

# *Sherfel v. Newson*

## WISCONSIN WORKERS SHOULD BE ABLE TO EXERCISE THEIR RIGHTS TO PAID LEAVE UNDER THE WISCONSIN FAMILY AND MEDICAL LEAVE ACT

FEBRUARY 2013

### Issue

Does the federal Employee Retirement Income Security Act nullify a provision of Wisconsin's Family and Medical Leave Act that permits workers to substitute employer-provided paid leave for unpaid leave?

### Background

In 2007, Katharine Gerum, a Nationwide Mutual Insurance Company (Nationwide) employee in Wisconsin, sought to take time off of work to care for her newborn baby. Wisconsin's Family and Medical Leave Act (WFMLA) permits employees to take up to 12 weeks of job-protected, unpaid leave to care for their own serious medical needs or those of a family member. Through a "substitution provision," the WFMLA also allows workers to substitute "paid or unpaid leave of any other type provided by the employer" for the unpaid leave provided by the WFMLA. Gerum asked Nationwide to make this substitution so she could continue receiving income while spending the time she needed with her baby. Nationwide denied her request.

On April 18, 2007, Gerum filed a claim with the Wisconsin Department of Workforce Development, the state agency that investigates violations of the WFMLA. An administrative law judge sided with Gerum, and Nationwide appealed that decision to a federal district court. The court found that Gerum did not have the right to substitute her paid leave for unpaid leave under the WFMLA because Nationwide's leave plan is governed by the federal Employee Retirement Income Security Act (ERISA), which the court ruled preempts the WFMLA's substitution provision. The state of Wisconsin appealed, seeking to protect the WFMLA from federal preemption, and the case is now pending in the United States Court of Appeals for the Sixth Circuit.

In reaching its decision against Gerum, the trial court ignored important Wisconsin precedent. In *Aurora Medical Group v. Department of Workforce Development* in 2000, the Supreme Court of Wisconsin held that ERISA does not preempt the WFMLA's substitution provision. Moreover, the legislative history of the federal Family and Medical Leave Act (FMLA), which was passed after the WFMLA, shows that Congress did not intend for state laws that offer greater benefits than the FMLA, like the WFMLA, to be preempted by federal laws like the FMLA and ERISA.

## Our Brief

In February 2013, the National Partnership for Women & Families filed a [friend-of-the-court brief](#) in the Sixth Circuit in support of the state of Wisconsin and the WFMLA. Legal Aid Society-Employment Law Center, Legal Momentum, the National Women's Law Center and the Service Employees International Union signed the brief. It argues that the legislative history of the federal FMLA makes clear that the WFMLA was intended to be insulated from federal law preemption, and that state laws like the WFMLA, which give employees greater access to paid leave, are vital in enabling workers to exercise their legal rights to family and medical leave.

Inability to afford to take unpaid leave is the most common reason workers who are covered by the FMLA say they forgo needed leave, and middle and lower income families are hurt most.<sup>1</sup> Fifty-four percent of workers in middle and lower income brackets do not receive pay while on leave.<sup>2</sup> For these families, the FMLA offers important legal rights to job-protected unpaid leave, but many cannot exercise those rights without facing economic hardship. New parents, like Katharine Gerum, need time off to recover from pregnancies and bond with newborn children without jeopardizing their economic security. Studies show that parental involvement is crucial to the health of newborns and seriously ill children.<sup>3</sup> In addition, workers must also be able to take time off to care for elderly parents, and to heal from their own serious illnesses, without sacrificing critical income.

## What's At Stake

If the Sixth Circuit allows ERISA to preempt the WFMLA's substitution provision, Wisconsin workers will be robbed of the right to take needed time off without sacrificing their economic security. The outcome of *Sherfel v. Newson* could have serious implications for Wisconsin workers and people across the country whose states offer greater benefits than those set out in federal law.

Paid and unpaid family and medical leave remains out of reach for many. When workers have to take unpaid leave, the loss of income can cause serious financial hardship for them and their families. As a result, leaves are cut short, finances are stretched, and workers delay or forgo necessary health procedures. States like Wisconsin must be able to pass laws that provide greater access to family and medical leave. And these laws must be insulated from federal preemption.

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1 Abt Associates. (2012, September). *Family and Medical Leave in 2012: Technical Report*. Department of Labor Publication. Retrieved 4 February 2013, from <http://www.dol.gov/asp/evaluation/fmla/fmla2012.htm>

2 Ibid, p. 99.

3 Human Impact Partners. (November 2011). *Fact Sheet: Parental Leave and the Health of Infants, Children and Mothers*. Retrieved 8 February 2013, from [http://workfamilyca.org/resources/HIPFactSheet\\_2011.pdf](http://workfamilyca.org/resources/HIPFactSheet_2011.pdf); Heymann. J. (2001, October 15). *The Widening Gap: Why America's Working Families Are in Jeopardy—and What Can Be Done About It*. New York, NY: Basic Books.

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The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. More information is available at [www.NationalPartnership.org](http://www.NationalPartnership.org).

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