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**Testimony for the Worker and Family Support Subcommittee:
“Legislative Subcommittee Hearing on Universal Paid Leave and Guaranteed Access to Child
Care”, Submitted June 9, 2021**

We submit testimony on behalf of A Better Balance, a legal advocacy organization whose mission is to fight for policies protecting American workers from having to choose between caring for themselves and their families and maintaining their economic security. We have been working on paid family and medical leave and paid sick time laws throughout the country for over a decade, drafting or helping to draft almost all of the state and local paid sick time laws and state paid family and medical leave laws that are now enacted, and we applaud this committee’s attention to these critical issues. We also run a free and confidential legal helpline to assist workers with issues affecting their ability to balance work, health, and family. When the COVID-19 pandemic hit, our call volume exploded—since March 2020, we have heard from thousands of workers across the country, from those needing time to recover from their own COVID symptoms to parents struggling with school and daycare closures to those with other health and caregiving needs, all in the face of a rapidly worsening economic situation. From caller after caller, we heard about a crisis in care, where longstanding gaps in our infrastructure, from a lack of national paid leave and paid sick time rights to a strained and stressed childcare system, were exacerbated by twin emergencies of public health and economic decline. The burdens—and the consequences—of this care crisis fall disproportionately on women and especially hard on low-income women and women of color.

We appreciate the incredibly hard work of this Committee to make paid family and medical leave a reality for America’s families as it is for workers in almost all countries in the rest of the world. We especially appreciate the thought and effort that went into development of a draft bill. Building on the FAMILY Act and on successful paid family and medical leave programs established in the states, the draft bill is an excellent start in addressing the needs of American families. Our testimony reviews the policy points in the draft, giving the reasons why these policies work and in some cases suggesting changes that would improve on an already excellent bill. We also urge you to prioritize inclusion of protection of the jobs of workers who take leave either in the paid family leave law itself or through improvement of the Family and Medical Leave Act (FMLA) which is currently failing nearly 40% of our workforce.

We applaud the committee for drafting a bill that will deliver paid family and medical leave benefits to most American workers, containing important provisions that guarantee equity and fairness. We particularly thank you for including:

- **A comprehensive set of medical and caregiving purposes for which benefits can be provided;**
- **12 weeks of benefits for all purposes;**
- **Universal coverage for all workers regardless of the size of their employer;**
- **Improved eligibility criteria (over the FAMILY Act);**
- **A progressive wage replacement rate so that low wage workers will get a higher proportion of their income which they need to live on;**
- **Recognition that the states have developed robust and successful paid family and medical leave programs that should be allowed to continue**
- **Inclusion of a broad definition of family for whom care can be provided reflecting the current American family.**

There are some details that we would like to work with the committee on improving in this draft but we want to focus on two issues in particular.

Eligibility

We appreciate that the discussion draft has abandoned the use of the OASDI standard for eligibility for benefits. That test excluded public workers in 14 states and many caregivers and younger workers. The eligibility test included in the Ways and Means draft requires wages or self employment income in the 30 days prior to the start of the benefit period or if engaging in full time caregiving, 30 days prior to when that caregiving began and earnings or self employment income in the last 8 quarters preceding the start of the benefit period. We believe that denying eligibility to those without income within 30 days of needing benefits will exclude many workers, especially low wage workers. In addition to layoffs and furloughs during a public health crisis as we just experienced or an economic downturn, many low wage workers suffer income and job volatility which means that there is often a gap in their wages even when they have worked most of their lives. Of special concern to us, are the many women who lose their jobs when their employer finds out they are pregnant. We hear from those women every day in our clinic. Although pregnancy discrimination is illegal, it is often difficult to prove and even if a complaint is filed, it is unlikely to be resolved by the time the worker needs benefits for recovery and bonding. No state has a recency of work requirement as stringent as 30 days; most states require income in four of the last five quarters. That requirement assures workforce attachment without a rigid requirement of income in the last month. We would suggest elimination of the 30 day requirement with just the 8 quarters of coverage as a test of earnings and workforce attachment or if a recency of work requirement is instituted it should allow for income any time in the last year.

Protection of workers against job loss, retaliation and discrimination for taking the benefit.

We want to take this opportunity to lift up one of the key necessary provisions of any paid leave law: job protection. Job protection ensures that people who need leave, whether due to their own serious health condition, caring for a new child or seriously ill loved one, or addressing the

impact of military deployment, will not have to worry about losing the job they and their family depend on. Without job protection, a paid leave law doesn't give workers a right to leave—it just gives them a right to benefits. Almost everyone will need to take leave for themselves or a loved one at some point in their working life; but without a clear legal right to job protection, many workers will be too afraid to take the leave they need.ⁱ

Job protection is essential to promote racial, gender, and economic equality in any paid leave program. However, the FMLA, the only Federal law giving job protection to workers fails to cover over 49 million workers.ⁱⁱ It is therefore essential in order to enable workers covered by a paid family and medical leave law to take the benefit that the right to return to work be a fundamental part of that paid leave program.

The FMLA's restrictions on the size of business covered (50 or more workers), tenure at the job (one year for same employer) and hours of work in a year (1250 for one employer regardless of how many total hours are worked for multiple employers) insure that the following groups tend to lack FMLA protection:

- Low-wage workersⁱⁱⁱ
- Young workers^{iv}
- Hispanic workers^v
- Employees with less educational attainment^{vi}
- LGBT, disabled and other workers who take leave to care for a family member not covered by the FMLA
- Disabled workers.^{vii}
- Military spouses ^{viii}

In addition:

Recent research from the Shift Project demonstrates the particular problem that lack of job protection imposes on the ability of low wage workers to access paid leave. The Shift Project, <https://shift.hks.harvard.edu/> has done extensive research on low wage workers at the largest retail and food establishments in the country and has recently used survey data to zero in on use of paid leave by workers in the service sector. The survey found that:

- Half of the workers in their survey did not take leave even when they had a qualifying event such as a new baby or a serious health issue that caused them to feel they needed the leave;
- The main reason for not taking leave or taking less than needed (71%) was the inability to afford taking time off from work without pay; and
- Fear of losing their job was mentioned by 38% of those surveyed as the reason they did not feel they could take leave.

We know from the states with paid leave programs that including job protection is feasible and critical. Massachusetts, Rhode Island and New York all provide full job protection, and

employers have not had a problem with the implementation of paid leave programs in those states. All recently enacted state programs -- Oregon, Connecticut and Colorado -- include full job protection. We believe that job protection is so integral to a paid leave program that inclusion of provisions that insure return to work and prohibit retaliation for using the benefit that comes out of the federal budget would survive any Byrd challenge. (see [PDF here](#)) and talking points on why those provisions could survive a Byrd challenge (see [PDF here](#)).

We also believe that inclusion of protection against job loss for taking paid leave and anti-retaliation provisions in a paid leave program IS reconcilable.

Again, we applaud the Committee and all those who are working so hard to make paid family and medical leave a reality for American workers. You deserve our sincerest thanks for the thought and concern that has gone into furthering the goal of enacting a first rate program

ⁱ Barbara E. Silver et al., *Launching the Rhode Island Temporary Caregiver Insurance Program (TCI): Employee Experiences One Year Later* (2016), https://www.dol.gov/wb/media/RI_paid_leave_report.pdf. A 2012 U.S. Department of Labor survey found that among employees needing leave for a qualified family and medical reason but not taking it, the fear of losing their job was the second most commonly cited reason (17 percent), behind unaffordability. Jacob Alex Klerman et al., *Family and Medical Leave in 2012: Technical Report 127* (2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/FMLA-2012-Technical-Report.pdf> (report prepared for the U.S. Dep't of Labor).

ⁱⁱ Helene Jorgensen & Eileen Appelbaum, *Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements?*, Center for Economic and Policy Research (2014), <http://cepr.net/documents/fmla-eligibility-2014-01.pdf> (using 2012 data).

ⁱⁱⁱ A Congressional Research Service report found that only about 39 percent of employees making less than \$35,000 may have been eligible for FMLA, while nearly 78 percent of employees paid more than \$75,000 could have taken the leave. Gerald Mayer, *The Family and Medical Leave Act (FMLA): Policy Issues*, Congressional Research Services (2013), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2316&context=key_workplace; see also Jorgensen & Appelbaum, *supra* note **Error! Bookmark not defined.** (“employees with higher incomes were more likely to be eligible for job-protected leave”).

^{iv} Jorgensen & Appelbaum, *supra* note **Error! Bookmark not defined.**

^v Jorgensen & Appelbaum, *supra* note **Error! Bookmark not defined.**

^{vi} Jorgensen & Appelbaum, *supra* note **Error! Bookmark not defined.**

^{vii} Kali Grant et al., *Security & Stability Paid Family and Medical Leave and its Importance to People with Disabilities and their Families*, Georgetown Center on Poverty and Inequality and The Arc, https://thearc.org/wp-content/uploads/forchapters/Georgetown_PFML-report_Dec17.pdf.

^{viii} The combination of frequent moves due to a spouse's service (on average, every two to three years) combined with difficult and often lengthy job searches in a new location make it difficult for military spouses to meet the one-year requirement. Jeremy Burke & Amalie Miller, *The Effects of Military Change-of-Station Moves on Spousal Earnings*, RAND Corporation (2016), https://www.rand.org/pubs/research_briefs/RB9920.html; U.S. Chamber of Commerce Found., *Military Spouse in the Workplace: Understanding the Impacts of Spouse Unemployment on Military Recruitment, Retention, and Readiness* 7, 9 (2017), <https://www.uschamberfoundation.org/sites/default/files/Military%20Spouses%20in%20the%20Workplace.pdf>. At the same time, military spouses are both more likely to work part-time and more likely to be involuntary part-time workers (meaning they would prefer to be working more hours) than the general workforce, making it harder to meet the 1,250 hours requirement. Nelson Lim & David Schulker, *Measuring Underemployment Among Military Spouses*, RAND Corporation 36 (2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG918.pdf.