



GREG BROCKMEYER  
Director of Administration

## COUNTY OF DANE

DEPARTMENT OF ADMINISTRATION  
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Date: November 29, 2021  
To: Evelyn Mikul  
Employee Group 720  
From: Greg Brockmeyer  
Director of Administration

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Dear Ms. Mikul:

Re: Grievance – Denial of Supplemental COVID-19 Leave

After reviewing the grievant's documentation, I have determined that an evidentiary hearing is not necessary at this time. My decision is based upon the following documents:

- A. Grievance Dated Nov. 22, 2021
- B. Attachments A to F of the Grievance
- C. Temporary Exception of COVID-19 Leave
- D. Exhibits 1 -5 attached to this grievance.

### **Employee's Position**

Employee requested to use the 2021 Supplemental Emergency COVID-19 Leave for an absence on November 2, 2021. According to Employee, she received a "booster" COVID-19 vaccination and following the vaccination, she had COVID-19 symptoms on November 2, 2021 and wished to use the 2021 COVID Supplemental Emergency COVID-19 Leave. She was informed that she could not use her leave to cover the absence because the 2021 Supplemental Emergency COVID-19 Leave did not authorize the use. In order to substantiate her request, the Employee provided a physician's note that indicated she was "excused from work on 11/2/21 due to a reported medical issue."

According to Employee, the denial of her request was in error because the 2021 COVID Emergency Leave permitted its use whenever an employee was absent because they have "a COVID-19 diagnosis, is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or the employee has been exposed to COVID-19 and is seeking a COVID-19 test." Furthermore, Employee identifies that on February 12, 2021, her supervisor relayed an interpretation from the Department of Administration that said that the use of the leave is permitted when there is a reaction the vaccine.

Accordingly, Employee asserts that the Existing Benefits Clause of the EBH requires that DOA's interpretation remain in place because it was one that is primarily related to "wages, hours and conditions of employment" and also were clearly "established by practice with the knowledge and tacit consent of the County." Specifically, the

Employee argues that since the language was “essentially the same” between the two temporary exceptions that the interpretation must be carried forward.

### **Management’s Position.**

Management relies on the language of the 2021 Supplemental Emergency COVID-19 Leave as well as the history behind the previous temporary exceptions to demonstrate that the interpretation was inapplicable to the new leave benefit.

### **Decision**

For the reasons set forth below, the grievance is denied.

On December 11, 2020, the Department of Administration (“department”) issued a temporary exception to update the 2020 COVID Emergency Leave and to create the 2021 COVID-19 Emergency Leave (“December Temp. Exception.”). (Attachment C to Grievance.) The December Temp. Exception extended the time period for employees to use the 2020 COVID-19 Emergency Leave until January 2, 2021, but also created a new benefit which was referred to as the 2021 COVID-19 Emergency Leave and slated to begin on January 3, 2021. The December Temp. Exception provided the following permitted uses for the 2021 COVID-19 Emergency Leave:

- i. The employee has a COVID-19 diagnosis, is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or the employee has been exposed to COVID-19 and is seeking a COVID-19 test.
- ii. The employee is quarantined (including self-imposed quarantine), at the instruction of a health care provider, employer, or government official in order to prevent the spread of COVID-19.
- iii. The employee is caring for an immediate family member who has COVID-19 or is under a quarantine related to COVID-19.
- iv. The employee is caring for their child or other individual who is unable to care for themselves due to COVID-19 close of their school, child care facility, or other care program. This includes having to support their child with virtual school.

(See Section 5 of Attachment C.) On or about February 12, 2021, the department provided a directive that explained: “Our [DOA] position is that the leave should be used for potential COVID exposure. That said, the symptoms that employees are experiencing after the vaccine are very similar to COVID and as such, the employee has no way of knowing if it’s a reaction to the vaccine or if they have COVID - so the answer to your question is yes, they can use the COVID leave in that situation.” (Attachment D.) In other words, since the side-effects to the COVID-19 vaccine could mirror symptoms of the disease itself, Section 5.i. would apply.

On or about March 18, 2021, the department issued a new temporary exception about the use of the 2021 COVID-19 Emergency Leave (“March Temp. Exception”). The March Temp. Exception explained that its terms “takes the place of the [December Temp. Exception]...” (See Exhibit 1.) Among the differences between the two exceptions were the listed permitted uses:

- a. The employee has a COVID-19 diagnosis, is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or the employee has been exposed to COVID-19 and is seeking a COVID-19 test.
- b. The employee is quarantined (including self-imposed quarantine), at the instruction of a health care provider, employer, or government official in order to prevent the spread of COVID-19.
- c. The employee is caring for an immediate family member who has COVID-19 or is under a quarantine related to COVID-19.
- d. The employee is caring for their child or other individual who is unable to care for themselves due to COVID-19 close of their school, child care facility, or other care program. This includes having to support their child with virtual school.
- e. The employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization.

(Exhibit 1, Section 5). In other words, an employee could use the leave whenever they sought a vaccine or suffered from any side-effect of the vaccine even if these side-effects did not mirror COVID-19 symptoms.

On or about July 11, 2021, another temporary exception was proposed. (See Exhibit 2.) However, rather than amend the March Temp. Exception, it created a new county benefit (“July Temp. Exception”). The new benefit was called “Supplemental Emergency COVID-19 Leave, “ and it differed significantly from the 2021 COVID-19 Emergency Leave. First, its use was contingent on an employee exhausting the 2021 COVID-19 Emergency Leave that was set forth in the March Temp. Exception, and required documentation “of the needed reason for leave.” (Exhibit 2, Section 7.) . Second, the permitted uses were limited to the following:

- a. The employee has a COVID-19 diagnosis or has symptoms of COVID-19 and is seeking a diagnosis.
- b. The employee is quarantined at the instruction of a health care provider, employer, or government official in order to prevent the spread of COVID-19.
- c. The employee is caring for an immediate family member who has COVID-19 or is under a quarantine related to COVID-19.

(Exhibit 2, Section 5) Before the July Temp. Exception went into effect, an objection was raised by Derek Wallace. (Exhibit 3.) Specifically, his objections included:

- The additional 40 hours of COVID-19 emergency leave can only be used effective July 18, 2021 and cannot be used retroactively. This is in direct contrast to Resolution 033, which indicates support for making all 80 hours of Emergency COVID-19 Leave available to employees effective March 11, 2021.
- The additional 40 hours of COVID-19 emergency leave is being classified as “Supplemental” 2021 Emergency COVID-19 Leave **and is more limiting than the “original” 2021 Emergency COVID-19 Leave**. Specifically, this Supplemental Leave appears to prohibit employees the ability to use the benefit to:
  - o Provide care for family members due to the closure of school or daycare, and
  - o **Obtain and recover from a COVID-19 vaccination.**

(Exhibit 3) (emphasis added). Undersigned director met with Mr. Wallace and issued a revised temporary exception on or about August 10, 2021 (“August Temp. Exception”) (See Exhibit 4.) The August Temp. Exception differed from the proposed July exception in that it revised the permitted uses as follows:

- a. The employee has a COVID-19 diagnosis or has symptoms of COVID-19 and is seeking a diagnosis.
- b. The employee is quarantined at the instruction of a health care provider, employer, or government official in order to prevent the spread of COVID-19.
- c. The employee is caring for an immediate family member who has COVID-19 or is under a quarantine related to COVID-19.
- d. The employee is caring for their child or other individual who is unable to care for themselves as a result of the closure of their school, child care facility, or other care program due to COVID-19.

(Exhibit 4, Section 5.) In other words, the undersigned considered Mr. Wallace's objections and included the use of the leave in cases where there is a school or daycare closure. Finally, the August Temp. Exception was extended until the end of 2022, but no other changes were made through the issuance of yet another temporary exception on or about September 20, 2022. (September Temp. Exception) (Attachment F.)

Although lengthy, the history behind the issuance of the various temporary exceptions reveals one incontrovertible fact: the Supplemental Emergency COVID-19 Leave was a new and separate benefit from the 2021 COVID-19 Emergency Leave. As a result, any attempt to tie an interpretation from one benefit to the other fails.

The interpretation of the 2021 COVID-19 Emergency Leave was issued on February 12, 2021, and then codified in the March Temp. Exception with explicit language. However, the Supplemental Emergency COVID-19 Leave was initially proposed in the July Temp. Exception, but was never implemented because Mr. Wallace objected to the fact that the new benefit was more limited than the 2021 COVID-19 Emergency Leave because it did not allow employees to use the leave benefit when an employee "obtain[s] and recover[s] from a COVID-19 vaccination." Thus, the department's intention to prohibit such a use was clear at the time of the creation of the benefit, and such was the case when the August Temp. Exception finalized the benefit.

Further, if there were any doubt about whether an employee could use the benefit when recovering from a COVID-19 vaccine, it was lost when the undersigned provided FAQs to all employees on September 21, 2022. (Exhibit 5.) In it, the following Q&A was issued:

Q: Will Dane County be offering additional leave time for employees to receive a booster shot?

A: Working with their supervisor and following their Department's procedure, **employees may use 2021 COVID-19 Emergency Leave (but not Supplemental COVID-19 Emergency Leave)**, Sick Leave, vacation and other forms of leave (Sabbatical, Wellness, etc.) to receive a booster shot. No new time is being provided.

(Exhibit 5.) Again, the department's intention to prohibit the use of Supplemental COVID-19 Emergency Leave for vaccines was made clear. Put simply, there was never any ambiguity as to whether the Supplemental COVID-19 Emergency Leave would apply when receiving or recovering from a vaccine - it would not.

To get around this fact, Employee tries to argue that the use of similar language in the 2021 Emergency Leave and the Supplemental COVID-19 Emergency Leave means that any interpretation associated with the former is precedential to the latter under the Existing Benefit Clause. This is incorrect for the following reasons. First, the Department's interpretation was made when the 2021 COVID-19 Emergency Leave did not explicitly permit the use of leave for receiving or recovering vaccines. The interpretation became a nullity when the March Temp. Exception incorporated explicit language permitting the leave to be used for vaccine receipt and recovery. Second, the Existing Benefit clause is triggered when there is evidence of the Employer's "knowledge and tacit consent." Here there is evidence of the opposite: the department went to great lengths to differentiate the two benefits, and even explicitly notified the employees that they could not use the Supplemental COVID-19 Emergency Leave Benefit for the receipt and recovery from vaccines just one month after the benefit was finalized, and weeks after the benefit was extended. It is unclear how much more notice the department could have provided to the county's employees.

One last argument remains. Even if one were to assume that the Employee was correct that side-effects to symptoms of the COVID-19 vaccine were a permitted reason to use the Supplemental COVID-19 Leave (which it is not), denial of the leave was appropriate. In order to use the Supplemental COVID-19 Leave, an employee has

to produce documentation that demonstrates the need for the leave falls under one of the permitted uses. In this case, Employee produced a physician's note that stated employee was "excused from work on 11/2/21 due to a reported medical issue." There's no mention of the symptoms the Employee was experiencing to determine whether it was due to COVID-19 or its vaccines. Employee's failure to provide sufficient documentation dooms her grievance.

For these reasons, the grievance is denied.

*Greg Brockmeyer*

Greg Brockmeyer

Director of Administration

Cc: Derek Wallace