

May 4, 2018

Ms. Monnika Madison  
Associate Director  
Department of Employment Services  
Office of Paid Family Leave  
4058 Minnesota Avenue NE,  
Washington, DC, 20019  
**Via email: [does.opfl@dc.gov](mailto:does.opfl@dc.gov)**

Dear Associate Director Madison,

On behalf of the Legal Aid Society of the District of Columbia (Legal Aid), I write to submit the following comments on the Department of Employment Services' proposed regulations on the Universal Paid Leave Act (UPLA). Legal Aid is the largest general civil legal services program in the nation's capital. Our mission is to make justice real for the District's low-income residents through individual and systemic advocacy. As an organization that cares about the health and wellbeing of low-income workers, as well as their children and other relatives who depend on them for care, we are grateful for and proud of the District's leadership on paid family and medical leave. Paid leave has proven time and again to improve health outcomes for patients when they and/or their family caregivers have financial peace of mind. Completing UPLA's regulations is an important part of addressing persistent racial and economic health disparities in the District. We hope the comments below on myriad topics related to claims processing will help the agency to implement a user-friendly program that best meets the needs of patients, working caregivers, and health care providers.

### **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 pre-file a claim 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. 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 very 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." This appears to require workers or loved ones for whom they are caring 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). This 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 that the child's parent or guardian (including the worker seeking leave) can sign the waiver on the child's behalf.

### **Clarifying the purpose and application of 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 (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.

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

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 and foster placement paperwork from courts can 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;
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, local volunteer agency, or other public or private adoption or foster care agency;
7. Court order granting legal custody of the child;
8. Documentation showing an *in loco parentis* relationship;
9. A simple statement from the employee, as provided in 29 C.F.R. § 825.122(k); or
10. 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.

### **Online portal (3305)**

This provision requires that all claims and communications regarding the UPLA program be conducted through an online portal or “through another format approved by DOES.” Many clients do not have regular access to the internet and will need other methods of conducting business with DOES. We therefore urge DOES to specify the other formats that the agency will approve so that claimants without regular internet access will get consistent guidance on how else they can communicate with DOES.

### **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.

### **Providing specific information about appeal rights (3307.6(c))**

This provision requires that as part of an initial determination, DOES provides “[a] description of the process to file an appeal with the Office of Administrative Hearings.” The next section (3308) provides for substantive appeal rights. We urge DOES to include the substantive appeal rights in the initial determination (or as an attachment sent out with every determination) rather than just a description of the appeals process. This would make clear that claimants have a right to appeal their adverse determinations and ensure that they understand the timelines for doing so.

### **Relationship to other benefits (3314)**

This section discusses the intersection of the UPLA program with other benefits including the federal and District FMLA and unemployment insurance. We recommend adding provisions that would require DOES to take steps to ensure that the transition from UPL to other benefits (particularly those also administered by DOES, such as unemployment insurance) is seamless. In practice, this could mean: (1) informing employees who are taking parental leave after the birth of a newborn about the availability of benefits such as WIC, Medicaid and child care subsidies; (2) adding a FAQ section to the DOES website explaining the difference between UPL benefits and unemployment insurance so that a claimant can determine which benefit is the appropriate one for their situation; (3) informing individuals who are having difficulty obtaining medical documentation due to a lack of health insurance about the availability of and procedures for applying for Medicaid or private health insurance coverage through DC Health Link; and (4) providing information to individuals whose UPL benefits are coming to an end about other safety net benefits (such as Temporary Assistance for Needy Families) if they are unable to return to work.

Additionally, we recommend that the agency add a provision to the regulations to help individuals who use up their UPL and might qualify for unemployment insurance (for example, because they quit their jobs with good cause due to caretaking responsibilities but are still available to work). This would include providing information about unemployment insurance when UPL benefits are terminating (so that individuals can determine if they might meet the eligibility criteria) and a requirement that DOES maintain information and documents provided to DOES for the UPL determination so that, assuming that some information remains the same (for example, documents verifying the family relationship between the caregiver and the family member who needs care), the individual can ask DOES to rely on these information and documents rather than having to provide them again.

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Thank you for considering my feedback on the proposed regulations. I hope the agency will bring medical professionals, public health advocates, and workers to the table to discuss and solve some of the concerns and ambiguity in the proposed regulations. Many people and organizations, including ours, have a vested interest in the success of DC's paid leave program and we look forward to supporting DOES's efforts to establish a world-class program for the District's working families and caregivers.

Sincerely,

*/s/ Jennifer Mezey*

Jennifer Mezey  
*Supervising Attorney*