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## **Testimony of Marcy Karin. The Committee of The Whole. October 10, 2017**

Marcy L. Karin

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## TESTIMONY OF MARCY KARIN

The Committee on the Whole

D.C. Council

October 10, 2017

Thank you, Mr. Chairman and Members of the Council. My name is Marcy Karin. I am a proud Ward 2 resident who returned to the District last year to work in Ward 3 as the Jack & Lovell Olender Director of the Legislation Clinic and an employment law professor at the University of the District of Columbia David. A. Clarke School of Law. Through the UDC Legislation Clinic, I have supervised the work of a team of excellent student attorneys representing Jews United for Justice in preparing for this hearing.<sup>1</sup>

I am honored to testify, in my personal capacity, in support of the Universal Paid Leave Act (“UPLA”). Paid leave is a critically needed economic security policy that helps address the mismatch between the way workplaces are structured in the 21st Century and the needs of the District’s workers, businesses, and our community as a whole. Among other things, the UPLA contains a combination of anti-retaliation, third-party review, and portability provisions that greatly increase the likelihood that the law’s goals will be achieved. As enacted, it represents the best way for the District to move forward at this time.

Today, I offer three observations based on my years of rigorous study, academic scholarship, and practice as a lawyer who has represented both workers and employers of all sizes in disputes involving workplace rights, including access to and enforcement of paid and unpaid leave.<sup>2</sup>

First, *the UPLA affords workers the robust retaliation protection needed for success*. This is critical for a paid leave policy, especially for low-wage and part-time workers who otherwise might not know about their rights or fear asking for wage replacement directly from an employer. Indeed, the benefits of a paid leave law will not be realized without education and meaningful anti-retaliation provisions that protect against employer-based intimidation or discrimination.

Generally, these types of anti-retaliation protections prevent employers from taking adverse employment actions in hopes of stopping an employee from exercising a right or pursuing a complaint through a formal process. Under existing local employment laws, cases have alleged that employers have failed to hire, changed shifts, reduced hours, and or terminated workers who are also caregivers, women who are pregnant, have experienced miscarriages or are otherwise of childrearing age, mature workers, workers with disabilities and others for enforcing a right or seeking recourse when one has been denied.

Of course, there are many good employers in the District. But there is no reason to expect that all employers will forgo these types of bad acts under a paid leave law and engage in best

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<sup>1</sup> Thanks to the following UDC Legislation Clinic Student Attorneys who have worked with Jews United for Justice this semester: Hannah Amundson, Grace Emery, Maryann Menanno, and Thomas Moore.

<sup>2</sup> My author pages on SSRN (<http://ssrn.com/author=1497843>) and HUFFING POST (<http://www.huffingtonpost.com/author/marcy-karin>) contain representative examples of my employment law scholarship. In addition to this writing, over the years, I have worked to develop thoughtful local and national employment law in a number of capacities, including as Legislative Counsel for Workplace Flexibility 2010, an Alfred P. Sloan Foundation grant-funded initiative that was housed at Georgetown University Law Center, and as pro bono counsel to Corporate Voices for Working Families.

practices. This is especially true under an employer mandate model, where the decision about whether to pay wage replacement is given to a party with an incentive to deny claims for perceived cost savings, or to factor in the cost of self-insurance into hiring decisions, or to otherwise engage in activities that prevent a worker from seeking payment in the first place. When this type of bad act happens, retaliation protection is meant to offer workers the opportunity to seek recourse based on an employers' intimidation, discrimination or retaliation.

***Second, the UPLA's third party process for providing wage replacement will help minimize employer retaliation and legal challenges against employers.*** Put simply, it places an unreasonable burden on workers to require them to seek wage replacement directly from their employers and then sue if a bad act happens. Workers often do not have access to or control over the paperwork needed to demonstrate access to a protection, the existence of retaliation, or the ability to disprove an employer's claim that an action was taken for a legitimate business reason. As a result, a strong anti-retaliation provision by itself is not enough to prevent potential employer abuse.

Realistically, it is hard to capture all of the ways that workers have been intimidated in the past under existing employment laws or paint a full picture of how much retaliation might happen under a new paid leave statute. In part, this is because of an underreporting phenomenon in many areas of employment law. Further, the reality of workers' experiences enforcing existing laws is that many do not have the knowledge, ability, time, or other resources to seek recourse via litigation. Among other reasons, past experience demonstrates that some workers are afraid to ask, others do not understand available rights, and some elect not to bring a formal complaint or private lawsuit because of the amount of resources it would take—including time and often money—to enforce one's rights. It also belies common sense to ask workers to engage in an expensive and time-consuming litigation process when the very reason they sought leave in the first place was to address a major life change, family emergency, or needed self-care. As a result, lawsuits simply are not the answer for every situation, especially if it costs workers more to pursue a claim than the total amount of wage replacement denied in the first place.

Bad actors will still exist; but the UPLA minimizes their impact by removing employers from the decision about whether to approve or deny wages. Using this social insurance model offers hope that workers will still get needed compensation by having a party outside the employment relationship examine the situation. It also allows workers to proactively seek this determination; rather than requiring a bad act to happen to get recourse. The employer mandate model does not offer the same level of protection or guarantee a neutral determination on wages if an employment relationship sours.

**Finally, the portability and predictability of access to wage replacement that the UPLA provides is crucial to success.** Especially in a town with such high turnover and given the realities of part time and low-wage work, fairness dictates that workers must have access to wage replacement regardless of whether they win the boss lottery or need to switch jobs.

Thank you again for allowing me testify. I look forward to answering your questions and providing any guidance I can to the District as it hopefully moves forward with the implementation of UPLA.