

D.C. City Council Passes Paid Family and Medical Leave Law

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Summary: New law provides D.C. employees with 8 weeks of paid parental leave, 6 weeks of paid family leave, and 2 weeks of paid medical leave, and imposes new obligations on employers.

On December 20, 2016, the District of Columbia City Council moved towards implementing one of the nation's most generous paid family and parental leave regimes, passing the Universal Paid Leave Act of 2015 (the "Act") by a vote of 9-to-4. If the Act is signed by the Mayor, who has stated that she opposes it, and is not subsequently rejected by Congress, it will provide employees working in D.C. with the benefit of a generous paid leave regime and impose significant new obligations on employers. Employers should continue to monitor the legislative process, however, as the program could still undergo significant changes.

The Act provides three separate benefits: family leave, parental leave, and medical leave. The first, family leave, is triggered by the diagnosis or occurrence of a "serious health condition" of an employee's family member. This benefit provides the employee with up to 6 weeks of paid leave. The second benefit, for parental leave, is triggered by the birth of the employee's child, the placement of a child with the employee for adoption or foster care, or other placement of a child with the employee where the employee legally assumes parental responsibility over the child. The parental leave benefit provides the employee with up to 8 weeks of paid leave, and explicitly includes leave for the purpose of bonding with the employee's child. Finally, the Act provides 2 weeks of paid medical leave for the employee's own serious health condition. In total, an employee may receive up to 8 weeks of paid leave, regardless of type. Leave may be taken intermittently in increments of no less than one day (partial days of leave cannot be taken). The amount of the leave benefit is set by a formula based on the employee's salary or wages, and is capped at a maximum of \$1,000 per week.

These benefits are paid to employees by the D.C. government, not directly by employers. To pay the benefits, the Act creates a fund consisting of the proceeds of a tax imposed on employers in the amount of 0.62% of the annual wages of each of the employer's "covered employees." Covered employees are those who spend more than 50% of their work time in D.C., or who spend a substantial amount of work time in D.C. and do not spend more than 50% of their work time in any one other jurisdiction. Determining the base of employees on which an employer must pay taxes could be complicated for employees who do not work primarily out of a single, fixed location.

For employers who already offer paid leave, the Act subsidizes that leave (in return for the payment of the 0.62% tax) by paying a portion of the employee's salary up to \$1,000 per week. Employers who wish to "top off" the Act's leave benefit in order to provide an employee with his or her full salary while on leave are permitted to do so, as the Act permits employers to provide additional and supplementary leave benefits. Employers should ensure, however, that they update their leave and benefit policies to account for the interaction between an employer's benefits and those under the Act.

If leave under the Act would also qualify under D.C.'s Family and Medical Leave Act ("DCFMLA"), then the Act provides that the employee's paid leave and DCFMLA leave run concurrently. Less clear is when and how DCFMLA's job restoration requirements apply to the new paid leave Act for employees who are not DCFMLA-eligible. While the new Act provides that an employer cannot retaliate against an employee for taking paid leave or interfere with the employee's use of paid leave, it does not have any provision that is expressly analogous to the requirement under DCFMLA that the employee must be restored to his or her former position (or an equivalent position) when the employee returns from leave. DCFMLA is available only to employees who have worked 1,000 hours over the preceding 12 months; the new Act does not contain this eligibility requirement. While the Act appears ambiguous as to the treatment of non-DCFMLA eligible employees, the safer course of action for D.C. employers is to extend the DCFMLA's job restoration protection to such employees unless and until a court or administrative agency rules that they do not receive this protection.

The Act also imposes notice requirements on both employers and employees. Employers are required to provide each employee with a notice of their paid leave rights created by the city government at the time of hiring and on an annual basis afterwards. The notice must also be provided when an employer becomes aware that an employee needs to take paid leave. Finally, the notice must be posted in a conspicuous place in the employer's premises. An employer that fails to comply with the paid leave Act's notice requirements is subject to a civil penalty of \$100 for each employee that is not given notice and \$100 per day that the notice is not posted.

Employees must also provide notice to employers if they intend to take paid leave. The Act is not clear on what, if any, consequences occur in the event that an employee fails to provide the required notice and expressly states that an employee's failure to give notice is not a ground for the denial of leave.

Also unclear is when the Act's tax and benefit provisions will take effect. The Act only provides deadlines by which the Mayor must begin collecting its tax (July 1, 2019) and paying its benefits (July 1, 2020). It does not address the status of tax collection and benefit payment before those dates, leaving it uncertain when the Mayor will begin implementing the Act's provisions.

Finally, it is also possible that there could be significant changes in the Act before it becomes law, as at least one alternative paid leave proposal previously rejected by the City Council could be resurrected if Mayor Bowser vetoes the current version of the Act.

If you have questions about D.C.'s new paid leave law or want advice on how to prepare for its implementation, the Paley Rothman Employment Law Group is available for consultation with D.C. employers.