Written testimony of American Society of Association Executives
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December 2, 2015 hearing before the
Council of the District of Columbia Committee of the Whole
on Bill 21-415, Universal Paid Leave Act of 2015

The American Society of Association Executives ("ASAE") is a Washington, D.C.-based membership organization that represents more than 21,000 association executives and industry partners, from more than 10,000 nonprofit organizations across the United State and in more than 50 countries. ASAE members manage nonprofit 501(c)(6) trade and professional associations, individual membership societies, and voluntary organizations. The nonprofit organizations managed by ASAE's members include many 501(c)(3) tax-exempt charities and educational organizations, as well as religiously affiliated organizations, grant making and giving services, social advocacy organizations, and civic and social organizations. ASAE provides resources, education, ideas and advocacy to enhance the power and performance of the association and nonprofit community.

While the associations that are led by ASAE members are all in the nonprofit sector, they range in size from local organizations with tiny budgets and just one or two employees to large national or international membership organizations with thousands of employees and millions of members. According to 2013 Bureau of Labor Statistics ("BLS") data, associations in the Washington, D.C., metropolitan region employ approximately 37,000 employees.[1] The 2014 IRS Business Master File lists 35,661 501(c)(3) organizations and 2,916 501(c)(6) organizations registered in the Washington, D.C. metropolitan area. Examples of large nonprofit membership associations based in Washington, D.C., include AARP, the National Retail Federation, and the YMCA; examples of small associations in the District that nonetheless do important work include American Academy of Nursing, The National Association of Minority Architects, and the National Association for Bilingual Education.

As currently drafted, Bill 21-415 would create significant problems and burdens for association employers and employees in the District. ASAE urges the Council to reconsider the provisions of the Universal Paid Leave Act (the "Act") in order to eliminate ambiguity, ease the burden on small employers, on employees, and on District residents, conform the structure of the Act to established structures of existing employment and leave laws, and provide employers with reasonable mechanisms to ensure that employees use paid leave benefits only for authorized purposes.

1. Ambiguity as to amount and extent of paid leave.

The Bill is unclear as to whether it creates a paid leave entitlement of 16 weeks per 12-month period or 32 weeks per 12-month period.

[1] The available federal data provides statistics by metropolitan area, so some of these employees may be employed in Maryland or Virginia. Nonetheless, because the proposed Universal Paid Leave Act of 2015 also covers District residents who work outside of Washington, D.C., these figures provide an indication of the number of employees in the nonprofit sector who would be affected by this legislation.

At a minimum, the Bill would provide for up to 16 weeks of paid leave benefits that could be taken for family or medical leave reasons. The introduction to Title I of the Bill states that it "allow[s] for 16 weeks of paid family and medical leave." Section 104 states that the "cumulative nature of family and medical leave benefits shall be identical to the D.C. FMLA." While the federal FMLA caps the combined leave entitlement for family or medical leave absences at 12 weeks per year, the D.C. FMLA provides separate entitlements for family and medical leave. Under the D.C. FMLA, eligible employees are entitled to up to 16 weeks of unpaid medical leave in any 24-month period and up to 16 weeks of unpaid family leave in any 24-month period, for a total possible combined leave entitlement of 32 weeks in any 24-month period. By stating that the cumulative leave benefits are "identical" to the D.C. FMLA, the language of the Bill suggests that an eligible employee with both qualifying medical absences and qualifying family leave absences could receive up to 32 weeks of paid leave benefits.

There is no provision in the Bill stating that use of paid medical leave benefits erodes the availability of paid family leave benefits, or vice versa. Rather, Section 104 provides that an individual precluded from working due to a serious health condition would be "entitled to medical leave benefits for so long as the individual is unable to perform the functions [or the job], except that medical leave benefits shall not exceed 16 workweeks during any application period." Similarly, an eligible individual taking family leave would be "entitled to family leave benefits for so long as the individual's family member for whom the individual is providing care has a serious health condition or qualifying exigency, or in the case of a new child, at any time during the application period, except that family leave benefits shall not exceed 16 workweeks during any application period." Thus, because medical leave benefits and family leave benefits are addressed separately, a fair reading of the Bill suggests that it would create a right to up to a combined 32 weeks of paid family and medical leave benefits during a 12-month period.

2. Burden on small employers and co-workers in the District.

Title I of the Bill establishes the universal paid leave entitlement and structure. Title II of the Bill would amend the D.C. FMLA, which applies only to employers with 20 or more employees. Under Section 108 of Title I, leave taken under the Act "also qualifies for protected leave" under the D.C. FMLA and the federal FMLA and runs concurrently with leave under those statutes. Title I of the Bill contains no exclusions based on employer size, however, so employers that are too small to be covered by either the D.C. FMLA or federal FMLA nonetheless must grant employees the full quantum of leave under the Act.

Sections 101(13), 102(e)(B), and 111 of Title I make clear that no covered employer may take any "adverse employment action," including transfer or reassignment or reduction in pay, because an employee exercises a right under the Act or requests, applies for, or uses family and medical leave benefits, and no "person" may "interfere with, restrain, or deny the exercise or the attempt to exercise any right" under the Act. Thus, the Bill would require that even a two-employee association must grant the full amount of leave to any employee who qualifies for taking the Universal Paid Leave benefit. Unlike the federal and D.C. FMLA, the Bill includes no "key employee" or "five highest paid employee" exception to restoration rights. Unlike the ADA and the D.C. Human Rights Act, the Bill includes no "undue hardship" exception.

As a practical matter, prolonged absences of employees will create a burden that falls on their co-workers and disrupts the operations of the employer. Some lower level or clerical vacancies can be filled by short-term temporary employees. It is not realistic, however, to expect employers to be able to find qualified and experienced replacement employees on short notice for only brief periods of employment. Thus, any remaining co-workers will have to stretch to take on the responsibilities of their absent colleague, for months at a time. While larger employers may be able to redistribute responsibilities over several colleagues in order to alleviate the burden, covered employers with only a handful of employees will not be able to absorb the prolonged absences of their employees without unfairly burdening the remaining employees or simply curtailing aspects of their operations. The practical challenges facing small employers are why Congress and the D.C. Council have limited FMLA and D.C. FMLA rights to employers with, respectively, at least 50 employees or at least 20 employees. Because the Bill includes no such limitation, it will create an untenable burden for the District's small employers.

Another concern for employers is that, unlike under the D.C. FMLA or the Accrued Sick and Safe Leave Act, the Bill provides for no minimum period of employment before an eligible employee can access the benefits. Under Section 104, benefits would be available to an eligible employee after the first 5 consecutive days in which the individual would otherwise be scheduled to work in the application period, but the benefits would be retroactive to the initial period of absence if the individual uses more than five days of family or medical leave benefits during that application period. In addition, individuals with chronic conditions who take intermittent leave would not be subject to the 5-day qualification period.

3. Burden on employees.

The Bill provides that covered employers in the District will fund the paid leave benefit through contributions, calculated according to scaled percentage of the wages of each covered employee in the District. District residents who work for employers in Maryland, Virginia, or other jurisdictions, however, must contribute to the paid leave Fund at the same scaled percentage contribution rate. Although the Bill allows self-employed individuals to opt out of participation in – and contributions to – the Fund, no opt-out is available for District residents who are W-2 employees of employers outside the District. The Bill just operates as a tax on these employees, many of whom may never or rarely access the paid leave benefits provided by the Fund, either because they will not have a medical or family event that qualifies for paid leave, or because, despite the income replacement available to them, they do not feel that their work obligations allow them to take an extended absence from their job.

District residents and employees are also likely to face considerable family pressures to take paid leave for qualifying family reasons, even if they would prefer to remain at work, supporting their organizational mission and advancing in their careers. Because there is no national paid leave benefit and no other state or locality with paid leave benefits even approaching the levels proposed in the Bill, passage of the Bill would likely result in disproportionate use of paid family leave benefits by District residents and employees. Consider, for example, a family with an elderly parent receiving medical treatment who lives alone in Tennessee, with three employed adult children who work, respectively, in D.C., in Illinois, and in Tennessee. Currently, if all the adult children are eligible for FMLA leave, they would be likely to share the burden of elder care among them, arranging their schedules so that each takes

a few weeks of leave to provide care to their parent, and the adult child who lives nearest to the parent may also be able to take an occasional day or two of additional unpaid leave to accompany the parent to important medical appointments as they arise. If the Bill passes, however, that family dynamic will change significantly, as only the adult child who lives in the District will be able to take family leave with up to $3,000 per week of income replacement, for up to 16 weeks. The other siblings are likely to resist a request to take much unpaid leave in that situation, thus transferring the bulk of the family leave obligation to the District-based sibling.

The Bill also may have the unintended consequence of restricting job mobility for District residents. Title I of the Bill defines "eligible individuals" to include individuals who resided in the District "for some or all of the 52 calendar weeks immediately preceding the qualifying event" who earned wages during that period, either as a covered employee or in a capacity other than a covered employee. Thus, if the Bill becomes law, an individual who earned wages in the District in January would still be entitled to take paid leave for a qualifying event under the Act in December. Section 111 prohibits "any person" from interfering with, restraining, or denying exercise of a paid leave right under the Act, regardless of whether the person is a covered employer under the Act. Moreover, the civil enforcement rights under Section 114 of the Bill permits claims against "any employer" in "any court of competent jurisdiction" under the Act. Prospective employers outside the District, therefore, may be hesitant to hire any applicant who lived in or worked in the District within the prior 12 months, because hiring that employee would subject the non-District employer to legal obligations that the employer would not otherwise have.

4. Problems with policing abuse of paid leave.

Unlike all other leave laws to which D.C. employers are subject – including the ADA, the FMLA, the D.C. FMLA, the Accrued Sick and Safe Leave Act, jury leave laws, military leave laws, and parental leave laws – the Bill as drafted includes no requirement that employees taking leave provide certification to the employer that their absences meet the criteria for a qualifying event under the Act. Claims for paid leave benefits are to be administered by a Fund to be established by the Mayor. The Mayor will be required to notify the employer that a claim has been filed, but the Fund, not the employer, will evaluate whether the claim relates to a qualifying event. Under Section 109, the initial determination of eligibility may take up to ten days from the filing of the claim. In the meantime, if an employer denies an employee's request for leave because of the employer's belief that the employee's absence does not qualify for protected leave, the employer will be in jeopardy of violating the Act by interfering with a request for leave.

Under Section 110, if an employee abuses the paid universal leave process by "willfully ma[king] a false statement or misrepresentation regarding a material fact" in order to gain benefits under the Act, the only consequence to the employee will be disqualification from paid leave benefits for one year and, in the Mayor's discretion, a requirement that the individual replay in whole or in part the benefits received. The Bill provides no recourse that an employer can initiate in response to employee misuse of the paid leave benefit process. Moreover, even if the Mayor does take action against an employee who willfully abused the system, such action would be after-the-fact and would not assist employers in deciding how to deal with employees whom they suspect of fabricating information about a qualifying event.

5. Suggestions for addressing some of the problems with the Bill.

The District already has well-established statutory and regulatory structures for balancing the interests of employers and employees in connection with leave for family or medical reasons. Many of the problems created by the current draft of the Bill could be avoided by considering possible enhancements to the existing structures of the D.C. FMLA and the Accrued Sick and Safe Leave Act, as amended.