Council of the District of Columbia
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Director Unique Morris-Hughes
Department of Employment Services
4058 Minnesota Ave, N.E., Suite 5800
Washington, D.C. 20019

SUBMITTED VIA EMAIL: does.opfl@dc.gov.

Re: Comments on Proposed Rules Adding a New Chapter 35, "Paid Leave Benefits" to Title 7 of the District of Columbia Municipal Regulations

Dear Dir. Morris-Hughes:

We write to submit comments on the Department of Employment Services' proposed regulations to administer benefits for the upcoming paid family and medical leave program, as required by the Universal Paid Leave Amendment Act of 2016 ("UPLA"). Congratulations to you and your team on the release of these critical regulations. Starting in July of next year, thousands of District workers will have access to a vital lifeline when they need to take time off for personal medical and family circumstances. The release of these proposed regulations show the Department's commitment to helping workers navigate through the program.

In order to ensure that the final regulations provide detailed guidance to District workers covered by the law we are submitting comments, which you will find below. These comments clarify for the agency the Council's intentions when it legislatively established the paid family and medical leave program three years ago. These comments also reflect our desire to see comprehensive final regulations that provide clear direction and guidance for the city's workers and employers.

In addition to being members of the Committee on Labor and Workforce Development, we are also interested Councilmembers that want to continue working with you to ensure that the launch of this landmark law is smooth, its guidelines are clear, and the goal of protecting workers during critical health moments is met.

**Key Concerns and Recommendations**

Proposed Rules should ensure accessibility to the Paid Leave program as intended in the UPLA:

**Strike Section 3500.1(c)(1)(A)**

This provision in the regulations would require that an applicant be "employed by a covered employer at the time of application." Yet according to UPLA, an "eligible individual" is someone who has been "a covered employee during *some* or all of the 52 calendar weeks immediately preceding the qualifying event for which paid leave is being taken." D.C. Code § 32-541.01(6)(A) (emphasis added). As such, the Committee considers this proposed regulation to be in conflict with the statute as written and longstanding case law.

The inclusion of the word "some" serves two purposes. First, it ensures that an individual does not have to work for a certain period of time before being eligible for the benefit. This would allow a new worker to take paid time, if needed.[1] Second, it guarantees that a worker—whose employer has been paying into the system on his or her behalf—is eligible to collect the benefit, regardless of whether or not they are working at the time they needed to take the benefit.

We believe that the employment requirement in the regulations would likely deny benefits to workers who need the leave most. Not only does the requirement put D.C. out of sync with other paid leave programs across the country, there is deeper concern that eligible individuals will be shut out from receiving benefits if they lose their jobs through no fault of their own. This includes workers who lose their jobs because they have a personal or family health situation. For example, under the proposed regulations, a pregnant retail worker who lost or had to leave her job because she couldn't stand all day would not be eligible for paid leave benefits once she gave birth—a time when she would need income the most. In addition, under the District's Family and Medical Leave Act, District workers who are employed by companies of fewer than 20 employees do not have job protection if they take leave. These workers should benefit from UPLA even if taking leave ends up in a job separation. The intent of UPLA was to have a level-playing-field for workers whether they were employed by small or large employers.

Throughout the debate around paid family leave, several organizations testified about the positive effects paid leave can have on low-income families. An employment eligibility requirement will likely have the hardest effect on low-income workers and undermine the law's intention of financially safeguarding those who need it the most during medical and family emergencies.

It is also worth noting that a covered employer is not eligible to receive a "refund" of its paid leave contributions unless an applicant has been determined to have fraudulently applied for benefits. Therefore, a current employment requirement should have no bearing on an applicant's eligibility because his or her employer has already paid into the system on their behalf.

[1] Because the benefit is based on the average weekly wages earned during the four-quarter period preceding the leave, applicants with limited work history and earnings would receive a minimal amount, disincentivizing claims for benefits by workers with little to no paid work history.

Additionally, it is worth noting that the D.C. Court of Appeals has opined on the extent to which an agency may interpret a statute when creating regulations. Specifically, the court said "[a]lthough we 'must give weight to any reasonable construction of a regulatory statute that has been adopted by the agency charged with its enforcement,' we will not sustain the agency's interpretation if it 'is plainly wrong or inconsistent with the statute[.]' *Nat'l Geographic Soc'y v. District of Columbia Dep't of Emp't Servs.*, 721 A.2d 618, 620 (D.C. 1998) (internal quotation marks omitted)." *Ware v. D.C. Dep't of Employment Servs.*, 157 A.3d 1275, 1280 (D.C. 2017) Here, the plain language of the statute makes the Council's intent abundantly clear that an employee need not be currently employed to receive benefits at the time of application. Because of these reasons, this provision should be removed from the regulations altogether.

**Revise Section 3501.3 so that DOES accepts applications up to two weeks prior to the date of the qualifying event in order to accommodate workers with foreseeable needs to use UPLA.**

We concur that benefits should not be paid to an applicant until his or her application has demonstrated that it satisfies all of the law's requirements. But expectant parents, whether adoptive, biological, or foster, do not always know when precisely their child will arrive and may prefer to start their application ahead of a child's arrival. Similarly, surgical patients may be better equipped before the date of their surgery to submit their leave application than once they have had surgery and are recovering. The law and rules already incorporate a seven-day waiting period during which time workers may not be earning income; requiring an applicant to wait until the date of their qualifying event to apply could further delay receipt of benefits. *See*, Section 104(c) of the Universal Paid Leave Amendment Act of 2016, effective April 7, 2017 (D.C. Law 21-264; D.C. Official Code §§ 32-541.04(c)).

**Revise Section 3501.6(a)(3) to allow an applicant to simply provide a social security number or individual tax identification number when applying for paid leave benefits.**

We recommend that this requirement be modified because, as written, it requires the applicant to provide "*evidence* showing valid proof of the applicant's social security number or individual tax identification number" (ITIN) (emphasis added). Many people with valid social security number or ITINs do not have their social security card and requiring them to begin a lengthy process to obtain it may delay or prevent qualified applicants from receiving benefits. It should be sufficient for the applicant to provide a social security or ITIN which the agency can validate by comparing to employer-provided records, including those required to be maintained under 7 DCMR 3408(h),(j), or District records. Further, DOES should consider accepting other forms of identification that meet the requirements set out in the regulations, including drivers' licenses that are REAL ID compliant, which require a jurisdiction to validate a person's proof of identity, social security number, and residency.

**Revise Section 3501.6 (c),(f) so that the guidelines for using intermittent leave are clear and understandable to workers applying for benefits.**

As proposed, the regulations dictate rigid standards for use of intermittent leave that will result in some workers being denied benefits they otherwise qualify for. Many workers, particularly those

in the service industries, have unpredictable schedules and do not work regular shifts. Moreover, the nature of many serious health conditions is that they are unpredictable. An applicant who wants to use intermittent leave should be able, in consultation with their doctor and their employer, to indicate the number of days each week, rather than the exact days and dates, that intermittent leave will be taken.

We strongly urge DOES to supplement this with clear, plain-language guidance on its website regarding how to request and use intermittent leave.

**Revise Section 3501.6(i)(3) to allow for additional documentation to be provided in the case of adoption or foster care.**

This proposed rule should be amended to include additional forms of documentation. First, in the case of private (or "independent") adoptions, a letter signed by an attorney who is representing the prospective parent or parents is sufficient documentation of the qualifying parental leave event should be allowed. While many adoptees come to their families via adoption agencies, other adoptions are conducted between biological and adoptive parents through attorneys. In such a case, the attorney performs a role similar to an agency and therefore the attorney is best positioned to certify that the adoption has been undertaken. Further, for international adoptions, the regulations should include the documents listed in D.C. Code § 16-317 that are accepted for obtaining a D.C. birth certificate.

We also suggest that the regulations include as acceptable proof of birth a Consular Report of Birth Abroad, in addition to a birth certificate. Some parents of children (especially children of federal government employees, including active duty military) who are born outside of the United States but receive birthright citizenship through their parents' citizenship may not have access to a birth certificate from the overseas hospital or to an English translation, making a CRBA the only proof of birth available.

**Revise the introductory language to Section 3501.7 to prohibit excessive fees for medical certification.**

While it is reasonable to compensate health care providers for completing paperwork necessary to certify medical or paid family leave, fees should not be a barrier. We encourage DOES to require that the fees charged are reasonable, or to set a hard cap, and to bar fees when the paperwork is presented as part of an otherwise scheduled visit. DOES may also consider prohibiting fees for Medicaid enrollees, for whom even a nominal fee could make accessing this statutory right cost-prohibitive.

**Revise Section 3501.11 so that the guidelines for applicants seeking benefits for adoption or foster care are clear and understandable.**

The requirement that an applicant notify DOES "[i]f the adoptive or foster *status* of an individual changes," (emphasis added) is unduly vague. The agency should clarify that, in the unfortunate event that an adoptive or foster parent has begun to use leave but the placement does not proceed as planned, the applicant must notify the agency so that benefits can be terminated from that date

forward. The agency should also make it clear that under no circumstances should an expectant parent be required to repay benefits received based on a good faith application.

**Revise Section 3509.1(a),(d) to increase protections for employees who have not been provided sufficient notice of UPLA's application requirements.**

We appreciate that DOES has considered that applicants' personal circumstances will vary and that the proposed rules attempt to accommodate those different situations. The agency should clarify, however, that if the employer has not provided the notice of rights to employees, an employee's failure to satisfy these notice requirements should not result in a denial of benefits. Further, the agency should affirm that any employer discipline resulting from "improper notice" shall constitute retaliation in violation of the law. It is not practicable for the employee to follow this procedure if the employer has not provided the required notice. (See, for example, DC Code §32-1308.01(b), tolling statute of limitations where employer has failed to provide notice.) The agency should also consider amending this section to clarify that an employer may not require written or oral notice stricter than the law and the rules, but may permit a more lenient standard.

Additionally, Section 3501.4 should specify that an error by DOES or an employer's failure to provide employees with the notice of paid leave rights are examples of "exigent circumstances" for which benefits may be payable after the leave is taken.

Sincerely yours,

Elissa Silverman
Chair, Committee on Labor
and Workforce Development

Charles Allen

Brianne K. Nadeau

Anita Bonds

David Grosso