

WISCONSIN STATE
LEGISLATURE
COMMITTEE HEARING
RECORDS

2007-08

(session year)

Senate

(Assembly, Senate or Joint)

Committee on
Economic
Development
(SC-ED)

(Form Updated: 08/11/2009)

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE PAT STRACHOTA
FROM: Carlos Montoya, Intern
RE: 2007 Assembly Bill 324 (Family Military Leave)
DATE: June 22, 2007

This memorandum responds to your staff's request for information regarding 2007 Assembly Bill 324 (Family Military Leave Act). This memorandum includes a summary of the bill and an analysis of consequences resulting from the Family Military Leave Act's inclusion in the Wisconsin Family or Medical Leave section of the statutes. Furthermore, you asked for the status of family military leave acts in other states, an overview of the requirements of the Federal Family and Medical Leave Act, and a description of current laws regulating military leave. Last, this memorandum describes possible consequences of Assembly Bill 324 and a summary of restrictions other states have imposed.

CURRENT MILITARY LEAVE LAW

State Law

There is no Wisconsin statute that grants specified leave to employees on the basis of relation to a person in active service. However, there are protections offered to current state employees called to active service. A classified state employee, who is activated to service (not including training) in the U.S. armed forces has rights to: employment restoration, pay benefits equal to his or her state salary (less any military pay and housing allowances that he or she receives, during the period in which the employee is on military duty in the U.S. armed forces, unless the military pay and housing allowances equal or exceed his or her state salary), and accumulation of sick and annual leave. [s. 230.315 *et. seq.*, Stats.; s. 230.32 (1), Stats.] The latter two benefits may only be received for 179 days. [s. 230.315 (3), Stats.] In 2006, the Governor issued executive order #156 and extended, for two additional years, the benefits received under s. 230.315, Stats., pursuant to authority granted in s. 230.315 (3) (b), Stats. There is no comparable differential pay provision in current law for unclassified state employees.

Furthermore, an employee may take up to two weeks of leave to care for a sick child, spouse, or parent who suffers from a serious health condition or to care for the employee's own serious health condition that makes the employee unable to perform employment responsibilities. The total amount of leave under the WFMLA may not exceed eight weeks. [s. 103.10 (3) (a) 3., Stats.] Upon return from family or medical leave, the employer must place the employee in the same vacant position or in an equivalent position if the employee's job prior to the leave is no longer vacant. [s. 103.10 (8), Stats.] In Wisconsin, an employee is also permitted to substitute any type of paid or unpaid leave provided by the employer for family or medical leave. [s. 103.10 (5) (b), Stats.; s. DWD 225.03, Wis. Adm. Code.] For example, an employee is given the option to use paid time off to substitute for unpaid family or medical leave. [*Richland School District v. DILHR*, 174 Wis. 2d 878, 498 N.W.2d 827 (1993).] Furthermore, the restrictions described in the FFMLA section do not apply to the WFMLA. Additional benefits of the WFMLA are discussed further in following sections.

OVERVIEW OF 2007 ASSEMBLY BILL 324

This bill grants unpaid family military leave to an employee, when either the employee, the employee's spouse, or child of an employee has been called to active service for a period of 30 days or more by the U.S. armed forces, the national guard of any state, or defense forces under the order of the President of the United States or the governor of any state. If the employer of the employee employs 50 or fewer employees, the employee is eligible to take no more than 15 days of unpaid family military leave. However, if the employer of the employee employs more than 50 employees, then the employee is eligible to take no more than 30 days of unpaid family military leave. The period of active service begins on the date the employee or spouse or child of the employee receives the order to enter active service. The eligibility for family military leave ends when the employee or spouse or child of the employee is released from active service or upon death.

This bill amends s. 103.10, Stats., and incorporates limitations from the WFMLA. There are two requirements that must be met before an employee is eligible for leave under this bill. First, under the bill, the employee must have worked for the same employer for at least 1,000 hours during the preceding 52-week period. However, the employee need not be employed for the consecutive 52-week period prior to taking leave. [See *Butzlaff v. Wisconsin Personnel Com.*, 166 Wis. 2d 1028, 480 N.W.2d 559, 1992 (Ct. App. 1992).] Second, the employer may require the employee to provide certification by proper military authority to verify that the employee or the spouse or child of the employee is in a period of active service.

This bill incorporates benefits derived by amending the WFMLA section. First, the employee receives the same reemployment protection upon return from leave as in s. 103.10 (8), Stats. This means that the employee must be placed back in the vacant position that the employee last held upon return from leave. If the position is not vacant upon return from leave, the employee must be placed in an equivalent position with the same pay, benefits, and employment conditions. This benefit is more generous than those provided by the FFMLA because an employer does not have the option to move an employee into a different and equivalent position when the employee's previous position is vacant after return from leave. Second, the employer of the employee must maintain the group health coverage that was held by the employee prior to taking leave as outlined in s. 103.10 (9) (c), Stats. However, an employee must continue to make the same contribution to the plan as required by the agreement made prior to taking leave. The same payment arrangements as the family or medical leave apply. Third, the employee receives the same rights to an administrative proceeding under s. 103.10 (12), Stats., but the

6. The employee may bring a civil action to prosecute a practice that violates or may violate this statute.

This statute has three general provisions limiting the use of military family leave:

1. Employees must give at least 14 days advance notice if the leave lasts for five or more consecutive workdays, or as much notice as is practicable if the leave is for less than five days.
2. All accrued vacation, personal leave, compensatory leave, and any other leave that may be granted to the employee, except sick leave and disability leave must be used before taking family military leave.
3. The employer of the employee may require the employee to provide certification by proper military authority to verify that the spouse or child of the employee is in a period of active service.

Nebraska

On April 4, 2007, the Governor of Nebraska enacted a family military leave act almost identical to the Illinois statute. [Laws 2007, LB 497.] However, the statute only grants family military leave requested by an employee who is the spouse or parent of a person called to military service lasting longer than 179 days under an order of the Governor or the President of the United States. Like the Illinois statute, this enactment does not cover the employee who enters active service. However, unlike Illinois, Nebraska does not require the employee to use all other paid and unpaid leave prior to using family military leave.

Maine

Maine also enacted a family military leave statute almost identical to Illinois. [Me. Rev. Stat. Ann. tit. 26 s. 7, 523-1.] There are some differences that are worth noting. First, the statute grants family military leave requested by an employee who is the spouse, domestic partner, or parent of a person deployed to military service lasting longer than 180 days under an order of the Governor or the President of the United States. [*Id.*] Second, employees are not expressly permitted to bargain with the employer to cover the entire cost of benefits during leave. Third, family military leave taken may only be used during the 15-day period prior to the deployment, the 15-day period following the end of deployment, or any combination of the two periods. Like Nebraska, Maine does not require the employee to use all other paid and unpaid leave prior to using family military leave.

Minnesota

Minnesota permits unpaid leave to family members, including the parent, child, grandparents, siblings, or spouse, of military person injured or killed while on active service. [Minn. Stat., s. 181.947.] This statute includes any employee working at a business that employs one or more employees, which includes state and other governmental subdivision employees. The leave can last no more than 10 working days. The employee must give as much notice as "practicable" to the employer in order to guarantee leave.

administrative rules pertaining to the WFMLA. The Wisconsin Administrative Code provides further interpretation of the notice required for family or medical leave for medical treatment or supervision of an ill family member. Section DWD 225.02 (4) and (5), Wis. Adm. Code, provides as follows:

DWD 225.02 (4) (a) An employee shall be deemed to have given the employer "advance notice of the medical treatment or supervision in a reasonable and practicable manner" within the meaning of s. 103.10 (6) (b) 2., Stats., if the notice identifies the planned dates of the leave and is given to the employer by the employee with reasonable promptness after the employee learns of the probable necessity of the leave.

(b) If the employer has a written policy which requires notice of leave pursuant to s. 103.10 (6) (b) 2., Stats., to be in writing, if this policy governs all employees of the employer within this state, and if the employee has been made aware of this policy, the notice required by s. 103.10 (6) (b) 2., Stats., shall be in writing except where precluded by the need for health care consultation or treatment.

(5) An employee shall be deemed to have made "a reasonable effort" to schedule a leave so that it does not "unduly disrupt the employer's operations" within the meaning of s. 103.10 (6) (b) 1., Stats., (sic)

(a) If the employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity of the leave; and

(b) Except where precluded by the need for health care consultation or treatment, if that proposed schedule is sufficiently definite that the employer is able to schedule replacement employees, to the extent replacement employees need to be scheduled, to cover the absence of the employee taking the leave.

Because 2007 Assembly Bill 324 uses the same standard ("reasonable and practicable") as the WFMLA, and such language is included in the section of the WFMLA statute, the administrative code's interpretation of notice will likely apply to the Family Military Leave Act.

Intermittent Leave

Under the WFMLA, s. 103.10 (3) (d) and (4) (c), Stats., an employee may take family leave as a partial absence from employment, or may take medical leave as "medically necessary." Under s. DWD 225.02 (1), Wis. Adm. Code, WFMLA leave may be taken in noncontinuous increments. An employee may schedule and take partial absence leave, or medical 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 WFMLA is equal to the shortest increment the employer allows to be taken by that employee for any other nonemergency leave. Although the proposed bill does not explicitly state that family military leave could be taken in an intermittent manner, such leave will likely be permitted. Intermittent leave is likely acceptable while

substitution of unpaid leave with paid leave are not defined. However, a prohibition against the use of intermittent leave and pay substitution will likely be needed in order to avoid an interpretation similar to s. 103.10, Stats.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

CM:ty:jb;ksm