

July 2009

## Labor and Employment Law Alert

### **Wisconsin Budget Broadens Wisconsin FMLA Leave Rights To Include Domestic Partnerships, Effective June 30, 2009**

On June 29, 2009, Governor Doyle signed the Wisconsin budget into law (the "Budget"). The Budget contained provisions which extend the Wisconsin Family and Medical Leave Law ("WFMLA") to domestic partners. There are two categories of domestic partner recognized by the Budget (discussed below): registered and unregistered. WFMLA leave rights for registered and unregistered domestic partnerships become effective on June 30, 2009. However, WFMLA leave rights for registered domestic partners will not be available to exercise until August 1, 2009, the date domestic partners may begin registering in the State of Wisconsin.

#### **Background**

Before the Budget was passed, the WFMLA required employers with 50 or more employees to provide leave entitlements to eligible employees based upon three types of WFMLA-qualifying events: up to six weeks of leave for the birth or placement for adoption of a child, up to two weeks for the serious health condition of certain family members, and up to two weeks for the employee's own serious health condition. Before the Budget was passed, an employee's ability to take leave for a family member was limited to parents, parents-in-law, spouses, and children (including stepchildren, adopted children, foster children, and legal wards).

#### **New Leave Rights**

Now employees may also take WFMLA leave for the serious health condition of the domestic partner, or the domestic partner's parent. Interestingly, the Budget fails to extend the definition of child to include a domestic partner's child. Therefore, an employee remains unable to take WFMLA for purposes of caring for a domestic partner's child with a serious health condition or for purposes of "bonding" with the domestic partner's child following the birth of a child (or placement of a child for adoption or foster care) if the child is not also the employee's "child" as defined by statute.

#### **How Does The WFMLA Define Domestic Partner?**

The Budget permits an individual to become a domestic partner (for WFMLA purposes) in two ways. First, the individual can register the domestic partnership with the Register of Deeds for the county in which the domestic partner resides. Individuals who choose to register their domestic partnership must certify the following:

- Each individual is at least 18 years old and capable of consenting to the domestic partnership;



- Neither individual is married to, or in a domestic partnership with, another individual;
- The two individuals share a common residence;
- The two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and
- The individuals are of the same gender.

Alternatively, an individual can be in an unregistered domestic partnership, which is a relationship between two individuals (not necessarily of the same gender) who satisfy the following requirements:

- Each individual is at least 18 years old and otherwise competent to enter into a contract;
- Neither individual is married to, or in a domestic partnership with, another individual;
- The two individuals share a common residence.
- The two individuals are not related by blood in any way that would prohibit marriage under the Wisconsin Code;
- The two individuals consider themselves to be members of each other's immediate family;
- The two individuals agree to be responsible for each other's basic living expenses; and
- There is no "certification" with a state authority required for an unregistered domestic partnership.

These competing definitions of domestic partnership appear problematic. Although there are similarities between the two standards, the additional factors required of an unregistered domestic partnership are difficult for an employer to substantiate and raise unanswered questions. For example, how will an employer establish that the individuals agree to be responsible for each other's basic living expenses? How does an employer determine whether the parties consider themselves to be members of each other's immediate family?

The changes to the WFMLA also may create unintended consequences. Consider the following: While a registered domestic partnership prohibits partnership between first cousins, an unregistered domestic partnership does not because the Wisconsin Code's prohibition of marriage includes some exceptions. Consequently, unregistered domestic partners can be first cousins if the female partner is over 55 years of age or sterile. There is no requirement that the partnership be of a romantic nature. Therefore, assume two cousins age 55, both widows, move in together and share living expenses – Cousin No. 1 and Cousin No. 2. The two cousins have always been close, so close they consider one another to be more of a sibling than a cousin. The father (age 75) of Cousin No. 1 suffers congestive heart failure and is hospitalized. His niece, Cousin No. 2, requests WFMLA leave with the intent of caring for her uncle. Before the Budget was passed, employers had the right to deny this request for leave because the WFMLA did not provide for time away from work in order to care for the employee's uncle's serious health condition. Under the provisions of the WFMLA, as amended, Cousin No. 2 (the employee/niece) may seek leave as an unregistered domestic partner caring for her domestic partner's parent (the employee's uncle). Was the WFMLA intended to cover uncles?



## Next Steps

Employers subject to the WFMLA will need to update their policies and forms to incorporate the new leave rights. Employers must consider how they will deal with the substantiation of registered and unregistered domestic partnership and build these procedures into their policy and other internal procedures for WFMLA administration.

Additionally, the Department of Workforce Development (“DWD”) has created a new poster to address the changes to the WFMLA. Employers will also need to update their Wisconsin posters accordingly. A copy of the poster is available at <http://www.dwd.state.wi.us/dwd/posters.htm>

### ***Michael Best’s Labor and Employment Law Practice***

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