

Paid leave hearing

3/7/2000

Senator Gregg talking

Rep. Johnson: does n support any VI to pay cash benefits.
Nancy Johnson + Archer move to ports + sec term
"backdoor raid"

I am a supporter of leave

~~for 65 yrs everyone assumed that~~

if more ppl get benif taxes will ↑

For yrs we have hid from Vol that trust funds are too low,
now we are saying let paid leave

FMLA reveals problems

irresponsible to use the form for this purpose

major domestic program, deserves thoughtful reforms. It will considerably
↑

disapp't that Vol has n been fit to submit legis/law that
would contain it

bad procedure creates bad law. I am amazed to see a pol.
I'd propose expanding w/out limits to back mem

Cardin

Sen Gregg

DOL is doing something which is outside of its powers. DOL is attempting to legislate - trampling on the Congress
restricting const'l rights of citizens

proposed rule had $\uparrow$ impact on FMLA + UI laws.

1 Chair comm. on Sen side

We have held legs on this bill, ^{on} + the DOL

There are probs w/ FMLA being ignored by D.L:

- ① sig admin burden
- ② resentment by workers
- ③ invasion of privacy
- ④ unnecessary redundancy
- ⑤ conflict w/ existing policies

These ~~are~~ problems exist, yet they want to expand

UI has been on books for 65 yrs

This is a good time proposal, but as practical matter

" If we go into another recession, the states will
need to borrow \$20-25 bill from the Fed gov

UI is better during hard times - to invade these sets for a good &
polling int, is a serious pub policy error

UI structured to benefit ppl who are available + able to
work + had lost their jobs by no decision of their own

Dol need only look at its own states:

'82, 1991,

+ consider what would happen if we had another recession.

It is federal gov that's the insurer of last resort - if VI is
not fully solvent.

I suggest:

rather than open brand new drain, they consider looking
at mgt management of FICA procedures

Johnson there is no impediment in federal law to do this.
~~when you were governor~~, states have it to set up new
act that is separate from VI

~~had to get sword benching - you offered by~~

Gray

INNH we had a long and long into recession which is
why you don't want to weaken it.
then we had to ↑ taxes to keep bond solvent.

Cordin

~~legis~~ This is a new ground. At first time VI is used for
other probs in community. ~~that~~

All states have exceptions to involuntary separation. Some include

- wife who quits following spouse transfer
- if who quits from abusive spouse
- wife who quits to care for ill parent or ill child

nothing in this reg MANDATES - just give will of opportunity

Gregg

74%. All on FMLA get some sort of compensation. This would mean employees pass the buck to the gov.

Sharon

This committee has ~~no~~ jurisdiction over FMLA, but we do have juris. over UI

Upset that Admin did not have the custody of legis.

States can do this

Gordin

yes states can pass paid leave laws + programs. The reg way
is response to whether the state had the authority. Reg not
issued to, clarify how states can administer.

Christopher Donovan in CT
(See testimony)

Johnson has questions

Donovan: parental part for BAA would cost nothing.
tax on employers

Johnson: Owe \$530 mill for BAA

Donovan: \$530 million owed to fed govt. I believe state took out funds

August 2001 we will pay it back

~~Johnson: Large govt~~
Johnson: what are usage stats in CT?

Donovan: Total # of gun leases is 20,000 about 1/3 for BAA
60,000 for UE in CT

Johnson: Separate land for EMCA w/ exception of BAA is funded by
new taxes

Johnson: plbl w/ty necessary: \$530 mill plus reforming
makes solvency n as possible.

FORUS assumes ↑ in unemployment rate

Donovan: when we went into debt, we looked solvency on total wages

McCreary

who administers?

Don. DoL

McCreary is concerned that those prices will be overburdened?

Don. There will be some admin funds available

doing it through est'd fund is better

if you provide paid FICA, then you do not have to participate in the other program - don't have to contribute to the separate fund (same BAA)

Camp

we have growing inequality w/ staying at home spouses

I'm afraid for solvency

in michigan our econ is more cyclical. eroding at the UI

and would require ability to borrow \$. I'm concerned @ integrity of funds.

John. Strong. less automatic tax ↑ in CT helps w/ delivery of fund

Cardin. we all share some concerns. - michigan cut its health taxes on employers -
it's ~~the~~ so solvency is an issue

the part under UI is a discretionary - if employers need to pay it.
which I suspect is why CT has decided to use UI

* *

7.1 → 5.3 %

Uhlde

John
Dol

how many are FMLA?

we don't have stats on how many are FMLA

but the policy is not connected to BAA, while we have stats for
did any state had to ↑ taxes.

John

given ↑ in Maryland, how much will this cost.

Dol

if all states took up which they won't
less than 5%. Then what is currently paid in trust and

John:

Delayed.

Dol

at 1987. interst ~~state~~ was conservative interst, but is also precedent +
that we have interst & ~~26~~ 26c + 20c differently
~~the~~ ex: Hawaii - in 1961 - there what would have better labor force & the chart
that is what we are trying to do. Parents will have stronger labor force
attachment w/ trust.

John

we need to make an automatic trigger

Dol

but this is not in the law, it is in our interst
& we have done that many times

John

it was irresponsible that Dol would not refer the bill to
review states

Dol

Every state does have automatic tax trigger
- " " ~~the~~ does ↑ or ↓ taxes to compensate for ally.
This says it where states have authority.
we were afraid & we decided we would give authority

Cordin

you've done a study in 4 states: MD, VT, MA, CT

~~279% of reports~~ modest savings VT used for BAA

Del

Cordin

relatively small, + those states are equipped to deal w/ those
80% will return to jobs
maternity

John

why do you n support wage hour
bring bill to the floor! as a backdoor approach

Chair Johnson Watkins
Gordin
English
Boley
Coyle

**LIST OF WITNESSES TO APPEAR BEFORE
SUBCOMMITTEE ON HUMAN RESOURCES
COMMITTEE ON WAYS AND MEANS
ON
UNEMPLOYMENT COMPENSATION AND THE FAMILY AND MEDICAL LEAVE
ACT**

THURSDAY, MARCH 9, 2000 - BEGINNING AT 10:00 A.M.

ROOM B-318 RAYBURN HOUSE OFFICE BUILDING

The Honorable Judd Gregg, U.S.S., New Hampshire

The Honorable Christopher G. Donovan, Member, Connecticut House of Representatives

Raymond J. Uhalde, Deputy Assistant Secretary, Employment and Training Administration,
U.S. Department of Labor

PANEL:

Eric Oxfeld, UWC-Strategic Services on Workers' Compensation and Unemployment

Kimberley K. Hostetler, Director, Human Resources Services, Connecticut
Hospital Association, on behalf of the Society for Human Resource Management

Maurice Emsellem, Policy Director, National Employment Law Project

Todd L. Shimkus, Vice President, North Central Massachusetts Chamber of Commerce

Jack F. Wheatley, Director, Michigan Unemployment Agency

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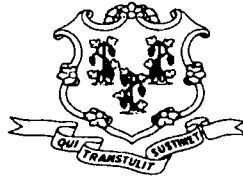
The Connecticut General Assembly

HOUSE OF REPRESENTATIVES

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Hartford, CT 06106-1591

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Eighty-fourth District

188 Atkins Street
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CHAIR
LABOR AND PUBLIC EMPLOYEES COMMITTEE

MEMBER
APPROPRIATIONS COMMITTEE
PUBLIC HEALTH COMMITTEE

Testimony before the Subcommittee on Human Resources

Committee on Ways and Means

March 9, 2000

State Representative Christopher G. Donovan

Testimony before the Committee on Ways and Means, Subcommittee on Human Resources

Good morning Chairwoman Johnson and members of the Committee on Ways and Means, Subcommittee on Human Resources. I want to thank you for inviting me here this morning to provide testimony on the use of Unemployment Compensation funds to pay for family leave benefits.

I am excited that our states and our federal government are taking a serious look at proposals that would provide needed support for our most vital institution...the American family. The hardworking, productive American working family is feeling the strain. Young working couples are finding it hard to afford to stay home with their newborns. The sandwich generation is balancing work demands while caring for their children and assisting their aging parents. Time is a precious commodity for American families these days and many just don't have it. No time for the newborn, no time for the ill family member and no time for family life. If one unforeseen problem occurs, the balancing act collapses and misfortune falls on the American family. Loss of wages, loss of a job, loss of a home, loss of precious time with a loved one in their time of need-time that can't be replaced.

We can bolster our American and Connecticut families with a paid family leave system. All of Europe and Canada support their working families and have been doing so for decades. We can too. It's not a matter of should, but it's only a matter of when and how.

In terms of the when....it can be now. President Clinton has authorized the Department of Labor to draw up regulations concerning the use of states' unemployment funds for paid family leave. That action has spurred states like Connecticut to consider initiating paid family leave proposals that uniquely fit the needs and economic structures of that state. These states are holding hearings, getting input and looking at possible funding mechanisms and funding streams.

I am honored to serve the State of Connecticut as House Chair of the Labor and Public Employees Committee and recently the committee had the opportunity to listen to Connecticut about the need for wage replacement for workers temporarily leaving the workforce in order to care for a newborn, an adopted child or a seriously ill family member.

We heard from the grandmother worried about her granddaughter having the burden to care for her own children and her at the same time. We heard from the young man who is taking unpaid leave to care for his very ill mother. We heard from the young mother, holding her squirming daughter, about how difficult it was to make ends meet with one income in the family. We heard from experts such as a professor from the University of Connecticut who issued a report on the benefits of paid family leave, and from Dr. Edward Zigler, Sterling Professor of Psychology at Yale, noted child development scholar and nationally recognized as the father of Head Start, who elaborated on the societal benefits of family caring for newborns and the necessity of paid family leave.

And we listened to business leaders who, though open to the idea, were concerned about costs. So we charged economists at the University of Connecticut to provide us with a preliminary estimate of the cost for paid family leave proposals in order to determine the expenses related to such a program. The

cost estimate was within a reasonable range of \$2.08 to \$75 a year per employee....the cost of a cup of coffee a week or the cost of paper towels in the company bathrooms.

I am here to report that on Tuesday of this week, having listened to the testimony and studied the reports, our committee submitted legislation and voted favorably to assist Connecticut families by providing compensation for wages lost when taking necessary parental and family leave.

Connecticut House Bill 5619, An Act Concerning Paid Family and Medical Leave, provides up to 12 weeks of wage replacement per year for workers temporarily leaving the workplace after the birth or adoption of a child, for serious illness or to care for a family member with a serious illness. A key provision of this proposal is the use of Connecticut's Unemployment Compensation Fund to provide benefits for workers taking the leave to care for a child following birth or adoption. I have enclosed the legislation with my testimony.

In Connecticut, using our democratic and legislative system, state elected officials voted out a proposal that includes the use of the unemployment fund for workers temporarily leaving the workplace. I believe use of the UI fund is appropriate and reflects both the original intent as well as the ongoing understanding of the purpose of the fund.

Connecticut's unemployment fund already provides benefits for workers who temporarily leave the workforce. For example, companies that have seasonal shut downs must temporarily displace their workers and rely on the unemployment system to sustain those workers until work is resumed. Neither the company nor the administrators of the fund wish those workers to seek other jobs. The company needs those experienced workers and expects them to return. It is understood that the compensation is temporary and that the workers will return to work. *According to the Connecticut Department of Labor any temporary layoff of 6 weeks or less is treated as a recall and workers may collect benefits without looking for work.* Approximately 60,000 Connecticut workers receive benefits for temporary layoff each year. Compare that figure with the much smaller number of workers taking unpaid family leave in Connecticut -20,000.

Here's another example: According to Connecticut law, a worker is not disqualified for unemployment benefits if the worker quits employment to care for a seriously ill family member. However, the workers in this case cannot collect benefits until they are ready, once again, to look for work. This old-fashioned rule leads to the ironic result that while the workers are considered justified in seeking unemployment, they cannot collect it when they need it the most. We make other important exceptions in determining eligibility: Just last year, the Connecticut General Assembly passed legislation, signed by Governor Rowland into law, that permits a worker to quit a job and collect unemployment in order to avoid domestic violence. In neither of these provisions is the employer charged for the claimant's benefit.

Unemployed workers, engaged in approved training or apprenticeships are also permitted to collect benefits and not be required to look for work.

Other industries utilize the unemployment fund as a way of business. The construction industry depends on workers in the building trades collecting unemployment during slow times so that they will be available to work. And the temporary businesses would be decimated without a flexible unemployment system.

① not needed (w/ for ppl to use UI if they are dom. vio victim)
② allow for quit job + collect UI from number

in looking for work

*we have included
a voluntary target for our
fund - the fund*

Our state recognizes the value of these exceptions. These provisions reflect our state's needs and values: keep good workers linked to their jobs during temporary layoffs, allow workers to obtain needed retraining skills, reflect family responsibilities and provide for family safety.

Providing unemployment benefits so that a family member may temporarily leave the workplace to care for a new born or adopted child is consistent with other uses of the fund.

But what about drawing on the fund for family leave? Connecticut's fund is solvent and can easily withstand the drawing of benefits for parental leave. According to the Connecticut Department of Labor, the Unemployment Insurance Fund balance as of December 31, 1999 was estimated to be \$838 million. The targeted fund reserve, the amount required by law to be maintained in the fund, for the same period was \$448 million, leaving \$390 million over the target fund reserve amount.

The preliminary estimate on the cost of parental leave is approximately \$40 million per year. Given these estimates, Connecticut's UI fund could provide paid parental leave at no cost to Connecticut employers.

In the past few years, Connecticut employers have received big UI tax cuts-approximately \$275 million dollars. As the good economy rolls on, experience rates for companies drop as well.

Using the unemployment fund for paid family leave works for Connecticut. It may not work for every state but it is an option we have in our legislation. The UI system is familiar to business and employee. We don't have to create a new bureaucracy. The benefits are clear, the payment system is in place and the overall system can easily be adapted for family leave.

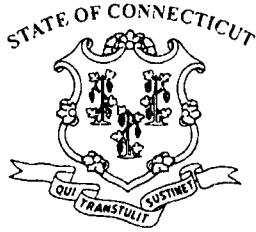
*Can be easily adapted to include one more exception
to help families*

Unemployment Compensation was enacted in 1935, only 15 years after women permitted by our government to vote. But although family issues may not have been on the minds of Congress, it is clear that states were given the authority to administer the fund. Since that time states have initiated many additions to the program. The pattern has been that the federal government sets minimum benefits and the states may expand on those benefits. - *Issue going to bring is this*

Our country needs to support its working families. The choice is ours. Do we ignore our common family experiences and make no room for our newborns, no time for ailing parents or do we develop a system that balances the needs of the workplace with the responsibilities of being a family member?

I welcome Congress to devise such a system. As you consider these ideas, please do not hold back those states, like Connecticut, that are ready to experiment and implement innovative strategies. We believe in and support our hardworking, responsible American families.

Thank you.



General Assembly

***Proposed Substitute
Bill No. 5619***

February Session, 2000

LCO No. 2598

An Act Concerning Paid Family And Medical Leave.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Subdivision (4) of section 31-51kk of the general statutes is
2 repealed and the following is substituted in lieu thereof:

3 (4) "Employer" means a person engaged in any activity, enterprise
4 or business who employs [seventy-five] fifteen or more employees,
5 and includes any person who acts, directly or indirectly, in the interest
6 of an employer to any of the employees of such employer and any
7 successor in interest of an employer, but shall not include the state, a
8 municipality, a local or regional board of education, or a private or
9 parochial elementary or secondary school. The number of employees
10 of an employer shall be determined on October first annually.

11 Sec. 2. (NEW) (a) Effective July 1, 2001, any individual who (1)
12 meets the monetary eligibility requirements set forth in chapter 567 of
13 the general statutes, and (2) takes a leave of absence from employment
14 (A) in order to care for the spouse, or a son, daughter or parent of the

15 individual, if such spouse, son, daughter or parent has a serious health
16 condition, or (B) because of a serious health condition of such
17 individual, shall be entitled to receive family and medical leave
18 benefits from the Family and Medical Leave Insurance Fund
19 established under section 3 of this act for a maximum of twelve weeks
20 during any twelve-month period, such twelve-month period to begin
21 with the first day of leave taken. For purposes of this section: (i)
22 "Parent" has the same meaning as in subdivision (7) of section 31-51kk
23 of the general statutes; (ii) "serious health condition" has the same
24 meaning as in subdivision (10) of said section 31-51kk; (iii) "son or
25 daughter" has the same meaning as in subdivision (11) of said section
26 31-51kk; and (iv) "spouse" has the same meaning as in subdivision (12)
27 of said section 31-51kk.

28 (b) Except as provided in subsection (c) of this section, the weekly
29 benefit amount of family and medical leave benefits payable to an
30 individual under this section shall be equal to such individual's total
31 unemployment benefit rate, calculated pursuant to section 31-231a of
32 the general statutes, plus a dependency allowance in an amount equal
33 to that provided under section 31-234 of the general statutes, as
34 amended by public act 99-154 and public act 99-1 of the June special
35 session.

36 (c) Any individual whose weekly benefit payable under this section
37 is less than forty-seven per cent, rounded to the next lower dollar, of
38 the average weekly wage of production and related workers in the
39 state, as determined by the Labor Commissioner pursuant to
40 subsection (b) of section 31-231a of the general statutes shall be entitled
41 to receive a weekly benefit equal to the lesser of (1) one hundred per
42 cent, rounded to the next lower dollar, of such individual's total
43 weekly earnings, or (2) forty-seven per cent, rounded to the next lower
44 dollar, of the average weekly wage of production and related workers
45 in the state, as determined by the Labor Commissioner pursuant to
46 subsection (b) of section 31-231a of the general statutes.

47 (d) (1) No individual may receive family and medical leave benefits

48 under this section for a week in which the individual receives a wage
49 replacement equal to or greater than the weekly benefit provided by
50 this section under any of the following: (A) Any government program
51 or law, including, but not limited to, the unemployment compensation
52 program established under chapter 567 of the general statutes, the
53 workers' compensation program established under chapter 568 of the
54 general statutes, other than for permanent partial disability incurred
55 prior to the claim for family and medical leave benefits, or under other
56 state or federal temporary or permanent disability benefits law, (B) a
57 permanent disability policy or program of an employer, (C) a
58 temporary disability policy program of an employer, or (D) a paid sick,
59 vacation, family or medical leave policy of an employer.

60 (2) For a week in which an individual receives a wage replacement
61 less than the weekly benefit amount provided by this section, the
62 individual shall receive family and medical leave benefits equal to the
63 difference between the weekly benefit amount provided by this section
64 and the amount of wage replacement received by such individual.

65 (e) On or before January 1, 2001, the Labor Commissioner shall
66 adopt regulations, in accordance with the provisions of chapter 54 of
67 the general statutes, to establish procedures and guidelines necessary
68 to implement the provisions of this section, including, but not limited
69 to, procedures for the filing of claims, procedures for hearings and
70 redress and procedures for the periodic reporting by employers to the
71 commissioner of their current experience with leaves of absence taken
72 pursuant to this section.

73 Sec. 3. (NEW) (a) There is created in the office of the State Treasurer
74 a special segregated fund to be known as the Family and Medical
75 Leave Insurance Fund. Said fund shall consist of all contributions and
76 moneys paid into or received by it for the payment of family and
77 medical leave benefits pursuant to section 2 of this act, of any property
78 or securities acquired from the use of moneys belonging to the fund,
79 all interest earned thereon and all money received for the fund from
80 any other source. All moneys in said fund shall be expended solely for

81 the payment of benefits and expenses provided for by section 2 of this
82 act. The Labor Commissioner shall maintain a separate record of the
83 deposit, obligation, expenditure and return of funds so deposited. The
84 State Treasurer shall be liable on the Treasurer's official bond for the
85 faithful performance of the Treasurer's duties in connection with the
86 Family and Medical Leave Insurance Fund. All sums recovered on any
87 surety bond for losses sustained by the Family and Medical Leave
88 Insurance Fund shall be deposited in said fund.

89 (b) Effective June 30, 2000, and annually thereafter, the Labor
90 Commissioner shall determine the contribution rate for each employer,
91 except employers that secure family and medical leave benefits for
92 employees in any of the following ways:

93 (1) By insuring and keeping insured the payment of employment
94 leave benefits with a stock, mutual, reciprocal or other insurer
95 authorized to transact the business of disability insurance in this state,
96 provided the benefits under the policy are at least equivalent to the
97 benefits provided by section 2 of this act and such policy does not
98 require contributions from any employee or class of employees;

99 (2) By a private plan or agreement that the employer may, by the
100 employer's sole act, terminate at any time, provided the benefits under
101 the plan or agreement are at least as favorable as the benefits provided
102 under section 2 of this act and the policy does not require contributions
103 of any employee or class of employees; or

104 (3) By any plan or agreement in existence by agreement or collective
105 bargaining agreement between an employer and an employee
106 organization, provided the benefits under the agreement are at least
107 equivalent to the benefits provided under section 2 of this act and do
108 not require contributions from any employee or class of employees.

109 (c) All contributions made in accordance with subsection (b) of this
110 section and all other moneys payable into this fund, upon receipt
111 thereof by the Labor Commissioner, shall be paid to the State
112 Treasurer, who shall deposit them in the Family and Medical Leave

113 Insurance Fund.

114 (d) The State Treasurer, as treasurer of the Family and Medical
115 Leave Insurance Fund, shall, as directed by the Labor Commissioner,
116 requisition from the Family and Medical Leave Insurance Fund such
117 amounts, not exceeding the amount standing to this state's account
118 therein, as the Labor Commissioner deems necessary for the payment
119 of benefits in accordance with section 2 of this act. Upon receipt
120 thereof, the Treasurer shall deposit such moneys in a depository
121 designated by the Treasurer in an account to be known as the family
122 and medical leave insurance account, from which account the Labor
123 Commissioner shall pay the benefits provided by section 2 of this act.
124 The Labor Commissioner shall be liable on the commissioner's official
125 bond for the faithful performance of the commissioner's duties in
126 connection with the family and medical leave insurance account. All
127 sums recovered on any surety bond for losses sustained by the family
128 and medical leave insurance account shall be deposited in the family
129 and medical leave insurance account in the office of the State
130 Treasurer.

131 Sec. 4. (NEW) (a) In addition to the leave provided in sections 5-248a
132 and 31-511l of the general statutes, an employee shall be entitled to take
133 unpaid leave not to exceed four hours in any thirty-day period and not
134 to exceed twenty-four hours in any twelve-month period. An employer
135 may require that leave be taken in a minimum of two-hour segments
136 and may be taken for any of the following purposes:

137 (1) To participate in preschool or school activities directly related to
138 the academic educational advancement of the employee's child, such
139 as a parent-teacher conference;

140 (2) To attend or accompany the employee's child or the employee's
141 parent, spouse or parent-in-law to routine medical or dental
142 appointments;

143 (3) To accompany the employee's parent, spouse or parent-in-law to
144 other appointments for professional services related to their care and

145 well-being;

146 (4) To respond to a medical emergency involving the employee's
147 child or the employee's parent, spouse or parent-in-law; or

148 (5) To respond to a medical emergency involving the employee's
149 child or the employee's parent, spouse or parent-in-law.

150 (b) An employee taking leave under this section shall make a
151 reasonable attempt to schedule appointments for which leave may be
152 taken under this section outside of regular work hours. In order to
153 take leave under this section, an employee shall provide the employer
154 with the earliest possible notice, but in no case later than seven days,
155 before leave is to be taken, except when the required seven-day notice
156 could have a significant adverse impact on the family member of the
157 employee.

158 (c) At the employee's discretion, the employee may substitute
159 accrued paid leave, including vacation, sick and personal leave, for
160 leave taken under this section.

161 Sec. 5. (NEW) (a) An individual who is on a leave of absence from
162 employment or who has left employment to be with the individual's
163 child during the first year of life, or during the first year following
164 placement with the individual for adoption, shall not be denied
165 unemployment compensation benefits under the provisions of section
166 31-236 of the general statutes, as amended by public act 99-123, for
167 failing to either apply for or accept available, suitable employment or
168 for voluntarily leaving suitable employment, provided such individual
169 is otherwise eligible to receive unemployment compensation benefits
170 under the provisions of chapter 567 of the general statutes.

171 (b) Unemployment compensation benefits shall be payable under
172 chapter 567 of the general statutes to an individual who is on a leave of
173 absence from employment or who has left employment to be with the
174 individual's child during the first year of life, or during the first year
175 following placement with the individual for adoption for a maximum

176 of twelve weeks per year. Such benefits shall be in addition to the
177 maximum limitation on total benefits set forth in section 31-231b of the
178 general statutes.

179 (c) The amount of unemployment compensation payable to an
180 individual who is on a leave of absence from employment or who has
181 left employment to be with the individual's child during the first year
182 of life, or during the first year following placement with the individual
183 for adoption shall be reduced by the amount of the deductions
184 specified in subsections (g), (h) and (j) of section 31-227 of the general
185 statutes and subdivision (4) of subsection (a) of section 31-236 of the
186 general statutes, as amended by public act 99-123.

187 (d) Notwithstanding the provisions of section 31-231a of the general
188 statutes, any individual entitled to receive unemployment
189 compensation benefits under this section whose weekly benefit is less
190 than forty-seven per cent, rounded to the next lower dollar, of the
191 average weekly wage of production and related workers in the state,
192 as determined by the Labor Commissioner pursuant to subsection (b)
193 of section 31-231a of the general statutes shall be entitled to receive a
194 weekly benefit equal to the lesser of (1) one hundred per cent, rounded
195 to the next lower dollar, of such individual's total weekly earnings, or
196 (2) forty-seven per cent, rounded to the next lower dollar, of the
197 average weekly wage of production and related workers in the state,
198 as determined by the Labor Commissioner pursuant to said subsection
199 (b) of section 31-231a of the general statutes. Such individual shall not
200 be entitled to receive a dependency allowance under section 31-234 of
201 the general statutes, as amended by public act 99-154 and public act 99-
202 1 of the June special session, if the dependency allowance plus the
203 individual's total weekly benefit exceeds such individual's total weekly
204 earnings.

205 (e) No individual employer's experience account shall be charged
206 with respect to unemployment compensation paid to an individual
207 who took a leave of absence from employment or who voluntarily left
208 employment to be with the individual's child during the first year of

209 life, or during the first year following placement with the individual
210 for adoption.

211 (f) Each employer shall post at each site operated by the employer in
212 a conspicuous place, accessible to all employees, information relating
213 to the availability of unemployment compensation to any individual
214 who takes a leave of absence from employment or who otherwise
215 leaves employment to be with the individual's child during the first
216 year of life, or during the first year following placement with the
217 individual for adoption.

218 (g) Not later than two years following the effective date of this act,
219 the administrator shall issue a report to the Governor and the General
220 Assembly evaluating the effectiveness of making unemployment
221 compensation benefits available to any individual who takes a leave of
222 absence from employment or who leaves employment to be with the
223 individual's child during the first year of life, or during the first year
224 following placement with the individual for adoption.

225 Sec. 6. This act shall take effect from its passage.

**STATEMENT OF RAYMOND J. UHALDE
DEPUTY ASSISTANT SECRETARY
EMPLOYMENT AND TRAINING ADMINISTRATION
BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES**

March 9, 2000

Madam Chairwoman and Members of the Subcommittee:

Thank you for the opportunity to testify on the proposed Birth and Adoption - Unemployment Compensation program -- a proposed rule change designed to permit interested States to experiment with using the unemployment compensation (UC) program to provide partial wage replacement to parents on leave following the birth or adoption of a child. As you know, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) last December seeking comments on this proposed program from all interested parties. The NPRM generated considerable response from the public.

I will begin by providing some background information which may be helpful to the Subcommittee in understanding why the Department of Labor believes this proposed program is important to parents trying to balance work and family responsibilities.

With me today is Grace Kilbane, Administrator of the Office of Workforce Security.

BACKGROUND

There have been dramatic changes in our society, the economy, and the workforce since the UC program was designed in 1935. One of those changes is the tremendous increase in women who work outside the home. Today, almost 60 percent of mothers with children under the age of one are in the work force. Evidence suggests that children who have bonded strongly with their parents early in their lives tend to be healthier both emotionally and physically. Working parents who are able financially to take leave from their jobs can spend this critical time with their children. Yet, too many parents cannot afford to do so. According to the Commission on Family and Medical Leave's report "A Workable Balance: Report to Congress on Family and Medical Leave Policies," nearly two-thirds of employees who did not take leave to be with their newborns cited lost wages as the primary reason.

According to the International Labor Organization, more than 120 nations around the globe provide paid maternity leave by law. This includes most industrialized countries except for the United States, New Zealand, and Australia. The United States is the only country in the North American continent that does not provide paid maternity leave to its female workers. I do note that six States and territories provide for paid maternity benefits through State Temporary Disability Insurance (TDI) programs.

Interest in expanding the UC program to these workers began to manifest itself in 1997 through bills introduced in several State legislatures on a wider issue of family and medical leave benefits

within the UC program. Interest was also expressed by members of the Congress and worker advocates. Accordingly, the Department of Labor began to analyze whether we could expand our interpretations of UC laws to accommodate State interest in providing such benefits.

On May 23, 1999, in a commencement address at Grambling University, the President announced that he would be asking the Secretary of Labor to propose regulations allowing States to use unemployment fund moneys to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child, and an Executive Memorandum to this effect was issued on May 24, 1999.

NOTICE OF PROPOSED RULEMAKING

The Department of Labor has proposed allowing States that choose to do so to implement an experimental program to use UC as a means for providing partial wage replacement to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child. To accomplish this, the Department is exercising its authority to interpret Federal UC law, and specifically is extending its interpretation that workers be able and available to work in order to collect benefits to include new parents. The Department of Labor's proposed experimental Birth and Adoption-UC program is designed to test whether expansion of this able and available interpretation to include new parents would promote a continued connection to the workforce for parents who receive such payments.

As the number of families with both parents working rises, the need to test this interpretation increases, and collecting data under the Birth and Adoption-UC program to test the existence and magnitude of this group's connection to the work force, is increasingly important. Indeed, much in the same way that providing training to laid-off workers enhances their connection to the workforce by making them more marketable, the Department of Labor wants to test whether providing parents with Birth and Adoption-UC at a point during the first year of a newborn's life, or after placement for adoption, will help employees maintain or even promote their connection to the workforce.

The initial time period during which a new child is introduced into a home, and how that child's care will be assimilated into the working lives of the parents, is critical. It is during this period that secure emotional bonds are formed between children and their parents. It is also during this period that a system of child care, which will foster the parents' availability for work, can be firmly established. These requirements are universal when any working family has a new child. Addressing these needs is fundamental to helping families flourish and is also connected to sustaining a stable workforce.

For the above reasons, the Department of Labor believes that these parents are an appropriate focus of an experimental extension of the able and available requirements. Due to the experimental nature of this program, this proposed expanded interpretation of the Federal able and available requirements would apply only to Birth and Adoption-UC.

This experiment would build on past Department of Labor interpretations that said, under certain circumstances, workers need not meet the classic definition of being “able to and available for work” to receive benefits. For example, all States now treat individuals in training approved by the State agency as meeting the able and available requirements. The rationale for this interpretation is that the best route to a strong labor market attachment for these workers is to acquire new skills through training. In 1961, the Department of Labor interpreted Federal law to permit States to allow workers to participate in training while receiving benefits. This strategy was so successful that the Congress subsequently amended the law in 1970 to accommodate worker training.

Other special circumstances under which States may permit unemployed workers to continue to receive UC benefits include jury duty and temporary illnesses during their spell of unemployment. The proposed rule would permit States to test whether these special circumstances should be expanded to individuals on leave following birth and adoption by determining whether payment of UC promotes their connection to the labor market.

Under our proposal, State participation in this experiment is wholly voluntary. A State choosing to implement a Birth and Adoption program will need to amend its UC law to provide for these benefits. For guidance purposes, the Department of Labor developed an optional model of State legislation and a commentary on the model legislation and policy issues; both were appended to the NPRM. Among other things, the model legislation provides for 12 weeks of benefits for eligible parents of newborns and newly adopted children. The model legislation also provides that

the costs associated with these benefits be spread among employers, i.e., benefits not be charged to individual employers. The model State legislation is just that -- a model -- and in most cases the proposed regulation is structured to provide States with the same flexibility they have in other UC program areas.

Some critics of the proposal have argued that Federal law requires UC recipients to be involuntarily unemployed to qualify for benefits and that this experimental program violates this requirement by allowing States to provide benefits to individuals voluntarily leaving employment to be with their newborns or newly adopted children. The Department of Labor does not interpret Federal law to require States to disqualify individuals who voluntarily leave their jobs. For example, some States allow the payment of UC benefits to individuals who quit their jobs to accompany spouses who have been transferred to other locations.

Another concern that has been raised by some critics is the impact of the proposal on the solvency of State unemployment funds. While the Department is concerned about trust fund solvency, and has proposed legislation which includes an incentive for States to make progress in this area, we fully expect that a State would be prudent in its decisions and would not enact changes without first assessing the effect on the solvency of its unemployment fund. Each State has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions, or tax changes are considered within its UC program.

The NPRM on Birth and Adoption UC was published in the Federal Register on December 3,

1999, with a 45-day comment period. We believed this period was ample because of the simple nature of the experimental program and the relatively short length of the proposed rule, although we did receive a number of requests for additional time. In light of the fact that the proposal was a new one, and to accommodate the holiday season, we decided to extend the comment period 15 days, which comports with the President's Executive Order No. 12866 encouraging agencies to allow a 60-day comment wherever possible.

The Department of Labor received over 3,700 timely responses to the NPRM and we are in the process of reviewing and considering all of the comments. We will then draft the final rule and obtain the necessary Administration clearances -- a process which we anticipate will allow for publication in late Spring.

In closing, we note that State interest in the proposed Birth and Adoption UC program continues this year. In fact, bills have been introduced in over a dozen States to implement the program. While not all of these are likely to be enacted, we are very excited about this opportunity to explore new ways to support families in balancing responsibilities at home and at work.

Madam Chairwoman, this concludes my formal remarks. I will be pleased to respond to any questions you or the Subcommittee may have.

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SHRM Press Page:

www.shrm.org/press

For Immediate Release

SHRM-Launched Coalition Opposes Raiding of Unemployment Funds: Member Testifies About Proposal's Problems Before Congressional Hearing

(Alexandria, Va., March 9, 2000) A member of the Society for Human Resource Management (SHRM) today strongly urged Congress to stop the Labor Department's proposed regulations which would allow states to use their Unemployment Insurance (UI) Trust Funds to pay workers for leave taken under the Family and Medical Leave Act (FMLA).

Kim Hostetler, who is the Director of Human Resources Services for the Connecticut Hospital Association, testified during a hearing on the proposed regulations held by the Subcommittee on Human Resources of the House Committee on Ways and Means. Hostetler described how "the implementation of the Family and Medical Leave Act – through the Department of Labor's complex regulations and contradictory opinion letters – has moved it far from its original intent, resulting in substantial unintended consequences for employers and employees alike."

Hostetler represented SHRM on the matter before the subcommittee, providing numerous examples of current problems with the FMLA that would be exacerbated by the Administration's proposal. Stopping the expansion is a top legislative priority of SHRM. The Society's Governmental Affairs Director, Deron Zeppelin said SHRM applauds the subcommittee's chair, Rep. Nancy Johnson, for holding the hearing. "We are pleased that key members of Congress are taking a close look at this troublesome and risky proposal and we hope that they will act to stop it."

SHRM has launched a broad-based business group and a national campaign to stop the proposal. The campaign is being led by Deanna Gelak, Executive Director of the National FMLA Technical Corrections Coalition and Eric Oxfeld, President of UWC -- Strategic Services on Unemployment and Workers' Compensation. Oxfeld noted the long-standing federal law governing UI would require a significant change to implement this proposal. "A worker who has taken leave and is, by law, entitled to a job upon returning from leave, is not "unemployed" as required currently by federal unemployment laws."

Referring to current problems with the FMLA, Hostetler stated, "no expansion of the Act – including paid leave - should be considered before these regulatory and administrative issues are addressed...Tapping into the security program for jobless workers to provide pay for employees on family leave will endanger the solvency of unemployment insurance trust funds and represents an inappropriate attempt to circumvent Congressional legislative intent and authority."

- SHRM -

The Society for Human Resource Management is the leading voice of the human resource profession, representing more than 130,000 professional and student members throughout the world. Visit SHRM Online at www.shrm.org.

The FMLA Technical Corrections Coalition is a nonpartisan group of nearly 300 companies and associations dedicated to making technical corrections to the FMLA. Visit www.workingforthefuture.org.

The UI Working Group is a lobbying coalition headed up by UWC --Strategic Services on Unemployment & Workers' Compensation and the SHRM-led FMLA Corrections Coalition. UWC is the only association dedicated to lobbying for business on unemployment and workers compensation issues at the national level. Visit www.savcui.org.

**Testimony of Jack F. Wheatley,
Director, Michigan Unemployment Agency
Before the Subcommittee on Human Resources,
Committee on Ways and Means
United States House of Representatives
March 9, 2000**

Madame Chair and Members of the Subcommittee on Human Resources, I am Jack F. Wheatley, Director of the Michigan Unemployment Agency and a member of the Board of Directors for the Interstate Conference on Employment Security Agencies. Thank you for inviting me to testify today on behalf of the Michigan Unemployment Agency concerning the proposed regulations involving the Birth and Adoption Unemployment Compensation. I would like to commend the Chair for both the important hearing that occurred last week on the proposals to improve the administration of the national Employment Security system as well as the hearing today on the proposed regulatory action initiated by the U. S. Department of Labor.

The Unemployment Insurance program has been a critical program for the State of Michigan and we have a keen interest in assuring that it continues to provide adequate wage replacement whenever individuals become unemployed through no fault of their own. Michigan has relied on the Unemployment Insurance system to stabilize our economy through the horrific recessions in the late 50's and during the back-to-back recessions of the mid-70's and early 80's. As some of you may remember, between the years 1980 and 1983, Michigan's unemployment trust fund was required to borrow \$2.6 billion when unemployment rates hit 17%. During that time, hundreds of thousands of Michigan residents collected benefits that carried them through the difficult times that Michigan experienced.

The good news is that because of diversification and sustained economic recovery, the economy is thriving, workers are reemployed, Michigan employers have fully repaid all outstanding loans and have accumulated a \$2.7 billion positive reserve to guard against future recessions. Unfortunately, now comes some bad news, which in some ways could threaten the reserves that we've been able to build. Worse, the proposal that you're holding hearings on today, in my opinion, potentially will totally undermine the integrity of the program that has served Michigan so well during periods of prolonged economic downturn.

It is important to indicate at the onset, that my comments should not be perceived as opposition to the concept, or the policy debate, of providing a means for individuals to address the needs of their families. No doubt we have all experienced situations in which, for the good of the family, it is necessary to put work aside and take some time off. I'm not questioning the importance of doing that. Rather, as the administrator of Michigan's Unemployment Insurance system, I have significant concerns about the impact of the

proposed reinterpretation of federal eligibility criteria on the integrity of the federal/state Unemployment Insurance program.

My first concern is that the proposed program, while voluntary in nature, is a serious departure from the intended purpose of the Unemployment Insurance program. Over the history of the Unemployment Insurance program, employers have been consistently told that the taxes that are collected both from the federal unemployment taxes and the state unemployment taxes will be used solely for purposes associated with paying benefits to individuals who are unemployed through no fault of their own. Since the late 1970's, however, this employer-funded program, has not lived up to the promises made.

For example, a temporary 0.2% federal tax used to repay the costs of a federal benefit program has remained in effect even though the loan- which, was the reason for the tax- has been fully repaid. In spite of the surpluses that were being generated from the Federal Unemployment Tax Act (FUTA) revenues, states are not receiving the administrative grants that are needed to support the administrative costs of the UI program. Obviously, because there are sufficient tax revenues available, the problem is not a lack of resources. Rather, the problem is that the Administration does not request sufficient administrative funds to operate the system. This contributes to both the perception, and reality, that FUTA taxes are being used for other purposes.

Speaking of our federal partner, the U. S. Department of Labor, it seems that they are pulling states in opposite directions on this issue. On one hand, they want states to increase the size of our Trust Funds even though the reserves are at record levels. On the other hand, the Department want states to increase eligibility levels, not only for good deeds such as this, but to mandate that states pay benefits to part-time workers who are not available for full-time work, again something that is illegal under Michigan law. The U. S. Department of Labor also wants to lower the trigger levels for Extended Benefits. These proposals alone, not including the Family Leave proposal, would have only one result. That is, increased taxes for Michigan employers who would, I am sure, rather have the money to expand their businesses, hire more workers, pay higher wages, than paying taxes into a Trust Fund that is already at record levels.

Employers are encouraged to maintain solvent state trust funds to guard against future downturns. Now comes a proposed use of state trust funds for purposes unrelated to the original intent of the program.

You and I are stewards for the federal/state program. How do we face employers and suggest that an experimental program will be initiated to address family leave situations and that individuals will not have to be able and available to qualify for these special benefits? How does that change really relate to the insurance protection of a program whose sole purpose is to provide an income bridge for someone who involuntarily becomes unemployed? While many people may feel that it is a laudable goal to provide for parental leave, how does providing Birth and Adoption benefits become a responsibility of the Unemployment Insurance system? If the goal is to provide a social benefit to parents and their children, where will it end? Isn't it just as appropriate to

provide benefits during leave time to care for a sick child, spouse or parent? That certainly strengthens the family. What about providing parental leave during the summer months, when children might be alone while they are on summer break? Isn't that also an important time to be with children and to strengthen family ties? These are all great ideas and the existence of the proposed wage replacement would certainly make it possible for more parents to be with their children and relatives. Even though this experimental program is voluntary, I believe the proposed changes seriously undermine the integrity of the Unemployment Insurance program.

As you know, the rationale for the federal/state Unemployment Insurance program as enacted by the Social Security Act of 1935 was to alleviate the financial hardships of unemployment by providing temporary wage replacement of lost wages. Benefit entitlement was established only for those who were involuntarily unemployed and genuinely attached to the labor market.

As proposed, this experimental program ignores the existing "able and available" requirements of the system and weakens its ability to effectively determine a claimant's attachment to the labor force while benefits are being paid. Although the Department acknowledges that there have been some situations in the past when it interpreted exceptions to the "able and available" requirement, this is the first instance where the Department proposes to ignore (reinterpret) this requirement and allow a person who *chooses* to be unemployed to receive unemployment benefits.

Consequently, the suggestion that the existing state balances be used in family leave situations abandons the fundamental concept that an individual must be attached to the labor market as a condition of receiving benefits. Such a proposal also brings into question why states should accumulate additional reserves if those balances are simply seen as a "cash cow" to be used for unrelated purposes.

This voluntary program would also present a unique problem for Michigan employers who strongly support our system of experience rating. In the unlikely event that the Michigan legislature was to endorse the proposed program, employers would lose the ability to control their costs (either through direct or socialized benefit charges). However, the potential costs on the state unemployment trust funds could be dramatic. For example, in 1998, 133,649 babies were born in Michigan. If 25% of the parents avail themselves of these benefits, the costs would exceed \$190 million per year (22% of our benefit expenditures last year). Those costs would skyrocket to \$572 million per year if 75% used these benefits (68% of Michigan's 1999 payouts) and, \$763 million per year (or, over 90% of our total payouts) if all parents used these benefits. (CHART ATTACHED)

The concepts inherent in the Unemployment Insurance system have survived for over sixty years - throughout periods of prolonged economic downturns, through periods of insolvency, and recently through periods of prolonged economic recovery and expansion. The proposal if fairly analyzed is patently unfair to employers and the working men and

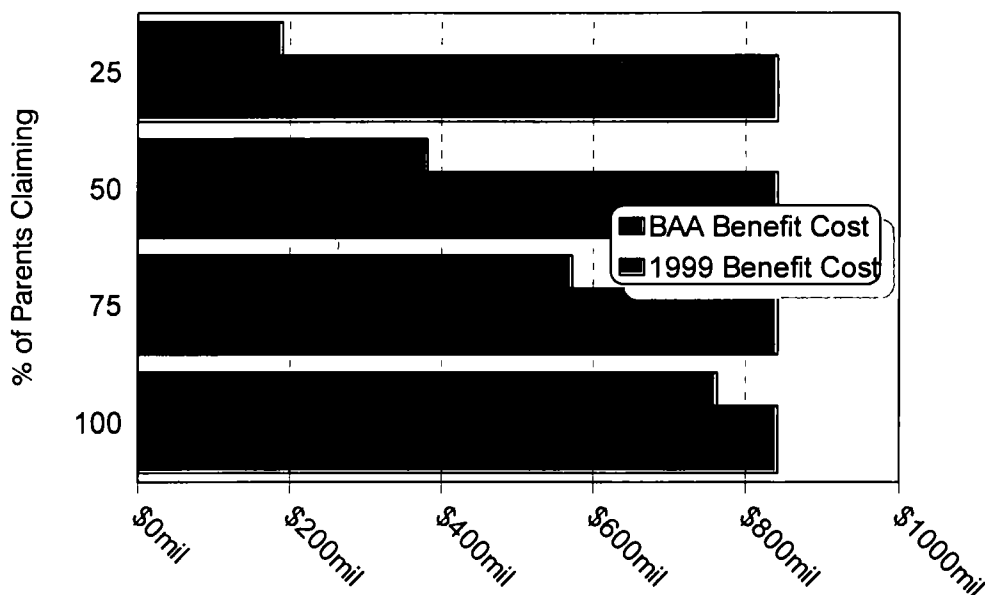
women of this nation. I believe that these proposed regulations will serve only to vitiate the system.

Clearly, the Unemployment Insurance system has one of the best, proven infrastructures to deliver benefits. However, I would suggest that the service delivery system is a completely different issue from the revenue source and I want to take this opportunity to reiterate that Michigan and I oppose using Unemployment Insurance funds to finance these benefits.

As this committee moves forward in your analysis and discussion of the issues relating to the Unemployment Insurance program, I would ask you to keep several points in mind. First, relating to your meeting last week, Michigan supports reform efforts as long as the changes will sustain the system throughout the full economic cycle. Second, as it relates to the Birth and Adoption benefits, please do not expand the scope of entitlement to include individuals who are not available and able to work. We must ensure that the integrity of this important self-financed program continues and is available to the involuntarily unemployed during the good times and the bad. Since the Birth and Adoption benefits would rely on existing state trust fund resources needed for future downturns, if the reserves are used now to expand the scope of the benefits, the basic concept of forward funding for the Unemployment Insurance program is compromised. If you choose to assist the parents of newborns and those who choose to adopt, then I would strongly ask this committee to identify an alternate source of funding.

I would be happy to answer any questions that you might have. Again, I thank you for the opportunity to share my views with you on this important matter.

Impact of Birth and Adoption Benefits on Michigan





Statement of the U.S. Chamber of Commerce

ON: TESTIMONY IN OPPOSITION TO THE DEPARTMENT OF
LABOR'S PROPOSED REGULATION ON BIRTH AND
ADOPTION UNEMPLOYMENT COMPENSATION

TO: SUBCOMMITTEE ON HUMAN RESOURCES OF THE
HOUSE WAYS AND MEANS COMMITTEE

BY: TODD L. SHIMKUS

DATE: MARCH 9, 2000

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 71 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of the number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—numbers more than 10,000 members. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 83 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. Currently, some 1,800 business people participate in this process.

* * * *

The North Central Massachusetts Chamber of Commerce is the region's leading economic development organization with more than 1,500 business members who employ in excess of 25,000 people in 14 local cities and towns. More than 70 percent of the Chamber's members employ between one and five employees with nearly 90 percent employing less than 10. The Chamber's membership includes service firms (30%), construction companies (15%), retailers (12%), and manufacturers (12%).

The North Central Massachusetts Chamber of Commerce's mission is to advance the economic development of the region by creating and sustaining relationships among businesses-and between businesses and the community. The Chamber also has several affiliate and subsidiary organizations including the Johnny Appleseed Trail Association which operates a regional visitor center; the North Central Massachusetts Development Corporation which facilitates a regional micro-loan program; the Chamber Foundation which provides scholarship assistance to area high school students; and the Executive Women's Network which has established a unique networking program to help area women entrepreneurs.

I. INTRODUCTION

Chairperson Johnson and Members of the Subcommittee, thank you for your kind invitation. I am pleased and honored to be here to testify on behalf of the U.S. Chamber of Commerce and the North Central Massachusetts Chamber of Commerce, where I am the Vice President. The U.S. Chamber of Commerce is a business federation representing more than three million businesses and organizations of every size, sector and region. In fact, our regional chamber of commerce, which has 1,500 businesses who employ in excess of 25,000 people in 14 local communities, is one of those regional organizations.

As a representative of employers in the Commonwealth of Massachusetts, a State considered by proponents and opponents alike as one of the most likely testing centers for this "experiment," I am here today to emphatically state our opposition to the BAA-UC initiative to divert unemployment compensation funds to employees on parental leave because it is unsound public policy. At the same time, we are convinced that the rulemaking process being used to enact this "experiment", as the Department of Labor has called this initiative (64 Fed. Reg. 67974), is entirely inappropriate and unlawful. In particular, we find this "experiment" to be too costly, potentially divisive within communities, and a threat to jobless workers and employers who have been protected by law and the actions of the Congress for the past 65 years.

II. BAA-UC: AN UNWISE SOCIAL POLICY EXPERIMENT

In 1998, our regional Chamber was the only business organization in Massachusetts to support an initiative calling for the bifurcation of our state's unemployment insurance trust fund in order to provide a limited amount of dollars, \$18 million annually, for incumbent worker training. In fact, it was our Chamber's Plastics Council that first suggested to State Senate President Birmingham, the bill's sponsor at a breakfast one year earlier, that such an initiative be launched.

While some may suggest that this initiative itself demonstrates that states deserve wide latitude with respect to the use of their trust funds, I want you to understand that our regional chamber views the BAA-UC initiative in a far different light. Our support for the Massachusetts Workforce Training Fund was predicated on our belief that the best way to expand economic opportunity is through improving the skills of existing employees and their employer's aggregate innovation capacity. With 98 percent of all state training funds directed towards those on welfare or unemployed prior to 1999, we remain confident that our ability to expand economic opportunity in Massachusetts is being enhanced by this infusion of new public funds to encourage new private investment for incumbent worker training.

The North Central Massachusetts Chamber's support for the Workforce Training Fund initiative was further predicated on our belief that these new private and public investments will protect the long-term solvency of the UI trust fund. In other words, improving the skills of existing employees will initially help their companies to succeed, grow and thrive, thereby, decreasing the potential that these companies will fail and need to involuntarily lay-off their employees. Should such innovation fail to prevent employees from being involuntarily laid-off, it is our expectation that the skills these employees acquired through this investment in training will provide them with a new set of marketable employment qualifications so as to further reduce the amount of time they will need UI benefits.

The BAA-UC experiment is not a reasonable or prudent corollary to this already successful initiative. While some proponents of BAA-UC may argue that paid FMLA benefits using UI trust funds is similar because it might improve employee morale or help a company to retain skilled employees, it fails to meet the second key component that gave our regional members the confidence to support the bifurcation of Massachusetts' UI trust funds. Specifically, the diversion of UI trust funds to provide paid family leave will not improve either the employment skills of those employees or the aggregate innovation capacity of their employers. Furthermore, this diversion of funds does not result in employee promotions or wage and benefit increases, as the successful completion of training programs often does. Nor will such a diversion of funds reduce the amount of time UI benefits will need to be paid to an employee facing an involuntary lay-off.

To make matters much worse, this experiment will cost a great deal more than its proponents have calculated. According to the Massachusetts Division of Employment and Training, implementing the BAA-UC experiment in our state will divert at least \$200 million, about seven times as much as the DOL estimates, in unemployment benefits from those who are involuntarily laid-off to provide employees (regardless of income) with partial wage replacement while they take leave following the birth or adoption of a child.

With respect to the real cost of BAA-UC, I want to emphasize that this experiment is too expensive even in these "good" times. As those of us on the front lines of community economic development understand, while the technology sector may be booming and the Internet is creating new opportunities never before dreamed possible, our more mature industries continue to face significant challenges. From traditional manufacturers to downtown retail stores, our local business environment and community in general is at a crossroads. While the stock market may continue to soar, it is these small employers, the ones who are an integral part of our region's quality of life, who are in harms way as the economy "as we know it" transforms.

In this environment, it is clearly rational for employers and business organizations, such as the U. S. Chamber and our regional Chamber, to both oppose the BAA-UC experiment and to support UI tax rate reductions. On the one hand, the \$1.8 billion balance in our state's trust fund is sufficient to provide some support to these traditional employers by allowing for a \$90 million tax reduction effective January 1, 2001. At the same time, the \$200 million annual cost of diverting UI funds for a new social experiment far outweighs the benefits to these small to mid-size employers and their employees.

What troubles us even more is that the BAA-UC experiment, if it does dramatically reduce UI trust funds in states like Massachusetts, will end up placing out-of-work Americans in direct competition for UI benefits with their more economically secure neighbors who have jobs and want the benefit of partial wage replacement while they take voluntary leave. There is an old saying: "If it ain't broke, don't fix it." Well, we have 65 years of proof that, while not perfect, the Unemployment Compensation system works. The BAA-UC experiment is entirely inconsistent with this 65 years of experience. The BAA-UC experiment is too costly, has great potential to be divisive and is a real threat to the economic well being of employees and employers. Therefore, the diversion of UI trust funds to pay employees on parental leave is unsound public policy.

III. BAA-UC: THE RULEMAKING PROCESS IS UNLAWFUL AND INAPPROPRIATE

Before I cite the numerous legal principles circumvented by the BAA-UC experiment, I feel compelled to offer my sincere gratitude to Chairperson Johnson and the Subcommittee for the opportunity to voice our members' concerns in a public forum. It is important to note that the use of the rulemaking process has precluded Congressional deliberation on this important issue. Furthermore, the repeated calls from numerous organizations both inside and outside of the Beltway for field hearings has been ignored by the Department of Labor. Noting the potential cost and divisive consequences of this experiment, the use of the rulemaking process is inappropriate because of the lack of public deliberation and debate in those regions of the country, like North Central Massachusetts, where because of unique community economic circumstances, this experiment may do far more harm than good!

The Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq.(FUTA), requires state programs to satisfy certain minimum criteria. One of the fundamental requirements imposed by federal law is that money made available through this system be used solely for the payment of "unemployment compensation." FUTA, 26 U.S.C. §3304(a). Under these circumstances, the term "unemployment" has acquired a well-established and understood meaning which requires that all unemployment compensation claimants be (1) without a job; (2) able and available to work; and (3) unemployed involuntarily, (which normally includes the requirement that claimants be actively seeking work).

The proposed regulations cannot be reconciled with these requirements. BAA-UC explicitly proposes to provide payments of unemployment compensation to employees who have jobs but are simply taking temporary parental leave, who are not available for work and who left their jobs voluntarily

but are not seeking work. This regulation effectively strips “unemployment” from unemployment compensation. The legislative intent here is clear—Congress has not delegated the authority to the Department of Labor to carve out exceptions to the fundamental requirements of joblessness, availability, and involuntariness imposed on state UC programs, where those exceptions are directly contrary to Federal unemployment compensation law.

The proposed regulations boldly acknowledge that BAA-UC is designed to “provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child” (64 Fed. Reg. 67972). As the U.S. Chamber of Commerce established in its written comments opposing BAA-UC, submitted to the Department of Labor on February 2, 2000,* this objective is wholly incompatible with the purpose of unemployment compensation, and the requirements of joblessness, availability, and involuntariness which are intended to prevent the diversion of UC funds for other governmental experiments and purposes. Moreover, this frank admission of intent demonstrates that the BAA-UC stands as a direct challenge to Congressional judgment and intent.

Thus, in enacting the Family and Medical Leave Act of 1993, Congress considered whether family leave should be paid or unpaid and expressly provided that, as regulated by the Federal government, the right to leave “because of the birth of a son or daughter” (29 U.S.C. §2612 (a)(1)(A)) should be unpaid (29 U.S.C. §2612(c)(d)). Accordingly, the BAA-UC, which authorizes states to pay parents on parental leave out of unemployment compensation funds, is an impermissible attempt to make an end-run around the considered judgment and authority of Congress.

Lastly, our regional Chamber understands from experience just how limiting the existing Federal law can be with respect to Unemployment Compensation. As I mentioned earlier, we supported the use of a limited amount of the UI trust fund balance for worker training. Yet, Federal law did NOT allow Massachusetts to simply divert funds for even this directly work-related purpose. In order to establish the Massachusetts’ Workforce Training Fund, the legislation we supported established a new surcharge on employer UI taxes. This surcharge, in fact, provided the \$18 million that is annually placed into a separate fund for the training purposes set forth in the state legislation.

With this in mind, we are confident that, based on law and our own experience, the Department of Labor’s use of the rulemaking process in this case is both inappropriate and unlawful. By using the rulemaking process to implement the BAA-UC experiment, the Department of Labor is seeking to circumvent both Congressional intent and a full public debate on the merits and costs of this experiment. Moreover, the BAA-UC experiment ignores a volume of evidence which suggests that such a diversion of funds may jeopardize the “security blanket” for the unemployed and pit the unemployed against their more fortunate neighbors who have a job but voluntarily choose to take parental leave.

IV. CONCLUSION

For the foregoing reasons, the U.S. Chamber of Commerce and the North Central Massachusetts Chamber of Commerce strongly oppose the BAA-UC initiative and urge the Congress to take all appropriate action to protect employees and employers from the implementation of this costly, divisive and inappropriately implemented “experiment.”

* Excerpts from the Comments of the U.S. Chamber of Commerce are attached hereto as Exhibit #1

U.S. Chamber of Commerce

Washington, D.C. 20062-2000

[Excerpts from letter to Grace Kilbane, Director of Unemployment Insurance Service, U.S. Department of Labor, from U.S. Chamber of Commerce, February 2, 2000]

Re: Proposed Regulations on Birth and Adoption Unemployment Compensation

The U.S. Chamber of Commerce (the Chamber) submits the following comments in opposition to the Department of Labor's (DOL) proposed regulation on Birth and Adoption Unemployment Compensation (BAA-UC) published in the Federal Register at 64 Fed. Reg. 67972 et seq. on December 3, 1999.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The BAA-UC rule authorizes states to divert unemployment compensation funds to parents, for up to 12 to 26 weeks or more, who voluntarily take leave from work or quit their jobs in order to be with a newborn or newly adopted child. This proposal will have a substantial, detrimental impact on our members, who will be forced to pay for BAA-UC benefits through higher payroll taxes.

REASONS WHY THE BAA-UC PROPOSED RULE SHOULD BE WITHDRAWN

It is both unlawful and bad public policy to divert unemployment compensation (UC) funds to employees on parental leave. Federal law has protected jobless workers and employers for over 65 years by assuring that state unemployment trust funds are used for the **sole purpose** of paying **unemployment** compensation. DOL's proposed regulation will change the fundamental purpose and nature of the UC program, the **safety net for jobless workers**, by allowing the expenditure of state unemployment trust funds for the entirely unrelated purpose of compensating employed workers who take parental leave. Their proposal to convert parental leave to paid status using UC funds also contravenes Congressional judgement, expressed in the Family and Medical Leave Act, that such leave be unpaid. In addition, BAA-UC undermines the stability of the unemployment compensation system by imposing staggering new liabilities of up to **\$36 billion** or more per year on a fragile, under-funded unemployment compensation system.

I. FEDERAL UNEMPLOYMENT COMPENSATION LAW PRECLUDES DOL's ADOPTION OF THE PROPOSED BAA-UC REGULATIONS*

Unemployment insurance in each of the 50 states is provided through a cooperative federal-state arrangement in which a federally-collected tax is used to finance state UC programs that meet federal requirements. Although federal law allows states wide latitude in the administration of the unemployment compensation system, it does prohibit states from "depart[ing] from those standards which, in the

* A fuller development of this position is found in the comments filed by LPA, Inc., which the Chamber hereby adopts and incorporates herein.

judgement of Congress, are to be ranked as fundamental.” *Steward Machine Co. v. Davis*, 301 U.S. 548, 594 (1937). Thus, the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq. (FUTA), requires state programs to satisfy certain minimum criteria “designed to give assurance that the state unemployment compensation law shall be one in substance as well as name.” 301 U.S. at 575.

One of the fundamental requirements imposed by federal law is that money made available through this system be used **solely** for the payment of “unemployment compensation.” FUTA, 26 U.S.C. § 3304 (a). This principle is so deeply embedded in the federal-state relationship that Federal law prohibits the use of state trust funds even for the directly related purpose of financing the administrative cost of providing unemployment benefits. Under these circumstances, the term “unemployment” has acquired a well-established and understood meaning: namely, that all unemployment compensation claimants be (1) without a job; (2) able and available to work; and (3) unemployed involuntarily, which normally includes the requirement that claimants be actively seeking work.

The proposed regulations cannot be reconciled with these requirements. BAA-UC explicitly proposes to provide payments of unemployment compensation to employees who have jobs but are simply taking temporary parental leave, who are not available for work and who left their jobs voluntarily but are not seeking work. Indeed, the Model State Legislation included in the Notice of Proposed Rulemaking would preclude the application of the joblessness, availability, and involuntariness requirements to BAA-UC claimants, thereby stripping “unemployment” from unemployment compensation. Moreover, DOL’s prior treatment of areas such as temporary layoffs, illness, jury duty, and training do not provide any justification for its attempt in the proposed regulation to turn the unemployment requirement upside down. An agency’s authority to interpret the statute it administers is not unlimited. It does not permit any agency to “disregard legislative direction in the statutory scheme(s) that the agency administers.” *Heckler v. Chaney*, 470 U.S. 821 833 (1985). Moreover, where “Congress has directly spoken to the precise question at issue..., that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (fn. omitted). The legislative intent here is clear—Congress has not delegated the authority to the DOL to carve out exceptions to the fundamental requirements of joblessness, availability, and involuntariness imposed on state UC programs, where those exceptions are antithetical to Federal unemployment compensation law.

Far from attempting the impossible—reconciling the regulation with the joblessness, availability, and involuntariness requirements—the proposed rule effectively acknowledges that the BAA-UC does not satisfy these requirements. Thus, the Model State Legislation accompanying the BAA-UC provides that individuals on birth or adoption leave shall not be denied unemployment compensation based upon the “availability of work”, the “inability to work”, or the “failure to actively seek work.” 64 Fed. Reg. 67977. Such state legislation is necessary because the proposed payment of unemployment compensation to individuals on birth and adoption leave conflicts with all three aspects of unemployment.

A. The BAA-UC is Incompatible with the Jobless Requirement

In construing a statute, a Federal agency normally “‘look(s) first to its language,’ ... ‘giving the words used their ordinary meaning.’” *Moskal v. U.S.*, 498 U.S. 103, 108 (1990), quoting *U.S. v. Turkette*, 452 U.S. 576, 580 (1981); *Richards v. U.S.*, 369 U.S. 1, 9 (1962). In ordinary, everyday usage, the term “unemployment” indicates a state in which one is without a job. Thus, it is clear that, when FUTA refers to “unemployment compensation,” it is referring to persons who are without a job.

A parent on BAA-UC leave has a job at the outset of the leave and is guaranteed to have a job at its conclusion. The proposed regulations authorize states to pay unemployment compensation to “parents on approved leave.” Approved leave is defined as a “specific period of time, agreed to by both the employee and the employer, during which an employee is temporarily separated from employment after which the employee will return to work for that employer.” 64 Fed. Reg. 67976-77. Thus, the proposed regulations contemplate payment of unemployment compensation to persons who “will return to the last employer after a designated period.” 64 Fed. Reg. 67975.

Such a payment cannot be reconciled with the requirement that the unemployment funds be “used solely in the payment of unemployment compensation.” FUTA 26 U.S.C. § 3304 (a)(4). Persons who are temporarily absent from their employment are not jobless and, hence, are not “unemployed.” Employees routinely take time off from their employment for vacations, jury duty, illness, and family matters. These individuals are not without a job and, therefore, are not eligible to receive unemployment compensation. The proposed regulations cite no authority for the proposition that parents or other persons who take approved leave are “unemployed.” Indeed, to characterize such persons as unemployed would mean that all individuals who are absent from work for any reason are unemployed as well.

The DOL notes that unemployment compensation has been paid to persons who are “temporarily laid off” because of lack of work and who have an expectation that they will be rehired. *See* 64 Fed. Reg. 67973. However, those on temporary layoff, do not have a job. At best, such persons have an expectation, and in some cases, a contractual right, to a job if work becomes available in the future. Teachers during the months between school years, and athletes in the off-season are in a position more analogous to individuals taking birth or adoption leave. They have a job but are simply not working for a period. FUTA, however, specifically bars teachers and athletes in such circumstances from claiming unemployment. *See* 26 U.S.C. §§3304(a)(6)(A), 3304(a)(13). Thus, these situations offer no indication that Congress wished to provide unemployment compensation to persons who have jobs but take temporary leave from them for personal reasons.

B. The BAA-UC is Incompatible with the “Able and Available” Requirement

Joblessness alone does not capture all aspects of the status of “unemployment” under FUTA. As the proposed regulations acknowledge, one well-recognized aspect of the status of unemployment under FUTA is the requirement that a person be “able and available” for employment. *See* 64 Fed. Reg. 67972. Thus, the status of “unemployment” implies not only that a person is out of work but also that the individual is available for work (except for temporary illness). It is also implicit in the requirement that persons who are “unemployed” actively seek work.

The able-and-available requirement is reflected in other FUTA provisions as well. For example, FUTA Section 3304(a)(8) prohibits states from denying compensation to otherwise eligible individuals who are participating in a state-approved training program. *See* 26 U.S.C. § 3304(a)(8). This provision states that compensation shall not be denied “because of the application, to any such week in training, of state law provisions relating to availability for work...or refusal to accept work.” *Id.* Obviously, this exemption assumes the existence of an availability requirement because, without such a requirement, there would be no need for an exemption.

FUTA also requires that unemployment compensation be “paid through public employment offices” FUTA, 26 U.S.C. § 3304(a)(1). As the purpose of such offices is to find people jobs, this provision ties the payment of unemployment compensation to that individual’s availability for work. *See* 64 Fed. Reg. 67972. Thus, the statutory context confirms that, for purposes of FUTA, the availability of an individual for work is an integral part of the status of unemployment.

The cornerstone to ensuring that UC trust funds will only be paid to those involuntarily unemployed but seeking new employment, is the well-established requirement that recipients be **available** for work. Clearly, employees voluntarily taking parental leave are **not available**, fail to satisfy the second requirement for unemployment, and, therefore, should be barred from receiving UC benefits. Given the decision of a parent to leave work and devote time to a newborn or newly adopted child, the parent is clearly not available for work during the leave period. The parental leave proposal acknowledges as much by noting that BAA-UC claimants are parents who “wish to take approved leave” and by including in the definition of “approved leave” the fact that claimants are “**temporarily** separated from employment.” 64 Fed. Reg. 67972, 67974 (emphasis added). It is also telling that the proposed regulations do not require BAA-UC claimants to register with the public employment offices. Thus, the proposed regulations clearly conflict with the requirement that unemployment compensation claimants be “available” for work and remain attached to the labor force in accordance with the fundamental purposes of the UC statutes.

C. The BAA-UC is Incompatible with the Involuntariness Requirement

The final requirement of the tripartite rule governing the status of "unemployment" is involuntariness, which is the requirement that an individual be seeking work. Most unemployment compensation laws also disqualify individuals from receiving unemployment benefits when they leave their employment voluntarily without good cause attributable to their work. *See, e.g., Wimberly v. Lab. and Indus. Rel. Comm'n of Missouri*, 479 U.S. 511, 515 (1987) (Employee who left her job due to pregnancy properly denied UC benefits). This aspect of the status of unemployment reflects common usage. The context in which the term unemployment appears in FUTA makes it clear that the term is being used in this involuntary sense. For example, as noted above, FUTA requires unemployment compensation to be paid through public employment offices. As the proposed rule recognizes, because the purpose of such offices is to find people jobs, this requirement "ties the payment of UC to an individual's search for employment." The provision prohibiting states from denying compensation to otherwise eligible individuals involved in job training programs because of state law provisions "relating to...active search for work" further illustrates the linkage between the UC payments and the pursuit of employment. FUTA, 26 U.S.C. § 3304(a)(8). Just as the exemption for provisions relating to availability for work indicated that "availability" is an aspect of unemployment under FUTA, the exemption for provisions relating to the active search for work confirms that involuntariness is an aspect as well.

Individuals who exercise the option to elect a temporary parental leave from their existing jobs are not "involuntarily" out of work. Hence, employees on parental leave fail to meet the third eligibility criteria as well. The proposed regulations establish that, since the employee will return to employment at the end of the leave, the employee will not actively be seeking new or other work during the leave period. *See* 64 Fed. Reg. 67975 ("The term 'leave' implies that the individual will return to the last employer after a designated period."). Finally, the comments to the proposed Model State Legislation underscore this fact by providing that BAA-UC recipients "cannot meet the systemic and sustained work search requirement" relating to the 1970 amendments to FUTA. 64 Fed. Reg. 67979.

II. THE PROPOSED REGULATIONS IMPERMISSIBLY UNDERMINE CONGRESSIONAL INTENT EMBODIED IN THE FAMILY AND MEDICAL LEAVE ACT

The proposed regulations boldly acknowledge that BAA-UC is designed to "provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child." 64 Fed. Reg. 67972; *see also*, commentary on Model State Legislation, 64 Fed. Reg. 67978. As the Chamber established above, this objective is wholly incompatible with the purpose of unemployment compensation and the requirements of joblessness, availability, and involuntariness which are intended to prevent the diversion of UC funds to other governmental purposes. Moreover, this frank admission of intent to use UC funds to pay for parental leave demonstrates that the proposed regulation is a direct challenge to Congressional judgement and intent. Thus, in enacting the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq. (FMLA), Congress considered whether family leave should be paid or unpaid and expressly provided that, as regulated by the Federal government, the right to leave "because of the birth of a son or daughter" (29 U.S.C. § 2612(a)(1)(A)), should be **unpaid**. 29 U.S.C. § 2612(c)(d). Accordingly, the BAA-UC, which authorizes states to pay parents on parental leave out of unemployment compensation funds, is an impermissible attempt to make an end-run around the considered judgement and authority of Congress.

III. THE PROPOSED REGULATIONS UNDERMINE THE STABILITY OF THE UC SYSTEM AND JEOPARDIZE THE SECURITY OF THE UNEMPLOYED WHO RELY UPON THE UC SAFETY NET

The BAA-UC proposal also jeopardizes the stability of the UC system. In the last recession, more than 25 states depleted their UC reserves and had to borrow from the federal government. DOL's own statistics show that if another similar recession hits, states will need to borrow an additional \$25 billion. In spite of this, DOL now advocates (through the proposed regulations) that states expand access to UC, a

policy which is at cross-purposes with DOL's solvency objective and its goal of expanded access to legitimate UC claims.

By DOL standards, the trust funds of some 20 states are currently under-funded, and the combined funds of all states fail to satisfy DOL's solvency rating. *UI Data Summary, Unemployment Insurance Service, U.S. Department of Labor, June 1999 (Data Summary)*. The proposed rule would exacerbate this serious problem by piggy-backing parental leave benefits on a financially precarious UC system.

The potential costs of parental leave benefits are not inconsequential. Contrary to DOL's maximum estimated cost of \$68 million for BAA-UC implementation, it cannot be assumed that only a few states will adopt the proposed regulation. All 50 states are invited to embrace these regulations providing paid parental leave from UC funds, and the possibility that all 50 states will adopt the proposed regulation must be considered in determining the potential negative financial impact on the UC system. On this premise, and given the average benefit per claimant of \$200 per week (*Data Summary, September 1999*), a 12-week benefit pay out as contemplated by the Model State Legislation (64 Fed. Reg. 67977), experience rating and other factors costing 25 percent or some \$600 per claim, and DOL's projection of 6 million potential new claimants each year, the drain on the nation-wide UC system could be **\$18 billion** per year. This amounts to about 60% of the regular benefits paid to truly unemployed workers in 1999. Moreover, since states are free to establish the length of the benefit period under the proposed regulation, it seems likely that all or many would treat unemployed claimants and BAA-UC claimants the same and provide payments to both for 26 weeks. This could increase the cost of BAA-UC claims to **\$36 billion** and consume 80% of current UC reserves. Moreover, this \$36 billion is nearly twice the annual revenue flowing into the state UC trust funds. Under these circumstances, UC trust funds would be quickly drained unless substantial new taxes were imposed on business.

Without question, the magnitude of increased taxes required to satisfy both unemployment and parental leave claims, particularly in the context of a future recession with an increase of 200-300 percent in unemployed claimants, would place an unconscionable burden on all employers and, particularly, small businesses. Rather than further burdening employers with new payroll taxes, Federal and state governments should be easing taxes on business and encouraging the building of reserves for periods of economic hardship. Alternatively, in the absence of overbearing tax increases, payments to BAA-UC claimants are likely to dissipate UC funds beyond the minimum necessary to pay the claims of those unemployed but available for work—those for whom these benefits were created and intended. Both alternatives are unsatisfactory.

Finally, small business is likely to be disproportionately impacted by diversion of UC funds to those on parental leave, regardless of whether or to what extent new taxes are imposed. Since the proposed regulation deals only with the payment of UC funds to employees on BAA-UC leave, and not with the right to take leave in the first place, most employees are expected to establish their right to leave under the FMLA. The DOL clearly contemplated this as well in fashioning Model State Legislation based upon a leave period of 12 weeks. Compare 29 U.S.C. § 2612(a)(1) with 64 Fed. Reg. 67977. However, the FMLA only covers employees of businesses with 50 or more workers. 29 U.S.C. § 2611(4)(A)(i). For this reason, employees of small businesses are far less likely to secure parental leave; hence, the UC contributions of small employers applied to BAA-UC will be disproportionately diverted to employees of larger companies rather than evenly distributed without regard for employer size. This disparate impact in the application of UC funds under the BAA-UC is blatantly unfair to small business and constitutes equitable grounds for withdrawing the proposed regulation.

CONCLUSION

It is hardly coincidental that in the 65 years since the unemployment compensation system was adopted, stringent requirements have developed to govern qualification for UC benefits. Strict limitations on the use of unemployment trust funds is necessary to counter political pressure to use these funds for other governmental purposes. Those limitations embodied in FUTA require claimants to satisfy the following criteria: (1) be without a job; (2) be able to and available for work; and (3) be involuntarily unemployed.

The BAA-UC satisfies none of these FUTA-required criteria. Thus, a claimant on parental leave (1) has a job guaranteed by law, contract, or through arrangement with the employer; (2) is on leave from the job, not out of a job and searching for other employment; and (3) is temporarily away from the job by choice, rather than by direction of the employer. Hence, it should be beyond dispute that paid parental leave does not qualify as unemployment within the meaning of FUTA and related laws and decisions.

Moreover, the BAA-UC oversteps permissible bounds by attempting to create paid leave for parents of newborns and newly adopted children in the face of Congress' determination under the Family and Medical Leave Act to limit parental leave to unpaid leave.

In addition, the BAA-UC proposal undermines the stability of the unemployment compensation system and jeopardizes the UC safety net for jobless workers by imposing potentially staggering new liabilities upon a fragile, under-funded unemployment compensation system.

Finally, the timing of the BAA-UC, and time frame for comments thereon, necessarily discouraged public responses at the state, local, and Congressional levels. The initial 45-day comment period from December 3, 1999 to January 18, 2000 fell within a Congressional adjournment, and the period was too short—particularly in view of the intervening holidays—to permit meaningful grassroots comment. The subsequent 15-day extension did not cure these defects. Hence, a further extension should be granted to allow hearings at several locations throughout the country in order to ensure that state and local officials, individual employees, and employers have an adequate opportunity to comment on the proposed regulation.

REQUEST FOR RELIEF

For all of the reasons discussed above, the proposed BAA-UC regulation is contrary to law, represents unsound public policy, and should be withdrawn. Due to the abbreviated comment period, the Chamber requests that hearings in several diverse locations be held to permit greater participation in the BAA-UC process at state and local levels, and the Chamber reserves the right to supplement these comments at a later date if additional relevant information comes to our attention.

Respectfully submitted,

U.S. CHAMBER OF COMMERCE

Statement of

Maurice Emsellem
National Employment Law Project

Unemployment Compensation
and the Family & Medical Leave Act

Hearing before the
Subcommittee on Human Resources
Committee on Ways & Means

U.S. House of Representatives

March 9, 2000

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**Statement of Maurice Emsellem
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**Hearing before the Subcommittee on Human Resources
Committee on Ways & Means, U.S. House of Representatives
March 9, 2000**

Good morning, Madam Chairman and members of the Committee. My name is Maurice Emsellem, and I am Director of Public Policy with the National Employment Law Project. Thank you for this opportunity to testify in support of the Administration's action, proposing regulations that authorize the states to provide eligible workers with unemployment benefits while caring for a newborn or newly-adopted child. For the reasons described below, we believe that the proposed regulations represent sound public policy and a critical step forward in the evolution of the unemployment compensation (UC) system.

The National Employment Law Project (NELP) is a non-profit organization that specializes in the unemployment compensation system, the Family & Medical Leave Act of 1993 (FMLA), and other employment laws that are of particular concern to the working poor. We provide technical assistance to state lawmakers and advocates in support of reforms of the UC system. We have published extensively on the unemployment system, including several scholarly articles, a popular resource guide entitled *Women, Low-Wage Workers and the Unemployment Compensation System: State Legislative Models for Change* (Revised 1997), and a recent state report co-authored with the Institute for Women's Policy Research (IWPR) entitled, *The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time & Women Workers* (February 1999). We are also working with policy-makers in the states as they develop legislation to establish Birth and Adoption, Unemployment Compensation (BAA-UC) programs.

In today's testimony, I will address the following key issues related to the BAA-UC initiative.

1. The BAA-UC initiative is part of a growing movement in the states to expand access to the unemployment system to meet the needs of the changing workforce.
2. BAA-UC advances the goals of the unemployment program to increase attachment to the labor market, especially for low-wage working families.
3. State unemployment laws cover workers who are temporarily separated from their jobs for family reasons and many other circumstances not strictly limited to coverage of the "involuntarily unemployed".
4. As set forth in the proposed regulations, the federal unemployment laws do not preempt the states from enacting BAA-UC programs.
5. With the sustained low unemployment rate, state trust funds are well-equipped to

support UC eligibility expansions, including the BAA-UC program.

6. State trust funds are building despite dramatic cuts in UC taxes.

- **The BAA-UC initiative is part of a growing movement in the states to expand access to the unemployment system to meet the needs of the changing workforce**

Over the past several decades, access to the unemployment system has declined to unacceptably low levels due largely to the failure of the program to keep pace with the changing needs of today's workforce. Nationally, the proportion of the unemployed receiving unemployment benefits has dropped from an average of 49% in the 1950s, and over 75% during the 1974-75 recession, to just 35% in the 1990s. As documented by the Advisory Council on Unemployment Compensation and the National Commission on Employment Policy, low-wage, part-time and women workers are the hardest hit by this lack of access to the UC system. The Texas study authored by NELP and IWPR illustrates how these negative trends impact individual groups of workers at the state level. In Texas, only 21% of unemployed women workers received UC. 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.

As a result of these conditions and the vast growth in state trust funds caused by the low unemployment rate, a movement has taken hold to expand access to the unemployment program. Just in the past few years, states as politically diverse as Wisconsin, California, New Hampshire, Florida, Massachusetts, Georgia, Washington, North Carolina, New Jersey and Connecticut, have enacted or are now actively debating broad reforms specifically intended to reach more low-wage and women workers.¹ For example, Governor Thompson of Wisconsin recently signed a comprehensive package of UC reforms that included the "movable base period," broader coverage for workers who leave their jobs due to a wide range of family circumstances, and the creation of a study commission to consider options to expand UC for part-time workers.

The BAA-UC initiative, now being considered in eight states (Connecticut, Illinois, Indiana, Maryland, Massachusetts, New Jersey, Vermont, Washington), is part of this growing movement to make the unemployment system more accessible to low-wage and women workers. Although not without its critics, the BAA-UC initiative has successfully generated an unprecedented public debate that has begun to address the many misperceptions about the

¹ See, e.g., "Jobless Insurance Ready to Take Friendly Turn," *Milwaukee Journal Sentinel*, October 24, 1999; "Labor Seeks to Broaden Unemployment Eligibility," *The Wall Street Journal (Florida Edition)*, June 3, 1998; "Texas Ranks Low in Benefits for the Unemployed," *Dallas Morning News*, April 14, 1999; "Safety Net Repair: Hole in Jobless Benefits Needs Mending," *The Sacramento Bee*, September 25, 1997; "Revamping Jobless Benefits Could Ease Welfare Burden," *The Sacramento Bee*, September 7, 1998.

limits of the unemployment program and spark discussion about the need for reform.² Today's hearing provides another critical opportunity to publicize the need to reform the UC system to keep pace with today's workers, and the opportunities to enact BAA-UC programs consistent with the purposes of the federal unemployment laws.

- **BAA-UC advances the goals of the unemployment program to increase attachment to the labor market, especially for low-wage working families**

As stated in the proposed regulations, the goal of the BAA-UC program is to "help employees maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work." 64 Fed. Reg. at 67974. The Labor Department's position is supported by the legislative history of the Social Security Act of 1935, reflected in the statement in the Senate Report emphasizing that unemployment benefits "should encourage the *regularization of employment*." S. Rep. No. 628, 74th Cong., 1st Sess. 16 (1935) (emphasis added).³

As described in President Clinton's speech on May 23, 1999 announcing the BAA-UC initiative, large numbers of working families cannot take advantage of the 12 weeks of job-protected leave provided by FMLA because they do not have the financial means to support their families while on unpaid leave. As the report of the Commission on Family and Medical Leave found, 64% of those who wanted to take advantage of FMLA could not because the leave was unpaid. The absence of paid family leave has had a devastating impact on low-income families in particular. For example, 21% of those families with incomes of less than \$20,000 a year reported having to resort to public assistance given the absence of paid leave. The benefits provided by BAA-UC will thus help keep these low-income families who sought to take family and medical leave from losing their attachment to the labor market and falling into poverty. See *California Dept. of Human Develop. v. Java*, 402 U.S. 121, 132 (1974) (unemployment benefits are necessary to "maintain the recipient at subsistence levels, without the necessity of his turning to welfare or private charity.").

² For example, a *New York Times* editorial ("Paid Leave for Parents," dated December 1, 1999) supported the proposed BAA-UC regulations stating that, "Although unemployment insurance is traditionally seen as helping only those who have been involuntarily laid off and immediately available for work, many states have granted benefits to workers who are not in that narrow category."

³ Saul Blaustein, in his treatise on the history of the UI system, also emphasizes the key role that unemployment benefits play in maintaining a skilled and productive workforce. According to Blaustein, "The compensation tends to preserve the workforce intact, with its particular skills, training, and experience, until it can be recalled While this support of workforce retention may somewhat restrict the mobility of labor, it is of value to the employer, as well as to the worker and the community." Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century* (W.E. Upjohn Institute: 1993), at 63.

In fact, years of research in the United States and abroad demonstrates empirically the value of family leave policies to workers and their employers. According to Professor Janet C. Gornick, an expert in family leave policies in Europe and the United States, "paid family leave benefits for new parents strengthen women's labor market attachment, in both the short-and long-term."⁴ Specifically, the studies show that access to maternity benefits is strongly associated with new mothers' probability of returning to work within six months of giving birth. Women with access to paid leave were also found to work later into pregnancy and to start working sooner once the infant was at least two months old. In addition, Canada has successfully offered family leave benefits through its unemployment system for many years, covering qualified employees unable to work "due to maternity" (since 1971) and "due to parental caring" (since 1990).

The BAA-UC program thus represents a logical next step in the evolution of the UC system to accommodate the changing circumstances of today's working families. As documented by the successful Canadian experience and the empirical research on paid family leave policies, the BAA-UC program will reap significant benefits for workers, their families and employers thereby serving the essential goals of the unemployment system.

- **State unemployment laws cover workers who are temporarily separated from their jobs for family reasons and many other circumstances not strictly limited to coverage of the "involuntarily unemployed"**

The "involuntarily unemployed" is a phrase that has been relied upon often in this debate in an effort to distinguish BAA-UC recipients from all other claimants who collect unemployment benefits. For the purpose of this hearing, therefore, it is appropriate to explore whether it is true that only the "involuntarily unemployed" are entitled to unemployment benefits. Thus, is it accurate to portray BAA-UC recipients as somehow "pitted" against all other UC claimants? In our view, the phrase "involuntarily unemployed" does not accurately characterize all workers who are covered by today's state unemployment laws. Nor should it, as this narrow statement of the purposes of the unemployment program represents a substantial step backward in the evolution of state UC programs as they develop the flexibility to serve the changing needs of today's workforce.

While the phrase "involuntarily unemployed" is not found anywhere in the federal unemployment laws, it is mentioned in the Senate Report accompanying the Social Security Act of 1935. Putting aside the legal arguments for the moment, we'll explore how this phrase has been applied in actual state practice. This is an important exercise to clarify that the unemployment laws are open to interpretation by the states and that narrow terms do not capture the broad range of state unemployment policies that have been established to respond to the everyday needs of workers, employers, and the labor market more generally. It is also important to correct any public misperceptions about the scope of the unemployment

⁴ Letter of Professor Gornick submitted in support of the BAA-UC regulations, dated January 14, 2000.

program. Otherwise, fewer workers who now qualify for unemployment benefits will actually apply for benefits, thus contributing to the low "take up" rate for the unemployment program. Already, less than half (45%) of the jobless who have significant labor force attachment apply for unemployment benefits with many believing, incorrectly, that they do not qualify.

Accordingly, we begin by examining how the general rule has been applied to the process of qualifying for unemployment benefits. First, if workers have to be "involuntarily unemployed," are they also entitled under federal law to leave work for compelling family reasons or other reasons not limited to an employer-initiated layoff? Yes they are, according to the states. In fact, going back to the early days of the unemployment program, there are numerous examples of state laws that consider an employee's initiation of his or her separation from work involuntary under a broad range of circumstances. About one-third of the states cover compelling personal circumstances requiring an individual to leave his or her job, including many situations that qualify for coverage under FMLA.⁵ A number of states also provide benefits to striking workers, which was upheld by the U.S. Supreme Court in the case *New York Tel. Co. v. New York State Department of Labor*, 99 S.Ct. 1328 (1979), despite the argument that these workers were "voluntarily" unemployed.

Second, is it always the case that unemployment recipients have to be "able and available" for work to be considered "involuntarily unemployed" and therefore qualify for UC? Again, the states have seen fit to create appropriate exceptions from this rule especially where, as in the case of the BAA-UC program, the goal is to increase attachment to the labor market. For example, as described in the proposed regulations, at least eight states now provide unemployment benefits to workers on temporary layoff. Not unlike the situation of those taking a family leave, the states in this situation have made the decision that it is not always good public policy to require workers to accept new work – even a superior job, with better pay and benefits – when the worker, in fact, still retains a connection, a commitment of employment, with his or her current employer. This rationale applies as well to the 22 states that exempted workers in training programs from having to meet the work-search rules before this policy was adopted as the law of the land in 1976.

Finally, by generally limiting unemployment benefits to those who are "involuntarily unemployed," are states prevented from providing benefits to workers who are not necessarily "unemployed"? Again, states have acted within their discretion to define these terms broadly. Indeed, there are many circumstances where workers are entitled to unemployment benefits while maintaining an on-going relationship with their employers, as in the case of BAA-UC. For example, nearly all states operate a "partial" unemployment program, meaning that benefits are paid to workers who are still employed but whose hours have been reduced below full-time.

⁵ Thus, under many state laws, an individual who is unemployed as a result of compelling family or medical reasons is considered to be *involuntarily* unemployed. For example, the Massachusetts unemployment statute provides that, "[a]n individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the director that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary." Mass. Gen. Laws Ann., c. 151A, Section 25(e), para. 2 (emphasis added).

The same is true of "short-time compensation" or "work-sharing" programs that have been adopted by at least 17 states, where unemployment benefits are paid to current workers whose hours were reduced in order to avoid layoffs. The state courts have also decided several cases in which unemployment benefits were provided to "unemployed" workers who were only temporarily separated from their jobs yet still received job-related benefits, as in the case of the BAA-UC program.⁶

While everyone may not agree with all the policy decisions described above, the point is that many states have expanded the scope of their unemployment programs to serve not just those workers who are narrowly defined as the "involuntarily unemployed." The states have put in place unemployment programs that expand the flexibility to serve a wide variety of employment needs, including family and workforce development needs. By expanding the scope of the program, the states have not "pitted" one group of workers against another. To the contrary, they have created a situation where the program benefits a greater proportion of those in need. Similarly, in the case of the BAA-UC program, the states are taking advantage of their flexibility to expand the program to serve newly-defined needs. Thus, while everyone may not agree with the merits of the BAA-UC program, it is not accurate to conclude that those states that have proposed such legislation are acting outside their rights to expand benefits beyond a narrowly defined group of the "involuntarily unemployed."

- **As set forth in the proposed regulations, the federal unemployment laws do not preempt the states from enacting BAA-UC programs**

The states have exercised vast discretion in developing unemployment laws to meet the needs of today's workers, including unemployment policies designed to reach beyond a narrowly-defined group of "involuntarily unemployed" workers. Thus, as set forth in the proposed regulations, the federal unemployment laws also allow for the adoption of BAA-UC programs. Rather than restate the legal analysis of the U.S. Department of Labor in support of this position, we take this opportunity to underscore certain key legal issues.

First, the U.S. Supreme Court has consistently held that the states are provided with the discretion under the Social Security Act of 1935 to decide basic issues of eligibility unless specifically prohibited by federal law. This rule was upheld most recently in the case of *New York Tel. Co. v. New York State Department of Labor*, 99 S.Ct. 1328 (1979), the decision upholding the right of states to provide unemployment benefits to striking workers. The Court cited several prior decisions and concluded that, "These cases demonstrate that Congress has been sensitive to the importance of the State's interest in fashioning their own unemployment

⁶ See, e.g., *Donahue v. Dept. of Employment Security*, 142 Vt. 351, 355 (1982) (awarding benefits to an "unemployed" group of hourly paid, nonprofessional school employees during the three weeks of Christmas, mid-winter and spring vacations observed by the Vermont public schools); *Pennsylvania Electric Company v. Board of Review*, 450 A.2d 779 (Pa. Cmwltth. 1982) (awarding benefits to an "unemployed" woman who was granted an unpaid leave when she became pregnant and presented medical certification that her job threatened the safety of the fetus, during which time she continued to receive holiday pay, life insurance and hospitalization coverage).

compensation programs, *especially their own eligibility criteria.*" *Id.* at 1340 (emphasis added). Thus, "when Congress wishes to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the State's freedom to legislate in this area."

Accordingly, DOL's interpretation of the federal unemployment laws as set forth in the BAA-UC regulations is clearly supported by a consistent line of U.S. Supreme Court decisions directly addressing the right of the states to determine the scope of their eligibility rules. The case in support of the agency's action is even more compelling given the absence of any explicit reference in the federal statutes to the terms "involuntary unemployment" or "able and available" for work. Finally, the law is clear that the interpretation of the federal unemployment statutes by the U.S. Labor Department is entitled to great deference. Certainly, the agency's action is not "arbitrary and capricious," which is the standard that applies to overrule a regulation properly promulgated pursuant to the federal Administrative Procedures Act (APA).

- **With the sustained low unemployment rate, state trust funds are well-equipped to support UC eligibility expansions, including the BAA-UC program**

The decision to expand UC is made by each state legislature based on a balancing of many factors, including the solvency of their UC trust funds, the projected funding coming in and benefits being paid out, the UC tax structure, the size of the new program, and its projected cost. Based on this analysis, most states -- but not all -- are well prepared to support UC eligibility expansions, including the BAA-UC program.

The cost considerations of the BAA-UC program will vary significantly from state to state, depending on the scope of coverage, the number of weeks of benefits provided, birth rates, UC "take up" rates, and each state's benefit levels. For example, some states have proposed benefits lasting just six weeks, while others have proposed providing benefits for a maximum of 12 weeks. DOL, in the proposed regulations, estimates that the BAA-UC program would cost in the range of zero to \$68 million. The higher estimate optimistically assumes that all the states which introduced legislation last year will actually enact the program. In individual states, the cost of the program ranges from \$1 million in Vermont to \$34 million in Massachusetts.

Since the end of the last recession in 1992, state trust fund reserves have increased significantly as the unemployment rate has remained consistently low (now at just 4.1%). This makes it possible to advance a range of UC expansions to bring the rates of access back up to more acceptable levels, especially for women, part-time and low-wage workers. State trust fund reserves have almost doubled since the end of the last recession, growing from \$26 billion in 1992 to over \$50 billion in 1999. And since the economy shows no signs of slowing down significantly, the trust fund reserves are expected to continue to build as long as the unemployment rate remains low.

As measured by the generally-accepted solvency standard, most state trust funds are thus well-positioned to handle UC expansions including the BAA-UC program. The standard, known as the "average high cost multiple" (AHCM), measures the number of years that a state can pay UC benefits at peak recessionary levels. The recommended AHCM is 1.0, meaning that a state trust fund can afford to pay at least one year of benefits *during a severe recession without collecting any additional revenues*. The AHCM for the states has increased by 48% since 1992, now averaging .93. As of the end of 1999, 33 states were above the trust fund solvency standard.

- **State trust funds are building despite dramatic cuts in UC taxes**

The state trust funds would be even more solvent, and even better equipped to handle long-overdue UC expansions, were it not for the record level of UC tax cuts that have been enacted in recent years.

At the same time that U.S. businesses are experiencing optimal profits, they have also been lobbying aggressively, and successfully, for dramatic cuts in state UC taxes. According to a recent tally prepared by NELP, at least 25 states have cut UC taxes dramatically over the last few years. Not surprisingly, therefore, the average rate of employer contributions has dropped by one-third, from .92% of total wages in 1994 to just .57% in 1999. (See the attached table for more detail on the yearly drop in the rate and the state figures). According to our estimates, employers would have contributed almost \$34 billion more into the state UC trust funds for the years 1995-1999 if they had continued to be taxed at the 1994 contribution rate.

The following examples illustrate the dramatic impact that UC tax cuts have had on the state trust funds:

- In 1998, Georgia enacted a tax cut costing the trust fund \$122 million over the next two years. In 1999, the Governor signed legislation to further cut UC taxes by \$1 billion over the next four years.
- In 1998, Idaho enacted legislation that cut UC taxes by \$31 million in 1998 and by a projected \$112 million over the next four years, reducing the rate of the UC tax by 30%.
- In Illinois, the UC tax rate was cut by 16% in 1996, costing the trust fund \$128 million. Legislation has been proposed to reduce the rate this year by another 12%, with an impact of \$150 million.
- In 1995, a tax cut was enacted in Maryland that the Governor estimates will save employers \$410 million over five years.
- At the end of last year, the Massachusetts Governor sought a UC tax cut of \$203 million, while the Legislature agreed instead to freeze a scheduled tax increase thereby costing the trust fund \$120 million.
- In 1996, Michigan enacted a 10% cut in its UC tax rate, costing the trust fund about \$500 million over three years. The 1996 legislation included a provision for future cuts in the event that the fund balance continued to rise, causing a second round of cuts

- costing the trust fund \$750 million since 1996.
- In 1996, UC taxes were reduced in New Jersey costing the trust fund \$200 million a year, which was followed by a second round of cuts in 1997 resulting in a total tax cut of \$450 million a year.
- In 1998, New York employers received a \$420 million tax break, reducing the average UC tax rate by 27%.
- In 1998, South Carolina cut its UC taxes by 50%, costing the trust fund an estimated \$50 million.
- In 1999, Washington froze its tax base at 1999 levels, stopped an automatic shift to a higher tax schedule, and provided additional tax reductions for employers in some rate classes. These tax cuts will cost the trust fund \$590 million over six years.

For today's hearing, we have also prepared an estimate that documents the impact of the reduced tax rates of the past several years on the state trust funds. We found that, if taxed at the 1994 U.S. average rate of .92% on total wages, employers would have contributed almost \$34 billion more into the state UC trust funds for the period from 1994-1999 (i.e., \$159 billion as opposed to \$126 billion).⁷ As reflected in the attached graph, it is significant that the amount of actual employer contributions has in fact been going down over these years, and the gap between actual contributions and estimated contributions at the 1994 tax rate is growing substantially. Despite these reduced employer contributions, the state trust funds are still building as a result of the low unemployment rate.

Unfortunately, the data does not exist to document precisely the impact of tax cuts alone on the trust funds. Thus, given the data limitations, our estimate also takes into account the impact of experience rating on the tax rates (which generally brings down the tax rate for those employers who are laying off fewer workers), and the automatic triggers that exist in some states that decrease or increase the tax rates depending on the solvency of the trust fund. Therefore, while not an estimate of the impact of tax cuts alone, the calculation accurately reflects the significant impact on the trust funds of the reduced tax burden on employers over the years 1994 to 1999.

Ironically, many business groups have been highly critical of the BAA-UC initiative, claiming that it will result in a "raid" of state UC trust funds. For example, in Massachusetts, business interests are opposed to the expansion of UC to cover workers on family and medical leave, yet they have actively lobbied for a UC tax cut that would have cost the UI trust fund \$203 million. 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

⁷ These estimates were prepared with data provided by the U.S. Department of Labor, the only national data documenting UC tax rates and contributions. We calculated the dollar amount of employer contributions that would have been deposited in state trust funds had employers been taxed at the 1994 U.S. average rate of .92% of total wages, which is the year when the average tax rate started declining (see attached table). This calculation was then made for each of the years from 1995 to 1999, and the results were added together to arrive at the \$34-billion figure. The contributions included in the calculation are only for experience-rated employers, and they do not include FUTA taxes.

better time for taking additional action to keep UI costs down could hardly be found." These business and state officials are, of course, hard pressed to demonstrate how the trust fund can handle these massive tax cuts if they cannot afford reforms expanding access to the UC system, including UC to cover workers on family leave.

* * *

Madam Chairman and members of the Committee, thank you again for this opportunity to testify in support of the BAA-UC initiatives in the states and the Labor Department's proposed regulations.

UI Tax Rates as a Percentage of Total Wages by State for the Years 1994 through 1999

	CY1994	CY1995	CY1996	CY1997	CY1998	CY1999 *	Change ('94-'99)
US	0.92%	0.86%	0.78%	0.70%	0.62%	0.57%	-38.48%
AL	0.36	0.37	0.34	0.34	0.44	0.39	8.42%
AK	1.66	1.71	1.77	1.88	1.63	1.65	-0.35%
AZ	0.61	0.61	0.52	0.47	0.38	0.32	-47.06%
AR	0.95	0.88	0.83	0.83	0.81	0.78	-17.56%
CA	0.98	0.96	0.94	0.76	0.66	0.62	-36.36%
CO	0.53	0.47	0.40	0.38	0.33	0.32	-38.91%
CT	1.21	1.26	1.23	1.18	1.10	0.66	-45.41%
DE	0.83	0.86	0.72	0.68	0.56	0.55	-33.75%
DC	1.03	0.92	0.79	0.50	0.54	0.56	-45.22%
FL	0.65	0.58	0.50	0.45	0.32	0.34	-47.12%
GA	0.56	0.48	0.45	0.37	0.30	0.15	-73.36%
HI	0.76	1.60	1.46	1.33	1.25	1.23	61.65%
ID	0.95	0.92	1.21	0.92	0.77	0.73	-22.78%
IL	1.10	1.01	0.78	0.73	0.68	0.64	-41.43%
IN	0.42	0.41	0.38	0.39	0.32	0.37	-11.62%
IA	0.69	0.51	0.51	0.50	0.50	0.50	-26.88%
KS	0.76	0.16	0.12	0.13	0.13	0.13	-82.64%
KY	0.78	0.75	0.72	0.72	0.68	0.63	-19.41%
LA	0.70	0.64	0.57	0.54	0.48	0.42	-39.40%
ME	1.45	1.27	1.23	1.03	1.13	1.12	-22.45%
MD	1.18	1.08	0.77	0.54	0.48	0.48	-59.17%
MA	1.53	1.43	1.31	1.30	0.94	0.76	-50.59%
MI	1.46	1.34	1.09	0.98	0.80	0.77	-46.95%
MN	0.94	0.79	0.66	0.60	0.55	0.51	-45.94%
MS	0.85	0.77	0.48	0.43	0.50	0.56	-33.72%
MO	0.94	0.70	0.66	0.61	0.55	0.43	-54.74%
MT	0.95	0.95	0.87	0.86	0.86	0.87	-8.05%
NE	0.31	0.27	0.30	0.34	0.14	0.18	-41.74%
NV	0.91	0.89	0.89	0.84	0.81	0.81	-10.98%
NH	0.72	0.48	0.31	0.20	0.20	0.18	-74.82%
NJ	0.83	0.87	1.16	1.14	0.96	0.82	-0.65%
NM	0.86	0.72	0.72	0.74	0.75	0.63	-26.56%
NY	1.10	1.02	0.94	0.84	0.61	0.56	-48.97%
NC	0.34	0.28	0.10	0.31	0.35	0.36	5.89%
ND	0.65	0.61	0.45	0.46	0.59	0.62	-5.17%
OH	0.95	0.91	0.76	0.54	0.51	0.46	-51.56%
OK	0.53	0.49	0.40	0.32	0.17	0.18	-66.06%
OR	0.96	0.85	1.28	1.23	1.24	1.26	31.32%
PA	1.72	1.57	1.27	1.13	1.07	1.01	-41.01%
PR	1.51	1.52	1.56	1.53	1.44	1.36	-9.80%
RI	2.09	2.07	2.05	2.00	1.85	1.55	-26.01%
SC	0.64	0.63	0.62	0.60	0.42	0.41	-35.57%
SD	0.21	0.21	0.20	0.21	0.21	0.20	-4.77%
TN	0.59	0.55	0.50	0.46	0.46	0.43	-27.76%
TX	0.62	0.60	0.52	0.47	0.43	0.38	-38.63%
UT	0.59	0.55	0.50	0.42	0.36	0.27	-53.82%
VT	1.10	0.95	0.91	0.89	0.85	0.84	-23.54%
VA	0.48	0.45	0.36	0.26	0.17	0.16	-66.74%
VI	1.09	1.44	1.67	1.69	0.94	0.62	-43.01%
WA	1.22	1.16	1.10	1.19	1.19	1.17	-3.86%
WV	1.12	1.08	1.06	1.03	1.01	1.00	-10.63%
WI	0.90	0.84	0.79	0.74	0.68	0.68	-24.58%
WY	0.74	0.73	0.72	0.75	0.74	0.55	-25.38%

Source: U.S. Department of Labor, Employment and Training Administration

Based on calculations prepared by the National Employment Law Project

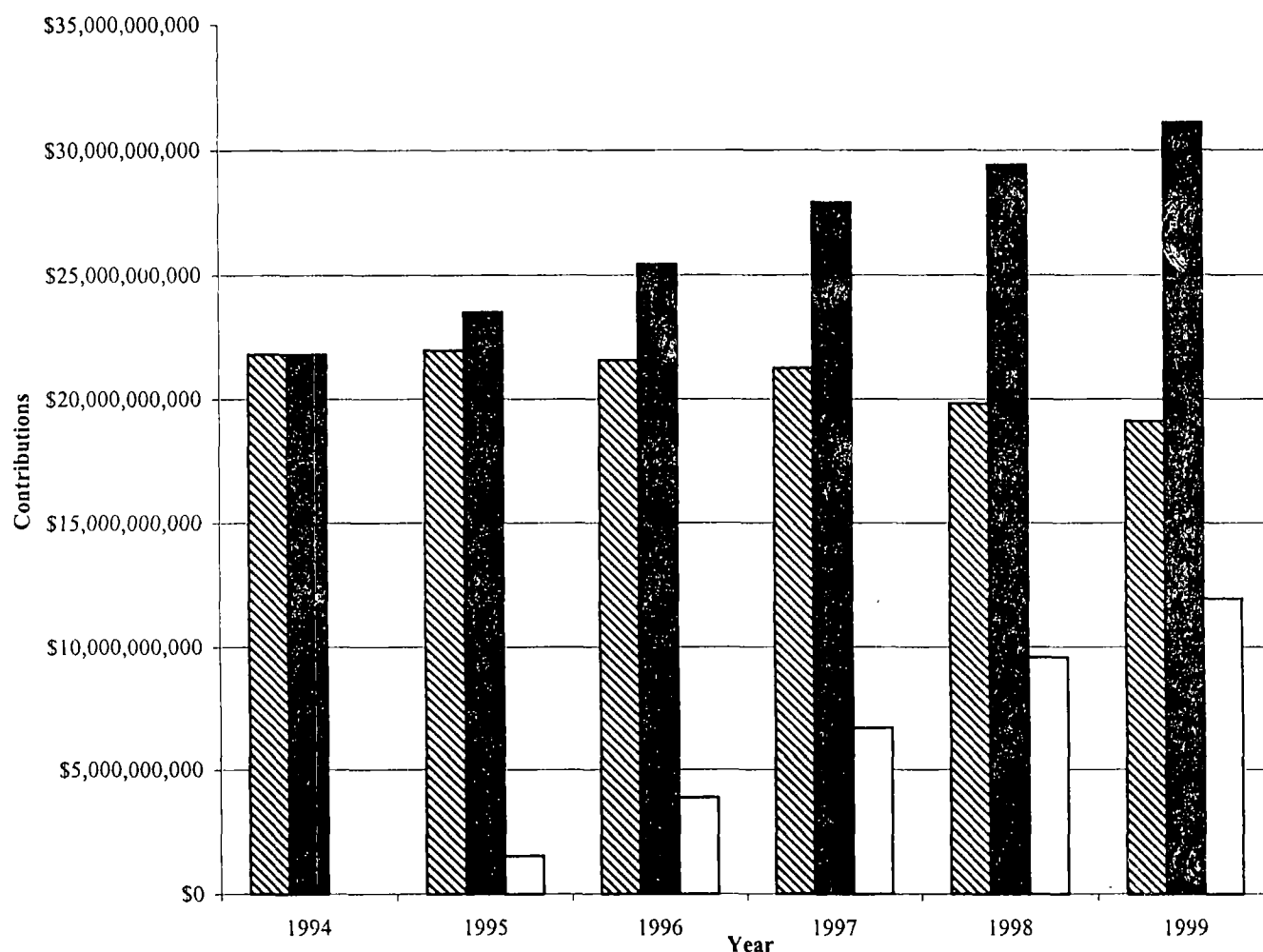
*The 1999 average contribution rates as a percentage of total wages were estimated by the U.S. Department of Labor.

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Comparison of Actual Employer Contributions to State Unemployment Trust Funds for the Years 1994-1999* With the Estimated Yearly Contributions Calculated at the 1994 Tax Rate



- ▨ Actual UI Contributions
- Estimated UI Contributions (based on the 1994 rate as a percentage of total wages (0.92%))
- Difference Between the Actual and Estimated UI Contributions (totalling \$33,646,646,000)

Source: U.S. Department of Labor, Employment and Training Administration
Based on calculations prepared by the National Employment Law Project

*The 1999 U.S. average contribution rate as a percentage of total wages was estimated by the U.S. Department of Labor.

Supplemental Statement

As required by the Committee's rules related to submission of testimony, the following information is provided:

1. The witness, Maurice Emsellem, may be reached at the National Employment Law Project, located at 55 John Street, 7th Floor, New York, NY 10038. The phone number is (212) 285-3025, ext. 106, and the fax number is (212) 285-3044.

2. Mr. Emsellem is Director of Public Policy with the National Employment Law Project, a non-profit organization. Mr. Emsellem specializes in government systems of support, including the unemployment compensation system, workforce development programs and the welfare system. He has published extensively on the unemployment compensation system, including articles that appeared in the *University of Michigan Journal of Law Reform* and the *Stanford Law & Policy Review*. Mr. Emsellem received his B.A. in 1982 from the University of Michigan in Ann Arbor, and his J.D. in 1986 from Northeastern University School of Law.

TESTIMONY OF

KIMBERLEY K. HOSTETLER

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CONNECTICUT HOSPITAL ASSOCIATION
WALLINGFORD, CT
AND

OWNER, HUMAN RESOURCES MANAGEMENT SERVICES

REPRESENTING

THE CONNECTICUT HOSPITAL ASSOCIATION
AND

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

ON

“UNEMPLOYMENT COMPENSATION AND THE FAMILY AND MEDICAL LEAVE ACT”

BEFORE

THE HUMAN RESOURCES SUBCOMMITTEE
OF

THE HOUSE WAYS AND MEANS COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

MARCH 9, 2000

INTRODUCTION

Congresswoman Johnson and Members of the Subcommittee:

Good morning. My name is Kim Hostetler. I am Director, Human Resources Services, for the Connecticut Hospital Association (CHA), and in that capacity provide services and information to our member hospitals and other healthcare organizations on topics and issues relating to human resources. Founded in 1919, the Connecticut Hospital Association has been representing hospitals and health-related member organizations for over 80 years. CHA's diverse membership includes the 31 Connecticut acute-care hospitals and their related healthcare organizations, short-term specialty hospitals, long-term care facilities, nursing homes, hospices, home health agencies, ambulatory care centers, clinics, physician group practices and many other organizations. CHA provides legislative and regulatory advocacy on behalf of our members by supporting initiatives that are in the interests of our members and their patients. I also own a sole practitioner human resources consulting business, Human Resources Management Services, in Bristol CT, where I am an active member of the Greater Bristol Chamber of Commerce. The Greater Bristol Chamber has over 1,200 individual and business members from the city of Bristol and surrounding towns of Plymouth and Wolcott whose common goal is to advance the commercial, financial, industrial and civic interests of the community.

In my capacity as a Human Resources professional, I am an active member of several professional organizations, including the Society for Human Resource Management (SHRM) and its local chapter, the Human Resources Association of Central Connecticut (HRACC). SHRM is the leading voice of the human resource profession, providing education and information services, conferences and seminars, government and media representation, online services and publications to more than 130,000 professional and student members throughout the world. I very much appreciate having the opportunity to voice the objections that these organizations and their members have to the Department of Labor's Proposed Rule on Birth and Adoption Unemployment Compensation.

This past July, I had the privilege of representing CHA and the Greater Bristol Chamber at one of the four Congressional hearings that have been held to examine the impact and unintended problems with the Family and Medical Leave Act's implementing regulations and interpretations. Both these

organizations, and their respective members, are firm supporters of the FMLA as it was conceived and passed. However the implementation of the law – through the Department of Labor’s complex regulations and contradictory opinion letters – has moved it far from its original intent, resulting in substantial unintended consequences for employers and employees alike. As a result, I testified in July that we would like to see relatively modest, but very important revisions made to current FMLA provisions, *especially before any further expansion is discussed.*

Now that the Department of Labor’s Proposed Rule on Birth and Adoption Unemployment Compensation (BAA-UC) has been published, our concern has deepened. Four separate congressional hearings have documented the substantial issues that exist with the Department of Labor’s current FMLA regulations and interpretations. We feel strongly that *no expansion of any sort, including this proposal to provide paid family leave, should be considered before these regulatory and administrative issues are addressed.* We also feel strongly that *tapping into the safety net for jobless workers to provide pay for an entirely different program -- employees on family leave -- will endanger the solvency of unemployment insurance trust funds, represents an inappropriate attempt to circumvent legislative authority, and violates both the original spirit of the Family and Medical Leave Act as well as current Unemployment Insurance law.*

ISSUES WITH CURRENT FMLA REGULATIONS

In my work with CHA, with the Bristol Chamber, and with the Human Resources Association of Central Connecticut, I have found remarkable uniformity in reactions to FMLA administration. People repeatedly confirm that while they and their organizations have a deep and abiding commitment to meeting the concepts, the purpose and the provisions of the Act, they face substantial, burdensome administrative requirements as a result of the Act’s regulations. While the intent of the FMLA seems simple and clear and is fully embraced by these professionals and their employers, the administration of the Act is far from simple and clear and has resulted in confusion, employer and coworker frustration, enormous time investment and lack of control over attendance policies.

[Note: The differences in eligibility parameters and leave amounts between the FMLA and our state Family and Medical Leave Act, passed in 1990, make administering FMLA programs particularly

complex in Connecticut. However, given the state's tendency to follow federal guidelines in many key areas, we welcome positive and constructive modifications at the federal level.]

The purpose of the Family and Medical Leave Act, as defined by Congress in the text of the Act, is to balance the demands of the workplace with the needs of families *in a manner that accommodates the legitimate business interests of employers* [emphasis added]. The Department of Labor's implementing regulations and opinion letters have moved far from that instruction. There seems to be little accommodation for the truly legitimate business interests of employers, and there have clearly been unintended negative consequences for employers and employees alike.

When the FMLA passed Congress, it seemed straightforward and simple: employees are provided protected, secure time off from work to deal with serious medical or family issues. But, as I noted in my Senate Subcommittee testimony, the devil is in the details – or, more specifically, the devil is in the Labor Department's regulations! The primary issues in our experience, for organizations trying to administer leaves under the FMLA correctly, are:

- the very broad definition of “serious health condition”
- the uncontrolled use of intermittent leave
- the 2-day notice requirement, and
- the interference of FMLA with attendance control policies in questionable cases.

In addition, the inability of employers to count FMLA designated time for purposes of determining perfect attendance award eligibility is counterintuitive and perceived by employers and employees alike as unfair.

Definition of “Serious Health Condition”

The FMLA was intended to cover “serious health conditions” which implied that hospitalization, extended lengths of treatment or serious chronic conditions would be covered by the law, and that employees would be allowed time away from work to attend to their family's needs, a laudable goal. However, our experience demonstrates that some employees seek to use this time for conditions well

beyond what a reasonable person would define as a serious health problem. Extremely broad Department of Labor regulations and guidance on the definition result in employers being required to certify all kinds of mild or minor conditions as FMLA-protected, including such things as bad colds, simple outpatient procedures not contemplated by the Congress which do not require extensive recovery times, and vague diagnoses of “depression”, “stress”, or “back pain”. Despite an original opinion letter from the Department of Labor indicating that the cold, flu and non-migraine headaches were not serious health conditions, the Department issued a contradictory opinion letter the following year saying they could be. (These opinion letters are attached to my statement.) The conclusion of many employers is that the loose definition currently in use makes the Act a target for abuse. Many Connecticut employers have experienced the situation where an employee facing disciplinary action promptly brings in a doctor’s form verifying an often-vague condition requiring immediate time off. This is extremely frustrating to employers, but it is equally disturbing to coworkers who are left with the work. One of the biggest frustrations I hear from supervisors is their inability to effectively address employee concerns about a coworker whose manipulation of well-intentioned leave provisions leaves them with extra work and additional stress.

Intermittent Leave

The FMLA legislation envisioned allowing employees to attend periodic, intermittent appointments for medical problems, physical therapy, or family member medical appointments, or take necessary time off intermittently for serious chronic conditions, and have this time protected as FMLA leave time.

Unfortunately, instead of keeping records of this leave in one-half day increments - a reasonable approach - the Department of Labor has required employers to allow leave time (and account for it) in the shortest increments of time tracked by their payroll systems, which can be as little as single minutes.

This has created a world of administrative problems which can be rectified by simply changing the law to specify that FMLA leave time can be taken in increments of as little as one-half days.

Here again, the opportunity for abuse is rampant. Many organizations can point to chronic attendance abusers being able to virtually always produce a doctor’s statement to cover periodic absences. The lesson here is that there seems to always be a small group of employees who will attempt (and generally succeed) in taking advantage of the loose and vague provisions of FMLA as it is currently defined.

While there will always be people who look for all the angles, misuse benefits and abuse privileges, we need not make it as inviting for them as we have.

Two Day Notice Requirement

The law provides employers two days to designate employee absences as FMLA time off once the employer knows the leave is needed for an FMLA required reason. However, in many organizations, determining if absence is FMLA time most frequently occurs when time records are submitted for payroll processing - generally once a week or once every other week; the result is that the employer representative responsible for providing FMLA notice doesn't learn of the situation until well after the two day notice period has expired, and the employer cannot correct these entries retroactively.

Perfect Attendance Awards

The time an employee takes away from work under the Family and Medical Leave Act may not be counted for the purpose of perfect attendance awards. An employee who has taken three months off under FMLA – or missed 38 days intermittently due to a chronic condition - may still be eligible for a perfect attendance award. Coworkers find this impossible to understand. Morale is affected when those rewarded for perfect attendance are recognized together with colleagues who no one has seen in months. The law states “the taking of leave shall not result in the loss of any employment benefit accrued prior to the date of the leave”. Employment benefits are defined as “all benefits provided or made available to an employee by an employer”, and the Department of Labor has interpreted that to mean attendance awards. But the benefits contemplated in the law are “group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions” - clearly Congress was concerned about the loss or reduction of significant health and welfare benefits. To include perfect attendance programs – when attendance is the *essence* of the program – seems to go beyond congressional intent. Not only is such an interpretation unfair to employees who do have perfect attendance, but it is also unfair to employees who may need to miss time for equally compelling reasons that may not qualify for FMLA (such as having to take time for the funeral of a family member).

We are not suggesting that absences covered by FMLA be counted for attendance control purposes or for performance evaluation, but only in the single instance of attendance award programs where it

would make so much sense to employees and employers alike.

EMPLOYER COMMENTS ON FMLA ADMINISTRATION

While additional examples and first-hand stories of FMLA administration issues were included and are available in my Senate testimony, I also asked for current feedback from a group of human resources executives who attended a CHA meeting with me last week to prepare for today's testimony. They reiterated their concerns and universally expressed opposition to the Department of Labor's Proposed Rule on Birth and Adoption Unemployment Compensation. Following that meeting, one participant sent me the following email message:

This past year was our first year of tracking FMLA leaves in a credible way. Prior to that it was happenstance. As a firm supporter of FMLA, I was astounded by the year end report. In 1999, as an organization of 2000 employees with about 1800 who would meet the hour requirements, we had 194 employees participate in FMLA. 56% were on medical leave, 25% maternity, 14% intermittent, and 5% family. That represents 1,234 weeks taken for FMLA and, is equivalent to 24 FTE's. At one point in the midst of high census where we were reaching to grab anyone who could come in, we had 54 employees out on FMLA. Staffing was a nightmare for our nurse managers. We had one specialty area which has 7 FTE's and it had 3 out on FMLA. So, while I remain an ardent supporter of FMLA, I also think it needs to be reviewed in a significant way prior to expansion.

The most prevalent comment and story "themes" that colleagues have shared include the following:

- The regulations, which go beyond Congressional intention, are complicated and difficult to understand, frequently resulting in costly consultation with an attorney to determine eligibility, etc.
- Intermittent leave is the hardest thing for managers (and coworkers!) to deal with.
- The two-day notice requirement for FMLA designation is very difficult for employers to meet.
- The opportunities for - and examples of - abuse are rampant.
- FMLA makes absence control virtually impossible; it has become essentially impossible to address many chronic attendance abuse situations. This is extremely upsetting to other employees.
- There is frequently a correlation between employees facing disciplinary action and the use of FMLA. FMLA documentation is often presented at the point when disciplinary action has been initiated

with an employee.

- Employers have found a pattern of attendance abusers taking intermittent FMLA leave on Mondays and Fridays.
- Employers report seeing employees using FMLA as a way of getting time off to which they would not otherwise be entitled (time off at peak vacation times, for example).
- Employees have become increasingly savvy about the opportunities for abuse available under FMLA (for example, coming in late and making up the time at the end of the shift when shift differential is provided).
- The common difficult diagnoses include headaches, back pain, asthma, depression, anxiety, bronchitis, stress, and stomach problems.
- Employers – and coworkers – are hurt by employees with controllable conditions – like ulcers, for example – when the employees chose not to follow the treatment regimen and experience periods of incapacity as a result.
- Some employers have reduced benefits as a result of FMLA (previously open-ended or 6-months leaves are now limited to 12 or 16 weeks, for example). Some employers have eliminated perfect attendance awards.
- Many employers are finding that the highest usage of FMLA time used to be for maternity leaves, but it is now serious medical conditions.
- Planned and scheduled leaves, even intermittent or reduced hours leaves, can be accommodated; it's the surprises for vague or questionable reasons that are so problematic for employers and coworkers alike.
- The amount of time employers spend on FMLA administration is growing, and in many cases is consuming large percentages of staff time.

These experiences and difficulties with FMLA administration are not unique to Connecticut organizations; similar experiences have been shared and documented in previous hearings.

ISSUES WITH THE LABOR DEPARTMENT'S PROPOSED RULE ON BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION

Our concerns with the Department of Labor's proposed rule are two-fold:

- We are opposed to tapping into the resources of a critical safety net program to provide funding for family leave, leaving the Unemployment Compensation system vulnerable to insolvency due to its application to situations for which it was never intended.
- We are opposed to the process – the issuing of Department of Labor regulations rather than an open, thorough legislative review.

It is not just the business community that has grave concerns about this proposed bill. I have been an active member of the Board of Directors of Family Services of Central Connecticut (FSCC) for many years, serving as Board Chair for the past four years. Family Services is a 104-year old agency providing social and behavioral health services throughout thirteen (13) communities in central Connecticut by providing services and advocacy on behalf of families and their members. One of our most significant projects during the past two years has been the Employment Success Program, a welfare-to-work initiative operated collaboratively throughout the state under the auspices of the Connecticut Council of Family Service Agencies. Its purpose is to assist people who are leaving the welfare rolls to achieve economic independence by identifying barriers to employment, developing family plans and budgets, and providing referrals to specific services. This successful “safety net” program is now in its third year. This is third year that I have also served on the board of the Bristol Preschool Child Care Center (BPCCC), an organization that has provided quality, age-appropriate child care services to economically disadvantaged families in Bristol for almost thirty years. Currently the program serves one hundred twenty-three (123) three to five year olds. Both of these organizations provide services to a population that often faces unemployment. Both of these agencies oppose using unemployment insurance trust funds to pay for paid family leave. Their reasons are similar: let’s not drain resources from one needy population to provide a new support service for another population. Both favor the concept of financial support for those who need it to take family leave, but not at the expense of jeopardizing the safety net for the out-of-work population.

My work with those two organizations has intersected in one other way. The Connecticut Council of Family Service Agencies (CCFSA) recently published *Families Work: The 2000 Report on the State of the Family in Connecticut*. CCSFA has worked with the Connecticut population transitioning off welfare through its Employment Success Program (ESP). In the report they have identified trends

during 1998-99, all of which complicate attaining employment success. Almost half (44%) of the referrals into ESP's Safety Net program were families who were unable to comply with program rules: they were most commonly sanctioned for loss of jobs, *often through lack of daycare*. And hospital HR leaders have commented that one of the most common reasons employees ask to extend their planned leave period is not a desire to stay home rather than work, but *a lack of adequate child care*. Perhaps the goal of providing support for working families would be better served by first focusing on closing the harmful gap between the availability and the need for quality childcare.

People who are unemployed are also concerned about and opposed to the Department of Labor's proposal. The Human Resources Association of Central Connecticut sponsors a "HR Lead Group" – a networking and information-sharing group for HR professionals who have lost their jobs. During a meeting of this group on March 1st, the Department of Labor's proposed rule was discussed. The meeting was attended by 15 HR management level individuals, all in transition and seeking employment, and all seasoned professionals. The group was generally well informed on this issue, and all reacted very negatively to President Clinton's proposal. No one present supported using unemployment funds this way. Participants were particularly concerned about potential unemployment funds shortages or benefit cutbacks, especially if we head into a period of economic downturn. They also expressed concerns about increased record-keeping and cost burdens for employers, and the potential for paid leave to discourage attachment to the labor force.

In Connecticut, our unemployment insurance system was so overburdened in the early 1990's that we had to float a bond worth nearly a billion dollars to cover the deficit. Connecticut employers have been paying an annual special employer assessment every year since then, which is just now expected to end in August 2000. So Connecticut employers and unemployed individuals are understandably nervous about any changes that would jeopardize the solvency of the trust fund. Even the Connecticut Department of Labor is not supportive of the federal proposal. During a presentation to Bristol Chamber members in January, a department director said that the general sense of the Department is that after just coming off the problems with our program, this isn't the right direction... He said that most state administrators have not warmed to the idea and that whether paid leave is a good idea or not, state unemployment funds weren't set up to deal with this.

Local employers who belong to the Bristol Chamber have also voiced strong opposition:

- *We're a small business. As part of our benefit package, we provide short-term disability income insurance for our employees, which pays up to 13 weeks. Our employees have taken advantage of this benefit on four separate occasions - four new babies in our "family". If employees are allowed to collect unemployment benefits for maternity leave, should I then consider eliminating short-term disability income from our benefit package? The working environment in most small businesses is family-oriented. Flextime, part-time, work-at-home options are being implemented in small businesses more and more, particularly during this tight labor market. Small businesses want to accommodate dependable, loyal employees. Allowing employees to collect unemployment during family leave will erode the family-like relationship that exists in many small businesses. This is not just about an increase in the FUTA tax rate. It's as much about government forcing small employers to do things that they might well be doing on their own - because they want to!*
- *I own a small job shop. We fluctuate between 24 - 30 employees and are looking for good people now. Only once in our history have we had to have a lay off due to slow down in work and at that time I was proud to know we had unemployment benefits to offer our laid off workers as they looked for other employment. The burden of that benefit in this state has become an enormous weight especially on small business trying to control the cost but must pay for the interest assessment on the bond. Times are good now with unemployment low but history has proved that will change. If employees are allowed to collect unemployment benefits for FMLA and my small shop must pay for that with increased taxes and must also pay someone to replace the employee who is not here how will we survive? Insurance companies offer insurance to employees for long and short term disability and my employees gladly of their own free will offer to pay the premiums in full to make sure they are covered if they must be out of work. If we must pay to replace an employee with skilled labor to get the work out the door to please our customers and we must pay the increased unemployment insurance and then conceivably pay an assessment because we didn't pay enough and must borrow again, what incentive is there to employ people? We as owners take all the risk, borrow all the money to run a company, invest in new machinery, spend money on*

training, etc. just to be taxed out of business. Many of us have put up our homes, our savings, all that we consider investing in our future and our children's future and the future of our employees and their families. Family Leave is a wonderful idea...I would love to see us all be able to take more time off to spend with our families...and not just when they are sick. But until we find a way to do that that doesn't put the burden on employers.... or until we have a society that is not concerned with OUTPUT and production to make our economy grow, employers cannot be stuck with this mandate.

- *I have read that the Department of Labor's Proposed Rule to alter the existing Family and Medical Leave Act (FMLA) is under consideration. This change to allow funds from the existing unemployment funds to be allocated to the FMLA would be devastating to businesses throughout the United States. If enacted, it would increase our cost of doing business, a cost that cannot and should not be passed on to our customers. As Plant Manager of four facilities in four different states, I believe the current FMLA has served as a useful tool for employees to address personal or family situations. The current practice promotes the proper usage to the intention of the law. We have finally started to manage our current unemployment insurance system and have eliminated much of the abuse. By allowing unemployment funds to those who qualify for the FMLA, we would be opening the doors to potential abuse. In addition to the abuse, the cost of hiring back-up personnel to fill in would jeopardize our ability to effectively manage the business. THIS WOULD BE DISASTROUS TO THE BUSINESS CLIMATE!*
- *Using unemployment funds to subsidize FMLA is wrong. Furthermore the unemployment system is just now starting to regain its health. The FMLA gives employees a vehicle to use when they need to deal with specific family related issues. Let's not turn it into a vehicle that can be used to avoid work. The only way our economy grows and takes care of the people of Connecticut is when money is paid for a service. We do quite poorly when we pay money for nothing.*

Our hospitals and other healthcare providers, especially home health agencies, are facing severe funding shortages, as Chairman Johnson well knows. In many cases these financial shortfalls have resulted in staff downsizing. Healthcare HR leaders and administrators are very concerned that unemployment

compensation resources be available to displaced workers. If unemployment compensation funds are tapped to provide paid leave to employees who take family leave, there is no doubt that the increased costs will be substantial. This will be one more significant financial burden placed on employers who, in the case of the healthcare industry, are already struggling to maintain jobs, minimize layoffs, and in some cases, simply keep their doors open.

Our recent remarkable economic prosperity may be providing for some a false sense of security that our communities and employers can afford to allow current unemployment insurance funds to be used to pay for an entirely new entitlement benefit. But we cannot afford to lose focus on what this important program was established to provide. The decision to create a new entitlement benefit, as well as the decision on how to fund it, belongs with Congress.

SUMMARY

We feel strongly that no expansion of FMLA, including the provision of paid family leave, should be considered before these regulatory and administrative issues are addressed. The first step in increasing the provision of paid leave in this country should be to address the Labor Department's FMLA regulations and interpretations which are discouraging employers from implementing or expanding paid leave. Correcting the FMLA's administrative problems can result in employment policies which are more fair to all employees and which still achieve the intent of the original FMLA legislation. And exploring alternative or incentive approaches to increase paid family leave would achieve the Administration's objective, but without causing crisis to our unemployment system in the process.

We would like to request your consideration of the following points and suggestions.

A. To address the FMLA's unintended consequences, we urge Congress to consider the following suggestions on a bipartisan basis:

1. Restore the FMLA to original Congressional intent by clarifying and tightening the definition of "serious health condition". Perhaps for all conditions other than chronic health conditions, the current definition of serious health condition which includes a minimal period of incapacity (time away from work) of "more than three consecutive calendar days", could be changed to 14 days,

or minimally, seven days. This would still protect any serious conditions, but would eliminate the need to designate and track questionable situations that may be addressed by a company's sick leave like minor injuries, earaches, headaches or flu.

2. Given the difficulty in meeting the two-day notice requirement, change the law to allow employers three weeks, rather than two days, to retroactively designate absences as FMLA leave time and provide written notice. This change alone would simplify the administration of this program immensely.
3. Require that intermittent leave be offered and tracked in increments of not less than one-half day as Congress originally intended.
4. Because of the inherent unfairness of exempting FMLA time from attendance program consideration, clarify that employers may record FMLA leaves as absences for purposes of perfect attendance awards only (the only "employee benefit" that could be so affected by FMLA use).
5. Address the intermittent leave certification process. The employee taking intermittent leave now has no responsibility in the process (e.g., to request FMLA) – the onus is completely on the employer to deal with the absence. There is virtually no system of checks or controls. Once an employee has an open-ended certification from a medical provider indicating that time off should be taken as required, the employee can come and go without providing notice and there is no incentive to minimize absences and avoid abuse.
6. Clarify the eligibility parameters to say 12 continuous months of employment. Given the unusual and varied staffing arrangements used by healthcare providers (and now employers in other industries as well), including sporadic on-call work and summer/after-school jobs, it is difficult to determine whether an employee with a history of these kinds of short-term assignments has met the eligibility requirement.
7. Remove the FMLA restriction that prohibits the use of certain providers for second opinions. In any case where employer has reason to doubt the validity of the medical certification, the employer may require a second opinion. But the health care provider used for that second opinion cannot be employed on a regular basis by the employer. That provision is in conflict

with ADA, disability, and workers' compensation provisions. Use of regular company doctors for second opinions would be easier, quicker, more practical and reasonable.

B. To address the need for some employees for paid family leave:

1. First and foremost, address current problems with the FMLA's regulations and interpretations that are actually serving as a disincentive for companies to offer or expand paid leave policies.
We urge the speedy enactment of technical corrections, S. 1530 - The Family and Medical Leave Clarification Act, on a bipartisan basis to remove current disincentives that actually discourage employers from providing paid leave.
2. Support the win-win proposition of compensatory time. Proposals such as H.R. 1, the Working Families Flexibility Act of 1997, or S. 4, the Family Friendly Workplace Act, would allow employers to offer and employees to receive overtime payment in the form of time-and-one-half paid compensatory time off in lieu of cash payment, enabling employees to bank paid time off for times when it is needed.
3. Explore the use of employee pretax savings accounts (such as an IRA or dependent care flexible spending account) for funding leaves.
4. Encourage flexible work arrangements such as job sharing, flextime, and telecommuting, perhaps with tax incentives and certainly by removing current obstacles or disincentives.
5. For employers that do not provide paid family leave already, encourage the inclusion of such a benefit as an option in cafeteria-style benefit plans.
6. Promote utilization of existing tax credits for adoption assistance which are available for employers to help adoptive parents.
7. Thoroughly explore all alternative funding options.

Tapping into the security program for jobless workers to provide pay for employees on family leave will endanger the solvency of unemployment insurance trust funds and represents an inappropriate attempt to circumvent Congressional legislative intent and authority.

Thank you again for the opportunity to participate in this morning's hearing.



APR 7 1995

FMLA - 57

The Honorable Ernest F. Hollings
United States Senate
Washington, D.C. 20510-4002

Dear Senator Hollings:

This is in response to your letter of March 14 forwarding
a copy of a letter from your constituent,

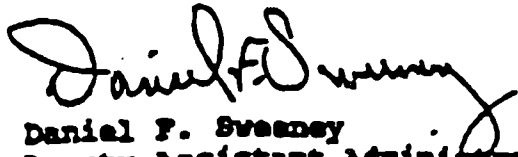
, regarding
the Family and Medical Leave Act of 1993 (FMLA).
expresses two concerns: that the Department's interpretation
of the term serious health condition does not reflect the intent
of the Act's authors and is being applied inconsistently; and,
that FMLA leave absences may not be counted against an employee
for purposes of perfect attendance bonuses or other disciplinary
actions.

The FMLA defines serious health condition to mean either
"inpatient care in a hospital, hospice, or residential
medical care facility" or "continuing treatment by a health
care provider." Regulations, 29 CFR Part 825, published as
a Final Rule on January 6, 1995 and effective April 6, 1995,
state that, unless complications arise, the common cold, the
flu, ear aches, upset stomach, minor ulcers, headaches other
than migraine, routine dental or orthodontia problems, periodon-
tal disease, etc., are examples of conditions that do not meet
the definition of a serious health condition and therefore do
not qualify for FMLA leave. The fact that an employee is
incapacitated for more than three days, has been treated by a
health care provider on at least one occasion which has resulted
in a regimen of continuing treatment prescribed by the health
care provider does not convert minor illnesses such as the common
cold into serious health conditions in the ordinary case (absent
complications.) See §825.114(c) of the final FMLA Regulations,
29 CFR Part 825.

With regard to incentive plans rewarding attendance, an employee
may not be disqualified solely for having taken bona fide FMLA
leave. The statute states that the taking of FMLA leave shall
not result in the loss of any employment benefit accrued prior
to the date the FMLA leave commences. To the extent an employee
had perfect attendance before the FMLA leave begins, the employee
is entitled to continue eligibility for perfect attendance upon
return from FMLA leave and may not be disqualified from the bonus
because of taking FMLA leave. Illnesses that do not meet the
definition of a serious health condition do not enjoy FMLA's
protection in this regard.

I hope that the above addresses your constituent's concerns and conveys fully the Department's position with respect to these concerns. I would be glad to address any further questions you or your constituent may have.

Sincerely,

A handwritten signature in cursive script, reading "Daniel F. Sweeney". The signature is written in dark ink and is positioned above the typed name and title.

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure



FMLA - 86

December 12, 1996

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from _____, Human Resources Manager for _____, in which we expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying "serious health conditions" under the FMLA regulations, 29 CFR Section 825.114.

As you know, "eligible employees" (those who have worked at least 12 months for their employer, at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs at least 50 employees within 75 miles) may take qualifying leave under the FMLA for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define "serious health conditions" to include a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

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FMLA.86

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that ordinarily, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses * * * into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, ordinarily, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

FMLA 86

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator



Statement on
**Unemployment Compensation
and the Family and Medical Leave Act**

Before the
Human Resources Subcommittee

Of the
House Ways & Means Committee

On behalf of
**UWC – Strategic Services on Unemployment
& Workers' Compensation**

By
**Eric J. Oxfeld
President**

March 9, 2000

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**Statement on Unemployment Compensation and
the Family and Medical Leave Act**

Before the

House Ways & Means Human Resources Subcommittee

On behalf of

UWC --- Strategic Services on Unemployment & Workers' Compensation

By

Eric J. Oxfeld, President

March 9, 2000

Good morning, Madam Chairman and members of the committee. My name is Eric Oxfeld, and I am President of UWC, the only business organization specializing exclusively in public policy advocacy on national unemployment insurance (UI) and workers' compensation issues. UWC members are employers of all sizes and industry, national and state business associations, and third party administrators and accounting firms, all of whom are concerned about maintaining a sound UI system.

UWC is intimately acquainted with UI laws and public policy. Our research arm, the National Foundation for Unemployment Compensation & Workers' Compensation, publishes numerous materials on UI, including the annual HIGHLIGHTS OF STATE UNEMPLOYMENT COMPENSATION LAWS.

UWC supports the UI program, through which employers provide benefits for a temporary period of time to insured workers with a strong attachment to work who become temporarily and involuntarily jobless when their employer no longer has suitable work available. UWC believes that a sound UI program is best embodied through the state UI system, with a limited federal role where uniformity of state law is considered essential.

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UWC, jointly with the FMLA Technical Corrections Coalition, leads the UI Working Group. The UI Working Group, which was established in cooperation with the Society for Human Resource Management, is a coalition of organizations, businesses, and associations committed to advancing sound UI policy. The UI Working Group opposes the Birth and Adoption Unemployment Compensation (BAA-UC) regulations proposed by the U.S. Department of Labor (DOL) because this proposal allows the misuse of state UI benefits trust funds to finance a new and disparate program providing paid parental leave. More information on the UI Working Group and its mission can be found on its homepage, www.SAVEUI.org.

The BAA-UC Proposal

The proposed BAA-UC regulation authorizes states to enact laws enabling workers to collect UI benefits *while on leave* following childbirth or adoption of a child up to three years of age. The proposal is described as an "experiment" designed to "test the proposition that providing [UI benefits] 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."

UWC and the UI Working Group believe that DOL's BAA-UC proposal is fundamentally and fatally flawed.

- ◆ DOL lacks the authority to promulgate the BAA-UC regulations, which are contrary to the clear and unambiguous intent of the Federal Unemployment Tax Act (FUTA) and the Family Medical Leave Act (FMLA).
- ◆ The proposed BAA-UC regulations are an attempt to "end run" Congress and amount to DOL legislating through the rulemaking process.
- ◆ The BAA-UC proposal will jeopardize the UI safety net for jobless workers by eliminating the federal protection against misuse of UI benefits trust funds for other purposes.
- ◆ The BAA-UC program violates the clear requirements of the Federal Unemployment Tax Act (FUTA) and will put employers in a state with such a program at risk of a 700% FUTA tax increase.
- ◆ BAA-UC and UI are different and incompatible programs.

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DOL has exceeded its authority by proposing BAA-UC, which is contrary to the clear and unambiguous intent of the federal UI laws and the FMLA.

Allowing payments of UI benefits to workers on parental leave as proposed in the BAA-UC regulations is contrary to federal UI laws and the FMLA.

Indeed, former Representative Pat Schroeder, one of the original sponsors of FMLA, made it clear during congressional debate on the FMLA that workers taking family and medical leave would not be eligible for unemployment benefits: "The leave is unpaid, so your paycheck will stop. *There is not federal compensation such as unemployment.*" 139 Cong. Rec. E2010 (daily ed. Aug 5, 1993, emphasis added).

The Federal Unemployment Tax Act (FUTA) and related laws¹ effectively prohibit expenditures out of state unemployment benefits trust accounts for any purpose other than payment of "unemployment compensation."² As former Representative Schroeder clearly understood, BAA-UC payments constitute "paid parental leave" and are not "unemployment compensation."

The plain meaning of the term "unemployment" as used in the FUTA requires all unemployment compensation claimants to meet a 3-pronged test. Under this test, UI claimants must be:

- (1) Without a job;
- (2) Involuntarily unemployed; and

¹E.g., Federal Unemployment Tax Act [26 U.S.C.A. 3301 et seq] 3304(a)(4). The penalty when a state is out of conformity with the FUTA is loss of the FUTA "offset credit" for all employers in the state – a more than 700% tax increase from \$56/worker to \$434/worker.

² Where Congress has decided that it is appropriate to deviate from this basic UI principle it has done so by a limited number of express exceptions. For example, under FUTA Section 3304(a)(4) employee contributions may be used for payment of temporary disability benefits. FUTA 3304(a)(4) also contains provisions expressly permitting payments out of state unemployment trust accounts for health insurance premium payments by UI recipients; repayment of UI over-payments; payment of UI benefits to workers in approved work-sharing ("short-time compensation") plans; self-employment assistance; and use of Reed Act funds for UI administrative costs. Parental leave is not covered by any of these exceptions.

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(3) Able and available for work.

These federal requirements are a cornerstone of UI policy, confirmed by consistent administrative interpretation, FUTA legislative history, and subsequent action by Congress. These 3 requirements were recognized in the legislative history of federal UI laws, and they are consistently identified and applied in administrative interpretations of those laws from 1935 until the current notice of proposed rulemaking.

Payments out of state UI benefits trust funds for workers who take parental leave are inconsistent with all 3 of these statutory requirements. A worker on parental leave cannot be considered to be "without a job" because the worker has a job, either by law or through arrangement with the employer. When a worker is on parental leave, the worker's absence from work is not "involuntary" because the absence (from start to finish) is by the worker's choice, not the employer's. Finally, when a worker is on parental leave, the worker is not "available for work" because the worker cannot return to work *until after the leave period expires*, which may be 3 months, 6 months, or even 1 year later.

Federal UI law includes the "able and available" requirement even though there is no specific reference to this requirement in the FUTA. Until now, DOL has consistently recognized and applied the able and available requirement. As recently as 1997 DOL clearly understood that use of UI trust funds to compensate workers on family and medical leave would violate federal UI law. In separate letters from the DOL regional office to the Vermont Department of Employment & Training, and from DOL Employment & Training Administration Assistant Secretary (Acting) Ray Uhalde to Senator Patrick Leahy, DOL stated that UI payments to workers on family leave are contrary to the federal requirement that UI beneficiaries be "able and available" to work.

To cite another example, in 1955 DOL described UI as "a program -- established under Federal and State law -- for income maintenance during periods of involuntary unemployment due to lack of work" (emphasis added). When a worker takes leave in accordance with the FMLA, the employer must hold the worker's job open. During the leave period, the worker is not "unemployed" or "available for work."

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Commentator Ralph Altman, of DOL's then named Bureau of Employment Security, noted: "The availability requirement in unemployment compensation is universal as an inevitable result of a program which compensates wage loss" (Altman, Availability for Work, Harvard University Press 1950, at 2).

The able and available requirement has also been repeatedly recognized by Congress. For example, in the 1998 Green Book, the House Committee on Ways and Means stated: "All state laws provide that a claimant must be both able to work and available for work. A claimant must meet these conditions continually to receive benefits. 'Available for work is translated to mean being ready, willing, and able to work' (1998 Green Book at 336, emphasis added).

The BAA-UC proposal makes the extraordinary assertion that "able and available" somehow can be interpreted to mean "unavailable *now* but *perhaps* available *later*." This interpretation of the federal "able and available" requirement contradicts the plain meaning of the word "available" by covering employed workers who take leave from employment when the employer has work available but the worker cannot, or does not wish to, work.

DOL recommends that a state pay BAA-UC benefits for 3 months. The proposal allows states to use different maximum durations. Under the BAA-UC proposal, states could provide BAA-UC benefits for 6 months (standard duration of UI benefits) or even 1 year. Thus, the BAA-UC proposal requires the conclusion that a worker who is away from, and unable to, work for a significant amount of time -- up to an entire year -- may be considered "available" during the entire leave period because at the end of this period he or she may decide to return to the prior job or job market.

It is impossible to understand how a worker who made a decision to take leave dedicated to the up bringing of a child can in any way be considered "able" or "available" for work during the leave period consistent with sound UI policy. If the worker were in fact, "able and available" there would be no leave taken.

Even if one accepts the illogical and invalid assertion that a worker can be considered "available" under the federal "able and available" test during parental leave because of the intention to return to work following this leave, we note that the proposal lacks any provision for demonstrating the parent's intention to return to the previous employer or other meaningful attachment to the workforce prior to the conclusion of the leave period. The only recognition of eventual work force

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attachment is that states would be allowed to recover BAA-UC payments if the worker fails to go back to work. It is completely ineffective to rely on repayment of BAA-UC benefits if the worker fails to return to work because the likelihood of ever fully collecting these funds is remote, and there is no requirement that states attempt to collect them.

The requirement that a claimant be "able and available" for work is critically important in determining attachment to the workforce. Meeting this requirement demonstrates a clear ability and willingness to rejoin the workforce immediately. Indeed, DOL's Employment and Training Administration (ETA) web site states: "Unemployment insurance pays benefits to qualified workers who are unemployed and *looking for work* (emphasis added). In its 1998 UI Dialogue, DOL stated that the "basic Federal requirement for eligibility is that the worker be able to work and available to accept an offer of work." *A Dialogue: Unemployment Insurance and Employment Security Programs*, Dialogue Technical Supplement at 11 (1998).

It is noteworthy that during DOL's two year dialogue, which involved 65 meetings attended by nearly 4,000 individuals representing business, labor, and government, DOL did not report any recommendations to extend UI benefit payments to workers while they are on parental leave or are otherwise unavailable for work.³

Exceptions to the FUTA "availability" test cited in the BAA-UC proposal do not support misuse of UI trust funds to compensate workers who take parental leave

The proposed rule states: "Under its authority to interpret Federal unemployment compensation law, the DOL interprets the Federal 'able and available' requirements to include experimental Birth and Adoption Unemployment Compensation." The BAA-UC proposed rule then lists several examples of interpretations of the federal "able and available" requirement. Contrary to the conclusions drawn in the proposed rule, however, these examples do not support the contention that BAA-UC is consistent with the "able and available" test. The examples are materially and legally distinguishable from BAA-UC.

³ See e.g., DOL's February 1999 summary of *Unemployment Insurance and Employment Service Program: A Dialogue*, and UI Occasional Paper 99-5 at 170.

First and foremost, Congress has specifically recognized exceptions from the "able and available" requirements but has not chosen to include parental leave.

- ◆ Unlike the BAA-UC proposal, the exception under UI for **state approved training** is the product of congressional action expressly waiving the "able and available" test. In fact, a worker in approved training is engaged in an activity that is directly designed to enhance the worker's employability, and a worker's failure to be available for the training is disqualifying.
- ◆ The **illness** and **layoff** examples in fact require denial of benefits to any claimant who demonstrates that he or she is not available by refusing an offer of suitable work. Note that Congress has expressly recognized that states can legally suspend the availability test for EB if a worker is hospitalized. Federal State Extended Benefit Act of 1970, section 202(a)(3)(A)(ii)(II).
- ◆ The final DOL example, **jury duty**, can also be reconciled with the able and available test and distinguished from parental leave. Unlike parental leave, when a worker is called for jury duty the government itself has compelled the worker's removal from employment, thus the separation is involuntary. Most states do not provide UI benefits to compensate workers while on jury duty because they recognize that such payments are inconsistent with the basic purposes of unemployment insurance. However, unlike parental leave, Congress has expressly recognized that states can legally pay UI benefit to a worker on jury duty. Federal-State Extended Benefit Unemployment Compensation Act of 1970, section 202(a)(3)(A)(ii)(I).

BAA-UC is an attempt to legislate through rulemaking

The BAA-UC proposal is a change in the fundamental purpose of unemployment insurance. Only Congress has the power to make this change in the basic mission of the UI program. Proposing BAA-UC through rulemaking amounts to legislating through the Department of Labor -- at the expense of Congress, the states, and employers. In effect, the BAA-UC proposal is a regulatory "permission slip" for states to misuse UI by going through the "back door" -- the *rulemaking* process -- to achieve what *Congress* did not and would not agree to do. DOL delayed publishing the Notice of Proposed rulemaking until after Congress adjourned (and most members of Congress left town), with the public comment period closing before Congress returned. The timing of the proposed rule appears to be a conscious

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decision to avoid an adverse congressional response to the use of rulemaking to circumvent the federal "able and available" test and the clear intent that the FMLA does not require paid leave.

BAA-UC is a new and disparate benefit unrelated to legitimate UI

The proposed regulations and the model state law included with the proposed rule consistently demonstrate that BAA-UC is a disparate benefit for a disparate class of recipients which is functionally and legally different from legitimate "unemployment compensation." As noted above, federal law requires that a worker be involuntarily jobless and both "able and available" in order to collect UI benefits. This legal test cannot be met by a worker taking parental leave. Thus, the proposed rule proposes to create a new parental leave compensation benefit financed by the misapplication of UI trust funds. The proposed rule does not demonstrate any nexus between "regular" UI benefits and BAA-UC, yet it seeks to finance these benefits out of UI payroll taxes. BAA-UC is entirely different from legitimate UI. As state in DOL's Fact Sheet on Unemployment Insurance, published by the Employment and Training Administration: "unemployment compensation is designed to provide benefits to most workers out of work due to no fault of their own for periods between jobs." BAA-UC benefits are for employees who have jobs and take leave to be with a newborn or newly adopted child (see Section 604.2.) BAA-UC is compensation for voluntary parental leave from work, thus it cannot be *unemployment* compensation.

The differences between BAA-UC and UI benefits are strikingly clear. Unemployment compensation and parental leave compensation have different and incompatible purposes, and the UI system is not equipped to handle payment for parental leave. The UI program is intended to be a re-employment system. The purpose of UI is to compensate a worker who becomes temporarily unemployed when the employer no longer has suitable work available, while continuing to search for suitable work. Family leave, on the other hand, is in part to "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity" (see e.g., Section 2(b)(1) Family and Medical Leave Act, P. Law 103-3.).

The differences between parental leave and UI are starkly demonstrated by the number of standard UI elements that should or could be varied in attempting to fit the "square peg" of parental leave into the "round hole" of UI, including the following:

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- (1) Voluntary quit disqualification is eliminated
- (2) Availability for work eligibility requirement is eliminated
- (3) Ability to work eligibility requirement is eliminated
- (4) Refusal of suitable work eligibility requirement is eliminated
- (5) Work search test is waived
- (6) BAA-UC benefit duration is recommended for 12 weeks and may be up to 1 year, unlike the 26 weeks of regular UI benefits
- (7) No extended benefits are payable for BAA-UC (although BAA-UC claimants apparently would be counted as unemployed for triggering benefit extensions)
- (8) BAA-UC benefits can be concurrent with legitimate UI benefits
- (9) BAA-UC costs would be socialized under DOL's recommendations, not experienced rated
- (10) Means testing may be appropriate for compensating parental leave but are not permissible under BAA-UC because benefits are delivered and financed through the UI system
- (11) An exemption for small business may be appropriate for compensating parental leave but is not permissible under BAA-UC because benefits are delivered and financed through the UI system
- (12) Worker contributions, rather than employer contributions, may be appropriate for BAA-UC but not UI

The fact that all of these basic characteristics of legitimate UI must be changed to accommodate BAA-UC compensation makes crystal clear that these are two entirely separate systems and that BAA-UC is outside the scope of the UI program.

Section 604.3(b) of the proposed regulations provides another clear example of the new and disparate class of beneficiaries which BAA-UC will create. "Approved leave" means temporary separation "after which the employee will return to work for that employer." The assumption that workers who take leave will return to employment is invalid. Many workers who take leave choose not to return to work.

Section 604.20 states that "All persons covered by a state's UI law must also be covered for Birth and Adoption unemployment compensation." This section

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demonstrates why UI and compensation for family leave are and should be separate. As DOL correctly points out, UI programs have near universal coverage and cannot be limited by type of industry or other factors unrelated to a claimant's unemployment. On the other hand, a state may determine, quite within the bounds of the law, that certain industries or employers should be exempt from family leave compensation requirements or that means testing is appropriate. The policies and mechanics underlying UI and BAA-UC are disparate and ought not be forced to fit together.

Workers who receive BAA-UC should not be counted as "unemployed" for purposes of extended UI benefits

The proposed rule is correct in providing that BAA-UC benefits cannot be the basis for extended benefits (EB) under the Federal-State Extended Unemployment Compensation Act (EUCA). EB is expressly provided to provide additional weeks of UI benefits for otherwise eligible workers who may need more time to find suitable work when jobs are scarce during periods of high and rising unemployment. However, should the BAA-UC program be allowed to take effect, BAA-UC payments will inflate the "insured unemployment rate" and the "total unemployment rate" which are used to "trigger" EB benefit periods. Workers who are on leave are not unemployed and should not be counted as unemployed for EB purposes. However, nothing in the proposed rule provides for such a protection. This is another example of why BAA-UC is an entirely different benefit from legitimate UI.

BAA-UC threatens the UI safety net

For more than 65 years, federal law has protected jobless workers, employers, and the public by assuring that state unemployment trust funds are used for the *sole purpose* of paying *unemployment* compensation. This protection is so deeply embedded in the federal-state UI "partnership" that federal law prohibits the use of state trust funds even for the related purpose of financing the *administrative* cost of processing claims for unemployment benefits. By allowing the expenditure of state *unemployment trust funds* for the entirely different and incompatible purpose of compensating employed workers who take *parental leave*, DOL's proposed rulemaking will change the fundamental purpose and nature of the UI program, the *safety net for jobless workers*. Elimination of this essential federal protection for the jobless will abandon the principle that serves as a cornerstone of the nation's unemployment insurance system.

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Allowing the misuse of UI benefits trust funds to finance paid leave under the FMLA will eliminate the protection federal law has always provided against misuse of state UI reserves for purposes other than payment of *unemployment* compensation. This new use for UI benefits trust funds for paid leave will in due course deplete trust fund balances and lead to increased payroll taxes on employers and/or cutbacks in protections for workers who lose their jobs.

DOL Secretary Alexis Herman and other DOL officials have repeatedly – as recently as February 29, 2000, in hearings before this subcommittee -- expressed concern that the existing UI program is now *under-funded*. For example, DOL recognized that states have not rebuilt their trust fund solvency to pre- 1990-91 recession levels. See, *A Dialogue: Unemployment Insurance and Employment Security Programs*, Dialogue Technical Supplement at 24 (1998). In their fiscal year (FY) 1998 and 1999 budget requests, DOL called for legislation that encourages states to improve the solvency of their UI trust funds. At DOL's request, H.R. 3167 was introduced in Congress last year to give states incentives to raise or maintain high payroll taxes with the express purpose of enhancing state trust fund solvency.

In the 1980's and again in the 1990-91 recession, many states used up their UI reserves and had to borrow from the federal government. In the 1990-91 recession, more than half the states were forced to borrow. DOL's own statistics show that if another similar recession takes place, states will need to borrow an additional \$2-4 billion. That figure increases to \$20-25 billion if the recession is like the one in 1980-82. Id. The interest on federal loans to state UI trust funds cannot be paid from state trust funds and is an obligation of **state general revenues** at market interest rates – a painful and costly charge -- taking money away from schools, roads, and other state priorities. As of 1997, states have paid more than \$1.7 billion in interest on UI loans. Id. The State of Connecticut floated a bond to repay its most recent loan – and has yet to fully pay off that debt. Employers finance the bond fund through a special tax (sometimes referred to as a bond assessment) scheduled to end in 2001.

During the recessions discussed above, many states were forced to cut back on their UI benefits and eligibility to keep their UI accounts solvent.

Prior to and following the issuance of the BAA-UC proposed rule, and as recently as February 29 in hearings before this subcommittee, DOL has advocated that states

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expand access to UI by lowering monetary eligibility, adopting alternative base periods, and taking other steps that will increase UI benefit outlays for low-wage workers without any waiver of the joblessness, involuntariness, and availability requirements of federal law. UWC does not agree that these DOL expansion proposals are sound public policy, but we readily agree that – unlike the BAA-UC proposal -- states have the legal authority to adopt them.⁴ However, we must point out that by expanding UI to cover workers on parental leave and opening the door to other new uses of the UI program,⁵ the BAA-UC proposal will put further pressure on state UI trust funds and work at cross purposes to DOL's solvency objective as well as its goal of expanded UI access for low-wage workers.

Ironically, the BAA-UC proposal sends a strong signal to the states not to build up their UI reserves – because any state that is risk-averse and wants to take a conservative approach in building up its benefits trust account risks irresistible political pressure to “spend it” now on an unrelated program.

Problems with UI should be fixed before considering changes in its fundamental purpose such as compensating workers who take parental leave.

The UI system is experiencing many severe problems, as outlined in UWC's testimony on UI reform at the hearings before this committee on February 29. Because of these problems, employers now pay \$30 billion a year in UI taxes when there's practically no unemployment, and that figure could double or triple in the future, when the economy goes into recession. We believe these problems should be fixed, to protect workers and employers, before considering changes in the fundamental purposes of UI.

- ◆ **BAA-UC will exacerbate UI problems caused by inadequate administrative financing.** As detailed at length in our February 29 testimony, the federal government is not providing adequate financial resources for effective and efficient program administration by state UI agencies. DOL statistics show that the average UI claim now lasts 2 weeks longer than during previous periods

⁴ We believe that the decision whether to lower monetary eligibility tests or by adopt alternative base periods, as advocated by DOL, should be a matter for the states and not mandated or “incentivized” by the federal government through financial rewards or penalties.

⁵ At 64 Fed. Reg. 67974, the proposal unabashedly states that the information from BAA-UC could serve as “a basis for further expanding [UI] coverage.”

when unemployment was low and there was a severe labor shortage. The extended claim duration is directly inflating state UI tax costs to finance additional, unnecessary weeks of benefits. A flood of new BAA-UC claims for workers on parental leave will further strain resources need to assist workers who have legitimate UI claims --and likewise further inflate the cost of legitimate UI benefits. This problem will grow in severity when the economic cycle turns.

- ◆ **BAA-UC will exacerbate problems with UI benefit fraud and abuse.** Improper payments under UI are already a serious problem, but the BAA-UC proposal contains provisions that will lead to increased fraud and abuse. The BAA-UC proposal does not condition receipt of benefit payments on any demonstrable effort to “bond” or actually spend any time with a child. How will UI agencies or employers possibly determine who is a “parent” (per the expansive definition in Section 604.3(f)) and whether he or she is bonding with a child consistent with the intent of the regulation?⁶ The absence of any requirement to show contact and interaction with the child while collecting BAA-UC benefits will lead to large scale abuses. This defect will result in BAA-UC being little more than a paid vacation plan during hunting and fishing season, etc.
- ◆ **BAA-UC will undermine UI return to work incentives.** Under the proposal, payment of BAA-UC benefits can be concurrent with receipt of legitimate UI benefits if the worker on parental leave no longer has a job (e.g., because the FMLA leave has expired or the employer does not provide leave). This “double-dipping” improperly increases the amount of wage replacement to levels that will frustrate UI return to work incentives, thus further inflating legitimate UI costs.
- ◆ **BAA-UC will expand over-reliance on socialized costs.** Under DOL’s model state BAA-UC law, BAA-UC benefits would be “socialized.” Socialized costs are claim costs are financed through higher taxes on all employers rather than a charge to the employer at the time of separation of unemployment. Over-use of socialized costs for legitimate UI benefits is already a serious problem for state UI programs. It is inequitable to socialize costs because all employers are forced to subsidize benefits paid for claims by another employer’s workers. Socialized costs also reduces the employer’s interest in (1) maintaining a stable workforce,

⁶ This definition create situations ripe for abuse where “parents” with little if any actual contact or interaction with the child would be able to collect BAA-UC benefits contrary to the intent of the proposed rule.

(2) making sure UI claims are paid properly, and (3) promptly re-employing laid off workers.

If states adopt DOL's model BAA-UC proposal, the problem of socialized costs will grow. Employers who already pay the maximum UI tax will not have to pay any additional taxes. Small businesses who are unable to hold jobs open for their own employees will subsidize paid leave by employees of their larger competitors.

BAA-UC raises a conformity question

The disparate nature of BAA-UC compared to legitimate UI is highlighted by the fact that it raises a UI conformity question. If a state passes a law or even promulgates an administrative provision based on a law allowing BAA-UC benefits to be paid to this new class of claimants, and DOL's proposed rule is then struck down in court as violative of FUTA conformity requirements, that state will be -- de facto and de jure -- out of conformity. The BAA-UC proposal puts employers in such a state at risk of the 700% FUTA tax increase which is the penalty for being out of conformity.⁷

BAA-UC is not UI, thus studies and the administrative costs of BAA-UC benefits cannot be financed from FUTA dollars

Of particular concern is the fact that even though states are not receiving enough administrative funding, they would be expected to use FUTA administrative funds to finance the administration of BAA-UC. By law Congress may appropriate FUTA funds only for "UI" administration and state employment services. Because BAA-UC is not UI, the direct cost of administering BAA-UC benefits may not be funded out of FUTA revenue. In the current context of UI administrative financing, it is extremely unwise for the federal government to add a new benefit to the UI system. The proposal cites no authority for using FUTA revenue to study and evaluate a parental leave compensation program.

Even if it were a valid use of FUTA to finance the administration of BAA-UC benefits, an additional appropriation would be required to cover the increased administrative costs. If the federal government to provide the additional appropriation, states will have to cut services. The administrative costs of state temporary disability

⁷ The state will also lose its FUTA grant which finances the state UI/ES administrative agency.

insurance (TDI) programs, which are similar to BAA-UC, are not funded out of FUTA for the same reason.

DOL's cost estimates and assumptions regarding fiscal impacts substantially understate the true cost of BAA-UC benefits

The proposal states that the BAA-UC rule could cost between zero and \$68 million, depending on the number of states that implement BAA-UC (64 Fed. Reg. at 67975). This estimate is invalid because it understates the cost impact.

- ◆ An estimate of zero suggests no state will enact a BAA-UC law. The figure of zero cannot be accepted or valid because DOL cannot encourage states to adopt BAA-UC laws and then argue it will cost nothing because no state will take such action. In addition, how could the proposal be justified as a response to "expressed interest by a small number of states" if no state is expected to act? See 64 Fed. Reg. 67975. In fact if only one medium size state such as Massachusetts were to enact any conservative BAA-UC proposal, the cost impact will easily exceed \$68 million.
- ◆ We believe it is fairer to take into account the possible impact if all states enact BAA-UC programs as DOL advocates. In that case, the direct additional state UI payroll tax burden on employers for compensating parental leave will be at least \$18 billion per year, using conservative estimates. The calculation is straightforward. The current weekly UI benefit amount is approximately \$200. If a claimant were to collect 12 weeks of benefits (as recommended in DOL's model state legislation) the direct price is \$2,400 per claim. Because of the effect of experience rating, the ultimate additional tax will be \$3,000 per claim. DOL has stated that there are 6 million potential claimants each year, thus the aggregate impact would be \$18 billion. The annual effect of \$18 billion is "economically significant."
- ◆ If it is permissible under federal law to pay compensation to workers on parental leave using I trust funds, then federal law also permits states to use UI trust funds to compensate workers who take leave for other reasons. We are aware of no basis in federal law for making distinctions among the various possible personal reasons for not being available for work. The "door" is either open or shut -- it cannot be "ajar."

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If states compensate all workers who take family or medical leave, using DOL's published estimates of the number of workers who would like to take leave, the additional payroll tax cost to employers for BAA-UC escalates to \$84 billion a year.

- ◆ The proposed rule requires states to provide BAA-UC benefits to workers who quit their jobs because they do not have approved leave. Separation from employment ostensibly for parental or other types of leave will be considered compensable even though the worker has completely severed the employment relationship.
- ◆ The \$18 billion (parental leave) and \$84 billion (all FMLA leave) figures include only the higher payroll tax resulting from paying compensation to workers who take parental leave. The calculation doesn't take into account the cost of lost productivity or the fact states may decide to provide paid leave for 26 weeks like legitimate UI claims (or longer). Nor does it consider the impact on employers who will have even more vacant positions to fill or the impact on remaining workers who must work longer hours. Ironically, employers may have greater UI liability if replacement workers hired to substitute for workers on leave become unemployed and collect benefits.
- ◆ The proposed rule incorrectly states there will not be an impact to "small entities." Given that BAA-UC will have to be financed through higher taxes on employers, it stands to reason that there will be a direct impact to "small business[es]" and "small organization[s]." Apart from the statutory definition of "small entities" under the Regulatory Flexibility Act there is a practical concern that small employers will bear a disproportionate share of the cost of this proposal. The FMLA and some state leave laws exempt small employers. On the other hand, BAA-UC will have universal application because it is paid through the UI system. This means that small employers must incur the cost of compensating workers who take leave (in many cases, leave taken by employees of other employers) in the form of increased payroll taxes.
- ◆ The proposal makes an incorrect assumption that this proposal will not impact states in a material way. This assertion is wrong for several reasons. States themselves are large employers who must pay the cost of BAA-UC benefits their workers collect (an added cost to taxpayers, as well). Furthermore, BAA-UC is a new benefit, calculated on a different basis than regular UI, which will introduce a

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new and different class of beneficiaries into the UI system. State UI agencies will have to re-program their UI administration systems to handle this benefit, which will undoubtedly be a “material” dollar cost to states. These burdens will divert resources and attention away from serving workers who lose their jobs and workers and employers who use state employment services.

- ◆ All BAA-UC benefits will be “scored” for federal budget purposes as increased outlays. There will also be increased federal outlays for UI and BAA-UC administration and decreased federal revenue because more workers will forego wages subject to federal income tax, FUTA, FICA and state unemployment tax.

BAA-UC conflicts with FUTA pregnancy provisions (section 3304(a)(12))

The BAA-UC proposal states that weeks preceding the week in which birth or placement takes place are not compensable. The FUTA at 3304(a)(12) already specifically addresses UI benefits during pregnancy. It states that “no person shall be denied compensation under ... State [UI] law *solely* on the basis of pregnancy or termination of pregnancy.” [emphasis added] This provision of FUTA means that states cannot disqualify a pregnant worker who is able and available to work, and it clearly preserves the right and necessity to disqualify a pregnant worker who is unable to work and is unavailable for work because of pregnancy or any other reason. Nothing in the BAA-UC proposal provides any legal authority or rational explanation for qualifying a worker to receive BAA-UC benefits after giving birth when the same worker cannot receive UI benefits because she is unable to work and unavailable for work during the pregnancy itself. Either federal law prohibits payment of BAA-UC benefits to a worker who is not able and available to work – the only correct conclusion – or else it appears that federal law also permits payment of UI benefits to workers who in fact are unable and unavailable before the birth occurs – contrary to section 604.21 of the proposal.

BAA-UC is not truly an experimental program

DOL defines BAA-UC as an “experimental program,” but nothing in the proposal distinguishes it from any other permanent program. There is no termination date, dollar threshold, data limitation or other factor that would suggest that this program is truly experimental. On its face, the proposal discusses the need for data to determine:

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- (1) whether individuals who are compensated for birth and adoption leave are more likely to return to employment,
- (2) the effects on employers whose employees take compensated leave,
- (3) the effects on all employers in a state who bear BAA-UC costs, and
- (4) the effect on a state's unemployment fund.

There is precedent for developing a Notice of Proposed rulemaking (NPRM) for a study whereby interested parties could comment on the form and substance of the study. However, the proposal skips that step and attempts to collect data at the same time it expands UI benefits. Nothing in the proposal demonstrates an emergency situation in which skipping this step is justified.

Moreover the proposal provides that a comprehensive evaluation will be performed only when "at *least* four [s]tates have implemented *legislation* and operated a BAA-UC for a minimum of three years" (emphasis added). If only one state were to enact implementing legislation the impact could be significant yet no study would be conducted. The proposal states that, "the [f]ederal evaluation methodology has not yet been completed." We are greatly concerned that for a proposal of this magnitude with a "study" as its cornerstone, the proposed rule does not provide even a preliminary burden estimate. These points demonstrate that there is nothing "experimental" about this proposal.

Finally, DOL asserts that state participation is optional. In practice, however, we foresee significant political and economic pressure exerted states to enact BAA-UC programs.

The Model's recommendations regarding eligibility for and financing of BAA-UC are also troublesome. Employers are taxed to pay for legitimate UI benefits. We believe this is appropriate because employers are responsible for the circumstances connected with the unemployment, rather than the employee. BAA-UC is distinguishable from legitimate UI in that employers are not responsible for the circumstances connected with parental leave. To pay for parental leave benefits, states or employers should be able to impose an employee contribution. Consequently it is inappropriate to recommend financing of BAA-UC benefits out of employer contributions.

Paid parental leave is more like temporary disability insurance (TDI) than UI. Under TDI, state and private programs require worker contributions for a major part or the entire amount of the program, including administrative costs. While employee financing is appropriate for BAA-UC, the UI system is not equipped to handle collection of employee contributions. Only two states now have any employee contributions for UI. It would be a major change in UI administration to now collect employee contributions for parental leave compensation, and it would lead to greater use of employee taxes for legitimate UI. Finally, the Model lacks any effective protection against abuse. It would allow a state to recover an overpayment for BAA-UC benefits paid to workers to do not return to work, but it is important to note that improperly paid benefits are rarely recovered once they are paid.

Conclusion

Although DOL describes BAA-UC as a form of “unemployment compensation,” in fact BAA-UC will create a new and different type of benefit program compensating workers who take parental leave. BAA-UC is contrary to federal UI laws and the FMLA. To sum up, there are many reasons why the BAA-UC proposal is contrary to sound public policy and should be withdrawn:

1. “Unemployment compensation” is designed to provide benefits to workers out of work due to no fault of their own. BAA-UC benefits are for employees who have jobs and take leave to be with a newborn or newly adopted child. BAA-UC provides compensation for voluntary parental leave from work, thus it cannot be *unemployment* compensation.
2. Allowing states to use UI trust funds for parental leave compensation abandons the joblessness/involuntarily unemployed/able and available principles which serve as the cornerstone of the UI program, nation’s social insurance system for jobless workers.
3. A worker who made a decision to take leave dedicated to the up bringing of a child cannot in any way be “able” or “available” for work consistent with sound UI policy statements. If the worker were “able and available” there would be no leave.
4. If all states adopt BAA-UC, there will be a direct additional state UI payroll tax burden on employers totalling at least \$18 billion per year using conservative estimates – \$84 billion if all FMLA leave is included.

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5. DOL says the UI system is now underfunded. Expanding it for parental leave will put at risk the solvency of the safety net for workers who lose their jobs.
6. During DOL's two year dialogue which had 65 meetings attended by nearly 4,000 individuals representing business, labor, and government, DOL did not report any recommendations to change the fundamental nature of UI by using it to also compensate workers while they are on parental leave.
7. Congress has not amended the UI laws or the FMLA to permit use of UI trust funds for BAA-UC. This puts any state with a BAA-UC program at risk of being out of conformity with FUTA – and their employers at risk of a 700% FUTA tax increase.
8. The proposal lacks any provision for demonstrating the parent's intention to return to the previous employer or other meaningful attachment to the workforce prior to the conclusion of the leave period.
9. The proposal does not cite any legal authority why if BAA-UC payments are permissible under FUTA for leave to be with a newborn they would not be permissible for older children for other family or medical purposes.
10. DOL asserts that state participation is voluntary. To the contrary, significant political and economic pressure will be exerted on state UI administrators and legislators to enact BAA-UC programs.
11. BAA-UC will be rife with fraud and there is no effective manner to recover improper payments.
12. BAA-UC costs will not be distributed equitably among employers and should not be an employer obligation.

As detailed at the February 29, 2000, hearing on UI reform before this Subcommittee, the UI system is experiencing significant problems handling its existing obligations. Employers now pay nearly \$30 billion a year in UI taxes when there is practically no unemployment. That figure will double or triple in future recessions. The current method of financing UI administration exacerbates these problems by providing inadequate funding for state UI and employment services agencies. Workers and employers are not receiving adequate service, and UI claims

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last longer than they should during this tight labor market. The UI system is not equipped to take on another new and entirely different purpose such as BAA-UC.

The cost of BAA-UC benefits plus higher UI costs resulting from prolonged claims for legitimate UI caused by diversion of administrative resources for BAA-UC claims, as well as the cost of lost productivity and new record keeping, will be borne by employers. Rather than adding new costs to the UI system, DOL should focus on reducing the inflated FUTA tax burden on employers and making adequate funds available for UI administration without putting greater strain on the adequacy of state UI benefit reserves needed for times of economic hardship.

By trying to force a new parental leave compensation benefit into the existing UI system, the BAA-UC proposal would in effect abolish the federal "able and available" requirement, which is a bedrock principle of UI. The BAA-UC proposal is contrary to the plain and unambiguous intent of UI law and policy and the FMLA. It will put the UI safety net at risk and dramatically increase employer cost. Thus, we strongly urge that these unwise and unworkable regulations be withdrawn.

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STATEMENT SUBMITTED FOR THE RECORD

BY

LPA

HEARING ON UNEMPLOYMENT COMPENSATION AND THE FAMILY
MEDICAL LEAVE ACT

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES OF
THE HOUSE COMMITTEE ON WAYS AND MEANS

MARCH 9, 2000
(00-53)



For The Record

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MADAME CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to submit this testimony to your Subcommittee on the critical issue of whether using unemployment compensation funds, collected to help those involuntarily unemployed, to pay benefits to those voluntarily taking family leave is good policy and whether it is appropriate for the Department of Labor ("DOL" or the "Department") to circumvent Congress in ordering this dramatic redirection of the unemployment insurance system.

LPA, Inc. is a public policy advocacy association of senior human resource executives and over 250 major corporations. LPA's purpose is to ensure that employment policies in the United States support the goals and interests of its member companies and their employees, and it regularly represents the interests of its members on these issues. Collectively, LPA members employ over 12 million individuals, roughly 12% of the private sector workforce. LPA members therefore fund a significant portion of the costs of this country's unemployment compensation system and are extremely concerned about any proposals that would increase those costs or undermine the stability and viability of that system.

While we firmly support employers' efforts to accommodate the family needs of their workers, LPA is submitting testimony to express our strong opposition to the potential dilution of the federal unemployment insurance system through the Birth and Adoption Unemployment Compensation ("BAA-UC") regulations proposed by the DOL's Employment and Training Administration on December 3, 1999. *See* Notice of Proposed Rulemaking on Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67972 (proposed Dec. 3, 1999) ("NPRM"). On February 2, 2000, LPA filed comments on the proposed BAA-UC Program. These comments, prepared by the law firm of Jones Day Reavis and Pogue, establish the legal basis for a lawsuit LPA will file in federal court seeking an injunction against the regulations if they are finalized.

We wish to make it clear at the outset that LPA and its member companies are strongly committed to enabling American workers to reconcile the conflicts between work and family needs. This is being done through a wide variety of innovative programs that have shown our members to be among America's most family-friendly companies. While we oppose this attempt to compensate birth-and-adoption leave under a program clearly designed to address other needs, any responsible attempts by Congress to remove existing legal impediments to birth-and-adoption leave under the wage/hour, tax, and other laws would obviously receive a warm welcome from our members.

In the view of LPA and its member companies, there are a number of defects in the proposed BAA-UC regulations. First and foremost, if the proposed BAA-UC regulations were widely adopted, they would increase the costs of the unemployment compensation system, which are almost entirely borne by employers. Depending upon how the states responded, these costs could very likely double to more than \$50 billion per year, thereby undermining the financial stability and viability of the unemployment compensation system. The \$30 billion a year that full BAA-UC coverage would cost, in turn, would increase the taxes paid by employers by 34% on average, imposing a massive burden on employers. In addition, the proposed regulations cannot be reconciled with the requirements of the Federal Unemployment Tax Act ("FUTA") or with the provisions of the Family and Medical Leave Act of 1993 ("FMLA"). Adoption of the proposed regulations would also be arbitrary and capricious because, among other things, the

NPRM fails to offer any justification for the Department's abrupt change of position on BAA-UC.

PAID BIRTH-AND-ADOPTION LEAVE SHOULD NOT BE CREATED THROUGH THE UNEMPLOYMENT COMPENSATION SYSTEM

LPA members and their companies strive to accommodate the needs of parents and families in a number of different ways, with flexible work schedules, leave, both paid and unpaid, and other innovative employment practices. It is, however, both unwise and inappropriate to permit states to provide wage replacement to parents on birth-and-adoption leave through the unemployment compensation system. However laudable it is to assist employees in balancing the demands of an increasingly competitive and intense workplace with the needs of their families and personal lives, the unemployment compensation system is not the proper method for implementing such a policy.

As the Employment Policy Foundation has pointed out, the authorization of unemployment compensation for birth-and-adoption leave would impose a potentially massive financial burden on employers and an already-underfunded UI system. See Letter from Edward E. Potter to Grace A. Kilbane, Jan. 26, 2000, available at <http://www.epf.org/documents/20000126.pdf>. Although the Department estimates that the cost of its proposed regulations would be minimal, "from zero to approximately \$68 million," this estimate is based upon the assumption that only a small number of states are interested in providing birth-and-adoption leave unemployment compensation. If, however, such unemployment compensation is adopted by all the states, the cost of providing birth and adoption unemployment compensation could climb as high as \$30 billion. As the entire unemployment system currently pays out only about \$20 billion per year, full adoption of BAA-UC would more than double the pay outs in the entire system. Moreover, even assuming that the economy will continue to grow, the unemployment funds in as many as 46 states and the District of Columbia would face insolvency within three years if they were to adopt birth-and-adoption leave pursuant to the proposed regulations. In addition, based upon conservative assumptions, states would on average have to increase their unemployment compensation taxes by 34% to pay for this shortfall.

In addition, the unemployment compensation system is ill-equipped to deliver wage replacement to parents on birth-and-adoption leave, just as birth-and-adoption leave is ill-suited for the unemployment compensation system. One of the enduring strengths of that system is its simplicity and focus. The system is not designed to have the flexibility to deal with birth-and-adoption leave. Although Congress found that *unpaid* family leave was too burdensome to impose upon small business and therefore exempted them from the obligations imposed by the FMLA, no similar exception can be carved out of the unemployment compensation system because, as the NPRM recognizes, any eligibility test for unemployment compensation must relate directly to the fact or cause of the individual's unemployment. Thus, by encouraging workers to take birth-and-adoption leave, the proposed regulations would require all businesses to plan for, find, and train replacement personnel, no matter how burdensome doing so may be in light of a small business' limited resources. Similarly, under the unemployment compensation system, the payment of birth-and-adoption leave unemployment compensation cannot be limited to one parent in each family, denied to highly-compensated individuals, or adjusted to reflect the

means and needs of claimants. In short, the unemployment compensation system is not well-suited for dealing with the complexities of birth-and-adoption leave.

It has not been demonstrated that the burdens of BAA-UC would be counterbalanced by any benefits relevant to the unemployment compensation system. In the NPRM, the Department hypothesizes that providing parents on birth-and-adoption leave with unemployment compensation would be consistent with the goals of the system because it would ultimately promote their attachment to the work force. Notably absent from the NPRM, however, is any solid evidence that BAA-UC would have this effect.

Finally, the provision of unemployment compensation for birth-and-adoption leave would create an unstable and pernicious precedent. As there is no tenable distinction between birth-and-adoption leave and other forms of personal leave, once unemployment compensation were provided to individuals taking the former, there would be an irresistible pressure to extend compensation to the latter, as the NPRM itself appears to recognize. If that were to happen, however, the unemployment compensation system would be transformed from a focused and relatively uncontroversial insurance program into an over-stretched and difficult-to-maintain source of funds for programs that may or may not have the support of the public and the business community. The Department should not jeopardize the unemployment compensation system in this way.

THE PROPOSED REGULATIONS CONFLICT WITH FEDERAL UNEMPLOYMENT COMPENSATION LAW

In this country, unemployment compensation is provided through a cooperative federal-state system in which a federally-collected tax is used to finance state unemployment compensation programs that meet certain minimum federal requirements. One of the most fundamental requirements imposed by federal law is that the money made available through this system be used solely for the payment of “unemployment compensation.” 26 U.S.C. § 3304(a)(4). In this context, the term “unemployment” has a well-established and understood meaning: It requires claimants to be (1) without a job; (2) able and available for work; and (3) involuntarily without work, which normally means that claimants must be actively seeking work. As LPA makes clear in the comments it filed with DOL in response to the NPRM, these requirements are inherent in the plain language of FUTA and are confirmed by the legislative history of FUTA; the amendments to the Act and the Act’s statutory predecessor; the administrative interpretations stretching from the enactment of FUTA’s predecessor in 1935 up until the current NPRM; and the Supreme Court’s interpretation of FUTA.

The proposed regulations cannot be reconciled with the statutory requirements for unemployment. Indeed, the NPRM does not even attempt to reconcile the proposed regulations with the joblessness and involuntariness requirements. The proposed regulations would authorize payments of unemployment compensation to individuals who have jobs but are simply taking temporary leave, who have chosen to make themselves unavailable for work, and who are not seeking work. Indeed, the model state legislation included in the NPRM would effectively preclude the application of the joblessness, availability, and involuntariness requirements to BAA-UC claimants, thereby virtually stripping the term “unemployment” out of unemployment compensation. The DOL’s prior treatment of state law provisions concerning temporary layoffs,

illness, jury duty, and training does not provide any justification for the proposed regulations. Congress has not delegated to the Department authority to carve out exceptions to the fundamental restrictions imposed on state unemployment programs in service of goals that, whatever their benefits, are foreign to federal unemployment compensation law.

THE PROPOSED REGULATIONS CONFLICT WITH THE CONGRESSIONAL REQUIREMENT THAT FAMILY-RELATED LEAVE BE UNPAID

The proposed regulations are also inconsistent with the FMLA because they effectively require employers to pay for birth-and-adoption leave. Although the proposed regulations on birth-and-adoption leave would clearly be linked to the FMLA's family leave provisions and could create confusion between BAA-UC and FMLA, the NPRM does not attempt to reconcile the proposed rules with the FMLA. This is not surprising. In the FMLA, Congress struck a delicate and purposeful balance between the burden on employers and benefits to employees: While the statute requires employers to grant family-and-medical leave to employees, including leave for birth and adoption, it explicitly provides that such leave "may consist of unpaid leave," thereby protecting employers from federal requirements that such leave be paid. Indeed, even the FMLA's chief sponsor, Rep. Patricia Schroeder (D-CO), made it clear that there would be no federal unemployment compensation for leave under the FMLA:

"The leave is unpaid, so your paycheck will stop. There is no federal compensation such as unemployment."

139 Cong. Rec. E2010 (daily ed. Aug. 5, 1993) (emphasis added).

The proposed regulations disrupt the balance struck by Congress. The FMLA's savings clause confirms this. Although that clause states that nothing in the FMLA "shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act," it leaves no room, absent separate statutory authority, for a federal agency construing federal law to require paid leave in disregard of the protections that Congress chose to provide employers.

THE PROPOSED REGULATIONS ARE ARBITRARY AND CAPRICIOUS

Even apart from their conflict with FUTA and the FMLA, the proposed regulations are arbitrary and capricious. First, the NPRM fails to consider obviously relevant factors such as the policies underlying the FMLA and the massive cost of funding birth-and-adoption leave through the unemployment compensation system. Second, the NPRM fails to justify the Department's departure from its long-standing interpretation of FUTA's unemployment requirements. For decades, the Department has refused to permit payment of unemployment compensation to individuals who remain out of work for personal reasons, and in 1997 it expressly rejected a Vermont proposal to pay unemployment compensation to individuals on family leave. *See* Letter from Raymond J. Uhalde to the Hon. Patrick Leahy, July 17, 1997. The NPRM does not explain why the Department has suddenly departed from these positions and, more generally, from the joblessness, availability, and involuntariness requirements that it has recognized for more than sixty years. Third, the NPRM fails to draw a reasoned distinction between the

proposed regulations' authorization of unemployment compensation for individuals on birth or adoption leave and the Department's refusal to authorize compensation for other types of family and personal leave.

THE PROCESS BY WHICH THE PROPOSED BAA-UC REGULATIONS ARE BEING CONSIDERED IS DEFECTIVE

Finally, the rulemaking suffers from two procedural defects. First, the NPRM violates the Administrative Procedure Act ("APA"). Although the APA guarantees the public an opportunity to participate in the rulemaking process by requiring agencies to consider and respond to comments submitted by the public, the President has short-circuited that process here by directing the Department to issue regulations authorizing BAA-UC and thereby preventing the public from playing any meaningful role in the decision whether to issue such regulations. Second, this rulemaking fails to comply with the Regulatory Flexibility Act ("RFA"), under which any proposed rule affecting small businesses must be accompanied by a regulatory flexibility analysis that, among other things, describes any significant alternative to the proposed rule that would minimize the impact on small businesses. The NPRM neglected to include any such analysis on the theory that the proposed regulations will have no effect on small businesses. Plainly, however, if the regulations are promulgated and states authorize BAA-UC pursuant to them, small businesses will feel the effect of the regulations in the form of higher taxes, increased absenteeism, and decreased productivity. Thus, an initial regulatory flexibility analysis must be formulated and made available for public comment.

CONCLUSION

Although LPA members and other employers are attempting to accommodate the family needs of their employees, we must oppose this attempt to undermine the nation's 65-year-old unemployment compensation system by seeking to serve needs that clearly fall outside those that the system was designed to address. The unemployment compensation system is not well-suited to deal with birth-and-adoption leave because it does not have the flexibility to deal with matters such as the interests of small businesses or needs testing. In addition, BAA-UC would impose a massive financial burden on the unemployment compensation system, necessitating an increase in taxes of an average of 34% per state to cover the shortfall that would be created by nationwide coverage. The proposed regulations also create an unstable and pernicious precedent that may transform unemployment compensation from a focused, well-functioning, and uncontroversial program into an over-stretched and controversial one. The fundamental flaw in DOL's approach from which all of our criticisms emerge is that it is seeking to do something that only Congress can accomplish. We strongly support any efforts by this Committee to forestall this dangerous precedent.

Thank you for consideration of our views.

**Statement of Judith L. Lichtman, President, National Partnership for Women & Families
for the Record of the House Ways and Means Human Resources Subcommittee Hearing
on Unemployment Compensation and the Family and Medical Leave Act
March 9, 2000**

As the leaders of the growing movement to make family leave more affordable, the National Partnership for Women & Families wholeheartedly supports the proposed regulation that is the topic of today's hearing. Formerly the Women's Legal Defense Fund, the National Partnership wrote the first draft of the Family and Medical Leave Act (FMLA) and led the nine-year fight for its passage. In 1999, the National Partnership launched the Campaign for Family Leave Income, a multi-year initiative to make family and medical leave more affordable for all working Americans.

Encouraging states to provide unemployment insurance to new parents is the right move for working families. This new form of unemployment coverage will let millions of mothers and fathers help their children thrive during the critical months after birth and adoption. It will alleviate a major source of economic pressure on working families. And it will put our nation's policies more in sync with the realities facing today's workforce.

This concept is catching fire in the states. Legislators around the country are introducing new bills that would extend their state unemployment benefits to new parents. In fact, legislative efforts to provide some income during family leave are already underway in at least 13 states: California, Connecticut, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Vermont, Washington.

Since the FMLA became law in 1993, more parents are spending precious time with new babies, fewer children have to face hospital stays alone, and more workers can care for their parents in an emergency. In almost seven years, the FMLA has helped some 26 million women and men care for their loved ones and keep their jobs, without harming employers.

The FMLA was a critical first step, but it was not enough. Too many Americans simply cannot afford to take the unpaid leave the law provides. The bi-partisan Family Leave Commission found that lost wages are the number-one reason people do not take needed leave. Sadly, nearly one in ten FMLA users is forced onto public assistance while on unpaid leave. At a time when we have such a strong economy – and working families need relief so urgently – this regulation is a major step forward that can make a real difference in the lives of millions of Americans.

Attachments

PROVIDING FAMILY LEAVE INCOME THROUGH UNEMPLOYMENT INSURANCE

Questions & Answers

On December 3, 1999, the Department of Labor proposed a new federal regulation that encourages states to let new parents collect unemployment insurance while on unpaid family leave. This document answers some of the most common questions about using unemployment insurance to provide family leave income and about the upcoming regulation.

Background

Since the Family and Medical Leave Act (FMLA) was enacted in 1993, it has helped at least 24 million Americans take up to 12 weeks of *unpaid*, job-protected leave to care for their new babies and sick family members, and to recover from their own serious illnesses, without hurting businesses. Yet too many women and men simply cannot afford to take unpaid leave, even when their families need them most. The bipartisan Family Leave Commission found that nearly two-thirds of employees who did not take needed leave cited lost wages as the primary reason.

In June 1999, the National Partnership for Women & Families launched the Campaign for Family Leave Income, a multi-year initiative to make family and medical leave more affordable for all working Americans. "Family leave income" (FLI) describes a variety of ways to help people afford time off when a baby is born or adopted, when a close relative is seriously ill, or when workers themselves need medical care.

Unemployment insurance is one of the most widely considered and promising vehicles for providing FLI. Legislators and advocates in several states -- including Connecticut, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, New Hampshire, New Jersey, Oregon, Vermont, and Washington -- are considering extending unemployment benefits to employees taking family or medical leave. A 1998 National Partnership survey found that most Americans -- 79% -- support this approach.

Family Leave Income and Unemployment Insurance

Why should unemployment insurance be used to provide FLI benefits?

Originally a safety net primarily for male breadwinners, unemployment insurance was designed with the assumption that women could devote themselves exclusively to family needs. With the massive entry of women into the workforce and the rapid aging of the population, along with an historically high demand for workers, the unemployment insurance system must evolve to accommodate the real-life challenges facing today's families: more people need care, but fewer people are available to provide that care without compensation. Using unemployment insurance to provide FLI benefits would help update the unemployment system to fit the changing composition of the American workforce and the American family.

Won't it be very expensive to provide FLI through unemployment insurance?

No. Because it is based on an insurance model, providing FLI this way is very inexpensive. For instance, extending unemployment benefits to Massachusetts workers on family or medical leave is estimated to cost no more than a modest \$1.25 per covered worker per week. Further, in states with such proposals, the cost can be fully offset by unemployment fund surpluses -- surpluses that states like Massachusetts are considering simply returning to employers in the form of tax cuts.

At the same time, the hidden costs of *not* having FLI are substantial. The costs to employers include higher turnover and replacement costs and lower productivity when employees are forced either to forgo needed time off from work or to leave their jobs entirely. The costs to society include increased health care and public benefits expenses. In fact, the bipartisan Family Leave Commission found that nearly one in ten leave-takers, and 12% of women leave-takers, were forced onto public assistance during leave.

But isn't unemployment just for people who get laid off?

Since its creation in the 1930's, the unemployment insurance system has given states considerable flexibility in determining how best to use their unemployment funds, including setting eligibility requirements. Many states have found it worthwhile to provide unemployment benefits to people in situations that do not fit the narrow, traditional criteria of being involuntarily laid off and immediately available for work. Examples of such state policies now in place with the approval of the U.S. Department of Labor include the following:

- ◆ Employees who are temporarily laid off, but will be "recalled" to work for the same employer, are not required to be "available" to work for anyone else to be eligible for unemployment benefits in seven states. Similarly, people who are temporarily not working because they are on family or medical leave also want and intend to return to the same job: the bipartisan Commission on Leave found that 84% of employees who take FMLA leave return to their jobs.
- ◆ Several states provide benefits to workers who become unemployed and then develop a physical condition that prevents them from working. Employees who must take medical leave to recover from a physical disability are in essentially the same position. The mere timing of their disability should not control employees' access to benefits.
- ◆ One-third of states already recognize that employees who must leave their jobs for an urgent and compelling reason -- such as a spouse getting relocated or the inability to find child care -- still deserve unemployment benefits, even though they were not laid off.
- ◆ People enrolled in approved job training programs receive benefits, even though they are allowed to turn down work during their training periods. Such employees are no more available for work than employees taking family or medical leave.

Won't providing FLI endanger unemployment insurance trust funds in times of recession?

No. The real threat to trust funds comes not from an expansion of unemployment benefits, but from repeated and dramatic employer tax cuts. Even as American businesses have enjoyed record-breaking profits, they have been lobbying aggressively and successfully for large cuts in their unemployment taxes: at least 15 states have cut unemployment taxes sharply in the past five years, and legislation to lower taxes is pending in many more. Ironically, some of the same business groups insisting that providing FLI would "devastate" state trust funds are still calling for cuts that would deplete those same funds -- but would benefit their own bottom line. For example, Massachusetts business interests oppose using unemployment insurance for family or medical leave, even as they lobby for tax cuts equal to the entire cost of providing FLI throughout the state.

In fact, many states are well positioned for an expansion of unemployment insurance benefits to include employees on family and medical leave. State trust fund reserves increased 85% overall from the end of the last recession in 1992 through 1998. Well over half the states have reserves that exceed solvency guidelines specifically designed to measure the ability to withstand a severe recession. These guidelines are calculated by averaging actual unemployment costs from the three worst economic downturns of the previous twenty years.

The President's Directive on Unemployment Insurance for New Parents

What was President Clinton's directive to the Department of Labor?

In May 1999, the President directed the Secretary of Labor to propose a new regulation confirming that states may offer unemployment insurance to working parents on leave to care for a newborn or newly adopted child.

How will the regulation be developed and when will it go into effect?

The Department of Labor issued a "notice of proposed rulemaking" -- or draft regulation -- on December 3, 1999. States and the public now have the opportunity to submit comments until **February 2, 2000**, as part of the process of developing the final regulation. An effectiveness date for the final regulation has not yet been set.

Why is this regulation necessary?

Four states (Maryland, Massachusetts, Vermont, and Washington) asked the Administration to confirm that they could use their unemployment insurance systems to offer FLI in accordance with federal law. In response, the President directed the Labor Department to clarify how states wishing to use unemployment insurance to assist new parents could put those plans into effect.

How long will people be able to take leave and receive pay?

States will be free to define the length of time employees may receive unemployment insurance while on family leave.

Who will be eligible for this new form of unemployment insurance coverage?

Each state may establish its own eligibility requirements.

Why should new parents be singled out for this benefit?

Providing FLI benefits to new parents is an important investment in the future workforce. Research shows that parental involvement is crucial to help babies develop physically, emotionally, and intellectually, and that children benefit from early parental attention long after they leave infancy.

While recognizing the needs of new parents, advocates for women, children, parents, seniors, and people with disabilities also strongly support making family leave affordable for those who need to care for seriously ill children or other family members or to recover from their own serious illness.

Right now, employers who fire more workers pay higher unemployment taxes -- it's called "experience rating." Won't this regulation increase unemployment taxes for employers with more new parents on the payroll?

No. States can, and should, exempt this new form of unemployment coverage from experience rating.

Won't the new regulation force state governments to pay for people's individual choices?

No. State participation in this program is wholly voluntary. Indeed, the new regulation protects state governments' choice to provide FLI to new parents through unemployment insurance (or not). In choosing to set up FLI programs, states fulfill our collective responsibility to help young families thrive, to value caregiving, and to prevent poverty -- all longstanding American values that are already reflected in a range of public policies, from Social Security to dependent care tax credits.

The Labor Department estimates that the annual cost of this regulation could range from \$0-68 million. What does this range represent?

The Department of Labor based its cost estimate on data from the four states (Maryland, Massachusetts, Vermont, and Washington) that asked the Administration to provide guidance on providing FLI through their unemployment insurance systems. If no state enacts UI/parental-leave legislation, the annual cost of the regulation will be 0, while if all four of these states enact legislation, the Labor Department estimates that the total annual cost will be around \$68 million. This estimate reflects the Labor Department's assumptions about how many people are likely to use the benefit. Several other independent studies have also estimated the cost of providing unemployment insurance benefits to employees on parental leave. These studies are summarized on our website at www.nationalpartnership.org/workandfamily/fmleave/expansion/uitdichart1.htm.

How many states can participate?

The regulation does not limit the number of states that can participate. A state simply must

amend its unemployment insurance law to include parental leave.

Isn't this a backdoor way of addressing a question that Congress should decide?

No. In creating the national unemployment compensation system in 1935, Congress envisioned a federal-state cooperative scheme that would provide a uniform national floor for the benefits states could grant, while leaving states otherwise free to develop eligibility criteria that would offer more generous coverage and benefits. When questions about this scheme have arisen, however, states have routinely asked the Department of Labor to clarify the law, as four states did in this case.

*This document was produced by the **Campaign for Family Leave Income**, a project of the National Partnership for Women & Families. For more details about state proposals and programs and the Campaign for Family Leave Income, please see www.nationalpartnership.org or call 202/986-2600.*

1/27/00

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 compiled by the National Partnership for Women & Families as the leader of the Campaign for Family Leave Income.

* 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.

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CALIFORNIA

A dynamic coalition of advocates for women, children, and labor has advanced a family leave agenda for the 1999-2000 legislative session. In February 2000, a bill was introduced requiring employers with five or more workers to offer at least six days of paid sick leave to their full-time low-wage employees. In 1999, California enacted a law requiring a study of the cost of extending the state's TDI program to cover family leave, and increasing the weekly TDI benefit cap from \$336 to \$490. Also in 1999, California passed a law requiring employers who offer paid sick leave to let employees use some of their sick leave to care for a sick child, parent, or spouse.

<i>Contact:</i>	State Senator Hilda Solis (916) 445-1418	Assemblyman Wally Knox (323) 932-1201
	State Senator Tom Hayden (916) 445-1353	Aimee Durfee and Emily Katz Kishawi Equal Rights Advocates (415) 621-0672
	Lisa Ecks California Labor Federation (916) 444-3676	Patricia Shiu Employment Law Center (415) 864-8848
	Netsy Firestein Labor Project for Working Families (510) 643-6814	

CONNECTICUT

The Connecticut General Assembly's Labor and Public Employees Committee introduced a bill in February 2000 to provide unemployment benefits to workers on parental leave. The bill would also create a "Family and Medical Leave Insurance Fund," financed by an employer payroll tax, that would pay benefits to employees taking leave to care for a seriously ill family member or to recover from a serious health condition. The cost of offering benefits equal to unemployment compensation to workers on family and medical leave has been estimated to cost as little as 28 cents per covered worker per week, and no more than \$1.15 per employee per week. The Labor and Public Employees Committee recently held a hearing on the bill at which a wide range of legislators, advocacy groups, unions, and leave-takers testified in support of the proposal.

<i>Contact:</i>	State Representative Christopher Donovan (860) 240-0540	Leslie Brett Connecticut Permanent Commission on the Status of Women (860) 240-8300
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ILLINOIS

A bill was introduced in February 2000 to provide up to 12 weeks of unemployment benefits to workers on any approved FMLA leave and to workers who leave a job for any reason specified in the FMLA.

<i>Contact:</i>	State Representative Julie Hamos (217) 782-8052	Lindsey Crawford Women Employed (312) 782-3902
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INDIANA

In January, 2000, Indiana House legislators introduced a bill that would provide up to 12 weeks of unemployment insurance benefits to parents who take leave to care for a newborn or newly adopted child. The bill passed by a 52-44 vote, with bipartisan support. The Senate is now considering the legislation; it has been referred to the Committee on Pensions and Labor.

Contact: State Senator Anita Bowser
(317) 232-9400

State Representative Linda Lawson
(317) 232-9600

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

Bills were introduced in the House and Senate in February 2000 to provide up to 12 weeks of unemployment insurance benefits to parents who take leave to care for a newborn or newly adopted child. Several local groups, including the Maryland Women's Law Center and the Public Justice Center, have been working to support the bill. A hearing before the House Committee on Economic Matters is scheduled for March 9. During the 1999 session, Maryland passed a law requiring employers that grant paid leave to workers following the birth of a child to grant the same leave to employees who adopt a child.

Contact: Delegate Michael Dobson
(410) 841-3850

Denise Davis
Maryland Women's Law Center
(410) 321-8761

Debra Gardner
Public Justice Center
(410) 625-9409

-more-

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." In April 1999, the state legislature's Joint Committee on Commerce and Labor (chaired by Senator Steven 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. Further, Massachusetts recently unveiled a \$13 million plan to make the state a more "family friendly" employer, including a proposal to allow state workers to use up to 12 weeks of accumulated sick leave for maternity or adoptive leave without a doctor's note.

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

Linda Johnson
Women's Statewide Legislative Network
(617) 426-1878

State Representative Anne Paulsen
(617) 722-2140

MINNESOTA

In February 2000, two bills were introduced in the Minnesota House and Senate that would provide income to employees taking leave to care for a newborn or newly adopted child. One bill (SF 3541/HF3869) would establish a "voluntary paid parental leave program" that would partially reimburse employers that provide "qualified paid parental leave." The other bill (SF2996/HF3605) would provide benefits under a "birth and adoption leave program" financed through unemployment insurance funds. 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: Marcie Jefferys
Children's Defense Fund-MN
(651) 227-6121

State Senator Jerry Janezich
(651) 296-8017

Cherie Kotilineck
Department of Children, Family & Learning
(651) 582-8562

State Senator Ellen Anderson
(651) 296-5537

NEW HAMPSHIRE

The New Hampshire House of Representatives is currently considering a bill to establish a committee to study a broad range of options for providing benefits to New Hampshire employees who take family and medical leave.

Contact: State Representative Mary Stuart Gile
(603) 224-2278

Jonathan Baird
New Hampshire Legal Assistance
(603) 542-8795

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NEW JERSEY

The New Jersey legislature will consider at least two family leave income initiatives this session. Bill A3027, introduced in February 2000, would extend unemployment insurance benefits to employees who take leave to care for a newborn or newly adopted child and TDI benefits to employees who take leave to care for an ill parent, child, or spouse. Another bill introduced this legislative session – A1577 – would also extend benefits for leave taken to care for newborn or newly adopted children or ill parents, children or spouses, but would do so solely through the statewide TDI system.

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

Assemblyman Charles Zisa
(201)-996-8040

Assemblywoman Arline M. Friscia
(732)-634-2526

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 Reilly
Counsel for Labor Committee
New York State Assembly
(518) 455-4311

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

VERMONT

A bipartisan bill was introduced in the 2000 legislative session to authorize a three-year pilot program, financed through Vermont's general fund, that would provide partial pay for employees who take leave to care for newborn or newly adopted children. The estimated cost of providing income to Vermont workers on parental leave is less than 15 cents per week per employee. In February 2000, the Senate Committees on Appropriations, Finance, and General Affairs and Housing held hearings on the bill.

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

State Senator Cheryl Rivers
(802) 828-2228

State Senate President Peter Shumlin
(802) 828-2228

State Senator Peter Illuzzi
(802) 828-2228

Michael Sirotkin and Adam Necrason
Vermont AFL-CIO
(802) 223-9988

-more-

WASHINGTON

In early February 2000, the Washington State Senate Committee on Labor and Workforce Development held hearings on, and passed, a bill providing 5 weeks of unemployment benefits for employees taking leave to care for newborn or newly adopted children. The witnesses, who all supported the bill, included a pediatrician, advocacy groups, union representatives, and parents who had suffered financially in taking unpaid family leave. Similar legislation is also pending in the Washington House of Representatives, where the Children & Family Services Committee held a Work Session on Family Leave later in February that also featured strongly supportive testimony from advocates, labor representatives, and leavetakers. These proposals have been estimated to cost 11 cents per employee per week. Washington law already allows employees to use accrued sick leave to care for sick children.

Contact: John Burbank
Economic Opportunity Institute
(206) 633-6580

State Senator Lisa Brown
(360) 786-7604

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

State Representative Mary Lou Dickerson
(360) 786-7860

*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 the National Partnership for Women & Families at 1875 Connecticut Avenue, NW, Suite 710, Washington, D.C. 20009, (202) 986-2600, info@nationalpartnership.org.*

3/07/00

The Heritage Foundation
Executive Memorandum

No. 644

January 24, 2000

PRESIDENT CLINTON PUTS UNEMPLOYMENT INSURANCE AT RISK

D. MARK WILSON

On December 3, 1999, while Congress was in recess and Americans were busy with the holidays, the U.S. Department of Labor (DOL) published proposed new regulations in the *Federal Register* that both redefine what it means to be unemployed and allow states to pay workers who choose to stay home up to one year with their newborn or newly adopted children. The President's plan would put at serious risk the ability of states to pay unemployment benefits to laid-off workers.

Congress should not allow the President to unilaterally convert the Unemployment Insurance (UI) program into a huge new government entitlement program unrelated to unemployment. The current federal-state UI partnership—particularly the system's outmoded method of administration and financing—is already seriously flawed. Substantially changing the purpose of UI and expanding the program to cover family leave will only make these problems worse. The new program would pit employees who voluntarily choose (and in many instances can afford) to be out of work against workers who involuntarily lose their jobs.

Congress should repeal the federal unemployment surtax on workers' wages and transfer the UI system to the states. Senator Mike DeWine (R-OH) and Representative Jim McCrery (R-LA) have introduced the Employment Security Financing Act of 1999 (S. 462 and H.R. 3174), which would repeal the surtax, begin to reform the UI system,

and prevent Washington from raiding the program to pay for new spending.

Governors Recognize Threat. North Dakota

Governor Ed Schafer, chairman of the Republican Governors Association, has said that UI "is not designed, equipped or adequately funded to pay for absences from work that are related to extended family leave." Michigan Governor John Engler has said that his state "will not put at risk the financial integrity of its unemployment insurance program." Even the Interstate Conference of Employment Security Agencies has expressed concerns with the potential cost of the proposed regulation.

If all 50 states provide just 12 weeks of benefits to new parents in the labor force, as recommended by DOL, the cost could be \$11.3 billion per year—over one-half the amount of regular benefits paid to out-of-work Americans in 1999. State UI benefit payments could balloon from \$24.9 billion to \$36.2 billion this year and quickly drain the trust funds. By 2002, state trust fund balances could fall

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This paper, in its entirety, can be found at: www.heritage.org/library/execmemo/em644.html

Executive Memorandum

by over 60 percent from \$53.7 billion to just \$21.4 billion, substantially threatening the ability of states to pay regular UI benefits to laid-off workers during the next economic downturn unless states increase taxes. Moreover, the cost of the program could explode if Washington expands it again to cover other types of leave such as illness and elder care.

Despite DOL's claim that the new program is designed to give states the "flexibility" to experiment with the UI program, the proposed regulation in reality gives them the flexibility to do only one thing: expand UI benefits to new parents. True flexibility would allow the states to conduct many different types of experiments, such as privatizing UI or offering other reemployment incentives that are not allowed under current law.

Higher Taxes, Slower Wage Growth, Fewer Benefits. Without large state tax increases to pay for these new benefits, the payment of regular unemployment benefits to laid-off workers will be jeopardized. A number of states have automatic tax increases built into their UI systems that kick in when their trust fund balances fall below certain levels. In Ohio alone, taxes could increase by \$900 million, nearly doubling the existing unemployment tax rate. Moreover, studies indicate that, on average, over 70 percent of the cost of all employer-paid payroll taxes is shifted to workers in the form of lower real wages.

Employees want creative pay and benefit packages, and they often choose their employers based on these packages. Employers know this and have incentives to compete for the best talent by offering innovative benefit packages. There is no need for the government to intervene. Many workers already have paid parental leave programs from their employers that pay more than what they would get from the UI system. However, DOL now proposes to reduce or eliminate the incentive to compete by

substituting a new, less attractive government benefits program for all workers.

DOL Discourages Public Comment on Proposal. When DOL proposed this new multibillion-dollar entitlement program, it initially gave the public a 45-day comment period from December 3, 1999, to January 18, 2000. After considerable public outcry from Congress, governors, and businesses, it extended the comment period an additional 15 days to February 2, 2000. The public comment period should be extended an additional 90 days, as requested by the governors, from February 2 to May 2, 2000. This would insure that state UI program administrators, workers, and Congress have adequate time to study and comment on a proposed regulation that would have such a significant financial impact on them.

Conclusion. When both UI and Social Security were created in 1935, policymakers knew there would be political pressure to use the tax revenue for other government programs. That is why they placed limits on the use of those funds. Now DOL is rushing to remove those limits by regulatory fiat. Enough time should be allowed so that such an important change can be considered carefully by Congress, governors, and the public.

With the tax burden on American jobs at a record high, the Clinton Administration has found a source of money to pay for new government programs that threatens the payment of regular UI benefits. Congress should repeal the federal unemployment surtax on workers' wages, transfer the UI system to the states, and restate the historical intent of the UI program: that UI benefits should be paid only to individuals who are involuntarily out of work.

—D. Mark Wilson is a Research Fellow in the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.

LYNN WOOLSEY
6TH DISTRICT, CALIFORNIA

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REP. LYNN WOOLSEY
TESTIMONY BEFORE THE
HOUSE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON HUMAN RESOURCES
HEARING ON UNEMPLOYMENT COMPENSATION
AND THE FAMILY AND MEDICAL LEAVE ACT
March 9, 2000

Thank you for giving me this opportunity to add my voice in strong support of the Department of Labor's proposed regulation which clarifies that States may provide unemployment benefits to new parents. I urge final adoption of the regulation.

The proposed regulation permits States to voluntarily extend their unemployment compensation programs to cover workers who take approved leave to be with newborn or newly adopted children. Implementation of a birth and adoption unemployment compensation program is entirely at the discretion of the States.

The Unemployment Insurance system is a unique federal-state partnership that sets a national floor for the benefits that States can grant, but gives States the right to provide more generous coverage if they choose. It should be left up to States to decide whether or not to provide unemployment benefits to new parents.

The nation's workforce has changed dramatically since the unemployment insurance system was started. Among the most significant changes has been the increase of women in the labor market and the dependence of most families on more than one wage earner. The proposed regulation will bring the unemployment insurance program closer to this new workforce reality.

It is important to point out that paying unemployment benefits to workers who are not immediately ready and available for work does not establish a new precedent. The proposed regulation is fully consistent with previous rulings by the Department of Labor that workers who are in training programs; workers who become ill; workers on jury duty; and workers who have been temporarily laid-off may be eligible to receive unemployment compensation under State law.

Most importantly, however, the proposed regulation is a key part of the long-term investment in families, and a family friendly workplace, that this nation must make. Research has shown how important it is to establish a strong bond between parents and their new children during their first few months of life together. Unfortunately, far too few babies in America get that kind of start. If today's children are lucky enough to have both parents living with them, chances are both work outside the home. And, its almost impossible for new parents to take time off from work without pay.

The recent tragedies in our nation's schools and communities compel all of us to ask the question, "Who is taking care of our children?"

We all know that during those critical first months, it should be the child's parents..... Mom and Dad. But, families are struggling to make ends meet and our children are getting left behind. The Family and Medical Leave Act gives parents the right to take leave when a new baby joins the family. The reality is, however, that a recent study found that nearly two-thirds of the employees who were eligible for Family and Medical Leave did not take it because they could not afford to give up their income.

NEW PARENTS MUST NOT BE FORCED TO CHOOSE BETWEEN TAKING CARE OF THEIR CHILD FINANCIALLY, AND TAKING CARE OF

THAT CHILD PHYSICALLY AND EMOTIONALLY.

Using unemployment benefits to help more American workers take care of their new children is a sound investment in the current and future workforce of this country. States that want to make that investment should be allowed to do so. Again, I urge you to adopt the proposed parental leave regulation.

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**United States House of Representatives
Ways and Means Committee
Subcommittee on Human Resources**

March 9, 2000

**Written Statement Submitted for the Record on
Unemployment Compensation and the Family and Medical
Leave Act**

**By
Mark Wilson
Research Fellow
THE HERITAGE FOUNDATION
Washington, DC 20002**

FOR THE RECORD

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Madam Chairman, Members of the Committee, thank you for the opportunity to submit this written statement for the record. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

On December 3, 1999, while Congress was in recess and Americans were busy with the holidays, the U.S. Department of Labor (DOL) published proposed new regulations in the Federal Register that both redefine what it means to be unemployed and allow states to pay workers who choose to stay home up to one year with their newborn or newly adopted children. The President's plan would put at serious risk the ability of states to pay unemployment benefits to laid-off workers.

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Despite DOL's claim that the new program is designed to give states the "flexibility" to experiment with the UI program, the proposed regulation in reality gives them the flexibility to do only one thing: expand UI benefits to new parents. True flexibility would allow the states to conduct many different types of experiments, such as privatizing UI or offering other reemployment incentives that are not allowed under current law.

Higher Taxes, Slower Wage Growth, Fewer Benefits. Without large state tax increases to pay for these new benefits, the payment of regular unemployment benefits to laid-off workers will be jeopardized. A number of states have automatic tax increases built into their UI systems that kick in when their trust fund balances fall below certain levels. In Ohio alone, taxes could increase by \$900 million, nearly doubling the existing unemployment tax rate. Moreover, studies indicate that, on average, over 70 percent of the cost of all employer-paid payroll taxes is shifted to workers in the form of lower real wages.

Employees want creative pay and benefit packages, and they often choose their employers based on these packages. Employers know this and have incentives to compete for the best talent by offering innovative benefit packages. There is no need for the government to intervene. Many workers already have paid parental leave programs from their employers that pay more than what they would get from the UI system. However, DOL now proposes to reduce or eliminate the incentive to compete by substituting a new, less attractive government benefits program for all workers.

The Proposed Rule Effectively Creates an Employer Paid Severance Program. DoL's proposed rule says that states may provide birth and adoption unemployment compensation (BAA-UC) to new parents without requiring that they return to their previous employer or demonstrate any attachment to the workforce. Since around 50 percent of new parents that take family and medical leave never return to their job this would dramatically alter the UI program by effectively creating an employer paid severance benefit for new parents. For

the first time, workers who are new parents could receive a UI benefit without having to look for work or even return to work. New parents that sign up for the benefit and decide not to return to work would receive an average severance package of \$2,520.

The Proposed Rule Creates a Permanent Program. DoL's proposed rule describes the BAA-UC as an experimental program, but nothing in the proposal distinguishes it from any other permanent program. There is no sunset date, evaluation process, or other factor in the proposed rule that would suggest that this program is truly experimental.

The Proposed Rule Could Lead to Benefit Fraud and Abuse. DOL does not propose to condition receipt of BAA-UC benefit payments on any demonstrable effort to actually spend any time with a child. How can state UI agencies or an employer possibly determine if a parent is bonding with a child consistent with the intent of the regulation? This defect would quickly result in BAA-UC being little more than a paid vacation plan. The amount of improper payments in the UI system is always a serious concern. DOL should take no action that exacerbates this problem.

Conclusion. When both UI and Social Security were created in 1935, policymakers knew there would be political pressure to use the tax revenue for other government programs. That is why they placed limits on the use of those funds. Now DOL is rushing to remove those limits by regulatory fiat. Enough time should be allowed so that such an important change can be considered carefully by Congress, governors, and the public.

With the tax burden on American jobs at a record high, the Clinton Administration has found a source of money to pay for new government programs that threatens the payment of regular UI benefits. Congress should repeal the federal unemployment surtax on workers' wages, transfer the UI system to the states, and restate the historical intent of the UI program: that UI benefits should be paid only to individuals who are involuntarily out of work.

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Gov set to veto bill for parental paid leave by Cosmo Macero Jr. and Ellen J. Silberman

Thursday, August 10, 2000

The ``family-friendly'' Cellucci administration is preparing to veto benchmark legislation that would provide paid leave to new parents from the state's \$1.87 billion unemployment insurance trust fund.

The first-in-the-nation proposal, which was quietly approved by the Legislature last week as part of a \$275 million supplemental budget, calls for a pilot program under which parents caring for an infant or a newly adopted child could collect up to 12 weeks of unemployment benefits.

``We love the idea, we just don't like the funding source,'' said John Birtwell, press secretary for Gov. Paul Cellucci. ``There was a time when that fund was running a negative balance. We think that's the last place to look rather than the first.''

The so-called ``Baby UI'' initiative, estimated to cost between \$30 million and \$40 million annually, would provide qualified working parents with benefit checks of up to \$431 a week for 12 weeks, based on the formula for determining unemployment benefits.

But Birtwell said Cellucci is simply unwilling to saddle the unemployment trust fund with that size liability.

``This is one of the original bedrock social safety programs. It's almost been a trust between the government and the average worker that it will be there,'' he said. ``The unemployment insurance trust fund was designed by President Roosevelt as a safety net for working men and women should the economy take a downturn.''

The so-called Baby UI initiative has been a bone of contention between labor advocates and business leaders since President Clinton in June announced new regulations allowing states to use unemployment insurance funds to pay for such leave.

Business lobbyists say the plan unfairly robs a key safety net for the state's jobless, while diverting benefits to those who are gainfully employed. But labor leaders say it preserves economic security for working families, particularly where some employers provide frugal family leave options.

Labor leaders blasted the administration last night, saying Cellucci's move won't jibe with his own initiatives to make the workplace more

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move won't jibe with his own initiatives to make the workplace more accommodating to parents.

The Source



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``The Cellucci-Swift administration is squandering an opportunity to be the first in the country to pass a progressive pro-family program and back up all their rhetoric about family-friendly government," said Kathy Casavant, secretary-treasurer of the Massachusetts AFL/CIO.

In the final days of the last legislative cycle, which ended July 31, the Baby UI measure appeared doomed when lawmakers attached amendments calling for House and Senate committees to study and approve any plan before it was implemented.

But that language was removed in time for the proposal to be included as four outside sections of the supplemental spending plan.

Bay State labor leaders had hoped the measure's quiet passage would lead to an equally quiet approval by Cellucci, who until yesterday had not indicated any intention to veto it.

Indeed even some lawmakers who forcefully supported Baby UI at hearings and in floor debate were unaware last night that it had passed.

Birtwell, however, said Cellucci would likely veto the plan with a directive for lawmakers to consider other funding sources.

Casavant also took a thinly veiled jab at Lt. Gov. Jane Swift, who has come under fire for using staff members to help out with on-the-job childcare.

``Most working families don't have anywhere near the resources that the lieutenant governor and governor have to address or handle their responsibilities at home and at work," she said.

Cellucci has squared off with organized labor on unemployment benefits before - most recently when the governor proposed a prison work program that would have allowed convicts to collect benefits once their sentences were completed.

Labor leaders fought the plan, saying it threatened the private sector work force, and lawmakers failed to approve it.

INTERACTIVE

Talk back to Cosmo Macero Jr.

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August 1, 2000

Letters to the Editor
The Washington Post
1515 L Street, NW
Washington, DC 20071
submitted via email to letterstoed@washpost.com

Dear Editor:

By dismissing state proposals to make family leave more affordable, Dale Russakoff's article in today's *Washington Post* ("Clinton's Push for Paid Parental Leave Falls Flat in States," p. A2) flatly misses the point. The movement to help families who cannot afford to take unpaid leave is steadily gaining across the country, calling needed attention to an issue that has been neglected for far too long.

Over the past year, the number of states with family leave benefit proposals doubled from nine to 18. Five states – California, Connecticut, Illinois, New Hampshire, and New York –passed legislation requiring studies of possible solutions, including using unemployment insurance (UI) to help new parents spend more time with their babies.

Introducing legislation is just the first step in what is nearly always a long road to public policy reform, yet Russakoff ignores this simple and obvious fact of political life. For example, in 1986 New Jersey was the first state to introduce a bill to provide unpaid family and medical leave. It did not become law until 1990, three years before the federal Family & Medical Leave Act ended its own nine-year journey to passage.

In June, thanks to the Clinton Administration's leadership, the Labor Department finalized a regulation encouraging states to extend UI to cover parental leave. This regulation, which was developed in response to state inquiries, has already inspired several new proposals. While it is true that no state legislature has passed a law extending UI to new parents so far this year, the coalitions and lawmakers that care about family leave are already gearing up for the next round.

States will not solve the problem of unpaid leave in a day, or even a year. But we are on the road to real solutions, and the increase in state legislative activity this year is a powerful indication of the issue's growing appeal.

Sincerely,

Judith L. Lichtman, President
National Partnership for Women & Families

Work: National Partnership for Women & Families
1875 Connecticut Ave., NW, Suite 710
Washington, DC 20009
202/986-2600

Home: 2930 Ellicott St., NW
Washington, DC 20008
202/686-9448

Note: The National Partnership for Women & Families, formerly the women's Legal Defense Fund, wrote the first

draft of the FMLA and led the nine-year fight for its passage. In 1999, the National Partnership launched the Campaign for Family Leave Benefits, a multi-year initiative to make family and medical leave more affordable for all working Americans. The National Partnership is a non-profit, non-partisan organization that promotes fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family.

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 6/8/00 ACTION / CONCURRENCE / COMMENT DUE BY: ASAPSubject: Radio Address on Paid Leave

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REMARKS:

Comments to Gotthelmer x62554

RESPONSE:

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Draft 06/08/00 7:30pm
Josh Gottheimer

**PRESIDENT WILLIAM J. CLINTON
RADIO ADDRESS ON PAID LEAVE
THE WHITE HOUSE
June 9, 2000**

Good morning. As we enter the new century, Americans are finding it harder and harder to balance the demands of work and family. People are working more jobs and longer hours than ever before – forcing many of them to make the unacceptable choice between being good workers, and being good parents or caregivers. Today I want to speak with you about important new steps we are taking to give working Americans the time off they need to care for their families – without losing the income they need to support them.

According to a recent federal study, parents in the average family now have 22 fewer hours per week to spend at home than they did just a generation ago. And the percentage of married mothers working outside the home has nearly doubled – from 38 percent to 68 percent over the last three decades. Many of them are working weekends or on the night shift – times they have traditionally spent at home caring for their families. In our fast-paced, 'round-the-clock economy, there just don't seem to be enough hours in the day for working Americans to do everything they need to.

For more than seven years now, our Administration has taken action to give families the flexibility they need to balance the demands of work and home. We've helped make child care better, safer, and more affordable for millions of families. We've greatly expanded pre-school and after-school programs. We've fought to give generous tax credits to help the growing number of families who provide care for aging and ailing loved ones at home.

I am especially proud that the first bill I signed as President was the Family and Medical Leave Act. Since 1993, more than 20 million Americans have used it to take up to 12 weeks of unpaid leave to care for a newborn or a sick relative without fear of losing their jobs. But there are still too many families that aren't taking advantage of the law – because they simply can't afford to take the time off if it means sacrificing their paycheck.

Today I am announcing two new steps that will allow working Americans to take the time off they need to care for their families, without giving up the pay they need to support them. First, we all know that record numbers of Americans are providing for aging or ailing loved ones at home. It's a loving choice, but potentially a very expensive one. That's why, beginning later this month, all federal employees will be able to take up to 12 weeks paid sick leave, that they have earned, to nurse an ailing child or parent back to health. If every company in America followed this example, half of all American workers would have this important benefit for their families.

Second, I am pleased to announce that, effective today, states will have the option to use funds from their unemployment insurance programs to provide paid leave to new parents

following the birth or adoption of a child. While this initiative is totally voluntary, there are already 15 states considering legislation that will allow them to provide paid leave through unemployment insurance or other means. In fact, Massachusetts may vote on such a bill in the next few weeks. In this strong economy, I hope that more states will take advantage of this new option. And I believe that those that do, can provide this new benefit, while still preserving the fiscal soundness of their unemployment insurance programs. The first few months with a newborn are precious ones. No parent should have to miss them.

There are additional steps that I believe we should take right away to help more parents balance work and family. Again, I call on Congress to extend the benefits of Family and Medical Leave to employees of smaller companies – so that we can reach another 12 million American families. And I urge Congress to pass the \$3,000 long-term-care tax credit to meet the growing needs of the elderly and their families.

At the dawn of the last century, Teddy Roosevelt said, "The greatest prizes of life ... are those connected to the home." Today, more than a century later, our families are still our most valued treasures. That's why I believe no American should ever have to choose between the job they need and the parent or child they love. The actions we are taking today go a long way toward ensuring that they will never have to.

Thanks for listening.

DRAFTDRAFT**DRAFT**
PRESIDENT CLINTON ANNOUNCES ACTIONS TO
OFFER PAID LEAVE TO AMERICA'S WORKING FAMILIES

Today, in his weekly radio address, the President will announce new steps to support America's working families, who increasingly feel the pressure of balancing work and family responsibilities and have few resources to afford to take family leave without pay. President Clinton will announce final actions to enable states to help parents afford to take leave after the birth or adoption of a child and to enable federal employees to take paid leave to care for a seriously ill family member.

PARENTS NEED OPTIONS TO AFFORD PARENTAL LEAVE.

A recent poll released by the National Parenting Association showed that low-income parents and parents with very young children were the least likely to be able to take family leave. And, we know from the 1996 study by the Commission on Family and Medical Leave that the most significant reason why parents did not take advantage of unpaid leave after the birth or adoption of a child was the expected loss of income. Parents need more support to help balance their responsibilities at home and at work.

ENCOURAGING STATES TO CREATE MORE OPTIONS FOR PARENTS.

That is why today the President will announce that the U.S. Department of Labor is issuing a final regulation offering states the option to use their unemployment compensation system to offer paid leave for new parents. This regulation will allow states to amend their unemployment compensation laws to allow parents to qualify for benefits after the birth or adoption of a child. This benefit will help parents afford to stay-at-home during the critical first days of their child's life where babies are growing and developing every moment. In amending their unemployment compensation system, states are strongly encouraged, and will be offered assistance by the Department of Labor, to assess the effect of this change on the fiscal long-term stability of their unemployment system. Since the President issued the Executive Memorandum on May 24, 1999, directing the Secretary of Labor to allow states this opportunity, States have demonstrated increasing interest. At the time, there were four states with paid parental leave proposals pending in their State legislature. Today, there are 15 states with paid parental leave proposals, including Massachusetts which is considering legislation in this session to use its unemployment compensation system for this purpose. The President will urge states to take advantage of this final regulation to provide new parents with greater access to parental leave to care for a new born or newly adopted child. *A pre-publication copy of the final regulation can be found at the U.S. Department of Labor's web site: www.dol.gov.*

ALLOWING FEDERAL EMPLOYEES TO USE EARNED SICK LEAVE TO CARE FOR SERIOUSLY ILL FAMILY MEMBERS

Today, the President also will announce a final regulation, effective June 20th, that will allow Federal employees to use up to twelve weeks of earned sick leave to care for a family member with a serious health condition. This benefit will broaden the options available for employees to meet their family responsibilities and will ensure that the Federal government is leading by example.

BUILDING ON A STRONG RECORD OF SUPPORTING WORKING FAMILIES.

Throughout his Administration, President Clinton has fought to provide families with the tools they need to meet their responsibilities both at home and at work. In 1993, the President signed the Family and Medical Leave Act, providing workers with up to 12 weeks of unpaid, job-protected leave, which has benefited more than 20 million Americans. Today, the President will continue to set forth an agenda for working families and call for Congress to act on his proposals to expand FMLA to cover more workers and allow leave for more parental activities, including parent-teacher conferences and routine doctor's appointments. The President's FY 2001 budget will help give American families the tools they need to meet their responsibilities at home and at work – by doubling funding for after-school programs, investing an additional \$1 billion in Head Start, providing expanded tax credits and more subsidies for child care, and tripling the proposed tax credit for long-term care costs.

Paid Leave Radio Address
Questions and Answers on Baby-UI Proposal
June 10, 2000

- 1. What does the final regulation do that allows states to use unemployment compensation to pay for leave after the birth or adoption of a child?**

The Department of Labor has issued this final rule to allow States the option to implement an experiment using their unemployment compensation system as a means for providing paid leave via the partial wage replacement afforded by unemployment compensation to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child. The Administration developed this rule because of dramatic changes in the workforce and interest among State legislatures, worker advocates, and members of the Congress in finding ways to help working families cope with work and family demands.

- 2. Does the Administration have the authority to make this change through regulations rather than by seeking legislation as some members of Congress have suggested?**

The Department of Labor has the authority and responsibility to interpret Federal Unemployment Compensation statutes such as the requirement that individuals must be “able to work and available for work” to be eligible for UC. Although no explicit able and available requirements are stated in Federal UC law, the Department and its predecessors have interpreted Federal UC law as requiring participating States to have these requirements.

The Department believes that an expansion of an earlier interpretation of existing Federal law provisions does not require legislative approval. The Department has previously interpreted the able and available requirements to permit the payment of UC in some specific areas: jury duty, temporary layoffs, illness, and training. While none of these previous interpretations exactly parallels the payment of Birth and Adoption UC, they are based on the same premise that situations exist in which it is important to allow a flexible demonstration of availability.

- 3. Will States be required to develop Birth and Adoption UC experiments?**

No. State participation is wholly voluntary and States will have wide latitude in developing such a proposal. A State choosing to implement Birth and Adoption UC will need to amend its UC law.

- 4. Some critics of the experiment cite the Department’s own concerns about State**

unemployment fund solvency as a reason not to allow States the flexibility to offer these benefits. Will these regulations undermine fund solvency?

No. The Administration expects that a State will not enact changes without assessing the effect on the solvency of its unemployment fund. Each State has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions, or tax changes are considered within its UC program. States in weak solvency positions should not conduct a Birth and Adoption UC experiment without creating a means of financing it. The Department of Labor will provide technical support to States needing assistance in determining their solvency positions.

5. The Administration's cost estimates have been called "scandalously" low as compared to the estimates offered by some others which ranged as high as \$36 billion. How do you explain the differences between the estimates?

We believe the \$36 billion estimates grossly overstate expenditures. They assume:

- All States will enact Birth and Adoption UC. We expect only a few.
- All employed workers will be eligible. This is not the case - some do not have sufficient earnings.
- All potential eligibles will take leave. We think this is doubtful, especially for both parents.
- All leave-takers will apply for Birth and Adoption UC. This is not the case for the current program where at most 70 to 80 percent of eligibles apply.
- Each claimant will collect the full 12 weeks. This ignores that UC does not provide full wage replacement so that many people will still need to get back to work sooner than 12 weeks.
- There will be no deductible income such as employer supplied disability insurance or paid annual or sick leave. In fact, due to employer-provided benefits, there will be substantial reductions which will lower costs to the States' UC programs.

6. What is the cost estimate for the final rule?

The estimated costs changed between the proposed rule, issued December 3, 1999, and the final rule. After the proposed regulation was published, legislation was introduced in significantly more States than had previously shown interest in Birth and Adoption UC. Consequently, based on past enactment of UC expansions, we adjusted the upper range of

our cost estimate to \$196 million to reflect the increased likelihood of State experimentation with Birth and Adoption UC. Although actual costs will vary among States, a typical State's expenditures will increase only by 6% to 9% of current benefits.

Because of this change in the cost estimates, the Birth and Adoption UC rule is considered a "major" rule. Accordingly, a Regulatory Impact Analysis has been developed and is available as part of the public record.

7. Which States are considering making this change to their UC system?

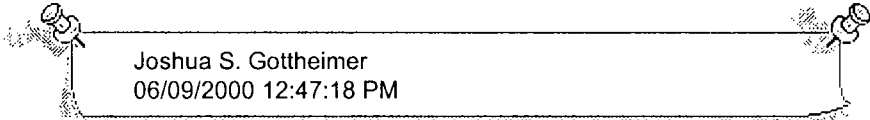
Fifteen states have proposals to offer paid leave to parents through the UC system, ~~but not all states would use their UC system to do so~~. The fifteen states are: ~~California, Connecticut, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Vermont and Washington~~. ~~Of those states the following seven states are specifically considering using the UC system to provide paid leave to new parents: Illinois, Indiana, Maryland, Massachusetts, New Jersey, Vermont and Washington~~. Some of these States, along with several additional States, are also developing coordinated proposals to provide paid family leave using resources beyond UC. The Massachusetts state legislature is considering a UC proposal in its current legislative session, which ends July 31st.

7. In 1997 the Department of Labor, in response to a bill introduced in the Vermont legislature, stated that the UC program could not be used to provide partial wage replacement under the Vermont family and parental leave program. Why has the Department changed its policy in this area?

The Department has, indeed, revisited its position. Since the time of the Vermont inquiry, additional State legislatures expressed interest in using the UC program for this purpose. We subsequently determined that there was sufficient flexibility in Federal UC law to accommodate an experiment in this area, and focused that experiment on birth and adoption leave.

8. When will the rule be effective?

The proposed regulation will be effective 60 days from the date of its publication in the Federal Register.



Joshua S. Gottheimer
06/09/2000 12:47:18 PM

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Final 06/09/00 11:45am

Josh Gottheimer

**PRESIDENT WILLIAM J. CLINTON
RADIO ADDRESS ON PAID LEAVE
THE WHITE HOUSE
June 9, 2000**

Good morning. As we enter the new century, opportunity is abundant. We are in the midst of the longest economic expansion in history – with 22 million new jobs and the lowest unemployment in 30 years. Yet we know that some Americans are finding it harder and harder to balance the demands of work and family. People are working more jobs and longer hours than ever before – forcing many of them to make the unacceptable choice between being good workers, and being good parents or caregivers. Today I want to speak with you about important new steps we are taking to give working Americans the time off they need to care for their families -- without losing the income they need to support them.

According to a recent federal study, parents in the average family now have 22 fewer hours per week to spend at home than they did just a generation ago. That's the loss of nearly a full day to spend time with their families. And the percentage of married mothers working outside the home has nearly doubled – from 38 percent to 68 percent over the last three decades. This is encouraging news. Yet we also know that many of them are working weekends or on the night shift – times they have traditionally spent at home caring for their families. In our 'round-the-clock economy, there just doesn't seem to be enough hours in the day for working Americans to do everything they need to.

For more than seven years now, our Administration has taken action to give families the flexibility they need to balance the demands of work and home. We've helped make child care better, safer, and more affordable for millions of families. We've greatly expanded pre-school and after-school programs. We've fought to give generous tax credits to help the growing number of families who provide care for aging and ailing loved ones at home.

I am especially proud that the first bill I signed as President was the Family and Medical Leave Act. Since 1993, more than 20 million Americans have used it to take up to 12

weeks of unpaid leave to care for a newborn or a sick relative without fear of losing their jobs. Still there are too many families that aren't making use of the law – because they simply can't afford to take the time off if it means sacrificing their paycheck.

Today I am announcing two new steps that will allow working Americans to take the time off they need to care for their families, without giving up the pay they need to support them.

First, I am pleased to announce that states will soon have the option to use funds from their unemployment insurance programs to provide paid leave to new parents following the birth or adoption of a child. While this initiative is totally voluntary, there are already 15 states considering legislation to provide paid leave through unemployment insurance or other means. In fact, Massachusetts may vote on such a bill in the next few weeks. In this strong economy, I hope that more states will take advantage of this new option. And I believe that those that do, can provide this new benefit, while still preserving the fiscal soundness of their unemployment insurance programs. The first few months with a newborn are precious ones. No parent should have to miss them.

Second, we all know that record numbers of Americans are providing for aging or ailing loved ones at home. It's a loving choice, but potentially a very expensive one. That's why, beginning later this month, all federal employees will be able to take up to 12 weeks paid sick leave, that they have earned, to nurse an ailing child or parent back to health. If every company in America followed this example, half of all American workers would have this important benefit for their families.

There are further steps that we should take right away to help more parents balance work and family. I again call on Congress to extend the benefits of Family and Medical Leave to employees of smaller companies – so that we can reach another 12 million American families. And I urge Congress to pass my comprehensive long-term care initiative, which includes a \$3,000 tax credit to meet the growing needs of the elderly and their families.

At the dawn of the last century, Theodore Roosevelt said, "The greatest prizes of life ... are those connected to the home." Today, more than a century later, our families are still our most valued treasures. That's why I believe no American should ever have to choose between the job they need and the parent or child they love. The actions we are taking today will help ensure that they will never have to make that choice.

Thanks for listening.

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