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COLLECTION:
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Ann O'Leary
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FOLDER TITLE:
BAA - UI [Birth and Adoption - Unemployment Insurance]

2013-0436-S
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Ann O'Leary's Files
Office of Policy Development, Domestic Policy Council, First Lady's issues

BOX 7 of 23

BAA UI
Frist Paid Leave Bill
Parental discrimination bill
Food stamps
FY -01 budget initiatives
FY- 01 appropriations
CNS re-authorization
FY 2000
FY -01 groups
FY -01 advocacy
GME proposal
GME
Vaccines
Long term care
Guns
CEA/guns
Hate Crimes Event
Face amendment
Gun lawsuit
Headstart
Headstart general
Lead poisoning
Environment public health
Children's hospitals GME legislation
Pediatric labeling
Health
Lupus
Epilepsy
Long term care
Alternative medicine
Medicare
Ritalin
AIDS
Infant screening

Ann O'Leary's Files

BAA - UI

file UI-BAA

U. S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION UI CORRESPONDENCE SYMBOL TEURL DATE October 5, 1995

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-96

TO: : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : MARY ANN WYRSCH Mary Ann Wyrsch
Director
Unemployment Insurance Service

SUBJECT : The Legal Authority of Unemployment Insurance Program Letters and Similar Directives

1. Purpose. To advise States of the position of the Department of Labor (Department) regarding the legal authority for Unemployment Insurance Program Letters (UIPLs) and other Departmental directives which affect the Federal-State Unemployment Insurance (UI) Program.

2. References. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559; the Social Security Act (SSA); and the Federal Unemployment Tax Act (FUTA).

3. Background. Departmental directives for the UI program include UIPLs, General Administration Letters (GALs), Handbooks, the Employment Security Manual (ESM) and various transmittals of model legislation for implementing Federal law requirements. These directives are issued to the States under authority delegated by the Secretary of Labor.

The Department issues directives to set forth official agency policy. These directives state or clarify the Department's position, particularly with respect to the Department's interpretation of the minimum Federal requirements for conformity or compliance, thereby assuring greater uniformity of application of such requirements by the States. Oftentimes these directives provide information in the public interest which is vital to guiding the States' courses of operations.

States have raised questions regarding what weight these directives carry as interpretations of Federal law. These inquiries have come from State legislators, State Attorney General offices, other State officials and attorneys in Legal Services. It has sometimes been argued that, since the

RESCISSIONS	EXPIRATION DATE
None	October 31, 1996

interpretations in these directives are not found in the Code of Federal Regulations, they have no legal effect. This UIPL is issued to advise States that these directives do, in fact, have legal effect. *

4. Discussion. The APA contains requirements to determine which rules are subject to its notice and comment procedures (ultimately leading to publication in the Code of Federal Regulations) to have force and effect as well as provisions for those rules which are not subject to those procedures. The APA, originally enacted on June 11, 1946, and later revised by P.L. 89-554, (5 U.S.C. §§ 551-559) was passed in part to assist the various Federal government agencies in their administration of statutes under their jurisdiction. The APA recognizes that some functions and some operations of Federal agencies do not lend themselves to a formal procedure. For this reason, the APA provides for different types of rules including "substantive" or "legislative" rules and "interpretative" rules. Section 553(b) of the APA, which requires that a general notice of proposed rule making must be published in the Federal Register, makes two exceptions to this requirement, one of which is relevant here as follows:

> Except when notice or hearing is required by statute, this subsection does not apply--
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;
>
> . . . .

The test for determining if a rule is interpretative, and thus not subject to the requirement of a published notice of proposed rulemaking, is found in Gibson Wine Co., Inc. v. Snyder et. al., 194 F.2d 329 (D.C. Cir. 1952). In Gibson, the court addressed an interpretative ruling transmitted by the Deputy Commissioner of the Internal Revenue Service. The court stated on page 331:

> Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that "regulations," "substantive rules" or "legislative rules" are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means. [Emphasis supplied.]

Under Gibson, an interpretative rule is one which explains or defines particular terms in a statute or is an opinion of an official, having authority on a particular subject, as to the meaning of a statute or regulation. Id. at 331-332.

British Caledonian Airways, Ltd. v. C.A.B., 584 F.2d 982 (D.C. Cir. 1978), is a leading case concerning the use of interpretative rules. The court stated that the agency was "construing the language and intent of the existing statute and regulations in order to . . . remove uncertainty "which is "a function peculiarly within the ability and expertise of the agency." Id. at 991. The agency's actions were entirely appropriate "to illuminate the meaning" of its regulations. Id. at 993. Another court has stated that, when interpretative rules reiterate or explain an explicit statutory obligation, they can even help "make sense" of inconsistent statutory direction created by acts of Congress as long as they do not impose a new procedure or obligation which is not derived from the language of the statute or regulation. American Hospital Association v. Bowen, 640 F. Supp. 453, 460 (D.D.C. 1986).

In Cabais v. Egger, 690 F.2d 234 (D.C. Cir. 1982), the court held that a UIPL was not subject to the APA notice and comment procedures when it construed the language and intent of a statute and reminded States of existing duties, and where the UIPL did not grant or deny rights nor impose obligations which did not already exist in statute.[1]

Even if an interpretative rule has a wide ranging effect or a "substantial impact" on individuals, this does not mean it is subject to notice and comment procedures. Following the U.S. Supreme Court decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519, 524 (1978) that courts are generally not free to impose on agencies requirements that exceed those required by the APA, courts have rejected the "substantial impact" test. See Cabais, 690 F.2d at 237-238); Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983). The Rivera court, which specifically addressed UIPLs, stated that agencies are not required to comply with a notice and comment procedure for interpretative rules which have a substantial effect because Congress considered the matter and explicitly excepted interpretative rules and general statements of policy from this procedure. Id. at 890-891. The court observed that agencies now freely issue interpretative rules as guidance and that unnecessarily restrictive procedures should not be imposed beyond that contemplated by the APA. Id.

5. Action Required. State Administrators are requested to provide the above information to the appropriate staff.

6. Inquiries. Direct questions to the appropriate Regional Office.

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[1]The Cabais court did, however, conclude that, in one area, a UIPL did create a substantive rule since, contrary to the broad latitude granted to the states in the statute, the UIPL imposed "an obligation on the States not found in the statute itself." Id. at 239.

file BAA-UI

MEMORANDUM FOR THE DIRECTOR

FROM: Barbara Chow

SUBJECT: UI and Paid Family and Medical Leave

We have spoken briefly about the idea of using the unemployment insurance (UI) system to pay Family and Medical Leave Act (FMLA) benefits. DPC is now pushing for a decision on this issue due to the President's upcoming speech at Grambling University on Monday. Below is the background on this issue as well as the policy, operational, budgetary and regulatory questions regarding this proposal.

Background on Paid Parental Leave and State UI Proposals.

The idea of paid parental leave was discussed the last two years as a possible budget initiative, but did not make it through the process in either year. As it was developed in 1997, the Administration's paid parental leave proposal would have provided eligible new parents $200 a week in paid leave, funded by the Federal government, for up to six weeks. Eligibility was based on income and time in the workforce. This initiative would have used the UI system to deliver the leave payments, but would not have used UI funds to pay for these benefits. The policy goal was to offer persons who cannot afford to take leave after the birth or adoption of a child an option to stay at home, versus child care. It was estimated to cost $1 billion annually.

DOL raised the issue again recently because of interest by the Hill, specifically Sen. Kennedy, in the Administration's position on paid parental leave. Four states have introduced legislation that would allow use of UI trust funds to pay individuals some form of family and medical leave (Vermont, Massachusetts, Maryland, and Washington). DOL has opposed this proposed use in the past because the individuals receiving the benefit are not available for work -- a fundamental requirement of the UI program known as the "availability test." Federal law does not contain an explicit requirement that UI claimants be available for work, and DOL has relied for many years on the legislative history of the UI program to enforce its availability interpretation.

Absent a change in its long-standing interpretation, DOL would declare any State law using UI trust funds for family and medical leave to be "out of conformity" with Federal requirements.

DPC is currently running a policy process to determine if States should have the flexibility to use UI funds for paid family and medical leave. The options for implementing this policy are laid out later in this memo (see DPC Options).

Policy Questions

What is the size of the problem that we are trying to address with this policy? The data on the need for or use of paid parental leave are scant and were collected very soon after FMLA was passed. We do not have data on recent experience. I understand that a survey conducted by the Commission on Family and Medical Leave found that 3.4 percent of respondents did not take unpaid leave when needed. Of those 64 percent (or 2 percent of the overall sample) cited affordability as the main reason they did not take advantage of unpaid leave when they needed it. Of the respondents who stated they did not take unpaid leave for birth or adoption of a child, 100 percent (0.2 percent of the overall sample) cited affordability as the main reason. By offering paid leave, the Administration could try to address this problem. It is also important to note that while the policy under consideration may be characterized as a paid parental leave proposal, only 17% of those who took FMLA covered leave did so for maternity leave..

Is there a substitution effect? If States implement this proposal, employers may decide to offset their costs by decreasing current benefits such as annual leave, paid parental leave, or even lowering wages. In addition, employers may lobby States to modify their state workers compensation programs to only allow for maternity disability after the UI benefit is exhausted. At one of the meetings, CEA raised the possibility that this policy could result in increasing hiring discrimination against women in the child bearing years.

What are the implications for the UI program? The UI system is designed to pay benefits only to workers who lose a job through no fault of their own and who continue to be unemployed because no other work is available. The major concern of DOL is that a change in the Department's long-standing position on availability -- because it is not in Federal law -- would create a "slippery slope" for other aspects of the UI program. States might decide to pay benefits to other people not available for work because of vacations, sick leave, sabbaticals, or retirement. In addition, DOL believes that employers may push to turn UI into a mean-tested program to reduce costs. DOL also fears that any attempt to create limited State flexibility in using UI funds for family and medical leave will end up eliminating any DOL control over State UI programs except for provisions explicitly in Federal law.

Will this be seen as circumventing the legislative process in order to expand FMLA coverage? The Administration has tried to lower the current 50 employee threshold for coverage under FMLA to 25. Administration support for paid leave may undercut support for expansion of unpaid leave under FMLA. Given UI covers all employers regardless of size, with limited exceptions, employees not currently covered by FMLA could receive paid leave benefits.

Operational Questions.

The following questions must be addressed in designing a program for paid family and medical leave. These questions can be left to individual States to answer as they design their own family and medical leave programs or they can be addressed through Federal policy guidance or model legislation. However, if we decided to issue guidance or regulations, it is unclear whether we have the legal authority to compel States to follow these guidelines.

Should this benefit be universal or targeted to lower income persons? UI is a non-means tested program – it is insurance against wage loss when involuntarily unemployed regardless of current family income or assets. The FMLA proposals discussed in 1997 and 1998 would have limited the benefit to those with incomes below a certain amount – as initially discussed the limit was a family income of $50,000, then it was $36,000. An income test could be interpreted as the first step to welfarizing UI. This may be preferable from a policy perspective, but is inconsistent with UI policy.

What should the length of benefits be? Currently, FMLA provides job-protected unpaid leave for 12 weeks. UI benefits are available for up to 26 weeks. The State proposals we have seen would have chosen the shorter duration but there is no particular reason to adopt that duration.

What type of leave will be covered? The Administration's budget initiatives were focused on paid parental leave. Some of the State proposals (including Massachusetts) cover all family and medical leave under State law, which is much broader than parental leave – including leave for the person's own health or to care for a sick parent or child. Of those who took FMLA covered leave in 1995, 60 percent did so due to personal illness. UI coverage for intermittent leave may be very difficult to administer and enforce.

Should the individual be required to exhaust current leave options first prior to seeking UI benefits? Currently, most employees receive annual and sick leave from their employers. FMLA does not require the individual to exhaust other avenues prior to taking advantage of unpaid leave. Any requirement that individuals use all of the leave available to them for this purpose prior to seeking the UI benefit would be difficult to track and enforce.

<u>Budgetary and Regulatory Questions.</u>

What would the proposed program cost the Federal Government? The options under consideration are designed to permit interested States to provide paid family and medical leave; there will be no Federal mandate. Because there will be no Federal legislation, there will be no legislative PAYGO requirements. The intended effect of these options is to increase spending from the Unemployment Trust Fund, which is on budget. But State UI taxes will increase over time in response to the higher benefit outlays, so over the longer term paid family and medical leave will be deficit neutral. We are trying estimate the effects of this policy on a year by year basis but the estimate will be very soft and difficult to construct.

Only rough estimates of potential program costs are available. If paid family and medical leave were implemented in every State with the current Federal thresholds, DOL estimates that the costs would be $2-$9 billion a year, compared with current UI benefits of $23 billion a year. The low end assumes no behavioral changes; the high end assumes behavioral changes by workers and employers, including shifts from currently paid leave to the new program. For the Massachusetts proposal, which covered all family and medical leave for all sizes of firms for 12 weeks, three independent estimates concluded costs would be about $200 million a year, compared with current UI benefit payments of $750 million in that State. We would anticipate that over time States would increase taxes, so over the years the program would be deficit neutral.

Would this be subject to Congressional review under the Small Business Regulatory Enforcement Fairness Act (SBREFA)? Yes. If DOL issued either a program letter or a proposed regulation, it would be subject to Congressional review.

DPC Options.

DPC is currently developing three options. All are permissive, not mandates, and would rely on State legislation to change State UI laws.

1. Instruct DOL to Issue New Program Guidance (interpretative rule).

Pros:

- Guarantees a specific policy outcome.
- Could be done quickly and does not require public comment.
- Could include Federal parameters on the structure of the program.

Cons:

- Compromises DOL's "availability" standard.
- More susceptible to legal challenge and therefore could be easily overturned.
- Subject to Congressional review under SBREFA and would likely be categorized as "major."
- More susceptible to future policy changes.
- Could provoke an appropriations rider or other legislative action.

2. Instruct DOL to Issue New Regulations.

Pros:

- Creates a sounder legal basis and is less susceptible to legal challenge.
- Provides for public comment.
- Offers time for "fine tuning" Federal guidance on the parameters of UI coverage of family and medical leave.
- Less susceptible to future policy changes.

Cons:

- Compromises DOL's "availability" standard.
- Could result in changes to the policy based on public comment.
- Regulations require more time – delays State adoption of program and allows opposition to mobilize.
- Subject to Congressional review under SBREFA and would likely be categorized as "major."
- Could provoke an appropriations rider or other legislative action.

3. Instruct DOL to Produce Model State Legislation for Separate UI-FMLA Fund. States could create a separate State tax to fund parental leave (that would not be part of the UI trust fund) and could reduce their State UI taxes to make this new program revenue-neutral for employers. Several States have already established separate taxes for training or for employment security administration. DOL could use the UI system to administer this new program.

Pros:

- Achieves States objective of providing paid leave.
- Provides assistance to States without compromising DOL's "availability" standard.
- Easier because no Federal administrative actions are necessary.
- Designing model legislation could be done relatively quickly.

Cons:

- Appears less pro-active.
- Less responsive to State initiatives in this area.
- Less attractive to States due to the requirement of a new tax.

Recommendation. I recommend Option 3. By supporting this option, the Administration can show its strong support for paid parental leave without compromising the fundamental requirements of the UI program. In addition, other alternatives should be explored such as creation of a new tax credit, use of State temporary disability programs, or creation of a Federal program of paid parental leave like the 1997 proposal.

file UI-issue

Bruce N. Reed
05/24/99 11:25:35 AM

Record Type: Record

To: Nicole R. Rabner/WHO/EOP@EOP, Thomas L. Freedman/OPD/EOP@EOP, Audrey Choi/CEA/EOP@EOP

cc:
Subject: Re: story

Good work!

---------------------- Forwarded by Bruce N. Reed/OPD/EOP on 05/24/99 11:24 AM ---------------------------

Jennifer M. Palmieri
05/24/99 11:02:27 AM

Record Type: Record

To: Sara M. Latham/WHO/EOP@EOP, Joseph P. Lockhart/WHO/EOP@EOP, Loretta M. Ucelli/WHO/EOP@EOP, Bruce N. Reed/OPD/EOP@EOP

cc:
Subject: Re: story

FYI -- please see attached for stories on yesterday's announcement.

---------------------- Forwarded by Jennifer M. Palmieri/WHO/EOP on 05/24/99 11:01 AM ---------------------------

Barry J. Toiv

05/24/99 10:56:56 AM

Record Type: Record

To: Jennifer M. Palmieri/WHO/EOP@EOP

cc:
Subject: Re: story

l.a. times, wash. times, boston globe all on front page

---------------------- Forwarded by Barry J. Toiv/WHO/EOP on 05/24/99 10:56 AM ---------------------------

Sarah E. Gegenheimer 05/24/99 10:36:40 AM

Record Type: Record.

To: Julia M. Payne/WHO/EOP@EOP, Barry J. Toiv/WHO/EOP@EOP
cc:
bcc:
Subject: Re: story

Based on a quick search...

The following ran original stories:
New York Times
USA Today
Washington Post
Los Angeles Times
Boston Globe
Washington Times
New Orleans Times Picayune

The following ran the AP story:
Chicago Tribune
Atlanta Journal Constitution
The Advocate (Baton Rouge, LA)

I'll let you know if I find more. I saw the Ann Scales article while doing my search. The story follows...

The Boston Globe

May 24, 1999, Monday ,City Edition

SECTION: NATIONAL/FOREIGN; Pg. A1

LENGTH: 944 words

HEADLINE: Clinton vows to let states help parents;
Benefits touted for infant care

BYLINE: By Ann Scales, Globe Staff

BODY:

GRAMBLING, La. - Calling parents too stressed and overworked, President Clinton said yesterday he would order a change in federal regulations that would allow workers to collect unemployment benefits while on leave to care for newborn or newly adopted children.

In a commencement address at Grambling State University, the president said the revisions would give states the enlarged authority to provide the benefits. The change follows inquiries from Massachusetts, Maryland, Washington and Vermont, which, the White House said, have bills pending in their legislatures to allow them to use surpluses in unemployment insurance programs to pay leave benefits to new parents.

Clinton also proposed greatly expanding the government's sick leave policy to allow federal workers up to 12 weeks off with pay to care for seriously ill family members. Neither action, White House aides said, requires the approval of Congress.

Clinton said the federal government needed to find "creative ways to help Americans use benefits they've worked for to finance the time off they need for their families."

He said last month's killing of 14 students and a teacher at Columbine High School in Littleton, Colo., coupled with a recent spate of hate crimes, underscored the importance of making "the bonds that tie parents to children stronger."

Armed with a new study by his Council of Economic Advisers that shows that more parents are working outside the home and have less time for their children, he said, "It all begins with family, with parents who love their children more than life and raise them to live their dreams."

According to the study, the percentage of married mothers in the work force has nearly doubled over the last 30 years, from 38 percent in 1969 to 68 percent in 1996.

Because more mothers are working outside the home and the number of single-parent households has risen, parents now have 22 fewer hours each week, or 14 percent less time, to spend at home than they used to, the study said.

"That means by the time a child reaches the age of 18 in today's world those 22 hours a week amount to over two years more the parents are away from home," Clinton said.

He told the nearly 500 graduates, "We as a nation must find a way to give your generation of parents some of that time back."

Clinton said the Family and Medical Leave Act, the first bill he signed into law as president in 1993, "just meets a fraction of the need." Too many families, he added, "can't take advantage of the law because they can't afford to take the time off because they can't live without their paychecks."

He said, "In our around-the-world, around-the-clock economy, there just don't seem to be enough hours in the day for parents to do everything they need to do."

Clinton challenged the private sector to follow his lead by allowing more paid sick leave to employees caring for a spouse, child or parent with a serious illness like cancer, heart or kidney disease.

He has directed the Federal Office of Personnel Management to revise its regulations to allow employees to use up to 12 weeks of accrued sick leave each year to care for an ill family member. Currently, most federal employees are limited to 13 sick days a year.

"If every company in America that offers sick leave to its workers adopted the same policy we're adopting today, half of all the American work force would have this important benefit for their families," he said.

White House officials estimated that about half a percent of the federal workforce would use the option, costing the federal government about $60 million annually.

Clinton also directed Labor Secretary Alexis Herman to draw up the new regulations authorizing the expansion of the unemployment insurance system.

But Clinton aides said it would be up to the states to decide whether to use the surpluses most have in their unemployment insurance programs to allow parents paid leave following the birth or adoption of a child.

"This would be strictly voluntary," said White House spokesman Barry Toiv.

Clinton told the graduates at the historically black college, "If you or any American has to choose between being a good parent and successful in your careers, you have paid a terrible price, and so has your country."

He urged school districts to "unlock those empty classrooms in the late afternoon, fill them with the sounds of children playing and learning" and prodded business "to do more by helping their own workers find and afford quality child care."

The commencement speech was the first of three Clinton will deliver this spring. He will address graduates at the Air Force Academy in Colorado on June 2 and the University of Chicago on June 12.

Clinton, who received an honorary Doctor of Laws degree from Grambling, was also offered a post-White House job by university President Steve A. Favors, who enticed the president with offers of Louisiana cuisine, including "gumbo, jambalaya, crawfish . . . collard greens, sweet potato pie and ham."

Favors said, "We'll even allow you unlimited opportunities to play the saxophone with the world-renowned Grambling State University marching band," which, in a tribute to Clinton, performed the song "Heatwave" during the ceremony.

Said Clinton: "I was getting into this" before Favors said he was just kidding. "I've got a good pension, I can work pretty cheap."

Favors was not the only one thinking about future jobs. As Clinton began his speech, telling graduates that this was an important day in their lives, one student yelled out, "I need a job!"

Clinton replied, "Well, you'll be able to get one now."

GRAPHIC: PHOTO, AP PHOTO/President Clinton received an early-morning salute as he departed Air Force One at Barksdale Air Force Base, La., yesterday.

LANGUAGE: ENGLISH

LOAD-DATE: May 24, 1999

From: Julia M. Payne on 05/24/99 09:16:54 AM

From: Julia M. Payne on 05/24/99 09:16:54 AM

Record Type: Record

To: Julie B. Goldberg/WHO/EOP@EOP

cc: Sarah E. Gegenheimer/WHO/EOP@EOP

Subject: story

Julie, can you please see, per BT, if Ann Scales' story from yesterday ran in today's Globe? Also, SarahG, BT is looking for a quick read-out of how many papers the speech got into yesterday. Thanks!

file BAA-UI

Birth and Adoption Unemployment Compensation (NPRM)

<u>**Meeting Time and Place**</u>: Friday, October 22, at 11:00 AM in Room 260 of OEOB.

<u>**Meeting Participants**</u>: Holly Fetchner, Sen. Kennedy's Labor Committee; Suzanne Day, Sen. Dodd's office; Geri Palast, Assistant Secretary for the Office of Congressional and Intergovernmental Affairs (DOL); Barbara Chow (EIML); John Spotila (OIRA); Nicole Rabner (DPC).

<u>**Meeting Purpose**</u>: DPC (Rabner) wants to coordinate with the Hill before POTUS announces this regulation. Dodd and Kennedy have been key supporters of the concept of using UI to pay for leave and the White House doesn't want the Administration taking big steps forward without giving Dodd and Kennedy a heads up on how we are proceeding.

<u>**Overview of Regulation**</u>: The regulation creates an opportunity for State agencies that administer the Unemployment Compensation (UC) programs to pay, under a voluntary experimental program, UC to parents who take time off from employment after the birth or placement for adoption of a child. State participation is wholly voluntary and will require States to enact enabling legislation to participate. This effort responds to the President's Executive Memorandum issued May 24, 1999, directing the Secretary of Labor to allow States the opportunity to develop innovative ways of using UC to support parents taking leave to be with their newborns or newly-adopted children and to evaluate the effectiveness of using the UC system for these or related purposes.

<u>**Congressional Interest**</u>: There is a great deal of congressional interest in this issue. Senators Kennedy and Dodd are strong advocates for compensating individuals who leave work to meet family obligations. They believe that DOL should reinterpret Federal law to allow States to compensate leave through the UC program, but are likely to find this NPRM too narrow in scope in that it provides compensation only for those leaving employment to be with newborns and newly-adopted children. They support programs which are broader, essentially providing compensation to those eligible under the Family and Medical Leave Act. In this regard, Senator Dodd introduced S. 1355 (with co-sponsors Kennedy, Leahy, Murray) which would establish demonstration projects to provide income to respond to significant family transitions. On the other hand, Representatives Archer, Ballenger, Goodling, and Johnson have written the President indicating their strong opposition; they raise such issues as implementing the program through regulations rather than legislation and using UC funds for family leave benefits, thereby pitting jobless workers against those taking voluntary leave from employment.

Summary of the Regulation

<u>**The Federal-State UC System**</u>: States collect State UC taxes used to pay compensation. The Federal government collects taxes, used for grants for State UC administration, under the Federal Unemployment Tax Act (FUTA).

Able and Available: DOL has long interpreted Federal UC law to require that claimants be able to and available for work. DOL previously exercised its authority to interpret the able and available requirements in the areas of training, illness, jury duty, and temporary layoffs. Based on this precedent, DOL interprets "able and available" to allow the an experimental the UC program where workers taking leave during the first year following birth or placement for adoption of a child are provided UC.

Experimental Program: DOL chose to proceed with an experimental rather than a permanent program in order to test the proposition that providing UC to the parents of newborns and newly-adopted children who wish to take approved leave or otherwise leave their employment will increase their attachment to the workforce. The DOL will begin collecting administrative data immediately upon implementation of the program. DOL will evaluate each State individually, but a comprehensive evaluation will not be completed until four States have implemented legislation and operated a BAA-UC program for a minimum of three years. The Federal evaluation methodology has not yet been completed

Implementation at the State Level: States may enact legislation and begin operation of a BAA-UC program any time after the effective date of the Final Rule. States can enact legislation prior to completion of the rulemaking process, but would need a contingency provision in their legislation allowing for any necessary changes to comply with Federal regulations prior to implementation of their program. Model legislation is provided, but is optional and is for the convenience of States that choose to implement a BAA-UC program.

Legislation has been introduced in five States – Maryland, Massachusetts, New York, Vermont, and Washington – during this and prior years to provide UC to workers on some form of leave to meet family obligations. In Massachusetts and New York the bills remain in committee, while the legislatures adjourned without action in the other States. Note that legislators in New York are also considering using the Temporary Disability Insurance Program (TDI) instead of UC. Worker advocates in these States and others strongly support permitting States to use the UC program for such purposes.

Parameters in the Rule: States have wide latitude in implementing the program, but certain parameters apply:

- Eligibility. Only parents of newborns or newly-adopted children are included in the experiment. Also, states are prohibited from introducing eligibility factors unrelated to the fact or cause of unemployment, such as industry, employer size or whether the spouse of a UC recipient also receives (or has received) UC. Finally, all individuals covered by the State's UC law must also be covered for Birth and Adoption unemployment compensation.
- Timing. The first compensable week is the week in which birth or placement for adoption takes place. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable.
- Definition of "Newborns" and Newly Adopted Children: *Newborns* means children up

to one-year old, and *Newly-adopted children* means children, regardless of age, who have been placed within the previous 12 calendar months with an adoptive parent(s). Placement occurs at the time a parent becomes legally responsible for a child pending adoption

Suggested Parameters in the Model Legislation and Q's and A's: DOL provides non-binding guidance on how states can set up there programs.

Model Legislation:

- Timing. UC can only be provided for a maximum of 12 weeks. (Model Leg.)
- Deductions in UC. UC paid to the parent is deducted by payments from the employer resulting from a birth or adoption described and payments from a disability insurance plan contributed to by an employer, in proportion to the employer's contribution to such plan.
- Non-charging. Compensation paid under this section shall not be charged to the account of the individual employer.
- State self evaluation. State agency shall issue a report to the governor and the legislature evaluating the effectiveness of the program.

Q's and A's:

- Payment for other Types of Leave. Payment of UC for other types of family leave is inconsistent with the program.
- Exhausting other Paid Leave. All employer-paid leave need not be exhausted before US is available.
- Solvency. While solvency not required, decision makers should examine the State's solvency position and projected taxes and benefit payments under current law before deciding to enact BAA-UC legislation.
- Both Parents. Both parent may receive UC and they may receive it at the same time. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose.
- Eligibility. Eligibility under this program should not be based on whether an employer is required to grant the leave, but on the parent's reason for wanting to take the leave. Also, eligibility may be conditioned on whether the individual gave notice to the employer and on whether the individual chooses not to return to work.

Agenda - Briefing on Administration's Initiative on
Paid Leave and Unemployment Insurance
July 16, 1999

I. White House Initiative

II. Legal Framework and Regulatory Timeline -- Department of Labor

III. Efforts in States on Paid Leave/UI and Grassroots

IV. Reaction to President's Initiative

V. Related Legislation

- Vehicles for Effort to block
- Dodd Paid Leave bill

VI. Questions

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VI. Questions

compelling reason - part. / availability
Is ~~both~~ new parents?

→ $43-80 mil 4 states

VT $4 mil

MA:

WSLN

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FAX: (617)695-1295

TO: White House Staff
FROM: Linda Johnson, Executive Director
DATE: July 16, 1999
RE: Allowing States To Use Unemployment Insurance Benefits For Family And Medical Leave.

On behalf of the Massachusetts Family Leave Coalition, the Women's Statewide Legislative Network (WSLN) wishes to express our appreciation to President Clinton for his long standing commitment to a national family and medical leave policy, and for all that he has done to make it a meaningful support system for America's working families. In addition, we want to express our gratitude for his willingness to take concrete action to give states more flexibility in expanding family and medical leave policy. The President's commencement address delivered at Grambling University helped to expand even further the enormous support and interest that the Massachusetts Family Leave Campaign has generated.

WSLN was ecstatic when we heard about President Clinton's policy directive instructing the US Department of Labor to draft regulations that would allow states to use their unemployment insurance programs to provide income support to new parents. Since WSLN is a women's group working primarily to improve the economic status and condition of women and girls in Massachusetts, we are deeply concerned about the millions of dollars that women lose annually due to unpaid maternity leaves, as well as the negative impact that childbirth still has on women's overall earning potential and their ability to maintain a consistent presence in the workforce. In addition, the announcement specifically addressed the problem we were having with DOL over using unemployment insurance benefits for family and medical leave.

We commend President Clinton for his vision and his understanding for the need to bring the unemployment insurance system up to date so that it is capable to meeting the needs of today's workforce. However, we respectfully urge him to take the additional step that will allow states such as Massachusetts to use unemployment insurance benefits for all of the FMLA reasons for leave. Childbirth is only one of the many family care responsibilities that cause women to lose income and jobs. Despite the fact that women currently lose the most, and at the same time, stand to gain the most if we are successful, we made a strategic decision to pursue a family and medical leave policy that will benefit all workers because it will take the unyielding support of all working people to get the legislation passed. Limiting the new unemployment insurance regulations only to parental leave threatens to undermine and diminish the strength of the Massachusetts Family Leave Campaign, and the Family Leave Coalition. The strength of the campaign and the coalition rests squarely on the broad-based support from a richly diverse constituency which includes single workers, families with children, women, labor, the elderly and the disabled, as well as new parents.

The Massachusetts Family Leave Campaign is an exciting citizen action initiative working to expand family and medical leave policy to all working people in Massachusetts. WSLN initiated the campaign last year following several months of discussions with working women and men throughout the Commonwealth. Through a series of focus groups and public forums as well as a worker survey conducted by WSLN and the Massachusetts AFL-CIO, we learned that working people in Massachusetts wholeheartedly support expanding family and medical leave. Specifically, working people consistently identified universal coverage, job protection and access to some form of a wage replacement as the top three priority issues.

The Family Leave Coalition was convened to spearhead the campaign and transform the priorities identified by working people into a comprehensive family and medical leave policy for Massachusetts. We worked in collaboration with our lead legislative sponsors, Senator Stephen Lynch and Representative Anne Paulsen to file realistic, cost-effective legislation that would make family and medical leave a solid support system for all types of working people and families – S.61/H.1890 An Act To Provide Unemployment Benefits For Family And Medical Leave Recall. The bill proposes using unemployment insurance benefits to ease the financial burdens on families and individuals struggling with a serious family medical emergency or following the arrival of a new child.

The Coalition is firmly united in its commitment to continuing to build a critical mass of grassroots and legislative support for expansions in family and medical leave. Coalition partners work tirelessly to mobilize their members and constituents to help educate state policy-makers about the critical need for these policy reforms. We have succeeded in generating widespread excitement and enthusiastic support among working people, as well as a significant number of state legislators specifically because the legislation includes protections that benefit all working people regardless of their family composition, gender, income or occupation.

As you are aware, the movement to expand family and medical leave has powerful opponents at the national and state levels. Our experience with controversial legislative campaigns here in Massachusetts has taught us that the more universal the policy, and hence, the broader the base of support, the more likely it is to succeed. If we are forced to limit the family and medical leave campaign to a parental leave only campaign we risk losing critical coalition partners and their constituencies (eg: AARP, the Alzheimer's Association, Nine to Five, union locals representing younger workers who are not thinking about having children yet, and older workers who may be thinking about whether their adult children will be able to help them through a serious illness). We hope that you will help us keep the momentum going by ensuring that Massachusetts has the freedom it needs to use our unemployment insurance system for all of the FMLA reasons for leave.

Thank-you for this wonderful opportunity to express our gratitude to President Clinton, and for inviting us to be part of this exciting dialogue. Please feel free to contact us directly if you have questions, need additional information, or if there is anything else that we should be doing to facilitate this process.

July 1999

Unemployment Insurance Tax Cuts on the Rise: A Summary of Recent State Experiences

At a time when U.S. businesses are experiencing record profits, they have been lobbying aggressively for cuts in state taxes, including unemployment insurance(UI) taxes. This fact sheet summarizes some of the most extreme examples of UI tax cuts over the past several years and their negative impact on state UI trust funds.

Arizona In 1996, the Legislature passed an 11% reduction in UI taxes which resulted in a $23.4 million decrease in the trust fund. At the time of enactment, Arizona ranked 38th in the nation in the per worker size of its tax with a trust fund that totaled $512 million. In 1998, the Legislature reduced UI tax rates for employers with positive reserves by 0.1% and for employers with negative reserves by 0.05%. The 1998 tax cut will cost the trust fund another $45 million over the next four years.

Georgia In 1994, the state reduced the UI tax rate by 6.25%, which cost the trust fund $45 million. At the time, the state had a trust fund balance of $1.2 billion- the largest in the nation. In 1998, the Legislature passed a bill that cut the UI payroll tax again by $122 million. This bill provides for a tax cut of $92.2 million in 1999, and a tax cut of $30.6 million in 2000. In February 1999, the Governor announced plans to further cut UI taxes by $1 billion over the next four years.

Idaho In February 1998, the Governor signed a bill that cut taxes for employers by $31 million in 1998 and will reduce taxes by $112 million over the next four years. It will also reduce the rate new employers pay by approximately 30%. This is the fifth cut in the UI tax rate since 1983, including a $24 million tax cut that was enacted in 1997. State officials reported that at the end of 1997 the trust fund balance was $330 million.

Illinois In 1996, the state's UI tax was cut by $147 million.

Kansas In 1995, the Legislature provided a two-year exemption from UI taxes for businesses with positive UI fund balances. The Governor signed into law a two-year extension of the moratorium on UI taxes.

Massachusetts The Governor is sponsoring a bill that will reduce UI tax rates and cost the trust fund another $200 million per year, beginning this year, resulting in a 32% reduction in employer taxes from last year's rate. A $200 million cut previously went into effect in January 1998. Freezes and cuts in the UI tax rates since 1993 have cost the trust fund an estimated $1 billion.

Michigan In 1996, the state enacted a 10% cut in its UI tax rate and other financing reforms. These changes in state UI law have realized more then a half billion dollar cost to the trust fund over a three-year period, out of a total trust fund of $2.5 billion. Another $200 million tax cut went into effect in 1999. This is the 4th straight year that Michigan businesses have received a 10% across the board cut. Overall, UI costs for Michigan businesses have been slashed by $750 million over the past five years.

N. Carolina In 1995, the state cut the UI tax by 23% which resulted in an estimated trust fund drain of $73 million. In 1996, the Legislature approved a one-year moratorium on UI taxes. In May 1999, the state Senate passed a plan that provided for a 20% reduction in the UI tax rate. The plan is now under consideration in the state House.

New York In 1998, employers received a $420 million tax break from a 27% reduction in the average tax rate. This latest reduction means UI rates will have fallen 33% from 1995 through 1998.

Oklahoma In 1997, employer's UI taxes were reduced by 25%. This reduction will cost the trust fund over $63 million over a three-year period, and it is projected to leave the UI trust fund with a surplus of $500 million.

Rhode Island A bill passed in 1998 cut state UI taxes and resulted in a $42 million reduction in the trust fund. In 1997, the State Legislature reduced the UI tax rate from 4.2 to 2.3 % of base payroll for new businesses.

S. Carolina In 1998, the state cut UI tax rates by 50%, costing the trust fund an estimated $50 million. The trust fund had a balance of $600 million in 1997 according to state officials.

Utah In 1997, the average UI tax rate for employers was at a sixty-two year low of .7 percent.

Virginia In 1997, the Virginia Legislature passed a six-year UI tax rate reduction which cost the trust fund $7 million last year. During that time, the trust fund balance was nearly $900 million. The state currently has the 3rd lowest UI tax rate in the country.

Washington There is a bill under consideration that would reduce the UI tax rate by about 10% and cost the trust fund $513 million over the next six years in exchange for $90 million in retraining money.

-- DISCUSSION DRAFT --
July 15, 1999

Expanding Unemployment Insurance for Workers on Family & Medical Leave

Question & Answer

On May 23, 1999, President Clinton delivered a commencement speech at Grambling State University announcing the Administration's support for several pending state initiatives to expand unemployment insurance to cover workers on family leave. The next day, the President issued a memorandum to the heads of all Executive departments and agencies, titled "New Tools to Help Parents Balance Work and Family." While citing the progress made since the enactment of the Family and Medical Leave Act of 1993 (FMLA), the memorandum concluded that, "Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck."

In response to the need for income support for workers on family leave, the President directed the Secretary of Labor to "propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child." The President's action is not a mandate imposed on the states. Rather, it paves the way for states, at their option, to enact UI legislation that is consistent with the regulations adopted by the Administration. This document seeks to provide state legislators and advocates with more background on this initiative, its impact on the UI system, the proposals that have been developed in individual states and selected issues related to implementation of the President's directive.

1. Why link unemployment insurance (UI) and paid family and medical leave?

The federal Family and Medical Leave Act (FMLA) of 1993 stopped short of providing <u>paid</u> family and medical leave. As a result, large numbers of working families, especially those families headed by women working in low-wage jobs, are not able to take advantage of the 12 weeks of job-protected leave provided by the federal law. A national survey found that 64% of workers who needed to take advantage of the FMLA did not because they could not afford to do so.

Access to unemployment benefits is also on the decline, due largely to the failure of the UI system to keep pace with the changing needs of today's workforce, which includes a dramatic increase in the number of women, low-wage and contingent workers. Nationally, the proportion

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of the unemployed receiving unemployment benefits has dropped from an average of 49% in the 1950's, and over 75% during the 1974-75 recession, to just 35% in the 1990's (with significant variation from state to state).

A recent study of the Texas UI system provides a profile of those who are denied UI at the state level.[1] In Texas, only 21% of women workers received UI. The rate for part-time workers was 8.5% and only 18.4% for low-wage workers, despite the significant labor force attachment of both these groups. In recent years, legislators and advocates in the states have been actively campaigning to promote UI reform to meet the needs of this changing workforce. This state advocacy has targeted and promoted the findings of a recent federal commission that recommended fundamental reform of the UI program.[2]

Recognizing the combined need for paid leave and reform of the UI system to benefit woman and low-wage workers, advocates began rallying support in several states to expand unemployment insurance to apply to workers taking family and medical leave. A federal commission, the Commission on Family and Medical Leave, first recommended that states extend their unemployment insurance qualifications to employees on family and medical leave.[3] The UI system, with its established infrastructure in all the states and its pooled financing scheme, proved to be an appropriate place to start to develop a program of partial wage replacement for workers on family and medical leave. State proposals have also been developed to expand state temporary disability insurance (TDI) systems to cover both family and medical leave. TDI programs, which now exist in five states and Puerto Rico, currently provide the equivalent of UI benefits for workers who suffer non-work related disabilities.

2. What is unemployment insurance, and how does it relate to paid family and medical leave?

The UI program, which is funded by a payroll tax on employers, provides up to 26 weeks of partial wage replacement to qualified workers. Eligibility for the UI program, the amount of weekly benefits and other program rules are governed primarily by state law. Given the significant state discretion that is built into the system, some state UI programs are far more generous than others. For example, most people think of UI benefits as being available only to workers who have been laid off from their jobs. In fact, many state laws protect workers who leave their jobs for "compelling" family reasons as well, such as an emergency child care

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[1] Maurice Emsellem, Katherine Allen, Lois Shaw, *The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time & Women Workers* (National Employment Law Project\Institute for Women's Policy Research: February 1999).

[2] Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage* (February 1995).

[3] Commission on Family and Medical Leave, *A Workable Balance: A Report to Congress on Family and Medical Leave Policies* 199 (1996).

problem or the need to care for a sick family member. Nor do workers always have to be totally " unemployed" and "available for work" to recover unemployment benefits. For example, many states provide UI to workers who are on recall status from their jobs and to those workers who become sick after they apply for benefits. Thus, while no state now provides UI to all workers taking leave under FMLA, the UI system clearly has the precedent and flexibility to make it possible.

3. How did the state proposals develop?

Vermont, a state with a strong, worker-friendly UI program, was the first to propose covering workers on family and medical leave through unemployment insurance. In 1997, the Vermont AFL-CIO and State Senator Jan Backus led an initiative fueled in part by record high reserves in the state's UI trust fund and by an employer proposal to dramatically cut UI taxes. As a result of legal issues under consideration by the U.S. Department of Labor, the Vermont bill did not proceed through the legislative process.

In preparation for the 1998 state legislative sessions, several national organizations (the AFL-CIO, the National Employment Law Project and the National Partnership for Women & Families) and state advocates in Massachusetts worked together with the Vermont proponents to redraft the original bill to address these legal concerns. Finally, new bills were introduced in Massachusetts and Vermont during the 1998 legislative session, accompanied by a request for approval by the U.S. Department of Labor. This request eventually led to the President's favorable decision.

The Massachusetts campaign is presently the most active. While the legislative sessions ended in the other states before they could act on the President's announcement, the Massachusetts legislature continues on a two-year legislative cycle. The Massachusetts legislation is sponsored by a broad coalition of organizations, including the Massachusetts AFL-CIO, the Women's Statewide Legislative Network, Greater Boston Legal Services, and many other interested organizations. Like Vermont, Massachusetts is also faced with growing UI reserves due to the sustained low levels of unemployment and with a proposal by business to cut UI taxes by 32%. Other states that introduced legislation in 1998 include Washington and Maryland.[4]

4. What have the states proposed specifically?

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[4] For an update on these state proposals, and list of contacts in the states, see the National Partnership for Women & Families, *Making Family Leave More Affordable Through Family Leave Insurance: State Initiatives*, which is available on the website of the National Partnership at www.nationalpartnership.org.

While there are many similarities in these proposals, there will also be great variation in the scope of the state programs. This is due to the difference in each state's basic UI eligibility standards and benefit levels. However, all these bills necessarily address two key UI issues – that the worker left work for legitimate reasons (known as the "voluntary quit" provision) and that the worker be "able and available" for work.

Each bill addresses the first concern by stating that leaving work for the recognized leave constitutes "good cause" under the "voluntary quit" rules. This is similar to the twenty or so states that recognize many other "compelling" individual circumstances for leaving work. The second concern is addressed by exempting the workers on family and medical leave from having to be "able and available" for work. This is similar to the work-search exemption in state laws for workers who are temporarily separated from work while waiting to be recalled. In all the states, the UI benefits for this program would be considered "non-charged", meaning they are absorbed by the UI trust fund and not charged against in individual employer's UI tax rating.

The state bills differ primarily in the type and extent of leave covered. The Massachusetts bill (Senate Bill 61/House Bill 1890) provides up to 12 weeks of unemployment benefits to individuals who are covered by the federal FMLA (thus covering both family and medical leave), the Massachusetts Maternity Leave Act, or by a voluntary leave policy provided by the employer. These are all situations in which the employer is obligated to or has voluntarily decided to hold open the individual's job during the leave. In addition, even if not eligible for a job-protected leave, any individual who leaves a job for reasons that are recognized as legitimate under FMLA would also be entitled to up to 12 weeks of unemployment benefits.[5]

The Vermont bill differs only slightly from the Massachusetts legislation. The revised Vermont bill (Senate Bill 179) extends an existing exemption from the state's "voluntary quit" disqualification for workers who leave their jobs due to a certified illness. Under the proposed law, those who leave their jobs for reasons covered by the state's FMLA would also not be disqualified. The Vermont bill requires that the workers intend to return to the employment to receive benefits. In contrast to the Massachusetts and Vermont proposals, the Washington (Senate Bill 5959) and Maryland bills (House Bill 1124) are limited to individuals who take leave to care for a newborn or adopted child. The Washington bill limits the leave to 6 weeks. The Maryland bill allows up to 12 weeks of UI benefits.

5. How do these state proposals compare with the details described in the

[5] For an excellent background piece on the Massachusetts proposal, see Memorandum to Individuals Interested in Paid Family & Medical Leave, from Monica Halas of Greater Boston Legal Services, entitled "The Significance of the President's Executive Memorandum of May 24, 1999, for Massachusetts State Bill 61/House Bill 1890: An Act to Provide Unemployment Benefits for Family and Medical Leave Recall" (dated July 16, 1999).

President's announcement?

The President's Executive Memorandum, directing the Secretary of Labor to issue proposed regulations, spoke only to the issue of leave following the birth or adoption of a child, not to other forms of family leave or medical leave. While the Massachusetts and Vermont proposals cover all forms of family and medical leave, it is necessary to await further direction from the proposed regulations to determine whether these additional forms of leave will be considered by the Department on a case-by-case basis at the state legislation develops. Except for this issue, nothing in the President's speech and the Executive Memorandum specifically forecloses these states from pursuing the legislation as drafted.

6. Can state UI trust funds afford the family and medical leave expansion?

Yes, under appropriate circumstances. The decision to expand UI is made by each state legislature based on a balancing of many factors, including the solvency of their UI trust funds. In addition, the costs of these proposals will vary significantly from state to state, depending on the scope of coverage, the number of weeks of benefits provided and the state's UI benefit levels. For example, the Washington proposal to provide 6 weeks of benefits to workers taking leave to care for a newborn or adopted child is estimated to cost $29 million a year, which is less than 2% of the $1.573 billion dollar UI trust fund.

Second, since the end of the last recession in 1992, state trust reserves have increased significantly as the unemployment rate remain consistently low. This makes it possible to advance a range of UI expansions to bring the rates of access back up to more acceptable levels, especially for women, part-time and low-wage workers. As illustrated by Table 1 (attached), state trust fund reserves increased by 85% from 1992 through 1998. In almost half the states, the trust fund balances have increased by over 75%. Assuming the same rate of increase for 1999 as occurred for 1998 (9.45%), state trust funds will have doubled, growing from $26 billion in 1992 to over $52 billion in 1999 (Chart 1).

In addition, as measured by the U.S. Department of Labor trust fund solvency standard, most state trust funds are well positioned to handle UI expansions. The DOL solvency standard, known as the "average high cost multiple" (AHCM), measures the number of years that a state could pay UI benefits at peak recessionary levels. The DOL-recommended AHCM is 1.0, meaning that the state trust fund could afford to pay at least one year of benefits during a severe recession without collecting additional revenues. Table 3 (attached) shows that the AHCM for the states has increased by 49% since 1992, now averaging .94. As of the end of 1998, 38 states were above the DOL standard, including Massachusetts (which has increased to 1.3 since the 1998 1.07 estimate), Washington (which has increased to 1.8 since the 1998 1.02 estimate) and Vermont (which ranks third in the nation at 2.44).

7. To what extent have employers benefitted from the improved solvency of state trust funds?

Employer tax cuts have accounted for the main drain on state UI trust funds over the past several years, making it even more noteworthy that the trust funds are doing remarkable well. At the same time that U.S. businesses are experiencing record profits, they have been lobbying aggressively, and successfully, for dramatic cuts in state UI taxes. According to a recent tally prepared by NELP, at least 15 states have cut UI taxes dramatically over the past few years, and legislation is pending in many more states to expand this number.[6] For example, in Georgia UI taxes were cut in 1994 by 6.25%, costing the trust fund $45 million. This was followed by another cut in 1998, costing the fund $122 million and another cut in 1999, costing the fund $122 million. This year, the Georgia Governor proposed to cut taxes by another $1 billion over the next four years. In Michigan, businesses received four straight years of 10% tax cuts, costing the trust fund over $750 million. In South Carolina, UI taxes were cut by 50% in 1998, costing the fund $50 million.

Ironically, many of these same business groups have been critical of the President's directive, claiming that it will result in a "raid" of state UI trust funds. For example, in Massachusetts, business interests are opposed to the expansion of UI to cover workers on family and medical leave, yet they are actively lobbying for a UI tax cut that would cost the UI trust fund $200 million per year over the next several years. This amounts to a 32% cut in employer taxes. This proposal follows freezes and cuts in the UI tax rates since 1993 that have cost the trust fund an estimated $1 billion. According to state labor department officials writing in support of the tax cut proposal, "the current status of the Massachusetts UI Trust Fund is extremely positive, and a better time for taking additional action to keep UI costs down could hardly be found."[7] These business and state officials are, of course, hard pressed to demonstrate how the trust fund can handle this massive tax cut if it cannot handle an expansion of UI to cover workers on family and medical leave.

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[6] National Employment Law Project, "Unemployment Insurance Tax Cuts on the Rise: A Summary of Recent State Experiences" (July 1999).

[7] Unpublished Memorandum from John A. King of the Massachusetts Division of Employment & Training to the Legislature Reporting on the State UI Trust Fund (June 1999).

Greater Boston Legal Services

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Draft Memorandum

To: Individuals Interested in Paid Family and Medical Leave

From: Monica Halas, on behalf of the Massachusetts Women's Statewide Legislative Network's Paid Family Leave Campaign

Date: July 16, 1999

Subject: **The Significance of the President's Executive Memorandum of May 24, 1999, for Massachusetts Senate Bill 61/House Bill 1890: An Act to Provide Unemployment Benefits for Family and Medical Leave Recall**

This memorandum addresses the impact on proposed Massachusetts legislation of the President's Executive Memorandum of May 24, 1999, "*New Tools to Help Parents Balance Work and Family,*" which followed a commencement speech delivered on May 23, 1999, at Grambling State University in Louisiana. In his speech, the President directed the Secretary of Labor to issue a rule allowing states to use their unemployment insurance (UI) systems to offer paid leave to new mothers and fathers. The Executive Memorandum, which was issued to the heads of all federal executive departments and agencies and released the following day, outlined the steps which the President planned to take in an effort to make family and medical leave more affordable for workers in both the private and public sectors.

The President's actions are highly significant with respect to Massachusetts Senate Bill 61/ House Bill 1890. Before the President's speech, the Department of Labor had asserted that it had the authority to impose limitations on a state's eligibility requirements — in particular, to limit a state's discretion to determine whether or not an individual must always be "available" for work at the time she applies for benefits. The Department of Labor had rejected a similar piece of legislation offered by Vermont last year, asserting that federal unemployment law prohibited Vermont from exercising its discretion to define availability.

The President's announcement confirms that the proposed Vermont and Massachusetts bills are consistent with federal statutory law and with past precedents in state unemployment laws. Although the President focused on the problems of new parents, the acknowledgment that the unemployment system can be expanded to incorporate family leaves without any federal statutory changes affirms the legal viability of the Massachusetts legislation under federal law.

The following question and answer format addresses several issues that have been raised recently in conjunction with the Massachusetts legislation.

1. **Q. What unmet needs under the Family and Medical Leave Act has the President's Executive Memorandum addressed?**

A. The first bill that the President signed into law was the Family and Medical Leave Act (FMLA), which since 1993 has permitted workers in companies of 50 employees or more to take up to 12 weeks of unpaid job-protected leave to care for a newborn or adopted child, to attend to their own serious health needs, or to care for a seriously ill parent, child, or spouse. But as the President stated in his Executive Memorandum of May 24, 1999, under the FMLA: "Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck."

The President's observations follow a 1996 study by the bipartisan Commission on Leave,[1] which found that 63% of workers who needed leave for a reason covered by the FMLA but who did not take it were unable to take the leave because they could not afford to go without pay.[2] The study found that over 20% of workers with family incomes under $20,000 were forced to resort to welfare because they could not afford an unpaid leave.[3] The Commission specifically recommended that states extend their unemployment compensation qualifications to employees on family *and medical* leave.[4] In its report, the Commission emphasized that employees need time off not only to care for a new child but also for the employee's own serious medical condition or to care for a seriously ill spouse, child, or parent.[5]

2. **Q. Why is the UI system an appropriate mechanism for financing family and medical leave?**

A. The UI system has an established infrastructure in all the states and, with its pooled financing scheme, is an appropriate mechanism for providing partial wage replacement for workers. Expansion of the unemployment system is particularly timely given the strength of many UI trust funds and the state UI tax breaks that have already been provided to employers.

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[1] 29 U.S.C. §§ 2631 *et seq.*

[2] *See* Commission on Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies ("Workable Balance")* 99-100 (1996).

[3] *Workable Balance* at 283.

[4] *Workable Balance* at 199 (emphasis added).

[5] The Commission noted that, with the dramatic increase in dual-earner and single parent families, an increasing number of working adults are responsible for the care of their aging parents and other close relatives and require leave from work so that they can meet these responsibilities. *See Workable Balance* at 6-7, 9-10. Among employees who anticipated that they would need FMLA leave within the next five years, the most frequently cited reason was care of a seriously ill parent. *Workable Balance* at xix, 275. And of employees who took FMLA leave, over 80% took medical leave for their own or a family member's serious health condition. *Workable Balance* at 94 (fig. 5.2), 267.

For example, the Massachusetts unemployment trust fund has an unprecedented balance. The Deputy Director of the Massachusetts Division of Employment and Training (DET) estimates that this balance will rise to $1.827 billion during the course of 1999, sufficient to pay benefits for nearly two and a half years at current levels of unemployment or 13 months under a severe recession.[6] Although the DET Deputy Director questions whether this legislation is affordable, he is recommending another tax cut for employers (following a prior year 32% tax cut) that is roughly equivalent in amount to the estimate of the highest possible cost of this legislation.

Extending unemployment compensation to workers on unpaid leave promotes stability in employment and strengthens the national economy, two key policy objectives of the UI system. The Massachusetts legislation is consistent with these policy objectives as it effectively creates less unemployment by allowing workers to keep their jobs while on leave and lessens the burden on those who are forced to become separated from work when they need to care for themselves or their families.

3. Q. What are the provisions of the Massachusetts bill?

A. The Massachusetts bill provides up to 12 weeks of unemployment benefits to individuals who are covered by the federal FMLA, the Massachusetts Maternity Leave Act,[7] or by a voluntary leave policy provided by the employer. These are all situations in which the employer is obligated or has voluntarily decided to hold open the individual's job during the leave. In addition, even if not eligible for a job-protected leave, any individual who leaves a job for reasons that are recognized as legitimate under the FMLA[8] would also be entitled to up to 12 weeks of unemployment benefits. The financial eligibility requirements are the same as those under the current Massachusetts unemployment program, so that only those workers who are determined to have a sufficient "labor attachment" under Massachusetts unemployment law are

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[6] Letter from John A. King, DET Deputy Director to Monica Halas, Greater Boston Legal Services (April 21, 1999).

[7] This law, enacted in 1972, provides that a female employee employed by an employer with 6 or more employees who has completed a probationary period or completed three consecutive months of full-time employment may take 8 weeks of job-protected unpaid leave for purposes of giving birth or adopting a child. *See* Mass. Gen. Laws Ann. ch. 149, § 105D.

[8] The FMLA provides that eligible employees are entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following reasons: 1) the birth of a son or daughter and to care for such son or daughter; 2) the placement of a son or daughter with the employee for adoption or foster care; 3) the care of the spouse, or a son, daughter, or parent who has a serious health condition; or 4) a serious health condition that makes the employee unable to perform the functions of the position of the employee. *See* 29 U.S.C. § 2612.

[9] Two methods were used to arrive at this cost analysis by Professor Randy Albelda, labor economist at the University of Massachusetts. First, using survey data from *Workable Balance* adjusted for a 12 month period, the percentage of employees who took or needed a leave (minus those who would not use paid leave) was calculated to arrive at the actual users (factoring in take-up rates and average weekly UI benefits). Second, New Jersey's current cost of Temporary Disability Insurance (TDI) plus the estimated cost for FMLA coverage under TDI was adjusted to Massachusetts coverage and employees. The results were very similar.

covered under the bill. The program is estimated to cost the UI trust fund less than $1.25 a week per covered employee.[9] The costs are contained significantly because the Massachusetts UI system requires a one-week "waiting period" before the receipt of benefits, and over 40% of all leaves are for less than seven days.[10]

4. **Q.** What "legal hurdles" did the President's Executive Memorandum address?

A. Some people may question whether federal UI law allows states the right to determine whether workers who must separate from employment for circumstances under the FMLA qualify for UI if they are not "available for work" at the time they apply for benefits. Eligibility under these circumstance is proposed by the Massachusetts bill and the earlier Vermont bill. In response to this question, proponents of the Massachusetts bill had demonstrated, through careful research and analysis, that the Massachusetts bill is consistent in all respects with the intent of the federal UI law and its legislative history, which provides maximum flexibility to the states in establishing eligibility rules.[11] In addition, the bill is consistent with ample precedent in state laws, including Massachusetts law, for exempting workers from availability requirements, such as exemptions for workers who are subject to recall.[12] The President's guidance now makes clear that waiving "availability" for family leave is analogous to waiving "availability" for recall.

5. Q. Is this a new direction to be taking under Massachusetts law?

A. No. Providing unemployment benefits to individuals who are on job-protected leave or who must leave work for reasons covered under the FMLA is consistent with Massachusetts unemployment law. The statutory purpose of the law is "to lighten the burden which now falls on the *unemployed worker and his family.*" Mass. Gen. Laws Ann., ch. 151A, § 74 (emphasis added). Like some other states, Massachusetts already provides unemployment benefits to individuals who must leave a job for non-work-connected personal reasons which are " urgent, compelling, and necessitous." The statute provides that leaving a job for these reasons renders the leaving "involuntary." Mass. Gen. Laws Ann., ch. 151A, § 25(e), ¶ 2. The Massachusetts Supreme Judicial Court has interpreted this provision to include leaving due to

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A more comprehensive analysis will be available shortly.

[10] *Workable Balance* at 96, 269-70.

[11] *See* Maurice Emsellem, National Employment Law Project, and Monica Halas, Greater Boston Legal Services, *Memorandum in Support of Massachusetts Bill Amending Its Unemployment Compensation Law to Include Eligibility for Family and Medical Leave* (March 15, 1999).

[12] Seven states' laws (Arkansas, Detroit, Michigan, Missouri, New Mexico, Ohio, and South Dakota) authorize workers who are temporarily laid off from their jobs to be exempted from the state's availability rules. *See* Ark. Code. Ann. § 11-10-507(3)(E) (1997); Del. Code Ann. tit. 19, § 3314(3) (1998); Mich. Stat. Ann. § 17.530(28)(1)(a) (1998); Mo. Rev. Stat. § 288.040(1)(2)(b) (1999); N.M. Stat. Ann. § 51-1-5(A) (1998); Ohio Rev. Code Ann. § 4141.29(A)(4)(a) (1999); S.D. Admin. R. 47:06:04:11(2) (1999).

pregnancy or a pregnancy-related disability.[13] Reasons which are sufficient for leaving under the federal FMLA are entirely consistent with this provision.

Furthermore, under current Massachusetts unemployment policy, a claimant on a four week recall is not required to be "available" for work.[14] In addition to the recall situation, " availability" is waived during participation in a DET-approved training program, Mass. Gen. Laws Ann., ch. 151A, §§ 24(b), 30; participation in a work sharing agreement, Mass. Gen. Laws Ann., ch. 151A, § 29D(h)(1); or when an individual is summoned for jury duty[15]. In addition, under DET's regulations, various provisions are set forth as "conditions for limiting availability" to part-time employment, which include a history of part-time work for "good cause" encompassing family and medical reasons[16].

6. Q. Should a distinction be drawn between an employer-initiated lay-off in the recall situation and a family or medical leave?

A. No. It is well-established that federal law does not limit unemployment compensation only to cases where an employer terminates its relationship with an employee. And, as described in answer #5, under Massachusetts law an employee-initiated separation from work for urgent, compelling and necessitous reasons renders the leaving "involuntary," i.e., the leaving is treated for unemployment eligibility purposes as if the employer had terminated the employment.

Moreover, the distinction between employer-initiated layoffs and those initiated by employees can be ambiguous. For example, several states have laws that specifically allow workers to choose to take a lay-off and still qualify for unemployment benefits, as occurs with many lay-off schemes authorized by collective bargaining agreements. Just such a result was permitted by the Massachusetts Supreme Judicial Court, which found that the liberal construction required by the Massachusetts unemployment law warranted a finding of eligibility for unemployment benefits where an employee agreed to be one of a group of workers to be laid off.[17]

Lastly, family and medical leave is not always "initiated" by the employee. It is unfortunately quite common for employers to coerce workers into taking family leave. For example, this occurs when pregnant women seek an accommodation to stay on their jobs during the course of their pregnancy rather than go on unpaid family leave. The employer denies the accommodation and the worker is forced to go on leave or risk losing her job. Since employees take family and medical leave in many, if not most, cases due to circumstances beyond their

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[13] *See Dohoney v. Director of Div. of Employment Sec.*, 386 N.E. 2d 10 (Mass. 1979).

[14] *See* Massachusetts DET *Service Representative Handbook,* § 1051 (Rev. 10/96).

[15] *See* Massachusetts DET *Service Representative Handbook,* § 1039 (Rev. 10/96).

[16] 430 Code of Massachusetts Regulations 4.42 - .45 (4/5/96).

[17] *See Morillo v. Director of Div. of Employment Sec.*, 477 N.E. 2d 412, 413 (Mass. 1985).

control, allowing these employees to receive unemployment benefits is consistent with the goal of compensating involuntary unemployment.

7. Q. Will allowing unemployment benefits for family and medical leave result in discrimination against employees who have families or who are otherwise perceived as likely to utilize this benefit?

A. No. The bill is not experience-rated, i.e., the individual employer is not charged for providing these benefits. All charges that result from claims under the bill are charged to the solvency account rather than to the employer's account. There is ample precedent for this under Massachusetts law. Benefits to workers who leave for "urgent, compelling, and necessitous" reasons are already charged to the solvency account, as are other benefits which do not relate to work-connected reasons for leaving, including dependency allowances and benefits while attending a training program.[18]

8. Q. Should this bill be restricted to larger employers who are covered under the federal FMLA, and does the extension of this bill to small businesses impose a heavy burden on these businesses?

A. No, just the opposite is true. First, the bill does not require any employer who is not already mandated (either under the federal FMLA or under the Massachusetts Maternity Leave Act) to provide a job-protected leave. Therefore, generally speaking, companies with fewer than 50 employees[19] are not required under the bill to hold an individual's job. All employers contribute to the unemployment compensation system. If these benefits were available only to employees who worked for companies with 50 or more employers, smaller businesses would, in effect, be subsidizing benefits which their own employees would never receive.

9. Q. If an employee is already receiving whole or partial wages while on an authorized leave, will this bill result in a windfall to that employee?

A. No. This bill is an amendment to the unemployment law and, excepting "availability," all other provisions of the law remain in effect. Consistent with current Massachusetts unemployment law, if the employee were receiving total or partial wages, the receipt of this "remuneration" would preclude the receipt of benefits under the bill.[20] This complements the provisions of the federal FMLA, which permits an employee to elect or the employer to require the employee to substitute any accrued paid vacation leave, personal leave,

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[18] *See* Mass. Gen. Laws Ann. ch. 151A, § 14(d)(3),(e)(7); § 30.

[19] The one exception is the 8-week maternity leave provided under the Massachusetts Maternity Leave Act which applies to companies with 6 or more employees.

[20] *See* Mass. Gen. Laws Ann. ch. 151A, § 1(r),(s).

[21] 29 U.S.C. § 2612 (d)(2).

or family leave, for leave under the bill.[21]

10. Q. Will employees who become separated from work for "urgent, compelling, and necessitous" reasons now get additional unemployment benefits?

A. No. The bill specifically provides that any unemployment benefits received under the provisions of the bill are to be subtracted from the total amount of benefits that the individual can collect in their benefit year (the 52-week period following the date of application for benefits). In fact, for the group of employees who do not have a job-protected leave and whose only recourse is to receive unemployment benefits, this bill simply changes the timing of the availability of unemployment benefits. Under current law, an individual who leaves work due to a child's illness is eligible to collect unemployment benefits as soon as she is again available to work. The Massachusetts bill simply waives the "availability" requirement for up to 12 weeks. Any benefits received are then deducted from the total amount of benefits for which the individual is eligible. Therefore, the bill does not create a new entitlement to benefits but merely changes the timing of the receipt of these benefits.

11. Q. Does the issue of paid family and medical leave enjoy public support?

A. Yes. A survey conducted for the National Partnership for Women & Families found that 79% of all Americans favored the establishment of family leave insurance (such as the Massachusetts proposal to use the UI system) for partial wage replacement during family and medical leave.[22] The Massachusetts bill, sponsored by Senator Stephen Lynch, the Senate Chair of the Joint Committee of Commerce and Labor, Representative Anne Paulsen and many other respected lawmakers has garnered broad legislative and public support. Following a highly successful hearing before the Commerce and Labor Committee, the Senate and House Chairs of the Committee are establishing an active working committee to consider further the issue of paid family and medical leave.

A strong, broad-based Family Leave Coalition, organized by the Women's Statewide Legislative Network, includes the Massachusetts AFL-CIO and numerous unions, academics including the Executive Director of the Commission on Leave and prestigious researchers including contributors to the *Workable Balance,* a wide range of community groups, interfaith organizations, women's groups, social service agencies, groups representing disabled individuals as well as the elderly, and advocates committed to attaining passage of this legislation. The Coalition is also working in partnership with the national AFL-CIO, the National Employment Law Project, the National Partnership on Women and Families, and affiliated campaigns around the country.

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[21] 29 U.S.C. § 2612 (d)(2).

[22] *Family Matters: A National Survey of Women and Men,* conducted for the National Partnership for Women & Families by Lake Sosin Snell Perry & Associates (February 1998).

July 16, 1999

AN ANALYSIS OF FEDERAL LAW, STATE PRECEDENTS, AND PUBLIC POLICY CONSIDERATIONS SUPPORTING THE USE OF THE UNEMPLOYMENT INSURANCE SYSTEM FOR PARTIAL WAGE REPLACEMENT DURING FAMILY AND MEDICAL LEAVE

Prepared by
Greater Boston Legal Services
National Employment Law Project[1]

Executive Summary

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for up to 12 weeks to workers who must take leave or who become separated from their jobs for reasons that qualify for protection under family and medical leave laws. This bill, and similar legislation introduced in Maryland, Washington and Vermont, had initially raised the question of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this legislation. In particular, the question had been raised whether federal law could prevent a state from creating an exception to the general requirement that an unemployment benefits recipient must be "available for work."

In response to inquiries by state legislators and advocates, President Clinton addressed this question in an Executive Memorandum of May 24, 1999, entitled "*New Tools to Help Parents Balance Work and Family.*" The Executive Memorandum expressly directed "the Secretary of Labor to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child." The Executive Memorandum thus demonstrated that states may, at their option, waive the "availability" requirement for a reason covered by the Family and Medical Leave Act.

Our memorandum outlines the legal underpinnings for the President's Executive Memorandum allowing the expansion of unemployment insurance to parents of newborn and

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newly adopted children. The same legal bases for the President's Executive Memorandum apply to the entire Massachusetts bill, which simply expands the President's concept to include leave taken for any of the other reasons which would be allowed under the FMLA.

* **Federal law does not require states to adopt any particular definition of availability for work and grants broad discretion to states to develop their eligibility requirements. Federal law merely sets the "floor" of basic UI standards, and it was never intended to be a "ceiling" or to limit a state's ability to provide more expansive coverage.**

The plain language of the Federal Unemployment Tax Act and the Social Security Act, their legislative histories, and their implementation clearly demonstrate that federal law does not restrict states' prerogatives to determine availability requirements. The laws themselves do not provide any particular availability requirement, and legislation which would have injected a federal availability requirement was repeatedly rejected by Congress. Ralph Altman, a senior official of the Bureau of Employment Security in 1950, provides the most comprehensive published survey of the availability for work requirement and concludes that "determination of availability for work under American unemployment compensation laws is *exclusively a state function*." This conclusion is supported by numerous statements from the initial drafters and enforcers of the federal unemployment laws, including the President, legislators, the Committee on Economic Security, and the Social Security Board itself.

* **States have previously adopted, with Department of Labor approval, numerous exceptions to their availability requirements, demonstrating that states have the authority to create such exceptions.**

Ample precedent establishes that states have the authority to carve exceptions to their availability requirements. Even before federal law was amended to speak to the issue, 22 states exempted trainees from their availability requirements. Numerous states have at one time or another exempted workers who become disabled while unemployed from disqualification due to unavailability. Most importantly, employees on temporary lay-off need not be available for other jobs while on recall status. These exceptions further demonstrate that the federal law creates only a floor for basic UI coverage, not a ceiling which would limit states ability to expand coverage. Although the proposed bill varies from these precedents in some ways, none of the differences distinguishes their validity under federal law. The leave bill maintains the state's general availability requirement and simply creates a limited exception for the particular circumstances of family and medical leave.

* **Compelling policy considerations support deference to the right of states to expand UI eligibility under their availability rules.**

Broad state discretion over availability requirements is supported not only by law but by sound public policy considerations as well. States are best suited to determine their eligibility and disqualification requirements based on their differing economic and social circumstances. Experimentation among states is not only allowed by the unemployment scheme but encouraged to discover new ways to adapt unemployment laws to further the goal of employment stabilization. Now more than any time in recent history, the opportunity exists for states to promote long-overdue reforms in the UI system, as reserves in UI trust funds have increased with the sustained decline in unemployment. Finally, the proposed bill itself furthers important federal and state policy interests, including the unemployment scheme's goals of employment stabilization and the FMLA's goals of providing access to family and medical leave.

I. Introduction

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for up to 12 weeks to workers who must take leave or who become separated from their jobs for reasons that qualify for protection under family and medical leave laws. This bill, and similar legislation introduced in Maryland, Washington and Vermont, had initially raised the question of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this legislation. In particular, the question had been raised whether federal law could prevent a state from creating an exception to the general requirement that an unemployment benefits recipient must be "available for work."

In response to inquiries by state legislators and advocates, President Clinton addressed this question in an Executive Memorandum of May 24, 1999, entitled "*New Tools to Help Parents Balance Work and Family.*" The Executive Memorandum expressly directed "the Secretary of Labor to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child." The Executive Memorandum thus demonstrated that states may, at their option, waive the "availability" requirement for a reason covered by the Family and Medical Leave Act.

The Executive Memorandum followed the President's commencement speech on May 23, 1999, at Grambling State University in Louisiana. In that speech, the President noted that millions of Americans have used the 1993 Family and Medical Leave Act (FMLA) to "take up to 12 weeks of unpaid leave to care for a newborn or a sick relative without losing their jobs." However, the President recognized that the FMLA meets only a fraction of the need, stating, " Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck." He articulated as a goal for the 21st century that "all working Americans can take time when they need it to care for their families without losing the income they need to support their families."

Our memorandum outlines the legal underpinnings for the President's Executive Memorandum allowing the expansion of unemployment insurance to parents of newborn and newly adopted children. The same legal bases for the President's Executive Memorandum apply to the entire Massachusetts bill, which simply expands the President's concept to include leave taken for any of the other reasons which would be allowed under the FMLA.

II. Federal Law Grants States the Authority To Expand UI Eligibility by Defining Availability.

The plain language, legislative history, and early implementation of the federal laws which created the UI system make clear that federal law does not limit states' ability to expand UI eligibility by defining "availability." Federal law, which does not set forth any particular availability requirement, was envisioned as providing a "floor" for coverage and not a "ceiling"

— that is, it is simply a minimum standard below which a state's UI system cannot sink. States have full authority to expand their UI coverage beyond the basic federal level to provide additional coverage, as they see fit, to meet the needs of their citizens.

A. The Applicable Federal Statutes Do Not Require States To Adopt Any Particular Availability Requirement.

No federal statute or regulation requires states to adopt any particular availability requirement. The applicable federal unemployment insurance laws, the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), contain no provisions regulating the substantive eligibility and disqualification requirements to be included in state unemployment legislation. *See* 26 U.S.C. §§ 3304, 3306; 42 U.S.C. §§ 503, 504 (1998). As Dr. Edwin Witte, Executive Director of the Committee on Economic Security, whom President Roosevelt appointed to draft the Social Security Act, points out, "[a]t the very outset of its final deliberations, the committee decided against federal dictation regarding the content of state unemployment compensation laws. It reached the conclusion that the federal bill should contain only a few necessary standards. . . ." Edwin Witte, *The Development of the Social Security Act* 125 (1962). These standards do not include any definition of availability for work to be followed by the states.

B. The History of the Unemployment Laws Demonstrates That Availability Requirements Were Intended To Be Defined Solely by the States.

A review of the legislative history of FUTA and the SSA, as well as of contemporaneous commentary by those responsible for enforcing the newly-enacted laws, demonstrates that states were intended to have complete discretion in defining their eligibility and disqualification requirements. The history of the federal unemployment laws makes clear that they were never intended to limit a state's ability to provide benefits for its citizens.

Indeed, availability for work is one area of law over which states have vast discretion. Ralph Altman, a senior official of the Bureau of Employment Security in 1950 (and with the Unemployment Insurance Service for many years thereafter), provides the most comprehensive published survey of the availability-for-work requirement and concludes that states can define availability for work in whatever manner they wish. He writes:

> "The Social Security Act and the federal unemployment tax provisions of the Internal Revenue Code, which prompted almost all the state unemployment compensation laws, make no provision for payment of benefits to claimants. Neither do they establish any eligibility requirements which claimants must satisfy. . . . [T]he only [provisions] that affect state laws and administration on availability problems are those which protect labor standards . . . and those which provide that all compensation must be paid through public employment offices or such other agencies as the Labor Department may approve. *The practical result is*

that determination of availability for work under American unemployment compensation laws is exclusively a state function." Ralph Altman, *Availability for Work* 74-5 (1950) (emphasis added).

1. Congress Expressly Declined to Impose Specific Federal Definitions or Standards for State Eligibility and Disqualification Rules.

Legislation imposing specific federal requirements on state unemployment laws was proposed and rejected repeatedly during the formative years of the UI system.[2] All of these proposals were rejected in favor of maintaining a system of minimal federal control over state eligibility standards. *See* Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 46-7 (1945). While the Woodrum proposal arose in the context of a Works Progress Administration appropriation, it is notable that a comparable availability requirement never made its way into the general federal unemployment laws. Thus, Congress expressly declined at the outset to limit states' discretion over the details of their unemployment laws.

2. The Initial Drafters and Enforcers of the Unemployment Laws Believed That States Alone Should Define Eligibility and Disqualification Requirements, Including Availability for Work.

The Social Security Board recognized early on that, in constructing the federal-state unemployment scheme, Congress required only that a limited number of specific standards be satisfied for state unemployment laws to be approved and that these standards existed only to ensure that states provide adequate compensation. In its first annual report, the Board explained that "[t]he amount of assistance and practically all the conditions under which assistance is granted are determined by the States. In unemployment compensation *the primary role of the Federal Government is to remove obstacles to State action*." United States Social Security Board, *Annual Report* 8 (1936) (emphasis added). In a 1936 circular, the Board outlined the main features of the federal-state relationship in administering unemployment laws. Notably, in a section entitled "Essential Features of Unemployment Compensation," the Board never even

[2]In 1939, Senator Woodrum proposed a number of specific requirements in connection with new unemployment legislation that would constrain states and the federal government in their ability to grant unemployment benefits, including a requirement that an eligible worker must be available for and seeking work. *See* H.R.J. Res. 151, 76th Cong. (1939) (printed in 84 Cong. Rec. 1160 (1939)). Senator Murray proposed a bill in 1940 which would have amended the Social Security Act to require states to follow specific guidelines in making determinations of whether work is suitable. *See* S. 3365, 76th Cong. (1940). Other proposals would have imposed varying specific requirements on state unemployment laws. *See* S. 2203, 76th Cong. (1939) (Byrne amendments); H. R. 7762, 76th Cong. (1940) (McCormack bill).

hints at a federal requirement that states define availability to work in any particular manner. To the contrary, the Board goes on to conclude that "It is desirable that a State law should be at least as broad in its coverage as the Federal act. . . . *The State may, of course, go further and adopt a wider coverage . . . This is a matter of policy for the State to decide.*" United States Social Security Board, *The Federal-State Program for Unemployment Compensation* 5, 9 (1936) (emphasis added).

Thus, the constraints that federal law placed on state action were viewed as creating select minimum standards, not maximums limiting states' abilities to provide benefits. President Roosevelt transmitted this very message to the Senate during the floor debates on the SSA: "In order to encourage the stabilization of private employment Federal legislation should not foreclose the States from establishing means for inducing industries to afford an even greater stabilization of employment." 79 Cong. Rec. 545 (1935) (introduced by Sen. Smith).

Federal officials recognized from the very beginning that states enjoy considerable discretion in crafting eligibility guidelines, including availability for work. In its report to the president, the Committee on Economic Security recommended that any federal unemployment legislation give states near-total discretion over their unemployment laws. The Committee stated that "[t]he plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States." Committee on Economic Security, Report to the President 20 (1935) (quoted in Murray Rubin, *Federal-State Relations in Unemployment Insurance* 22 (1983)). Ten years later, in its 1945 Annual Report, the Social Security Board reviewed the contents of all the states' laws and similarly concluded that "[t]he extent to which . . . claimants received benefits, and the amount and duration of their payments, depended entirely on the applicable State law," including whether "*a claimant was considered unavailable for work.*" United States Social Security Board, *Annual Report* 87 (1945) (emphasis added).

III. Extensive Precedent Demonstrates That States May Define "Availability For Work" to Expand UI Eligibility.

Many states have enacted UI laws which broadly expand the definition of "availability," thus establishing ample precedent for the state family leave recall proposals. These state laws have been left undisturbed by DOL even where states enacted provisions eliminating their availability requirement in particular circumstances.

A. Recall.

The precedents in state UI laws that are the most directly analogous to family and medical leave are the recall statutes authorizing workers who are temporarily laid off from their jobs to be exempted from the state's availability rules. The Massachusetts bill is thus modeled on the state recall statutes and on Massachusetts' recall policy.[3] These statutes, which exist in seven states (Arkansas, Delaware, Michigan, Missouri, New Mexico, Ohio and South Dakota), vary significantly in scope.[4] Some states statutes, including the Michigan law and Massachusetts recall policy, are worded such that they allow for a waiver not only of the work-search obligations but also of the entire "availability" requirement. Thus, the state recall statutes and policies clearly illustrate the vast authority that states have to determine their availability rules. These states have concluded that it is bad policy to force workers to search for work or be available for work when they are only temporarily separated from their jobs.

B. Training.

States have also dramatically altered their availability requirements to extend benefits to individuals in approved training programs. Before 1976, FUTA did not contain its current provision prohibiting states from disqualifying otherwise eligible workers from unemployment eligibility on the basis of their participation in a vocational training program. *See id.* at 549-50. Nevertheless, by 1966, twenty-two states had enacted provisions exempting unemployed workers in training or retraining programs from availability requirements if otherwise eligible. *See* William Haber & Merrill G. Murray, *Unemployment Insurance in the American Economy* 114 (1966). These states chose this policy based on their view of "unemployment insurance as part of a comprehensive labor market program." *Id.*

Such workers clearly were not available for work in any literal sense, since they were allowed to turn down work during their training periods. They certainly were no more available for work than an individual taking leave under the proposed Massachusetts bill. With over twenty state training laws already on the books, Congress amended FUTA to expressly require such availability exceptions to be followed in each state. This demonstrates not only that the availability requirement has been sharply limited by states in the past, but also that Congress limits state discretion only where it wishes to provide certain minimum benefit coverage, not to prevent higher levels of coverage from being granted.

C. Disability.

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[3] "A claimant who is temporarily unemployed because of a vacation shutdown or a brief layoff not to exceed four weeks with a definite date to return to work with the same employer *is not required to be available for work* or actively seeking work with other employers..." (emphasis added). *See* Massachusetts Division of Employment and Training, *Service Representative Handbook, § 1051,* Vacation Shutdown or Brief Layoff (Rev. 10/96).

[4] *See* Ark. Code. Ann. § 11-10-507(3)(E) (1997); Del. Code Ann. tit. 19, § 3314(3) (1998); Mich. Stat. Ann. § 17.530(28)(1)(a) (1998); Mo. Rev. Stat. § 288.040(1)(2)(b) (1999); N.M. Stat. Ann. § 51-1-5(A) (1998); Ohio Rev. Code Ann. § 4141.29(A)(4)(a) (1999); S.D. Admin. R. 47:06:04:11(2) (1999).

States currently are allowed to exempt disabled workers from availability requirements if the disability or illness arises after the worker applies for benefits.[5] The only difference between these laws and the proposed Massachusetts legislation is that the proposed bill would exempt workers from the availability requirement at the time they apply for benefits. The President's Executive Memorandum confirms that this difference has no bearing on the legality of the state scheme under federal law.

D. Inverse Seniority Layoff.

Another relevant precedent in state law supporting the validity of the Massachusetts bill is the exemption that applies to workers who "choose" a layoff as authorized by a collective bargaining agreement. These laws, which exist in at least three states (Pennsylvania, Ohio and Michigan), typically apply where a collective bargaining agreement gives senior employees the option to choose a layoff and permits less senior employees to continue to work. Normally, these are used in temporary layoff situations, and they give workers input into which specific employees are going to be laid off in a particular layoff situation. The employer "initiates" the layoff and determines the overall number of employees laid off, but the employees' seniority system and individual choice determine which employees are laid off. The state statutes (and case law in selected states, including Massachusetts[6]) exempt those workers who "choose" to be laid off in these situations from the "voluntary" quit disqualification. While not addressing the " availability" requirement per se, these state statutes make clear that not all layoffs can be neatly characterized as either employer or employee "initiated". As discussed below, the same is true in

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[5] Notably, according to a study of utilization of leave under the federal Family and Medical Leave Act (FMLA) by the Commission on Family and Medical Leave, the most frequent reason for leave was the individual's own illness (60%) followed by childbirth, adoption, or placement of a foster child (13.3%). These numbers were closely mirrored in non-FMLA worksites, where 56.1% of all individuals left due to their own illness, and 14.7% left due to childbirth, adoption or foster child placement. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 93-96, 267-68 (1996).

[6] *See Morillo v. Director of Div. of Employment Sec.,* 477 N.E. 2d 412, 413 (Mass. 1985) (holding that the liberal construction required under the Massachusetts unemployment law warranted a finding of eligibility for unemployment benefits where an employee agreed to be one of a group of workers to be laid off).

[7] There are several other relevant precedents worth noting. First, there is the deduction for retirement pay from UI that is required by federal law in specific circumstances. Although receipt of retirement pay while unemployed would appear to raise a question whether the individual is available for work, Congress focused instead on other objections. "Under these amendments, Congress appeared less interested in the retirement payment as a test of availability

the case of workers taking family and medical leave.[7]

IV. The Massachusetts Bill Significantly Advances the Basic Goals of the UI and FMLA Programs.

A. States Need Flexibility to Fit Their Unemployment Laws and Labor Policies to Meet Their Particular Economic Needs.

State discretion over availability standards is appropriate because states have different economic structures, budget surpluses or deficits, and job markets, and they should thus be allowed latitude to design unemployment laws which best serve their individual needs. A state with an unemployment fund surplus and many workers left uncovered when taking leave should be able to decide what scope of unemployment compensation coverage is appropriate. The President has demonstrated his support for allowing states to expand their unemployment benefit system to address the needs of workers with family responsibilities.

Part of the rationale for implementing a federal-state unemployment compensation

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than with preventing duplicate payments attributable to the same employer." Gerald Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. Mich. J.L. Ref. 527, 557 (1996). Second, DOL has authorized unemployed seasonal workers to refuse work that would interfere with their ability to return to their seasonal jobs. Department of Labor Manual of Precedent Decisions, AA 450.45(c) ("A seasonal worker who regularly works for one employer in one industry and who has definite prospects of recall to work may restrict the employment acceptable to him during the off-season to work which will permit him to return to his regular employment when the season begins."). Other examples that exist in Massachusetts and elsewhere include exemptions for acceptance of suitable work for workers receiving UI in work-sharing situations, the provisions allowing workers to recover UI on jury duty and refuse an offer of suitable work, and the part-time worker availability rules allowing workers to limit their availability to part-time rather than full-time work. For example, the Massachusetts statutory law provides that "[a]n otherwise eligible affected individual shall not be denied worksharing benefits for any week *by reason of application of provisions relating to availability for work, active search for work or applying for or accepting suitable work* with other than the worksharing employer." Mass. Gen. Laws Ann. ch. 151A, §29D(h)(1) (emphasis added). Under Massachusetts policy, the statutory provision which requires availability for work is deemed satisfied when an otherwise eligible claimant is summoned for jury duty during a period of unemployment. *See* Massachusetts Division of Employment Security, *Service Representative Handbook,* § 1039, Jury Duty (Rev. 10/96). Under recently promulgated Massachusetts regulations, various provisions are set forth as " conditions for limiting availability" to part-time employment which include a history of part-time work for "good cause" encompassing family and medical reasons. 430 Code of Massachusetts Regulations 4.42-4.45 (4/5/96).

system, rather than a completely federalized system, was to encourage state experimentation with various compensation systems so that various methods could be tried and tested. In President Roosevelt's message to Congress during the SSA floor debates, he explained: "We believe, further, that the Federal act should require high administrative standards, but should leave wide latitude to the States in other respects, as we deem varied experience necessary within particular provisions in unemployment compensation laws in order to conclude what types are most practicable in this country." 79 Cong. Rec. 546 (1935).

Murray A. Rubin, former chief of the Division of Program Policy and Legislation of the Labor Department's former Bureau of Employment Security, offers the following observations based on his 29 years of government service: "An important advantage of a dual system was that it permitted wide latitude for experimentation by the states, needed because of the nation's lack of experience with unemployment insurance at the time. In the process, mistakes made by individual states could be confined within the boundaries of those states, while successful measures could be adopted and shared elsewhere." Rubin at 13. The benefits of such experimentation are great, and the costs are borne only by the experimenting states. Indeed, " [t]he entire unemployment insurance system would not be damaged if ideas which are tried out in individual states do not work." Haber & Murray at 441.

Massachusetts unemployment compensation law, which has as its statutory purpose "to lighten the burden on the worker and his family," exemplifies the beneficial result of permitting state experimentation in order to best serve the needs of unemployed workers. Mass. Gen. Laws Ann., ch. 151A, §74. Consistent with this remedial purpose, Massachusetts already provides benefits to individuals who must leave a job for non-work connected personal reasons which are " urgent, compelling, and necessitous." The statute provides that leaving a job for these reasons renders the leaving "involuntary." The Massachusetts Supreme Judicial Court has interpreted this provision to include leaving due to domestic responsibilities. The reasons which are sufficient for leave under the federal FMLA are entirely consistent with this provision.

Massachusetts law provides for the longest duration of benefits (30 weeks) and one of the most generous benefit amounts (currently $402 a week, plus a potential addition of $200 in dependency allowance). Although many states have closed offices for intake of claims, recently enacted state law requires that regional offices remain open and that multilingual orientations and forms be provided to facilitate access to newcomers. Mass. Gen. Laws Ann., ch. 151A, §62A. In addition, interpreters are provided at no cost to claimants for all unemployment hearings concerning eligibility for benefits. Eligibility and higher benefits for low-wage workers are assured both by requiring a movable base period and by including the most recent earnings in the calculation of the weekly benefit amount if the result would be at least 10% higher. *See* Mass.

[8] The administration is currently proposing providing lump sum unemployment benefits

Gen. Laws Ann., ch. 151A, §§ 1(a), 24(b), 25(e), 30. Benefits are provided to workers who reduce hours to preserve jobs through worksharing[8] and benefits are also provided to workers who reduce their hours because of new or worsening disabilities. Mass. Gen. Laws Ann., ch. 151A, §29D; 430 Code of Massachusetts Regulations 4.45 (4/5/96).

Individuals are not only exempt from availability requirements while participating in approved training, but up to an additional eighteen times the weekly benefit amount is available for continued participation in training. Mass. Gen. Laws Ann., ch. 151A, § 30(c). Moreover, Massachusetts is also the only state to provide health insurance benefits for unemployed workers and their families through a modest tax on employers. Mass. Gen. Laws Ann., ch. 151A, § 14G(j). Although this Medical Security Plan is paid for out of a separate trust fund, it is administered by the Massachusetts Division of Employment and Training as a needs-based program of COBRA continuation benefits or direct coverage. And most recently, a portion of the employer tax was diverted to provide incumbent worker training targeted to low-wage, low-skilled workers. Mass. Gen. Laws Ann. ch. 29, § 2RR; 430 CMR § 8.01 *et seq.* These provisions, like the proposed benefits for family and medical leave, further the purpose of the Massachusetts law to benefit "the worker and his family."

Experimental programmatic additions to the Massachusetts unemployment scheme are possible due to the solvency of the Massachusetts unemployment trust fund. Currently, the Massachusetts Trust Fund has a balance of $1.694 billion. According to John A. King, Deputy Director of the Massachusetts Division of Employment and Training, this balance "represents far and away the largest balance the Fund has ever attained. Reserves are now large enough, even after excluding all anticipated 1999 contribution income, to pay benefits for twenty-nine month at current levels of unemployment and for more than one year at a severe recessional level."[9] This is precisely the time for the state to expand its efforts to help workers during times of difficulty. The trust fund is solvent, yet at the same time, sobering statistics demonstrate that the Massachusetts boom economy has not reached all its citizens, particularly low wage workers. Added to this fact is the impact of the state's two-year time limit on welfare, which means that many working poor heads of households will no longer be able to rely on public assistance when they are forced to take an unpaid leave. All of these factors, unique to the state, are best resolved at the state level where the needs of workers can be evaluated in the context of the particular state's economic condition.

The case for experimentation is particularly strong as applied to the proposed recall bill. The FMLA is a fairly recent federal enactment, and even more recent are findings that the

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to individuals seeking self-employment. *See* Massachusetts House Bill No. 590 (filed 12/2/98).

[9] Letter from John A. King, Deputy Director of Massachusetts Division of Employment and Training, to Monica Halas, Greater Boston Legal Services (February 17, 1999).

[10] Other states also are attempting to pick up where the FMLA left off. For example,

FMLA's benefits are not enjoyed by a substantial number of the citizens whom the Act targets.[10] The proposed Massachusetts bill is an ideal opportunity to test a creative and innovative means for implementing the letter and spirit of the federal mandate. Just as Massachusetts was on the cutting edge as the first state to consider unemployment legislation in 1916, its willingness to consider such a bold modification constitutes exactly the type of experimentation that the federal-state scheme is designed to encourage.

B. The Proposed Legislation Furthers Important Federal Policies and Promotes the Exercise of Federal Rights.

Extending unemployment compensation to workers on unpaid leave promotes stability in employment and strengthens the national economy, two key policy objectives of the unemployment system, since workers are able to return to work rather than be forced to search for new jobs. *See* Advisory Council on Unemployment Compensation, *Defining Federal and State Roles in Unemployment Insurance* 27. The policy underlying such legislation parallels the justification for defining availability to account for workers on recall status. The proposed recall bill effectively creates less unemployment by allowing workers to keep their jobs while on leave and less hardship on those separated from work when necessary to care for themselves or their

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under proposed legislation introduced in Vermont, individuals who are eligible for leave under Vermont state law, as well as individuals who work for smaller employers who are not required to give leave who intend to return to employment within the time frame of the leave are eligible for unemployment benefits. *See* Vermont Senate Bill 179. The statement of purpose which addresses the critical need to provide unemployment benefits for family and medical leave provides:

> "The General Assembly finds that many low wage employees, those most in need of the protection of family leave laws, are least able to afford to take time from work without pay. These employees effectively are presented with the Hobson's choice of either taking unpaid leave from work for the birth of a child or the illness of themselves or a family member or having enough employment income to pay for basic necessities of life. Therefore, it is the purpose of this act to provide a real choice for these employees by making unemployment compensation available to those for whom family and parental leave has been merely an illusory right."

Under legislation proposed in the state of Maryland, an individual who voluntarily leaves employment immediately following the birth or adoption of a child has good cause for leaving and is deemed to be in compliance with availability requirements. *See* Maryland House Bill 1124. The State of Washington has pending legislation to qualify for unemployment benefits those individuals who leave to care for a newborn child under one month old and who request reemployment at the end of the leave. *See* Washington House Bill 2074.

families.

The bill is premised on findings that most workers are unable to take advantage of leave available under FMLA since it is currently unpaid and since it applies only to companies of 50 employees or more (a concern which the administration has most recently highlighted). The bill does not create an impediment to any federal right; to the contrary, it removes an obstacle to its exercise, by providing limited compensation so that low- and moderate-income workers can take family and medical leave as can higher-income workers. Congress apparently contemplated such state legislation when it included a non-preemption provision in the FMLA. *See* 29 U.S.C. § 2651 (expressly permitting states to provide more protective family and medical leave guarantees, but not less, than that provided by FMLA).

A bipartisan congressional commission reached the same conclusion. According to the Commission on Leave, established by Congress to study the impact of the FMLA, the major reason why employees in FMLA-covered businesses do not take FMLA leave is that they cannot afford to do so. To make it possible for such workers to take needed leave, the Commission recommended that consideration be given to a uniform system of wage replacement. Specifically, the Commission suggested that states extend unemployment compensation qualifications to employees on family and medical leave. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996).[11]

VI. Conclusion

The expansion of the Massachusetts UI system to cover unemployment during periods of family and medical leave, as proposed in the Massachusetts bill, is clearly consistent with federal UI law. As set forth above, President Clinton's directive that states may use the UI system to support parents on leave following the birth or adoption of a child is firmly grounded in federal law, past precedent, and important policy considerations. This use of the UI system is based on the concept that, since federal law simply sets a floor and not a ceiling for UI coverage, states have the discretion to define "availability" so that it includes individuals who are on leave because they must attend to family responsibilities. The Massachusetts bill simply applies this same logic to additional reasons for leave, as provided under the FMLA — not only the birth or adoption of a child but also the serious illness of the worker or a family member. Thus, the legal supports for the President's directive also firmly establish the legality of the expanded coverage which the Massachusetts bill provides.

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[11] Specifically, the Commission recommended that "States should consider voluntarily extending unemployment compensation qualifications to employees on family and medical leave . . . . " Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996).

National Partnership
for Women & Families

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source for solutions,

and force for change.

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The National Partnership for
Women & Families

Making History
Annual Luncheon

Thursday, June 10, 1999

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The National Partnership for Women & Families

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Thursday, June 10, 1999

National Partnership for Women & Families

STATEMENT OF JUDITH L. LICHTMAN
President, National Partnership for Women & Families
June 10, 1999

Exactly one year ago, on June 10th, 1998, we met in this very room to launch a new and revitalized organization. Debra has already outlined our accomplishments over the past 12 months, and now I'd like to briefly share with you our goals for the future.

The National Partnership for Women & Families is working to create a future in which workplaces are fair and flexible, and employers routinely accommodate working parents; a world where we can give our children the time they need, and care for the aging parents who once cared for us. We are working for a country in which no woman, man or child goes without medical care; where every child gets a healthy start, and where every person can count on quality health care in old age.

This is not America today - but it can be America tomorrow, if we re-dedicate ourselves to creating real and meaningful change.

As most of you know, the National Partnership for Women & Families was the driving force behind passage of the Family & Medical Leave Act. We conceived that legislation. We drafted the law. We built a coalition to support it. We organized families to share their stories. And we led the fight for passage — year after year — until it was signed into law.

With our record of past accomplishment, we will not shrink from an ambitious agenda for the future. Millions of Americans now benefit from the Family & Medical Leave Act, keeping their jobs and health insurance when they take leave to care for a newborn or adopted child; tend to a sick parent, child or spouse; or recover from their own serious illness. But being legally eligible for family leave is not the same as being financially capable of using it. The fact is that too many hard-working Americans simply cannot afford to take the unpaid leave the law provides.

That is why today the National Partnership for Women & Families is taking our next step into history by launching the Campaign for Family Leave Income — a major new effort to help Americans balance their work and family responsibilities.

The goal of our new campaign is to find ways of providing income support to Americans when they must take time off to care for their families. In the era of managed care, the Campaign for Family Leave Income could not be more urgent. Look at the bind our society is creating for working families.

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An elderly parent, a child or a spouse gets sick. Most patients receive minimal treatment in a health care setting. Discharge occurs early, long before the patient is ready to care for her – or himself. Who is to care for this person once they go home? Can everyone afford a professional caregiver? Of course not. We assume that a family member will provide the care.

But how do they do it? Too often, under current law, at great cost to their job, income or family's financial well being.

This is wrong. We cannot as a society be content to allow people the time to care for their loved ones, but then prevent them from doing so because they can't afford it. We need to find a way to help people temporarily leave their jobs so they don't have to abandon their families.

The public is way ahead of Washington on this issue (not the first time in our history this has happened). A public opinion survey we conducted last year found that an overwhelming majority of Americans support finding a way to replace the wages lost during unpaid family and medical leave.

We are going to take the lead in finding that way. We know that, right now, we must work on many fronts. We will promote both public and private, economically feasible models for providing family leave income. We have formed a distinguished, bipartisan national advisory committee to guide us in our search for solutions.

We intend to break ground on a number of fronts. We will promote the research needed to come up with innovative models, and demonstrate that doing so is not only economically *feasible*, but economically *wise.*

We will look specifically at whether unemployment, temporary disability and other insurance programs can provide income for workers taking family or medical leave.

(Think about it. We insure our most valuable possessions - our homes and our cars. But in this day and age what's more valuable than our time. Shouldn't we be able to insure the time our loved ones need to take care of their families?)

We will work hand-in-hand with states as they explore these options — eight states already do so, and there is no reason why they all can't.

And we will work with businesses to test creative new approaches.

We will, in fact, create nothing less than a new national movement – a powerful network of lawmakers, researchers, activists, business leaders – old and new partners. Victory won't be easy. It will require energy, stamina, creativity, skill and savvy. But our past — and your presence here today — proves we have plenty of that. Americans are counting on us, and I know that we are ready to meet this challenge.

Today we gather for the last time in this century. To those of you who have joined us before, I thank you for your past help and for making this event the success it is. To those of you here for the first time, thank you for supporting our work to improve the lives of America's women and families.

For nearly 30 years, the National Partnership for Women & Families has been making life better for women and families. We are proud to celebrate women's advances and the role we played in those victories.

Making history. Making progress. Making a difference. This has been our past, and it will be out future. Thank you all for making it possible.

It is now my pleasure to introduce a woman who knows more than almost anyone else about America's past, and has tremendous insights into our future. In addition to being one of the nation's pre-eminent historians, Doris Kearns Goodwin is a commentator, an analyst, a mother, and a role model for women and girls worldwide.

Her books bring history — and the people who make it — to life. She has written about some of the most important events and individuals of our time. And the historic and human insight she brings to her writing has earned her a Pulitzer Prize for *No Ordinary Time*. Her books teach us about the dynamics of power and the ways in which our leaders make the decisions that shape our lives. In so doing, they speak not only about the past, but about the present.

Of course, the trials and travails of Franklin and Eleanor Roosevelt pale in comparison to those of our glorious Brooklyn Dodgers, about whom Doris wrote so lovingly in her most recent book, *Wait Til Next Year*. To those of us who lived in New York in the 1940's and 50's, that book was a miraculous stroll down memory lane.

As we celebrate women's remarkable advances in this century and shape our vision for the next, Doris Kearns Goodwin's vast knowledge, keen observations, discerning commentary and sharp wit make her an invaluable guide to our times. It is my very great pleasure to introduce the National Partnership for Women & Families' 1999 honoree, the remarkable Doris Kearns Goodwin. Doris . . .

STATEMENT OF DEBRA L. NESS
Executive Vice President, National Partnership for Women & Families
June 10, 1999

Thank you all – for being here, and making this luncheon another record-breaking success for the National Partnership. It is your support – today and throughout the year – that makes our work possible.

One year ago we promised you that the next time we met we would be bigger, better, and more powerful than ever. Well today, I am proud to tell you – we have delivered on that promise.

In a few moments, our President, Judy Lichtman, will unveil a major new campaign to push our nation another step forward on the work/family front. But first, I'd like to tell you about something we accomplished, that didn't make a lot of headlines – but will affect a lot of women's lives.

At a time when politicians were trumpeting the huge number of people who have left public assistance, we took a hard look at what was happening as these people, mostly women, entered the workforce. What these women thought they were getting, were real jobs; what they too often got, were jobs with real problems –

No health and safety protections. No recourse for discrimination. No family and medical leave. Not even minimum wage. You see, some states weren't sure that these workers were entitled to the same rights and protections as other workers.

Well, we rejected the idea that the extent of a woman's protection under the law should be determined by the extent of the resources in her wallet. We worked hard to turn this around, with our allies and with our friends at the Departments of Health and Human Services and Labor and the Equal Employment Opportunity Commission. We succeeded. And we are pleased to say that today there is no longer any ambiguity that even our lowest income workers are entitled to decent working conditions.

On another front – We are on the cutting edge of efforts to make sure that every person in this nation has access to quality, affordable health care. Women especially have an enormous stake in health care. We are the primary health care consumers, the primary care-givers, and the primary health care decision makers.

Over the past year, we have talked with women around the country. No matter their background, they place health care at the top of their list of concerns. They speak passionately about their fear that the health care they or their loved ones need will be denied by a system increasingly focused on *profits* rather than *patients*.

That is why we are fighting hard on Capitol Hill for meaningful patient protections. This year we were asked to lead an extraordinary coalition of more than 180 organizations who have put their differences aside to fight for this common goal. And, outside of Washington D.C., we are working with business leaders to encourage them to use the power of the dollars they spend on health care to push for better quality.

This is a challenge that confronts us all. Whether it be corporate executives, single mothers, Medicare recipients – nobody is immune to the failures of our current system.

If you have seriously sick child – you shouldn't have to worry whether the nearest emergency room is part of your health plan's network.

If a loved one needs high-risk surgery – you want to be sure they have access to the most experienced specialists.

If you take a specific medicine for a chronic condition – you don't want to be told it's not on your plan's approved list.

We live in the world's most prosperous democracy and we have the world's finest health care. We should not accept a system that denies any of our citizens access to that care. The status quo just isn't good enough. And the National Partnership will continue this fight until we have achieved meaningful change.

We are proud of the past year and the new ground we broke – but our eyes are already fixed on a millennium of possibilities. As a voice for fairness, a source for solutions, and a force for change – the National Partnership will play a powerful role in shaping that future.

Now it is my pleasure to ask Ellen Malcolm, the Chair of our Board, to come back to the podium.

National Partnership for Women & Families

FAMILY LEAVE INCOME CAMPAIGN ADVISORY COMMITTEE

(in formation)

Affiliations listed for purposes of identification only.

Helen Blank
Children's Defense Fund
Ann Bookman, Ph.D.
College of the Holy Cross
Ellen Bravo
9 to 5, National Association of Working Women
Betty Carlson
Family Resource Coalition of America
Kathleen Casavant
Massachusetts AFL-CIO
The Hon. William L. Clay
U.S. House of Representatives
Justin Dart, Jr.
Justice For All
The Hon. Rosa DeLauro
U.S. House of Representatives
The Hon. Christopher Dodd
U.S. Senate
Donna Dolan
Communications Workers of America, AFL-CIO
Maurice Emsellem
National Employment Law Project
Jeff Faux
Economic Policy Institute
Netsy Firestein
Labor Project for Working Families
Ellen Galinsky
Families and Work Institute
William A. Galston
School of Public Affairs, University of Maryland
Mary Ellen Gornick
The CPA Group
Stanley Greenspan, M.D.
George Washington University Medical School
Monica Halas
Greater Boston Legal Services
The Right Hon. Harriet Harman
Member of Parliament, U.K.
Heidi Hartmann, Ph.D.
Institute for Women's Policy Research
Dorothy Height, Ph.D.
National Council of Negro Women
Wade Henderson, Esq.
Leadership Conference on Civil Rights
Sylvia Ann Hewlett, Ph.D.
National Parenting Association
Betty Holcomb
Working Mother Magazine
Gail Hunt
National Alliance for Caregiving
The Hon. Patricia Jehlen
Massachusetts State Representative
Linda Johnson
Massachusetts Women's Statewide Legislative Network
Sheila B. Kamerman, Ph.D.
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Deborah King
New York Union Child Care Coalition, AFL-CIO
Carol Levine
Families and Health Care Project, United Hospital Fund
Joan Lombardi, Ph.D.
Bush Center in Child Development and Social Policy, Yale University
The Hon. Carolyn Maloney
U.S. House of Representatives
Joel Marks
American Small Business Alliance
Jay Mazur
UNITE, AFL-CIO
Suzanne Mintz
National Family Caregivers Association
Ann Mosle
Center for Policy Alternatives
The Hon. Patty Murray
U.S. Senate
The Hon. Eleanor Holmes Norton
U.S. House of Representatives
Karen Nussbaum
AFL-CIO Working Women's Department
Paul Osterman, Ph.D.
The Sloan School of Management, Massachusetts Institute of Technology
Deborah Phillips, Ph.D.
National Research Council/Institute of Medicine, The National Academies
Paula Rayman, Ph.D.
Radcliffe Public Policy Institute
Robert B. Reich
Brandeis University
Judith Riggs
Alzheimer's Association
Sheli Z. Rosenberg
Equity Group Investments, Inc.
John Rother
AARP
Gail S. Shaffer
Business and Professional Women / USA
Jan Schneiderman
National Council of Jewish Women
Patricia A. Shiu
Employment Law Center, A Project of the Legal Aid Society of San Francisco
Michael Sirotkin
Sirotkin and Necrason
Faith Wohl
Child Care Action Campaign
The Hon. Lynn Woolsey
U.S. House of Representatives
Nancy Zirkin
American Association of University Women

6/8/99

National Partnership for Women & Families

News Release

NEWS RELEASE
June 10, 1999

CONTACT: Lauren Asher, 202/986-2600
Lisa Lederer, 202/371-1999

CAMPAIGN FOR FAMILY LEAVE INCOME LAUNCHED TODAY

Historian and Author Doris Kearns Goodwin Keynotes National Partnership Annual Luncheon

WASHINGTON, D.C. -- The National Partnership for Women & Families launched a major new campaign to help provide families with income during family and medical leave at its annual luncheon here today. The *Campaign for Family Leave Income* will explore innovative ways to give Americans some income when they take unpaid time off to care for new babies or sick family members.

"Today, we take the historic step of launching the first national campaign to help working Americans afford to take time off when their families need them most," said National Partnership President Judith L. Lichtman. "The goal of the *Campaign for Family Leave Income* is to make society more family-friendly – to solve the problem of unpaid leave by finding ways to provide some income to Americans with new babies or family health emergencies."

Since its enactment in 1993, the Family and Medical Leave Act (FMLA) has helped an estimated 20 million Americans take time off from work to care for newborns, newly adopted children, and seriously ill family members, or to recover from their own illnesses, without losing their jobs or health insurance. But because the FMLA guarantees only *unpaid* leave when a new baby arrives or a medical crisis strikes, too many women and men are still unable to take essential time off.

The *Campaign for Family Leave Income* will include state and national organizations representing women, children, families, senior citizens, businesses, people with disabilities, and others.

- more-

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Add One

Efforts to establish family leave income policies already are underway in several states, including California, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, Vermont, and Washington. Promising proposals would allow people on unpaid family leave to qualify for unemployment insurance. Other innovative approaches include covering family leave under state or private disability insurance programs, creating subsidies for new parents who take time off, or offering tax credits to make family leave more affordable.

"We recognize that right now, we must work on many fronts," Lichtman said. "We will promote both public and private, economically feasible models for providing family leave income. We will create a new national movement – a powerful network of lawmakers, researchers, activists, business leaders, and long-time and new partners – to develop leave policies that work for everyone."

This multi-year campaign has six primary components:

- *Research*: coordinating a cross-disciplinary, multi-year research agenda to create and test new models for providing family leave income.
- *Clearinghouse*: maintaining a comprehensive inventory of information on family leave income proposals, activities, and related research.
- *Advocacy*: developing and supporting national public- and private-sector policies that increase access to family leave.
- *Public Education*: creating materials and opportunities for policymakers, the media, and the general public to learn about family leave income efforts around the country.
- *Family Leave Income Network*: involving a growing base of committed state and national advocates, policymakers, and researchers in sharing information, strategies, and resources.
- *Advisory Committee*: bringing together distinguished experts and leaders from across the nation to provide ongoing input to the Campaign.

Research shows that lost wages are the primary reason people do not take needed family or medical leave. Lower-income workers are the most vulnerable. According to the bipartisan Family Leave Commission, nearly one in ten employees who takes family or medical leave is forced onto public assistance while on leave.

- more -

Add Two

Four out of five Americans -- an overwhelming majority -- support expanding unemployment or disability insurance to provide partial wages during periods of unpaid family and medical leave, according to a 1998 National Partnership survey.

"We intend to find solutions that work for the young parents with a baby on the way, the teacher diagnosed with breast cancer, the corporate executive whose mother suddenly needs round-the-clock medical care, and the construction worker whose husband needs bypass surgery," added Lichtman.

The new campaign was announced at the National Partnership's annual luncheon. Noted historian, author, and commentator Doris Kearns Goodwin was the featured speaker at the event. WJLA-TV Anchor Maureen Bunyan served as emcee.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership's General Counsel, Donna R. Lenhoff, wrote the first draft of the Family and Medical Leave Act in 1984 and led the fight for passage until it became law in 1993.

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NOTE: For more information about the *Campaign for Family Leave Income*, including a round-up of state proposals, the latest news and research, or a list of Advisory Committee members, please see the National Partnership's web site at www.nationalpartnership.org, or contact Lauren Asher at 202/986-2600.

National Partnership
for Women & Families

CAMPAIGN FOR FAMILY LEAVE INCOME

The National Partnership for Women & Families' **Campaign for Family Leave Income** is the first national campaign to help more working people afford time off when their families need them most. After leading and winning the fight for the Family and Medical Leave Act (FMLA), the National Partnership is now committed to building a new social movement to solve the problem of unpaid leave.

Drafted by the National Partnership in 1984 and enacted in 1993, the FMLA is the first national policy designed to help working people fulfill both their work and family responsibilities. It has been a great success, allowing millions of families to care for their loved ones without putting their jobs at risk. *But because the FMLA guarantees only* unpaid *leave when a new baby arrives or a medical crisis strikes, too many women and men are still unable to take essential time off.*

Research shows that lost wages are the primary reason why people do not take needed family or medical leave. Not surprisingly, lower-income families have the least access to any compensation during leave, such as paid sick days or vacation time, with devastating implications for the poorest families. According to the latest data available, nearly one in ten of all FMLA users is forced onto public assistance while on leave. The problem is so serious that in 1996, the bipartisan Family Leave Commission called for consideration of a "uniform system of wage replacement during periods of family and medical leave" that would be affordable for employers and employees alike.

Across the nation, concerned advocates, policymakers, and researchers have started taking a closer look at ways to provide family leave income. Promising proposals in several states would allow people on unpaid leave to qualify for unemployment insurance or state disability insurance. Other innovative approaches include covering family leave under private disability insurance policies, creating subsidies for new parents who take time off, or offering tax credits to make family leave more affordable. A 1998 survey found that an overwhelming majority of Americans support "family leave insurance" programs.

The National Partnership's **Campaign for Family Leave Income** unites these emerging efforts for the first time, bringing together a wide range of experts and state and national organizations representing women, children, families, senior citizens, caregivers, people with disabilities, business, and labor. Launched in June 1999, this multi-year campaign has six components:

- ***Research***: coordinating a cross-disciplinary, multi-year research agenda to create and test new models for providing family leave income.
- ***Clearinghouse***: maintaining a comprehensive inventory of information on family leave income proposals, activities, and related research.
- ***Advocacy***: developing and supporting a range of state, national and private-sector policies that increase access to family leave income.
- ***Public Education***: creating materials and opportunities for the public, press, and policy-makers to learn about family leave income efforts around the country.
- ***Family Leave Income Network***: supporting a rapidly expanding network of state and national advocates, policymakers, and researchers sharing information, strategies, and resources.
- ***Advisory Committee***: enlisting distinguished experts and leaders from across the nation to provide ongoing input to the Campaign.

*For more information about the **Campaign for Family Leave Income**, including a list of Advisory Committee members, a round-up of state proposals, and the latest news and research, please see our web site (www.nationalpartnership.org) or contact us at 202/986-2600 or info@nationalpartnership.org.*

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National Partnership
for Women & Families

CAMPAIGN FOR FAMILY LEAVE INCOME

Program Components

Research

Research is the key to creating and testing new models for providing family leave income. Research can answer important questions about the economic and social costs and benefits of various approaches, including the impact on both employees and employers and the particular needs of low-income families. The Campaign's cross-disciplinary research agenda is designed to stimulate and coordinate needed research over the next two years, including research to be funded by the $10 million designated for family leave research in the U.S. Labor Department's fiscal year 2000 budget.

Elements of this research agenda are already underway. A 1998 National Partnership survey included the first direct measure of public support for state family leave insurance programs, and the National Partnership will soon release a new study of how low-income women, especially those making the transition from welfare to work, are affected by work/family issues such as access to leave.

Clearinghouse

The Campaign collects and provides a wide range of information related to family leave income, such as proposed legislation, model programs, the latest research reports, and stories of families who could not afford to take needed leave. These and other resources are available to the media and the public through the Campaign's clearinghouse.

Advocacy

The Campaign develops and supports a range of public and private sector policies that increase access to family leave income. At the *state* level, the Campaign serves as a catalyst and coordinator for innovative policy proposals. For example, efforts are already underway in at least seven states to expand current unemployment or disability insurance programs to cover periods of unpaid family leave. In May 1999, the President responded by announcing important new unemployment insurance regulations specific to family leave.

At the *federal* level, the Campaign supports efforts to encourage state experimentation, such as funding for demonstration projects and new research. Even before the launch of the Campaign, the National Partnership successfully fought to include family leave research funds in the federal budget (see *Research* above). The Campaign is also exploring the potential of other national policies, such as tax credits, direct subsidies, and programs for federal employees.

In the *private sector*, some companies already recognize the bottom-line benefits of providing pay during family leave. The Campaign recognizes the leadership of such companies and encourages more employers to provide family leave income through voluntary policies. The Campaign is also exploring the development of family leave insurance for the private market.

Public Education

The Campaign works on multiple fronts to keep the public, the press, and policymakers informed about the growing movement for family leave income. Campaign public education materials -- in print and online -- include regularly updated fact sheets, articles, action alerts, research summaries, and press releases outlining the latest state and national developments.

- more -

Family Leave Income Network
The Network links family leave income supporters across the nation, including state, local, and national advocates, policymakers, and researchers. Growing every day, the Network began with a December 1998 meeting convened by the National Partnership, which brought state activists and leading national experts together for the first time to focus on insurance-based solutions to the problem of unpaid leave. The Campaign supports the Network by hosting a listserv, meetings, and symposia; recruiting new members; and providing timely updates on new research and policy developments.

Advisory Committee
The Advisory Committee provides the Campaign with in-depth expertise across a wide range of issues and disciplines. Advisory Committee members include representatives from businesses, unions, research institutions, the health care professions, and federal and state governments; experts in insurance, benefits, and work/family issues in the U.S. and abroad; and advocates for women, families, children, seniors, caregivers, the disabled, and others with a stake in family leave.

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6/10/99

National Partnership for Women & Families

STATE FAMILY LEAVE INCOME INITIATIVES:
Making Family Leave More Affordable

Around the country, activists for women, children, seniors, and working families are organizing to make family leave more affordable through *family leave income*. Efforts have been undertaken in at least nine states to provide family leave benefits. For example, many states are considering expanding unemployment or disability insurance to provide some pay during periods of unpaid family and medical leave.

- ✦ Most Americans -- fully 82% of women and 75% of men -- support such "family leave insurance" proposals.*

Currently, the federal Family and Medical Leave Act (FMLA) guarantees covered employees 12 weeks of *unpaid* leave each year to care for a newborn or newly adopted child or seriously ill family member (family leave), or to recover from their own serious health condition (medical leave). The FMLA was an essential step toward recognizing Americans' work and family responsibilities. However, because FMLA leave is unpaid, many employees cannot afford to take time off at the very time their families need them most.

- ✦ The bipartisan Family Leave Commission found that nearly two-thirds of employees who needed but did not take family or medical leave cited lost wages as the reason.**

Existing public and private responses are limited. For instance, five states (as well as Puerto Rico) require employers to offer temporary disability insurance (TDI), which provides partial wage replacement to employees who are temporarily disabled for non-work-related reasons, and many employers voluntarily offer TDI as an employee benefit. While TDI covers disabilities arising from pregnancy or childbirth, TDI currently offers no benefits for employees who take leave beyond the period of maternal disability, or take leave for paternity, for adoption, or to care for seriously ill family members. Although the five states with TDI systems employ 22% of working Americans, employees in other states have no such coverage guarantees.

To make family leave more affordable for more Americans, state legislators, activists, and researchers are mobilizing behind a range of innovative proposals. Attached is a sampling of current state efforts.

* National Partnership for Women & Families, *Family Matters: A National Survey of Women and Men*, 1998.
** Commission on Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, 1996.

- more -

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CALIFORNIA

A dynamic coalition of advocates for women, children, and labor is advancing a family leave agenda for the 1999 legislative session. The California State Senate has already passed a bill to study the cost of extending the state's TDI program to include employees taking family leave. This bill will now be considered by the California State Assembly.

Contact: Lisa Ecks
California Labor Federation
(916) 444-3676

Netsy Firestein
Labor Project for Working Families
(510) 643-6814

Elizabeth Landsberg and
Deanna Zachary
Equal Rights Advocates
(415) 621-0672

Patricia Shiu
Employment Law Center
(415) 864-8848

IOWA

A bill introduced during the 1998 legislative session would have established a fund for providing benefits to employees on family leave. It would also have created a work and family task force to examine the impact of this family leave insurance program.

Contact: State Senator Michael Gronstal
(515) 281-3901

MARYLAND

A bill was introduced during the 1999 legislative session to expand unemployment insurance to include employees who voluntarily leave work immediately following the birth or adoption of a child and are the child's primary care providers.

Contact: Lieutenant Governor
Kathleen Kennedy Townsend
Attention: Erin Ferguson
(410) 974-2804

thy Brennan
ryland Women's Law Center
0) 321-8761

MASSACHUSETTS

Spearheaded by the Women's Statewide Legislative Network, a diverse and active Family Leave Coalition is rallying support for a bill to extend unemployment benefits to employees taking family and medical leave. The estimated cost of providing unemployment benefits for family and medical leave is less than $1.25 per week per employee. Also pending is a bill aiming to create a "family and employment security trust fund." On April 7, the state legislature's Joint Committee on Commerce and Labor (chaired by Senator Stephen Lynch, sponsor of the unemployment insurance bill) held a hearing on the two bills. A broad array of researchers, legislators, advocates, and leave-takers testified in support of the bills, and the hearing was widely and favorably reported by media across the state. The bills are currently pending in the Joint Committee on Commerce and Labor.

Contact: Monica Halas
Greater Boston Legal Services
(617) 371-1270, ext. 621

Linda Johnson
Women's Statewide Legislative Network

MINNESOTA

Since July 1998, a state-funded, at-home infant child care program has allowed working parents who fulfill income eligibility requirements to receive subsidies for caring for infants under the age of one.

Contact: Cherie Kotilineck
Department of Children, Family and Learning
(651) 582-8562

NEW JERSEY

A bipartisan bill introduced in the 1998 legislative session proposed to extend New Jersey's statewide TDI system to cover family leave. The bill would also have established a task force to study the impact of family leave benefits on workers, their families, employers, and the general public.

Contact: Laurel Brennan
New Jersey AFL-CIO
(609) 989-8730

Meryl Frank
New Jersey Coalition for
Family & Medical Leave
(732) 247-3561

NEW YORK

A dedicated group of labor unions is generating support for family leave insurance in New York. A bill has been introduced to amend New York's TDI law to cover employees taking family leave.

Contact: Assemblywoman Catherine Nolan
Attention: Geri Riley
Counsel for Labor Committee
New York State Assembly
Office of Program and Counsel
(518) 455-4311

Deborah King
New York Union Child Care Coalition,
AFL-CIO
(212) 494-0524

VERMONT

A bill was introduced in the 1999 legislative session to authorize unemployment benefits for employees who take family or medical leave.

Contact: State Senator Jan Backus
(802) 655-7455

Michael Sirotkin
Vermont AFL-CIO
(802) 658-6951

- more -

WASHINGTON

Bills have been introduced in the Washington State Senate and House of Representatives to extend unemployment compensation benefits to employees who voluntarily leave work to care for newborn or newly adopted children.

Contact: John Burbank
Economic Opportunity Institute
(206) 694-6797

Jeff Johnson
Research Director, Washington State Labor Council, AFL-CIO
(360) 943-0608

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For more information about the ***Campaign for Family Leave Income****, including a list of Advisory Committee members, a round-up of state proposals, and the latest news and research, please see our web site (www.nationalpartnership.org) or contact us at 1875 Connecticut Avenue, NW, Suite 710, Washington, D.C. 20009, (202) 986-2600, info@nationalpartnership.org.*

6/10/99

National Partnership
for Women & Families

Sharon McDougle
La Porte, Texas

FAMILY AND MEDICAL LEAVE
-- CHILDBIRTH AND NEW BABY

According to Sharon McDougle:

Sharon McDougle has been employed as a technician for an aerospace company in Texas since 1990.

In January 1993, Ms. McDougle learned she was pregnant. She continued to work full-time right up until the weekend of her daughter's birth. Because she could not afford to take unpaid leave, she used sick leave and vacation time after her daughter was born. When she had used up her two weeks of available paid leave, she tried to return to work. However, company policy required a doctor to verify that she was fit to come back to work, and she had to take an additional week off, without pay, while waiting for this verification. Knowing that she could not afford even one week of unpaid leave, Ms. McDougle's co-workers raised money to help her get by. Ms. McDougle went back to work only three weeks after giving birth to her daughter.

Ms. McDougle's work often requires travel, and sometimes she has to be away from her family for a week at a time. Because of this, she wanted to spend as much time with her daughter as possible before returning to work. However, Ms. McDougle simply could not afford to take the unpaid leave guaranteed her by the Family and Medical Leave Act; Ms. McDougle's family depends on her paycheck to meet their basic needs. The single week she took off without pay was possible only because of the generosity of her co-workers.

Although Ms. McDougle is grateful that she did not have to worry about job security during her three weeks of leave, she feels that no new mother should have to worry about how to make ends meet without an income in the weeks immediately following childbirth. She reminds us that many working families cannot afford to take unpaid leave from work, no matter how great the need.

Ms. McDougle can be reached through the National Partnership for Women & Families at (202) 986-2600.

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National Partnership for Women & Families

Kathleen Duffus **FAMILY LEAVE**
Boston, MA **-- FATHER WITH A SERIOUS HEALTH CONDITION**

According to Kathleen Duffus:

Kathleen Duffus worked at a Boston financial services company for eight years, starting at an entry level position and advancing to controller of the brokerage division. She resigned in December of 1998 to take her current position at the Alzheimer's Association of Eastern Massachusetts.

In 1991, at age 56, Ms. Duffus' father, Donald A. Duffus Sr., was diagnosed with Alzheimer's disease. Alzheimer's is a progressive, degenerative disease that attacks the brain and results in impaired memory, thinking, and behavior. For the next eight years, Ms. Duffus was one of her father's primary caregivers. This role was both emotionally painful and time-consuming, as her father lived an hour and a half away. Some of her responsibilities involved choosing an appropriate adult day health program and later a nursing home for him; meeting with nursing home staff; attending to his finances; taking him to doctor's appointments; going to court to be appointed his co-guardian; and providing regular one-on-one care. Balancing her work with caring for her father proved difficult. There were many times when Ms. Duffus needed to take leave from her job at the financial services company to care for her father.

Ms. Duffus was aware of the unpaid leave guaranteed her by the Family and Medical Leave Act (FMLA), although it was not widely discussed at her workplace. However, as a single woman living alone, she depended on her salary and could not afford to take the unpaid leave the FMLA offered. From the time of her father's diagnosis in 1991 until his death in March 1998, Ms. Duffus was forced to limit her leave to her vacation time, approximately three weeks every year, to care for her father.

Although Ms. Duffus is grateful that her vacation time allowed her to care for her father, and also that her company gave her some flexibility, she feels that if paid family and medical leave had been available to her, it would have allowed her to take better care of both herself and her father. "During the time when my dad was sick, which was over a period of eight years, I had a lot of responsibilities and demands put upon me from both family and work. A lot of this time I felt like I was in crisis mode, working in overdrive, and struggling with being so far away from my dad. It definitely took a toll on me. Paid family and medical leave would have allowed me to plan a little better for things, and it also would have given me more time with my dad," said Ms. Duffus. "Paid family and medical leave is a win-win situation. It helps out the caregiver, which in turn helps out the businesses, as the person can be more productive when he or she is at work."

Ms. Duffus can be reached through the Alzheimer's Association of Eastern Massachusetts at (617) 868-6718.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. paper	re: personal story (1 page)	n.d.	b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Ann O'Leary
OA/Box Number: 19581

FOLDER TITLE:
BAA - UI [Birth and Adoption - Unemployment Insurance]

2013-0436-S
rc1265

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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National Partnership for Women & Families

AMERICANS SUPPORT FAMILY LEAVE INSURANCE

findings from *Family Matters: A National Survey of Women and Men**

A large majority of Americans think it's important to make family leave more affordable. They support the creation of state family leave insurance programs that would help working people makes ends meet while on leave to care for new babies or sick family members. This support crosses lines of sex, age, family structure, income, race, and political affiliation, with especially strong support among women and among people under age 45.

We asked: "Some states are considering proposals that would establish Family Leave Insurance. They could do this by expanding unemployment or disability insurance to provide partial wages when people need to take time from work to care for a newborn or a newly adopted child; to care for a seriously ill parent, child, or spouse; or to recover from their own serious illness. Would you *strongly* favor, *somewhat* favor, *somewhat* oppose, or *strongly* oppose that proposal?"

Findings: <u>Large and consistent majorities FAVOR family leave insurance, including</u>:

All Americans	79%	Women	82%
		Men	75%
Americans under age 45	84%		
Americans age 45 and over	74%		
Democrats	85%	Women only	86%
Republicans	71%	Women only	75%
Independents	79%	Women only	83%
Dem. Women under age 45	89%		
Rep. Women under age 45	91%		
Ind. Women under age 45	91%		
People with Children at Home	82%	Women only	86%
People w/out Children at Home	77%	Women only	80%
Parents Working for Pay	83%	Women only	89%
Parents not Working for Pay	80%	Women only	81%
Working People w/out Children	81%	Women only	85%

* a nationally representative survey of 740 women and 375 men conducted for the National Partnership for Women & Families by Lake Sosin Snell Perry & Associates, February 1998.

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JUN 23 1999

NOTE FOR:

Ed Montgomery
Geri Palast
Henry Solano
Judy Kramer
Susan Green
Bill Samuel
Ray Uhalde
Teri Bergman

FROM: Grace Kilbane

SUBJECT: Materials for White House Meeting on UI/FMLA

Here for your review are materials for the White House meeting tomorrow on "Birth and Adoption Unemployment Compensation." We are also faxing them (except the list of letters) to Nicole et. al. at the White House.

If you have any questions or comments, please let me know.

Attachment

To reach
leg. state leg.
cycles

BIRTH AND ADOPTION UC
TENTATIVE TIME LINE

Start date for activity:

Jul 15	DOL Clearance - 15 day expedited (incl. revisions)
Jul 31	OMB - 30 day expedited (incl. revisions)
Aug 31	Publish NPRM
Sep 30	Comments Due
Nov 15	DOL Clearance - 15 day expedited (incl. revisions)
Nov 30	OMB - 30 day expedited (incl. revisions)
Dec 31	Publish Final Rule

PRINCIPLES FOR "BIRTH AND ADOPTION UC" RULES

1. The rules should be minimal - leaving as much flexibility to States as possible. Reasons:

- The purpose of the rule is to "fence in" the exception to the availability requirement, not regulate every aspect of program.

- The less DOL regulates, the fewer issues susceptible to legal challenge. For example, if we limit duration to 12 weeks, somebody could challenge why DOL does not permit payment of 14 weeks.

- States, which might otherwise be indifferent to the rule, could react negatively if DOL regulates eligibility since States view eligibility as exclusively their prerogative. This could drive them into a camp opposing the rule.

- The approaches in MD, WA, VT and MA differ significantly. The rule should accommodate the full range of proposals.

- The greater the States' flexibility, the greater the chance of enactment as States can make adjustments to obtain enactment.

2. Take the President's statement at face value. E.g., since the purpose is to spend time with new children, the rule will only authorize payment of UC to parents who are taking time off to be with these children.

3. Maintain the nature of UI as insurance program. Under the rule, parents will be insured for jobless periods they spend with new children. Currently, States may not introduce eligibility factors unrelated to the fact or cause of unemployment, and this principle should be preserved. For example, whether the other spouse is receiving (or has received) parental UI is unrelated to the insured's unemployment as is the household income. These types of provisions would continue to be prohibited.

i.e. means testing

Birth and Adoption UC:
PERMANENT OR EXPERIMENTAL PROGRAM?

As DOL works to implement the President's Executive Memorandum authorizing the payment of UC to new parents, it is studying the best legal means of doing so. This is significant as any rule, whether permanent or pilot, will likely face a challenge.

Our policy has been that Federal law requires workers to be "available" for work in order to be eligible for UC. This would disqualify workers on family leave. This regulation will change that policy for workers who are on leave to care for newborns or newly-adopted children but not for workers on other types of family leave. Because of its temporary nature and the opportunity it would provide for the collection of information, an experimental program would provide the rationale for paying UC to one group but not another.

In addition, individuals or other groups who want UC paid for other types of leave could challenge the rule on equal protection or Administrative Procedure Act (APA) grounds. States and employers could also challenge the rule on APA grounds. To survive an equal protection challenge, the rule need only pass a test of minimum rationality; i.e., we could defend an equal protection challenge by showing any rational basis for the regulation. However, to survive an APA challenge the rule must pass the generally stricter test of whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Employers (and possibly states) could also challenge the rule claiming that it is contrary to Federal UC law, i.e., that an "availability" requirement is inherent in the federal law and that the payment of UC for parental leave runs afoul of this requirement and improperly makes employers responsible for workers' personal lifestyle choices.

Characterizing the Birth and Adoption UC program as an "experiment" rather than a permanent change could help in defending against challenges to the rationality of making UC available to one group, but not another.

Experimental Program

Pros:

- The President announced the program as an "innovative way" to use UI and ordered DOL to "evaluate the effectiveness" of this approach. This suggests experimentation.

- The decision to exclude other types of family leave (e.g., personal illness, elder care) from the expansion of the interpretation of the "availability" requirement is more easily defended if it is viewed as possibly temporary and tentative, and subject to reconsideration based on future experience. An experiment would be limited, so as to lessen its potential negative impact while compiling data such as: whether individuals compensated for family leave are more likely to return to work, and therefore are more available, in the long run, than those on unpaid leave or who quit; how it affects employers whose employees take such compensated leave; and how it affects employers throughout the State who bear the benefit costs. It also allows us to admit that there may be some flaws in our data or rationale and to argue that we have chosen an experimental program to test our ideas. It should be less difficult to defend a challenge to the decision to institute an experimental program, rather than an immediately permanent program.

- DOL can limit eligibility initially to the desired groups and extend eligibility later at our choosing for other purposes without including every category up front. An experiment allows for the accumulation of data on actual costs and other economic impacts and will likely allow for a more accurate cost-benefit analysis when it is time to decide whether to extend eligibility.

- An experimental program, by allowing for the collection of data, could also aid in defending against a challenge to an interpretation of "able and available" as including people on leave for birth or adoption of a child.

- The rule could be fashioned so that it remains effective almost indefinitely. For example, the rule could remain in force until a sufficient number of States have enacted and operated Birth and Adoption programs and until DOL has had time to sufficiently evaluate the programs.

- While such experiments are more typically authorized by law, there seems to be some precedent for both authorizing and designing such programs through rulemaking. Where?

- A new administration wishing to terminate such a rule would have to go through the same rulemaking process as would apply to a permanent program.

Cons:

- The rule would probably have to provide for some sort of sunset, and it would ultimately require a significant amount of study and analysis (that must be funded in some manner), and, to the extent the effort was successful, additional rulemaking.

- Although the President did describe this as an innovation and did ask the Department to study the matter, he did not indicate that the program would in any way be temporary or "experimental."

- Advocacy groups and their friends in Congress, who are already concerned that not all FMLA-type leave is covered, might feel the DOL was further limiting the President's decision.

Permanent Program

Pros:

- DOL has authority to interpret Federal law and is entitled to deference if the interpretation is reasonable. Whether experimental or permanent, DOL will have to explain how making UI available to new parents is rationally related to the purposes of UI and is consistent with the "availability" requirement.

- A number of cases, including Supreme Court precedent, recognize agencies' discretion to limit the scope of rulemaking and to proceed one step at a time in addressing an issue or a number of related issues. Such cases, however, generally pertain to legislative, not interpretive, rules.

- No additional rulemaking would be required.

- Would help satisfy the proponents of UC for parental leave.

Cons:

- A permanent program could not be defended as experimental, and thus could be more vulnerable to the argument that it is arbitrary or contrary to Federal law to define "available" to include only birth and adoption leave, but not leave for personal illness, or for the care of sick children or other family members. Although there is literature supporting the idea that new parents have a greater need for income protection, it appears that it may not adequately support the distinction between parenting and health needs, and, in any event, such data's relevance to the Federal "able and available" requirement may be seen as tenuous.

BIRTH AND ADOPTION UC
RESPONSE TALLY

LETTERS RECEIVED

For	4
Against	271
Total	275*

*UWC counted as 1.

06/21/99
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Letters Responded to Opposing the Payment of UI To Individuals Taking Leave Under the FMLA

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(11)

Letters Responded to in favor of paying UI to individuals taking leave.

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Massachusetts Senate
State House, Room 424
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The Honorable Anne M. Paulsen
Massachusetts House of Representatives
State House
Boston, MA 02133-1053

(2)

Letter received from Eric Oxfeld at UWC-Strategic Services on Unemployment and Workers Compensation - Signed by the following associations and companies - Not answered

Associated Builders and Contractors
American Hotel and Motel Association
American Rental Association
American Trucking Association
Americans for Tax Reform
Associated General Contractors
Association of International Automobile Dealers
Associaion of International Automobile Manufacturers
Food Marketing Institute
Goodyear Tire and Ruber Company
International Mass Retail Association
Laurdan Associates, Inc.
Maryland Chamber of Commerce
Mitsubishi Moter Manufacturing of America
Montgomery Maryland Chapter of the Society for Human Resource Management
National Association of Manufacturers
National Association of Retailers
National Federation of Independent Business
National Mining Association
National Restaurant Association
Printing Industries of America
Society for Human Resource Management
Small Business Survival Committee
UWC-Strategic Services on Unemployment and Workers Compensation
United States Chamber of Commerce
University of Chicago Hospital System

(26)

Letters addressed to Rhett Hensley, ETA/UIS

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Letters Received and not responded to.

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file BAA-UI proposal

Family-leave plan lands with thud

No groundswell in four states cited as backing proposal

By Joyce Howard Price
THE WASHINGTON TIMES

Officials in at least three of the four states portrayed as seeking authority to use unemployment surpluses to pay new parents to stay home to care for an infant either oppose the plan or have serious doubts about it.

According to published reports, Maryland and at least three other states — Massachusetts, Vermont, and Washington — are already eyeing extending unemployment benefits to new parents, including those adopting children.

President Clinton instructed the Labor Department last spring to write new regulations that would allow states to legislate such changes. Proposed rule changes, announced this week, could take effect after a 45-day comment period.

But the U.S. Chamber of Commerce and other groups have vowed to fight the loosening of rules, which they said amounted to a huge new welfare entitlement.

Maryland officials already have strong reservations about such an arrangement, which they say would require both a change in state law and steep new taxes. And the governors of Massachusetts and Vermont also oppose the idea, aides said yesterday. Washington officials could not be reached for comment.

"Our unemployment-insurance fund is not running a large surplus. It's running at exactly what is needed to maintain fiscal solvency during a period of economic downturn," said Mike Morrill, spokesman for Maryland Gov. Parris N. Glendening, a Democrat.

Said Susan Allen, press secretary to Vermont Gov. Howard Dean, also a Democrat: "The governor's position is that unemployment funds are not the place to go for parental-leave proposals. We've needed those funds before [during hard economic times], and we could need them again," she said.

For months, Massachusetts Gov. Paul Cellucci, a Republican, has not given his position on this issue. But his spokesman, Jason Kauppi, said yesterday, "We'd be somewhat concerned we'd be raiding a program that's purposely there to protect families whose primary breadwinner is out of a job .... We've made efforts to lower the unemployment-insurance [tax] rates in this state, and we wouldn't want to see a reversal of that trend."

"Most states are in surplus situations [in terms of their unemployment trust funds] ... but there appears not to be a groundswell" of support for setting aside such income for workers on maternity leave, said Bill Conerly, an economist and contributing fellow to the American Institute for Full Employment.

As for the four states cited as leading the drive for such a change, the one thing they have in common is that bills have been introduced in their state legislatures to use unemployment compensation to provide parents with paid leave to stay home with newborns or new adoptees.

"Last session, a proposal was introduced in the [Maryland] legislature to do that, but it went nowhere," said Mr. Morrill.

He added that no one in the Glendening administration wrote to the U.S. Department of Labor or the White House seeking guidance on how to accomplish this.

Unemployment-insurance funds were established 65 years ago to provide stipends for laid-off workers.

Mr. Conerly said he tried to ascertain the status of the issue in Washington. He called Bob Williams, who heads a think tank in that state called the Evergreen Freedom Foundation. He said Mr. Williams didn't know anything about it, so he called some senior lawmakers in the state legislature, who were equally uninformed.

A bill is pending in the Massachusetts legislature that would use the unemployment trust fund — which currently has a surplus of $1.7 billion — to pay a working parent up to $402 weekly for 12 weeks to stay at home.

The measure is being pushed by advocacy groups such as the National Partnerships for Women and Families and Greater Boston Legal Services.

The Washington Times
THURSDAY, DECEMBER 2, 1999

#310460

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file UI-BAA

July 6, 1999

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We write to express our strong opposition to your proposal to use America's unemployment compensation funds to provide paid family leave benefits to employed Americans. We oppose your effort to unilaterally alter laws enacted by Congress and drastically change the unemployment system that provides critically needed funds to sustain millions of unemployed workers.

The unemployment compensation and the family leave laws serve different and incompatible purposes. Unemployment compensation laws protect workers who lose their jobs when an employer no longer has work available. Family leave is for workers who have jobs but choose to take time off for personal medical reasons. We believe burdening the unemployment compensation trust fund with family leave benefits will financially and administratively jeopardize the unemployment compensation system and those whom it sustains.

Historically, Congress has been required to bail out numerous state unemployment compensation systems. From 1973 to 1975, Congress extended loans to 25 states that faced insolvent unemployment insurance funds. From 1980 to 1982, Congress was forced to loan monies to 32 states that were insolvent. At the peak of borrowing in 1983, the federal government extended loans to states totaling $13 billion. After 1989, the situation deteriorated again. In 1990, 1991, and 1992, outlays surpassed unemployment insurance taxes by $3 billion, $10 billion, and $8 billion, respectively.

Currently, 22 states have flunked the solvency test recommended by the Department of Labor. Moreover, the Department of Labor has published a report warning that at current reserve levels 25 to 30 states would need to borrow $20 - $25 billion in order to provide unemployment benefits, if an economic downturn like the 1980-82 recession occurs. During the past two years, Department of Labor officials have been outspoken in expressing concern that states have failed to adequately replenish their unemployment compensation funds, during the present strong economy.

History has demonstrated that unemployment compensation funds are volatile and not as flush as some would have us believe. Even the Department of Labor expresses concern about the continued solvency of state unemployment compensation funds. We believe that a meaningful review must occur before raiding trust funds intended for the safety and well-being of this nation's unemployed. Let us not pit the employed and unemployed workers against one another for monies intended for the unemployed.

We urge you to reconsider your policy or, at the very least, work with Congress to debate legislative proposals in the proper forum. Your effort to unilaterally alter a 64-year-old statute is unsustainable.

Sincerely,

Bill Goodling

BILL GOODLING
Chairman

Cass Ballenger

CASS BALLENGER
Chairman, Subcommittee on
Workforce Protections

cc: The Honorable J. Dennis Hastert, Speaker of the House
The Honorable Alexis M. Herman, Secretary of Labor