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Must Know Changes to DC's Paid Family Leave Law and D.C. Family and Medical Leave Act

By Tina M. Maiolo and Thomas L. McCally

With the barrage of employment law changes in the District of Columbia related to the recent Covid-19 pandemic, and the multitude of other challenges employers have faced during this unique time, it is possible that you have missed some more subtle modifications to DC laws that equally effect your business. For example, there have been amendments to the D.C. Universal Paid Leave Act and the D.C. FMLA that may not have made it on your radar. We are highlighting those changes to ensure they have been brought to your attention.

CHANGES TO DC'S PAID FAMILY LEAVE LAW

As of October 1, 2021, D.C.'s Paid Family Leave law (also called D.C.'s Universal Paid Leave Act or UPLA) has been expanded to provide eligible employees with three times the amount of leave (from "up to 2 weeks" to "up to 6 weeks") for their own serious health condition and add a new category of leave ("up to 2 weeks") for "pregnancy related" care.

Pregnancy related care can be used in block or intermittent (1-day) increments when absence from work is required to:

- Attend prenatal check-up appointments with your doctor;
- Receive any kind of medical treatment related to your pregnancy;
- Visit a doctor for a diagnosis of a condition related to your pregnancy;
- Stay on bedrest because of conditions related to your pregnancy, if ordered by your doctor.

It should be noted that "qualifying pre-natal leave" is defined by statute as "paid leave that an eligible individual who is pregnant may take for pre-natal medical care following the occurrence of a qualifying pre-natal leave event and prior to the occurrence of a qualifying parental leave event." This suggests that only the pregnant employee, and not an employee who is the partner of a pregnant individual, is eligible for prenatal leave. Eligibility requirements and the definition of an employee's own "serious health condition" remain unchanged.

This expansion of leave will expire on October 1, 2022, at which time, depending on the availability of funds, the amount of leave can either remain the same or increase. Each year thereafter, the amount of leave can increase according to the following order, remain the same or decrease. If the amount of leave decreases, it cannot decrease below its current (10/1/2021 – 9/30/2022) amounts. Falling short of providing a definite schedule for increases, Section 32-541.04(c)(1) of the Code of the District of Columbia provides that, if leave amounts are increased, they must expand in the following order, some of which may occur concurrently:

(C) Extend the maximum duration of qualifying parental leave by one or more workweeks, until the maximum duration of qualifying parental leave equals 10 workweeks;

(D) Extend the maximum duration of qualifying medical leave by one or more workweeks, until the maximum duration of qualifying medical leave equals 8 workweeks;

(E) Extend the maximum duration of qualifying family leave by one or more workweeks, until the maximum duration of qualifying family leave equals 8 workweeks;

(F) Extend the maximum duration of qualifying parental leave by one or more workweeks, until the maximum duration of qualifying parental leave equals 12 workweeks;

(G) Extend the maximum duration of qualifying medical leave by one or more workweeks, until the maximum duration of qualifying medical leave equals 10 workweeks;

(H) Extend the maximum duration of qualifying family leave by one or more workweeks, until the maximum duration of qualifying family leave equals 10 workweeks;

(I) Extend the maximum duration of qualifying medical leave by one or more workweeks, until the maximum duration of qualifying medical leave equals 12 workweeks;

(J) Extend the maximum duration of qualifying family leave by one or more workweeks, until the maximum duration of qualifying family leave equals 12 workweeks;

As currently written, provided there is sufficient funding, the D.C. Council's ultimate intention is to max out available paid leave for qualifying parental, medical, and family leave at 12 workweeks in the upcoming years. Absent statutory amendment, pregnancy related paid leave will not increase beyond two weeks.

Interestingly, because this benefit is given on an annual basis, it appears that, if increased to its maximum, the UPLA will provide more paid leave for qualifying events than the D.C. Family and Medical Leave Act will provide for unpaid, protected leave for the same events. As a reminder, the D.C. FMLA provides up to 16 weeks of unpaid, protected leave for eligible employees, for the birth or placement of a child, an employee's own serious health condition or the serious health condition of a close family member, over a two-year period. Notwithstanding, to qualify for D.C. Universal Paid Leave Act leave, an employee must be unable to work ("perform his or her regular and customary work because of the occurrence of a qualifying event"), so they should not be paid by the UPLA after they have returned to work.

Additionally, unlike the D.C. FMLA, it is much easier for an employee to qualify for UPLA benefits. In addition to experiencing a "qualifying event" and being unable to work because of that event, covered employees need only:

- be employed by a covered employer when the employee applies for benefits;
- have 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.

In other words, an employee can receive payment under the UPLA even if they are not protected under the FMLA. As such, if an employee is terminated because they are not qualified to perform the essential functions of their job and do not qualify for D.C. FMLA protections, he/she may still be eligible for payment under the UPLA beyond termination. At that time, the employee may also qualify for unemployment benefits, but those benefits will be offset by income received through the UPLA.

The amended law also now provides for retroactive benefits if the employee files their claim within 30 days of the qualifying event. This 30-day deadline may be waived due to exigent circumstances, which is defined as physical or mental incapacity, inability to reasonably access the means by which a claim could be filed, or an actual lack of knowledge by the employee because of his/her employer's failure to provide proper notice to the employee of his/her rights.

Additionally, short-term or temporary disability insurers are prohibited from offsetting or reducing benefits or income to claimants based on the availability of UPLA payments. In other words, employees can collect short-term disability benefits as well as UPLA medical leave benefits, even though it may result in the employee receiving more than 100 percent of pay. Self-insured employers, however, are allowed to reduce or offset the benefits they provide to employees to take into consideration UPLA payments.

Lastly, the one-week waiting period for benefits is waived until one year after the end of the COVID-19 public health emergency expires.

Employers must review and update your personnel policies to reflect the new expansion of benefits each year. Carr Maloney recommends marking your calendars for September each year and making any necessary updates by October 1. Even if you do not update your entire manual at that time, you should circulate these, and any other policy changes effective October 1, while awaiting other, nonurgent handbook edits. In addition, it is imperative that you update your posters to comply with all notice requirements in a timely manner.

CHANGES TO DC'S FAMILY AND MEDICAL LEAVE ACT

In addition to the changes to the Paid Family Leave law, the new law also amends the D.C. FMLA. Prior to October 1, 2021, employees had to be employed by the same employer the previous twelve (12) consecutive months. The amended law, however, changes this requirement to be consistent with federal FMLA requirements. Now, an employee is eligible for D.C. FMLA leave if the individual has been employed by the same employer for at least 12 consecutive or non-consecutive months in the seven years immediately preceding the date on which the leave will begin. Inconsistent with federal requirements, however, which require the eligible employee work at least 1250 hours in the last twelve (12) consecutive months, the D.C. FMLA's requirement that the employee worked for 1,000 hours now applies during the new non-consecutive 12-month period; the law no longer requires that the employee work 1,000 hours in the 12 months immediately preceding the need for leave.

Again, employers should update their employee handbooks immediately to reflect these changes to the DC FMLA.

For questions about these changes, or about any other D.C. employment law, contact the authors of this article or another member of Carr Maloney's labor and employment team.

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