



September 9, 2019

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

Email: 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 in response to the Department of Employment Services' Notice of Proposed Rulemaking, proposing regulations to implement the Universal Paid Leave Amendment Act of 2016, D.C. Code § 32-541.01 et seq. (the "Act"). 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.

On May 4, 2018, Legal Aid submitted extensive comments to the earlier version of the rulemaking and reincorporates those comments to the extent they are still relevant. In addition, Legal Aid is also aware of and fully supportive of the comments submitted today by fellow organizations such as Jews United for Justice that are intended to ensure that the UPL program is fair, just, and accessible to all.

For purposes of these comments, however, we propose some primarily technical changes that we hope will align the regulations to the provisions of the Act, correct inconsistencies, support eligible individuals' access to benefits, reduce administrative burdens on covered employees, and promote better coordination of voluntary employer benefits and Universal Paid Leave ("UPL") benefit administration in a way that advantages employees.

I. Comments and Proposed Changes Relating to Eligibility For and Access to Benefits.

The proposed regulations would restrict eligibility for benefits in two ways that are not authorized by the Act. First, the Act is intended to compensate eligible individuals for lost income for leave taken from covered employment due to a qualifying event. There is no requirement in the Act that an individual who is eligible due to covered employment be employed at the time of application. For this reason, Legal Aid proposes deleting Section 3500.1(c)(1)(A).

3500.1 An individual shall be eligible for paid-leave benefits under this chapter if: ...

(c) The individual satisfies one or both of the following sets of criteria:

- (1) ~~(A) The individual is employed by a covered employer at the time of application;~~

Second, nothing in the Act limits eligibility only to individuals who have obtained Social Security cards or taxpayer identification numbers. Individuals may lawfully work for covered employers in the District of Columbia without either, provided that the individual has a U.S. Passport, a “green card” employment authorization document, a foreign passport stamped with an endorsement to work in the U.S., or other documents listed as sufficient to complete a Form I-9. For this reason, Legal Aid proposes revising Section 3500.1(a) to add that any proof of identity acceptable for I-9 purposes will support a claim for benefits, as indicated below.

3501.6 When submitting a claim for paid-leave benefits, an applicant shall provide. . . .

- (a) Proof of the applicant’s identity, which shall be satisfied by providing evidence showing valid proof for each of the following three (3) elements:
- a. The applicant’s name;
 - b. Date of birth; and
 - c. One of the following:
 - (i) Social security number; ~~or~~
 - (ii) Individual taxpayer identification number; or
 - (iii) Any other form of identification constituting a List A or List B document sufficient to establish identity for purposes of Form I-9 requirements.

II. Comments and Proposed Changes Relating to Timing of Claim Applications.

The proposed regulations impose stringent timing requirements that, in practical effect, are likely to deprive eligible individuals of benefits to which they would be otherwise entitled. There is no mandate in the Act for application timing requirements to be so restrictive. Indeed, given that the Act was established to provide critical financial support to individuals during periods of their lives in which they are facing intense personal circumstances at a level preventing them from working – whether for their own or a family member’s medical issue or because of the birth of a newborn – implementing the purpose of the Act counsels against any requirement that an applicant submit an application in the midst of these stresses. Moreover, the procedures for filing a claim will be new to everyone – to eligible individuals, to covered employers, and even to DOES. Providing sufficient time to file and flexibility in considering explanations for missed deadlines will help to ensure that UPL benefits are available to those most in need of them, without employers who have complied with notice requirements or who otherwise do not have ready access to information about how to file a claim.

In addition, in their current form, the proposed regulations place applicants in a bind. Section 3501.3 states that “no claim submitted before the date of the occurrence of a qualifying leave event shall be approved by DOES.” The following section, however, states “No benefits shall be payable for leave taken before the applicant submitted a claim to DOES for paid leave benefits.” Taken together, this suggests that applicants must submit claims on a daily basis. In addition, because qualifying leave events often do not rise to the level of “qualifying” until after the passage of time (e.g., more than three continuous days of absence due to a serious health condition), applicants will not know to submit application until after some qualifying leave has been taken, yet will not be eligible for back payment unless meeting a narrow definition of “exigent circumstances.” Legal Aid proposes that a more workable approach would be to require claims to be submitted within thirty days of the first occurrence of a qualifying leave and subsequent claims for continuing leave be submitted on at least a monthly basis, subject to the employer’s confirmation of a covered employee’s absence from work. This approach would also be consistent with the timing requirements for repeated medical certifications for ongoing medical leave. Legal Aid also proposes an expanded definition of “exigent circumstances.” In light of this, Legal Aid suggests the changes indicated below.

3501.3 No claim submitted before the date of the **first** occurrence of a qualifying leave event shall be approved by DOES. **A claim must be made within thirty (30) days of the occurrence of a qualifying leave event, except in exigent circumstances.**

3501.4 No benefits shall be payable for leave taken **more than thirty (30) days** before the applicant submitted a claim to DOES for paid-leave benefits, except in exigent circumstances.

(a) For the purposes of this subsection, “exigent circumstances” means:

- (1) Physical or mental incapacity that prevented the applicant or the applicant’s authorized representative from filing for benefits following the occurrence of the qualifying event; ~~or~~
- (2) A demonstrable inability to reasonably access the means by which a claim could have been filed by the applicant or the applicant’s authorized representative following the occurrence of the qualifying event;
- (3) **The applicant or the applicant’s authorized representative had a reasonable basis for not recognizing that the applicant’s absence from work constituted a qualifying event;**
- (4) **The applicant was unaware that the applicant was eligible for the benefits; or**
- (5) **The applicant’s authorized representative failed to timely file, without fault by the applicant.**

3501.6 [An applicant’s claim shall provide...]

- (f) The specific ~~future~~ dates, or, in exigent circumstances pursuant to 3501.4, ~~the~~ past dates **occurring more than thirty (30) days prior to the claim,** for which paid leave is being sought; ...

- (i)(2)(C) An affirmation that the applicant will be taking **or took** the leave in order to provide care or companionship for the family member with a serious health condition;

3501.11 If the adoptive or foster status of an individual changes while an application for paid parental leave is pending or while the individual is currently receiving paid leave benefits based on their adoptive or foster status, the applicant or eligible individual shall notify DOES within ~~ten~~ **thirty (+30)** business days of the status change.

3501.14 During an open claim, an applicant may request a continuation of leave for the claim. A continuation of leave occurs when an applicant requests and is approved for a new last payable date of the claim that is later than the existing last payable date of the claim. DOES shall process the request for continuation of leave in a manner consistent with the provisions of this chapter. **No new documentation from the applicant is needed if prior documentation certifies the need for such leave and, for applicants employed by a covered employer, if the covered employer confirms the continued leave status of the applicant.**

III. Comments and Proposed Changes Relating to Coordinating Employer Leave and UPL Benefits.

For employees without existing paid leave benefits from their employer that they can use for qualifying leave events, the new law is a substantial improvement over current circumstances. For employees working for employers who already provide paid leave benefits, the new law is both an added administrative burden and in fact may work a hardship because of the delay between the employee's absence and DOES's approval and processing of their claim check. From the standpoint of employees, it is far better to receive a continuing paycheck from their employer during a medical or family absence than to be granted unpaid leave by their employer and lack financial support during their leave until their claim is approved and processed. From the standpoint of employers, their voluntary paid leave policies may be designed to provide paid leave benefits only during periods that the employee is not receiving income replacement benefits from other sources, yet employers may not know whether to grant paid leave to employees until after DOES evaluates and processes the employee's application. To alleviate that financial support gap and to promote better coordination between employer-provided paid leave benefits and UPL benefits, several changes are prudent. These would allow the employer to submit a claim on behalf of the employee, if authorized to do so by the employee, and also to advance paid leave to an employee while the employee is waiting to receive UPL benefits, with the understanding that the employer may then offset future payments by UPL benefit amounts the employee in fact receives.¹ To make this possible, the regulations would need to permit the

¹ To be clear, under this arrangement, even if the employer acts as the employee's authorized representative, the employee would still receive his or her UPL benefits directly. We contemplate only that the employer would serve as the authorized representative, submitting and managing the claim on the employee's behalf, *not* that the employer would serve as a payee.

covered employer to be notified of the benefits amount approved for the employee, and could include protections for employees from the negligence or deliberate failure by employers to submit claims on their behalf. Finally, for coordination of leave and other benefits, the regulations should clarify an application for UPL benefits does not obviate notification and certification requirements under existing laws or applicable employer policies. In light of this, Legal Aid suggests the changes indicated below.

3501.12 DOES shall permit authorized representatives to file and manage claims on behalf of applicants. In order to be designated as an authorized representative, an individual or entity must submit appropriate legal documentation sufficient to establish bona fide legal authority to represent the applicant. Such documentation may include a court order, proof of designation as a power of attorney, or other documentation approved by DOES. **An applicant's covered employer may serve as the applicant's authorized representative for purposes of submitting the applicant's claim if authorized by the applicant to do so, as demonstrated by filing an authorization form signed by the employee in a form approved by DOES. If authorized to serve as an authorized representative for an employee, an employer who fails to submit a timely benefits claim for an eligible employee's qualifying event after being requested to do so by the employee may be deemed to have engaged in prohibited retaliation.**

3502.2 Within three (3) business days after the filing of a claim for paid-leave benefits, a DOES claims examiner shall:

- (a) Notify the current covered employer of the filing of a claim by the applicant, **unless the employer submitted the claim on the applicant's behalf;** ...

3502.7 DOES shall issue a notification of the initial determination:

- (b) To the eligible individual in private communication:

- (1) If the claim was approved, the approved weekly benefit amount, and, if applicable, the equivalent daily benefit amount; **this information shall also be shared with a covered employer who serves as the authorized representative of the applicant;**

3502.9 If a covered employer advances paid leave to an employee for a period in which the employee receives paid leave benefits from DOES, the covered employer may lawfully withhold the amount of such benefits from the employee's future wages, if done in accordance with a written policy of the employer that has been provided to the employee prior to the employer's advance of paid leave.

3509.3 Employers may require employees to comply with the employer's notice, approval, and certification requirements applicable to the leave under the employer's policies and as permitted or required under other applicable laws governing employee leave.

IV. Comments Related to "Relationship to other Benefits" (3513)

In addition to the comments submitted by Jews United for Justice, we write separately to request the addition of 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) 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; and (2) 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 this information and documents rather than having to provide them again. Neither of these measures require changes to the proposed regulations, but we urge DOES to implement them.

Additionally, we recommend that the agency add provisions to the regulations to help individuals access other safety net benefits that might be available to them (such as unemployment benefits for individuals who 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); informing individuals about the availability of and procedures for applying for Medicaid or private health insurance coverage through DC Health Link; providing information to individuals who have exhausted their UPL benefits about other safety net benefits (such as Temporary Assistance for Needy Families) if they are unable to return to work, and informing applicants who qualify for UPL benefits due to the birth of a newborn about the availability of benefits such as WIC, Medicaid and child care subsidies. In light of these points, Legal Aid suggests adding three new subsections, as indicated below:

3513.7 Within three (3) business days after the filing of a claim for paid-leave benefits, a DOES claims examiner shall:

- (a) Inform applicants whose qualifying event is the birth of a newborn about the availability of benefits such as WIC, Medicaid and child care subsidies; and**
- (b) Inform applicants seeking UPL due to the qualifying event of the applicant or the applicant's family member about the availability of and procedures for applying for Medicaid or private health insurance coverage through DC Health Link.**

3513.8 Within three (3) business days of the expiration of an applicant's eligibility for UPL benefits due to exhaustion of those benefits, DOES shall provide the applicant:

- (a) Information about other safety net benefits (such as Temporary Assistance for Needy Families) that may be available to the applicant if the applicant is unable to return to work; and**

(b) Information about unemployment insurance benefits, claim procedures, and eligibility criteria.

3513.9 Within thirty (30) days of the effective date of these regulations, DOES shall add a FAQ section to the DOES website explaining the difference between UPL benefits and unemployment insurance so that individuals can determine which benefit is the appropriate one for their situation.

We, and our outside pro bono counsel, are happy to work with you on the wording and implementation of these proposals. Thank you for your consideration of these comments.
Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Eric Angel". The signature is fluid and cursive, with the first letter "E" being particularly large and stylized.

Eric Angel
Executive Director