

# The DC Family & Medical Leave Act of 1990 (DCFMLA): Selected Topics

- OHR Enforcement Guidance 18-03 -



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## SUBJECT

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Selected Topics under the D.C. Family & Medical Leave Act of 1990 (DCFMLA)

- I. Job Protection
- II. Absences
- III. Federal Coverage and DC Coverage
- IV. Former Employees Returning to the Same Employer
- V. Disability accommodation protection as it intersects with DCFMLA

## PURPOSE

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This enforcement guidance is provided to bring some clarity to otherwise confusing or unclear provisions under the DCFMLA. For guidance on DCFMLA generally, please consult OHR's Factsheet at [ohr.dc.gov](http://ohr.dc.gov).

## I. JOB ELIMINATION WHILE ON DCFMLA LEAVE

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If an employee's position has been eliminated while they are out on DCFMLA leave, is the employer obligated to restore the employee to the same or a similar position upon the end of the DCFMLA leave?

*Yes, an employee must be returned to the same or a substantially similar position upon return from DCFMLA leave.<sup>1</sup> A substantially similar position includes positions with "equivalent employment benefits, pay, seniority, and other terms and conditions of employment."<sup>2</sup>*

**EXAMPLE:** Philippe is a sales representative at a retail clothing store, where the owner manages two other stores in the District. While sales representatives are assigned to one location, they periodically rotate locations or substitute to cover absences. While on an approved DCFMLA family leave after his wife gave birth, Philippe's store location closes due to lack of business. All employees at that location are laid off. When Philippe returns from his leave, does the employer have to return Philippe to the same or similar position at another store?

**ANSWER:** Possibly. Philippe must generally be returned to the same or a substantially similar position after a period of job-protected leave. While the DCFMLA provides only one exception to job restoration (in the case of a highly salaried employee which is not applicable in this scenario), OHR may be guided by the federal regulations which provide for several exceptions to job restoration, including a layoff that was not based on the employee taking DCFMLA leave. See 29 CFR § 825.216 (exceptions to job restoration under the federal FMLA). (Under the DCFMLA, in the event that Philippe is salaried

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<sup>1</sup> See 4 DCMR § 1609.6(a)-(b) (except for highly paid, salaried employees under specific circumstances pursuant to § 1609.8, or if a collective bargaining agreement provides differently).

<sup>2</sup> 4 DCMR § 1609.6(b).

and one of the highest paid employees pursuant to § 1609.8, the employer would not need to restore Philippe if it would cause grievous and substantial economic injury to the business. See fn. 1.)

## II. AWOL ABSENCES BASED ON A QUALIFYING MEDICAL EVENT

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**If an employee is terminated based on unauthorized or unexplained absences, such as being absent without leave, and it is later revealed that they were absent for a qualifying medical event while incapacitated, is an employer required to restore the employee?**

*Yes, assuming the employer is notified of the qualifying event as soon as possible. See 4 DCMR § 1605.1 (leave due to a qualifying medical event is job protected) and § 4 DCMR § 1614.3 (an incapacitated employee or their spokesperson must notify the employer of the need for qualifying leave “as soon as practicable.”)*

**EXAMPLE:** Genevieve, a receptionist at a medium-sized law firm, suffers a heart attack while on vacation and is hospitalized in Mozambique on November 28. She stayed at a hotel in a less secure area and her passport and identification were stolen. She was supposed to return to the U.S. and return to work on December 1, but she was in a coma for two weeks, listed as a Jane Doe. During this time, the employer, not having heard from Genevieve by December 7, terminates Genevieve. Upon awakening, on December 12, she calls her employer to tell them what had happened, makes a swift recovery, returns to the United States, and reunites with her family. Is Genevieve entitled to return to her same position?

**ANSWER:** Most likely, yes. Genevieve is likely entitled to restoration to the same or a substantially similar position, because she was on leave due to a qualifying absence and informed her employer as soon as practicable. Genevieve’s absence from December 1 to December 12 constitutes qualified leave because she arguably suffered a serious medical condition (coma) and she notified her employer as soon as she was able.

## III. FEDERAL BENEFITS MAY EXIST AFTER EXHAUSTION OF DCFMLA

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**If an employee in the District exhausts their DCFMLA leave entitlement, could they nonetheless be entitled to additional leave under the federal Family & Medical Leave Act (FMLA)?**

*Yes. Although DCFMLA provides for 16 weeks of medical and 16 weeks of family leave during a 24-month period (see 4 DCMR § 1604.1), the Family Medical Leave Act provides for 12 weeks of combined medical or family leave during a 12-month period (see 29 CFR § 800.100(a)). Therefore, an employee could theoretically exhaust their DCFMLA entitlement during the first 12 months of a 24-month period, but nonetheless be entitled to another 12 weeks of FMLA leave during the second 12 months of that 24-month period.*

**EXAMPLE:** An employer uses the calendar year to determine the 24-month eligibility period.<sup>3</sup> Paulette is a sound technician for a cable news station based in Washington. She experiences a complicated pregnancy and requires 16 weeks of medical leave and a subsequent 16 weeks of family bonding

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<sup>3</sup> There are four acceptable methods of calculating the eligibility period. See 4 DCMR § 1616.1.

leave in the latter part of 2017. She experiences post partem depression in 2018, necessitating an additional 12 weeks of medical leave. Although she exhausted her 2017-2018 DCFMLA entitlement, she nonetheless is entitled to 12 weeks of federal FMLA leave during 2018, and thus her request must be granted.

#### IV. DCFMLA BENEFITS OF FORMER EMPLOYEES WHO ARE RE-HIRED

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**If a former employee is re-hired, must the re-hired employee wait one year again before becoming eligible for DCFMLA leave?**

*a. Not always. If at any point during the past seven years, the employee had accrued one year of service without a break in service, once they have again worked for at least 1,000 hours during the 12-month period preceding a request for DCFMLA leave, they are entitled to DCFMLA benefits. See 4 DCMR § 1603.2 (the one year of employment without a break in service need not be immediately preceding the DCFMLA request) and § 1603.1 (to be eligible an employee must have also worked 1,000 hours during the twelve months immediately preceding the request for leave). OHR generally considers a break in service to have occurred when an employee is in a non-pay status while not on sick, annual, or personal leave approved by the employer. See 4 DCMR § 1603.5.*

**b. Please note:**

- i. Leave taken as a result of a worker's compensation generally would qualify as a break in service, unless such absence was otherwise covered by accrued paid leave. See 4 DCMR § 1603.1, 1603.5.*
- ii. The District of Columbia government is considered one employer and thus a change from one agency to another would have no effect on DCFMLA entitlements. See 4 DCMR § 1601.6.*

**EXAMPLE:** Jean-Luc is the full-time captain of a starship assigned to the spaceport in Washington, D.C. Jean-Luc serves as captain from 1987 to 2002, employed by Three Starfleet. However, in 2005, Three Starfleet rehires Jean-Luc as a chef. Jean-Luc works part-time for 25 hours per week. After 40 weeks (1000 hours of work), he again becomes eligible for DCFMLA benefits because he had previously accrued one year of service within the past seven years, when he was with Three Starfleet from 1987 to 2002.

**CONTRASTING EXAMPLE:** Emmanuel is manager of a retail store from 2007 until 2009, when he is recruited by an online retailer which eventually dissolves in 2018. In 2019, Emmanuel returns to the original brick and mortar retail store where he worked from 2007 to 2009. He will not be eligible for DCFMLA benefits until he works for one year without a break in service, because the prior one year without a break in service was more than seven years ago.

#### V. ADDITIONAL LEAVE AS A REASONABLE ACCOMMODATION OF A DISABILITY AFTER EXHAUSTION OF DCFMLA LEAVE

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**If an employee exhausts their DCFMLA medical leave entitlement, could an employer be required under the DC Human Rights Act of 1977 (DCHRA) to provide additional leave?**

Possibly. The DCFMLA does not modify or affect federal or District disability laws.<sup>4</sup> Therefore, if an employee's serious medical condition qualifies as a **disability** under the DCHRA, an employer could be required to provide additional unpaid medical leave<sup>5</sup> (or other reasonable accommodation) after an employee has exhausted their DCFMLA entitlement, so long as such unpaid medical leave would be reasonable under the particular circumstances and not an undue burden to the employer. Notably, the leave would not be job-protected under the DCFMLA, but it would qualify as "protected activity" under the DCHRA.<sup>6</sup>

**EXAMPLE:** Linda Martinez is assistant to the regional manager of a widget supply company. She contracts lupus and is on DCFMLA medical leave for 16 weeks. At the conclusion of her DCFMLA entitlement, she informs her employer that her doctor recommends that she work half days for the next few weeks. The employer must, under the DCHRA, engage in an interactive process to identify a reasonable accommodation for her disability (lupus) unless it would be an undue burden. The employer had temporarily promoted a senior widget salesman to the assistant to the regional manager position, and while there had been some problems, overall revenue had stayed steady. The employer likely must grant the request, but it could probably specify the particular half-time hours it wishes Linda Martinez to work.

## VI. THE "INTERACTIVE PROCESS" BETWEEN EMPLOYER AND EMPLOYEE UNDER DCHRA DISABILITY PROTECTION AND "REASONABLE NOTICE" BY EMPLOYER AND EMPLOYEE UNDER DCFMLA

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The disability protection under the DCHRA requires both the employer and employee to engage in an interactive process to try to identify a reasonable accommodation after an employee has provided the employer with information that reasonably places the employer on notice that the employee is disabled and requires a job-related accommodation. The initial burden is on the employer to facilitate a dialogue in a good faith effort to identify an accommodation that would enable the employee to perform the core functions of the position.<sup>7</sup>

**EXAMPLE:** Jeanne works full time as a cashier at a grocery store that is part of a national chain. She suffers from a degenerative spinal disease and one day can no longer stand. She arrives at work with a wheelchair. While she is still able to lift and scan items, she cannot do so standing. The manager is aware that a low level cash register, product scanning station, and product conveyer are available at a premium, but not excessive, price. Upon seeing Jeanne arrive to work in a wheelchair and unable to reach the cash register, thereby providing the employer with notice of an apparent disability, the interactive process requirement under the DCHRA is triggered. As part of the interactive process, the manager is obligated to have a conversation with Jeanne to discuss options for reasonably accommodating her, and the manager is obligated to suggest acquiring a modified register station.

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<sup>4</sup> See 4 DCMR § 1620.3.

<sup>5</sup> Leave time may constitute a reasonable accommodation. See *Woodruff v. LaHood*, 777 F. Supp. 2d 33, 44 (D.D.C. 2011).

<sup>6</sup> It is clear that requesting a reasonable accommodation for a disability is a protected activity under the ADA. *Zeigler v. Potter*, 641 F.Supp.2d 25, 29 (D.D.C. 2009), citing *Cassimy v. Bd. of Ed.*, 461 F.3d 932, 938 (7th Cir. 2006); see also *Weigert v. Georgetown Univ.*, 120 F.Supp.2d 1, 16 at n. 15 (D.D.C. 2000).

<sup>7</sup> Once the employer knows of the disability and the employee's desire for accommodations, "it makes sense to place the burden on the employer to request additional information that the employer believes it needs." *Woodruff v. LaHood*, 777 F. Supp. 2d 33, 41 (D.D.C. 2011) (quoting *Taylor*, 184 F.3d at 315; see also 29 C.F.R. § 1630.2(o)(3) (2011) (stating that the employer must make a reasonable effort to determine the appropriate accommodation). Thus, in order to determine an appropriate accommodation, the employer and employee must make a good-faith effort to engage in a flexible, interactive process. *Id.* § 1630.2(o)(3). Courts have provided guidance to employers, noting, for example:

Employers participate in an interactive process by 'meeting with the employee who requests accommodation, requesting information about the condition and what limitations the employee has, asking the employee what he or she specifically wants, showing some sign of having considered the employee's request, and offering and discussing available alternatives when the employee's request is too burdensome.'

*Sparrow*, 74 A.3d at 704 (quoting *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 953 n.7 (8th Cir. 1999)).

This interactive process could also include ascertaining whether Jeanne will need intermittent leave for doctor's appointments or blocks of leave to recover from her medical condition, which could also be covered under the DCFMLA.

### How does this relate to DCFMLA?

The correlating requirements under the DCFMLA are that both employer and employee must provide reasonable notice to the other. Once the employer is aware that an employee may have need of leave due to a qualifying event (such as adoption of a child, hospitalization, ongoing medical treatment, etc.), the employer must send, within 5 calendar days, a written notice of DCFMLA eligibility to the employee. See 4 DCMR § 1613.4. Likewise, when an employee becomes aware of the need for qualifying leave, the employee must generally provide 30 days' notice or as soon as possible if the leave was unforeseeable. See 4 DCMR §§ 1614.1-5.

**EXAMPLE:** Elise, a senior attorney at an employment law firm specializing in FMLA, announces that she is pregnant. Within 5 calendar days, the employer must send her a notice of DCFMLA eligibility. Elise must provide her employer with at least 30 days' notice of her intention to use family leave to bond with her child.

**MORE NUANCED EXAMPLE:** Javert is an inspector for a small DC government agency. Javert calls out sick four days in a row and mentions in the final call to his supervisor that he had gone to the emergency room the night before. The agency must send a DCFMLA eligibility notice within 5 calendar days of the fourth absence or phone call about the emergency room visit. Javert returns to work, but his doctor indicates that Javert has a chronic condition that requires monthly blood tests which can only be taken at a special office open on Fridays during Javert's working hours. Javert must immediately inform his employer that he will require medical leave one Friday per month and submit a request for DCFMLA leave pursuant to the instructions the employer provided him in the eligibility notice. The employer must also engage in the interactive process under the DCHRA, to ascertain whether Javert requires any additional accommodations for his disability.