

The District of Columbia Passes the Nation's Most Expansive Paid Family and Medical Leave Law

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By Brian W. Steinbach and Nancy L. Gunzenhauser

On February 15, 2017, District of Columbia Mayor Muriel Bowser [announced](#) that she will not veto the [Universal Paid Leave Amendment Act of 2016 \(Bill 21-415\)](#) ("Act"), previously passed by the D.C. Council on December 22, 2016. The Act will create the most generous paid family and medical leave benefit in the nation by guaranteeing D.C. employees up to a combined 16 weeks of paid family, medical, and parental leave in a 52-workweek period ("Universal Paid Leave"), starting on July 1, 2020. The Act will take effect following a 30-day period of congressional review required by the [District of Columbia Home Rule Act](#) and publication in the *D.C. Register* and will apply upon inclusion of its fiscal effect in an approved budget and financial plan, all of which will likely occur by late spring 2017.

The Act calls for the mayor to issue rules regarding its implementation within 180 days of the effective date of the Act. The proposed rules will then be submitted to the D.C. Council for a 45-day review period. The Act does not supersede any collective bargaining agreement that provides paid leave rights in addition to what is provided under Universal Paid Leave.

Reasons for Leave

The Act provides paid leave for three types of Universal Paid Leave:

- **Family Leave:** Eligible employees may take up to a maximum of six workweeks of leave within a 52-workweek period to provide care or companionship to a family member because of the diagnosis or occurrence of a "serious health condition"¹ of an employee's family member.
- **Medical Leave:** Eligible employees may take up to a maximum of two workweeks of leave within a 52-workweek period following the diagnosis or

¹ "Serious health condition" has the same definition as under the federal Family and Medical Leave Act.

occurrence of a serious health condition of the employee. Medical leave must be taken within one year of the qualifying medical leave event.

- **Parental Leave:** Eligible employees may take up to a maximum of eight workweeks of leave within a 52-workweek period to bond with a newborn or a child placed for adoption, foster care, or *in loco parentis*. Parental leave must be taken within one year of the birth or placement.

The leave is job-protected to the extent that it runs concurrently with the District of Columbia Family and Medical Leave Act (“DCFMLA”), which already provides up to 16 weeks of unpaid job-protected leave every two years for both medical and family leave purposes.

These maximum leave and paid entitlements may be spread across multiple qualifying events during the 52-workweek period. Leave may be taken intermittently or in a single period of time.

A “family member” is defined as a child (including a biological, adopted, or foster son or daughter; a stepchild; or a legal ward or person to whom the employee stands *in loco parentis*), a parent (including in-laws, foster parents, guardians, and persons *in loco parentis*), a spouse or domestic partner, a grandparent, or a sibling.

Eligible employees have a one-week waiting period during which no benefits are available. If an employee uses leave more than once in a 52-workweek period, there will not be a second week-long waiting period.

Funding

Importantly, employers will not be required to provide *pay* under the Act. Instead, all private D.C. employers will be required to pay what effectively is a payroll tax by contributing an amount equal to 0.62 percent of the wage of each of their covered employees to a Universal Paid Leave Implementation Fund (“Fund”). Collections for the Fund will begin by July 1, 2019, and employees may begin to receive payment under Universal Paid Leave beginning on July 1, 2020.

Pay During Leave

Employees will be eligible for pay from the Fund depending on their wages during four of the five previous quarters immediately prior to taking Universal Paid Leave:

- An eligible individual who earns an average weekly wage from all sources that is *equal to or less than* 150 percent of the District’s minimum wage multiplied by 40 will be entitled to weekly paid leave benefits that equal 90 percent of that individual’s average weekly wage.

- An eligible individual who earns an average weekly wage from all sources that is *greater than* 150 percent of the District’s minimum wage multiplied by 40 will be entitled to weekly paid leave benefits that equal:
 - 90 percent of 150 percent of the District’s minimum wage multiplied by 40, **plus**
 - 50 percent of the amount by which the eligible individual’s average weekly wage exceeds 150 percent of the District’s minimum wage multiplied by 40.

The maximum weekly benefit amount will be \$1,000 through September 30, 2021. On October 1, 2021, and each October 1 thereafter, the maximum weekly benefit amount will increase with the Consumer Price Index for All Urban Consumers, Washington-Baltimore Metropolitan area.

If an eligible employee only takes a partial week of leave, the weekly benefit amount will be prorated.

Eligible employees will apply for Universal Paid Leave through a new administrative agency that will be created by the mayor. Additionally, the mayor will notify the employer within three business days of the filing of a claim for benefits. A decision is supposed to be made within 10 business days. The eligible employee then has a right to appeal to the Office of Administrative Hearings. The employer is not directly involved in determining eligibility.

Covered Employer

Virtually all private employers are covered under the Act, as there is no minimum employee threshold. The Act’s definition of “covered employer” tracks the definition under the D.C. Unemployment Compensation Act. The Act states, however, that an employee who works for a covered employer with fewer than 20 employees—and therefore is not covered by DCFMLA—is not entitled to job protection if he or she takes Universal Paid Leave. Accordingly, a smaller employer will have to pay the payroll tax and allow employees to take covered leave but need not protect their jobs. Federal and D.C. government employers are entirely exempt from the Act.

Covered Employee

An employee is covered under the Act when he or she:

- spends more than 50 percent of his or her work time for the covered employer in the District of Columbia,

- regularly spends a substantial amount of his or her work time for the covered employer in the District of Columbia and not more than 50 percent of his or her work time for the covered employer in another jurisdiction, and
- has worked “some or all” of the previous 52 calendar weeks for a covered employer.

The Act currently does not define what the term “some or all” means.

Interaction with Other Leave Laws and Pay Policies

All leave that qualifies for both Universal Paid Leave and either the federal Family and Medical Leave Act or the DCFMLA will run concurrently with leave taken under those laws. The Act does not address how Universal Paid Leave interacts with an employer’s short-term disability or salary continuation policy. The Act also does not address how Universal Paid Leave interacts with D.C. paid sick leave, although it is clear that such sick leave could be used during the one-week waiting period. If an employee is receiving long-term disability payments or unemployment compensation, however, the employee is ineligible to receive pay under the Act. Employers may provide employees with additional benefits beyond what is provided in the Act.

Notice

Employers will be required to provide all employees with notice of their rights to take Universal Paid Leave. The notice must be provided to employees (i) upon hire, (ii) annually thereafter, and (iii) each time the employer is aware that leave is needed. Employers must *also* post the notice in a conspicuous place within the workplace. The mayor will create a notice in English and other languages that explains:

- employees’ right to paid leave benefits under the Act, and the terms under which such leave may be used;
- that retaliation by an employer against an employee for requesting, applying for, or using paid leave benefits is prohibited;
- that an employee who works for an employer with under 20 employees will not be entitled to job protection if he or she decides to take paid leave pursuant to the Act; and
- that the employee has a right to file a complaint, and the procedures established by the mayor for filing a complaint.

Employees will be required to provide written notice to the employer of the need for the use of paid leave benefits prior to taking leave. If the leave is foreseeable, employees must provide at least 10 days’ notice; if the leave is unforeseeable, notice must be provided prior to the start of the work shift, if possible.

Retaliation

The Act makes it unlawful to interfere with, restrain, or deny the exercise or the attempt to exercise any right provided by this Act, or to retaliate in any manner against a person who opposes any practices made unlawful by the Act or asserts any right granted by the Act. This includes requesting, applying for, or using the paid-leave benefit, or pursuing or assisting in any inquiry or proceeding relating to the Act.

Penalties

Employers that violate the Act may be subject to civil action by either the eligible employee, the attorney general of the District of Columbia, or the mayor. The Act has a one-year statute of limitations. Employers may be required to pay back pay, the same amount in liquidated damages or up to three times that amount in compensatory damages, and attorneys' fees.

Employers may also be subject to civil penalties of up to \$100 for failure to provide a notice to each employee who did not receive individual notice and of up to \$100 for each day that the employer fails to post the notice in a conspicuous place.

What D.C. Employers Should Do Now

- Await the effective date of the Act, and review the subsequent regulations due 180 days thereafter.
- Review family and medical leave policies and draft amendments, as necessary, to make sure that they include appropriate references to, and comply with, the Act, once it takes effect.
- Ensure that your human resources personnel and payroll personnel or payroll service provider takes the appropriate actions to prepare to administer Universal Paid Leave benefits.
- Ensure that your finance department takes appropriate action to implement the payroll tax.
- Review collective bargaining agreements covering persons employed in the District of Columbia to assess what impact, if any, the adoption of Universal Paid Leave benefits may have on contractual obligations.

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