

COVID-19 Response Emergency Amendment Act (CREA)

Preliminary Guidance

- OHR Enforcement Guidance 20-001 -



Date: April 20, 2020

SUBJECT

D.C. COVID-19 Response Emergency Amendment Act as it relates to D.C. Family & Medical Leave Act of 1990 (DCFMLA)

BACKGROUND

On March 17, 2020, the Mayor signed the COVID-19 Response Emergency Amendment Act (CREA), which temporarily amends the DCFMLA to expand DCFMLA coverage for employees working in the District of Columbia. It is important to note that Congress recently enacted the Families First Coronavirus Response Act (FFCRA), which requires certain employers to provide paid leave for COVID-19 related reasons. For guidance under FFCRA, see the United States Department of Labor's website at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

PURPOSE

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

KEY PROVISIONS OF THE CREA

- 1. Waiver of Certain Requirements (D.C. Code § 32-501(1)):** During a public health emergency declared by the Mayor, when requesting leave under the DCFMLA, an employee need not have worked for the employer for 1,000 hours in the past year or have one year of continuous service, if the employee has been ordered or recommended to self-quarantine or isolate by a medical professional, the Department of Health, or other District or federal agency.
- 2. Creation of "Declaration of Emergency" (DOE) Leave (D.C. Code § 32-502.01):** A new section is added to the DCFMLA providing that during a public health emergency declared by the Mayor, if an employee is unable to work due to the circumstances giving rise to the public health emergency, the employee may request for "declaration of emergency" leave *during* the declared public health emergency period.
- 3. Applicability for DOE Leave (D.C. Code § 32-516):** During a public health emergency declared by the Mayor, for the DOE leave, the benefit applies to employees working for an employer of any size (1 or more employees in the District of Columbia).
- 4. Certification (D.C. Code § 32-502.01):** For DOE Leave, recommendation from the Mayor, Department of Health, medical professional, or other District or federal agency that the employee self-quarantine or isolate is sufficient; for government mandated quarantine or isolation, the declaration of public health emergency shall serve as certification.
- 5. Effective Dates:** CREA was signed by the Mayor on March 17, 2020 and its provisions amending the DCFMLA will expire 90 days after the Mayor's signature. Therefore, the law is **effective as of March 17, 2020 and will expire on June 15, 2020**. All other provisions of the DCFMLA remain in effect.

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. Question: How long is the “Declaration of Emergency” (DOE) leave? Is it 16 weeks? Is there a cap?

The declaration of emergency leave may last as long as the duration of public health emergency period. See D.C. Code § 32-502.01 (2020). Therefore, it may be shorter or longer than 16 weeks as compared to family and medical leave. The DOE leave will end at the expiration of the public health emergency period.

2. Question: Do employers have to provide notice of rights added to the DCFMLA, including DOE leave?

Yes. All traditionally covered employers, as well as employers temporarily covered for DOE leave, are required to inform employees of new rights under the DCFMLA created by CREA. This includes posting a notice in a conspicuous place and notifying an eligible employee of DOE 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.

3. Question: Is the DOE 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. 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.

4. Question: When does the DOE leave get triggered exactly?

The DOE leave is triggered if:

- (a) The Mayor declares a public health emergency; and*
- (b) The employee is unable to work due to the circumstances giving rise to the public health emergency.*

An employer limiting its operations to remote operations does not by itself trigger DOE leave, if an employee is able to work remotely. On the other hand, if the employer is physically closed but business operations are continuing and the employee in question is unable to perform their duties (even remotely) due to circumstances giving rise to the state of public health emergency, then the employee may be entitled to a “declaration of emergency” leave.

5. Question: What about caregivers who can’t work because their child’s school or daycare is closed, but aren’t specifically ordered to self-isolate or quarantine?

According to the temporarily amended DCFMLA at D.C. Code § 32-502.01, if the need for leave arises from government mandated quarantine or isolation, the declaration of public health emergency shall be sufficient certification to request a DOE leave. Additionally, the Council has expressed that its intent in drafting CREA was to allow leave for “any employee who needs to be absent from work as a result of the coronavirus emergency.” See Letter from the Council, dated March 27, 2020. In so expressing this intent, the Council provided examples, including in the event of a school or day care closure. Therefore, if a child-care facility or school is closed, a caregiver of the affected child may request a DOE leave since

they may be unable to work due to circumstances giving rise to the declaration of the public health emergency. See D.C. Code § 32-502.01 (2020).

6. Question: Is the DOE leave a job protected leave, like family and medical leave?

Yes. The declaration of emergency leave is job protected leave consistent with D.C. Code § 32-505. Although the Council did not specifically amend this section of the DCFMLA, in a letter dated March 27, 2020, the Council expressed that it intended for CREA amendments to include both job and health insurance benefits while the employee is on leave. Therefore, upon returning from DOE leave, an employer must restore the employee to their original position or an equivalent position.

7. Question: Do the new provisions affect employers outside of the District with offices or jobsites in the District? For example, what if my employer's main office is in Virginia or Maryland, but I typically work from an office in D.C.?

Potentially. Under the DCFMLA, if an employer has 20 or more employees who work in the District, and your typical jobsite is in the District of Columbia or you typically work 50% or more of the time in the District of Columbia, you are covered by the DCFMLA, even if the employer's main office is outside of the District. See 4 DCMR §§ 1601.1, 1603.5. Therefore, if you and your employer are covered by the DCFMLA, the new provisions would apply to you.

8. Question: What if I typically work in Virginia or Maryland, but now am working from home in DC? Does the DCFMLA and the new amendments apply to me?

Likely not. To be a covered employee, your typical jobsite must be in D.C., or you must typically work more than 50% of the time in D.C. See 4 DCMR § 1603.5. And the employer must still have 20 or more employees working in the District. See 4 DCMR § 1601.1.

9. Question: What if I typically work in an office in DC and my employer has 20 or more employees in the District normally, but now because of the state of health emergency, I now work from home in Virginia and my colleagues are in Maryland? Am I still covered by the DCFMLA and the new amendments if my employer no longer has 20 or more employees working in the District?

Yes, you are still covered. Temporarily teleworking from out of state will not cause you to lose eligibility, so long as your primary job site had been in the District prior to the pandemic and you and your employer were covered by the DCFMLA. See 4 DCMR § 1603.5.

10. Question: Can I contact OHR if I have additional questions?

Yes, OHR welcomes questions but please note that OHR cannot provide legal advice on specific situations. OHR will assess inquiries and issue supplemental guidance as appropriate. Please contact OHR at ohr@dc.gov with any further questions.