DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF PROPOSED RULEMAKING


The rulemaking is necessary to implement the provisions of the Act, which requires employers in the District of Columbia to provide paid leave to employees for illness and for absences associated with domestic violence and sexual abuse.

Final rulemaking action to adopt these rules shall be taken not less than thirty (30) days after the publication of this Notice in the D.C. Register and approval of the proposed rules by the Council of the District of Columbia pursuant to section 14 of the Act (D.C. Official Code §§ 32-131.13).

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

PURPOSE AND SCOPE

The purpose of this Chapter is to establish standards and procedures for the implementation of the Sick and Safe Leave Act of 2008 ("Act").

Unless otherwise required by law, all matters concerning the implementation and enforcement of the Act shall be determined in accordance with these regulations.

PROVISION OF PAID LEAVE; AMOUNT OF PAID LEAVE REQUIRED

An employee shall begin to accrue paid leave pursuant to the Act and this Chapter on his or her date of hire; provided, accrual shall not begin before November 13, 2008.

An employer employing one hundred (100) or more eligible 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.

An employer employing from twenty-five (25) to ninety-nine (99) eligible 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.

An employer employing twenty-four (24) or fewer eligible 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.

The number of eligible employees employed by an employer in the District of Columbia shall be computed each calendar month and shall be equal to the number of full-time equivalent employees the employer employed in the District of Columbia at the beginning of the month.

The employment location of an eligible employee shall be determined in accordance with the definition of the term "employee".

EXCEPTIONS TO CALCULATION OR PROVISION OF PAID LEAVE

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.

A person 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 eligible 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 eligible 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.
ACCESSING PAID LEAVE

3204.1 Only an eligible employee may access paid leave.

3204.2 An eligible employee may access paid leave beginning on the date on which the employee becomes an eligible employee or ninety (90) days after the start of the employee’s employment with the employer, whichever is later; provided, an employee shall not access paid leave earlier than February 11, 2009.

3204.3 An employee who is discharged after completion of a ninety (90) day probationary period and who is rehired within one (1) year after the date of discharge may access accrued paid leave immediately upon rehire if the employee is an eligible employee on the date of rehire. The rehired employee’s accrual of paid leave shall begin upon the date of rehire and paid leave accrued during the prior period of employment shall not carry over.

LIMITATIONS ON USE OF PAID LEAVE

3205.1 An eligible employee shall not use in any calendar year more paid leave 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 eligible employee 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.

REQUIRED NOTICE TO EMPLOYERS

3206.1 An eligible employee shall provide at least thirty (30) 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 thirty (30) days before the date on which the paid leave is to be used.

3206.2 If the eligible employee becomes aware of the need to use paid leave less than thirty (30) days before the date on which the paid leave is to be used, the eligible employee shall provide written notice to the employer of the need to use the paid leave on the day that the eligible employee becomes aware of the need to use the paid leave or, if such day is not a business day of the employer, on the earliest following business day.

3206.3 If an eligible employee becomes aware of the need to use paid leave after the eligible employee’s work shift that immediately precedes the work shift for which the paid leave will be used, the eligible employee may orally request the use of paid leave and shall make such a request before the start of the work shift for which the paid leave is
requested. If an emergency prevents an eligible employee from notifying the employer of the need to use paid leave before the start of the work shift, the eligible employee shall notify the employer within twenty-four (24) hours after the onset of the emergency.

3206.4 An eligible 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 eligible 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. A form shall require only the eligible employee’s name, employee identification number (if any), information needed to designate the type of paid leave and the reason for taking the paid leave, and the date and time of the paid leave. The form shall not be used as a substitute for medical certification unless such use is accepted by the employer.

3207.2 If the employer prescribes a form but the form is not reasonably available to the eligible employee, the employee may provide written notice to the employer by setting forth in writing the information required by the employer on such form.

3207.3 If the employer has not prescribed a form, the eligible employee may provide written notice to the employer by providing to the employer in writing the employee’s name, employment identification number (if any), type of paid leave to be taken, reason for taking the paid leave, and date and time of paid leave to be taken.

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 eligible 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 eligible employee or the eligible employee’s family member;

(b) A police report indicating that the eligible employee or the eligible employee’s family member was the victim of stalking, domestic violence, or sexual abuse;

(c) A court order indicating that the eligible employee or eligible employee’s family member was the victim of stalking, domestic violence, or sexual abuse; or
A signed written statement from a victim and witness advocate or a domestic violence counselor affirming that the eligible employee is involved in legal action or proceedings related to stalking, domestic violence, or sexual abuse.

If the employer requires a certification, the certification may be provided by the eligible employee upon the employee’s return to work.

RELEASE OF INFORMATION


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 eligible employee;

(b) Ordered by a court or administrative agency;

(c) Otherwise required by federal or local law.

CARRYOVER OF PAID LEAVE

Unused paid leave in one calendar year shall carry over to the next calendar year.

PAYOUT OF PAID LEAVE

Paid leave shall not be reimbursed upon the discharge or resignation of an eligible employee.

EFFECT ON CURRENT COMPENSATED LEAVE POLICIES

An employer that has a compensated leave policy (for example, paid time off or universal leave) that is at least equivalent to the paid leave provided by the Act shall not be required to change that policy.

An existing compensated leave policy shall be presumed to be equivalent to the 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; and
(b) Use the compensated leave for the same purposes as those set forth in § 3203.

3213 POSTING REQUIREMENTS AND PENALTIES

3213.1 An employer shall post and maintain in a conspicuous place a notice setting forth excerpts or summaries of the provisions of the Act and 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 prescribes the notice under section 10 of the Act and provides the notice 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 compensated leave rights to employees which are greater than those established by the Act.

3214.2 An existing collective bargaining agreement that provides at least three (3) compensated leave days by its written terms shall be deemed to comply with the Act for the duration of such existing agreement.

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 or sanctions the improper use of paid leave or that requires more frequent certifications from an employee if there is evidence of a pattern of abuse of paid leave. A pattern of abuse may be evidenced by the following:

(a) Consistent taking of paid leave without advance notice when there is no emergency requiring it;

(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; and

(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 manner prescribed by the Director. Complaints shall be filed within sixty (60) days after the event on which the complaint is based.

3216.2 The Director shall review all complaints and shall investigate those complaints which the Director determines require investigation.

3216.3 In the course of investigating and 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.

3216.4 Following an investigation, the Director shall issue a decision concerning the complaint. Copies of the decision shall be served on each party.

3216.5 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.).

3216.6 Complaints shall be investigated and resolved in an expeditious manner consistent with the nature of the complaint.

3217 PENALTIES

Except as provided in § 3213.3, an employer who willfully violates the requirements of the Act shall be subject to 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.

3218 HARDSHIP EXEMPTION

3218.1 An employer may apply to the Associate Director of the Office of Labor Standards of the Department of Employment Services for an exemption from the provisions of the Act, pursuant to section 15 of the Act (D.C. Official Code § 32-131.14).

3218.2 The application shall be in writing and shall include a narrative fully explaining the basis for the request and shall be accompanied by supporting documentation sufficient to demonstrate that hardship has been or will be created by complying with the Act.

3218.3 Hardship means a negative impact caused or to be caused by the Act that:

(a) Threatens or will threaten the financial viability of the employer;

(b) Jeopardizes the ability of the employer to sustain operations;

(c) Significantly degrades the quality of the employer’s operations; or

(d) Creates a significant negative financial impact on the revenues or income of the employer.

3218.4 After receipt of an application, the Associate Director may request additional information from the employer and designate a date by which such information shall be provided.
3218.5 If the employer establishes that the Act has caused or will cause hardship, the Associate Director shall approve the application, exempt the employer from application of the Act, and establish the time period during which the exemption shall apply.

3218.6 The time period during which the exemption applies shall be consistent with the time period during which the hardship is likely to exist; provided, if the time period is greater than one (1) year, the employer may be required to reapply for the exemption after one (1) year.

3218.7 The Associate Director shall issue a written decision within twenty-one (21) days after receiving a complete application, including any additional information requested pursuant to § 3218.4. The written decision shall fully explain the reasons for approving or rejecting the application and for establishing the specific time period during which the exemption shall apply.

3218.8 The employer may appeal the decision of the Associate Director to the Director within ten (10) days after issuance of the decision. An appeal shall be in writing and shall provide a clear explanation of the basis for the appeal.

3218.9 The Director shall issue a decision on the appeal within thirty (30) days after receiving the appeal.

3299 DEFINITIONS

When used in this Chapter, the term:


Compensated leave – accrued increments of leave, for which the employee is paid at the same rate as if the employee were working, provided by an employer for use by an employee during an absence of work

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

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

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

Domestic violence – an intra-family offense as defined in D.C. Official Code § 16-1001(5).

Eligible employee – an employee 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 has worked at least one thousand (1,000) hours of service with such employer during the previous 12-month period.

**Employee** – an individual employed by an employer who 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 time of his or her work time in the District of Columbia working for the employer and does not spend more than fifty percent (50%) of his or her work time working for the employer in any particular state; provided, that 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** – a legal entity (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** — (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.

**Family member** —

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
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** – accrued increments of compensated leave provided by an employer for use by an employee during an absence from work for any of the reasons specified in section 3(b) of the Act.

**Premium pay program** – 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** – includes waiters, waitresses, counter personnel who serve customers, bus persons, server helpers, service bartenders, and barbacks.


**Student** – 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.

All persons wishing to comment on these proposed rules shall submit written comments no later than thirty (30) days after the publication of this notice in the *D.C. Register* to Eugene Irvin, General Counsel, Department of Employment Services, 64 New York Avenue, N.E., 3rd Floor, Washington, D.C. 20002. Copies of the proposed ruled may be obtained from the same address between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, excluding holidays.