

her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. See § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. See §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. See § 825.121 for rules governing leave for adoption or

foster care. See § 825.601 for special rules applicable to instructional employees of schools.

✱ § 825.121 Leave for adoption or foster care. ✱

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. See § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of

the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newly placed child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. See § 825.120 for general rules governing leave for pregnancy and birth of a child. See

Eve would be eligible for two more weeks of WFMLA leave for her own serious health condition. (Her two weeks of WFMLA leave to care for a seriously ill parent, spouse or child ran concurrently with the time she took to care for her mother). Todd would have four more weeks of WFMLA leave for the birth of their child, two weeks for his own serious health condition and two weeks to care for his seriously ill parent, spouse or child.

Under the federal FMLA, both spouses are considered to be working for the same employer even if they work at separate work sites which are more than 75 miles from each other. This aggregation of leave requirement under the federal FMLA applies only to a married couple.

The Wisconsin FMLA has no aggregation of leave for married couples working for the same employer. Each spouse is entitled to six weeks for birth or adoption of a child, two weeks to care for a spouse, parent, parent-in-law or child with a serious health condition and two weeks for his/her own serious health condition.

Wisconsin FMLA	Federal FMLA
<ul style="list-style-type: none"> ▪ Each employee is entitled to receive six weeks for birth or adoption and two weeks to care for a parent separately 	<ul style="list-style-type: none"> ▪ The husband/wife must aggregate the twelve workweeks based upon the birth, adoption or foster care of a child or care of a parent*
<p>* If only one of the spouses is eligible for federal FMLA benefits, the eligible spouse may take the full 12 weeks of federal leave.</p>	

✱ Special Provisions Related to Adoption ✱

Employers covered by both the Wisconsin and federal Family and Medical Leave Acts are required to grant leave for placement with the employee of a child for adoption. The source of an adopted child (e.g. whether from a licensed placement agency or otherwise) is not a factor of determining FMLA eligibility. Adoptions most often involve infants or very small children but can, in some instances, involve an adult child who is incapable of self-care.

partial absences so the leave does not *unduly disrupt* the employer's operations. Wis. Admin. Code § DWD 225.02(3). An employee will be considered to have accomplished this if:

1. The employee provides the employer with at least as much notice for a proposed schedule of partial absence as the shortest notice required for the taking of any other non-emergency or non-medical leave, *and*
2. The schedule is sufficiently definite for the employer to be able to schedule replacement employees to cover for the absences.

For Example: Employee reasonably considers employer's operations by giving advance notice and providing a definite schedule

John's employer has a policy of requiring its employees to provide 30 days advance notice of the need for personal leave, vacation leave and other non-emergency leaves. John informs his employer that he will need intermittent FMLA leave to attend court appearances and counseling sessions for the adoption of a new baby. The legal proceedings are scheduled to begin 30 days from the time of his request and will require a series of hearings and multiple absences. At the time he submits the request, he provides his employer with a tentative schedule of his court appearances. John would be considered to have scheduled leave that complies with the law.

The Wisconsin FMLA allows an employee to take the shortest increment of time for FMLA leave that is allowed to be taken by that employee for any other non-emergency leave. Wis. Admin. Code § DWD 225.02(1). In other words, if an employer allows an employee to take sick leave or vacation time in one-hour increments, an employee must also be permitted to take Wisconsin FMLA leave in one-hour increments. An employer may want to review its other leave and time off policies to assure consistency.

★ Examples of leave increments which may be applied toward the six-week leave entitlement for birth and adoption leave are:

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For Birth Leave	For Adoption Leave
<ul style="list-style-type: none"> ▪ Birthing/Lamaze classes ▪ Doctor appointments ▪ Prenatal visits 	<ul style="list-style-type: none"> ▪ Attendance at counseling sessions ▪ Appearances in court ▪ Consultation with an attorney

Federal Intermittent Leave

Federal FMLA leave for all entitlements, including after the birth, adoption or foster care of a healthy child, must be taken all at once unless the employer *agrees* to allow the employee to take leave intermittently or on a reduced schedule. 29 U.S.C. § 2612(b) and 29 C.F.R. §§ 825.120(b) and 825.121(b). An employee must, however, be granted intermittent leave for mandatory counseling sessions, court appearances, medical or legal consultations, or physical examinations in anticipation of adoption or foster care. [See Chapter 12, *Intermittent Leave or Reduced Schedule Leave Under the FMLA*, for more discussion concerning intermittent leave.]