

COVID-19 Support Emergency Amendment Act

- OHR Enforcement Guidance 20-001 -



Date: August 25, 2020

SUBJECT

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

BACKGROUND

On May 27, 2020, the Mayor signed CSEA, D.C. Act 23-326, which replaces all previous Coronavirus-related legislation and temporarily amends the DCFMLA to create a new COVID-19 job-protected leave. It is important to note that Congress passed 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>. Similarly, CSEA 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 FFCRA.

SPECIAL NOTE

This guidance entirely replaces and supersedes OHR's previous DCFMLA expansion guidance, which was based on the COVID-19 Response Emergency Amendment Act (CREA), signed by the Mayor on March 17, 2020, as that law has been entirely replaced by CSEA.

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

This guidance entirely replaces and supersedes OHR's previous DCFMLA expansion guidance, which was based on the COVID-19 Response Emergency Amendment Act (CREA), signed by the Mayor on March 17, 2020, as that law has been entirely replaced by CSEA.

1. **COVID-19 Leave (D.C. Code § 32-502.01):** During the 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 has ended, 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 is retroactive, effective March 11, 2020 and will expire at the end of a declared public health emergency. Currently, the state of public health emergency **will expire on October 9, 2020.**
- 5. **"COVID-19 Public Health Emergency" means** Mayor's declarations of emergencies under MO 2020-045 and MO 2020-046 and any extensions thereof.
- 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: <https://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 DOE leave?

Yes. All traditionally covered employers, as well as employers temporarily covered for COVID-19 leave, are required to inform employees of new rights under the DCFMLA created by CSEA. 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.

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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).

5. Can an employer retaliate against an employee for requesting or using COVID-19 leave?

No. See D.C. Code § 32-507.

6. May an employer designate leave taken for a qualifying reason as COVID-19 leave, even if the employee does not so request?

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).

7. 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 emergency.

8. 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 in court. For government complaints, no EEO counseling is required for filing a COVID-19 Leave complaint with OHR.

9. 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.