

NEW COVID-19 Leave Under the DCFMLA

OHR Enforcement Guidance No. 22-01

-Revised January 14, 2022-



Date: January 14, 2022

SUBJECT

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

BACKGROUND

In 2020 and 2021, through a series of legislative acts, the D.C. Council amended the DCFMLA, adding a form of leave known as “COVID-19 Leave.” This leave ran from March 11, 2020, through November 5, 2021 (“Original COVID-19 Leave”). OHR’s guidance on the Original COVID-19 leave can be found at ohr.dc.gov/page/updated-covid-19-leave-under-dcfmla.

On November 18, 2021, the Mayor signed the COVID Vaccination Leave **Emergency** Act of 2021, D.C. Act 24-209, D.C. Code § 32-502.01, which amended the Original COVID-19 Leave provision and created a new COVID-19 Leave to take effect November 5, 2021 (“New COVID-19 Leave”). On December 22, 2021, the Mayor also signed the COVID Vaccination Leave **Temporary** Act of 2021. This guidance (No. 22-01) is confined to the New COVID-19 Leave, which began on November 5, 2021.

PURPOSE

The purpose of this guidance is to summarize the New COVID-19 Leave added to the DCFMLA by D.C. Act 24-209. The current effective dates for the new COVID-19 Leave are November 5, 2021, through February 3, 2022. However, once the COVID Vaccination Leave **Temporary** Act of 2021 is either approved by Congress or the review period expires, whichever occurs first, the effective period will be extended.

KEY PROVISIONS OF THE NEW COVID-19 LEAVE, STARTING **NOVEMBER 5, 2021**

1. Starting November 5, 2021, an employee who has worked for 30 days for an employer with 20 or more employees in the District may use up to 16 weeks of New COVID-19 Leave (D.C. Code § 32-502.01, version approved November 18, 2021) for one of the following reasons:
 - a. Positive Test Result – if the employee tested positive for COVID-19 or is caring for a family member or individual with whom the employee shares a household who has tested positive for COVID-19 and must quarantine pursuant to Department of Health guidelines
 - b. Isolation or Quarantine – if the employee has a recommendation from a health care provider or a directive from an employer that the employee isolate or quarantine due to COVID-19, including because the employee or an individual with whom the employee shares a household is at high risk for serious illness from COVID-19
 - c. Care for Other – if the employee must care for a family member or an individual with whom the employee shares a household, who is isolating or quarantining pursuant to Department of Health guidance, the recommendation of a health care provider, or the order or policy of the family member’s or individual’s school or childcare provider

- d. Childcare Closure – if the employee must care for a child whose school or place of care is closed or whose childcare provider is unavailable to the employee due to COVID-19.
2. **Certification** – An employer may request reasonable certification of the need, such as:
 - a. Dated test result
 - b. Health care provider signed and dated statement
 - c. Copy of Department of Health guidance and documentation demonstrating need to comply
 - d. Copy of childcare facility policy or written statement from the facility.
3. **Advance Notice** – An employee must provide advance notice where possible, or otherwise as soon as possible after a need to take leave arises.
4. **Unpaid Leave** – New COVID-19 Leave is unpaid, but an employee may use accrued paid leave, which counts against the 16-week entitlement.
5. **Penalties** – A violation of COVID-19 leave provisions could result in a fine of \$1,000 per offense as well as damages outlined in D.C. Code § 32-509.
6. **Effective Dates** – New COVID-19 Leave is available starting November 5, 2021.

FREQUENTLY ASKED QUESTIONS

Please be advised that the below are preliminary interpretations of the newly enacted temporary amendments to the DCFMLA and is thus subject to change.

1. What are the differences between the Original COVID-19 Leave and the New COVID-19 Leave?
 - a. Both the Original COVID-19 and New COVID-19 Leave permit the use of leave for childcare duties based on a COVID-related childcare facility closure.
 - b. The differences between the Original COVID-19 Leave and the New COVID-19 Leave are the following:
 - i. The Original COVID-19 Leave permitted leave to be taken for care of self where a healthcare provider recommended to quarantine or isolate OR care for family or household member where government or healthcare provider has ordered to isolate.
 - ii. The New COVID-19 Leave made changes to these reason by allowing for the care for self after **testing positive** or after the recommendation from a healthcare provider or order from an **employer** for the employee to quarantine or isolate. The New COVID-19 Leave also permits the use of the leave to care for family or household member who has **tested positive** or who is isolating or quarantining due to **Department of Health guidelines**, recommendation of a healthcare provider, or **order or policy of a school or childcare facility**.
 - iii. The Original COVID-19 Leave was available to an employee who had worked for 30 days for an employer of any size. The New COVID-19 Leave is available to an employee who has worked for 30 days for an employer with **20 or more employees in the District**. (Bolded terms are new provisions).
2. Do employers have to provide notice of rights added to the DCFMLA, including New COVID-19 Leave?
 - a. Yes. All employers with any covered employee should post a notice of rights, which can be obtained on OHR's website. The Poster for the New COVID-19 Leave can be found here: ohr.dc.gov/page/workplaceposters
3. Is New COVID-19 Leave paid or unpaid?
 - a. Unpaid, but paid leave may be used contemporaneously which would count against the 16-week entitlement.

4. Is New COVID-19 Leave job protected?
 - a. Yes, all protections at D.C. Code § 32-505 apply.
5. Does New COVID-19 Leave count against the traditional entitlements to 16 weeks of family and 16 weeks of medical during a 24-month period?
 - a. No.
6. If an absence would qualify for both COVID-19 leave, as well as either traditional family or traditional medical leave, how should it be coded?
 - a. The employer should ask the employee which type of leave the employee wishes to use. D.C. Code § 32-502.01(e)(4). The employer is responsible for proper record-keeping. 4 DCMR § 1613.
7. If a childcare facility is open, but a parent employee chooses not to send the child, may the employee use COVID-19 Leave?
 - a. Generally no, unless the child has been recommended by a healthcare provider to isolate, is isolating consistent with Department of Health guidance, or ordered by the childcare facility to isolate.
8. If an employee is on leave for New COVID-19 qualifying reasons, may the employer so designate the leave, even if the employee did not request the leave?
 - a. Yes, and must give notice of the designation to the employee. 4 DCMR § 1613.6-.7.
9. Does New COVID-19 Leave run concurrently with the federal FMLA?
 - a. Yes, if the reason for the leave makes it federal FMLA leave qualifying, they run concurrently. 4 DCMR § 1620.2.
10. Can an employer retaliate against an employee for requesting or using New COVID-19 Leave?
 - a. No. D.C. Code § 32-507.
11. Does COVID-19 Leave apply to an employee working from home in the District of Columbia for an employer located outside of the District of Columbia?
 - a. Generally yes, if the employee is working from home pursuant to an employer policy.
12. Where can New COVID-19 Leave complaints be filed?
 - a. EITHER with OHR by filling out the employment questionnaire at ohr.dc.gov, OR by filing a lawsuit in D.C. Superior court.

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