Legal Update Article

With Federal COVID-19 Leave Ending, Leave Laws in D.C. and Elsewhere Take Center Stage

By Teresa Burke Wright, Matthew F. Nieman &

January 4, 2021

Meet the Authors

Teresa Burke Wright

(She/Her)
Principal
(703) 483-8310
Teresa.Wright@jacksonlewis.com

Matthew F. Nieman

Principal
703-483-8331
Matthew.Nieman@jacksonlewis.com

Related Services

COVID-19
Disability, Leave and Health Management

When the federal Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020, COVID-19-related leave was no longer assured for many employees throughout the United States unless another law, like the Family and Medical Leave Act or the Americans with Disabilities Act, applies. Jurisdictions that have COVID-19-related leave laws (such as the District of Columbia and certain California municipalities), however, will continue to grant time off to eligible employees.

D.C.'s COVID-19-leave laws took effect on March 11, 2020, and are set to expire on March 31, 2021. In 2020, employers subject to both the FFCRA and these D.C. laws generally fulfilled their D.C. COVID-19 leave obligations when they provided FFCRA leave to covered employees. Now, employers with workers in D.C. should ensure they provide D.C. COVID-19 leave to covered employees who need it.

FFCRA Expired

The FFCRA expired after Congress took no action to extend it. As a result, job-protected leave for COVID-19-related reasons is no longer available to employees nationwide. Although the federal appropriations bill passed by Congress on December 21, 2020, permits employers to take advantage of the FFCRA tax credit until at least March 31, 2021, this means employers *may*, but are not *required* to, continue to provide employees FFCRA-type leave. Now, employers should ensure they are providing COVID-19-related leave to their employees where required by state and local laws.

D.C. COVID-19 Leave Laws

A series of emergency legislation passed by the D.C. City Council effective March 11, 2020, created two types of job-protected leave for COVID-19 reasons. One was a new, separate "bucket" of leave under the D.C. Accrued Sick and Safe Leave Act that is enforced by the D.C. Office of Attorney General (OAG), as well as by Department of Employment Services (DOES) audits. The other was a new, separate "bucket" of leave under the D.C. Family and Medical Leave Act (DCFMLA), enforced by the D.C. Office of Human Rights (OHR). Each type of leave has its own employer coverage thresholds, employee tenure requirements, and benefits.

D.C. Paid Public Health Emergency Leave

Enforced by OAG and DOES, D.C. Paid Public Health Emergency Leave is available to covered employees who work in the District of Columbia for an employer that has between 50 and 499 employees and is not a healthcare provider. Employees must have been employed for at least 15 days to be eligible. Eligible employees are entitled to fully paid leave for up to two full weeks, or a maximum of 80 hours (prorated for part-timers), for the same COVID-19-related reasons as listed in the FFCRA. Like the FFCRA, this is a one-time-only benefit: employees who have already used their two weeks of paid leave are not entitled to use that leave again. There is no guidance as to whether this leave can

be used intermittently.

The law does not state whether employers should count only employees working in D.C. or all employees when determining whether they meet the 50-499 employee thresholds. However, the D.C. Paid Public Health Emergency Leave law is deemed an amendment to the D.C. Accrued Sick and Safe Leave Act (SSLA). As a result, the definitions applicable to the SSLA apply to paid COVID-19 leave as well. The D.C. Department of Employment Services (DOES) interprets "employee" for purposes of SSLA thresholds to mean only those working in D.C. Thus, it appears that employers need only count employees working in D.C. when determining whether the employer falls within the 50-499 employee coverage of the law. For employees who work in more than one location, working "in D.C." means that the person spends more than 50 percent of their working time in D.C., or that (1) their employment is based in D.C., (2) they regularly spend a substantial part of their working time in D.C., and (3) they do not spend more than 50 percent of their working time in any particular state.

Employees may only use their 80 hours of paid leave "concurrently with or after exhausting any other paid leave to which the employee may be entitled for covered reasons under federal or District law or an employer's policies," including the FFCRA. The law permits an offset for the amount of monetary benefits paid or hours of leave provided under the FFCRA or other law – meaning that paid D.C. COVID-19 leave essentially runs concurrently with leave provided under the FFCRA. Employers who provided their D.C. employees with FFCRA leave in 2020, in most cases, have fully complied with the D.C. paid COVID-19 leave law. The D.C. leave, however, is *fully* paid, while FFCRA leave may be partially paid or subject to caps. Accordingly, D.C. employees who took FFRCRA leave in 2020 should have been fully compensated for the first 80 hours of leave, rather than compensated at 2/3 pay or subject to the FFCRA's caps.

D.C. Unpaid "COVID-19 Leave"

In addition to the two weeks/80 hours of paid leave described above, the D.C. City Council adopted an unpaid leave entitlement of 16 weeks, separate from the 16 weeks of family leave and 16 weeks of medical leave provided by the existing DCFMLA. Enforced by OHR, this unpaid COVID-19 leave is available when a covered employee is unable to work for the following reasons, which are similar, but not identical, to the reasons covered under the FFCRA:

> (1) A recommendation from a health care provider that the employee isolate or quarantine, including because the employee or an individual with whom the employee shares a household is at high risk for serious illness from COVID-19;
>
> (2) A need to care for a family member or household member who is under a government or health care provider's order to quarantine or isolate; or
>
> (3) A need to care for a child whose school or place of care is closed or whose childcare provider is unavailable to the employee.

Unlike the Paid Public Health Emergency Leave described above, this unpaid leave requirement applies to *all employers* with employees in D.C. – not just those with 50-499 employees. Employees must have been employed for 30 days (not 15 days) to take this unpaid leave. Employees may use any paid leave provided by the employer when taking this otherwise unpaid leave. Although the law does not specify, presumably this includes

the two weeks/80 hours of paid leave described above. The law is silent as to whether the leave can be taken intermittently, and the agency has not provided any guidance on this issue. Where a period of leave would qualify as both COVID-19 leave and traditional family or medical leave, the employee can choose the type of leave they wish to use. When D.C. unpaid COVID-19 leave is used, that leave runs concurrently with leave taken under the FFCRA.

The same definition of "working in D.C." as described above applies to unpaid COVID-19 leave. In addition, the OHR has stated in its guidance that if an employee's typical jobsite has been in D.C., or the employee typically works at least 50 percent of the time in D.C., the employee remains covered by the DCFMLA even if the employee is working from home outside of D.C. during the declared public health emergency.

***

Now that the FFCRA has expired, employers with workers in D.C. must evaluate COVID-19-related leave requests under D.C.'s two COVID-19 leave laws. Jackson Lewis attorneys are available to assist employers in navigating these two complex laws.