COVID-19 Support Emergency Amendment Act
- OHR Enforcement Guidance 21-001 -

Date: November 5, 2020

SUBJECT

COVID-19 Leave under the D.C. Family & Medical Leave Act of 1990 (DCFMLA)

BACKGROUND

On May 27, 2020, the Mayor signed the Coronavirus Support Emergency Act (CSEA), D.C. Act 23-326, which replaced all previous Coronavirus-related legislation and in part temporarily amended the DCFMLA to create a new COVID-19 job-protected leave. On August 19, 2020, the Mayor signed D.C. Act 23-405, extending the temporary legislation until November 16, 2020. The Mayor has also signed identical long-term legislation (D.C. Act 23-334), which became effective on October 9, 2020, after the Congressional review period expired. Act 23-334 will expire on May 22, 2021, 225 days after the effective date.

Congress also passed the Families First Coronavirus Response Act (FFCRA), requiring certain employers to provide paid leave for COVID-19 related reasons. For guidance under the FFCRA, see the United States Department of Labor's website at: dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave. Similarly, the District of Columbia also amended the District Paid Sick and Safe Leave Act (D.C. Code § 32-531.02a) which requires certain employers to provide paid leave for COVID-19 related reasons based on the FFCRA.

SPECIAL NOTE

This guidance entirely replaces and supersedes any previous OHR guidance on COVID-19 Leave under the DCFMLA.

PURPOSE

The purpose of this guidance is to summarize key amendments to the DCFMLA created by CSEA and to provide interpretational guidance pertinent to the DCFMLA during the COVID-19 public health emergency.

KEY PROVISIONS OF THE CSEA

1. **COVID-19 Leave (D.C. Code § 32-502.01):** During a declared state of public health emergency, an employee who has **worked for 30 days** for an **employer of any size** may use up to 16 weeks of "COVID-19" Leave for one of the following reasons:

   a. **Care for Self:** A recommendation from a healthcare provider to quarantine or isolate, including because the employee or an employee's household member is high risk for serious illness from COVID-19;

   b. **Care for Family or Household Member:** A need to care for a family member or a member of the employee's household pursuant to a government or healthcare provider's order to quarantine or isolate; or

    c. **Childcare Closure:** A need to care for a child whose childcare facility is closed or childcare provider is unavailable.

The right to COVID-19 Leave terminates when the public health emergency ends, even If an employee has not exhausted the 16-week entitlement.

2. **Certification (D.C. Code § 32-502.01(c)):** For COVID-19 Leave, an employer may request certification of the need for leave, including a signed, dated letter from a healthcare provider, including a probable duration, or a statement by a childcare provider or a printed statement from the childcare provider's website.

3. **Penalties:** Violation of the COVID-19 Leave provision (D.C. Code § 32-502.01) could result in a civil penalty of **$1000 per offense** in addition to any damages outlined in D.C. Code § 32-509.

4. **Effective Dates:** CSEA was signed by the Mayor on May 27, 2020, with retroactive coverage from March 11, 2020. The law is, therefore, **effective as of March 11, 2020, and is currently set to expire once the declared public health emergency ends.**

5. **"COVID-19 Public Health Emergency" means** Mayor's declarations of emergencies under MO 2020-045 and MO 2020-046 and any extensions thereof. On October 7, 2020, via MO 2020-103, the Mayor extended the COVID-19 Public Health Emergency **through December 31, 2020.**

6. **No Effect on Traditional Family and Medical Leave:** CSEA does not change the definitions of employer and employee, or eligibility for traditional family and medical leave entitlements, i.e., the employee must have worked for one year without a break in service and at least 1,000 hours in the preceding twelve months, and only employers with 20 or more employees are covered. Guidance on traditional family and medical leave can be found at: ohr.dc.gov/page/OHRGuidance.

FREQUENTLY ASKED QUESTIONS

Please be advised that the below are preliminary interpretation of the newly enacted temporary amendments to the D.C. Family and Medical Leave Act. The below is subject to change as the law and circumstances evolve.

1. **Do employers have to provide notice of rights added to the DCFMLA, including COVID-19 Leave?**

   Yes. All traditionally covered employers, as well as employers temporarily covered for COVID-19 Leave, are required to inform employees of new rights added to the DCFMLA by CSEA during the declared state of public health emergency. This includes posting a notice in a conspicuous place and notifying an eligible employee of COVID-19 Leave as soon as they become eligible or may become eligible under the prescribed circumstances. However, consistent with D.C. Code § 32-509(b)(6)(C), violations occurring in good faith will be considered by OHR.

2. **Is COVID-19 Leave paid or unpaid?**

   Unpaid. The DCFMLA does not require employers to provide paid leave but employees may use accrued leave to pay for their leave or take the leave as unpaid. If an employee elects to use otherwise available paid leave benefits while on COVID-19 eligible leave, such period of leave counts against the 16-week entitlement. Consistent with D.C. Code § 32-514, to the extent feasible, an employee and employer may mutually agree to telework arrangement in lieu of the employee taking unpaid leave under the DCFMLA.

3. **Is the COVID-19 leave a job protected leave, like family and medical leave?**

   Yes. All employment and benefits protections found at D.C. Code § 32-505 apply when an employee takes COVID-19 Leave.

4. **Does using COVID-19 leave count against the traditional 16 weeks of family and 16 weeks of medical leave provided by the DCFMLA?**

   No. The Council specifically created COVID-19 Leave as a new type of leave, codified at D.C. Code § 32-502.01, in addition to family leave (D.C. Code § 32-502) and medical leave (D.C. Code § 32-503). Therefore, there exist three buckets of DCFMLA leave: 1) 16 weeks of medical leave during a 24-month period; 2) 16 weeks of family leave during the same 24-month period; and 3) 16 weeks of COVID-19 Leave during the public health emergency.

5. **If a child's childcare facility, such as a nursery or school, is operating remotely, may a parent use COVID-19 Leave to supervise a child who, based on age or other bona fide behavioral or health condition, requires custodial supervision?**

   Yes, but the parent must provide certification to the employer of the childcare facility's physical closure, the reason custodial supervision of the child is necessary, and the unavailability of any other supervisory adult. If a childcare facility is physically open on some days and not on other days, COVID-19 Leave may only be used on the days the childcare facility is physically closed.

6. **If a child's childcare facility, such as a nursery or school, is physically open, but a parent chooses not to send the child, may the parent use COVID-19 Leave to supervise the child?**

   No, unless there is a recommendation from a healthcare provider to quarantine or isolate, or a government or healthcare provider's order to quarantine or isolate the child.

7. **If an absence would qualify both for COVID-19 Leave, as well as traditional family or medical leave, how should the leave be coded?**

   Where a period of leave would qualify as both COVID-19 Leave and traditional family or medical leave, the employer must ask the employee which type of leave the employee wishes to use. D.C. Code § 32-502.01(e)(4). The employer remains responsible for correctly designating and calculating DCFMLA qualifying periods of leave and for providing the employee with notice thereof, as required by 4 DCMR § 1613.

8. **Where qualifying reasons exist, may an employer designate the leave taken as COVID-19 Leave, even if the employee does not so request or does not want to "use" their COVID-19 Leave?**

   Yes. Consistent with the regulations implementing the DCFMLA, an employer may designate qualifying leave as COVID-19 Leave whether or not the employee requests such designation. Please note that an employer must provide notice to the employee of any such designation. See 4 DCMR §§ 1613.6-.7. See also FMLA2019-1-A, Mar. 14, 2019 (Department of Labor Guidance under the federal FMLA). But, see No. 7 above for circumstances where COVID-19 Leave also qualifies for other leave under the DCFMLA.

9. **Does COVID-19 Leave under the DCFMLA run concurrently with the federal FMLA and FFCRA?**

    Yes, like traditional family and medical leave, any leave taken under the DFMLA runs concurrently with the federal counterparts. See 4 DCMR § 1620.2; see also FMLA2019-1-A, Mar. 14, 2019 (Department of Labor Guidance under the federal FMLA).

10. **Can an employer retaliate against an employee for requesting or using COVID-19 Leave?**

    No. See D.C. Code § 32-507.

11. **Do the new provisions affect employers outside of the District with employees in the District? If so, does it include those working from home in the District of Columbia?**

    Yes. If an employee's typical jobsite has been in the District of Columbia or the employee typically works 50% or more of the employee's time in the District of Columbia, the employee remains covered by the DCFMLA even if the employee is working from home outside of the District of Columbia during a declaration of health emergency.

12. **Where can COVID-19 Leave complaints be filed?**

    Administrative complaints can be filed with the D.C. Office of Human Rights; OR a civil complaint can be filed in court. But, the complaint may ONLY be filed in one place, not both. For government complaints, no EEO counseling is required for filing a DCFMLA Complaint with OHR, including a complaint involving COVID-19 Leave.

13. **Can I contact OHR if I have additional questions?**

    Yes, but please note that OHR cannot provide legal advice on specific situations. OHR will assess inquiries and issue supplemental guidance as appropriate.

Additional OHR guidance issuances under the DCFMLA can be found at: ohr.dc.gov/page/OHRGuidance.