GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Brian Schwalb
Attorney General

May 20, 2024

ADVISORY OPINION OF THE ATTORNEY GENERAL

Re: Proposed Initiative, "The Vermelle Paid Maternity Leave Act"

Ms. Terri Stroud
General Counsel
Board of Elections
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Dear Ms. Stroud:

This memorandum responds to your April 29, 2024 request, on behalf of the Board of Elections ("Board"), that the Office of the Attorney General (the "Office") provide an advisory opinion on whether the proposed initiative, "The Vermelle Paid Maternity Leave Act" ("Proposed Initiative"), is a proper subject of initiative in the District of Columbia, pursuant to D.C. Official Code § 1-1001.16(b)(1A)(B)(i). For the reasons set forth in this letter, the Proposed Initiative is not a proper subject of initiative.[1]

STATUTORY BACKGROUND

The District Charter ("Charter") establishes the right of initiative, which allows District electors to "propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval."[2] The Charter requires that the Board submit an initiative to the voters "without alteration."[3] Pursuant to the Charter, the Council has adopted an implementing statute detailing the initiative process.[4] Under this statute, any registered qualified elector may begin the initiative process by filing the full text of the proposed measure, a summary statement of not more than 100 words, and a short title with the Board.[5] After receiving a proposed initiative, the Board must refuse to accept it if the Board determines that it is not a "proper subject" of initiative.[6]

[1] If the Board accepts the Proposed Initiative, in accordance with D.C. Official Code § 1-1001.16(c)(3), this Office may provide recommendations for ensuring that it is prepared in the proper legislative form.
[2] D.C. Official Code § 1-204.101(a).
[3] *Id.* § 1-204.103.
[4] *Id.* § 1-204.107.
[5] *Id.* § 1-1001.16(a)(1).
[6] *Id.* § 1-1001.16(b)(1).

A measure is not a proper subject for initiative if it does not propose a law, is not in the proper form, or if it would:

- Appropriate funds;
- Violate or seek to amend the Home Rule Act;
- Violate the U.S. Constitution;
- Authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977; or
- Negate or limit an act of the Council enacted pursuant to section 446 of the Home Rule Act.[7]

If the Board determines that a proposed initiative is a proper subject of initiative, it must accept the measure and, within 20 calendar days, prepare and adopt a true and impartial summary statement, prepare a short title, prepare the proposed initiative in the proper legislative form, and request a fiscal impact statement from the Office of the Chief Financial Officer ("OCFO").[8] The Board must then adopt the summary statement, short title, and legislative form at a public meeting.[9] Within 24 hours after adoption, the Board must publish its formulation and the fiscal impact statement.[10] If no registered qualified elector objects to the Board's formulation by seeking review in Superior Court within 10 days after publication in the *District of Columbia Register*, the Board must certify the measure and provide the proposer with a petition form for use in securing the required signatures to place the proposed initiative on the ballot at an election.[11] The Board must then submit the initiative "without alteration" at the next primary, general, or city-wide special election held at least 90 days after it certifies the measure.[12]

FACTUAL BACKGROUND

The Proposed Initiative includes headings labeled "Short Title," "Summary Statement," and "Legislative Text." Under the Summary Statement heading, the Proposed Initiative states that, if enacted, it would "[a]llow pregnant woman working in DC to receive one year of full paid maternity leave, once they start their third trimester," and "nine months of full paid leave after giving birth."[13] It states that the legislation would also "[a]llow the significant other/spouse of a pregnant woman to receive full pay while working only half-days during the third trimester, to care for their spouse. This only applies to significant others who work in DC."[14]

Under the "Legislative Text" heading, the Proposed Initiative discusses racial disparities in pregnancy complications, miscarriages, postpartum depression, and infant mortality.[15] It then states that increasing paid maternity leave has been proven to reduce these risks.[16] The Proposed Initiative states that the legislation "will allow pregnant women working in DC to receive paid maternity leave once they start their third trimester and will receive nine months of paid leave after giving birth."[17] Further, "[t]he significant

[7] *Id.* §§ 1-204.101(a); 1-1001.16(b)(1); 3 DCMR § 1000.5.
[8] D.C. Official Code § 1-1001.16(c).
[9] *Id.* § 1-1001.16(d)(1).
[10] *Id.* § 1-1001.16(d)(2).
[11] *Id.* § 1-1001.16(e)–(i); *see also id.* § 1-204.102(a) (requiring, under the District Charter, an initiative petition to be signed by 5 percent of the registered electors in the District, including 5 percent of registered electors in each of five or more wards).
[12] *Id.* §§ 1-204.103, 1-1001.16(p)(1).
[13] Proposed Initiative at 3.
[14] *Id.*
[15] *Id.* at 2–3.
[16] *Id.* at 3.
[17] *Id.*

others/spouses of pregnant women will be allowed to receive full pay while working only half-days during the third trimester, to care for their spouse," provided that the significant other/spouse works in the District.[18] Finally the Proposed Initiative states that the "legislation does not appropriate funds because it is the same funds that would already [be] used for employees if they were not on leave."[19]

ANALYSIS

The Proposed Initiative is not legislative in nature, and so does not meet the threshold requirement to propose a law. Therefore, it is not a proper subject, and the Board must refuse to accept it. Even if the Proposed Initiative were a proper subject, the Board must refuse to accept it because, by imposing requirements on the federal government, it would violate the Home Rule Act.

1. The Proposed Initiative is not legislative.

The right of initiative "is a power of direct legislation by the electorate."[20] Accordingly, a threshold requirement for any initiative is that it must "propose [a] law[]."[21] This right must be construed "liberally," and "only those limitations expressed in the law or clear[ly] and compelling[ly] implied" may be imposed on that right.[22]

As the District of Columbia Court of Appeals has explained, because "the power of the electorate to act by initiative is coextensive with the legislative power[,] an initiative cannot extend to administrative matters."[23] In distinguishing legislative acts from administrative regulations, the Court noted that legislative power "includes an action which adopts a policy affecting the public generally and sets in motion the effectuation of that policy."[24] A legislative act "is the declaration and adoption of a policy and program by which affairs of general public concern are to be controlled."[25]

Between the Summary Statement and the Legislative Text, the Proposed Initiative seeks to enact a policy that, in three situations, entitles a woman or her significant other/spouse to a certain duration of paid maternity leave before or after a triggering event.[26]

The Proposed Initiative, however, falls short of being legislative because it does not provide enough specificity to "set[] in motion the effectuation of that policy."[27] To simply "allow" pregnant women and their significant others/spouses working in the District to have paid leave under certain circumstances for a certain period of time, without more, is insufficient to carry out the policy. This is particularly so given the current statutory backdrop of paid leave in the District. The Universal Paid Leave Amendment Act of 2016[28] requires covered employers—which do not include the District government—to pay a payroll tax to fund

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[18] *Id.*
[19] *Id.*
[20] *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981) (internal citations and quotations omitted).
[21] D.C. Official Code § 1-204.101(a).
[22] *Convention Ctr. Referendum Comm.*, 441 A.2d at 913 (internal citations and quotations omitted).
[23] *Hessey v. Burden*, 615 A.2d 562, 578 (D.C. 1992).
[24] *Id.* (quoting *Woods v. Babcock*, 185 F.2d 508, 510 (D.C. Cir. 1950)).
[25] *Woods*, 185 F.2d at 510.
[26] *See Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1078–79 (concluding that the summary statement reflects the electorate's intent in ratifying a charter amendment).
[27] *Hessey*, 615 A.2d at 578 (quoting *Woods*, 185 F.2d at 510).
[28] Effective April 7, 2017 (D.C. Law 21-264; D.C. Official Code § 32-521.01 *et seq.*).

paid family, medical, parental, and pre-natal benefits for their employees. District government employers receive different types of paid leave through the District of Columbia Government Comprehensive Merit Personnel Act of 1978.[29] The Proposed Initiative would seem to cover at least some people already provided for under these two acts but does not provide any detail for those people or their employers to understand their rights separate from already existing laws. Further, the Proposed Initiative does not explain what it means to be "working in DC," a "significant other," or what it would mean for a significant other to work only "half-days." These details are necessary to determine who is eligible for paid leave.

The Board is unable to add these details regarding how the Proposed Initiative will be carried out. The Charter right of initiative, and the statute implementing that right, require the proposer to provide for how the policy it seeks to declare will be carried out. The Board is constrained by the Charter to present a proposed initiative to the voters "without alteration" from what it receives from the proposer.[30] Thus, the implementing statute provides that it is the responsibility of the proposer to submit to the Board "the full text of the measure" in the form of an initiative, meaning a proposed law. [31] For the Board to recraft the Proposed Initiative into a proposed law, it would have to make policy determinations that must be made by the proposer prior to submission. This would violate the Board's Charter obligation to not alter the measure and exceed the Board's limited statutory authority to prepare a proposed initiative "in the proper legislative form."[32]

2. If the Proposed Initiative did propose a law, it would not be a proper subject of initiative because it would violate the Home Rule Act.

Even if the Board determines that the Proposed Initiative is legislative in nature, and it could be redrafted to establish or expand paid leave along the lines the proposer envisions, it still would not be a proper subject. Entitling pregnant women and their significant others/spouses "working in DC" to paid leave, without exception, would necessarily require the federal government to provide paid leave to its employees working in the District. Imposing such a requirement on the federal government would violate the District of Columbia Home Rule Act's prohibition against the Council "[e]nacting any act[] . . . which concerns the functions . . . of the United States."[33] As discussed above, the Board cannot cure this substantive problem given that its authority after submission is confined to making technical drafting edits to ensure legislative form.[34]

We acknowledge that the Proposed Initiative would not necessarily violate the prohibition against proposing a law appropriating funds. At a minimum, requiring the District government to expand paid maternity leave for its own employees would likely require it to allocate additional funds. The OCFO has previously opined that requiring the District government to increase paid leave for employees would have a negative fiscal impact.[35] However, any mandatory provisions requiring funds would necessarily be subject to

[29] Effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*).
[30] D.C. Official Code § 1-204.103. The District's initiative process is distinct from the process in other states that allow an initiative proposer to obtain legislative and drafting assistance from the government. *See, e.g.*, Cal. Gov't Code. § 10243 (requiring the state legislature's Legislative Counsel to "cooperate with the proponents of an initiative measure in its preparation" in certain circumstances).
[31] *See* D.C. Official Code § 1-1001.16(a)(1).
[32] *See id.* §§ 1-204.103, 1-1001.16(c)(3).
[33] *Id.* § 1-206.02(a)(2)
[34] *Id.* § 1-1001.16(c)(3).
[35] *See, e.g.*, Memorandum from Fitzroy Lee, Chief Fin. Officer, to Chairman Phil Mendelson, Fiscal Impact Statement – District Government Paid Leave Enhancement Act of 2022 3–4 (July 13, 2022),

appropriations,[36] which could be reflected in a clause indicating that the measure is subject to appropriations before becoming effective.[37] Again, though, such a clause alone would not rescue the proposal from being an improper subject, since the measure otherwise violates the Home Rule Act.

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We underscore that the Proposed Initiative's fundamental deficiency has nothing to do with its apparent substance. An initiative may conceivably legislate with respect to paid leave, just as other initiatives have legislated with respect to the tipped minimum wage paid by private employers.[38] The Proposed Initiative, however, is deficient because it announces public policies without a sufficient mechanism for the policies to be carried out.[39] The absence of detail and lack of clarity preclude the Proposed Initiative from "set[ting] in motion the effectuation of" any policy, which is fatal to it being legislative in nature.[40]

We also acknowledge that aspirational policy declarations are regularly adopted by the Council by resolution. The Charter permits the Council to adopt resolutions "to express simple determinations, decisions, or directions of the Council of a special or temporary character."[41] Resolutions, however, are not laws. The Council must use "acts for all *legislative* purposes,"[42] and the initiative power "is coextensive with the power of the [Council] to adopt *legislative* measures."[43] The pronouncement of policy aspirations is a simple determination of a special character appropriate for a Council resolution, but it is not a proper subject for a voter-proposed initiative.

Finally, we recognize that a proponent's failure to submit a proposed initiative in the technical form of an act of the Council does not by itself render the measure not a proper subject. The responsibility to prepare an initiative in the "proper legislative form" of a Council act lies with the Board, after it has determined that the measure is a proper subject.[44] The Proposed Initiative, however, is vague and unclear as to the law its passage would effectuate. Recasting the Proposed Initiative's policy declaration as legislation would require extensive substantive changes, which can only be made by the proposer and are beyond the Board's limited authority to make technical drafting revisions. The Proposed Initiative, even if enacted, would not

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https://lims.dccouncil.gov/downloads/LIMS/48620/Other/B24-0615-FIS_District_Government_Paid_Leave_Enhancement.pdf?Id=144072 (opining that legislation expanding the type of qualifying events and the duration of paid leave for District government employees is expected to increase personnel costs by reducing vacancy savings and increasing overtime).

[36] *See* D.C. Official Code § 1-301.47a(b) ("Permanent and emergency acts which are accompanied by fiscal impact statements which reflect unbudgeted costs, shall be subject to appropriations."); *see also* Letter from Brian Schwalb, Att'y Gen. to Terri Stroud, Gen. Counsel, D.C. Bd. of Elections, Advisory Opinion of the Attorney General on Proposed Initiative, "The Make All Votes Count Act of 2024," at 7–9 (June 9, 2023).

[37] *See District of Columbia Board of Elections & Ethics v. District of Columbia*, 866 A.2d 788, 797 (D.C. 2005) (opining that initiative would be a proper subject if it "condition[ed] . . . compliance with its dictates upon funding by the Council" by being subject to appropriations).

[38] *See* District of Columbia Tip Credit Elimination Act of 2022, § 2(b), effective February 23, 2023 (D.C. Law 24-281; 69 DCR 15142) (codified at D.C. Official Code § 32-1003(i)).

[39] *See Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1176 (Alaska 1985) (noting that initiative's provisions "establish a public policy and they make it the chief executive's duty to carry that policy out," and that "[t]hey are a solemn expression of legislative will, and that is what law is all about").

[40] *See Woods*, 185 F.2d at 510.

[41] D.C. Official Code § 1-204.12(a).

[42] *Id.* (emphasis added).

[43] *Convention Ctr. Referendum Comm.*, 441 A.2d at 897 (emphasis added).

[44] D.C. Official Code § 1-1001.16(c)(3).

"set[] in motion the effectuation" of any policy."[45] Accordingly, the measure is not legislative and therefore not a proper subject of initiative.

CONCLUSION

It is the opinion of this Office that the *Vermelle Paid Maternity Leave Act* is not a proper subject of initiative. It is not legislative in nature because it does not provide detail necessary to effectuate its stated policies, particularly in the context of other District paid leave statutes. Further, even if it were legislative, it would not be a proper subject because it would violate the Home Rule Act by requiring the federal government to provide paid leave.

Sincerely,

Brian L. Schwalb
Attorney General for the District of Columbia

[45] *See Hessey*, 615 A.2d at 578 (quoting *Woods*, 185 F.2d at 510).