

D.C.'s Displaced Workers Protection Act Expanded to Assist Employees Laid Off in COVID-19 Era

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Eligible workers in D.C. who have been displaced by the COVID-19 pandemic have the opportunity to be reinstated once their employer starts rehiring after the pandemic, according to a new law. The “[Displaced Workers Right to Reinstatement and Retention Amendment Act of 2020](#)” also allows eligible employees to be reinstated and retained if there is a change in the ownership, controlling interest, or identity of their employer. The law is in effect until June 30, 2023.

D.C. Mayor Muriel Bowser has announced that fully vaccinated individuals will no longer be required to wear masks in most situations, following new Centers for Disease Control and Prevention (CDC) recommendations. Given the rapid loosening of COVID-19-related restrictions, many D.C. businesses are ramping up hiring as they hope to return to pre-COVID-19 business levels.

Covered Employers

The new law is designed to protect employees who work for certain employers or contractors, primarily in the retail, healthcare, security, and hospitality industries. Covered employers include operators of hotels, restaurants, taverns, brew pubs, nightclubs, entertainment venues, and businesses engaged in the sale of goods to consumers, but not wholesalers.

The Act applies to employers that had at least 50 employees as of March 1, 2020 (for hotels, at least 50 employees as of December 1, 2019). The law also applies to “contractors,” which means an individual or company, other than an employer, that employs at least 25 individuals and has hired individuals to work in food service, as janitorial or building maintenance workers, as nonprofessional employees in healthcare settings, or to perform security services, with some exceptions.

The law does not specify whether an employer or contractor should count only employees working in D.C., or all employees, when determining whether it is covered by the new law.

Covered Employees

Employees are protected if they worked at a covered establishment or for a covered contractor and stopped working for reasons other than voluntary resignation or termination for cause during certain specified time periods (described below). The law does not extend protection to employees who were employed in an executive, administrative, or professional capacity; those who received severance at separation; or those who could have been terminated for “demonstrable just cause” during their prior period of employment. The Act does not define this term.

If the employee worked for a hotel, the individual’s last date of employment had to be between December 1, 2019, and the last day of the public health emergency declared by

Mayor's Order in response to the COVID-19 pandemic, which is still in effect.

For all other eligible employees, the last date of employment had to be between March 1, 2020, and the last day of the public health emergency.

Employer Obligations

To comply with the new law, as positions become available, covered employers and contractors must:

1. Offer each eligible employee reinstatement to the employee's previous position or to a position performing the same or substantially similar duties;
2. Communicate all offers in writing through email, text, or registered mail or other method that is documented and retained and provide three days for the employee to respond (if made by email or text) or seven days for the employee to respond (if made by registered mail or similar delivery method); and
3. Return the reinstated employee to work seven days after the offer is accepted, unless the employer allows a later date.

Covered employers who change their identity, or experience a change in controlling interest but maintain the same or similar business operations, must first give notice of the anticipated change to all affected employees at least 15 days prior to the date the change is to take effect. The new employing entity must follow the procedures above to reinstate employees and must retain the reinstated employees for at least 90 days, absent a termination for cause. At the end of the 90-day transition period, the new employing entity must perform a written performance evaluation. If the employee's performance is satisfactory, the new employing entity must offer the employee continued employment.

Anti-Retaliation; Private Right of Action

The law contains an anti-retaliation provision that prohibits covered employers from taking any adverse action against individuals who assert rights under, participate in proceedings related to, or oppose a practice believed to be in violation of, the law. Significantly, the Act creates a rebuttable presumption that an adverse action was retaliatory if it occurs within 60 days after the individual engaged in protected activity. To overcome this presumption, the employer must produce credible evidence that the sole reason for the adverse action was a legitimate business reason. The burden would then shift to the employee to show pretext.

The Act gives an aggrieved worker a private right of action to sue for back pay, the cost of lost benefits, and reasonable attorney's fees and costs. If the employer is found to have violated the law with malice or reckless indifference, the employee may be awarded treble damages, compensatory damages and punitive damages.

These provisions of the law expire June 30, 2024.

Implications

The new law can have broad-reaching consequences for employers with D.C.-based employees who are covered. Employers who terminated or laid off employees in the covered industries should review the new law and ensure they are offering reinstatement when required to do so. If reinstatement is not offered to previously employed incumbents, employers should be prepared to show cause, based on

legitimate business reasons and with solid documentation. Employers also should be mindful when considering new corporate transactions involving D.C. establishments.

Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved with state-specific or multistate-compliant plans.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#).

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