



Wisconsin Legislative Council

RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Anne Sappenfield
Legislative Council Director

Margit Kelley
Clearinghouse Assistant Director

CLEARINGHOUSE RULE 21-097

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

2. Form, Style and Placement in Administrative Code

- a. In s. DWD 226.01 (1) (intro.), the phrase “, the following definitions apply” should be deleted.
- b. In s. DWD 226.06 (2) (a) and (b) Note, it appears that “Equal Rights Division” should be changed to the lowercase.
- c. In s. DWD 226.22 (2), “shall not” should be changed to “may not”.
- d. In s. DWD 226.23 (3), “Department” should be changed to the lowercase.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. DWD 226.01 (1) (a) and (b), there are two definitions of the same term but each one is used for a different section of s. 103.11, Stats. It may also be helpful to the reader to include a Note after each subsection that provides the cited statutory language and explains the context in which each definition applies.

Additionally, in s. DWD 226.01 (1) (a), the department defines “12-month period”, as that term is used in s. 103.11 (4), Stats., to be a calendar year beginning January 1 and ending December 31. The statutory reference specifies that an employee may take bone marrow and organ donation leave to undergo and recover from bone marrow or organ donation, except that no more than six weeks of leave in a 12-month period may be taken.

Does defining 12 months as a calendar year create circumstances in which different employees receive different amounts of leave depending on the time in the year when that leave is taken? For example, as proposed, if an employee undergoes a donation and begins to take leave on July 1, they would receive 6 weeks of leave. In contrast, if an employee undergoes a donation and begins to take leave on December 1, would the employee receive only one month of leave (less than the six weeks for a leave beginning July 1) or would the employee also be eligible for six weeks of leave beginning on January 1 (for a total of more than the six weeks of leave available to an

employee whose leave begins July 1)? The department should provide additional clarity as to which outcome would arise under the proposed rule, and whether it intends to provide certain employees with more or less leave than others based on the timing of the leave within the calendar year.

b. In s. DWD 226.02 (6), the department should consider deleting the word “proper” and replacing it with “notice of leave as required under s. 103.11 (6)”. Similar use of the word “proper” also occurs in sub. (7). While this word is consistent with other code provisions promulgated by the department, it is vague, and clarity could be improved through use of a more specific phrase.

c. In s. DWD 226.16 (1), “the bureau of hearings and mediation of the department” should be changed to “department’s bureau of hearings and mediation”.

d. In s. DWD 226.25 (2), “(13)” should be added between “s. 103.11” and “; Stats.”.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

In its analysis, the department cites both state and federal Family and Medical Leave Acts (FMLA) as related regulations. With respect to the calculation of the amount of leave under federal FMLA, an employer may elect a 12-month time period from four options, including a January 1 to December 31 option as well as rolling options. (See, e.g., <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf>, at page 3.) Proposed s. DWD 226.01 (1) (a) would require the calendar year calculation of the 12-month time period for bone marrow and organ donation leave. If the department’s intent is alignment with practices under the federal FMLA, should this provision be revised? (While tangential to this particular rulemaking, does the same question apply to s. DWD 225.01 (1) (m), relating to a similar definition under Wisconsin’s FMLA?)

Additionally, should the department clarify whether the leave would run concurrently with federal FMLA, in similar fashion to the clarification it provides in s. DWD 226.02 (8), which states that leave under the proposed rule may not run concurrently with state FMLA leave?