

NOTICE OF ADOPTION OF EMERGENCY RULEMAKING

TO: The General Public

FROM: Mónica Palacio, Director, D.C. Office of Human Rights

DATE: September 30, 2021

RE: Creation of a New Chapter 17 Regarding OHR Enforcement Jurisdiction under the Universal Paid Leave Amendment Act of 2016

The D.C. Office of Human Rights (OHR) hereby adopts emergency rules regarding OHR's enforcement jurisdiction under the Universal Paid Leave Amendment Act of 2016, pursuant to the authority described below. The following text will be published in the D.C. Register as a Notice of Emergency & Proposed Rulemaking, whereupon OHR will accept comments on the proposed rulemaking.



Monica Palacio, Director
D.C. Office of Human Rights

EMERGENCY & PROPOSED RULEMAKING

The Director of the Office of Human Rights (OHR), pursuant to the authority to issue rules set forth in section 102(b) of the Universal Paid Leave Amendment Act of 2016 ("Universal Paid Leave Act"), effective April 17, 2017 (D.C. Law 21-264; D.C. Official Code § 32-541.02(b)), section 18 of the District of Columbia Family & Medical Leave Act of 1990, effective October 3, 1990 (D.C. Law 8-181; D.C. Official Code § 32-517), Mayor's Order 2021-026, dated March 4, 2021, and Mayor's Order 2009-45, dated March 31, 2009, hereby gives notice of her intent to amend Title 4 (Human Rights) of the District of Columbia Municipal Regulations ("DCMR") by adding a new Chapter 17 (Complaints of Interference and Retaliation under the Universal Paid Leave Amendment Act of 2016 and Coordination of Benefits with the D.C. Family & Medical Leave Act of 1990 and the federal Family & Medical Leave Act of 1993).

The proposed rulemaking describes the scope of OHR's enforcement authority under the Universal Paid Leave Act, provides examples of employer interference and retaliation prohibited by the Universal Paid Leave Act, and clarifies the relationship between the protections, remedies, and enforcement proceedings under the Universal Paid Leave Act, the federal Family and Medical Leave Act of 1993, approved February 5, 1993 (107 Stat. 6; 29 U.S.C.A. §§ 2601 *et seq.*), and 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.*).

Emergency rules are necessary because the benefits under the Universal Paid Leave Act became available July 1, 2020, and there are presently no specific rules detailing OHR’s enforcement authority under the Universal Paid Leave Act. Rules are needed to ensure the efficient implementation of this important work benefit, which improves the public welfare. Furthermore, there could be confusion among the public regarding complaint procedures, as the benefits under the Universal Paid Leave Act are administered by a different agency, the Department of Employment Services, and appeals of claims determinations are heard by a third agency, the Office of Administrative Hearings.

This emergency rulemaking was adopted on September 30, 2021, and became effective immediately on that date. The emergency rule will expire on January 28, 2022, one hundred twenty (120) days from the date of, or upon publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever occurs first.

The Director of OHR also provides notice of her intent to take final rulemaking action not less than the later of thirty (30) days after the publication of this notice in the D.C. Register and approval of the regulations by the Council of the District of Columbia pursuant to section 102(b)(2) of the Universal Paid Leave Amendment Act of 2016, effective April 17, 2017 (D.C. Law 21-264; D.C. Official Code § 32-541.02(b)(2)).

Directions for submitting comments are provided at the end of this notice.

Title 4, HUMAN RIGHTS, of the DCMR, is amended by adding a new Chapter 17, COMPLAINTS OF INTERFERENCE AND RETALIATION UNDER THE UNIVERSAL PAID LEAVE AMENDMENT ACT OF 2016 AND COORDINATION OF BENEFITS WITH THE D.C. FAMILY & MEDICAL LEAVE ACT OF 1990 AND THE FEDERAL FAMILY & MEDICAL LEAVE ACT OF 1993, to read as follows:

CHAPTER 17

COMPLAINTS OF INTERFERENCE AND RETALIATION UNDER THE UNIVERSAL PAID LEAVE AMENDMENT ACT OF 2016 AND COORDINATION OF BENEFITS WITH THE D.C. FAMILY & MEDICAL LEAVE ACT OF 1990 AND THE FEDERAL FAMILY & MEDICAL LEAVE ACT OF 1993

1700	Authority, Scope, and Purpose
1701	Interference Prohibited
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1703	Interaction with the Federal FMLA and the DCFMLA: Concurrent Usage, Entitlements, Notice, Rights, and Scope of Coverage
1704	Interaction with DCFMLA: Employment and Benefits Protection
1705	Administrative Proceedings and Civil Actions

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1799 Definitions

1700 AUTHORITY, SCOPE, AND PURPOSE

1700.1 Pursuant to Mayor’s Order 2021-026, dated March 4, 2021, the Mayor has delegated her regulatory authority under section 102(b)(1) of the Universal Paid Leave Amendment Act of 2016 (UPLA), effective April 7, 2017 (D.C. Law 21-264; D.C. Official Code § 32-541.10), to the Office of Human Rights (OHR) to enforce the provisions of, and to receive and adjudicate administrative complaints alleging interference or retaliation made under, section 110(a) and (b) of the UPLA (D.C. Official Code § 32-541.10(a) and (b)).

1700.2 OHR has no jurisdiction over claims determinations or appeals of claims determinations under the UPLA.

1700.3 The purpose of this Chapter is to describe the scope of OHR’s authority under the UPLA, to clarify the procedures and remedies for complaints under OHR’s jurisdiction, to interpret provisions of the UPLA relevant to OHR’s enforcement authority, and to describe how the UPLA interacts with the DCFMLA and the federal FMLA.

1701 INTERFERENCE PROHIBITED

1701.1 As provided in section 110(a) of the UPLA (D.C. Official Code § 32-541.10(a)), it is unlawful for any person to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the UPLA.

1701.2 Unlawful interference, restraint, or denial includes, but is not limited to:

- (a) Intimidating or threatening conduct intended to discourage an employee from accessing paid-leave benefits, or which has the effect of discouraging an employee from accessing paid-leave benefits;
- (b) Providing false or misleading information intended to interfere with an employee’s ability to access paid-leave benefits, or which has the effect of interfering with an employee’s ability to access paid-leave benefits;
- (c) Failing to provide notice, as required by 7 DCMR § 3407 (Employer Responsibilities [under the UPLA]), where such failure has the effect of causing material harm to the employee, including the loss of paid-leave benefits;
- (d) Failing to grant a leave request for a period of leave for which paid-leave benefits would be available, absent a legitimate business reason, where such

denial of leave has the effect of causing material harm to the employee, including the loss of paid-leave benefits;

- (e) Failing to cooperate with the Department of Employment Services in processing a request for paid-leave benefits, where such failure has the effect of causing material harm to the employee, including the loss of or significant delay in receiving paid-leave benefits;
- (f) Failing to cooperate with OHR during the processing of a complaint filed under this Chapter, where such failure has the effect of substantially impeding OHR's enforcement efforts or of foreseeably causing material harm to the employee, including a significant delay in compensation for one or more violations of this Chapter; and
- (g) Failure to comply with § 1704.4.

1702 RETALIATION PROHIBITED

1702.1 As provided in section 110(b) of the UPLA (D.C. Official Code § 32-541.10(b)), it is unlawful for an employer to retaliate in any manner against any other person because the person:

- (a) Opposes any practice made unlawful by the UPLA;
- (b) Files or attempts to file a charge, institutes or attempts to institute a proceeding, or facilitates the institution of a proceeding under the UPLA;
- (c) Requests, applies for, or uses paid leave benefits under the UPLA; or
- (d) Gives any information or testimony in connection with an inquiry or proceeding related to the UPLA.

1702.2 Unlawful retaliation includes, but is not limited to:

- (a) Subjecting an employee to intimidation, threat, reprisal, harassment, or discrimination;
- (b) Subjecting an employee to an adverse employment action, absent a legitimate business reason, including discipline, discharge, suspension, transfer or assignment to a lesser position in terms of job classification, job security, or another term or condition of employment, including those terms and conditions enumerated in 4 DCMR § 506;
- (c) Reducing the pay or hours of work of an employee or denying an employee additional hours of work, absent a legitimate business reason;

- (d) Informing another employer that the person has engaged in a protected activity described in § 1702.1 of this Chapter, absent a legitimate business reason;
- (e) Reporting, or threatening to report, the actual or suspected citizenship or immigration status of an employee, former employee, or family member of an employee or former employee, to a federal, state, or local agency; and
- (f) Engaging in conduct which would reasonably have the effect of discouraging a reasonable employee from accessing paid-leave benefits, absent a legitimate business reason.

1703 INTERACTION WITH THE FEDERAL FMLA AND THE DCFMLA: CONCURRENT USAGE, ENTITLEMENTS, NOTICE, RIGHTS, AND SCOPE OF COVERAGE

- 1703.1 The UPLA provides a pay benefit but does not create an entitlement to take leave beyond the entitlements of the D.C. Family & Medical Leave Act of 1990 (DCFMLA), effective October 9, 2020 ((D.C. Law 8-181; D.C. Official Code § 32.501 *et seq.*), as amended.
- 1703.2 As provided in section 107(b) of the UPLA (D.C. Official Code § 32-541.07(b)), if paid leave taken pursuant to the UPLA also qualifies as protected leave under the federal FMLA as amended, or the DCFMLA, the period of leave under the UPLA shall run concurrently with, and not in addition to, leave taken under the federal FMLA and/or the DCFMLA.
- 1703.3 Except as provided by § 1701.2(d), an employer is not required by the UPLA to grant a leave request for a period of leave for which paid-leave benefits would be available, unless otherwise required by sections 3, 3a, and 4 of the DCFMLA (D.C. Official Code §§ 32-502, 32-502.01, and 32-503) (Family, Covid-19, and Medical Leave Entitlements under the DCFMLA).
- 1703.4 Even if an employee has exhausted his or her DCFMLA leave entitlement during the pertinent twenty-four (24)-month DCFMLA leave calculation period, the employee nonetheless may, under some circumstances, remain eligible for paid-leave benefits during the fifty-two (52)-week paid-leave benefits calculation period; however, such additional period of paid leave would not be subject to any of the entitlements or protections afforded by the DCFMLA.
- 1703.5 An employee’s failure to comply with the UPLA notice requirements of 7 DCMR § 3509 (Employee Notice to Employer [Under the UPLA]) shall not, of itself, affect an employee’s rights under the DCFMLA, but designation of DCFMLA coverage

may be delayed pursuant to 4 DCMR § 1614 (Reasonable Notice by Employee to be Provided to Employer [Under the DCFMLA]).

1703.6 No provision of the UPLA or this Chapter, whether substantive or procedural, nor any logistical aspect of the processing of paid-leave benefits, shall affect the legal rights of an employee or the legal obligations of an employer under the DCFMLA.

1703.7 Paid-leave benefits under the UPLA are not limited to employees who are covered by the DCFMLA, because the scope of “covered employer,” “covered employee,” and “eligible employee” under section 101 of the UPLA (D.C. Official Code § 32-541.01)), are each broader than the definitions of “employee,” and “employer,” under section 2 of the DCFMLA (D.C. Official Code § 32-501(1)-(2)) and are not subject to the applicability requirement in § 17 of the DCFMLA (D.C. Official Code § 32-516(2)).

1704 INTERACTION WITH DCFMLA: EMPLOYMENT AND BENEFITS PROTECTION

1704.1 Pursuant to section 107(c) of the UPLA (D.C. Official Code § 32-541.07(c)), the UPLA does not provide job protection beyond that which the DCFMLA provides. However, where an employee is eligible to receive paid-leave benefits for a period of leave which also qualifies as DCFMLA leave, the employee is entitled to job protection under the DCFMLA, pursuant to 4 DCMR § 1609 ([DCFMLA] Employment and Benefits Protection).

1704.2 If an employee’s period of paid leave does not qualify as leave under the DCFMLA, the leave is not job-protected. However, pursuant to § 1701.2 of this Chapter, reduction of hours, transfer to a lesser position, or termination, absent a legitimate business reason, after a period of leave for which the employee requested and received UPLA benefits, even if the period of leave does not also qualify as DCFMLA leave, could constitute retaliation under the UPLA.

1704.3 Where an employee is eligible to receive paid-leave benefits for a period of leave which also qualifies as DCFMLA leave, the employer must maintain seniority and benefits as required by the DCFMLA, pursuant to 4 DCMR § 1609.

1704.4 Where an employer customarily maintains benefits or seniority for employees on an unpaid, non-DCFMLA qualifying leave status, an employer must maintain the benefits or seniority of an employee while the employee is on paid leave.

1705 ADMINISTRATIVE PROCEEDINGS AND CIVIL ACTIONS

1705.1 A person claiming to be aggrieved by an act of interference or retaliation under the UPLA may file an administrative complaint pursuant to this Chapter within one (1) year of the occurrence or discovery of the alleged violation, whichever is later.

- 1705.2 OHR shall process an administrative complaint filed under this Chapter in accordance with the complaint procedures of the DCFMLA (D.C. Official Code § 32-501, *et seq.*), as set forth in 4 DCMR §§ 1600 *et seq.*
- 1705.4 To the extent practicable, where an employee’s complaint states a claim of one or more violations under both the UPLA and the DCFMLA, OHR shall attempt to process the complaints concurrently, but each complaint shall be perfected singly, receiving its own docket number, and the OHR Director shall issue a final decision separately for each complaint.
- 1705.5 Pursuant to D.C. Official Code § 32-541.12(b)(2), the one-year statute of limitations to file a civil action under the UPLA shall be tolled during the pendency of an administrative proceeding pursuant to this Chapter or during any period when a covered employer has failed to comply with the notice provisions of section 106(i) of the UPLA (D.C. Official Code § 32-541.06(i)) and 7 DCMR § 3407 (Employer Responsibilities [under the UPLA]). An employer’s failure to comply with any notice provision shall not toll the one-year statute of limitations to file an administrative action.
- 1705.6 Any rule found at 4 DCMR § 1600 *et seq.* regarding any effect of a private cause of action on the processing of an administrative complaint is applicable to proceedings governed by this Chapter, except that if there is any inconsistency, the UPLA shall control.
- 1705.7 The Director of OHR may initiate a complaint of interference in violation of § 1701.2(f) of this Chapter, where the Director plausibly believes that a person other than the complainant has engaged in conduct prohibited by § 1701.2(f).

1706 REMEDIES

- 1706.1 The damages and relief for which a person may be eligible under this Chapter shall be the same as those under the DCFMLA (D.C. Official Code § 32-509(b)(6) and (7)), except an employee may not recover duplicative damages, fees, or costs under both this Chapter and the DCFMLA.

1799 DEFINITIONS

For the purposes of this Chapter, the following words and phrases shall have the meanings ascribed:

“Discrimination” - adversely treating an employee differently from similarly situated employees, absent a legitimate business reason, with respect to a material term or condition of employment, wholly or partially because the employee

requested paid-leave benefits or asserted or attempted to assert a right under the UPLA.

“DCFMLA” – 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.*).

“DOES” - the District of Columbia Department of Employment Services.

“Employee” - an individual who qualifies as both a “covered employee” pursuant to D.C. Official Code § 32-541.01(3) and an “eligible individual” pursuant to D.C. Official Code § 32-541.01(6).

“Employer” - a “covered employer” pursuant to D.C. Official Code § 32-541.01(4).

“Federal FMLA” - The Family and Medical Leave Act of 1993, approved February 5, 1993 (Pub.L 103-3; 107 Stat. 6; 29 U.S.C.A. §§ 2601 *et seq.*)

“Harassment” - subjecting an employee to severe or pervasive, objectively and subjectively hostile conduct, wholly or partially because the employee requested paid-leave benefits or asserted or attempted to assert a right under the UPLA, where (1) the harasser was the president, owner, proprietor, partner, or corporate officer of the employer of the employee; (2) the harasser was a supervisory employee, unless the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise; or (3) the employer of the employee knew or should have known of co-worker or third party harassment and failed to prevent the harassment.

“Paid Leave” and “Paid-Leave Benefits” - leave or benefits related to the UPLA as described throughout 7 DCMR §§ 3400 *et seq.* and 3500 *et seq.*

“OHR” – the District of Columbia Office of Human Rights.

“UPLA” – The Universal Paid Leave Amendment Act of 2016, effective April 17, 2017 (D.C. Law 21-264; D.C. Official Code § 32-541.02(b)).

Comments on these proposed rules must be submitted within thirty (30) days after publication of this notice in the D.C. Register to the Director of the Office of Human Rights, at ohr.ogc@dc.gov or 441 4th Street, NW, #570N, Washington, DC 20001. A copy of this notice may be obtained at ohr.dc.gov or dcregs.dc.gov.