

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF PROPOSED RULEMAKING

(Paid-Leave Program Benefits)

The Director of the Department of Employment Services (DOES), pursuant to the authority set forth in the Universal Paid Leave Amendment Act of 2016, effective April 7, 2017 (D.C. Law 21-264; D.C. Official Code § 32-541.01 *et seq.*) (the “Act”), and Mayor’s Order 2018-36, dated March 29, 2018, hereby gives notice of the intent to amend Title 7 (Employment Benefits) of the District of Columbia Municipal Regulations (DCMR) by adding a new Chapter 35 (Paid Leave Benefits) in not less than thirty (30) days after publication of this notice in the *D.C. Register*. Pursuant to section 102 of the Act (D.C. Code § 32-541.02), the proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, holidays, and days of Council recess.

The proposed rulemaking would implement the Act by establishing the procedures necessary to administer a paid-leave program for eligible individuals employed in the District of Columbia.

The Director initially published a Notice of Proposed Rulemaking in the *D.C. Register* on April 6, 2018, at 7 DCMR 33, which included regulations to implement the Act as a whole. Based on comments received, and the statutory timelines, DOES decided to bifurcate the regulations into two chapters, separating the employer contributions and paid-leave benefits. Also, based on comments received, these proposed rules include significant changes from the initial proposed rules in order to address eligibility for benefits, calculation of benefit amounts, filing for benefits, erroneous payments, and the repayment of benefits.

Title 7 DCMR, EMPLOYMENT BENEFITS, is amended by adding a new Chapter 35, PAID LEAVE BENEFITS, to read as follows:

CHAPTER 35 PAID LEAVE BENEFITS

3500 ELIGIBILITY FOR PAID LEAVE BENEFITS

3500.1 An individual shall be eligible for paid-leave benefits under this chapter if:

- (a) The individual experiences a qualifying event;
- (b) The individual does not perform his or her regular and customary work because of the occurrence of the qualifying event; and
- (c) The individual satisfies one or both of the following sets of criteria:
 - (1) (A) The individual is employed by a covered employer at the time of application;

- (B) The individual has earned income as a covered employee of a covered employer during at least one (1) of the past five (5) completed quarters immediately preceding the qualifying event for which the paid-leave claim is being submitted; and
 - (C) The employee's wages were reportable to DOES under Chapter 34 (Paid Leave Contributions) by the covered employer(s); or
- (2) (A) The individual is currently a self-employed individual who is currently opted into and enrolled in the paid-leave program;
 - (B) The individual earned and reported to DOES under Chapter 34 (Paid Leave Contributions) self-employment income during at least one (1) of the past five (5) completed quarters immediately preceding the qualifying event for which the paid-leave claim is being submitted;
 - (C) The individual is in good standing with the program and has no past-due contributions for self-employment income earned in previous completed quarters; and
 - (D) The individual earned self-employment income for work performed more than fifty percent (50%) of the time in the District of Columbia during some or all of the fifty-two (52) calendar weeks immediately preceding the qualifying event for which paid leave is being taken.

3501 FILING A CLAIM FOR PAID-LEAVE BENEFITS

- 3501.1 An applicant shall submit a claim for paid-leave benefits using the online portal, or an electronic or non-electronic format approved by DOES.
- 3501.2 An applicant may submit a claim for one (1) of three (3) types of qualifying paid leave. The three (3) types of qualifying paid leave are:
 - (a) Qualifying family leave;
 - (b) Qualifying medical leave; and
 - (c) Qualifying parental leave.
- 3501.3 No claim submitted before the date of the occurrence of a qualifying leave event shall be approved by DOES.

3501.4 No benefits shall be payable for leave taken before the applicant submitted a claim to DOES for paid-leave benefits, except in exigent circumstances.

- (a) For the purposes of this subsection, “exigent circumstances” means:
 - (1) Physical or mental incapacity that prevented the applicant or the applicant’s authorized representative from filing for benefits following the occurrence of the qualifying event; or
 - (2) A demonstrable inability to reasonably access the means by which a claim could have been filed by the applicant or the applicant’s authorized representative following the occurrence of the qualifying event.
- (b) If an applicant believes that exigent circumstances exist, the applicant or the applicant’s authorized representative shall submit the claim for paid-leave benefits as soon as practicable after the qualifying event and shall provide evidence of the exigent circumstances.
- (c) Based on the evidence provided by the applicant or the applicant’s representative (and any supplemental evidence requested by DOES and provided by the applicant or the applicant’s representative), DOES shall determine whether exigent circumstances existed. If DOES determines that exigent circumstances existed, DOES shall then determine the earliest date on which a claim could practicably have been filed by the applicant or the applicant’s authorized representative, taking into consideration the evidence submitted by the applicant, and process the claim based on that date.

3501.5 No benefits shall be payable for qualifying parental leave more than fifty-two (52) calendar weeks after the qualifying parental leave event.

3501.6 When submitting a claim for paid-leave benefits, an applicant shall provide the following information through the online portal, or an electronic or non-electronic format as approved by DOES:

- (a) Proof of the applicant’s identity, which shall be satisfied by providing evidence showing valid proof for each of the following three (3) elements:
 - (1) The applicant’s name;
 - (2) Date of birth; and
 - (3) One of the following:

- (A) Social security number; or
 - (B) Individual taxpayer identification number.
- (b) Contact information, including the applicant's mailing address, telephone number, and email address;
 - (c) Whether the paid leave will initially be taken continuously or intermittently;
 - (d) If the paid leave will be taken continuously, then the elements set forth in subsection 3506.4;
 - (e) If the paid leave will be taken intermittently, then the elements set forth in subsection 3506.5;
 - (f) The specific future dates, or, in exigent circumstances pursuant to 3501.4, the past dates, for which paid leave is being sought;
 - (g) For covered employees, the name, business address, telephone number, and email address of the applicant's supervisor at the covered employer, if applicable;
 - (h) A signed affirmation certifying that the information provided in support of the claim for paid-leave benefits is true and accurate; and
 - (i)
 - (1) For a paid medical leave claim:
 - (A) Proof of a qualifying medical leave event, including medical documentation signed by the health care provider that certifies the diagnosis or occurrence of a serious health condition;
 - (B) The expected duration of the condition certified by the health care provider and based on industry standards used by health care professionals to identify diagnoses of medical conditions and treatments; and
 - (C) A form signed by the applicant authorizing the individual's health care provider to provide medical documentation and/or additional information necessary to process the claim for paid leave.
 - (2) For a paid family leave claim:

- (A) Proof of a qualifying family leave event, including medical documentation signed by the health care provider that certifies the diagnosis or occurrence of a serious health condition of a family member;
 - (B) The expected duration of the condition certified by the health care provider and based on industry standards used by health care professionals to identify diagnoses of medical conditions and treatments;
 - (C) An affirmation that the applicant will be taking the leave in order to provide care or companionship for the family member with a serious health condition;
 - (D) A statement of the relationship of the family member needing care to the applicant, and proof of such relationship, which may be established by a signed affirmation form promulgated by DOES or other documentation approved by DOES;
 - (E) A description of the care or companionship to be provided by the applicant to the family member; and
 - (F) If requested by DOES, a form signed by the family member authorizing the family member's health care provider to provide medical documentation and/or additional information to DOES necessary to process the claim for paid leave.
- (3) For a paid parental leave claim, proof of a qualifying parental leave event, which may be established by a birth certificate, court document, a document issued by the health care provider of the child, a document from the adoption or foster care agency involved in the placement that confirms the placement and date of placement, hospital admission form associated with delivery, or another document approved by DOES for this purpose.

3501.7

For paid medical leave claims or paid family leave claims, applicants shall also include a medical certification. The medical certification must be completed by a health care provider. The applicant shall bear the cost, if any, charged by the health care provider for completing the certification. The medical certification shall include the following information:

- (a) Contact information for the health care provider, including the name, address, telephone number, and email address;

- (b) Medical license information for the health care provider;
- (c) The date that the serious health condition began;
- (d) The expected duration for the serious health condition;
- (e) If medical leave, a physician's opinion as to the employee's ability to work, and the expected duration of any inability to work;
- (f) If family leave, the type of care or companionship required by the family member, and the expected frequency and duration of the leave that is required for the applicant to provide that care to the family member; and
- (g) A summary of the medical condition.

- 3501.8
- (a) DOES may, to the extent necessary to administer the paid-leave program under the Act and to the extent consistent with federal and District law, seek records from the applicant that are deemed confidential under federal or District law.
 - (b) If an applicant does not consent to the disclosure of information necessary to process a claim or to determine eligibility, an individual's claim for paid-leave benefits may be denied.
 - (c) All records shall be kept confidential by DOES and may only be released to parties other than authorized DOES staff when such release is required by law. Information contained in the records pertaining to an individual under this chapter shall be confidential and not open to public inspection, other than to public employees in the performance of their official duties, pursuant to section 106(h) of the Act (D.C. Official Code § 32-541.06(h)).

3501.9 Any applicant filing a new claim for paid leave shall be advised at the time of filing the claim that:

- (a) Paid-leave benefits may be subject to federal, state, and local income taxes; and
- (b) The applicant is responsible for complying with applicable federal, state, and local tax laws.

3501.10 DOES may require that the applicant obtain additional medical documentation if:

- (a) The applicant requests an extension of leave or a different type or frequency of leave, beyond what the applicant requested in his or her initial application for the qualifying leave event; or

(b) DOES obtains new information which causes it to doubt the validity of the applicant's stated reason for the leave or the validity of the medical documentation.

3501.11 If the adoptive or foster status of an individual changes while an application for paid parental leave is pending or while the individual is currently receiving paid-leave benefits based on their adoptive or foster status, the applicant or eligible individual shall notify DOES within ten (10) business days of the status change.

3501.12 DOES shall permit authorized representatives to file and manage claims on behalf of applicants. In order to be designated as an authorized representative, an individual or entity must submit appropriate legal documentation sufficient to establish bona fide legal authority to represent the applicant. Such documentation may include a court order, proof of designation as a power of attorney, or other documentation approved by DOES.

3501.13 (a) An applicant may have more than one (1) open claim at a time, provided that the simultaneously open claims are for different qualifying events.

(b) The multiple qualifying events may be within the same type of qualifying event; for example, there may be two (2) open qualifying family leave claims or two (2) open qualifying medical leave claims for an individual at a time.

(c) An individual shall not receive payment for more than one (1) open claim on any particular day.

3501.14 During an open claim, an applicant may request a continuation of leave for the claim. A continuation of leave occurs when an applicant requests and is approved for a new last payable date of the claim that is later than the existing last payable date of the claim. DOES shall process the request for continuation of leave in a manner consistent with the provisions of this chapter.

3501.15 During an open claim, an applicant may request a reduction in leave for the claim. A reduction of leave occurs when an applicant requests and is approved for a new last payable date of the claim that is sooner than the existing last payable date of the claim. DOES shall process the request for reduction of leave in a manner consistent with the provisions of this chapter.

3501.16 Unless an applicant requests a continuation of leave pursuant to subsection 3501.14, a claim shall be considered a closed claim after the last payable date.

3502 PROCESSING CLAIMS FOR PAID LEAVE

3502.1 Within ten (10) business days after the filing of a claim for paid-leave benefits, a DOES claims examiner shall:

- (a) Notify the applicant of DOES's determination of eligibility or ineligibility for the type of paid-leave benefits sought; or
- (b) Issue a provisional denial of the claim and provide an explanation of the need to submit additional information for DOES to process the claim.

3502.2 Within three (3) business days after the filing of a claim for paid-leave benefits, a DOES claims examiner shall:

- (a) Notify the current covered employer of the filing of a claim by the applicant; and
- (b) Request from the employer:
 - (1) The employment status of the applicant;
 - (2) The last day worked by the applicant;
 - (3) Which type of leave from among the three (3) options described in subsection 3501.2 that the employee requested from the employer pursuant to the notice described in section 3509; and
 - (4) If applicable, whether the employer agrees with the employee's self-described workweek provided pursuant to 3506.5(b)(1).

3502.3 The covered employer shall submit the requested information, or an attestation that the applicant was or is not an employee of the employer, within four (4) business days after receipt of the request from the claims examiner. If the covered employer fails to provide the requested information within four (4) business days, the claim for paid leave shall be processed using the available information; provided that if the covered employer later files additional information, DOES may re-process the claim, taking into account the additional information.

3502.4 (a) If DOES requires additional information from an applicant to process a claim, and the information cannot be obtained within the 10-day processing period provided in 3502.1, DOES shall issue a provisional denial of the claim and provide a description of the missing information to the applicant.

(b) If the applicant provides the additional information in response to DOES' request for additional information within ten (10) business days of the date of the provisional denial, DOES shall reprocess the claim taking into account the additional information.

- (c) If the applicant does not provide additional information in response to DOES' request for additional information within ten (10) business days of the date of the request, the determination of denial shall be final.
- (d) A provisional denial pursuant to this subsection shall be considered an official determination for the purposes of appeals pursuant to sections 3511 and 3512.

3502.5 For qualifying family leave or qualifying medical leave, the claims examiner shall first determine an applicant's tentative eligibility based on non-medical factors supported by documentation submitted to establish the applicant's identity, employment history, and familial relationship.

3502.6 After establishing tentative eligibility for qualifying family leave or qualifying medical leave, the claims examiner shall review the medical evidence for eligibility. The medical evidence shall take the form of proof of a qualifying event provided by the eligible individual, health care provider, and the qualified family member, if applicable. This evidence shall be reviewed by the claims examiner in accordance with the International Classification of Diseases, Tenth Revision (ICD-10), or subsequent revisions by the World Health Organization to the International Classification of Diseases.

3502.7 If DOES determines that additional information is not required and makes an initial determination on eligibility for paid-leave benefits, DOES shall issue a notification of the initial determination:

- (a) To both the eligible individual and the covered employer that includes:
 - (1) A statement as to whether the claim for paid-leave benefits has been approved or denied;
 - (2) If the claim was approved:
 - (A) The start date for the payment of paid-leave benefits;
 - (B) Whether the leave will initially be taken continuously or intermittently, and, if intermittently, the scheduled days on which benefits will be payable; and
 - (C) The expected end date for paid-leave benefits, given the current payment schedule elected by the eligible individual.
- (b) To the eligible individual in private communication:
 - (1) If the claim was approved, the approved weekly benefit amount, and, if applicable, the equivalent daily benefit amount;

- (2) If the claim was denied, the reason(s) for the denial; and
- (3) Regardless of whether the claim was approved or denied, a description of the process to file an appeal with the DOES Administrative Appeals Division or the Office of Administrative Hearings.

3502.8 Any information described in subsection 3502.7(b) provided by DOES to the individual may be shared by the eligible individual with the covered employer or other entities for the purposes of allowing the covered employer or other entities to coordinate their paid-leave benefits with the benefits provided by this Chapter, or for other purposes at the discretion of the eligible individual. Covered employers or other entities may require that such information be shared by the individual in order for benefits provided by the covered employer or other entity to be paid to the individual.

3503 CALCULATION OF WEEKLY BENEFIT AMOUNT

3503.1 Subject to other provisions in this chapter, including but not limited to subsection 3503.2 and sections 3504 and 3513, DOES shall calculate the weekly paid-leave benefit amount to which an eligible individual is entitled pursuant to the following procedures:

- (a) The wages used to calculate the weekly benefit amount shall be limited to wages reported and paid to the covered employee by covered employers; provided, that “wages” also includes reported self-employment income.
- (b) The weekly benefit amount shall be calculated in the following manner (which provides a higher wage replacement for low wages (below the formula bend point) in comparison to high wages (above the formula bend point)):
 - (1) DOES shall first determine the total amount of all reported covered wages, including any reported self-employment income, for each of the past five (5) completed quarters. Only completed quarters shall be considered in calculating the weekly benefit amount. The quarters are as follows: January 1 to March 31; April 1 to June 30; July 1 to September 30; October 1 to December 31.
 - (2) The quarter with the lowest total earnings in the past five (5) quarters shall be discarded for purposes of the benefit calculation. If multiple quarters have the same total earnings, and those quarters with identical earnings are the lowest-earning quarters, only one (1) of the quarters with identical earnings shall be discarded.

- (3) The total earnings in the four (4) remaining quarters with the highest total earnings shall then be added together. This sum shall be divided by fifty-two (52) to arrive at the average weekly wage.
- (4) The resultant average weekly wage shall then be compared with the formula bend point to determine the applicable formula to be used to calculate the weekly benefit amount.
- (5) For the purpose of this subsection, the formula bend point is defined as the District's hourly minimum wage multiplied by forty (40), then multiplied by one point five (1.5).
- (6) The applicable benefit formula for the weekly benefit amount shall be as follows:
 - (A) If the average weekly wage is less than or equal to the formula bend point, then the average weekly wage shall be multiplied by nine-tenths (0.9). The resulting product shall be the weekly benefit amount, subject to subsection 3503.2.
 - (B) If the average weekly wage is greater than the formula bend point, then the following benefit formula shall be used:
 - (i) The amount of the formula bend point shall be subtracted from the average weekly wage;
 - (ii) The resultant difference shall be multiplied by five-tenths (0.5);
 - (iii) This product shall be added to the following: the amount of the formula bend point multiplied by nine-tenths (0.9);
 - (iv) This sum shall be the weekly benefit amount, subject to subsection 3503.2.
- (c) If an eligible individual has wages from multiple covered employers or income from self-employment, the wages from these multiple sources in each separate quarter shall be combined to determine the eligible individual's average weekly wage calculated pursuant to paragraph (b).
- (d) The weekly benefit amount calculated according to this section, if not a multiple of one dollar (\$1.00), shall be rounded to the nearest dollar amount.

- 3503.2 (a) No eligible individual shall be entitled to payment of paid-leave benefits at a rate in excess of the maximum weekly benefit amount.
- (b) Before October 1, 2021, the maximum weekly benefit amount shall be one thousand dollars (\$1,000).
- (c) DOES shall adjust the maximum weekly benefit amount annually, to take effect on October 1, 2021, and on October 1 of each successive year, as provided in section 104(g)(6) of the Act (D.C. Official Code § 32-541.04(g)(6)).

3504 WAITING PERIOD FOR BENEFITS

- 3504.1 After the occurrence of a qualifying event, an eligible individual shall not be entitled to paid-leave benefits payable under this chapter until after the eligible individual has waited seven (7) calendar days.
- 3504.2 No benefits shall be payable during the seven (7) calendar-day waiting period.
- 3504.3 The seven (7) calendar-day waiting period shall begin to run on the first day of the qualifying event.
- 3504.4 Regardless of the number of qualifying events for which an eligible individual files a claim for paid-leave benefits, he or she shall only have one (1) waiting period of seven (7) calendar days during and for which no benefits are payable within a fifty-two (52) calendar-week period.
- 3504.5 The seven (7) calendar-day waiting period shall not count toward the number of workweeks of paid-leave benefits that an eligible individual may receive.

3505 DURATION OF PAID-LEAVE BENEFITS

- 3505.1 An eligible individual shall not receive more than:
- (a) Two (2) workweeks of qualifying medical leave for qualifying medical leave event(s) within a fifty-two (52) calendar week period;
- (b) Six (6) workweeks of qualifying family leave for qualifying family leave event(s) within a fifty-two (52) calendar week period; and
- (c) Eight (8) workweeks of qualifying parental leave for qualifying parental leave event(s) within a fifty-two (52) calendar week period.
- 3505.2 Notwithstanding subsection 3505.1, an eligible individual shall not receive more than a maximum of eight (8) workweeks of paid leave during a fifty-two (52)

calendar week period, regardless of the number of qualifying leave events that occurred during the fifty-two (52) calendar week period.

3505.3 All leave taken pursuant to this chapter shall be in no less than one (1) workday increments.

3506 CONTINUOUS AND INTERMITTENT LEAVE

3506.1 An eligible individual may elect to receive paid leave either intermittently or continuously.

3506.2 When receiving benefits payable for continuous leave, an eligible individual shall earn no income by performing his or her usual and customary work during any part of the calendar weeks during which benefits for continuous leave are payable to the eligible individual, except for the first and last payable weeks, which, if they are partial weeks, shall be treated for the purposes of benefit amounts in a similar manner as weeks during which intermittent-leave benefits are payable pursuant to this section.

3506.3 When receiving benefits payable for intermittent leave, an eligible individual shall earn no income by performing his or her usual and customary work on any of the days for which the eligible individual is claiming paid-leave benefits. However, the eligible individual may earn income by performing his or her usual and customary work on days for which intermittent-leave benefits are not payable, subject to the limitation described in section 3506.11.

3506.4 When electing continuous leave upon initial application for benefits, or when electing a change in payment schedule from intermittent to continuous leave, an eligible individual shall:

- (a) Acknowledge in writing to DOES that the individual understands that he or she may earn no income by performing his or her usual and customary work during any part of the calendar week(s) during which benefits for continuous leave benefits are payable to the eligible individual, except for the first and last payable weeks, if they are partial weeks; and
- (b) If either the first or last payable weeks are partial weeks:
 - (1) Designate an intermittent leave indicator pursuant to subsection 3506.5; and
 - (2) Certify that the days of the calendar week for which the individual seeks a partial week of benefits were days of the calendar week during which the individual performed his or her regular and customary work in the period before the occurrence of the qualifying paid-leave event.

3506.5

When electing intermittent leave upon initial application for benefits, or when electing a change in payment schedule from continuous to intermittent leave, the eligible individual shall:

- (a) Inform DOES and the covered employer of the specific dates on which the individual wishes to claim paid-leave benefits;
- (b) Designate an intermittent leave indicator, identifying the days on which the individual regularly worked, in total, from all sources of employment. This intermittent leave indicator shall be either a personalized intermittent leave indicator or the default intermittent leave indicator.
 - (1) A personalized intermittent leave indicator identifies the number of days per calendar week, different from the five (5) day workweek described in the default intermittent leave indicator, that the individual regularly worked, during the individual's most recent usual and customary week of working.
 - (2) The default intermittent leave indicator is based on a five (5) day workweek. Individuals receiving benefits on a continuous payment schedule are assigned the default intermittent leave indicator (except for the first and last payable weeks, if they are partial weeks) for the purposes of this chapter. If an individual receiving benefits on an intermittent leave schedule does not designate a number of days as provided in subparagraph (1), the default intermittent leave workweek shall be assigned to the individual.
- (c) Certify that the days of the calendar week for which the individual seeks intermittent benefits were days of the calendar week during which the individual performed his or her regular and customary work in the period before the occurrence of the qualifying paid-leave event; and
- (d) Acknowledge in writing to DOES that the individual understands that he or she may earn no income by performing his or her usual and customary work on any of the days for which intermittent paid-leave benefits are payable to the eligible individual.

3506.6

When receiving benefits on an intermittent payment schedule, an individual may submit a request to amend the leave schedule.

- (a) For qualifying medical leave or qualifying family leave, any amendment to the leave schedule must be medically necessary as established by appropriate medical documentation submitted to DOES by the individual.

- (b) If the individual did not take leave on the past dates on which the individual intended to take paid leave, the individual shall submit a request to amend the payment schedule to DOES with an explanation of the need to amend the past dates and an indication of the dates on which leave was actually taken. A request to amend leave for past dates shall be submitted either during an open claim or no later than ten (10) days after a claim has been closed.
- (c) During an open claim, when the individual intends to take leave on future dates that differ from the approved schedule, the individual shall submit a request to amend the payment schedule to DOES with an explanation of the need to amend the future dates and an indication of the dates on which the individual now intends to claim paid leave.
- (d) DOES shall notify the employer of any such amendment.

3506.7 The amount paid to an individual electing intermittent leave shall be calculated based on a daily benefit amount, which shall be derived from the individual's weekly benefit amount calculated pursuant to section 3503. The daily benefit amount for an individual electing intermittent leave shall equal the individual's weekly benefit amount calculated in section 3503 divided by the individual's intermittent leave indicator, incorporating any amendments pursuant to subsection 3506.8.

3506.8 During an open claim, an individual may request that DOES amend the indicator supplied pursuant to section 3506.5(b) if the individual's work schedule changes.

- (a) Any such change shall affect only those benefits payable for dates after the date on which DOES receives notice of such change, if the change is approved.
- (b) An individual may request such an amendment no more than one (1) time per calendar month during an open claim.

3506.9 If an individual's intermittent leave indicator changes during an open claim as a result of the individual's election pursuant to section 3506.8, the maximum number of intermittent-leave days for which the individual is eligible for benefits will also change, but neither the total number of eligible workweeks nor the total dollar amount of eligible benefits will change. For example, if an individual's work schedule changes from three days to five days during an open claim, and the individual properly notifies DOES of such change pursuant to section 3506.8 and is approved for such change, then the individual's daily benefit amount for all days claimed in the future will decrease from one-third (1/3) of the weekly benefit amount to one-fifth (1/5) of the weekly benefit amount. In such case, the maximum amount of approved benefits for the open claim, expressed as a dollar amount or as a number of workweeks, will not change, but the number of

remaining days for which the individual is eligible for intermittent leave will change.

3506.10 If, as a result of changes to the individual's work schedule pursuant to subsection 3506.8, the amount of workweeks of leave remaining on the last day of approved leave equals a fraction less than the individual's weekly benefit amount calculated in section 3503 divided by the individual's intermittent leave indicator, then the individual shall receive payment only for the fraction remaining.

3506.11 For individuals receiving benefits on an intermittent schedule, the sum of the number of days in a calendar week during which benefits under this chapter are payable, and the number of days in that calendar week during which the eligible individual earns income by performing his or her usual and customary work, shall not exceed the number of days given by the intermittent leave indicator supplied by the individual pursuant to section 3506.5(b) and any amendments pursuant to section 3506.8.

(a) Calendar weeks during which the sum of the number of days on which the individual performs his or her usual and customary work, and the number of days on which the individual receives benefits payable under this chapter, exceeds the individual's current intermittent leave indicator shall be considered weeks during which erroneous payments subject to section 3514 were made.

(b) The number of days for which erroneous payments were made in such weeks shall be determined as the number of days on which the individual performed his or her usual and customary work and received benefits payable under this chapter that exceed the individual's current intermittent leave indicator.

3506.12 At any time after the first day for which paid-leave benefits are payable under this chapter, an eligible individual may notify DOES of his or her election to change the leave schedule, but such elections may be made no more frequently than once a month. When a change in the payment schedule is from intermittent to continuous leave or from continuous to intermittent leave, such notification shall include:

(a) The type of benefit payment schedule currently in payment status, either continuous or intermittent;

(b) The type of benefit payment schedule to which the eligible individual is electing to change, either continuous or intermittent;

(c) If changing to a continuous payment schedule, then the elements described in subsection 3506.4; and

- (d) If changing to an intermittent payment schedule, then the elements described in subsection 3506.5.

3506.13 Within ten (10) business days after receiving the eligible individual's notification of his or her election to change the leave schedule from either intermittent to continuous leave or from continuous to intermittent leave, DOES shall notify both the covered employer and eligible individual of the following:

- (a) A determination of the approval or denial of the request to change the payment schedule, or a request for additional information;
- (b) If approved, a description of the approved payment schedule.

3506.14 In addition to the notifications described in section 3506.13, DOES shall also notify the eligible individual in private communication within the ten (10) business day period described in subsection 3506.13 of the following:

- (a) The approved weekly benefit amount and, if applicable, the approved daily benefit amount; and
- (b) A description of the process to file an appeal with the DOES Administrative Appeals Division or the Office of Administrative Hearings.

3506.15 A change in the benefit payment schedule from continuous to intermittent or from intermittent to continuous shall take effect on the first Sunday that begins the next biweekly payment period following DOES's approval of the individual's request to change the payment schedule.

3507 PAYMENT OF BENEFITS

3507.1 Subject to the other provisions of this chapter, DOES shall pay benefits to which the eligible individual is entitled on a biweekly payment schedule.

3507.2 The biweekly payment period shall begin on a Sunday and end on a Saturday.

3507.3 DOES shall determine the day(s) of the calendar week on which biweekly payments shall be made to eligible individuals.

3507.4 DOES shall determine the method(s) of payment by which eligible individuals may receive benefits.

3507.5 After notifying an applicant of the approval of benefits, DOES shall make the first payment to the eligible individual within ten (10) business days. Such first payment shall coincide with a regularly scheduled biweekly payment schedule.

3508 ONLINE PORTAL

- 3508.1 All claims for paid-leave benefits shall be submitted through the online portal, or an electronic or non-electronic format approved by DOES.
- 3508.2 All DOES communications pursuant to this chapter shall occur through the online portal, or an electronic or non-electronic format approved by DOES.
- 3508.3 Initial and subsequent determinations shall be sent to applicants and eligible individuals through the online portal, or an electronic or non-electronic format approved by DOES.
- 3508.4 All applicants and eligible individuals shall be responsible for maintaining current contact information in the online portal, but may update the contact information via an electronic or non-electronic format approved by DOES.
- 3508.5 All applicants and eligible individuals shall receive notifications related to any required actions and the status of claims for paid leave through the online portal, or through an electronic or non-electronic format approved by DOES.
- 3508.6 All applicants and eligible individuals shall be responsible for responding to any requests for additional information through the online portal, or through an electronic or non-electronic format approved by DOES.

3509 EMPLOYEE NOTICE TO EMPLOYER

- 3509.1
 - (a) Except as provided in subsection (d), an eligible individual shall provide written notice to his or her employer of the need for the use of paid-leave benefits before taking leave.
 - (b) If the leave pursuant to this chapter is foreseeable, the eligible individual shall provide the written notice at least ten (10) business days in advance of the leave.
 - (c) If the leave pursuant to this chapter is unforeseeable, the eligible individual shall provide a notification in writing, or orally in exigent circumstances, before the start of the work shift for which the individual intends to take leave pursuant to this chapter.
 - (d) In the case of an emergency that prevents an individual from providing notice before the start of the work shift for which the individual intends to take leave pursuant to this chapter, the eligible individual, or another individual on behalf of the eligible individual, shall notify the eligible individual's employer of the need for leave in writing, or orally in exigent circumstances, within forty-eight (48) hours after the emergency occurs. The eligible individual, or another individual on behalf of the eligible

individual, shall supplement oral notice with written notice of the need for leave as soon as practicable.

3509.2 The eligible individual's written or oral notice to the employer shall include:

- (a) The type of qualifying leave requested;
- (b) The expected duration of the leave pursuant to this chapter;
- (c) The expected start and end dates of the leave taken pursuant to this chapter; and
- (d) Whether the paid leave benefits sought under this chapter will initially be used continuously or intermittently.

3510 APPEALS OF CLAIM DETERMINATIONS

3510.1 If the applicant or eligible individual disagrees with all or any part of a claim determination issued pursuant to section 3502 or 3506, the applicant or eligible individual may appeal the claim determination to DOES's Administrative Appeals Division pursuant to section 3511, or to the Office of Administrative Hearings pursuant to section 3512.

3511 DOES ADMINISTRATIVE APPEALS

3511.1 To request an administrative appeal to DOES's Administrative Appeals Division of a claim determination issued under section 3502 or 3506, the applicant or eligible individual shall file a request for appeal with DOES within ten (10) business days after the applicant or eligible individual receives a claim determination. The applicant or eligible individual shall submit with the request for administrative appeal an explanation of the basis for the appeal and any information and documents in support of the appeal.

3511.2 After receiving a request for an administrative appeal, DOES shall process the claim that is the subject of the appeal in the same manner as provided under this chapter, taking into consideration any new information and documents submitted by the applicant in support of the appeal.

3511.3 DOES shall issue a new determination within ten (10) business days after the receipt of the request for an administrative appeal.

3511.4 An applicant or eligible individual may appeal the new determination to the Office of the Administrative Hearings, as provided by section 3512.

3511.5 A request for an administrative appeal does not diminish an applicant's right to file an appeal with the Office of Administrative Hearings.

3512 OAH APPEALS

- 3512.1 An applicant or eligible individual may appeal a claim determination issued under section 3502 or 3506, or a new determination issued under section 3511, to the Office of Administrative Hearings. The appeal to the Office of Administrative Hearings must be filed within sixty (60) calendar days after the date the claim determination or new determination is issued.
- 3512.2 Appeals to the Office of Administrative Hearings shall be governed by the rules, policies, and procedures of the Office of Administrative Hearings.

3513 RELATIONSHIP TO OTHER BENEFITS AND INCOME

- 3513.1 If paid leave taken pursuant to this chapter also qualifies as protected leave pursuant to FMLA, or D.C. FMLA, the paid leave shall run concurrently with, and not in addition to, leave taken under those other acts.
- 3513.2 Nothing in this chapter shall be construed to provide job protection to any eligible individual beyond that to which an individual is entitled under the D.C. FMLA.
- 3513.3 An eligible individual receiving benefits pursuant to the District of Columbia Unemployment Compensation Act, effective August 28, 1935 (49 Stat. 946; D.C. Official Code § 51-101 *et seq.*), shall not be eligible to receive paid-leave benefits under this chapter.
- 3513.4 An eligible individual receiving long-term disability payments, whether provided under a private or public program, shall not be eligible to receive paid-leave benefits under this chapter.
- 3513.5 An eligible individual's right to short-term, employer-provided paid-leave benefits, including but not limited to paid sick time, vacation time, short-term disability benefits, and paid parental leave, while receiving paid-leave benefits under this chapter will be determined by the employer's policies. Nothing in this chapter shall be interpreted as prohibiting employers from amending any existing or future policies regarding their own private employee benefits.
- 3513.6 (a) An eligible individual is not permitted to earn income by performing his or her regular and customary work during the period for which the eligible individual receives benefits under this chapter.
- (b) Payments made under this chapter for days on which the eligible individual earns income by performing his or her regular and customary work shall constitute erroneous payments subject to sections 3514 and 3515.

- (c) Unless other provisions in this chapter provide for an earlier date of benefit termination, an eligible individual's entitlement to benefits payable under a continuous payment schedule provided by this chapter shall stop on the date on which the eligible individual returns to earning income by performing his or her regular and customary work.
- (d) Unless other provisions in this chapter provide for an earlier date of benefit termination, an eligible individual's entitlement to benefits payable under an intermittent payment schedule provided by this chapter shall stop on the day of the week on which an eligible individual elected to receive intermittent benefits and on which the eligible individual returns to earning income by performing his or her usual and customary work.
- (e) Restrictions on earning income while receiving benefits for continuous and intermittent leave are subject to the limitations set forth in section 3506.

3514 ERRONEOUS PAYMENTS AND DISQUALIFICATION FOR BENEFITS

- 3514.1 It is unlawful for any applicant or eligible individual to intentionally provide knowingly false statements to obtain paid-leave benefits.
- 3514.2 An eligible individual shall not earn income by performing his or her regular and customary work during a period for which paid-leave benefits provided under this chapter are payable.
- 3514.3 An applicant or eligible individual who intentionally makes a false statement or misrepresentation regarding a material fact, or who intentionally fails to report a material fact, in order to obtain paid-leave benefits shall be disqualified from receiving paid-leave benefits for a period of three (3) years beginning with the date of disqualification.
- 3514.4 Disqualification under this section shall not affect paid-leave benefits otherwise properly paid prior to the date of such false statements, misrepresentations, or failure to report a material fact.
- 3514.5 DOES shall provide written notice to an applicant or eligible individual of the applicant or eligible individual's disqualification under this section. The notice shall include the following information:
 - (a) The reason for the disqualification;
 - (b) The disqualification period beginning date and ending date; and
 - (c) The amount of paid-leave benefits overpaid to the eligible individual, if any.

3515 REPAYMENT OF PAID-LEAVE BENEFITS

- 3515.1 In the event of erroneous payment or overpayment, DOES shall seek repayment of benefits from the recipient; provided, that the Director may waive, in whole or in part, the amount of any such payments when the recovery would be against equity and good conscience.
- 3515.2 DOES shall provide notice in writing to an eligible individual of the requirement to repay erroneous payments or overpayments. The repayment notice shall include the following information:
- (a) The amount of paid-leave benefits overpaid to the individual;
 - (b) The option to enter into a repayment agreement with DOES; and
 - (c) The collection methods DOES may utilize to seek repayment of paid-leave benefits if the recipient does not enter into a repayment agreement with DOES.
- 3515.3 DOES shall not attempt to collect repayment of paid-leave benefits during an appeal of a claim determination or while the recipient has a pending bankruptcy case.
- 3515.4 DOES may utilize the following methods to seek repayment of paid-leave benefits from the recipient:
- (a) Accepting full repayment, or monthly installments as outlined in an optional repayment agreement between DOES and the recipient, in the form of personal check, money order, or electronic payment through a debit card, credit card, or personal checking account via the online portal;
 - (b) Offsetting the balance of erroneous payments from future paid-leave benefit entitlements at a rate of one hundred percent (100%), if:
 - (1) The recipient is actively collecting paid-leave benefits after the completion of the appeal of a claim determination; and
 - (2) There is no existing disqualification on the recipient's current paid-leave claim;
 - (c) Filing a claim in the Superior Court of the District of Columbia; and
 - (d) Intercepting District income tax refunds to the extent consistent with District law, or of state, federal, and local income tax refunds to the extent consistent with state, federal, or local law.

- 3515.5 A recipient may request that DOES waive the requirement that a recipient repay paid-leave benefits. The request shall be submitted through the online portal, or through an electronic or non-electronic format approved by DOES, within thirty (30) calendar days after DOES sends a repayment notice to the recipient.
- 3515.6 If the request for waiver of the paid-leave benefit repayment is not submitted within the thirty (30) calendar-day period, the recipient shall provide good cause for failure to meet the thirty (30) calendar-day requirement before the request can be considered.
- 3515.7 DOES may refer a repayment matter to the Office of the Attorney General for the District of Columbia or the Office of the Inspector General.
- 3515.8
- (a) If DOES obtains repayment of benefits from an individual who has made a willful misrepresentation or otherwise perpetrated fraud to obtain paid-leave benefits and who received paid-leave benefits under this chapter for a period during which he or she earned income by performing work as a covered employee for a covered employer, and that covered employer made contributions to the Universal Paid Leave Implementation Fund based on the wages paid to that individual during the period he or she improperly received paid-leave benefits under this chapter, DOES shall distribute a proportional share of the recovered amount to that covered employer.
 - (b) For the purposes of paragraph (a) of this subsection, a covered employer's proportional share of the recovered amount shall be determined by the following method:
 - (1) The total amount paid into the Universal Paid Leave Implementation Fund by all covered employers on behalf of the individual during the period that he or she improperly obtained benefits shall be added together;
 - (2) The amount contributed by the covered employer during the period described in paragraph (a) shall be divided by the total amount calculated in subparagraph (1);
 - (3) This proportion shall be applied to the amount recovered from the individual;
 - (4) The resulting amount shall be distributed to the covered employer.
- 3515.9 DOES may cancel the requirement that a recipient repay a paid-leave repayment balance if:

- (a) The recipient is deceased; provided that a death certificate is provided to DOES; or
- (b) The recipient is a victim of identity theft and the claim submitted to DOES was made by an unauthorized person using the identity of the victim; provided, that evidence supporting the occurrence of identity theft, such as a police report and other supporting documentation, is provided to DOES.

3516 COMPLAINTS

- 3516.1 A complaint alleging a violation of this chapter or the Act, other than a complaint regarding a claim determination (which shall be filed as an appeal as provided in this chapter), shall be filed with the Office of Human Rights and shall be governed by the administrative enforcement procedure used for the D.C. FMLA.
- 3516.2 All complaints pursuant to this section shall be filed within one (1) year after the occurrence or discovery of the alleged violation, whichever is later.

3599 DEFINITIONS

In addition to the definitions in 34 DCMR § 3499, the following definitions shall apply to this chapter:

“Authorized representative” – means an individual or entity who is legally permitted to act on behalf of an applicant or eligible individual. Such individual or entity may act as an authorized representative only if approved by DOES to act as an authorized representative for the applicant or eligible individual under the provisions of subsection 3501.12.

“Average weekly wage” – means the average weekly wage as calculated by section 3503.1(b).

“Biweekly” – means intervals of fourteen (14) calendar days.

“Bonding” – means the formation of a close emotional and psychological relationship between a parent or primary caregiver and an infant or child.

“Calendar week” – means each seven (7) day period beginning on Sunday and ending on Saturday.

“Child” – means 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 to whom an eligible individual stands in loco parentis.

“Closed claim” – means a claim that was an open claim but whose last payable date has passed.

“Daily benefit amount” – means, with respect to eligible individuals electing intermittent leave, the weekly benefit amount divided by the intermittent leave indicator.

“DOES” – means the District of Columbia Department of Employment Services.

“D.C. FMLA” – means the District of Columbia Family and Medical Leave Act of 1990, effective October 3, 1990 (D.C. Law 8-181; D.C. Official Code § 32-501 *et seq.*)

“Family member” – means:

- (a) A child;
- (b) 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;
- (c) A person to whom an eligible individual is related by domestic partnership, as defined by section 2(4) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code § 32-701(4)), or marriage;
- (d) A grandparent of an eligible individual, which means the biological, foster, or adoptive parent of the eligible individual’s biological, foster, or adoptive parent; or
- (e) A sibling of an eligible individual, which means the biological, half-, step-, adopted-, or foster-sibling or sibling-in-law of the eligible individual.

“FMLA” – means the Family and Medical Leave Act of 1993, approved February 5, 1993 (107 Stat. 6; 29 U.S.C. § 2601 *et seq.*).

“Health care provider” – shall have the same meaning as provided in section 2(5) of the D.C. FMLA (D.C. Official Code § 32-501(5)).

“In loco parentis” – means in place of a parent.

“Intermittent leave indicator” – means the number of days designated by the eligible individual in 3506.5(b)(1) or the default intermittent leave workweek provided in 3506.5(b)(2).

“Open claim” – means a claim whose last payable date has not yet occurred.

“Payable date” – means a day for which paid-leave benefits provided under this chapter have been approved as payable by DOES.

“Placement” – means the transfer of physical custody of a child into the household of an eligible individual.

“Primary caregiver” – means legal guardian, or other person who stands in loco parentis to a child.

“Qualifying event” – means qualifying family leave event, qualifying medical leave event, or qualifying parental leave event.

“Qualifying family leave” – means paid leave for up to a maximum amount of six (6) workweeks within a fifty-two (52) calendar week period, regardless of calendar year, that an eligible individual may take in order to provide care or companionship to a family member because of the occurrence of a qualifying family leave event.

“Qualifying family leave event” – means the diagnosis or occurrence of a serious health condition of a family member of an eligible individual.

“Qualifying medical leave” – means paid leave for up to a maximum of two (2) workweeks within a fifty-two (52) calendar week period, regardless of calendar year, that an eligible individual may take following the occurrence of a qualifying medical leave event.

“Qualifying medical leave event” – means the diagnosis or occurrence of a serious health condition of an eligible individual.

“Qualifying parental leave” – means paid leave for up to a maximum of eight (8) workweeks within a fifty-two (52) calendar week period, regardless of calendar year, that an eligible individual may take following the occurrence of a qualifying parental leave event.

“Qualifying parental leave event” – means events, including bonding, associated with:

- (a) The birth of a child of an eligible individual;
- (b) The placement of a child with an eligible individual for adoption or foster care; or
- (c) The placement of a child with an eligible individual for whom the eligible individual legally assumes and discharges parental responsibility.

“Self-employment income” – means gross income earned from carrying on a trade or business as a sole proprietor, an independent contractor, or a member of a partnership.

“Serious health condition” – means 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, or at the home of a caregiver or other family member, by a health care provider or other competent individual. For the purposes of this definition:

- (a)
 - (1) The term “treatment” includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition.
 - (2) Treatment does not include routine physical examinations, eye examinations, or dental examinations.
 - (3) A regimen of continuing treatment such as the taking of over-the-counter medications, bed rest, or similar activities that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute continuing treatment for the purposes of this chapter.
- (b) The term “inpatient care” is the care of a patient in a hospital, hospice, or residential medical care facility for the duration of one overnight period or longer or any subsequent treatment in connection with such inpatient care.
- (c) The term “incapacity” means inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition.
- (d) Conditions for which cosmetic treatments are administered are not serious health conditions; provided, that procedures related to an individual’s gender transition or restorative surgery following surgery or treatments for diseases or injury shall not be considered cosmetic treatments for the purposes of this subparagraph.
- (e) A serious health condition involving continuing treatment by a health care provider means any one or more of the following:
 - (1) A period of incapacity of more than three (3) consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:

- (A) Treatment of two (2) or more times within thirty (30) days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider. For the purposes of this sub-subparagraph, “extenuating circumstances” means circumstances beyond an individual’s control that prevent the follow-up visit from occurring as planned by the health care provider;
 - (B) The first, or only, in-person treatment visit within ten (10) days after the first day of incapacity if extenuating circumstances exist; or
 - (C) Treatment by a health care provider on at least one (1) occasion, which results in a regimen of continuing treatment under the supervision of the health care provider;
- (2) Any period of incapacity or treatment, including prenatal care, for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
- (A) Requires two (2) or more periodic visits annually for treatment by a health care provider or by a nurse under direct supervision of a health care provider;
 - (B) Continues over an extended period of time, which shall include recurring episodes of a single underlying condition; and
 - (C) May cause episodic rather than a continuing period of incapacity;
- (3) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The family member of an eligible individual must be under continuing supervision of, but need not be receiving active treatment by, a health care provider; or
- (4) Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:
- (A) Restorative surgery after an accident or other injury; or

- (B) A condition that would likely result in a period of incapacity of more than three (3) consecutive, full calendar days in the absence of medical intervention or treatment.

“Wages” – shall have the same meaning as provided in section 1(3) of the District of Columbia Unemployment Compensation Act, approved August 28, 1935 (49 Stat. 946; D.C. Official Code § 51-101(3)); provided, that the term “wages” also includes self-employment income earned by a self-employed individual who has opted into the paid-leave program established pursuant to this chapter.

“Weekly benefit amount” – means the amount calculated using the procedure described in section 3503.1(b).

“Workweek” – means the number of days within a calendar week provided by the indication made pursuant to section 3506.5(b).

Comments on this proposed rulemaking should be submitted, in writing, within thirty (30) days of the date of the publication of this notice in the *D.C. Register* to the Department of Employment Services, 4058 Minnesota Avenue NE, Suite 4500, Washington, DC, 20019, or via email to does.opfl@dc.gov. Additional copies of these proposed rules are available at the above address.