

# Understanding Leave Stacking under the DCFMLA

- OHR Enforcement Guidance 19-002 -



Date: November 8, 2019

## SUBJECT

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D.C. Family & Medical Leave Act of 1990 (DCFMLA) – Leave Stacking

## PURPOSE

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This enforcement guidance is provided to specifically discuss what “leave stacking” means, whether DCFMLA permits “leave stacking,” and whether DCFMLA requires an employer to pay an employee during a covered leave of absence. This guidance document contains examples to illustrate certain points, but the examples are for educational purposes only and shall not constitute legal advice.

For more general information regarding DCFMLA, please reference OHR Enforcement Guidance 18-03, published in 2018 which includes the following topics: (1) job protection while on DCFMLA leave, (2) the intersection between DCFMLA and the federal FMLA, (3) the intersection between DCFMLA and reasonable accommodation obligations under disability laws, and (4) benefits restoration for former employees who are re-hired. OHR Enforcement Guidance 18-03 can be accessed [here](#).

## GENERAL BACKGROUND

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Under the DCFMLA, a covered employee in the District of Columbia may take job protected medical and/or family leave.<sup>1</sup> Generally speaking, job protected leave means the employer may not terminate or take other forms of adverse action against an employee while the individual is on qualified DCFMLA leave or because they took the DCFMLA leave.

DCFMLA allows for 16 weeks of **medical** and 16 weeks of **family** leave during a 24-month period. DCFMLA leave is NOT a PAID leave.<sup>2</sup>

However, many employers provide various forms of paid leave, such as accrued vacation, annual, sick, or Paid Family Leave (in the District). Employees may wish to maximize their leave benefits by using accrued leave (annual, sick, etc.) in order to pay for the otherwise unpaid DCFMLA leave. Employees may also try to extend their leave period by taking leave at the end of one 24-month period and again at the beginning of the next 24-month period. Further, they may try to “save” leave by asking the employer to use DCFMLA leave and accrued leave separately in order to extend the leave to the maximum amount. These strategies are often referred to as “leave stacking,” and this guidance will explain what is permitted and not permitted under the DCFMLA.

*Please see detailed examples of leave stacking on the following pages.*

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<sup>1</sup> Generally, for serious medical condition of the employee or a family member, including pregnancy, the birth, adoption, or foster placement of a child. 4 DCMR § 1605.3(a)-(c).

<sup>2</sup> See 4 DCMR § 1605.5, 1606.6.

## I. “Saving” DCFMLA Leave: Stacking DCFMLA Leave after Using Accrued Leave

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**Question:** If an employee is taking leave that would qualify for family or medical leave under the DCFMLA, may the individual use accrued paid leave first in order to “save” their DCFMLA leave to use at a later time for another qualifying event?

**Answer:** Generally no. While an employee may use accrued paid leave (such as annual, vacation, or sick leave) to cover a leave that would constitute family or medical absence under DCFMLA, the accrued leave taken can count against the 16 weeks of medical or family leave an employee is entitled to under DCFMLA.<sup>3</sup> Below is an example.

**EXAMPLE A:** Penny Wise, an inventory accountant, needs a shoulder surgery in the month of January 2020, and she expects to be out of the office for two weeks, but she is also in need of a knee surgery in February 2020, which she is told would be a longer recovery period lasting as many as sixteen weeks. In order to save up or extend her DCFMLA leave, she tells her employer, Super Office that she needs to use her accrued sick leave for two weeks in January for the shoulder surgery, but requests that they do not designate the leave as DCFMLA “medical leave.” Super Office allows Penny Wise to go out on two weeks of sick leave. But, Super Office also issues Complainant an eligibility notice under the DCFMLA, informing her that she is eligible for DCFMLA leave, how to apply, and that her two weeks’ absence in January could count against the 16 weeks of medical leave allowed under the law if it qualifies as a serious medical condition. Penny Wise does not want the absence to count against her DCFMLA entitlement, so she does not apply for DCFMLA. She returns to work in late January. In February, as she had planned, she requests Super Office for 16 weeks of medical leave for her knee surgery. Super Office advises her that she may take the leave, but that she only has 14 weeks of “medical leave” because of her two weeks of medical leave in January. Penny Wise is very upset and wonders whether Super Office has violated the DCFMLA.

**ANALYSIS:** The key question here is whether Penny can simply use “sick” leave to cover the first part of her absence **without** counting it against her DCFMLA leave. The short answer is generally, no. First, the statute (DCFMLA) provides that if an employee uses their accrued “sick” leave” for “qualifying” medical leave under the DCFMLA, such “sick” leave taken will count against the amount of leave provided under the law.<sup>4</sup> Second, the regulations implementing the DCFMLA at 4 DCMR § 16131.7 provide that the employer can designate any qualifying leave as DCFMLA leave, “**regardless of whether the employee requested** to have the leave designated.” Reading these two provisions together, in this case, Super Office can lawfully designate Penny’s first two weeks of “sick” leave as DCFMLA medical leave, because she took the sick leave for shoulder surgery, which likely constitutes a qualifying “serious medical” condition or event under the law. However, Super Office should have notified Penny of their designation of the January leave as DCFMLA “medical leave.”

## II. “Saving” Accrued Leave: Stacking Accrued Leave after Using DCFMLA Leave

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**Question:** If an employee is taking leave that would qualify for family or medical leave under the DCFMLA, may the individual take the qualified DCFMLA leave “unpaid” in order to “save” their accrued paid leave, such as annual, sick, and compensatory time, to use at a later time?

**Answer:** YES. Note, however, that any paid leave, even if taken immediately following the expiration of the

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<sup>3</sup> See D.C. Code §§ 32-502(e)(2) and 32-503(b)(2).

<sup>4</sup> See D.C. Code § 32-503(b)(2) (Any paid medical or sick leave provided by an employer that the employee elects to use for medical leave shall count against the 16 workweeks of allowable medical leave under this chapter.)

unpaid DCFMLA leave, would not be job-protected under the DCFMLA. Some employers may have a policy requiring an employee to exhaust paid leave before being placed in an unpaid leave status, and such policy would generally be permissible under the DCFMLA.

**EXAMPLE B:** Jack O. Alltrades is depressed and needs to go through a mental health treatment for 7 days in January. But, he suffers from other ailments, has already used 15 weeks of unpaid DCFMLA medical leave, and wants to save his sick leave for other things that may come up.

On December 29, he requests that his employer, Genie Wish, allow him to take medical leave under DCFMLA but does not ask to use his sick leave to get paid. Genie Wish approves his leave, and Jack goes on DCFMLA leave for one week on January 3 with a return date of January 10.

Unfortunately, Jack O. Alltrades learns that he needs additional weeks of treatment, at least 3 weeks. Unfortunately, Jack has now run out of available DCFMLA leave because he used up his last remaining week of leave from January 3 – 7. But, he is grateful he saved his sick leave hours, and asks Genie Wish to place him on sick leave for 3 weeks, with a new returning date of January 31. Genie Wish grants Jack's request.

However, on January 25, Genie Wish informs Jack that his position has been eliminated and that he need not return to work after January 25. Further, Genie Wish provides that Jack will be paid until January 25 and any accrued leave will be paid out to him. Jack O. Alltrades is distraught that he has lost his job and wonders if he has any protection under DCFMLA.

**ANALYSIS:** Was Jack O. Alltrades entitled to job protection under DCFMLA since he was on leave for a serious medical condition from January 10 – January 25? Most likely, no. Jack likely lost his job protection once DCFMLA benefits expired on January 10, and he was no longer on DCFMLA leave, but was on regular sick leave. However, Jack may have a viable DCFMLA retaliation claim if the employer permits similar leaves of absence for other reasons.

### III. Calculating the 24-Month Period under DCFMLA & Stacking DCFMLA Leave from Two Adjacent 24-Month Periods

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**Question:** Can an employee stack DCFMLA leave such that the employee may be lawfully absent for more than 16 weeks?

**Answer:** Possibly. The answer will depend on when the employer starts the clock for calculating DCFMLA leave. For example, does the 24-month cycle start from the date of hire, from the calendar year, or fiscal year? The answer to that depends on whether it is a public or private employer.

In the private sector, there are four methods of calculating the 24-month period:

1. The calendar year (i.e., January 1),
2. Any standard 12-month period such as the fiscal year or an employee's start date,
3. The date an employee first uses DCFMLA leave (i.e. January 3 for Jack O. Alltrades from above example), or
4. Measuring backwards 24 months from when the employee uses or would use DCFMLA leave.

**EXAMPLE C:** Inita Breake works for an employer, Stars and Mars, LLC, that uses Method #1, the calendar year, to determine the 24-month leave calculation period. The current period, which started on January 1, 2017, will end on December 31, 2019. The next period will begin on January 1, 2020. As of July 15, 2019, Inita has not used any DCFMLA leave during the current period. Inita's mother, Mrs. Breake, has several serious medical conditions and is declining. Mrs. Breake requires medical care from September 1, 2019 to December 31, 2019 (16 weeks). Inita Breake asks for leave in August, and Stars and Mars approves a "family" leave under DCFMLA. Later, Inita finds out that her mother's health is rapidly declining and she needs two more weeks of care from January 1, 2020, to January 15, 2020. Stars and Mars does not approve her leave, stating that she has exhausted her 16 weeks of family leave and that she may not "stack" more leave in the next period.

**ANALYSIS:** Did Stars and Mars violate the DCFMLA by denying Inita Breake's leave from January 1, 2020, to January 15, 2020? Likely, yes. As discussed above, employees may lawfully stack leave between 24-month periods if the 24-month period is calculated using method #1, #2, or #3.

#### IV. Stacking DCFMLA and Federal FMLA

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**Question:** Can an employee stack DCFMLA and federal FMLA leave?

**Answer:** Generally no, because DCFMLA and FMLA run concurrently or at the same time.<sup>5</sup> However, because the DCFMLA uses a 24-month calculation period,<sup>6</sup> and the federal FMLA uses a 12-month period,<sup>7</sup> there may be certain scenarios whereby an employee has exhausted their DCFMLA leave, but their federal FMLA subsequently renews, thereby providing them with an additional 12 weeks of federal FMLA leave even where they have no DCFMLA leave available.

**EXAMPLE D:** Lucky Day works for an employer that uses the calendar year to determine the 24-month period. Lucky begins work on January 1, 2018, so her first DCFMLA benefit period is January 1, 2018, to December 31, 2019. She has an operation on her knee and is out on DCFMLA leave for 16 weeks toward the end of 2018, exhausting both her DCFMLA medical and federal FMLA medical. She will not receive additional DCFMLA medical leave benefits until January 1, 2020.

**ANALYSIS:** Based on the above, as of January 1, 2019, Lucky's federal FMLA entitlement renews, because the federal FMLA uses a 12-month benefit period. Accordingly, it's Lucky's lucky day, and she may take an additional 12 weeks of job protected leave under the federal FMLA.

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<sup>5</sup> See 4 DCMR § 1620.2.

<sup>6</sup> See 4 DCMR §§ 1605.1, 1606.1.

<sup>7</sup> See 29 CFR § 825.200(a).

## V. Intersection of DCFMLA Leave and Paid Family Leave in DC Government

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**Question:** Can an employee use Paid Family Leave (PFL) to pay for their family leave and medical leave under DCFMLA?

**Answer:** The PFL program in District government provides eligible employees with up to eight (8) weeks of paid leave for the birth, adoption, placement of a child, or to care for a family member. Thus, YES, an employee in the District government COULD use PFL to pay for their **family** leave. But, NO, not for **medical** leave. Note that OHR does NOT enforce PFL. More information about PFL may be found [here](#), and any complaints regarding PFL may be filed with the D.C. Department of Human Resources.

## VI. Additional Example

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**EXAMPLE E (Stacking Annual Leave after DCFMLA Leave; Retaliation):** Ophelia Ail, an accountant, works for an employer that provides a combined 8 week paid annual leave for vacation, sick, or personal leave. Ophelia learns that she needs to use 16 weeks of “family” leave under DCFMLA to care for her aging parents. Because she has some money in her savings account, she decides not to use her paid leave while she is out on DCFMLA leave. Upon her return on February 15, 2019, her unit is very busy with tax filing season, but she feels she is in need of personal leave after exhaustingly caring for her parents. She decides that she wants to use her 8 weeks of paid leave. Although her employer generally allows employees to use their leave whenever they want, this year with the new tax laws causing filing problems, her whole team is put on leave restriction. As such, her request to take leave after February 15, 2019 is denied. However, Ophelia decides that she’s entitled to her 8 weeks of paid leave, tells her supervisor as much. Within days, Ophelia is subsequently fired for being absent without permission. Ophelia feels she was terminated because she used DCFMLA leave.

**ANALYSIS:** Generally, an employer may not retaliate against an employee for using DCFMLA leave. Terminating an employee shortly after their DCFMLA may give rise to a claim for retaliation because of the closeness in time between the employee’s leave and the adverse actin (termination). Here, Complainant used DCFMLA and was terminated shortly thereafter. This may give an appearance of retaliation. However, the employer likely will NOT be found to have retaliated against Ophelia, because Ophelia’s job-protected leave expired on February 15, 2019, and the employer had a legitimate business reason (tax filing season leave restriction) for denying her request to use annual leave and for terminating Ophelia (taking leave without approval).