

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF PROPOSED RULEMAKING

(Paid-Leave Program Contributions)

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 2018-036, 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 34 (Paid Leave Contributions) in not less than thirty (30) days after publication of this notice in the *D.C. Register*. Pursuant to D.C. Official Code § 32-541.02(b)(2), the proposed rules will also be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, holidays, and days of Council recess.

The proposed rules, if adopted, will implement a portion of the Act by establishing the tax collection 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 employer registration and responsibilities, opt-in and opt-out procedures for self-employed individuals, wages, and contribution and collection procedures.

Title 7 DCMR, EMPLOYMENT BENEFITS, is amended by adding a new Chapter 34, PAID LEAVE CONTRIBUTIONS, to read as follows:

CHAPTER 34 PAID LEAVE CONTRIBUTIONS

3400 EMPLOYER REGISTRATION

3400.1 Each covered employer performing services in the District of Columbia shall register through the online portal with DOES.

3400.2 DOES shall maintain a separate account for each covered employer and shall credit the account with all contributions paid by the covered employer after July 1, 2019.

3400.3 Each covered employer shall be able to update its account with information related to its business activities, such as street address, email address, telephone number, and business status, to submit its quarterly wage reports, and make payments electronically.

3401 OPT-IN FOR SELF-EMPLOYED INDIVIDUALS

- 3401.1 An individual who earns self-employment income (“self-employed individual”) may opt into the paid-leave program during an applicable open enrollment period.
- 3401.2 A self-employed individual shall submit a request to opt into the paid-leave program using the online portal or through another format approved by DOES.
- 3401.3 When submitting a request to opt into the paid-leave program, a self-employed individual shall provide a copy of one of the following documents through the online portal or in another format approved by DOES:
- (a) Basic business license;
 - (b) General business license;
 - (c) Occupation or professional license in addition to a business license (if applicable).
- 3401.4 After a self-employed individual opts into the paid-leave program, DOES shall provide notice to that individual regarding the manner in which contributions to the Universal Paid Leave Implementation Fund shall be collected from the individual.
- 3401.5 A self-employed individual who opts into the paid-leave program shall remain continuously enrolled in the program until such time as he or she elects to opt out, as provided in section 3402.
- 3401.6 A self-employed individual shall notify DOES when his or her licensed business activity has ended and the individual has submitted a request for license cancellation to the Department of Consumer and Regulatory Affairs.
- 3401.7 If an individual who earns self-employment income has chosen not to opt into the paid-leave program within the first 90 days after the date on which DOES begins to collect contributions to the Universal Paid Leave Implementation Fund, he or she shall only be permitted to enroll, or re-enroll, in the program during an open enrollment period through the online portal and shall make contributions to the Universal Paid Leave Implementation Fund for no less than three (3) consecutive years.
- 3401.8 If a self-employed individual who has opted into the paid-leave program is also a covered employee employed by a covered employer, he or she shall not be entitled to receive double payments of paid-leave benefits under this chapter. His or her paid-leave benefit payment amount shall be based on the combined wages from covered employment and self-employment.

3402 OPT-OUT OF SELF-EMPLOYED INDIVIDUALS

- 3402.1 A self-employed individual who opts into the paid-leave program may elect to opt out of the paid-leave program through the online portal or through another format approved by DOES.
- 3402.2 A self-employed individual who has opted into the program may only opt out of the program during an open enrollment period or if the individual ceases to be a self-employed individual.
- 3402.3 A self-employed individual who previously opted out of or withdrew from the paid-leave program may re-enroll in the program; provided that:
- (a) Beginning on January 1, 2020, a self-employed individual who previously opted out of the paid-leave program shall not be eligible to receive benefits pursuant to this chapter for the first year after enrolling or reenrolling in the program; and
 - (b) If a self-employed individual withdraws from the paid-leave program two (2) or more times, he or she shall be barred from reenrolling in the program for a period of five (5) years from the date of his or her withdrawal from the program.

3403 WAGES

- 3403.1 For the purposes of implementation of the Act, the term “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.
- 3403.2 If compensation is paid in any medium other than cash, the covered employer shall include the cash value of the non-monetary remuneration in the amount reported as wages.
- 3403.3 If the cash value of non-monetary remuneration is agreed to by the covered employer and the covered employee, the agreed value shall be reported as wages.
- 3403.4 If the cash value of non-monetary remuneration is not agreed to, the covered employer shall place a reasonable value upon the thing used in the place of money and report that amount as wages.
- 3403.5 The following amounts shall be reported as wages:

- (a) Amounts paid to a covered employee while an employee is on vacation or sick leave;
- (b) Prizes awarded to covered employees in connection with services performed in the business; and
- (c) Sums disbursed by a covered employer based on the covered employer's addition of a certain percentage to the customer's bill as a tip.

3403.6 Drawing accounts shall be reported as wages at the amount actually drawn by the covered employee regardless of the status of the account between the covered employer and covered employee at the close of the pay period.

3403.7 The following amounts shall not be reported as wages:

- (a) Any definite allowance which represents no profit to the covered employee but is used by the covered employee to meet expenses of the covered employer's business.

(For example -- an allowance for automobile, oil, and gas to a salesman required to work in his or her own car over an extended territory; all transit flash passes or tokens; telephone in an employee's residence for the employer's convenience; and entertainment money expended on the employer's customers);

- (b) Where a covered employer requires a covered employee to wear a special uniform and the covered employer launders or pays for the laundering of the uniform, the amount paid for laundering;
- (c) Discounts allowed covered employees upon goods purchased from the covered employers; and
- (d) So-called "supper money," being an allowance for a meal when the covered employee works overtime and is thus required to eat at other than his or her regular boarding or living place.

3403.8 Covered employers shall report all severance payments on the quarterly wage reports.

3404 CONTRIBUTIONS BY COVERED EMPLOYERS TO THE UNIVERSAL PAID LEAVE IMPLEMENTATION FUND

3404.1 A covered employer shall contribute quarterly an amount equal to 0.62% of the total wages of each of its covered employees to the Universal Paid Leave Implementation Fund online or in another format approved by DOES.

- 3404.2 A covered employer who is a self-employed individual who has opted-in to the paid-leave program shall contribute quarterly an amount equal to 0.62% of his or her self-employment income to the Universal Paid Leave Implementation Fund online or in another format approved by DOES.
- 3404.3 A covered employer shall make contributions under subsection 3404.1 even if the covered employer provides additional leave benefits to its employees.
- 3404.4 The contributions payable pursuant to subsection 3404.1 shall become due and be paid by each covered employer to DOES, and shall not be deducted in whole or in part from the wages of individuals in such employer's employ.
- 3404.5 Each covered employer shall, not later than the last day of the month following the close of each calendar quarter, make a report of and pay the contributions which shall have accrued with respect to wages paid during the quarter to DOES.
- 3404.6 DOES may extend the time for filing quarterly reports for all covered employers for a period of not more than thirty (30) calendar days if DOES finds that the purposes of the Act would be defeated by requiring timely filing of the quarterly reports.
- 3404.7 After making the findings specified in subsection 3404.6, DOES shall simultaneously publish notice of the extension of time to file covered employers' quarterly reports through the online portal at least twenty-one (21) days immediately preceding the last day of the month following the close of the calendar quarter.
- 3404.8 Where a covered employee performs services in employment for two (2) or more covered employers during the same period, each covered employer shall make contributions on the basis of each covered employer's payments to the covered employee.
- 3404.9 If the contributions under subsections 3404.1 and 3404.2 are not paid when due, there shall be added thereto interest at the rate of one and a half percent (1 1/2%) per month or fraction thereof from the date they become due until paid. Interest shall not run against a court-appointed fiduciary when the contributions are not paid timely because of a court order.
- 3404.10 If contributions under subsections 3404.1 and 3404.2 are not paid or wage reports are not filed on or before the first day of the second month following the close of the calendar quarters for which they are due, there shall be added a penalty of ten percent (10%) of the amount due. The penalty shall not be less than one hundred dollars (\$100), and DOES may waive the penalty for good cause.
- 3404.11 If a self-employed individual does not make a timely payment required by this chapter, DOES shall inform the self-employed individual of the payment due by

electronic notice via the online portal and to the self-employed individual's last known email address. If the payment due is not received by DOES within ten (10) calendar days after the receipt of the notice in the online portal, DOES shall disenroll the individual and the individual shall not be eligible for paid-leave benefits under this chapter. An individual who has been disenrolled may, after payment of all amounts due, opt-in to the paid-leave program during an open enrollment period.

3405 COLLECTION PROCEDURES

- 3405.1 At any time after a covered employer fails to file reports or pay contributions required by the Act, DOES shall inform the covered employer of such failing by electronic notice via the online portal and to the covered employer's last known email address. Such notice shall be on forms of general applicability and shall include information regarding the quarters for which reports were not filed and the amount of contributions, interest, and penalties owed. Such notice shall demand filing of unfiled reports and payment of all sums owed within ten (10) calendar days from the date of receipt of the notice in the online portal.
- 3405.2 If the covered employer fails to respond to the notice by filing reports and paying contributions, interest, and penalties, DOES may file liens, bring civil actions, or otherwise take any lawful action to compel the filing of reports and the payment of contributions, interest, and penalties.
- 3405.3 In cases where DOES determines that collection by levy, distraint, or other extraordinary process may be necessary, a Notice of Delinquency shall be served in person by the Director's designee or by registered mail, return receipt requested, at the employer's last known address. In the case of a Notice served by mail which is refused or otherwise not deliverable, the Director shall serve a second Notice of Delinquency by first class mail, postage prepaid, at the employer's last known address. Such Notice of Delinquency shall be in addition to the general notice set forth in subsection 3405.1.
- 3405.4 The Notice of Delinquency shall contain the following:
- (a) A statement of the amount due for contributions plus interest and penalties;
 - (b) A demand for payment of the amount due;
 - (c) A statement that the covered employer has ten (10) calendar days from the date of the receipt of the notice to respond to DOES as provided in this subsection; and

- (d) A statement that at the end of the ten (10) calendar day period, the Director may attempt to collect the amount due by any means authorized by the Act and without further demand or notice to the employer.

3405.5 Within ten (10) calendar days after receipt of the Notice of Delinquency, the covered employer shall pay in full the amount due for contributions plus interest and penalties unless the covered employer agrees to a payment schedule, approved by DOES, by which the covered employer will pay the amount due, together with interest and penalties, in regular installments.

3405.6 The ten (10) calendar day period during which a covered employer must respond to a Notice of Delinquency shall be determined as follows:

- (a) The period shall begin to run on the day after the receipt of the notice in person or by registered mail;
- (b) Saturdays, Sundays, and legal holidays shall be counted except that if the last day for responding to a notice falls on a Saturday, Sunday, or legal holiday, the time period shall end on the next day which is not a Saturday, Sunday, or legal holiday; and
- (c) Responses which are mailed shall be deemed timely if postmarked before the expiration of the ten (10) day period.

3405.7 The Director may authorize a covered employer to pay delinquent amounts by regular monthly installments of such duration as will liquidate the delinquency in the shortest amount of time deemed reasonable by DOES. In determining whether to enter into an installment agreement, DOES shall consider:

- (a) The amounts owed and age of the debt;
- (b) The covered employer's past history of payment and compliance with any prior installment payment plans;
- (c) The covered employer's financial condition and, particularly, the prospects that the covered employer will be able to fulfill its obligations under the installment plan; and
- (d) Any other factors which may be brought to DOES' attention which might impact upon the covered employer's ability to meet its installment obligations.

3405.8 In any installment payment agreement, the covered employer shall acknowledge that default in any installment payment or in any future filing of required reports or payment of contributions voids the agreement and the Director may institute

any collection procedure permitted by the Act without further notice or demand to the covered employer.

- 3405.9 DOES may renegotiate an installment payment schedule if DOES determines that changed circumstances of the covered employer warrant changes to the plan. However, renegotiation of an installment schedule may not extend the time period beyond twenty-four (24) months from the conclusion date of the original agreement.
- 3405.10 If a covered employer fails to respond to DOES' Notice of Delinquency and demand for payment of delinquent contributions, interest, and penalties, or if a covered employer fails to make a scheduled installment payment, DOES, without further notice or demand to the covered employer, may attempt to collect the overdue payments by any method authorized by the Act.
- 3405.11 DOES may levy a covered employer's bank account(s) by serving a Notice of Levy on the appropriate officer of the bank.
- 3405.12 DOES may levy a covered employer's contract(s) with any agency of the Government of the District of Columbia by serving a Notice of Levy on the official of said agency authorized to accept said Notice.
- 3405.13 DOES may levy upon property belonging to a covered employer by serving a Notice of Levy on the custodian of said property. Failure of the custodian to honor the levy shall result in the custodian's liability for the delinquent contributions, interest, and penalties.
- 3405.14 DOES shall cause the examination of any property seized pursuant to subsection 3405.13 to determine its condition, and shall keep records of condition, storage location, and any other actions necessary to maintain the property prior to sale.
- 3405.15 A covered employer whose property has been seized pursuant to subsection 3405.13 may redeem the property prior to the time it is sold by paying DOES the full amount of delinquent contributions, interest, and penalties owed and any costs incurred by DOES in seizing and storing the property.
- 3405.16 No earlier than ten (10) calendar days following seizure of property pursuant to subsection 3405.13, DOES shall commence the process to sell the property. If DOES determines that adjournment of the sale will best serve the interest of the Universal Paid Leave Implementation Fund, DOES shall have the power to adjourn the sale until such time as DOES determines that the best interest of the Universal Paid Leave Implementation Fund would be served by continuation of the sale of the property.
- 3405.17 (a) The proceeds of any sale of property under subsection 3405.16 shall be allocated to the balance due to DOES as follows:

- (1) Costs of the sale, including costs of seizing, storing, advertising, and auctioneer fees;
 - (2) Delinquent penalties, interest, and contributions in that order.
- (b) Any excess funds remaining after paragraph (a) of this subsection has been complied with shall be forwarded to the covered employer from whom the property was seized.

3405.18 DOES shall issue a Certificate of Sale to the purchaser of property at the sale and shall prepare ownership documents for property conveyed by sales made pursuant to subsection 3405.16. All property shall be sold "as is" and "where is" without any guarantee or warranty express or implied. DOES shall sell only the right, title, and interest of the delinquent covered employer in the property, and the covered employer's interest will be offered subject to any prior outstanding mortgages, encumbrances, or other liens.

3406 ONLINE PORTAL

3406.1 All DOES communications with covered employers pursuant to this chapter shall occur through the online portal or through another format approved by DOES.

3406.2 All covered employers, shall be responsible for maintaining current contact information in the online portal or through another format approved by DOES.

3406.3 All covered employers will receive notifications related to any required actions and the status of claims for paid leave through the online portal or through another format approved by DOES.

3406.4 All covered employers shall be responsible for responding to any requests for additional information through the online portal or through another format approved by DOES.

3407 EMPLOYER RESPONSIBILITIES

3407.1 Each covered employer shall post and maintain a paid leave program notice promulgated by DOES, in a conspicuous place at each worksite that is accessible by its employees.

3407.2 Each covered employer shall also provide the paid leave program notice to employees at the following times:

- (a) To an individual employee, at the time of the employee's hiring;
- (b) Annually to all employees; and

- (c) To an individual employee, at the time the covered employer is aware that paid leave is needed.

3407.3 A covered employer who violates this notice requirement shall be assessed a civil penalty not to exceed one hundred dollars (\$100) for each covered employee to whom individual notice was not delivered and one hundred dollars (\$100) for each day that the covered employer fails to post the notice in a conspicuous place at each worksite.

3408 RECORD KEEPING

3408.1 For a period of not less than three (3) years, all covered employers shall develop, maintain, and make available to DOES records regarding the employer's activities related to the Act, including paystubs, personal checks, cash receipts, or bank deposits; work schedules; communications between employer and employee; any circumstantial evidence regarding the employee's eligibility; and any other record as requested by DOES; provided, that the payroll records contain the following information:

- (a) Name and social security number, or individual taxpayer identification number in lieu of a social security number, of each employee;
- (b) Beginning and ending dates of each pay period;
- (c) Wages paid for each pay period, including the value of non-monetary remuneration; and
- (d) Dates of employment.

3499 DEFINITIONS – As used in this chapter –

“**Act**” – means 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.*).

“**Covered employee**” – means an employee of a covered employer:

- (a) Who spends more than fifty percent (50%) of his or her work time for that employer working in the District of Columbia; or
- (b) Whose employment for the covered employer is based in the District of Columbia and who regularly spends a substantial amount of his or her work time for that covered employer in the District of Columbia and not more than fifty percent (50%) of his or her work time for that covered employer in another jurisdiction.

“Covered employer” – means:

- (a) 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 is required to pay unemployment insurance on behalf of its employees by section 3 of the District of Columbia Unemployment Compensation Act, approved August 28, 1935 (49 Stat. 947; D.C. Official Code § 51-103); provided, that the term “covered employer” shall not include the United States, the District of Columbia, or any employer that the District of Columbia is not authorized to tax under federal law or treaty; or
- (b) A self-employed individual who has opted into the paid-leave program established pursuant to this chapter.

“Director” – means the director of DOES.

“DOES” – means the Department of Employment Services.

“Eligible individual” – means a person whose claim for paid-leave benefits is not based on employment for the United States, the District of Columbia, or an employer that the District of Columbia is not authorized to tax under federal law or treaty, who meets the requirements of the Act and this chapter and:

- (a) Has been a covered employee during some or all of the fifty-two (52) calendar weeks immediately preceding the qualifying event for which paid leave is being taken; or
- (b) Is a self-employed individual who has:
 - (1) Opted into the paid-leave program established pursuant to this chapter; and
 - (2) 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.

“Employment”:

- (a) Means any localized services performed in the District of Columbia for a covered employer; and

- (a) Includes personal or domestic service in a private home, local college club, or a college fraternity or sorority for an employer who paid cash remuneration of five hundred dollars (\$500) or more in any calendar quarter.

“Online portal” – means the user-friendly system for the submission and management of forms and documents necessary to administer the paid-leave program.

“Paid-leave benefits” – means the monetary benefits provided pursuant to this chapter.

“Personal or domestic service” – includes all persons employed by an employer in the employer’s capacity as a householder, as distinguished from a person employed by the employer in the pursuit of a trade, occupation, profession, enterprise, or vocation.

“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.

“Self-employed individual” – means an individual who carries on a trade or business as a sole proprietor, an independent contractor, or a member of a partnership. The individual shall have been registered with the Office of Tax and Revenue, been issued a business license by the District of Columbia Department of Consumer and Regulatory Affairs, or been otherwise licensed (e.g. occupational and professional licenses).

“Universal Paid Leave Implementation Fund” means the Universal Paid Leave Implementation Fund established by section 1152 of the Universal Paid Leave Implementation Fund Act of 2016, effective October 8, 2016 (D.C. Law 21-160; 63 DCR 10775).

“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.

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, Washington, DC, 20019, or via email to does.opfl@dc.gov. Additional copies of these proposed rules are available at the above address.