

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF FINAL RULEMAKING

The Director of the Department of Employment Services, pursuant to the authority set forth in sections 11 and 14 of the Accrued Sick and Safe Leave Act of 2008 (Act), effective May 13, 2008 (D.C. Code § 32-131.10 and 131.13 (2008 Supp.) and Mayor's Order 2008-153, dated November 6, 2008, hereby gives notice of the adoption of a new Chapter 32 entitled "Accrued Sick and Safe Leave" to Title 7 ("Employment Benefits") of the District of Columbia Municipal Regulations (DCMR). These rules implement the provisions of the Accrued Sick and Safe Leave Act, excepting §15 of the Act.

Notice of Proposed Rulemaking was published in the *D.C. Register* on February 5, 2010 (57 DCR 1246). Comments were received and considered. No substantive changes were made to the text of the proposed rules. A technical change having no substantive impact was made. Additionally, the Accrued Sick and Safe Leave Act Regulations Approval Resolution of 2010 (PB 18-0716) was submitted to the Council on February 2, 2010. The Council has neither approved nor disapproved during the required 30 day period of Council review and the rules are therefore deemed approved pursuant to section 14 of the Act. These rules shall become effective on the date of publication of this notice in the D.C. Register.

Title 7 (Employment Benefits) of the DCMR is amended by adding a new Chapter 32 to read as follows:

CHAPTER 32 ACCRUED SAFE AND SICK LEAVE

3200 PURPOSE AND SCOPE

- 3200.1 The purpose of this Chapter is to establish standards and procedures for the implementation of the Act.
- 3200.2 Unless otherwise required by law, all matters concerning the implementation and enforcement of the Act shall be determined in accordance with these regulations.

3201 PROVISION OF PAID LEAVE; AMOUNT OF PAID LEAVE

- 3201.1 An employee shall begin to accrue paid leave pursuant to the Act and this Chapter on the date the individual qualifies as an employee provided, that accrual shall not commence prior to November 13, 2008.
- 3201.2 An employer employing one hundred (100) or more employees in the District of Columbia shall provide each employee not less than one (1) hour of paid

leave for each thirty-seven (37) hours worked, not to exceed seven (7) days of paid leave per calendar year.

3201.3 An employer employing from twenty-five (25) to ninety-nine (99) employees in the District of Columbia shall provide each employee with not less than one (1) hour paid leave for every forty-three (43) hours worked, not to exceed five (5) days of paid leave per calendar year.

3201.4 An employer employing twenty-four (24) or fewer employees in the District of Columbia shall provide not less than one (1) hour of paid leave for every eighty-seven (87) hours worked, not to exceed three (3) days of paid leave per calendar year.

3201.5 For purposes of subsections 3201.2- 3201.4, the number of employees employed by an employer shall be average number of monthly full-time equivalent employees it employed in a preceding calendar year. This number shall be computed by adding the total number of full-time equivalent employees employed in the District of Columbia at the beginning of each month of the preceding calendar year and dividing by 12.

3201.6 The employment location of an employee shall be determined in accordance with the definition of the term “employee”.

3202 EXCEPTIONS TO CALCULATION OR PROVISION OF PAID LEAVE

3202.1 An employee who is exempt from overtime payment by reason of section 213(a)(1) of the Fair Labor Standards Act of 1938, approved June 25, 1938 (52 Stat. 1060; 29 U.S.C. § 201 *et seq.*) shall not accrue leave pursuant to this chapter for hours worked beyond a forty (40) hour work week.

3202.2 An individual who works for an employer both as an employee and in a non-covered employment position shall accrue paid leave for the hours worked as an employee.

3202.3 If the employee does not suffer a loss of income when absent from work for the number of days of paid leave provided in § 3201, the employer shall not be required to provide paid leave to the employee as would have been otherwise required by the Act.

3203 USES OF PAID LEAVE

3203.1 An employee may use paid leave for the following reasons:

- (a) An absence resulting from a physical or mental illness, injury, or medical condition of the employee;

- (b) An absence resulting from obtaining professional medical diagnosis or care or preventive medical care for the employee; or
- (c) An absence for the purpose of caring for a family member who has any of the conditions or needs for diagnosis or care described in paragraphs (a) and (b) of this subsection.

3203.2 An employee may also use paid leave for an absence if the employee or the employee's family member is a victim of stalking, domestic violence, or sexual abuse and the absence is directly related to medical, social, or legal services pertaining to the stalking, domestic violence, or sexual abuse for the purposes of:

- (a) Seeking medical attention for the employee or the employee's family member to treat or recover from physical or psychological injury or disability caused by the stalking, domestic violence, or sexual abuse;
- (b) Obtaining services for the employee or the employee's family member from a victim services organization;
- (c) Obtaining psychological or other counseling services for the employee or the employee's family member;
- (d) The temporary or permanent relocation of the employee or the employee's family member;
- (e) Taking legal action, including preparing for or participating in any criminal or civil proceeding related to or resulting from the stalking, domestic violence, or sexual abuse; or
- (f) Taking other actions that could be reasonably determined to enhance the physical, psychological, or economic health or safety of the employee or the employee's family member or the safety of those who work or associate with the employee.

3204 ACCESSING PAID LEAVE

3204.1 Only an employee may access paid leave.

3204.2 Unused paid leave accrued by an employee during a 12 month period shall carry over annually. An employee shall not use in one year more than the maximum hours accrued pursuant to subsections §3201.2, §3201.3 and §3201.4 of this Chapter unless the employer permits otherwise.

3204.3 Paid leave accrued pursuant to the Act which is unused at the termination or

Resignation of the employee shall not be reimbursed to the employee

3205 LIMITATIONS ON USE OF PAID LEAVE

- 3205.1 An employee shall not use in any calendar year more paid leave accrued pursuant to the Act than the maximum number of hours that the employee may accrue annually pursuant to §3201 unless permitted to do so by the employer.
- 3205.2 If mutually agreed to by both the employer and employee, an employeeⁱ who chooses to work additional hours or shifts in the employer's same or next pay period in lieu of hours or shifts missed shall not use leave accrued pursuant to the Act in those hours or shifts; provided, however, that the employer does not require the employee to work such additional hours or shifts.

3206 REQUIRED NOTICE TO EMPLOYERS

- 3206.1 An employee shall provide at least ten (10) days prior written notice to his or her employer of the employee's planned use of paid leave, if the employee is aware of the need to use such paid leave at least ten (10) days before the date on which the paid leave is to be used.
- 3206.2 If an employee becomes aware of the need to use paid leave less than ten (10) days before the date on which the paid leave is to be used, the employee shall provide written notice to the employer of the need to use the paid leave on the day that the employee becomes aware of the need to use the paid leave or, otherwise as early as possible. If that day is not a business day for the employer, notice shall be given on the next business day.
- 3206.3 If the need to use paid leave is not foreseeable, the employee shall make an oral request for paid leave prior to the start of the work shift for which the paid leave is requested.
- 3206.4 If an emergency prevents the employee from making prior notification to the employer of the need to use paid leave, the employer shall be notified prior to the start of the next work shift or within 24 hour of the onset of the emergency, whichever occurs sooner.
- 3206.5 An employee shall make a reasonable effort to schedule paid leave in a manner that does not unduly disrupt the operations of the employer. If paid leave is requested in a non-emergency situation, the employee shall consult with the employer regarding the date and time of the paid leave to be taken.

3207 FORM OF NOTICE TO EMPLOYERS

- 3207.1 The employer may prescribe a written notice form for the request of paid leave. Such form shall require only the employee's name, employee identification number (if any), and minimal information needed (e.g., type of leave, or basic reason for leave) to show that the request comes within the Act's coverage, and the date(s) and time of the paid leave to be taken.
- 3207.2 The leave request form shall not be used as a substitute for medical certification, unless such use is designated by the employer.
- 3207.3 If the employer prescribes a form, but the form is not reasonably available to the employee, the employee may provide written notice to the employer by setting forth in writing the information required by §3207.1.
- 3207.4 If the employer has not prescribed a form, the employee may provide written notice to the employer by setting forth in writing the information required by §3207.1.

3208 CERTIFICATION OF LEAVE REQUEST

- 3208.1 An employer may require that a request for the granting of paid leave for three (3) or more consecutive days be supported by a reasonable certification of the reason given by the employee for requesting the paid leave.
- 3208.2 A reasonable certification may include:
- (a) A signed document from a health care provider affirming the illness of the employee or the employee's family member;
 - (b) A police report indicating that the employee or the employee's family member was the victim of stalking, domestic violence, or sexual abuse;
 - (c) A court order indicating that the employee or employee's family member was the victim of stalking, domestic violence, or sexual abuse;
 - (d) A signed written statement from a victim and witness advocate affirming that the employee or employee's family member is involved in legal action or proceedings related to stalking, domestic violence, or sexual abuse. The signed statement shall include only the name of the employee or employee's family member who is a victim and the date on which services were sought; or

- (e) A signed written statement from a victim and witness advocate, or domestic violence counselor affirming the employee or employee's family member sought services to enhance the physical, psychological, economic health or safety of the employee or employee's family member.

3208.3 If the employer requires a certification, the certification shall be provided upon the employee's return to work or within one business day thereafter.

3209 RELEASE OF INFORMATION

3209.1 Nothing in the Act or this chapter shall require a health care professional to disclose information in violation of section 1177 of the Social Security Act, effective August 21, 1996 (110 Stat. 2029; 42 U.S.C. § 1320d-6) or the regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996, effective August 21, 1996 (110 Stat. 2033; 42 U.S.C §1320d-2 note).

3209.2 Information provided to an employer pursuant to §§ 3206, 3207, or 3208 shall not be disclosed by the employer, except when such disclosure is:

- (a) Requested or consented to by the employee;
- (b) Ordered by a court or administrative agency; or
- (c) Otherwise required by federal or local law.

3210 CARRYOVER OF PAID LEAVE

3210.1 Unused paid leave accrued in one calendar year shall be carried over to the next calendar year.

3210.2 An employee shall not use more paid leave in one year than the employee accrues pursuant to § 3102.2-4 of this Chapter, unless permitted to by the employer.

3211 PAYOUT OF PAID LEAVE

3211.1 Accumulated paid leave shall not be reimbursed upon the discharge or resignation of an employee.

3212 EFFECT ON CURRENT COMPENSATED LEAVE POLICIES

3212.1 An employer that has a paid leave policy, (for example, paid time off or universal leave) that gives the employee paid leave options to utilize at the employer's discretion, which allow the accrual and usage of leave that are at

least equivalent to the paid leave prescribed in the Act, shall not be required to modify that policy

- 3212.2 An existing compensated leave policy shall be presumed to be equivalent to requirements of the Act if the policy allows the employee to:
- (a) Access and accrue compensated leave at the same rate or greater than the hours of leave provided in § 3201 of this Chapter; or
 - (b) Use the compensated leave for the same purposes as those set forth in § 3203.

3213 POSTING REQUIREMENTS AND PENALTIES

- 3213.1 The employer shall post and maintain in a conspicuous place a notice, prescribed and provided by the Mayor, which sets forth excerpts and summaries of the Act and contains information pertaining to the filing of complaints asserting violations of the Act.
- 3213.2 The employer shall post the notice in English and in all languages spoken by its eligible employees with limited or no-English proficiency as defined in section 2(5) of the of the Language Access Act, effective June 19, 2004 (D.C. Law 15-167; D.C. Official Code § 2-1931(5)).
- 3213.3 An employer who willfully fails to post a notice pursuant to this section shall be assessed a civil penalty of one hundred dollars (\$100) per day for each day that the employer fails to post the notice; provided, that the total penalty shall not exceed five hundred dollars (\$500) per violation.
- 3213.4 An employer shall not be liable for failing to post a notice until thirty (30) days after the Mayor provides the notice required by section 10 of the Act to the employer.

3214 EFFECT ON EXISTING EMPLOYMENT BENEFITS

- 3214.1 The provisions of the Act do not alter the obligation of an employer to comply with any collective bargaining agreement or any employment benefit or plan that provides paid leave rights greater than those established by the Act.
- 3214.2 Subject to the provisions of section 13 of the Act and § 3216 of this Chapter, a written bona fide collective bargaining agreement shall not waive the paid leave requirements of the Act and this Chapter, unless such collective bargaining agreement provides at least three (3) paid days of leave.

3215 PROHIBITED ACTS

- 3215.1 No employer or person acting on behalf of an employer shall interfere with, restrain, or otherwise deny the exercise or attempt to exercise of any right provided by the Act.
- 3215.2 An employer shall not discharge or discriminate in any manner against an employee because the employee:
- (a) Opposes any practice by an employer made unlawful by the Act;
 - (b) Files or attempts to file a claim or charge for violation of the Act;
 - (c) Institutes or attempts to institute an proceeding under the Act;
 - (d) Facilitates the institution of a proceeding under the Act;
 - (e) Provides information or testimony in connection with an inquiry or proceeding related to the Act; or
 - (f) Uses paid leave in accordance with the Act and this Chapter.
- 3215.3 The Act shall not be construed to prohibit an employer from creating and enforcing a policy that prohibits the improper use of paid leave or that requires the more frequent certifications from an employee if there is evidence documenting a pattern of abuse of paid leave. A pattern of abuse may be evidenced by the following:
- (a) Consistent taking of paid leave without the notice required by the Act;
 - (b) Consistent taking of leave on days for which vacation or annual leave have been denied;
 - (c) A pattern of taking paid leave on days where the employee is scheduled to work a shift or perform duties perceived as undesirable, including high customer volume days; or
 - (d) A pattern of taking paid leave on Mondays, Fridays, or the day immediately preceding or following holidays.

3216 COMPLAINT RESOLUTION

- 3216.1 A person who believes that any of the rights created by the Act has been improperly denied him or her may file a complaint with the Department of Employment Services in the form and manner prescribed by the Director of the Department. Complaints shall be filed within sixty (60) days after the event on which the complaint is based; provided that no sixty (60) day period

shall commence until the employer has posted the notice required by section 10 of the Act and § 3213 of this Chapter

- 3216.2 The Director shall review all complaints and shall investigate those complaints which the Director determines require investigation.
- 3216.3 Complaints shall be investigated and resolved in an expeditious manner consistent with the nature of the complaint. The Director shall make all reasonable efforts to resolve all complaints within forty-five (45) business days of their filing and shall notify all parties if that time period cannot be met and shall make a good faith estimate of the expected resolution date.
- 3216.4 In the course of investigating, resolving and deciding complaints, the Director shall have the authority to:
- (a) Investigate and ascertain the length of service, hiring dates, paid leave usage requests, certifications provided by employees, and any other issue relating to the rights created by the Act;
 - (b) Require sworn written statements from employers and employees concerning the issues raised by the complaint; and
 - (c) Conduct informal investigations, examinations, or meetings at which employers and employees appear, give sworn statements, and answer questions from the Director or the adverse party.
- 3216.5 Following an investigation, the Director shall issue a decision concerning the complaint. Copies of the decision shall be served on each party at their last known address.
- 3216.6 A party aggrieved by the Director's decision may appeal the decision as provided in the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).
- 3216.7 Complaints shall be investigated and resolved in an expeditious manner consistent with the nature of the complaint.
- 3216.8 The employer shall maintain records of the accrual, granting and denial of leave pursuant to the Act for a period of three years as generally provided in 7 DCMR § 911.

3217 PENALTIES

- 3217.1 Except as provided in § 3213.3, an employer who willfully violates the requirements of the Act shall be assessed a civil penalty in the amount of five

hundred dollars (\$500) for the first violation, seven hundred and fifty dollars (\$750) for the second violation, and one thousand dollars (\$1,000) for the third and any subsequent violations.

3217.2 All penalties paid by employers shall be deposited into the General Revenue Fund of the District of Columbia.

3299 DEFINITIONS

When used in this Chapter, the term:

Act – means the Accrued Safe and Sick Leave Act of 2008, effective May 13, 2008 (D.C. Law 17-152; D.C. Official Code § 32-131.01 *et seq.*).

Day – means the length of the employee’s customary work day or work shift.

Director – means the Director of the District of Columbia Department of Employment Services, or the Director’s designee.

Discharge – means the involuntary severing of the employment relationship by the employer.

Domestic violence – means an intra-family offense as defined in D.C. Official Code § 16-1001(8).

Emergency – means an unexpected or unforeseen event or events which render an employee unable to contact the employer or communicate the need to access leave accrued under the Act to the Employer as required by Sec. 3206.1, Sec. 3206.2 or Sec. 3206.3. An emergency shall include a personal illness, illness of a family member, or an act of domestic violence or sexual abuse as defined in the Act which requires the employee to seek medical treatment or law enforcement assistance for the employee or other persons covered by the Act.

Employee – means an individual who has been employed by the same employer for at least one (1) year without a break in service except for regular holiday, sick, or personal leave granted by the employer and who has worked at least one thousand (1,000) hours of service with such employer during the previous 12-month period. The term “employee” also includes an individual who meets the foregoing criteria and who is employed by the employer in more than one location and spends more than fifty percent (50%) of his or her working time for his or her employer in the District of Columbia or whose employment is based in the District of Columbia and who regularly spends a substantial part of his or her time working for the employer in the District of Columbia and does not spend more than fifty percent (50%) of his or her work-time working for the employer in any particular state. The term “employee” shall not include: (1) an independent contractor, (2) a student, (3) health care workers who choose to participate in a premium

pay program, or (4) restaurant wait staff and bartenders who work for a combination of wages and tips.

Employer – means (including a for-profit or not-for-profit firm, partnership, proprietorship, sole proprietorship, limited liability company, association or corporation), or any receiver or trustee of such entity (including the legal representative of a deceased individual or receiver or trustee of an individual), who employs an employee. The term “employer” includes the District of Columbia government.

Non-covered employment position — means (1) an independent contractor, (2) a student, (3) a health care worker who choose to participate in a premium pay program, or (4) restaurant wait staff and bartenders who work for a combination of wages and tips.

Family member — means:

- (1) A spouse, including the person identified by an employee as his or her domestic partner, as defined in section 2(3) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code § 32-701(3));
- (2) The parents of a spouse;
- (3) Children (including step-children, foster children, and grandchildren);
- (4) The spouses of children (including step-children, foster children, and grandchildren);
- (5) Parents (including step-parents);
- (6) Brothers and sisters (including step-brothers and sisters and half-brothers and sisters);
- (7) The spouses of brothers and sisters (including step-brothers and sisters and half-brothers and sisters);
- (8) A child who lives with the employee and for whom the employee permanently assumes and discharges parental responsibility; and
- (9) A person with whom the employee shares or has shared, for not less than the preceding of twelve (12) months a mutual residence and with whom the employee maintains a committed relationship, as defined in section 2(1) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code §32-701(1)).

Paid leave – means accrued hours of paid leave provided by an employer for use by an employee in hourly increments during an absence from work for any of the reasons specified in section 3(b) of the Act, for which the employee is paid at the same rate as if the employee were working.

Premium pay program – means a plan offered by an employer by which an employee may voluntarily elect to receive additional pay in lieu of benefits.

Restaurant wait staff and bartenders-means waiters, waitresses, counter personnel who serve customers, bus persons, server helpers, service bartenders and barbacks.

Sexual abuse – means an offense described in the Anti-Sexual Abuse Act of 1994, effective May 23, 1995 (D.C. Law 10-257; D.C. Official Code § 22-3001 *et seq.*).

Student – means a person employed by an employer who:

- (1) (A) Is a full-time student as defined by an accredited institution of higher education;
 - (B) Is employed by the institution at which the student is enrolled;
 - (C) Is employed for less than 25 hours per week (the number of hours being determined based on the standard or usual work week of the employee); and,
 - (D) Does not replace an employee covered by the Act; or
- (2) Is employed as part of the Year Round Program for Youth as established by the Department of Employment Services.
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