

- Continuing treatment by a health care provider involving *incapacity* for more than three consecutive days
  - Must also involve treatment two or more times within 30 days of the first day of incapacity or

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## Serious Health Condition (cont.)

- Treatment by a health care provider on one occasion that results in a regimen of continuing treatment
- Initial/first visit must occur within seven days of the first day of incapacity
- Chronic conditions
- Permanent or long-term condition
- Multiple treatments
- Pregnancy/prenatal care

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## Serious Health Condition (cont.)

- What to do?
  - If an employee only satisfies the Wisconsin or federal definition of "serious health condition," the employer should grant the employee only the leave required by that specific law

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## Serious Health Condition (cont.)

- Instead of using the DOL's model designation form, you should work with counsel on revising this form to specifically reference WFMLA leave so you can specifically indicate whether WFMLA and federal FMLA leave was approved

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## Leave Years

- Wisconsin
  - Calendar-year basis
- Federal
  - Leave may be calculated using any of the following methods:
    - Calendar-year basis

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## Leave Years (cont.)

- Any fixed 12-month "leave year"  
(e.g., company's fiscal year)
- 12-month period measured *forward* from the date an employee's first FMLA leave begins
- A "rolling" 12-month period measured *backward* from the date an employee uses any FMLA leave
- What leave year should you use?

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## Caring for a Family Member— Who Is "Family"

- Wisconsin
  - Parent, parent-in-law, child, spouse, domestic partner or parent of domestic partner with serious health condition
  - Adult children: Cannot care for themselves because of a "serious health condition"

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## Caring for a Family Member— Who Is "Family" (cont.)

- Federal
  - Post-*Windsor*
  - *In Loco Parentis*: "Parent" may be someone who stood *in loco parentis* when the employee was a child, taking responsibility for their care and financial support
  - Caregiver leave: Also includes a servicemember's "next of kin"
  - Adult children: Incapable of self-care due to "disability"

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## Reassignment During FMLA Leave

- Wisconsin
  - WFMLA does not expressly authorize reassignment

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## Reassignment During FMLA Leave (cont.)

- Federal
  - Employers may only make *mandatory* reassignments of employees if they need intermittent or reduced schedule leave

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## Reassignment

### During FMLA Leave (cont.)

- The mandatory reassignment is permissible only if:
  - The intermittent or reduced schedule leave is due to *planned* (*i.e.*, foreseeable) medical treatment for the employee, family member or servicemember;

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## Reassignment

### During FMLA Leave (cont.)

- The intermittent or reduced schedule leave is due to a period of recovery from a serious health condition of the employee, parent, spouse or child, or injury/illness of a covered servicemember; or
- The employer has agreed to permit the employee the intermittent or reduced schedule leave due to the birth of a child or the placement of a child for adoption/foster care

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## Reassignment During FMLA Leave (cont.)

- Reassignment must be limited to the period that the employee requires the intermittent or reduced schedule leave and to a position for which the employee is qualified and that better accommodates the employee's need for leave
- Employer must ensure the employee receives equivalent pay and benefits while in the alternative position

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## Reassignment During FMLA Leave (cont.)

- Employers may not *require* a transfer when the employee will need intermittent or reduced schedule leave on an *unforeseeable* basis

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## Reassignment During FMLA Leave (cont.)

- What to do?
  - Wait until the employee's WFMLA leave has been exhausted before requiring the reassignment of the employee (and then ensure the reassignment is permissible under federal FMLA)
    - If employer cannot *require* the reassignment under federal FMLA, then ask employee if he will voluntarily agree to the reassignment
  - Determine if the employee will *voluntarily* agree to the reassignment during the WFMLA leave

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## Substitution of Accrued Paid Leave

- Wisconsin
  - Employers may not *require* an employee to substitute paid leave
  - WFMLA allows employees to substitute vacation, sick days, holidays and other paid leave for WFMLA, even if the paid leave policy does not cover the type of absence (e.g., substituting sick days to "bond" with a new child)

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## Substitution of Accrued Paid Leave (cont.)

- Federal
  - Employer *may* require an employee to substitute paid leave
  - Employer can also require the employee to satisfy any procedural requirements of the paid leave policy

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## Substitution of Accrued Paid Leave (cont.)

- What to do?
  - If the leave is covered by both Wisconsin and federal FMLA, then employer should wait until WFMLA has been exhausted before *requiring* substitution

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## Insurance Benefits

- Wisconsin
  - Wisconsin FMLA allows employers to require employees to deposit eight weeks of health insurance premiums in an escrow account. It can then recover the premiums paid during the employee's WFMLA leave from this account if the employee does not return.
  - Employer must give its employees at least 12 months to make the deposits, and the deposits must be in an interest-bearing account. Employer must return the balance, plus interest, to the employee.

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## Insurance Benefits (cont.)

- Federal
  - Employers may not require prepayment of premiums

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## Reinstatement

- Employers must reinstate employees to the same or equivalent position
- Federal law provides an exception for key employees—Wisconsin does not

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## Reinstatement (cont.)

- Key employees may not be entitled to reinstatement upon the conclusion of their leave if their *reinstatement* (not their leave) would cause "substantial and grievous economic injury" to the employer
- A key employee is defined as a salaried, FMLA-eligible employee who is among the highest paid 10% of all the employees working for the employer within 75 miles of the employee's worksite

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## Reinstatement (cont.)

- What to do?
  - If the leave is covered by WFMLA (regardless of whether it is also covered by federal FMLA), you *must* reinstate the key employee
  - However, if the employee exhausts his WFMLA leave such that the leave is only covered by federal FMLA (or if WFMLA never applied), the employer may take advantage of the "key employee" exception

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## FMLA Policies and Forms

- Handbook must include *all* of the provisions found in DOL's FMLA poster (Form WH-1420)
- Designation Notice: Identify whether leave will count as federal FMLA, WFMLA or both
- Notice of Eligibility and Designation Notice: PTO substitution section should separately address federal FMLA and WFMLA

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## Example 1

- Susie Smith just informed her manager that she is pregnant. She goes to HR with a list of questions:
  - How will my prenatal appointments be treated?
  - What happens if I develop complications?

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## Example 1 (cont.)

- After I deliver, how much leave can I take? Will it be paid?
- Can I work part-time or on a reduced schedule?
- When does the period for leave in connection with this birth expire?
- The father is my boyfriend and he also works for the company. Does he have any rights to FMLA leave?

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## Example 2

- While an employee in the accounts receivable department was on leave to care for her newborn child, the company discovered that she failed to deposit hundreds of checks totaling over \$350,000 over the past year. The employee recently informed the company that she may need additional time off because her newborn was diagnosed with a life-threatening condition. What do you do?

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## Example 3

- An employee requests FMLA leave because she has migraines and may need to come in late or leave early when she experiences symptoms. This will pose a significant hardship on the company. Although she is paid only \$12 per hour, she is a highly valued employee, as she is the only employee who can operate the press machine. Without her on the assembly line, all production will cease. What can you do?

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## Example 3 (cont.)

- Can you require her to take a different position and train someone else to operate the press machine?

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## Example 4

- From March to May, a male employee used 12 weeks of FMLA leave to care for his wife, who was confined to bed rest during her pregnancy due to complications. After his child is born, he announces that he intends to take more time off to "bond" with his baby (who does not have a serious health condition). The company has been eagerly awaiting his return, and his supervisor expresses to HR that his absence will result in the department not meeting its sales goals. What do you do?

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## Example 4 (cont.)

- After six weeks of leave to "bond" with his child, the employee returns to work for several weeks. He then announces he needs eight weeks off because he has been diagnosed with cancer and will need treatments. What do you do?

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## Questions?



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## THANK YOU!

Thank you for attending our presentation.  
If you have questions, please contact your  
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