COMMITTEE OF THE WHOLE PUBLIC HEARING ON

[Bill 23-965](https://lims.dccouncil.us/Legislation/B23-0965), “Displaced Workers Right to Reinstatement and Retention

Amendment Act of 2020”

Testimony of John Boardman
Executive Secretary-Treasurer, UNITE HERE Local 25
Tuesday, November 4, 2020

Good morning Mr. Chairman and members of the Council. It is a pleasure to appear before you this morning on this important issue. I am John Boardman, Executive Secretary-Treasurer of UNITE HERE Local 25, a union of more than 7,000 hospitality workers serving the nation’s capital region.

As you know, COVID-19 has had a significant impact on employment generally and the service sector specifically. For the hospitality industry it has been devastating with the crushing effect on employment expected to extend through 2021. In my union, 90% of our members remain out of work. They need your support for legislative protections that will allow them to return to their jobs when that work once again becomes available.

We are asking for your support of a very simple concept; that a worker who was thrown out of work, through no fault of their own, has a guaranteed right to return to his or her job when that job comes back. It would seem simple but there are those who wish to use this pandemic, this human tragedy, to gain advantage. A global pandemic is not something we could have predicted when we negotiated our contracts, nor is it something most workplaces will have built into their policies. That is why we are asking that you prevent further harm befalling District workers.

There are some that will claim that this puts businesses at a disadvantage? How? How is returning a skilled, experienced worker to the job they previously held a disadvantage? The legislation will not require that every worker be returned to work on a date certain. It will, however, give a worker the enforceable right to her or his job - *when it exists again*. Don’t fall for the specious arguments of those with nefarious intent. Workers have endured enough. You can relieve some of their stress as they wait for the economy to restart. Let them know they have their job and can get back to work.

I have taken the liberty of attaching a draft of amendments to the proposed legislation which we believe further clarifies the rights I noted above. We look forward to working with all of you to make this simple concept a reality.

I am happy to answer any questions you may have. Thank you.

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A BILL

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IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Displaced Workers Protection Act of 1994 to provide eligible workers who have been displaced by COVID-19 the opportunity to be reinstated once business operations resume.

 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Displaced Workers Right to Reinstatement and Retention Amendment Act of 2020”.

 Sec. 2. The Displaced Workers Protection Act of 1994, effective April 26, 1994 (D.C. Law 10-105), as amended, codified at D.C. Official Code § 32-101 *et seq.*, is amended to read as follows:

 “Sec. 2. Covered employees – Contractors.

 (a) This chapter shall apply to the following employees, except persons employed less than 15 hours per week and except persons employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act (29 U.S.C. § 213(a)(1)), or required by District of Columbia law in effect on April 26, 1994, to possess an occupational license:

 (1) Employees hired by a contractor as food service workers in a hotel, restaurant, cafeteria, apartment building, hospital, nursing care facility, or similar establishment;

 (2) Employees hired by a contractor to perform janitorial or building maintenance services in an office building, institution, or similar establishment;
 (3) Nonprofessional employees hired by a contractor to perform health care or related support services in a hospital, nursing care facility, or similar establishment; and

 (4) Employees hired by a contractor to perform security services in an office building, institution, or similar establishment; provided, that special police officers who are armed, and employees hired by a contractor to perform security services for the Board of Education or a public charter school shall not be included.

 (b) For purposes of this chapter “contractor” includes a subcontractor and means an individual or company that employs 25 or more persons.

Sec. 3. Transition employment period for employees of contractors.

 (a) The present contractor within a period of 10 days after the awarding of a contract shall make available to prospective contractors the names of all employees of the present contractor employed at the site or sites covered by the prospective contract, the date each employee was hired, and the employee’s occupation classification.

 (b) A new contractor who is awarded a contract to provide similar covered services provided by the previous contractor shall retain, for a 90-day transition employment period, eligible employees who have been employed by the previous contractor for the preceding 8 months or longer at the site or sites covered by the contract.

 (c) If at any time, the new contractor determines that fewer employees are required to perform the new contract than were required by the previous contractor, the new contractor shall retain employees by seniority within job classification.

 (d) During the 90-day transition employment period, the new contractor shall maintain a preferential hiring list of covered employees not retained by the new contractor from which the new contractor may hire additional employees.

 (e) Except as provided in subsection (c) of this section, the new contractor shall not discharge an employee retained pursuant to this chapter during the 90-day transition period without cause.

 (f) At the end of the 90-day transition employment period, the new contractor shall perform a written performance evaluation for each employee retained pursuant to this chapter. If the employee’s performance during the 90-day transition employment period is satisfactory, the new contractor shall offer the employee continued employment under the terms and conditions established by the new contractor.

 (g) If a contractor’s contract at an establishment in the District of Columbia is not renewed, and within 30 days the contractor is awarded a similar contract at another establishment in the District of Columbia, the contractor shall retain at least 50% of the employees from each establishment as needed to perform the contract.

Section 4. Right to Reinstatement and Retention

 (a) For purposes of this section, the term:

 (1) “Employee” shall mean any individual employed by an employer, except (i) persons employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act (29 U.S.C. § 213(a)(1)), or required by District of Columbia law in effect on April 26, 1994, to possess an occupational license; (ii) any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization; (iii) any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions; or (iv) any individual employed as a casual babysitter, in or about the residence of the employer.

 (2) “Employer” shall mean any entity (including but not limited to a for-profit or nonprofit firm, partnership, proprietorship, sole proprietorship, or limited liability company, association, or corporation), including any contractor, or any receiver or trustee of an entity (including the legal representative of a deceased individual or receiver or trustee of an individual), who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee.

 (3) “Change in controlling interest or identity of an employer” means any event or sequence of events occurring on or after January 31, 2020, in which the business operation conducted consists of the same or similar operation as before January 31, 2020, including any sale, assignment, transfer, contribution or other disposition of a controlling interest by consolidation, merger, or reorganization of the employer, or of any entity that maintains any ownership interest in the employer; any purchase, sale, lease, reorganization or restructuring, or relocation of the operation; or any combination of such events, that causes either a change in the entity or entities holding a controlling interest in the employer, or a change in the identity of the employer.

 (4) “Eligible employee” means any employee whose most recent separation from employment occurred on or after February 1, 2020, and was not due to either voluntary resignation without good cause or misconduct.

 (b) (1) Employers shall offer all eligible employees reinstatement to their previous positions or to positions performing the same or similar duties, as those positions become available in the operation.

 (2) (A) Offers shall be made in writing, by registered mail, to the eligible employee’s last known physical address.

 (B) An employee who is offered reinstatement pursuant to this section shall be given no less than ten days from the date of receipt of the mailed offer in which to accept or decline the offer.

 (3) If more than one eligible employee is entitled to reinstatement to a particular position, the employer may make simultaneous, conditional offers of reinstatement to eligible employees for the same position, but shall reinstate eligible employees based on seniority within job classification.

 (4) An employer shall not hire a new employee for a position until all eligible employees have declined offers of reinstatement.

 (c) (1) The requirements of this section shall also apply in the event of one or more changes in controlling interest or identity of the employer.

 (2) In the event of one or more changes in controlling interest or identity of the employer, the new employer shall offer employment to any eligible employees pursuant to subsection (b) of this section, and shall retain any eligible employees accepting reinstatement for a 90 day transition employment period.

 (3) Except as provided in paragraph (6) of this subsection, the new employer shall not discharge an eligible employee retained pursuant to this section during the 90-day transition employment period without cause.

 (4) At the end of the 90-day transition employment period, the new employer shall perform a written performance evaluation for each employee retained pursuant to this section, and if the employee’s performance during the 90-day transition employment period is satisfactory, the new employer shall offer the employee continued employment under the terms and conditions established by the new employer.

 (5) An employer that experiences or anticipates a change in controlling interest or identity, where such change is anticipated to occur on or after the effective date of this law, must, no later than 15 calendar days before the anticipated date of such event, provide notice as follows:

 (A) Notice to all other parties to the event or transaction of the name, last known address, date of hire, position, and text or telephone contact information of each eligible employee; and

 (B) Notice to all eligible employees, either by posting in the business in the same place and manner as other statutorily-required notices or, if the business is not operating, by the means described in subparagraph (b)(2)(A) of this section. Notice to eligible employees shall state that the employer is experiencing or anticipates a change in controlling interest or identity, and shall advise employees of their right to retention under this section.

 (C) If eligible employees are represented by a labor organization, the notices specified in this Section must simultaneously be provided to the labor organization.

 (6) If at any time, a new employer determines that fewer employees are required to perform the work of the operation, the new employer shall retain employees by seniority within job classification.

Section 4. Enforcement.

 (a) An employee or employees may, on behalf of themselves and/or on behalf of other employees similarly situated, bring an action in the Superior Court of the District of Columbia and may be awarded:

 (1) Back pay for each day the violation continues at a rate of compensation not less than the higher of:

 (A) The average regular rate of pay received by the employee during the last 3 years of the employee’s employment in the same occupation classification, or

 (B) The final regular rate received by the employee; and

 (2) Costs of benefits the employer would have incurred for the employee under the employer’s benefit plan; and

 (3) If it is established that an employer violated this Chapter with malice or with reckless indifference, the affected employee(s) shall be entitled to treble damages, and, in addition, may be awarded compensatory or punitive damages.

 (b) (1) No employer may refuse to reinstate or employ, or terminate or otherwise take any adverse action against, any person who asserts rights under this Chapter, participates in proceedings related to this Chapter, or opposes any practice they believe in good faith is proscribed by this Chapter.

 (2) If it is established that a person engaged in conduct protected by subsection (b)(1) of this section, and an employer thereafter refused to reinstate or employ, terminated or otherwise took adverse action against such person within sixty (60) days after such conduct, then a rebuttable presumption shall arise that the employer’s action was taken in violation of subsection (b)(1) of this section. In such a case, the employer must prove that the sole reason for the action was a legitimate business reason. The employer’s asserted business reason may be rebutted by showing pretext.

 (c) In any suit, the court shall allow a prevailing employee reasonable attorney’s fees, and costs of suit (including expert witness fees) as part of the costs recoverable.

Section 5. Relationship to employment contracts and agreements.

 The requirements of this Chapter shall not diminish the obligation of an employer to comply with the provisions of any contract, including but not limited to any individual contractual arrangement or any collective bargaining agreement, providing greater or equal rights to employees than are afforded under this law.