

District of Columbia Employees Now Eligible to Collect Benefits Under the Universal Paid Leave Amendment Act of 2016

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The time has come. As of July 1, 2020, almost a year after Washington, DC, started collecting an employer payroll tax to fund the city-run leave program, employees are now eligible to collect benefits.

As we described in prior *Act Now* Advisories (see [“The District of Columbia Passes the Nation’s Most Expansive Paid Family and Medical Leave Law,”](#) [“New D.C. Office of Paid Family Leave Launches Website,”](#) and [“DC Paid Family Leave: Employers Must Provide Notice by February 1; Final Regulations Take Effect March 26”](#)), the Universal Paid Leave Amendment Act of 2016 (“the Act” or “UPL”) allows covered employees to receive paid time off from work for qualifying parental, family, and medical events.

Reasons for Leave

- **Parental Leave** allows eligible employees to 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—and not before—the child’s birth or placement.
- **Family leave** allows eligible employees to take up to a maximum of six workweeks of leave within a 52-workweek period to provide care or companionship to a family member¹ because of the diagnosis or occurrence of a “serious health condition”² of an employee’s family member. *An individual may file a claim for leave to provide care or companionship to a family member diagnosed with COVID-19. Eligibility will be determined on a case-by-case basis.*
- **Medical Leave** allows eligible employees to take up to a maximum of two workweeks of leave within a 52-workweek period following the diagnosis or

¹ 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.

² “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. *Benefits will not be paid to individuals who are quarantined but have not received an official diagnosis of COVID-19.*

An employee cannot receive more than eight weeks of paid leave under the Act during a 52-workweek period, regardless of the types of qualifying events during the period.

Funding

The Act is funded by employers. Since July 1, 2019, covered DC employers have been required to contribute an amount equal to 0.62 percent of the wages of each of their covered employees to a Universal Paid Leave Implementation Fund (“Fund”). The Department of Employment Services pays benefits to eligible employees directly from the Fund (unlike in other states, such as New York, in which benefits are paid by an insurer).

Notice

Covered employers had to post a city-supplied notice by February 1, 2020, in a conspicuous place accessible to employees at each worksite. Employers were also required to send copies to remote workers. Failure to post the notice at the worksite carries a \$100 fine for each day of noncompliance. Another \$100 daily fine applies if employers fail to provide notice to individual employees:

- (1) within 30 days of hire (for employees starting after January 2020),
- (2) on annual basis starting in 2020, and
- (3) after receiving a “direct” notice from an employee about the need to take UPL leave for a qualifying event.

The [benefit regulation](#) finalized this year requires employees, when practicable, to provide their employer written notice about the need for paid leave. When the leave is foreseeable, employees must give at least 10 days’ advance notice. When the need for leave is unexpected, shorter notice periods apply.

Eligibility and Exception Process

Any private-sector employer—whether for profit or nonprofit—paying DC unemployment insurance taxes for one or more employees is covered by the Act. Employees of a covered employer have paid leave rights if they spend at least 50 percent of their work time—whether full time or part time—in the city. Questions about whether the Act covers employees with attenuated work connections to the city are particularly relevant due to the recent increase in remote work accommodations. For instance, an employee may work in DC infrequently or work remotely from another jurisdiction, even though the

employer is paying unemployment insurance in the District. In response, the city has clarified who is a covered employee and set up a formal process for employers to request UPL exceptions for specific employees.

Covered Employees Clarified

[Guidance](#) on the exceptions process notes that employees working in the city during a particular quarter and reported by the employer to the District's unemployment insurance program are always covered by the Act, with no exceptions.

Employees also are covered by the Act if their work performed outside of the District consists of merely isolated transactions or is temporary, transitory, or incidental. Therefore, if employees are temporarily working remotely outside of the District due to COVID-19, those employees continue to be covered by the Act.

Critically, employees who telework/telecommute may be eligible for paid leave benefits, provided that they spend more than 50 percent of their work time physically working in DC for a covered employer that is based in the District.

Obtaining an Exception

An employer can apply to obtain a formal UPL exception for an employee who meets two conditions:

- (1) performs work outside the District that is not temporary, transitory, incidental or isolated, and
- (2) spends more than 50 percent of his or her work time in a jurisdiction other than the District.

Employers must apply each quarter to request an exception and must pay the full quarterly payroll tax for the employee while the application is pending. If the District determines that an employee is excepted from the Act, the city will credit the quarterly payroll taxes paid for that employee to the employer's account.

The guidance sets out the documentation required to request an exception and the email address for submitting the documentation. The District has provided a template for the employer's [cover letter](#) and the required [employee acknowledgement form](#).

Coordinating UPL with Other Leave

A key implementation issue concerns how the new paid leave benefit will coordinate with other leave—whether voluntarily provided by an employer or required under federal or District law.

The District's UPL program does not supersede any law, collective bargaining agreement, or contract that provides paid-leave rights in addition to the rights established by the Act.

If paid leave taken under the District's program also qualifies as protected leave under the federal Family and Medical Leave Act ("FMLA"), or the District's Family and Medical Leave Act ("DCFMLA"), the paid leave taken runs concurrently with, and not in addition to, the leave taken under FMLA or DCFMLA. However, individuals receiving long-term disability benefits and unemployment insurance benefits under a private or public program are not eligible for paid leave under the Act.

Employers with their own paid leave programs, such as for parental leave, have complete discretion as to how they revise, amend, and administer their own paid leave benefit plans. Therefore, employers may take the benefits provided for under the Act into account and reduce employer-paid leave benefits correspondingly—for example, by offsetting the benefits or simply paying the difference between paid leave benefits under the Act and an employee's full wages.

COVID-19-Related Temporary Leave

The new federal Families First Coronavirus Response Act ("FFCRA") ([Pub. L. No. 116-127](#)) requires employers with fewer than 500 employees—with certain exceptions—to grant paid sick and expanded FMLA leave for certain pandemic-related reasons. The District also has temporarily expanded DCFMLA and paid sick leave laws in response to the pandemic.

Federal Paid Sick Leave for COVID-19

In some circumstances, an employee's need for paid leave under the Act could overlap with the FFCRA's emergency paid sick leave—for instance, when an employee is caring for someone under quarantine due to a serious health condition related to COVID-19. Federal guidance provides that the FFCRA's paid sick leave is in addition to any benefits under state and local leave laws.

FMLA Leave for COVID-19

The FFCRA's emergency FMLA leave is available only to employees unable to work because their child's school or childcare has closed due to the pandemic. This FFCRA leave will not overlap with the Act because the Act does not recognize a similar qualifying event.

DCFMLA Leave for COVID-19

[Emergency legislation](#) temporarily expands the DCFMLA through the end of the District's public health emergency.

Under the expanded DCFMLA, up to 16 weeks of emergency unpaid leave is available to an employee unable to work (even remotely) due to the need to quarantine, care for an individual under quarantine, or care for a child whose school or place of care has closed because of the public health emergency. Unlike the permanent DCFMLA, this temporary leave obligation applies to employers of all sizes and employees who have worked at least 30 days for the employer. The right to COVID-19 leave terminates when the public health emergency has ended, even if an employee has not exhausted the 16-week entitlement.

Any employer-paid leave used counts against this new DCFMLA leave entitlement. An employee can elect (but an employer cannot require) to use this emergency unpaid leave before taking other leave available under federal or District law or an employer's policies. Qualifying events under this temporary program and the UPL program could overlap if the leave involves taking care of someone with a serious health condition due to COVID-19.

DC Paid Sick Leave for COVID-19

[Supplemental emergency legislation](#) amends DC's Accrued Sick and Safe Leave Act through the end of the District's public health emergency.

The legislation expands the FFCRA's paid sick leave to provide up to 80 hours of paid sick leave for full-time workers, with lower amounts for part-time workers. Because the District's public health emergency currently extends through July 24, 2020, this paid sick leave will overlap with the UPL program. The emergency sick leave applies to employees who have worked at least 15 days for the employer before requesting leave. Employees can use this leave concurrently with or after exhausting other leave available under federal or District law or an employer's policies. When an employee takes this leave concurrently with other paid leave, an employer can reduce the amount paid for DC sick leave by the amount of other paid leave the employee receives.

What DC Employers Should Do Now

The city's Office of Paid Family Leave has made UPL resources available on its [website](#). Here are some actions to consider:

- If a company has not done so already, make sure to post and distribute the required notice. The original notice for posting has been updated since first issued, so all employers should verify that the latest version is posted.
- Identify employees covered by the Act in light of updated guidance, especially when so many employees are working remotely outside of DC during the COVID-19 pandemic. Employers and employees will want to be clear about how UPL applies to teleworkers. It is likely that remote work due to the pandemic does not preclude an employee from being covered under the Act.

- Consider how (or whether) current paid leave policies should change in light of the new UPL benefit. The Act permits employers to institute policies that prevent employees from receiving more than 100 percent income replacement as a result of receiving both paid leave under the Act and employer-provided paid leave benefits. Employers may choose to modify their paid leave policies to proportionately reduce existing employer-paid leave benefits.
- If currently providing short-term disability benefits to employees, consider restricting benefit terms to limit the payout when an employee is receiving similar wage-replacement benefits elsewhere. This would prevent employees from simultaneously receiving short-term disability and UPL benefits that total more than the average wage.
- The Act does not cover absences due to short-term illnesses that do not meet the definition of “serious health condition,” but the city’s paid sick leave law does address these shorter absences. Check whether current policies distinguish between extended medical leave and brief sick leave to better coordinate across the expanding leave landscape.

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