

1 **AMENDMENT IN THE NATURE OF A SUBSTITUTE**
2 **December 15, 2020**
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9 A BILL

10 23-965
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13 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
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18 To amend the Displaced Workers Protection Act of 1994 to add a new Title II to provide eligible
19 workers who have been displaced by COVID-19 the opportunity to be reinstated once
20 their employer starts rehiring after the pandemic and to allow eligible employees to be
21 reinstated and retained employees employed if there is a change in the ownership,
22 controlling interest, or identify of their employer.
23

24 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
25 act may be cited as the “Displaced Workers Right to Reinstatement and Retention Amendment
26 Act of 2020”.

27 Sec. 2. The Displaced Workers Protection Act of 1994, effective April 26, 1994 (D.C.
28 Law 10-105; D.C. Official Code § 32-101 *et seq.*) is amended as follows:

29 (a) Add a new title heading to read as follows:

30 “Title I. Displaced Workers Protection.”

31 (b) Existing sections 2, 3, and 4 are redesignated as sections 101, 102, and 103,
32 respectively.

33 (c) A new title II is added to read as follows:

34 “Title II. Protections for Workers Displaced by COVID-19.

35 “Sec. 201. Definitions.

36 “For the purposes of this title, the term:

37 “(1) “Change in controlling interest or identity of an employer” includes any
38 combination of the following events that causes either a change in the entity or entities holding a
39 controlling interest in an employer, or a change in the identity of an employer, after February 29,
40 2020; provided, that the business operations conducted by the new employer consist of the same
41 or similar operations as those conducted by the employer existing on or before February 29,
42 2020:

43 “(A) Any sale, assignment, transfer, contribution, or other disposition of a
44 controlling interest in an employer by consolidation, merger, or reorganization of the employer,
45 or of any entity or entities that maintains any ownership interest in the employer; or

46 “(B) Any purchase, sale, lease, reorganization or restructuring, or
47 relocation of the operation of an employer.

48 “(2) “Contractor” means an individual or company, other than an employer, that
49 employs 25 or more individuals and who has hired individuals to work as:

50 “(A) Food service workers in a hotel, restaurant, cafeteria, apartment
51 building, hospital, nursing care facility, or similar establishment;

52 “(B) Persons to perform janitorial or building maintenance services in an
53 office building, institution, or similar establishment;

54 “(C) Nonprofessional employees to perform health care or related services
55 in a hospital, nursing care facility, or similar establishment; or

56 “(D) Persons to perform security services in an office building, institution,
57 or similar establishment; provided that special police officers who are armed, and employees

hired to perform security services for District of Columbia Public Schools or a public charter school shall not be included.

“(3) “Covered establishment” means any of the following businesses in the District of Columbia, a:

“(A) Hotel, ~~as defined in paragraph (6) of this section;~~

“(B) Restaurant, as defined in § 25-101(43), and any other establishments licensed by the District of Columbia in the business of preparing or serving food to the public;

“(C) Tavern, as defined in § 25-101(52);

“(D) Brew pub, as defined in § 25-101(12)

“(E) Nightclub, as defined in § 25-101(33);

“(F) Club, as defined in § 25-101(15);

“(G) An event or entertainment establishment or venue at which live performing arts, sporting, or other entertainment events are held; or

“(H) A business engaged in the sale of goods to consumers, but does not include wholesalers.

“(4) “Eligible employee” means:

“(A) An individual who was employed to work at a covered establishment or for a contractor, and who ceased working at the covered establishment or for the contractor for reasons other than voluntary resignation or termination for ~~good~~ cause ~~or misconduct~~, and

(i) If the individual was a hotel worker, the individual’s last date of employment for the employer was ~~between on or after~~ December 1, 2019 and the last day of the public health emergency declared by Mayor’s Order in response to the COVID-19 pandemic;

(ii) If the individual was not a hotel worker, the individual's last date of employment for the contractor or employer was between ~~was on or after~~ March 1, 2020 and the last day of the public health emergency declared by Mayor's Order in response to the COVID-19 pandemic; but

“(B) Does not include an individuals;

“(i) E-employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. § 213(a)(1));

– “(ii) Who received severance from the individual's employer or contractor when the individual's employment ceased and whose employer or contractor has written, verifiable proof of the severance; or

“(iii) Whose employer or contractor could have terminated the individual for demonstrable just cause when the individual previously worked for the employer or contractor.

“(5) “Employer” means any entity, including but not limited to, a for-profit or nonprofit firm, partnership, proprietorship, sole proprietorship, or limited liability company, association, or corporation, or any receiver or trustee of an entity, including the legal representative of a deceased individual or receiver or trustee of an individual, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity:

“(A) Employs or exercises control over the wages, hours, or working conditions of an employee at a covered establishment;

“(B) Is not a contractor;

“(C) If the entity operates a hotel, ~~the entity and~~ employed ~~35-50~~ or more individuals at a hotel on December 1, 2019; and

_____“(D) If the entity does not operate a hotel, ~~the entity~~ and employed ~~35-50~~ or more individuals at a covered establishment ~~other than a hotel~~ on March 1, 2020.

“(6) “Hotel” means a hotel, motel, or similar establishment in the District of Columbia, which provides lodging to transient guests.

“(7) “Hotel worker” means an individual who is employed ~~by an employer or to work at~~ by a hotel, as defined in paragraph (6), motel, or similar establishment in the District of Columbia, which provides lodging to transient guests.

“(8) “New employer” means an employer created as a consequence of a change in controlling interest or identity of an employer.

“(9) “Retained employee” means any individual, except individuals employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 213(a)(1)), who was working for an employer at a covered establishment ~~before when~~ a change in controlling interest or identity of an employer occurred or when an employer was required to give notice of a change in controlling interest or the identity of the employer pursuant to section 203(c)(4).

“Sec. 202. Right to reinstatement.

“(a)(1) Beginning February 1, 2021, as positions become available with the contractor or in the employer’s operation at a covered establishment, the contractor or employer shall offer each eligible employee reinstatement to the employee’s previous position or to a position

performing the same or substantially similar duties, and that requires essentially the same skills,
as those performed by the eligible employee before the eligible employee ceased working for the
contractor or at the covered establishment.

“(2)(A) A contractor or an employer shall make the offer of reinstatement in
writing, to the employee’s last known address, by registered mail, or by email, text, or other
method that is documented and retained.

“(B) If ~~a~~ the offer of reinstatement is made by email, text, or same--day
delivery, a contractor or employer shall give a deadline, that is no less than 340 calendar days
from the date the offer of reinstatement is sent, for an eligible employee to accept or decline the
offer.

“(C) If the offer of reinstatement is made by registered mail, ~~or~~ mail, or
some other method that does not provide for a same--day delivery, a contractor or employer shall
give a deadline that is no less than 3 calendar days from the date the offer of reinstatement is
received for an eligible employee to accept or decline the offer.

“(D) If the eligible employee accepts the offer of reinstatement, the
eligible employee shall report to work no later than 7 days, or later if requested by the employer,
from the date the offer of reinstatement is received.

“(3) If more than one eligible employee is entitled to reinstatement to a particular
position, the contractor or employer may make simultaneous, conditional offers of reinstatement
to eligible employees for the same position; provided, that the contractor or employer makes
offers of reinstatement based on seniority within job classifications, unless the employer is
offering reinstatement to positions at a restaurant, tavern, brew pub, nightclub, or club.

“(4) A contractor or employer shall not hire a new employee for a position until all eligible employees have either not responded by the deadline indicated in it or have the declined the offer of reinstatement.

“Sec. 203. Changes in controlling interest or employer.

“(a) This section shall not apply to:

“(1) Eligible employees otherwise covered by section 102; or

“(2) Eligible or retained employees who work at restaurants, taverns, brew pubs, nightclubs, or clubs unless the change in controlling interest or identity of an employer would have no demonstrable change to its operations.

“(b) Except as provided in subsection (a) of this section, tThe requirements of section 202 shall apply to a new employer.

“(c)(1) A new employer shall retain any:

“(A) Eligible employee reinstated pursuant to section 202 for a 90-day transition period beginning on the date the eligible employee is reinstated; and

“(B) Retained employee who agrees to remain employed by the new employer for a 90-day transition period beginning on the date of the change in controlling interest or identity of the employer.

“(2) Except as provided in paragraph (5) of this subsection, the new employer shall not discharge a retained employee or an eligible employee reinstated pursuant to section 202 during the 90-day transition period without cause.

“(3) At the end of the 90-day transition period, the new employer shall perform a written performance evaluation for each retained employee and each eligible employee reinstated

pursuant to section 202, and if the retained employee's or eligible employee's performance during the 90-day transition period was satisfactory, the new employer shall offer the retained employee or eligible employee continued employment under the terms and conditions established by the new employer.

“(4)(A) ~~After the effective date of this title~~Beginning on February 1, 2021, an employer that anticipates a change in controlling interest or the identity of the employer, must, no later than 15 calendar days before the anticipated date of the change in controlling interest or the identity of the employer, provide the following notice:

“(i) To all parties to the transaction that results in the change in controlling interest or the identity of the employer, notice of the name, last known address, date of hire, position, and text or telephone contact information of each eligible employee;

“(ii) To retained employees and eligible employees, notice that the employer is experiencing or anticipates a change in controlling interest or identity of the employer and of an employee's right to reinstatement or retention under this section; and

“(iii) To any labor organization that represents the employer's retained employees or eligible employees, the notices specified in sub-subparagraphs (i) and (ii) of this subparagraph.

“(B) The new employer shall provide the notice required pursuant to sub-subparagraph (ii) of this paragraph by:

“(i) Posting the notice on the premises of the covered establishment in the same place and manner as other statutorily-required notices, unless the covered establishment is no longer operating; and

194 “(ii) By texting, emailing, or mailing ~~the notice~~ to the last known
195 address the notice to ~~of~~ all eligible employees.

196 “(5) If at any time, a new employer determines that fewer employees are required
197 to work at the covered establishment than the number required before the change in controlling
198 interest or identity of the employer, the new employer shall retain employees by seniority within
199 job classification; provided, that if the new employer is a restaurant, tavern, brew pub, nightclub,
200 or club, the new employer shall not be required to utilize seniority.

201 “Sec. 204. Retaliation prohibited.

202 “(a) No contractor or employer may terminate, refuse to reinstate or employ, or otherwise
203 take an adverse action against any eligible employee or retained employee ~~who asserts because~~
204 the eligible employee or retained asserted rights under or participated~~s~~ in proceedings related to
205 this title, or ~~who because the eligible employee or retained~~ opposed~~s~~ any practice the individual
206 reasonably believes, in good faith, to be proscribed by this title.

207 “(b) If it is established that an employee engaged in conduct protected by subsection (a)
208 of this section, and the contractor or employer thereafter terminated, refused to reinstate or
209 employ, or otherwise took adverse action against such person within 60 days after such protected
210 activity, then a rebuttable presumption shall arise that the contractor or employer’s action was
211 taken in violation of subsection (a) of this section. In such a case, the contractor or employer may
212 rebut the presumption by producing credible evidence that the sole reason for the adverse action
213 was a legitimate business reason. The contractor or employer’s asserted business reason may be
214 rebutted by a showing of pretext.

215 “Sec. 205. Enforcement.

216 “(a) An eligible employee or retained employee may, on behalf of themselves or on
217 behalf of other eligible employees or retained employees similarly situated, bring an action to
218 enforce this title in the Superior Court of the District of Columbia and shall be awarded upon
219 prevailing:

220 “(1) Back pay for each day the violation continues at a rate of compensation not
221 less than the higher of:

222 “(A) The average regular rate of pay received by the eligible employee or
223 retained employee during the last 3 years of the eligible employee or retained employee’s
224 employment in the same occupation classification, or

225 “(B) The final regular rate received by the eligible employee or retained
226 employee;

227 “(2) Costs of benefits the employer would have incurred for the eligible employee
228 or retained employee under the employer’s benefit plan;

229 “(3) If it is established that a contractor or employer violated this title with malice
230 or with reckless indifference, an affected eligible employee or retained employee shall be entitled
231 to treble damages, and, in addition, may be awarded compensatory or punitive damages; and

232 “(4) Reasonable attorney fees and costs of the suit, including expert witness fees.

233 “Sec. 206. Relationship to employment contracts and agreements.

234 “The requirements of this title shall not diminish the obligation of a contractor or an
235 employer to comply with the provisions of any contract, including but not limited to any
236 individual contractual arrangement or any collective bargaining agreement that provides greater
237 or equal rights to employees than the rights afforded under this title.

238 “Sec. 207. Applicability.

239 “(a) Except as provided in for subsection (b), tThis title shall expire on June 30~~December~~
240 31, 2024.”.

241 “(b) Sections 204 and 205 shall expire on June 30, 2025.

242 Sec. 4. Fiscal impact statement.

243 The Council adopts the fiscal impact statement in the committee report as the fiscal
244 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
245 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

246 Sec. 5. Effective date.

247 This act shall take effect following approval of the Mayor (or in the event of veto by the
248 Mayor, action by the Council to override the veto), a 60-day period of congressional review as
249 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
250 24, 1973 (87 Stat. 813; D.C Official Code § 1-206.22(c)(1)), and publication in the District of
251 Columbia Register.