

LAW & POLICY GROUP

GRIST

EMPLOYERS NEED TO PREPARE NOW FOR WASHINGTON, DC'S UNIVERSAL PAID LEAVE

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In This Article

[Preparing for Universal Paid Leave](#) | [Step 1: Determine If Law Applies](#) | [Step 2: Get Ready for Quarterly Contributions and Filings](#) | [Step 3: Prepare for Notice and Recordkeeping Requirements](#) | [Step 4: Assess How New Law Coordinates With Other Leave](#) | [Step 5: Prepare for Benefits To Begin in 2020](#) | [Step 6: Update Policies and Train Staff on Leave Rights](#) | [Step 7: Monitor Compliance To Avoid Enforcement Action](#) | [Employers Need To Act Now](#) | [Related Resources](#)

Washington, DC, is moving forward with its paid family, parental and medical leave law by finalizing regulations that set out contribution and reporting requirements for employers. The Universal Paid Leave (UPL) Amendment Act of 2016 creates a city-run leave program (DC Code § [32-541.01](#) et seq.) with partial wage replacement funded through an employer payroll tax for district-based workers (DC Code § [32-551.01](#)) Covered employers must [file](#) a wage report and make their first contribution of the new payroll tax in July 2019 for wages paid between April 1 and June 30, 2019. Eligible employees can start receiving benefits under the program beginning July 1, 2020. This GRIST discusses key provisions of the paid leave law, including [final contribution regulations](#), [proposed benefit regulations](#) and steps employers should take to comply with the law.

PREPARING FOR UNIVERSAL PAID LEAVE

The city's Department of Employment Services (DOES) has an [Office of Paid Family Leave](#) (OPFL) that implements the new law. The OPFL has been conducting webinars and in person sessions to prepare employers for compliance. It has a [website](#) with legal and practical resources, including:

- An employer [toolkit](#)
- Employer [FAQs](#)
- A [chart](#) with sample benefit amounts

- Another [chart](#) comparing the federal Family and Medical Leave Act (FMLA), the DC UPL law, and the DC FMLA
- A benefit [calculator](#)
- A notice in [English](#) and [Spanish](#) explaining the UPL law

Employers should plan actions needed to comply with the new law, including the following steps:

1. Determine whether the law applies to any employees.
2. Get ready for quarterly tax payment and wage reporting beginning July 1.
3. Prepare for notice and recordkeeping obligations.
4. Assess how the UPL law coordinates with existing paid leave benefits.
5. Prepare for UPL benefits to begin in 2020
6. Update policies and train staff on leave rights.
7. Monitor compliance to avoid enforcement action.

STEP 1: DETERMINE IF LAW APPLIES

The UPL law generally covers all employers subject to the city's unemployment compensation law. According to final [contribution regulations](#), if an employer pays the city's unemployment insurance (UI) taxes for at least one employee in the quarter, the employer is covered by the UPL law. Any employee for whom an employer pays UI taxes to the city likewise is "presumed to be" covered by the leave law ([FAQ 3](#)). Covered employers will pay the UPL payroll tax based on their covered employees' wages and handle any UPL program inquiries about employees who become entitled to benefits.

Covered Employers

A covered employer is (i) an individual, partnership, general contractor, subcontractor, association, corporation or business trust that (ii) employs or exercises control over the wages, hours or working conditions of an employee and (iii) is covered by the city's unemployment compensation law. Covered employers include those with indirect control over a worker's wages, hours or working conditions, such as personnel provided through temporary service or staffing agencies. Employers of all sizes are covered, regardless of the number of individuals employed.

Charitable organizations meeting the [requirements](#) of Internal Revenue Code § 501(c)(3) are not subject to the city's unemployment compensation law but are subject to the UPL law and must make quarterly contributions for employees based in the city. Self-employed individuals can opt into the program.

Excluded employers include the federal and DC governments and any employer not subject to city tax.

Covered Employees

The UPL law covers all part- or full-time employees working for a covered employer if they spend more than 50% of that work time in the city. The law also applies to employees who work for a covered employer inside and outside of city limits as long as they don't spend more than 50% (i.e., a majority) of their work time in another jurisdiction.

Employees who have jobs based in the city but spend more than 50% of their work time *in more than one jurisdiction* (rather than a single jurisdiction) outside of the city may be considered covered individuals, but confirmation from DOES would be helpful (see the [employer toolkit](#), p. 23). An example in the employer toolkit also indicates that telecommuters who spend the majority of their worktime in a home office outside of the city (Maryland in the example) might be covered by the UPL law. Confirmation from DOES would be helpful as final and proposed UPL regulations do not address telecommuters.

In general, if an employee is covered by another jurisdiction's unemployment insurance law, the employee is not covered by the UPL law.

Leave eligibility. The draft [benefit regulations](#) indicate eligibility for paid family, parental or medical leave extends to anyone who is a covered employee at the time of the UPL application and has worked for a covered employer "for some or all of the 52 calendar weeks" immediately before the qualifying leave event. Neither the law nor the proposed rules specify a minimum threshold of time worked before a covered employee can take leave. The 52-week wage averaging used to determine UPL benefits (discussed [later](#)) may serve as a type of practical threshold, since anyone working for significantly less than 52 weeks won't receive as much in benefits. However, even recent hires would be eligible for some benefit, which is not the case under some states' similar paid leave laws.

STEP 2: GET READY FOR QUARTERLY CONTRIBUTIONS AND FILINGS

Like other states that have implemented family, parental and medical leave laws, the city's paid leave program will be financed through a payroll tax and administered by a government agency. (Examples of other states with paid family and medical leave mandates include [California](#), [Massachusetts](#), [New Jersey](#), [New York](#), [Rhode Island](#) and [Washington](#).)

Unlike many states' funding mechanisms, the city's payroll tax is paid entirely by employers; no tax is paid by employees. Under the [federal law](#) that outlines the DC government's powers (called home rule), the city cannot impose any tax on the personal income of anyone who is not a DC resident (such as a "commuter" tax). This prohibits the city from imposing a payroll tax on a DC employer's workers who live elsewhere, such as residents of neighboring states who commute to work in the city. As a result, the city does not impose the UPL payroll tax on employees.

The UPL law does not provide any opt-out or private/voluntary plan option for covered employers.

Employer Payroll Tax

Employers must contribute 0.62% of the wages of each covered employee to fund the program and may not deduct any part of the contribution from employee wages. Neither the law nor the final contribution

regulation specifies a dollar cap on the contribution. The tax will be collected quarterly based on total gross wages paid to covered employees during the previous quarter. Employers must also submit quarterly wage reports. Employers that currently report and pay UI in the District will use the same [online portal](#) to submit UPL wage reports and tax payments.

Wages

"Wages" for determining the quarterly UPL contribution have the meaning provided in the city's unemployment compensation law. Employers will report the same wages for UI and UPL on the same form (UC-30) and will pay UI and UPL contributions using the same [online portal](#) (the Employer Self-Service Portal or ESSP).

Wages include all remuneration, including commissions, tips, bonuses, gratuities, vacation pay, severance pay, cafeteria plan deductions, deferred compensation and sick pay, unless paid under a third-party plan or system. The value of noncash remuneration like meals and lodging is also included. Wages do not include common benefits (or the employer's cost to provide such benefits) like health insurance, accident and disability insurance, life insurance, or retirement benefits.

Collection Procedures

Employers must start to pay contributions on July 1, 2019. An employer's obligation to make timely UPL contributions is subject to the same procedures, late-payment interest and penalties, and other remedies that apply under UI program. The regulations outline these collection processes:

- **Employer registration.** Quarterly payments and reports will be made online, with a separate account maintained for each covered employer's contributions. Employers with an existing UI account won't need to create a new account for UPL, but will need to make sure that their account information is up-to-date. New employers will have to register for the ESSP online portal.
- **Vendors can access the portal.** Employers can grant third-party administrators (TPAs) and payroll service providers access to the online portal so they can file wage reports and pay contributions on the employer's behalf. For most employers, contacting the vendor that currently handles UI administration should be the first step they take for implementation.
- **Due date.** Quarterly reports and contribution payments are due on the day after the close of each calendar quarter and considered late unless filed by the last day of the month after a quarter has ended. Employers must submit the initial payment on July 1, 2019, but will not face late penalties as long as payment is made by July 31, 2019. The quarterly report is the same used for UI — the UC-30 form. Payment will be made with the PFL-30 form. At its discretion, DOES can extend the deadline for all employers up to 30 days if it deems necessary to achieve the purposes of the UPL law.
- **Interest and penalty for delay.** Employers will owe 1.5% interest per month on any late contributions. An additional penalty equal to 10% of the amount due or \$100 — whichever is greater — will apply if contributions or wage reports are not filed by the first day of the second month after the close of the calendar quarter for which they are due.

- **Notice of failure to file/pay.** The city will provide notice via the online portal, email and postal mail when an employer fails to file a report or pay contributions. Employers will have 30 calendar days from the date of the notice to submit the payment and/or report or to file an administrative appeal. Failure to respond to the notice will cause the city to undertake enforcement by filing a lien, bringing a civil action or pursuing other legal remedies.
- **Notice of delinquency.** If the city seeks to collect overdue contributions through a levy or similar means, the employer will receive a notice of delinquency. The employer will have 10 business days from the date of the notice to respond and pay the owed amount in full (contributions, interest and penalties). Alternatively, within the same 10-day business period, an employer can agree to a payment schedule (regular monthly installments) meeting specified criteria and approved by DOES.
- **Collection methods.** If an employer does not respond to the notice of delinquency, the city can attempt to collect owed contributions — without further notice or demand to the employer — using any lawful methods. Examples include a levy on an employer's bank account or the seizure and sale of an employer's property.

STEP 3: PREPARE FOR NOTICE AND RECORDKEEPING REQUIREMENTS

Notice requirements will apply to both employers and employees, while employers will have recordkeeping duties as well.

Employer Notice to Employee

According to the UPL employer toolkit, employers must comply with notice requirements no earlier than Jan. 1, 2020. The DOES will create a notice describing employee rights, including job protections, under the UPL law. Covered employers must post and maintain a notice about the paid leave program in a conspicuous place accessible to employees at each worksite. Copies of the notice can be sent to remote covered employees for posting at their worksites. Employers must also provide a notice to each employee:

- Within 30 days of hire
- On annual basis
- On learning of the employee's need for UPL

Employers can comply with these three notice obligations by sending the notice via email or similar electronic delivery. However, employers using electronic distribution must retain email receipts or signed statements from covered employees acknowledging delivery.

Covered employers face a \$100 per day fine for failure to post the worksite notice and a \$100 fine for each failure to supply individual notices.

Employee Notice to Employer

Draft [benefit regulations](#) require an employee who needs to take UPL to provide notice to the employer. The notice must give the expected start and end dates of the leave and indicate whether the leave will be taken continuously or intermittently.

Whenever possible, the employee must provide this notice in writing at least 10 days before the paid leave begins. When the need for leave is unforeseeable, employees must give written or oral notice before the start of the first work shift missed for UPL reasons. In an emergency, the employee or someone acting on the employee's behalf must notify the employer — orally or in writing — within 48 hours of the emergency.

Failure to satisfy these notice requirements, however, will not disqualify an otherwise eligible employee from receiving UPL benefits.

Employer Recordkeeping

The UPL law and final [contribution regulations](#) list the types of records employers will have to develop and maintain. These records must be kept confidential. Employers must keep for at least three years payroll records that include the following information:

- Employee's name and Social Security number
- Start and end dates of each pay period
- Wages paid for each pay period, including the value of nonmonetary compensation
- Method of payment
- Earnings of the employee
- Dates when wages were paid
- Dates of parental, medical and family leave taken by employees
- Copies of employee notices of leave furnished to the employer
- Copies of all legally required written UPL notices given to employees
- Documents describing employee benefits, including long- and short-term disability policies, sick leave, vacation leave, and other employer paid and unpaid leave policies and practices
- Records of UPL disputes between the employer and the employee

The first six recordkeeping requirements are also required by the city's UI regulations. The last five requirements are new for employers covered by the UPL law and will likely require new policies and

procedures to comply. In particular, employers will need a system to keep all written UPL notices received from employees and records of disputes with employees about the UPL law.

STEP 4: ASSESS HOW NEW LAW COORDINATES WITH OTHER LEAVE

According to the UPL law and proposed [benefit regulations](#), employers can maintain more generous leave policies than the law requires, but even covered employers voluntarily providing paid leave benefits must comply with the UPL mandate. An individual's right to UPL benefits can't be diminished through an employer policy or a contract or collective bargaining agreement entered or renewed after Dec. 31, 2017.

A key implementation issue concerns how to coordinate an employer's existing leave program with the new UPL requirements, unpaid FMLA leave under the federal and city laws, unpaid leave under the city's Parental Leave Act of 1994, and paid leave under the city's Accrued Sick and Safe Leave Act of 2008 (ASSLA). The city has prepared a [chart](#) comparing the UPL law to the federal FMLA, the DC FMLA, and the DC ASSLA.

Concurrent Leave

If UPL also qualifies as federal or DC FMLA leave, an employer can require the paid leave to run concurrently with — not in addition to — unpaid FMLA leave. In some cases, however, the UPL law is broader than the federal or DC FMLA. For instance, paid family leave under the UPL law applies to more types of family members and covers employees with an employer for less time than the unpaid FMLA laws allow. On the other hand, the maximum duration of UPL benefits might be shorter than the maximum weeks of unpaid leave allowed by other laws.

DC Paid Sick Leave

Neither the UPL law nor the proposed regulations address how or whether this leave interacts with paid sick leave under the city's ASSLA. That law requires employers with at least 100 employees to provide one hour of paid sick leave for every 37 hours worked, capped at seven days a year. The UPL employer toolkit says that the city's paid sick leave law covers short-term illnesses and routine medical care for employees and their families, while UPL can be used for serious health conditions affecting workers and their families (as well as to bond with new children). The interaction of these two laws may be fleshed out further in final benefit regulations.

Disability Benefits

Individuals already receiving long-term disability (LTD) or unemployment benefits are ineligible for UPL benefits. Under the proposed benefits regulation, however, employees receiving short-term disability (STD) benefits remain eligible to receive UPL benefits. If this provision is finalized, an employee might be able to get both STD and UPL benefits for the same serious medical condition. These combined benefits might exceed the employee's salary for some period of time.

The city's UPL regulators have encouraged employers to consult with their STD plan administrators to discuss benefit coordination. Employers that voluntarily provide paid STD leave may want to adjust those benefits so combined weekly STD and UPL payments don't exceed an employee's current weekly wage.

Additional Paid Leave

A covered employer can provide leave benefits in addition to the UPL benefits available to covered employees, but still must pay the UPL payroll tax. A covered employer cannot opt out of the city's program.

STEP 5: PREPARE FOR BENEFITS TO BEGIN IN 2020

Proposed regulations set out the benefit periods, weekly benefit calculations, and standards for eligibility and claims processing. Benefits won't become available until July 1, 2020, and the [proposed regulations](#) published in April 2018 are subject to change. Final regulations are expected sometime this year. In the meantime, employers should think about updating employee leave policies and preparing for other administrative tasks that will begin once the benefit program starts operating in 2020. Below are the basic features of the benefits program as described in the UPL law and the proposed benefit regulation.

Three Types of Paid Leave

The UPL law provides for three types of paid leave, each with a maximum duration for partial wage replacement:

- **Family leave** benefits cannot exceed **six workweeks** within a 52-week period (regardless of calendar year). Employees can take paid family leave to provide care or companionship to a family member who has a serious health condition. Family members include a covered employee's spouse or domestic partner; the employee's (or the spouse/domestic partner's) biological, step-, foster or adopted children or parents; the employee's grandparent or siblings; and others.
- **Parental leave** benefits can last up to **eight workweeks** within a 52-week period (regardless of calendar year). An eligible employee may take this leave within one year of having a child born, placed for adoption or legally made the employee's parental responsibility.
- **Medical leave** for the employee's own serious health condition cannot exceed **two workweeks** within a 52-week period (regardless of calendar year).

Waiting period. A covered employee must wait one week after a qualifying leave begins before the city will pay any wage-replacement benefits. Regardless of the number of qualifying leave events, a covered employee only has to satisfy the waiting period once within a 52-week period.

Maximum leave duration and intermittent leave. An employee can't receive more than eight workweeks of paid UPL leave during a 52-workweek period, regardless of the number or types of qualifying events during that period. Employees can take intermittent paid leave in increments no shorter than one day.

Serious health condition. A "serious health condition" qualifying for UPL is a physical or mental illness, injury, or impairment that requires inpatient care or continuing treatment or supervision by a healthcare provider or other competent individual. Absences for routine physical, eye or dental exams or cosmetic treatments do not qualify. Procedures related to gender transition or restorative surgery aren't considered cosmetic for this purpose. The law and proposed regulations provide more detail about what constitutes "continuing treatment" and "inpatient care" as well as other terms relevant to a "serious health condition."

Amount of Wage Replacement

UPL benefits will be based on the covered employee's average weekly wage (AWW). The law defines the AWW as the total wages earned from a covered employer during the base period, divided by 52. The base period is the four quarters with the highest wages out of the five quarters immediately preceding the qualifying event.

Maximum weekly and part-week benefits. UPL benefits will be capped at \$1,000 per week, adjusted annually starting Oct. 1, 2021, by the DC-area Consumer Price Index. Family, parental and medical leave benefits for partial weeks will be prorated.

Benefit calculation. The benefit calculation depends on whether an individual's AWW is more or less than a specific base level: 150% of the city's minimum wage for a 40-hour workweek. Since the city's [minimum wage](#) will be \$15 per hour when UPL benefits start in July 2020, the initial UPL wage base will be \$900 per week.

Covered employees earning less than or equal to that wage base will receive 90% of their AWW during paid leave. Employees with higher AWWs will receive 90% of the UPL wage base (\$810 per week in 2020), plus 50% of their wages exceeding the wage base. The following table and example illustrate these benefit formulas:

EMPLOYEE'S AWW RELATIVE TO UPL WAGE BASE *	WEEKLY BENEFIT CALCULATION
AWW ≤ UPL wage base	0.9 x employee's AWW
AWW > UPL wage base	0.9 x UPL wage base + 0.5 x (employee's AWW – UPL wage base)
* UPL wage base = 1.5 x (DC minimum wage x 40)	

Example. Sharon's AWW from her DC employer is \$1,000 as of October 2020, when the city's minimum wage is \$15 per hour. In December 2020, Sharon takes three weeks off to care for her mother, who has a serious health condition. Sharon applies and qualifies for a weekly UPL benefit of \$860 after the one-week waiting period, calculated as 90% of her AWW up to the UPL base (0.9 x \$900 = \$810) plus 50% of her AWW over that base (0.5 x (\$1,000 – \$900) = \$50).

The [OPFL website](#) offers an online calculator and a [chart](#) with sample benefit amounts. However, these tools appear to reflect the current minimum wage, not the minimum wage that will be in effect in July 2020.

Benefit payments. UPL benefits will be paid biweekly by DOES directly to employees on leave. Covered employers will not have to collect or track any taxes that individuals may owe on these payments.

Process To Receive Paid Leave Benefits

The UPL law and proposed benefit regulations provide some details on how the city will process claims and pay benefits:

- **Online portal.** Individuals will submit claims for paid leave through an online portal or other format. At a minimum, employers will probably have to use the portal when responding to any requests for required information.
- **Claim for benefits.** An individual submitting a claim will need to specify the number of weeks of paid leave requested and supply certain supporting records, such as medical documentation of their own or a family member's serious health condition, and proof of relationship for a family or parental leave request.
- **Proof of employment.** Within three business days of a claim filing, the UPL claim examiner will request the employer to supply proof of the applicant's employment and, if necessary, contact the applicant for any additional information required. The employer must respond within two business days. While applicants have no deadline to respond, claim processing will be suspended in the meantime.
- **Initial determination.** Within 10 days of a claim filing, the DOES will notify the applicant about the initial claim determination. For approved claims, the notice will describe the amount to be paid, the duration of the benefit and the timing of payments. For denied claims, the notice must provide reasons for the denial.
- **Appeal.** Applicants will have 60 days after receiving notice of a denied claim to appeal the initial determination through the city's Office of Administrative Hearings.

STEP 6: UPDATE POLICIES AND TRAIN STAFF ON LEAVE RIGHTS

The UPL law provides largely the same employment protections that exist under the city's FMLA.

Job Protections

Job protections under the UPL law include an employee's right to continue group health plan benefits during the leave and return to the same or an equivalent position after the leave. These protections won't apply if the covered employer has fewer than 20 employees.

Retaliation

The law prohibits anyone from interfering with an individual's exercise of UPL rights. Employers cannot retaliate in any way against individuals who request, apply for or use UPL benefits; file or attempt to file a charge or initiate a proceeding under the UPL law; or oppose a practice made unlawful by the UPL law.

STEP 7: MONITOR COMPLIANCE TO AVOID ENFORCEMENT ACTION

Employers should have a plan in place to monitor compliance with the law, which provides a variety of enforcement remedies.

Administrative Enforcement

Within a year of discovering an alleged violation (other than a claims determination), an individual can file a complaint with the city's Office of Human Rights (OHR). The OHR's existing administrative enforcement process for DC FMLA complaints will apply to alleged UPL violations as well. Employers that violate the law could have to pay the affected employee damages equal to lost wages, salary, employment benefits or other compensation caused by the violation, as well as damages equal to three times that amount.

Civil Action

Individuals can bring a civil action in court against an employer to enforce the law within one year of discovering an alleged violation. Remedies available through a civil lawsuit are the same provided for administrative enforcement.

Civil Penalties for Notice Violation

Covered employers face a penalty of up to \$100 per day for any failure to post the UPL notice in a workplace. Employers risk the same daily penalty for each covered employee not supplied a copy of the notice when required.

Investigative Authority

The city government can investigate and gather data regarding any wages, work hours, working conditions or employment practices related to the UPL law. Enforcement staff can enter any place of employment and inspect any record required by the law. The city can also issue subpoenas to exercise its investigative authority and ensure compliance with the law.

EMPLOYERS NEED TO ACT NOW

Employers have limited time to make their initial contribution and file a wage report in July 2019. The [OPFL website](#) is the best place to start for employer information. Employers currently paying UI for at least one employee in the district should contact their payroll staff or TPAs who administer that program to see if they can simply use the existing UI process to submit UPL contributions and reports. Employers that are covered by the UPL law but don't currently pay UI in the district will need to register and create an account on the [Employer Self-Service Portal](#).

Covered employers should prepare to:

- Pay the 0.62% tax on wages paid from April 1–June 30 on the July 1 due date or by the July 31 deadline to avoid late penalties.
- Satisfy the initial notice and poster requirements in early 2020, if not sooner.
- Develop recordkeeping processes for employee leave requests, disputes and usage.

- Maintain employee benefit documents, including disability policies, and employer paid and unpaid leave policies and practices, including but not limited to sick leave, vacation leave, and parental leave.
- Consider how to coordinate federal FMLA, DC's FMLA and ASSLA, and any employer-provided leave benefits with the UPL benefits. Update employee handbooks and benefit policies accordingly.

RELATED RESOURCES

Non-Mercer Resources

- [DC Paid Family Leave Website](#) (DC DOES)
- [Employer Toolkit: The Paid Family Leave Act](#) (DC DOES)
- [District of Columbia Paid Family Leave](#) (DC DOES)
- [Final UPL Contribution Rules](#) (Mayor's Office, Feb. 28, 2019; approved May 2019)
- [Proposed UPL Benefit Rules](#) (DC Register, April 6, 2018)
- [UPL Law](#) (DC Code § 32-541.01 et seq.)
- [UPL Implementation Fund](#) (DC Code § 32.551.01)
- [Unemployment Insurance Handbook for Employers](#) (DOES, revised Dec. 3, 2018)

Mercer Law & Policy Resources

Links to any resources in the Mercer Select archive are accessible to Mercer consultants. Clients may contact their consultants for free copies:

- [2019 Outlook for State Health and Leave Initiatives](#) (Feb. 6, 2019)
- [2019 State-Mandated Short-Term Disability Contributions and Benefits](#) (Jan. 31, 2019)
- [States Mandating Paid Sick Leave](#) (Jan. 31, 2019)

Other Mercer Resources

- [Think Globally, Comply Locally: How Employers Navigate Leave Laws](#) (Nov. 15, 2018)
- [Life, Absence & Disability](#)

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