Frequently Ask Questions
Factsheet 24-03
Date: September 10, 2024

The DC Office of Human Rights' (OHR) Frequently Asked Questions About the D.C. Family and Medical Leave Act

I. Purpose

This is a document provided by the D.C. Office of Human Rights ("OHR") to help answer frequently asked questions about the D.C. Family and Medical Leave Act ("DCFMLA").[1] This document is designed to help both D.C. employees and employers understand their rights and obligations under the DCFMLA.

II. General Questions

- **What Is the DCFMLA?**
    - The DCFMLA is a local law that requires covered employers to provide eligible employees with up to 16 weeks of unpaid leave every 24 months for family leave **and** up to 16 weeks of unpaid leave every 24 months for medical leave. Eligible employees may take family leave under the DCFMLA for the care of a family member with a serious health condition, or for the birth, adoption, fostering or other placement of a child under the employee's care. Eligible employees may take medical leave under the DCFMLA if they suffer from a serious health condition if the condition prevents them from performing their job responsibilities.

- **What is a "serious health condition" under the DCFMLA?**
    - A serious health condition is a physical or mental illness, injury, or impairment that involves either inpatient care in a medical facility or continuing treatment or supervision at home by a health care provider or other competent individual. Generally, "inpatient care" must last for one night or more, and "continuing treatment" involves a period of incapacity followed by in-person doctor's visits, or a period of incapacity due to pregnancy or a chronic health condition. There are some situations where a period of incapacity is not required to qualify as a serious health condition, for example where incapacity is likely to occur absent medical treatment.
    - **Example 1:** An employee who periodically suffers from asthma attacks that render them temporarily unable to perform their job duties would qualify as having a serious health condition because they have a chronic condition, provided they require treatment by a health care provider for their asthma at least twice a year.

[1] D.C. Code § 32-501 et seq. Implementing regulations are 4 DCMR §§ 1600-1699.

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- **Example 2:** An employee has been diagnosed with cancer requiring regular radiation treatments. Even if the employee is never incapacitated by their illness, they would nonetheless qualify as having a serious health condition because incapacity would be likely if they did not receive radiation treatment.
- **Example 3:** An employee who is incapacitated by a serious case of flu but does not seek medical care and treats their symptoms with over-the-counter medicines does not have a serious health condition under the DCFMLA because they did not seek treatment from a healthcare provider.

- **Who is considered a family member under the DCFMLA?**
  - Family members under the DCFMLA are defined as people to whom an employee is related by blood, marriage, or legal custody, including foster children, as well as any child who lives with an employee and whom the employee has permanently assumed parental responsibility. It also includes a person with whom an employee has a committed relationship (i.e. domestic partner) so long as the employee has shared a mutual residence with the person in the last year.

- **Does the DCFMLA provide for paid leave?**
  - No. While employers are encouraged to offer paid medical and family leave, the DCFMLA only requires that they offer unpaid leave. An employee's use of DCFMLA-protected leave may also be covered by other types of paid leave programs at the same time, such as regular paid sick leave, however DCFMLA leave on its own is unpaid.

III. Who Is Covered Under the DCFMLA

- **What employers are covered by the DCFMLA?**
  - Employers who employ more than 20 employees (regardless of whether they are full-time or part-time) in D.C. are covered by the DCFMLA (with the exception of the United States government – federal employees are not covered). The 20-employee threshold is met when an employer maintains 20 or more employees on payroll during 20 or more calendar workweeks (whether consecutive or not) in the current or preceding calendar year.
  - The D.C. government is considered a single employer under the DCFMLA, and all subdivisions of the government are covered regardless of their size.**Example:** If an employer employed 20 employees during 20 workweeks in the calendar year as of September 1, 2024, then subsequently dropped below 20 employees before the end of calendar year 2024 and continued to employ fewer than 20 employees during that year, the employer would continue to be covered throughout calendar year 2025 because it met the coverage criteria for 20 workweeks in the preceding calendar year 2024.

- **When determining how many employees an employer has in order to be covered by the DCFMLA, should remote employees who work from outside the District be counted?**
    - Only employees who meet the definition of being "employed within the District" are counted toward the 20-employee requirement. See below for the definition of "employed within the District."

- **What employees are covered by the DCFMLA?**
    - Employees are eligible for leave under the DCFMLA if they work within the District, have been employed by the same covered employer for at least 12 months (consecutive or non-consecutive) within a 7-year period of the start date of DCFMLA leave, **and** the employee worked at least 1,000 hours for the employer within the 12-month period.[2] An employee is covered regardless of if they are part-time or full-time provided they worked the required 1,000 hours within the 12-month period in the preceding 7 years. Elementary and secondary school teachers (both public and private) are covered by the DCFMLA, but their leave entitlement is more restricted than other employees.[3]
    - When an employee leaves a job temporarily for military leave, the employer must count the hours the employee would have worked had the employee not been on military leave when determining DCFMLA eligibility.
    - **Example:** An employee who works for a covered employer for three years, resigns and returns to the same employer two years later could be immediately eligible for DCFMLA upon their return if they worked for the employer for at least 1,000 hours within a 12-month period.

- **If an employee works from outside D.C. for an employer who has 20 or more employees in the District, is the employee still covered by the DCFMLA?**
    - Fully-remote employees who only work outside of D.C. are not covered. An employee is only covered by the DCFMLA if they work within the District. An employee is considered to work within the District if they spend more than 50% of their work-time working within D.C.
    - **Example:** Assuming a standard 40-hour work week schedule, an employee who works remotely from their home in Virginia three days a week but goes into an office in D.C. two days a week would not be considered to be employed within the District because they spend more than 50% of their work-time working outside of the District. However, if they went into the office in D.C. three days a week, they would be considered to work within the District, as they passed the 50% threshold.

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[2] Although this FAQ answer reflects the current law, please note that the D.C. Municipal Regulation section on eligible employees, 4 DCMR § 1603.1, has not been amended at the time of this factsheet to reflect the current eligibility standards under the DCFMLA, which was amended in 2021.

[3] Teachers may be required to only take leave for the specific time required for the medical treatment or to temporarily transfer to a different position. They may also be required to continue leave until the end of the school term if they take leave five weeks or less before the end of term. *See generally* D.C. Code § 32-506.

- **Can a change in an employer's ownership or corporate structure reset or otherwise change the length of time an employee has worked for the employer?**
    - If an employer undergoes a business change, such as a merger or name change, the employer's successor-in-interest is considered the same as the original employer for purposes of determining employee eligibility. Accordingly, an employee's time spent working for the original employer would still count toward the employee's DCFMLA eligibility as an employee of the successor-in-interest.

- **Can employers with fewer than 20 employees still grant DCFMLA leave?**
    - Employers who are not covered by the DCFMLA are of course welcome to grant family or medical leave to their employees and to afford them the rights they would have under the DCFMLA. However, an employer who is not covered likely cannot be held liable for violations of the DCFMLA, even if they essentially "opt in" to the Act's requirements. If an employee of a non-covered employer was granted DCFMLA-like rights, and the employer than interfered with those rights, the employee might have a breach of contract claim, a disability discrimination claim, or other type of legal claim, but they would not have a claim under the DCFMLA. The DCFMLA only applies to covered employers.

IV. Types and Duration of Leave Under the DCFMLA

- **Can an employee use leave for portions of a week or day, rather than for consecutive weeks or days?**
    - Yes. This is called intermittent or reduced schedule leave. DCFMLA leave can be granted by the hour rather than by the day or week. Employees who have a serious health condition, or a family member with a serious health condition, that only prevents them from performing their duties on occasion or for a few hours a day may use DCFMLA leave to cover this time when medically necessary.
    - **Example 1:** An employee may take leave for two hours each Wednesday to attend the doctor's appointments of a family member with a serious health condition. For foreseeable medical or family leave such as regular doctor's appointments, the employee must provide notice to the employer prior to taking leave.
    - **Example 2:** An employee has a chronic health condition that flares up periodically and unpredictably, incapacitating the employee for short periods of time. The employee may use intermittent DCFMLA leave during a flare-up, even if they do not seek medical attention each time.

- **Can family leave and medical leave be taken separately and consecutively for the same medical event? For example, if an employee gives birth, can she take medical leave to recover and then take family leave to bond with her baby?**
    - Under the DCFMLA, leave for childbirth is most clearly provided for under family leave, which provides for up to 16 weeks of leave for an employee who has recently had a child born (this applies to both parents). Medical leave for childbirth under the DCFMLA is only available if the childbirth results in a serious health condition (i.e. requiring inpatient care or at-home treatment) and the medical leave is only available for the period in which the employee is unable to perform their job functions. Under such conditions, an employee may take medical leave under the DCFMLA and may then also take up to 16 weeks of consecutive DCFMLA family leave. However, the family leave must be taken within 12 months of the birth or adoption of the child.
    - It is important to note that employees who are pregnant or have recently given birth may be entitled to additional rights and protections under the D.C. Human Rights Act and the Pregnant Workers Fairness Act, in addition to federal laws. Employees who have given birth may also be entitled to be paid while on leave under the D.C. Paid Family Leave program, but that program does not provide any additional leave, as it solely provides for payment during leave.

- **If both parents of a child work for the same employer, are they entitled to a combined total of 32 weeks of DCFMLA family leave for the birth, adoption, or placement of the child?**
    - If two family members are employees of the same employer, the employer may limit their family leave to 16 weeks total, but only if both family members are requesting leave for the same underlying reason (i.e. birth of a child). The employer may also limit the family members' family leave to four workweeks within a 24-month period for leave they take simultaneously. The DCFMLA limits the definition of "same employer" to an office or other subdivision of an employer in which both family member-employees have identical or interrelated duties such that the absence of both employees would unduly disrupt the employer's business. For example, if both parents work for Big Box Corp. but in different stores, they are not considered to work for the same employer. Likewise, if both parents work for the D.C. government, but in different agencies, they do not work for the same employer.

- **Is contracting COVID (as distinct from long COVID) grounds for requesting DCFMLA leave?**
    - Absent complicating medical factors (i.e. an underlying health condition), contracting COVID-19 is generally not grounds for requesting DCFMLA medical leave because COVID-19 does not usually constitute a serious health condition. Under the DCFMLA, employees are only entitled to medical leave for serious health conditions, which are defined as conditions which require inpatient care or continuing treatment or supervision at home, in addition to an inability to perform their job functions. Conditions which can be treated without a visit to a health care provider (i.e. with over-the-counter

medications or bed rest) are not serious health conditions, and in most situations COVID-19, like a flu or cold, would fall into this category.
    - Some employees and employers may recall that during the COVID-19 public health emergency certain employees were entitled to take "COVID-19 leave" under the DCFMLA. However, that leave was created pursuant to emergency legislation which has since expired, and there are no longer any leave entitlements specific to COVID-19.

- **Can an employer limit the amount of DCFMLA leave that an employee can use? Or specify days on which an employee can use intermittent leave?**
    - If an employee is qualified and entitled to family or medical leave under the DCFMLA, the employer generally may not place limitations on that leave. However, an employer can require that leave requests are supported by medical certification issued by the employee or family member's treating health care provider, and employers are not required to provide leave beyond what the medical certification supports.
    - Additionally, as discussed above, an employer may place limits on how much leave two family members may take for the same reason. Also, when the need for leave is foreseeable, for example because an employee needs to schedule a non-emergency doctor's appointment, the employee is required to give the employer advanced notice and to schedule their leave for a time that does not unduly interrupt the employer's operations.
    - **Example:** An employee provides a medical certification that states the employee will need three hours off per week to attend physical therapy for a serious health condition. The employer is not required to grant the employee 8 hours of leave every day for 16 weeks based on this certification.

- **Do holidays count against DCFMLA leave? What if an employee typically works on the holiday?**
    - Observance of a holiday during an employee's continuous DCFMLA leave does not affect the length of the employee's leave entitlement (e.g., leave during the week of Thanksgiving would still count as a full week of leave). However, if the employee is taking intermittent leave, the holiday would not count against the leave entitlement unless the employee was scheduled to and expected to work on the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., closing for a week for the Christmas/New Year holiday or an employer closing a plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.

- **An employee's 16 weeks of family leave and 16 weeks of medical leave are tied to a 24-month period. When does the 24-month period start and end?**
    - The 24-month period can be calculated by one of four methods, as chosen by the employer:
        1. Calendar year
        2. Any fixed 12-month year, such as fiscal year or a year starting on the employee's anniversary date
        3. The 24-month period measured forward from the date the employee's first DCFMLA leave begins
        4. The 24-month period measured backward from the date an employee uses DCFMLA leave
    - The employer may choose any of the four methods above, but it must inform its employees of the choice it has selected, and it must apply the same method to all employees. For D.C. government employees, the third method is used. An employer may also choose to designate leave on an hourly basis, wherein 640 hours is equal to 16 weeks for an employee on a 40 hour per week schedule.

V. Protections Under the DCFMLA

- **Is an employee protected from retaliation for requesting or taking DCFMLA leave?**
    - Yes. Employers may not punish employees for requesting or taking DCFMLA leave, for example by assigning them the most undesirable shifts or reducing their pay. Employees who believe they have been punished for taking or requesting leave may file a complaint with the D.C. Office of Human Rights or with the D.C. Superior Court within one year of the alleged unlawful punishment or the discovery thereof.

- **Can an employer terminate an employee who is out on DCFMLA leave?**
    - An employer may not terminate an employee *because* they have taken leave, but they can terminate an employee for other legitimate reasons while the employee is on leave.
    - **Example 1:** An employee is accused of theft at work. While the theft is being investigated, the employee requests and begins taking DCFMLA leave. The employer may conclude its investigation and terminate the employee for theft while the employee is on DCFMLA leave.
    - **Example 2:** An employer determines it needs to conduct a mass layoff (also called a reduction in force), and lays off everyone who meets a specific, universally applied set of criteria. The employer may terminate an employee who is on DCFMLA if they fall within these criteria. Note, however, that if the employer is using a criterion such as productivity, an employee on DCFMLA leave should not have their lack of work during leave held against them, such as being measured as having a lower productivity metric because they were not working while on leave.

- **Is an employer required to return an employee to their same position after the employee's return from DFMLA leave?**
    - Generally, the employee is guaranteed to be returned to the same position or, if that position is no longer available, to an equivalent position including the same benefits, pay, seniority, and other terms and conditions of employment. There are some limited exceptions involving grievous economic injury to the employer that do not apply to most employees.

- **How long is an employer obligated to keep an employee who is on DCFMLA leave on their health insurance plan?**
    - For the duration of the DCFMLA leave. The only exception is if the employee, before taking leave, made a contribution to the health plan and is then unable or refuses to make the contribution while on leave. In such cases, the employee may be removed from the plan until they return to work and resume their contribution.

VI. Notification Requirements

- **When does an employer have to notify its employees of their rights under the DCFMLA?**
    - Covered employers are required to post information about the DCFMLA (either in an accessible physical space or on its website) and to include that information in its employee handbook or manual (or in a separate handout for new hires if it has no handbook or manual). Additionally, when an employee requests DCFMLA leave, or requests leave that the employer has reason to believe is for a DCFMLA-qualifying reason, the employer must inform the employee of their eligibility under the Act. The employer must respond to an employee's DCFMLA leave request within 5 days with a determination on the employee's eligibility. Employers can find the workplace poster here.

- **When should an employee apply for DCFMLA leave?**
    - When possible, an employee with advanced notice of the need for DCFMLA leave must notify their employer at least 30 days before the need for leave begins. For leave that is not reasonably foreseeable 30 days in advance, the employee must notify their employer as soon as practicable prior to the need for leave. If an employee had no advance notice of their need for leave, for example because of a medical emergency, they should notify their employer within 5 days after the need for leave begins, or as soon as practicable.
    - Family leave taken for the birth, adoption, or placement of a child must be taken within 12 months of the birth, adoption, or placement, after which it expires.

- **If an employer is not covered by the DCFMLA, are they obligated to inform their employees that they do not have DCFMLA protections?**
    - No. The DCFMLA requires employers with more than 20 employees to provide notice (see above for description of how the employer must provide notice) to their employees of their rights under the DCMFLA. There is no requirement that an employer inform an employee of their lack of rights under the DCFMLA.

- **Are employers still required to post in the workplace "COVID-19 Leave Under DC Family and Medical Leave Act (DCFMLA)?"**
    - No, this is no longer a requirement.

VII. Documentation Requirements

- **Is there an application form and medical certification form for DCFMLA leave? Or is this something the employer has to create on their own? Can employers use federal FMLA forms for DCFMLA leave certification?**
    - At this time, there is no published standard DCFMLA application form. Employers can create their own. Some employers use the federal FMLA forms, however employers should note that the DCFMLA is more expansive than the FMLA, and the FMLA does not address all situations covered by the DCFMLA. For example, the federal forms do not have an option to request family leave to care for someone with whom an employee is in a committed relationship, a situation covered by the DCFMLA.

- **What information does an employee need to provide to an employer when requesting DCFMLA leave?**
    - When an employee is requesting medical leave or leave to care for a family member with a serious health condition, an employer may request that the employee provide a medical certification signed by a healthcare provider. The certification must include (1) the date the serious health condition commenced; (2) how long the condition is expected to last; (3) appropriate medical facts that would qualify the employee for leave; and (4) for medical leave, a statement that the employee is unable to perform the functions of their position and, for family leave, an estimate of the amount of time the employee will be needed to care for their family member.
    - An employer may not request medical certification for an employee who is seeking DCFMLA for the birth of a child, or placement of a child.

- **Can an employer require an employee to get a second medical opinion?**
    - If the employer has reason to believe that the medical certification is not valid, the employer may require that the employee obtain a second opinion; however, the employer must pay for any costs associated with a second opinion. If the second opinion

differs from the first, the employee may obtain a third opinion, at the employer's expense, from a healthcare provider agreed upon by the employer and employee. The third opinion shall be binding.

- **Can an employer require an employee to provide periodic updates on their medical condition while they are on DCFMLA leave?**
  - An employer may require recertification from a healthcare professional on a "reasonable basis," including if more than six months have passed since the last certification; if the employee requests an extension of leave or change to their leave; or if the employer obtains new information that casts doubt on the validity of the employee's asserted reason for needing leave. However, if an employer's questioning of the employee is not reasonable, such as excessive questions about when the employee is returning to work or weekly requests for status updates about the employee's condition, such could constitute unlawful interference with the employee's rights under the DCFMLA.

- **Is an employee required to get medical documentation in a non-English language translated?**
  - Yes, if the employer requests it. If, for example, an employee needs to care for a family member residing in another country, or if an employee develops a serious health condition while abroad, an employer must accept a medical certification from a health care provider who practices in the country, but the employee must provide an English-translated copy of the certification upon the request of their employer.

VIII. DCFMLA and Other Types of Leave

- **Is the DCFMLA the same thing as FMLA?**
  - The DCFMLA is separate from the federal FMLA, although both laws provide for unpaid family and medical leave. The DCFMLA is more expansive than the federal FMLA, including by requiring covered employers to provide up to 16 weeks of family **and** 16 weeks of medical leave every 24 months to eligible employees, whereas the federal FMLA only entitles employees to up to 12 weeks of either family **or** medical leave every 12 months.

- **If an employer is covered by both the DCFMLA and the federal FMLA, does any eligible employee get both types of leave (i.e. 16 weeks of DCFMLA and then 12 weeks of FMLA)?**
  - Generally, no. For leave which qualifies under both DCFMLA and federal FMLA, the leave counts against the employee's entitlement under both laws and is counted concurrently. For leave which qualifies under both, an employer may choose to designate it as DCFMLA and/or federal FMLA leave, regardless of the employee's original request. However, there are some narrow circumstances where an employee may be entitled to additional federal FMLA leave after exhausting their DCFMLA leave

due to the differing calculation periods of the laws (24 months for DCFMLA and 12 months for FMLA).

- **Can an employer require an employee to use accrued paid leave time before using DCFMLA leave?**
    - No. An employee **may** use accrued paid leave for a DCFMLA qualifying event – which will count against the 16 weeks of DCFMLA leave – but an employer cannot require an employee to use paid leave time instead of or before DCFMLA leave.

- **Is an employee entitled to stack D.C. Paid Family Leave with DCFMLA leave? For example, can the employee receive a total of 28 weeks of leave by stacking 12 weeks of PFL leave and 16 weeks of DCFMLA leave?**
    - No. D.C. Paid Family Leave does not create any entitlements to take leave beyond those provided for in the DCFMLA; rather, it allows eligible employees to receive pay for certain qualifying leave for family or medical purposes. Furthermore, any paid leave taken pursuant to Paid Family Leave which would also qualify for DCFMLA leave runs concurrently with DCFMLA leave.[4]

IX. Additional Questions or Comments

If you have any further questions about DCFMLA or the information in this document, please contact us via:

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- Phone: (202) 727-4559

Please note that while OHR is available to answer questions to the best of our ability, any information provided should not be considered legal advice.

[4] There are some circumstances where an employee has exhausted their DCFMLA leave entitlement but may still be entitled to Paid Family Leave benefits. However, such an employee would not have any of the entitlements or protections provided by the DCFMLA for any Paid Family Leave they take after their DCFMLA entitlement has been exhausted.