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Employer not Obligated to Substitute paid Disability Leave for Unpaid Leave under Wisconsin FMLA if Employee does not Qualify as Disabled Under Plan

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Wisconsin's Family Medical Leave Act (WFMLA) requires that employers allow their employees six weeks of unpaid leave following "[t]he birth of an employee's natural child." Wis. Stat. §103.10(3). The Act's substitution provision requires employers to allow an employee to substitute "paid or unpaid leave of any other type provided by the employer" for the unpaid leave provided by the statute. *Id*. §103.10(5)(b). In ***Sherfel v. Nelson*****,** the Plaintiff, Joan Sherfel, exhausted her short-term disability benefit following the birth of her child. She then requested and was provided additional leave under the WFMLA. When Ms. Sherfel asked to substitute paid short-term disability leave for the unpaid WFMLA leave her employer refused because she was no longer short-term disabled as defined by the plan.

Ms. Sherfel filed a complaint with the Wisconsin Department of Workforce Development based on the employer's refusal to abide by the substitution provision under the WFMLA. On appeal, the Sixth Circuit concluded that when a plan administrator is faced with the choice of violating the Wisconsin Act or violating the terms of the ERISA plan, the Supremacy Clause of the federal Constitution requires the administrator to comply with ERISA. In other words, the plan language governs the employees' eligibility for benefits under the plan.

Wisconsin employers must to be sure to provide employees with the *option* to substitute accrued, paid leave for unpaid leave under the WFMLA. Unlike the federal Family Medical Leave Act, an employer cannot require an employee to substitute paid leave; the decision must be left to the employee. Under *Sherfel v. Nelson*, an employee may not substitute short-term disability benefits if the employee does not meet the definition of disabled under the plan. However, it is well established that employees may substitute accrued vacation and/or sick time for unpaid leave under the WFMLA. Employers should have in place leave policies that clearly identify available benefits. Whenever an employee is out on leave, the employer should communicate the leave designation (state/federal) and substitution policy (optional/mandatory).

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