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Testimony of Ed Lazere, Executive Director
At the Public Hearing on
B22-130, Paid Leave Compensation Act of 2017
B22-133, Universal Paid Leave Compensation for Workers Amendment Act of 2017
B22-302, Large Employer Paid-Leave Compensation act of 2017
B22-325, Universal Paid Leave Amendment Act of 2017
B22-334, Universal Paid Leave Pay Structure Amendment Act of 2017
DC Council Committee of the Whole
October 10, 2017

Chairperson Mendelson and members of the Committee, and thank you for the opportunity to speak today. My name is Ed Lazere and I am the Executive Director of the DC Fiscal Policy Institute. DCFPI is a non-profit organization that promotes opportunity and widespread prosperity for all residents of the District of Columbia through thoughtful policy solutions.

I appreciate the opportunity to testify on the bills today. As you know, the Universal Paid Leave Act (UPLA) passed in 2016 by the DC Council guarantees that people who work in DC can take time off from work, with pay, when they need to be with a new baby, care for an ill relative, or address their own health need. It is important and commendable to note that all of the bills being considered today recognize the importance of paid family and medical leave, and all of them maintain the same level of benefits and benefit structure as UPLA. The bills differ from UPLA primarily in the way that DC's paid family and medical leave program will be administered.

That does not mean, however, that the proposed changes are minor or insignificant. Indeed, the structure of DC's program, as I will discuss below, is incredibly important to ensuring that workers can easily access leave when needed and that the program provides the least administrative burden on businesses.

Given that UPLA is already DC law, and that all of the alternative bills would maintain UPLA's benefits, the Council should only support changes if they would improve the way that UPLA is administered—that is, if they would result in a better program for workers and businesses. The DC Fiscal Policy Institute's review concludes that none of the alternatives meet this standard, however, and that all of the alternatives would weaken UPLA in one or more critical ways. DCFPI urges the Council to reject these alternatives.

UPLA, was designed with national experts and uses a proven "social insurance" model like Social Security, which results in low administrative costs, very limited administrative burden on employers, and a transparent system for both workers and their employers. These features would be important for any program but are especially important in this case because UPLA was designed to reach all workers and to be especially helpful to low-wage workers and workers of color.

Most of the alternative bills include an "employer mandate," where employers provide the benefit directly rather than through a public fund as under UPLA. Yet an employer mandate undermines each of the advantages of UPLA, particularly because it creates financial incentives for employers to limit the amount of leave taken by their workers. Workers with the most advanced skills and most power in the workplace

would likely receive paid family and medical leave under an employer mandate. But low-wage workers and workers of color—who already face the most discrimination and the highest rates of wage theft—would face challenges and barriers to accessing benefits.

An employer mandate would result in a less equitable program. An employer mandate also would place significant administrative burdens on many businesses, and lead to unpredictable costs—in sharp contrast with UPLA.

A final bill alters the way that the UPLA payroll tax is levied, placing most of the tax on *employees* rather than fully on *employers* as under UPLA. This rests on an untested and very risky notion that the UPLA payroll tax can be considered a "fee" and thus avoid the federal law that prevents DC from levying a tax in income earned in DC by non-residents. If this bill were to be adopted, it almost certainly would face a legal challenge that would tie up the program, potentially for years, and could in fact imperil the program's survival. As discussed below, a legal opinion from the law firm Steptoe and Johnson, sought by the DC Fiscal Policy Institute, concludes that there is significant risk that that imposing the UPLA assessment on employees would be rule by the courts to be an impermissible tax on non-resident income. This bill is simply not work the risk.

UPLA Uses a Proven Social Insurance Model

UPLA uses a social insurance model, like Social Security and Unemployment Insurance, which has been tested and proven to work. Under UPLA, all private-sector employers in the District will pay a fixed payroll tax into a government-run fund to cover the cost of benefits for their workers. When workers experience a qualifying event—welcoming a new child into their families or addressing their own or a family member's serious health condition—the employee comes off the company's payroll, and receives wage replacement from the public fund. The agency administering the fund is responsible for processing claims and paying benefits.

This structure is beneficial in several ways:

- It offers a predictable tax to employers. This tax is modest, amounting to just $5 a week for an employee being paid $800 a week.
- It has low administrative costs and places virtually no administrative burden on employers.
- It uses a neutral third-party arbiter to decide whether a claim for benefits should be approved.

In addition, DC's Council Budget Office found that the District can implement UPLA without affecting the ability of businesses and the DC economy to thrive. Their thorough analysis concluded that the economy will be 99.9 percent as large as it would be without UPLA, and that the adopted program is "unlikely to alter the current upward trajectory of the District's economy." A universal program also minimizes cost, increases employee morale, and reduces turnover.[1]

For these reasons, all of the states that currently offer paid family and medical leave use this structure.

UPLA Promotes Economic and Racial Equity While Also Promoting Economic Development

The design of UPLA will help address economic and racial inequities in DC. This is because the paid family and medical leave program would replace 90 percent of the wages for workers with the lowest incomes, with

[1] http://dccouncil.us/news/entry/economic-and-policy-impact-statement-universal-paid-leave

lower reimbursement rates for higher-paid workers. This substantial wage replacement rate will help ensure that low-wage workers in DC—most of them people of color—will actually be able to take the leave for which they are eligible. This will help stabilize the incomes of low-wage workers, many of whom work in industry sectors with very rates of turnover, when they have a life event that requires time off. In addition, taking paid leave from a job is likely to help low-wage workers keep their jobs when leave is over, although UPLA does not guarantee this right. Currently a worker who needs to take an extended amount of time off but does not have leave is likely to leave their job. This change under UPLA is especially important to Black workers, since they are much more likely than White workers in DC to stay out of work for an extended time when they leave a job.[2]

UPLA also is likely to support economic development in the District and the city's competitiveness with its neighbors, by making jobs in the city more attractive than jobs in the suburbs. Beyond that, residents preparing to have children may be more likely to stay in DC—and keep their DC-based job—if they know they can get paid parental leave. Paid leave would help these residents afford DC's high cost of living and tilt the balance of location decisions toward staying in the city.

Proposed Alternatives Would Undermine UPLA and Hurt Workers and Businesses

All of the bills being considered today offer the same benefits as UPLA, but would provide them in very different ways.

- Two bills use an "employer mandate" model[3], in which all employers provide employees with paid leave directly, without a public fund to administer the benefit. Instead, employers would either "self-insure"—which means the employer pays the cost of an employee's wage replacement directly out of pocket—or purchase insurance through a private company if that is available. All employers would have to self-insure for at least part of the program, since there are no insurance products anywhere in the country that cover all of UPLA's benefits, particularly leave to care for an ill relative. These alternatives would also require larger businesses to pay a small payroll tax to support tax credits to some small businesses.
- Two other proposals are "hybrid" models,[4] in which small employers would pay a payroll tax to participate in an UPLA-type government-run fund, and larger employers would be subject to an employer mandate (as described above). Employers under the mandate would be required to provide benefits to their workers and also pay a payroll tax into the government-run fund to help offset the cost to small businesses.
- A final bill, the Universal Paid Leave Amendment Act, is the same as UPLA other than the 0.62 percent payroll tax would be split between the employee (0.42 percent) and employer (0.2 percent).

DCFPI's review of the alternatives that include an employer mandate raise a number of concerns: an employer mandate would likely be bad for workers, bad for many businesses, and have much higher administrative costs. As shown below, an employer mandate undermines each of the advantages of UPLA: easy access to benefits for workers, predictable costs for businesses, and low administrative costs.

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[2] DC Fiscal Policy Institute, "Left Behind: DC's Economic Recovery Is Not Reaching All Residents," January 29, 2015
[3] B22-0133, The Universal Paid Leave Compensation for Workers Amendment Act of 2017, and B22-0302, The Large Employer Paid-Leave Compensation Act of 2017.
[4] B22-0130, The Paid Leave Compensation Act of 2017, and B22-0334, The Universal Paid Leave Pay Structure Amendment Act of 2017.

It should be noted that there are other details of the individual bills that are also problematic. A full chart including the full details of each proposal, and how they compare to UPLA, is available here.

An Employer Mandate Would Be Bad for Workers, Especially Workers in Low-Wage Jobs

Under an employer mandate, employees request paid leave from their own employer, rather than filing a claim for benefits with a neutral government agency under UPLA. This is problematic because it would create a financial incentive and other reasons for employers to deny or limit claims. Think of the way for-profit private health insurance coverage works—in which it can be quite common for workers' benefits to be denied—versus the way that Social Security benefits are administered, in which retirees rarely have a problem receiving their payments.

In the case of paid family and medical leave, consider a business facing its busiest time of the year, and the pressure a manager may put on a worker to not take leave or to cut their leave short. Or consider a business facing a cash-flow problem, and the fear they would have about paying a worker for several weeks of leave while also having to replace the worker temporarily. The pressure to limit or deny claims under an employer mandate would exist whether a business self-insured—paying benefits directly—or if it bought insurance to cover benefits. In the latter case, insurance premiums tend to be experience rated, so that premiums would be higher for businesses with higher claim rates.

Employees in low-wage occupations where hourly pay and shift work is common are especially vulnerable to intimidation and pressure to not to take leave. These workers already often experience retaliation in the form of reduced hours, worse schedules, or even termination, and often do not even ask for benefits to which they are currently entitled, such as paid sick days.[5] This means that under an employer mandate, the highest paid workers with the most power in the workplace would have much better access to paid family leave than low-wage workers and workers of color. An employer mandate thus severely undercuts the goal of UPLA to create an equitable program that is accessible to all.

In addition:

- An employer mandate can increase the likelihood of discrimination for certain workers. There is evidence that employers in countries that have an employer mandate discriminate against workers they think would be most likely to take leave, especially women of child-bearing age.

- Models dependent on employer-provided benefits prevent people from accessing benefits when they are unemployed or between jobs—even if contributions were made on their behalf while they were working. This discriminates against people recently separated from the workforce or with irregular work patterns, and acts as a deterrent for workers to switch jobs or start their own business.

An Employer Mandate Would Be Bad for Many Businesses

It is unclear whether an employer mandate would be any less expensive for employers than UPLA, especially since all employer mandate bills require affected employers to pay a tax *and* pay the full costs of benefits themselves. There is a substantial risk that an employer mandate could be costly and unpredictable for many businesses, in contrast to the entirely predictable cost of the UPLA payroll tax. The risks are especially great for small and mid-sized businesses.

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[5] DCFPI, DC Jobs with Justice, and the Kalmanovitz Initiative at Georgetown University. 2015. Unpredictable, Unsustainable: The Impact of Employers' Scheduling Practices in DC.

- Under each of the alternative proposals, employers would still pay a payroll tax. This would be on top of funding benefits for their own workers, either through self-insurance or private insurance. Because costs of providing benefits directly is unknown, it is not clear that an employer mandate approach will be any cheaper than UPLA on average, especially since the employer mandate bills all provide roughly the same benefits as UPLA.

- Currently, no insurance product exists in the private market to provide paid family leave. It is completely unknown how long it would take to develop such a product, if ever, and what this product would cost on the open market.

- Because no private insurance product exists, employers would have to self-insure for paid family leave, which is financially risky and administratively challenging. Self-insurance could lead to volatile costs that vary greatly from employer to employer and from year to year, since the number of workers needing leave could vary greatly from year to year. Self-insurance therefore is likely to have higher costs for many businesses, at least in some years. For example, if a worker making $500 a week takes six weeks of leave, an employer who self-insures would have to pay $2,700. Under UPLA, the employer would pay just $161 a year into the insurance pool to provide the same benefit.

- The hybrid approach may discourage business growth. Requiring employers to go from the publicly funded program to an employer mandate when their number of employees rises above a set threshold creates a cliff effect for businesses, which could be a disincentive to grow.

- Because costs will vary from employer to employer, companies that have higher usage of leave—or perhaps even *perceived* higher usage, based on the demographics of their workforce—will pay more, and therefore they will be at a competitive disadvantage. Again, this creates a market incentive to not hire workers likely to need leave, and to attempt to deny leave when workers seek it.

The uncertainty around costs of an employer mandate runs counter to the predictability that employers often say they are looking for. The unpredictably of an employer mandate is in sharp contrast to the fully predictable and modest cost of the 0.62 percent payroll tax that funds UPLA.

An Employer Mandate Is Bad for Program Administration and Costs

Administration of a paid leave program has three general cost categories: processing benefit claims, the cost of education and enforcement of the law, and infrastructure/IT costs. Under UPLA, all costs have been calculated and fully accounted for— and the administrative and education/enforcement costs are embedded as part of the 0.62 percent payroll tax. Under the alternative proposals, the total costs have not been calculated, and these total costs are likely to be the same or much higher than those under UPLA:

- **Processing Benefit Claims:** Rather than utilizing the economy of scale of a single, centralized agency, the alternate models will turn each employer into an individual program administrator. Under self-insurance, every employer would need to have staff, software, and procedures for administering this benefit. This could be burdensome to businesses and result in higher overall cost.

- **Education, Monitoring, and Enforcement:** Any employer mandate would require very strong mechanisms to ensure that workers know about their rights, so they can access their leave benefits and can seek redress when they are wrongfully denied such benefits. It also should require

employers to provide detailed information on their workforce and applications for leave, to help the District monitor compliance. DC's enforcement agency would need to be much larger than under UPLA and would therefore be more costly.

- **IT/Infrastructure:** A hybrid approach still requires DC to create an IT system and a division to run a public program. Start-up costs are likely to be the same as UPLA, as the IT costs of a social insurance program are relatively fixed. This means that a hybrid approach would have almost all the IT and administrative costs of UPLA *plus* the added administrative costs placed on all employers.

Taxing Workers Directly to Fund Paid Family Leave Is Legally and Politically Risky, and Unnecessary

The Universal Paid Leave Amendment Act is the same as UPLA except that the 0.62 percent tax would be split between employees (0.42 percent) and employers (0.2 percent) rather than entirely on employees. This kind of sharing of the expense makes sense in principle and is used in other states, but it is a challenge in DC because the District is not allowed to levy an income tax on non-residents. For people who work in DC but live elsewhere, this bill would create a non-resident income tax. The bill supporters suggest that this can be considered a "fee," because it supports a benefit for workers, but this is highly risky. Designers of UPLA chose a payroll tax on employers after a lengthy analysis and conclusion that a levy on workers would violate the federal government's prohibition of the District levying an income tax on non-residents who work here.

The DC Fiscal Policy Institute sought a legal analysis of this issue from the Steptoe and Johnson law firm, and that is attached to my testimony. That analysis confirms that there is a possible legal argument for considering the UPLA payroll assessment a fee rather than a tax, but that this is not a slam-dunk conclusion and that in fact there are strong reasons to consider the assessment a tax. This means that adopting this bill would likely face a legal challenge, for perhaps an extended period that would delay implementation, with a good possibility that the effort to call the assessment a fee would be overturned by the courts.

Notably, the legal analysis points out that Congress has expressed a strong and long-standing interest in preventing a non-resident income tax, and that any court would likely take that into account if declaring the assessment a "fee" faced a legal challenge. If the UPLA assessment were considered a fee, the District could start levying income taxes on non-residents for other reasons, such as public safety or public works, that non-resident workers benefit from.

For these reasons, the memo from Steptoe and Johnson concludes that "there appears to be a significant risk that a court might find that levying this 'fee' on nonresidents' income, even to provide a benefit to those same individuals, represents an impermissible tax."

It is important to note that levying the UPLA tax on employees, rather than employers, is not necessary to ensure that the cost of the program is shared with workers. Economic logic, and the analysis by the DC Council Budget Office, suggest that a levy on employers for an employee benefit would be fully or partially passed on to workers through slightly lower wages. If working in the District brings a substantial benefit that working in the suburbs does not—that is, it brings a substantial increase to a job's total compensation—it is likely that the added attraction of working in DC would allow employers to attract and retain workers at slightly lower wages. It also is possible that employers could pass on the cost to employees by offering slightly lower wage increases for existing employees.

The changes would not have to be great to fully pass on the cost to workers. If an employer has a position with a $50,000 salary without paid family leave, offering the job for $49,700 plus paid family leave would *fully* pass the cost on to the worker. Or if an employer that usually offers 2 percent pay increases were to provide 1.7 percent pay increases for just two years—perhaps even noting that it is doing so because workers now have paid family leave—that would permanently adjust the wage scale to fully pass the cost on to workers.

Thank you for the opportunity to testify.