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Universal? You Bet – How the D.C. Universal Paid Leave Act May Impact Your Business

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The D.C. Universal Paid Leave Act has incredibly broad reach. All employers that directly or indirectly employ or exercise control over the terms and conditions of employees working in D.C. and that are required to pay unemployment insurance on behalf of their employees are covered by the Act regardless of whether the employer has a physical location in D.C. In this article, we briefly cover the Act's general provisions, its interaction with other leave laws, and recommendations for employers who must comply with the Act.

In brief, the Act creates a paid leave system funded by employers for those employed in D.C. "Covered employers" are required to contribute an amount equal to 0.62 percent of the wages of each of their "covered employees" to the Universal Paid Leave Implementation Fund. "Eligible individuals" may then file a claim for paid leave benefits for a "qualifying leave event," with those benefits to be paid out of the Fund. The Act requires employers to start paying into the Fund on July 1, 2019, and employees will be eligible for leave benefits beginning July 1, 2020.

The Act's History

In late 2016, after much controversy and debate, the D.C. Council enacted one of the most liberal paid leave laws in the country, which took effect on April 7, 2017. Employers were in limbo until the Mayor's office moved forward with the Act's implementation. The Act provides covered employees with eight weeks of paid parental leave, six weeks of paid family leave, and two weeks of paid personal medical leave.

The D.C. Department of Employment Services (DOES) initially published a Notice of Proposed Rulemaking (NPRM) in the D.C. Register on April 6, 2018, which included regulations to implement the Act as a whole. Based on comments received, DOES decided to divide the regulations into two chapters, separating the employer contributions and paid-leave benefits. The proposed tax regulations include significant changes from the initial proposed rules in order to address employer registration and responsibilities, opt-in and opt-out procedures for self-employed individuals, wages, and contribution and collection procedures. DOES published a second NPRM in the D.C. Register on July 6, 2018. The public comment period for this proposed rulemaking closed on August 5, 2018. The Act's Final Tax Regulations as proposed may be [reviewed here](#).

Eligibility: Covered Employers, Covered Employees, and Eligible Individuals

A "covered employer" is defined as any individual, partnership, general contractor, subcontractor, association, corporation, business trust, or any group of persons who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee *and* must pay unemployment insurance on behalf of its employees in D.C., or a self-employed individual who has opted into the paid leave program.

Thus, as required by the D.C. Unemployment Compensation Act, employers who "employ one or more individuals in any employment" in D.C. must pay unemployment insurance (with few exceptions) are covered by the Act.

A "covered employee" is any employee who spends more than 50 percent of his or her work time working in D.C. for a "covered employer." Thus, those employers that do not have a physical location in D.C., but employ remote workers who perform services for the employer 50 percent or more of the time in D.C., would be required to comply with the Act.

An "eligible individual" is an individual who has been a "covered employee" during some or all of the 52 calendar weeks immediately preceding the qualifying event for which paid leave is being taken, or is a self-employed individual who earned self-employment income for work performed primarily in D.C. during some or all of the 52 calendar weeks immediately preceding the qualifying event for which paid leave is being taken and has opted into the paid leave program.

Employee Paid Leave Benefits

The Act provides for three types of paid leave benefits:

- Parental Paid Leave – employees are entitled to up to eight weeks of paid parental leave, which may be taken within one year following the birth of a child, placement of a child for adoption or foster care, or placement of a child where the eligible individual legally assumes and discharges parental responsibility;
- Family Paid Leave – employees are entitled to up to six weeks of paid family leave under the Act so the employee can provide "care or companionship" to a family member who has a diagnosis or occurrence of a serious health condition; and
- Medical Paid Leave – employees are entitled to two weeks of paid medical leave for an eligible individual following his or her diagnosis or occurrence of a serious health condition.

Under the Act, "family member" is broadly defined and includes:

- A biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or a person whom an eligible individual stands *in loco parentis*;
- A biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood *in loco parentis* to an eligible individual when the eligible individual was a child;
- A person to whom an eligible individual is related by domestic partnership or marriage;
- A grandparent of an eligible individual; or
- A sibling of an eligible individual.

To qualify for Family or Medical paid leave under the Act, an employee must show that a "serious health condition" exists, which includes a physical or mental illness, injury, or impairment that requires inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or supervision at home by a health care provider or other competent individual.

Beginning July 1, 2019, employers are saddled with funding these paid leave benefits through a 0.62 percent payroll tax of the annual gross wages of each covered employee. The contribution amount is in addition to any other benefits provided to employees, such as short-term disability, paid sick leave, and the like. The Act relies on the definition of wages under the D.C. Unemployment Compensation Act. Thus, "wages" is generally defined as "all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash." This tax collection process will be similar to the collection of unemployment taxes and will be conducted on a quarterly basis. Employers are required to make a report of and pay the contributions for a quarter no later than the last day of the month following the close of each calendar quarter. As such, a covered employer's first report and payment will be due by October 31, 2019.

If the contributions are not paid when due, an interest rate of 1.5 percent per month will be assessed until the contributions are made. In addition, if the contributions are not paid or wage reports are not filed before the first day of the second month following the close of a calendar quarter, an employer will be assessed a penalty of ten percent of the amount due. The tax regulations associated with the Act authorize the DOES to proceed with "collection" activities against those employers who fail to comply with the Act, including levying an employer's bank account and seizing and selling property of the employer.

Covered employers with five or more covered employees will be required to register with DOES via an online portal. Covered employers with fewer than five employees without computer access may contact DOES to register via a paper form. The DOES will maintain a separate Fund account for each employer for all contributions made after July 1, 2019.

Employees may begin to access paid leave beginning in 2020. Eligible employees with a weekly wage at a rate that, on an annualized basis, is equal to or less than 150 percent of the D.C. minimum wage (which will be \$14.00 per hour in 2020) will be entitled to payment of benefits at a rate that equals 90 percent of that eligible individual's average weekly wage rate. Eligible employees earning in excess of 150 percent of the D.C. minimum wage will be entitled to 90 percent of 150 percent of the D.C. minimum wage, plus 50 percent of the amount by which the eligible individual's average weekly wage rate exceeds 150 percent of the D.C. minimum wage, with a maximum weekly benefit capped at \$1,000. The \$1,000 weekly benefit cap will increase in proportion to the annual average increase, if any, in the Consumer Price Index beginning October 1, 2021.

Employer Notice Requirements

Covered employers must post a paid leave program notice provided by the DOES at each worksite in conspicuous place or places where notices are customarily posted. Employers are also required to send the notice to remote-covered employees to post at their individual worksites.

Further, employers must provide the notice to employees at the following times:

- To an individual employee within 30 days of hiring;
- To all employees annually; and
- To an individual employee at the time the employer receives notice from the employee that leave for a qualifying event is needed.

Employers have the burden of demonstrating compliance with the notice requirements; therefore, if the notices are distributed via email, the employer should retain email receipts and obtain signed statements by employees acknowledging receipt of the notice. The notice (in English and Spanish) may be found on the [DOES's website](#).

Accessing Paid Leave Under the Act

An eligible individual may submit a claim for payment for any period during which he or she does not perform work because of a qualifying event. Employees will not be entitled to receive payment for more than one qualifying event in any 52-workweek period.

An eligible individual is required to provide written notice to his or her employer of the need to use paid leave under the Act. The written notice must include a reason for the absence, within the parameters of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the expected duration of leave. If the leave is foreseeable, the written notice must be provided at least ten days, or as early as possible, before the start of leave. If the leave is not foreseeable, an oral or written notification must be provided prior to the start of the work shift for which leave is being used. In case of an emergency, the eligible individual, or another individual

on behalf of the eligible individual, must notify the eligible individual's employer, either orally or in writing, within 48 hours of the emergency.

The DOES will notify the employer within three business days of a claim being filed. Within ten business days after an individual has filed a claim for benefits under the Act, the DOES will make an initial determination of an individual's eligibility to receive benefits, the weekly amount payable, the week when payments will commence, and the maximum duration of benefits. The DOES will notify the individual and also advise of the right to appeal to the Office of Administrative Hearings if an eligible individual does not agree with one or more determinations. Payment of benefits will begin within ten business days of determining eligibility and subsequent payments will be made every other week thereafter.

Recordkeeping Requirements

Employers are required to develop and maintain certain records related to the Act for three years. Those records include:

- The name and social security number, or, if the social security number is unavailable, tax identification number, of each covered employee;
- The beginning and ending dates of each pay period;
- The wages paid for each pay period, including the cash value of other remuneration, gratuities, and tips and expenses incurred by each covered employee for which a deduction from wages is claimed;
- Method of payment;
- Earnings of employees;
- The dates on which wages were paid;
- Dates of parental, medical, and family leave taken by employees;
- Copies of employee notices of leave furnished to the employer;
- Copies of all written notices given to employees as required under the Act;
- Documents describing employee benefits, including short- and long-term disability policies, sick leave, vacation leave, and other employer paid and unpaid leave policies and practices; and
- Records of disputes between the employer and the employee regarding the Act.

Private Right to Sue Employers

Within one year after the occurrence or discovery of a violation of the Act, an employee may sue an employer to enforce the Act's provisions. In addition, the D.C. Attorney General or the Mayor may bring a civil action against an employer. If a court determines that an employer violated the Act, the remedies available under the D.C. Family and Medical Leave Act will apply. Those remedies include wages, benefits or other compensation denied or lost, plus interest; liquidated damages; and reasonable attorneys' fees and costs.

Interactions with Other Laws and Employer Policies

If paid leave taken under the Act also qualifies as protected leave under the federal Family and Medical Leave Act or the D.C. FMLA, the leave taken under the Act will run concurrently with, and not in addition to, such protected leave. The Act provides no additional job protections beyond those already existing in the D.C. FMLA.

A covered employer may provide employees with leave benefits in addition to those provided by the Act. The provision of such benefits, however, does not exempt the employer or the eligible individuals from the provisions of the Act, including payment of the tax. If an eligible individual is receiving unemployment insurance or long-term disability payments, they are not eligible to receive benefits under the Act. The Act also prohibits any agreement by an individual to waive his or her rights under this Act.

Recommendations for Employers

If covered employers have not yet considered the implications of the Act, they should do so now. The Act's payroll tax begins July 1, 2019, and employee access to benefits begins on July 1, 2020. Employers should focus on readying their payroll systems for complying with the additional payroll tax and review current employer-provided paid time off and leave benefits and policies to consider how the Act will interface with those benefits.

For assistance with understanding how the D.C. Universal Paid Leave Act will affect your organization, contact the author, [Donna Glover](#), or any member of Baker Donelson's [Labor & Employment Group](#).