

Preparing for the July 2020 DC Paid Family Leave Rollout

June 29, 2020

By Sadina Montani and Aleksandra Rybicki

As Vedder Price [previously reported](#), the Universal Paid Leave Amendment Act of 2016 (the “Paid Leave Act” or the “Act”) will make Washington, D.C. among the most generous of U.S. jurisdictions with regard to employee paid family leave. Employees will be able to access this paid leave benefit beginning on July 1, 2020.

What are the paid leave benefits for employees?

The Paid Leave Act provides employees with up to eight weeks of paid family leave (“PFL”) benefits, which can be used for any of the following purposes: to bond with a new child; to care for a family member with a serious health condition; or to care for one’s own serious health condition. The Paid Leave Act specifies that eight weeks can be used for leave to bond with a new child, but not more than six weeks may be used to care for a family member and not more than two weeks may be for one’s own health condition.

PFL benefits are based on the employee’s average weekly wage for the prior five calendar quarters. For employees who earn up to 1.5 times the D.C. minimum wage, the maximum wage replacement is 90%. For employees who earn more, the maximum weekly benefit is \$1,000.

Which employers are impacted by the Paid Leave Act?

The Paid Leave Act applies to employers that directly or indirectly employ or exercise control over the terms and conditions of employees working in D.C., and which are required to pay Unemployment Insurance (“UI”) tax on behalf of their employees. These requirements apply to employers regardless of whether they have a physical location in D.C. The 0.62% quarterly payroll tax on employees’ total wages that funds PFL benefits has been in effect since July 1, 2019. Employers should confirm with their payroll providers that this quarterly payroll tax has properly been paid for their D.C. employees.

What are the employer notice requirements?

The Paid Leave Act includes certain notice requirements with which employers must comply. These employer notice requirements went into effect on January 1, 2020. D.C. employers are required to provide notice about PFL benefits to:

- (1) all new employees within thirty (30) days of hire (in paper or electronic form);
- (2) all employees at all times (via physical posting at each worksite);
- (3) all employees annually (either in paper or electronic form); and
- (4) each covered worker at the time the employer learns that PFL benefits may be needed (in paper or electronic form).

The physical notice must be kept in a visible and easily accessible place at each worksite where labor notices are customarily posted. Workers who work remotely or primarily telework must be sent an electronic copy of the notice so they can access it at their individual work sites. Employers are responsible for establishing that they have complied with all notice requirements. For the individual and annual notices, compliance can be evidenced by maintaining email receipts or signed acknowledgements from covered workers confirming receipt of the notice. There is a \$100 per-employee penalty

for failing to meet the Act's individual notice requirements.

How can employers prepare for the July 1, 2020 benefits launch date?

As the July 1, 2020 launch date for benefits approaches, employers can prepare for Paid Leave Act implementation by coordinating their paid leave benefits with PFL benefits, and instituting an in-house procedure for smooth and proper compliance.

The D.C. Office of Employment Services (“DOES”) - the entity responsible for implementation of the Paid Leave Act - will not consider the availability of employer-provided paid leave benefits when calculating benefits available under the Act. This leaves open the possibility that employees technically could receive paid leave benefits from both the employer and DOES for the same time period. Under the Paid Leave Act, employers cannot “interfere with, restrain, or deny the exercise of” employees’ rights to access benefits under the PFL program. However, as outlined more fully below, employers can modify their existing paid leave benefits to run concurrently – or in coordination – with PFL benefits.

Employers should take steps now to establish an in-house procedure to facilitate compliance with the Paid Leave Act. DOES stresses that maintaining records is crucial for the coordination of PFL benefits and anticipates that the program may require an additional point of contact at the employer to enforce PFL benefits. Notably, the definition of a serious health condition under the Paid Leave Act is similar to that of the Family and Medical Leave Act (“FMLA”) and therefore, according to DOES, employers can expect Paid Leave Act certification to be similar. Documenting employee notice of the use of PFL benefits, retaining communications with DOES regarding claim filing and approval, calendaring employees’ use of leave benefits, and recording compliance with all notice requirements are some of the ways employers can effectively comply with the Paid Leave Act.

Employer policies also should advise employees that, to the extent practical, employees are required by the Paid Leave Act to provide notice to the employer in advance of requesting PFL benefits.

What can employers expect when an employee applies for PFL benefits?

Within three business days after an employee files a claim for PFL benefits, DOES will notify the employer of the claim and will request the following information from the employer:

- (1) the employee’s employment status;
- (2) the last day worked by the employee; and
- (3) which type of PFL leave the employee notified the employer she intended to request (family, medical, or parental).

The employer must submit the requested information within four business days. After DOES makes an initial determination on eligibility, it is required to inform the employer of:

- (1) the start date for the payment of PFL benefits;
- (2) the expected start and end dates for the leave;
- (3) whether the leave benefits will be continuous or intermittent, and, if intermittent, the intermediate dates; and
- (4) if the employee opted to instruct DOES to disclose the weekly benefit amount, the employee’s approved weekly benefit amount.

DOES will not disclose to employers the amount of PFL benefits the employee is receiving without employee permission. However, the Paid Leave Act does not preclude employers from obtaining this information directly from their employees, or requiring that employees authorize DOES to provide this information to the employer. Therefore, employers can modify their existing leave policies to include a provision requiring an employee to disclose the amount of PFL benefits the employee is receiving as a condition of receiving other employer paid leave benefits for the same leave period. Employers can use this information to track PFL benefits to ensure coordination with other paid leave benefits the employer is providing to the employee per its policies.

How can employers modify their existing leave policies?

The Paid Leave Act permits employers to institute policies that prevent employees from receiving more than 100% income replacement as a result of receiving both PFL and employer-provided paid leave benefits.

Employers may choose to modify their paid leave policies to proportionately reduce existing employer-paid leave benefits. For example, employers could opt to replace existing paid leave benefits with an income replacement benefit in order to supplement the PFL benefits to which employees are entitled under the Paid Leave Act. This structure would involve revising policies to reduce certain types of paid leave entitlements (which overlap with PFL benefits) by the amount the employee would be entitled under the Paid Leave Act. (For instance, if an employee is entitled to the full \$1,000/week PFL benefit, the employer-provided paid leave benefit would be reduced by \$1,000/week.) Thus, once the employee applied for and began receiving the PFL benefits, the employee would achieve full income replacement.

This approach may not be viewed by employees as particularly desirable, as it likely would delay their receipt of full income during a covered leave period, given the inevitable delay before an employee begins receiving PFL benefits for a covered leave. Thus, as an alternative, employers could choose to enter into agreements with employees to advance paid leave to those who take leave for qualifying absences under the Paid Leave Act. In exchange for the advanced pay, employees could be required to timely apply for PFL benefits and assign their PFL check to the employer to repay the prior pay advance. This coordination method could prevent delays in the employees' receipt of payment for their leave period, allow for the continuity of full payment, and prevent employee double-dipping.

Does remote working due to COVID-19 affect an employer's obligation to pay tax?

DOES guidance suggests that employees who have been working remotely outside of D.C. due to COVID-19 are still covered by the Paid Leave Act.

Under the Paid Leave Act, a "Covered Employee" is someone: (1) who spends more than 50% of her work time in D.C. for the employer; or (2) whose employment is based in D.C., who regularly spends a substantial amount of her work time for the employer in D.C., and who spends not more than 50% of her work time for that employer in another jurisdiction. If a covered employer pays UI tax on a worker for any quarter of a calendar year, the worker is automatically considered a Covered Employee for that quarter.

Additionally, DOES guidance states that a worker is a Covered Employee unless the employer can show that the worker's time spent working outside D.C. is not "[i]ncidental in nature" or "[t]emporary or transitory in nature." The agency guidance specifically cites employees who telework more than half the time at home as an example of "incidental" work. Based on this information, remote work from home due to the pandemic does not preclude an employee from being covered under the Paid Leave Act. Accordingly, employers must continue to pay the Paid Leave Act payroll tax for D.C.-based employees to fund PFL benefits.

If you have any questions regarding the topics discussed in this article, please contact **Sadina Montani** at +1 (202) 312 3363, **Aleksandra Rybicki** at +1 (202) 312 3336 or any Vedder Price attorney with whom you have worked.

vedderprice.com