

**Testimony of Ed Lazere, Executive Director
At the Public Oversight Roundtable on
Implementation of Law 21-264, The Universal Paid Leave Amendment Act of 2016
DC Council Committee on Labor and Workforce Development
October 16, 2019**

Chairwoman Silverman and other members of the Committee, thank you for the opportunity to testify 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 budget choices to reduce DC's economic and racial inequities and build widespread prosperity in the District of Columbia, through independent research and thoughtful policy recommendations.

I will add that as a DC-based employer and organization that cares about economic justice, we are grateful for and proud of DC's leadership in establishing a paid family and medical leave program for our workforce.

I'm here today to highlight several issues related to the proposed benefit regulations for DC's paid family and medical leave program. I will use my testimony to highlight key aspects of DCFPI's comments on the proposed rules, and I have attached my full comments to my testimony.

I first want to thank the staff in the Office of Paid Family Leave for their thoughtful and diligent work to implement this new program, including the work that went into crafting these draft rules. Every interaction I have had with the people in this office shows that they are thoughtful, devoted public servants who are committed to running a successful program. I appreciate the progress they have made to date, including implementing the tax collection portion of the program this year.

As DCFPI thinks about the program's rules, we believe the Department of Employment Services should interpret the statute in ways that minimize barriers for workers seeking benefits, especially when there is a question about interpretation of the law. DC's Paid Family and Medical Leave program provides a benefit that people earn through their work, and it provides a social good by allowing workers to attend to urgent family needs without having to worry about the loss of work income. The rules should thus aim to be inclusive of workers who need to take time away from work to care for themselves or their families.

I will highlight four parts of the proposed benefit regulations today. They are proposed rules that would make it hard or impossible for workers to claim benefits and make it harder for the District to administer the program. In one case, the proposed rule is not consistent with the letter or spirit of the law, and in two cases, the proposed rules reflect an overly restrictive interpretation of the law.

- The proposed rules require that workers be employed at an employer covered by DC's paid family and medical leave at the time of application. There is nothing in the statute to support this proposed rule, which would eliminate access to benefits for many workers, especially low-wage workers and workers of color. It should be removed.

- The proposed rules prohibit people from doing any work for pay on any day they claim paid family leave benefits. DCFPI believes the rules should instead allow workers to claim benefits when they are able to work part of a day, but not a whole day, due to a qualifying event. This is likely to be a common experience, such as someone who needs to care for an ill relative for half the day but can work the remaining half. Workers should be able to claim intermittent leave benefits for the hours they are unable to work on a given day, while maintaining the rule requiring workers to submit claims for leave in full-day increments.
- With limited exceptions, the proposed rules do not allow workers to claim benefits after an event has happened, at least not for the time between the start of the event and the date they apply. This means that a parent who has a baby on the first of the month and applies for benefits on the 15th would lose out on one week of benefits. (Note that the law doesn't provide benefits for the first week of leave.) The notion that workers should claim benefits only for events or time that occur after a claim is submitted is both cumbersome and counterintuitive. Many family events cannot be predicted in advance and submitting an immediate claim may be difficult. The prohibition on retroactive claims would leave many workers unable to claim their full earned benefits. This proposed rule relies on an overly strict interpretation of just one word in the statute, even though the statute does not include any specific language barring claims after an event has started. DCFPI believes the rules should instead allow workers to claim benefits within a reasonable time frame after an event (like 30 days).

In addition to these changes, DCFPI believes that workers should be able to submit application materials within a reasonable period before an expected qualifying event, such as planned surgery, with the final application approval coming after OPFL receives notice that the event has occurred.

Paid Family and Medical Leave Rules Should Not Require Workers to Be Working at the Time They Claim Paid Family and Medical Leave Benefits

The proposed rules require that workers be employed at an employer covered by paid family and medical leave at the time of application. This provision should be struck because it violates both the letter and spirit of the law, and it would deny benefits to many workers.

Paid family leave eligibility is tied to earnings in the five quarters prior to the qualifying event and then experiencing a qualifying event that leaves a worker unable to perform regular work. Neither of these requirements has anything to do with current employment with a covered employer.

Any unemployed worker needing to take family leave is unable to *look for work* and thus is prevented from earning income. This is effectively no different from an employed worker unable to work because of a family need. Workers should be eligible for paid family leave in both cases. Consider these examples:

- A worker is laid off from their job in DC with a covered employer and starts to collect unemployment insurance. They then need to care for an ill relative and cannot look for work, losing their UI. They should be able to claim paid family leave benefits.

- A DC resident who is pregnant and employed for a covered employer takes leave to be with an ill relative and loses their job in the process. They then have their child. They should be able to use the remainder of their 8-week maximum weeks of leave.

Finally, the fact that DC's paid family and medical leave law does not provide any job protections is a further reason that tying eligibility to current employment is wrong. A worker needing to take time off for family and medical leave may lose their job if they are not covered by DC FMLA, which is the case for thousands of workers. It would not be fair that a worker could not claim benefits they have earned because they have been let go by their employer due to their need for leave.

Paid Family and Medical Leave Rules Should Allow Workers to Claim Benefits When They Are Able to Work Part of a Day

The paid family and medical leave law allows workers to claim their leave benefits intermittently, but also requires workers to claim leave in full-day increments. In response, the proposed rules would prohibit workers from earning any income on a day for which they claim intermittent leave. While this interpretation is understandable, it is unnecessary and would harm workers who only need to take off a part of the day for their qualifying event.

It is unlikely that the drafters of the paid family and medical leave statute intended for workers to take off a full day from work when they are able to work part of the day. Consider these examples.

- A worker sprains their ankle and is able to work a 4 -hour day but needs to rest for the remainder of the day.
- A worker needs to take off half a day to take a relative to medical treatment but can work the remainder of the day.

The rules should allow workers in these cases to claim benefits for the time they are unable to work. This can be accomplished in the following way:

- The rules should clarify that the law's requirement that a worker can claim benefits when they are not able to perform their "full regular and customary work schedule" include that workers who can work a reduced schedule that is less than their regular schedule.
- The rules should clarify that intermittent leave includes workers who are able to work part of a normal day but not a full day. This interpretation is consistent with the intent of the law—that workers claim benefits for the time they are not able to work—rather than not being able to perform *any* work at all on days they collect benefits. Someone who normally works 40 hours a week but then can only work 20 hours weekly due to a qualifying event is indeed not performing their regular and customary work.
- The rules should eliminate provisions that workers cannot work any period of hours on days for which they are claiming benefits.

- The rules should clarify that leave must be claimed in one-day increments but that several leave events can be claimed together to make one day of leave. For example, a worker who can work only 4 hours of their normal 8-hour day could claim one day of leave for every two days of work. This would meet the goals of allowing workers to claim leave only for time they are unable to work and also limit claims to increments of one day or more.

Paid Family and Medical Leave Rules Should Allow Workers to Claim Benefits After an Event Has Started

The proposed rules state that “No benefits shall be payable for leave taken before the applicant submitted a claim to DOES for paid-leave benefits, except in exigent circumstances.” This is an overly strict interpretation of the law. This means that a parent who has a baby on the first of the month and applies for benefits on the 15th would lose out on one week of benefits. (Note that the law doesn’t provide benefits for the first week of leave.)

This rule appears to stem from the language of the statute that says that “An eligible individual may submit a claim for payment of his or her paid-leave benefits for a period during which he or she *does not* perform his or her regular and customary work because of the occurrence of a qualifying event.” [emphasis added] Because the law says that benefits are available when a worker “does not perform,” as opposed to “did not perform,” it appears DOES concluded that benefits cannot be paid retroactively. It is an interpretation based on one word, with no other language in the statute suggesting that benefits cannot be paid for an event that started before the claim was made.

The notion that workers should claim benefits only for events that occur after a claim is submitted is both cumbersome and counterintuitive, especially since the proposed rules do not allow workers to submit claims in advance of an event. These provisions almost certainly would leave workers unable to claim some earned benefits. Consider these examples:

- A working single parent who finds out one of her relatives needs immediate care. The parent would need to rush to find someone to care for their children, make arrangements with their job, plan travel to reach their relative—all while being worried about their relative’s health.
- A parent has a premature baby who is very ill. The baby’s parents may not have the state of mind to think about applying for paid family leave benefits.
- A working caregiver for an ill parent cannot apply for benefits promptly because they have not received documentation from the parent’s health provider.

DOES itself recognizes that it would be inappropriate to never allow retroactive benefits, by adding a rule within 3501.4 that retroactive benefits can be claimed under “exigent circumstances,” with relatively strict conditions for meeting that standard. It’s important to note that if DOES believes that the law does not allow retroactive benefits, there is no basis for this exception. The exception instead appears to reflect DOES’s common-sense recognition of the inappropriateness of retroactive-only benefits.

Given that, there is no reason to make the exception narrow and restrictive. We recommend revising the regulations to ensure workers can receive full benefits without penalty so long as they file a claim within some reasonable time after the onset of a qualifying leave event or after the beginning of the leave period, without the need to demonstrate exigent circumstances. The 30-day time frame model provided by Massachusetts provides sufficient time for applicants to gather needed claims documentation in the midst of juggling all the other complications of a family or medical emergency.

Allowing workers to claim benefits after the fact also would allow the District to administer the program more easily for workers needing intermittent leave. Due to the strict interpretation of the statute that retroactive benefits are not allowed, the proposed rules require workers to list the specific dates for which intermittent leave will be taken in the future, and to submit amendments if there is any change.

Yet this process would be unworkable for many workers. A worker may not know in advance when future medical appointments will happen, because they may be hard to schedule or may depend on other unpredictable factors. Beyond that, a worker who works an unpredictable and changing schedule from week to week may have scheduled a medical appointment but will not know if they need to work that day. The proposed rules allow workers to amend their schedule as needed, but this would be an administratively burdensome process for both workers and OPFL.

Instead, DOES should develop rules so that workers facing intermittent leave (like needing to take a parent to medical treatment) should be able to set up a claim for likely benefits and then submit claims after leave is taken. This is a logical approach that would be simple for workers and for program administrators. It is fully consistent with the intent of the paid family leave law.

Paid Family and Medical Leave Rules Should Allow Workers to Prepare for Claims in Advance

The proposed rules are restrictive because they do not allow workers to apply in advance when they know a qualifying event will be happening soon. They should be revised to create more flexibility in the benefit application process.

When leave needs are known—such as a parent with planned surgery or the impending arrival of a child—pre-filing for benefits could be allowed within a certain time frame so that an individual need only submit minimal additional documentation when their leave begins (e.g. hospital admittance papers, documentation confirming the birth or placement of a child, notes or forms from health care providers, etc.). Allowing workers to apply in advance, such as within 30 days of an event, would allow those workers to avoid having to complete a full application for benefits at a time when their focus should be on their family.

Under a revised rule, workers could be allowed to complete an application for benefits, and receive preliminary approval from OPFL, with final approval made after the event has occurred and documentation of it. This would ease the application process while also ensuring that no benefits are paid inappropriately.

Thank you for this opportunity to testify. I am happy to answer any of your questions.