

**ORDER OF THE
DEPARTMENT OF ADMINISTRATION, DIVISION OF PERSONNEL
MANGAGEMENT**

The scope statement for this rule, [SS 131-20](#), was approved by the Governor on October 9, 2020, published in Register No. [778A2](#), on October 12, 2020, and approved by Department of Administration, Division of Personnel Management on October 23, 2020. This emergency rule was approved by the Governor on November 05, 2020.

The Wisconsin Department of Administration, Division of Personnel Management hereby adopts the following emergency rule to create ss. ER 18.01 (6m) and ER 18.03 (4) (cm); relating to Absence provisions.

**Analysis Prepared by the Department of Administration, Division of Personnel
Management**

FINDING OF EMERGENCY

The Department of Administration, Division of Personnel Management (DPM) finds that an emergency exists and that promulgation of the attached emergency rule pursuant to Wis. Stat. s. 227.24 (1) (a) is necessary for the immediate preservation of the public peace, health, safety, and welfare. Wisconsin is currently experiencing unprecedented, near exponential growth of the COVID-19 pandemic. This has been driven by new factors not present before, primarily significant increase in spread since the beginning of the K-12 and collegiate school years on or about September 1. According to the Department of Health Services, numerous cases involving students and staff have been reported at schools across the state, pushing thousands into quarantine or isolation and forcing some districts to close buildings, move to online learning, at least temporarily, and delay re-opening plans.

DPM has determined a rule change is therefore needed to provide state agencies with additional flexibilities to address employee absences caused by these new circumstances. A permanent rule, however, will not be promulgated in time to respond to the current situation. An emergency rule is therefore needed to provide flexibilities for state employees who may need to be absent from employment due to the COVID-19 pandemic and will ensure flexibilities are available through at least the remainder of the calendar year. If employees who have leave available are unable to use that leave to stay home to care for their children while schools and childcare facilities are closed, they may be forced to eventually take leave without pay, which could cause unnecessary economic stress given the potential availability of paid leave already earned, and jeopardize the health and safety of these employees and their families.

1. Citations to statutes interpreted:

Sections 230.04 and 230.35, Stats.

2. Statutory authority:

Sections 227.11 (2) (a), 230.04 (1), 230.04 (5), and 230.35 (2), Stats.

3. Explanation of the agency's statutory authority to promulgate the rule under the statutes cited:

The Department of Administration, Division of Personnel Management is responsible for the promulgation of rules relating to the administration of the division and the effective operation of subch. II of ch. 230 of the Wisconsin Statutes. The proposed rule changes are authorized by Wis. Stat. ss. 230.04 (1), and 230.04 (5), being necessary for performance of duties assigned to the administrator and necessary for the effective operation of subch. II of ch. 230 of the Wisconsin Statutes. Paragraph (a) of Wisconsin Stat. s. 227.11 (2) also authorize the department to prescribe forms and procedures and promulgate rules interpreting the provisions of ch. 230 to the extent necessary to effectuate the purpose of the statute.

In addition to the authority provided in ss. 230.04 (1), 230.04 (5) and 227.11(2), Wis. Stats., the administrator has additional statutory authority to promulgate rules governing the use of sick leave under s. 230.35 (2), Wis. Stats.

4. Related statutes or rules:

N/A

5. Brief plain language summary of the proposed rule:

Chapter ER 18 of the Wisconsin Administrative Code contains the current rules governing absences for state employees, including rules that permit employees to use accrued sick leave to care for immediate family members only when the family member is ill or injured and in need of emergency medical care. Additionally, in some situations, prior approval is currently required for any use beyond 5 working days. The emergency rule provides modifications to the rules governing absences to provide employees greater flexibility to use earned leave during the COVID-19 pandemic. The emergency rule creates a limited exception that allows employees to use sick leave for the care of individuals who require the employee's general care, regardless of whether they are sick or not, for the necessary period of time without requiring prior appointing authority approval. For the exceptions to apply, the individual requiring care must be a member of the employee's immediate family, as defined in s. ER 18.01(4), Wis. Admin. Code, or a child to whom the employee stands in loco parentis, as the term is defined in 29 CFR s. 825.122(d)(3). Furthermore, the reason for care must specifically be related to a public health emergency due to the COVID-19 pandemic, and use of sick leave under this exception may not exceed the period of time required for the confinement of the immediate family member requiring care or the closure of schools or unavailability of child care due to the pandemic.

6. Summary of, and preliminary comparison with, any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The Families First Coronavirus Response Act (FFCRA) provided federal Emergency Paid Sick Leave (EPSL) and Expanded FMLA leave (EFMLA) for state employees beginning April 1, 2020 and in effect through December 31, 2020. These leave provisions are in addition to any leave programs offered by the state. The emergency rules being proposed are intended to work in conjunction with these federal leave provisions and to provide coverage where gaps in the federal leave may occur or after the federal leave options have expired.

7. Comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota:

All states, as required by the FFCRA, have implemented EPSL and EFMLA for employees to provide for paid time off for employees related to COVID-19 reasons, including to care for a child due to school or daycare closures.

The State of Iowa has a current Administrative Rule waiver in place to remove their 40 hour cap on the use of sick leave by an employee to provide care and necessary attention of an immediate family member for the specific purpose of COVID-19.

<https://das.iowa.gov/sites/default/files/core/WAIVERS/D2020-5.pdf>

The State of Minnesota does not have any similar administrative rules addressing sick leave for state employees. However, Minnesota Management and Budget, which establishes statewide standards outside of the Administrative Procedures process, has issued two HR/LR policies implementing EPSL and EFMLA as required under the FFCRA. See HR/LR Policy [1440](#) and [1441](#) respectively.

The State of Michigan's State Personnel Director issued emergency amendments to Civil Service Regulation 5.10 on sick leave to allow employees to use sick leave to provide childcare when school or place of care or childcare provider is closed or unavailable, due to COVID-19 precautions or to provide care to a family member who is subject to an isolation order related to COVID-19. See the following official communications of the State Personnel Director for March 13, 2020 ([SPDOC 20-02](#)) and August 31, 2020 ([SPDOC 20-10](#))

At this time the department was unable to identify any similar administrative rules in Illinois that have been drafted or implemented in response to COVID-19.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule:

The Department considered information available from the Department of Health Services relating to the COVID-19 pandemic in Wisconsin. On November 1, 2020, the average cases confirmed over the last 7 days was 4,385. This number is compared to the 7-day average of 2,405 present on October 1, 2020. Furthermore, over the same time period, the percent of positive tests have increased from 9.6 % to 15.1%. Wisconsin is continuing to experience unprecedented, near exponential growth of the COVID-19 pandemic. This growth is also impacting schools. In reviewing the Department of Health Services' weekly COVID-19 facilities update, as of October 28, 2020 there have been 668 schools, colleges, or day care centers with

two or more confirmed cases. Of these, 542 are categorized as “active investigations,” meaning fewer than four weeks had passed since the last possible exposure within those facilities. This is up from October 7, 2020, where there were 404 total and 340 active investigations for educational facilities. Some cases within educational facilities are forcing some districts to close buildings, move to online learning, at least temporarily, and delay re-opening plans.

The Department also considered federal leave available through the FFCRA. Since October 1, 2020, at least 59 additional state employees have requested EPSL and 44 additional state employees have requested EFMLA for the purposes of childcare. Leave available under the FFCRA is limited and will expire after December 31, 2020. However, the impacts of the COVID-19 pandemic are likely to remain beyond the exhaustion of FFCRA leave by individual employees and the expiration of FFCRA leave as a whole. In addition, the pay for employees using this leave has a cap of 2/3 the employee’s rate of pay, capped at \$200 per day. Employees may substitute, or in some case supplement, this federal leave with available state leave. Revising ch. ER 18 through the emergency rulemaking process is necessary to protect the health, safety, and welfare of state employees by providing continued flexibilities for employees to care for their children and immediate family members impacted by the COVID-19 and the ability to maintain full pay by using leave previously earned by the employee.

The Department also held a preliminary public hearing on the scope statement on October 22, 2020 in which no members of the public participated nor submitted comments for consideration.

9. Effect on small business:

The rule has no effect on small businesses.

10. Any analysis and supporting documents used in support of the agency’s determination of the rule’s effect on small business or in preparation of economic impact report:

The proposed rule has no effect on small businesses because only governmental employers and their employees are governed by ch. 230, Wis. Stats., as administered by the Department of Administration, Division of Personnel Management.

11. Agency Contact Person:

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RULE TEXT

SECTION 1. ER 18.01 (6m) is created to read:

ER 18.01 (6m) “Public health emergency” means a public health emergency declared by the Governor under s. 323.10, Stats., a public health emergency declared by the Secretary of Health and Human Services under 42 U.S.C. 247d, or an emergency declared by a governing body of a local unit of government under s. 323.11, Stats.

SECTION 2. ER 18.03 (4) (cm) is created to read:

ER 18.03 (4) (cm) During a public health emergency that is related to the 2019 novel coronavirus pandemic, for temporary care of members of the immediate family, or a child to whom the employee stands in loco parentis as defined under 29 CFR s. 825.122(d)(3), for a limited period of time for a reason that is specifically related to the public health emergency. Such reasons may include when the individual requiring care has been exposed to a contagious disease which requires the individual’s confinement, or when the employee lacks needed child care because schools or other places of care are closed or unavailable as a result of the public health emergency. Use of sick leave for these purposes is limited to the period of time required for confinement, closure, or unavailability. An appointing authority may require documentation to justify the granting of sick leave under this subsection.

SECTION 3: EFFECTIVE DATE. This emergency rule shall take effect upon publication in the official state newspaper.

Dated this 5th day of November, 2020.

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
DIVISION OF PERSONNEL MANAGEMENT

Malika S. Evanco