

D.C. Council Considers Overhaul of Recently-Enacted Paid Leave Law

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In December 2016, the District of Columbia Council enacted one of the nation's most generous paid family, medical, and parental leave programs, which became law when Mayor Bowser refused to either veto or sign it on February 17, 2017. The paid leave act is now subject to a 30 day congressional review period, but Congress is not expected to take action to overturn it. While the paid leave act is now law, its taxes and benefit payments are not scheduled to begin until 2019 and 2020, respectively. Due to strong opposition from the D.C. business community and concerns about the cost and feasibility of the leave program, however, the D.C. Council is already revisiting the paid leave act and considering alternatives to replace the enrolled paid leave act before it goes into operation.

The first of possibly multiple alternative frameworks was introduced by Councilmembers Mary Cheh and Jack Evans on February 21, 2017, a mere four days after the original leave act was enrolled. While the alternative leave act contains many similarities to the enrolled act – most prominently maintaining the same leave entitlements – it also has some significant differences.

The major change of the Cheh-Evans proposal is that it scraps the enrolled act's "one size fits all" framework, under which all D.C. employees have their leave administered by a city administrative agency, and instead creates three separate tiers of employers with three separate benefit regimes:

- Large employers, defined as those with more than 50 employees or more than \$3,500,000 in annual payroll, must administer a leave program themselves to provide the required 8 weeks of paid parental leave, 6 weeks of paid family leave, and 2 weeks of paid sick leave. Large employers may administer leave benefits through an insurance company or they may self-insure.
- Small employers, defined as those with between 5 and 49 employees and less than \$3,500,000 in annual payroll, will continue to have their employees' leave benefits administered by the city administrative agency.
- Very small employers, defined as those with fewer than 5 employees, will not be subject to any leave benefit regime.

With these changes in administration come changes in the amount of the payroll tax imposed to fund the paid leave benefits. Under the enrolled act, a 0.62% payroll tax is imposed on all D.C. employers regardless of size. Under the Cheh-Evans proposal, the payroll tax is reduced for all employers, with large employers paying a 0.2% payroll tax, small employers paying 0.4%, and very small employers exempted from the tax altogether. For large employers, at least, this "reduction" is bittersweet because such employers would have to pay the payroll tax *and* their employees' leave benefits.

The Cheh-Evans proposal would enact other changes as well. First, the requirement that employees provide their employer with notice of their intent to take leave is no longer toothless. Where under the enrolled act an employee's failure to give notice was not a ground for the denial of benefits, the Cheh-Evans proposal permits denial based on lack of notice unless certain conditions are met. Second, the employer is given a role in the benefit determination process. Large employers now make the initial determination of whether the employee receives benefits and to what extent. Both large and small employers may also participate in appeal proceedings if an employee challenges his or her benefit award.

Finally, the Cheh-Evans proposal would accelerate the time when paid leave becomes effective in D.C. Employers would have to begin paying the payroll tax by October 1, 2018, nearly a year before the date set forth in the enrolled act. Where the city's paid leave fund would not begin paying benefits until July 1, 2020 under the enrolled act, the Cheh-Evans proposal would start benefit payments 1 year after its effective date. With respect to large employers, who now administer their own benefit plans independent of the city, there is no delayed start date and such employers would be required to begin administering most benefits immediately. One exception to all of these deadlines in the Cheh-Evans proposal is that it appears to delay the commencement of family leave benefits (for employees of both large and small

employers) until October 1, 2022.

A hearing on the Cheh-Evans proposal is expected to occur in June 2017, and, of course, there is no guarantee that it will become law. Notably, however, Council Chairman Phil Mendelson has expressed that the Council is open to revisiting the enrolled paid leave act and expects for additional bills to be introduced. Accordingly, it seems likely that changes will be made to the enrolled paid leave act prior to the time taxes and benefits are set to commence.