DISTRICT OF COLUMBIA

FAMILY AND MEDICAL LEAVE (FML)

The District of Columbia offers FML protections to public and private employers under its **Family and Medical Leave Act (FMLA)** (DC Code Sec. 32-501 *et seq.*).

Employers Covered

The Act covers employers with 20 or more employees in the District.

Eligible Employees

Under the Act, an individual who has been employed by the same employer for 1 year without a break in service except for regular holiday, sick, or personal leave granted by the employer and has worked for at least 1,000 hours during the 12-month period prior to the request for the leave is eligible for a family and medical leave.

Events for Which Leave May Be Taken

Family leave. A family leave is available to an eligible employee for:

- The birth of a child
- The placement of a child with the employee for adoption or foster care
- The placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility
- The care of the employee's family member who has a serious health condition

Medical leave. In addition, a medical leave is available to an eligible employee when the employee becomes unable to perform the functions of his or her position because of a serious health condition.

Covered Relations

A *family member* means:

- A person to whom the employee is related by blood, legal custody, or marriage
- A child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility
- A person with whom the employee shares, or has shared within the last year, a mutual residence and with whom the employee maintains a committed relationship

The District of Columbia's Rules define a *child* as a person under the age of 21, persons 21 years of age or older who are substantially dependent on the employee by reason of physical or mental disability, and persons under the age of 23 who are full-time students at an accredited college or university.

The Rules define a *committed relationship* as "a familial relationship between two individuals demonstrated by such factors as, but not limited to, mutual economic interdependence including joint bank accounts, joint tenancy, and shared leases, and joint and mutual financial obligations such as loans; domestic interdependence including close association, public presentment of the relationship, exclusiveness of the relationship, length of the relationship, and intent of the relationship as evidenced by a will or life insurance."

As one can see, the District of Columbia's definition of "family members" is much broader than the federal FMLA's definition of "covered relations."

Leave Requirements

Family leave. An eligible employee is entitled to a total of 16 workweeks of family leave during any 24-month period. However, if the family leave is for the birth, adoption, or placement of a child with the employee, the family leave is available only within the 12 months after the birth, adoption, or placement of the child with the employee.

In addition, if the family leave is for the care of a family member with a serious health condition, the leave may be taken intermittently when medically necessary. The Act also provides that upon agreement between the employer and employee, the family leave may be taken on a reduced leave schedule that cannot exceed 24 consecutive workweeks.

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Medical leave. Any employee who becomes unable to perform the functions of his or her position because of a serious health condition is entitled to medical leave for as long as the employee is unable to perform the functions, up to a maximum of 16 workweeks during any 24-month period. The medical leave may also be taken intermittently when medically necessary.

The District of Columbia's FMLA does not require an employer to provide paid family and medical leaves.

If a family leave is foreseeable on the basis of an expected birth or placement of a child with an employee, the employee is required to provide the employer with reasonable prior notice of the birth or placement of a child. If a family or medical leave is foreseeable on the basis of planned medical treatment or supervision, an employee is required to provide the employer with reasonable prior notice of the treatment and supervision and to make a reasonable effort to schedule the treatment or supervision in a manner that does not unduly disrupt the employer's operations, subject to the healthcare provider's approval.

Substituting Paid Leave Time

The **Accrued Sick and Safe Leave Act of 2008** entitles employees covered by the District Family and Medical Leave Act to paid sick leave for use under certain circumstances. For details, see **PAID SICK AND SAFE LEAVE** in this section. Any paid family, vacation, personal, or compensatory leave provided by an employer that the employee elects to use for family leave counts against the 16 workweeks of family leave. Any paid medical or sick leave provided by an employer that the employee elects to use for medical leave will count against the 16 workweeks of medical leave. Moreover, if an employer and employee agree, an employee may use paid vacation, personal, or other compensatory leave as medical leave, and this paid leave counts against the 16 workweeks of medical leave.

In addition, if the employer has a program that allows an employee to use the paid leave of another employee under certain conditions that have been met, the employee may use the paid leave as family and/or medical leave, and the leave will count against the 16 workweeks of family and/or medical leave.

Continuation of Benefits

An employee who takes a family or medical leave under the Act does not lose any employment benefit or seniority that accrued before the date on which the leave commenced. The employer is also required to maintain any coverage under any group health plan for the duration of the leave at the same level and under the same conditions that coverage would have been provided if the employee had not taken the leave. However, the District of Columbia's statute provides that an employer may require the employee to continue to make any contributions to a group health plan that the employee would have made if the employee had not taken the leave. If the employee is unable or refuses to make the contribution, the employee must forfeit the health benefit plan until the employee is restored to employment and resumes payment to the plan.

Restoration. An employer in the District of Columbia, as under the federal FMLA, is required to restore an employee who takes a family or medical leave to the employee's former position or an equivalent position (i.e., equivalent benefits, pay, seniority, and other terms and conditions of employment). The District of Columbia's statute has the same provision as the federal FMLA concerning the accrual of benefits during the leaves. The District of Columbia's statute provides that an employer is not required to accrue seniority or other employment benefits during the leave period or to provide the employee with any right, employment, benefit, or position other than those to which the employee would have been entitled had the employee not taken the leave.

Highly Compensated Employees

The District of Columbia's law, like the federal FMLA, has an exception for highly paid salaried employees. An employer may deny restoration of employment to a salaried employee if the employee is among the five highest-paid employees of an employer with fewer than 50 employees, or among the highest-paid 10 percent of employees of an employer with 50 or more employees and the following conditions are met:

- The employer demonstrates that the denial of restoration is necessary to prevent substantial economic injury to the employer's operations, and the injury is not directly related to the employee's leave; *and*
- The employer notifies the employee of the intent to deny restoration of employment and the basis for the decision at the time the employer determines that the denial is necessary.

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However, an employer is not required to demonstrate that the denial is necessary to prevent substantial economic harm and the injury is not directly related to the employee's leave if the following conditions have been met:

- An employer has a contract to provide work or services and the employee's absence prohibits the employer from completing the contract in accordance with the contract's terms;
- The failure to complete the contract will cause substantial economic injury to the employer; *and*
- After the employer has made reasonable attempts, the employer failed to find a temporary replacement for the employee.

Defining Serious Health Conditions

The District of Columbia Act's definition of *serious health condition* is very similar to the federal FMLA's definition. A serious health condition is a physical or mental illness, injury, or impairment that involves inpatient care in a hospital, hospice, or residential healthcare facility, or continuing treatment or supervision at home by a healthcare provider or other competent individual.

Certifying Serious Health Conditions

An employer may require that a request for a family leave, due to the serious health condition of a family member, or a medical leave be supported by a certification issued by the employee's or family member's healthcare provider. The certification should state the date on which the serious health condition commenced, the probable duration of the condition, and the appropriate medical facts known to the healthcare provider that would entitle the employee to the leave.

For a medical leave, the employer may require a statement that the employee is unable to perform the employee's job functions and an explanation of the extent to which the employee is unable to perform the job functions. In the case of a family leave, the employer also may require an estimate of the amount of time that the employee is needed to care for the family member.

Employer Challenges to Medical Certification

If an employer has reason to doubt the validity of the certification, the employer may require the employee to obtain a second opinion at the employer's expense and approval. If the second opinion differs from the original certification, the employee may obtain a third opinion from a healthcare provider mutually agreed on by the employer and employee at the employer's expense. The third opinion must be final and binding on the employer and employee.

Healthcare providers that furnish second and third opinions may not be retained on a regular basis by the employer or employee or bear a close relationship to the employer or employee that would give the appearance that the certification is biased. The employer may also require that the employee obtain subsequent recertification on a "reasonable basis" as under the federal FMLA. The employer is required to keep any medical information obtained confidential.

Leave Limitations on Spouses Employed by the Same Employer

Under the District of Columbia's FMLA, if two family members are employed by the same employer, the employer may limit the aggregate amount of family leave to 16 workweeks during a 24-month period. The employer may also limit the aggregate amount of family leave to which family members are entitled to take simultaneously to 4 workweeks during a 24-month period. The term "same employer" means an office, division, subdivision, or other organizational section of an employer in which both employees have the same or interrelated duties, and the absence of both employees would unduly disrupt the employer's business.

Prohibited Acts

The District of Columbia's law makes it unlawful for any person to interfere with, restrain, or deny the exercise of or attempt to exercise any right provided by the Act. It also prohibits an employer from discharging or discriminating in any manner against any person because the person opposes any unlawful practice under this Act; files or attempts to file a charge or proceeding; facilitates the institution of a proceeding; or gives any information or testimony in connection with an inquiry or proceeding related to this Act.

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Recordkeeping and Posting Requirements

The Rules provide that an employer is required to maintain records that document, on an annual basis:

- The total number of employees who have taken a leave
- The annual additional cost to the employer for expenses incurred to replace an employee during the time the employee is on leave
- The annual additional cost to pay for the employee's health insurance while the employee is on leave
- The length of leave taken by the employee
- The reason(s) an employee took the leave
- The salary, hourly wage, or grade level of the employee who has taken the leave
- The employee's request and supporting documents for the leave requested
- The employer's disposition of the employee's request for leave

Furthermore, employers may also be required to report on an annual basis a summary of leave actions taken pursuant to the Act at the time and in the form as the Department of Human Rights and Minority Business Development may prescribe.

Finally, employers must conspicuously post a notice of the Act's requirements.

PAID SICK AND SAFE LEAVE

The District of Columbia's **Accrued Sick and Safe Leave Act of 2008** entitles employees covered by the District Family and Medical Leave Act to paid sick and "safe" leave for use under certain circumstances. All employers with one or more employees and the District government are covered under the Sick and Safe Leave Act. The amount of paid sick leave given to the employee depends on the size of the employer, as follows:

- Employers with 100 or more employees must provide 1 hour of paid leave for every 37 hours worked, not to exceed 7 days per calendar year.
- Employers with at least 25, but not more than 99, employees must provide 1 hour of paid leave for every 43 hours worked, not to exceed 5 days per calendar year.
- Employers with 24 or fewer employees must provide 1 hour of paid leave for every 87 hours worked, not to exceed 3 days per calendar year.

Counting employees. The number of employees an employer has is determined by the average monthly number of full-time equivalent employees for the prior calendar year. The average monthly number is calculated by adding the total monthly full-time equivalent employees for each month and dividing by 12.

Exempt employees. Employees who are exempt from overtime payment under the federal **Fair Labor Standards Act (FLSA)** will not accrue leave for hours worked in excess of 40 during a workweek.

Reasons for leave. Paid leave accrued under the Sick and Safe Leave Act may be used by an employee for any of the following reasons:

- Physical or mental illness, injury, or medical condition of the employee;
- Obtaining professional medical diagnosis or care, or preventive medical care, for the employee, provided that the employee makes a reasonable effort to schedule such leave in a manner that does not unduly disrupt the operations of the employer;
- Caring for a child, a parent, a spouse, domestic partner, or any other family member who has a physical or mental illness, injury, or medical condition or needs for diagnosis or care; *or*
- If the employee or the employee's family member is a victim of stalking, domestic violence, or sexual abuse; provided, that the absence is directly related to social or legal services pertaining to the stalking, domestic violence, or sexual abuse.

Covered family members. A covered family member is defined as a spouse, domestic partner, parents of a spouse, children (including foster children and grandchildren), spouses of children, parents, siblings, and spouses of siblings. Also included in the definition of a covered family member are a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility, and a person with whom the employee shares or has shared for at least the preceding 12 months a mutual residence, and with whom the employee maintains a committed relationship.

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Limitation on leave for violence, abuse, and stalking. An absence if the employee or the employee's family member is a victim of stalking, domestic violence, or sexual abuse is permitted, provided that the absence is taken in order to:

- Seek medical attention for the employee or the employee's family member to recover from physical or psychological injury or disability caused by domestic violence or sexual abuse;
- Obtain services from a victim services organization;
- Obtain psychological or other counseling;
- Temporarily or permanently relocate;
- Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic violence or sexual abuse; *or*
- Take other actions to enhance the physical, psychological, or economic health or safety of the employee or the employee's family member or to enhance the safety of those who associate or work with the employee.

Leave accrual and administration. Paid sick and safe leave will accrue in accordance with the employer's established pay period. Accrual starts on the first day of an individual's employment. An employee is eligible to use paid leave after he or she has 12 months of service with the employer and has 1,000 hours of service during the 12-month period that ends when the request for the leave is made. An employee's unused paid leave accrued during a 12-month period will carry over annually. However, in a 1-year period, an employee may not use more than the maximum hours allowed by law, unless the employer chooses otherwise. Accrued and unused paid leave will not be reimbursed upon the termination or resignation of any employee.

If an employee and the employer mutually agree, an employee who chooses to work additional hours or shifts during the same or next pay period in lieu of hours or shifts missed will not use paid leave, provided that the employer does not require the employee to work such additional hours or shifts.

Existing paid leave policies. An employer with a paid leave policy providing paid leave options, such as a paid time-off program or universal leave policy, will not be required to modify the policy if it offers an employee the option, at the employee's discretion, to accrue and use leave under terms and conditions that are at least equivalent to the paid leave prescribed by the Accrued Sick and Safe Leave Act. The terms and conditions of an employer's policy are equivalent if they allow an employee to access and accrue paid leave at least at the same rate as or greater than the hours of paid leave provided by law, and to use the paid leave for the same purposes as those allowed by law.

Employers should ensure their policies allow employees to begin accruing leave on November 13, 2008, or their date of hire if starting employment after that date. Then, beginning February 11, 2009, employees may begin using accrued leave if they have worked at least one continuous year and 1,000 hours during the previous 12 months.

Collective bargaining agreements. The Accrued Sick and Safe Leave Act may not diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid leave rights to employees than the rights established by law. The paid leave requirements may not be waived for less than 3 paid leave days by the written terms of a bona fide collective bargaining agreement.

Notice and certification. The Accrued Sick and Safe Leave Act poster must be posted by employers in all languages spoken by 3 percent or 500 of a company's D.C. employees, whichever is less. An employer that fails to post the notice can be assessed a civil penalty of $100 per day up to a total of $500. The notice, which is available at http://www.does.dc.gov/does/frames.asp?doc=/does/lib/does/info/ASSLAPoster_Final10_7_10.pdf, states that complaints under the law must be filed with the Employment Services Department Office of Wage/Hour within 60 days of the alleged violation. Failure to post the notice extends that deadline for an undetermined period.

Paid leave must be provided upon the written request of an employee. The request must include a reason for the absence involved and the expected duration of the paid leave. If the paid leave is foreseeable, the request must be provided at least 10 days, or as early as possible, in advance of the paid leave. If the paid leave is unforeseeable, an oral request for paid leave must be provided before the start of the work shift for which the paid leave is requested. In the case of an emergency, the employer must be notified before the start of the next work shift or within 24 hours of the onset of the emergency, whichever occurs sooner.

An employer may require that paid leave for 3 or more consecutive days be supported by reasonable certification. Reasonable certification may include a signed document from a healthcare provider (as allowed under the District

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FMLA), affirming the illness of the employee; a police report indicating that the employee was a victim of stalking, domestic violence, or sexual abuse; a court order; or a signed statement from a victim and witness advocate, or domestic violence counselor, affirming that the employee is involved in legal action related to stalking, domestic violence, or sexual abuse. If certification is required by an employer, the employee must provide a copy of the certification to the employer when the employee returns to work.

Confidentiality. All information provided by the employee to the employer for notice and certification purposes may not be disclosed by the employer, except to the extent that the disclosure is requested or consented to by the employee, ordered by a court or administrative agency, or otherwise required by applicable federal or local law.

Employees of beauty, hair, or nail salons. If an employee of a beauty, hair, or nail salon is paid by commission (whether commission only or base wage plus commission), the sick leave rate of pay will be calculated by dividing the employee's total earnings in base wages and commissions for the prior calendar year by the total hours worked as a commissioned employee during the prior calendar year. If the employee does not have a prior calendar year's work history, divide the employee's total earnings in base wages and commissions since the employee's date of hire by the total hours worked as a commissioned employee since that date.

Exemptions. Independent contractors, students, healthcare workers who choose to participate in a premium pay program, and restaurant wait staff or bartenders who work for a combination of wages and tips are not covered by the District's paid sick and safe leave law.

If an employee does not suffer a loss of income when absent from work for sick and safe leave, the employer is not required to provide paid leave for that employee.

Penalties. An employer that willfully violates the requirements of the law will be subject to a civil penalty of $500 for the first offense, $750 for the second offense, and $1,000 for the third and each subsequent offense.

SCHOOL VISITATION

The District of Columbia's **Parental Leave Law** applies to all public and private employers and provides an employee with a total of 24 hours of leave during any 12-month period to attend or participate in school-related events for his or her child. Under the District Parental Leave Law, employees are also entitled to 1 day of leave each year on April 16, for the District of Columbia Emancipation Day (DC Code Sec. 32-1201 *et seq.*).

Definitions. The District of Columbia goes beyond the other jurisdictions that have adopted some form of small necessities law by defining both "parent" and "school-related event" very broadly.

According to the law, a "parent" is the natural mother or father; a person who has legal custody; a person who acts as a guardian regardless of whether he or she has been appointed legally as such; an aunt, uncle, or grandparent; or a person who is married to a person listed above.

"School-related event" is defined as an activity sponsored by either a school or an associated organization such as a parent-teacher association, and includes a student performance such as a concert, play, or rehearsal; the sporting game or practice of a school team; a meeting with a teacher or counselor; or any similar type of activity. However, to qualify, a school-related event must involve the parent's child directly either as a participant or subject, not as a spectator.

Limits on leave. An employer may deny this leave only if granting the leave would disrupt the employer's business and make the achievement of production or service delivery unusually difficult.

Use of paid leave. Parental leave is unpaid, unless the parent elects to use any paid family, vacation, personal, compensatory, or leave from a leave bank that has been provided by the employer.

Notice. Employees must notify the employer at least 10 calendar days before the event, unless the need to attend the school-related event cannot be reasonably foreseen.

Employee rights. An employee who takes parental leave will not lose any employment benefit or seniority accrued before or during the date of such leave.

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PREGNANCY LEAVE

The **District of Columbia Pregnancy Antidiscrimination Act** provides that women affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes, including receipt of benefits, as other persons not affected but similar in their ability or inability to work (DC Code Sec. 2-1401.5).

For more information, see the national and state ***MATERNITY AND PREGNANCY*** sections.

DONOR LEAVE—PUBLIC EMPLOYERS

Public employees are entitled to take up to 30 days of paid leave per year to serve as an organ donor. Employees are also entitled to take up to 7 days of paid leave per year to serve as a bone marrow donor. Both leaves must be granted without loss or reduction in pay, leave, or credit for time of service. This law applies only if the employee is a volunteer donor, and any compensation received by the employee is limited to costs and expenses associated with organ or bone marrow donations (DC Code Sec. 1-612.03b).

TIME OFF FOR MILITARY SERVICE

Under certain circumstances, employees are entitled to take time off to serve in the U.S. armed forces and to be reinstated when service has been completed. For details, see the national ***MILITARY SERVICE*** section.

TIME OFF FOR VOTING, JURY DUTY

Employees are also entitled to take time off to vote in an election, to serve on jury duty, or to make other types of court appearances. For full details, see the national and state ***JURY DUTY/COURT APPEARANCE*** sections and the national ***POLITICAL ACTIVITY*** section.

LEAVE OF ABSENCE POLICIES

It is a good idea to have a written policy in place explaining employee rights and responsibilities regarding leaves of absence. Some employers implement a comprehensive policy addressing many different types of leave; others develop separate policies for each type of leave available. Companies should consider developing and implementing a stated policy regarding the following:

- Family and medical leave
- Paid sick leave
- Disability leave
- Workers' compensation leave
- Paid holidays
- Union-related leave
- Vacation time
- Military service leave
- Voting and jury duty leave
- Bereavement leave

Some of these types of leave are subject to federal and state requirements that must be integrated into the policy. Others are purely voluntary categories of leave that may or may not be offered at the employer's discretion. For more details on legal requirements, refer to the national ***ATTENDANCE, DEATH IN FAMILY, DISABILITIES, LEAVE OF ABSENCE, MATERNITY AND PREGNANCY,*** and ***PERSONAL LEAVE*** sections and the national and state ***HOLIDAYS, JURY DUTY/COURT APPEARANCE, MILITARY SERVICE, SICK LEAVE, VACATIONS,*** and ***WORKERS' COMPENSATION*** sections. For a leave of absence policy planner outlining the basic steps in developing a leave policy, see the national ***LEAVE OF ABSENCE*** section.

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