CLASP

Policy solutions that work for low-income people

September 9, 2019

Monnikka Madison
Associate Director
Department of Employment Services
Office of Paid Family Leave
4058 Minnesota Avenue NE
Washington, D.C., 20019

Dear Associate Director Madison:

We want to thank you for the opportunity to comment on the Department of Employment Services' proposed benefits administration regulations for the Universal Paid Leave Act (UPLA). We appreciate the Office of Paid Leave's engagement with community members and advocates to ensure that UPLA is thoughtfully implemented so that it can truly benefit all workers in DC, especially low-wage workers. As concerns about a potential recession grow, paid family and medical leave is a critical work support that can help working families, especially low-income working families safeguard their economic security.

The Center for Law and Social Policy (CLASP) is a national organization that works to improve the lives of low-income people by developing practical yet visionary strategies for reducing poverty, promoting economic opportunity, and addressing barriers faced by people of color. We advocate for and conduct research and analysis on improving jobs, including through paid sick days, paid family and medical leave, and fair scheduling. We also work with community and government partners to promote effective implementation and enforcement of labor standards. Further, we work extensively on paid family and medical leave, partnering with and advising state and local groups working to pass or expand workers' access to this essential benefit.

While we think there are a number of strong provisions in the proposed regulations, we continue to have some significant concerns about proposed provisions and language that will make the program inaccessible to many low-wage workers, including:

1) Section 3500.1 (c)(1)(A) –which requires an "individual to be employed by a covered employer at the time of application."
2) In sections 3500.1(b), 3506.2-6, 3513.6(a)/(b), and 3514.2 --the restrictive interpretation of the terms "regular or customary work" that will be harmful for individuals working multiple jobs.
3) The use of the term "reported" wages in sections 3503.1(a) and 3503(b)(1).
4) Section 3506 --the onerous process governing intermittent leave.

5) Section 3501.6(a) –requiring an applicant to provide valid proof of a Social Security number or Individual Taxpayer Identification Number, as well as other information than can serve as barriers to access.
6) In sections 3509, 3513 and 3599 – the lack of anti-retaliation language and references to other existing workplace protection laws.

1. Strike section 3500.1 (c)(1)(A), which contravenes UPLA Section 101.6 by requiring that eligible individuals be currently employed when applying for paid leave benefits.

This added language would wrongly exclude individuals who have lost a job, but whose work history qualifies them for benefits under the law. 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. One study found that one in seven low-wage workers—and one in five low-wage working mothers—reported losing a job because he or she was sick or needed to care for a family member.[1] Low-income workers also 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. The most vulnerable workers will disproportionately bear the harm of this exclusion. Finally, the requirement would also put D.C. out of sync with existing state paid leave programs, which generally all allow workers to receive benefits during unemployment, subject to certain conditions.

2. Revise the language in sections 3500.1(b), 3506.2-6, 3513.6(a)/(b), and 3514.2 to ensure that workers holding multiple jobs have greater flexibility when they take their leave benefits by clarifying that the "regular or customary work" provision is only for the employer or employers from whom they are taking leave because of the occurrence of the qualifying event.

As low-wage jobs continue to grow and proliferate, many workers are underemployed and must work involuntary part-time jobs.[2] Furthermore, as wages continue to stagnate, many more low-wage workers are working multiple jobs to make ends meet. A recent Census Bureau report found that about 13 million US workers now hold multiple jobs and that women are more likely to be multiple job holders.[3] The current proposed language in sections 3500.1(b), 3506.2-6, 3513.6(a)/(b), and 3514.2 seems to restrict workers from any employment while receiving paid leave benefits. However, some workers holding multiple jobs may only qualify for the paid leave through one of the jobs and not the other. Therefore, these workers should not be forced to cease working or receiving income from their non-covered job, especially since this can impact their families' economic well-being. New Jersey recently updated its Family Leave Insurance and Temporary Disability Law and program to reflect this critical challenge facing workers with multiple jobs. Starting July 1, 2020, the new policy will allow workers to continue some part-time work without having to forfeit their paid leave benefits. The new policy states: "Workers with more than one job will have the option to take leave from one employer while continuing to work for another. Their weekly benefit rate will be based only on wages from the employment from which they are taking leave."[4] We urge DOES to follow New Jersey's example and to revise sections 3500.1(b), 3506.2-6,

3513.6(a)/(b), and 3514.2 by adding the following clarifying language --"the individual does not perform his or her regular or customary work for the employers or employers from whom they are taking leave because of the occurrence of the qualifying event." This will ensure that workers are not penalized when they rely on additional employment to get by financially.

3. **Revise the language in sections 3503.1(a) and 3503(b)(1) from "reported" to "reportable wages."**

We recommend that paid leave benefits be tied to reportable wages, including gratuities, instead of reported wages. This is critical as worker misclassification continues to grow and inflict significant hardship on workers,[5] and lessons from the unemployment insurance system illustrate that not all employers pay required taxes or accurately report employees or their wages. Using reportable wages will hold employees harmless in cases of wage theft, failures to pay taxes or failures to properly classify workers as covered employees for purposes of the paid leave program.

4. **Create a more flexible process for workers taking intermittent leave.**

While we appreciate the thorough process for intermittent leave as outlined in section 3506, it seems quite complex and potentially onerous. Asking workers to share in advance their intermittent leave schedule for specific dates and then only be allowed to amend it one time per calendar month does not fully take into account that medical appointments may change or that an individual's work schedule may change. Many low-wage workers have to contend with unpredictable and unstable work schedules. Forty-one percent of hourly workers ages 26 to 32 receive one week or less notice of their job schedules.[6] Furthermore, such a complicated process seems unnecessary for a paid leave program that can last no more than eight weeks total in a year. We urge DOES to devise a simpler and more flexible process for intermittent leave. We also recommend DOES reinterpret the intent of UPLA section 104 (d), and allow workers to submit a request for payment after they have taken the intermittent leave rather than before they have taken the leave.

5. **Remove all barriers to access and the requirement that applicants must provide valid proof of a Social Security number or Individual Taxpayer Identification Number when submitting a claim for paid leave benefits in section 3501.6 (a).**

As we have shared in comments before, these requirements exclude many of our most vulnerable workers from accessing benefits when they desperately need them. Some workers are under-documented, under-resourced and may be facing tremendous stress when a leave event arises. No other state requires someone to provide the validity of their Social Security Number or ITIN. At a time of heightened anti-immigrant sentiments, DC should lead the nation in creating an environment where workers feel safe applying for this critical work support that allows workers to heal, or care for a loved one.

Further, the District should not mandate that individuals provide a home address, phone number,

and email address (section 3501.6(b)). These requirement places a disproportionate burden and barrier to access on low income, elderly, and vulnerable workers who may not have a current or permanent address or these methods of communication. Providing one means of contact should be sufficient for the application process. We also recommend the regulations are inclusive of individuals who do not have the means to possess a phone and those who do not have the access to technology (or are not tech savvy enough) to maintain an email address.

6. Cross-reference other statutes that provide job protection, reasonable accommodations and anti-retaliation in sections 3509, 3513 and 3599.

We urge DOES to reference and define "retaliate" or "retaliation" and "prohibited acts" in the final regulations in sections 3509 and 3599. Retaliation against workers who speak out or raise concerns about their rights continues to be widespread. According to a 2009 national survey, 43 percent of workers were victims of illegal retaliation when they raised concerns about their pay and working conditions.[7] Immigrant workers are particularly vulnerable to threats and other forms of retaliation. Low-wage, vulnerable workers literally cannot afford to lose their jobs and may be hesitant to come forward without substantial protections.

We also encourage DOES to cross-reference, in section 3513, federal and local job protection, reasonable accommodation, and anti-retaliation laws that relate to the need for a worker to take parental, family, or medical leave. Specifically, it would be helpful to employers and employees alike to be reminded of their obligations and rights under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. (FMLA), the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. § 12101, et seq., the District of Columbia Family and Medical Leave Act (DCFMLA), D.C. Code. § 32–501 et seq., the District of Columbia Accrued Paid Sick and Safe Leave Act of 2008 (ASSLA), D.C. Code § 32-531 *et seq.*, and D.C.'s Protecting Pregnant Workers Fairness Act (PPWFA), D.C. Code § 32-1231 *et seq*. This would help employers and employees understand and distinguish between their obligations and protections under UPLA and related laws. For example, 3513.2 cross-references DCFMLA, but the FMLA and other laws also provide job protection. Leave taken under UPLA will run concurrently with any leave taken under the FMLA (*see* § 32–541.07), so the regulations should remind employers and employees that those job protections will remain.

Thank you for considering our feedback on the proposed regulations. We would welcome the opportunity to discuss our comments with you in person and we look forward to continuing to work with you to make sure that UPLA is implemented in an equitable manner that maximizes opportunities for all workers, especially low-wage workers, to take paid leave when needed.

Sincerely,

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[1] Zoe Ziliak Michel and Liz Ben-Ishai, "Good Jobs for All," Mar. 31, 2016, CLASP, **https://www.clasp.org/sites/default/files/publications/2017/04/Race-and-Job-Quality-Brief-3_30ar.docx-FINAL.pdf** (citing "Hard Work, Hard Lives: Survey Exposes Harsh Reality Faced By Low-Wage Workers in the U.S.," Oxfam America, 2013, **http://www.oxfamamerica.org/static/media/files/low-wage-worker-report-oxfam-america.pdf**. The study didn't ask respondents about a specific length of illness, so it could have been lack of either paid sick days or paid family and medical leave that contributed to this job loss.).

[2] Tanya Goldman, Pronita Gupta and Eduardo Hernandez, "The Struggles of Low-Wage Work," May 29,2018, CLASP, **https://www.clasp.org/publications/fact-sheet/struggles-low-wage-work**

[3] Julia Beckhusen, "About 13M U.S. Workers Have More Than One Job," United States Census Bureau, June 18, 2019, **https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html**

[4] New Jersey Department of Labor and Workforce Development, **https://myleavebenefits.nj.gov/labor/myleavebenefits/help/faq/updatestolaw_2.shtm**

[5] David Weil, "Lots of Employees Get Misclassified as Contractors. Here's Why It Matters," July 5, 2017, *Harvard Business Review*, **https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters**

[6] Tanya Goldman, Pronita Gupta and Eduardo Hernandez, "The Struggles of Low-Wage Work," May 29,2018, CLASP, **https://www.clasp.org/publications/fact-sheet/struggles-low-wage-work**

[7] Tanya Goldman, "Addressing and Preventing Retaliation and Immigration-Based Threats to Workers," April 2019, CLASP and Rutgers CIWO, **https://www.clasp.org/publications/report/brief/labor-standards-enforcement-toolbox-addressing-and-preventing-retaliation**