

DC Employers - On Your Marks, Get Set, Go!: Universal Paid Leave Tax Starts Soon

Friday, April 19, 2019

District employers, get on your marks! We told you way back in 2017 that Universal Paid Leave (UPL) would be coming to the District, and here it is. Under the DC Universal Paid Leave Act (the Act) and its implementing regulations, beginning on July 1, you will be liable for a 0.62% tax on your employees' gross wages. That means you should contact your payroll administrator now, to make sure you're ready to comply. In this post, we outline the key details about the new payroll tax, including how to pay it, and refresh your memory on the other significant provisions of the Act.

The UPL Payroll Tax: Your Questions Answered

How Does the Tax Work?

If you directly or indirectly employ or exercise control over the terms and conditions of employees working in the District and you are required to pay unemployment insurance on behalf of your employees, then you are a "covered employer" under the Act, regardless of whether you have a physical location in the District, and regardless of the number of employees you employ in the District.

The Act creates a paid leave system funded by employers for those employed in the District. You are not permitted to collect any portion of this tax from your employees through payroll deduction or otherwise, and the payroll tax is in addition to any other payroll taxes or benefits you provide to your employees.

As a covered employer, you will be required on a quarterly basis to file a report and contribute to the UPL Implementation Fund an amount equal to 0.62 percent of the gross wages you paid your District employees during the quarter. The tax will be computed on wages paid beginning July 1, 2019. Then, beginning on July 1, 2020, eligible individuals taking a qualifying leave may file a claim with the DC Department of Employment Services (DOES) for paid leave benefits, with those benefits to be paid out of the fund comprised of the UPL taxes collected from all employers, and managed by the DC government .

Because the Act's definition of wages borrows the definition of wages from the DC Unemployment Compensation Act, "wages" is 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 (which is also conducted on a quarterly basis.)

You must report and pay the contributions for a quarter no later than the last day of the month that follows the close of each calendar quarter. That means your first report and payment will be due no later than October 31.

If you employ five (5) or more covered employees, you must register to report and pay through the [online portal](#) with DOES. If you have fewer than five covered employees, you may use the portal or, if you do not have access to a computer, you may request from DOES to register on a paper form. DOES will maintain a separate account for each covered employer and credit your account with all contributions you pay after July 1, 2019.



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Because this account will be maintained by DOES for accounting purposes only, it will not impact the rights of covered employees to UPL benefits. You will be able to update your account with your current address, contact information, and business status, and you will be able to use the account to submit your quarterly wage reports and tax payments electronically.

What Happens If We Don't Comply?

If you miss the quarterly deadline or otherwise fail to pay a contribution when due, interest at the rate of 1.5 percent per month will accrue and be assessed against you until you pay the past-due contribution. In addition, you face a penalty of 10 percent of the amount due if you fail to make the payment or file the report. The tax regulations promulgated under the Act authorize DOES to proceed with collection activities against you if you fail to comply, including levying your bank account(s) and seizing and selling your property.

What are Our Next Steps for Right Now?

1. Contact your payroll administrator to ensure they're prepared for compliance. Compliance is mandatory and the penalties can be stiff for non-compliance, so stay on it!
2. Now is a great time to review your leave programs, policies, and practices to determine whether they're still right-sized for you and whether you're accounting for the interaction of different leaves in line with your objectives. Consider whether you may want to amend those policies to address the availability, beginning next year, of paid leave under the UPL.
3. Keep reading below to refresh your memory on the other requirements the Act places on you and your employees.

Universal Paid Leave Act Refresher

Because it has been a while since we last explained how the Act works, here are some key points about UPL to refresh your memory.

Which of Our Employees are Eligible for UPL?

A "covered employee" is an employed individual who spends more than half of her work time working for a covered employer in the District. Thus, even if you don't maintain an office in the District but employ residents of the District who perform services for you in the District at least half of the time, you're on the hook to help fund UPL.

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.

How Will UPL Work for Our Employees?

Your employees will be able to take UPL for any of these three reasons:

1. **Parental paid leave.** An eligible employee is 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.
2. **Family paid leave.** An eligible employee is 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.
3. **Medical paid leave.** An eligible employee is entitled to two weeks of paid medical leave following his or her diagnosis or occurrence of a serious health condition.

The Act broadly defines "family member" to include:

- 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 for whom an eligible individual stands in loco parentis.
- A biological, foster or adoptive parent; a parent-in-law; a stepparent; a legal guardian; or another 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.
- A sibling of an eligible individual.

Similar to the federal and the District's Family and Medical Leave Act (FMLA), to qualify for family or medical paid leave, an eligible employee must show that a "serious health condition" exists. A "serious health condition" is 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.

Employees may begin to access paid leave beginning July 1, 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 District's minimum wage (which will rise to \$15.00 per hour effective July 1, 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 minimum wage will be entitled to 90 percent of 150 percent of the District's minimum wage, plus 50 percent of the amount by which the eligible individual's average weekly wage rate exceeds 150 percent of the 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.

An eligible employee may submit a claim for payment for any period during which 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-week period.

An eligible employee who wishes to access this leave must provide you with written notice of the need to use paid leave. The written notice must include: (1) a reason for the absence (as long as you don't require details that would violate the employee's right to privacy under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)), and (2) the expected duration of leave. If the leave is foreseeable, the employee must give written notice at least 10 days, or as early as possible under the circumstances, before the start of leave. If the leave is not foreseeable, the employee must provide oral or written notification prior to the start of the work shift for which she asserts the need for leave. In case of an emergency, the eligible employee (including through someone authorized by her to notify you) must notify you either orally or in writing within 48 hours of the emergency.

DOES will notify you within three business days that your employee has filed a claim for UPL. Within 10 business days after the claim is filed, DOES will make an initial determination of the claimant's eligibility to receive benefits, the weekly amount payable, the week when payments will commence and the maximum duration of benefits.

DOES will notify the claimant and also advise her of the right to appeal to the Office of Administrative Hearings if she does not agree with DOES' determination. Payment of benefits will begin within 10 business days of DOES' determination of the claimant's eligibility and subsequent payments will be made on a bi-weekly basis.

Do We Have to Give Notice to Employees?

You must post a notice of UPL rights at each worksite in a conspicuous place or in a place where you customarily post notices. You must also send the notice to remote covered employees in the District. Further, you must provide the notice to employees at the following times:

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

Because you carry the burden of demonstrating compliance with the notice requirements, you should retain email receipts and signed acknowledgments by employees proving that you delivered the required notices. A penalty of up to \$100 per employee, per day may be assessed against you for failure to comply with the notice requirements.

What Records Must We Keep?

You must generate and keep certain records related to UPL 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.

- 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-term and long-term disability policies, sick leave, vacation leave, and other employer paid and unpaid leave policies and practices.
- Records of disputes between you and any employee regarding UPL

How Does UPL Interact With Leaves?

If an eligible employee's UPL also qualifies as protected leave under the federal Family and Medical Leave Act or the DC FMLA, the employee's UPL period will run concurrently with (not in addition to) the other leave period. The Act does not provide any job protections other than those already provided by DC FMLA.

It remains your prerogative to provide employees with leave benefits beyond those provided by the Act. If you do so, know that you must still comply with the Act, including payment of the tax. You may be wise to take this opportunity to review and update your leave policies to prevent the unintended consequence of "double dipping" by employees who may qualify for both UPL and paid leave under your policy.

If an eligible employee is receiving unemployment insurance benefits or long-term disability benefit payments, he or she is not eligible to receive any UPL benefit payments.

Can Our Employees Sue Us Over This?

Within one year after the occurrence or discovery of a violation of the Act, an employee can sue you to enforce the Act's provisions. In addition, the DC Attorney General or Mayor may bring an enforcement action against you.

If a court determines that you violated the Act, the remedies available under the DC Family and Medical Leave Act (DC FMLA) will apply, which include lost wages, benefits or other compensation, plus interest, as well as liquidated damages and reasonable attorney fees and costs.

Also, keep in mind when fashioning an employment, separation, or settlement agreement with an employee that the Act prohibits any waiver of rights under the Act.

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