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Monnikka Madison
Associate Director
Department of Employment Services
Office of Paid Family Leave
4058 Minnesota Avenue NE,
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Emailed to: does.opfl@dc.gov

Re: Comments on Proposed Regulations for the Universal Paid Leave Act

Dear Associate Director Madison:

Thank you for the opportunity to comment on the Department of Employment Services' proposed regulations on the Universal Paid Leave Act (UPLA). I am submitting these comments on behalf of Children's Law Center (CLC),[1] which fights so every DC child can grow up with a loving family, good health and a quality education. With more than 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. As an organization that cares about the health and wellbeing of children and their families, especially low-income children and families, we are grateful for and proud of DC's leadership on paid family and medical leave. Completing UPLA's regulations is an important part of this process. I hope the comments below will help the agency to implement a user-friendly program that best meets the needs of children, families, people in need of care, working caregivers, employers, and health care providers.

Documenting family relationships - 3301.2(c)(2)(C) and 3301.5(b)

We are concerned about the proposed requirement that workers provide official documentation of their family relationship to the care recipient in order to take paid family leave. Specifically, the regulations would require workers to "[p]rovide government-issued documents, court orders, or other forms of documentation establishing a familial relationship between the eligible individual and family member[.]"

As written, this requirement would pose a substantial barrier to workers' ability to take the leave they need. For many relationships protected by the UPLA, such as one's relationship with a grandparent or a sibling, straightforward government-issued documentation or court orders establishing the relationship are unlikely to exist. Even if such documents formally exist or could be produced, workers may not have easy access to them, especially low-income or immigrant workers. When someone is facing a caregiving crisis, adding a financially costly and time-consuming burden of tracking down multiple birth certificates and/or marriage licenses to prove your grandmother is your grandmother diminishes the dignity with which we should be treating DC workers. While the proposed language states that "other documentation" may be used, it provides no guidance as to what types of other documentation would be acceptable.

In place of this restrictive language, we urge you to adopt the approach to proving family relationships used in the federal Family and Medical Leave Act. Under FMLA regulations (29 C.F.R. § 825.122(k)), employees can establish their relationship to the family member for whom they are providing care in "the form of a simple statement from the employee[.]" This would provide needed dignity and flexibility to workers while also maintaining consistency with existing law, rather than imposing a confusing and burdensome new requirement. This statement would be provided in addition to the medical documentation establishing the family member's need for care, which ensures that workers can only take leave when there is a valid medical need.

Proof of Identity Requirements - 3301.2(a) and 3301.3

We urge DOES to amend the restrictive requirements to produce government IDs and Social Security numbers when applying for paid leave (3301.2(a) and 3301.3). These requirements may exclude some of our most vulnerable workers from accessing benefits when they desperately need them. Some immigrant workers do not have Social Security numbers or may not feel comfortable entering their number into a government database; low-income and elderly workers may not possess government IDs and may not have the means or resources to obtain them; transgender individuals may not possess a current ID that matches the name and gender they identify with; if homeless workers have IDs, they may not have ones with a current address confirming the place of residency with which they are applying for benefits. No other paid leave state requires the burdensome combination of proof of identification documentation that DC is considering in these proposed regulations yet few instances of fraud occur in these states. A more inclusive application process will better serve the diversity of the District's workforce when a family or personal medical crisis arises.

DOES should provide alternatives to the requirement to use a Social Security number for a paid leave application. New York's new paid family leave program, for example,

allows applicants to claim benefits using either a Social Security number **or** an Individual Taxpayer Identification Number. In New Jersey, the Department of Labor and Workforce Development requests claimants provide a Social Security number but, upon a showing of good cause by the claimant, the Department may, on a claimant-by-claimant basis, waive the requirement that the claimant have a valid Social Security Number when filing a claim for benefits. Further, DOES should make clear in the paid leave program's educational and application materials that in requesting these personal identification numbers, the agency will not inquire about or disclose immigration status of an applicant or their family members; all workers must feel safe applying for paid leave benefits to ensure they can care for their families to the best of their ability.

The District should not require individuals to have a government ID to utilize paid family leave benefits as it places a disproportionate burden on low income and vulnerable workers. If, however, there is sufficient reason to question the validity of someone's identity or need for leave (i.e. if an employer or a medical professional informs the government of suspected fraud) such that an applicant's proof of identity is called into question, the agency should accept a broader range of documentation from applicants, including, but not limited to: a government ID (including an expired ID), a non-government form of photo ID (such as a work badge or certain credit cards), pay stubs, a bill or letter addressed to the individual in the past 30 days, a medical bill or paperwork with the applicant's address, or a foreign passport. The agency should strive to make the submission of these forms - and all forms and paperwork associated with the program's application process - as simple as possible; for example, allowing applicants to take photos of documents on their phone and uploading those photo files. Inclusive and accessible application processes must also be developed for those without readily available access to technology or the internet.

Ability to pre-file a claim for parental, family or medical leave (3301)

Where appropriate, workers should be able to pre-file their claims with DOES for foreseeable uses of leave prior to the start of leave, just as those workers provide notice to their employers earlier for such uses. Under those circumstances, a worker could submit all available information ahead of time, including documentation such as a diagnosis and recommended course of treatment, as appropriate, and then update the filing as needed. Additionally, a worker who was expecting a child could submit a claim for parental leave, including documentation of pregnancy and expected due date, and then update the filing with hospital paperwork to reflect the child's birthdate. Pre-filing would speed processing of claims for workers, ensuring they can receive benefits in a timely manner during their leave, as well as aid DOES by providing earlier notice of upcoming leaves. While eligible individuals should have the option to prefile it shouldn't be required, even if a leave need is known in advance.

Forms needed for filing a claim for medical leave (3301.2(c-e))

For workers seeking leave in connection with their own or a family member's medical needs, clear guidance on the medical documentation needed to support such a claim is essential. As written, proposed § 3301.2 offers a good start, but additional clarification on the specific requirements is needed. We strongly suggest that DOES develop straightforward, easy-to-complete forms for health providers to fill out, as other states have done for their paid leave programs and as the Department of Labor has done for purposes of the federal FMLA. This will facilitate claims filing -- saving workers, health providers, and DOES time and energy by ensuring all needed information is provided in the first instance. In addition, this will protect patients' privacy by ensuring that only necessary medical information is revealed. However, if DOES does create a form, it should not be required; if medical records that provide all the information needed are submitted by either the applicant or a medical office, those medical records should be accepted instead of a DOES form. Local health care professionals and providers should be consulted in the development of these forms and subsequently trained on how to complete them well in advance of paid leave benefits becoming available.

Protecting medical privacy and related health care provider authorizations (3301.4 & 3301.5(a))

We are concerned about the language in section 3301.4 of the proposed regulations regarding authorization to health care providers to disclose "medical and/or additional information necessary to process the claim for paid leave." Final regulatory language should be clear that workers or loved ones for whom they are caring do not need to provide an *unlimited* waiver of their medical privacy as a condition of receiving paid leave benefits (or having someone receive paid leave benefits to care for them). An open-ended requirement is likely to provide a substantial disincentive to seeking paid leave or allowing some to seek paid leave to care for you, especially for immigrant workers, those dealing with substance use disorders, those with mental health needs, and those with HIV/AIDS.

We strongly urge DOES to revise these provisions to make clear that the waiver will cover only the information necessary to complete the form prescribed by the Department and only regarding the specific condition in question. If a more expansive waiver is absolutely necessary, the waiver should be limited in time and make clear that the worker or care recipient can rescind the waiver at any time. It should also specify that the health provider shall *not* be authorized to release any HIV/AIDS information, mental health information, information regarding substance use treatment, or

psychotherapy notes unless the worker or care recipient specifically authorizes the health provider to reveal that type of information. New York's paid family leave program offers a strong model of this type of limited waiver (beginning on page 8 of the linked form).

In addition, section 3301.5(a) of the regulations requires as a condition of completed claim for family leave that the care recipients themselves sign a waiver. This will not be possible in all circumstances: for example, a worker's loved one may be suffering from a condition or incapacity that prevents him or her from signing such legal documents. In those circumstances, the regulations should allow for whomever is the appropriate legally authorized person to sign the waiver. In addition, the regulations should make clear that when the care recipient is a minor child, the child's parent or guardian (including the worker seeking leave) can sign the waiver on the child's behalf.

Deferring to health professional expertise for claims processing (3307.5)

We are concerned by the lack of clarity regarding the role of the claims examiner in reviewing medical documentation. Section 3307.5 of the proposed regulations states that, after a worker submits a paid family leave or paid medical leave claim including the necessary medical documentation, "the claim shall be reviewed by the claims examiner in accordance with the International Classification of Diseases, Tenth Revision (ICD-10), or subsequent revisions by the World Health Organization to the International Classification of Diseases, along with the proof of qualifying event provided by the eligible individual to support the claim for paid leave." This appears to imply that, even when a worker has submitted the required documentation from a health care provider who has actually examined the patient, the claims examiner will have the open-ended ability to overrule that provider's determinations and health treatment recommendations. In the vast majority of cases, there will be no reason for the claims examiner to take on this role. We strongly urge DOES to revise the regulations to make clear that, absent significant evidence that the documentation is substantially inaccurate or fraudulent, the determination of the health care provider as to the nature of the condition and the necessary duration of leave will be dispositive. In a case where there is such evidence of fraud or substantial inaccuracy, the claims examiner should seek additional information in order to better evaluate the claim before making any determination contrary to that of the health care provider. Additionally, states like California offer strong models for how and when the government should seek out an independent medical examination, at the expense of the state, of the claimant or their family member for whom they are providing care.

Clarifying the waiting period (3303)

As written, section 3303 of the proposed regulations leaves unanswered many important questions regarding the role of the waiting period required by statute. To avoid any possible confusion, we suggest that DOES provide further clarification on the following points.

First, the regulations should clarify the definition of "one week" for purposes of this section, particularly for purposes of intermittent leave. We suggest the following language:

"For purposes of the waiting period under this section, "one week" shall be defined as one calendar week (7 calendar days); provided, however, that for purposes of intermittent leave, an eligible individual shall be deemed to have completed the waiting period when that eligible individual has taken leave for a number of workdays equal to the number of days that eligible individual works in an average workweek or five workdays, whichever is lesser."

Note: we recommend the regulations also define "workweek" in sections 3304 and 3399 in alignment with the DCFMLA regulations (4 DCMR § 1699).
Second, the regulations should make clear that the unpaid waiting period does not count against a workers' entitlement to the maximum number of weeks of paid leave benefits. We suggest the following language:

> "The one-week waiting period shall not count towards the number of workweeks of paid-leave benefits that an eligible individual may receive. An eligible individual may receive payment for 6 workweeks in a 52-workweek period for a qualifying family leave event, 2 workweeks in a 52-workweek period for a qualifying medical leave event, or 8 workweeks in a 52-workweek period for a qualifying parental leave event."

Third, the regulations should make explicitly clear that a worker may apply for paid leave benefits as soon as a qualifying event occurs, including following a medical diagnosis, or, if the worker is pre-filing, as soon as the worker knows the qualifying event will occur. As written, the regulations could be misinterpreted as suggesting that workers cannot even apply for benefits until after the waiting period, rather than that benefits are not payable during or for the waiting period. Such a delay would be unnecessary and out of sync with the way waiting periods are handled in other paid leave programs or short-term disability programs (where such programs have waiting periods). We suggest adding the following language to make this clarification:
"Nothing in this subsection should be construed to place limitations on when an individual may file an application for benefits upon occurrence of a qualifying event."

Fourth, the regulations should make clear that an employee, may, if they choose to do so, use any available accrued paid time off, including but not limited Sick and Safe Days under D.C. law, during the waiting period.

Fifth, the regulations should clarify that the 10-business-day processing period under D.C. Code § 32-541.06(d) will begin to run immediately at the time the eligible individual files a claim for benefits.

Current employment eligibility - 3301.1(c)(1)(B)

Section 3300.1(c)(1)(B), which requires that eligible individuals be currently employed when applying for paid leave benefits, appears to conflict with the Universal Paid Leave Act (UPLA). Section 3301.1(c)(1)(B) goes beyond the plain language of the statute, which contains no such requirement for eligibility. Section 101(6)(A) of UPLA states that an eligible individual must have "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." Nowhere does the statute state that an individual must be currently employed at the time of applying for benefits in order to be eligible.

This eligibility requirement will likely have negative consequences for individual applicants, the government, and covered employers. Individuals who otherwise meet the law's eligibility requirements will be shut out from receiving benefits if they lose their jobs -- including if they lose their job on account of the need to care for a personal or family health situation, which is still an all too common occurrence even when workers request unpaid leave. The most vulnerable workers will disproportionately bear the harm of this exclusion. In particular, low-income workers change jobs more often than other workers, which puts these individuals at especially great risk of being between jobs when the need for leave occurs.

Further, a requirement to verify current employment (3300.1(c)(1)(B) and 3307.2-3) would create an unnecessary administrative burden for DOES and employers by creating a need to verify every applicant's employment status at the time of application and keep this information up-to-date throughout the entire period of benefits.

We urge DOES to remove section 3301.1(c)(1)(B). This would bring the eligibility regulations back into alignment with the plain language of the statute, and with the program operating procedures of every other state paid leave program which do not require current employment as a condition of eligibility. Making this change will enable workers to continue caring and providing for their families through tough situations,

and will eliminate unnecessary administrative paperwork burdens for the government and employers.

Expanding types of acceptable documentation for parental leave - 3301.2(c)(3) and 3301.6

Finally, we have concerns about the proposed requirements regarding documentation for paid parental leave claims. As proposed, section 3301.6 of the regulations would require workers to provide "government-issued documents, court orders, or other forms of documentation establishing a familial relationship between the eligible individual and the child for whom parental leave is sought." As with documentation for family leave, the regulations provide no guidance as to what "other documentation" may be used. This requirement will be very difficult for many workers to satisfy at the time they need to take parental leave. For example, there is often a significant time delay after a child's birth before an official birth certificate is issued, making it impossible for a worker seeking parental leave immediately after the child's birth to provide this document. Similarly, adoption orders and even custody orders from courts often take weeks or months to finalize. Parent-child bonding the first weeks of a child's life or placement with a family are essential to ensuring the long term health, success, and wellbeing of that family; the application process for paid parental leave should be designed to eliminate, not erect, barriers to access at this most critical time in a family's life.

We suggest using the following language in section 3301.6 to demonstrate a qualifying parental leave event has occurred, which incorporates models from New York's paid family leave program, the federal Family and Medical Leave Act, and the D.C. government's own family leave program:

> For a parental leave claim, an eligible individual shall submit documentation establishing a familial relationship between the eligible individual and the child for whom parental leave is sought, such as:
>
> 1. A birth certificate;
> 2. Documentation of pregnancy or birth from a health care provider that includes the name of the parent who gave or will give birth and the child's due or birth date, including but not limited to hospital discharge papers;
> 3. An acknowledgment of paternity, court order of parentage, or other equivalent legal document or order establishing parentage (including a marriage certificate showing marriage of the parent giving birth and

applicant, given DC law's presumption of parentage inside a marriage);

4. A court document indicating that an adoption is in process or is being finalized;
5. A document evidencing that the adoption process is underway, including but not limited to, a signed statement from an attorney, adoption agency, or adoption-related social service provider that an adoption is in process;
6. A letter of placement issued by the county or city department of social services, DC Child and Family Services Agency or DC Department of Youth Rehabilitation Services, local volunteer agency, or other public or private adoption or foster care agency;
7. Court order granting legal or physical custody of the child;
8. A power of attorney or other similar statement giving custody or caretaking of the child;
9. Documentation showing an *in loco parentis* relationship, such as documents acceptable for school enrollment under Office of the State Superintendent of Education's policies and rules. *See* https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Other%20Primary%20Caregiver%20Verfication%20Form.pdf;
10. A simple statement from the employee, as provided in 29 C.F.R. § 825.122(k); or
11. Other documentation approved by DOES.

Where the provided documentation does not include the name of the eligible individual, the eligible individual shall submit additional documentation establishing the eligible individual's relationship to the child or to the parent named in the documentation, such as a marriage license, documentation of a domestic partnership, or other official records (*e.g.*, tax records, leases, or bank documents).

In addition, section 3301.2(c)(3) of the proposed regulations would require workers seeking paid parental leave to provide two separate types of documentation: "(A) Proof of a qualifying parental leave event; and (B) Proof of a familial relationship between the child for whom paid leave is sought and the eligible individual[.]" We recommend amending this subsection to make clear that meeting the requirements of § 3301.6 fully satisfies a worker's responsibility to provide documentation in support of a claim for paid parental leave.

Thank you for considering our feedback on the proposed regulations. If you have questions, you may reach me at (202) 467-4900 ext. 580 or rmurphy@childrenslawcenter.org.

Sincerely,

Renee Murphy
Supervising Attorney - Policy

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[1] Children's Law Center fights so every child in DC can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to us to advocate for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With more than 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And, we multiply this impact by advocating for city-wide solutions that benefit children.