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District of Columbia Passes Expansive Paid Leave Law

BY S. LIBBY HENNINGER AND EUNJU PARK

After more than a year of debate, on December 20, 2016, the District of Columbia Council voted to create one of the most generous paid leave laws in the country. DC now joins California, New Jersey, New York and Rhode Island in advancing laws to provide paid medical, parental and family care leave to employees working in those jurisdictions. The Universal Paid Leave Act of 2015 (Bill B21-0415) (“the Act”), in its final form, provides covered employees with 8 weeks of paid parental leave, 6 weeks of paid family leave, and 2 weeks of paid personal medical leave. The paid leave will be funded by a 0.62% increase in DC employer payroll taxes.

The Act now goes to DC Mayor Muriel Bowser for approval. The Mayor has publically stated that she does not support the Act in its current form and will either issue a veto or allow it to become law without her signature. The Mayor’s opposition is rooted in the financial burden that will be placed on the DC government to create a new agency to administer paid leave and the anomaly that nearly two-thirds of eligible DC employees reside outside the jurisdiction in either Maryland or Virginia. Should the Mayor veto the Act, the DC Council will be able to override it with a two-thirds vote. If the veto is overridden, or the Mayor allows it to take effect without her signature, the Act then will then be subject to a 30-day congressional review period before becoming law.

Eligibility

Under the Act, a “covered employee” is any employee who spends over 50% of his or her work time working in DC for a covered employer. A “covered employer” is defined as: (1) any individual, partnership, general contractor, subcontractor, association, corporation, business trust, or any group of persons who directly or indirectly or through an agent or any other person, including through the services of a temporary services or

staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee and must pay unemployment insurance on behalf of its employees in DC, or (2) a self-employed individual who has opted into the paid leave program.

An individual is an “eligible individual” if the individual (1) has been a covered employee during some or all the 52 calendar weeks immediately preceding the qualifying event for which paid leave is being taken, or (2) is a self-employed individual who earned self-employment income for work performed primarily in DC during some or all of the 52 calendar weeks immediately preceding the qualifying event for which paid leave is being taken and has opted into the paid leave program. Under these requirements, residents of Maryland and Virginia who work in DC, would be covered under the Act if they otherwise meet the eligibility requirements and work for a covered employer.

Leave Entitlements

The Act provides for three types of leave: parental leave, family leave and medical leave.

The Act provides up to 8 weeks of paid parental leave, which may be taken within one year following (1) birth of a child, (2) placement of a child for adoption or foster care, or (3) placement of a child where the eligible individual legally assumes and discharges parental responsibility. Up to 6 weeks of paid family leave is given under the Act to provide “care or companionship” to a family member who has a diagnosis or occurrence of a serious health condition. Up to 2 weeks of paid medical leave is provided for an eligible individual following his or her diagnosis or occurrence of a serious health condition.

Under the Act, a “family member” includes:

- 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 whom an eligible individual stands in loco parentis;
- A biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in loco parentis to an eligible individual when the eligible individual was a child;
- A person whom an eligible individual is related by domestic partnership or marriage;
- A grandparent of an eligible individual; or
- A sibling of an eligible individual.

In order to qualify for family or medical leave, the employee must demonstrate the existence of a “serious health condition,” which 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.

Under the program provided by the Act, covered employees may apply for paid leave following the occurrence of a qualifying event. Payment is subject to a one-week waiting period during which no benefits are payable. An eligible employee may also receive payment for intermittent leave, provided that the total amount of intermittent leave does not exceed the caps provided above.

Employees may begin to access paid leave beginning in 2020. Eligible employees with a weekly wage at a rate that, on an annualized basis, is equal to or less than 150% of the DC minimum wage (which will be \$14.00 per hour in 2020) will be entitled to payment of leave benefits at a rate that equals 90% of that

eligible individual's average weekly wage rate. Eligible employees earning in excess of 150% of the DC minimum wage will be entitled to (1) 90% of 150% of the DC minimum wage, plus (2) 50% of the amount by which the eligible individual's average weekly wage rate exceeds 150% of the DC 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.

Establishment of the Paid Leave Program

The Mayor is tasked with establishing an agency to administer the paid leave program and is also responsible for issuing implementing regulations. It is estimated that the District of Columbia will require 113 full-time employees to administer this program.

The paid leave program will be funded through a 0.62% employer payroll tax of the annual wages of each covered employee. The collection of this tax is scheduled to begin on March 1, 2019. The monies collected will be put into a universal fund that will be administered by the District. It is estimated that over \$246 million will be collected each year and over 500,000 employees will be covered.

Requesting Paid Leave

The Mayor will establish reasonable procedures and forms for filing claims for benefits under the Act and specify what supporting documentation is necessary to support a claim of benefits, including requiring proof of a serious health condition and the length of leave expected.

An eligible individual may submit a claim for payment following the occurrence of a qualifying event for any period during which he or she does not perform work. However, employees will not be entitled to receive payment for more than one qualifying event in any 52-workweek period. The Mayor is tasked with creating a user-friendly, online portal for the submission and management of forms and documents necessary to administer the paid leave program. Information in the files and records pertaining to an individual will be confidential and not open to public inspection, other than to public employees during the performance of their official duties.

To the extent practicable, an eligible individual must provide written notice to his or her employer of the need to use paid leave under the Act. This written notice must include a reason for the absence, within the parameters of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the expected duration of the paid leave. If the paid leave is foreseeable, the written notice must be provided at least 10 days, or as early as possible, before the paid leave. If the paid leave is unforeseeable, an oral or written notification must be provided prior to the start of the work shift for which paid leave is being used. However, in case of an emergency, the eligible individual, or another individual on behalf of the eligible individual, must notify the eligible individual's employer, either orally or in writing, within 48 hours of the emergency.

The Mayor will notify the employer within 5 business days of a claim being filed. Within 10 business days after an individual has filed a claim for benefits under the Act, the Mayor will make an initial determination of (1) an individual's eligibility to receive benefits, (2) the weekly amount payable, (3) the week when payments will commence, and (4) the maximum duration of benefits. The Mayor will so notify the individual and also

advice of the right to appeal to the Office of Administrative Hearings if an eligible individual does not agree with one or more determinations. Payment will begin within 10 business days of determining eligibility and subsequent payments will be made every other week thereafter.

Notice Requirements

The Mayor will provide to covered employers a notice explaining:

- The employees' right to paid leave benefits under the Act and the terms under which such leave may be used;
- That retaliation is prohibited with regard to an employee requesting, applying for, or using paid leave benefits is prohibited;
- That an employee who works for a covered employer with under 20 employees will not be entitled to job protection if he or she takes paid leave under the Act; and
- That the covered employee has a right to file a complaint and the procedures established by the Mayor for filing a complaint.

Each covered employer must, at the time of hiring and annually thereafter, and at the time the covered employer is aware that the leave is needed, provide this notice to each covered employee. The covered employer must also post and maintain the notice in a conspicuous place in English and in all languages in which the Mayor has published the notice.

Violations of the notice requirement, after the Mayor provides the notice, will be penalized by a civil penalty up to \$100 for each covered employee to whom individual notice was not delivered and \$100 for each day that the covered employer fails to post the notice in a conspicuous place.

Interactions with Other Laws and Employer Policies

If paid leave taken under the Act also qualifies as protected leave under the Family and Medical Leave Act ("FMLA") or the DC Family and Medical Leave Act ("DC FMLA"), the paid leave taken under the Act will run concurrently with, and not in addition to, such protected leave. No additional job protections beyond that provided under the DC FMLA are provided by the Act.

A covered employer may provide eligible individuals with leave benefits in addition to those provided by the Act. However, the provision of such benefits, including a paid leave program, does not exempt the covered employer or the eligible individuals from the provisions of the Act, including payment of the tax.

If eligible individuals are receiving unemployment insurance or long-term disability payments, they are not eligible to receive benefits provided for in the Act. Additionally, if an individual concurrently earns self-employment income and is a covered employee employed by a covered employer, the individual will not be entitled to receive double payments.

Any agreement by an individual to waive his or her rights under this Act is void as against public policy.

Disqualification for Benefits

An individual who makes a false statement or misrepresentation regarding a material fact, or fails to report a material fact, in order to obtain a benefit under the Act will be disqualified from receiving paid leave benefits for three years. If family or parental paid leave benefits provided for in the Act are paid erroneously or because of willful misrepresentation, or if a claim for family or parental paid leave benefits is rejected after benefits are paid, the Mayor will seek repayment of benefits from the recipient. If the Mayor obtains repayment of benefits from an individual who has made a willful misrepresentation or otherwise perpetrated fraud to obtain family or parental paid leave benefits, the Mayor will distribute a proportional share of the recovered amount to each covered employer who paid into the fund on behalf of that individual while he or she improperly obtained benefits.

Recommendations for Employers

Littler will continue to monitor the Act as it goes before the Mayor for approval, as well as any subsequent DC Council and congressional review.

While the Act represents a major change in the law concerning paid leave for District of Columbia employers, its substantive provisions do not take effect until March 1, 2019, providing employers time to prepare. The Mayor is tasked with issuing interpretive regulations, which should provide businesses with some much-needed clarification prior to the requirements taking effect.

Employers should take advantage of this lead time to identify covered employees, prepare their payroll systems to include the additional payroll tax should it take effect, and to consult experienced DC employment counsel to review current paid time off, leaves of absence and family and medical leave policies to account for these new requirements.