

# PUBLICATION

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## A Look at the D.C. Universal Paid Leave Amendment Act Final Benefit Regulations

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The D.C. Universal Paid Leave Amendment Act of 2016 (UPLA) provides covered employees with certain amounts of paid leave during any 52-week period for one of three qualifying events: eight weeks for parental leave; six weeks for family leave; and two weeks for medical leave. Employers covered by the UPLA have been paying the employer payroll tax since July 1, 2019, and covered employees will have the right to apply for UPLA benefits effective July 1, 2020. This article takes a look at requirements and provisions of the Final Benefit Regulations, which took effect on March 26, 2020.<sup>1</sup>

### Employer Notice Requirements

Although UPLA benefits are not available until July 1, 2020, the required employer notice obligations became effective on February 1, 2020. By that date, all D.C. employers were required to post the employee UPLA notice, which is available in English, Spanish, French, Amharic, Chinese, Korean, and Vietnamese, in all work locations. Additionally, the notice must be provided in electronic or physical form to:

- All employees at least once between February 1, 2020 and February 1, 2021, and at least annually thereafter;
- All new employees hired after February 1, 2020 within 30 days of hiring; and
- Any individual employee who asks the employer after February 1, 2020, for leave that could qualify for benefits under the UPLA.

Employers that fail to comply with the notice requirements will be assessed a civil penalty not to exceed \$100 for each covered employee to whom the notice was not provided and \$100 each day that a covered employer fails to post the notice in a conspicuous place. Employers have the burden of demonstrating compliance with the notice requirements; therefore, employers should retain email receipts and/or obtain signed statements by employees acknowledging receipt of the notice. Employers also should include the notice in their onboarding materials for new employees.

### Employee Eligibility Requirements for UPLA Benefits<sup>2</sup>

Covered employees must meet the following three criteria to be eligible for UPLA benefits:

- An employee must experience a "qualifying event;"
- An employee must not be able to work ("perform his or her regular and customary work because of the occurrence of a qualifying event"); and
- An employee must satisfy the following criteria:
  - is employed by a covered employer when the employee applies for benefits;
  - earned wages during at least one of the past five completed quarters immediately preceding a qualifying event; and
  - the employee's wages were reportable to the DOES pursuant to the UPLA's tax regulations.

### Qualifying Events

Under the UPLA, an employee may apply for benefits for any one of three qualifying events. 1) Parental leave of up to eight weeks may be taken for 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. 2) Employees are entitled to up to six weeks of paid family leave so the employee can provide "care or companionship" to a family member (broad definition) who has a diagnosis or occurrence of a serious health condition. 3) Finally, employees are entitled to up to two weeks of paid medical leave following the diagnosis or occurrence of their own serious health condition. Generally, "serious health condition" 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.

Of course, if an employee is eligible for D.C. FMLA or federal FMLA at the time of the qualifying event, then the employee would also have rights under those leave laws. The UPLA and its regulations *require* that UPLA leave run concurrently with D.C. FMLA and federal FMLA, as applicable.

### **Accessing Benefits as of July 1, 2020 and Employee Notice Requirements**

Generally, employees are not entitled to full wage replacement. Benefits are determined using an average weekly wage calculation and are capped at \$1,000 weekly. If an employee earns a wage equal to or less than 150 percent of the D.C. minimum wage, the employee will receive a benefit equal to 90 percent of his or her average weekly wage. For example, if an employee earns \$20 per hour, and assuming an average weekly wage of \$800, the weekly UPLA benefits would be \$720. Employees who earn wages in excess of 150 percent of the D.C. minimum wage are entitled to 90 percent of the 150 percent amount, plus 50 percent of the amount by which the average weekly wage exceeds 150 percent of the D.C. minimum wage.

Employees must submit claims through a DOES portal. Employees will submit claim information such as name, social security number, contact information, whether leave is continuous or intermittent, and dates of leave, plus additional documentation to support the need for leave. Employers will not have access to this documentation, so depending on the reason for leave, they may need to obtain their own documentation such as for the federal FMLA or D.C. FMLA, as applicable – they should consider UPLA approval as separate from any leave processes they may have in place for employer-provided leave or for federal, state, or District mandatory leave benefits.

Employees must apply for family or medical leave benefits within 90 days of a qualifying event. However, they have up to 52 weeks from the qualifying event to file a parental leave claim. An employee may have more than one open claim at a time, provided that the simultaneously open claims are for different qualifying events. Additionally, the multiple qualifying events may be within the same type of qualifying event; for example, there may be two open qualifying family leave claims or two open qualifying medical leave claims for an employee at a time.

Employees cannot submit a benefit claim prior to the first date of leave, and benefits will not be paid for any leave taken before a claim is submitted except in "exigent circumstances."

"Exigent circumstances" means:

- Physical or mental incapacity that prevented the applicant or the applicant's authorized representative from filing for benefits following the occurrence of the qualifying event;
- A demonstrable inability to reasonably access the means by which a claim could have been filed by the applicant or the applicant's authorized representative following the occurrence of the qualifying event; or
- Actual lack of knowledge by the applicant of his or her right to apply for benefits due to the noncompliance of all of the employee's covered employers with the notice requirements of the UPLA.

Employees may, however, submit a request for benefits for a qualifying event that occurred *prior* to July 1, 2020, such as the birth of a child when the employee wants to take parental leave for that qualifying reason July 1, 2020 or after.

Employees are required to provide written notice to their employers of the need to use UPLA paid leave. The written notice must include the type of leave requested, the expected duration of leave, the expected start and end dates, and whether leave benefits will be used continuously or intermittently. If the leave is foreseeable, the written notice must be provided at least ten days in advance, 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 an emergency, the employee, or another individual on behalf of the eligible individual, must notify the employer, either orally or in writing, within 48 hours of the emergency.

### **DOES Approves or Denies Claims for Benefits**

Employers have no role in approval or denial of UPLA claims - the D.C. Department of Employment Services (DOES) administers the UPLA and has responsibility for reviewing and approving employees' applications for benefits.—Within three business days after the filing of a claim for paid leave benefits, a DOES claims examiner must notify the current covered employer of the filing of a claim by the applicant and request from the employer the following information:

- The employment status of the employee;
- The last day worked by the employee;
- Which type of leave the employee requested, and
- If applicable, whether the employer agrees with the employee's self-described workweek the employee provided to DOES.

The benefit regulations provide that the DOES may request additional information from the employee. If the employee fails to provide the requested information, DOES may deny the claim. DOES must make an initial determination of eligibility for benefits within 10 days of receipt of claim and is required to issue a notification of the initial determination to both the eligible individual and the covered employer that includes the following information:

- A statement as to whether the claim for paid-leave benefits has been approved or denied; and
- If the claim is approved:
  - The start date for the payment of benefits;
  - Whether the leave will initially be taken continuously or intermittently, and, if intermittently, the scheduled days on which benefits will be payable;
  - The expected end date for benefits; and
  - If the employee instructs DOES to disclose the weekly benefit amount, and, if applicable, the equivalent daily benefit amount, the notification also will include the employee's approved weekly benefit amount, and, if applicable, the equivalent daily benefit.

Importantly, by default the DOES will not tell an employer the weekly benefit amount that was approved unless the employee instructs the DOES to do so. Employers, however, may require that such information be shared by the employee in order for company provided benefits to be integrated and paid to the employee so that the employee is not paid more than 100 percent of their pay. Employers should be sure to include this employee notification requirement in their policies to assist with benefits coordination.

No benefits are paid during the seven-day calendar period that begins, not when the claim was filed, but rather on the first day of the qualifying event. Employees will only have to satisfy one seven-day waiting period within any 52-calendar week period. Benefit payments (by direct deposit or debit card) begin within ten days after the

DOES approves the claim, and thereafter are paid on a bi-weekly basis. Employees may not receive UPLA benefits and unemployment benefits at the same time.

### **Integration with Other Leave Laws**

The UPLA clearly provides that paid benefits *must* run concurrently with D.C. FMLA and/or federal FMLA as applicable. Additionally, the UPLA does not supersede any existing law (e.g., the D.C. Accrued Sick and Safe Leave Act), collective bargaining agreement, or contract that provides paid leave rights in addition to the benefits provided by the UPLA.

### **The UPLA is NOT Job-Protected Leave**

If an employee qualifies for paid leave benefits under the UPLA, those benefits do not afford the employee any job protection. The UPLA, however, contains a prohibition on retaliation – employers may not take an adverse action against an employee for accessing their rights under the UPLA. Even so, employers must consider other job protections that may be available to employees under the federal FMLA, the D.C. FMLA, the ADA, and similar D.C. laws. Employees have a right to sue with a one-year limitation period for employer violations of the UPLA. Remedies include wages, benefits, or other compensation denied or lost, liquidated damages, and reasonable attorneys' fees and costs.

### **Employer Recordkeeping Requirements**

Although the DOES handles much of the benefits administration work, employers are burdened with certain recordkeeping requirements beyond those records which they might otherwise retain for payroll or other employment purposes. Under the UPLA, the following records must be retained for three years:

- 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;
- 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 UPLA leave furnished to the employer;
- Copies of all UPLA written notices given to employees as required;
- 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 UPLA-related disputes between the employer and the employee.

### **Next Steps: Employers Should Review and Update Their Current Leave Policies**

Employers *may not* in any way interfere with or reduce employees' entitlement to UPLA benefits. In light of the payroll tax paid by employers to fund UPLA benefits, employers may decide to reduce the monetary value of the company benefits they provide or eliminate those benefits altogether. Employers should consider whether their paid leave policies should be modified while considering the economic impact of the UPLA on their businesses and the employee relations impact of reducing or eliminating company paid leave benefits. They should also carefully consider how current company paid leave benefits and policies will (or will not) integrate with UPLA benefits.

After considering policy and integration issues, covered employers should update and re-issue any modified policies and establish new policies governing UPLA benefits, which summarize the benefits and include employee notice and other obligations with which employees must comply.

<sup>1</sup> For information on whether your business is a covered employer or an employee is a covered employee, read our May 2019 article on the [Final Tax Regulations](#) and view our June 18, 2020 Coffee Chat [webinar](#) that provides an overview of UPLA benefits and tax provisions.

<sup>2</sup> Although the UPLA offers coverage for those individuals who are self-employed, this article focuses on the UPLA with respect to employees only.